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Consumer Form Contracting in the Age of Mechanical Reproduction

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CONSUMER FORM CONTRACTING IN THE AGE OF MECHANICAL REPRODUCTION: THE UNREAD AND THE UNDEAD

Ethan J. Leib*
Zev J. Eigen**

What has happened to contract since Grant Gilmore famously pronounced it dead in 1974? This Article points a way past theoretical paralysis caused by the perplexing mismatch between doctrine devised for living and breathing contracts, and behaviors of courts and contracting parties produced by what we refer to as “zombie exchange.” “Zombie contracts” are not the same as contracts produced from what we call “archetypal exchange,” but it is often hard not to acknowledge the legal form in which zombie contracts clothe themselves. Yet individuals likely feel the pre-mortem pull of a moral obligation to do as promised because the zombie contract uses the shell of archetypal exchange to create the impression of a promise that should be kept. This paper explores why contract zombification is costly: individuals trust the rule of law less, respect contracts less, are less able and less willing to consume important disclosed information, and are more likely to retaliate in asocial or illegal ways. We ultimately propose a means of reducing these costs with augmented transparency through a neutral source.

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“I will not negotiate with the undead!”
-David Wellington, *Monster Island*

I. INTRODUCTION

When Grant Gilmore famously noticed that contract was on its death bed,¹ contract’s friends and relatives gathered and expressed concern.² Some agreed that the prognosis was bad.³ Some disagreed.⁴ The conversation focused on the degree to which contract would continue to

1. GRANT GILMORE, *THE DEATH OF CONTRACT* 95 (2d ed. 1995) (“Speaking descriptively, we might say that what is happening is that ‘contract’ is being re-absorbed into the mainstream of ‘tort.’”); *see also id.* at 96 (“We may take the fact that damages in contract have become indistinguishable from damages in tort as obscurely reflecting an instinctive, almost unconscious realization that the two fields, which had been artificially set apart, are gradually merging and becoming one.”); Robert E. Scott, *The Death of Contract Law*, 54 U. TORONTO L.J. 369, 369 (2004) (noting that Gilmore saw “the expansion of legal liability for relied-upon promises as evidence that contract was being swallowed up by tort and would soon disappear as an independent, coherent body of law.”).

2. *See, e.g.*, CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 2 (1981) (asserting that the conception of contractual obligation as “essentially self-imposed has been under increasing pressure over the last fifty years.”).

3. *See, e.g.*, P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 571–779 (1979); Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J., 472–511 (1980); Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483–525 (1985).

4. *See* FRIED, *supra* note 2, at 6 (“Contract law is complex, and it is easy to lose sight of its essential unity. The adherents of the ‘Death of Contract’ school have been left too free a rein to exploit these complexities.”); *see also* Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1291 (1990) (remarking that “*The Death of Contract* is good literature, bad history, and questionable theory,” and that “Gilmore’s picture of the development and decline of classical law is in many respects overdrawn or just wrong. . . .”); Richard E. Speidel, *An Essay on the Reported Death and Continued Vitality of Contract*, 27 STAN. L. REV. 1161, 1177–82 (1975) (book review) (advancing that Gilmore’s “thesis of ‘creeping tortism’ is not tested against the efficacy of individual choice or consent.”).

dominate as the primary means of regulation of economic exchanges, as it had done for the past hundred years or more, depending on how one documents the development of economic exchange.⁵ Concern was both doctrinal and behavioral.

From a doctrinal perspective, what concerned Gilmore and others were the burgeoning alternative regimes of statute and tort.⁶ They thought contract's influence on the observed volume of economic exchanges would be eclipsed by these alternative regulatory schemes, leaving less room for bilaterally exchanged promises, the objective theory of contract, and contractual remedies.⁷ For instance, instead of traditional contractual doctrines like unconscionability, parties would instead rely on negligence and statutory regulation forbidding specific terms in contracts.⁸

The concern about contract's continued viability was also behavioral. Here, the worry was that contracts would be less influential on parties' behaviors relative to alternative factors.⁹ For instance, instead of looking to a contract to determine what happens if a buyer makes a late payment, parties might look to statutes or to social conventions or reputations.¹⁰ This behavioral death of contract is a way of observing a growing gap between law "on the books" and law "in action."¹¹

As contract allegedly died a slow death, contract theorists, lawyers, and judges grappled with the growing fundamental and profound mismatch between contract doctrine and contract as experienced. The focus was sharply on growing regimes of tort and statute as applied to areas of dyadic exchange and economic relationships that maybe should be the sole domain of contract.¹² Significantly less attention has been paid to an underlying shift in the way contracts are formed, experienced, and enforced. Below, we attribute the repeatedly observed mismatch between contract doctrine and contract in action to an articulable and palpable

5. See GILMORE, *supra* note 1; see also Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 63-64 (1963) (concluding that relationships are often more important than contract terms in business exchanges).

6. See GILMORE, *supra* note 1, at 85-87 (noting that "consideration theory . . . [has] suffered considerable statutory erosion" since the 1930s); *id.* at 95 ("[C]ontract" is being reabsorbed into the mainstream of 'tort.'").

7. See, e.g., *id.* at 87; see also Macaulay, *supra* note 5, at 55 (introducing the article asking, "[w]hat good is contract law?"). See generally LAWRENCE M. FRIEDMAN, *CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY* 82-215 (1965) (examining changes in contract law from the Civil War through the 1950s).

8. See GILMORE, *supra* note 1, at 105.

9. See, e.g., Celia R. Taylor, *Self-Help in Contract Law: An Exploration and Proposal*, 33 WAKE FOREST L. REV. 839, 839 (1998).

10. See, e.g., N.Y. PERS. PROP. LAW § 501 (McKinney 2011) (regulating late fees for rental-purchase agreements).

11. See Macaulay, *supra* note 5, at 64 (pointing out that "[e]ven where agreement can be reached at the negotiation stage, carefully planned arrangements may create undesirable exchange relationships between business units," for businessmen may "welcome a measure of vagueness in the obligations they assume so that they may negotiate matters in light of the actual circumstances.").

12. See FRIED, *supra* note 2, at 4-5.

transition from what we call “archetypal exchange” to what we will call “zombie exchange.”

Regardless of the cause for the demise and what portion can be pinned on the rise of alternative regimes or the underlying shift in contracting parties’ behaviors, contract was partially dead or dying, and this created a state of uncertainty. Contract theory developed around this uncertainty by attempting to harmonize or shoehorn old doctrines into new exchange settings. For instance, the doctrine of unconscionability was not initially designed to cover end-user license agreements (“EULAs”) between freeware distributors and users downloading media from the Internet.¹³ That doctrine contemplates two parties on unequal footing knowingly entering into a one-sided contract.¹⁴ It was not designed for a situation in which two parties could not name the other person, as is the case when an individual enters into a contract with a corporation in the typical online exchange.¹⁵ Most contract doctrine covered in first-year law courses was formulated well before judges could foresee a time when computers could facilitate double-blind¹⁶ contracting on such a grand scale as permitted by the Internet today. It is, therefore, unsurprising that sometimes the application of such doctrines to novel settings requires back-bending that produces suboptimal results both in terms of economic efficiency and welfare enhancement.¹⁷ This is the current state of contract theory in the post-contract-is-dead world. Theory has been paralyzed by the choice to either accept that old contract doctrines are

13. See Arthur Allen Leff, *Unconscionability and the Code—the Emperor’s New Clause*, 115 U. PA. L. REV. 485, 489 (1967) (discussing the drafting of the Uniform Commercial Code’s unconscionability clause).

14. See *id.* at 506; see also Craig Horowitz, *Reviving the Law of Substantive Unconscionability: Applying the Implied Covenant of Good Faith and Fair Dealing to Excessively Priced Consumer Credit Contracts*, 33 UCLA L. REV. 940, 941–42 (1986) (“Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties [procedural unconscionability] together with contract terms which are unreasonably favorable to the other party [substantive unconscionability].”) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)).

15. See, e.g., Horowitz, *supra* note 14, at 943 (highlighting this issue in the consumer-credit industry).

16. By “double blind” we mean that neither party knows the identity of the other at the time of contract formation. When an individual licenses the use of video from Amazon, no human being at Amazon “knows” the identity of the person making the purchase, nor is the person making the purchase aware of any human being directly impacted by the transaction. Perhaps a variation on this theme is the relatively new phenomenon of algorithmic contracts, in which parties set in motion an algorithm that is programmed to enter into contracts with unknown persons or organizations. See generally Lauren Henry Scholz, *Algorithmic Contracts*, STAN. TECH. L. REV. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2747701.

17. See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 563 (2014) (discussing types of inefficiencies that may be present in contractual agreements within a predatory lending context). Ayres and Schwartz explain that one type of inefficiency involves “state-of-the-world” mistakes: the consumer may “make a state-of-the world mistake either because he lacks information or because his choice is a product of cognitive bias.” *Id.* The second type of inefficiency, according to Ayres and Schwartz, involves “term” mistakes: “[t]he consumer may be informed and capable of making rational decisions” but nevertheless made an inefficient mistake to contract “because she failed to understand the legal relationship the contract created.” *Id.* at 563–64.

defunct, or to apply them in ways that push upon their contemplated scope.

This Article hopes to advance contract theory beyond this paralysis. We try to do this by offering a conceptualization of contract as the product of one of two categorically distinct exchange models. Ultimately, it is not useful for courts, researchers, and policymakers to try to rely too heavily on a doctrinal apparatus that was derived from a mostly outdated model of exchange to cope with a modern contracting experience. Instead of arguing for the relevance of contract as it once was, courts, researchers, and policymakers should acknowledge that the volume of zombie contracts vastly outnumbers the volume of non-zombie contracts in circulation, and that this outnumbering merits a shift in focus in how we think about contracts doctrinally, philosophically, economically, and socially.

Contract theory has to evolve past contract's demise in order for it to continue to advance policy and doctrine and to dovetail with relevant empirical work on contracts. As behavioral responses to contract evolve, so too ought theory. At the heart of the behavioral basis for this assertion is a simple cohort effect. Individuals under approximately thirty-five years old (as of the writing of this paper), likely have different pre-Internet "base rates" for contracting experiences than individuals over thirty-five years old. A fifty-year-old grew up signing contracts on paper. Then, the Internet happened and she now experiences zombie contracts. For this cohort, zombie contracts look like the contracts they signed—and may, accordingly, have greater promissory components to them. Those under thirty-five grew up clicking to agree to legalese to receive underlying benefits of a "bargain." To this cohort, the "base rate" is a lifeless, mostly amoral, barely "contractual" piece of dead legalese. So, for this cohort especially, the promissory pull of contract comes not from the contract itself, but from other sources, if and when other sources are salient.¹⁸ This suggests that the newer cohort is losing grip on a breed of archetypal contracts that gave the category of contract its vitality and soul.¹⁹

18. See, e.g., Zev J. Eigen, *An Experimental Test of the Effectiveness of Terms & Conditions* (Northwestern Law & Econ. Research Paper No. 13-32, 2013), https://papers.ssrn.com/sol3/Data_Integrity_Notice.cfm?abid=2338559; Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87 (2012) (suggesting, for example, that individuals' participation in the formation of contracts may impact their post-agreement behavior and thus increase the promissory pull of contract: "[w]hen subjects saw and actively selected the term obligating them to perform the undesirable task, they were significantly more likely to perform that task than when they had no such choice."); Lisa L. Shu et al., *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Motivated Forgetting*, 37 PERS. & SOC. PSYCHOL. BULL. 330, 344 (2011) [hereinafter Eigen, *When and Why Individuals Obey Contracts*] (showing that reading an honor code reduces cheating in an unrelated task). The most recent effort to evaluate the cohort effect empirically is in David A. Hoffman, *From Promise to Form: How Contracting Changes Consumers*, 91 N.Y.U. L. REV. (forthcoming 2016), <https://ssrn.com/abstract=2724661>.

19. See Yannis Bakos, et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (2014); Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J.

Zombie contracts—which most often take the form of consumer-form contracts—don the skin of contract, routinely get taken for contract, and at the same time, live by consuming contract's soul. Yet, it is exceedingly difficult to kill the undead, as any zombie scholarship will tell you.²⁰ It is hard to kill zombies because they look so much like the real, living thing that has been killed to use as a host.²¹ Just as it would be hard to slaughter one's zombified sister, brother, or best friend because of his or her verisimilitude to previously living counterparts, for individuals over thirty-five years old raised on archetypal contracts, it is especially psychologically difficult to “kill” zombie contracts. As the Urban Dictionary tells us, “the walking dead are the incarnation of death itself, a mockery of life that use[] the vessels of the living to carry out their dark intentions[;] they are the opposite of life and are driven to simply undo it.”²² Consumer contracts that are the product of zombie exchange mock the life of living contracts by looking contractual and tricking people, and sometimes courts, into affixing to them the same moral weight, as recent empirical work suggests.²³ Their effects may be more bleak and systemic still: zombie contracts likely erode our collective trust in the rule of law, and they pave the way for more erosion by lending the “haves” more than their share as compared to the “have-nots.”²⁴ We elaborate on these themes below.

INSTITUTIONAL & THEORETICAL ECON. 124, 138 (2012) (“[M]ore information provided to individuals corresponds with less time spent reviewing the contract.”); Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 31 LAW & HUM. BEHAV. 293, 293–311 (2012) (providing evidence of consumer inattentiveness to click-through agreements).

