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A Negotiated Instrument: Proposing a Safer Contract for Consumers (And Not Just a Smarter One)

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A NEGOTIATED INSTRUMENT: PROPOSING A SAFER CONTRACT FOR CONSUMERS (AND NOT JUST A SMARTER ONE)

By Michael S. Lewis*

ABSTRACT

In this Article, I propose a new standard for determining what constitutes assent, as a matter of contract formation, within the domain of electronic consumer contracting. The threshold test should reject the “take-it-or-leave-it” arrangement dominant in the marketplace and reified by recent proposals before the American Law Institute (“ALI”) under the moniker “blanket assent.” The new standard should reject blanket assent in favor of a default rule that would require any electronic form proposing contract terms to permit at least a minimal amount of negotiation around terms seeking waiver of rights from consumers. I propose this rule as a more acceptable behavioral proxy in determining whether the manifestation of the mutual assent standard applicable to all contracts performed by competent contracting parties is met. Requiring negotiation and negotiability from electronic forms will go further than the current “click-through” baseline to cure the current problem of consumer incapacity widely recognized (though not widely named) in the consumer marketplace. It is that disturbingly debased status that defines the plight of the consumer in the modern consumer contracting domain (a point I make in a related, earlier piece). This Article argues that technology has advanced to such an extent that the absence of greater negotiability

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can no longer be defended with regard to electronic forms. As an example of this technology, I use the life of a wager from the online sports gaming business to make this point. Given what this gaming technology demonstrates, we are now able to see how technology may facilitate ever greater consumer interface around pricing, risk-taking, risk-prediction, and active choice in relation to qualitative events, features, and outcomes online. Using this technology, in conjunction with contract law and tort law norms, this Article argues that a recent decision by the Massachusetts Supreme Judicial Court analyzing Uber’s electronic form should demand more from sellers than the “click-through” option the court appears to set, as a baseline, for accomplishing assent with regard to electronic consumer contracting formation.

CONTENTS

ABSTRACT	403
INTRODUCTION	406
I. RETURNING TO FIRST PRINCIPLES	415
II. THE MASSACHUSETTS SUPREME JUDICIAL COURT’S RECENT EFFORTS TO RESTORE INTELLIGIBILITY TO CONTRACT LAW.	421
III. THE NEGOTIABLE INSTRUMENT: A SAFER CONTRACT FOR CONSUMERS IN A LIBERAL DEMOCRACY THAN WHICH <i>KAUDERS SECURES</i>	430
A. <i>What Emerging Gaming Technology Demonstrates About the Possibility for Greater Consumer Engagement</i>	430
B. <i>How Emerging Technology Can Serve as a Benchmark for Restoring Intelligibility to the Law of Consumer Contracts</i>	447
CONCLUSION	453

INTRODUCTION

A few months before the 2020 COVID-19 pandemic crushed us all, I went into my primary care doctor’s office to have my annual physical. Checking in, I sat down across from an administrator who asked the standard questions that I have come to expect when going to this practice. My insurance had not changed. My date of birth recedes from sight with each coming day, while remaining tethered to the same starting point. My wife is, remarkably, still married to me, and her phone number remains the same.

Having survived that gauntlet, I prepared to stand up and walk to the general waiting area to have my name called by one of the practice’s begowned employees before being weighed and measured, per usual. But the hospital added a step. The kind administrator flipped over a screen she had been reviewing and said, in a tone more perfunctory than demanding, “Please review and sign this at the lower righthand corner.”

The interaction posed a basic test. I had just written a draft of a law review article challenging default claims regarding adult capacity to contract in very similar situations.¹ In the article, my critique of contemporary consumer contracts was that the form she was about to present to me was not really a “contract” because adults are not capable of rendering them so in most situations, including the one at hand.² I argued that adults do not engage or understand these sorts of documents and their contents, and, even if they did, they could not bargain for a better deal to protect important interests that they should, rationally, seek to protect.³ I further argued that adults have been, and

1. See generally Michael S. Lewis, *Pervasive Infancy: Reassessing the Contract Capacity of Adults in Modern America*, 19 U.N.H. L. REV. 69 (2020).

2. See *id.* at 75 (“Together, all of these forces have altered the status of American adults with regard to the law of consumer contracts. American adults are now no differently positioned from American children in regard to their capacity to enter most, if not all, of the consumer contracts they execute.”).

