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Pervasive Infancy: Reassessing the Contract Capacity of Adults in Modern America

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Michael S. Lewis

Pervasive Infancy: Reassessing the Contract Capacity of Adults in Modern America

19 U.N.H. L. REV. 69 (2020)

ABSTRACT. This article argues that the law of consumer contracts should permit adults to access the same protections available to children where data about adult performance indicates that the two categories of people are similarly situated within the domain of consumer contracts. In making this claim, this article relies upon a description of capacity articulated by Professor Martha Nussbaum in her important work on the subject. Professor Nussbaum explains that capacity is a function, not only of a person's innate capabilities, but of a person's opportunity or ability to deploy those capabilities within environmental limitations. Capacity to contract in a free society has demanded sufficient internal self-control to direct action and make decisions we would expect of a free person vested with a set of important personal rights. Nussbaum's standard raises the possibility that even people with substantial internal capabilities may not have capacity if the environment in which they are seeking to express their capabilities negates them. This article argues that the law of consumer contracts is one such domain. It therefore argues that this domain should reassign risks between consumers and sellers in the consumer contracting market, where data about adult decision-making in the domain suggests that adults do not have the power to protect their contract rights through reasoned decision-making. It does so as a means of saving the very institution of contract law itself, which is a central mechanism for securing freedom of choice for Americans.

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Klepper: Did you read the transcript?

Citizen: I don't have to. I can read it if I need to.

Klepper: But it's important that everybody reads the transcript?

Citizen: It is. Very important. Pay attention and think for yourself.

Klepper: But to be clear, you haven't read it You just trusted somebody else who has.

Citizen: Correct Don't be a sheep Think for yourself Do your own research.

—Jordan Klepper¹

I. INTRODUCTION

I experienced a sort of shock a few years ago when I walked into a local sandwich shop to order a late lunch. The two men who owned the shop and who had never demonstrated the slightest interest in law or politics over the time I'd known them were engaged in a heated debate. The debate subject: the authority of a court to reverse an arbitration order. The victim of the adverse arbitration order: New England Patriots quarterback Tom Brady, who had been suspended for four NFL games for his role in Deflategate.²

As I waited for my sandwich, it became clear that the two sandwich shop owners had taken a deep dive into the law of arbitration. Their goal was to determine whether a federal court decision would deprive Brady of his initial court victory upon appellate review.³ They'd read the federal district court's decision reversing

¹ *Jordan Klepper Fingers the Pulse of Trump Supporters on Impeachment*, THE DAILY SHOW (Dec. 16, 2019) (clip at 4:50), https://www.youtube.com/watch?v=X-ZFoco_1gQ. [https://perma.cc/85SK-Q5PV] (last visited Oct. 28, 2020).

² See David Berger, *Deflategate: Tom Brady's Battle Against the NFL and Arbitration*, 50 LOY. L.A. L. REV. 483, 483 (2017) (outlining the matter and stating: "Deflategate started in January of 2015, when [NFL Commissioner Roger Goodell] and the NFL hired Theodore Wells Jr. ('Wells') and his New York powerhouse law firm Paul, Weiss, Rifkind, Wharton & Garrison LLP to conduct an investigation into Brady's alleged misconduct, and ended in July of 2016 when Brady ultimately decided not to appeal to the United States Supreme Court after the Second Circuit ruled to uphold the suspension ordered by Goodell."); see also DAVID MICHAELS, *THE TRIUMPH OF DOUBT: DARK MONEY AND THE SCIENCE OF DECEPTION 1* (2020) (describing the controversy as relating to "someone in the Patriots locker room tamper[ing] with the footballs during halftime . . . perhaps at the direction of the team's famed quarterback Tom Brady, who reportedly prefers underinflated footballs.").

³ See Berger, *supra* note 2, at 484–85 ("Following the conclusion of a three-month investigation . . . Goodell . . . suspended Brady . . . Brady appealed his suspension by requesting arbitration . . .

the arbitration result. They'd examined some of the underlying law. But they disagreed with each other over the question of whether the federal court's decision would stand on appeal.

The two men knew me as a lawyer because I'd been going to their sandwich shop for years. They saw that I was listening to their conversation, so they asked me a few questions about the case and my predictions about the likely result on appeal. I gave them some qualified answers and referred them to my colleague, Michael McCann, who is a national specialist in the area.⁴ But their heightened engagement with a sophisticated area of the law in a specific context of interest for them (and many others) sparked for me some broader curiosity about their general interest and experiences with the law.

I pressed the subject of their engagement further. I asked if they'd ever read a court decision before *Deflategate*. They said no. I asked if they'd ever heard of arbitration as a procedure before. They said no. I asked how often they read the fine print of the many consumer contracts they execute in the course of their business and personal lives. They said not often.

The sum of this conversation revealed that these businessmen seemed much more engaged with the legal rights of the well-represented and extremely wealthy quarterback for the New England Patriots than their own. Such is the mark of a true New England sports fan.⁵

To be clear, this story is not conveyed as an effort to single out these two businessmen or any other American who would give the same or similar answers. All indications are that there is nothing abnormal about the responses of these two fully-grown, adult, male, American entrepreneurs.⁶ They stand with millions and

. Goodell . . . served as the arbitrator . . . [and] affirmed his previous order Brady . . . filed a motion to vacate the arbitration award Judge Richard Berman . . . vacated Goodell's ruling [T]he Second Circuit overturned the lower court, which thereby re-enforced Goodell's arbitration decision." (footnotes and citations omitted).

⁴ See, e.g., Michael McCann, *Tom Brady faces long odds after NFL wins Deflategate appeal*, SPORTS ILLUSTRATED (Apr. 25, 2016), <https://www.si.com/nfl/2016/04/25/tom-brady-deflategate-suspension-nfl-appeal-roger-goodell> [<http://perma.cc/3MXN-9F8S>] (last visited Oct. 28, 2020).

⁵ See CONSUMER BEHAVIOR KNOWLEDGE FOR EFFECTIVE SPORTS AND EVENT MARKETING xiv (Lynn R. Kahle & Angeline G. Close eds., 2011) ("Sports have become a secular religion Like religion...sports and sporting events provide a social fabric that knits people together into brand communities This phenomenon of community enthusiasm . . ." using as an example the Boston Red Sox quest for a 2004 World Championship. ").

⁶ See Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747 (2014) ("The proposition that most people do not read the small print, heed the warning labels, or review the 'Terms and Conditions' links, is no longer controversial. ").

millions of American adults.

We the people do not read or understand the overwhelming majority of the consumer contracts we execute.⁷ We do not pay attention to fundamental legal rights implicated by these contracts.⁸ We do not and could not protect ourselves, our dependents, or third parties who may be injured by the transactions arising from these devices.⁹

Scholars acknowledge that our lack of engagement with contracts, contract law, and our contract rights, has to do with our limitations in the modern world.¹⁰ American law is not a topic most Americans understand.¹¹ It would be unimaginable, for instance, that any survey of the American public would yield answers demonstrating comprehension about core baseline legal constructs like “consideration,” “detriment,” “disclaimer,” or “warranty.”¹² Consider that, as

⁷ This paper adopts the definition of consumer contracts relied upon by the American Law Institute in its Restatement of the Law, Consumer Contracts. “Consumer contracts” are contracts other than employment contracts that individuals enter into with businesses when individuals are acting primarily for personal, family and household purposes. See Restatement of the Law, Consumer Contracts § 1 (Am. Law Inst., Tentative Draft, 2019).

⁸ Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1 (“We track the Internet browsing behavior of 48,154 monthly visitors to the Web sites of 90 online software companies to study the extent to which potential buyers access the end-user license agreement. We find that only one or two out of every 1,000 retail software shoppers access the license agreement and most of those who do access it read no more than a small portion.”).

⁹ See Sarah Conly, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* 1 (2013) (“We are too fat, we are too much in debt, and we save too little for the future. This is no news – it is something Americans that hear almost every day The truth is that we don’t reason very well, and in many cases there is no justification for leaving us to struggle with our own inabilities and to suffer the consequences.”).

¹⁰ See, e.g., Tom Baker and Kyle D. Logue, *INSURANCE LAW AND POLICY* 1 (3d ed. 2013) (“For most people most of the time, insurance operates in the background of everyday life, a dimly understood part of the social infrastructure that is often taken for granted. We have limited attention spans and cannot focus on the inner workings of more than a small fraction of the institutions that we come across. We are content to ignore them until they are called into use. Insurance is one such institution.”).

¹¹ See, e.g., LEONARD D. DUBOFF AND AMANDA BRYAN, *THE LAW (IN PLAIN ENGLISH) FOR SMALL BUSINESS*, at xvii (5th ed. 2019) (“The law is quite complex and rapidly evolving.”).

¹² Cf. J.H. Verkerke, *Legal Ignorance and Information-Forcing Rules*, 56 WM. & MARY L. REV. 899, 902 (2015) (“People are often ignorant about the legal rules that govern the most common transactions in their lives. Whether purchasing products and services, leasing real estate, obtaining insurance, borrowing money, or finding employment, many laypeople have a surprisingly poor grasp of basic legal principles.”); see also Jonathan Koehler, *Train Our Jurors* 304

recently as this summer, students at the university that publishes this law review received a so-called “informed consent” form before returning to campus in the fall, in which their school asked them to “assume the risk of exposure to COVID-19.”¹³ One student, a graduate student in American law, training in the subject matter at a level well beyond the average person, asked the commonsense but unanswered question: “[W]hat does it mean to quote-unquote ‘assume the risk of coronavirus?’”¹⁴

This predicament with regard to our engagement with contracts thus is not a product of a rational choice not to choose.¹⁵ We do not have the bandwidth; time; or the cognitive, intellectual, and psychological capacity to engage in these subjects.¹⁶ In addition to our ignorance, we suffer from serious conditions that inhibit our ability to choose, such as substance and behavior addiction. These conditions are exacerbated by the ever-more-sophisticated strategies of large businesses to limit our free agency as a conscious business strategy. These strategies are designed to capture our attention and get us hooked on their platform

(Northwestern University School of Law Scholarly Commons, Faculty Working Paper No. 141, 2006) (“Jurors misunderstand rules of law, legal presumptions, and applicable standards of proof. They rely on information that they are told not to use, ignore crucial evidentiary points, and make inappropriate inferences.”).

¹³ See Daniela Allee, *Some UNH Students Uneasy About ‘Consent Agreement’ Assuming Risks Around Coronavirus on Campus*, NHPR (Jul. 20, 2020), <https://www.nhpr.org/post/some-unh-students-uneasy-about-consent-agreement-assuming-risks-around-coronavirus-campus#stream/0> [<https://perma.cc/6YVN-GW45>].

¹⁴ *Id.*; see also Teddy Rosenbluth, *UNH students still unclear on waiver to return to classes*, CONCORD MONITOR (Jul. 29, 2020, 5:07:23 PM), https://www.sentinelsource.com/unh-students-still-unclear-on-waiver-to-return-to-classes/article_db61ff26-9cc6-5de1-94a0-obddf1f372.html [<https://perma.cc/JA8H-GA7S>] (“In a six-page document, students listed 122 questions on topics like housing, exiting and entering buildings, testing, and university communication” about the informed consent document proposed by the University of New Hampshire).

¹⁵ See, e.g., CASS SUNSTEIN, *HOW CHANGE HAPPENS* 69 (2019) (describing a series of biases, fears and states of ignorance as leading to confusion and a desire to avoid responsibility).

¹⁶ See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546-47 (2014) (“People rarely read the forest of trees that are harvested and mailed in the form of credit card and cell phone contracts, insurance policies, gym membership agreements, or mutual fund prospectuses. The data also suggest that people do not read important parts of one-time contracts such as home mortgage agreements. More recently, evidence suggests that consumers seldom read Internet contracts, which contain many controversial provisions.”); see also TIM WU, *THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS* 6 (2016) (“It is no coincidence that ours is a time afflicted by a widespread sense of attentional crisis . . . one captured by the phrase ‘homo distractus,’ a species of ever shorter attention span known for compulsively checking his devices.”).

for selling us goods on terms they devise.¹⁷

Together, all of these forces have altered the status of American adults with regard to the law of consumer contracts. American adults are now no differently positioned from American children in regard to their capacity to enter most, if not all, of the consumer contracts they execute.¹⁸ This is true even if adults are more capable than children in many ways. This article, therefore, argues that the law should reassign the risks between consumers and sellers in the consumer contracting market to reflect commercial reality. It does so as a means of saving the very institution of contract law itself, which is a central mechanism for securing freedom of choice for Americans.¹⁹

To do so, this article challenges the standard story about adult capacity as that standard story becomes less plausible by the day.²⁰ It is a story about a

¹⁷ See, e.g., ADAM ALTER, *IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED* 18–19 (2017) (“Intrusive tech has also made shopping, work, and porn harder to escape. It was once almost impossible to shop and work between the late evening and early morning, but now you can shop online and connect to your workplace any time of the day.”); see also Benjamin Kessler & Steven Sweldens, *Think You’re Immune to Advertising? Think Again*, KNOWLEDGE (Jan. 30, 2018), <https://knowledge.insead.edu/marketing/think-youre-immune-to-advertising-think-again-8286> [<https://perma.cc/SW36-ZXBUB>] (“Consumers may need more than a caveat emptor approach to withstand the daily advertising barrage, especially in sensitive domains such as food advertising, pharmaceutical advertising and advertising targeting children. For example, a 2016 article in the *Journal of Bioethical Inquiry* found that pleasing imagery of the sort commonly used in American prescription drug advertisements strongly affected consumer opinions of pharmaceutical brands. The authors saw reason for federal regulators to mull more serious involvement.”).

¹⁸ See JONATHAN HERRING, *VULNERABILITY, CHILDHOOD AND THE LAW* 33 (2018) (“In respect of any complex decision[,] [a]dults are rarely familiar with the key facts. That is why we seek the advice of professionals and others.”); MARGARET JANE RADIN, *BOILERPLATE* 8 (2013) (“In short, if you are like most US consumers, you enter into ‘contracts’ daily without knowing it, or at least without being able to do anything about it.”).

¹⁹ See SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 220 (2019) (describing evolving arrangements between consumers and dominant businesses as giving rise to “uncontracts.” “The uncontract is not a space of contractual relations but rather a unilateral execution that makes those relations unnecessary The uncontract bypasses all that social work in favor of compulsion, and it does so for the sake of more-lucrative prediction products that approximate observation and therefore guarantee outcomes.”).

²⁰ See Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 *HOFSTRA L. REV.* 13, 14 (2009) (“[W]hen social-science accounts of children’s capacities are offered to distinguish the law’s treatment of children from that of adults, these accounts tend to produce an increasingly subtle depiction of children that is contrasted with a static and idealized caricature of adults. The contrast is particularly jarring because the social science inevitably calls

presumptively rational adult capable of rationally taking in information about the world to forecast risk and bargain through the device of the contract in a manner consistent with his/her/their rational interest.²¹ Nothing about the American experience of consumer contracting confirms this proposition.

This article does not, however, rest on observations about the chasm that has opened between what the law assumes about our intellectual and cognitive capabilities and what our capabilities have proven themselves to be, alone. The nature of modern commerce is such that we would not be able to alter the dynamics of the terms of consumer contracts in any given contract, even if any of us were free of these inhibiting features of our cognition.²² The terms come to us on a take-it-or-leave-it basis.²³ Under these circumstances, we have no power to put our intelligence and negotiating capabilities to the test.

The law itself, moreover, has played a powerful role in disempowering and subverting the American consumer in this regard.²⁴ Because of how courts have developed and applied the law between consumers and the drafters of terms and conditions, the separation between the capacity of Americans to understand and influence the content of these contracts has only widened as the volume of

attention to the gap between adult ideal and actual adult functioning.”); see also Anna Grear, *Vulnerability, Advanced Global Capitalism and Co-symptomatic Injustice: Locating the Vulnerable Subject*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 48 (Martha Albertson Fineman & Anna Grear eds., 2016) (“Liberal legal justice is thus constructed as being fundamentally abstract, general, universal and relatively blind to embodied and concrete particularities.”).

²¹ See, e.g., Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 764 (2016) (“Empowerment should also be understood as a type of *capability*, as Professors Amartya Sen and Martha Nussbaum have defined that term.”) (footnote omitted).

²² See, e.g., Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 118 (2017) (“Most people interact with contract law almost exclusively via contracts of adhesion—take-it-or-leave-it deals between firms and individuals.”).

²³ See *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 173–74 (Iowa 1975) (“With respect to those interested in buying insurance, it has been observed that . . . [h]is chances of successfully negotiating with the company for any substantial change in the proposed contract are just about zero.”) (citing 7 Williston on Contracts § 900, at 29–30 (3d ed. 1963)).

²⁴ See Verkerke, *supra* note 12, at 903–906 (“[T]he law encourages sophisticated parties to provide legal information to the comparatively poorly informed individuals with whom they do business,” which these individuals then ignore to the benefit of the sophisticated parties); see also Max N. Helveston, *Judicial Deregulation of Consumer Markets*, 36 CARDOZO L. REV. 1739, 1740 (2015) (“Whereas the rights of consumers expanded drastically in the mid- to late twentieth century, the last twenty years have seen many of these protections clawed back. One of the agents responsible for this change is the judiciary, where a strongly anti-consumer jurisprudence has taken root.”).

commerce has increased and taken flight over the internet.²⁵ To ensure that readers understand this dynamic, this article therefore spends a substantial amount of space discussing how the decisions responsible for the current state of modern commercial law rest on false theories regarding human decision-making. These theories embrace the standard story about human decision-making.²⁶

By adopting this perspective so robustly into the modern law of commercial contracts, the law has provided incentives for large firms to magnify the effect of the law's error by drafting terms and conditions we cannot and do not understand and cannot alter.²⁷ In a self-reinforcing loop, these incomprehensible "contracts," having been deemed "contracts" by courts, have proliferated in a market comprised of an uncomprehending consumer public.²⁸

²⁵ See Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1141 (2019) ("With the rise of the internet and online contracting beginning in the mid-1990s, it finally became possible to deliver massive amounts of pre-stored boilerplate text to multiple parties via mere hyperlinks or in other digital forms. All of these technological developments have changed how parties typically contract. The most recent developments are exceptional, however, in that they have generated an unprecedented explosion in the amount of boilerplate text that is often conveyed during contract formation and in the methods and forms in which it is conveyed.").

²⁶ See, e.g., Nicholas Mercuro & Steven G. Medema, *ECONOMICS AND THE LAW* 102–103 (2d ed. 2006) ("The assumption that economic agents are rational maximizers—that is, they make purposeful choices so as to pursue consistent ends using efficient means—stands as a cornerstone of modern economic theory. Under this view, individuals are assumed to have a set of preferences that are complete, reflexive, transitive, and continuous."); but see Stephen Macedo, *Introduction to ELIZABETH ANDERSON, PRIVATE GOVERNMENT*, at vii–viii (2017) ("Today's free market thinking—among scholars, intellectuals, and politicians—radically misconstrues the condition of most private sector workers and is blind to the degree of arbitrary and unaccountable power to which private sector workers are subject."). Cf. Beverley Clough, *Disability and Vulnerability: Challenging the Capacity/Incapacity Binary*, 16 SOC. POL'Y & SOC'Y 469, 470 (2017) ("[T]he dominant political and legal subject presents an impoverished view of humanity, presented as being a competent, capable, self-sufficient and self-actualising agent who 'seeks liberty or autonomy as a primary value.'"); but see Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295, 1321 (2015) ("One of the powerful elements of Thaler and Sunstein's argument is the use of behavior economics to convincingly cast aside John Stuart Mill's bizarre libertarian premise that we are always the best judges of our own well-being.") (footnote omitted).

²⁷ See Verkerke, *supra* note 12, at 904 ("Unfavorable default rules encourage legally sophisticated parties to contract expressly for their preferred terms.").

