More Contract Lore

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I. INTRODUCTION

Contract lore consists of "'traditional beliefs' about contract law that 'contracts people'—judges, lawyers, and scholars applying and writing about contract law—employ so routinely and confidently that the principles [demonstrate] how we perceive contract law today."1

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Previously, I presented three illustrations of contract lore: first, expectancy damages put the injured party in as good a position as if there were no breach; second, the "reasons for a breach, whether willful, negligent, or unavoidable, are irrelevant to the rules of performance and remedies"; third, contract formation and interpretation focus on the parties' intentions.

None of these principles are factually or historically even close to true and are nothing more than myths. For example, expectancy damages rarely, if ever, make the injured party whole. Important remedial rules, such as the obligation of injured parties to pay their lawyers win or lose, the bar to the recovery of prejudgment interest, the preclusion of unforeseeable and unquantifiable damages, and the high bar to recover emotional distress damages, mean that injured parties usually recover well short of their lost expectancy.

Courts also pay close attention to the nature of a breach, whether willful, negligent, or unavoidable, in determining liability and formulating remedies. For example, the degree of willfulness of a breach in construction contracts helps courts determine whether to measure damages based on the cost of repair or the diminution in value. The reasons for breach also constitute a factor in determining the materiality of a breach. Bad-faith breach of contract creates rights

that corporate law is based on a number of basic principles and assumptions that have neither factual basis nor historical validity."; Roseanna Sommers, Commonsense Consent, 129 YAL E L.J. (forthcoming 2020) ("Scholars, judges, and treatises tend to parrot the canonical line that 'fraud destroys all consent,' but the case law paints a muddier picture." (internal footnote omitted) (quoting Ganley Bros. v. Butler Bros. Bldg. Co., 212 N.W. 602, 603 (Minn. 1927)).

2. Hillman, Lore I, supra note 1, at 505-06.

3. In this Article, I use the term "myth" interchangeably with "lore," although there may be some technical differences. A myth is "an unfounded or false notion." Myth, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/myth (last visited Mar. 22, 2020). And folklore is "an often unsupported notion, story, or saying that is widely circulated." Folklore, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/folklore (last visited Mar. 22, 2020). "A ‘political myth’ is a particular kind of narrative that provides legitimacy to a particular facet of a legal system." Macey, supra note 1, at 3 n.1. "Generally, the term ‘myth’ refers to a belief that is (or was) held to be true . . . ." Id. at 4.


7. See, e.g., Groves v. John Wunder Co., 286 N.W. 235 (Minn. 1939).

in favor of the injured party that are not expressly set forth in the contract.\(^9\)

Despite recitation of the "rule" that contract law enforces the intentions of the parties, actual intentions rarely matter in contract decisions.\(^{10}\) Instead, courts apply an objective theory of formation and interpretation that enforces contracts based on apparent, not actual intentions.\(^{11}\)

When pressed, most contracts people would admit all of this.\(^{12}\) Nevertheless, why do contracts people invoke these "traditional beliefs" even though they are, in reality, nothing more than lore? I reckoned that "contract lore represents contracts people's aspirations—their strong preference for how contract law should operate if realities did not preclude it."\(^{13}\) Further, people tend to seek consistency in their beliefs, which "leads them to believe things that are not true and to avoid conflicting information."\(^{14}\) As such, contract lore represents an example of the psychological phenomenon of cognitive dissonance.\(^{15}\)

In this Article, I delve deeper into the phenomenon of contract lore. I offer additional examples that focus on the contract lore of consent in the context of standard-form contracting, "intention of the parties" in the context of gaps in contracts, and the requirement of a "bargained-for exchange" in the context of promise enforcement.\(^{16}\) Based on these examples, I don't abandon cognitive dissonance as one explanation of contract lore, but I offer additional explanations and show that context plays an important role in explaining contract lore.\(^{17}\) My ultimate goal is to shed light on possible areas of contract law in need of reform.\(^{18}\)

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10. Id. at 510-12.
11. Id. at 511.
12. Corporate law evidences the same phenomenon: "[I]ntellectuals, academic specialists and elites are likely to comprehend the lack of congruence between the world described by these myths and the actual world in which corporations operate." Macey, *supra* note 1, at 6.
14. Id.
15. Id. at 515-16; see infr a notes 69-76 and accompanying text.
16. See infra Part II.
17. See infra Part III.
18. See infra Part IV.
II. MORE EVIDENCE OF CONTRACT LORE

A. Consumers Consent to Their Standard Forms

Although many scholars are aware that consent is a rather hollow construct in reference to consumer standard form contracts, especially in the world of digital contracts, contracts people still cling to this rationale for enforcing them.\(^\text{19}\) The reality is sadly different. Merchants may create and present obtuse and lengthy standard forms and conjure up questionable methods of acceptance in an environment in which few consumers read their voluminous, overly technical forms.\(^\text{20}\) In such a take-it-or-leave-it environment, merchants can fill the standard form with one-sided terms, for example, that (1) relinquish privacy, (2) call for automatic renewal, (3) allow for unilateral modification, (4) provide for arbitration in distant venues, (5) deny class actions, and (6) disclaim all liability despite making promises and representations that would constitute warranties on merchants' websites.\(^\text{21}\) Some of these terms may be particularly troublesome in e-commerce. For example, licensors of software make representations and promises about the quality of their software online that attract customers only to disclaim the representations and promises in the subsequent standard form.\(^\text{22}\)

\(^{19}\) Contracts people often rely on Llewellyn's "blanket assent" theory. Karl Llewellyn The Common Law Tradition: Deciding Appeals 370 (1960); see infra note 67 and accompanying text.