3. See *id.* at 77–78 (discussing capacity as defined by Martha Nussbaum in MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011)). With my wife, Leah A. Plunkett, a fellow law professor, I have since discussed my growing concerns regarding this phenomenon within the area of contracts posed to parents in the context of educating children during the COVID-19 pandemic. See Leah A. Plunkett & Michael S. Lewis, *Education Contracts of Adhesion in the COVID-19*

are being, infantilized by this state of affairs in commercial life and should be able to access defenses commensurate with their degraded status as a means of protection and as a means of reestablishing agency.⁴

In advancing this argument, I relied upon what I viewed as a sharper, stronger, and more realistic conceptualization of capacity provided by leading scholars in the area, Martha Nussbaum and Amartya Sen, a Nobel Prize winning economist.⁵ This conception acknowledged that capacity is a function both of one's internal capabilities and the potential that a person may deploy those capabilities to shape their experience.⁶

Having set out to solve a problem in the area of consumer contracts, I decided that I was obliged to test out my sense of things in my own situation at the doctor's office. After all, where better to attain capability than in a setting designed to provide for my health and well-being? Where better to strike out for adults everywhere and do something I had never done before as a consumer? I would try to reclaim my capacity. I would not just sign away my rights, unthinkingly, to go from intake to physical to a blueprint for my own personal health and well-being. I would read the contract. I would ask questions about it. And I would try to alter it through negotiation that I deemed promoted my overall best interests.

Pandemic, 2021 U. ILL. L. REV. ONLINE 1, 13–15, <https://www.illinoislawreview.org/online/education-contracts-of-adhesion-in-the-covid-19-pandemic/> [<https://perma.cc/VP3J-R2NT>] (discussing concerns about the capacities of parents to protect their children through one-sided contracts presented to them under desperate circumstances).

4. See Lewis, *supra* note 1, at 82–83, 117–25; see also Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 568 (1985) (“At the *individual* level, most people . . . simply cannot make their way safely through the maze.”). Immanuel Kant apparently expressed similar concerns at a more general level. See RITCHIE ROBERTSON, *THE ENLIGHTENMENT: THE PURSUIT OF HAPPINESS 1680–1790*, at 30 (HarperCollins Publishers 2021) (2020) (Kant argued that “[m]ost people . . . allow guardians of various kinds to think for them, and the guardians are only too happy to take control and reduce their charges to a position like that of domestic animals, or small children who cannot walk without leading strings.” (footnote omitted)).

5. Lewis, *supra* note 1, at 78 & n.31 (first citing NUSSBAUM, *supra* note 3, at 20, 25; and then citing AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 75 (1999)) (discussing how Nussbaum and Sen define “capacity” in their respective works).

6. *Id.* at 78; cf. DEREK PARFIT, *REASONS AND PERSONS* 14–15 (reprint 1987) (1984) (describing at least one perspective in which the direction of one's life and fate is determined and beyond the capability of any person to affect).

The “contract” that the healthcare provider presented to me had a number of paragraphs, which spanned three pages.⁷ Some of the paragraphs included procedural authorizations.⁸ Some related to healthcare privacy and reaffirmed that I had this privacy.⁹ These proposed terms seemed unobjectionable to me. The final paragraph, though, was alarming. It essentially stated that the doctor’s office was part of a larger healthcare system that employs independent third parties from time to time. It further stated: “I understand and acknowledge that [the hospital] cannot be held . . . liable for the conduct of these providers.”¹⁰

A recent memory immediately popped into my head. At another local hospital, an employee contaminated needles and spread Hepatitis C through the patient population.¹¹ The employee, “employed as a [healthcare] technician at [the other hospital] in 2011 . . . [,] devised a scheme to divert and steal . . . Fentanyl for personal use and abuse.”¹² Indeed, the employee admitted:

[H]e would surreptitiously take syringes of Fentanyl prepared for patients, inject himself with the drug and refill the syringes with saline, causing the syringes to become tainted with his infected blood. He then replaced the tainted syringes for use on unsuspecting patients. Consequently, instead of receiving the prescribed dose of Fentanyl together with its intended anesthetic effect, patients actually received saline that was tainted with the same strain of Hepatitis C

7. *Treatment Authorization and Administrative Acknowledgment*, CONCORD HOSP. [hereinafter *Treatment Authorization*], <https://www.giaofnh.com/UploadedFiles/Files/CHTreatmentAuthorizationAdministrativeAcknowledgment.pdf> [<https://perma.cc/8AVP-7SK8>] (Dec. 1, 2017).

8. *Id.*

9. *Id.*

10. *Id.* at 2.