²⁸ See *id.* at 929 ("[C]ourts routinely give effect to prospective waivers of liability for ordinary negligence. The barrage of exculpatory clause that greet participants . . . is the predictable consequence of these rules. The ubiquity and enforceability of these waivers transforms at least part of the ostensibly mandatory tort rule into a legal-information-forcing default.").

The alternative portrait of the American adult in contemporary commercial life this article thus paints challenges the core assumptions about adult capacity in the domain of consumer contracting, where the absence of capacity is so obvious.²⁹ In making this claim, this article relies upon a description of capacity articulated by Professor Martha Nussbaum in her important work on the subject, *Creating Capabilities*.³⁰ Professor Nussbaum explains that capacity is a function, not only of a person's innate capabilities, but of a person's opportunity or ability to deploy those capabilities within environmental limitations.³¹

Capacity to contract in a free society has demanded sufficient internal self-control to direct action and make decisions we would expect of a free person vested with a set of important personal rights.³² Nussbaum's standard raises the possibility that people with substantial internal capabilities may not have the capacity to contract if the environment in which they are seeking to express their capacities negates or suppresses them. Under this perspective, categories that distinguish adults from children cease to make sense if people within each category are similarly situated with regard to their respective capacities, so defined. This article therefore proposes that the protections available to children be made available to

²⁹ See CONLY, *supra* note 9, at 63 ("Not everyone needs paternalistic interference all the time.").

³⁰ MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 25 (2011).

³¹ See *id.* at 20. Referencing the work of economist and Nobel laureate Amartya Sen, she uses as an example the difference between a person who fasts and a person who is starving. A person who fasts has the freedom to choose and has capability to obtain nourishment. A person who is starving does not have the same freedom and so does not have the same capability under the definition of the term she and Sen adopt. *Id.* at 25; see also AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75 (1999) ("A person's 'capability' refers to the alternative combinations of functionings that are feasible for her to achieve. Capability is thus a kind of freedom: the substantive freedom to achieve alternative functioning combinations.").

³² See, e.g., MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 107 (2d ed. 2005) ("From the standpoint of autonomy, a contract's moral force derives from the fact of its voluntary agreement; when I enter freely into an agreement, I am bound by its terms, whatever they may be. Whether its provisions are fair or inequitable, favorable or harsh, I have 'brought them on myself, and the fact that they are self-imposed provides one reason at least why I am obligated to fulfill them."); see also DANIEL C. POPE, *NEW HAMPSHIRE CIVIL JURY INSTRUCTIONS* 32.31 (2018–2019 ed.) ("The parties to a contract must be competent. A person is competent if he or she is capable of understanding the nature and the effect of the contract."); CHARLES L. KNAPP, ET AL., *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* 586–87 (9th ed. 2019) (describing capacity as a function of cognitive abilities and volitional activity); Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 169 (2017) (Positing intention, knowledge and voluntariness as indicators of consent).

similarly situated adult.

The approach this article takes may seem discombobulating. After all, the standard law review article addressing the relationship between “adult law” and “the law of children” has made claims about whether children should be governed by the laws of adulthood.³³ This article, again, reverses the standard perspective adopted in the area of the law and children. It claims that adults should be protected as children under circumstances arising in contract law, where no meaningful distinction may be made between the capacities of adults and children.³⁴ It maintains that this must be the conclusion we draw if capacity is to be taken seriously as a concept with any true content.³⁵

This article thus seeks to expand the sympathies of the law beyond one of society’s most beloved human archetypes: the child.³⁶ It maintains that if we agree

³³ See, e.g., Emily Buss, *What the Law Should (and Should Not) Learn from Child Development Research*, 38 HOFSTRA L. REV. 13, 15 (2009) (“My criticism is more narrowly pointed at attempts in the law, primarily through its courts, to justify the granting or denying of specific adult rights or responsibilities to children.”).

³⁴ Cf. DAVID BJORKLUND, *CHILDREN’S THINKING: COGNITIVE DEVELOPMENT AND INDIVIDUAL DIFFERENCES* 18 (4th ed. 2005) (describing the concept of “domain-specific abilities” as examining capacity with reference to specific functions or tasks).

³⁵ Cf. David P. Weber, *Restricting the Freedom of Contract*, 16 YALE HUM. RTS. & DEV. L.J. 51, 56 (2013) (“Under current law, contractual incapacity generally focuses on the age of the contracting party (whether the party is a minor), or potential impairment of one’s mental capacity to contract.”) (footnote omitted); see also Clough, *supra* note 26, at 476 (“The richer understanding of vulnerability as a universal condition of our ontological experience as human beings calls into question this division between those with cognitive impairments and those without. It sees us all as vulnerable to relationships of domination, to structures that discriminate and allow the unequal distribution of resources necessary to enable meaningful choice, and to cultural and political norms which disavow and devalue.”); WILLIAM MAGNUSON, *BLOCKCHAIN DEMOCRACY* at vii (2020) (“Online shopping is Amazon. Apple and Netflix have competitors, but they still manage to exert unrivaled control over their industries. These companies rule technology and, consequently, our lives. One cannot partake in the wonders of modern technology without going through them.”).

³⁶ Cf. FYODOR DOSTOEVSKY, *THE BROTHERS KARAMAZOV* 237 (Richard Pevear & Larissa Volokhonsky trans., 2002) (“I meant to talk about the suffering of mankind in general, but better let us dwell only on the suffering of children. That will reduce the scope of my argument about ten times, but even so it’s better if we keep to children. The more unprofitable for me, of course. But, first, one can love children even up close, even dirty or homely children (it seems to me, however, that children are never homely). Second, I will not speak of grown-ups because, apart from the fact that they are disgusting and do not deserve love, they also have retribution: they ate the apple, and knew good and evil, and became ‘as gods.’”).

that a child is worthy of our utmost concern and sympathy generally,³⁷ and we cannot draw any distinction between children and adults in a specific forum, then the laws and policies pertaining to our treatment of children provide a useful psychological and conceptual basis for expanding our sympathies to humans whose capacities are no greater.³⁸

In the process, this article offers a new perspective on the commercial contracting dynamic in the aftermath of an unresolved debate among contract law authorities around draft proposals for the Restatement of Law, Third, Consumer Contracts.³⁹ Central to the debate was a dispute about the continued status of assent as an element that distinguishes contracts as a defensibly separate area of law.⁴⁰ The Restatement drafters would remove traditional assent as an element, replacing it with a new concept, “blanket assent,” which does not share features with traditional conceptions of assent.⁴¹ They claim that their proposal is a description of the state of the law and evidence suggests that they are correct.⁴²

Authorities who critique the reforms the Restatement proposed have twisted themselves in a series of contradictory theoretical knots while failing to provide doctrinally sound solutions. They argue, on the one hand, that adults are rational and act with agency when they “decide” to contract, and, on the other, that these same adults rationally toss away legal rights without having any sense of the effect

³⁷ Cf. Douglas E. Abrams, et al., CHILDREN AND THE LAW: DOCTRINE, POLICY, AND PRACTICE 17–18 (6th ed.) (“The status of ‘child’ is . . . complex in our society. An older adolescent may be a child for some purposes but an adult for others. The law views children as vulnerable, incapable, and needing protection in some circumstances, but as persons with rights, decisionmaking capacity, and personal responsibility in others. A fifteen-year-old, for example, may not be competent to sign a binding contract but may be prosecuted as an adult and sentenced to a lengthy prison term.”).

³⁸ Cf. HERRING, *supra* note 18, at 27 (arguing that “childhood is a social construction created to disguise the vulnerability of adults.”).

³⁹ David Dayen, *Controversial Change to Consumer Rights Postponed*, THE AMERICAN PROSPECT (May 22, 2019), <https://prospect.org/economy/controversial-change-consumer-rights-postponed> [<http://perma.cc/858Q-48PK>] (“Such a drastic reinterpretation of law was always going to inspire debate. Civil rights groups and consumer organizations almost unanimously opposed the Restatement, as did a bipartisan group of 24 state attorneys general.”).

⁴⁰ See, e.g., Melvin Eisenberg, *The Proposed Restatement of Contracts, if Adopted, Would Drive a Dagger Through Consumers’ Rights*, YALE J. ON REGUL. (Mar. 20, 2019), <https://www.yalejreg.com/nc/the-proposed-restatement-of-consumer-contracts-if-adopted-would-drive-a-dagger-through-consumers-rights-by-melvin-eisenberg/> [<https://perma.cc/XCW2-7V3Y>] (arguing that the Restatement imposes only “notice and opportunity-to-review” standard).

⁴¹ *Id.*

⁴² See *infra* pp. 22–24.

this conduct will have on their personal legal status or upon the status of consumers as a whole.⁴³

The knot needs to be untied. To do so requires honest self-reflection. This article engages in that sort of reflection and concludes that adults do not become meaningfully more capable in the area of consumer contracting when they cross the threshold from age of minority to age of majority legal status. Instead, this article concludes that the threshold is a mirage when one considers the commercial circumstances of adult consumers. It argues that the law should treat it as such. In doing so, it seeks doctrinal refuge within a preexisting legal category: infancy.

The "infancy" defense provides that "a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday."⁴⁴ The infancy defense protects "persons under the legally designated age of adulthood from both 'crafty adults' and their own bad judgment. The doctrine is based on the presumption that minors are generally easily exploitable and less capable of understanding the nature of legal obligations that come with contracts."⁴⁵ This article maintains that adults are similarly situated and so should be permitted access to the same protections.⁴⁶

⁴³ See Eisenberg, *supra* note 40 ("Faced with terms that a consumer knows she will find difficult or impossible to understand and that typically aren't subject to revision in any event, consumers will almost invariably decide to remain rationally ignorant of the terms."); see also Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1962, 1967 (2019) ("The most prominent critique of consent search jurisprudence is that police searches cannot be truly voluntary if citizens do not know they have the option of withholding consent.") (citation omitted).

⁴⁴ RESTATEMENT (Second) of Contracts § 14 (Am. Law Inst. 1981). The age of capacity was once twenty-one under the common law. See *id.* at Comment a.

⁴⁵ Cheryl B. Preston and Brandon T. Crowther, *Infancy Doctrine Inquiries*, 52 SANTA CLARA L. REV. 47, 52 (2012) (footnotes omitted); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 212 (1995) ("Lack of capacity exists when a party is not competent to understand the nature and consequences of his acts, is an infant, or is under guardianship. If a party is not competent to understand the nature and consequences of his acts, he cannot make adequate judgements concerning his utility. If a party is an infant or under guardianship, the law conclusively presumes that he cannot make such judgements."). But see CONLY, *supra* note 9, at 40 ("When someone accurately assesses my abilities, though, and finds me lacking in some respects, it is very hard for me to argue that I have been degraded, and thus disrespected.");

⁴⁶ See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH* 8 (2004) ("At the beginning of the twenty-first century we find an American society that, at least in its political rhetoric and imagination, is seriously incapacitated in dealing with some of the most important social welfare problems facing its citizens today.").

Some may view this proposal as insulting or humiliating.⁴⁷ That view fails to provide proper respect for the capacities of children. It also implies that human vulnerability corresponds with lesser standing under the law.⁴⁸ Such a view denies the accomplishments and standing of many remarkable, yet vulnerable, adults, ranging from Stephen Hawking to Judy Garland to Martin Luther King, Jr., to Hellen Keller.⁴⁹ It is also inconsistent with laws that demand the removal of systemic barriers to equal status and dignity for the disabled population, for those with pre-existing conditions, and for groups subject to historical discrimination, including “poor people.”⁵⁰ Law so conceived rejects the notion that cruelty is the response law should adopt when interfacing with vulnerability. That notion animates this article.

Nothing about such an approach is a slight against children either.⁵¹ Brain development in children is a staggeringly remarkable process.⁵² Many children are

⁴⁷ Cf. CHARLES FRIED, *CONTRACT AS PROMISE* 20–21 (2015) (“If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor’s prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person. We infantilize him, as we do quite properly when we release the very young from the consequences of their choices.”); see Cornell, *supra* note 26, at 1297 (describing and responding to claims that paternalism is an insult.).

⁴⁸ Cf. HERRING, *supra* note 18, at 65 (“Vulnerability is often seen in public discourse as an undesirable state to be in. It implies weakness and an inability to look after yourself This chapter will claim the opposite. We should rejoice in our vulnerability. It [is] our pretence that it is only children who are vulnerable and we adults who need to grow out of vulnerability, that is a tragedy.”).

⁴⁹ Each of these individuals were world leaders who were vulnerable by virtue of illness or prejudice or both.

⁵⁰ ADAM COHEN, *SUPREME INEQUALITY* xxii (2020) (Prior to the Warren Court era, “[p]oor people had always been seen through demeaning stereotypes—as lazy, immoral, dangerous, or biologically deficient—and they had often been victims of severe discrimination.”).

⁵¹ Cf. Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 *YALE L.J.* 1448, 1451 (2018) (“[The] new law of the child situates children’s interests within a normative universe that values the extraordinary richness and variety of children’s lives.”); John M. Lewis & Stephen E. Borofsky, *Claremont I and II—Were They Rightly Decided, and Where Have They Left Us?*, 14 *U.N.H. L. REV.* 1, 2 (2016) (“Our children embody the enduring wonder of life. They hold our hopes for the future. We want them to be happy, to succeed in whatever they do both in work and in play. We want them to contribute to our country and the world in constructive ways.”).

⁵² See ERIN CLABOUGH, *SECOND NATURE: HOW PARENTS CAN USE NEUROSCIENCE TO HELP KIDS DEVELOP EMPATHY, CREATIVITY, AND SELF-CONTROL* 27 (2019) (“Your child’s brain is *not* a blank slate at birth. Fetal behavior begins as reflex movements and it gradually expands into behavior that is distinct and responsive as the birth date nears. Even during the birth process, he is already collecting sensory information, evaluating his environment, using sophisticated neural

more capable than adults when capacity is linked to specific tasks or specific virtues.⁵³ I'm less capable than my nine-year-old son when it comes to bouncing around in a trampoline gym. And my imagination is inferior. And my ability to learn languages is inferior. And I've suffered hits to idealism that he hasn't.⁵⁴ But when it comes to fixing a broken lawnmower, we are equally inept.⁵⁵ The question is how we will be treated from venue-to-venue based upon a realistic assessment of capacities, incorporating external and internal limitations.⁵⁶

In what follows, Part I presents the long-standing dilemma facing contract law: the uncomfortable status of consumer contracts as legal arrangements worthy of enforcement before our courts under theories of contract that demand mutual assent.⁵⁷ It draws an uncontroversial conclusion: contract law and contract law

machinery, and—perhaps more impressive—constantly remodeling his brain in response to what he senses.”).

⁵³ Heidi Priebe, *10 Things That Children Do Better Than Adults*, THOUGHT CATALOG (May 27, 2014), <https://thoughtcatalog.com/heidi-priebe/2014/05/10-things-that-children-do-better-than-adults/> [<https://perma.cc/NWB3-VBVC>] (listing ten ways in which children have greater capacity than adults, including: “Children, much more so than adults, understand that interdependence is a natural part of what it means to be human.”); see also Lexi Becker Austin, *Five Reasons Why Kids Are Better Than Adults*, ODYSSEY (Nov. 11, 2015), <https://www.theodysseyonline.com/5-reasons-why-kids-are-better-than-adults> [<https://perma.cc/4DTS-2THR>] (observing that their hearts are bigger than ours).

⁵⁴ Cf. Jack Hodgson, *Belittling activists like Greta Thunberg because they are young is a mistake*, WASH. POST (Feb. 19, 2020), <https://www.washingtonpost.com/outlook/2020/02/19/belittling-activists-like-greta-thunberg-because-they-are-young-is-mistake/> [<https://perma.cc/H582-SCAV>] (“Greta Thunberg and other young activists have become inspiring leaders for a generation because of their climate activism, but their youthfulness has been used by politicians who wish to ignore their message.”).

⁵⁵ Some scholars denigrate childhood and its qualities without demonstrating true engagement with the stage of life. See CONLY, *supra* note 9, at 41 (making undifferentiated claims about adult superiority to children and about the capabilities of children).

⁵⁶ Cf. Kay Schriener & Richard K. Scotch, *The ADA and the Meaning of Disability*, in BACKLASH AGAINST THE ADA 165 (Linda Hamilton Krieger ed., 2006) (“In the sociopolitical model, disability is viewed not as a physical or mental impairment, but as a social construction shaped by environmental factors, including physical characteristics built into the environment, cultural attitudes and social behaviors, and the institutionalized rules, procedures, and practices of private entities and public organizations.”).

⁵⁷ See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943) (“The development of large scale enterprise with its mass production and mass distribution made a new type of contract inevitable—the standardized mass contract. A standardized contract, once its contents have been formulated by a business firm, is used in every bargain dealing with the same product or service. The individuality of the parties

foundations have diverged to an indefensible extent.⁵⁸

Part II argues that the true source of this divergence is the law's denial about the pervasive reality of adult vulnerability and incapacity. It traces the law's failure to account for this reality to Justice Oliver Wendell Holmes' perspective on the law, one that permits law to be a mechanism for the perpetuation of human cruelty.⁵⁹ It argues that decisions by modern adherents of Holmes share a perspective on human frailty that Holmes exhibited in the decision that stains Holmes' legacy.⁶⁰ That decision, *Buck v. Bell*, has been described as "the dark legal landmark" in which the United States Supreme Court "upheld eugenic sterilization and allowed the state to sterilize Carrie Buck, a young woman wrongly labeled 'feebleminded.'"⁶¹ It was premised on a dehumanized view of the law, one that reveled in the power of the law to crush people. This article argues that humans deserve greater kindness from their laws than this tradition provides.⁶² It takes a position toward humans engaged in consumer contracting that is consistent with the liberal perspective.⁶³ It

which so frequently gave color to the old type contract has disappeared.").

⁵⁸ See *id.* at 632 ("The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party, terms whose consequences are often understood only in a vague way, if at all. Thus, standardized contracts are frequently contracts of adhesion; they are *à prendre ou à liasser.*") (footnote omitted).

⁵⁹ Cf. Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 YALE L.J. F. 960, 964 (2018) (exploring the genealogy of ideological failures with American antitrust law).

⁶⁰ See ALBERT W. ALSCHULER, *LAW WITHOUT VALUES: THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES 2* (2000) ("Champions of both the mild brand of skepticism (utilitarian pragmatism) and the piquant (law as power) are the heirs of Holmes.").

⁶¹ ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK 1* (2017) ("On May 2, 2002, the governor of Virginia offered a 'sincere apology' for his state's 'participation in eugenics.' In an effort to improve the genetic quality of its population, Virginia forcibly sterilized at least 7,450 'unfit' people between 1927 and 1979.").

⁶² See, e.g., *id.* at 4 (proposing that "libertarian benevolence" be "enlisted in the interest of vulnerable third parties"); cf. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (arguing that law may be deployed to cause further harm to vulnerable populations); Stephen A. Siegel, *Justice Holmes, Buck v. Bell, and the History of Equal Protection*, 90 MINN. L. REV. 106, 107–08 (2005) (collecting critiques of the cruelty of the law in regard to vulnerable populations).

⁶³ Cf. JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* 27 (Ruth W. Grant & Nathan Tarcov eds., 1996) ("Before they can go, they principle them with violence, revenge, and cruelty. Give me a blow that I may beat him, is a lesson which most children every day hear: and it is thought nothing because their hands have not strength to do any mischief. . . . And if they have been taught when little to strike and hurt others by proxy, and encouraged to rejoice in the harm they have

would seek to limit the illiberal and cruel influence of Holmes' perspective.⁶⁴

Part III then proposes that contract law may be saved through a reframing of our notion of the capacities of parties to commercial contracts. It does so by drawing upon the infancy defense.⁶⁵ It outlines the contours and principles underlying the law of infancy. It places the adult and the child side-by-side and demonstrates that adults and children are similarly situated in terms of their capacity to contract as consumers when adulthood is viewed with a greater level of care and sophistication than the law now permits. It then defends the solution this article proposes: the removal of a presumption of adult capacity, with reference to the standard explanations of contract law theory. It maintains that this solution would provide a systemic, doctrinal solution necessary to save consumer contract law from its current predicament.