20. See generally DANIEL W. DREZNER, *THEORIES OF INTERNATIONAL POLITICS AND ZOMBIES* (2011); ROBERT KIRK, *ZOMBIES AND CONSCIOUSNESS* (2005); MATT MOGK, *EVERYTHING YOU ALWAYS WANTED TO KNOW ABOUT ZOMBIES* (2011). Mr. Mogk heads the Zombie Research Society (<http://zombieresearchsociety.com>). All of this research must give homage to the father of the modern American zombie, George Romero; his film *NIGHT OF THE LIVING DEAD* (The Laurel Group 1968) spawned contemporary interest in the undead. Its final scene makes the point plain: a couple's daughter turns into a zombie—but the couple cannot kill the likeness of their own daughter, even though the zombie-child is attacking them.

21. Tal Kastner, *The Persisting Ideal of Agreement in an Age of Boilerplate*, 35 LAW & SOC. INQUIRY 793, 793 (2010) (arguing that despite contract scholarship's treatment of “boilerplate” language in contracts as unique phenomena, “a narrative of genuine agreement continues to frame a conception of contractual relations.”).

22. *Zombie*, URBAN DICTIONARY, <http://www.urbandictionary.com/define.php?term=Zombie&defid=861995> (last visited Nov. 3, 2016).

23. See Eigen, *When and Why Individuals Obey Contracts*, *supra* note 18, at 67 (arguing “moral” framing of a request to perform an “undesirable task/contract term” in a form contract was most effective in inducing performance); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009) (showing that participants in a series of experiments were sensitive to the moral context of breach of contract).

24. See Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 27 (2011) (“[T]he suppliers of the contract are viewed as powerful and sophisticated, whereas the consumers are viewed as weak and vulnerable.”); Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98 (1974) (“RPs [Repeat Players], having done it before, have advance intelligence; they are able to structure the next transaction and build a record. It is the RP who writes the form contract, requires the security deposit, and the like.”).

We come neither to bury zombie contracts—denying their contractual legitimacy altogether²⁵—nor to praise, embrace, or laud them.²⁶ Instead, we fear that the lack of a cohesive and systematic profile of zombie exchange and the resulting zombie contracts has led to a cacophony of responses to the zombie uprising. Some deny that adhesive boilerplate contracts are problematic, some fail in identifying problems unique to form contracts of a certain kind, or identify problems that really are not so problematic.²⁷ In what follows, we identify a dynamic about zombies' erosion of the archetypal exchange that has not received the attention it deserves; without this attention it will be hard to heed all the calls to "fix" the "problems" with consumer form contracting. In explicating the typological mapping we propose, we hope to reduce or eliminate theoretical stalemates.

After a definition and elaboration of the process of zombification and its tie to the "death of contract" trope in Part II, Part III seeks to undermine the economic orthodoxy preaching that people should not be terribly concerned about the moral sleight of hand we expose in zombie exchange. We highlight the negative externalities that flow from the use of zombie contracts, such as the erosion in trust in the rule of law by the average citizen and legal (but asocial) and illegal reciprocity with undesirable social costs. Although we are sympathetic to other costs of zombie contracts—particularly the erosion of the norm not to delegate extensive law-making functions to private parties that have no meaningful political accountability²⁸—we emphasize the negative effects of zombie contracts in sociological and economic terms in what follows to enable those providing support to the zombification of contract to appreciate better what they are facilitating.

Part IV, finally, provides the ammunition to contain the zombies and cohabit peacefully with them. Instead of engaging in the scholarly debate over whether it is possible to better inform consumers through more simplified or conspicuous contract terms,²⁹ we propose leveraging

25. See MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND RULE OF LAW* 8 (2013); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1283–84 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21, 71–72 (1984); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 540 (1971) [hereinafter Slawson, *Standard Form Contracts*].

26. See generally Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 5 EUR. REV. CONT. L. 1 (2009).

27. *Id.*

28. See, e.g., Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1051 (1966) (arguing that the court's imposition of a "duty to read" gives financial institutions and businesses the power "legislate privately"); Slawson, *Standard Form Contracts*, *supra* note 25, at 530 ("The privately made law imposed by standard form has not only engulfed the law of contract; it has become a considerable portion of all the law to which we are subject.").

29. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT* 1, 4 (2012); RADIN, *supra* note 25; Ayres & Schwartz, *supra* note 17, at 545 ("[C]onsumer protection law should focus on 'term optimism'—situations in which consumers expect more favorable terms than they actually receive."); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 742

the very technological advances that have permitted zombie contracts to thrive to help keep them in check. Specifically, we propose a means of efficiently and cheaply using technology to leverage intermediary academic knowledge and resources to permit organizations to recast zombie contracts as *live* contracts. Corporate-zombie-contract promulgators are made better off because the proposal reduces the heretofore unmeasured costs associated with zombie contracts and augments the positive benefits associated with live contracts. Individuals are made better off because of increased incentives to craft contracts with more transparent terms, and the social costs of zombie exchange decline as transparency helps control rule of law erosion. We refer to these effects collectively as the “transparency dividend.” This strategy, we hope, can help maintain the integrity of law and contract. The zombies will not kill us then; they will just make us stronger.

II. THE DEATH OF CONTRACT REDUX

In this Part, we introduce the category of “archetypal contracts” (Part II.A); review the old narrative about the “death of contract” (Part II.B); and then explain our own tale of the potential for a Contract Zombie Apocalypse (Part II.C).

A. *W(h)ither Contract?*

Contracts are ancient means of managing dyadic exchanges. Since their modern formalization as legal, state-backed instruments, contractual exchange has been hailed as the foundation of both capitalism and the liberal state.³⁰ Courts, popular notions of law, and scholarship in law, economics, and sociology have described contracts as the product of bilaterally exchanged commitments freely negotiated and agreed upon by the parties.³¹ As Friedman notes, “the law of contract was the legal reflection of [the free] market and naturally took on its characteristics.”³² The image commonly invoked is of two businessmen haggling over the terms of sale of some commodity like wheat, real estate, or widgets, and then memorializing the terms in a jointly crafted document, or by exchanging

(2011) (arguing that mandated-disclosure regulation fails to protect consumers); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 494 (2002) (“[I]n policing the electronic contracting environment, courts should apply the rule of blanket assent to electronic contracts.”); Abraham L. Wickelgren, *Standardization as a Solution to the Reading Costs of Form Contracts*, 167 J. INSTITUTIONAL & THEORETICAL ECON. 30, 43 (2011) (“[S]ome governmental push towards standardization might be a desirable intervention to solve the problem of reading costs in standard form contracts.”); see also Ethan J. Leib, *Is Omri Ben-Shahar a Duncan Kennedy in Disguise?*, CONTRACTSPROF BLOG (Sept. 17, 2014), http://lawprofessors.typepad.com/contractsprof_blog/2014/09/ben-shahar-schneider-symposium-part-v-ethan-leib.html.

30. See generally E. ALLAN FARNSWORTH, *CONTRACTS* (A. James Casner et al., eds., 1982); FRIEDMAN, *supra* note 7; PHILIP SELZNICK, *LAW, SOCIETY, AND INDUSTRIAL JUSTICE* (1969); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* (1975).

31. Macaulay, *supra* note 5, at 55–67; LISA J. MCINTYRE, *LAW IN THE SOCIOLOGICAL ENTERPRISE: A RECONSTRUCTION* 13 (1994).

32. FRIEDMAN, *supra* note 7, at 22.

drafts and dickering over terms until each freely assents. Indeed, this kind of transactional pattern may be found in cases throughout contract-law textbooks used in first-year law-school classes across the country for at least a century.

Archetypal contracts are contracts derived from an archetypal set of exchange conditions. These conditions include some bilateral, pre-consent negotiation, a general understanding by both parties that an enforceable obligation is being undertaken, a general understanding of the terms, a general understanding of the consequences of breach, and some direct relationship between the benefit of the bargain and the contract itself.³³ These bedrock components of the collective imagination about “contract” sustain its sociological and normative legitimacy.³⁴

Of course, most have come to appreciate that we observe archetypal exchange mostly in the breach, so to speak. The archetypal contract is not the only kind of contract that can be accommodated by contract law; rather, contract is ultimately a multifarious and pluralistic practice.³⁵ Negotiation is sometimes unnecessary because many similar transactions have been undertaken by parties in the past and take a standardized form; liability attaches even though one party did not intend to undertake an enforceable obligation for social-justice reasons; or some liability must be found, notwithstanding a party’s misunderstanding of the terms in the agreement or of the consequences associated with breach, because of sound risk-allocation principles that help better structure people’s incentives. These failures to correspond perfectly with the ideal of archetypal exchange in the practice and sociology of contract have never fully undermined contract’s core. Indeed, archetypal contracts seem to continue to predominate contract theory.³⁶ Neo-classical contract law, of course, helped erode the commitment to contract as a perfect type—and provided room for phenomena like quasi-contract, promissory estoppel, and relational contracts.³⁷ Maybe these progeny finally ate their parents and contract is dead because the archetype is so far from contract “in action.” But let us say a little more about the history of the “death of con-

33. *Id.* at 21.

34. See Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 389–90 (2008); Kastner, *supra* note 21, at 799 (“[T]hreads of the narratives woven from and around the experiences of industrialization and emancipation persist in our presumptions and values. Agency, autonomy, and assent still underpin traditional approaches to contract.”); Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC’Y REV. 91, 131 (2003).

35. See generally Ethan J. Leib, *Contracts and Friendships*, 59 EMORY L.J. 649 (2010); Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPAC L. REV. 1 (2005) [hereinafter Leib, *On Collaboration*.]

36. See Leib, *On Collaboration*, *supra* note 35, at 10.

37. See Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738 (2000) (“The essence of the criticism of classical law and its reconstruction through succeeding scholarly generations was contextualization; the more classical contract law was placed in context, the less sense it made. . . . Neoclassical contract law—the law of the Uniform Commercial Code, the Restatement (Second) of Contracts, and today—is the product of this criticism.”).

tract” trope—and provide a new descriptive window into what we see as the modern decomposition of contract.

B. *Old and Exaggerated Rumors of Death*

Here is the standard core of the old “death of contract” theory: contract is dying because it is being absorbed into tort, statute, and reputation networks—and because general theory is no longer of interest, splintering as it is into empirical and contextual fragments of itself.³⁸

On the first point, Grant Gilmore made much in *The Death of Contract* about the way the consideration doctrine—the centerpiece of contract and its “bargain theory”—was eroded by the influence and gravitational pull of promissory estoppel.³⁹ He charts the Restatement’s shift over time to make promissory estoppel much more essential to the current Second Restatement, derogating from an ideal picture of well-negotiated transactions that prevailed in the First Restatement.⁴⁰ His predictions have not quite come true: promissory estoppel has had a decent run and occupies a comfortable corner in contract law⁴¹—but contract did not really succumb to promissory estoppel; it just became increasingly plurivalent. It is probably true, at the margins, that tort principles and statutory remedies have more relevance in contract law than they once did in the bargain theory’s heyday, but it is hard to say that these marginal incursions into the common law of contract took down the archetypal vision of exchange that anchors so much of contract theory and law.

Gilmore also suggested that contract was receding in interest because the “Lord High Executioner of the Contract is Dead” school—Stewart Macaulay⁴²—had succeeded in getting people to train their eye on empirical studies of contract and regulation through reputation rather than work on elaborating upon the general theory of contract.⁴³ Although this theme was not as developed in *The Death of Contract*, it certainly seems like empirical studies of contract and reputation networks in controlling behavior within exchange relationships have only grown in visibility and importance among contract law professors,⁴⁴ and Macaulay’s

38. See generally GILMORE, *supra* note 1.

39. *Id.* at 61–93.

40. *Id.* This is, perhaps, ironic in light of the First Restatement’s embracing of “peppercorn” consideration, which was rejected in the Second Restatement.

41. See Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1331 (1998) (“In short, our common law of contract—at least as reflected in the Restatement (Second)—repeatedly recognizes and protects the substantial and detrimental changes of position that can result when one person reasonably relies on another’s manifestations of commitment.”).

42. See generally GILMORE, *supra* note 1, at 113 n.1.

43. *Id.*

44. See Zev J. Eigen, *Empirical Studies of Contract*, 8 ANN. REV. L. SOC. & SCI. 291, 301–03 (2012) (summarizing the growth of empirical studies of contract across disciplines); MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION* (2013); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001); Florencia Marotta-Wurgler, *What’s in a Standard Form Contract? An*

article about non-contractual relations in business is one of the most-cited articles of all time.⁴⁵

Yet, it is hard to conclude that the development of careful empirical and contextual information about contracting has led to any decline in the centrality of general contract doctrine and theory. Indeed, knowing how people—businesses and consumers alike—use contract in daily life has probably only enhanced commentators' ability to say things that could be useful to courts in developing and applying doctrine.⁴⁶ Students are also better trained in transactional and litigation-oriented work because their teachers now better understand how contracts are used across transactional contexts. In any event, plenty of attention is still lavished on general contract theory, notwithstanding all the new contextual work.⁴⁷ Even a recently published festschrift for Macaulay—the so-called Lord High Executioner—is mostly filled with general theory about contract rather than empirical studies of contract, though there is some of that, too.⁴⁸

There is one final part of Gilmore's story worth retelling here, a complementary narrative that has received less attention than his other prognostications. It is surprising that this part of his book has been less emphasized than others because it is the one that comes closest to being part of the real story of the modern death of contract in the age of mechanical reproduction.⁴⁹ In summary, Gilmore identified that contract would have a hard time surviving through the "avoidance of fact questions wherever possible as well as the restatement of questions of fact as questions of law. . . ."⁵⁰ He understood the development of contract law to "reflect[] an uneasy, inarticulate distrust of the role and function of the civil jury,"⁵¹ and as the jury recedes, contract practice in the courts becomes disconnected from facts about transactions and humans.

