

THE LIMITS OF VOLUNTARINESS IN CONTRACT

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[Contractual obligations are routinely characterised in the contract literature as voluntary or voluntarily assumed. This article examines the major challenges to the voluntaristic conception of contract. An obligation can be regarded as voluntary only if it is meaningfully understood, and the decision to assume it is intentional and substantially unconstrained. Many contractual obligations arise from standard form terms, which are commonly unread, frequently misunderstood, and routinely unavoidable due to the lack of available alternatives. In some circumstances, the obligations and curtailments of rights arising from unread standard form terms can be regarded as voluntary, but in others they cannot. In exceptional cases, the objective approaches to formation and interpretation result in parties becoming subject to obligations that they cannot be said to have voluntarily assumed. The objective approach to the incorporation of terms, particularly unsigned terms, leaves even greater scope for parties to become subject to obligations that cannot be said to have been voluntarily assumed. Obligations routinely arise from the default rules of contract law, which appear not to be well understood, even in the commercial context, and are often difficult to avoid. Recent claims that these obligations inhere in the agreement itself have not been made out. Contractual obligations and curtailments of rights are routinely fashioned by one contracting party in the ignorance of the other, or by the state in the ignorance of both, and are often practically unavoidable for one or both parties.]

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I INTRODUCTION

We are repeatedly told in the contemporary contract literature that contractual obligations are voluntary ('the voluntariness claim') and that contracting parties are free to shape their contractual obligations according to their wishes ('the autonomy claim'). An understanding that embodies the voluntariness claim, the autonomy claim and a sharp distinction between contract and tort represents one of the most powerful conceptions of contractual obligation in the contemporary contract literature. This contemporary understanding remains strongly influenced by the classical view of contract adopted in the 19th century.¹ The principal difference between the classical understanding and what we might call the neoclassical understanding is that the implications of the objective approach to contract formation and interpretation are now well recognised.² In recognition of these objective approaches, the 'convergence of the wills of the contracting parties'³ is no longer said to be the source of contractual obligation. The idea that contractual obligations emanate from the will of the parties has not been entirely abandoned, however, because it remains implicit in the claim that contractual obligations are voluntary.⁴ The 'voluntary assumption of obligation' has replaced the 'meeting of the minds' as the perceived core of contract.

Whether the neoclassical conception of contract is currently the dominant understanding of contract might be debated,⁵ but it certainly occupies a position of prominence in the contemporary contract literature. The voluntariness and autonomy claims are repeatedly made in leading judgments, scholarly writings, practitioner treatises and student texts. Contract scholars are divided on their willingness to acknowledge the defects in the neoclassical model. This division is neatly captured in two almost contradictory statements made by Richard Craswell. According to Craswell, 'common belief holds that tort law imposes duties without regard to a party's consent, while contract law enforces only those duties that a party has voluntarily assumed.'⁶ He goes on to say, however, that '[b]y now, it is well understood that the distinction between contract and tort is not that simple, and that it does not line up neatly with any distinction between

¹ On the classical conception of contract, see, eg, Morton Horwitz, *The Transformation of American Law, 1780–1860* (1977) ch 6; P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 405–8; Betty Mensch, 'Freedom of Contract as Ideology' (1981) 33 *Stanford Law Review* 753, 758–64; Hugh Collins, *The Law of Contract* (4th ed, 2003) 3–7.

² Following the observation made by Jay Feinman in relation to 'neoclassical contract law', we might say that the contemporary understanding of contract has not departed so far from the classical understanding as to justify an entirely new name: Jay Feinman, 'The Significance of Contract Theory' (1990) 58 *University of Cincinnati Law Review* 1283, 1285.

³ Horwitz, *The Transformation of American Law, 1780–1860*, above n 1, 160.

⁴ See Atiyah, *The Rise and Fall of Freedom of Contract*, above n 1, 406.

⁵ Hanoch Sheinman has suggested that 'the new orthodoxy in contract theory [is that] there is no such thing as a distinctly contractual obligation': Hanoch Sheinman, 'Contractual Liability and Voluntary Undertakings' (2000) 20 *Oxford Journal of Legal Studies* 205, 205. However, in support of that claim, Sheinman cites only a single book, published 30 years ago: Grant Gilmore, *The Death of Contract* (1974): at 205 fn 1.

⁶ Richard Craswell, 'Against Fuller and Perdue' (2000) 67 *University of Chicago Law Review* 99, 129.

voluntary and involuntary obligations.⁷ Craswell's two statements accurately describe the state of a field in which many judges and scholars *understand* that there are defects in the voluntariness claim, yet still *believe* that contract law 'enforces only those duties that a party has voluntarily assumed.'⁸

This article asks whether it is accurate to characterise contractual obligations in general as voluntary. Although the autonomy claim and the sharp distinction between contract and tort have been extensively criticised,⁹ the voluntariness claim has not been the subject of sustained scrutiny. This article is concerned with the idea that contractual obligations are voluntarily assumed, rather than the related but distinct idea that contracting parties are free to make whatever agreements they wish. Two examples illustrate the distinction as well as the overlap between the two ideas. When the courts fill a contractual gap by imposing a contractual obligation on one of the parties, this undermines the voluntariness claim, but not the autonomy claim. Indeed, Timothy Endicott has argued that gap-filling actually enhances contractual autonomy.¹⁰ The law of penalties, on the other hand, challenges the autonomy claim, because it limits the capacity of parties to shape their contractual obligations according to their wishes.¹¹ Less obviously, and less significantly, the law of penalties can also be seen as impinging on the voluntariness claim, since it imposes a non-voluntary curtailment of the aggrieved party's rights in the event of breach.¹²

The first part of this article will deal with two important preliminary issues. First, it will outline and provide prominent examples of the voluntariness claim. Second, it will explore the nature of voluntariness, arguing that an obligation can only be regarded as voluntary if the obligation is meaningfully understood and the decision to adopt it is substantially unconstrained. The second part of the article will consider the aspects of contractual behaviour and contract law that undermine the claim that contractual obligations are generally voluntarily assumed. That analysis will show that parties' deficiencies of understanding and choice are substantial and widespread, particularly in relation to rights and obligations arising from standard forms and from the default rules of contract

⁷ Ibid 130 (citations omitted).

⁸ Ibid 129.

⁹ On the autonomy claim, see, eg, G H L Fridman, 'Freedom of Contract' (1967) 2 *Ottawa Law Review* 1; Atiyah, *The Rise and Fall of Freedom of Contract*, above n 1, especially chs 21–2; Roger Brownsword, *Contract Law: Themes for the Twenty-First Century* (2000) ch 2. On the distinction between contract and tort, see P S Atiyah, 'Contracts, Promises and the Law of Obligations' (1978) 94 *Law Quarterly Review* 193; Andrew Robertson, 'On the Distinction between Contract and Tort' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004) 87.

¹⁰ Timothy Endicott, 'Objectivity, Subjectivity, and Incomplete Agreements' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (2000) 151, 170 argues that '[i]mposing obligations that the parties did not agree to is not necessarily contrary to freedom of contract. In fact, it is a necessary feature of a regime that promotes freedom of contract.' Endicott goes on to justify the second point by reference to the familiar idea that the courts facilitate the making of contracts by providing default rules that save the parties from reaching agreement on all issues.

¹¹ When a contract stipulates that a particular sum should be paid in the event of a breach, that stipulation will be struck down as a penalty if the stipulated sum is extravagant and unconscionable, having regard to the likely loss and the relationship between the parties: *Esanda Finance Corporation Ltd v Plessnig* (1989) 166 CLR 131.

¹² See below Part II(C).

law. Since standard form terms and default rules are significant sources of contractual obligation, the sweeping characterisation of contractual obligations in general as voluntary paints a distorted and incomplete picture of contract.¹³

II THE VOLUNTARINESS CLAIM AND ITS MEANING

A *The Voluntariness Claim*

The cornerstone of the neoclassical conception of contract is the idea that contractual obligations are voluntarily undertaken by contracting parties. Judges and scholars routinely justify the legal recognition and enforcement of contractual obligations and curtailments of rights on the basis that they are voluntarily adopted by the parties. In recent times, the House of Lords has held that contractual duties are ‘attributable to the will of the parties’,¹⁴ while the High Court of Australia has insisted that ‘contractual obligations are voluntarily assumed’¹⁵ and that ‘[i]t is of the essence of contract, regarded as a class of obligations, that there is a voluntary assumption of a legally enforceable duty.’¹⁶ The authors of *Chitty on Contracts* have maintained that ‘contractual obligations are voluntary’,¹⁷ and a popular English textbook tells students that ‘[t]he distinguishing feature of contractual obligations is that they are not imposed by the law but undertaken by the contracting parties.’¹⁸

Scholars who acknowledge that there are defects in the classical conception of contract still insist that at some fundamental level contractual obligations can be regarded as voluntary commitments. Three examples of such thinking illustrate the point. First, Brian Coote explains the need for a more inclusive theory of contract than one based on will, agreement or promise,¹⁹ but goes on to identify the voluntary assumption of obligation as the essence of contract.²⁰ Second, Andrew Burrows justifies doctrinal differences between remedies for breach of contract and remedies for torts on the basis of ‘[t]he root distinction between voluntary and purely imposed obligations’.²¹ He suggests that since contract is ‘based on a voluntary undertaking, the courts ought to tailor the remedy in contract to what was voluntarily undertaken’.²² Broader remedial consequences

¹³ A related but different observation is made by Ian Macneil, ‘Book Review: *Law in Society — An Introduction to Freedom of Contract — Cases and Materials*’ (1960) 46 *Cornell Law Review* 176, 177.

¹⁴ *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 194 (Lord Goff).

¹⁵ *Astley v Austrust Ltd* (1999) 197 CLR 1, 1 (Gleeson CJ, McHugh, Gummow, Hayne and Callinan JJ).

¹⁶ *Ermogenous v Greek Orthodox Community of SA Inc* (2002) 209 CLR 95, 105 (Gaudron, McHugh, Hayne and Callinan JJ), quoting *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 457 (Dixon CJ, Williams, Webb, Fullagar and Kitto JJ).

¹⁷ H G Beale (ed), *Chitty on Contracts* (28th ed, 1999) vol 1, 31. The proposition is later qualified: at 34–5.

¹⁸ Sir John Smith, *The Law of Contract* (2nd ed, 1993) 2.

¹⁹ Brian Coote, ‘The Essence of Contract’ (Pt 2) (1989) 1 *Journal of Contract Law* 183, 190–1.

²⁰ *Ibid* 194–5.

²¹ Andrew Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (1998) 13.

²² *Ibid*.

in tort can be justified on the basis that, in tort, ‘the liability is purely imposed’.²³ This discussion is cross-referenced to an earlier footnote in which Burrows acknowledges the ‘wide ranging implication of terms’ and the objective foundation of contractual obligations.²⁴ Third, the ambivalence within the contract literature is perhaps best expressed by US contracts scholar Charles Knapp, who criticises Grant Gilmore, Macneil and others for

blurring the line between commitments which have been voluntarily assumed and those that are socially imposed. One may concede that the line between the two is wavering, illogical and marked by needlessly confusing overlaps, and yet feel that there is a fundamental difference between the two types of obligations, a difference worth preserving in the structure of the law. While tort law deals with conduct that flouts general notions of proper behaviour in society, contract law addresses injuries occasioned by the breaking of commitments voluntarily expressed.²⁵

Two of the most prominent contract theorists in the US describe the assumption of contractual obligation in terms that are closely akin to the voluntariness claim. Charles Fried maintains that contract law is based on ‘the promise principle’, which is ‘that principle by which persons may impose on themselves obligations where none existed before.’²⁶ For Fried, a contractual obligation is ‘essentially self-imposed.’²⁷ In order to justify these claims, however, Fried treats as ‘non-contractual’ much of what we regard as contract law, and much of what the courts do in contract cases.²⁸ Randy Barnett argues that the consent of parties to be legally obligated is ‘at the heart of contract law’.²⁹ The legal enforcement of a contract ‘is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation’.³⁰ As we will see, Barnett goes on to acknowledge that it is the *behaviour* of the promisor that is crucial, rather than her *consent* or *intentions*,³¹ and accepts that the principles of contract law cannot be justified or explained solely on the basis of voluntary commitment. Barnett’s consent theory of contract is, therefore, a more complex theory of obligation than its name suggests. Nevertheless, its labelling as a consent theory powerfully advances the voluntariness claim. Barnett’s prominent ‘consent theory’ label and Fried’s ‘contract as promise’ banner may have a more powerful effect on our collective perception of contract than the detail of the arguments made by Barnett and

²³ Ibid.

²⁴ Ibid 9–10 fn 29 (‘one is not looking at what the promisor has himself accepted an obligation to do but at what a reasonable man regards the promisor as having accepted an obligation to do.’)

²⁵ Charles Knapp, ‘Rescuing Reliance: The Perils of Promissory Estoppel’ (1998) 49 *Hastings Law Journal* 1191, 1333 (citations omitted).

²⁶ Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981) 1.

²⁷ Ibid 2.

²⁸ For example, the objective approach to contract formation, the doctrine of frustration and the implication of terms.

²⁹ Randy Barnett, ‘A Consent Theory of Contract’ (1986) 86 *Columbia Law Review* 269, 299 (citations omitted).

³⁰ Ibid 300. See also at 318–19.

³¹ Ibid 305. See below nn 161–6 and accompanying text.

Fried, which acknowledge some of the significant limits of promise and consent in the field of contract.³²

B *Voluntary Actions and Voluntary Obligations*

Two different voluntariness claims are made in the contract literature. The first claim is that the *act* of contracting is voluntary.³³ The second is that contractual *obligations* are voluntarily assumed.³⁴ This article is concerned with the second claim. The distinction between the two claims is crucial because it is the second claim that is used to shape contract doctrine and to distinguish contract from other fields of law. The law of contract, like criminal law and the law of tort, is concerned with the legal consequences of voluntary behaviour. It is only in the law of contract, however, that *those legal consequences* are regarded as voluntary or voluntarily assumed.

When can an obligation be regarded as voluntary? This question can be approached by beginning with a consideration of voluntary *action*, and then using that conception of voluntariness to develop an understanding of a voluntary *legal obligation*. Aristotle identified two essential conditions of voluntary action: freedom from coercion, and an understanding of the circumstances and implications of the action.³⁵ At the strictest level, an action is voluntary only if the decision to engage in the action is entirely unconstrained and fully understood.³⁶ Since breadth of choice and depth of understanding are matters of degree, voluntariness can also be seen as a matter of degree.³⁷ The very broadest conception of voluntariness would accommodate any action motivated by a deliberate decision, regardless of the conditions under which that decision is

³² Roland Barthes, *Mythologies* (Annette Lavers trans, 1993 ed) 130 suggests that myth operates at the level of first impression. The myth has done its work even if we are later allowed to see through it. The effect of the headline may 'be stronger than the rational explanations which may later belie it': at 130.

³³ See, eg, *Agnew v Länsförsäkringsbolagens AB* [2001] 1 AC 223, 264 (Lord Millett): 'Contracts are consensual transactions; they depend for their validity on the consent of both parties.' On the relationship between consent and voluntariness, see below n 73.