\(^{20}\) In a recent article, Uri Benoliel and Shmuel I. Becher examined 500 of the most popular websites' "sign-in-wrap agreements," to determine their "readability." Uri Benoliel & Shmuel I. Becher, The Duty to Read the Unreadable, 60 B.C. L. REV. 2255, 2256 (2019). The tests measured the average length of sentences and the average number of syllables per word. Id. at 2272. Sign-in-wrap agreements, the authors determined, were as readable as academic journal articles (and we all know how readable these are!). Id. at 2277-78. The article reinforces other studies highlighting the deficiencies of Internet agreements. See id. at 2290. See also Shmuel I. Becher & Uri Benoliel, Sneak in Contracts: An Empirical and Legal Analysis of Unilateral Modification Clauses in Consumer Contracts, 55 GA. L. REV. (forthcoming 2020) (unilateral change in terms).

\(^{21}\) See generally PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS 116 (AM. LAW INST. 2009) [hereinafter ALI SOFTWARE PRINCIPLES] (noting the use of unsavory terms by merchants).

\(^{22}\) In an article on this subject, my coauthor and I reported that virtually all of the websites and End User License Agreements (EULAs) we sampled made warranties on the website and disclaimed them in their EULAs. Robert A. Hillman & Ibrahim Barakat, Warranties and Disclaimers in the Electronic Age, 11 YALE J.L. & TECH. 1, 6 (2009). In part, we argued for enhanced disclosure of disclaimers prior to a consumer downloading the software or requiring a pop-up window that reveals the disclaimers at the time of the download. Id. at 23-24.
An important article by Professors Kar and Radin illustrates the contradiction between lore (consumers consent to their standard forms) and law (contract law enforces standard forms in the absence of consumer consent). Kar and Radin warn that “assimilationists” try to treat all boilerplate text as contract (and therefore necessarily the subject of consent)

so long as it is delivered with actual or merely constructive “notice” to a party who agrees to a more basic transaction. Assimilationists assume that all boilerplate text serves the same essentially contractual function, and they do not recognize the critical difference between terms that parties cooperatively communicate and agree to during contract formation and the increasingly copious boilerplate text that is merely tacked onto that agreement but never read.

Kar and Radin suggest replacing current law with what they refer to as “shared meaning analysis.” They ask courts to “imagine that all of the written and digital text exchanged during contract formation is converted into oral form and takes place in a face-to-face conversation between the relevant parties.” Courts should search for the “common meaning” of the parties, based on “how parties produce shared meanings through interpersonal linguistic exchange.” One can certainly debate whether their approach is a viable solution—I doubt it (for reasons I explain later in this Article)—but the article deftly illustrates that the reality of standard-form contracting starkly departs from the lore that consumers consent to their standard forms.

24. Id. at 1139-40.
25. Id. at 1142-43. The authors build on Paul Grice’s analysis of the speaker/sentence meaning distinction. Id. at 1143-45 (“To help courts discern these shared meanings under today’s conditions, we add precision to traditional approaches by building on the linguistic distinction, first treated rigorously by the philosopher of language Paul Grice, between what sentences mean (including any sentences delivered in boilerplate text) and what people mean when they use language to communicate with one another (including to form contracts).”).
26. Id. at 1167.
27. Id. at 1143-44. The authors assert that their approach is “consistent with long-standing approaches to contract interpretation, which are grounded in a nuanced and careful assessment of the common understandings that parties produce when they use language to form contracts.” Id. at 1143.
28. See infra notes 97-98 and accompanying text.
29. The authors consider other solutions to the problem of standard forms inadequate. See Kar & Radin, supra note 23, at 1168-72.
B. Contract Law Enforces the Intentions of the Parties

Previously (and earlier in this Article), I pointed out that the parties' intentions often are irrelevant in judicial decisions under the objective theory of contract formation and interpretation, notwithstanding the contract lore that intentions form the basis for contract enforcement. Another example of the intentions shibboleth is that courts curiously rely on the "intention of the parties" rubric even in cases involving stark contract gaps. Such gap cases are another illustration of the division between lore (contract law enforces the intentions of the parties) and law (contract law fills gaps in contracts from various sources having little to do with actual intentions).

A recent United States Supreme Court case, M & G Polymers USA, LLC v. Tackett best illustrates this division. The case considered whether certain retired union employees were entitled to lifetime healthcare benefits under their union's contract when the contract was silent on the duration of the benefits. In fact, trial testimony showed that drafting of the contract was "ill-informed and haphazard" and interviews with lawyers involved in such negotiations showed that for strategic reasons the parties purposely left a gap with respect to the duration of the benefits. Each side feared the other would prevail on the duration issue if it was raised and negotiated.

At oral argument, members of the Supreme Court certainly agreed that this was a gap case. "Justice Alito asked why the bargainers left the [collective bargaining agreement] silent on the duration of healthcare benefits." Justice Scalia then remarked, "I mean, this thing [the duration issue] is obviously an important feature. Both sides knew it was left unaddressed, so, you know, whoever loses deserves to lose for casting this upon us when it could have been said very clearly in the contract. Such an important feature."