This last story strikes us as sound and most related to our own take on these themes. We do not ultimately disagree that a thousand cuts into archetypal exchange—by statutes and alternative remedial schemes—

Empirical Analysis of Software License Agreements, 4 J. EMP. LEGAL STUD. 677 (2007) [hereinafter Marotta-Wurgler, *What's in a Standard Form Contract?*]

45. See Macaulay, *supra* note 5; Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 (2012) (ranking the Macaulay paper at 15).

46. See, e.g., Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS 561 (2015); Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 454 (2009).

47. See Ethan J. Leib, *The State of Contracts Scholarship in the United States*, 1 LAWS 64, 67 (2012) ("Although empirical scholarship may seem to be all the rage, economic and doctrinal work . . . occup[ies] more of the field.").

48. See REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL (Jean Braucher, et al. eds., 2013).

49. Perhaps the reason fewer discuss this feature of Gilmore's book is because others said it before Gilmore and others have said it since, so it is harder to see it as a distinctive contribution of Gilmore's work. It is a central theme, for example, of Richard Danzig, *Hadley v. Baxendale: A Study in the Industrialization of the Law*, 4 J. LEGAL STUD. 249 (1975).

50. GILMORE, *supra* note 1, at 107.

51. *Id.* at 108.

have tempered the relevance of contract.⁵² Our core narrative of contract's decline, however, involves zombie contracts, in which abstraction prevails over individualized fact. Indeed, with the rise of zombie contracts, the civil jury's power becomes much more constrained since a large number of zombie contracts command arbitration without juries,⁵³ keeping stories of people and their individual contexts outside the courthouse. It is also true that zombie contracts likely scare consumers into staying home and out of court; even when formally unenforceable, zombie contracts can be persuasive in encouraging consumers not to sue and tell their stories in court.

C. *Zombies*

What is a zombie contract, which mocks its host? A dictionary definition of a zombie is a place to start: "the body of a dead person given the semblance of life, but mute and will-less"⁵⁴ Here is how zombie contracts—consumer form contracts—are reasonably conceptualized as these malevolent creatures, which are at war with archetypal contracts, lacking their souls yet parading around demanding equal treatment.

Zombie contracts are spawned through "zombie exchange." The characteristics of zombie exchange are as follows: one party, most frequently a consumer, is directed by terms drafted by another. The arising obligations are essentially unknown by the consumer prior to her manifestation of assent. The consumer does not discover the consequences of acquiescence or breach until after the manifestation of assent; those consequences may not even become known until after a breach occurs. Expectations of behavior come not from negotiation or the terms of a document, but from exogenous social and normative sources. In a zombie exchange, the consumer holds expectations of what the contract dictates, but those expectations arise not from reading and understanding the words of the actual contract but from signposts elsewhere.

Zombie contracts, however, have the body of living contracts; they look like they have the vitality, mind, heart, and soul of the archetypal contract. Indeed, a zombie contract may contain many clauses that closely mirror those that might reasonably appear in the archetypal ancestor host. This is by design. Although zombie contracts have the semblance of live contracts produced by archetypal exchange, they are mostly mute and will-less, doing little to inform behavior. They look like law—written in legalese—but lack characteristics central to archetypal exchange between persons. How else could they leverage a magnetism of obedience through perceived legitimacy if not by masquerading as a living, breathing contract?

52. *Id.* at 107–08.

53. See Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 244 (2013) (finding that arbitration clauses have become "relatively more pervasive" in consumer contracts).

54. *Zombie*, *supra* note 22.

These zombies are taking over the world of transactions, particularly the world of transactions between organizations and individuals, an important and growing subset of all transactions. One main reason for this takeover is technological. The Internet facilitates rapid and voluminous exchange between singular organizations and multitudes of individuals.⁵⁵ The need to standardize across these exchanges, such that automated code and processes replace sentient decision-making, gives rise to zombie contracts' quick proliferation. Resource Dependence Theory may also be used to explain why corporate actors are more likely to use zombie contracts to extend and replicate their power over consumers, employees, and individuals with whom they contract.⁵⁶ In any dyadic exchange between a corporate actor and an individual, the corporate actor tends to need the individual's resources less than the individual needs the corporate actor's resources.⁵⁷ This imbalance of mutual dependence suggests an increased likelihood for zombie contracts to give the consumer a bad deal.

The "end-user license agreement" ("EULA") governing how consumers may use purchased content like software, motion pictures, and music is the quintessential zombie contract. EULAs are everywhere and they often limit the rights of individuals in significant ways. Browse-wrap "agreements" on websites—instruments hard to find in tiny font—purport to permit websites to collect browsing information, even after individuals leave their sites.⁵⁸ If you keep money in a bank, you have likely agreed to be bound by a contract with the bank that governs important rights about liability and penalty fees that you may come to owe—and that contract may well be subject to unilateral modification on the part of the bank. So too with credit cards, cell phones, Internet-service providers, and just about any other commercial entity selling products or services: customers agree to be bound by contracts they have never read, let alone understand. There are also routine waivers of liability and the right to sue buried in boilerplate agreements; these are matters of substantial public import that are given away without consumers being remotely aware what they are trading away. These deals are hard to price when broken into their several unrelated components, though economists assure us that these trade-offs are reflected in lower prices for consumer goods and services.⁵⁹

55. See Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 313 (2009) ("An enormous range of modern transactions are governed by standard-form contracts."); Marotta-Wurgler, *What's in a Standard Form Contract*, *supra* note 44, at 678 ("It has been estimated that 99 percent of all commercial contracts are standard form contracts. . . . [C]onsumers . . . are often left with little choice but to accept the many important secondary terms presented in nonnegotiable boilerplate.").

56. On resource dependence theory, see Richard M. Emerson, *Power-Dependence Relations*, 27 AM. SOC. REV. 31 (1962).

57. See *id.*

58. See Plaut & Bartlett, *supra* note 19, at 294.

59. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (Easterbrook, J.) ("Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple

Obviously, bilaterally negotiated contracts continue to exist, but zombie contracts contribute to contract's decline because, by no accident, doctrinal contract law continues to evolve to reduce uncertainty, *mostly* for repeat institutional players, and to ensure that when parties enter into zombie contracts, their parcels of self-made law will be safeguarded by the silent third contractual party—the State—in a manner most likely to permit institutional repeat players to contract in ways that serve their interests.⁶⁰ This undoes the presumption of equality so essential to the core of contract. The scales are tipped through self-regulation, and the law's solicitude for the repeat-player organizations that write the zombie contracts knows few bounds.

Two things that occur simultaneously herald a coming Contract Zombie Apocalypse. First, consumers normalize to the experience of waiving rights as a condition of any and all exchanges. Our own behavior—mindlessly agreeing to zombie contacts—is, notably, zombie-like as well. We have become so accustomed to giving everything up to the corporate entities with whom we contract that it seems crazy to suggest anything in the alternative. As contract scholar Clayton Gillette writes, “[w]here potential losses to any given consumer are small, the likelihood of either reputational or legal redress may be so remote that sellers essentially face little downside risk from efforts to exploit.”⁶¹ Second, norms of contractual exchange from the archetypal model are shored up by doctrinal reinforcement and by academic and legislative hand-wringing over the need for free economic exchange.⁶² We accede to the story that efficiency commands that zombie contracts must proliferate. Ideological, doctrinal, and economic commitments—born of archetypal contract but manipulated by zombie contracts—collude to render us passive in the face of the growing denigration and decomposition of contract.

Consider Section 211 of the Second Restatement of Contracts (entitled, “Standardized Agreements”). Section 211(1) states that

where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.⁶³

approve-or-return device.”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (Easterbrook, J.) (“[A]djusting terms in buyers’ favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as a higher price, that might make consumers as a whole worse off.”).

60. See EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (W.D. Halls trans., 1984); EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1936); Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285 (2007).

61. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 978 (2005).

62. See *id.* at 987–88.

63. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

Subsection (2) states that everyone should be treated alike with respect to these contracts, without regard to their knowledge or understanding of the standard terms of the writing.⁶⁴ Subsection (3) states that drafters are limited in their creation of (zombie) contracts only by the reasonable belief that “the party manifesting such assent would not do so if he knew that the writing contained a particular term.”⁶⁵ In such a case, that term is not part of the agreement.⁶⁶ In other words, so long as companies standardize terms, they can expect them to be enforceable against all—with the very limited exception that they cannot knowingly include terms they basically know would cause consumers to *reject the whole of the agreement*. The Restatement, by its terms, does not exclude any term the consumer would reasonably reject—but only those that would cause a consumer to reject the whole of the transaction.⁶⁷

The more we fail to resist zombie contracts, the easier it is for drafting entities to assert that they hold a reasonable belief that individuals manifesting assent to terms would still do so, even in the face of more and more rights-encroaching terms. Essentially, our behavior—growing accustomed to respecting zombie contracts and expecting to get the short end of the deal—further fuels the legal authority of a Contract Zombie Apocalypse. In fact, efforts to augment disclosure by the use boxes or other ways of improving the visibility of text of terms and conditions serve only to further exacerbate the decline of pro-consumer terms, and to accelerate a Contract Zombie Apocalypse. This is because it speeds up the rate at which individuals normalize to intolerable contract terms. Today, we tolerate a lot of contract terms that encroach on individual privacy rights. In ten years, at the pace we are going, it would be reasonable for drafting entities to believe that individuals manifesting assent to terms would do so even if the terms included provisions obligating consent to strip searches, to DNA sampling, and to genetic data mining. That seems apocalyptic indeed.

Ultimately, the way individuals almost always experience contract in contemporary life lacks all of the critical components of the archetypal model of exchange, though it bears a superficial resemblance to it. In the

64. *See id.*

65. *Id.*

66. *Id.*

67. This is notwithstanding comment f’s suggestion that consumers “are not bound to unknown terms which are beyond the range of reasonable expectation.” *Id.* § 211 cmt. f. Comment e also focuses on reasonable expectations: “courts in construing and applying a standardized contract seek to effectuate the reasonable-expectations of the average member of the public who accepts it.” *Id.* cmt. e. Iowa and Arizona, to the extent that they formally embrace § 211 (and few states do) actually try to do more with the reasonable expectations focus of comments e and f than they do with the more restrictive text. *See* Roger C. Henderson, *The Doctrine of Reasonable Expectation in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 842–46 (1990). But in various applications of § 211, courts routinely treat reasonable expectations as a mere *exception* to the enforceability of a form contract, see *Sw. Pet Prod. v. Koch Indus.*, 32 F. App’x 213, 217 (9th Cir. 2002), rather than a starting point, in which the form’s terms are taken to be evidence of the actual expectations of a consumer. For further elaboration of these points, see Ethan J. Leib, *What is the Relational Theory of Consumer Form Contract?*, in REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY, *supra* note 48, at 259.

archetypal model, parties are approximately equally sophisticated, informed, and mutually dependent on one another for the resources underlying their contractual arrangements. In the zombie model, parties are not equal on these registers, and are characteristically not mutually dependent on one another for the resources underlying their agreements. For instance, if one transacts with AT&T for mobile phone service, an individual's alternatives to the exchange are extremely limited, particularly if one wants a certain kind of phone. On the other hand, AT&T's alternatives to the exchange number in the hundreds of thousands, if not millions. Therefore, the individual customer is much more dependent on AT&T than AT&T is on any individual customer. The median customer of AT&T is likely not nearly as legally sophisticated as AT&T, and AT&T is privy to much more relevant information than the median or potential customer of AT&T's services. We are far from the archetypal contract in zombie land.

In the archetypal model of contract, moreover, the means of enforcing contracts are approximately equivalent and equally available to both sides. In the archetypal model, both parties are able to leverage law or extra-legal means of enforcement as forms of coercive power. This is not as clear in a case of zombie exchange. Using the AT&T example, AT&T can leverage law and extra-legal means of enforcement in a much more effective way than an individual customer. AT&T can enforce the contract by threatening legal action and reporting breaching individuals to credit agencies. Additionally, AT&T requires means of payment to be established that reduce the transactional costs to AT&T of self-policing deals. Strategies like auto-payment and credit-card payments are set up specifically for this purpose. The means of enforcement available to the individual on the other end of the transaction are threatening to discontinue payment, publicly complaining, or suing. None of these threats of coercive power is remotely as effective for enforcing contractual performance as AT&T's readily available means. If AT&T breaches, other individuals are not likely to ostracize AT&T, regardless of what an individual user writes on Yelp or in the comments to some blog. When AT&T can successfully use its zombie contract to eradicate useful enforcement mechanisms available to the consumer—class actions—the consumer is less able to leverage power.

Finally, in the archetypal model there is only one primary exchange, which is generally memorialized in the parties' contract. By contrast, in the zombie contract, there are often two distinct layers of interaction: the primary one, which involves the main terms of the deal, and the secondary one, which involves terms drafted only by one entity that are offered on a take-it-or-leave-it basis, which often have little to do with the main purpose of the deal. These terms are not a memorialization of primary exchange terms, but are extensions that reach beyond the scope of the parties' primary contemplation. This divorces the contract from the primary terms of exchange, stripping it of the legitimacy derived from mu-

tual consideration. Table 1 below shows the comparison between the characteristics of archetypal and zombie exchange.