³⁴ See above Part II(A).

³⁵ Aristotle, *Nicomachean Ethics* (Sir David Ross trans, 1925 ed) Book III. Cf Robert Nozick, *Anarchy, State, and Utopia* (1974) 262, who suggests that whether an action is voluntary depends on what limits the actor's alternatives. For Nozick, an action is voluntary no matter how severely constrained it is by nature or by the actions of other people, provided those people are acting within their rights. Nozick suggests that the actions of others impinge on voluntariness only if those others had no right to act as they did. This normative conception of voluntariness does not accord with the general understanding of the term expressed in the legal literature, nor does it reflect the dictionary meaning. The general understanding is adopted here because the central concern of this article is with the understanding of contract that is generated by the voluntariness claim. In any case, Nozick's conception of voluntary action tells us only that the *act* of contracting should be regarded as voluntary. It cannot readily be extended to develop an understanding of voluntary *obligations* because it does not address the dimension of knowledge or understanding. That dimension is crucial to a consideration of the question whether particular conditions (such as legal obligations or curtailments of rights) have been voluntarily assumed.

³⁶ A dictionary definition of voluntary is: 'Of an action: performed or done of one's own free will, impulse, or choice; not constrained, prompted or suggested by another. Also more widely, left to choice, not required or imposed, optional': Lesley Brown (ed), *The New Shorter Oxford English Dictionary on Historical Principles* (1993) 3600.

³⁷ See Joel Feinberg, *Social Philosophy* (1973) 48. See also Ruth Faden and Tom Beauchamp, *A History and Theory of Informed Consent* (1986) ch 7, who make the same point about autonomy.

made.³⁸ It is well accepted that even highly coerced agreements involve some exercise of will or choice, ‘however truncated or twisted the choice may be’.³⁹ A slave chooses to work rather than be punished.⁴⁰ The victim of an armed hold-up chooses to give up money rather than suffer the violent consequences of his or her refusal.⁴¹

Some basic standards of choice and understanding must be met, however, before we can regard a legal obligation as voluntarily assumed in the strong sense used in contract texts. If contractual obligations are to be regarded as voluntarily assumed, more is required than just an exercise of will or a deliberate action. Aristotle argued that responsibility for the consequences of an action can be attributed to the actor only if basic thresholds of choice and understanding are met.⁴² In a similar vein, Anthony Kronman has said that

[i]n assessing the voluntariness of an agreement, it is not enough merely to determine that the agreement was motivated by a deliberate decision of some sort; we also want to know something about the circumstances under which it was given.⁴³

Ruth Faden and Tom Beauchamp have argued in the analogous context of informed consent to medical treatment that intentionality, substantial understanding and substantial freedom from control are necessary conditions of autonomous action.⁴⁴ If obligations created by particular actions are to be regarded as voluntary, then the following prerequisites must be fulfilled: the assumption of obligation must be intentional; the decision to assume the obligation must be substantially unconstrained; and the obligation itself must be substantially understood.

It is important to reiterate that the voluntariness claim usually made in contract texts is not that the *act* of contracting is voluntary, but that the *legal consequences* of that action have been voluntarily assumed.⁴⁵ The crucial question, then, is not whether we can say that contracting is voluntary conduct, but whether we can accurately say that, generally speaking, contracting parties voluntarily undertake the obligations created by contract and voluntarily give up the rights that contracts curtail or take away.⁴⁶ This conclusion does not just

³⁸ See, eg. Michael Philips, ‘Are Coerced Agreements Involuntary?’ (1984) 3 *Law and Philosophy* 133, 133–4; Anthony Kronman, ‘Contract Law and Distributive Justice’ (1980) 89 *Yale Law Journal* 472, 477–8.

³⁹ Ian Macneil, ‘The Many Futures of Contracts’ (1974) 47 *Southern California Law Review* 691, 705. See also Collins, *The Law of Contract*, above n 1, 138.

⁴⁰ Robert Hale, ‘Bargaining, Duress, and Economic Liberty’ (1943) 43 *Columbia Law Review* 603, 606.

⁴¹ Macneil, ‘The Many Futures of Contracts’, above n 39, 703–4.

⁴² Aristotle, above n 35, 1 referred to actions for which ‘praise and blame are bestowed’.

⁴³ Kronman, above n 38, 478. See also Joan McGregor, ‘Philips on Coerced Agreements’ (1988) 7 *Law and Philosophy* 225, 227–8.

⁴⁴ Faden and Beauchamp, above n 37, ch 7.

⁴⁵ See above nn 15–24 and accompanying text. When used to characterise obligations, the word ‘voluntary’ is used in this sense: ‘Assumed or adopted voluntarily or by free choice; freely chosen or undertaken’: J A Simpson and E S C Weiner (eds), *Oxford English Dictionary* (2nd ed, 1989) vol 19, 754.

⁴⁶ See below n 51 and accompanying text.

depend on contracting parties generally behaving intentionally and being substantially free from external control. Most importantly, it requires that contracting parties substantially understand the nature of the obligations they are undertaking and the rights they are giving up. If we are asking whether a particular obligation has been voluntarily assumed then the dimension of information becomes crucial, as it does in determining whether a particular risk was voluntarily assumed. Joel Feinberg has observed that '[o]ne assumes a risk in a *fully voluntary* way when one shoulders it while informed of all relevant facts and contingencies, and in the absence of coercive pressure or compulsion.'⁴⁷ We are not concerned here with the question whether contractual obligations are *fully voluntary*, because insisting on that standard would 'stack the deck of the argument' against voluntariness.⁴⁸ Instead, the relevant question is whether contractual obligations are sufficiently voluntary that the concept of voluntariness carries the weight it is asked to bear in the neoclassical literature. The issue, therefore, is whether contractual obligations can be regarded as *substantially voluntary*.⁴⁹ If we accept that the making of a contract generally involves intentional conduct,⁵⁰ the crucial issues in determining whether contractual obligations are substantially voluntary are whether a contracting party *substantially* understands the nature of the obligations and curtailments of rights created by the contract, and whether he or she is able to exercise a *substantially* unconstrained choice as to whether to assume them.

C Obligations and Curtailments of Rights

The consideration of contractual obligations in this article is not limited to contractual stipulations requiring the performance of particular positive actions. Many contract terms, and indeed contract doctrines, do not require the parties to take particular actions, but operate instead to limit or curtail their rights. Such rights may be curtailed by a limitation of liability clause, a jurisdiction clause, a governing law clause, an arbitration clause, a merger or entire agreement clause, or a termination clause. Curtailments of rights such as these are, of course, extremely significant from a practical point of view. In assessing the role of voluntariness in contract, it is crucial to ask whether the adjustments of rights under these 'nonperformance terms'⁵¹ can be regarded as voluntarily assumed. One of the most important lessons of the 20th century contract literature was that the unread, non-negotiable standard form is the dominant form of written contracting. Contract scholarship must therefore take the standard form, rather

⁴⁷ Feinberg, above n 37, 48 (emphasis added).

⁴⁸ Faden and Beauchamp, above n 37, 240, observe that '[t]o chain informed consent [to medical treatment] to *fully or completely* autonomous decisionmaking stacks the deck of the argument and strips informed consent of any meaningful place in the practical world' (emphasis in original).

⁴⁹ The concept of 'substantial voluntariness' is analogous to the concept of 'substantial autonomy' adopted and explained by Faden and Beauchamp: *ibid* ch 7.

⁵⁰ Leaving aside the exceptional cases in which a contract may be made inadvertently: see Robertson, above n 9, 92–3, 95.

⁵¹ Melvin Eisenberg, 'The Limits of Cognition and the Limits of Contract' (1995) 47 *Stanford Law Review* 211, 240.

than the negotiated transaction, as its central focus. Whether the legal implications of a limitation of liability clause in an unread standard form contract can be regarded as voluntarily assumed should perhaps be regarded as the exemplary issue in relation to voluntariness in contract. From this perspective, contracting is about questions of consent (to the curtailment of rights) as much as it is about the practice of promising (to perform actions). In considering whether the voluntariness claim made in the contract literature stands up to close scrutiny, proper account must be taken of non-performance terms and curtailments of rights as well as obligations requiring positive actions.

III CHALLENGES TO THE VOLUNTARISTIC UNDERSTANDING OF CONTRACT

In order to understand the limits of voluntariness, it is necessary to scrutinise the two least voluntary sources of contractual obligations: the role played by standard forms, and the role played by the courts in shaping the rights and obligations of the parties.

A Standard Form Contracts

The first question is the extent to which standard form contracting undermines the voluntariness claim. This depends on the extent to which standard forms are used and whether the contractual obligations and curtailments of rights arising from standard forms can properly be seen as voluntary. A number of issues need to be considered. First, how widespread is the use of standard forms in contracting? Second, how often are standard forms read by the non-drafting party? Third, can voluntary obligations arise from unread terms? Fourth, to what extent is it possible to avoid known, undesirable terms of standard form contracts? Fifth, how far does the law go towards ensuring that the obligations that arise from standard form terms are voluntary? In particular, to what extent does the law ensure that parties are not bound by terms that they have not read, terms whose implications they could not understand, or terms that are difficult or impossible to avoid in practice?

1 *The Use of Standard Forms*

In 1971, W David Slawson estimated that 99 per cent of all contracts were made on terms presented by one party to the other in a standard form.⁵² This estimate has since been widely accepted as an accurate assessment of the percentage of *written* contracts made on standard form terms.⁵³ While it would be difficult for any researcher to generate meaningful data comparing the use of

⁵² W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84 *Harvard Law Review* 529, 529.

⁵³ See, eg, Robert Hillman and Jeffrey Rachlinski, 'Standard-Form Contracting in the Electronic Age' (2002) 77 *New York University Law Review* 429, 431; John Burke, 'Contract as Commodity: A Nonfiction Approach' (2000) 24 *Seton Hall Legislative Journal* 285, 290; Russell Korobkin, 'Bounded Rationality, Standard Form Contracts, and Unconscionability' (2003) 70 *University of Chicago Law Review* 1203, 1203; William Woodward Jr, 'Neoformalism in a Real World of Forms' [2001] *Wisconsin Law Review* 971, 985 fn 62.

standard forms with the use of fully negotiated contracts,⁵⁴ personal and professional experience leads scholars who write on this topic to accept that standard forms dominate all forms of contracting, other than agreements that are wholly oral (including routine retail purchases), and non-routine commercial contracts.⁵⁵

2 *The Failure to Read*

(a) *The Empirical Evidence*

It is well accepted that standard form contracts are rarely read by the non-drafting party, and rarely understood on the odd occasions when they are read.⁵⁶ Some say they are not meant to be read.⁵⁷ The failure of consumers to read standard form contracts has been recognised by the courts in the US,⁵⁸ the United Kingdom,⁵⁹ Canada⁶⁰ and Australia.⁶¹ Empirical evidence suggests that even businesspeople commonly fail to read standard forms. In his study of contractual practices amongst Wisconsin manufacturers, Stewart Macaulay found that 'only occasionally would [purchasing agents] bother to read the fine print on the back of suppliers' forms.'⁶² John Murray reported in 1982 that he had 'conducted seminars involving over 5000 purchasing agents and ha[d] never

⁵⁴ Harold Shepherd, 'Contracts in a Prosperity Year' (1954) 6 *Stanford Law Review* 208 studied the very different question of the types of contract that were the subject of appellate litigation in the US in 1951. Approximately 23 per cent were oral, 25 per cent were in printed form, 37 per cent were negotiated, 6 per cent constituted other written contracts, 3 per cent were implied, and 6 per cent were unclear: at 212.

⁵⁵ Atiyah, *The Rise and Fall of Freedom of Contract*, above n 1, 734 suggests that fully negotiated contracts are 'the exception in life as a whole, though they may not be exceptional in the Chambers of a barrister.' Although Friederich Kessler, 'Contracts of Adhesion — Some Thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629, 632 famously observed in 1943 that standard form contracts 'are typically used by enterprises with strong bargaining power', it is now well accepted that they are very commonly used by enterprises without market power: see, eg, Michael Trebilcock, 'An Economic Approach to the Doctrine of Unconscionability' in Barry Reiter and John Swan (eds), *Studies in Contract Law* (1980) 379, 398–404; Hugh Collins, *Regulating Contracts* (1999) 230; Hugh Beale, 'Legislative Control of Fairness: The Directive on Unfair Terms in Consumer Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (1995) 231, 232.

⁵⁶ Todd Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173, 1179. See also Hillman and Rachlinski, above n 53, 432–3, 448; Michael Meyerson, 'The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts' (1993) 47 *University of Miami Law Review* 1263, 1269–70; Randy Barnett, 'Consenting to Form Contracts' (2002) 71 *Fordham Law Review* 627, 628–9.

⁵⁷ *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, 436 (Lord Devlin); Ian Macneil, 'Bureaucracy and Contracts of Adhesion' (1984) 22 *Osgoode Hall Law Journal* 5, 5. See also Arthur Leff, who states that: 'The form contract is designed *not* to be read or pondered; if it is or has to be it loses much of its utility': Arthur Leff, 'Unconscionability and the Code — The Emperor's New Clause' (1967) 115 *University of Pennsylvania Law Review* 485, 504 (emphasis in original).

⁵⁸ See, eg, *Davis v MLG Corporation*, 712 P 2d 985, 992 (Colo, 1986) (Neighbors J); Meyerson, 'The Reunification of Contract Law', above n 56, 1269 fnn 28–9.

⁵⁹ See, eg, *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406 (Lord Reid); *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163, 169 (Lord Denning).

⁶⁰ See, eg, *Tilden Rent-A-Car Company v Clendenning* (1978) 83 DLR (3d) 400, 408 (Dubin JA).

⁶¹ See, eg, *MacRobertson Miller Airline Services v Commissioner of State Taxation (WA)* (1975) 133 CLR 125, 137 (Stephen J). See also *Baltic Shipping Co v Dillon*; *The 'Mikhail Lermontov'* (1991) 22 NSWLR 1, 25 (Kirby P).

⁶² Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55, 59.

discovered one who read or understood printed terms. Moreover not one read or understood the terms on his own purchase order form.⁶³ Daniel Keating interviewed 13 buyers and sellers from various industries and found that ‘[v]irtually none [of them] actually read the other party’s form beyond verifying the key terms of the deal: quantity, type, price, and delivery terms.’⁶⁴ In Keating’s later study of large manufacturing companies involved in buying and selling, most respondents believed that ‘their own company’s employees never or rarely read what was on the other side’s form beyond the dickered terms of the deal.’⁶⁵ About half of his respondents believed that parties on the other side of transactions were reading the forms sent to them. As Keating observes, however, the raising of an objection to a particular term is

[p]robably the surest indication that the other side is reading your company’s form ... [T]he consensus on this question was that it rarely happens, and when it does, it is much more likely to be with a large-dollar purchaser or a large-dollar vendor.⁶⁶

While the courts must be right to assume that consumers do not generally read terms in routine transactions such as passenger transportation or car rental agreements, there is empirical evidence that some types of standard form contracts are more commonly read. In their study of sale and purchase contracts made by engineering manufacturers, Hugh Beale and Tony Dugdale found that printed terms were sometimes read.⁶⁷ While in some cases the ‘back of order’ terms were not looked at, in others, buyers and sellers not only read each other’s forms, but identified and resolved major differences between them.⁶⁸ Of the 100 residential tenants in Ann Arbor, Michigan, surveyed by Warren Mueller, about half claimed to have ‘read carefully all paragraphs of any leases they had signed.’⁶⁹ Mueller also cites a study by the Ontario Law Reform Commission, in which 92 per cent of respondents claimed to have read their leases before signing

⁶³ John Murray Jr, ‘The Standardized Agreement Phenomena in the *Restatement (Second) of Contracts*’ (1982) 67 *Cornell Law Review* 735, 778–9 fn 207. Murray also said that ‘when the purchasing agents were asked to explain a printed term from their own purchase order forms, they could not do so’: John Murray Jr, ‘The Chaos of the “Battle of the Forms”: Solutions’ (1986) 39 *Vanderbilt Law Review* 1307, 1317 fn 47.

