Guerilla Terms

Peter A. Alces

William & Mary Law School, paalce@wm.edu

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INTRODUCTION

You check your mail to find yet another promotional mailing from a credit card company, just like hundreds of others you have thrown away. But walking toward the trash can to deposit it, the large print on this one catches your eye: “Zero-percent interest on balance transfers.” And this is not just another zero-percent-for-three-months offer; this card promises zero percent until the balance is paid off. Figuring that zero is less than the ten percent you are currently paying on your credit card balance, you fill out the application, send it in, and shortly thereafter, your credit card balance transfers to an account on which you pay no interest. So far, so good. While you pay down the balance on the credit card account—you figure you can do it in two years—you also begin using your new card to buy groceries, put gas in your car, and the like. You understand that the interest rate on purchases is not zero; but it’s a modest seven percent, still less than the ten percent you had been paying.

All is well, until you get a bill. Then, you see that your monthly payment goes to pay off the transferred balance, not your subsequent purchases. So those purchases you have made will accrue interest at a rate of seven percent until you pay off the entire transferred balance—at least two years—and there is nothing you can do about it. Frustrated, you shove the bill in a desk drawer and forget about it. Three weeks go by; your payment is late. Then you get a reminder from the credit card company. The letter informs you that because “your minimum payment from the preceding billing period remains due and unpaid, the APR for your account will now be billed at eighteen percent.” When you applied for this card, you had no idea that payments would be allocated to the transferred balance before current charges would be paid off. You had no idea that one late payment could be so disastrous. These are guerilla terms.

There is a perceived tension between autonomy and efficiency in the case of terms in standardized consumer contracts. Can we rely on notions of autonomy to determine what should be enforced and to what extent? Or should we instead trust the market to assure that the terms that would bind consumers are the terms a competitive environment—a contract-bargain model—would provide? Those questions seem to admit answers based on either autonomy or efficiency, but not an accommodation of the two.
But recent contributions to economic theory may provide the means to reconcile those ostensibly inconsistent objects. An appreciation of the forces operating on those who draft form agreements demonstrates a type of market failure that calls for the balance struck by contract doctrine's inquiry into the basis of substantial rather than merely ostensible "agreement." That is, contract doctrine properly appreciated through conceptions of "bargain" and "agreement" may police just those transactional contexts in which the apparent disjunction of efficiency and equity may be most pronounced.

The inquiry pursued here proceeds from four premises: (1) it is irrational to read standard forms like those used in common consumer transactions; (2) the terms form drafters include in those standard forms are functionally equivalent to "add on" product supplements (like the printer cartridge you need for your computer printer or the telephone charges on your hotel bill); (3) "shrouding"—effectively hiding the true and complete cost of a purchase—explains the inefficiency at equilibrium of what I refer to as "guerilla terms"—the terms hidden in the boilerplate—because it is not in rational form drafters' interest to bring them to the attention of less sophisticated consumers; and (4) certainty and predictability in the contract law governing form agreements need only be realized in an actuarial and not in a per-transaction sense. The argument presented in this Article supports each of those assertions and reconciles our attitude toward "contract doctrine" with the reality of standard form agreements.

Contract doctrine relies on the notion of "bargain" and its constituent "agreement." A contract paradigm based on substantial agreement on something that takes bargain seriously is ill suited to establish the inferred "consensual" assumption of liability. Arguments vindicating the necessity of inferring contract on the basis of even thin objective indicia may have some appeal in a regime where market forces may be expected to result in welfare-maximizing transactions. But when contract doctrine so corrupted conspires,
even unwittingly, with incentives to take unconscientious advantage and also yields ultimately inefficient outcomes, it is appropriate to question the role and operation of doctrine that has strayed too far from the substantial, real bargain and agreement, to the insubstantial, indeed aleatory, inference of consent.

This Article considers how contract doctrine matters (or may matter) and what twenty-first century contracting law and principles can determine for the present and future of contract. I take account of the role of doctrine as well as its substance in light of the tensions imposed on contract doctrine by the proliferation of contracting practices that advances in intellectual property technologies facilitate and even engender. Part I focuses first on the nature of doctrine and how it constrains analysis by channeling the course of inquiry. The premises of this Part support conclusions about the role and operation of doctrine and its application in evolving transactional contexts. Part II then turns to recent contributions to the economic literature that identify “shrouding” as a device, or system of devices, that results in the imposition of “bargains” that autonomists would deem “unfair” and welfare economists would deem inefficient. “Shrouding” is, in fact, facilitated by the more expeditious forms of contracting accommodated by the fit between advances in intellectual property, computerized contracting, and the state of contemporary commercial law and transactional patterns. This Article discovers in shrouding the “guerilla term,” a disclosed but yet, in a real sense, undisclosed term that takes advantage of contract fictions and transactional realities to provide form drafters and “sophisticated” consumers the means to exploit the vulnerable by effecting an inevitable, and ultimately pernicious, cross-subsidy.

My conclusions are reinforced, in Part III, by reference to the law and social psychology literature as it relates to contract. A conception of human agency in terms of situation and context—rather than disposition—reveals the mechanism by which guerilla terms accomplish unfair and inefficient results. “Dispositionism”—the idea that human actors are defined by the rational disposition they assume—is chimerical, appealing to our most robust conceptions of “self,” but also ultimately false, or at least profoundly incomplete. Social psychology’s revelation of our situationist selves—we are in no small part defined by the circumstances that surround us and our often less than rational responses to them—corrects misapprehensions founded on

*Zeidenberg, 86 F.3d 1447, 1453 (7th Cir. 1996)*, in which Judge Frank Easterbrook argued that judicial interference in competition would hurt consumers.
idealistic and ultimately inaccurate depictions of how we engage contract
document.

Doctrine does not fail so long as we take it seriously; it is only our
propensity to translate the elements of doctrine into terms that we, wrongly,
assume are constrained by transactional realities that corrupts contract
document. This Article concludes that there is a role for the courts and the
common law to play, that contract doctrine founded on substantial bargain and
agreement can and should continue to matter, and that only conscientious
application of classical contract doctrine can realize the goals of equity and
efficiency simultaneously.4

I. CLASSICAL CONTRACT DOCTRINE DESCRIBES OVERLAPPING EXCHANGE
OBJECTIVES

Any theory of contract must account for why we would enforce some
promises and not others, for not all promises are enforceable at law. Those
promises that result from offer, acceptance, and are supported by a bargained-
for consideration constitute “contracts” and are enforceable.5 So there must be
something to “bargain” and the “agreement” that captures what it is contract,
as distinct from other theories of legal obligation, endeavors to vindicate.6

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4 The impact of guerilla terms, as well as the need to police the unfair and inefficient bargains that they
may produce, is both real and relevant. A recent Government Accountability Office (GAO) study illustrates
the problem: In 2005, Americans used 691 million credit cards to transact $1.8 trillion in business. U.S.
GOV'T ACCOUNTABILITY OFFICE, CREDIT CARDS: INCREASED COMPLEXITY IN RATES AND FEES HEIGHTENS
items/d06929.pdf. The GAO found that few credit card users took the time to read the terms and conditions
that governed their credit accounts, and of those who did read, “many failed to understand key terms or
conditions that could affect their costs, including when they would be charged for late payments or what
actions could cause issuers to raise rates.” Id. at 6. Both the motivation behind these hidden terms and their
(intended) result are clear: “[T]he majority—about 70 percent in recent years—of issuer revenues came from
interest charges, and the portion attributable to penalty rates appears to have been growing.” Id. at 8.

5 This leaves aside for the moment promises enforceable on the basis of estoppel, when the “promisor
should reasonably expect [the promise] to induce action or forbearance on the part of the promisee or a third
person and which does induce such action or forbearance.” RESTATEMENT (SECOND) OF CONTRACTS § 90
(1981). Promises enforceable by reference to some restitution criterion also are not considered. See § 86
(Promises made “in recognition of a benefit previously received” are “binding to the extent necessary to
prevent injustice.”); § 370 (restitution for a benefit conferred).

6 See Peter A. Alces, Contract Reconceived, 96 NW. U. L. REV. 39, 46–51 (2001) (reasoning that the
extent of promise enforceability cannot be determined through an independent examination of each element of
contract formation, but can, instead, be measured by the dynamic interaction of agreement, bargain, and
consideration).
Now the power to contract is crucial and may even be indispensable to the form of cooperative coexistence to which we are naturally driven. So perhaps contract doctrine, at least on some level, very literally resonates with our cooperative coexistence. But even short of that, there is no question that contract facilitates exchange and exchange may result in the creation of welfare. Exchange may also, though, squander welfare, and we trust, at least to an extent, that contract doctrine would help us separate the wheat from the chaff. People “agree” to many things that are not contracts, and their recourse in the event of disappointment in such instances is to the court of conscience. We perceive the need for a theory of contract in order to understand, construe, and apply the elements of contract doctrine. Otherwise, we would take a party’s word for it that she “agrees” to be bound and not bother with whether the law should consider her to be bound. It is in the course of deciding what “bargain” and “agreement” entail that we need theory to animate and give meaning to doctrine.

There has persisted a tension in the contract law between objective (status-based) and subjective (will-, promise-, or consent-based) enforcement theories.

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7 See Morris, B. Hoffman, The Neuroeconomic Path of the Law, 359 PHIL. TRANS. ROYAL SOC., SERIES B, BIOLOGICAL SCIENCES 1667, 1671 (2004) (“It appears that humans, and indeed all intensely social animals, have a predisposition to follow three central behavioral rules: (i) promises to reciprocate must be kept (contract) . . . .”). See also Daniel Markovits, Contract and Collaboration, 113 YALE L.J. 1417, 1419 (2004), which begins,

Promises lie at the center of persons’ moral experience of one another, and contracts lie at the center of their legal experience of one another. Many of the most important relationships in our moral and legal culture characteristically arise in connection with promises and contracts of some form or other.


9 “Complete exploitation of all gains from trade may be precluded . . . by incomplete markets, pecuniary externalities (such as absence of necessary complementary goods), or insufficient contracts; or by strategic behaviour.” Id. at 203.

10 See Grant Gilmore, The Death of Contract 42 (1974) (stating that if courts use an objective theory of assent, then “the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedents about recurring types of permissible and impermissible ‘conduct’); Morton J. Horwitz, The Transformation of American Law 1870-1960, at 33-39 (1992) (noting that by the middle of the nineteenth century, judges favored an objective theory over a subjective theory of contract because they believed that an objective theory led to greater “certainty and predictability as well as uniformity and consistency of legal results”).

11 See Charles Fried, Contract as Promise: A Theory of Contractual Obligation 21 (1981) (asserting that “contracts invoke and are invoked by promises”); Horwitz, supra note 10, at 35 (noting that under the will theory, “contract law could be justly characterized as a neutral and voluntary system in which the judge simply carried out the will of the contracting parties”); Randy E. Barnett, Consenting to Form
An objective theory of contract liability would hold a party to the deal that an idealized objective observer would discover from that party’s deal-making activity. So when you sign something, you would likely be deemed to have assented to the terms contained therein. In fact, we could discover sufficient intent to contract and the substance of your undertaking based on your status, in a tort-like sense. That was the conception of contract that emerged from Grant Gilmore’s The Death of Contract.\textsuperscript{12} Contract analysis would then be as easy as tort analysis, which is probably more a matter of marshaling facts than “doing” much law.

One of the first “legal realists,” Walter Wheeler Cook, concluded in 1905 that contract was based on objectivism, what he termed “the principle of manifested intention.”\textsuperscript{13} This would, necessarily, make questions relating to the formation of contract and the incidents of contract liability easier to resolve and would fit well with comprehensive theories of law such as that defended by Oliver Wendell Holmes in The Common Law.\textsuperscript{14} According to Horwitz, Holmes recognized that an objective theory of contract would serve the goals of certainty and predictability, and that certainty and predictability would be “necessary to regulate an increasingly complex and interdependent society.”\textsuperscript{15}

To be sure, basing the imposition of contract liability on objective indicia fosters certainty and predictability. Objectivism obviates the need for inquiry into facts less readily discoverable than what the reasonable person would (or should) think; but such an objective perspective effectively foists on the less sophisticated actor the consequences of actions the legal significance of which he did not in fact appreciate. Seen from that perspective, objectivism subverts the very principles contract based on substantial agreement (understood in its arguably more accurate subjective sense) would vindicate. Further, the

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\textit{Contracts}, 71 Fordham L. Rev. 627, 635 (2002) (positing that standard forms would present no cause for discomfort if contract law were based on consent); Peter Benson, The Idea of a Public Basis of Justification for Contract, 33 Osgoode Hall L.J. 273, 308 (1995) (advocating a theory of contract enforcement in which the “focus is solely on whether two acts of will of the requisite kind—offer and acceptance—have occurred”). \textsuperscript{12}

\textsuperscript{12} Gilmore, supra note 10, at 90 (maintaining that the promissory estoppel principle of enforcement was paving the way for the “fusing of contract and tort in a unified theory of civil obligation”).

\textsuperscript{13} Walter Wheeler Cook, Agency by Estoppel, 5 Colum. L. Rev. 36, 40 (1905) (discussed in Horwitz, supra note 10, at 47). Horwitz presents Cook’s conclusions concerning agency contracts as indicative of a general understanding “that most agreements bore little necessary relationship to a supposed actual intent of the parties.” Horwitz, supra note 10, at 48.


\textsuperscript{15} Horwitz, supra note 10, at 110.
\end{flushright}
objectification of contract challenges natural law theories that somewhat persistently tug at the fabric of the law.16

Natural law and natural (prepolitical) rights theory would determine the sum and substance of contract liability on the basis of the authentic, not constructed, will of the parties.17 But the cost of a purely subjective theory of contract is great in terms of judicial resources certainly, and even greater in terms of the certainty and predictability criteria. It is one thing to acknowledge the expense, in time and professional expertise, incurred when contracting parties need to rely on tribunals to determine their rights inter se, but even that expense is insignificant compared with the cost of transactions frustrated by the parties’ inability to price them properly.