TABLE 1: DIVERGENT CONCEPTUALIZATIONS OF DYADIC ECONOMIC EXCHANGE

Zombie	Archetypal
Lack of clear, meaningful, bilateral negotiation.	Clear, meaningful, bilateral negotiation.
At least one party does not understand that an enforceable obligation is being undertaken.	Both parties understand that an enforceable obligation is being undertaken.
At least one party does not understand the terms before agreeing.	Both parties understand the terms before agreeing.
At least one party does not understand the consequences of breach (before formation).	Both parties understand the consequences of breach (before formation).
An indirect relationship between the benefit of the bargain and the contract itself.	A direct relationship between the benefit of the bargain and the contract itself.

Consider an exchange that has occurred millions of times and has affected millions of people: downloading Apple's iTunes software. When one does this, a primary exchange occurs: the consumer receives "free" music-management, along with access to Apple's proprietary electronic store ("iTunes Store") through which users are encouraged to "purchase" music, television shows, and theatrical motion pictures. Apple collects a fee per purchase. But to access the iTunes Store, one also needs to agree to another take-it-or-leave-it contract by clicking to agree that one has "read and agreed to the iTunes Terms and Conditions and Apple's Privacy Policy."⁶⁸ The parties do not negotiate over any of these terms. They are offered by Apple and either accepted or rejected by individuals. The secondary terms of exchange come in the form of a tiny box that must be clicked, indicating that an individual agrees to Apple's "terms of service." If the box is not clicked, individuals may not install or use iTunes. Also, in the terms of use is a clause purporting to permit Apple

68. See APPLE, <http://www.apple.com/itunes/> (click the "Download" hyperlink; then follow the on-screen directions to download iTunes) (last visited Nov. 3, 2016).

and its subsidiaries “to collect and use technical and related information” it extracts from individuals’ computers for marketing purposes, and to police whether individuals comply with the terms of the contract.⁶⁹ The contract permits Apple to use this information, “as long as it is in a form that does not personally identify you,” to improve Apple’s products or to sell other products.⁷⁰ The iTunes exchange illustrates the stark contrast between the mindless and will-less zombie contractual model and the archetypal one.

In summary, zombie contracts look like archetypal contracts on their face, but they have several distinct features that sit in very deep tension with contract. Organizations, most often in the form of corporations, do the vast majority of contract drafting.⁷¹ As industrialization increased the volume of exchanges between organizations and individuals, contracts governing exchanges became increasingly formalized and standardized.⁷² Standardization of contract is the optimal way for organizations to legislate predictably, leveraging the social artifact of contractual enforcement gleaned from doctrinal contract law and the traditional model of exchange.⁷³ Over time, this is how the traditional model of contract came to be replaced by zombies as the dominant way in which contract is experienced. In the next Part, we explore what is so costly about this zombification process.

III. ZOMBIE ECONOMICS

In this Part, we review economic arguments supporting zombie contracts—and highlight some weaknesses in these arguments (Part III.A). We then identify a set of costs that most often elude zombie supporters (Part III.B).

A. *Economic Arguments and Their Shortcomings*

Zombie sympathizers fail to acknowledge many of the costs associated with zombie contracts.⁷⁴ The zombification of contract is costly even

69. APPLE, <http://www.apple.com/legal/internet-services/itunes/appstore/dev/stdeula/> (last visited Nov. 3, 2016).

70. *Software License Agreement for Boot Camp (Windows Utility)*, APPLE, <https://support.apple.com/en-eg/HT202010> (last visited Nov. 3, 2016) (“Consent to Use of Data. You agree that Apple and its subsidiaries may collect, maintain, process and use diagnostic, technical and related information, including but not limited to information about your computer, system and application software, and peripherals, that is gathered periodically to facilitate the provision of software updates, product support and other services to you (if any) related to the Apple Software, and to verify compliance with the terms of this License. Apple may use this information, as long as it is in a form that does not personally identify you, to improve our products or to provide services or technologies to you.”).

71. See Eigen, *supra* note 44, at 299.

72. See *id.* (stating that the proliferation of unilateral form contracts, or form-adhesive contracts, coincided with the rise of the modern corporation).

73. See generally Suchman, *supra* note 34.

74. See, e.g., Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45, 46–66 (Omri Ben-Shahar ed., 2007) (stating that form contracts do not place undue hardships upon consumers); Lucian A. Beb-

if the categories in which these costs are borne have heretofore been neglected, leaving the costs mostly undocumented and unmeasured. Zombie contracts are frequently lauded as economically efficient, properly allocating to affected individuals the costs associated with what are low-probability events for the consenting individuals, but predictable and more costly events for the drafting organizations.⁷⁵ Consumers allegedly benefit from zombie contracts because they make the contracted-for products and services cheaper. The argument goes that contract terms are included to save the company money, and the money saved is passed on to consumers.⁷⁶

This model either assumes too much about how form contracts come to be, or it ascribes unrealistically altruistic and charitable motives to corporate entities. First, this model seems to suggest that lawyers sit around with the CEO or financial accountants of the firm, pricing out the value of various contract terms, including only the ones that add value to the firm, and excluding those that do not. This seems far-fetched. The more likely way in which contract terms come into existence is a mandate to lawyers to draft something that protects the company from every possible occurrence. This becomes an exercise in risk aversion for the attorney charged with this task: she must include everything possible in this contract regardless of the costs associated with the terms. Further, this mandate likely leads to rampant drafting isomorphism: the copying and pasting of clauses from other existing form contracts that might be relevant. There is evidence that drafting isomorphism is prevalent, and that it results in over-drafting with duplicate clauses, inconsistent terms, and clauses retaining “ghosts” of other contracts found in form contracts.⁷⁷ It is unlikely that efficiency is a focal point at the drafting stage, and, therefore, unlikely that resulting form contracts can be described as efficiency-maximizing machines.

Second, even if a firm determined that it saved money by including a particular configuration of contract terms, it is unlikely the firm would regard the contract as cost-avoiding. Rather, it is more likely the case that clauses are included in order to keep them at the same cost level as their competitors. That is, the race to the bottom has already occurred, so no additional cost-savings could be passed on to the consumer. Be-

chuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 829–30 (2006); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983 (2006); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006).

75. BOB SULLIVAN, GOTCHA CAPITALISM 25–29 (2007).

76. This is the standard-form defense from the law and economics of standard-form contracting. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996); Bebhuk & Posner, *supra* note 74; Ben-Shahar, *supra* note 26, at 5.

77. stanfordlawschool, *FutureLaw2013 – Computational Law and Contracts*, YOUTUBE (May 3, 2013), https://www.youtube.com/watch?v=KB18_tv2VDM (discussing that this was the case for Kingsley Martin, CEO of KIAC in the high volume of contracts his company has digitally coded and reviewed).

cause consumers likely do not fully appreciate what they are trading away, it would not make sense to do this calculus and pass any costs saved onto them. Why would companies volunteer to give money to consumers, which consumers are unaware exists in the first place, as surplus resulting from a risk allocation that they did not understand or care about?

Lastly, companies over-draft zombie contracts, retaining all rights to everything and stripping rights from consumers as much as possible without scrutiny. Over-drafting is entirely inconsistent with the logic of using form contracts to save money in order to pass cost-savings onto consumers since parsimony in stripping is more consistent with calibrating cost-savings that are to be passed along to consumers. In the final analysis, costs saved that are passed onto consumers likely come from standardization and the saving of negotiation and other transaction costs, but likely not from the terms of zombie contracts themselves.

B. *The Costs of Zombie Exchange*

The costs imposed by zombie contracts are not particularly tied up with their departure from an idealized picture of consent.⁷⁸ Zombie contracts carry themselves as entitled to—and often receive—the same moral respect accorded to archetypal contracts by leveraging moral suasion despite possessing none of the relevant moral credibility. It is this treatment that is responsible for the costs of zombie contracts that we wish to highlight here.⁷⁹ An unhealthy feedback loop is at play: zombie contracts feed on the moral/mortal soul of archetypal contract; humans, especially those over thirty-five, cannot resist the moral suasion of the zombie contract because they so much resemble the archetypal form that has legitimate moral suasion; the legal system is essentially compliant; and humans, now further desensitized to living in a world of zombies, just keep allowing the zombies to feed. This cycle has a set of distinctive costs we document here.

1. *Broken Trust*

No single zombie contract brings the house of contract down, but the aggregate effect slowly reveals itself, perhaps at a rate too slowly to be noticed. The riots in response to the Rodney King verdict were also evidence of a bubbling over that was a deep reaction to erosion of the rule of law.⁸⁰ So too with some of the observed responses to the *Bush v.*

78. See Ethan J. Leib, *Boilerplate Symposium V: Ethan Leib on the Fetishization of Consent*, CONTRACTSPROF BLOG (May 15, 2013), http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-v-ethan-leib-on-the-fetishization-of-consent.html. We elaborate on this *infra* Part III.A.1.

79. See generally Eigen, *When and Why Individuals Obey Contracts*, *supra* note 18, at 88 (showing that boilerplate contracts receive moral respect).

80. See Cedrick J. Robinson, *Race Capitalism and the Antidemocracy*, in *READING RODNEY KING* 73 (Robert Gooding-Williams ed., 1993).

Gore opinion;⁸¹ there is growing distrust in legal institutions like the Supreme Court.⁸² It would be foolish not to attend to the societal cost that is brewing on account of the chipping away that the zombies are effectuating; we should not wait for the corollary to the riots—a Contract Zombie Apocalypse—to chart losses to the rule of law.⁸³

Consider this: people from lower socio-economic classes are probably more likely to perceive themselves as bound by the terms of a form contract than people from higher socio-economic backgrounds.⁸⁴ What this means is that zombie contracts put in place and sustain a two-track system with substantial distributional consequences: lower socio-economic actors are more compliant and more able to be controlled by corporations with zombie contracts. Those from higher socio-economic backgrounds have more time and resources to complain and have their needs met independently of whatever terms are in the deal. Since they are more desirable consumers for corporations to retain and woo, the extra costs associated with accommodating high socio-economic consumers with rewards, fee waivers, and bonuses are passed off on lower socio-economic consumers with penalties, higher fees, and higher interest rates on credit.

There was a time when differential attention to different classes of consumers was seen as a virtue by the law-and-economics community because sophisticates were seen as policing the deals corporations were imposing, and everyone was benefiting through the elite's oversight of terms.⁸⁵ But recent experiments seem to show that elites do not feel as bound by the terms anymore; as a result, they ignore terms rather than argue for better ones.⁸⁶ So the elite are significantly less effective advocates for the poor because of the differential interpretations and behaviors around zombie contracts structured by socio-economic status. Zombie contracts thus support a system of injustice and derogate from the essential principle that like cases should be treated alike. Lacking fairness among consumers, citizens' perception of the legitimacy of the legal system can be substantially threatened.⁸⁷

Zombie contracts' unilateral nature, depriving consumers of any ability to negotiate terms, also erodes the public's trust in the rule of law. Recent empirical evidence suggests that greater levels of participation and negotiation in the terms of an agreement can lead individuals to be

81. See Kathryn Abrams, *Extraordinary Measures: Protesting Rule of Law Violations after Bush v. Gore*, 21 LAW & PHIL. 165, 170 (2002).

82. See generally Dan M. Kahan, *Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

83. See Abrams, *supra* note 81; Janice Nadler, *Flouting the Law*, 18 TEX. L. REV. 1399, 1403 (2005).

84. See Eigen, *When and Why Individuals Obey Contracts*, *supra* note 18, at 74.

85. See Alan Schwartz & Louise L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

86. See generally Eigen, *supra* note 34.

87. See TOM R. TYLER, *WHY PEOPLE OBEY THE LAW*, 3-4 (1990); Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 PERSONALITY & SOC. PSYCHOL. REV. 323, 327 (1997).

more likely to comply with undesirable contract terms.⁸⁸ This means the more the zombies penetrate the contract system, the less we are likely to have a system of contract compliance. This also derogates from the system of trust and rule of law necessary for a contract system to function well.

These dynamics have an effect not only on the rule of law and trust in the legal system at a level of abstraction but also on the ground, in how consumers actually respond to the documents that purport to control their behavior. Surprise associated with form contract terms serves not only to undermine a sense of consumer efficacy and political empowerment, contributing to erosion of the rule of law, but also to trigger practical reactions that cause higher costs associated with zombie exchange that are rarely logged. Our hope is to show the economists these costs they have been missing. Even though the “haves” come out ahead in terms of the perception of the bindingness of their contracts (they are more likely to feel themselves free to ignore terms), there are a range of costs imposed on them that are worth putting into our accounting of our zombified environment: the erosion of the rule of law affects us all, as do the costs corporations have to pay to keep everyone in check. What companies may save in negotiation costs could be counterbalanced by the extra costs they incur in the enforcement regimes they must implement because of the frustration of their terms during performance.

2. *The Costs of Dissatisfaction*

Because contracts produced by zombie exchange are reminiscent of contracts produced by archetypal exchange,⁸⁹ there is dissonance between the perceived obligation to do as one promised to do and the desire to disregard zombie contractual terms divorced from the primary benefit of the bargain motivating the consumer’s entrance into the contract. For instance, if one pays Apple to download a song in digital form, the primary exchange is money for the right to listen to the file. The secondary terms might limit one’s right to use that song in ways beyond what the individual expected based on the primary part of the exchange. If one is later surprised to learn that the contract limited one’s rights, there is dissonance between wanting to do as promised (because one acceded the agreement) and the irritation of feeling misled by Apple.⁹⁰ This dissonance occurs across the two tracks of consumers, even if one group is less likely to view the paper terms as ultimately binding.