⁶⁴ Daniel Keating, ‘Measuring Sales Law against Sales Practice: A Reality Check’ (1997) 17 *Journal of Law and Commerce* 99, 106.

⁶⁵ Daniel Keating, ‘Exploring the Battle of the Forms in Action’ (2000) 98 *Michigan Law Review* 2678, 2704. Keating interviewed in-house counsel and businesspeople handling sales contracts at 25 companies, 10 of which contracted as both buyer and seller, 11 principally as buyer and 4 principally as seller: at 2693.

⁶⁶ *Ibid* 2703–4 (citations omitted).

⁶⁷ Hugh Beale and Tony Dugdale, ‘Contracts between Businessmen: Planning and the Use of Contractual Remedies’ (1975) 2 *British Journal of Law and Society* 45, 50.

⁶⁸ *Ibid*. Beale and Dugdale observe that ‘[u]sually these were the same items that would be the subject of detailed discussion if a contract were specifically negotiated ... for instance payment terms or warranty periods, and whether the price was fixed or open’: at 50.

⁶⁹ Warren Mueller, ‘Residential Tenants and Their Leases: An Empirical Study’ (1970) 69 *Michigan Law Review* 247, 274. Mueller notes that his sample was unusually well-educated: 70 per cent were either professionals or students and 60 per cent had either a graduate degree or some graduate school education: at 254–5.

them.⁷⁰ Although most respondents in both studies claimed to understand the terms of their leases, both studies indicated that the majority of tenants did not in fact understand the basic covenants of their leases.⁷¹

One could hypothesise as to why residential leases might be read more often than other types of contracts. The transaction is likely to be financially significant and of long duration. Security of tenure in one's home is likely to be of fundamental importance to the individual. The risk of breach and the prospect of enforcement of the terms of a residential lease may be less remote than for other contracts. Residential tenants may also be given an opportunity to read leases before signing and not pressured into signing quickly. In these respects a residential lease differs from the paradigmatic unread consumer agreement: the car rental contract signed by a busy traveller at the airport while other customers, 'also in a hurry, are waiting in line'.⁷²

(b) *Voluntary Obligations Arising from Unread Terms*

Might obligations and curtailments of rights arising from standard form terms be regarded as voluntary even if the form has not been read? Barnett has argued that, because they are freely accepted, the obligations arising from unread standard form terms should be viewed as voluntary.⁷³ A person who signs a standard form contract signals her consent to be bound by the terms set out in the contract.⁷⁴ Barnett suggests that it does not matter whether the signing party has read the terms or not: she is agreeing to be bound by them, *whatever they may be*. The same applies when a person clicks the 'I agree' dialogue box on a computer screen without having read the terms set out in a scroll box. 'Whether or not it is a fiction to say someone is making the promise in the scroll box, it is no fiction to say that by clicking "I agree" a person is consensually committing to these (unread) promises.'⁷⁵ For Barnett, the law of contract facilitates the assumption of risk. A person who promises to accept an unknown obligation or curtailment of rights is simply accepting a risk that the promise may be regretted when the content becomes known.⁷⁶ Barnett convincingly explains that, in some situations, the non-drafting party makes a voluntary choice not to inform himself or herself about the obligations he or she is undertaking.

⁷⁰ Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968), as cited in *ibid* 250–1.

⁷¹ Mueller, above n 69, 251, 274.

⁷² Hillman and Rachlinski, above n 53, 448. See also Eisenberg, 'The Limits of Cognition and the Limits of Contract', above n 51, 242; Meyerson, 'The Reunification of Contract Law', above n 56, 1269; Burke, above n 53, 286; *Srivastava v TD Waterhouse* (Unreported, Ontario Superior Court of Justice, Hoilett J, 16 July 2003) [47]: 'Those contracts may well be referred to as "contracts-on-the-run"; they are seldom if ever read and few people, if any, expects [sic] them to be read.'

⁷³ Barnett, 'Consenting to Form Contracts', above n 56. Barnett's argument is that the non-drafting party 'consents to' or 'consensually commits to' standard form terms. Since the dictionary definition of 'consent', when used in relation to terms, is a 'voluntary agreement to or acquiescence in' those terms (Brown, above n 36, 484), Barnett can be seen as defending the voluntariness claim in relation to standard form terms.

⁷⁴ Barnett, 'Consenting to Form Contracts', above n 56.

⁷⁵ *Ibid* 636.

⁷⁶ *Ibid*.

There is, however, a problem with Barnett's theory that limits its scope of application. In some situations, the non-drafting party's decision not to inform himself or herself about the terms of a standard form contract may not itself be voluntary. It must be recalled that we are not concerned here with the question whether the act of accepting the unread terms is a voluntary action. Rather, we are concerned with the question whether the obligations created by the unread standard form can be regarded as voluntarily assumed. Knowledge of the obligation to be assumed is a prerequisite of the voluntary assumption of obligation. Barnett's analysis suggests that a contracting party might voluntarily dispense with the knowledge requirement. The question, then, is whether a party signing an unread standard form has made a voluntary decision to assume a set of unknown obligations. That depends on whether the party's decision not to inform himself or herself of the obligations to be undertaken can itself be regarded as voluntary.

The non-drafting party's decision not to read can only be regarded as voluntary if he or she exercises a substantially unconstrained choice not to read the terms and have a basic understanding of what the terms might deal with.⁷⁷ As Kim Lane Scheppele has observed, the principal difficulty is that while information as to alternatives and consequences is 'a precondition of choice', it is also itself 'an object of choice'.⁷⁸ A contracting party's decision not to inform himself or herself about the terms of a contract may be regarded as voluntary in some circumstances but not in others. Whether the obligations created by an unread standard form may be regarded as voluntary depends on why the non-drafting party has failed to read the contract terms.

There is now a substantial body of literature exploring the reasons why individual and business consumers fail to read standard form contracts.⁷⁹ The various reasons represent a spectrum running from a substantially voluntary decision not to read (well-informed and relatively unconstrained) to a substantially non-voluntary decision not to read (poorly informed or significantly constrained). At the highly voluntary end of the spectrum is the decision not to read that is made for reasons of efficiency. Psychological evidence indicates that individuals will take shortcuts rather than process all available information in relation to a transaction.⁸⁰ Reading and understanding standard forms is costly, and that cost may not be justified by the benefits yielded.⁸¹ We might see these motivations as substantially voluntary. The decision not to read may, however, also be motivated by misplaced optimism. Standard forms mostly contain 'nonperformance terms that ... concern low-probability risks.'⁸² Studies have

⁷⁷ Michael Trebilcock, *The Limits of Freedom of Contract* (1993) 103 has observed that 'it is difficult to conceive of a choice as autonomous without basic information on its implications'.

⁷⁸ Kim Lane Scheppele, *Legal Secrets: Equality and Efficiency in the Common Law* (1988) 25.

⁷⁹ The discussion below draws on Hillman and Rachlinski, above n 53, 445–54, who survey the literature and explain the ways in which rational, social and cognitive factors conspire against the reading of standard forms.

⁸⁰ *Ibid* 450–1. See also Eisenberg, 'The Limits of Cognition and the Limits of Contract', above n 51, 214–16; Korobkin, above n 53, 1226–9.

⁸¹ Michael Meyerson, 'The Efficient Consumer Form Contract: Law and Economics Meets the Real World' (1990) 24 *Georgia Law Review* 583, 597–600.

⁸² Eisenberg, 'The Limits of Cognition and the Limits of Contract', above n 51, 240.

repeatedly shown that ‘people are unrealistically optimistic.’⁸³ The human tendency to underestimate and ignore low-probability adverse risks⁸⁴ makes contracting parties unlikely to be concerned about the remote contingencies dealt with in most standard form terms.⁸⁵ The non-drafting party may believe that the terms reflect industry standards,⁸⁶ that the drafting party will act fairly in any case to protect its reputation,⁸⁷ or that the courts will not enforce unfair terms.⁸⁸ More significantly, the non-drafting party may be unable to read or understand the implications of the terms. Terms expressed in technical legal language will often be difficult for a consumer or businessperson to read, and the implications of the terms will often be difficult for a non-lawyer to comprehend.⁸⁹

The decision not to read may also result from social factors, which do not sit entirely comfortably with Barnett’s idea that the failure to read can be regarded as a voluntary decision to assume an unknown risk. Reading standard form terms can be confrontational and indicates that the non-drafting party does not trust the drafting party or the drafting party’s representative.⁹⁰ There is evidence that people generally seek to avoid confrontation and willingly do favours for others.⁹¹ These social factors may be deliberately exploited by salespeople to discourage reading.⁹² Robert Hillman and Jeffrey Rachlinski conclude that salespeople can draw on ‘a host of social conventions and influences that lead people into quiet compliance when signing standard-form contracts.’⁹³

In light of the above, can the legal obligations that arise from signing an unread standard form always be regarded as having been voluntarily assumed? There are clearly some situations in which we might regard the unknown obligations created by unread standard form terms as substantially voluntary. We might draw this conclusion where the non-drafting party correctly believes that the terms deal with low-probability risks, has a basic understanding of what such risks might be, and is content to accept whatever such risks are allocated to him

⁸³ Ibid 216–18 (citations omitted). See also Melvin Eisenberg, ‘The Theory of Contracts’ in Peter Benson (ed), *The Theory of Contract Law* (2001) 206, 251.

⁸⁴ See Eisenberg, ‘The Limits of Cognition and the Limits of Contract’, above n 51, 223–5; Eisenberg, ‘The Theory of Contracts’, above n 83, 253.

⁸⁵ Hillman and Rachlinski, above n 53, 453–4; Robert Hillman, ‘The Limits of Behavioural Decision Theory in Legal Analysis: The Case of Liquidated Damages’ (2000) 85 *Cornell Law Review* 717, 723–4; Korobkin, above n 53, 1233.

⁸⁶ Daniel Ostas, ‘Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard A Posner’ (1998) 36 *American Business Law Journal* 193, 229.

⁸⁷ On firms’ repair and return practices being more generous than their written terms require, see William Whitford, ‘Strict Products Liability and the Automobile Industry: Much Ado about Nothing’ [1968] *Wisconsin Law Review* 83, 161–2. See also Rakoff, above n 56, 1221, 1228; Robert Hillman, ‘Rolling Contracts’ (2002) 71 *Fordham Law Review* 743, 746.

⁸⁸ Hillman, ‘Rolling Contracts’, above n 87, 747; Hillman and Rachlinski, above n 53, 447; Ostas, above n 86, 229.

⁸⁹ See Alan White and Cathy Lesser Mansfield, ‘Literacy and Contract’ (2002) 13 *Stanford Law and Policy Review* 233; Eisenberg, ‘The Limits of Cognition and the Limits of Contract’, above n 51, 241; Meyerson, ‘The Reunification of Contract Law’, above n 56, 1270.

⁹⁰ Hillman and Rachlinski, above n 53, 448.

⁹¹ Ibid 449–50.

⁹² For example, the form may be presented after the customer has been made to feel that he or she has won concessions: *ibid* 449.

⁹³ *Ibid* 450 (citations omitted).

or her. In this situation, the non-drafting party does not have knowledge of the specific obligations they are accepting, but substantially understands the nature of the risk he or she is assuming. In other circumstances, the decision not to read may be regarded as substantially non-voluntary. We might draw this conclusion where the non-drafting party decides not to read because of a misunderstanding as to the likely subject matter of the terms or because of an inability to read or comprehend the implications of the terms.⁹⁴

3 *Can Standard Form Terms Be Avoided?*

The next question is whether a contracting party who reads standard form terms can avoid those obligations and curtailments of rights that he or she finds unpalatable. Whether a particular term can be avoided by an individual or business consumer who is aware of it depends on four questions: first, whether the terms are negotiable; second, whether substitute goods or services are available on different terms; third, whether it is feasible for the individual or business consumer to investigate differences between relevant terms; and fourth, whether the individual or business consumer can do without the goods or services altogether.⁹⁵

It is well accepted that standard form terms are typically not negotiable in consumer contracts and are often not negotiable in commercial contracts.⁹⁶ Standard forms are used in order to reduce transaction costs⁹⁷ and standardise transactions.⁹⁸ Negotiation of terms would undermine the first of these goals and any resulting variation would undermine the second.⁹⁹ In any case, an attempt to negotiate will be futile if the consumer is dealing with a salesperson who is not authorised to accept a variation, and it is well accepted that this is typically the

⁹⁴ The legal response to standard form contracts fails to distinguish between these two situations. As a result, contract law does not ensure that the decision not to read a standard form contract is a voluntary decision to accept the risk of unknown obligations and curtailments of rights.

⁹⁵ The second and fourth questions come from John Murray Jr, 'Unconscionability: Unconscionability' (1969) 31 *University of Pittsburgh Law Review* 1, 31–3.

⁹⁶ See, eg, Hillman and Rachlinski, above n 53, 435–6; E Allan Farnsworth, *Farnsworth on Contracts* (1990) vol 1, 480; Kessler, above n 55, 632; *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361, 406 (Lord Reid). In a commercial context, the limited empirical evidence that is available on this point tells us only what can be learned from a year or two in legal practice, namely that the terms of commercial contracts are sometimes negotiable, depending on factors such as dollar value and level of risk: Keating, 'Exploring the Battle of the Forms in Action', above n 65, 2697–8; Beale and Dugdale, above n 67, 48–51.

⁹⁷ Hillman and Rachlinski, above n 53, 439–40; Kessler, above n 55, 631–2; Steven Salbu, 'Evolving Contract as a Device for Flexible Coordination and Control' (1997) 34 *American Business Law Journal* 329, 375–9 (also explaining reduction of agency costs); Alan Schwartz, 'A Reexamination of Nonsubstantive Unconscionability' (1977) 63 *Virginia Law Review* 1053, 1064–71; Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power', above n 52, 531.

⁹⁸ *Restatement (Second) of Contracts* § 211 cmt b (1981): 'One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms.' See also Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power', above n 52, 552; Rakoff, above n 56, 1221–4; Barnett, 'Consenting to Form Contracts', above n 56, 630–1.