Price is the flip side of risk18 and in order to be able to fix one (in the sense of “set the level of one”), you must be able to control the other. An objective theory of contract facilitates the fixing of risk—in fact, across many contract settings, you are contracting with only one other idealized counterparty—but a subjective theory that champions the individual will, that is takes seriously the concept of agreement as colloquially understood, frustrates such certain risk-fixing, or so the story goes.19

16 “Holmes confronted and dismissed legal arguments deriving from natural rights theories, which emphasized that laws based on objective standards were immoral because they failed to take into account the state of mind of individuals when assigning liability.” Id. Horwitz further reports that Holmes was “bent on attacking German idealism and its philosophy of natural rights. In the realm of jurisprudence, Hegel, Kant, and, in much more limited ways, Austin, were clearly the enemy.” Id. at 111.

17 Id. at 122.

18 See Hal S. Scott, The Risk Fixers, 91 Harv. L. Rev. 737 (1978). Focusing on the banking industry, Scott notes that once the Federal Reserve Board allowed participating banks to shift collection risks to depositors while nonparticipating banks could not, the nonparticipating banks were forced to “price these risks to depositors through collection charges.” Id. at 759–60. Banks were concerned that they would be accused of violating the Sherman Antitrust Act if they tried to solve this problem through price-fixing agreements, so they began using statutes (including the American Bankers’ Association’s Bank Collection Code) to fix risk instead. Id. at 760–62.

19 See Morris R. Cohen, The Basis of Contract, 46 Harv. L. Rev. 553, 588 (1933) (positing that form contracts provide “that real security which is the necessary basis of initiative and the assumption of tolerable risks”); Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 631–32 (1943) (“Risks which are difficult to calculate can be excluded altogether.”). Judge Easterbrook asserted that shrinkwrap licenses, with “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable” are “a means of doing business valuable to buyers and sellers alike.” ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996). Failure to validate such agreements “would drive prices through the ceiling or return transactions to the horse-and-buggy age.” Id. at 1452.
Ultimately then, we cannot accept either predisposition toward contract—objective or subjective—absolutely. We would no more enforce a too severe forfeiture clause in a contract by relying on objective indicia\textsuperscript{20} than we would excuse a party from a contractual obligation that only the most vulnerable would find intolerable.\textsuperscript{21} We have a full array of deal-policing mechanisms\textsuperscript{22}

\textsuperscript{20}See Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921). The contract there clearly stated that Reading pipe should be installed in a home, but, due to an oversight, the subcontractor used pipe from a different manufacturer. \textit{Id.} at 890. Strict compliance with the contract would have entailed "demolition at a great expense of substantial parts of the completed structure" in order to replace pipes that were in every way identical to Reading pipes except for "the name of the manufacturer stamped upon [them]." \textit{Id.} Judge Cardozo held that the difference between the pipes was insignificant and he did not require the contractor to replace the pipes because he did not want to "visit venial faults with oppressive retribution." \textit{Id.} at 891. The decision demonstrates how "justice will determine agreement and agreement will fix the right to recovery, the substance of the contract." Peter A. Alces, \textit{On Discovering Doctrine: "Justice" in Contract Agreement}, 83 WASH. U. L.Q. 471, 487 (2005). For Judge Cardozo, "substantial performance will not be a material breach justifying forfeiture so long as the nonconforming tender was not willful and did in fact comport with standards of good faith and fair dealing." Peter A. Alces, \textit{Regret and Contract "Science"}, 89 GEO. L.J. 143, 169 (2000).

\textsuperscript{21}See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). The Supreme Court upheld a forum selection clause on a cruise ticket; the Court found that Florida was not an inconvenient forum for litigation because the dispute, which arose from an injury off the coast of Mexico, was not "an essentially local one inherently more suited to resolution in the State of Washington than in Florida." \textit{Id.} at 594; Hopper v. All Pet Animal Clinic, Inc., 861 P.2d 531 (Wyo. 1993) (holding that a covenant not to compete was reasonable because it only applied to small animal veterinary practices within a five mile radius of the city in which All Pet Animal Clinic was located).

\textsuperscript{22}U.C.C. § 2-302 (2004) ("Unconscionability"); \textit{RESTATEMENT (SECOND) OF CONTRACTS} § 208 (1981); see, e.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965) (holding that unconscionability exists when one party has no meaningful choice and the terms are unreasonably favorable to the other party).


\textit{RESTATEMENT (SECOND) OF CONTRACTS} §§ 159-77 (1981) ("Misrepresentation, Duress, and Undue Influence"); see, e.g., Odorizzi v. Bloomfield Sch. Dist., 246 Cal. App. 2d 123, 130 (Cal. Dist. Ct. App. 1966) (holding, in a case of undue influence, that, "[p]ressure of whatever sort which overpowers the will without convincing the judgment is a species of restraint under which no valid contract can be made").

\textit{RESTATEMENT (SECOND) OF CONTRACTS} §§ 12-16 (1981) ("Capacity"); see, e.g., Ortelere v. Teachers’ Retirement Bd., 250 N.E.2d 460, 466 (N.Y. 1969) (declining to give effect to a teacher's retirement application because mental illness had left her incompetent to contract); Kiefer v. Fred Howe Motors, 158 N.W.2d 288, 292 (Wis. 1968) (holding that minors lack capacity to contract).
and contract formation rules to draw the distinctions we would not need to
draw if we had either a truly objective or subjective conception of contract. 23
Where we draw the line is a function of a number of variables—time, context,
transactor types—and the inquiry is focused by doctrine, the set of devices that
constrain analysis in order to make it determinative.

Doctrine operates by removing from the calculus considerations that we
have decided, in isolation, frustrate analysis. By that process of excision,
doctrine directs inquiry but may do so by obscuring its object: We focus so
much on getting the doctrine right that we risk losing sight of the object of the
doctrine’s operation. Doctrine, isolated from context, might best be
understood as a vessel that determines the shape but not the substance of what
it contains. That is, we can impose a particular doctrinal “shape” on
substances that do not share fundamental characteristics. Once we select the
shape, we determine results; to call something a “contract” is to impose
liabilities that flow from contract doctrine. Professor Clare Dalton was
sensitive to this, and more:

[D]octrine is redolent with meaning [and] it incorporates debates
about commitments and concerns central to our society. However,

23 The reality is some amalgam of the two theories in which “objective measures of will or intent . . .
become the necessary proxies for subjective states of mind.” Clare Dalton, An Essay in the Deconstruction of
Contract Doctrine, 94 YALE L.J. 997, 1001 (1985). As Judge Learned Hand famously put it, a party who
assents to a term will be bound by its objective meaning even if “it were proved by twenty bishops that . . .
when he used the words, [he] intended something else.” Hotchkiss v. Nat’l City Bank of N.Y., 200 F. 287,
293 (S.D.N.Y. 1911). But thirty-five years later, Judge Jerome Frank, concurring with a majority decision
written by Judge Hand, argued that while courts often speak in objective terms, the “theory of ‘actual mutual
assent’ explains the great majority of the decisions.” Ricketts v. Penn. R.R. Co., 153 F.2d 757, 763 (2d Cir.
1946) (Frank, J., concurring) (quoting Clarke B. Whittier, The Restatement of Contracts and Mutual Assent, 17
CAL. L. REV. 441 (1929)). Judge Frank concluded that in attempting to explain the entirety of contract, “the
objectivists . . . went too far.” Id. at 761.

The Restatement illustrates the modern blend of the subjective and the objective. For example, a party
assents to a contract only if he subjectively “intends to engage in the conduct [of assent] and knows or has
reason to know that the other party may infer from his conduct that he assents.” RESTATEMENT (SECOND) OF
CONTRACTS § 19 (1981). Pure objective assent is insufficient: “[W]hen a party is used as a mere mechanical
instrument, his apparent assent does not affect his contractual relations.” § 19 cmt. c. In the interpretation of
contracts, the subjective “principal purpose of the parties . . . is given great weight” if it is ascertainable;
otherwise, objective indicia will control. § 202. And the Restatement’s iteration of the parol evidence rule
“deem[s] simplistic” a “bald objective-subjective distinction.” § 212 cmt. a.
the usefulness of those debates is unfortunately limited by their stylized distance from the core issues they represent. Debate on these core issues is further limited by doctrine’s pretense that it can resolve these issues rather than simply articulate them in a fashion that would allow a decisionmaker to make a considered choice in the case before her.24

Dalton’s recognition of “doctrine’s pretense” captures the heuristic nature of doctrine: It channels inquiry in ways that may obfuscate rather than reveal the constituents of “considered choice.”

That is precisely what is going on when we apply contract doctrine, in terms of bargain and agreement, to writings and other exchanged communications to determine the scope of contract liability. From a writing, we infer contract. But if it is irrational to read a form contract,25 it makes no sense whatsoever to apply doctrine based on actual reading (bargain, agreement, communication) to fix constructively the contours of the parties’ undertaking. The challenge is to discern the fit between classical contract doctrine based on bargain and agreement and transactional practices that have, at least, obscured that doctrine in favor of constructive bases of liability.

The new forms of “contracting” that the evolution of transactional practices (beginning with the proliferation of form contracts) has accommodated challenge the extant contract doctrine. There is more contracting today then ever before for a number of reasons, including: there are more literate people, more people and entities actively participating in Tom Friedman’s “flat world,”26 and more opportunities as well as ways to enter into “contractual”

24 Dalton, supra note 23, at 1009. Professor Dalton was focusing particularly on the operation of contract doctrine in the context of marital contracts, but her conclusions resonate beyond that setting.

25 See Barnett, supra note 11, at 631 (asserting that because it is difficult for most consumers to judge the likelihood that the remote contingencies described in standard forms will occur, “the rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest” (quoting Todd D. Rakoff, Contracts of Adhesion: An Essay in Reconstruction, 96 HARV. L. REV. 1174, 1226 (1983)); Robert A. Hillman, Rolling Contracts, 71 FORDHAM L. REV. 743, 746-47 (2002) (concluding that given the consumer’s expectation that nothing will go wrong with the product and, if it does, that the law will provide protection from harsh terms, “the consumer has good reason not to read the form”).

26 THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005). Technological developments have “leveled the playing field” because they allow “more people than ever to collaborate and compete in real time with more other people on more different kinds of work from more different corners of the planet and on a more equal footing” than in the past. Id. at 8. Friedman observes that “hierarchies are being challenged from below or transforming themselves from top-down structures into more horizontal and collaborative ones.” Id. at 45. Commercial law must adapt to this new “flat” world where, instead of contemplating transactions between equally large corporations, contracting parties are
relations (or at least relations we deem contractual for purposes of importing a decisional—doctrinal—template). In addition to the sheer proliferation of contract, there is what we might describe as a new “physics” of contracting, the “browsewrap” and “clickwrap” forms considered by Professors Hillman and Rachlinski,27 which at least present old questions in new ways.28 There are also innovations of another, more conventional sort, such as development of an “underground” contract law formulated in arbitration,29 and hiding the “real cost” of the contract in terms that are hidden in plain view by disclosures30 or

increasingly likely to include individuals such as a “kid designer with a computer in his own basement,” id. at 341, young students in India, id. at 21–29, or “housewives in Utah,” id. at 36.

27 See Robert Hillman & Jeffrey Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. REV. 429, 464 (2002) (“In browsewrap contracts, Internet users . . . will find a ‘term or conditions’ hyperlink somewhere on web pages that offer to sell goods and services . . . . [C]ontracts requir[ing] consumers to click through one or more steps that constitute the formation of an agreement.”). See Hillman, supra note 25, at 744 (“In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time.”). In browsewrap the “terms and conditions are usually found behind a hyperlink marked something like ‘Legal’ or ‘Terms.’” Jane K. Winn, Contracting Spyware by Contract, 20 BERKELEY TECH. L.J. 1345, 1351 (2005). These agreements “require some explicit manifestation of assent by the consumer to form a contract; in most cases, the consumer is asked to select between graphical representations signifying ‘I accept’ and ‘I decline.’” Id.

28 The impact of behavioral decision theory on rational choice has received considerable attention in the literature. See Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CAL. L. REV. 1051, 1055 (2000) (asserting that “[t]here is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory”); Jeffrey J. Rachlinski, Heuristics and Biases in the Courts: Ignorance or Adaptation?, 79 OR. L. REV. 61, 63 (2000) (discussing the ways in which the law has adapted and failed to adapt to “cognitive illusions of judgment”); Jeffrey J. Rachlinski, Gains, Losses, and the Psychology of Litigation, 70 S. CAL. L. REV. 113, 114 (1996) (criticizing extant theories of litigation because they “fail to account for the possibility that litigants’ decisionmaking under risk and uncertainty may not comport with rational theories of behavior”).

29 When claims are diverted from the courts and submitted to arbitration, the outcomes “furnish no precedent by which future decisionmakers—whether judges or other arbitrators—will be guided . . . . They neither follow the law, nor contribute to it.” Charles L. Knapp, Taking Contracts Private: The Quiet Revolution in Contract Law, 71 FORDHAM L. REV. 761, 785 (2002) (emphasis omitted). Knapp fears that widespread arbitration would lead the common law to become a “legal King Tut in its elaborately detailed Restatement (Second) sarcophagus.” Id. at 786. Jean R. Sternlight also is wary of arbitration clauses, in part because they may limit a consumer’s right to a jury trial without a court’s determination that the “knowing, voluntary, intelligent waiver” required by the Seventh Amendment has been made. Jean R. Sternlight, The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial, 38 U.S.F. L. REV. 17, 22 (2003). Stephen Ware counters that the clauses Sternlight refers to as mandatory actually are contractual and should be subject to “contract law’s standards of consent.” Stephen J. Ware, Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights, 38 U.S.F. L. REV. 39, 39 (2003). The standard Ware would apply is less stringent than the knowing-consent standard that Sternlight advocates. Id. at 45.

30 See infra text accompanying note 36.
While there have always been forces limited only by human imagination that strain the contract law fabric, it is appropriate to wonder whether this confluence of challenges to transactor expectations is the perfect storm that would cause something, as a matter of doctrine, to give.

A reclamation of "contract doctrine" would take notice of new transactional forms and their fit with accepted conceptions. It would be sensitive to the heuristic function that doctrine performs and recognize unconscientious manipulation of doctrine. It would, if need be, provide the premises to understand old structure in a new way, to reject insubstantial forms in favor of rules that vindicate the object of contract. To see what a true renaissance of contract doctrine would entail, it is worthwhile to take account of the "economics" of form contracting.