The Court, in a unanimous decision written by Justice Thomas, faulted the United States Court of Appeals for the Sixth Circuit for

30. Hillman, Lore I, supra note 1, at 510-12; supra note 11 and accompanying text.
32. Id. at 930.
34. Id. at 317-18. I learned of the motive for leaving such gaps by talking to lawyers involved in such disputes. These lawyers preferred to remain anonymous. Id. at 317 n.162.
35. Id. at 317.
36. Id. at 317 & n.160.
applying to the case certain inferences and presumptions first enumerated in another Sixth Circuit case,\textsuperscript{37} which the Court believed failed to constitute "ordinary principles of contract law."\textsuperscript{38} These inferences and presumptions included that "retiree healthcare benefits can be a form of deferred compensation; healthcare benefits likely last while the former employee is a retiree; tying healthcare benefits to pension benefits [that vest] suggests that healthcare benefits vest."\textsuperscript{39} The Court therefore reversed and remanded the Sixth Circuit's decision that the employees were entitled to lifetime benefits for further proceedings that employed what the Court thought were authentic "ordinary contract principles."\textsuperscript{40}

The Supreme Court's opinion is full of language indicating that these "ordinary contract principles" were tools for finding the parties' intentions.\textsuperscript{41} For example, Justice Thomas wrote that the Court must apply "ordinary principles of contract law,"\textsuperscript{42} and proceeded to invoke the "parties' intentions" and the "plainly expressed intent" of the agreement.\textsuperscript{43} The Court added that the Sixth Circuit's use of inferences "distort[ed] the attempt 'to ascertain the intention of the parties.'"\textsuperscript{44} And further, "[w]here the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent."\textsuperscript{45}

The concurrence also fixated on the parties' intentions. Written by Justice Ginsburg, and joined by Justices Breyer, Sotomayor, and Kagan, the opinion directed the Sixth Circuit to search for the "intention of the parties."\textsuperscript{46} Further the concurrence noted that "clear and express language" is not necessary to prove that the parties intended lifetime benefits.\textsuperscript{47}

The Supreme Court is not alone in invoking the "intention of the parties" lore in gap cases. For example, in cases of changed

\begin{itemize}
  \item \textsuperscript{38} \textit{M & G Polymers}, 135 S. Ct. at 933.
  \item \textsuperscript{39} Hillman, \textit{Supreme Court, supra note 33}, at 312-13.
  \item \textsuperscript{40} \textit{M & G Polymers}, 135 S. Ct. at 937.
  \item \textsuperscript{41} \textit{Id.}
  \item \textsuperscript{42} \textit{Id.} at 933.
  \item \textsuperscript{43} \textit{Id.} (quoting \textit{11 RICHARD A. LORD, WILLISTON ON CONTRACTS} § 30:2 (4th ed. 2012)).
  \item \textsuperscript{44} \textit{Id.} at 935 (emphasis added) (quoting LORD, \textit{supra note 43}, § 30:2).
  \item \textsuperscript{45} \textit{Id.} at 933 (quoting LORD, \textit{supra note 43}, § 30:6).
  \item \textsuperscript{46} \textit{Id.} at 937 (Ginsburg, J., concurring) (quoting LORD, \textit{supra note 43}, § 30:2).
  \item \textsuperscript{47} \textit{Id.} at 937-38.
\end{itemize}
circumstances, where at the bargaining and drafting stages the parties clearly never contemplated an issue, courts nonetheless profess to find the parties’ intentions.\textsuperscript{48} This is nothing but contract lore.

C. Promises Are Enforceable Only if They Are Supported by Consideration

Students of contract law learn early in their legal education that the law enforces promises if part of a “bargained-for exchange.”\textsuperscript{49} A bargain requires that the promisor extracts something, called “consideration” from the promisee in exchange for the promise.\textsuperscript{50} Gift promises, on the other hand, in which there is no return consideration, are not legally enforceable.\textsuperscript{51} But students have a lot more to learn about enforceable promises. The reality is that promise enforcement is dramatically different than the bargain theory lets on. To be clear, I’m not arguing that contracts people perceive that promises are solely enforced if part of a bargain. Promissory estoppel, for example, is so well established, that contracts people acknowledge it openly, although some analysts may be overly enthusiastic about its significance.\textsuperscript{52} Instead, I argue that the bargain theory is so incoherent that it is no theory at all:

The bargain theory is neither descriptively nor normatively very coherent.\ldots Courts sometimes police the adequacy of consideration despite contract law’s freedom-of-contract norm to leave that issue to the parties. Courts enforce gift promises that induce reliance or for a benefit already received despite the absence of a bargain. Courts enforce without consideration contract modifications, option contracts, waivers, and promises made to charitable institutions. Courts enforce promises even if the return consideration is only an ephemeral reason for making the promise. Courts manipulate or dispense with consideration if they

\textsuperscript{49} In these essays the premise will be that bargain consideration has been and will remain for a long time to come a central feature of our law of contract, central in the sense that it provides a strong affirmative reason for enforcing promises, the reason that is by a wide margin the most often used, though it is not the only one.
\textsuperscript{50} See, e.g., Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 665-66 (Minn. 1960).
\textsuperscript{51} Id. at 665.
\textsuperscript{52} See Charles L. Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 COLUM. L. REV. 52, 53 (1981) (“[T]he principle of section 90 . . . has become perhaps the most radical and expansive development of this century in the law of promissory liability.”).
believe a gift promise is important enough to enforce. Consideration to support a promise can come from a party other than the promisee. . . . No wonder Professor Grant Gilmore was moved to announce the wholesale demise of the bargain theory of consideration.\textsuperscript{53}

The bargain theory survives because it helps (a little) to draw the distinction between promises that should be enforced and those that should be left to the promisor’s conscience.\textsuperscript{54} As such, the theory acts as a minimal gatekeeper, deterring the enforcement of promises where the cost of enforcement outweighs the benefit. But to say that contract law requires a distinct, cognizable bargain is nothing more than contract lore.\textsuperscript{55}

III. WHY CONTRACT LORE?

The discussion in this Part describes various possible explanations for contract lore. I am not wedded to any one of them, but believe that some of them are plausible in particular contexts and, perhaps, not in others. Nor is any one of the explanations that follow the only possible reason for contract lore in a particular context. Nevertheless, considering the reasons behind contract lore creates a better understanding of contract law.