⁹⁹ Meyerson, 'The Reunification of Contract Law', above n 56, 1270.

case.¹⁰⁰ It is now well-recognised that the question whether standard form terms are negotiable is not really to the point. In most situations it does not make economic sense to negotiate standard form terms. The issue in routine transactions is not whether the terms are negotiable, nor whether the non-drafting party has power to bargain, but whether the non-drafting party has the power to avoid undesirable terms by walking away from the transaction.

It is well-recognised that there is considerable uniformity of terms between competing suppliers of particular goods and services.¹⁰¹ This may be because the commonly used terms represent an ideal allocation of risks, because smaller competitors have copied the terms offered by larger firms or because competition as to terms has forced all suppliers to adopt generous terms.¹⁰² However, it may be because suppliers tend to compete on price, rather than terms, and because of the failure of consumers to read the terms, and the irregularity with which they are enforced, having the result that no competition as to terms ever develops.¹⁰³ Indeed, strong price competition may even exacerbate a standardisation of terms that shifts risk to the non-drafting party.¹⁰⁴ As Slawson has pointed out, '[s]tandardization reduces the number of choices and so makes more likely the possibility that in any particular instance there will be only one that is reasonable.'¹⁰⁵

Even if the providers of a particular product or service do offer different terms, cost and cognitive factors make it extremely unlikely that an individual or business consumer will identify and compare the available alternatives.¹⁰⁶ Psychological evidence suggests that people 'seldom collect all relevant data before making decisions.'¹⁰⁷ It may be considered irrational to review and compare available terms, particularly in relation to a one-off transaction where the terms in question deal mostly with low-probability risks.¹⁰⁸ A non-drafting

¹⁰⁰ *Restatement (Second) of Contracts* § 211 cmt b (1981): 'Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them.' Meyerson, 'The Reunification of Contract Law', above n 56, 1269–70, cites *A & M Produce Co v FMC Corp*, 186 Cal Rptr 125 fn 13 (Ct App, 1982) where an employee gave evidence that he was not empowered to negotiate over standard form terms, and *Davis v MLG Corporation*, 712 P 2d 985, 992 (Colo, 1986), where a car rental agent gave evidence that the standard form agreement was offered on a take it or leave it basis and that she had never seen a customer read the terms on the back of the rental agreement.

¹⁰¹ See Hillman, 'Rolling Contracts', above n 87, 747–8; Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960) 362; Karl Llewellyn, 'What Price Contract? — An Essay in Perspective' (1931) 40 *Yale Law Journal* 704, 734; Rakoff, above n 56, 1227; Hugh Beale, 'Inequality of Bargaining Power' (1986) 6 *Oxford Journal of Legal Studies* 123, 133.

¹⁰² Hillman and Rachlinski, above n 53, 439.

¹⁰³ See Korobkin, above n 53, 1206.

¹⁰⁴ Rakoff, above n 56, 1227; Beale, 'Inequality of Bargaining Power', above n 101, 131; Korobkin, above n 53, 1206.

¹⁰⁵ Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power', above n 52, 550.

¹⁰⁶ See Arthur Leff, 'Unconscionability and the Crowd — Consumers and the Common Law Tradition' (1970) 31 *University of Pittsburgh Law Review* 349, 351. For a specific example, see *Ting v AT & T*, 182 F Supp 2d 902, 914, 929 (ND Cal, 2002) on the commonality of dispute resolution terms amongst the major long-distance telecommunications carriers servicing California, and the difficulties a consumer would face in identifying the carrier that did offer more favourable terms.

¹⁰⁷ Eisenberg, 'The Theory of Contracts', above n 83, 252.

¹⁰⁸ Eisenberg, 'The Limits of Cognition and the Limits of Contract', above n 51, 243–4.

party must understand the legal implications of particular terms before he or she will be *motivated* to shop for terms and *able* to weigh the respective benefits of the different terms available, and in most cases the costs of search and comparison will be prohibitive.¹⁰⁹ For the business consumer engaged in a large number of purchases from different suppliers, it is not economical to have employees read standard forms or to seek legal advice on their implications.¹¹⁰ It is said that ‘imperfections in human processing ability increase as decisions become more complex and involve more permutations.’¹¹¹ For individual or business consumers, it would be extremely difficult to weigh the respective benefits of price and terms packages offered by different providers of a particular good or service.¹¹² If the products on offer differ, then the weighing of benefits becomes even more complex as the product dimension is introduced to the equation.

The final question is whether, in a given situation, it is possible to avoid obligations arising from standard form terms by going without the relevant goods or services altogether. The answer depends, of course, on the particular context and the nature of the good or service in question. No doubt in some situations individuals and business organisations contract for goods and services that they could do without altogether, while in others the latitude of choice is narrower. However, Robert Hale taught us long ago that exchange is essential in a market economy. The idea that individuals ‘can choose not to participate in market transactions’¹¹³ has long been recognised as a misconception. The free market economic system requires all individuals to contract in order to live.¹¹⁴ Both individuals and business organisations are dependent on many products and services that are available only on standard terms.¹¹⁵ This product dependence

¹⁰⁹ Ibid. See also Alan Schwartz and Louis Wilde, ‘Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis’ (1979) 127 *University of Pennsylvania Law Review* 630, 660–1.

¹¹⁰ See Richard Craswell, ‘The Sound of One Form Battling: Comments on Daniel Keating’s “Exploring the Battle of Forms in Action”’ (2000) 98 *Michigan Law Review* 2727, 2730–1; Victor Goldberg, ‘The “Battle of the Forms”: Fairness, Efficiency, and the Best-Shot Rule’ (1997) 76 *Oregon Law Review* 155, 157, 164.

¹¹¹ Eisenberg, ‘The Theory of Contracts’, above n 83, 250 (citations omitted).

¹¹² Korobkin, above n 53, 1225–34; Melvin Eisenberg, ‘Text Anxiety’ (1986) 59 *Southern California Law Review* 305; Schwartz and Wilde, above n 109, 659–61; Rakoff, above n 56, 1226.

¹¹³ Larry Bates, ‘Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection’ (2002) 16 *Emory International Law Review* 1, 1. Bates argues that ‘[a]lthough consumers have a choice in the sense that they can choose not to participate in market transactions, once consumers decide to participate, the choices that remain available do not concern the rights and responsibilities of each party to the transaction’: at 1.

¹¹⁴ Robert Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470; Hale, ‘Bargaining, Duress, and Economic Liberty’, above n 40 (on the significance of Hale’s work, see Morton Horwitz, *The Transformation of American Law, 1870–1960: The Crisis of Legal Orthodoxy* (1992) 195–8); Macneil, ‘The Many Futures of Contracts’, above n 39; Macneil, ‘Bureaucracy and Contracts of Adhesion’, above n 57, 19–20; Slawson, ‘Standard Form Contracts and Democratic Control of Lawmaking Power’, above n 52; W David Slawson, *Binding Promises: The Late 20th-Century Reformation of Contract Law* (1996) 22–3; Max Radin, ‘Contract Obligation and the Human Will’ (1943) 43 *Columbia Law Review* 575; John Dalzell, ‘Duress by Economic Pressure’ (Pt 1) (1942) 20 *North Carolina Law Review* 237.

¹¹⁵ Slawson, *Binding Promises*, above n 114, 21. Slawson goes on to make the bolder claim that ‘[a] person today who refused to contract unless he understood what he was committing himself to would deny himself most of the means of living in society’: at 21.

does not mean that all contractual obligations are non-voluntary, because it does not deprive contracting parties of the capacity to choose between available alternatives. It does, however, operate as a significant constraint on the ability of non-drafting parties to avoid obligations arising from standard form terms.¹¹⁶ In some situations the choice is severely constrained. For example, in order to satisfy the need for housing, most individuals have no alternative but to choose between a non-negotiable standard form lease and a non-negotiable standard form mortgage.

4 *The Legal Response*

The factors considered above would be rendered irrelevant if the legal response to standard forms ensured that their terms were binding only if they were voluntarily accepted. Our particular interest here is the way in which the law responds to terms that have not been read, terms whose implications could not be understood and terms that are difficult or impossible in practice to avoid. The starting point is that the terms set out in a signed, standard form contractual document are normally binding, even if the signatory has not read the document and has no knowledge of its terms.¹¹⁷ The terms set out in an unsigned contractual document are binding if the non-drafting party has assented to the terms¹¹⁸ or the drafting party has taken reasonable steps to bring the terms to the notice of the non-drafting party before the contract is made.¹¹⁹ An onerous or unusual provision in an unsigned contractual document is binding only if the drafting party has taken the steps necessary to bring the relevant provision to the attention of a reasonable person.¹²⁰ Some Canadian and Australian cases have in the past offered support for the view that an onerous or unusual provision in a signed, standard form contractual document would in some circumstances be binding only if the drafting party had taken reasonable steps to bring the relevant provision to the attention of the non-drafting party.¹²¹ This view has now been firmly rejected in Australia,¹²² however, and seems also to be out of favour in Canada.¹²³

¹¹⁶ Ibid 22–4.

¹¹⁷ *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 211 ALR 342; *Parker v South Eastern Railway Co* (1877) 2 CPD 416, 421 (Mellish LJ); *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. In the US, § 211(1) of the *Restatement (Second) of Contracts* (1981) reflects a similar general principle.

¹¹⁸ *Parker v South Eastern Railway Co* (1877) 2 CPD 416, 421 (Mellish LJ).

¹¹⁹ *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 228–9 (Brennan J); *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837; Sir Guenter Treitel, *The Law of Contract* (11th ed, 2003) 216–20, 245.

¹²⁰ See, eg, *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] 2 QB 433; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 229 (Brennan J); *Baltic Shipping Co v Dillon*; *The 'Mikhail Lermontov'* (1991) 22 NSWLR 1, 24–5 (Kirby P).

¹²¹ See especially, *Tilden Rent-A-Car Company v Clendenning* (1978) 83 DLR (3d) 400 and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2003) 56 NSWLR 662.

¹²² *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2003) 56 NSWLR 662 was reversed on appeal in *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 211 ALR 342.

¹²³ The decision in *Tilden Rent-A-Car Company v Clendenning* is routinely distinguished as applying only to contracts made 'on-the-run' (see, eg, *Srivastava v TD Waterhouse* (Unreported, Ontario Superior Court of Justice, Hoilett J, 16 July 2003) [47]). Moreover, its correctness was doubted by the Alberta Court of Appeal in *Budget Rent-A-Car of Edmonton Ltd v University of Toronto* (1995) 165 AR 236.

At common law, then, it is clear that standard form terms are routinely binding on parties who have not read them. Parties can also become bound by terms to which they have not specifically assented, and the existence of which they were not aware, provided reasonable notice has been given. Protective statutory regimes provide some scope for relieving non-drafting parties of obligations and curtailments of rights imposed by standard form contracts. An obvious difficulty in making a general assessment of the effect of protective statutory regimes is that the nature and extent of legislative protection differs from jurisdiction to jurisdiction. It can be said, however, that although protective statutory regimes *enhance* voluntariness to some extent, they generally fall well short of *ensuring* voluntariness in standard form contracts. It would be impossible for any legislation to address all of the issues of knowledge and choice outlined above, but legislatures do not generally seek to address these issues. Protective provisions tend to be more concerned with policing substantively unfair terms — or unfair conduct that results in the imposition of unfair terms — than with ensuring that non-drafting parties exercise a meaningful and adequately informed choice in everyday contracting. The more far-reaching protective provisions tend to operate only in relation to particular classes of contract, and commonly operate only for the benefit of individual or domestic consumers, rather than for business consumers.

There are three principal types of legislative response to the problems thought to arise from standard form contracts.¹²⁴ The first approach is to regulate contract content by specific provision.¹²⁵ This approach is commonly adopted in relation to consumer sales and consumer credit contracts, and involves the direct control of terms considered to be unfair, such as warranty disclaimers and clauses limiting liability.¹²⁶ This approach attempts to ensure that the terms of contracts governed by the legislation are substantively fair, and does not attempt to enhance the non-drafting party's knowledge or choice of contract terms.

The second approach is to regulate the contracting process. The aim here is to give the consumer a better chance of informing himself or herself about the terms being offered by the drafting party.¹²⁷ Provisions of this type are also commonly found in consumer credit legislation. They attempt to enhance the consumer's knowledge and understanding of contract terms by, for example, requiring terms to be set out in plain language or a readable typeface, requiring certain clauses to be printed in bold type or separately signed, or requiring pre-contractual explanations, warnings or disclosures to be given to consum-

¹²⁴ See Colin Scott and Julia Black, *Cranston's Consumers and the Law* (3rd ed, 2000) 96–102, who identify and evaluate four techniques: first, declaring invalid specific contract terms considered objectionable; second, imposing a broad standard of fairness; third, authorising a public agency to take action to have unfair terms declared void; and fourth, providing for mandatory approval of standard form contracts; Edward Belobaba, 'The Resolution of Common Law Contract Doctrinal Problems through Legislative and Administrative Intervention' in Barry Reiter and John Swan (eds), *Studies in Contract Law* (1980) 423, 450–9.

¹²⁵ Arthur Leff, 'Contract as Thing' (1970) 19 *American University Law Review* 131, 147–57.

¹²⁶ Farnsworth, above n 96, 517–19. See also Treitel, above n 119, 284–5.

¹²⁷ Farnsworth, above n 96, 518–21. See also Schwartz and Wilde, above n 109; Jeffrey Davis, 'Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts' (1977) 63 *Virginia Law Review* 841.

ers.¹²⁸ Mandatory cooling-off periods also ensure that the consumer has time to consider the wisdom of the transaction. These provisions may to some extent enhance the consumer's knowledge and understanding of contract terms in the classes of contract they cover. Such provisions tend, however, to be limited in their scope of application, and are commonly thought to be of little effect in cases where they do apply.¹²⁹ When they do enliven the consumer's appreciation of the meaning and significance of particular terms, they may not enhance the consumer's ability to choose whether to accept those terms, as this will depend on the availability of alternatives.¹³⁰

A third legislative response is a combination of the first two: the legislature empowers a court to intervene where contracting conduct is, or contractual terms are, unfair, unjust or unconscionable according to a range of criteria. Those criteria tend to include aspects of procedural unfairness (unfairness in the contracting process) and substantive unfairness (objectively unfair terms).¹³¹ This third type of legislation tends to be of the most general application. Since it allows or directs the court to take account of procedural unfairness, it has some potential for redressing the lack of meaningful choice commonly faced by parties to standard form contracts. Some provisions of this type operate in relation to a broad range of consumer contracts,¹³² others apply to commercial contracts,¹³³ others to both.¹³⁴ In the US, the unconscionability doctrine, both under § 2-302 of the *Uniform Commercial Code* ('UCC')¹³⁵ and under the general law,¹³⁶ allows for the close scrutiny of factors relevant to the question whether the non-drafting party's acceptance of terms was truly voluntary, including any inequality of bargaining power, the use of deceptive sales practices and the non-drafting party's knowledge of, and ability to understand, the standard form

¹²⁸ See, eg, Farnsworth, above n 96, 486, 518–21; William Whitford, 'The Functions of Disclosure Regulation in Consumer Transactions' [1973] *Wisconsin Law Review* 400; N C Seddon and M P Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8th Aust ed, 2002) 708, 728; John Goldring et al, *Consumer Protection Law* (5th ed, 1998) especially chs 8–9. For specific examples, see *Unfair Terms in Consumer Contracts Regulations 1999* (UK) reg 7(1); *Fair Trading Act 1999* (Vic) s 61; *Consumer Credit Regulations 1995* (Qld); *Family Law Act 1975* (Cth) s 90G.