II. "SHROUDING"

Professors Xavier Gabaix and David Laibson studied and discovered several modern contract phenomena that became the title of their seminal work, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*. Their study reveals what amounts to a market in misinformation: a market in which the incentives that normally would be expected to police "sharp practices" instead reward unconscientious behavior and the weight of contract doctrine is used as a lever to discourage competition and take advantage of behavioral biases that undermine contract. Their conclusions concern specifically the pricing of "loss leaders" (the base good) and the "add-ons" (necessary accoutrements) that account for sellers' and service providers' profit centers. But because "price" and "risk" are directly correlated (the more risk you assume the lower the price you pay and, conversely, the less risk you assume the higher the price you pay), their conclusions apply to contracting terms generally; when so applied, their work reveals incongruities that undermine the objectification of contract doctrine. An excerpt from Gabaix and Laibson's abstract captures the crux of their discovery: "We show that informational shrouding flourishes even in highly

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31 A pertinent "transactional reality" may arise when a consumer needs to purchase both the base good and an add-on in order to exploit the value of the base good. An example would be a computer printer, the "base good," and the supply of printer cartridges, the "add-on." *See infra* Part II.


33 *Id.* at 509.

34 *See supra* note 18 and accompanying text.
competitive markets, even in markets with costless advertising, and even when the shrouding generates allocational inefficiencies.\textsuperscript{35}

It is productive to contextualize those general observations. First, behavioral biases persist in contract law; they are the misjudgments made by less sophisticated, or myopic or naïve, consumers. Of course we are likely all “less sophisticated” in at least some markets. For example, the same person who knows what constitutes a good deal on a computer may well not know what is a good deal on a new car. Second, “shrouding” is nothing more than hiding the true cost of contracting. So “shrouded product attributes,” such as hidden fees (e.g., overdraft fee, late payment fee), maintenance costs (e.g., oil and filter changes, inspections), prices for necessary accessories (e.g., printer cartridges, adapters) may not be considered by consumers making the initial purchase decision.\textsuperscript{36} Even a group we might imagine to be among the more sophisticated consumers, like investors buying investment products, generally are unaware of the fees they pay to their mutual fund management companies.\textsuperscript{37}

Sellers of goods and services are able to exploit consumer naïveté because price competition and educational advertising will not arise in equilibrium, that is, in a competitive market. Gabaix and Laibson show that there are two kinds of exploitation. Sophisticated firms exploit myopic consumers. In turn, when consumers become sophisticated, they take advantage of these exploitative firms . . . . In equilibrium, nobody has an incentive to deviate except the myopic consumers. But the myopes do not know any better, and often nobody has an incentive to show them the error of their ways. Educating a myopic consumer turns him into a (less profitable) sophisticated consumer who prefers to go to firms with loss-leader base-good pricing and high-priced (but avoidable) add-ons.\textsuperscript{38}

It is obvious that sellers have no incentive to drive myopic buyers out of the market. But it is also true that sellers have no incentive to alert those same myopic buyers to the fact that they are subsidizing the sophisticated buyers. In fact, then, sophisticated buyers are (perhaps unwitting) co-conspirators in sellers’ efforts to take advantage of myopic buyers’ naïveté.

\textsuperscript{35} Gabaix & Laibson, supra note 32, at 505 (emphasis added).
\textsuperscript{36} Id. at 506.
\textsuperscript{37} Id. at 528 (citing Brad M. Barber, Terrance Odean & Lu Zheng, Out of Sight, Out of Mind: The Effects of Expenses on Mutual Fund Flows, 78 J. Bus. 2095 (2005)).
\textsuperscript{38} Id. at 509.
Succinctly, "[A] shrouded attribute is a product attribute that is hidden by a firm, even though the attribute could be nearly costlessly revealed." 39 All of the risks imposed on the myopic consumer (including the buyer who rationally remains ignorant) 40 by operation of form contracts or even nonform contracts that are not understood by the buyer accomplish the same result: The myopic subsidize the sophisticated. The scope of the subsidy is as broad as contract.

The dynamics of shrouding are familiar and accessible: you pay less for a product or service because you are a sophisticated consumer and someone else pays more—effectively subsidizing you—because the other person is a less sophisticated consumer, in Gabaix and Laibson’s terms, a “myopic consumer.” For example, you may use a credit card to buy just about everything you can use it to buy and then pay your balance in full at the end of each month. With the right credit card, the amount you pay is equal to the amount of your purchases less a rebate of somewhere from one percent to perhaps as much as five percent for some transactions. The merchant who took your card in payment does not receive the full price of the good or service, but receives from the credit card system an amount discounted by maybe one to three percent.

Certainly cash buyers are subsidizing most sophisticated consumers, paying full price where the credit card user pays the posted price less the rebate. Also, those credit card purchasers who do not use cards that provide a “rewards program” (e.g., cash, coupons, airline miles) are subsidizing those credit card users who do take advantage of “cash back” and the like. But it is perhaps the least well off among consumers who subsidize both cash buyers and credit card users who pay their account balances in full each month: credit card users who do not have access to reward cards and maintain a balance on their cards, paying perhaps ten percent or more in annual interest. 41

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39 Id. at 512 (citation omitted).

40 See Dalton, supra note 23, at 1009. Gabaix and Laibson observe that unsophisticated consumers “only compare the prices of base goods across firms, instead of comparing the total prices (base good plus add-on).” Gabaix & Laibson, supra note 32, at 511.

41 Credit card users who maintain credit card balances because they are unable to pay off each month’s balance out of current income are worse off than those who pay off each month’s balance by accessing a lower interest rate line of credit, such as a home equity line. The latter credit card users may further benefit from the tax advantages of their lending strategy.
Other examples of such subsidization abound: bank accounts,\textsuperscript{42} rental car fees,\textsuperscript{43} and telephone usage fees at hotels.\textsuperscript{44} While we may distinguish between “surcharges” and voluntary “add-ons,”\textsuperscript{45} the effect between the two may be much the same. Sophisticated consumers will anticipate and avoid or minimize such charges, and the myopic consumer will not. A subsidy results. Now this is not to suggest that the sophisticated consumer has done any more to “earn” sophisticated status than been “burned” once before. The myopic consumer may just be a victim of inexperience, in which case we would find that myopic consumers may become sophisticated consumers ready to take the advantaged position in the pyramid. There is no shortage of consumer biases that sellers may and do exploit to consumers’ disadvantage.\textsuperscript{46} So today’s sophisticated consumer may be tomorrow’s “myope.”

Gabaix and Laibson’s crucial discovery, the discovery that ultimately challenges an objectified contract doctrine, is that, contrary to earlier economists’ suppositions, sellers have no incentive to make more buyers sophisticated.\textsuperscript{47} So we cannot simply trust the market as the objectivists would have us do.\textsuperscript{48} In fact, sellers of goods and providers of services have an incentive to “shroud” add-on charges so that buyers will not have easy access to the true cost of their transactions and to maintain (or increase) the number of myopic buyers: “In a search model with only rational consumers, firms will choose to disclose all of their information if they can do so costlessly. In our model [sophisticated and myopic consumers in same market], with enough myopic consumers, shrouding is the more profitable strategy.”\textsuperscript{49} There is, then, a very real disincentive to educate:

Educating uniformed myopes enables them to get more value out of their relationships with high markup firms. After education, myopes anticipate the high add-on prices, and hence substitute away from add-ons while still enjoying loss-leader prices on the base good. The

\textsuperscript{42} For example, consumers with some form of “overdraft protection” do not pay overdraft fees. See, e.g., Federal Reserve Board, Protecting Yourself from Overdraft and Bounced-Check Fees (2005), http://www.federalreserve.gov/pubs/bounce/bounce.pdf.

\textsuperscript{43} For example, consumers who refill the tank before they return the car and deny insurance offered by car rental companies because they know it is duplicative can avoid refueling and insurance charges.

\textsuperscript{44} These charges can be avoided by using your own cell phone or calling card.

\textsuperscript{45} Gabaix and Laibson distinguish between those add-ons that can be avoided (voluntary add-ons), and those that cannot (surcharges). They focus on the former. Gabaix & Laibson, supra note 32, at 512.

\textsuperscript{46} See, e.g., supra notes 36–37.

\textsuperscript{47} Gabaix & Laibson, supra note 32, at 511.

\textsuperscript{48} See supra notes 12–15 and accompanying text (describing the objectivist approach to contract).

\textsuperscript{49} Gabaix & Laibson, supra note 32, at 510.
newly educated consumers benefit from the “free gifts” and avoid the high fees.

This generates the curse of debiasing. A firm does not benefit by debiasing uninformed myopic consumers. Newly educated consumers (i.e., sophisticates) are not profitable to any firm. Specifically, sophisticates prefer to patronize—and in particular, exploit—firms that offer loss-leader prices on base goods.\footnote{Id. at 519–20 (citation omitted). These new sophisticates are then capable of educating the remaining myopes, snowballing the curse of debiasing. As Douglas Baird notes,}

We can equate add-ons to guerilla terms in standard form agreements.\footnote{The connection is not difficult: Add-ons and hidden (guerilla) contract terms are, “for economic purposes . . . both just features of the product.” Margaret Jane Radin, Boilerplate Today: The Rise of Modularity and the Waning of Consent, 104 Mich. L. Rev. 1223, 1229 (2006). Radin posits that the “collapse of the contract-product distinction is a trope that has become very prominent in contract theory.” Id. (citing Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 144–51, 155 (1970)). Gabaix and Laibson implicitly make the product-contract connection in their discussion of credit card terms and conditions. See Gabaix & Laibson, supra note 32, at 509 & n.11.}

A guerilla term is a provision in a form contract that takes advantage of “rational ignorance”—the irrationality of reading terms in forms. Though the term “guerilla” may be somewhat ironic (we are used to attributing guerilla tactics to the weak rather than the powerful), it may be that the irony makes clearer precisely what is going on. The more powerful market actors, i.e., those who draft form contracts, use guerilla terms and contract doctrine to exploit naïve consumers and have every incentive to maintain or even increase the pool of the naïve. Form drafters can use a kind of “three card Monty” game to assure maintenance of the pool of naïve: Each time consumers discover a particularly egregious term, hide the risk-shifting card by reshuffling the deck or by sleight of hand.\footnote{In the credit card context, for example, “[i]t is typical for major issuers to amend their agreements in important respects with remarkable frequency.” Ronald J. Mann, Charging Ahead: The Growth and Regulation of Payment Card Markets 132 (2006). Even the most sophisticated consumers among us may find it difficult to keep up with the changing terms. See id.} That is just effective marketing.
A. “We Have Found the Enemy and He Is Us”—Pogo

We—that is, the sophisticated—are all complicit in the exploitation of the myopic. Concomitantly, the same “we” have an interest in maintaining the status quo notwithstanding the welfare loss, all of which is born by the myopic and which redounds to “our” benefit. At this point, then, the shrouding effect seems to be no more than a case of the law helping those who help themselves. Why, after all, should the sophisticated not be able to take advantage of the expertise that they have developed, certainly at some cost, over time? If the result were otherwise, would not the myopic just be free riders on the market power the sophisticated have earned?

The formulation suggested by those questions misses the point: It is not a matter of the sophisticated taking advantage of the expertise they have acquired at some cost. It is, instead, a matter of the sophisticated becoming complicit with sellers of goods and providers of services who actively mask the true cost of what they sell. Indeed, the deal is only as good as it is for the sophisticated because the myopic are essentially tricked into subsidizing them. Further, it is not inappropriate to use the term “tricked,” because that is, in fact, what sellers are incentivized by market pressures to do: “[F]irms will choose high markups in the add-on market. In the Shrouded Prices Equilibrium [when the fraction of myopic consumers has reached a critical number], firms will choose markups that are so high that the sophisticated consumers substitute out of the add-on market.” 53 That discloses both an incentive to mask true product cost—“choose high markups in the add-on market”—and to maintain the ignorance of consumers by making sure that the share of sophisticated consumers is small. Gabaix and Laibson conclude that “[i]n many seemingly competitive markets the price of the base good is typically set below its marginal cost (e.g., printer, hotel, car rental, financial services), while the price of the add-on is set well above its marginal cost (printer cartridge, hotel phone call, gas charge, minimum balance fee).”54

The application to forms is clear. Consider that form contracts, like all contracts, allocate risk, and risk is the flip side of price. Imagine a form term that reduces risk—say, a risk of some type of loss—to the drafter (seller). Because the seller is no longer responsible in the event of such a loss, the price paid by the buyer is correspondingly reduced. Both sophisticated and myopic buyers will assume the risk of loss by the terms of the form contract. But the

53 Gabaix & Laibson, supra note 32, at 517.
54 Id. at 518 n.33.
A myopic buyer, on the other hand, would (perhaps quite rationally) not have been aware of the risk to which he had exposed himself. He therefore will not price the risk and separately insure against it. He will see only the lower cost of his purchase. Because myopic buyers will fail to understand the reason for the reduction in price, more myopic buyers will enter into the transaction and will be victimized by the contractual assumption of risk.

The seller, of course, realizes the increased sales resulting from the lower price and the failure of the myopic buyers to understand the reason. The seller, then, has an incentive not to reveal and price that risk ab initio: receipt of monopoly prices at equilibrium. So while the myopic buyer has, perhaps, entered into a transaction he should not have entered into, both the sophisticated buyer (who understood the risk) and the seller benefit from the shrouded allocation of risk.

The response of earlier economic study to instances of apparently noncompetitive pricing of add-ons had been the development of rational actor models that take into account search cost, commitment, and price discrimination. Exploitation of consumer naïveté was not identified as the source of the apparent disequilibrium. Consider the preshrouding explanations to which Gabaix and Laibson respond:

Search Cost. Buyers of goods and services pay too much for add-ons—and pay too much given the risks they (unwittingly) assume in the dense language

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55 Sophisticated consumers can both analyze the magnitude of risk and insure against that risk better than myopic consumers. See infra Part III.
56 "[I]t is clear that if a firm shrouds, the add-on price is the monopoly price." Id. at 536.
58 Id. at 511 & n.16 (citing Paul Klemperer, Markets with Consumer Switching Costs, 102 Q.J. ECON. 375 (1987); Joseph Farrell & Paul Klemperer, Recent Developments in the Theory of Regulation, in 3 HANDBOOK OF INDUSTRIAL ORGANIZATION (Mark Armstrong & Robert H. Porter eds., forthcoming 2007); Severin Borenstein et al., Antitrust Policy in Aftermarkets, 63 ANTITRUST L.J. 455 (1995)).
59 Id. at 511 & n.17 (citing Glenn Ellison & Sara Fisher Ellison, Search, Obfuscation, and Price Elasticities on the Internet (Nat’l Bureau of Econ. Research, Working Paper No. 10570, 2004)).
of the “agreement”—because the “search” cost of discovering the higher price and greater risk is too great given the benefit the buyer imagines she would derive from discovering the cost. That is just a reiteration of the “rational ignorance” principle that explains, *inter alia*, the treatment of form contracts under Uniform Commercial Code Section 2-207. It is one thing to discover search cost; it is quite another to exploit it.