11. See Press Release, U.S. Dep’t of Just., U.S. Att’y’s Off., Dist. of New Hampshire, Former Employee of Exeter Hospital Pleads Guilty to Charges Related to Multi-State Hepatitis C Outbreak, <https://www.justice.gov/usao-nh/pr/former-employee-exeter-hospital-pleads-guilty-charges-related-multi-state-hepatitis-c> [<https://perma.cc/PS8R-3GBZ>] (Apr. 10, 2015).

12. *Id.*

carried by [the employee].¹³

This sort of conduct by hospital employees is not unique to New Hampshire.¹⁴ Reflecting on this and the contract form that I had been presented with, it seemed to me that hospitals and hospital systems would have even more control over dangerous employees than the independent contractors that the contract appeared to worry about. But those third parties may not be subject to the same oversight, based on my understanding of the differences between contractors and employees.¹⁵

I looked up at the somewhat surprised, increasingly impatient intake administrator, who was waiting for me to sign the contract and move along, and the following dialogue ensued:

I said, “Well, I’m fine with the first few paragraphs, but I don’t like the last one, the one that seems to ask me to waive rights with regard to people who work for you. Can we strike it?”

She blanched a little at this, becoming just a little more rigid, and responded, “No. You have to sign or you have to decline.”

“Who are these third-party independent contractors? Do you know them? Do they work here? Are they good at what they do?”

“I don’t know. It’s just a form.”

13. *Id.* As it turned out, a third-party contractor placed the “employee” at the hospital, where the employee previously worked as a contractor before being hired full-time. *See* *Mass. Bay Ins. Co. v. Am. Healthcare Servs. Ass’n*, 172 A.3d 1043, 1046–47 (N.H. 2017) (describing how the staffing agency screened and placed temporary worker at hospital before he was hired full-time).

14. News reflects the range of helpful and harmful people who may hold such positions within hospital systems, even as employees. *See, e.g.,* Caroline Reinwald, *Former Hospital Worker Accused of Intentionally Spoiling Vaccine Vials Arrested*, WMUR9, <https://www.wmur.com/article/vaccines-intentionally-removed-from-refrigerator-at-grafton-hospital/35105546> [<https://perma.cc/46MB-YLZX>] (Jan. 1, 2021, 11:34 AM) (describing how a hospital employee tampered with COVID-19 vaccines).

15. *See* *Criteria to Establish an Employee or Independent Contractor*, N.H. DEP’T OF LAB., <https://www.nh.gov/labor/documents/employee-contractor-poster.pdf> [<https://perma.cc/88T2-47AB>] (Feb. 1, 2018) (indicating an independent contractor is not subject to the same extent of control as an employee, as a matter of law).

“Ok. Is there someone you can call to find out?”

“No.”

“No one?”

“No.”

“Can I pay extra to have this paragraph stricken?”

“No. You can either sign or decline.”

“Is there someone you can call to check on that?”

“No.”

“But I may want the stuff in the first two paragraphs. If I don’t sign this, will you still see me?”

“Yes.”

“Ok. I guess I’ll decline. Do you know if my healthcare privacy is still protected if I don’t sign?”

“I don’t.”

And so, I declined to sign. Instead, I had my physical, but I did so by taking risks around healthcare privacy that other patients could contract to augment. I did not and could not do that because I did not want to give up rights against the hospital for the negligence of third parties that the hospital hired that I did not know and that the agent proposing the terms could not describe.

I am sure the situation will not surprise the readers of this Article at all because this situation is so common for so many readers, who are

also patients. In sum, my doctors had presented me with a “contract” that I (a) did not understand (who were these third parties doing business with the hospital and why did the hospital need to extract a waiver?) and (b) could not negotiate to augment my rights for my benefit.

The reason I could not negotiate was because (a) the platform for contracting would not permit it, and (b) the agent offering it did not appear capable of negotiation on her end, very likely because of institutional reasons limiting her discretion.¹⁶

For the purpose of this Article, the interesting feature of this experience was that the form presented at the provider’s office had been ported over to a much more mutable transactional interface—an electronic contract presented on a tablet. Afterward, while waiting for the doctor to take my blood pressure, I reflected further on the experience and wondered, “Why is that platform so resistant to negotiation?”