¹²⁹ See, eg, Farnsworth, above n 96, 520; Charles Knapp, 'Taking Contracts Private: The Quiet Revolution in Contract Law' (2002) 71 *Fordham Law Review* 761, 792–4; Korobkin, above n 53, 1234; Scott and Black, above n 124, 250–3; Belobaba, above n 124, 455–6; White and Lesser Mansfield, above n 89, 234 fn 4, 260–1.

¹³⁰ Knapp, 'Taking Contracts Private', above n 129, 794–5.

¹³¹ The distinction comes from Leff, 'Unconscionability and the Code', above n 57, 487.

¹³² See, eg, *Unfair Terms in Consumer Contracts Regulations 1999* (UK); *Contracts Review Act 1980* (NSW); *Trade Practices Act 1974* (Cth) s 51AB.

¹³³ *Trade Practices Act 1974* (Cth) s 51AC.

¹³⁴ *Uniform Commercial Code* § 2-302. See also the general law principle described in the *Restatement (Second) of Contracts* § 208 (1981). Slawson, *Binding Promises*, above n 114, 25, 143, notes that in at least 40 per cent of cases since 1990, the unconscionability doctrine is invoked by business consumers. See also Farnsworth, above n 96, 503–6 on this point.

¹³⁵ Section 2-302(1) provides:

If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

¹³⁶ See *Restatement (Second) of Contracts* § 208 (1981); Farnsworth, above n 96, 497.

terms.¹³⁷ In New South Wales, the *Contracts Review Act 1980* (NSW) ('CRA') empowers a court to grant relief where it finds a consumer contract or a provision of a consumer contract to be 'unjust in the circumstances relating to the contract at the time it was made.'¹³⁸ In determining whether a provision is unjust, the court must take into account a list of factors going to the consumer's ability and opportunity in the circumstances of the transaction to protect himself or herself against an unfair bargain.¹³⁹

Neither the *UCC* unconscionability doctrine nor the *CRA*, however, redresses the lack of meaningful choice in everyday consumer or business transactions. William Whitford has suggested that this 'vague admonitory legislation is probably mostly symbolic in its effects, having little impact on the general situation of consumers.'¹⁴⁰ In each case, relief will generally be granted only where a lack of meaningful choice is combined with substantive unfairness in the form of unusually one-sided terms.¹⁴¹ 'Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties *together with contract terms which are unreasonably favorable to the other party*.'¹⁴² It is said that the combined effect of § 2-302 of the *UCC*, § 211(3) of the *Restatement (Second) of Contracts*¹⁴³ and the 'reasonable expectations doctrine'¹⁴⁴ is that US law 'presumes the general enforceability of standard terms, while negating terms that are procured unfairly, are unreasonable

¹³⁷ *Williams v Walker-Thomas Furniture Co*, 350 F 2d 445, 449 (DC Cir, 1965) (Skelly Wright J).

¹³⁸ *CRA* s 7(1). The court is given power to grant relief 'for the purpose of avoiding as far as practicable an unjust consequence or result', including an order declaring the whole or part of the contract void or varying the whole or part of the contract.

¹³⁹ The relevant factors listed in *CRA* s 9(2) include: 'any material inequality in bargaining power between the parties'; whether the contract was negotiated; whether negotiation was reasonably practicable; 'the relative economic circumstances, educational background and literacy' of the parties; the physical form and intelligibility of the contract; whether the consumer was given legal advice; whether the provisions of the contract were explained to the consumer; and 'whether any undue influence, unfair pressure or unfair tactics were exerted' against the consumer.

¹⁴⁰ William Whitford, 'Structuring Consumer Protection Legislation to Maximize Effectiveness' [1981] *Wisconsin Law Review* 1018, 1021.

¹⁴¹ See Farnsworth, above n 96, 507–10; Korobkin, above n 53, 1255–78; Hillman, 'Rolling Contracts', above n 87, 749 ('the strongest and most persuasive cases involve both' a deficient bargaining process and oppressive substantive terms), citing *Bischoff v DirectTV Inc*, 180 F Supp 2d 1097, 1107 (CD Cal, 2002) where Collins J said: 'An adhesion contract is unconscionable when both procedural unconscionability, meaning surprise or distress stemming from unequal bargaining power, and substantive unconscionability, meaning overly harsh or one-sided terms are present.'

¹⁴² *Williams v Walker-Thomas Furniture Co*, 350 F 2d 445, 449 (DC Cir, 1965) (Skelly Wright J) (emphasis added) (citations omitted). Farnsworth, above n 96, 506 notes that this is '[p]erhaps the most durable dictum on the meaning of "unconscionability"' and that the courts 'continue to focus on both "unreasonably favorable" terms and an "absence of meaningful choice."' The position is essentially the same under the New South Wales legislation: see *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610, 621–2 (McHugh JA); Ben Zipser, 'Unjust Contracts and the *Contracts Review Act 1980* (NSW)' (2001) 17 *Journal of Contract Law* 76, 79.

¹⁴³ Section 211(3) notes that where a party manifests assent to a document and 'the other party [that is, the drafting party] has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.'

¹⁴⁴ This doctrine allows the courts to give effect to the reasonable expectations of the parties, even when they are inconsistent with the express terms of the contract. It originated in the interpretation of insurance contracts and is now applied more broadly: see Slawson, *Binding Promises*, above n 114.

or indecent, or are reasonably unexpected.¹⁴⁵ Accordingly, we may conclude that while the US unconscionability doctrine and similar Australian legislation¹⁴⁶ do police procedurally unfair conduct resulting in unfair terms, they do not address the lack of understanding or the lack of choice in day-to-day contracting. Provided unfair tactics are not used by the drafting party, and provided unusually onerous conditions are not included, the terms set out in a quotidian, non-negotiable, unread standard form contract signed by an individual or business consumer remain binding under common law principles.

In the UK, both the *Unfair Terms in Consumer Contracts Regulations 1999* (UK) ('*UTCCR*') and the *Unfair Contract Terms Act 1977* (UK) c 50 ('*UCTA*') combine aspects of the first and third approaches outlined above.¹⁴⁷ The *UTCCR* provides that an unfair term in a consumer contract is not binding on the consumer.¹⁴⁸ Regulation 5(1) provides that a term that

has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.¹⁴⁹

Schedule 2 sets out an indicative list of terms that may be regarded as unfair. The indicative list in sch 2 of the *UTCCR* focuses on matters of substantive fairness, but does include a reference to terms that have the effect of '(i) irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract' and '(j) enabling the seller or supplier to alter the terms of the contract unilaterally'.¹⁵⁰ The *UCTA* invalidates standard form terms that unreasonably limit the liability of the drafting party, and standard form terms that unreasonably require a consumer to indemnify another party against liability. The guidelines for assessing 'reasonableness' set out in sch 2 of the *UCTA* include (a) the relative strengths of the parties' bargaining positions and (c) whether the consumer knew or ought to have known of the 'existence and extent of the term'.

Although the *UTCCR* and the *UCTA* do provide some scope for scrutinising the quality of the non-drafting party's assent to standard form terms, the main focus in each case is on the substantive fairness of the terms. Thus both are

¹⁴⁵ Hillman and Rachlinski, above n 53, 461.

¹⁴⁶ See, eg, *Trade Practices Act 1974* (Cth) ss 51AB, 51AC, which address 'unconscionable conduct' in certain consumer and business transactions; Consumer Credit (Victoria) Code s 70.

¹⁴⁷ Provisions similar to those in the *UTCCR* have recently been introduced in Victoria: *Fair Trading Act 1999* (Vic) pt 2B, amended by the *Fair Trading (Amendment) Act 2003* (Vic).

¹⁴⁸ *UTCCR* s 8(1). See also *Fair Trading Act 1999* (Vic) s 32Y(1): 'An unfair term in a consumer contract is void'.

¹⁴⁹ See also, to similar effect, *Fair Trading Act 1999* (Vic) s 32W, which provides that '[a] term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer'; s 32X, which provides that 'in determining whether a term of a consumer contract is unfair, a court or the [Victorian Civil and Administrative] Tribunal may take into account, among other matters, whether the term was individually negotiated'.

¹⁵⁰ The corresponding list in the *Fair Trading Act 1999* (Vic) s 32X includes '(d) permitting the supplier but not the consumer to vary the terms of the contract' but does not include an equivalent to para (i) on the *UTCCR*'s indicative list.

primarily concerned to address problems thought to arise from consumer ignorance and unavoidability of contract terms, rather than to address ignorance or unavoidability themselves. The point being made here is not that this legislation could or should overcome ignorance or unavoidability. Rather, the point is that this legislation is of only marginal significance to the argument being made in this article, because the legislation is essentially concerned with substantive fairness, rather than voluntariness issues. Under both the *UCTA* and the *UTCCR*, agreements are policed to ensure conformity to community standards of what ought and ought not to be in the agreement, rather than a concern to ensure that the terms set out in the document have not been imposed on the consumer, or a concern to ensure that the consumer's assent to the terms was meaningful. Indeed, the *UTCCR* has been criticised for focusing on substantive fairness rather than informed consent.¹⁵¹

It is clear from this brief discussion that while protective legislation does enhance voluntariness in standard form contracting, it does not compel the conclusion that the legal effects of standard forms are always voluntarily assumed by the non-drafting party. Even if we could go so far as to say that standard form terms are binding only if they are fair and of a kind that a reasonable person would not be surprised to find in the relevant document (and most jurisdictions clearly fall well short of this level of protection), such protections do not ensure that the obligations and curtailments of rights created by standard forms are voluntary. They do not ensure that there is an appreciable choice left to the non-drafting party, nor do they ensure that the non-drafting party has even a basic understanding of the obligations imposed by the contract or the rights curtailed. We can therefore conclude that, although the legal response to standard form contracts goes some way towards ensuring that the most egregious examples of unknown, unknowable and unavoidable terms are not binding, it does not substantially overcome the impediments to voluntariness in standard form contracting. Consumer protection legislation quite properly focuses on ensuring substantive fairness, rather than the more elusive task of ensuring that contractual obligations and curtailments of rights are substantially voluntary.¹⁵²

5 *Voluntariness and Standard Form Terms*

In light of the contracting practices and legal response described above, can contractual rights and obligations in general accurately be characterised as 'voluntary'? Most written contracts are made by standard form. Standard form terms are commonly adopted without being read. In some cases they become binding without any indication of genuine assent. The terms are generally not negotiable. It is extremely difficult to avoid particular obligations or curtailments of rights by shopping for different terms, because of the uniformity of available

¹⁵¹ Matthew Chapman, 'Common Law Contract and Consent: Signature and Objectivity' (1998) 49 *Northern Ireland Legal Quarterly* 363.

¹⁵² See, eg, Richard Speidel, 'Unconscionability, Assent and Consumer Protection' (1970) 31 *University of Pittsburgh Law Review* 359, 374; Leff, 'Unconscionability and the Code', above n 57; Leff, 'Contract as Thing', above n 125, 147–57; Leff, 'Unconscionability and the Crowd', above n 106, 352, 354–5. See also Korobkin, above n 53; Collins, *Regulating Contracts*, above n 55, ch 11.

terms, the need to understand the legal implications of the terms, and the cost and cognitive barriers to comparison of available terms. This suggests that it is not possible to make an accurate claim about the voluntariness of contractual obligations in general. A more sophisticated approach must be adopted.

First, a distinction must be drawn between negotiated or specifically agreed terms and standard form terms. Second, it is necessary to distinguish between read and unread standard form terms. Third, a distinction should be drawn between terms that are specifically assented to (through signature or by clicking 'I agree') and those that become binding on the basis of reasonable notice. Fourth, we need to consider *why* contracting parties fail to read standard form terms. A distinction must be drawn between the decision not to read that is substantially voluntary, and the decision not to read that is substantially non-voluntary. Fifth, the extent to which the legal implications of the terms are understood by the non-drafting party must be taken into account. Sixth, it is necessary to recognise the strong practical difficulties that individual and business consumers face in avoiding standard form terms.

There can be no doubt that in many situations the obligations arising from standard form terms can be regarded as voluntary. But if the factors listed above are taken into account, it must be accepted that legal obligations commonly arise from standard form terms in the absence of a substantial understanding and a substantially unconstrained choice. The contractual obligations undertaken in these circumstances are clearly not best understood as voluntary obligations.

B *The Courts and Contract Doctrine*

The second impediment to identifying contractual obligations as voluntary derives from the role played by the courts in shaping such obligations. The courts influence the existence and the content of contractual obligations by adopting objective tests relating to contract formation and the incorporation and interpretation of contract terms, and by filling gaps in contracts and applying the default rules of contract law relating to implied terms, termination and contract remedies.¹⁵³ By the 1980s, there appeared to be a scholarly consensus recognising that the courts play a significant role in shaping contractual obligations by reference to standards external to the parties.¹⁵⁴ More recently, however, a scholarly movement has begun to challenge this view.¹⁵⁵ Linguistic philosophy has been marshalled in support of the idea that the objective approach to interpretation does in fact give effect to the actual intentions of the parties. The implication of terms is said to be part of this process of interpretation, and we are told that there are far fewer gaps in contracts than we thought. Both 'gap-fillers' and contract remedies are said to derive from the agreement itself. It is said that the answer to frustration cases can be found in the agreements in question, and so

¹⁵³ Jean Braucher, 'Contract versus Contractarianism: The Regulatory Role of Contract Law' (1990) 47 *Washington and Lee Law Review* 697, 712 has identified three 'normative dimensions' in which 'the regulatory role of contract law is played out': validity, interpretation and gap-filling.

¹⁵⁴ The publication of Charles Fried's *Contract as Promise: A Theory of Contractual Obligation* in 1981 could be seen as marking this point.

¹⁵⁵ See below n 185 and accompanying text.

‘[n]eo-classical theorists can reclaim excuse cases for the sphere of party-oriented, voluntary obligations.’¹⁵⁶

1 *The Objective Approaches to Formation, Incorporation and Interpretation*

As noted in the introduction to this article, the neoclassical understanding of contract is to some extent shaped by the objective focus of contract doctrine. A contract is no longer seen to represent the will of the parties, but rather to ‘reflect the will of the parties, objectively determined.’¹⁵⁷ As we will see, the objective nature of contract doctrine does not seriously undermine the idea that contractual obligations can be regarded as voluntary, but it does show that there is more going on in the application of the principles of formation, incorporation of terms and interpretation of contracts than simply giving effect to the intentions of the parties.