**Commitment.** The commitment model would suggest that firms impose higher add-on costs and, by inference, shift more risk, because firms are not able to commit to a more accurate price-risk allocation at the time of contracting. Gabaix and Laibson, however, find the same mark-up of add-ons even in the event sellers are able to commit: Even those sellers able to commit choose not to lower their add-on price accordingly. While the commitment model may suggest some divergence between the pure add-on and enhanced risk-shifting contexts, the fact of that hypothetical divergence does not undermine the essential identity of those two forms of deceit in equilibrium.

**Price Discrimination.** The price-discrimination model would explain that “add-on pricing enables firms to charge high demand consumers relatively more than low demand consumers.” But when advertising is costless, add-on pricing would not increase profits. So a seller could not use add-on pricing to take advantage of price discrimination: All buyers would go to the seller advertising the lowest price. It is in the case where advertising is costless that we can assume that consumer “misdirection” is the result of shrouding.

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60 Consumers do not benefit from reading boilerplate for a variety of reasons: the language can be difficult for them to understand, they are unlikely to be affected by the contingencies described in the form, the salesperson is not authorized to change the terms, they would be confronted with nearly identical terms if they purchased the same product from another company, and they believe that courts will not enforce harsh terms. Hillman & Rachlinski, *supra* note 27, at 446-47. According to Hillman and Rachlinski, “For any single consumer, the costs of monitoring a business’s standard-form contract outweigh the benefits.” *Id.* at 447.

61 See Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 Va. L. Rev. 1387, 1389 (1983) (“Consumers may not read an entire contract, yet still know what much of it does.”). It does not make sense for consumers to read standard forms because “consumers’ mistakes regarding the risks contract terms allocate fluctuate randomly around true values in an unbiased way” and, therefore “firms will behave as if consumers choose correctly.” *Id.* at 1391.

62 Gabaix & Laibson, *supra* note 32, at 511 & n.16 (citing Klemperer, *supra* note 58; Farrell & Klemperer, *supra* note 58; Borenstein et al., *supra* note 58).

63 *Id.* at 511 n.16.

64 *Id.* (citing Ellison & Ellison, *supra* note 59).

65 *Id.* (citing Ellison & Ellison, *supra* note 59).
The foregoing conclusions would not be so troublesome were we able to rely on the market, specifically advertising, to expose cross-subsidization to light and thereby "disinfect" the market in misinformation, the cause of apparent disequilibrium. Carl Shapiro assumed that firms with higher, but realistic, initial prices and lower add-on prices would advertise that fact.66 Extended to the case of onerous but obscure risk-shifting terms, you might imagine that Princess Cruise Lines would be able to compete with Carnival by pointing out that those injured aboard a Princess ship could sue the cruise line in their home state; Princess could advertise that although their fare is the same as Carnival's, the effective cost to passengers who sail on Princess would be lower than the cost to Carnival passengers, who may have to bring suit against Carnival in a distant venue.67 The absurdity of that advertising strategy is manifest.68

Similarly, Dell could sell computers over the phone or Internet at the same price as Gateway but not include an arbitration clause in the paperwork delivered with the computer and advertise the lack of an arbitration clause so that consumers might buy a Dell rather than a Gateway computer.69 Insofar as it is not clear whether sellers of goods over the phone or Internet generally do draw their customers' attention to the risks their customers assume (or even that consumers would have any idea how to price that risk), it is likewise not clear that sellers would benefit by bargaining over terms other than price and perhaps quality (and quality representations might be most effective when offered by "independent" third parties, rather than the seller).70

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66 See Gabaix & Laibson, supra note 32, at 518–19 (citing Carl Shapiro, Aftermarkets and Consumer Welfare: Making Sense of Kodak, 63 ANTI TRUST L.J. 483, 495 (1995)).

67 See Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). The Court noted that "passengers ... benefit in the form of reduced fares reflecting the savings that the cruise line enjoys by limiting the fora in which it may be sued." Id. at 594.

68 Alternatively, so long as Princess could price the choice of forum risk, it could just rely on a choice of forum clause similar to Carnival's and charge an appropriately lower fare, or less for drinks while on board, or less for souvenirs in the gift shop and advertise the lower price. See also Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. CHI. L. REV. 1203, 1206 (2003) (assuming the salience of price).

69 See Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), for a case involving similar facts: The terms and conditions, including an arbitration clause, were shipped with the computer after the customer placed an order over the phone. Id. at 1148. Alternatively, Dell could include the arbitration clause in the follow-up documents but cut the price of their product in an amount that would reflect Dell's reduced risk of having to litigate rather than arbitrate, assuming Dell would have some idea of how to price that risk reduction and turn it into a price reduction.

There is more reason to believe, however, that sellers would not advertise in the way Shapiro imagined they would: Sophisticated buyers would not want them to do so. Gabaix and Laibson found that the "competitive" effect postulated by Shapiro would be overcome in equilibrium by a pooling effect where sophisticated consumers agree to the same terms as myopic consumers: "[E]ducated consumers would prefer to frequent firms with high add-on prices [onerous "hidden" terms] that they can avoid rather than defecting to firms with marginal cost pricing of both the base good and the add-on."71 It is the subsidization that accounts for pooling: "This preference for the firms with high markups reflects the fact that the sophisticated consumers are subsidized by pricing policies designed for uninformed myopic consumers."72

One might think that, over time, the pool of naïve buyers would shrink as more and more of them are "victimized" by overpriced add-ons or guerilla terms. For example, more consumers now know to ask what the deductible is when offered insurance at car rental counters, and more consumers know that their own insurance will also cover the rental or that the credit card they are using to rent the car provides insurance. Those who have been surprised by exorbitant hotel phone bills learn to use a cell phone or a calling card. Other examples abound, thanks in no small part to the media, including consumer publications. The benefits of "pooling" will determine how long the seller using a shrouded contract can realize enhanced gains from the high priced add-on or pernicious term: "The myopia model predicts that consumers will eventually learn to avoid add-on fees."73 But there is no limit (other than, perhaps, the misrepresentation and consumer protection laws) to the market manipulation devices in the form of add-ons and new risk-shifting terms that a clever seller may devise.74 By manipulating "loss leader" and add-on pricing,

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71 Gabaix & Laibson, supra note 32, at 519 (the language in brackets has been added to extend the conclusion to "hidden" terms).
72 Id.
73 Id. at 522.
74 Id. Gabaix and Laibson elaborate:

Several countervailing forces may sustain shrouding in the long run. First, new generations of myopic consumers enter the market. Second, sophistication is sometimes overturned by
just as by imposing hidden risks by operation of guerilla terms, sellers may take advantage of monopoly pricing and have every incentive not to advertise.

Legal commentary heretofore has recognized the challenge forms present to contract law and have responded by focusing on the extent to which the market can police forms and proposing policies to address the apparently aberrational case of market failure. But the analyses that preceded Gabaix and Laibson’s identification of shrouding reached efficiency conclusions insupportable now that the shrouding mechanism is manifest. Nevertheless, review of those perspectives—in the terms of two iterations in particular—is worthwhile. It will reveal that legal responses other than those previously proposed may be in order.

B. Response to “Trust the Market”

Commentators who have considered the efficiencies of form contracts have offered different reasons to support their confidence in market forces, recommending deference to the market even when they perceive the risk of form drafters’ unconscientious behavior. Professors Clayton Gillette and Russell Korobkin have both addressed problematic form terms and have reached conclusions that are compromised once we appreciate the power of shrouding in its accommodation of guerilla terms.

1. Agency Theory

Gillette assumes that buyers who read forms act as agents for those who do not (the sophisticated as agents for the myopic) and thereby assure that market forces will constrain sellers who would otherwise present forms containing oppressive terms. He acknowledges that there is no real assent in consumer form contracting settings but nonetheless proposes

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75 Clayton P. Gillette, Rolling Contracts as an Agency Problem, 2004 Wis. L. Rev. 679, 683.

Id.
that terms of [rolling contracts—"pay now-terms later"] should be considered binding as long as the process through which they emerged was one in which the nonreading, nonparticipating buyer was virtually represented in a manner that satisfies the same objectives as personal assent. Assent by representation is, therefore, no more (and no less) problematic than decision-making by representation in a variety of other contexts.

He does acknowledge, quite correctly, that "[a] single contract can contain some terms that would evolve in well-operating markets, and that thus reflect nonparticipating buyers’ interests, and other terms that reflect market failures." Certainly guerilla terms “reflect market failures.”

But what Gillette may miss, given his assumption of agency, is that even when all of the participants to the transactions are acting rationally at equilibrium, there may be certain and pervasive market failure. There is not simply an “agency problem” to be addressed. The incentives are skewed by the very fact that we start from a fiction, “assent,” and then exacerbate that error by assuming a relationship that only too clever economic theorists could consider to be an agency relationship. By mischaracterizing the transactional dynamic as agency rather than cross-subsidization and exploitation, Gillette’s analysis obscures the assault on assent that guerilla terms perpetrate.

An agency problem, the dilemma that arises when there is not a sufficiently close identity of interest between agents (here, the sophisticated) and their principals (the myopic), may be “solved” by a contract that coordinates the interests of agent and principal. If the agent and principal cannot make an enforceable contract, the rational agent will appropriate the principal’s investment. Professors Cooter and Ulen demonstrate this in terms of game theory. The principal who is (or becomes) aware of this appropriation will respond by not investing; in the case of shrouded goods and guerilla terms, the principal will not enter into the contract that results in exploitation at equilibrium. The whole premise of the cross-subsidization exploited by form drafters is that the gains to the sophisticated cannot, by definition, be captured in any way by naïve buyers. If it were otherwise, they would not be naïve.

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76 Id. at 684 (internal citation omitted).
77 Id.
78 See infra note 83 and accompanying text.
80 Id. at 198 ("[A]n enforceable contract converts a game with a noncooperative solution into a game with a cooperative solution. The first purpose of contract law is to enable people to cooperate by converting games with noncooperative solutions into games with cooperative solutions.").
The problem is not simply that one group of buyers may have different preferences than does the other group; instead, the problem is that one group of buyers, the sophisticated, is counting on, indeed, banking on (wittingly or otherwise), the ignorance of the other group. In the case of guerilla terms, the interests are opposed. The deal for which the sophisticated buyers are contracting is only what it is because of the myopic buyers’ ignorance and because the sophisticated buyers are in a position to exploit that rational ignorance. Certainly no one should have any problem with terms that in fact are in the interests of myopic or nonreading buyers. But it is too great a logical jump to say that because the naïve and sophisticated will have some identity of interest we should assume that the market will assure that they generally have the same identity of interest when more careful economic theory demonstrates just the opposite in equilibrium.

Application of Gabaix and Laibson’s discovery to standard form contracts convincingly demonstrates the error made by Gillette and others who see guerilla terms as presenting an agency problem. While Gillette qualifies his conclusion by “assuming . . . homogeneity of interests between readers and nonreaders,” it is clear that given the cross-subsidy that accommodates exploitation of the myopic, the nonreader, Gillette cannot assume the premise necessary to vindicate reliance on a functioning market. A competitor cannot be your agent.

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81 Gillette, supra note 75, at 689.
82 The economic error in Gillette’s analysis in light of shrouding and guerilla terms is revealed in his apology for market forces:

Even if sellers do not have altruistic reasons to internalize the interests of buyers, a desire to attract reading buyers may provide sellers with self-interested reasons to offer attractive terms that are then available to low demand, nonreading buyers.

. . . . [T]hose who read can serve as proxies for those who do not. Sellers who are unable or fail to differentiate among reading and nonreading buyers, and who participate in relatively competitive industries where capturing the marginal buyer increases profitability, will offer the same terms to all buyers that they offer to reading buyers.

Id. at 691.
84 Gillette, supra note 75, at 691.
But Gillette does recognize that the strength of his “proxy argument may depend on the conditions surrounding a particular term rather than just on the general characteristics of buyers.” That is certainly true. It is the case that courts should deny enforcement of guerilla terms but may enforce terms that do not present the same cross-subsidization and exploitation risk. That determination must be ad hoc if contract “agreement” is to do the work we need to trust it to do.

Gillette also recognizes, in terms that seem to resonate with shrouding, that the existence of “[s]eller willingness to trade a few readers for numerous nonreaders suggests a[another] possible . . . weakness in the proxy argument as it relates to [rolling contracts].” But he concludes that the question is not whether buyers will read terms as they are sent to them; instead the question is whether the terms’ presentation in some other fashion would encourage nonreading buyers to read. If buyers would simply not read no matter how form terms are presented, then there is no harm in the terms’ being supplied in one clandestine manner rather than another. That of course would be a sufficient response, if it were correct, to all questions regarding the enforceability of guerilla terms.

But Gillette’s response may not be correct. He ignores what it means for a term to be a form term—it is rational to remain ignorant of it and irrational to read it—and then superimposes a fictional contract bargain sense to justify the cross-subsidy and resulting exploitation. So in most cases, it is circular to argue that all would be well, even rational, were the law to provide us with the result that would maintain if people just acted irrationally and read forms it is irrational to read.

It is necessary to reproduce a portion of Gillette’s argument at some length to make the next point pertinent here. While Gillette is offering a comparison of standard form contracts (SFCs) and rolling contracts (RCs), his conclusions resonate with regard to the enforceability of form contracts generally. He assumes the enforceability of SFCs and compares them with RCs. If RCs are no more problematic, they should be no more subject to avoidance.