II. THE CONTRACT LAW PROFESSOR'S PERENNIAL CONUNDRUM

Each year, law professors stand at lecterns in large lecture halls and begin the process of teaching law students a course called Contracts.⁶⁶ As with many courses, the law professor must convince students that their value as lawyers will be connected, in part, to their ability to navigate a field where a principal source of authority, the decisions of judges, consistently defy principled, logical explanation.⁶⁷ They must do so where “one can learn contract law only if one can

brought upon them and see them suffer, are they not prepared to do it when they are strong enough to be felt themselves and can strike to some purpose?”); *see also* JOHN STUART MILL, *On Liberty*, in *ON LIBERTY, UTILITARIANISM, AND OTHER ESSAYS* 61 (Mark Philp & Frederick Rosen eds., 2015) (“In some such insidious form there is at present a strong tendency to this narrow theory of life, and to the pinched and hidebound type of human character which it patronizes.”).

⁶⁴ Cf. Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907, 918 (1933) (proposing that the law student “be made to see, among other things, the human side of the administration of justice,” including problems caused by human error and frailty).

⁶⁵ *See supra* note 44 (defining the infancy defense).

⁶⁶ *See Development in the Law—Unjust Enrichment*, 133 HARV. L. REV. 2062, 2062 (2020) (“In American law schools, first-year students learn about the basic obligations of private law through two required classes: contracts and torts.”). I must now acknowledge that COVID-19 will change the physical description of this experience in many ways, in the hope that some of the older ways will return sometime in the future.

⁶⁷ *See* STEPHEN A. SMITH, *CONTRACT THEORY* 11 (2007) (defining the intelligibility of any contract law theory in terms of “[c]onsistency in the sense of non-contradictoriness.”); *see* ERIC A. POSNER, *CONTRACT LAW AND THEORY* 7 (2011) (“Contract law is part of the common law, which was, and continues to be, created by judges rather than by legislatures.”); *but see* RADIN, *supra* note 18, at 19 (“The notion that a coerced or deceptive or completely covert divestment of an entitlement might qualify as a ‘contract’ is paradoxical.”); Randy E. Barnett, *A Consent Theory of Contract*, 86

understand the theoretical considerations that inform it.”⁶⁸

Among other things, law students learn that contract law is different from torts or property or criminal law because it addresses what makes contract behavior unique: contract law governs the voluntary, consensual series of acts and decisions that cause people to engage with each other for a specific, mutually beneficial purpose.⁶⁹ This distinguishing feature can only exist if both parties to a contract (or all parties) are able to act with volition and provide assent.⁷⁰ These elements of contract law have remained fundamental to theoretical defenses of contract law, even while explanations regarding why contracts are worthy of legal recognition have varied over time.⁷¹

Students will confront these elements, even if they rewind to the earliest stages of Western thought. Aristotle sought to ground all worthy human action, including his understanding of the purpose of contracts, in notions of virtue.⁷² Under this conception, “[m]aking a contract . . . was an exercise of the virtue of liberality by

COLUM. L. REV. 269, 269 (1986) (“The five best known theories or principles of contractual obligation—the will theory, the reliance theory, the efficiency theory and the bargain theory—each have very basic shortcomings.”).

⁶⁸ POSNER, *supra* note 67, at 2; *see also* Barnett, *supra* note 67, at 269 (“We look to legal theory to tell us when the use of legal force against an individual is morally justified. We look to contract theory, in particular, to tell us which interpersonal commitments the law ought to enforce.”).

⁶⁹ *See, e.g.*, SMITH, *supra* note 67, at 103 (defending promissory theories of contract law on the ground that it is best suited to explain contract law as “an autonomous body of law, distinct from tort law and other branches of private law.”); POSNER, *supra* note 67, at 1 (“Contract law is a set of rules related to the social practice of promising. Promises are important because they are the devices that people use to commit themselves to take actions in the future.”); RADIN, *supra* note 18, at 19 (“Our legal system adheres to an ideal of private ordering and its importance to individual freedom. Within this system, freedom of contract is a core value, and ‘involuntary’ or ‘unfree’ contract is a contradiction in terms.”).

⁷⁰ *See* POSNER, *supra* note 67, at 1 (“All of commerce and much else depends on this capacity to commit.”); *see also* RADIN, *supra* note 18, at 19–24 (arguing that contract law requires voluntary consent, a state of being inconsistent with, *inter alia*, sheer ignorance).

⁷¹ *See, e.g.*, SMITH, *supra* note 67, at 178 (arguing that simultaneous exchanges in which one cannot identify an offer and acceptance are not contracts and so should not be deemed contracts); *see also* Sommers and Bohns, *supra* note 43, at 2239–41 (describing the philosophical and historical foundations of “consent” and its relationship to “autonomy.”).

⁷² ARISTOTLE, NICOMACHEAN ETHICS 1 (Terrence Irwin trans., 2d ed. 1999) (“Suppose, then, that the things achievable by action have some end that we wish for . . . Clearly, this end will be the good, that is to say, the best good.”); *id.* at 9 (“Now each function is completed well by being completed in accord with the virtue proper [to that kind of thing]. And so the human good proves to be activity of the soul in accord with virtue, and indeed with the best and most complete virtue, if there are more virtues than one.”).

which one enriched another, or of the virtue of commutative justice by which one exchanged things of equal value.”⁷³ Aristotle tied the capacity to engage in this manner to maturity, which he deemed essential to the capacity of a person to become a rational decision-maker.⁷⁴

This idea remained true even as John Locke, Jean-Jacques Rousseau, and John Stuart Mill reframed the relationship between contract theory and freedom for modernity. In differing degrees, they set the capacity to contract at the foundation of their defense of the principles of freedom and equality, the pillars of liberal democracy.⁷⁵ For these foundational thinkers, all justified government action relied on an adult’s standing as a free-thinker, capable of rationally bargaining one’s natural freedom away to society in exchange for the benefits of a cooperative life in

⁷³ See JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* 7 (1991).

⁷⁴ See ARISTOTLE, *supra* note 72, at 3–4. The notion that contracts carry moral obligations that are worthy of legal recognition persist to this day and explain a substantial degree of behavior within the area of contract law. GORDLEY, *supra* note 73, at 9 (“It is indeed surprising that our modern legal doctrines were founded originally on philosophical ideas discarded long ago.”); see also Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885, 887 (2019) (“And because people also tend to think that breaking a promise is wrong, they think they are subject to a corresponding moral obligation to perform the contract.”); ELIZABETH ANDERSON, *supra* note 26, at 5 (2019) (arguing that Adam Smith envisioned a free market system as one that rests on the proposition that “a successful bargain requires each to consider how they could bring some advantage to the other.”) (emphasis in the original).

⁷⁵ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 42 (1980 ed.) (“GOD, having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into *society* as well as fitted him with the understanding and language to continue to enjoy it.”); see also JOHN STUART MILL *On Liberty* in *ON LIBERTY, UTILITARIANISM AND OTHER ESSAYS* at 15 (2015 ed.) (“But there is a sphere of action in which society as distinguished from the individual, has, if any, only indirect interest; comprehending all that portion of a person’s life and conduct which affects only himself, or it also affects others, only with their free, voluntary, and undeceived consent and participation.”); see also HOLLY BREWER, *BY BIRTH OR CONSENT* 8 (2005) (“The concept of an ‘age of reason’ became critical for determining who could give meaningful consent. . . . The changing status of childhood was a consequence of this emphasis on an age of reason, which arose as part of the new basis for political legitimacy.”); but see H.L.A. HART, *LAW, LIBERTY AND MORALITY* 32–33 (1963) (“No doubt if we no longer sympathize with [Mill’s criticism of paternalism] this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. . . . Underlying Mill’s extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts.”).

society.⁷⁶

The conceptual design of our government rose from this perspective. In the State of New Hampshire, for instance, the state's eighteenth and nineteenth century founders framed the basis of constitutional government in overtly contractual terms.⁷⁷ More recently, Professor Charles Fried reprised this perspective for contemporary times, stating, "It is the first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world."⁷⁸ For Fried, Locke, and Mill (and to a lesser degree Rousseau), freedom rests upon a system that permits a person to be left alone to accomplish what his capacities permit and to suffer the

⁷⁶ See LOCKE, *supra* note 75, at 52 ("M[en] being, as has been said, by nature, all free, equal, and independent; no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby anyone divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it."); see also WILLI PAUL ADAMS, *THE FIRST AMERICAN Constitutions* 24 (1973) ("It is certain, in theory," John Adams wrote in May 1776, "that the only moral foundation of government is, the consent of the people. But to what an extent shall we carry this principle?") (quotations and citation omitted); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 110 (Roger D. Masters ed., Judith R. Masters trans., 1978) ("There is only one law that, by its nature, requires unanimous consent. That is the social compact. For civil association is the most voluntary act in the world. Since every man is born free and master of himself, no one, under any pretext whatever, can subject him without his consent. To decide that the son of a slave is born a slave is to decide that he is not born a man.").

⁷⁷ See N.H. CONST. pt. I, art. III; pt. I, art. I ("All men are born equally free and independent: Therefore, all government, of right, originates from the people, is founded in consent, and instituted for the general good."); see also LAWRENCE FRIEDMAN, *THE NEW HAMPSHIRE CONSTITUTION* 41 (2d ed. 2015) ("The remainder of this article reflects a Lockean conception of the social contract, the notion that the people consent to be governed and that they have established government to promote the common good."). "Consent" as a constitutive imperative is present throughout our constitutional governments. See Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457, 473 (1994) (noting the demand of popular "consent" at the root of arguments supporting the United States Constitution and the Declaration of Independence); see also Donald S. Lutz, *The Theory of Consent in the Early State Constitutions*, 9 PUBLIUS 11, 13 (1979) ("My purpose in this article is to illustrate the extent to which the early state constitutions were built upon a relentless pursuit of direct consent by the majority. . . ." and tracking the use of contract language in the early state constitutions).

⁷⁸ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7 (2d ed. 2015).

responsibility of failures arising from free, active, and personal choice.⁷⁹ Fried describes this as the “liberal ideal.”⁸⁰ This ideal is also shared by theorists who assess law from a more consequentialist perspective, including proponents of the Law and Economics school.⁸¹

Perhaps the clearest description of the contract ideal is supplied by Professor Martha Albertson Fineman, who writes: “The underlying and essential elements in a contractual relationship are [1] that two or more autonomous individuals with capacity [2] voluntarily agree (consent) to be bound by [3] some mutually bargained for benefit or trade (exchange).”⁸² The closer the law adheres to these requirements, the likelier the law of contracts assures those agreements limiting agency are accomplished at a level of agency and rational understanding, consistent with a strong commitment to individual liberty.⁸³ As Justice Cardozo once wrote in regard to the proper application of contract law and its demands: “We are not to suppose that one party was to be placed at the mercy of the other.”⁸⁴

⁷⁹ *Id.* at 8.

⁸⁰ *Id.* at 7. Professor Barnett’s “consent theory” is a modification of this principle but is no less committed to the notion that evidence of capable individual agreement stands at the heart of a workable system of contract law. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986) (arguing that “consent” rather than “intent” or “will” provides the best theoretical basis for a justifiable theory of contract law).

⁸¹ *See* POSNER, *supra* note 67, at 1 (“Moral philosophers have pondered the basic questions about private and social cooperation for centuries, but the modern way of thinking about contract law is heavily influenced by economics. According to this approach, people are rational and enter into contracts in order to cooperate with each other. In a cooperative relationship, both sides of the transaction expect to do better than if each acted alone.”).

⁸² FINEMAN, *supra* note 46, at 219-20; *see also id.* at 225 (“In private contract theory, one is legitimately bound because one has agreed to be bound by the terms of the contract. Content to terms usually is expressed, but may be implied from one’s actions.”) (citation omitted); *see also* MILENA POPOVA, *SEXUAL CONSENT* at 18 (2019) (“Both the “yes means yes” and “no means no” approaches to consent place significant emphasis on individual agency in consent negotiations. At their core, they assume that we are all free individuals who at all times are able to exercise our agency without others exercising power over us; know and understand our own desires, and express them clearly; make ourselves understood to others, and in turn understand them, thereby reaching a mutual agreement through negotiation.”).

⁸³ *See* POPOVA, *supra* note 82, at 18; *see also* ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 50 (2013 ed. 1974) (“A person’s shaping of his life in accordance with some overall plan is his way of giving meaning to his life; only a being with the capacity so to shape his life can have or strive for a meaningful life.”).

⁸⁴ *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 91 (1917); *see also Morin Bldg. Products Co. v. Baystone Const. Inc.*, 717 F.2d 413, 415 (7th Cir. 1983) (Posner, J.) (acknowledging that “paternalism” may be appropriate “to protect the weaker party” to a contract); *see also* Philip Pettit,

But then one opens a casebook (the principle mechanism within the American legal academy for teaching students the law) and discovers how far these powerful contract law principles have withered in practice before courts in recent times.⁸⁵ *Meyer v. Uber Technologies, Inc.*, which students confront early in one prominent Contracts casebook, provides such an example.⁸⁶ *Meyer* is a provocative decision by an important federal appellate court examining litigation between a consumer and a well-known technology firm, Uber. The case involved an allegation by a consumer that Uber engaged in price-fixing.⁸⁷ Uber moved to send the case to arbitration, noting that its Terms of Service included a mandatory arbitration clause.⁸⁸ The Terms of Service were included in a hyperlink on the website where a user registers for an Uber account.⁸⁹ The registration page stated, “by creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.”⁹⁰ A depiction of this microscopic demand is included in an addendum demonstrating how the statement is depicted to the registrant.⁹¹ The process of registering did not require the registrant to click through the Terms of Service before finalizing registration.⁹²

The plaintiff in the case, a consumer, testified that he never saw or read the Terms of Service.⁹³ These Terms of Service ran seventeen single-spaced lines long and included references to “binding arbitration,” “equitable relief,” “competent jurisdiction,” “infringement,” “misappropriation,” “intellectual property,” “right to trial by jury,” and “consolidate.”⁹⁴ The question Uber raised was whether the plaintiff’s registration resulted in his agreement to accept the Terms of Service as a matter of contract law, and so the terms requiring that he submit any dispute to mandatory, binding arbitration.⁹⁵

REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT 52-54 (1997) (describing freedom dependent upon a state’s capacity to eliminate power imbalances that permit one party to dominate another).

⁸⁵ See, e.g., CHARLES L. KNAPP, NATHAN M. CRYSTAL & HARRY G. PRINCE, PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (9th ed. 2019) (hereinafter “Knapp”).

⁸⁶ *Id.* at 21 (excerpting *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir. 2017)).

⁸⁷ *See id.*

⁸⁸ *Id.* at 21-22.

⁸⁹ *Id.* at 22.

⁹⁰ *Id.* (herein and elsewhere, “Terms of Service”).

⁹¹ *Id.* at 31.

⁹² *See id.* at 22-23.

⁹³ *Id.* at 23.

⁹⁴ *Id.*

⁹⁵ *See id.* at 23-24.

No party litigated the comprehensibility of the Terms of Service in a manner that caused the issue to be raised by the Second Circuit Court of Appeals in its decision. Instead, the case, for the Court, turned on whether the law of contracts bound the plaintiff to the Terms of Service. In resolving the question, the Court wrote: “before an agreement ... can be enforced, the district court must first determine whether such agreement exists between the parties.”⁹⁶ “To form a contract, there must be mutual manifestation of assent, whether written or spoken word or by conduct.”⁹⁷ As an extension, the Court added that a party is not bound by “inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.”⁹⁸ The Court proclaimed that these rules persist whether a contract is online or not.⁹⁹

In applying these principles, the Court surveyed examples of electronic contracts that required a party to take some physically recordable step and/or steps to demonstrate engagement with the contractual provision at issue.¹⁰⁰ Despite a description of available alternative technology which required a greater level of demonstrated interface between the consumer and form terms, the Court reversed the District Court’s ruling, finding that the Terms of Service were sufficiently conspicuous so as to put the plaintiff on notice of them, whether there was any evidence that the plaintiff was on actual notice or not.¹⁰¹ And so, the Court drew from this conclusion a decision that the facts of the case sufficiently demonstrated a “manifestation of mutual assent” to bind the plaintiff to a waiver of a right. That right, the right to a jury trial, by the way, was of sufficient importance that James Madison and company inserted it into the United States Constitution under the Seventh Amendment.¹⁰²

None of the Court’s analysis explains how “mere awareness” is a substitute for “the manifestation of mutual assent at the core of traditional contract doctrine.”¹⁰³ One can be aware of many proposals and choose, through silence, to reject them. Indeed, true respect for freedom and the rights that define freedom and autonomy

⁹⁶ *Id.* at 25 (citation omitted).

⁹⁷ *Id.* (quotations and citation omitted).

⁹⁸ *Id.* (quotations and citation omitted).

⁹⁹ *See id.* at 25-26 (quotations and citation omitted).

¹⁰⁰ *See id.* at 26 (citations omitted) (describing “clickwrap” and “browsewrap” provisions).

¹⁰¹ *See id.* (“Clickwrap” agreements require a user to click agreement to the terms presented as such).

¹⁰² *See id.* at 28-30; *see also* U.S. CONST. amend. VII (the right to a civil trial by jury shall be preserved in suits at common law).

¹⁰³ *See Verkerke, supra* note 12, at 936 (arguing that it is not).

under our laws would leave the promisee as free as possible from enforceable restrictions imposed by others, demanding consent before permitting contract law to narrow those freedoms. The Court's decision to the contrary instead assumes consent by presuming actual notice. Beyond conflating materially distinct states of mind, the Court's analysis thus rests on the dubious proposition that the presence of terms on a website implies that a consumer will ever pay attention to them at any level of engagement. It is an analysis that does not square with the elevated prose of Charles Fried and other liberal theorists who place the act of contracting at the very foundation of notions of self-determination in a free society.¹⁰⁴

As they get deeper into the subject matter of contracts, reflective students will look back at the *Meyer* decision and ask: Why would the Second Circuit Court of Appeals reverse the factual determination of a federal district court that tiny print in a non-clickthrough, electronic registration software gives rise to the manifestation of mutual assent? They may remark on how the Court's decision does very little to connect its theoretical notion of "notice" with the concept of a "manifestation of mutual assent," the central traditional contract law doctrine it claims remains in place regardless of the electronic forum in which so many contracts are now conducted. They may then see how history provides disturbing news about the source of *Meyer's* strange analysis.

III. THE GENEALOGICAL POISON OF JUSTICE HOLMES' JURISPRUDENCE OF CRUELTY

As students read on, they will discover that the Second Circuit's approach has roots.¹⁰⁵ In the late 19th century, Oliver Wendell Holmes led a movement that sought to shut the intentions of the parties out of contract questions altogether.¹⁰⁶ This movement was grounded in a general rejection of a system that attended to the subjective desires of the contracting parties.¹⁰⁷ It also caused the law to develop

¹⁰⁴ See FRIED, *supra* note 78.

¹⁰⁵ Cf. F.A. HAYEK, *THE ROAD TO SERFDOM* 57 (Bruce Caldwell ed. 2007) (1944) ("Few discoveries are more irritating than those which expose the pedigree of ideas—Lord Acton.") (citation and footnote omitted).

¹⁰⁶ See KNAPP, *supra* note 85, at 44 ("At one point the law may have looked for a true, or 'subjective' intention on the part of the promisor. In any event, at least since Oliver Wendell Holmes's lectures and writings in the 1880s began to have their effect, both the rhetoric and the actions of courts and writers have stressed an 'objective theory' of contract obligation, by which one is ordinarily bound, not by her 'secret intent' to that effect, but by the reasonable interpretation of her words and actions.").