A. Cognitive Dissonance

Previously, I concluded that important counter-principles and policies stood in the way of enforcement of contract lore. For example,

\textsuperscript{53} Robert A. Hillman & Maureen A. O’Rourke, Rethinking Consideration in the Electronic Age, 61 Hastings L.J. 311, 321 (2009) [hereinafter Hillman, Consideration] (footnotes omitted); see also Baehr, 104 N.W.2d at 665 (noting the bargain theory “is a crude and not altogether successful attempt to generalize the conditions under which promises will be legally enforced”).

\textsuperscript{54} DAWSON, supra note 49, at 2-4.

\textsuperscript{55} Another example of contract lore is that lawyers in long-term business contracts draft performance obligations precisely and allocate risks optimally. Ian Macneil’s insight that in reality parties and their lawyers rely on norms to govern their “relational” agreements such as cooperation and flexibility is a more accurate description of the real world. See generally Ian R. Macneil, Relational Contract Theory: Challenges and Queries, 94 N.W. U. L. Rev. 877, 879-80 (2000) (discussing contract behavioral patterns and norms); Ian R. Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483 (1985) (discussing the complexity of human interactions and their effects on legal scholarship and developments).

Still another example is the lore that after a material breach injured contracting parties can cancel the contract and seek a remedy for unjust enrichment that is independent of the contract and measured by benefit conferred. The reality is that the contract rate is likely the best evidence of the benefit conferred and thus contract sneaks in through the back door. See, e.g., Joseph M. Perillo, Restitution in a Contractual Context, 73 Colum. L. Rev. 1208, 1215-16 (1973).
the rule that injured parties get their expectancy runs into counter-principles and policies, including the following:

We do not want to discourage parties from exercising their right to a day in court for fear of having to pay the other party’s legal fees. We do not want to license courts to award baseless recoveries, so we require injured parties to prove their damages with some precision.\(^{56}\)

In addition, we want to encourage disclosure of a contract party’s special circumstances so we deny unforeseeable consequential damages.\(^{57}\) Further, we encourage contract-making by ensuring that promisors do not face unlimited liability.\(^{58}\)

Based on the new examples of contract lore presented here, we can add additional counter-principles and policies that stand in the way of freedom of contract. For example, contract law enforces reasonable standard forms, not because consumers have consented to them, but because standard forms reduce costs and therefore facilitate exchange that, on the whole, benefits society. Contract law fills gaps in contracts and enforces them, not because they further contractual intent, but because doing so avoids the costs of contract breakdown. Contract law recites the requirement of a bargained-for-exchange to enforce a promise, not because the consideration construct is a neat way of distinguishing enforceable from unenforceable promises, but because we need a strategy (with all of its flaws) for distinguishing them.

But why is proclaiming the veracity of contract lore so prevalent among judges, lawyers, and scholars, who actually know better?\(^{59}\) For example, why don’t they just admit that contract damages do not make the injured party whole because of the important counter-principles and

\(^{56}\) Hillman, *Lore I*, supra note 1, at 508 (footnote omitted).


\(^{58}\) A host of exceptions also swallow up the lore that the reasons for breach are irrelevant and that the parties’ intentions control. For example, people should keep their promises, and intentional breaches deserve moral approbation. And deterring opportunistic breaches “encourages contracting and thwarts useless wealth transfers from an innocent party to a wrongdoer. Perhaps most obvious, judges and juries are human beings who cannot help but be influenced by the degree of nastiness and inconsiderateness of a breach.” Id. at 510 (internal footnote omitted).

Contract law applies an objective test of intentions, meaning what a reasonable person would believe are the intentions, not what either party internally believes are the contract terms. The objective test assures that promisees can rely on a reasonable interpretation of the contract, not what the promisor secretly intended or what that party carelessly said or did. Id. at 511-12.

\(^{59}\) For example, why do some analysts and courts insist that fault plays no role in contract enforcement? See, e.g., Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 634 (7th Cir. 2010) (Posner, J., concurring).
policies? Previously, I dismissed certain explanations. For example, I argued that contract lore is not merely countenancing a series of exceptions to the general rule. A good example of rule and exception is the rule that after a material breach the injured party may exit the contract and sue for damages. According to the Restatement (Second) of Contracts, however, certain material breaches entitle the injured party only to suspend performance, but not to cancel the contract. In addition, the rule that injured parties must mitigate damages, including in some instances by dealing further with the breaching party, creates an exception to the right to cancel. But expectancy damages almost inevitably fail to make an injured party whole, so one cannot insist that the actual general rule is that they do.

I also argued that contract lore constitutes more than a series of legal fictions. According to common usage, legal fictions are conscious judicial manipulations useful in developing legal principles for the purpose of achieving particular instrumental goals. But contract lore does not follow this strategy. Lawmakers acknowledge that fictions are not based in reality, whereas lawmakers and other contracts people (until reminded otherwise) typically invoke contract lore as an accurate description of contract law. For example, to justify enforcement of standard forms that for good reason consumers do not read, contracts people often rely on the “blanket assent” theory that “although consumers do not read standard terms, so long as their formal presentation and substance are reasonable, consumers comprehend the existence of the terms and agree to be bound to them.” So the concept of “blanket assent” is more than a legal fiction because contracts people

60. Hillman, Lore I, supra note 1, at 512.
61. See, e.g., Process Am., Inc. v. Cynergy Holdings, LLC, 839 F.3d 125, 136 (2d Cir. 2016) (“[A] party’s performance under a contract is excused where the other party has substantially failed to perform its side of the bargain or, synonymously, where that party has committed a material breach.”).
64. Hillman, Lore I, supra note 1, at 507-08.
65. LON L. FULLER, LEGAL FICTIONS 53 (1967); Hillman, Lore I, supra note 1, at 513.
67. Robert A. Hillman & Jeffrey J. Rachlinski, Standard-Form Contracting in the Electronic Age, 77 N.Y.U. L. REV. 429, 461 (2002). In the Standard-Form article, we referred to blanket assent, supplemented by additional policing doctrines, as a “workable solution” to the problem of standard forms. Id. Speaking only for myself, I am now even less confident that “blanket assent” alone is an adequate solution to the intractable problem of how to treat standard forms that consumers do not read.
treat the concept as an accurate description of what justifies enforcing terms in the consumer standard-form context.