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85 Id. at 693.
86 Id. at 695. The seller’s willingness to trade readers for nonreaders illustrates the seller’s (unstated) goal of obtaining a homogeneous group of nonreader-buyers—those who can be exploited. A seller wants readers among his buyers only to the extent that readers serve as window dressing for Gillette’s agency theory: Their presence justifies the seller’s exploitation of nonreaders.
87 Id. at 693.
[T]he underlying assumption of the claim that RCs will systematically include more exploitive terms [than SFCs] is that sellers will rely on a higher proportion of nonreadership in the RC context [than would be the case with regard to SFCs]. Consider the calculation that the seller would have to make in order to believe that it can gain by taking advantage of that marginal reduction in readership. First, the seller must understand that it will lose some reading buyers, though not as many as in the case of the traditional SFC. Second, the seller must believe that the conditions under which the questionable clause applies will arise with sufficient frequency as to offset lost sales to offended reading buyers . . . since, by definition, those nonreaders would have bought it with or without the new exploitive term. The sacrifice of sales to reading buyers only makes sense for the seller who expects to invoke the offensive clause against nonreading buyers with sufficient frequency to compensate for the loss of reading buyers. Third, the seller must believe that the clause will withstand any legal challenge, so that it can be enforced against nonreaders. Fourth . . . the seller must believe that the expected value of the clause exceeds not only the costs affiliated with lost readers, but also any financial and reputational costs incurred in defending the clause. The result is that, even if readership decreases in RCs, sellers are unlikely to alter terms beyond what they would include in more traditional SFCs.88

For present purposes there is no need to distinguish between types of form contracts—“rolling” or “standard”; the effect is the same.89 But Gillette’s arguments in favor of the distinction he would have the law draw are instructive in what they reveal about the logical errors discovered when we understand shrouding.

Gillette’s first point is that a seller who tries to exploit the naïve will lose some of the sophisticated.90 Shrouding concedes that, but recognizes that it is in the seller’s interest to lose some of the sophisticated in order to capture more of the naïve. Consider the credit card promotion presented in the Introduction. Sophisticated cardholders will realize how the account’s allocation of payments rules work and will not use the card at all until the transferred balance is paid in full. Myopic cardholders will probably think they are getting full advantage of the zero percent balance offer but will in fact wind up paying

88 Id. at 696–97.
89 So, to be fair to Gillette, I do not find it worthwhile to consider any differences between the two types of forms because I do not assume that even standard form contracts can pass fairness or welfare muster.
90 Id. at 695.
the ten percent interest rate on amounts charged to the card and will not begin making any payments on the ten percent balance until the transferred balance is paid in full.

Will the card issuer benefit more from the myopic cardholders it “captures” than it loses from the sophisticated who know the allocation of payments rules—which, after all, have been “disclosed”? It seems likely that card issuers have done the math and have found that Gabaix and Laibson are right and Gillette is wrong. This point also responds to Gillette’s second observation: The “questionable clause . . . will [operate] . . . with sufficient frequency as to offset lost sales to offended . . . buyers.”91 It is not clear that the sophisticated buyers who discover the card issuer’s scheme will be so much “offended” as they will be eager to take advantage of the cross subsidy the myopic provide by not understanding the math.

So, too, falls Gillette’s third reservation that the seller must have confidence in the term’s enforceability.92 There is no reason, absent a substantial commitment to give real effect to the bases of contract liability—bargain and agreement—to believe that a court would not enforce the application of payments clause properly disclosed in the account agreements and statement.93 Further, it is in fact not necessary that the clause be certainly enforceable in all cases. It is enough that the cardholder act as though the clause were enforceable, which most cardholders concerned with their credit ratings are most likely to do, particularly if their account agreement also includes an arbitration clause.

To respond to Gillette’s fourth point (creditor’s reputational concern),94 a card issuer complying with federal law and relying on a “disclosed” term whose operation really may be beyond the understanding or awareness of the vast majority of cardholders may not have much reason to be concerned with a

91 Id. at 696.
92 See id. at 697.
93 Courts generally enforce terms that have been disclosed, much to the chagrin of consumer advocates who fought to put those disclosure requirements into place. See Christopher L. Peterson, Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act, 55 FLA. L. REV. 807, 814–15 (2003). Advocates had hoped “that with uniformly disclosed prices, consumers would be able to shop for the best deal, thus better protecting themselves and forcing creditors to offer lower prices.” Id. at 814. These same advocates are now disillusioned because they believe that “watered down disclosure laws are too complex, come too late in negotiations, and are not accurate enough.” Id. Additionally, they worry that the “industry uses meaningless disclosure rules to deflect legislative pressure for more substantive consumer protections.” Id. at 814–15.
94 See Gillette, supra note 75, at 697.
pernicious guerilla term’s effect on the issuer’s reputation. The sophisticated, after all, may appreciate that the myopic are victims of their own lack of sophistication, not the issuer’s machinations.

Gillette’s object, ultimately, is only to demonstrate that rolling contracts are no more troublesome than more familiar standard form contracts. And about that he may be right. But the fact remains that there is already enough room for unconscientious exploitation—indeed, very rational exploitation—at equilibrium to demonstrate the market failure that precludes our having confidence in the market in the case of guerilla terms. It is also true, however, that some terms we could imagine and which sellers might use would present the risks Gillette does identify for form drafters and so would not present the guerilla term risk. In that case there would be no need for the contract law to preclude their enforcement. But once we do identify guerilla term risk, we cannot trust the market and agency theory, and we need to trust contract as applied by common law courts. That becomes even clearer when we consider an alternative, but no more efficacious, response to guerilla terms: unconscionability reconceived in terms of efficiency.

2. The Unconscionability Calculus

Professor Russell Korobkin has offered perhaps the most thoughtful argument in favor of relying on the unconscionability doctrine to police form drafter overreaching. He acknowledges that the doctrine, as heretofore applied by the courts, fails to separate accurately the chaff—the form terms that should be denied enforcement—from the wheat—the form terms that should be enforced because they inure to the benefit of both consumers and form drafters. Korobkin believes that “efficient” terms ought to be enforced and inefficient terms ought to be deemed unenforceable because they are unconscionable, and he criticizes decisions that have found unconscionability without a showing that the challenged term was necessarily inefficient. Korobkin, then, equates unconscionability with inefficiency and would leave that determination to common law courts.

95 See Korobkin, supra note 68.
96 Id. at 1278.
97 Id. at 1279 (“[T]he courts’ approach to substantive unconscionability analysis is not well-suited to separating terms that are detrimental to buyers as a class from those beneficial to buyers as a class.”).
Korobkin begins with an uncontroversial observation: The rationality of human agents is bounded and, therefore, we rely on heuristics that may mask the imperfect rationality of our choices.\(^98\) Indeed, it is rational to rely on heuristics that will lead us to suboptimal choices when the cost of making optimal choices is prohibitive.\(^99\) As a result, form drafters may exploit that reliance on heuristics in order to impose low quality nonsalient terms on buyers. It is, effectively by definition, the nonsalient terms that even a conscientious buyer will most often miss. While market forces may assure the efficiency of salient terms, "there is no reason to assume that non-salient terms will be efficient."\(^100\) Korobkin’s object is to provide a screening device to assure that only efficient terms in standard forms will be enforceable.

At the outset, then, the salient–nonsalient distinction will have to support a good deal of weight in Korobkin’s argument. Salience is not just a matter of awareness. That is, a term is not salient just because consumers know it exists; the consumer must also appreciate its operation and the impact of its operation on him.\(^101\) A form drafter could not always make the nonsalient form term salient simply by taking steps (such as having the buyer initial the form clause) to bring the term to the buyer’s attention. Salience is a matter of understanding.

From there, Korobkin concludes that the potential nonsalience of form terms accommodates a market in misinformation: "Far from operating as an invisible hand that promotes efficiency, market forces combined with the presence of non-salient product attributes can perversely enforce a regime of inefficiency."\(^102\) Keep in mind that from Korobkin’s perspective, both form drafters and consumers suffer from the inefficiency, so it is in the interest of both form drafters and consumers to assure that inefficient nonsalient terms not be enforced.\(^103\) While it may be more obvious that consumers suffer from the inefficiency, Korobkin demonstrates that sellers are similarly prejudiced: If buyers do not take account of terms that it would be in their interest to

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\(^98\) *Id.* at 1290.

\(^99\) *Id.* at 1292.

\(^100\) *Id.* at 1225. That is not to conclude, as Korobkin does not, that nonsalient terms will in fact be inefficient, it is just to say that the market cannot guarantee that nonsalient terms will be efficient.

\(^101\) Korobkin observes that "form terms are particularly likely to be non-salient because their usual content makes them unlikely to attract buyers’ voluntary or involuntary attention." *Id.* at 1226.

\(^102\) *Id.* at 1234. Also, "[i]ronically, far from guaranteeing a market equilibrium of efficient terms, competition can guarantee an equilibrium of inefficient terms." *Id.* at 1235.

\(^103\) "In a competitive market, [refusal by courts to enforce terms that reduce both buyer and seller welfare] . . . would also increase seller’s welfare." *Id.* at 1234.
consider, form drafters cannot compete among themselves on the basis of that term. The seller will have no incentive to offer a product attribute, including a contract term, which the buyer will not take into account in making the purchase decision. Money is left on the table, and that is a welfare loss for both buyer and form drafters.

Of course the seller may overcome this problem of nonsalient terms that should be salient by bringing the terms and their significance to the buyer’s attention: That would be the role of advertising. Korobkin, though, is skeptical of sellers’ ability to advertise product attributes in such a way as to make the nonsalient term salient. His skepticism is well founded. Though, as Gabaix and Laibson demonstrate, it is not at all clear that the cost of advertising explains as much as Korobkin would have it explain.

Whether a particular nonsalient term is efficient depends on what the term is. A nonsalient term may be efficient, according to Korobkin, so long as the value of the term to the buyer would exceed the cost to the seller of the seller’s providing that term: “[a]ssume that each buyer is willing to pay $15 more for a high-quality warranty term than a low-quality warranty term, and that a high-quality warranty costs sellers $10 more to provide per customer. Thus, in this

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104 Korobkin identifies this with the “‘lemons’ problem: When buyers cannot verify quality, the market will produce lower-quality goods.” Id. at 1235 (citing George A. Akerlof, The Market for “Lemons”: Quality Uncertainty and the Market Mechanism, 84 Q.J. ECON. 488 (1970); Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211, 244 (1995)).

105 Korobkin first notes that “if the buyers most likely to find an attribute salient in response to advertising are likely to be unprofitable customers on average, sellers might choose not to promote that attribute.” Id. at 1242. That certainly seems unassailable, but it may ignore the ability of consumer groups, among others, to bring the effects of a form term to the attention of media outlets that “sell” that information to consumers over commercial airways and in magazines and newspapers. Korobkin offers an alternative explanation:

Second, such marketing efforts will be costly, so sellers will have to balance the benefits of exploiting their competitive advantage against the cost of making the market responsive to it. Often, the value to a seller of making a term salient will be relatively small and the cost of changing the way a substantial number of buyers shop for the product enormous.

Id. at 1242–43. This response is certainly cogent and simply makes the point that a seller will not advertise when the costs of doing so outweigh the benefits. That, in fact, was one of the preshrouding explanations for monopoly pricing of add-ons. See supra notes 64–65 and accompanying text. See generally Ellison & Ellison, supra note 59.

Korobkin does make a point that is crucial to the guerilla term calculus: “[I]n a complex world in which products have many attributes, it seems likely that a seller could fail to make certain attributes salient no matter how many resources it expends on advertising.” Korobkin, supra note 68, at 1243.
example, a high-quality warranty term is efficient." 106 However, if it would cost the seller $7 to make that product attribute (or more desirable term) salient and that attribute (or term) is worth only $5 to the buyer, the seller will not offer the term even to buyers for whom it is already salient. The seller would, instead, provide a lower quality product or term. Again, money is left on the table, an efficient exchange lost. Korobkin’s argument about the inefficiency of a low-quality term is clear and goes some way toward explaining why inefficient terms may be pervasive. But if inefficient terms are to be avoided, the law should provide the incentive the market fails to provide. He believes that the unconscionability doctrine affords the law the means to do just that. 107

Korobkin’s conclusion is that the unconscionability doctrine should be read to police inefficient terms, 108 in the sense of efficiency described in the foregoing paragraph. He acknowledges that the doctrine would have to be modified in terms of its “procedural” 109 and “substantive” 110 aspects in order to do the work he has in mind. Korobkin concludes that, so configured, the unconscionability doctrine reveals “the source of contractual inefficiency and focuses judicial attention on the form terms most likely to be inefficient,” 111 nonsalient terms.

Korobkin notes, though, that “[j]udicial determinations of which contract terms are efficient and which terms are inefficient are subject to a high likelihood of error.” 112 To address that difficulty, Korobkin proposes a “presumption of enforceability.” 113 He fears “false positives,” a finding of inefficiency when, indeed, the term is efficient. 114 There are several responses to Korobkin’s proposal that unconscionability in terms of efficiency provides the best means available to police inefficient form terms.

106 Id. at 1236.
107 Id. at 1294–95.
108 Id.
109 Id. at 1279.
110 Id.
111 Id. at 1290.
112 Id. at 1285.
113 Id.
114 Id.
If courts are not particularly good at making efficiency determinations—a reasonable assumption—Korobkin offers no reason to assume that the risk of false positives is any greater than the risk of false negatives. A court that cannot do the math cannot do the math less unreliably in one direction than the other. Korobkin’s reason for the presumption is based on the false premise revealed by our understanding of shrouding:

The presumption in favor of enforceability has the benefit of promoting a large measure of certainty concerning contractual rights and responsibilities. Sellers as a group, as well as buyers, are better off if the law provides an incentive for them to provide efficient terms, so everyone benefits from a doctrine that empowers courts to strike down clearly inefficient terms.

As our understanding of shrouding makes clear, it is very much not the case that “[s]ellers as a group, as well as buyers, are better off if the law provides an incentive for them to provide efficient terms.” Shrouding works to fix equilibrium at the inefficient state because of the pooling effect that enables the sophisticated (those for whom a term is salient) to realize a cross-subsidy at the expense of the myopic (those for whom a term is not salient but should be), and because of sellers’ ability to exploit the cross-subsidy accomplished by such pooling. So Korobkin’s premise is incorrect.