¹⁰⁷ See *id.* ("In his famous 1881 set of lectures, Holmes stated, The Law has nothing to do with the actual state of mind of the parties' minds.") (quotations and citation omitted); see also *id.* (" . . .

such that a contract could be interpreted to create obligations that neither party to a contract intended or desired.¹⁰⁸

Holmes is, of course, presented as a pivotal figure in the life of the common law of contracts. First-year law students will have little reason to challenge his standing and the legitimacy of his influence over American law in a contract law course, without more.¹⁰⁹ As one scholar commented, “[t]o bring his work into question in a basic way is simultaneously to question to some degree much of what American law has almost explicitly accepted as its model and dominant image and much of what it has incorporated into its tradition.”¹¹⁰

Given characterizations such as these, it should not be surprising, and, indeed, it is provable, that results in cases like the *Meyer* decision are traceable to Holmes’ perspective on the common law. That perspective is a reflection of Holmes’ view of the intrinsic value of human life and freedom. Holmes’ view was brutal and unkind. William James, Holmes’ contemporary,¹¹¹ noted about his friend:

The more I live in the world, the more cold-blooded, conscious egotism and conceit of

Inquiry into the subjective intentions of the parties would greatly enhance the difficulty of enforcing contracts”) (quoting Oliver Wendell Holmes, *The Theory of Interpretation*, 12 HARV. L. REV. 417, 419 (1899) (quotations omitted); Daniel P. O’Gorman, *Learned Hand and the Objective Theory of Contract Interpretation*, 18 U.N.H. L. REV. 63, 78 (2019) (“Holmes was a particularly strong advocate of the objective theory of contracts.”); Grant Gilmore, *The Death of Contracts* 39 (describing how “Holmes and his successors substituted an ‘objective’ approach to the theory of contract for ‘subjectivist’ approach which the courts had--almost instinctively...been following”) (footnote omitted).

¹⁰⁸ See KNAPP, *supra* note 85, at 397 (Noting that to hold parties to interpretations of contracts neither held is to “hold justice up to ridicule.”) (quoting 3 Corbin on Contracts § 539 (1960)).

¹⁰⁹ Cf. Yosaf Rogat, *Mr. Justice Holmes: A Dissenting Opinion*, 15 STAN. L. REV. 3, 4-5 (1962) (“Holmes’ name is uniquely weighty. To describe his commanding stature and influence apparently requires language both oracular and portentous.”) (footnotes omitted); see also Jed Lewinsohn, *Paid on Both Sides: Quid Pro Quo Exchange and the Doctrine of Consideration*, 129 YALE L. J. 690, 695 (2020) (describing Holmes as one of “two giants” in the law of contracts).

¹¹⁰ Rogat, *supra* note 109, at 5. Questioning authority is important when assessing the law with reference to its monumental sources. See, e.g., Michael S. Lewis, *Confronting a Monument: The Great Chief Justice in an Age of Historical Reckoning*, 17 U.N.H. L. REV. 315, 326 (2019) (“We . . . are a legal culture that gives credence and authority to great decisions by great judicial figures.”).

¹¹¹ See LOUIS MENAND, *THE METAPHYSICAL CLUB* 1 (2001) (“...Oliver Wendell Holmes, William James, Charles S. Pierce, and John Dewey. These people had highly distinctive personalities, and they did not always agree with one another, but their careers intersected at many points”); *id.* at 88 (“...James often spoken of pragmatism, the philosophy he largely created, as the equivalent of the Protestant Reformation.”); BERTRAND RUSSELL, *THE HISTORY OF WESTERN PHILOSOPHY* 811 (1972 ed. 1944) (Writing of James: “His religious feelings were very Protestant, very democratic, and very full of a warmth of human kindness.”).

people afflict me. . . . All the noble qualities of Wendell Holmes, for instance, are poisoned by them, and friendly as I want to be towards him, as yet the good he has done me is more in presenting me something to kick away from or react against than to follow and embrace.¹¹²

Holmes had contempt for charity, embraced a caste system view of human society, and viewed human life as a power struggle in which winners and losers arise from operation of this struggle and whose results are self-justifying.¹¹³ His attitude of repulsion toward the common experiences of humankind bled into his attitude toward his own profession. He had a withering distaste for attorneys and the facts and practicalities of the disputes that they presented in court.¹¹⁴ Holmes' decisions reflected an unwillingness to listen to their arguments and to justify his decisions against a record developed through the judicial process.¹¹⁵

¹¹² See COHEN, *supra* note 61, at 224.

¹¹³ See *id.* at 223-26; see also *id.* at 229 (“He generally sided with the most powerful organizations or individuals, on the theory that they should be allowed to use their power as they saw fit.”). For one definition of “caste,” see ISABEL WILKERSON, *CASTE: THE ORIGINS OF OUR DISCONTENTS* 17 (2020) (“A caste system is an artificial construction, a fixed and embedded ranking of human value that sets the presumed supremacy of one group against the presumed inferiority of other groups on the basis of ancestry and often immutable traits, traits that would be neutral in the abstract but are ascribed life-and-death meaning in a hierarchy favoring the dominant caste whose forebears designed it.”).

¹¹⁴ See, COHEN, *supra* note 61, at 228 (Holmes described the legal profession as requiring “a greedy watch for clients and practice of shopkeepers’ arts” mixed with mannerless conflicts over often sordid interests.”) (quotations omitted); *id.* at 231 (“As we don’t shut up bores, one has to listen to discourses dragging slowly along after one has seen the point and made upon one’s mind...”). As I will demonstrate, this sort of contempt has been inherited by judges like Frank Easterbrook of the Seventh Circuit Court of Appeals. Compare *A Dialogue with Federal Judges on the Role of History in Interpretation*, 80 G.W. L. REV. 1889, 1890 (2011) (“JUDGE EASTERBROOK: Law office history is an oxymoron. I don’t pay much attention to purported history in legal briefs because people are always taking things out of context. Not that the lawyers generally know enough to understand original context. They may not even know which particular kind of mistake they’re making when they take statements out of context.... Real historians may have something useful to say even though lawyers don’t.”), with *id.* at 1897 (“JUDGE SUTTON: Just as cross examination works as a truth-divining device in a trial, so the adversarial process ought to work when it comes to understanding history. Yes, as Chief Judge Easterbrook points out, there is plenty of (unreliable) law office history, but there is no reason to doubt that most lawyers have the capacity to show courts when that is so.”).

¹¹⁵ See Rogat, *supra* note 109, at 9 (“A number of important articles have recently inaugurated a widespread and salutary discussion of the necessity of stating reasons for results. This dialogue may result in clarifying jurisprudential issues of the widest significance. To point to the intimate connection in the law between reason and reasons is to raise valuable questions about the nature of legality itself. It is submitted that Holmes failed to meet the standards emerging from this

Buck v. Bell is perhaps the most destructive example of Holmes' views and approach. In *Buck v. Bell*, Holmes affirmed the forced sterilization of Carrie Buck, a Virginia woman, against claims that her constitutional rights prohibited this state-sponsored attack on her body. As one critic has characterized it:

There will always be differences of opinion over which rulings should be on a list of worst decisions ... [b]ut there can be no doubt that *Buck v. Bell* must have a prominent place. In its aftermath, not only was Carrie Buck sterilized against her will, but states across the country sterilized another sixty to seventy thousand Americans. Many of the victims were, like Carrie, perfectly normal mentally and physically—and they desperately wanted to have children. The reach of *Buck v. Bell* extended beyond the United States. . . . Nazis who carried out 375,000 forced eugenic sterilizations cited *Buck v. Bell* in defense of their actions.¹¹⁶

Holmes' opinion in the case epitomizes his dehumanizing approach to the rights of his vulnerable contemporaries.¹¹⁷ The language of the decision's first lines reads as if authored by Margaret Atwood as part of a dystopian science fiction:

This writ of error to review a judgment . . . affirming a judgment . . . by which the defendant in error, the superintendent of the State Colony for Epileptics and the Feeble Minded, was ordered to perform the operation of salpingectomy upon Carrie Buck . . . for the purpose of making her sterile.¹¹⁸

The Virginia law under which the challenged judgment was rendered provided that the "health of the patient and the welfare of society may be promoted in certain cases by the sterilization of mental defectives . . ."¹¹⁹ To the litigation challenging the operation of that law to Carrie Buck, Holmes wrote:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world if, instead of waiting to execute degenerate offspring for crime or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are

discussion. That is, he characteristically wrote, as has been said of more recent courts, 'opinions that do not opine.'" (footnotes omitted).

¹¹⁶ 274 U.S. 200 (1927); see COHEN, *supra* note 61, at 10-11; see also NEIL M. GORSUCH, *THE FUTURE OF ASSISTED SUICIDE AND EUTHANASIA* 36 (2006) (describing the public reaction to the eugenics movement as information about Nazi practices became public).

¹¹⁷ See CONLY, *supra* note 9, at 2 ("the principle that those who fail deserve to fail isn't one that is geared to support equality and mutual respect" but rather is a "justification for inhumanity.").

¹¹⁸ 274 U.S. at 205.

¹¹⁹ *Id.*

enough.¹²⁰

Does any contemporary reader of this brutality believe that any modern jurist could have written those words and still be confirmed to any seat on any court in the United States?¹²¹ Yet the author is lionized by his profession even as the rawest expression of his philosophy is among the most dehumanizing in the annals of United States Supreme Court law.¹²² The decision is so void of empathy¹²³ as to draw the criticism that it is psychopathic.¹²⁴ Notwithstanding the stakes for Carrie Buck

¹²⁰ *Id.* at 207.

¹²¹ Even conceding the reality of the current nomination situation. *See, e.g.*, Mark Joseph Stern, *Senate Confirms Controversial Judicial Nominee, Flipping Court that Will Decide Trump Subpoena Cases*, SLATE.COM (Nov. 14, 2019) <https://slate.com/news-and-politics/2019/11/steven-menashi-second-circuit-senate-trump.html> [<https://perma.cc/CTR3-TYFS>] (discussing background and qualifications of nominee described as having authored writings that included “inflammatory and offensive remarks about women, Muslims, LGBTQ people, and racial minorities.”).

¹²² *See* Noah Feldman, *The Many Contradictions of Oliver Wendell Holmes*, N.Y. TIMES (May 28, 2019), <https://www.nytimes.com/2019/05/28/books/review/oliver-wendell-holmes-stephen-budiansky.html> [<https://perma.cc/LAN4-5EF5>] (“Holmes is the second most influential justice ever to have graced the bench, after Chief Justice John Marshall, who first got the court to overturn laws and set the body on its long path to constitutional supremacy.”); Haynes Johnson, *Does Souter Have Heart?*, WASH. POST. (July 27, 1990), <https://www.washingtonpost.com/archive/politics/1990/07/27/does-souter-have-heart/28e2794c-0981-4859-b260-c2853c82a4ed/> [<https://perma.cc/LAN4-5EF5>] (“Yet—and here is the mystery—while Holmes was a great intellectual force he was also a great human being of passion and conviction, tempered by a range of life experiences that shaped his thinking and responses from the bench.”); *but see* Ronald Dworkin, *JUSTICE IN ROBES* (2006) (“When Oliver Wendell Holmes was an Associate Justice of the Supreme Court he gave the young Learned Hand a lift in his carriage...Hand got out at his destination . . . and called out merrily, ‘Do justice, Justice!’ . . . ‘That’s not my job!’ [Holmes] said. . . . Then the carriage turned and departed, taking Holmes back top his job of allegedly not doing justice.”).

¹²³ *See* Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 152 (2014) (“[E]mpathy . . . refers to our capacity to better comprehend—through both knowledge and feeling—another’s perspective by trying to view the world from that person’s position, rather than simply observing another’s position from where we stand.”); Thomas B. Colby, *In Defense of Empathy*, 96 MINN. L. REV. 1945, 1958 (2012) (“Empathy is the action of understanding, being aware of, being sensitive to, and vicariously experiencing the feelings, thoughts, and experience of another of either the past or present without having the feelings, thoughts, and experience fully communicated in an objectively explicitly matter; also the capacity for this.”) (quotations and citation omitted).

¹²⁴ *See* MARTHA C. NUSSBAUM, *THE MONARCHY OF FEAR* 32 (2018) (“Robert Hare’s study of psychopaths concludes that the absence of mind reading and of genuine reciprocal concern are hallmarks of these deeply maimed individuals, who are probably born, not made.”) (footnote and internal quotations omitted); *cf.* STEPHEN BUDIANSKY, *OLIVER WENDELL HOLMES: A LIFE IN WAR*,

and for hundreds of thousands of others, one searches the opinion in vain for any reference to any record supporting the sociological, political, and economic conclusions Holmes draws in it. This is true whether they relate to the “cost benefit analysis” he proposes about the value of the human life and interests adjudged by him, or to Holmes’ assessments of causation with regard to public ills such as crime and poverty, or to the binary manner in which he devises death or starvation as the only fate for the “manifestly unfit.”¹²⁵

In Holmes’ decision, Carrie Buck is an abstraction whose identity he reduces to the barest combination of adjectives and nouns: “a feeble minded white woman.”¹²⁶ Like the “reasonable man,” this “feeble minded white woman” remains a concept without a story and with no facts that Holmes is moved to recite to support the characterization.¹²⁷ Carrie Buck is a disembodied victim of Holmes’ bloodless and unkind jurisprudence, a jurisprudence that placed judicial imprimatur on laws that forced a woman to submit to a medical procedure that prevented her from bringing human life into the world.¹²⁸

Holmes’ approach maps across domains and is reflected in his theory of contract law. Just as he reduced Carrie Buck to the barest conceptual shadow of true personhood, he sought to banish the subjective intent and desires of any given party from questions regarding contract formation and interpretation.¹²⁹ His stated justifications are consequentialist – that any other alternative would result in unfair results and produce a system of judicial resolution difficult to administer.

LAW, AND IDEAS 431 (2019) (“Likewise, [Holmes’] decisions in tort cases implicitly, and sometimes explicitly, embraced the view that a certain amount of maiming and death was just the price to be paid for the smooth functioning of society.”).

¹²⁵ See 274 U.S. at 207.

¹²⁶ COHEN, *supra* note 61, at 205.

¹²⁷ See *id.*; see also BUDIANSKY, *supra* note 124, at 430 (Holmes reflected on his decision as follows: “I purposely used short and rather brutal words for an antithesis, polysyllables that made them mad. . . .” when referring to his contempt for the editorial advice of his Supreme Court colleagues).

¹²⁸ Cf. MATHIAS W. REIMANN, *Holmes’s Common Law and German Legal Science*, in THE LEGACY OF OLIVER WENDELL HOLMES, JR. at 75-76 (Robert W. Gordon ed. 1992) (“Thus it was easy for Holmes to apply his views of the war to society at large and gradually to come to see life and the world in general as a struggle for power, driven by harsh self-preference. . . . Holmes’s Darwinism” had “little sympathy for the losers. . .”).

¹²⁹ Patrick J. Kelley, *Objective Interpretation and Objective Meaning in Holmes and Dickerson: Interpretive Practice and Interpretive Theory*, 1 NEV. L. J. 112, 115 (2001) (“The subjective motives and the subjective intentions of the parties are . . . banished from Holmes’s theory” of contract interpretation); Cf. R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 122 (2017) (exploring how external manifestations are used by courts as a means of applying objective standards to resolve interpretative disputes).

Holmes' successors have adopted his view that parties are dispensable to contract law.¹³⁰ Law and Economics proponents, the most powerful actors in the field, "sought to reduce interest balancing to a science, one replete with mathematical formulas. These scholars treated all desires as exogenous (that is as coming from 'outside,' as 'given,' or as the starting point for analysis.)."¹³¹ The notion has been embraced by jurists and scholars who embrace Holmes.¹³²

This has resulted in a substantial move away from requiring assent from a party before legally binding that party to a contract. Holmes was explicit with regard to this notion, stating, with reference to how contract law performed in operation, that the "law has nothing to do with the actual state of the parties' minds."¹³³

A slippery slope ensues. If we give such little weight to the subjective state of mind of the parties as they bargain around rights they would otherwise retain as free agents, why demand that parties to a contract assent at all? For the machinery to work, why not remove the individual and her eccentricities and quirks from the law altogether? In her stead, why not imagine a reasonable person and ask what that person would interpret the human thoughts, statements, and actions to have meant? And why not let us repose responsibility for that task in someone elevated and smart, like a judge? This train of thinking has produced decisions that imagine that normal adults are equipped to "inure" themselves against the "rough tumble of the world of commerce."¹³⁴ That notion rests on the conclusion that humans should be judged against an incorporeal, rational ideal; one that bears no resemblance to how humans are in our lesser, earthly form, the corporeal reality, pervasive vulnerabilities and all.¹³⁵

¹³⁰ Scholars have addressed other mistakes by Holmes that infect the law of contracts to this day. See, e.g., Lewinsohn, *supra* note 109, at 695 ("Thus, in its boldest formulation, my claim is that two giants of the common law, Langdell and Holmes, mangled a central doctrine of contract law by severing the link between the doctrine of consideration and the proper conception of a bargain.").

¹³¹ ALSCHULER, *supra* note 60, at 3.

¹³² See Verkerke, *supra* note 12, at 937-38 ("[C]ourts have shown little sympathy for litigants who claim not to have read or understood provisions of the legal documents they have signed.") (citation omitted).

¹³³ OLIVER WENDELL HOLMES JR., *THE COMMON LAW* 309 (1991).

¹³⁴ Cf. *Hair Excitement, Inc. v. L'Oreal U.S.A., Inc.*, 158 N.H. 363, 368 (2009) (drawing a distinction between deceptive business practices and rough business practices under New Hampshire's consumer protection act) (citations omitted).

¹³⁵ *But see* Lucy Jewel, *Does the Reasonable Man Have Obsessive Compulsive Disorder?*, 54 WAKE FOREST L. REV. 1049, 1053 (2019) ("I am interested in answers to the following questions: When we emulate the reasonable man's strict, patrimonial, no-nonsense approach to legal reasoning, what

Two modern decisions authored by Judge Frank Easterbrook of the Seventh Circuit Court of Appeals, *ProCD, Inc. v. Zeidenberg*,¹³⁶ and *Hill v. Gateway 2000*,¹³⁷ adopt the Holmesian perspective. They have had substantial influence over modern contract law. Going even further than the Second Circuit in *Meyers*, *ProCD* and *Hill* bind consumers to contract terms they could never have seen when they agreed to the contract. By subtracting the consumer's state of mind from the contracting equation, they are the natural outcome of Holmes' dehumanized perspective on the law into our commercial life and into contract law.¹³⁸

Indeed, their author, Judge Easterbrook has all but confirmed this genealogy. Judge Easterbrook is, of course, a somewhat famous appellate court judge. He was famous enough, at least at one point, to merit a television interview conducted by C-SPAN in the late 1980s.¹³⁹ The interview is revealing to the extent that it discloses the thinking of a jurist whose decisions are central to the critique this article levels. Easterbrook, in Holmesian fashion, characterizes the obligations of a judge as requiring that one decide cases "dispassionately" and "without regard to the merits of the parties and the right state of the world."¹⁴⁰ According to Judge Easterbrook, this is a "process of abstraction, a process of distancing the case from your own self and your own druthers."¹⁴¹ Easterbrook draws a distinction between the function of the judge in this regard and others who might view the project as "an opportunity to sit around and do what's just."¹⁴² According to him: "[T]he more personal the process, the less justice there can be because the less equal treatment there can be."

Easterbrook claims that "having a philosophical cast of mind" was one prerequisite to his approach.¹⁴³ Indeed, he reveals his own. He says: "My philosophical cast of mind . . . I suppose I am a skeptic in the tradition of Oliver Wendell Holmes and Learned Hand."¹⁴⁴ Expanding on the notion, he continues:

kind of *monster* are we emulating?" (footnote omitted).

¹³⁶ 86 F.3d 1447 (7th Cir. 1996).

¹³⁷ 105 F.3d 1147 (7th Cir. 1997).