Contract lore is also much more than fables or fairy tales not worthy of contemplation.68 Contract lore serves important purposes that I will now detail.

One explanation for contract lore, cognitive dissonance, heretofore mentioned, captures some of the reason for contract lore. Contracts people have a strong desire for freedom of contract that would exist were it not for counter-principles and policies that constitute barriers to achieving it. “In an ideal world of freedom and justice, a legal approach to exchange transactions would enforce parties’ actual agreements freely made by parties with equal bargaining power and information.”69 I argued that in this world, injured parties would be made whole, the reasons for breach would be irrelevant, and courts would enforce the “meeting of the minds” of the parties.70 I can now add that consumers would freely and knowingly consent to fair standard form agreements and the law would nicely delineate what promises are legally enforceable. But in the real world, substantive counter-principles and policies stand in the way.71

In fact, cognitive dissonance “may be especially strong concerning people’s ‘core values,’” such as freedom of contract and economic liberty.72 Contracts people simply are more comfortable with contract lore, and it is more culturally acceptable and legitimating than the realities of contract law. In fact, our country’s core belief in capitalism that lays the foundation for these contract principles is itself more lore than law. As one author states: “‘Socialism’ vs. ‘Capitalism’ is a False Dichotomy.”73 The U.S. economy “involve[s] a complex mix of ‘capitalist’ market institutions and ‘socialist’ regulatory and redistributive institutions.”74

68. See Macey, supra note 1, at 7-9 (“[M]yths play an important role in the law and they deserve to be taken seriously.”).
69. Hillman, Lore I, supra note 1, at 515.
70. Id.
71. Id.
72. Id.
Similarly, despite the lore that markets are the “center” of contract law and provide its normative foundation, in reality freedom of contract and counter-principles, such as fairness, equality, and morality “share the contract law spotlight.” The realities of market imperfections mean that we cannot achieve a truly free market system, but we want to believe that we have achieved it.

B. Beyond Cognitive Dissonance

1. Strategic Explanation for Contract Lore

Although cognitive dissonance is part of the mystery of contract lore, a “one size fits all” explanation is incomplete. For example, the Critical Legal Studies (CLS) movement, prominent in the 1980s and 1990s, pronounced that much of law is indeterminate, which can give license to lawmakers to legitimate, consciously or unconsciously, existing social inequities. In at least some contexts, then, contract lore may constitute a smoke screen that enables contract “elites” to favor one class of contractors over another.


76. ROBERT A. HILLMAN, THE RICHNESS OF CONTRACT LAW: AN ANALYSIS AND CRITIQUE OF CONTEMPORARY THEORIES OF CONTRACT LAW 267 (1997) [hereinafter HILLMAN, RICHNESS]. In Nathan Oman’s provocative book, well worth reading, he writes that we enforce boilerplate because “doing so strengthens and extends markets.” OMAN, supra note 75, at 134. He relegates consent to a secondary position rather dramatically in boilerplate cases, by arguing that consent is “attenuated” and “misplaced.” Id. Further, boilerplate only requires a “bare minimum of consent” and the “search for meaningful consent should be abandoned.” Id. at 135, 156 (emphasis added). Instead, Oman relies on “the social context in which boilerplate is written” to limit the possibility of abuse, such as competition and reputational sanctions. Id. at 148, 150-53 (emphasis added).

77. “Once we decide . . . that we should ordinarily bolster a private sphere of free action . . . we come to believe that we will find such a sphere out in the world.” MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 291 (1987).


79. But see Hillman, Lore I, supra note 1, at 514-15 (arguing that the CLS position did not apply as an explanation in most circumstances).

In the context of corporate law, Professor Macey states: “Interestingly, while each of the canons described here is false as a description of the world, each of them describes the way that elites would prefer the world to be perceived by non-elites.” Macey, supra note 1, at 4-5. And further, “In a nutshell, these myths serve the palliative role of obscuring the ugly truths about certain legal rules and depicting them in a more attractive and politically acceptable light.” Id. at 8; see also JOSEPH CAMPBELL, PATHWAYS TO BLISS 8 (David Kudler ed., 2004)
Consider again two of the examples of contract lore presented in this Article. The Supreme Court majority’s seeming hostility to unions in \textit{M \& G Polymers} arguably supports the CLS theory. As noted, the majority opinion criticized the Sixth Circuit’s use of context evidence, such as the connection between healthcare benefits and pension benefits, as “placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements.”\footnote{M \& G Polymers USA, LLC \textit{v.} Tackett, 135 S. Ct. 926, 935 (2015); see supra note 39 and accompanying text (discussing additional context evidence). The Court also argued that the Sixth Circuit wrongly inferred that “when ... parties contract for benefits which accrue upon achievement of retiree status, there is an inference that the parties likely intended those benefits to continue as long as the beneficiary remains a retiree.” \textit{M \& G Polymers}, 135 S. Ct. at 935 (quoting Int’l Union \textit{v.} Yard-Man, Inc., 716 F.2d 1476, 1482 (6th Cir. 1983)). Although such reasoning is not conclusive, the contract’s reference to retirement benefits is at least probative of duration. \textit{See} Hillman, \textit{Supreme Court}, supra note 33, at 312-15.} Calling such context evidence “speculations,” the majority resorted to the contract lore that the evidence “distort[ed] the attempt ‘to ascertain the intention of the parties.’”\footnote{M \& G Polymers, 135 S. Ct. at 935 (emphasis omitted) (quoting LORD, supra note 43, \S 30:2).} By discarding this evidence and several other inferences favorable to the union and relying on or searching for the party’s intentions on the duration of retiree health care benefits when the facts at trial clearly showed that the parties left a gap with respect to the issue, the Supreme Court majority arguably demonstrated more than a poor application of the law, but a strategy to favor business interests over unions.