Further, there is nothing about certainty and predictability that is better served by enforcement rather than nonenforcement of a contract term. To the extent that certainty and predictability should matter, the object should be to determine a reliable reason to enforce or not enforce and then apply that reason in a certain and predictable way. Otherwise, insofar as it is overwhelmingly the case that the party who drafts the form is the party with greater bargaining power as between the two contracting parties, we might expect that too often abuse of contracting power might be obscured by the Trojan Horse of certainty and predictability.

Korobkin also relies on the familiar idea that sellers need certainty in order to price their goods or services. While in the aggregate that is certainly true, it

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115 Likewise, there is no reason to assume that judges are any better than consumers at doing the efficiency calculus. I am indebted to Professor Richard M. Hynes for this observation.

116 Id. (emphasis added).

117 Id.

118 Gabaix and Laibson describe this pooling effect: “[E]ducated consumers would prefer to frequent firms with high add-on prices that they can avoid rather than defecting to firms with marginal cost pricing of both the base good and the add-on.” Gabaix & Laibson, supra note 32, at 519 (emphasis omitted).
is true only in the aggregate. Sellers can and likely very often do include terms in their forms that they know they will never enforce as well as terms that they know their buyers will rarely enforce. "Rebate" offers are particularly stark evidence of that phenomenon. 119 What matters to parties who contract on a

119 A rebate can be defined as "a money-refund offer available to consumers who . . . [send] in proof-of-purchase and other forms to a manufacturer who mails back a portion of the price paid by the consumer." Marvin A. Jolson et al., Correlates of Rebate Proneness, J. ADVERTISING RES., Feb./Mar. 1987, at 33, 34 (internal quotation marks omitted). The cost of the rebate is generally paid for by the manufacturer and does not cut into the percentage return of distributors and retailers, and therefore is distinct from a price cut. Henry Norr, The How and Why of Rebates, S.F. CHRON., Dec. 18, 2000, at D1.


The realization that the manufacturer's interest is at odds with the consumer's is pretty widespread. See, e.g., Feldman, supra ("They don't want you to redeem your rebate check."); Nguyen, supra ("Part of what they count on is that you'll send it in and that you'll forget about it.".). One has only to scan the popular press and Internet to find a litany of complaints and anecdotes detailing the travails of some particular rebate attempt. See, e.g., Don Oldenberg, The Rebate Check May Not Be in the Mail, WASH. POST, Feb. 1, 2005, at C10 (received rebate only after badgering corporate executives); Kevin DeMarrais, Answers to Some of Your Queries, RECORD (Hackensack, N.J.), Sept. 4, 2005 (rebate rejected for an invalid UPC number when original UPC was sent).

Manufacturers can legitimately try to lower the redemption rate by adjusting the terms of the rebate. From a manufacturer's perspective the ideal rebate terms would increase the breakage rate without substantially affecting the incentive to purchase the product. At first glance this would seem impossible: The more difficult the requirements of the rebate the less enticing such a rebate would be. But to some degree manufacturers can have their cake and eat it too. Rebate terms generally do not have a direct impact on rebate redemption; rather they have an indirect effect acting through an intermediate variable. See Tat & Schwepker, supra, at 69; Tim Silk & Chris Janiszewski, Managing Mail-in Rebate Promotions 11 (unpublished manuscript), available at http://www.cba.ufl.edu/mkt/docs/janiszewski/Rebate.pdf. For Tat and Schwepker the intermediate variable is satisfaction, Tat & Schwepker, supra, at 69; for Silk and Janiszewski the intermediate variable is confidence, see Silk & Janiszewski, supra, at 11. In the broadest sense there are three terms that manufacturers can adjust: the redemption period, the amount of effort required, i.e., the hoops that have to be jumped through, and the value of the rebate. Silk, supra, at 2.
large scale is that, in the aggregate, they be able to price their transactions accurately, perhaps within a range. It is not important that they know with certainty the price of each single transaction. Korobkin acknowledges that "[m]ost buyers will abide by the [even inefficient] form term rather than challenging it, giving the seller a windfall."\textsuperscript{120} While he offers that conclusion in the course of explaining the aptness of the reformation remedy (Section 2-302 of the UCC permits the court to excise an unconscionable contract term without voiding the contract), that recognition also undermines any defense of form terms on the basis of certainty and predictability.\textsuperscript{121}

In the past 20 years, manufacturers have been shortening rebate redemption periods. \textit{id}. The market has been moving under the commonsense notion that if you want to increase breakage, you decrease the amount of time the consumer has to redeem the rebate. Silk has shown that redemption rates actually increase with a shortened redemption period. \textit{id}. at 23. A shorter redemption period, however, does lower the confidence of the consumer that he will redeem, which affects demand. \textit{id}. The dissonance between a consumer's subjective probability of redemption, i.e., confidence of eventual redemption, and objective likelihood of actual redemption allows manufacturers to increase the demand a rebate generates while minimizing the actual redemption rates. \textit{See id}. at 28.

Adjustments to the amount of effort required also yield counterintuitive results. The time and effort required by the rebate process does not directly affect the rate of redemption. Tat & Schwepker, \textit{supra}, at 69. The level of effort, however, does have a direct affect on the satisfaction a consumer gets from the rebate process. \textit{id}. Research by Silk suggests that a multi-staged redemption process would increase breakage. Silk & Janiszewski, \textit{supra}, at 24. The additional breakage comes from the increased opportunity for procrastination, so in that way is more akin to increasing the redemption duration. \textit{id}.

Research shows that rebate value affects the perceived confidence that the consumer will redeem. \textit{id}. at 11. This approach can be explained by the concept of purchase and redemption segmentation. Silk & Janiszewski, \textit{supra}, at 10 (citing Dilip Soman, \textit{The Illusion of Delayed Incentives: Evaluating Future Effort-Money Transactions}, 35 J. MARKETING RES. 427, 435–36 (1998)). The theory is that consumers value the rebate at two distinct periods. \textit{id}. When a consumer makes a purchase the rebate amount will be immediately deducted from the good's price, making the good more attractive; but when it is time to redeem the rebate the redemption effort becomes prominent and a consumer will assess the value of the rebate in relation to the effort required by the redemption. \textit{id}. The dual valuation process that consumers engage in suggests that a manufacturer can value rebates in such a manner as to keep the enticement effect of the rebate high and the redemption likelihood of the rebate low. \textit{id}. at 13. Silk and Janiszewski suggest that increasing the percentage value of a reward will accomplish this, while increasing the absolute value of a reward, with a corresponding base price increase, will have the effect of increasing redemption rates by making the effort-reward ratio more attractive at the time of the redemption. \textit{id} at 21.

Korobkin, \textit{supra} note 68, at 1286.

121 I do not want to overstate this, but perhaps even more fundamentally, Korobkin's deference to certainty and predictability ultimately rings hollow. In fact, there may be no such thing in the law as the certainty and predictability Korobkin champions in defense of oppressive form terms. Jerome Frank suspected this over 75 years ago:

Legal predictability is plainly impossible, if, at the time I do an act, I do so with reference to law which, should a lawsuit thereafter arise with reference to my act, may be changed by the judge who tries the case. For then the result is that my case is decided according to law which was not in existence when I acted and which I, therefore, could not have known, predicted or relied on when I acted.
Finally, to appreciate why Korobkin's reliance on unconscionability doctrine must fail, consider how a court would have to do the math to make sense of an equation between unconscionability and inefficiency: recall Korobkin's hypothetical based on a high-quality term worth $15 to buyers that it costs the seller $10 to provide.\textsuperscript{122} While that hypothetical illustrates Korobkin's point that it would be efficient if the seller provided the warranty but that the nonsalience of that term would preclude the seller's doing so, when we would apply Korobkin's unconscionability as inefficiency test to just those facts, the failure of his thesis becomes clear. It does not seem to advance the inquiry much to posit the value of the "high-quality warranty" as $15 for each buyer. Indeed, doing so obscures the deficiency of the "unconscionability as inefficiency" equation. Is it not much more likely that the value of the warranty to each buyer will differ,\textsuperscript{123} certainly within some predictable range, but differ nonetheless? Would it not also follow that it is impossible to know ex ante whether the seller's inclusion of the low-quality rather than the high-quality term is inefficient in each case? One buyer's valuable term may be the next buyer's buggy whip. Korobkin's conclusion, then, must rest on a judgment regarding what the average value to the average buyer would be of the high-quality term.\textsuperscript{124} But if that is the case—if we rely on efficiency in the aggregate—would it not be better for the efficiency determination to be made

\textsuperscript{122} Korobkin, supra note 68, at 1209–12.

\textsuperscript{123} For example, the buyer's sophistication might well determine the efficiency of a particular term: the lawyer who buys a product accompanied by a form including an arbitration clause might be less troubled by the impact of that clause on her ability to obtain legal representation in an arbitration proceeding than would a nonlawyer without the same ability to represent himself.

\textsuperscript{124} It is probably no longer possible to ignore the deficiencies of efficiency analyses. Professors Adler and Posner demonstrated quite convincingly that cost-benefit analysis, and therefore efficiency analysis, is simply not doable across a diverse population, such as the population of consumers of form terms. Matthew D. Adler & Eric A. Posner, Implementing Cost-Benefit Analysis When Preferences Are Distorted, in COST-BENEFIT ANALYSIS: LEGAL, ECONOMIC, AND PHILOSOPHICAL PERSPECTIVES 269, 272–80 (Matthew D. Adler & Eric A. Posner eds., 2000).

Adler and Posner's contribution to the cost-benefit debate resonates with the very foundations of utilitarian analysis. They go beyond the biases that may frustrate rational choice and demonstrate the problematic nature of aggregate welfare analysis based on "compensating variation," subjective valuation. For present purposes it suffices to note the manifest difficulty (if not outright impossibility) of overcoming the preference distortions that would undermine the type of efficiency calculus Korobkin recommends.
by a regulatory agency rather than by a court? Korobkin cannot logically have it both ways: We cannot posit a value to the buyer for purposes of the efficiency calculus that does not take into account the efficiency of the transaction from the perspective of the individual buyer; but if we do find efficiency only in the aggregate sense, then it is not at all clear that a court should be doing the calculus on an ad hoc basis.

3. Conclusion

Economic theory confirms that sellers not only have no incentive to advertise in order to increase profits, but doing so in transactional circumstances involving add-ons, and, by extension, in transactions involving form agreements containing guerilla terms, will actually reduce sellers’ profits. Misinformation pays well and in fact pays better than the dissemination of accurate information even when that dissemination of accurate information would be free, where advertising is costless. For those concerned about the broader ramifications of a system of incentives that results in sellers having good reason to maintain buyer ignorance, “shrouding” also results in welfare losses. If add-ons are priced above marginal cost, as they will be, there will be underconsumption of the add-ons—a welfare loss. Further, some consumers will purchase the base good at the loss-leader price because they will not take into account the cost of add-ons.

Imported to the case of hidden and oppressive terms, the result is the same: Consumers will enter into contracts that they should not have entered into. Had they read and been able to understand the full ramifications (cost) of the contract terms, they would not have booked the cruise or bought the computer. But it would have been irrational for them to have read the form125 and the sellers had no reason to alert them to the term and every reason to hide it from them.

The deficiency of the Gillette and Korobkin solutions is that they fail to take seriously contract doctrine in terms of “bargain” and “agreement.” They rely instead on inferred assent and constructive agreement by operation of a contract bargain model (to what should the hypothetical rational and idealized economic actor agree?). Though Korobkin does take cognitive bias into account, he ultimately does not appreciate sufficiently its scope or consequences for the contract law. The prevailing incentive structure has, of

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125 See supra notes 25, 61.
course, been in place as long as transactors of unequal bargaining power have entered into contracts and sellers have been able to exploit informational asymmetries. What is there about contract law at the dawn of the twenty-first century that exacerbates the imbalance? To see why the microchip has caused the plot to thicken, we need to take account of the circumstances surrounding contemporary contracting as well as contributions of social psychologists to our understanding of situationism.

III. GUERRILLA TERMS IN CONTEXT: MAKING SENSE OF SITUATION

Contract law is based on a "dispositionist" perspective.\(^{126}\) Dispositionism entails a conception of human actors generally, and contracting parties particularly, as rational agents who are able to do a sufficient cost-benefit analysis\(^{127}\) as they contemplate transactional alternatives. But social psychological research suggests that a situationist rather than a dispositionist perspective may tell us more about the transactional dynamic.\(^ {128}\) Indeed, it may be the case that we have been "deeply captured" by the dispositionist perspective because those with substantial power to inform and even determine our situation have real incentives to propagate what amounts to near religious zeal for a "Marlboro Man"-like dispositionism.\(^ {129}\)

A focus on the context of contracting—the transactors' situation—may complement Part II’s description of microeconomic theory insofar as advertising is concerned to demonstrate that the party in control of situation, the seller of base goods and add-ons or the drafter of standard form agreements, has the incentive to actively obscure elements of the transaction that would counsel consumer caution. The market in misinformation should arise so long as no seller has an incentive to create more sophisticated consumers at the cost of decreasing the pool of myopic consumers. Further,

\(^{126}\) "Economists seem virtually unanimous in assuming that people are preference-driven choosers (that is, dispositionists)." Jon D. Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 Geo. L.J. 1, 8 (2004).

\(^{127}\) For a thoughtful and comprehensive collection on cost-benefit analysis, see Adler & Posner, supra note 124.

\(^{128}\) See generally Hanson & Yosifon, supra note 70.

sophisticated consumers have the same incentive to maintain the pooling effect
that assures myopic consumers' subsidization of sophisticated consumers.\footnote{130}

A. Situationism and the Illusion of Rational Choice

Challenges to the rational choice paradigm have encouraged the
contributions of social psychologists to resolution of persistent questions
regarding the reconciliation of economic theory and legal doctrine. The
rational actor seems illusory in a world in which sophisticated people make
manifestly improvident choices. The focus of those who have taken issue with
rational choice has been on certain biases\footnote{131} that seem to undermine our
idealized conception of human rationality.