These thoughts gave birth to this Article and to discussions not only between myself and the first-year law students whom I teach contracts and sales to as an adjunct professor at the University of New Hampshire Franklin Pierce School of Law and Vermont Law School, but also to discussions with attorneys practicing in fields ranging from healthcare, energy, consumer protection, and blockchain technology.¹⁷ Perhaps to me, but not, at least, to my students who increasingly were

16. An astute colleague who has served as the general counsel for a hospital system responded to this Article by noting that the situation did provide me with the possibility of not accepting the terms and still getting the physical. To this observation, I asked her how many people she thought took the route I had taken. She hypothesized no greater than one percent. Given this answer, I think it is safe to assume that the hospital system (not the one my colleague worked for) and its attorneys know this. Their de facto expectation is that patients will scan the text, do very little to understand it, and sign their rights away when presented with the threshold experience of getting through the registration process. This experience, even if it permits an opt-out option, does very little to alleviate the capacity problem this Article seeks to address. In any case, the anecdote is presented as an example of a form that could be negotiated but is not negotiable in a situation regarding health and well-being where, as I thought about it, the contract presented to me compromised my well-being. See *Treatment Authorization*, *supra* note 7.

17. Michael Lewis, UNIV. OF N.H. FRANKLIN PIERCE SCH. OF L., <https://law.unh.edu/person/michael-lewis> [<https://perma.cc/WQ5L-KDRD>]; Michael Lewis, VT. L. SCH., <https://www.vermontlaw.edu/directory/person/lewis-michael> [<https://perma.cc/CF4L-HNBU>].

“born digital,”¹⁸ it is a wonderment of modern word processing that electronic platforms provide for the sort of editing that was unthinkable in the age of the typewriter.¹⁹ It would defy credibility to argue that converting the document, which the hospital presented me, into a format that could be altered in ways subject to a greater level of precision and tailoring in negotiation, was outside the ken of modern technology two decades into the twenty-first century.²⁰ So, I thought: Does this technology not provide an opportunity to reconceive a ruleset in the area of consumer contracts that would solve some of my concerns regarding the dilemma of pervasive adult incapacity in the area of electronic contracts?²¹ The more I thought about it, the more I thought that it does.

I concluded that such a ruleset should draw upon the law of torts, which defines protections that the law confers to protect consumers from dangerous consumer goods. Tort law requires that consumer safety be protected through the imposition of rules that require the marketplace to keep up, at least, with available technology as it becomes safer for people to use and more pervasive within the marketplace.²² As an example, cars must now have seatbelts and airbags to protect people from injuries that they would otherwise suffer from if cars did not have these types of protections.²³ Tort law demands

18. See generally JOHN PALFREY & URS GASSER, *BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES* (1st ed. 2008) (coining the phrase with regard to children born into and raised in the digital world and discussing the special circumstances and features of growing up in the digital age).

19. See generally LEAH A. PLUNKETT, *SHARENTHOOD: WHY WE SHOULD THINK BEFORE WE TALK ABOUT OUR KIDS ONLINE* (2019) (discussing the special challenges facing those not born digital who are responsible for those who have been).

20. See JULIE E. COHEN, *BETWEEN TRUTH AND POWER 1* (2019) (“Information technologies are highly configurable, and their configurability offers multiple points of entry for interested and well-resourced parties to shape their development.”); see also WILLIAM MAGNUSON, *BLOCKCHAIN DEMOCRACY*, at vii (2020) (“As the nineteenth century belongs to literature, and the twentieth to war, the twenty-first century belongs to technology.”).

21. See Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIS L. REV. 133, 135 (2017) (“[T]he platform is not simply a new business model, a new social technology, or a new infrastructural formation . . . [but a] core organizational form of the emerging informational economy.”).

22. See Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 286 (2008) (“In assessing a defendant’s conduct, courts presume that a defendant who fails to comply with safety-related customs prevalent in her industry acts negligently.”).

23. Cf. Anthony J. Casey & Anthony Niblett, *Self-Driving Contracts*, 43 J. CORP. L. 1, 2–3 (2017)

that car manufacturers bear the expense to keep us all safe.²⁴ Why not demand the same of electronic contracts by updating forms like the one the hospital presented me? Why not think about how the law can create “seatbelts” for the drivers of dangerous contracts?

As it stands, that form otherwise proceeded, in archaic fashion, through more mutable and dynamic technology that (a) presented me with a deal I did not like in a fashion that I argue renders me incapable and (b) threatened to injure me by depriving me of remedies I would purchase or have purchased through technology that could be rendered better and safer for me—all in the context of an experience liminal to a fundamental and personal healthcare moment.