Think about when a consumer gets really mad about a mistreatment that stems from terms that are surprising or a hardship. What is she likely to do? Although those focused on functioning markets assume exit is

88. See Eigen, *When and Why Individuals Obey Contracts*, *supra* note 18, at 70.

89. See Suchman, *supra* note 34, at 127 (noting that form contracts retain the “image of the ‘binding commitment’ that symbolizes efficiency, effectiveness, free choice, and legal protection for both sides.”).

90. See SULLIVAN, *supra* note 75, at 3–37.

likely,⁹¹ there are a host of reasons exit may be delayed: there may be nowhere else to go (because of contractual or market conditions), switching costs may be very high on account of technological design or other reasons, it may feel like conceding too quickly by exiting, or exit may be deferred because of relational commitments to the organization that promulgated the form. We may be attached to Apple or Verizon. Consistent with the literature on “psychological contract” violation,⁹² particularly in the employment arena,⁹³ consumers may opt against exit.

One common effect of loyalty to a brand or organization may be to use voice rather than exit.⁹⁴ Of course, sometimes voice may cause an organization to change for the better, rendering the costs spent on dealing with voice a worthy investment. But the time, effort, and frustration involved in voicing discontent are also additional costs that routinely escape notice, particularly when the inspiration for assertion of voice is not a hope or desire to effect change or improvement, but to do harm. One of us spent six hours this year fighting with US Airways for a \$75 refund and with Alamo Rent-a-Car for a \$2.95 refund on a toll-processing charge. No surprise that after the effort, the corporations backed off their claimed entitlements to these fees under their form contracts. But the six hours of energy on both sides is often an undocumented cost that must be acknowledged for the corporation, for the “have” getting his or her refunds and special treatment, for the “have-not” who may be paying for some of this energy unknowingly, and for society more generally, which has to internalize the costs of the zombie contract system to the rule of law.

There is evidence to suggest that how individuals respond to zombie contract exchange varies by socio-economic status and other characteristics.⁹⁵ Lower socio-economic status (“SES”) actors are more likely to feel like they are being taken advantage of and are more likely to be in a more imbalanced mutual-dependence exchange with the drafting organizations than higher SES actors.⁹⁶ Even though, as we highlighted, they are more likely to feel they have to comply, they are also more likely to feel wronged. Lower-SES actors are also less likely to be viewed as viable “good customers,” worthy of the company trying to keep, than higher-SES actors⁹⁷—and for this reason lower-SES actors are less likely to get good outcomes merely by using voice.

91. See *id.* at 29.

92. See Jacqueline A-M. Coyle-Shapiro, *A Psychological Contract Perspective on Organizational Citizen Behavior*, 23 J. ORG. BEHAV. 927, 941–42 (2002); John Paul Kotter, *The Psychological Contract: Managing the Joining-Up Process*, 15 CA. MGMT. REV. 91, 98 (1973); Denise M. Rousseau, *New Hire Perceptions of Their Own and Their Employer's Obligations: A Study of Psychological Contracts*, 11 J. ORG. BEHAV. 389, 398 (1990).

93. See Thomas Kochan & Beth Shulman, *A New Social Contract: Restoring Dignity and Balance to the Economy*, EPI BRIEFING PAPER #184, Feb. 22, 2007, at 2, www.sharedprosperity.org/bp184/bp184.pdf.

94. See ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 30 (1970).

95. See Eigen, *supra* note 34, at 404.

96. See *id.*

97. *Id.*

On one occasion, upon presenting this idea in a research talk, a high-SES participant in the audience suggested he would never consider resorting to coercive extra-legal action like seeking to harm a company that furnishes him a bad term. He said if he were surprised by a rate term or a penalty clause, he would invariably contact the drafting organization's customer-service department and threaten to switch credit cards or cell-phone-service providers—and that the company would invariably waive the fee assessed or otherwise appease him to his satisfaction. Because such options are less available (either in reality or by perception) to low-SES actors, *ceteris paribus*, alternative means of redress become more attractive by comparison. Lower-SES is correlated with greater likelihood of considering extra-legal forms of redress as responses to unfavorable zombie-contract exchange.⁹⁸ Research suggests that low-SES actors are more likely to resort to coercive power than high-SES actors.⁹⁹ Further, the opportunity costs associated with taking coercive action against a zombie-drafting organization are lower for lower-SES actors.¹⁰⁰

Perhaps somewhat ironically, even judges sometimes recommend ways of seeking aggressive self-help when individuals feel wronged by companies abusing their trust. A good example of this is Judge King's opinion in *Harris v. Time, Inc.*¹⁰¹ In *Harris*, the plaintiff received a letter with the words, "JOSHUA A. GNAIZDA, I'LL GIVE YOU THIS VERSATILE NEW CALCULATOR WATCH FREE Just for Opening this Envelope Before Feb. 15, 1985."¹⁰² One had to open the envelope to see that the calculator watch was only offered to those who mailed a certificate back to Time, Inc., subscribing to *Fortune* magazine.¹⁰³ In other words, the watch was not "free" to those who opened the envelope, but only to those who bought a magazine subscription. Essentially, Time tricked people into opening the envelope. Time induced the plaintiffs to subject them to the magazine advertising inside the letter, and plaintiffs opened the envelope in order to secure the promised benefit for doing so: the calculator watch.

Yet the court agreed with Time's argument that this action should be dismissed because of the legal maxim, "*de minimis non curat lex*," or "the law disregards trifles."¹⁰⁴ Even though a first-year law student would see that a unilateral contract was formed upon opening the letter, Time was able to escape liability for its promise to thousands of people who were duped. But the judge didn't stop there. He issued the following advice to the plaintiffs:

98. *Id.* at 398.

99. See LINDA D. MOLM, COERCIVE POWER IN SOCIAL EXCHANGE 209–35 (1997); Linda D. Molm, et al., *Power in Negotiated and Reciprocal Exchange*, 64 AM. SOC. REV. 876, 887–88 (1999).

100. MOLM, *supra* note 99, at 881.

101. 237 Cal. Rptr. 584, 589 (Ct. App. 1987).

102. *Id.* at 586.

103. *Id.*

104. *Id.* at 589.

As a practical matter, plaintiffs' real complaint is that they were tricked into opening a piece of junk mail, *not* that they were misled into buying anything or expending more than the effort necessary to open an envelope. If [plaintiffs] were angry [they] might even have returned Time's business reply envelope empty, requiring Time to pay the return postage. If [they] felt particularly hostile, [they] might have inserted a nasty note or other evidence of [their] displeasure in the reply envelope.

A \$15,000,000 lawsuit, filed in a superior court underfunded and already overburdened with serious felony prosecutions and complex civil litigation involving catastrophic injury from asbestos, prescription drugs and intrauterine devices, is a vast overreaction. The law may permit junk mail to be delivered for a lower cost than the individual citizen must pay. It does not require that the public subsidize junk litigation.¹⁰⁵

Yet, the aggregate costs of these non-litigation "solutions" are not trivial. As people stay on hold for extended periods of time, call again and again, threaten lawsuits, lawyer themselves up, and make the company pay attention, the bills pile up—reciprocally, on both sides. And too often low-SES consumers are stuck paying the bill. As a company plans its defense and expends time and effort on a dispute, the racking up of billable hours eats resources that could have been saved with more compliant consumers, with more negotiation up front, with more transparent terms and fewer frustrating surprises. These are costs that routinely evade tabulation.

We are told about all the savings this system offers to consumer and company alike,¹⁰⁶ but it is hard to know whether they net these incurred reciprocal costs that could likely be avoided by fewer zombies—more mind and more soul in our contracting practices. And even if these costs do net out once economists pay sufficient attention to them, there is the problem that it is most likely the "haves" that will bend the will of the organization through sophisticated tactics and the desire by the organization to retain them.¹⁰⁷ Therefore, even if the average consumer is better off, the average rich consumer ends up being even better off, reinforcing inequality and injustice and derogating from the rule of law. In their zombified form, these contracts replicate power imbalances, and, at worst, exacerbate them.

3. *The Reciprocal Costs of Illegality*

Sometimes a consumer—of whatever socio-economic background—gets really upset, and the consumer's response may be costly in a way more directly undermining of the rule of law. Indeed, customers some-

105. *Id.*

106. See HIRSCHMAN, *supra* note 94, at 9.

107. Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 531 (2006).

times engage in illegal conduct in response to a cold shower of legality from zombie contracts. When a consumer of intellectual property perceives unfairness in the structure of their entitlements to the property, for example, they can be inclined to resist legal parameters through civil disobedience.¹⁰⁸ There is, of course, a complicated story about why consumers resist background law when it fails to cohere with their reasonable expectations about what social norms permit. The basic point, however, is that aggressive, one-sided terms can lead to illegal backlash. It matters less whether the terms are actually aggressively one-sided and more whether they are perceived as such.

What sort of illegal actions do angry consumers undertake that are more destructive of the rule of law than just waiting on hold and wasting people's time and money? Examples likely include illegal downloading and distribution of content, illegal reverse engineering, and illegal refusing to pay the bill. And these illegalities cost consumers and companies time, energy, and money. Fighting back to protect content, designing anti-circumvention techniques, and paying for collections are additional costs that are rarely tabulated in considering the costs associated with zombie exchange.¹⁰⁹ Moreover, all of these efforts take their toll on the rule of law generally, as consumers seek quite directly to take aim at law and the edifices—like contracts—that keep the rule of law functional.

Even when anger *per se* is not driving illegal behavior but is just a quotidian part of performance to use content in ways zombie contracts purport to constrain, consumers may be eroding the rule of law. As John Tehranian has noted, the law/norm gap can cause real turbulence in the efficacy of our legal regimes; this is as true of contract as it is of copyright.¹¹⁰

Ultimately, the literature on obedience to the law and responses to apparently unjust procedures or outcomes in court cases¹¹¹ support the basic case of this Part: there are real costs to negative experiences with ubiquitous zombie contracts. These experiences lead to erosion of the rule of law and a corresponding increased resort to extra-legal and sometimes antisocial means of adjudicating disputes. It is high time we give these costs attention in the ledger. Recognizing them is one way to make

108. Consider some of Ben Depoorter's work: Ben Depoorter et al., *Copyright Backlash*, 84 S. CAL. L. REV. 1251 (2011); Ben Depoorter & Sven Vanneste, *Norms and Enforcement: The Case against Copyright Litigation*, 84 OR. L. REV. 1127 (2005); Ben Depoorter et al., *Problems with the Enforcement of Copyright Law: Is There a Social Norm Backlash?*, 12 INT'L. J. ECON. BUS. 361 (2005) [hereinafter Depoorter et al., *Problems with Enforcement*].

109. Depoorter et al., *Problems with the Enforcement*, *supra* note 108, at 364.

110. See John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537 (2007).

111. See E. ALAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988); JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975); David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1091 (1999); Nadler, *supra* note 83, at 1439–40; Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 626 (1991).

salient the need for some strategy of containment. We sketch one method of containment below, in Part IV.

IV. TRANSPARENCY DIVIDENDS

Online, we “click to agree,” spawning zombie contracts many times a week without reading them—like zombies ourselves.¹¹² It would be useful, we think, to implement a strategy to survive this zombification process. Ultimately, we think it is possible to break this cycle in a way that respects the rule of law—and does not favor the “haves” with its attendant distributional consequences.¹¹³ Our approach follows prior scholarship that has sought to understand the relationship between actors’ interpretations of the rule of law and their behavioral interactions with other actors and organizations, appreciating the circumstances under which persons rely on the law, avoid the law, and break the law.¹¹⁴ We believe the introduction of our zombie exchange typology can advance our understanding of the behavioral economics, psychology, and sociology of consumer exchange.

To summarize what we have argued thus far, there are many costs associated with zombie exchanges. Legal costs are those incurred from individuals responding in a legal way. These legal costs come in the form of lawsuits (with or without merit), threats of lawsuits, and attendant publicity campaigns.¹¹⁵ Zombie exchange also produces lawful, negative-reciprocal behavior by individuals upset and surprised by the terms of their contracts.¹¹⁶ These take the form of contacting customer service, complaining, commenting on blogs, writing Yelp reviews, writing to the Chamber of Commerce and Better Business Bureaus, and initiating internal dispute resolution processes.¹¹⁷ Lawful ways abound to disrupt operations of large corporations in order to get back at drafting organizations. Not all of the impetus for such disruption results from feeling upset or surprised by zombie contracts, but surely some part of it does. Small actions taken by many individuals add up. Social media increases the rate at which bad press can spread. Companies often spend a lot of time mon-

112. See Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 168–69 (2011); see also Ben-Shahar, *supra* note 26, at 2 (“Real people don’t read standard form contracts. Reading is boring, incomprehensible, alienating, time consuming, but most of all pointless. We want the product, not the contract.”).

113. See generally EHLICH, *supra* note 60, at 392; DURKHEIM, *supra* note 60, at 270; MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 3 (Stephen Kalberg trans. 2011) (1905).

114. See generally SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN* (1990); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998); Abrams, *supra* note 81; James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC’Y REV. 195 (2011); Tyler & Rasinski, *supra* note 111.

115. See Gilo & Porat, *supra* note 74, at 1025.

116. See Ayres & Schwartz, *supra* note 17, at 545.

117. *Id.*

itoring and cataloging such consumer behaviors.¹¹⁸ Indeed, they may be acutely aware of these costs, but they rarely attribute any of the behavior to zombie exchange. Many companies presumably assume these costs are unavoidable in a large market, but we believe some of these costs are attributable to zombie contracts and may, therefore, be avoidable. Some of the public information produced by these skirmishes between persons and organizations is useful for the market, for consumers, and for organizations. Without more careful assessments of the zombie economics we propose here, though, we cannot optimize this costly process of dispute resolution that zombie contracts cause.