While the familiar biases have engendered considerable academic
attention,\footnote{132} recent work by Professors John Hanson and David Yosifon has
comprehensively offered a rejoinder to rational choice theorists’ reliance on
the standard model.\footnote{133} Hanson and Yosifon compare dispositionism, a
conception of the human agent in terms that accommodate the rational choice
model, with situationism, a more robust (they would say) rendering of what it
means to be a human actor confronted by real choices in a more authentic
world than that depicted by many welfare economists.\footnote{134} Hanson and
Yosifon’s argument is compelling. They argue that we are “captured” by a
dispositional self-image while we navigate through a situational world with
situational proclivities that overwhelm the dispositional selves in which we
want too much to believe.\footnote{135} The advertising industry is in no small way
responsible for nurturing that dispositional sense of ourselves as it manipulates
situation to exploit consumers.\footnote{136}

\footnote{130} See supra Part II.A.

\footnote{131} See generally Korobkin & Ulen, supra note 28.


\footnote{133} See supra note 70; Hanson & Yosifon, supra note 126; Adam Benforado, Jon
Hanson & David Yosifon, Broken Scales: Obesity and Justice in America, 53 EMORY L.J. 1645 (2004); Ronald
Chen & Jon D. Hanson, The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law, 103
MICH. L. REV. 1 (2004); Ronald Chen & Jon D. Hanson, Categorically Biased: The Influence of

\footnote{134} See Hanson & Yosifon, supra note 70, at 154 (“We are, in essence, not rational actors, but 'situational
characters.'”); Hanson & Yosifon, supra note 126, at 6 (arguing that situationism provides “a more realistic
depiction of the human animal” than dispositionism).

\footnote{135} A typical dispositionist assumption would be “that by their very nature humans enjoy the freedom to
order their actions as they see fit.” Hanson & Yosifon, supra note 126, at 10.

\footnote{136} Hanson & Yosifon, supra note 70, at 263.
The picture of the transactor as a “preference-driven chooser” with a sense of what she wants that may be informed but (generally) not manipulated is central to political theory, microeconomic analysis of law, and legal doctrine. Hanson and Yosifon conclude that contract law, “[f]or the most part . . . mirrors our basic dispositionist self-conceptions.” While contract certainly makes allowances for situation, particularly in the deal-policing mechanisms, the general rule of contract is dispositional: agreement, bargain, consensual liability. Even the objective senses of contract posit a tort-like reasonable person, an actor who makes decisions based on dispositional qualities: “her conscious thoughts (her ‘attention’), her perceptions, her memories, her intelligence, and, finally, the culmination of all those features, her judgment.”

Hanson and Yosifon describe legal and economic theories’ preoccupation with the disposition of the human agent, rather than recognition of the situational dynamic that informs behavior, as “fundamental attribution error.” The error is understandable, of course, because the dispositionist conception of ourselves is not imposed upon us by lawyers and economists (though lawyers and economists and others we encounter daily reinforce such dispositionism), but instead is central to our self-image; we are hardwired to be captivated by it even were it not reinforced in the course of our engagement with the world.

Similarly, as Daniel Wegner describes in The Illusion of Conscious Will, we have a propensity to ascribe our actions and reactions to the operation of our conscious will, even in cases where it is clear that our consciousness is misleading us. Wegner proposes, “The experience of will, then, is the way our minds portray their operations to us, not their actual operation.” Hanson and Yosifon state the proposition succinctly:

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137 Hanson & Yosifon, supra note 126, at 10–13.
138 Id. at 8–10.
139 Id. at 13–20.
140 Id. at 13.
141 See id. at 13–15.
142 Id. at 16 (referring to the tort “reasonable person” standard).
143 See Hanson & Yosifon, supra note 70, at 178.
144 See Hanson & Yosifon, supra note 126, at 25–33.
146 Id. at 96.
Our experience of will . . . is not only an internal illusion, it is an internal illusion that is susceptible to external situational manipulation . . . . Our point . . . is that our experience of will—our familiar experience that our will is responsible for our conduct—is often not a reliable indicator of the actual cause of our behavior . . . . The experienced “will,” rather than a mirror and measure of our true selves, may be another mask in the disguise of dispositionism that keeps us from seeing what really moves us.147

If what really moves us goes unseen, then we are most susceptible to “guerilla tactics,” including guerilla—at least in the sense of “hidden” (and perhaps as well in the pejorative sense)—terms in our contractual agreements.

B. What Is a “Guerilla” Term?

There is a threshold question: How do we distinguish the guerilla term from the less innocuous type? Very roughly, Section 211 of the Restatement (Second) of Contracts tries to answer this question in terms of consumer expectations.148 The Section 211 test, however, is problematic: It weaves “agreement” out of what the form drafter has reason to believe the consumer would assent to.149 That logic is far too attenuated from the problem—exploitation at equilibrium of cross-subsidies to sophisticated transactors to set monopoly price—to provide the basis of the distinctions that the law should draw, even if the only object of the law is consequentialist, competitive pricing. Instead of following the Section 211 scheme, this Article suggests that the idea of guerilla terms more closely tracks the problem at its source: the incentive not to advertise. Whenever the rational seller of goods or provider of services does not adequately advertise the presence of a term—and doing so would deplete the pool of myopic consumers subsidizing the sophisticated—the term is a guerilla term and should be voidable. This goes beyond the Korobkin unconscionability calculus and provides the more accurate decisional guide for the adjudication of contract-based claims.

Initially, it is important to appreciate what form terms would not be guerilla terms under this test. The credit card subsidies about which there is competition (and we know there is competition because there is advertisement)

147 Hanson & Yosifon, supra note 126, at 132–33.
149 See § 211(3) (“Where the [drafter of the standardized agreement] has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.”).
might be described in oxymoronically clandestine disclosures but would not, according to the test proposed above, be guerilla terms for the most part. Alternatively, when the credit card issuer hides a term in the math, that hidden item may be a guerilla term. In that case the issuer is exploiting the myopic consumers’ quantitative weaknesses to create the cross-subsidy that is also indicative of the market in misinformation. Advertising, even if free, would only reduce the pool of the myopic and reduce card issuers’ return.\textsuperscript{150}

Representations of quality, often in the form of warranties, may also be the type of standard term that would not be a guerilla term: sellers of goods and providers of services clearly advertise with regard to quality, so we can agree with Gillette that it must be the case that there is a coincidence of interest between sellers and providers and even naïve consumers. Price, too, is often an obvious representation of quality.\textsuperscript{151}

The guerilla term characterization need not be fixed with regard to all terms for all time. If consumers develop the ability to understand the ramifications of arbitration and the effect of a mandatory arbitration clause as well as they can understand a “shipping and handling additional” term, then arbitration clauses could lose “guerilla” status. They would lose that status only in the case that their inclusion in contracts did not provide the cross subsidization that fixes market equilibrium without welfare loss: too many myopic consumers entering into contracts they should not (and would not, if they knew better) enter and form drafters rationally exploiting that equilibrium.

A form drafter could, of course, make every reasonable effort to actually disclose to the consumer what it is the consumer is actually agreeing to. Just because federal regulations mandate a particular disclosure does not mean that form drafters cannot bring to consumers’ attention the substance of their deal in accessible terms. Certainly credit card issuers have no trouble alerting consumers to the most attractive terms of their offers: “Zero percent interest until paid off.” Courts would be able to ascertain the existence of real agreement the same way courts adjudicating strict liability actions consider product warnings. There is no immediately obvious reason why real agreement in contract cannot be measured by the same standards as are product

\textsuperscript{150} Advertising that would explain to consumers what is really going on might be quite expensive—even impossible—given the vulnerability of many of the target consumers.

\textsuperscript{151} “[T]he price at which a merchant closes a contract is an excellent index of the nature and scope of his obligation under [Section 2-314].” U.C.C. § 2-314 cmt. 7 (1998).
warnings. A seller who does not provide a sufficient warning bears the risk of product failure that a proper warning could have shifted to the consumer. Similarly, the drafter of the guerilla term should bear the risk of the courts’ refusal to enforce the term that would shift the risk of that term to the consumer. It may be that those who use forms with guerilla terms choose to assume that risk. What is important is that the terms would be vulnerable if used purely to shift a risk to the consumer, whose rational ignorance of that risk the form drafter would exploit.

Like all applications of common law, then, the common law of contract as it relates to guerilla terms could evolve. Evolution, though, is a protracted process. And perhaps “advances” in modern contractual contexts—situations—have taken advantage of an evolutionary lag.

C. The Easier It Is to Contract .

In a world where contracts “roll” and consumers can “click” and “browse” their way into agreement, it is easier to contract than it has ever been before, but likely not as easy as it will be tomorrow. There is a difference between the twenty-five page paper contract that you can hold in your hand and the twenty-five page electronic “document” you can agree to without ever touching in any real sense. Those contextual differences may intimate bases for legal distinctions, at least if we take the situationist perspective seriously. At the same time, though, one may conclude that developments in the way we conduct business and enter into contracts reduce some risks inherent in the

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152 See Restatement (Third) of Torts: Products Liability § 2(c) (1998) (providing that “[a] product . . . is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe”). In determining whether a particular warning is adequate, “courts must focus on various factors, such as content and comprehensibility, intensity of expression, and the characteristics of expected user groups.” Id. cmt. i. A similar admonition could guide courts’ determinations about the enforceability of a guerilla term. I am indebted to Professor Kelli A. Alces for this suggestion.

153 § 10. In the guerilla terms context, such a rule would curtail strategic or unethical advertising; an inadequate disclosure could not shift risk to the consumer.

154 In situations where “the exchange of money precedes the communication of detailed terms,” the contract is not formed until after the consumer has the opportunity to read the terms “for the first time in the comfort of home.” ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996). Rolling contracts are not formed “when the consumer orders and pays for the goods and the seller ships them,” but when “the prescribed ‘accept or return’ time expires.” Hillman, supra note 25, at 744.
contract formation setting. Even then, a problem may arise if consumers become too comfortable contracting, ignoring the cautionary role of familiar formal requirements.

At least part of the promise of technological advances is the enhanced access to information that the Internet would provide. A consumer could comparison shop from the comfort of her own home, office, or favorite coffee shop; she would need only a computer and an Internet connection. The truth could not hide on the web; a careful consumer could educate herself (almost) costlessly, and sellers and providers would have every reason to extol the virtues of their own product while bringing attention to the deficiencies of their competitors' goods or services.

But just as it might be easier to enlighten by means of the Internet, it is also easier to obfuscate. As Gabaix and Laibson discovered, it is quite difficult to find on the Internet the per-page printing cost of various printers, a figure that would be crucial to determining the true relative costs of competing printers. Without some "bottom line" figure for consumers to compare, such as the APR on home mortgages, it is difficult to compare costs. But if Gabaix and Laibson are right, then their conclusion suggests that technology will lead to more rather than less obfuscation by "streamlining" the contract formation process and encouraging the proliferation of more settings in which constructive consent will suffice. Firms may suppress information in order to manipulate situation. It is the intersection of shrouding and situationism that challenges contract in the twenty-first century. Granted, the potential for shrouding and manipulation has persisted as long as there has been contract. But the maturation of a new medium that accommodates shrouding and manipulation challenges contract doctrine, if not in a new way, certainly in a newly pernicious way. Surely there must be confirmation of that in the "junk" email that arrives at homes and offices electronically each day, and more now than ever before.

155 Hillman & Rachlinski, supra note 27, at 469–70 (pointing out that the Internet makes product and corporate reviews more accessible to consumers, so e-businesses and brick-and-mortar stores both have greater incentives to maintain good reputations). As a result, they surmise that businesses are less likely to offer or enforce onerous terms. Id. at 470.

156 See Lon L. Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 800 (1941), for a discussion on the "cautionary" role of consideration.

157 Gabaix & Laibson, supra note 32, at 506–07.

158 Though reliable figures are elusive, it is estimated that more than seventy percent of email may be "spam." See Postini Stat Tracker, http://www.postini.com/stats/.
Professors Hillman and Rachlinski have argued that, while the Internet presents new contracting forms, such as "clickwrap" and "browsewrap," Internet contracting is not fundamentally different from the paper world. Accordingly, major changes in the approach of contract law are not imperative. Other commentators have reached different conclusions. Hillman and Rachlinski’s conclusion is based on their analysis of e-contracting practices in terms of familiar behavioral biases. They recognize that the market does not provide consumers perfect protection; businesses may exploit informational asymmetries in order to undermine rational actors’ rational choice. Nonetheless, Hillman and Rachlinski observe that “courts recognize that the combination of businesses’ efforts to compete for savvy consumers and businesses’ concerns with their reputations often will dissuade them from attempting to exploit consumers with standard terms.”

Hillman and Rachlinski do engage, summarily, the “situationist” literature, but ultimately find nothing to distinguish the “paper” from “electronic” situations. They cite Llewellyn:

The developing case law involving browsewrap and clickwrap contracts demonstrates the application of Llewellyn’s paper-world principles to the world of electronic contracting. The courts in the electronic world search for the functional equivalent of the paper world’s formal requirements of a reasonable presentation of terms and a manifestation of assent, despite the recognition in both worlds that consumers do not read the terms. As with the paper world, if the

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159 See Hillman & Rachlinski, supra note 27, at 464.
161 See Hillman & Rachlinski, supra note 27, at 430 n.4, for a list of sources involved in the debate.
162 Because “electronic contracts, like transactions in the paper world, are dominated by standard forms,” consumers have the same incentives not to read every term of their contracts. Id. at 464 (citing Robert W. Gomulkiewicz, The License Is the Product: Comments on the Promise of Article 2B for Software and Information Licensing, 13 BERKELEY TECH L.J. 891, 897-99 (1998)). Like the consumer in the paper world, “the e-consumer knows (or quickly recognizes) that reading through the boilerplate is unlikely to be of any benefit.” Id. at 468. Consumers do not read standard forms thoroughly because they “recognize that they are unlikely to understand the lengthy and complicated legal jargon in the boilerplate.” Id. at 446. Furthermore, “the terms included in standard-form contracts tend to be uniform within an industry, so consumers see little point in attempting to shop around.” Id. Consumers defer to the customary practices within an industry and they may believe, therefore, that “the standard terms could reflect an industry’s attempt to identify the optimal allocation of contractual risks.” Id. at 446-47. Finally, consumers do not read standard form contracts because they may ‘believe that courts will strike unreasonable terms.” Id. at 447.
163 Id. at 444-45 (citing Richard Craswell, Remedies When Contracts Lack Consent: Autonomy and Institutional Competence, 33 OSGOODE HALL L.J. 209, 223-25 (1995)).
e-consumer has a reasonable opportunity to read and the e-consumer manifests assent, the courts presume the enforceability of the terms. The reasonable opportunity to read the terms and the purchaser's click meet the formal requirements of Llewellyn's "blanket assent" to the standard terms.\footnote{164}{Id. at 489–90 (footnote omitted) (emphasis added).}

It is one thing to posit that some consumers do not read but would be protected by market forces in any event when you include guerilla terms in your form agreements; it would seem to be wholly another when \textit{market incentives} actually encourage the type of pooling that facilitates exploitation of the myopic. Hillman's survey of first-year law students at Cornell (a group likely within the top one percent of the top one percent in terms of privilege, means, sophistication, and intelligence)\footnote{165}{According to the 2003 National Assessment of Adult Literacy, only thirteen percent of Americans are proficient, which means that they can "perform more complex and challenging literacy activities." \textsc{Mark Kutner, Elizabeth Greenberg \\& Justin Baer, \textsc{Nat'l Ctr. for Educ. Statistics, A First Look at the Literacy of America's Adults in the 21st Century} 3–4 (2005), http://nces.ed.gov/NAAL/PDF/2006470.PDF.}} revealed that only four percent of respondents read their e-purchase contracts.\footnote{166}{Hillman, \textit{supra} note 25, at 758–59. Hillman did not disclose how many of the students who generally read their contracts took the time to read all of them.} He disclosed neither the level of understanding of those who did read some or all of the terms nor the extent to which respondents researched competitive terms before making the purchase decision.