The existence of a contract, and the identification and interpretation of its terms, are all approached on an objective basis. When deciding whether a contract has been made, identifying the terms of the contract and deciding what they mean, the courts do not look to what the parties intended, but what they appear to have intended. The use of these objective standards in contract law has been criticised for undervaluing freedom of choice and freedom of contract.¹⁵⁸ It is said that a subjective theory would pay better regard to individual choice and the interest in freedom of contract.¹⁵⁹ For Fried, when courts adopt an objective approach to interpretation they impose an external standard on the parties and the resulting obligations cannot be regarded as contractual.¹⁶⁰

A close reading of Barnett’s work makes clear that protecting reliance plays a crucial role in the principles of formation, incorporation of terms and interpretation of contracts. Barnett’s ‘consent’ theory of contract is not a theory of obligation arising from consent, but a theory of obligation arising from particular *behaviour*. It does not matter whether a person signing a standard form contract intends to be bound, Barnett says, because the signing party ‘knows that the other party will take this conduct as indicating consent to be bound thereby.’¹⁶¹ The law of contract adopts objective tests because we do not have access to a person’s actual intentions.¹⁶² By judging intentions from words and behaviour, the law of contract protects ‘the rights and liberty interests of *others*, whose plans and expectations would be severely limited if they were not entitled to rely on things as they appear to be and to take the assertive conduct of others at face value.’¹⁶³ The objective approach thus protects reliance by promisees,¹⁶⁴ and the

¹⁵⁶ Andrew Morris, ‘Practical Reasoning and Contract as Promise: Extending Contract-Based Criteria to Decide Excuse Cases’ (1997) 56 *Cambridge Law Journal* 147, 174. See below nn 263–8.

¹⁵⁷ *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130, 132 (Kirby P).

¹⁵⁸ See, eg, Malcolm Sharp, ‘Mr Justice Holmes: Contracts’ (1964) 31 *University of Chicago Law Review* 268, 276–8; Clarke Whittier, ‘The Restatement of Contracts and Mutual Assent’ (1929) 17 *California Law Review* 441, 442–3.

¹⁵⁹ Sharp, above n 158, 277.

¹⁶⁰ Fried, above n 26, 61.

¹⁶¹ Barnett, ‘Consenting to Form Contracts’, above n 56, 635.

¹⁶² Barnett, ‘A Consent Theory of Contract’, above n 29, 305.

¹⁶³ *Ibid* 306 (emphasis in original) (citations omitted).

need to protect reliance ultimately trumps the need for consent.¹⁶⁵ Barnett argues that we should attribute responsibility to those who engage in contractual behaviour, not because they have consented to the transfer of entitlements, but so that those who deal with them can rely on their behaviour. Thus we can see that Barnett's theory, in spite of its name, is not a consent theory, but a more complex theory of contractual obligation in which the protection of reliance plays a pivotal role.¹⁶⁶

Deciding whether a contract has been formed involves interpretation of the conduct of the parties.¹⁶⁷ According to the objective approach to formation, contracts are made when parties behave in particular ways, regardless of their actual intentions. We look to whether the parties appear to have reached a consensus, whether they appear to have intended to create legal relations, and whether they appear to have agreed to exchange one thing for another.¹⁶⁸ A corollary of the objective approach to formation is that a mistake by one of the parties as to the terms or the subject matter will not generally prevent the mistaken party from being bound.¹⁶⁹ A contract is therefore an obligation that attaches by force of law to certain behaviour that usually, but not always, represents the intentions of the parties.¹⁷⁰ A contract can be formed against the wishes of one of the contracting parties. The objective approach to formation demonstrates that contractual obligations ultimately do not depend on consent or the voluntary assumption of obligation.

The standard response to these observations is that the law can only judge people's intentions by their behaviour.¹⁷¹ This facilitates reliance on agreements. The objective approach to contract formation can also be seen as a necessary mechanism for dealing with 'errors in communication'.¹⁷² Under this approach, the closest we can get to a voluntary obligation is one that *appears* to be voluntarily assumed: this can only be judged from the promisor's behaviour and the surrounding circumstances. In most cases the parties' apparent intentions will coincide with their actual intentions. There is considerable force in this response.

¹⁶⁴ Ibid 307. See also Randy Barnett, 'The Sound of Silence: Default Rules and Contractual Consent' (1992) 78 *Virginia Law Review* 821, 857–9.

¹⁶⁵ After justifying the objective approach on the basis of protecting reliance, Barnett attempts to reclaim subjective consent on the basis that 'a consent theory ... is not indifferent to the fact that the objective meaning of consent is likely to correspond to the subjectively held intentions of the parties.' For contract law to fulfil its function of giving effect to individual preferences, Barnett says that 'our objective interpretation of assent should mirror as nearly as possible ... the subjective intentions of the parties': Barnett, 'The Sound of Silence', above n 164, 876 (citations omitted).

¹⁶⁶ As Mikko Wennberg has observed, there are points at which 'Barnett's view begins to resemble not will theory, but *reliance* theory': Mikko Wennberg, 'On Barnett's Theory of Default Rules' (2003) 16 *Canadian Journal of Law and Jurisprudence* 147, 153 (emphasis in original).

¹⁶⁷ Braucher, above n 153, 723.

¹⁶⁸ See Robertson, above n 9, 91–5.

¹⁶⁹ *Bell v Lever Brothers Ltd* [1932] AC 161, 224 (Lord Atkin); *Taylor v Johnson* (1982) 151 CLR 422. See also Michael Trebilcock, 'External Critiques of Laissez-Faire Contract Values' in F H Buckley (ed), *The Fall and Rise of Freedom of Contract* (1999) 78, 85.

¹⁷⁰ *Hotchkiss v National City Bank of New York*, 200 F 287, 293 (SDNY, 1911).

¹⁷¹ See, eg, Barnett, 'A Consent Theory of Contract', above n 29, 305 et seq; Endicott, above n 10.

¹⁷² Richard Epstein, 'Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire' in F H Buckley (ed), *The Fall and Rise of Freedom of Contract* (1999) 25, 36.

It has been taken one step further by the argument, drawing on the work of Ludwig Wittgenstein, that unexpressed intention is simply irrelevant to meaning. An expression means what a reasonable person would take it to mean.¹⁷³ On this view, the existence of an agreement does not depend on a *consensus ad idem*, but on the making of ‘mutually dependent promises’.¹⁷⁴

It is clear that, taken by itself, the objective approach to contract formation is not a formidable obstacle to the view that contractual obligations are voluntary. Richard Epstein has criticised scholars such as P S Atiyah and Gilmore for making broad claims about contract law based on analysis of ‘small points’ and ‘sideshows’ such as default rules or the rules of formation.¹⁷⁵ Collected together, however, these ‘small points’ paint an informative picture of contract law. Indeed, contract law *is* simply a collection of small points, such as the rules of formation, interpretation and remedies. When these contract doctrines are viewed together, we see the emergence of a pattern in which the courts routinely fix norms of behaviour and determine contractual rights and obligations in accordance with those norms.

Courts also shape contractual obligations through the application of objective tests to determine the content of agreements. A pre-contractual statement constitutes a contractual promise ‘[i]f an intelligent bystander would reasonably infer that a warranty was intended’ and this ‘depends on the conduct of the parties, on their words and behaviour, rather than on their thoughts.’¹⁷⁶ Written terms form part of a contract if the non-drafting party has objectively manifested assent to the terms by signature, or the drafting party has done what is *reasonably* necessary to bring them to the attention of the non-drafting party.¹⁷⁷ As we saw in the discussion of standard form contracts above, the objective approach to the incorporation of terms leaves great scope for parties to become bound by obligations that cannot be said to have been voluntarily assumed. This is particularly so when terms are incorporated by way of reasonable notice, without any manifestation of assent such as signature or clicking ‘I agree’.

Once it is decided that particular language forms part of the contract between the parties, the courts shape contractual obligations through the interpretation of the meaning of that language.¹⁷⁸ The courts have in the past occasionally applied patently artificial techniques of ‘construction’ in order to avoid unfair outcomes that were undoubtedly intended by the parties drafting the agreements.¹⁷⁹ Lord

¹⁷³ David Goddard, ‘The Myth of Subjectivity’ (1987) 7 *Legal Studies* 263, 271.

¹⁷⁴ *Ibid* 268.

¹⁷⁵ Epstein, ‘Contracts Small and Contract Large’, above n 172, 61.

¹⁷⁶ *Oscar Chess Ltd v Williams* [1957] 1 All ER 325, 328 (Denning LJ).

¹⁷⁷ *Hood v Anchor Line (Henderson Bros) Ltd* [1918] AC 837; *McCutcheon v David MacBrayne Ltd* [1964] 1 All ER 430, 433 (Lord Hodson); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 229 (Brennan J); Treitel, above n 119, 216–19.

¹⁷⁸ Braucher, above n 153, 722–30. See also *Goldsbrough, Mort & Co Ltd v Quinn* (1910) 10 CLR 674, 685, where O’Connor J stated that a contracting party is ‘bound in case of dispute to the interpretation which a Court of law may put upon the instrument ... [and] ... cannot at law escape from the binding effect of his contract on the ground that he did not in his own mind intend the words’ to have the meaning the court places on them.

¹⁷⁹ Barry Reiter, ‘The Control of Contract Power’ (1981) 1 *Oxford Journal of Legal Studies* 347, 360. See also Llewellyn, *The Common Law Tradition*, above n 101, 364–5.

Denning MR famously observed that even when the judges worshipped the idol ‘freedom of contract’, they concealed beneath their cloaks a secret weapon called ‘the true construction of the contract’ and ‘used it to stab the idol in the back.’¹⁸⁰ It may well be, as Lord Denning MR suggested, that patently artificial ‘construction’ is a thing of the past. Contemporary Australian cases interpreting limitation of liability clauses certainly suggest that this is the case.¹⁸¹ Parties making a contract must, however, ultimately submit themselves to the court’s interpretation of the language they have used to express their rights and obligations.¹⁸² The courts interpret the language objectively, according to what a reasonable person would think was intended.¹⁸³ Extrinsic evidence of what the parties actually intended is excluded or disregarded.¹⁸⁴

As with the objective approach to formation, the objective approach to interpretation can be reconciled with a voluntaristic conception of contract on the basis that it is necessary to facilitate reliance on agreements, and it is commonly thought to provide a reliable guide to what the parties themselves intended in most cases. More recently, some contract scholars have argued that since language can only be understood against a shared background of knowledge, that shared background must be regarded as part of the agreement. The objectively apparent meaning of a particular utterance must be regarded as *the meaning*.¹⁸⁵ Notwithstanding this, contracts do, at times, create rights and obligations that are clearly not intended by one of the parties. In exceptional circumstances, contracts create rights and obligations intended by neither party. To take a prominent recent example, in *Brambles Holdings Ltd v Bathurst City Council*¹⁸⁶ contracting parties were held to an interpretation of the contract that appeared to be intended by neither party.¹⁸⁷ A contract dealing with ‘general commercial waste’ was held to cover liquid waste because, on an objective interpretation, ‘general commercial waste’ included liquid waste. Evidence of a mutual belief that the contract

¹⁸⁰ *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297.

¹⁸¹ See, eg, *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500, 510–11 (Mason, Wilson, Brennan, Deane and Dawson JJ); *Nissho Iwai Australia Ltd v Malaysian International Shipping Corporation Berhad* (1989) 167 CLR 219, 227 (Mason CJ, Brennan, Deane, Gaudron and McHugh JJ).

¹⁸² David Charny, ‘Hypothetical Bargains: The Normative Structure of Contract Interpretation’ (1991) 89 *Michigan Law Review* 1815, 1819 explains why ‘no text can completely specify its own means of interpretation’.

¹⁸³ *Reardon Smith Line Ltd v Hansen-Tangen; The ‘Diana Prosperity’* [1976] 3 All ER 570, 574 (Lord Wilberforce); *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98, 114 (Lord Hoffmann).

¹⁸⁴ Trebilcock, ‘External Critiques of Laissez-Faire Contract Values’, above n 169, 83 has observed that the sanctity of written agreements, reinforced by the parol evidence rule, is ‘obviously an embarrassment for consent-based or autonomy theories of contractual obligation’.

¹⁸⁵ See, eg, Goddard, above n 173; Brian Langille and Arthur Ripstein, ‘Strictly Speaking — It Went without Saying’ (1996) 2 *Legal Theory* 63 (see below nn 243–62 and accompanying text); Endicott, above n 10; Adam Kramer, ‘Common Sense Principles of Contract Interpretation (And How We’ve Been Using Them All Along)’ (2003) 23 *Oxford Journal of Legal Studies* 173; Adam Kramer, ‘Implication in Fact as an Instance of Contractual Interpretation’ (2004) 63 *Cambridge Law Journal* 384 (see below nn 203–5 and accompanying text); Adam Kramer, ‘An Agreement-Centred Approach to Remoteness and Contract Damages’ in Ewan McKendrick and Nili Cohen (eds), *Comparative Remedies for Breach of Contract* (2005) 249.

¹⁸⁶ (2001) 53 NSWLR 153.

¹⁸⁷ See the explanation given in Robertson, above n 9, 95–7.

did not regulate the charging of fees for liquid waste was held to be irrelevant and inadmissible. The New South Wales Court of Appeal held that the parties were simply ‘wrong’ in their understanding of the meaning of the agreement.¹⁸⁸ This case serves as a stark reminder of Oliver Wendell Holmes’ claim that ‘nothing is more certain than that parties may be bound by a contract to things that neither of them intended.’¹⁸⁹ The process of interpretation is not simply a matter of identifying what the parties intended. Cases such as *Brambles Holdings Ltd v Bathurst City Council* are hardly common, however, and neither they, nor the objective approach to interpretation can, on their own, be regarded as a formidable obstacle to the conclusion that contractual obligations are generally voluntarily assumed.

2 *Gap-Filling and Default Rules*

The courts play a more significant role in fashioning the rights and obligations of contracting parties in relation to imprecise stipulations, unallocated risks, unforeseen circumstances and the remedial consequences of breach. Some scholars who adopt a strongly voluntaristic conception of contract accept that all contracts are incomplete.¹⁹⁰ Even the most comprehensive agreements contain gaps relating to remote contingencies or remedies. There are several causes of contractual incompleteness.¹⁹¹ Contracting parties are unable to anticipate all possible future contingencies.¹⁹² Transaction costs require the parties to be selective in planning and drafting. The cost of dealing with a particular contingency may be disproportionate to the likelihood of the event occurring or the perceived benefit of making specific provision.¹⁹³ The negotiation of remote contingencies may unnecessarily reveal areas of disagreement between the parties.¹⁹⁴ Social or business practices may also play a role: by convention, some contracts contain no express terms, leaving the law to imply all rights and obligations on each side.¹⁹⁵ Jean Braucher has even suggested that the term

¹⁸⁸ (2001) 53 NSWLR 153, 193 (Ipp AJA).

¹⁸⁹ Oliver Wendell Holmes, ‘The Path of the Law’ (1897) 10 *Harvard Law Review* 457, 463.

¹⁹⁰ Barnett, ‘The Sound of Silence’, above n 164, 821. See also *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 848, where Lord Diplock states: ‘in practice a commercial contract never states all the primary obligations of the parties in full; many are left to be incorporated by implication of law from the legal nature of the contract into which the parties are entering’. But see Langille and Ripstein, above n 185, discussed below nn 243–62 and accompanying text.