¹³⁸ See *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1068 (R.I. 2009) ("The eminent Judge Frank Easterbrook has authored what are widely considered to be the two leading cases on so-called 'shrinkwrap' agreements.").

¹³⁹ *Life & Career of Frank Easterbrook*, C-SPAN (Mar. 20, 1989), <https://www.c-span.org/video/?7038-1/life-career-frank-easterbrook> [<https://perma.cc/TEH3-XWSW>].

¹⁴⁰ *Id.* at 1:25-30.

¹⁴¹ *Id.* at 1:30-1:50.

¹⁴² *Id.* at 2:10-2:15.

¹⁴³ *Id.* at 2:30-3:00.

¹⁴⁴ *Id.* at 3:24-4:15.

I suppose you will hear me quote Holmes and Hand from time to time because they're my judicial heroes. They were people who were never taken in too easily by the platitudes of the day, always wondered whether what they were being told was true, and that carried over, not only to about whether what the parties told them was true, something every judge has to have, but skepticism about general statement, about the meaning of law, about the relation between legal rules and people . . . they were just thorough going skeptics.¹⁴⁵

Pro-CD and *Hill* reflect Holmes' influence. They reflect Easterbrook's skepticism about what consumers might say about their agreements to construct a rule that deletes consumers from the offer-acceptance equation.

ProCD, presented the question: "Must buyers of computer software obey the terms of shrinkwrap licenses?"¹⁴⁶ According to Judge Easterbrook, the sort of transaction at issue in *Pro-CD* proceeded as follows: a customer walks into the store, finds the *Pro-CD* software packaged in a box on the shelf, takes the box off of the shelf, goes to the counter, purchases the software for the price, leaves the store and goes home.¹⁴⁷

Every box containing [Pro-CD's] consumer product declares that the software comes with restrictions stated in an enclosed license. This license, which is encoded on the CD-ROM disks as well as printed in the manual, and which appears on a user's screen every time the software runs, limits use of the application program and listings to non-commercial purposes.¹⁴⁸

At the time of purchase, the customer did not and could not see the terms of the license and did not see them until he exchanged money for the product. In deciding the case, Judge Easterbrook pays lips service to the notion that hidden terms are not part of an enforceable contract. He writes,

In Wisconsin, as elsewhere, a contract includes only the terms on which the parties agree. One cannot agree to hidden terms, the judge concluded. So far, so good—but one of the terms to which Zeidenberg agreed by purchasing the software is that the transaction was subject to a license.¹⁴⁹

This approach, of course, presages the Second Circuit's statements in *Meyers v. Uber*, as analyzed earlier in this article.

In a succession of statements that include no citations to the record or to any facts or data, Easterbrook nevertheless concluded that the license must be enforced

¹⁴⁵ *Id.*

¹⁴⁶ 86 F.3d at 1448.

¹⁴⁷ *Id.* at 1449-50.

¹⁴⁸ *Id.* at 1450.

¹⁴⁹ *Id.*

under contract law.¹⁵⁰ According to Easterbrook, any alternative perspective would require a business to include a lengthy series of written terms in microscopic print on the box and would interfere with the goals of modern commerce and render transactions in the area too costly and impractical. Thus, the consumer, a one-time participant in this transaction, must be bound by terms he did not see and so could not have even considered when he purchased the software. The terms contained in the software identifying a right of return were sufficient to provide relief.

The decision was subject to substantial critique in regard to its application of contract law and its interpretation of the applicable provisions of the Uniform Commercial Code.¹⁵¹ The Seventh Circuit ignored this criticism and extended *ProCD*'s influence in another decision authored by Judge Easterbrook, *Hill*. That case involved the following transaction: "A customer picks up the phone, orders a computer, and gives a credit card number. Presently, the box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days."¹⁵²

Easterbrook disposed of the claim that this transaction did not permit the consumer to agree to the terms of the transaction at the time of the exchange, as follows:

If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephone recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.¹⁵³

There is a copy-cattish cadence to this paragraph that moves apace with *Buck v. Bell*. As in that decision, after making a series of unsupported declarations about

¹⁵⁰ *Id.* at 1451.

¹⁵¹ See, e.g., John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory* (Duquesne University School of Law 2011); Eric Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1193 (2010) ("ProCD precipitated a typhoon of academic hostility."); Roger C. Bern, "Terms Later" Contracting: *Bad Economics, Bad Morals, and a Bad Idea for Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J. L. & POL'Y 641 (2004) (criticizing the decision); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 744, 753 (2002) ("Easterbrook was plainly wrong about section 2-207's applicability.").

¹⁵² 105 F.3d at 1148.

¹⁵³ *Id.* at 1149.

the state of the world as perceived by the judge, statements that disparage the capacities of the parties to the contract and their bandwidth for negotiations, the decision reaches a coda with a broader, unsupported declaration about the law's application to capable adults, generally.¹⁵⁴

As a result, under Judge Easterbrook's interpretation of law, a contract is formed at the point of purchase over the telephone when the parties reach a deal. And notwithstanding that fact, a party is bound by terms the promisor did not disclose at the time of the deal if they sent, unilaterally, after-the-fact. The party is bound regardless of whether he/she/they read these terms. Easterbrook, again in Holmesian fashion, removes the human consumer from the transaction,¹⁵⁵ and injects into the law of consumer contracts Holmes' much-celebrated perspective of the law as the product of might makes right.¹⁵⁶ His analysis makes no effort to reconcile itself with other areas of contract law in which courts consign to the category of fraud bait-and-switch disclosures that prejudice a counterparty.¹⁵⁷

Scholars have described Judge Easterbrook's formulation in these cases as "subverting. . . what is natural and traditional in contract law" and rendering a decision that is contrary to governing law.¹⁵⁸ The controversy Easterbrook's perspective has ignited became an even more public dispute as a result of the proposals set forth within the proposed Draft Restatement (Third) of Consumer

¹⁵⁴ In the aftermath of the 2008 housing crisis, many of the views that drove the interpretive approaches of Holmes, Easterbrook and others have been subject to a series of challenges, including those aimed at the consequences of the policies underlying their jurisprudence. *See, e.g.*, BINYAMIN APPELBAUM, *THE ECONOMISTS' HOUR 7* (2019) ("The medicine [of unconstrained free-market capitalism initiated in the late 1970s focused on wealth maximization] did not work. In the United States, growth slowed in each successive decade during the half century described in this book, from an annual average of 3.13 percent in the 1960s to 0.94 percent in the 2000s, adjusting for inflation and population.").

¹⁵⁵ *Cf.* Jewel, *supra* note 135, at 1080 (describing how "the reasonable man" in this tradition "fulfill[s]" a compulsion for "order and control" "through state sanctioned coercion . . . couched in the progressive rhetoric of science and progress.").

¹⁵⁶ *See* Jewel, *supra* note 135, at 1064 (describing the "reasonable man" as a puritan devoted to the use of law to engage in punitive sanctions).

¹⁵⁷ *Cf.* *Park 100 Investors, Inc. v. Kartes*, 650 N.E.2d 347, 350 (1995) (failure of party to disclose that contents included a personal guarantee to sophisticated counterparties constituted fraud); *Hill v. Jones*, 151 725 P.2d 1115, 1117 (1986) (Ariz. 1986) (Finding fraud due to nondisclosure where: "Sellers did not mention any of this information prior to close of escrow. They did not mention the past terminate infestation and treatment to the realtor or to the termite inspector.").

¹⁵⁸ Shubha Ghosh, *Where's the Sense in Hill v. Gateway 2000?: Reflections on the Visible Hand of Norm Creation*, 16 *TOURO L. REV.* 1125, 1135 (2015); *see also id.* at 1131-32 (noting divergence from applicable provisions of the Uniform Commercial Code).

Contracts.¹⁵⁹ Like Easterbrook, the authors of the proposed draft withdrew the requirement of formal assent as a feature of consumer contract formation. The drafters proposed replacing it with a series of notice requirements they equate with a notion they describe as “blanket assent.”¹⁶⁰

In effect, the ALI drafters concluded that if a company can prove that a consumer was on notice of terms, even in the absence of proof that the consumer agreed to those terms, notice would be sufficient to permit a finding that a contract has been formed.¹⁶¹ The drafters did so despite observing that:

Because the imbalance between businesses and consumers is so great, the application of contract law’s general rules of mutual assent alone are not likely to level the playing field. In a world of lengthy standard forms, which consumers are unlikely to read, more restrictive assent rules that demand more disclosures, more notifications and alerts, and more structured templates for manifesting assent are unlikely to produce substantial benefits.¹⁶²

The drafters also drew this conclusion despite noting, at another point, that “[t]he proliferation of lengthy-standard term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent.”¹⁶³ Like Easterbrook, the drafters did not address these circumstances in terms of capacity. Instead, the drafters characterize the problem as demonstrating the impracticality of requiring agreement in contracts. Their solution is to remove what they have identified as the barrier, the legal requirement of the co-equal participation of the consumer in the contracting process. In doing so, they do not question whether the seller truly values the terms and incorporates the terms into the price of the goods or services subject to the contract. They follow Judge Easterbrook in this regard.

As a consequence, Judge Easterbrook and the ALI drafters do not address the obvious question contract theorists raise in response to the conclusions he draws: Why place the risk of the attentional and intellectual limitations on the consumer as a matter of contract law?¹⁶⁴ Is it justified to believe the consumer could or would

¹⁵⁹ Restatement of the Consumer Contracts 5 (ALI Tentative Draft April 18, 2019).

¹⁶⁰ *Id.* (“This Restatement reflects the common-law “blanket-assent” principle, whereby courts allow businesses to draft and affix standard contract terms to the transaction, as long as they provide consumers with adequate notices and opportunity to review the terms, as a meaningful opportunity to avoid the transaction.”).

¹⁶¹ *Id.*

¹⁶² *Id.* at 3.

¹⁶³ *Id.* at 2.

¹⁶⁴ See POSNER, *supra* note 67, at 50.

ever be able to understand such terms even if they took the time to read them?¹⁶⁵ After all, as Professor Randy Barnett has noted:

Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form contracts all of the time. Every contracts professor and law student knows this from personal experience. Everyone reading these words, including yours truly, has at one time clicked the “I agree” box of a software license agreement without reading the terms in the scroll-down box.¹⁶⁶

Given this broad agreement about consumer capacities as reflected in their behavior, why would courts permit sophisticated parties to end-run traditional contract theory and shift legal risk to the average consumer?¹⁶⁷ Does anyone believe, for instance, that Amazon or Google or Facebook (or any other significant firm) will stop doing business in the market because they cannot get each and every one of the terms they demand in the form contracts they use with consumers? There is simply no data to support that conclusion, which defies all common sense. Yet that is the fiction Easterbrook and the ALI advanced.

The purveyors of this view do not provide solutions that address the fact that this fiction about what we now call “contracts” empower large businesses to use the law to control, without check, the terrain upon which individuals enter transactions with terms the law will require them to accept under almost all circumstances. This is the very opposite of a law that empowers the individual American consistent, with the narrative of contract freedom. It is based on a flawed assessment of adult capacity that persists within the law despite proof that it is flawed and evidence that it has had catastrophic effects on the lives of Americans and upon the strength of the nation as a whole.¹⁶⁸

In the aftermath of the 2008 financial crisis, those who take the ALI view can no longer lay claim to arguments implicit (if not explicit) within defenses provided by Easterbrook and company that we all benefit when commerce is conducted between large firms and the consumer public through form contracts that consumers do not understand and cannot negotiate.¹⁶⁹ Mass contracting in this manner crushed the

¹⁶⁵ See *id.*

¹⁶⁶ See Randy Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 628-29 (2002).

¹⁶⁷ See Verkerke, *supra* note 12, at 931 (“The common thread that runs through all of these examples is that sophisticated contracting parties respond to legal rules favoring their contractual partners by adopting express terms that shift the balance of legal rights in their own favor.”).

¹⁶⁸ See, e.g., RICHARD THALER, *MISBEHAVING* 7 (W.W. Norton & Company 2015) (“It is harder to dismiss studies that document poor choices in large-stakes domains such as saving for retirement, choosing a mortgage, or investing in the stock market. And it is impossible to dismiss the series of booms, bubbles and crashes we have observed in the financial markets”).

¹⁶⁹ See Joseph William Singer, *Foreclosure and the Failures of Formality, or Subprime Mortgage*

world economy and few can claim they were not harmed by the “contracting” practices our current legal regime upholds despite the ways in which they deform our notions of what it means to engage in contracts with capacity.¹⁷⁰

IV. INFANCY AS THE PATH TO CAPABILITY, EMPOWERMENT AND AUTONOMY.

A. *Refining notions of capacity to even the contracting playing field*

A central and unaddressed flaw in the reasoning exhibited by Easterbrook and the ALI is that each assumes that consumers are capable because they are adults. A true assessment of capacity reveals that it has never been a question that properly resolved with reference to age alone, without considering the domain in which one’s capacity is tested. At four-years-old, Tiger Woods was a better golfer than I will ever be.¹⁷¹ If I was to play a four-year-old Tiger Woods at golf, I would not be a capable (or even remotely respectable) adversary. How would I become capable? I would want access to a tried and true institution of the sport, handicapping. This institution is designed to secure that participants of differing abilities will be able to play the sport together in a competitive fashion. As one news source explains: “One of the reasons golf is such a popular sport is that a system of handicapping means players of all abilities can play against each other.”¹⁷²

Golf is a sport in which the player attempts to complete a course, defined as a

Conundrums and How to Fix Them, 46 CONN. L. REV. 497, 502 (2013) (“By selling adjustable-rate mortgages to millions of people who could not afford to pay them back, the banks inflicted novel individual and systemic risks” which ultimately led to a financial crash that shattered the world economy); see also Tomasz Piskorski and Amit Seru, *Mortgage Market Design: Lessons from the Great Recession*, in BROOKINGS PAPER ON ECONOMIC ACTIVITY 430 (Spring 2018) (“A series of papers have argued that a number of factors related to the rigidity of contract terms. . . hindered efforts to restructure or refinance household debt, exacerbating the foreclosure crisis.”); Alan S. Blinder, *AFTER THE MUSIC STOPPED* at 71 (2014 ed.) (describing banking practices presented to “unsophisticated” home purchasers who could not afford the financial risks mortgage devices entailed as “disgraceful”).

¹⁷⁰ *Id.* at 68 (“It is no secret that subprime mortgages led us into this mess. Many of them were inherently crazy, and they became the basis for even greater zaniness in the world worlds of mortgage-backed securities and derivatives. . . . The tragedy begins . . . with the huge volume of risky mortgages that should never have been created in the first place.”).

¹⁷¹ See DAVID EPSTEIN, *RANGE 2* (Riverhead Books 2019) (“When the boy was four, his father could drop him off at a golf course at nine in the morning and pick him up eight hours later, sometimes with money he’d won from those foolish enough to doubt.”).

¹⁷² See BBC Sport, *Handicapping*, GOLF, http://news.bbc.co.uk/sport2/hi/golf/rules_and_equipment/4748865.stm <https://perma.cc/2TA2-ZS5H>.

series of “holes” with the fewest number of shots. To even the field among players of different skills and abilities, a “handicap” permits a player of lesser ability to remove a set number of strokes from his or her score at the outset of the competition.¹⁷³ “In a competition involving handicaps, the stronger or lower player, ‘gives’ strokes to the weaker or higher handicap player based on the difference in their handicap.”¹⁷⁴

Ultimately, under a system of handicapping, the capacity of the golfer is judged against the performance of the golfer, and the competition among golfers is adjusted accordingly.¹⁷⁵ The overwhelming focus of the system is “fairness.” It seeks to promote fairness for its own sake and to make the game of golf more popular and so increasing its attraction to a wider population of potential consumers.

Handicapping in golf provides a way to introduce a better notion of “capacity.” A golfer’s performance within the environment in which his/her/their capacities is/are judged, the game of golf, provides the measure of golfing capacity. A handicap does not turn on a golfer’s age, height, weight, gender, race, education level, or IQ. Capacity is a function of real-world performance when measured against the goals of fairness and utility.

This is another version of Martha Nussbaum’s definition of capabilities. She asks, “What are capabilities? They are the answer to the question, ‘What is this person able to do and to be?’ ... [T]hey are not just abilities residing inside a person but also the freedoms or opportunities created by a combination of personal abilities and political, social and economic environment.”¹⁷⁶

She distinguishes this concept from a person’s “innate equipment” which she describes as “trained or developed traits and abilities, developed, in most cases, in interaction with the social, economic, and political environment.”¹⁷⁷ “A society might do quite well at producing internal capabilities but might cut off the avenues through which people actually have the opportunity to function in accordance with those capabilities.”¹⁷⁸

Thus, people may have very different “internal equipment,” but the environment in which that equipment must act may negate the effect of the capabilities the equipment enables. This would render those same people

¹⁷³ *Id.*; see also Timothy C. Y. Chan, David Madras, Martin Puterman, *Improving fairness in match play golf through enhanced handicap allocation*, 4 JOURNAL OF SPORTS ANALYTICS 251 (2018).

¹⁷⁴ *Id.* at 252.

¹⁷⁵ *See id.*

¹⁷⁶ NUSSBAUM, *supra* note 30, at 20.

¹⁷⁷ *See id.* at 21.

¹⁷⁸ *See id.*

ineffective at capably influencing the external world notwithstanding their capabilities. Thus, even those with “strong” equipment could see the merits of their equipment rendered a nullity.¹⁷⁹

Capacity thus defined has two variables. The first variable is one’s internal capabilities. The second is the degree to which the external factors permit or prevent those internal capabilities from exerting any influence upon measurable outcomes. Capacity, under the status quo in American law, focuses on one variable, internal capability, and relies on views about that variable that are false.¹⁸⁰ The perspective this article takes views capacity through both variables.

Ultimately, the solution this article proposes is meant to disrupt the law on contracting capacity as a means of creating an environment in which the entities most responsible for creating the legal landscape for consumer contractors, sellers of consumer goods and services, must draft contracts that are understandable and accessible to the consumer public. If they fail, they should take the risk of failing to do so. This approach adopts a handicapping view within the arena of consumer contracts. It proposes a solution that would require the drafters of consumer contracts to ensure that they are made understandable to consumers or face the consequence of having contracts or their terms rendered void. It does so by adjusting rules to fit the capacities of the participants. It does that by adjusting the incentives facing those in control of the contours of the game to encourage them to draft contours that make the game’s end, a contract derived from mutual assent, a far greater possibility. If the drafters fail to do so, they will not be able to gain the benefits that contracts provide, an enforceable agreement they can rely upon to protect rights they bargained for with a counterparty. In this respect, it thus seeks to make the game fairer and there is no reason to believe it will make the game less popular.

B. “Adulthood” Challenged

Evidence about adult performance in the domain of consumer contracting more than justifies the solution this article proposes. That evidence challenges the traditional view of adulthood, which persists in the face of so much data suggesting

¹⁷⁹ See also, FINEMAN, *supra* note 49, at 15 (“Altered social realities may require the explication of a more nuanced understanding of a cherished national characteristic or value.”).

¹⁸⁰ See, e.g., CONLY, *supra* note 9, at 19 (“The second general condition under which we typically allow coercive paternalism is that of incompetence. There are people we think aren’t capable of dealing with facts, even if they are informed of them. Their reasoning is impeded by any of a number of causes – youth, which may entail a whole host of factors that lead to poor decisions. . . and so forth.”).

its falsehood.¹⁸¹ That view sits at the foundations of central legal doctrines that harm consumers.