And it is not too far of a stretch to argue that courts that espouse the idea that consumers, who for good reason did not read their standard forms, still consent to them represents a choice, not to reduce costs and to facilitate fair transactions, but to favor businesses over consumers. The CLS insight may ring especially true today to consumers and employees faced with onerous, take-it-or-leave it terms in the digital environment.\footnote{\textit{See} Hillman, \textit{Supreme Court}, supra note 33, at 321-22. In another context, I wrote that “[\textit{AT&T Mobility LLC v.} Concepcion simply reveals five justices’ preference for enforcing standard terms, even if presented on a take-it-or-leave-it basis and under the cloud of fraud, and their quite passionate dislike of class actions.” \textit{Hillman, Principles}, supra note 63, at 254.} “Blanket assent,” according to this interpretation, is nothing more than a useful tool for businesses to enforce their sometimes onerous terms.\footnote{\textit{See supra} note 67 and accompanying text.}
However, other examples of contract lore do not fit neatly in the CLS legitimation-of-the-status-quo explanation. For example, the CLS theory does not help explain why contracts people support the bargain theory as a coherent method of distinguishing enforceable from unenforceable promises, but at the same time acknowledge the rise of promissory estoppel as an alternative theory for enforcing promises. Early cases denying enforcement of promises that induced detrimental reliance reflected judicial uneasiness with the injustice of the result.\textsuperscript{84} Not surprisingly, cases manipulating the idea of consideration in such settings began to arise in large numbers.\textsuperscript{85} Promissory estoppel then progressed to enforce promises relied on in business settings if an agreement was unenforceable, and then to enforce relied-on promises and representations made at the negotiation stage. In each instance, a large number of the cases reflected judicial concern for the underdog, not an effort to legitimate existing hierarchies.\textsuperscript{86}

If the CLS explanation holds weight in some contexts, contract lore is not always understood as a series of aspirations consistent with freedom of choice. Instead, contract lore may have a more ominous goal of making the law seem more palatable to the citizenry, but at its expense.

2. Changes in Circumstances as an Explanation for Contract Lore

Another explanation for contract lore lays blame on lawmakers for unconsciously extending contract law to new, but unsuitable, horizons. For example, Kar and Radin explain the uncomfortable treatment of standard forms as the result of changes in technology and

\textsuperscript{84} See, e.g., Kirksey v. Kirksey, 8 Ala. 131, 133 (1845) (noting the “loss and inconvenience” a widow suffered after moving in reliance on her brother-in-law’s promise to provide housing to her and her children); see also Local 1330, United Steel Workers v. U.S. Steel Corp., 631 F.2d 1264, 1265 (1980) (noting the effect the closure of two steel plants had on the local town).

\textsuperscript{85} See, e.g., Seavey v. Drake, 62 N.H. 393, 393 (1882) (“Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and if the donee, induced by the promise to give it, has made valuable improvements on the property.”); Ryerss v. Trs. of the Presbyterian Congregation of Blossburg, 33 Pa. 114, 114 (1859) (“An action may be maintained on a promise to subscribe a certain amount towards the building of a church ....”).

\textsuperscript{86} See, e.g., Wheeler v. White, 398 S.W.2d 93, 96 (Tex. 1965) (“The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.” (quoting Dickerson v. Colgrove, 100 U.S. 578, 580 (1879)); Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 268-70 (Wis. 1965) (noting that a baker sold his bakery in reliance on representations that Red Owl would build a store for the baker to operate).
the attempt by courts to extend “traditional” contract law to reach the new realities.\textsuperscript{87} They call this an “unconscious paradigm slip” in which “many courts and scholars now assume that all boilerplate text contributes ‘terms’ to a ‘contract’ in largely unproblematic ways akin to the simpler uses of language to form contracts in 1883.”\textsuperscript{88}

3. Benign Additional Explanations for Contract Lore

Additional possible explanations for contract lore are more benign. Perhaps in some contexts contract lore is a necessary simplification of complex legal principles in order to help educate people about the law and to implement it.\textsuperscript{89} For example, the myriad judicial sources of contractual gap filling may lead contracts people to want to simplify the analysis. In addition, contracts people may ignore fault as a factor for determining breach of contract to avoid the need to explain precisely the kinds of performance conduct that contract law either condones or rejects.

Of course, there are costs to simplifying explanations of the law. Lawyers must exercise care in advising clients for fear of conveying poor advice based on lore and not law. For example, lawyers should advise their clients who are contemplating breach of the possibility that their conduct may play a role in the measurement of damages or may even lead to a finding of an independent tort.\textsuperscript{90}

Contract lore may also increase the efficiency of exchange transactions by channeling contract parties’ actions in efficient ways. For example, in union-company negotiations, the parties’ strategy of avoiding the issue of the duration of retiree healthcare benefits led to years of costly and time-consuming litigation.\textsuperscript{91} If courts mistakenly look for the parties’ intentions in gap-filling cases, and in unpredictable ways, perhaps lawyers may advise their clients to avoid known gaps such as duration, despite the challenge of reaching agreement on the issue.