There are also extra-legal costs generated by zombie exchanges. These includes attempts to hack and bypass digital hurdles and protections, ignore legal boundaries and property rights (especially intellectual-property rights of organizational zombie-contract drafters), and otherwise exert non-legal disruption that costs drafters and non-drafters alike money and time.¹¹⁹

Even when organizations are aware of the kinds of legal and extra-legal costs described here, it is exceedingly rare for a drafting organization to attribute such costs to zombie exchange. Firms likely undervalue doing something different within the standard-form environment because individuals and corporations have normalized to one-sided zombie exchange. So, because the costs associated with zombie exchange are considered unavoidable, firms are not searching for ways of avoiding costs associated with zombie exchanges, nor are they interested in measuring or eliminating such costs.

The first aim of this Article is to suggest that legal and extra-legal costs (and the associated impact on the rule of law) are a product of zombie exchange. That much we sought to do in Part III. The second aim is to set forth the conceptual framework for reducing these costs. Our goal is not to kill the zombies;¹²⁰ rather, it is to illuminate a path away

118. Wayne R. Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661, 662 (2012) (“Recently, however, some consumers have used social media to assert a new kind of power over merchants. That is, these consumers have purchased goods or services by form contracts that contain unfavorable terms, and the eventualities that such terms are designed to address have in fact come to pass. When their initial efforts to protest for more favorable treatment than the contract terms technically require failed to yield any recourse to these consumers, they took their protests online into the social media—in the form of Facebook pages, Twitter posts, or YouTube videos—where their complaints are heard by hundreds, thousands, or sometimes even millions of other consumers. Faced with such online complaints which have garnered substantial attention, several merchants have relented and granted more favorable treatment than their contract terms otherwise required.”).

119. See Depoorter et al., *Problems with the Enforcement*, *supra* note 108, at 364.

120. On April 1, 2010, an online video game company, GameStation, included an “immortal soul clause” in the site’s terms and conditions. The term reads, “By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and forever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk or one of its duly authorized minions.” *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOX NEWS (Apr. 15, 2010), <http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html>. Only 12% of purchasers noticed the rule, in spite of GameStation’s monetarily incentivizing individuals to click a

from a Contract Zombie Apocalypse, demonstrating that high costs may be avoided, and, in fact, that additional dividends might be realized, too.

A. *The Problems with Generalized Complaints About Zombie Contracts*

Other scholars and commentators have attempted to explain their problems with zombie contracts. These complaints are worth mentioning here as a means of putting the cost-based problem of zombie contracts we identified in Part III in stark relief.

1. *Unfairness*

The most common complaint is that terms included by drafting organizations are generally unfair to consumers.¹²¹ To bolster this complaint, commentators pick terms they do not like. These terms are labeled unfair because of the combination of two elements. They inure more benefit to the drafting entity than the non-drafting entities—and consumers are likely unaware that they agreed to the term in exchange for the benefit of the underlying bargain.¹²² The latter element is one of the quintessential features distinguishing contracts produced from archetypal exchange from those produced by zombie exchange: there is an indirect relationship between the benefit of the bargain and the terms of the contract in zombie exchange. So identified, the unfairness could be remedied in one of three ways: (1) eliminating the offending term, (2) redrafting it to make it less one-sided, or (3) by making the term part of the primary exchange, forcing its salience onto the otherwise ignorant consumer. For instance, waivers of liability, limitations on individuals' privacy, waivers of the right to sue in court, or the granting of drafting organizations the right to commercialize private information have been the focus of most of the unfairness complaints.¹²³

There are three deficiencies with this class of complaint. First, fairness is subjective and needs to be judged in context. Just because I might not think it is fair to give up my right to a jury trial in exchange for use of a social networking site does not mean that everyone agrees it is unfair. If every other social networking site “charges” users the same thing, then a user's alternatives to exchange is the same no matter what he chooses. But still, one could argue that all social networking sites have raced to

box to “nullify your soul transfer.” The few who noticed the clause and clicked that were rewarded with a five £ credit. *See id.*; Catharine Smith, *7,500 Online Shoppers Accidentally Sold Their Souls to Gamestation*, HUFFINGTON POST (June 17, 2010, 5:12 AM), http://www.huffingtonpost.com/2010/04/17/gamestation-grabs-souls-o_n_541549.html.

121. *See* NANCY KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 78–79 (2013); RADIN, *supra* note 25, at 9.

122. RADIN *supra* note 25, at 12.

123. *See id.* at 16–17; KIM, *supra* note 121, at 70.

the bottom and all consumers are now being taken advantage of because there is no available alternative to the exchange.¹²⁴

Consider also that what commentators deem unfair might not be deemed so by most consumers. Indeed, initial empirical work conducted by one of us (Eigen) and Marotta-Wurgler is beginning to shed light on the degree to which this is so. This preliminary research reveals that individuals seem to care more about avoiding monetization of their private information and ownership of their personal content than they do about being advertised to, or having their activity monitored.¹²⁵ Table 2 below shows mean scores from 1–5, where 1 signifies that subjects thought the issue listed in the first column is unimportant, and 5 signifies that they regarded the question as very important to them. Expectations of treatment by organizations in zombie exchange are very subjective and are continuing to evolve.

TABLE 2

Issue	Mean
The company won't use information it collects about me to target advertising on its site for my interests.	3.35
The company's default settings won't change frequently.	3.53
The company won't track what I do online.	3.76
The company gives adequate notice of changes to terms.	3.91
The company won't change the terms of use whenever it wants.	3.98
The company won't force me to waive my right to sue them.	4.00
The company won't sell my information.	4.24
The company won't claim ownership of my content (music, video, images).	4.32
The company will safeguard my private information (email, name, phone number, etc.).	4.63

Context is important, too. Consider the exchange that happens when an individual signs up for Facebook. The individual might perceive the exchange as use of a powerful social networking site enabling them to communicate and share information and multi-media with others *for free*, but that is not realistic. It is not for free. Most people understand

124. See KIM, *supra* note 121, at 81. Admittedly, not being on any social networking site is arguably a more viable alternative because the service offered is not a resource users need as much as access to potable water. Indeed, the degree of need for the resource or set of resources controlled by the drafting entity is extremely important in understanding parameters of perceived fairness in contract drafting. If Facebook charged users \$1 million to sign up, it would be perceived as more fair than if the Facebook charged \$1 million for potable water in the middle of the Sahara.

125. See *id.* at 74; additional data on file with Zev Eigen and Florencia Marotta-Wurgler.

that Facebook's terms and conditions make this clear.¹²⁶ The exchange is use of the site, and, in return, individuals agree to permit access to their data, and be exposed to advertisements.¹²⁷ Thus, giving up some privacy rights might not be perceived as "unfair" by the consumer. If, by comparison, Steve owned an apple cart and with each apple he sold Steve included a term-sheet that said by purchasing an apple individuals agreed to permit Steve access to their email accounts, that might be contextually different and more likely unfair. In short, fairness is highly subjective and context specific, and commentator preferences are rarely based on empirical evidence.¹²⁸

Second, even if everyone read and understood unfair clauses, the same exchange might have resulted anyway. Even if Apple sat down and negotiated each iTunes agreement with each user, the same terms could exist. The existence of unfair terms is a function of mutual power imbalances, not of the type of exchange (archetypal versus zombie). It is thus not clear that unfair terms are symptomatic of form contracting. They are more likely symptomatic of something else: an imbalance of power in the underlying exchange. The unfairness complaint has less to do with the contracts and more to do with a general distaste for power-imbalance in exchanges.¹²⁹ But these exchanges are a part of life, regardless of whether the more powerful actor is Apple, a landlord, or just an individual in control of more resources.¹³⁰

Third, it is possible that some of the cries of unfairness of terms in zombie contracts stem from a common heuristic in negotiations called "reactive devaluation."¹³¹ This is when individuals deflate their valuations of offers made by their counterparts in a negotiation on the spurious assumption that a counterpart's proposal in her best interest is invariably in tension with the individual's best interest.¹³² Similarly, it is possible that commentators reactively devalue by proxy the valuation that individual consumers put on terms unilaterally offered by zombie-contract-drafting entities. Just because terms were unilaterally imposed by drafting entities, they are not axiomatically unfair to consumers. Some clauses may be disliked, but this does not make them unfair.

Ultimately, the doctrine of unconscionability deals with "unfair" terms by setting limits on procedural and substantive "naughtiness" in form contracts and elsewhere.¹³³ Courts consider the power imbalance of

126. See, e.g., *id.*

127. *Id.* at 156.

128. See, e.g., *id.* at 157.

129. KIM, *supra* note 121, at 81; RADIN *supra* note 25, at 12.

130. JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 547 (1990).

131. See, e.g., Lee Ross & Constance Stillinger, *Barriers to Conflict Resolution*, 7 NEGOT. J. 389, 394 (1991).

132. There is a substantial body of research on reactive valuation. See Lee Ross & Andrew Ward, *Psychological Barriers to Dispute Resolution*, in 27 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 255, 270 (Mark Zanna ed., 1995); Lee Ross, *Reactive Devaluation in Negotiation and Conflict Resolution*, in BARRIERS TO CONFLICT RESOLUTION 26-42, 28 (Kenneth J. Arrow et al. eds., 1995); Ross & Stillinger, *supra* note 131, at 389, 394.

133. See U.C.C. § 2-302 (2002); RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

parties and the relative sophistication of parties when determining procedural and substantive unconscionability.¹³⁴ With some exceptions (delineated by the unconscionability doctrine),¹³⁵ there are few terms that are unconscionable independent of their context. A term that requires a contracting party to hand over his first-born child is unconscionable regardless of the context, whether found in a contract between two equally footed parties or not. But terms that are more common, like forum-selection clauses, venue-selection provisions, or private-dispute-resolution clauses, require context in order to become unconscionable. This view is apparently not shared by some commentators who routinely decry arbitration clauses as unfair, regardless of context, so long as they are offered on a take-it-or-leave-it basis.¹³⁶ It is simply untrue that a take-it-or-leave-it arbitration clause must be unfair to individuals if it is offered by drafting parties.

2. *Lack of “Consent” and Lack of Comprehension*

Some commentators, consumer rights activists, and legislators believe that adhesive form contracts are bad because individuals fail to read them and are therefore surprised by their contents.¹³⁷ This is often described as a “problem” of consent.¹³⁸ The “problem” is that individuals do not meaningfully consent to terms because they do not read them first, or, if they tried to read the terms, they would likely not understand them.¹³⁹

Yet, this is not a problem unique to zombie contracts. If an individual negotiates a lease with a landlord, sending drafts back and forth, but signs the final version that the landlord sends back without reading it, he is bound to the terms contained in the final version for the simple reason that he had the opportunity to read it. Contract law binds the individual in arms-length negotiated transactions for the same reason that it generally binds signers in consumer-contract settings: the law wants to avoid the quagmire that would result with the contrary rule. If the burden were placed on the non-complaining party to prove meaningful consent—not just the opportunity to read, but actual, meaningful subjective understanding of the terms—it would be too easy for parties to escape from

134. RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d.

135. U.C.C. § 2–302 cmt. 1.

136. See RADIN, *supra* note 25, at 128; David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 132 (1997) (“By requiring customers and employees, through standardized contracts across entire markets, to agree in advance to submit all potential violations of common-law and statutory rights to arbitration—where defense costs and judgments will on the whole be less than under a regime of judicial enforcement—corporate defendants have begun to deregulate themselves.”); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 711 (1996) (“The Court should abandon its unjustified preference for arbitration and replace it with a policy of acceptance of arbitration voluntarily agreed to by contracting parties.”).

137. See, e.g., RADIN, *supra* note 25, at 127.

138. See, e.g., Rakoff, *supra* note 25, at 1228.

139. See *id.* at 1226.

properly formed contracts from which they later wish to escape. The doctrine on this is clear: courts permit parties to make bets in contracts, and courts make parties pay up if they lose those bets. Courts do not permit parties to get out of bad bets they made if it is clear that they intended to make the bet in the first place.

Another common complaint is that terms are generally too complicated for consumers to understand.¹⁴⁰ Accordingly, the opportunity or duty to read cannot make zombie contracts enforceable because it would make no difference if one sat down with many consumers and tried to explain how a damages waiver works; they would still not get it. Some argue that transparency is relatively unobtainable.¹⁴¹ Some argue it is reasonable to hope for better on consent metrics.¹⁴² We think the case for complexity is overstated, and that simplicity and transparency are more attainable than some may think. As we will argue below, transparency is, in fact, part of the solution.

Yet, individuals should not generally be reading zombie contracts for two obvious reasons. First, they plausibly perceive that there is no alternative to the form of their exchange. For instance, people think that Facebook is requiring them to give up x% of their privacy rights, so would Pinterest or any other social networking site. As we discussed above,¹⁴³ drafting isomorphism (the practice of copying contract terms in whole or in part) across companies is common, so this belief is somewhat accurate. If it is accurate, then it makes little sense to spend any time reading the same contract one would have to endure once one has decided to be a member of a social-networking site.