That view fails to consider whether internal capabilities exert any influence when interacting with the world. It thus adopts the mistaken position that modern free-market proponents make when they fail to take account of changes in the market environment in attempting to apply abstract principles from prior errors to modern commercial life.¹⁸² As Jonathan Herring of the University of Oxford, has written

Of course, we adults prefer not to think of ourselves in this way. We highlight our independence, capacity for rational thought, maturity and autonomy. However, we puff ourselves up with such talk. The reality is very different. In fact, we are deeply dependent on others for our most basic needs; we are rarely in a position to make an informed decision and even when we do we are hardly rational; and though we like to imagine ourselves having autonomy and being author of our own lives, we have little control over ourselves.¹⁸³

He supports his claim about the actual state of affairs for adults with reference to statistics about internal capabilities as measured in terms of IQ, long-term illness, addiction, and obesity.¹⁸⁴ In essence, he argues that these statistics eliminate claims that adults as a group are distinctively stronger and more responsible than children. Instead, he argues that adults are just as vulnerable and so adults should therefore be able to access protections available to children.¹⁸⁵

¹⁸¹ See THALER, *supra* note 168, at 5 (“The core premise of economic theory is that people choose by optimizing. Of all of the goods and services a family could buy, the family chooses the best one that it can afford. Furthermore, the beliefs upon which Econs make choices are assumed to be unbiased.”).

¹⁸² See ANDERSON, *supra* note 26, at 6 (“Images of free market society that made sense prior to the Industrial Revolution continue to circulate today as ideals, blind to the gross mismatch between the background social assumptions reigning in the seventeenth and eighteenth centuries, and today’s institutional realities.”).

¹⁸³ HERRING, *supra* note 18, at 27-28.

¹⁸⁴ See *id.* at 30.

¹⁸⁵ See *id.* at 48. There is more than enough evidence to suggest that adults are susceptible to the terrible consequences of defects in their decision-making that one might impute to irrationality. See Theresa Waldrop and Stephanie Gallman, *A group of young adults held a coronavirus party in Kentucky to defy orders to socially distance. Now one of them has coronavirus*, CNN HEALTH (Mar. 25, 2020) (“The partygoers intentionally got together ‘thinking they were invincible’ and purposely defying state guidance to practice social distancing, [Gov Andy] Beshear said.”), <https://www.cnn.com/2020/03/24/health/kentucky-coronavirus-party-infection/index.html//https://perma.cc/AL7K-P9HZ>). Even libertarians have begun to cede ground on these issues even if they continue to appeal to solutions grounded in appeals to reasoned decision-making that the

Advances in cognitive psychology provide even greater support for this proposition. These advances have challenged the proposition, central to the law, that adults are rational, their thinking normally sound, and that emotions such as “fear, affection and hatred explain the occasions on which people depart from rationality.”¹⁸⁶

Instead, cognitive science has demonstrated “systemic errors in the thinking of normal people” traceable to “the design of the machinery of cognition rather than to the corruption of thought by emotion.”¹⁸⁷ Specifically, these studies demonstrate that adults are particularly bad at identifying relevant data and analyzing it for the purpose of forecasting outcomes for themselves, even under circumstances where they have a stake in the outcome.

This has to do with a series of biases that cause us to gather and weigh information poorly.¹⁸⁸ These studies demonstrate that claims that a twenty-five-year-old, forty-five-year-old, sixty-five-year-old, or seventy-five-year-old will be better at assessing the world than a seventeen-year-old are so overstated as to render the distinction indefensible inside the area of consumer contracts. These deficits demonstrate that Americans lack the relevant cognitive capacity to defend their interests in the consumer contract domain.¹⁸⁹

Contributing to these deficits, few Americans have anything close to baseline

facts they now acknowledge as reality demonstrate most people avoid pandemically. See Kristin Tate, *Coronavirus reveals financial irresponsibility of Americans*, THE HILL (Mar. 22, 2020) (acknowledging the irrational personal spending decisions of Americans while lecturing that we all need to be more reasonable), <https://thehill.com/opinion/finance/488906-coronavirus-reveals-financial-irresponsibility-of-americans> <https://perma.cc/4A65-LSBS>.

¹⁸⁶ See DANIEL KAHNEMAN, *THINKING FAST AND SLOW* 8 (2011).

¹⁸⁷ *Id.*

¹⁸⁸ See RICHARD H. THALER AND CASS R. SUNSTEIN, *NUDGE* 7 (Penguin Books 2009) (“Hundreds of studies confirm that human forecasts are flawed and biased. Human decision making is not so great either.”); *id.* at 9 (“The false assumption is that almost all people, almost all of the time, make choices that are in their best interest or at the very least are better than the choices that would be made by someone else. We claim that this assumption is false—indeed, obviously false. In fact, we do not think that anyone believes it on reflection.”). Some of the greatest and most sensitive writers have described this phenomenon to us in literature. See ALBERT CAMUS, *THE PLAGUE* 36-37 (Stuart Gilbert trans., Vintage Books 1991) (“Everybody knows that pestilences have a way of recurring in the world; yet somehow we find it hard to believe in ones that crash down on our heads from a blue sky. There have been as many plagues as wars in history; yet always plagues and wars take people equally by surprise.”).

¹⁸⁹ KATHLEEN M. GALOTTI, *COGNITIVE DEVELOPMENT, INFANCY THROUGH ADOLESCENCE* 406 (2017 ed.) (“Cognition” includes the “processes by which an individual acquires, stores, manipulates, retrieves, and uses information.”).

literacy when it comes to rights conferred upon them under the state and federal constitutions.¹⁹⁰ Very few Americans can describe how our state and federal courts work,¹⁹¹ who populates them,¹⁹² what happens inside our courts, what a jury trial consists of, where the jury trial right arises from and what purposes it serves, and what alternative dispute resolution processes such as binding arbitration entail for them.¹⁹³ Very few Americans are aware of their non-constitutional rights as consumers under state and federal statutory law. No studies indicate that they understand the effects of warranties, disclaimers, waivers, or what the law demands of sellers and purchasers of a wide range of consumer goods and services.¹⁹⁴

¹⁹⁰ See, e.g., ABA Survey of Civic Literacy, AMERICAN BAR ASSOCIATION (2020), https://www.americanbar.org/groups/public_education/resources/civic-literacy/ <https://perma.cc/4RL9-4ATL> (“Less than 1 in 10 Americans can answer all 15 questions adopted from the U.S. Citizenship Test.”); see also Executive Summary, ABA Survey of Civic Literacy, AMERICAN BAR ASSOCIATION 2 (2020), https://www.americanbar.org/content/dam/aba/administrative/public_education/ABASurveyOfCivicLiteracy-summary.pdf [<https://perma.cc/4RL9-4ATL>] (describing basic confusion in the United States about core public law principles); *Americans Are Poorly Informed About Basic Constitutional Provisions*, ANNENBERG PUBLIC POLICY CENTER (Sept. 12, 2017), <https://www.annenbergpublicpolicycenter.org/americans-are-poorly-informed-about-basic-constitutional-provisions/> <https://perma.cc/PD4Y-WWVG> (“More than half of Americans . . . incorrectly think it is accurate to say that immigrants who are here illegally do not have any rights under the U.S. Constitution” and “More than a third of those surveyed . . . can’t name any of the rights guaranteed under the First Amendment.”); Ryan Lessard, *Former Justice Souter Warns About the State of Civics Education*, NHPR.ORG (Sep. 14, 2012) (“I don’t believe there is any problem of American politics in American life which is more significant today than the pervasive civic ignorance of the Constitution of the United States and the structure of government.”) available at <https://www.nhpr.org/post/former-justice-souter-warns-about-state-civics-education#stream/o> [<https://perma.cc/SJM4-DD5QJ>] (last visited Sep. 13, 2020).

¹⁹¹ GBA STRATEGIES, 2018 STATE OF THE STATE COURTS – SURVEY ANALYSIS 5 (2018) (“Voters feel ill-equipped to navigate the court system without an attorney and lack confidence in their ability to represent themselves.”).

¹⁹² See, e.g., Scott Bomboy, *Surveys: Many Americans know little about the Supreme Court*, CONSTITUTION DAILY (Feb. 17, 2016), <https://constitutioncenter.org/blog/surveys-many-americans-know-little-about-the-supreme-court/> <https://perma.cc/6PT3-QUNG> (citing statistics demonstrating general absence of knowledge about U.S. courts).

¹⁹³ See, e.g., Jonathan Koehler, *Train Our Jurors*, in FACULTY WORKING PAPERS 303, 304 (Northwestern University School of Law Scholarly Commons 2006) (“Jurors misunderstand rules of law, legal presumptions, and applicable standards of proof. They rely on information that they are told not to use, ignore crucial evidentiary points, and make inappropriate inferences.”).

¹⁹⁴ Other scholars express, through assessments of the state of the law, the extent to which the law downplays the profound illiteracy of the American public in regard to legal terms used in consumer contracts. See, e.g., Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869, 874

In other words, most Americans are perpetually ignorant of, or deeply mistaken about, the state of the law. Americans are worlds apart from what Holmes would have demanded of us when he wrote that mistake of law cannot be an excuse.¹⁹⁵ The rights that we consumers are said to waive, such as the right to trial by jury, are rights we could not value in any true sense because of our impoverished understanding of our legal rights, generally. These deficits demonstrate that Americans lack the relevant knowledge base to defend their interests in the consumer contract domain.¹⁹⁶

Addictions and mental health crises at all levels of adulthood, afflicting all ages of adults, weaken the standard paradigm of the strong, autonomous, accountable adult even further. Millions and millions of adult Americans suffer from a serious mental illness.¹⁹⁷ These mental illnesses relate to all-manner of cognitive and behavioral deficits and so undermine the broad-brush depiction of the adult human as rational in the traditional sense that law has connected the notion to accountability justifications.

Modern environmental factors weaken the paradigm of adult capacity further. For instance, a pervasive array of serious substance abuse disorders undermine notions that adults are able to engage in unconstrained, free choice at a general level.¹⁹⁸ “Half of all Americans report knowing someone who has struggled with an opioid addiction” and the opioid crisis in the United States is so severe that it has been compared to the most severe pandemics humanity has faced in recorded

(2011) (“Intervention is more likely to occur when the excessive terms are less conspicuous than the price and are less well understood by the weak party, suggesting that flaws existed in the manner in which assent was reached.”).

¹⁹⁵ Cf. Dan M. Kahan, *Ignorance of Law is an Excuse – but Only for the Virtuous*, 96 MICH. L. REV. 127, 127-130 (1997) (discussing Holmes’ of this axiom as a feature of amoral access to the law without reference to the knowability of the law); see also Sommers and Bohns, *supra* note 43, at 1982 (conducting studies indicating that “a large gulf exists between what most people do and what most people think is reasonable” when it comes to assessing circumstances used to determine consent).

¹⁹⁶ GALOTTI, *supra* note 189, at 412 (“Knowledge base” is “Stored information, including all knowledge possessed by an individual...”).

¹⁹⁷ See KENNETH PAUL ROSENBERG, *BEDLAM: AN INTIMATE JOURNEY INTO AMERICA’S MENTAL HEALTH CRISIS XIII* (Avery 2019) (“In this country, one in five adults . . . lives with a mental illness, according to the National Institute of Mental Health (NIMH). Of that total, an estimated 11.2 million people age eighteen or older have a serious mental illness (SMI), leading to some degree of functional impairment.”).

¹⁹⁸ See *id.* at XIII-XIV.

history.¹⁹⁹ Drugs of addiction “hijack” the brain and rewire it to further undermine the infrastructure of the brain that assists us in rational risk assessment.²⁰⁰ An addict in need of an addictive substance does not and will not exercise judgment consistent with the picture of the rational actor in many, if not most, venues.

Repeat actors have sought to harness our susceptibility to addiction by making addiction a feature of a primary commercial forum in which we transact business.²⁰¹ Because of the emergence of social media delivered through smartphones, “[w]hat might once have been called advertising must now be understood as continuous behavior modification on a titanic scale.”²⁰² According to one provocative commentator, we “might be turning, just a little, into a well-trained dog, or something less pleasant, like a lab rat or a robot.”²⁰³ Something “remote-controlled . . . by clients of big corporations.”²⁰⁴

The same commentator described our engagement with social media, and the way in which we supply companies with the data used to program us to consume their goods, as akin to a “relentless, robotic, ultimately meaningless” behavioral modification “in the service of unseen manipulators and uncaring algorithms.”²⁰⁵ The designers of these programs aimed to make us addicted consumers of the internet.²⁰⁶ Their platform and access to us have no precedent in human

¹⁹⁹ See TIMOTHY MCMAHAN KING, ADDICTION NATION 17 (Herald Press 2019).

²⁰⁰ See *id.* at 118 (quoting Addiction Researcher Neil Levy).

²⁰¹ JARON LANIER, TEN ARGUMENTS FOR DELETING YOUR SOCIAL MEDIA ACCOUNTS RIGHT NOW 21 (Henry Holt and Company 2018); see also FRANKLIN FOER, WORLD WITHOUT MIND: THE EXISTENTIAL THREAT OF BIG TECH 1-2 (Penguin Press 2017) (“The most ambitious tech companies . . . are in a race to become our ‘personal assistant.’ They want to wake us in the morning, have their artificial intelligence software guide us through the day, and never quite leave our sides. They aspire to become the repository for precious and private items, our calendar and contracts, our photos and documents. They intend for us to unthinkingly turn to them for information and entertainment, while they build unabridged catalogs of our intentions and aversions. Google Glass and the Apple Watch prefigure the day when these companies implant their artificial intelligence within our bodies.”)

²⁰² LANIER, *supra* note 201, at 6.

²⁰³ *Id.* at 7.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 23.

²⁰⁶ *Id.* at 8; see Tim Wu, THE ATTENTION MERCHANTS 6 (2016) (“Now, however, most of us carry devices on our bodies that constantly find ways to commercialize the smallest particles of our time and attention. Thus, bit by bit, what was once shocking became normal, until the shape of our lives yielded further and further to the logic of commerce—but gradually enough that we should find nothing strange about it.”); see also ROGER MCNAMEE, ZUCKED 2 (Penguin Books 2020)

existence.²⁰⁷ We are so addicted that we engage in commercial transactions that put the welfare of our children at risk at epidemic levels and without any sense that we are doing so.²⁰⁸

This development has implicated another area related to adult self-control: consumer credit-rating. In many areas of commercial life, a person's ability to contract will be dictated by their credit-worthiness. Credit-worthiness is assessed in terms of a person's credit-rating or credit-score. In the modern era, a credit score has become a function of undisclosed, obscure, and opaque calculations drawn, in part, from data generated by consumers over the internet, that government regulators do not understand, and individual consumers cannot assess.²⁰⁹

The effect of hits to credit-worthiness arising from damages alleged against a couple was depicted in a news report aired by National Public Radio in early March 2020.²¹⁰ The story depicts the plight of two educated, married adults who purchased a figurine, commented about the deficiencies of the product the seller conveyed and received notice from the seller that they were being fined for disparaging the company online.²¹¹

The basis for the seller's claim was a non-disparagement clause the seller maintained existed in a detailed form contract which the seller argued imposed

("Technology platforms, including Facebook and Google, are the beneficiaries of trust and goodwill accumulated over fifty years by early generations of technology companies. They have taken advantage of our trust, using sophisticated techniques to prey on the weakest aspects of human psychology, to gather and exploit private data, and to craft business models that do not protect users from harm.").

²⁰⁷ See DAVID PERLMUTTER AND AUSTIN PERLMUTTER, *BRAIN WASH* 14 (Little, Brown Spark 2020) ("Our society has experienced a fundamental shift since the beginning of the twenty-first century, largely because of an explosion in the availability of personal technology that keeps us locked on the grid. It's estimated that 70 percent of humans on the planet now own a smartphone. Data shows that the average internet user spends more than two hours a day on social networking. One survey found that 42 percent of the time Americans are awake, their eyes are fixated on a television, smartphone, computer, tablet, or other device.") (footnotes omitted).

²⁰⁸ See LEAH PLUNKETT, *SHARENTHOOD* 21 (Massachusetts Institute of Technology 2019) (noting how data parents post about children online can facilitate "criminal, illegal, or hostile adult activities" including child pornography, identify theft, stalking, trolling, and cyber bullying).

²⁰⁹ See FRANK PASQUALE, *THE BLACK BOX SOCIETY* 24 (Harvard University Press 2015) ("In the Heisenberg-meets-Kafka world of credit scoring, merely trying to figure out possible effects on one's score can reduce it.").

²¹⁰ See Planet Money, *Terms of Service*, NATIONAL PUBLIC RADIO (Mar. 4, 2020), <https://www.npr.org/transcripts/812264543> <https://perma.cc/R8VT-77PJ>.

²¹¹ *Id.*

obligations on the couple.²¹² The seller's position affected the couple's credit standing, which, in turn, obstructed their ability to engage in consumer activity like purchasing a car and a heating system in their home.²¹³ In the story, one of the members of this couple describes the quandary she found herself in as a result of the contract law position taken by the seller:

We tried to get emergency financing [to get a new furnace when her hot water heater died]. Every company I tried to go through turned us down. So finally, I'm at my wit's end. It's October in Utah. My house has no furnace. I have a 3-year-old and thinking to myself, oh, my God, we're going to end up in—with a frozen house. And CPS is going to come and take my child away because I can't keep the heat on because of this stupid mark on John's credit and there's nothing we can do. So finally, I mean, I am almost crying. I'm at work, and I have no idea what to do.²¹⁴

When considering that the root of this situation was a demand arising from an online form contract, the NPR reporter observed: "It feels like we've gotten to a place where, in order to be an informed consumer, you have to be a contract lawyer with an absurd amount of free time on your hands."²¹⁵ There is only the smallest fraction of society that would meet this definition.²¹⁶

Another specialist in the area has noted that this phenomenon breeds greater levels of bargaining inequality under circumstances where "[d]ata is becoming staggering in its breadth and depth, yet often the information most important to

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See APPELBAUM, *supra* note 154, at 305-306 ("A half century of experience 'self-policing' has amply demonstrated that even the most sophisticated customers are frequently victimized by financial industry professionals. . . . The average adult obtains a few mortgage loans in a lifetime, from bankers who make more loans before lunchtime. The paperwork is overwhelming; the language is impenetrable. And the most vulnerable borrowers often are least equipped to parse the details."). The problem of problematic contracts has even reached the doorstep of the very institution that sponsors this law review, demanding that students engage in the review of contracts proposing "informed consent" before returning to school in the fall of 2020 amid the Covid-19 pandemic. See Jonathan Phelps, *UNH Students worry about 'consent agreement' to return amid pandemic*, UNION LEADER (July 19, 2020) ("University of New Hampshire students are worried about a mandatory 'informed consent agreement' they must sign to return to campus in the fall, which they fear could prevent them from holding the school accountable during the pandemic.") available at https://www.unionleader.com/news/education/unh-students-worry-about-consent-agreement-to-return-amid-pandemic/article_8d6370da-274a-5f0d-bf04-cfb990c21017.html <https://perma.cc/5ZMY-S9WQ>.

us is out of our reach, available only to insiders.”²¹⁷ When discussing the extent to which the American public has bargained away any semblance of privacy without any understanding of the transactions they have engaged in with commercial giants like Google and Facebook, another has commented:

Our digital century was to have been democracy’s Golden Age. Instead, we enter its third decade marked by a stark new form of social inequality best understood as ‘epistemic inequality.’ It recalls a pre-Gutenberg era of extreme asymmetries of knowledge and the power that accrues to such knowledge, as the tech giants seize control of information and learning itself.²¹⁸

The extreme imbalances in negotiating power in most consumer contracts render their contracting capacities a nullity. Across mass consumer domains, sellers exercise overwhelming power to draft uniform terms for contracting that consumers could not alter through negotiation, even if they wanted to engage the negotiation process. It is not surprising, then, that consumers pay little attention to the fine print in most of their consumer contracts.²¹⁹

There is no mechanism by which consumers may alter this fine print, which is pervasive and beyond their grasp to comprehend. Consumers approach these terms as a *fait di accompli*. They do so without any ability, predisposition, or incentive to assess the risk of doing so. Indeed, they even punish themselves through harsh self-assessments when they face the consequences of having accepted these terms, adopting an Aristotelian view of contract honor though they face negotiating partners who deliberately take advantage of their weaknesses to coax them into a series of self-nullifying bargains.²²⁰

The problem raises the probability that we have experienced private

²¹⁷ PASQUALE, *supra* note, at 209. In another venue, some argue that new, endorsed forms of private investment have rendered investors in the private equity firm irrelevant by cutting off the flow of information and trapping investors in arrangements they cannot exist. See William Magnuson, *The Public Cost of Private Equity*, 102 MINN. L. REV. 1848, 1882-84 (2018).