\textsuperscript{87} "The changes in technology that have been altering how people communicate to form contracts began incrementally but have accumulated over time—with especially large transformations gathering over the last two decades." Kar & Radin, supra note 23, at 1140.

\textsuperscript{88} Id. at 1142.

\textsuperscript{89} But see Hillman, Lore I, supra note 1, at 514 (arguing that contract lore does not arise solely because attorneys simplify their explanations of the law to their clients).

\textsuperscript{90} See supra notes 6-8 and accompanying text; see also Mauldin v. Sheffer, 150 S.E.2d 150 (Ga. Ct. App. 1966) (noting that neglect of a legal duty other than the specific obligation of the contract can result in the committing of a tort).

\textsuperscript{91} Hillman, Supreme Court, supra note 33, at 324-25.
Contract law's move to enforce option contracts in the absence of real consideration is another example of an efficient outcome. In option contracts for the sale of real property, for example, a promise to leave an offer open for the sale of the property for a particular period of time is enforceable notwithstanding that the promise is not supported by real consideration. Contracts people understood that options are a socially useful transaction that provides an important substantive basis for enforcing them despite the absence of real consideration. In short, under the cover of consideration, "twentieth-century courts enforced promises that increased society's welfare, interpreted broadly, and that were capable of judicial administration." But as we will see in the next Part, perhaps clarifying the meaning and role of consideration would ultimately improve contract law.

IV. WHAT CAN WE LEARN FROM FOCUSING ON CONTRACT LORE?

A study of contract lore leads to a better understanding of potential areas of law reform. For example, I have already noted that a clearer explanation of the important role of fault in contract law would motivate lawyers to better caution clients contemplating breach of contract. Reformers should also consider whether contract law should rebalance the principles and policies of expectancy damages to assure that injured parties receive just compensation. For example, are the certainty and foreseeability barriers to damages too stringent? I will now suggest additional issues for law reformers.

A. Internet Standard Forms

Most obviously in need of further thought is the enforcement of standard-form Internet contracts. Current proposed solutions seem unsatisfactory. For example, although intriguing, Kar and Radin's "common meaning" approach would dramatically bog down

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92. See, e.g., Marsh v. Lott, 97 P. 163, 165 (Cal. Ct. App. 1908) ("[A]ny money consideration, however small, paid and received for an option to purchase property at its adequate value is binding upon the seller...") ; see RESTATEMENT (SECOND) OF CONTRACTS § 87(1) (AM. LAW INST. 1981).

93. Hillman, Consideration, supra note 53, at 322.

94. Id.

95. Hillman, Lore I, supra note 1, at 517.

96. I also questioned the efficient breach theory. The premise of the theory is that contract law makes the injured party whole. If contract law rarely if ever does so, the efficient breach theory must fall with the reality of expectancy's limits. Hillman, Lore I, supra note 1, at 517.
consumer-business exchanges in a context where lawmakers should be mindful of the need to facilitate them (but fairly). Further, I doubt that decision makers successfully could identify the terms that the thought process Kar and Radin suggest would yield.\textsuperscript{97} In short, I think it is a reach to think as Kar and Radin do that in standard-form litigation the “common meaning” of the parties is ascertainable based on the cooperative use of language by the parties in interpersonal conversation during contract formation.\textsuperscript{98}

Other suggestions are also problematic. The law could require consumers to click “I agree” next to each standard term or at least each problematic one. This would be cumbersome for consumers, and lawmakers would face a challenge identifying the terms that require consumers’ extra attention.\textsuperscript{99} Another approach, set forth in the latest draft of the new Restatement of Consumer Contracts, is to discount the consent requirement and weigh more heavily whether particular provisions are unconscionable.\textsuperscript{100} This approach would depend on greater judicial policing of standard forms through the rubric of unconscionability and, perhaps, related doctrines, but heretofore such an approach has shown little promise.\textsuperscript{101} Another proposal is to establish a government agency that would review terms.\textsuperscript{102} Such an approach would create serious incursions on freedom of contract, potentially beyond what is required to protect consumers.

The Principles of the Law of Software Contracts, promulgated by the American Law Institute, incentivizes licensors to disclose their terms on the Internet before a consumer initiates a transaction. The theory is that negative publicity, possibly generated by watchdog websites that collect suspect terms, would encourage licensors to draft reasonable ones.\textsuperscript{103} Perhaps one step in this direction that holds some promise would be to create and support more such websites that collect

\begin{footnotes}
\textsuperscript{97} See supra notes 25-29 and accompanying text.
\textsuperscript{98} Kar & Radin, supra note 23, at 1147-48; see Ian Ayres & Gregory Klass, Response, One-Legged Contracting, 133 HARV. L. REV. F. 1 (2019).
\textsuperscript{99} Hillman & Barakat, supra note 22, at 26.
\textsuperscript{100} RESTATEMENT OF CONSUMER CONTRACTS § 5 (AM. LAW INST., Tentative Draft 2019).
\textsuperscript{101} Unconscionability is too amorphous a term and is troublesome to judges when it collides with their perception of freedom of contract. See, e.g., Larry A. DiMatteo & Bruce Louis Rich, A Consent Theory of Unconscionability: An Empirical Study of Law in Action, 33 FLA. ST. U. L. REV. 1067, 1100 (2006) ("[R]eveal[ing] that unconscionability claims are difficult to win.").
\textsuperscript{102} See, e.g., Clayton P. Gillette, Preapproved Boilerplate, in BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 95 (Omri Ben-Shahar ed., 2007).
\textsuperscript{103} See ALI SOFTWARE PRINCIPLES, supra note 21, at 115-16, 121-43.
\end{footnotes}
one-sided terms and identify the businesses that use them. But it remains to be seen whether such resources would increase consumer shopping for terms.¹⁰⁴