Second, there is a critical component of disclosure that is not part of the debate, but needs to be. Disclosure is not just about conveying information—it is also about *trusting* that the entity conveying it is accurately and completely revealing information in a meaningful way tailored to what the individual needs to know (and not buried like a needle in a haystack among useless information). Individuals have been taught not to trust corporations in their disclosures. We have learned that the information conveyed by corporations fulfills a need by the corporation. It is a legal box-checking exercise devoid of substance and meaning. Information is not being disclosed to individuals to help them or to inform them in a clear, succinct way. Individuals have learned this from the incredibly high volume of repeated over-exposure to such fake disclosures that are plastered everywhere and on anything with enough surface area

140. See, e.g., Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 234 (2002) ("Less well known is how few American adults could understand and use contract documents and disclosures if they actually chose to read them. New research measuring the literacy of the U.S. population demonstrates that even consumers who might take the time and trouble to 'read' contemporary consumer contract documents are unlikely to understand them. The same literacy research suggests that many, if not most, consumers are unable to extract critical information on contract terms from federally mandated disclosure documents.").

141. Ben-Shahar & Schneider, *supra* note 29, at 679.

142. Ayres & Schwartz, *supra* note 17, at 607.

143. stanfordlawschool, *supra* note 77.

to accommodate them. That is a real social cost of boilerplate—our collective numbness to the potential for meaningful communication by the drafting parties. Individuals would also similarly not expect that anything they could communicate to the corporation would do anything other than fall on the deafest of ears. Of course, that trust could be abused: disclosing companies might leverage the trust they create for further exploitation.¹⁴⁴ But that is not an argument that can displace the centrality of successful and earned trust to the functioning of the market and legal system.

Our primary concern with zombie contracts here has to do with the legal, extra-legal, and social costs they impose on consumers, drafters, and everyone who wishes to have meaningful communication among organizations and individuals. The next Subpart outlines our proposal for dealing with these specific costs.

B. *The Transparency Dividend Solution*

There have been several attempts to “fix” consumer form contracting,¹⁴⁵ but since most of the proposed solutions are not calibrated to address problems that are uniquely associated with zombie exchange,¹⁴⁶ the costs we have identified are not being sufficiently targeted. Most of what others have identified as problems with zombie exchange would probably be better characterized as problems associated with the perceived underlying inequality of an imbalanced distribution of control over resources.

1. *The Problems with Other Proposed “Solutions” to Zombie Contracts*

In response to misidentified problems, commentators propose ways to make things better. There are two kinds of approaches. Some wish to legislate away a portion of entities’ rights to contract freely: this could be done either (1) by imposing constraints on drafting organizations as to what kinds of contracts they may impose on consumers, or (2) by using informal sanctions to adjust to the law’s unwillingness to address power imbalances.¹⁴⁷ The first approach frequently entails wholesale bans on categories of contract provisions like consumer-arbitration clauses and waivers-of-rights clauses.¹⁴⁸ The second approach often relies on publicity campaigns to effect boycotts of companies imposing onerous terms.¹⁴⁹ Neither response is optimal for addressing the costs associated with zom-

144. Some of the work exploring how disclosures of conflicts of interest are actually more likely to inspire misplaced trust is discussed in Ben-Shahar & Schneider, *supra* note 29, at 738.

145. See RADIN, *supra* note 25, at 223.

146. See *id.*

147. See, e.g., KIM, *supra* note 121, at 176; RADIN, *supra* note 25, at 213, 227.

148. See Schwartz, *supra* note 136, at 89; Sternlight, *supra* note 136, at 643 n.30 (citing Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 486 (1981)).

149. See RADIN, *supra* note 25, at 243.

bie contracting that we identify. This should not be surprising since the costs we have discussed here do not form the basis of the “problems” that either set of fixes attempts to address.

Both sets of responses bear significant costs of their own, too, rendering those proposals worth questioning. Legislative and doctrinal adjustments may too aggressively strip contracting parties of their right to contract freely, and run afoul of the mandate intrinsic to all contract law of toeing the line between according the liberal ideal of freedom of economic exchange and according socio-normative constraints on contracting. For instance, the law permits individuals to sell their Bentleys worth \$300,000 for \$100 if they so desire, but the law does not permit the sale of a child for \$50 million even if the child is being sold to a family with ample resources and motivation to care for the child with greater skill and more love than the current guardians. The law must always balance the liberal ideal of free exercise of economic exchange and the socio-normative parameters of what should and should not be enforceable.

Setting wholesale limitations on organizations’ drafting of clauses that are “unfair” because consumers do not read them, and are therefore surprised to learn they have agreed to them *ex post*, does real harm to the balancing of these two critical ideals. Not only would drafting organizations be harmed by this, consumers would as well. Even though it is unlikely that drafting organizations have been properly accounting for the saved costs associated with including contract terms in zombie contracts, for the reasons discussed in Part III, a legislative or doctrinal fix would make the increased costs salient and, therefore, more likely to be transferred onto consumers. Additionally, legislative and doctrinal fixes may underestimate the degree of dynamic potential in drafting. The incentive to draft around any proposed fixes would be great. The ability to do so would be high given the unlikely effect on consumer behavior that legislative or doctrinal changes would precipitate. It would be unlikely that making any of the changes proposed in this category of consumer-contract fixes would change anything in the long term. Rather, it would create only short-term instability before a new equilibrium is reached that either parallels the current state of “unfairness” commentators wring their hands about now, or even exacerbates it.

This category of fixes is quite unpalatable from an implementation perspective, regardless of these issues. Mandating a wholesale ban on these kinds of clauses for a selected group or class of drafting entities seems like a politically dangerous approach for Democrats and Republicans, particularly during an economic downturn. And, as we explored earlier, because so much about “unfairness” depends on context, wholesale bans are likely to do much injustice at the retail level. Therefore, the first category of addressing the “problem” of boilerplate is costly, unrealistic, politically untenable, and also is unlikely to substantially reduce the legal or extra-legal costs of zombie exchange.

The second category of proposals is just as unlikely to alleviate the burden of allegedly oppressive or surprising contract terms on consumers. Nor is it likely to reduce the legal and extra-legal costs of zombie contracts either. In part, this conclusion is apparent because there have already been efforts by consumer-advocacy groups and consumer-friendly Internet writers to inform consumers and raise awareness of contract terms that commentators regard as unsavory.¹⁵⁰ For instance, one website lists the “10 Ridiculous EULA Clauses That You May Have Already Agreed To.”¹⁵¹ The site informs consumers of unfavorable and unusual clauses in common EULAs.¹⁵² For example, in one of the site’s listings about the EULA for Google’s Chrome product, the webpage highlights the clause in this agreement purporting to give Google a “perpetual, irrevocable, worldwide, royalty-free, and non-exclusive license” to do whatever it wants with the content users submit, post, or display on or through the service.¹⁵³ Recognize, this would purport to give Google a license to use any Chrome user’s bank information displayed through its browser. There are many examples of news stories and other attempts to alert consumers to how bad zombie contracts are and to spotlight how unaware everyone is of their nefariousness.¹⁵⁴

These efforts have not worked in any systematic way that anyone has been able to chart. In fact, these efforts to inform consumers may have the exact opposite of the intended effect—they may serve to normalize individuals to terms in zombie contracts. The more normalized individuals are to “unfair” terms, the more individuals come to expect them, and the more doctrinally enforceable they become. We noted this as one of the inadequacies of Restatement § 211 in our discussion above, which some claim set the limit of zombie contracts’ enforceability at consumers’ “reasonable expectations.”¹⁵⁵

We speculate that these efforts belie the mismatch between what commentators regard as oppressive and what consumers regard as oppressive. Just because consumers may be surprised to learn *ex post* that they gave up their right to sue in court and instead must resolve claims in arbitration, this does not necessarily mean their decision-making process would be any different than it was. So, the second category of addressing the “problem” of boilerplate has already proven mostly ineffectual and

150. See, e.g., Chris Hoffman, *10 Ridiculous EULA Clauses That You May Have Already Agreed To*, MAKE USE OF (Apr. 23, 2012), <http://www.makeuseof.com/tag/10-ridiculous-eula-clauses-agreed/>.

151. *Id.*

152. *Id.*

153. *Id.*

154. The HUMANCENTIPAD episode on *South Park*, for example, pokes fun at the terms of the iTunes user agreement. (Comedy Central television broadcast Apr. 27, 2011). Recently, more serious documentaries attempt to alert consumers about the dangers of blindly clicking “I Agree” on websites like Facebook and Google. See, e.g., *TERMS AND CONDITIONS MAY APPLY* (Hyrax Films 2013).

155. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981). One of us (Leib) is somewhat more optimistic about the use of “reasonable expectations” doctrine in courts to minimize the costs of zombie exchange. See Leib, *supra* note 67, at 275.

unlikely to impact consumer behavior or organizations' contract drafting behaviors in meaningful ways.

2. *How to Leverage Trust to Augment Transparency and Avoid a Contract Zombie Apocalypse*

Both categories of fixes discussed above are well-intentioned. We are sympathetic to the aims of those with concerns about imbalanced distribution of resources and increasingly imbalanced exchange; however, we do not believe the remedies we survey here will fully solve the central problems of zombie exchange we identify. We advocate instead for shifting the focus of the solution to creating neutral, trustworthy sources of information to augment the likelihood that individuals will care about and rely upon information they are given, reducing the surprise associated with possibly unfavorable contract terms. The surprise is a substantial source of the increased costs brought about by zombie exchange; even if prior knowledge of the terms would not change the outcome of the exchange in material terms, avoiding surprise itself materially affects the exchange's costs to society.

Evidence suggests that acknowledging unfavorable contract terms up front reduces the likelihood of surprise, increases the rate of performance of the negative contract terms, and generally augments perceptions of the entity responsible for the unfavorable terms.¹⁵⁶ As some companies have discovered,¹⁵⁷ and commentators have lamented,¹⁵⁸ though, it is extremely hard for disclosure to be effective when it comes directly from the drafting organizations. Drafting entities are distrusted generally. Requiring individuals to click-to-agree to a set of seemingly indecipherable legal terms in order to receive the benefit of an underlying exchange reinforces this distrust.

Surveys routinely reveal significant distrust of corporations. The General Social Survey¹⁵⁹ asks respondents to rate their confidence in institutions like businesses and corporations, financial institutions, the executive branch of the federal government, the U.S. Supreme Court, and the scientific community.¹⁶⁰ Over time, financial institutions, the federal

156. See Ross & Ward, *supra* note 132, at 255; Ross, *supra* note 132, at 26; see generally Ross & Stillinger, *supra* note 131 (examining the complicated aspects of negotiations, conflicts, biases, and perceptions).

157. Stephen Lawson, *T-Mobile USA Agrees to Come Clean about 'Uncarrier' Service Plans*, PCWORLD (Apr. 25, 2013 1:50 PM), <http://www.pcworld.com/article/2036413/tmobile-usa-agrees-to-come-clean-about-uncarrier-service-plans.html>.

158. See Ben-Shahar & Schneider, *supra* note 29.

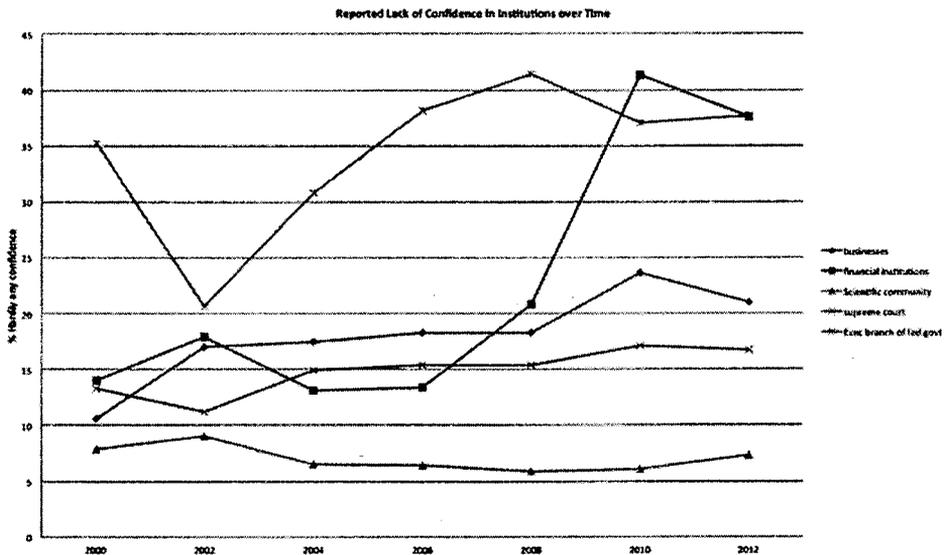
159. Other than the U.S. Census, the GSS is the most frequently analyzed source of information in the social sciences. It is the only survey that has tracked the opinions of Americans over an extended period of time—starting in 1972. GENERAL SOCIAL SURVEY, <http://gss.norc.org/> (last visited Sept. 30, 2016); *General Social Survey (GSS)*, NORC AT THE UNIVERSITY OF CHICAGO, <http://www.norc.org/Research/Projects/Pages/general-social-survey.aspx> (last visited Sept. 30, 2016).