What kind of technology, however, would make me capable and return contract law to intelligibility by creating recordable events that would serve as a better proxy for capable assent? Rather than defaulting to technology indicating “notice,” I argue that technology that may be negotiated at a more engaged level provides the key to this dilemma. Negotiation and evidence of negotiation provide a stronger indication of engagement, agency, mindfulness, and mutuality in the exchange of rights rather than one-way dictation.²⁵

(“We draw an analogy to self-driving or autonomous cars. Just as a passenger in a self-driving car relies on the car to determine optimal means (direction, speed, lane choice) to travel between two locations and to update its determination to account for real-time contingencies (traffic, weather, construction), the parties to a self-driving contract agree to a shared goal and trust in the contract to direct them on precisely how to achieve that goal in light of real-time contingencies.”). *See generally* Nora Freeman Engstrom, *When Cars Crash: The Automobile’s Tort Law Legacy*, 53 WAKE FOREST L. REV. 293 (2018) (discussing the development of tort liability and updates to safety standards supplied by tort law and statutory law in anticipation of a new regime governing autonomous cars).

24. *See* Sugarman, *supra* note 4, at 573–74 (discussing the concept of risk and loss spreading theories and use of common law to engage in the process of insuring society against acute injuries suffered by some).

25. *See* Jon Linkov, *How to Negotiate a New Car-Price Effectively*, CONSUMER REPS., <https://www.consumerreports.org/car-pricing-negotiation/how-to-negotiate-a-new-car-price-effectively/> [<https://perma.cc/KR9L-8KF9>] (July 26, 2021) (“Negotiating . . . might feel comical—like pitting an amateur against a team of professionals. But by setting the ground rules early, you can level the playing field.”). *Compare* Albert H. Choi & George Triantis, *Designing and Enforcing Preliminary Agreements*, 98 TEX. L. REV. 439, 446 (2020) (describing contracts in which more substantial negotiation among and between parties will still not yield an enforceable agreement among and between businesses), *with* OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 2 (2012) (“Put bluntly, competition forces sellers to exploit the biases and misperceptions of their customers.”). Consumers purchasing cars from dealers should negotiate one thing at a time and not accept package deals. *See* Linkov, *supra* (“Instead, insist on negotiating one thing at a time. Your first priority is

At an even more general level, the concept of negotiation is akin to navigability, where modern contracting has placed the consumer at the labyrinthian disposal of corporate counterparties.²⁶ Right now, consumers are in the maze, and the solution that the law provides is to tell them they are in the maze. For instance, the Tentative Draft of the Restatement (Third) of Consumer Contracts acknowledges that consumers are lost but imposes “blanket assent” on consumers to the contract terms because technological interface provides them of notice of the terms.²⁷ This Article rejects that position and attempts to provide a better and more credible solution.²⁸

In Part I of this Article, I reassert my previous claims about how the adult-consumer-contracting environment renders adults incapable as the concept of capacity is most credibly conceptualized.²⁹ In Part II, I explore the solution to this problem by analyzing a recent decision by the Massachusetts Supreme Judicial Court involving the contracting platform supplied by Uber.³⁰ Further, Part II argues that the decision signals movement toward the solution that this Article advances.³¹ I claim that it does so by permitting parties to argue that available technology indicating a firm’s capacity to facilitate greater consumer engagement with a transaction creates a minimum threshold for facilitating behavior, signaling the manifestation of assent.³² But, in

to settle on the lowest price you can get on the new vehicle. Only after you’ve locked that in should you begin to discuss a trade-in or financing, [if necessary].”).

26. COHEN, *supra* note 20, at 39 (describing the historical development of this phenomenon, including identifying twentieth century advertising as “[t]he era of the mass audience. . . in which the legibility rubric supplied by an intermediary became both an object of regularized economic exchange and an increasingly powerful, institutionalized arbiter of the knowledge upon which market participants relied”).

27. Lewis, *supra* note 1, at 103–05 (describing the ALI’s tentative draft); Plunkett & Lewis, *supra* note 3, at 17 (discussing same); Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute’s Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 370 (2020) (critiquing the ALI’s adoption of “blanket assent” as a concept that “creates a presumption that consumers conducting transactions . . . will be bound to standard contract terms”).

28. This Article adopts the definition of consumer contracts relied upon by the ALI in its Restatement of the Law, Consumer Contracts. “Consumer contracts” are contracts other than employment contracts that individuals enter into with businesses when individuals are acting primarily for personal, family, and household purposes. *See* RESTATEMENT OF THE L.: CONSUMER CONTS. § 1(a)(4) (AM. L. INST., Tentative Draft No.8, 2019).

29. *See infra* Part I.