B. Gap Cases

Courts should surrender their predilection to resort to the "intentions of the parties" rubric when it is clear the parties left a gap. Instead, courts should investigate and develop the appropriate gap filler in the particular context. Gap filler sources include efficiency, fairness (taking into account, for example, bargaining power and comparative gains and losses of the parties), and what the parties would have done if they had agreed to a gap filler. Penalty defaults also are a source of gap filling that create incentives to share information.¹⁰⁵

Admittedly, selecting the appropriate gap filler in a particular case will not be easy. For example, if courts fill the gap on the duration of healthcare benefits by finding that the benefits vest on retirement, healthcare providers may be discouraged from offering retirement plans to employees and unions in the first place. On the other hand, such a gap filler might help companies recruit and maintain an efficient workforce. Perhaps, the most appropriate approach to this problem would be, not all or nothing, but a gap filler that takes both sides' interest in mind. Healthcare benefits would vest upon retirement, but companies would be free to reasonably change the amount of protection based on their economic situation.¹⁰⁶

But such difficulties should not license courts to hide behind the "intentions of the parties" myth. Contract law should be as transparent as possible to help guide planners and drafters and, for that matter, courts facing such questions for the first time.

C. The Many Theories of Promise Enforcement

Lawmakers should concede more readily that consideration theory is not much of a theory at all. Doing so would help judges reach

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¹⁰⁴. The lack of consumer reading of terms is well-documented. See, e.g., Hillman & Rachlinski, supra note 67, at 433. There may be little reason to believe that consumers would expend energy comparing terms even if collected and labeled problematic. If businesses believe the potential is low, they may not be moved to avoid one-sided terms.

¹⁰⁵. See Ayres & Gertner, supra note 57, at 97-100.

¹⁰⁶. See, e.g., Tackett v. M & G Polymers USA, LLC, 733 F.3d 589, 600-01 (6th Cir. 2013).
hard decisions that are obfuscated by the need to show a bargained-for exchange.

For example, consider the issue of whether licenses of open source software are enforceable contracts if the licensor does not charge a fee for the software. To simplify, focus on the General Public License (GPL). This license authorizes licensees to transfer, copy, or modify the software, but not without restrictions usually referred to as “terms of use.” Examples of terms of use in the GPL include the requirement that licensees reveal the source code to their transferees and use the same GPL terms upon transfer of the software to these licensees. Is the GPL a contract between licensors and licensees that accept the terms so that the licensee has an obligation to abide by the restrictions? An analysis based on bargained-for exchange simply gums up the works. On the one hand, one can argue that the licensee has supplied no consideration to support the use of the free software—the transaction is a gift with conditions. On the other, an agreement by the licensee to the restrictions may suffice as consideration:

Terms of use . . . are not necessary to convey software and therefore constitute consideration under general contract law if at least part of the vendor’s motive (however insubstantial), judged objectively, is to extract agreement to the terms of use. Vendors in the open source movement make no secret about their desire to create a new paradigm of openness, to enhance the freedom and capabilities of software users, to foster innovation, and to create public acceptance and familiarity with their intellectual property framework. The motive to further one or more of these goals, without more, should be sufficient to satisfy the bargain requirement. But often there is more. A licensor may benefit indirectly, for example, by entering lucrative service and update contracts or by gaining publicity for other more entrepreneurial projects. Even without such benefits, collaborators work in a “gift culture” in which members

107. The principal goal of the open source intellectual property regime is to maximize the ongoing use, growth, development, and distribution of free software. To achieve that goal, this regime shifts the fundamental optic of intellectual property rights away from protecting the prerogatives of an author toward protecting the prerogatives of generations of users.


109. Id.

110. Id. at 328. The licensor could also bring an action based on infringement of intellectual property rights, which is beyond our subject here.
compete for status by giving things away." Contract law ... long has recognized that a motive to increase one's standing as opposed to pure altruism may be sufficient to constitute consideration. Further, developers learn state-of-the-art technology and gain prestige by participating in the open source movement. Thus, consideration supports open source software license grants under traditional contract law.\textsuperscript{111}

Perhaps it is not too much of a reach to suggest that instead of going through the paces of looking for consideration (as my coauthor and I did in the quotation above), which for businesspeople may lead to endless costly litigation,\textsuperscript{112} contract law should stop manipulating consideration theory and enforce promises that increase welfare and are capable of judicial administration (at least in the context of open source software and other transactions that stand at the border-line of consideration). Enforceable promises in the open source realm presumptively would include commercial promises made with the intent to be legally enforceable.\textsuperscript{113}

V. CONCLUSION

I have added three new examples of contract lore in this Article. The reader might think that almost nothing is what it seems in contract law. But that is not my aim, nor do I think that is true. Nor was my goal to evaluate the normative correctness of particular contract law outcomes. Instead, my goal was to reinforce the view that significant contract lore exists, and to consider what we can learn from it.\textsuperscript{114}


\textsuperscript{112} See, e.g., Jacobsen v. Katzer, 535 F.3d 1373, 1379 (Fed. Cir. 2008) (finding "collaborative work" consideration for the right "to copy, modify and distribute the software code subject to conditions").

\textsuperscript{113} Germany, for example, does not require consideration to enforce the GPL. Sapna Kumar, \textit{Enforcing the GNU GPL}, 2006 U. ILL. J.L. TECH. & POL'y 1, 26.

\textsuperscript{114} See Macey, \textit{supra} note 1, at 24 ("[T]he argument here is about what the law is perceived to be.").