160. TOM W. SMITH & JAESOK SON, NORC AT THE UNIV. OF CHI., GENERAL SOCIAL SURVEY 2012 FINAL REPORT: TRENDS IN PUBLIC ATTITUDES ABOUT CONFIDENCE IN INSTITUTIONS 1–5 (2013), http://www.norc.org/PDFs/GSS%20Reports/Trends%20in%20Confidence%20Institutions_Final.pdf.

government, and private businesses have become relatively distrusted by the American public. In 2012, only 17.3% of respondents said that they had a great deal of confidence in major companies, 60.7% reported only some confidence, and 20% reported hardly any confidence.¹⁶¹ Financial institutions fared worse. Only 11.8% of respondents reported a great deal of confidence in financial institutions, 51.4% only some confidence, and 36% said that they had hardly any confidence in those running financial institutions.¹⁶²

In stark contrast, 39.7% reported a great deal of confidence in the scientific community in 2012, 48.6% reported some confidence, and only 6.9% reported having hardly any confidence.¹⁶³ Figure 1 below shows the reported “hardly any” response percentages over time for the institutions described above. Financial institutions and businesses both significantly lost the trust of the American public from 2000 to 2012. By contrast, the scientific community has remained consistently the institution garnering the most confidence over this time period.

FIGURE 1



There are layers of distrust that likely render prior disclosure of operative unfavorable terms to individuals extremely unlikely to reduce *ex post* surprise. General social distrust of corporations—combined with specific distrust effectuated by the modality of exchange itself—snowballs and is difficult to overcome. The specific distrust is, notably, likely to be inversely proportional to the magnitude of the underlying exchange. That is, if the underlying exchange is a “free” download of a photo-editing application in exchange for exposure to banner advertis-

161. *Id.* at 10.

162. *Id.* at 9.

163. *Id.* at 14.

ing, and the drafting organization requires individuals to agree to a contract that is perceived as signing away one's rights to privacy of data, this would likely result in a high degree of distrust. By contrast, an underlying exchange of a greater magnitude like a paid download of an application that permits individuals to synthesize private data and aggregate it for ease of analysis in exchange for the same requirement of signing away rights in a zombie contract might still trigger distrust, but perhaps less so given the greater likelihood of conformity with norms of reciprocity.¹⁶⁴

One of us (Eigen) and Marotta-Wurgler recently conducted a survey of entering law students at four U.S. law schools and asked respondents the following question:

if there were a website or app that scanned the form contracts and "terms and conditions" you clicked to agree, and gave you a very short, simple, personalized summary of the terms that you should care about, how much would you trust that website or app to do this accurately if it were run by

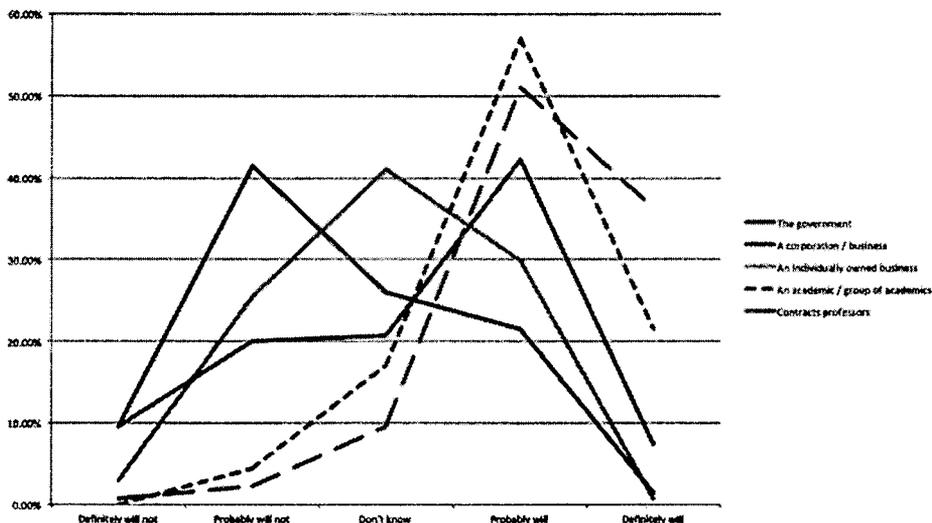
- (a) the government
- (b) a corporation / business
- (c) an individually owned business
- (d) an academic / group of academics
- (e) contracts professors

Figure 2 below shows the distribution of the 135 individuals who responded to this question.¹⁶⁵ The y-axis shows the percent of responses, and the x-axis shows the Likert scaled available responses. Most subjects reported they would trust contracts professors or academics significantly more than they would trust a corporation or an individually owned business. Because the survey was given to law students entering law school by contracts professors, it is unsurprising that contracts professors received the highest trust. Trust in academics or groups of academics, however, is still significantly greater than the other categories. Interestingly, in spite of recent governmental breaches of security of data, most individuals tended to report a greater willingness to trust the government than perhaps one might expect.

164. See generally Sandra L. Robinson & Denise M. Rousseau, *Violating the Psychological Contract: Not the Exception but the Norm*, 15 J. ORG. BEHAV. 245 (1994).

165. Data on file with Zev Eigen and Florencia Marotta-Wurgler.

FIGURE 2



In short, it is no surprise that individuals do not trust disclosures made by businesses. This is one main reason why efforts to disclose information have rung hollow, as described in detail in recent work by Professors Omri Ben-Shahar and Carl E. Schneider.¹⁶⁶

When one acknowledges a negative in a negotiation before it materializes, it is a way of demonstrating accountability and trustworthiness. Andrew Ward, Lauren Gerber Disston, Lyle Brenner, and Lee Ross have studied the positive effects of acknowledging negative elements in dyadic negotiations.¹⁶⁷ It is our contention that the way to surmount the costs associated with zombie contracts that we have identified in Part III is by relying on external academic sources as a means of augmenting fundamental transparency of exchange.

As an illustration, imagine that a bank is issuing a new credit card to individuals. As part of the transaction, the issuing bank requires individuals to consent to terms and conditions. The terms and conditions explain that there are different interest rates that apply to different kinds of transactions. For instance, if one transfers a balance from a different credit card, a much higher interest rate applies than the rate for carrying over balances from one period to the next. If individuals do not understand that there are variable rates, they are likely surprised by the higher than expected interest charged on balances they transfer, and are more likely to be upset, costing the issuing bank money in the ways outlined above. In order to minimize the surprise, the bank could disclose the information itself; however, banks do this very poorly, and even if they did it well, individuals are already inclined to mistrust the bank. If individuals are programmed to ignore disclosure, it seems unlikely that

166. See Ben-Shahar & Schneider, *supra* note 29, at 651.

167. See Andrew Ward et al, *Acknowledging the Other Side in Negotiation*, 24 NEGOT. J. 269 (2008).

PUTTING TERMS IN ALL CAPS AND BOLD, UNDERLINED WITH EXCLAMATION MARKS!!! is likely to break through the pre-programming. There is little the issuing bank could do to change individuals' minds about trust in disclosure.

One solution, as we see it, is in an independent academic process committed to conveying simple, salient, and transparent information. An academic institution devoted to transparent interpretation of the key surprising or potentially "unfair" terms of the contract between the issuing bank and individuals who want to sign up for a credit card could be used as an intermediary in the sign-up process. Imagine if the bank incentivized individuals to use the transparent academic solution by issuing a credit card to their new account once they demonstrated understanding and appreciation for the exchange. This augmented transparency would lower transaction costs associated with reciprocal negative exchange that now results from obfuscating less than favorable terms, or by downplaying that they are a part of the primary exchange.

The transparency solution would do two things. It would inform individuals of key, potentially surprising terms, and it would make more salient that some negative terms are essential components to the *quid pro quo* of the exchange. For instance, individuals are routinely upset by companies that offer "free" services but use their data to sell advertising.¹⁶⁸ Individuals are upset by Google's pervasive algorithmic searching of emails for words to target advertising to Gmail users.¹⁶⁹ Individuals are upset by Facebook's monetization of individual information and data shared with the company.¹⁷⁰ We suspect that some of this discontent would be reduced if the use of private data were more clearly communicated as being part of the underlying exchange.

Currently, Google conveys to individuals that Gmail is "free," and, by the way, click here acknowledging one's understanding to the terms and conditions that apply to use of the product.¹⁷¹ The primary exchange is presented as something (email use) for nothing, with the secondary exchange being contained in the terms and conditions. But that frame is dangerous and costly. Instead, the exchange should be characterized as being one in which Google is allowing individuals use of Gmail in exchange for individuals acquiescing to Google's monetization of individuals' personal data, and allowing Google to partner with advertisers to

168. See generally Rafi Goldberg, *Lack of Trust in Internet Privacy and Security May Deter Economic and Other Online Activities*, NAT'L TELECOMM. & INFO. ADMIN.: NTIA BLOG (May 13, 2016), <https://www.ntia.doc.gov/blog/2016/lack-trust-internet-privacy-and-security-may-deter-economic-and-other-online-activities>.

169. See Timothy B. Lee, *No, Gmail's Ad Targeting Isn't Wiretapping*, WASH. POST: THE SWITCH (Sept. 28, 2013), <http://www.washingtonpost.com/blogs/the-switch/wp/2013/09/28/heres-whats-wrong-with-this-weeks-ruling-that-google-may-be-wiretapping-its-customers/>.

170. See Karen Gullo, *Facebook Ads Settlement Challenged by Consumer Group*, BLOOMBERG (Feb. 13, 2014, 9:46 AM), <http://www.bloomberg.com/news/2014-02-13/facebook-ads-settlement-challenged-by-consumer-group.html>.

171. See Heather Kelly, *Why Gmail and Other E-mail Services Aren't Really Free*, CNN: TECH (Apr. 1, 2014, 4:31 PM), <http://www.cnn.com/2014/03/31/tech/web/gmail-privacy-problems/>.

target individuals based on algorithmic assessment of their preferences.¹⁷² There are some secondary terms of the exchange contained in the terms and conditions, like a choice-of-law provision, and other such clauses, but these are truly secondary.¹⁷³

Ultimately, Google may have the same problem as the credit-card-issuing bank in the first hypothetical. No one listens even if Google is digitally SHOUTING! This is the second function of the proposed academically neutral transparency solution. The entity would offer a transparent characterization of the true primary exchange involved in signing up to use Gmail, and that would redound to the benefit of consumer, company, and the rule of law alike.

It is not as if we are the first to propose intermediaries to inform consumers about their form contracts.¹⁷⁴ We are, however, the first to offer a theory about why there is a market failure here: zombification (of consumers and exchange) creates an impediment to the 'natural' development of such intermediaries. Contract parties are not credible. Third parties can intervene only if consumers are convinced both that there is a problem and that the intermediary can resolve it. Because of zombification, consumers cannot trust contract, and higher income consumers who might actually pay for intermediation think they are not at risk anyway.¹⁷⁵ Academic institutions are best situated here to stave off a Contract Zombie Apocalypse.

V. CONCLUSION

This Article proposes a way of surmounting contract theory's paralysis produced by doctrine tailored to a kind of exchange that is not consistent with most people's daily experiences with contracts. We suggest conceptualizing contract as a product of one of two types of exchange: archetypal or zombie. Considering zombie contracts produced by zombie exchange as a category of contract on its own reduces uncertainty in theorizing about the mismatch between contract doctrine and courts' and contracting parties' behaviors with respect to most form contracts. As empirical work on contracts has demonstrated, there is substantial variation in how individuals behave with respect to zombie contracts. We posit that at the core of that behavioral variation is a cohort effect: signers under thirty-five years old are more likely to have a base rate of zombie exchange to which they compare other exchanges. Signers over thirty-five are more likely to have a base rate of archetypal exchange and, therefore, are more likely pulled by framing a zombie contract as a morally binding promise. We have also identified specific costs associated

172. *See id.*

173. *See Google Terms of Service*, GOOGLE, <https://www.google.com/intl/en/policies/terms/> (last modified Apr. 14, 2014); *Privacy Policy*, GOOGLE, <https://www.google.com/policies/privacy/> (last modified Aug. 29, 2016).

174. *See, e.g.*, BAR-GILL, *supra* note 29, at 40.

175. Steve Thel gets the credit for this way of putting the point.

with the proliferation of zombie contracts. Those costs, if left unchecked, will continue to reduce the efficiency of market transactions, reduce the credibility of important disclosures, and reduce trust in contracts and the rule of law.

In addition to offering a theoretical solution, we have also offered a practical proposal as a means of reducing the costs we have discussed. A neutral, academic entity, perhaps a set of contracts experts, should inform individuals of potentially surprising terms, and frame exchanges more accurately. We believe this would reduce the costs associated with zombie exchange that we have identified here—costs like responding to legal threats, resolving customer complaints, loss of business, and reputational harm. In addition to reducing these costs, the transparency solution would likely increase the profit of the drafting entities. Research suggests that having a more honest and upfront contract formation increases contract-compliance rates and increases the degree to which individuals will feel bound by their contracts.¹⁷⁶ Research also suggests that individuals will be more loyal to the company, more likely to stay with the company over time, and less likely to regard the exchange as a market transaction devoid of trust.¹⁷⁷ Hence, we describe this solution as not just a cost-savings outcome, but as a dividend attributable to transparent, pre-contractual dealings. Thus, this solution should be attractive to drafting entities, too. With it, they would save costs of enforcement, policing, and collections—which could also be considered new dividends.

Last, the transparency solution we propose here should be quite attractive to those justifiably concerned with the deleterious effects zombie contracts have had on contractual relations and market exchange. The rule of law—a building block of civilized society—risks erosion from the burden of too many zombie contracts. The transparency dividend solution is calibrated to reinforce the rule of law without giving up on contract.

It's not dark yet, but it's getting there.

176. See Eigen, *When and Why Individuals Obey Contracts*, *supra* note 18.

177. John Hagell, III & John Seely Brown, *How to Deepen Customer Loyalty: Be Transparent*, FORBES (April 2, 2014), <http://fortune.com/2014/04/02/how-to-deepen-customer-loyalty-be-transparent/>.