¹⁹¹ See Alan Schwartz, ‘Relational Contracts in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies’ (1992) 21 *Journal of Legal Studies* 271, 278–9; Clayton Gillette, ‘Cooperation and Convention in Contractual Defaults’ (1993) 3 *Southern California Interdisciplinary Law Journal* 167, 170–1; Robert Hillman, *The Richness of Contract Law: An Analysis and Critique of Contemporary Theories of Contract Law* (1997) 32–3.

¹⁹² Macneil, ‘The Many Futures of Contracts’, above n 39, 726–7.

¹⁹³ See Schwartz, ‘Relational Contracts in the Courts’, above n 191, 278; Gillette, ‘Cooperation and Convention in Contractual Defaults’, above n 191, 171–2; Clayton Gillette, ‘Commercial Relationships and the Selection of Default Rules for Remote Risks’ (1990) 19 *Journal of Legal Studies* 535, 543.

¹⁹⁴ Hillman, ‘The Richness of Contract Law’, above n 191, 33.

¹⁹⁵ For example, contracts are routinely made between medical specialists and their patients in which neither the fee nor the obligations of the specialist are discussed in advance of performance. See also Atiyah, *The Rise and Fall of Freedom of Contract*, above n 1, 734.

‘gap-filling’, is ‘a misnomer because the “gaps” the law has to fill generally are wider than the zones filled in by the parties.’¹⁹⁶

Gap-filling occurs at both the primary level and the secondary or remedial level. At the level of primary obligation, gaps are principally filled through the implication of terms.¹⁹⁷ I have elsewhere set out the well-known argument that the implication of terms ‘by law’ and ‘in fact’ both depend on external policy considerations and involve the imposition of standards such as ‘reasonableness’ and ‘fairness’ that are fixed by the law, not by the parties.¹⁹⁸ This argument is familiar and generally well-accepted.¹⁹⁹ In 1904, Clarence Ashley stated that despite the courts’ insistence that they are identifying the intent of the parties when implying terms, this is a fiction, as the courts are actually imposing obligations in the absence of intent.²⁰⁰ The Supreme Court of Canada has openly acknowledged the role of the courts in defining contractual rights and obligations through the implication of terms.²⁰¹ The notion of intention is still commonly invoked, although implied terms are now usually said to give effect to the ‘presumed’ or ‘imputed’ intention of the parties.²⁰² Adam Kramer claims that the reference to intention is not fictional because

one can intend what goes without saying and what does not cross one’s mind. A communicator intends the background of social norms and his goals and principles within which he (non-consciously) formulated his utterance. These norms and goals and principles are thus intended to be used to determine issues that are undetermined by the express utterance.²⁰³

If we accept that parties mean more than they actually say, this does not necessarily mean that any supplementation by reference to what is reasonable accords with the parties’ intentions. The role of public policy and independent standards of reasonableness and fairness in the implication of terms is indisputable.²⁰⁴ Kramer’s claim is essentially that these standards, which are commonly consid-

¹⁹⁶ Braucher, above n 153, 731. See also *ibid.* Cf Richard Epstein, ‘Confusion about Custom: Disentangling Informal Customs from Standard Contractual Provisions’ (1999) 66 *University of Chicago Law Review* 821, 828.

¹⁹⁷ Gap-filling devices at the level of primary obligation also include the doctrine of frustration, which releases parties from the obligation to perform in circumstances that are radically different from what they intended. The idea that courts are filling gaps in frustration cases has been challenged by Langille and Ripstein, above n 185, and Morris, above n 156. See below nn 243–62 and accompanying text.

¹⁹⁸ Robertson, above n 9, 97–101. See also Elisabeth Peden, ‘Policy Concerns behind Implication of Terms in Law’ (2001) 117 *Law Quarterly Review* 459; Fried, above n 26, 60–1.

¹⁹⁹ Although it has been challenged by Langille and Ripstein, above n 185, see below nn 243–62 and accompanying text; Kramer, ‘Implication in Fact as an Instance of Contractual Interpretation’, above n 185; see below n 202.

²⁰⁰ Clarence Ashley, ‘Should There Be Freedom of Contract’ (1904) 4 *Columbia Law Review* 423, 424.

²⁰¹ *British Columbia Hydro and Power Authority v BG Checo International Ltd* (1993) 99 DLR (4th) 577, 585–6 (La Forest and McLachlin JJ).

²⁰² See, eg, *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410, 447 (McHugh and Gummow JJ); *Hughes v Greenwich London Borough Council* [1994] 1 AC 170, 179 (Lord Lowry); Jeannie Paterson, ‘Terms Implied in Fact: The Basis for Implication’ (1998) 13 *Journal of Contract Law* 103, 107–8.

²⁰³ Kramer, ‘Implication in Fact as an Instance of Contractual Interpretation’, above n 185, 385.

²⁰⁴ See Robertson, above n 9, 98–101.

ered to be external, are in fact internal. Kirby P suggested in *Biotechnology Australia Pty Ltd v Pace*²⁰⁵ that imported standards of reasonableness and fairness do not necessarily accord with the intentions of the parties because contracting parties do not necessarily intend to be reasonable or fair. Ultimately, though, Kramer's claim is susceptible of neither proof nor disproof.

The role of contract law in filling gaps through the imposition of external standards is even more pervasive at the remedial level.²⁰⁶ Enforceability is a defining feature of contractual obligation. Burrows has expressed the view that 'both primary and secondary obligations in contract belong together as stemming from a voluntary obligation.'²⁰⁷ Contract law allows parties considerable freedom to create a charter of their remedial rights and obligations,²⁰⁸ and contract remedies are often affected by express terms, such as limitation of liability clauses in standard form contracts.²⁰⁹ Remedial obligations are, however, very often left to be determined by the courts.²¹⁰ Lon Fuller and William Perdue drew our attention to the fact that the most basic principle in the law of contract remedies, the expectation damages rule, is a rule that has been fashioned by the courts, and cannot be explained by reference to the intention of the parties.²¹¹ Indeed, Macaulay found that the legal entitlement to expectation damages in the event of breach was not reflected in the practices and understandings of the business community he studied.²¹² Contract law also regulates, without reference to the intentions of the parties, the circumstances in which injunctions, specific performance and accounts of profits will be available.²¹³ The mitigation principle imposes an external standard by preventing the recovery of damages in respect of loss that would have been avoided by a reasonable person in the position of the plaintiff. The standard of reasonableness also controls the availability of damages to rectify defective building works, which

²⁰⁵ (1988) 15 NSWLR 130, 132–3.

²⁰⁶ See Robertson, above n 9, 101–3.

²⁰⁷ Burrows, above n 21, 14 fn 43. See also Kramer, 'An Agreement-Centred Approach to Remoteness and Contract Damages', above n 185.

²⁰⁸ Cf *Baltic Shipping Co v Dillon; The 'Mikhail Lermontov'* (1993) 176 CLR 344, 369, where Brennan J said (with reference to the types of loss for which damages for breach of contract will be awarded) that the institution of contract *empowers* parties 'to create a charter of their rights and obligations inter se'.

²⁰⁹ See, eg, *ibid*.

²¹⁰ In light of the widespread use of limitation of liability clauses in standard form contracts, we might not today put the point as strongly as Fuller and Perdue did in 1936: 'If a contract represents a kind of private law, it is a law which usually says nothing at all about what should be done when it is violated': Lon Fuller and William Perdue, 'The Reliance Interest in Contract Damages' (Pt 1) (1936) 46 *Yale Law Journal* 52, 58.

²¹¹ *Ibid* 52–3. See also Richard Craswell, 'Contract Law, Default Rules, and the Philosophy of Promising' (1989) 88 *Michigan Law Review* 489, 517–20.

²¹² Macaulay, above n 62, 61, observes that buyers expected to be able to cancel orders without liability, apart from an obligation to pay for major reliance loss (such as scrapped steel), and that sales personnel accepted this. See Braucher, above n 153, 725.

²¹³ J W Carter and Michael Tilbury, 'Remedial Choice and Contract Drafting' (1998) 13 *Journal of Contract Law* 5, 34 fn 112 note that: 'The fact that contracts sometimes contain clauses conferring jurisdiction to order specific performance merely illustrates the wishful thinking of those who draft contracts.' The apparent intentions of the parties, or at least one of them, can also be overridden by the law of penalties although, as noted above, this principally presents a challenge to the autonomy claim rather than the voluntariness claim: see above nn 11–12 and accompanying text.

are granted only when the defect is one that a reasonable person would rectify.²¹⁴ The law of contract remedies can thus be seen as a substantial gap-filling device based in large part on external social standards.

Barnett has observed that ‘the pervasiveness of contractual incompleteness’ and the idea that gap-fillers are ‘imposed by the legal system for reasons of principle or policy ... makes consent look quite irrelevant to the main issues of contract theory.’²¹⁵ Fried candidly acknowledges the disjunction between gap-filling and the promise principle. He has observed that there is ‘a vaguely marked boundary [in contract law] ... between *interpreting* what was agreed to and interpolating terms to which the parties in all probability would have agreed but did not.’²¹⁶ The further the courts stray from this boundary into the realm of interpolation, ‘the more palpably are they imposing an agreement.’²¹⁷ When courts fill a gap by reference to what the parties might have agreed, the term is imposed, and the courts are thus enforcing an external standard on the parties. That the decision to imply a term is the court’s and not the parties’ is, Fried observes, evidenced by the insistence that an implied term be fair to both parties²¹⁸ ‘even if ... the parties themselves might have been less fastidious.’²¹⁹ Fried’s solution is to separate out the practice of gap-filling from contract proper. Fried accepts that gaps in contracts must be filled, and this cannot be done by the promise principle.²²⁰ When promise gives out, then, for Fried, ‘the residuary principles of civil obligation’ take over, principally the tort principle requiring compensation for harm done and the restitution principle requiring restoration of benefits conferred.²²¹

Thus Fried acknowledges that in many contract cases ‘actual intent is missing’ and the courts impose external standards of behaviour and fair outcomes on the parties. Fried maintains, however, that, ‘by construing an allocation of burdens and benefits that reasonable persons would have made’, the court is ‘respect[ing] the autonomy of the parties so far as possible.’²²² This raises the question

²¹⁴ *Ruxley Electronics & Constructions Ltd v Forsyth* [1996] 1 AC 344; *Bellgrove v Eldridge* (1954) 90 CLR 613. As Michael Furmston has said, in *Ruxley Electronics & Constructions Ltd v Forsyth* ‘[t]he House of Lords attached much more importance to reasonableness than to intention’: Michael Furmston, ‘How Modern Is English Contract Law?’ (2000) 39 *Saggi, Conferenze e Seminari* 1, 7.

²¹⁵ Barnett, ‘The Sound of Silence’, above n 164, 822–3. Barnett has sought to challenge the accuracy of this perception, on the basis outlined below: see below nn 224–42 and accompanying text.

²¹⁶ Fried, above n 26, 60 (emphasis added).

²¹⁷ *Ibid* 61.

²¹⁸ See, eg, *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon, Viscount Dilhorne and Lord Keith), where the requirement of implication on the basis of business efficacy that the term sought to be implied must be ‘reasonable and equitable’.

²¹⁹ Fried, above n 26, 61.

²²⁰ *Ibid* 69.

²²¹ Many problems cannot, of course, be resolved by promissory principles, tort law or the law of restitution. Fried suggests that the solution to these problems is to be found in the (non-promissory) principle of ‘sharing’: *ibid* 69–73. According to this principle, losses and gains not otherwise dealt with should be shared between the parties. Fried does not suggest that this principle is to be found in the existing case law.

²²² *Ibid* 73. By using the word ‘construing’, rather than ‘imposing’, Fried is surely guilty of the sin that he earlier accuses ‘classical law’ of perpetrating; namely, dressing up an externally imposed rule in the clothing of the parties’ will: at 60–1.

whether there is any connection between the imposition of a reasonable or fair solution and respect for the autonomy of the parties. One possible connection lies in the fact that the parties can contract out of these gap-filling devices by express terms dealing with the contingency in question. Fried concludes that the courts' gap-filling role 'does not threaten to overwhelm the promissory principle, for the simple reason that the parties are quite free to control the meaning and extent of their relation by the contract itself.'²²³ Thus Fried points to the argument since made in great detail by Barnett: that gap-filling may be rationalised with the idea that contractual obligations are voluntary by attaching significance to the ability of contracting parties to avoid default rules by express stipulation.

3 *Gaps, Default Rules, Consent and Voluntariness*

Therefore, as with standard forms, we must consider Barnett's arguments in some detail if we are to understand the extent to which default rules can be understood as creating voluntary obligations. We must also consider the voluntaristic rationalisations of the doctrine of frustration made more recently by Brian Langille and Arthur Ripstein, and Andrew Morris. Barnett claims that 'there can realistically be said to be consent even to the enforcement of the default rules ... [and] ... the enforcement of judicially supplied default rules can be said to be based on consent'.²²⁴ Barnett's argument is that when parties manifest an intention to be legally bound, they implicitly consent to the background rules of contract law that govern their agreement. Parties signal their consent to applicable default rules by their failure to exclude them by express agreement. For Barnett, the failure of the parties to contract around a default rule indicates their consent to it, in the same way that, for Sherlock Holmes, the failure of the dog to bark at the midnight visitor signalled the dog's consent to the visit, and thus indicated that the visitor was someone the dog knew well.²²⁵ Barnett suggests that the parties' subjective intentions are most likely to be satisfied by a default rule that reflects 'the commonsense or conventional expectations that likely are part of the tacit assumptions of particular parties.'²²⁶

Barnett's theory assumes that the signal by which consent is said to be given is unambiguous. In the case of a standard form, the non-drafting party generally signals assent to the terms provided by the drafting party by signing a document or clicking 'I agree'. Signing follows a well-known social practice; clicking 'I agree' is unambiguous. There is, however, a far more tenuous connection between the default rules of contract law and the signal by which contracting parties are said to communicate their assent to those rules. Barnett refers to two different types of conduct as signalling indirect consent to default rules: first, conduct by which the parties manifest an intention to be legally bound; and, second, the act of remaining silent.²²⁷ Neither type of conduct is understood in the community as signalling assent to the default rules of contract law. Neither

²²³ Ibid 73.

²²⁴ Barnett, 'Consenting to Form Contracts', above n 56, 644.

²²⁵ Barnett, 'The Sound of Silence', above n 164, 821, citing Sir Arthur Conan Doyle, 'Silver Blaze' in William Baring-Gould (ed), *The Annotated Sherlock Holmes* (1967) 260, 281.

²²⁶ Barnett, 'The Sound of Silence', above n 164, 880.