The conclusion of those who are comfortable with the status quo—those who find sufficient identity of context to regulate e-commerce by reference to established paper-based doctrine—ultimately begs the question: have the paper-based rules simply outgrown contract doctrine? It could be that e-commerce has revealed, more starkly, the deficiencies of the prevailing paradigm. And that shrouding and situationism, which undermine the operation of traditional contract doctrine in the paper-based world, similarly cooperate in the electronic contracting setting to make contract doctrine, ultimately, incoherent.

But it is not necessary to see contract in the situationist terms described by Hanson and Yosifon in order to be concerned about the health and welfare of contract. We need not conclude that all of our law and legal theory must be discarded in order to respond to the most pessimistic social psychologists' understanding of our manipulability, though there would seem to be good
reason to reconsider broad swaths of our legal theory.\textsuperscript{167} It is enough to recognize that the trend of contract, perhaps over the last century but certainly at the beginning of the twenty-first, tugs at the fabric of contract doctrine, particularly at determinants that are inconsiderate of the more accurate, contemporary models of human agency and transactor incentive. So the story of contemporary contract might be, perhaps even should be, the story of contract doctrine’s renaissance.

\textbf{D. A Modest Proposal: Taking Agreement Seriously}

Contract doctrine requires that in order for there to be a “bargain,” for one party to be bound contractually to another, there must be “agreement” between the parties. The pace of modern transactions—understood roughly as those that have proliferated since the dawn of the Industrial Revolution—has made it attractive, if not at times apparently unavoidable, to require less in the way of real agreement and to settle for terms to which the parties would have, could have, or should have agreed. When contracting parties have acted as though they have agreed and have manifested an intention to go forward with a transaction, the law has been comfortable assuming sufficient agreement to support contract liability. Even those who might be “victimized” by such construed agreement have been hard pressed to explain why they should not be bound by what they were not careful enough to even read.

Economists, social psychologists, and others have now discovered the flaw in the equation of constructive agreement with actual agreement. There often is no substantial agreement in construed agreement, and we cannot trust the market to give us the efficient deal. So it is not just “unfair” to impose terms on those who did not agree to them; it is also inefficient. The arguments in favor of enforcing such construed agreements are lacking and there are good autonomy and efficiency arguments for avoiding their enforcement. How, then, to distinguish the form contracts and form contract terms the law should enforce from those to which the law should deny enforcement?

A return to contract doctrine in which “agreement” means sufficient understanding would provide the means for courts to do what courts do best: find the facts and apply the law to those unique facts. If agreement could be determined in the aggregate, there would be no need for courts to make the finding; but agreement is not a matter of “aggregate understanding”—surely an

\textsuperscript{167} See Hanson & Yosifon, supra note 126, at 136–38.
oxymoron. If agreement were determinable in the aggregate by reference to efficiency, an administrative agency would be in the best position to fix the terms of form contracts. But such an efficiency calculus is not possible. The same factors that frustrate cost-benefit analyses generally make clear that an administrative agency cannot with any confidence fix the efficient terms, assuming there were such a thing as “the” efficient terms.\textsuperscript{168}

To take agreement seriously is not to defer to consumers’ representations about what they in fact understood and the terms to which they agreed. It is entirely appropriate for the finder of fact to determine that the consumer did agree, even if after the fact she protests that she did not. And, of course, very few consumers will pursue litigation to establish their lack of agreement to a form. But it is one thing to say that many consumers will have a right—to avoid enforcement of a form to which they did not meaningfully agree—which they choose not to prosecute, and quite another to say that they do not have that right in the first place. Those who draft forms need not fear the consumers’ right to avoid enforcement on the basis of lack of agreement. Most consumers will never litigate, or even arbitrate; they will walk away, as they would under any regime that afforded less deference to real agreement. Further, so long as we understand that agreement is (at least largely) an idiosyncratic matter and no two consumers’ agreements necessarily are assured by reference to exactly the same facts, the risk of class action dissipates even if it does not vanish entirely.\textsuperscript{169} Certainly in only the most egregious (and so most worthy) cases will the facts disclosing lack of agreement be common to members of a class.

As suggested above, the products liability law with regard to warnings may provide an apt analogy for contract agreement.\textsuperscript{170} Indeed, it is not immediately apparent why there should be any distinction between the two bodies of doctrine. Products liability law does not seem to have a problem acknowledging the extent to which idiosyncrasy determines the sufficiency of a warning. That is not to say that a plaintiff can just claim he did not see or understand the warning and then avoid its effect. The court will still make a credibility determination and weigh the elements of the warning in the balance. It is certainly neither clear that it makes much sense to find an effective warning where you would not find agreement, nor clear that you would be able

\textsuperscript{168} See supra note 124 for a discussion of the limits of efficiency calculus.

\textsuperscript{169} See Fed. R. Civ. P. 23 (Consideration of the full ramifications of the class action requisite of factual similarity is beyond the scope of this Article.).

\textsuperscript{170} See supra notes 152–53.
to find an agreement without demonstrating that, on the same transactional facts, a warning would not be sufficient. This may be an instance of real consilience in the law.

So why rely on contract to maintain a right that might be only rarely asserted? In fact, the right to avoid terms to which you did not agree may well be interposed when the stakes are high enough. Under a fictional "aggregate efficiency"-based conception of that right, such as that offered by Korobkin, there would be no way for the contract law to police deals that are in fact not efficient because they do not reflect the rational choice of one of the contracting parties. Efficiency in the aggregate, so to speak, will not do. And there is no reason that contract must settle for efficiency in the aggregate when it can do better. Taking agreement seriously also vindicates conceptions of

171 Given the relatively small amounts at issue in many cases involving guerilla terms and the fact that consumers would often prefer the minor monetary loss occasioned by the enforcement of a guerilla term to the potentially greater loss caused by impairment of their credit reputations, it is not likely that courts would often be called upon to police the enforcement of guerilla terms. There is one setting, however, in which the tables may be turned just enough to accommodate courts' redressing the cognitive imbalance: bankruptcy. Once a debtor, consumer or otherwise, see 11 U.S.C. § 101(13) (2005) ("The term 'debtor' means person or municipality concerning which a case under [the Bankruptcy Code] has been commenced."), has become the subject of a bankruptcy proceeding, the debtor is no longer financing contract litigation with the debtor's own funds. See Elizabeth Warren, The Bankruptcy Crisis, 73 IND. L.J. 1079, 1087 (1998) (explaining that debtors' bankruptcy filings shift litigation costs to "their bill-paying counterparts who do not declare bankruptcy"). And the "other" creditors of the debtor—those creditors whose contracts with the debtor the debtor is not challenging—also have an interest in the debtor's avoiding liability pursuant to certain guerilla terms: The size of each creditor's share of the "pie"—the debtor's unencumbered assets—increases if the debtor is able to successfully avoid or reduce the claim of a creditor trying to enforce the operation of a guerilla term.

Moreover, the bankruptcy court ruling on the debtor's challenge to a guerilla term will determine the enforceability of the term by reference to the state common law of contract, including the state law governing "agreement." See Worthen Bank & Trust Co. v. Morris, 602 F.2d 826, 828 (8th Cir. 1979) ("[T]he validity and construction of [contract terms] should be determined by state law.") (citing Security Mortgage Co. v. Powers, 278 U.S. 149, 153–54 (1928)); In re Martindale, 125 B.R. 32, 37 (Bankr. D. Idaho 1991) (Where "terms are clearly set forth and agreed to in the contract documents, and are not unenforceable under state law, the Court has no license to disregard these provisions."); 2-303 COLLIER ON BANKRUPTCY § 303.07 (15th ed. rev. 2004) ("[A]greements among the parties . . . [are] governed by state law."). When the bankruptcy court rules on the guerilla term as an aspect of the debtor and creditor's agreement, the court's ruling will constitute a finding of fact, reviewable by an appellate court only on a "clearly erroneous" standard. See FED. R. BANKR. P. 8013 ("Findings of fact [of the bankruptcy court], whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous"); Chmil v. Rulis Operating Co. (In re Tudor Assoc., Ltd., II), 20 F.3d 115, 119 (4th Cir. 1994) ("We review the bankruptcy court's findings of fact under the clearly erroneous standard and its conclusions of law de novo.") (citations omitted); In re Armstrong World Indus., Inc., 432 F.3d 507, 511 (3rd Cir. 2005); Crowell v. Theodore Bender Accounting, Inc. (In re Crowell), 138 F.3d 1031, 1033 (5th Cir. 1998). The appellate court will not be able to ignore cavalierly the bankruptcy court's determination. So the guerilla terms analysis urged in this Article, in terms of fundamental contract conceptions of bargain and agreement, may well be worth pursuing for debtors who are resisting creditors' contract claims in bankruptcy.
individual autonomy at the foundation of contract law. Whether one subscribes to an autonomy or efficiency perspective, the argument must start with a respect for human agency that begins with individual autonomy.

CONCLUSION

Shrouding is what sellers of goods and providers of services do—what it is economically rational for them to do—when (1) what they sell is composed of a base product and add-on, (2) the consumer market in which they sell is bifurcated between the sophisticated and the myopic, and (3) there is more money to be made by maintaining a pool of consumers in which the myopic subsidize the sophisticated. The sellers and providers are better off not advertising, not increasing the pool of sophisticated consumers, even when advertising is costless. Indeed, in such a case, advertising is certainly not costless because the “cost” of the advertising will be a reduction in the pool of myopic consumers. It is economically rational not to advertise, so apologists for welfare economics cannot argue that competitive pressures will assure that consumers are educated. At equilibrium, there is no incentive to educate the myopic, and every reason to keep changing the rules to maintain or even increase the pool of the myopic.

This Article introduces the notion of the guerilla term, a provision inserted in a form contract that takes advantage of rational ignorance—the irrationality of reading terms in forms. A consumer may not read for any number of reasons, but she will not read. The more powerful market actors are using guerilla terms to exploit myopic consumers and have every incentive to maintain or even increase the pool of the myopic. Further, the sophisticated—the group most of us like to believe we are in (at least from time to time)—are complicit, or at least should be, if we are rational economic actors.

Guerilla terms are essentially add-ons, and the same market forces that perpetuate the proliferation of exploitive add-ons assure that guerilla terms will not lose their attraction, both for sellers and providers and for their sophisticated consumers, because “we” sophisticated consumers are subsidized by “those” myopic consumers. Recent contributions to the literature juxtaposing situationist reality with dispositionist fantasies demonstrate the incongruity and risk of maintaining the constructive contract fictions with

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172 See supra notes 25, 60, 161.
173 See supra note 51.
which consumers have grown so comfortable. Guerilla terms threaten to undermine a contract regime based on the most venerable contract doctrine. Our persistent focus on “bargain” and “agreement” as the earmark of contract, in particular, incongruously treats deception and failure to apprise as the aberrational cases—and relies on deal policing mechanisms, i.e., unconscionability, to redress imbalances. This Article’s analysis reveals that in a world of rational ignorance, deception is market driven; it is the paradigmatic, not the aberrational case.

This challenge to contract is particularly problematic at the dawn of the twenty-first century because the proliferation of contract has been accelerated and accommodated by technological developments that have enhanced the ease of contracting. Consumers now have contracts that “roll,” as well as “clickwrap” and “browsewrap” contracts, and society likely will continue to see new contracting forms, as the limits of human imagination are not yet in sight. And it may or may not be the case that the paper-based rules work in an electronic environment. The cynic may wonder if they work all that well in a paper-based environment.

There is no shortage of “hidden disclosures” in contemporary contracting forms. An arbitration term, even a “conspicuous” warranty disclaimer term, can be hidden in plain sight if the consumer does not know what is at stake in the consumer’s agreement to arbitrate or in the disclaimer of warranty. Credit card issuer balance transfer options that involve some understanding of how payments are allocated, “choices” of venue, and generally anything that is irrational to read, strain the fabric of contract doctrine premised in any meaningful way on “agreement.” We need not understand all such terms to be necessarily guerilla terms, but we do need to take agreement more seriously if we want to preserve contract in any recognizable form.

The risk of including guerilla terms in contracts should be borne by those in the best position to avoid their pernicious effects. Guerilla terms should be exposed to fora in which the risk of shrouding may be revealed, where guerilla terms cannot hide in the contract doctrine “jungle.” In order to accomplish that, we need a robust contract doctrine more than ever. And we need common law courts to develop precedent. Arbitration just operates to frustrate the necessary elaboration of the law in this crucial context. So the arbitration clause may need to be the first to go. This Article proposes a means to do that

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in a way that is consistent with contract doctrine and the objects of both normative economic analysis and deontological senses of justice.