²¹⁸ Shoshanna Zuboff, *You Are Now Remotely Controlled*, NY TIMES (Jan. 24, 2020), <https://www.nytimes.com/2020/01/24/opinion/sunday/surveillance-capitalism.html#click=https://t.co/RKUJMJZ6ZB> <https://perma.cc/B2DF-3KXR>.

²¹⁹ See Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 467 (2019) (“With unimaginable amounts of information at our literal fingertips . . . there is nonetheless a pervasive sense of disquiet that we, as individuals and as collective, are facing something like an epistemic crisis. The sheer volume of information may overwhelm our ability to categorize, process, sort, and remember. . . . The degradation of our attention spans makes it hard to engage in deep thinking and learning. And so on.”) (footnotes omitted).

²²⁰ See Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. 885, 887 (2019) (“And because people also tend to think that breaking a promise is wrong, they think they are subject to a corresponding moral obligation to perform the contract.”) (footnotes omitted).

governmental amendments to the United States Constitution, and its state constitutional analogs, through mass enforcement of controversial terms within contracts of adhesion.²²¹ Perhaps the most salient threats come from terms that enforce private arbitration awards or disclaim the full gamut of remedies ordinarily available to Americans injured in the marketplace.²²² Because Americans do not have a baseline understanding of the importance of their legal rights, they are generally not aware that they are facilitating a mass, de facto, repeal of constitutional protections conferred on those among us who are injured by counterparties responsible for these self-serving changes to our constitution.²²³

The standard explanation for this phenomenon avoids the elephant in the room. By couching the barriers between adults and full agency in terms of impracticability, for instance, ALI's proposal soft-pedals the innate and environmental barriers that face consumers. The proposal does so even as the view acknowledges that standard remedies that rely on disclosure of terms to render those terms as salient as possible will not result in "more prudent contracting decisions."²²⁴

The future does not suggest that things will get better for consumers. Advances in technology threaten to create a greater chasm between the abilities of humans and those of future robotic counterparties that will be able to negotiate with a far greater capacity to assess risk. The information and information processing approaches of these counterparties likely will be inaccessible, or unknowable, to consumers and regulators, even as these new technologies continue the process of

²²¹ See Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1659–61 (2020) (describing threats concentrated economic power poses to liberty and self-determination).

²²² See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) ("There is one additional aspect of the situation that is not included in the model but still forms part of the popular conception of the contract of adhesion: the adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion, and the few empirical studies that have been done have agreed.") (footnotes omitted)

²²³ See, e.g., Matthew Shaw, *Civic Illiteracy in America*, HARVARD POLITICAL REVIEW (May 25, 2017) <https://harvardpolitics.com/culture/civic-illiteracy-in-america/> [<https://perma.cc/N9SA-R88D>] (last visited Nov. 16, 2019) ("[T]he American public simply lacks basic knowledge about the Constitution and the Supreme Court. In fact, a Newsweek survey from 2011 found that 70 percent of Americans didn't even know that the Constitution is supreme law of the land. . . . [A] 2016 survey by Annenberg Public Policy Center of the University of Pennsylvania found that only 26 percent of respondents could name all three branches of government . . .").

²²⁴ ALI, Restatement of the Consumer Contracts (Tentative Draft) (April 18, 2019) at 3.

harnessing our cognitive deficits against us to bind us to unfavorable terms.²²⁵

C. Acknowledging infancy as a more realistic baseline

When using categories to define people for the purpose of assessing their legal rights and responsibilities, courts go through the process of determining whether the members of a category fit facts established about those subject to the rights and obligations the category confers or imposes, respectively. Age as a proxy for the capacity to contract is susceptible to such an assessment.²²⁶

Vastly overinclusive categories, that is, categories that are a bad fit because they include the intended subjects as well as many more unintended subjects, demonstrate the deficits of a law.²²⁷ Vastly underinclusive categories, that is, categories that are a bad fit because they fail to include many intended subjects the law seeks to regulate, also demonstrate deficits in the law.²²⁸

Nothing about the picture of adult capacities and performance demonstrates that adulthood, in reality, fits adulthood as a category defined by law.²²⁹ In other words, nothing about this picture signals that American adults are, in fact, “adults” possessing those qualities that define what it is to be an adult “under” the law as it relates to consumer contracts of the sort Judge Easterbrook and others would enforce against adults. The question is whether the law has access to a category that constitutes a better fit. This article proposes extended infancy as a better fit, where other, less encompassing conditions, such as mental illness, old-age, addiction, or any other status of vulnerability, would minimize facts that demonstrate, ubiquitous adult vulnerability and incapacity within the domain of consumer

²²⁵ CARL T. BERGSTROM & JEVIN D. WEST, *CALLING BULLSHIT* 29 (2020) (“Riffing on Allen Ginsburg, tech entrepreneur Jeff Hammerbacher complained in 2011 that ‘the best minds of my generation are thinking about how to make people click ads. That sucks.’ . . . The problem is that all of this intellectual firepower is devoted to hijacking our precious attention and wasting our minds as well.”).

²²⁶ See, e.g., Howard Eglit, *Of Age and the Constitution*, 57 *CHI.-KENT. L. REV.* 859, 860 (1981) (“[R]eliance upon age categorizations facilitates decisionmaking. Rather than a program administrator having to engage in the time-consuming and costly exercise of determining whether an individual does or does not fit into a programmatic charter, he can rely upon a clear, indisputable fact—the age of the person involved.”).

²²⁷ See Cass Sunstein, *Problems with Rules*, 83 *CAL. L. REV.* 953, 992–93 (1995) (providing examples).

²²⁸ *Id.*

²²⁹ See Vivian Hamilton, *Adulthood in Law and Culture*, 91 *TULANE L. REV.* 55, 59 (2016) (“Scholars and jurists alike have critiqued the body of law affecting young people as lacking coherence. Much of the criticism focuses on the challenges posed by attaching different legal consequences to different ages.”).

contracts.

Infancy is synonymous with minority under the law.²³⁰ In the law of contracts, contracts entered into with a minor are void or voidable.²³¹ That is, courts either determine that no party can save the contract or that one party, the minor, can enact the contract at his/her/their discretion. The age of minority in the area of contracts has changed over time. At common law, a person remained an infant until the age of twenty-one.²³² In the United States, the common law rule was changed in the 1970s, altering the law so that the age of minority ended at the age of eighteen.²³³ By some accounts, “the infant has capacity to contract coupled with an additional power of disaffirmance.”²³⁴ This has been the law for centuries.²³⁵

The application of the infancy defense to contract law disputes has been highly contingent. That is, the strength and effect of the infancy defense have depended upon whether the contract is or was prejudicial, possibly beneficial, or certainly beneficial to the alleged infant.²³⁶ Similarly, in both tort and criminal law, the law assesses responsibility based upon demonstrated capacity rather than with reference to age classification alone.²³⁷ A child’s capacity under the law may even deteriorate from a prior position of greater capacity at a younger age, depending upon the circumstances of the child’s life.²³⁸

Explanations for why children are treated differently as a class relate to their vulnerability and intellectual capacity, and to the interests of parents in directing

²³⁰ 7 CORBIN ON CONTRACTS § 27.2 (2020) (“In everyday language we distinguish between adults and minors. Lawyers, however, often refer to minors as ‘infants.’”).

²³¹ *Id.*

²³² *Id.*

²³³ *Id.*

²³⁴ *Id.*

²³⁵ See 5 WILLISTON ON CONTRACTS § 9:2 (4th ed.) (“By the 15th century, it seems to have been well-settled that an infant’s bargain was in general void at his election, that is voidable, and also that the minor was liable for necessities.”); *but see* Brewer, *supra* note 75 at 238 (“Although the age of twenty-one in some cases defined ‘minority,’ it did so only loosely as an outside delimiter, and only within the common law,” which Brewer describes as far more limited in medieval times).

²³⁶ See WILLISTON, *supra* note 235, at § 9:5.

²³⁷ See ABRAMS, ET AL., *supra* note 40, at 835 (“In negligent claims, about a dozen states follow a ‘rule of sevens,’ which holds that children under seven are incapable of negligence as a matter of law, children between seven and fourteen are presumptively incapable, and children over fourteen are presumptively capable.”) (citations omitted).

²³⁸ *Id.* at 195 (an emancipated child may secure an order compelling parental support if the child falls on hard times) (citations omitted).

their activities.²³⁹ Central to the separate status granted to children is the observation that “children . . . lack the capacity to make sound decisions. Because of their immature cognitive development, children are unable to employ reasoning and understanding sufficiently to make choices on the basis of a rational-decision-making process.”²⁴⁰

The treatment of minors as requiring greater protection under the law finds support in child psychology. In the 20th century, Jean Piaget, the most well-known theorist in the area of child cognitive development, proposed “what developmental psychologists call a stage theory of cognitive development. Stage theories . . . are those that view development as proceeding in qualitatively different steps, each one occurring in a set order and typically with an associated age range.”²⁴¹

Piaget proposed a theory of development in which children develop in near uniformity through a series of cognitive stages, reaching ultimate maturation at the end of these stages.²⁴² Piaget proposed that children reach their highest potential competence in late adolescence.²⁴³ This stage is one in which a child is able to engage in formal operations. At this stage:

[A]dolescence, for the first time, to see reality as only one of several possibilities. This allows the adolescent to be able to imagine other kinds of realities, ones where different rules or expectations apply. This new liberation of thought has been described as one of the sources of adolescent idealism and political awakening. Now that they see that the existing rules are only one possible way of doing things, they can question the validity of the rules and propose alternatives...Adolescents’ awareness of different possibilities opens up for them many different possible paths to the future because they can think beyond old limits. Thus they can . . . question social norms, rules, and systems—including school policies, religious teachings, and political processes.²⁴⁴

²³⁹ See *Bellotti v. Baird*, 443 U.S. 622, 633–34 (1979) (The United States Supreme Court has “recognized three reasons justifying the conclusion that the constitutional rights of children cannot be equated with those of adults: the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”); see also BREWER, *supra* note 75, at 5–8 (describing evolution of capacity to contract during Enlightenment).

²⁴⁰ Elizabeth C. Scott, *The Legal Construction of Adolescence*, 29 HOFSTRA L. REV. 547, 550 (2000); see also Anne Dailey, *Children’s Constitutional Rights*, 95 MINN. L. REV. 2099, 2103 (2011) (“Under choice theory, the quality of mind most frequently identified as missing in children is the capacity for cognitive, rational thought.”).

²⁴¹ KATHLEEN M. GALOTTI, *COGNITIVE DEVELOPMENT: INFANCY THROUGH ADOLESCENCE* 19 (2017).

²⁴² See *id.*

²⁴³ See *id.* at 39.

²⁴⁴ See *id.*

However, even according to Piaget, minors, like all people, “do not always display their highest competence. Instead, his idea was that adolescents who acquire formal operations have the ability to think abstractly, systematically, and logically, even if they do not always do so.”²⁴⁵

Indeed, the research of Piaget’s successors concluded that he greatly overestimated the capacity of adolescents and adults to engage in the sort of rational thought process he describes as the highest stage of human cognition.²⁴⁶ According to one scholar, “research reflects” that “American adults do not often reason at the formal level,” that is, they do not even reach the stages of developed thought Piaget associated with late adolescence.²⁴⁷

Lev Veygotzky, for instance, a 20th-century child psychology scholar of similar standing, challenged Piaget’s lock-step approach to child development. He offered a competing theory of child development, arguing that “all humans are inextricably part of a matrix that surrounds them, and their behavior cannot be analyzed or understood without simultaneously understanding and analyzing that matrix.”²⁴⁸ Under this perspective, the determination of the child’s capacities requires an assessment of the child in relation to the child’s environment as a means of understanding how the child’s environment impacts the child’s development and capacity.²⁴⁹

At the upper end is the performance a child is capable of, either with help from an adult or experienced older child, with the right set of props or tools, or in play. This zone represents potential development. As the child develops more ability, the zone changes as well. The important point is that at any given point in time, the child’s ‘true’ ability is not one level, but actually a range, depending on the circumstances in which the child is performing.²⁵⁰

As child psychology developed further, its top researchers continued to deploy domain-specific theories in which capacity was assessed against a specific environment in which the actor was asked to perform tasks. They did so because of the failure of domain-general theories “to account for the heterogeneity of cognitive

²⁴⁵ *Id.* at 39-40.

²⁴⁶ See DAVID BJORKLUND, CHILDREN’S THINKING 105 (4th ed. 2005).

²⁴⁷ See *id.* at 85 (Describing “formal operations” as the stage in which children “are able to make and test hypotheses” and children are “able to introspect their own thought processes and, generally, can think abstractly.”).

²⁴⁸ GALOTTI, *supra* note 241, at 40.

²⁴⁹ *Id.* at 41.

²⁵⁰ See *id.*

function” observed in development.²⁵¹ In other words, as our assessment of child capacity developed, specialists focused on specific environments when determining whether a child’s internal capabilities facilitated capacity within any given specific environment, without generalizing capacity from one environment to another.²⁵²

These developments challenge categorical theories regarding human development that assess human capacity at a general level without considering domain. They also raise questions regarding the current approach to capacity under contract law, which imposes “a binary classification system, in which individuals are either minors or adults,” despite the fact that development is understood to be more fluid and context-dependent than the law acknowledges.²⁵³

A greater level of focus on domain-specific assessments of capacity dovetails with the most sophisticated treatment of the issue of capacity by legal scholars, who have observed, that “individuals acquire different capabilities across the course of their development and exercise them with varying levels of competence in different contexts.”²⁵⁴ These same scholars have noted that the capacity to engage in private and public activities has never been linked to a stable age-cutoff and is, quite often, linked to questions regarding the domain where capacity is to be exercised.²⁵⁵

For centuries, for instance, one reached an age of capacity to contract not at the age of eighteen but at twenty-one.²⁵⁶ When life expectancies were drastically truncated,²⁵⁷ one could not serve as a knight in Medieval England until the age of twenty-one.²⁵⁸ Today, one cannot purchase alcohol until the age of twenty-one. One cannot purchase a credit-card by oneself before that age either.²⁵⁹ One cannot rent a car until the age of twenty-five. One remains a child for the purpose of healthcare

²⁵¹ See BJORKLUND, *supra* note 246, at 18; see also *id.* at 107 (discussing neo-Piagetian theories, including an approach that provides that “it is inappropriate to think of a child as ‘possessing’ a fixed level of skill. Rather, one’s dynamic skills are always changing as a people adjust and reorganize their skills in response to situations in the environment.”).

²⁵² See *id.*

²⁵³ See Hamilton, *supra* note 229, at 62.

²⁵⁴ *Id.* at 59; see also *id.* at 87 (“Studies have confirmed adolescents’ competence to make rational decisions, but the contexts in which adolescents make decisions can drastically affect the quality of their decision making.”) (citations omitted).

²⁵⁵ *Id.* at 62.

²⁵⁶ *Id.* at 64.

²⁵⁷ See Eglit, *supra* note 226, at 865 (noting that “Few people lived to see their 60s and 70s in eighteenth century America.”).

²⁵⁸ Hamilton, *supra* note 229, at 62.

²⁵⁹ *Id.* at 71.

until the age of twenty-six.²⁶⁰ One cannot serve as a member of the United States House of Representatives until the age of twenty-five, cannot serve as a United States Senator until the thirty, and cannot serve as President or Vice President of the United States until the age of thirty-five.²⁶¹

One loses capacity under the law as well. One can become a commissioned member of the United States military until the age of thirty-five with domain-specific exceptions for service as a chaplain or medical officer up to the age of forty-seven.²⁶² One loses the power to serve as a judge in state courts throughout the nation at seventy to seventy-five.²⁶³

Thus, our laws have a demonstrable, deep, if imperfect, tradition of modulating standards about age and capacity, many of which are designed to fit the domains in which capacity is demanded.²⁶⁴ In other words, our law has demonstrated an ability to change its perspective on adult capacity and render domain-specific conclusions about adult capacity in many fundamental areas of American life.

If we take this approach to consumer contracts, we must conclude that, even though children reach what might be characterized as general levels of intellectual and cognitive development associated with adulthood before the age of eighteen, there is no evidence that children ever reach a stage of capacity with regard to consumer contracts as currently devised.

That is, children never reach an age where they will pay attention to, understand, or affect their contract rights, given the nature of the consumer contracts they are said to have entered into by our courts of law. This article thus proposes that courts should permit adults to litigate the question of their own capacity and to render void contracts or contract terms that they have entered into with capacities that in no way differ from the capacities of minors who may seek similar relief.

²⁶⁰ *Id.* at 58.

²⁶¹ See Eglit, *supra* note 226, at 864 (citing U.S. CONST. art. I, §§ 2–3, art. II, § 1).

²⁶² See Stewart Smith, *Maximum Age to Become an Officer in the Military*, The Balance Careers (June 6, 2019), <https://www.thebalancecareers.com/maximum-age-to-become-officer-in-military-3354085> [<https://perma.cc/S8AY-5GCT>].

²⁶³ See Malia Reddick, *Mandatory Retirement Ages for Judges: How Old is Too Old to Judge?* IIALS Blog (July 22, 2015), <https://iaals.du.edu/blog/mandatory-retirement-ages-judges-how-old-too-old-judge> (last visited Jan. 26, 2020) [<https://perma.cc/BX4N-D6TW>] (“According to the National Center for State Courts, 32 states require at least some judges to retire at a certain age—usually between 70 and 75.”).

²⁶⁴ See BREWER, *supra* note 75, at 17 (describing the passage of law in colonial Virginia “making the elections of all those under age twenty-one void”) (footnote omitted).

D. “Extended Infancy” Meets the Theoretical Demands of Contract Law

The proposal may seem radical.²⁶⁵ Yet for most American adults, under our current conceptualization of adulthood, our status as relevant contract actors is becoming more tenuous by the day.²⁶⁶ Trends suggest that marketing technology will only continue to harness human vulnerabilities in a manner that drastically threatens commercial free agency.²⁶⁷ Capacity and agency questions will become even more acute as large firms accelerate their reliance on AI to widen the gap between corporate and individual capacities in the area of contract negotiations.²⁶⁸

This is true even as the standard sources of strength and protection have proved themselves insufficient to remedy the problems.²⁶⁹ Recent reports indicate that firms design communication and marketing strategies to take advantage of the mass illiteracy of adult Americans in the digital world. Among other things, they do so to mine information about children for their own marketing purposes and even for the purpose of conducting surveillance upon them.²⁷⁰

²⁶⁵ Cf. Stephen Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) (suggesting that the law of torts should be replaced because it fails to achieve its stated ends).

²⁶⁶ See, e.g., PETER H. DIAMANDIS & STEVEN KOTLER, *THE FUTURE IS FASTER THAN YOU THINK* 36–37 (2020) (describing how AI has “invaded finance, insurance, retail, entertainment, healthcare, law, your house, car, telephone television, even politics”).

²⁶⁷ See ALTER, *supra* note 16, at 39 (describing behavior addiction to technology as an intergenerational cycle of addiction).

²⁶⁸ See, e.g., Beverly Rich, *How AI is Changing Contracts*, HARVARD BUS. REV., Feb. 12, 2018, at 2, 3 (“AI software . . . can easily extract data and clarify the content of contracts. . . . It can let companies review contracts more rapidly, organize and locate large amounts of contract data more easily, decrease the potential for contract disputes, and in create the volume of contracts it is able to negotiate and execute.”); Marco Iansiti and Karim Lakhani, *Competing in the Age of AI*, HARVARD BUS. REV., Jan.-Feb. 2020, at 61, 67 (“The potential for businesses that embrace digital operating models is huge, but the capacity to inflict widespread harm needs to be explicitly considered.”); see also SAFIYA UMOJA NOBLE, *ALGORITHMS OF OPPRESSION 1* (2018) (“On the internet and in our everyday uses of technology, discrimination is also embedded in computer code and, increasingly, in artificial intelligence technologies that we are reliant on, by choice or not. I believe that artificial intelligence technologies will become a major human rights issue in the twenty-first century.”).