²²⁷ Ibid 827.

has a socially-understood connection with contract default rules. Moreover, as every student of contract law knows, silence is not a reliable indicator of assent.²²⁸ In this respect, Barnett's claim that default rules are consensual is weaker than his claim in relation to standard form terms.²²⁹

Barnett's argument also depends on the contracting parties having knowledge, either of the legal rules themselves or of well-established conventions that underlie the legal rules. Barnett accepts that 'silence is highly ambiguous' in the face of 'rules that are costly to discover'²³⁰ and indicates consent to a default rule only 'when the transaction costs of discovering ... the default rules are sufficiently low'.²³¹ Thus, he argues that where low stakes make it irrational for parties to seek legal advice about a default rule, the rule should reflect commonsense expectations so that it will 'be most likely to accurately reflect the tacit subjective agreement of these rationally ignorant parties.'²³² But do conventional expectations underlie the default rules of contract law? The entitlement to expectation damages in the event of breach must be the most fundamental default rule of contract law. As noted above, however, empirical evidence suggests that this rule may not reflect community expectations, even amongst businesspeople involved in sales transactions on a daily basis.²³³ Empirical studies repeatedly reveal ignorance of basic principles of contract law amongst experienced businesspeople.²³⁴ Even amongst lawyers and judges there are no universal understandings relating to either the existence or the content of the more contentious default rules, such as implied terms requiring contractual rights to be exercised reasonably or in good faith.²³⁵

Barnett's theory of default rules is also premised on contracting parties having a practical ability to avoid such rules. That practical ability is routinely lacking. Even if default rules reflect commonsense expectations, there remains the question whether it is feasible to contract around them in the circumstances of a particular transaction. It is certainly not feasible for parties to anticipate all possible contingencies that may be governed by a default rule or to consider the range of potentially applicable default rules.²³⁶ Where parties do anticipate the application of undesirable default rules, transaction costs constitute a major obstacle to the avoidance of those rules. Barnett's argument is premised on parties having 'the opportunity to deviate from the default rules'²³⁷ and he

²²⁸ See, eg, Treitel, above n 119, 31–5; *Restatement (Second) of Contracts* § 69(1) cmt a (1981) and the Reporter's Note.

²²⁹ Barnett has likened default rules to standard form contracts: 'In assessing the enforceability of form contracts, we must never forget that contract law is itself one big form contract that goes unread by most parties most of the time': Barnett, 'Consenting to Form Contracts', above n 56, 644.

²³⁰ Barnett, 'The Sound of Silence', above n 164, 866.

²³¹ *Ibid.*

²³² *Ibid.* 886.

²³³ See above n 212 and accompanying text.

²³⁴ See, eg, Macaulay, above n 62; Beale and Dugdale, above n 67; Franklin Schultz, 'The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry' (1952) 19 *University of Chicago Law Review* 237, 283.

²³⁵ See Robertson, above n 9, 106.

²³⁶ Braucher, above n 153, 731.

²³⁷ Barnett, 'The Sound of Silence', above n 164, 865.

accepts that consent to a rule cannot be inferred from the parties' silence 'if contracting around the rule is so costly that there is little point in raising the issue in negotiation.'²³⁸ Barnett notes that, '[i]n the presence of rules that are costly to ... contract around, silence is highly ambiguous.'²³⁹ Accordingly, he only claims that silence indicates consent to a default rule 'when the transaction costs of ... contracting around the default rules are sufficiently low'.²⁴⁰

Finally, if Barnett's notion of tacit consent is accepted, then it provides a justification for all legal obligations that arise from deliberate conduct and reflect commonsense or community expectations. To the extent that he has provided a consent basis for contract default rules, he has also provided a consent basis for the law of tort, or at least those tort obligations arising from deliberate conduct, the legal consequences of which are well known. Barnett indicates that in some circumstances, consent to immutable rules may be implied from silence.²⁴¹ A tort obligation that is better known and easier in practice to avoid than most contract default rules must, on this view, be regarded as consensual.²⁴² We might be tempted to ask whether, as a practical matter, it is possible to behave in such a way as to avoid the obligations imposed by the law of tort. If we are tempted to ask this question in relation to tort obligations, then we must ask the same of contractual obligations: how often are contracting parties free, as a practical matter, to shape their rights and obligations according to their own wishes?

The voluntaristic view of contract is also potentially supported by Langille and Ripstein's argument that gap-filling devices can be seen to reflect the intentions of contracting parties.²⁴³ They argue that apparently incomplete contracts are in fact highly determinate, and suggest that the work of Wittgenstein tells us that 'intentions always involve more than what comes to mind'.²⁴⁴ Thus, contracting parties mean and 'intend more than they thought'.²⁴⁵ Langille and Ripstein echo Wittgenstein in suggesting that it goes without saying that a babysitter must not teach children gaming with dice: 'what the parent thought to mention explicitly to the babysitter and what went unsaid are on the same footing'.²⁴⁶ Following Donald Davidson, Langille and Ripstein suggest that communication (and therefore contracting) requires a background of unexpressed but shared understandings, assumptions and beliefs. Custom, practice and usage are, they argue, just particular ways in which we make sense of the world: 'everything always depends on our ability to locate what is being said to us in a shared, public, and largely unarticulated and un contemplated world where what is said is made

²³⁸ Ibid 866.

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ Barnett has argued that '[w]hen background rules are immutable, we cannot *as readily* interpret silence as consent to their imposition': *ibid* 902 (emphasis added).

²⁴² See Robertson, above n 9, 104–6; Atiyah, 'Contracts, Promises and the Law of Obligations', above n 9, 201–2, 221.

²⁴³ Langille and Ripstein, above n 185.

²⁴⁴ Ibid 71.

²⁴⁵ Ibid.

²⁴⁶ Ibid.

possible by what went without saying.²⁴⁷ Thus, ‘applying the terms of our contract to unanticipated situations ... depends only on what we have reasonably taken each other to have said.’²⁴⁸

Langille and Ripstein assert that the gap-filling view of the doctrine of frustration (that is, the view that courts ‘respond to the lack of explicit agreement by resorting to some external standard of justice beyond the agreement of the parties’) ‘does not survive this sort of understanding’.²⁴⁹ They suggest that we can now see the gap-filling view of frustration ‘as entirely bankrupt.’²⁵⁰ This conclusion is based on an analysis of *Paradine v Jane*²⁵¹ and *Taylor v Caldwell*.²⁵² In *Paradine v Jane*, a lease was held not to have been frustrated by the invasion of ‘a certain German prince ... with a hostile army’ which expelled the tenant and kept him out of possession for three years.²⁵³ Here, Langille and Ripstein suggest, it was obvious where the risk lay and the ‘parties could be presumed to know of this fact and were free to contract around it’.²⁵⁴ Like Barnett, Langille and Ripstein assume knowledge of, and the ability and resources to contract around, default rules. In *Taylor v Caldwell*, a contract for the hire of a music hall was held to have been frustrated when the hall burnt down. Langille and Ripstein say that, because the hirer of the hall ‘obviously meant to bargain for the use of the music hall, the particular music hall was plainly the object of the agreement.’²⁵⁵ It is, however, very difficult to see the force of *voluntas* at work in the outcomes of these cases. Langille and Ripstein’s explanation seems to be firmly grounded in the imaginary world of the reasonable person. This is a world in which behaviour and expectations are so predictable and uniform that meaning is ‘plain’ and ‘obvious’. And what of *Krell v Henry*,²⁵⁶ a more controversial casebook favourite? What happens if rooms are hired to watch a coronation procession and the coronation is subsequently postponed due to illness? What, apart from ‘some external standard of justice ... is made available to us by the world we live in’²⁵⁷ to answer this question? In *Krell v Henry*, the English Court of Appeal concluded that the coronation procession was the unexpressed foundation of the contract, but it has since been suggested that, by failing to stipulate the procession as an express condition of performance, the hirer may be said to have taken his chance on the

²⁴⁷ Ibid 79.

²⁴⁸ Ibid 72.

²⁴⁹ Ibid 80.

²⁵⁰ Ibid.

²⁵¹ (1647) Aleyn 26; 82 ER 897.

²⁵² (1863) 3 B & S 826; 122 ER 309.

²⁵³ (1647) Aleyn 26, 26; 82 ER 897, 897.

²⁵⁴ Langille and Ripstein, above n 185, 80.

²⁵⁵ Ibid.

²⁵⁶ [1903] 2 KB 740. Langille and Ripstein, *ibid* 64, claim that in relation to unassigned risks ‘judges in different periods wander in different directions. Yet those disagreements are surprisingly absent from the results those judges reach. They all know what to do; they simply don’t know why’. However, in *Scanlan’s New Neon Ltd v Tooheys Ltd* (1942) 67 CLR 169, 188, Latham CJ observed that ‘[t]he decision in *Krell v Henry* has perhaps aroused as much difference of legal opinion as any decision given by English courts during this century’ (citations omitted).

²⁵⁷ Langille and Ripstein, above n 185, 80 (citations omitted).

event not happening.²⁵⁸ As with many frustration cases, it is neither plain nor obvious where the risk lay.

In the end, Langille and Ripstein's argument is that agreements implicitly allocate risk and, because we mean more than we think, this allocation includes 'risks that are not foreseen or even foreseeable, by either party.'²⁵⁹ But the idea of implicit risk allocation is well known to students of contract law and is notoriously unhelpful in dictating or predicting outcomes in implied terms and frustration cases. If we accept that contracting parties mean more than what comes to mind, that does not mean that there are no contractual gaps.²⁶⁰ Nor does it pose a serious challenge to the widely held view that the reference to implicit intention to fill gaps is a fiction.²⁶¹ Langille and Ripstein assert that 'agreements themselves turn out to be highly determinate ... when the relationship between the meaning of an agreement and the world in which it is made is properly understood'.²⁶² They do not, however, establish that there is any clear or consistent connection between the outcomes of gap-filling cases and 'the agreement' or the tacit intentions of the parties. They do not, therefore, offer any support for the view that the legal obligations and curtailments of rights arising from gap-filling doctrines such as implied terms and frustration can be regarded as voluntarily assumed.

Morris has also attempted to 'reclaim excuse cases for the sphere of party-oriented, voluntary obligations' on the basis that '[i]mpossibility, frustration and mistake decisions are grounded in the consent of the parties'.²⁶³ Like Langille and Ripstein, Morris argues that frustration cases do not involve contractual 'gaps' because the 'court draws on the contract itself to create an exception to the contract's literal terms'.²⁶⁴ He convincingly argues that judges are significantly constrained in frustration cases: they can 'alter the contract's application only in the direction of *narrowing* its application' and can only do so by identifying an implicit purpose that 'makes sense in the context of all of the fact-sets to which the contract uncontroversially applies'.²⁶⁵ Morris does not, however, make good his claim that the answer to frustration cases is to be found in the agreement itself. His argument is centred on the idea that frustration cases involve the identification of a factor that was not mentioned in the agreement, but must be added 'to the contract's factual predicate' so that 'the contract makes sense'.²⁶⁶ In *Krell v Henry*, Morris suggests, this factor was the occurrence of the coronation. Morris correctly points out that the court exercises a tightly con-

²⁵⁸ *Larrinaga & Co Ltd v Société Franco-Américaine des Phosphates de Medulla Paris* (1922) 29 Com Cas 1, 7 (Lord Finlay LC), quoted in *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, 528–9 (Lord Wright) and discussed in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337, 358 (Mason J).

²⁵⁹ Langille and Ripstein, above n 185, 81.

²⁶⁰ On this point, see also Endicott, above n 10, 164–5.

²⁶¹ See, eg, Robert Hillman, 'An Analysis of the Cessation of Contractual Relations' (1983) 68 *Cornell Law Review* 617, 627–8.

²⁶² Langille and Ripstein, above n 185, 63–4.

²⁶³ Morris, above n 156, 174.

²⁶⁴ *Ibid.*

²⁶⁵ *Ibid* 166 (emphasis in original).

²⁶⁶ *Ibid* 167.

strained choice in identifying the missing part of the factual predicate, because this must be done in such a way that it does not affect the ordinary operation of the contract.²⁶⁷ But in most frustration cases the identification of the (arguably) missing part of the factual predicate is uncontroversial. Rather, the decisive question is whether the contract ‘makes sense’ without the inclusion of what is said to be the ‘missing fact’ in the predicate. This is the matter on which views differ. Those who criticise the decision in *Krell v Henry* do so on the basis that the contract ‘makes sense’ without the inclusion of the coronation in its factual predicate, because the hirer assumed the risk of the event not happening. Thus, Morris does not justify his claim that ‘the validity of the legal answer [to frustration cases] stems from its source in the parties’ agreement rather than from a source elsewhere in the legal system.’²⁶⁸

IV CONCLUSION

A great deal of thinking about contract law is based on the idea that contractual obligations and curtailments of rights are, or should be, enforced against contracting parties because those conditions have been voluntarily assumed. This article has shown that contracts and contract law cannot be seen in such simple terms. The sweeping claim that contractual obligations are voluntary is misleading. Contractual obligations arise from a variety of sources and in a wide range of different situations. Many contractual obligations can be seen as substantially voluntary, but many cannot. Many contractual obligations arise from standard form terms, which are commonly unread, commonly misunderstood and routinely unavoidable due to the lack of available alternatives. In some cases, the obligations and curtailments of rights arising from unread standard form terms can be regarded as voluntary, but in others they cannot. In exceptional cases, the objective approaches to formation and interpretation of contracts result in parties becoming subject to obligations which they cannot be said to have voluntarily assumed. The objective approach to the incorporation of terms, particularly unsigned terms, leaves even greater scope for parties to become subject to obligations that have not been voluntarily assumed. Obligations routinely arise from the default rules of contract law, which appear not to be well understood, even in the commercial community, and are often difficult to avoid. The claim that these obligations inhere in the agreement itself has not been made out. Contractual obligations and curtailments of rights are routinely fashioned by one contracting party in the ignorance of the other, or by the state in the ignorance of both, and are commonly practically unavoidable for one or both parties.

The conclusion that contractual obligations as a class cannot accurately be characterised as voluntary does not of course mean that we are left without a basis for the enforcement of contracts. It is well accepted in the contract literature that the rationale for the enforcement of contracts is more complex.²⁶⁹ This

²⁶⁷ Ibid.

²⁶⁸ Ibid 174.

²⁶⁹ Note, for example, that leading autonomy theorist Randy Barnett accepts that other factors are involved, such as the need to protect reliance: see above nn 161–6 and accompanying text.

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article suggests that some influential contract texts give a misleading sense of contract as a sphere of individual freedom, particularly if one accepts that most fully-negotiated contracts are made by organisations, rather than individuals, and that most standard form terms are drafted on behalf of organisations, rather than individuals.²⁷⁰ The conclusion as to the limits of voluntariness in contract also has normative implications. Rather than looking to the voluntary assumption of obligation as a touchstone for the development of contract doctrine or the resolution of difficult issues, we need to embrace a more sophisticated conception of contract law, incorporating what Hillman has described as ‘a rich combination of normative approaches and theories of obligation.’²⁷¹

²⁷⁰ Braucher, above n 153, 706 fn 38; Llewellyn, ‘What Price Contract?’, above n 101, 733 fn 63; *Photo Production v Securicor Transport Ltd* [1980] AC 827, 848 (Lord Diplock). See also *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297 (Lord Denning MR).

²⁷¹ Hillman, *The Richness of Contract Law*, above n 191, 6.