²⁶⁹ See, e.g., RESTATEMENT (THIRD) OF CONSUMER CONTRACTS (Tentative Draft), *supra* note 224, § 1, Reporters’ Notes at 14 (“Professional transactors accumulate experience and expertise, which help them recognize the various aspects of the transaction, including the non-negotiated standard contract terms. Consumers, in contrast, do not have the same experience and expertise to draw on.”).

²⁷⁰ See, e.g., Hua Hsu, *Instagram, Facebook, and the Perils of Sharenting*, NEW YORKER (Sep. 11, 2019), <https://www.newyorker.com/culture/cultural-comment/instagram-facebook-and-the->

Other reports indicate that sophisticated firms have taken advantage of the cognitive disabilities of even the most educated and experienced professionals, physicians prescribing opioids, to get physicians hooked on their addictive drugs as a standard treatment method. Still other reports indicate that academics pawn their services for the express purpose of sowing confusion and doubt in the minds of the general public around consumer safety questions.²⁷¹

Consider, as an example, the much-publicized report disseminated by CNN, the *New York Post*, *Vice*, and through Twitter, that, “in a survey of 737 beer-drinking Americans, 38 percent said they ‘would not buy Corona [beer] under any circumstances now,’” in the aftermath of the outbreak of a new, virulent form of coronavirus.²⁷² Another news outlet has reported that the survey included a series of obviously flawed and biased elements “that journalists working for outlets from CNN to the *New York Post*” failed to disclose, including that “[o]f those Americans who *did* report regularly drinking Corona, only 4 percent said they would not stop drinking the beer.”²⁷³

One credible conclusion one might draw is that:

perils-of-sharenting [<https://perma.cc/9EQC-JTPA>] (“The underlying problem with sharenting is the same with many adult-world surveillance and privacy issues: the bargain we have made in exchange for these services is that we surrender our data and choose not to imagine the worst-case scenarios. At a time when we’re increasingly aware of data privacy and surveillance, what unforeseen consequences might there be to maintaining what Plunkett terms a ‘digital dossier’—especially one that stretches all the way back to the parents’ gleeful Facebook post revealing that they are expecting; Anya Kamenetz, *The Problem with “Sharenting”*, N.Y. TIMES (June 5, 2019), <https://www.nytimes.com/2019/06/05/opinion/children-internet-privacy.html> [<https://perma.cc/F6LB-T3SX>] (“Benjamin Herold detailed in Education Week how private companies are monitoring student assignments, emails and even social media posts. Students have become accustomed to the surveillance.”). The law appears indifferent to this state of affairs. See, e.g., Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. ON REG. 45, 48 (2019) (“There exists no . . . general law of data privacy in the United States. Instead, a business’s use of its consumers’ information is subject to a patchwork of federal and state laws.”).

²⁷¹ See NAOMI ORESKES & ERIK M. CONWAY, MERCHANTS OF DOUBT 6 (2010) (“In case after case, Fred Singer, Fred Seitz, and a handful of other scientists joined forces with think tanks and private corporations to challenge scientific evidence on a host of contemporary issues. In the early years, much of the money for this effort came from the tobacco industry; in later years, it came from foundations, think tanks, and the fossil fuel industry. They claimed the link between smoking and cancer remained unproven.”).

²⁷² Yascha Mounk, *What the Dubious Corona Poll Reveals: Americans Are Desperate to Believe the Worst about One Another*, THE ATLANTIC (Mar. 6, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/about-corona-poll/607240/> [<https://perma.cc/F37P-J555>].

²⁷³ *Id.*

The strange virality of the Corona poll demonstrates that there are ruthless PR flacks who are willing to play fast and loose with the truth. It also shows that there are many journalists at supposedly trustworthy news outlets who are so desperate to rush to publication that they can wind up misinforming their public. (What else is new?).²⁷⁴

The success of these efforts across professional and media sources of information has had catastrophic consequences for vulnerable adults.²⁷⁵ At least one conclusion we should draw from this information is that even those we might say are the strongest adults among us, strong enough to serve as proxies for other adults where we are not competent, are not as strong as they must be to protect us from the predatory nature of contemporary commercial life.²⁷⁶

The demonstrable permeability of these traditional protections provides yet another factor about the environment in which adults contract that challenges the notion that adults can reliably access information through experts and specialists

²⁷⁴ *Id.*; see also ZUBOFF, *supra* note 19, at 7 (“A detailed analysis of Nest’s policies by two University of London scholars concluded that were one to enter into the Nest ecosystem of connected devices and apps, each with their own equally burdensome and audacious terms, the purchase of a single home thermostat would entail the need to review nearly a thousand so-called contracts.”).

²⁷⁵ See Shahram Ahari, *I Was a Drug Rep. I Know How Pharma Companies Pushed Opioids*, WASH. POST, Nov. 26, 2019, https://www.washingtonpost.com/outlook/i-was-a-drug-rep-i-know-how-pharma-companies-pushed-opioids/2019/11/25/82b1da88-beb9-11e9-9b73-fd3c65ef8f9c_story.html [<https://perma.cc/QP9F-4CND>] (describing how pharma marketing effected opioid prescription practices resulting in the consequences of over-prescription); Cynthia M. Ho, *A Dangerous Concoction: Pharmaceutical Marketing, Cognitive Biases, and First Amendment Overprotection*, 94 INDIANA L. REV. 773, 775 (2019) (“Is more information always better? First Amendment jurisprudence takes this as a given. However, when information is only available from a self-interested and market-savvy pharmaceutical company, more information may simply lead to more misinformation. . . . Doctors are susceptible to the same largely unconscious cognitive biases as all individuals” that render them susceptible to marketing techniques deployed by pharmaceutical firms.).

²⁷⁶ This issue has been identified as one facing modern democracy more generally. See RUSSELL MUIRHEAD & NANCY ROSENBLUM, *A LOT OF PEOPLE ARE SAYING* 125–26 (2019) (“Democracy sometimes depends on trust in communities of special knowledge because it is impossible for every person to work up a scientifically grounded understanding of every domain of expertise that is relevant to politics.”). At least one author suggests that software designed as benevolent artificial intelligence is not designed to protect people in dire situations beyond their general comprehension. See Greg Callaghan, *Robo Advisers: An Argument for More Information Solicitation and Disclosure to Satisfy Fiduciary Duties* 14 (Dec. 18, 2019) (unpublished manuscript) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3506507 [<https://perma.cc/2XN6-63U3>] (describing how automated investment advisors failed investors during the 2008 financial crisis because they were not equipped to provide advice inside stressed market circumstances).

in order to protect their interests in the marketplace.²⁷⁷

In response, the approach this article takes in support of the individual autonomy and freedom which the mechanism of a contract would otherwise provide is to acknowledge our limitations in a world that imposes shifting environmental constraints and pressures upon which our capacities are contingent.²⁷⁸ In this article, these constraints take the form of complex, unreadable, unread, and sometimes hidden contract terms that no consumer has the power to negotiate, regardless of their intelligence, foresight, wisdom, or other internal capabilities.²⁷⁹

The extension of the infancy doctrine protections to adults in this manner provides a solution to the problem of the consumer contract within the larger domain of contract law. The solution would create additional protections adults

²⁷⁷ Continued faith in the role of the protections professionals confer has caused some to double-down on their faith in fiduciaries, with powerful critiques leveled at such an approach. See Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 499-501, 516-17 (2020) (critiquing a fiduciary model that would repose obligations on companies such as Facebook though such companies have pursued strategies that prey on human vulnerability that suggest they may not be best positioned to serve that role).

²⁷⁸ See, e.g., CHRISTINE JOLLS, BEHAVIOR ECONOMICS AND THE LAW at 1 (2010) (“Rather than focusing on how a theoretical and often highly unrealistic ‘homo economicus’ might make decisions, economics has increasingly turned its sights to analysis based on how real people actually behave. Such behavioral economics analysis seeks to enhance the predictive power of economics by improving its underlying model of human behavior.”); see also BLOOM, THE REPUBLIC OF PLATO 123 (1968) (“But in truth justice was, as it seems, something of this sort; however, not with respect to a man’s minding his external business, but with respect to what is within, with respect to what truly concerns him and his own. He doesn’t let each part in hm mind other people’s business . . . but really sets his own house in good order and rules himself . . .”); THE POLITICS OF ARISTOTLE 207 (T.A. Sinclair trans. 1992.) (“In every kind of knowledge and skill the end which is aimed at is good. . . . In the state, the good aimed at is justice; and that means what is for the benefit of the community. Now all men believe that justice means equality in some sense, . . . they hold that justice is some entity which is relative to persons, and that equality must be equal for equals.”); see also ERIC RAKOWSKI, EQUAL JUSTICE 1-2 (1991) (applying ancient philosophy to contemporary questions and asserting that a just society must endeavor to “eliminate discrepancies that cannot be traced to individuals’ choices”).

²⁷⁹ Cf. SUNSTEIN, *supra* note 15, at 62 (“In both rich and poor countries, complexity is a serious problem, in part because it causes confusion . . . in part because it can increase expense . . . and in part because it deters participation in important programs. . . . As a general rule, programs should be easily navigable, even intuitive. In many nations, simplification of forms and regulations should be a high priority.”); see also *id.* at 63-64 (“Simplicity is exceedingly important. . . . In some settings, disclosure can operate as a check on private or public inattention, negligence, incompetence, wrongdoing, and corruption.”).

now need in commercial life. It also meets the goals of the major schools of thought in the area of contract law in contemporary times.²⁸⁰

It does not presuppose capacity, as is the case with respect to amorphous defenses, such as unconscionability, which have been ineffective in protecting the law of contract from the threat of unintelligibility.²⁸¹ It does not presuppose a relevant difference between those adults who suffer from diagnosed mental illnesses and those who do not inside the domain of consumer contracts.²⁸² Indeed, it assumes that all adults require protections arising from pervasive vulnerabilities that the law otherwise refuses to acknowledge.²⁸³ It also rejects “empty vessel” doctrines that courts acknowledge through lip-service while dismantling in application. These include extra-contractual “protections” such as the doctrine that contracts include implied good faith obligations.²⁸⁴

²⁸⁰ See RADIN, *supra* note 18, at 57 (“Philosophy of contract has two main branches: welfare theories and autonomy theories. Welfare theories, stemming from Bentham, involve the maximization of social welfare based on subjective individual choices; autonomy theories, stemming from Kant, involve individual rights derived from the state of freedom of the will.”); see also NATHAN OMAN, *THE DIGNITY OF COMMERCE* 8 (2016) (“Broadly speaking, two contending families of arguments dominate modern contract law theory.”).

²⁸¹ See Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 471, 472 (2014) (“The unconscionability approach requires individual contracting parties to raise the defense and prevail in litigation. However, parties who lack bargaining power will generally also lack the knowledge that they have a legal challenge to the enforcement of terms, and the financial means to litigate.”); see also Anne Fleming, *The Rise and Fall of Unconscionability*, 102 GEO. L. J. 1383, 1386 (2014) (“By the dawn of the twenty-first century, unconscionability had lost much of its initial promise as a tool for protecting poor consumers.”).

²⁸² Cf. *Sparrow v. Demonic*, 960 N.E.2d 296 (2012) (ruling that incapacity may be established in a party in the absence of a diagnosed mental illness if that party cannot rationally comprehend or understand the nature of the transaction).

²⁸³ In patchwork fashion, the law has recognized this, haltingly, in the area of noncompete contracts. See Jamie Maggard & John Vering, *Overreaching Covenants Not to Compete Under Attack from All Sides*, AMERICAN BAR ASSOC., (Dec. 26, 2018) at <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2018/overreaching-covenants-not-to-compete/> [<https://perma.cc/67X4-9AKP>] (describing common law and statutory restrictions on the enforceability of covenant not to compete contracts against employees). For a discussion of general philosophical limitations to notions that justice equates with the enforcement of all so-called voluntary transactions, see G.A. COHEN, *SELF-OWNERSHIP FREEDOM AND EQUALITY* 21 (1995) (“Perhaps the strongest counter-example of this would be slavery. We might then say: voluntary self-enslavement is possible. But slavery is unjust.”).

²⁸⁴ See Michael P. Van Alstein, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L.

In so doing, this article meets the goals of theorists who have supported a promise-focused theory of contract law. This school's most famous exponent is Professor Charles Fried, through his book *Contract as Promise*. Fried argues that the law of contracts should enforce promises that reflect true, mature, contracting agency through adults who take their freedom as seriously as he believes they should.²⁸⁵

This article does not contest that Professor Fried's principles provide a strong basis for enforcing contracts. Instead, it argues that there are fewer contexts in which his principles should apply than he might defend given what we know about adult capacities and the venue in which those capacities must thrive: the form-ridden venue of consumer contracts. It maintains that an unrealistic position that denies adult incapacity undermines rather than furthers the interests of the sort of empowerment Fried embraces. This occurs as a result of a law of contracts that, in effect, undermines any credible confidence that both parties to a contract will engage in the sort of promises he describes.²⁸⁶

It also answers arguments offered by the welfare or consequentialist school of contract scholarship. It does so by sharpening the law's focus on the costs and benefits of the rules governing our transactions, bringing law closer to empirical reality and so promoting greater efficiency and better social outcomes.²⁸⁷ It accomplishes that end, at least in part, by recognizing that there is often true,

REV. 1223, 1224 (1999) (“[T]he 1990s have witnessed the rise of a new textualist approach to the contractual duty of good faith In its extreme form, this view holds that every expressly conferred contractual power is presumptively absolute and unrestricted. Because the parties’ writing reflects the sole repository of interpretive evidence, the textualist logic runs, every such express power renders altogether irrelevant any ‘implied’ notions of ‘good faith’ and ‘fair dealing.’”).

²⁸⁵ See, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* 7 (2d ed. 2015) (“It is a first principle of liberal political morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world.”).

²⁸⁶ See Clough, *supra* note 26, at 478–79 (“[I]f an individual is deemed to have mental capacity, either because they do not have a mental disorder, or because a low threshold test of capacity is set . . . then sources of vulnerability are ignored or obscured, and the means of addressing them are similarly discounted in the name of respecting autonomy. This does not make vulnerability disappear, as there is no state of invulnerable, but it does allow the systems and institutions perpetuating disempowerment to endure.”) (internal citations omitted)

²⁸⁷ See, e.g., ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 202 (5th ed. 2007) (“In general, economic efficiency requires enforcing a promise if the promisor and promisee both wanted enforceability when it was made.”); *id.* at 280 (noting that “stable, well-ordered preferences” are “violated” by “incompetency” and “incapacity”).

unrecognized, value in the rights American adults sign away without understanding them.²⁸⁸

One can imagine that, as a result of a change in rulesets, incentives will arise that will empower the market to support technology that facilitates true negotiation and decision-making, which, in turn, could result in a series of returns to society. In a legal environment that deemed take-it-or-leave-it contracts with incomprehensible terms subject to the challenge that they are not contracts because they render the counterparty incompetent, technology that facilitated negotiation, translation, and tailored pricing could arise to restore consumer capacity. One set of returns under this regime would be a more empowered and engaged consumer population positioned to return greater levels of tailored choice to the marketplace for the purpose of encouraging an ever more efficient market.

In the process, it relies upon advances in the field facilitated through findings from the fields of cognitive psychology and behavior law and economics. Those schools of thought have demonstrated cognitive barriers to considered decision-making inside a world of commerce that moves at an ever-increasing pace and have laid waste to the notion that adults should be deemed presumptively rational and thus capable.²⁸⁹

Incorporating this perspective, this article would place the risk of breach with the competent party who may more efficiently protect the interests of an incompetent party.²⁹⁰ In this regard, it proposes that if the drafter of a consumer contract truly wants to strike an agreement with a counterparty, then the drafter must draft a contract that the counterparty will understand in a manner that signals true agreement. It may be that the consequence of this is that only the most salient

²⁸⁸ See *id.* at 225 (“Dire constraints [to rationality] destroy freedom of action.”); see also Richard Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 288–89 (1979) (“The hypothesis . . . is that . . . the law brings the economic system closer to producing the results that effective competition—a free market operating without significant externality, monopoly, or information problems—would produce.”). But see LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* (2002) (noting that arguments about “efficiency” and “growth” “must provide not only an explanation of why the favored policy has those virtues, but also an argument of political morality that justifies the pursuit of grown or efficiency regardless of other social values.”).

²⁸⁹ See KAHNEMAN, *supra* note 186, at 19–20 (describing two systems of cognition, slow and fast thinking, and the ways in which they affect and warp judgment and decision-making).

²⁹⁰ See *id.* at 281 (“Competent contractual partners are usually better situated than anyone else to protect incompetent people from harmful contracts.”); see HERRING, *supra* note 18, at 48 (“A contract law based around the norm of a vulnerable contractor might impose duties on us to look out for those we contract with, to enter into contracts in good faith, and not give effect to contracts [which] are clearly unfair to one side or the other.”).

or obvious terms will be enforced. If that is the case, the drafters of contracts will engage in a greater level of engagement regarding the terms they value to ensure that those terms are understood as part of the bargain.²⁹¹

The solution this article proposes also meets the demands of critical race and feminist schools of contract law by acknowledging and adjusting to power dynamics that have deepened an imbalance between promisors and promisees in the contract arena.²⁹² It seeks to accomplish the goal by reining in the predatory (or at least amoral) contract-drafting approaches of large companies.²⁹³ To the extent more powerful actors in society have reshaped contract doctrine to exert greater control over less powerful actors, this article asserts a reform that acknowledges that fact, and seeks to rebalance the power imbalance by granting greater legal rights to less powerful actors.

Within this school, this article responds to the claim that it is rendering all so-called “adults” “enfeebled” in a manner that would expose them to the treatment Carrie Buck received from Holmes and his colleagues with following question: Do you accept an approach that would crush the vulnerable as following from an acknowledgement of vulnerabilities?

V. CONCLUSION

Consumer contracts are not contracts. They are one-sided expressions of a more powerful party’s preferences drafted by attorneys working for companies and foisted on consumers who have no idea what they mean and no ability to negotiate as coequal parties to the deal. If contracts are to continue to be taken seriously as a form of memorializing free choice among Americans, understanding and incorporating into the law the true and substantial limits on what we call adult

²⁹¹ See SUNSTEIN, *supra* note 15, at 60 (arguing that simplicity and transparency are fundamental to regimes based on freedom of choice).

²⁹² See generally Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); see also Charles Fried, *The Ambition of Contract as Promise* in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 17, 18–21 (Gregory Klass et al. eds., 2014) (describing the critical school as revealing how contract law doctrine is a product of power dynamics among competing forces).

²⁹³ See Seana Valentine Shffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 712 (2007) (“The content and normative justifications of a legal practice – at least one that is pervasive and involves simultaneous participation in a moral relationship or practice—should be capable of being known and accepted by a self-consciously moral agent.”); see also Seligman, *supra* note 220 at 887–88 (2019) (describing a divergence in views about the morality of contract obligations and its implications for society); GORDLEY, *supra* note 73 (tracking the history of modern contract law to Aristotelian and Thomistic notions of virtue).

capacity is necessary.

Such an understanding would permit adults to put their vulnerabilities forward within disputes to demonstrate how their business counterparts have sought to take advantage of those vulnerabilities to obtain advantages that could not be justified under any justified concept of contract law. As this article demonstrates, the most straightforward way of doing this is to permit adults to argue that they do not have adult capacity and that they should be permitted to access the defense of infancy to render contracts or contract terms void. As this article further demonstrates, such an approach would have theoretical and institutional benefits that would justify the adoption of this proposal.