30. *See infra* Part II.

31. *See infra* Part II.

32. *See infra* Part II.

this Part, I maintain that the Massachusetts Supreme Judicial Court falls short of complete conceptual intelligibility by suggesting a threshold for manifesting assent that does not provide a credible test for establishing mutual assent through a capable consumer counterparty.³³ I then use well-trodden gaming technology from the online sports gambling platform supplied by DraftKings, among other domains, to further demonstrate this point and to present how available technology provides far greater negotiability capabilities that are now possible in the consumer marketplace.³⁴

Part III asserts that negotiable technology demonstrated by the DraftKings platform indicates that recognition of greater capacity to negotiate between consumers and sellers should be imported into the law of consumer contracts, as a threshold matter, where other solutions have proved incapable of resolving the central problem facing consumer contracts.³⁵ The central problem is that consumers have been or could be deemed to assent to terms they do not and cannot understand, foisted upon them on a take-it-or-leave-it basis, without even leaving them with a mechanism to buy their way out of this conundrum.³⁶ Part III further argues that the same consumer welfare arguments that merit the imposition of safer technology for those who drive cars with seatbelts support default rules that encourage and promote safe technology around the documents that facilitate such purchases in e-commerce.

I. RETURNING TO FIRST PRINCIPLES

The concept of a contract is valuable on numerous grounds that give the concept definition, separate and apart from torts and criminal law; for instance, where our conduct is governed by standards derived from public processes.³⁷ As a field of conceptual inquiry, contract law is

33. *See infra* Part II.

34. *See infra* Part II.

35. *See infra* Part III.

36. *See infra* Part III.

37. *See* H.L.A. HART, *THE CONCEPT OF LAW* 123 (3d ed. 2012) (describing “conceptualization” as

distinct from these other subject fields because it defines and “governs the voluntary, consensual series of acts and decisions that cause people to engage with each other for a specific, mutually beneficial purpose.”³⁸ This distinguishing feature exists “if both parties to a contract (or all parties) . . . act with volition and provide assent.”³⁹ In other words, “[t]he underlying and essential elements in a contractual relationship are [1] that two or more autonomous individuals with capacity [2] voluntarily agree (consent) to be bound by [3] some mutually bargained for benefit or trade (exchange).”⁴⁰

The closer the law adheres to these requirements, the likelier the law of contracts will assure that those agreements limiting agency are accomplished at a level of agency and that rational understanding consistent with a strong commitment to individual liberty that this definition projects.⁴¹ The risks and implications of permitting slippage from this standard are well stated by Justice Benjamin Cardozo, who once wrote in regard to the proper application of contract law and its demands: “We are not to suppose that one party was to be placed at the mercy of the other.”⁴²

“recognizing or classifying particular cases as instances of general terms, and in the case of everything which we are prepared to call a rule it is possible to distinguish clear central cases, where it certainly applies and others where there are reasons for both asserting and denying that it applies”); *see also* SCOTT J. SHAPIRO, *LEGALITY* 13 (2011) (“Conceptual analysis can easily be thought of as . . . detective work. . . . In conceptual analysis, the philosopher also collects clues and uses the process of elimination for a specific purpose, namely, to elucidate the identity of the entity that falls under the concept in question.”).

38. Lewis, *supra* note 1, at 86 (describing the concept of the contract).

39. *Id.*

40. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 219–20 (2004).

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

42. *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214, 214 (N.Y. 1917) (first citing *Hearn v. Stevens & Bro.*, 97 N.Y.S. 566, 569–70 (App. Div. 1906); and then citing *Russell v. Allerton*, 15 N.E. 391 (N.Y. 1888)); *see also* *Morin Bldg. Prods. Co. v. Baystone Constr., Inc.*, 717 F.2d 413, 415 (7th Cir. 1983) (acknowledging that “paternalism” may be appropriate “to protect the weaker party” to a contract); PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* 52–54 (1997) (describing freedom dependent upon a state’s capacity to eliminate power imbalances that permit one party to dominate another). *But see* *State v. Khalil*, 956 N.W.2d 627, 629–30 (Minn. 2021) (reversing guilty verdict for defendant convicted of third-degree criminal sexual conduct on grounds of statute defining mental capacity with reference to victim’s participation in conduct leading to incapacitation).

The independence of contract law as conceptualized bears a strong, genealogical relationship to liberal theorists who created the foundation for our liberal democracy.⁴³ Liberal democratic revolutionaries grounded justified government action on an adult's standing as a free-thinker capable of rationally bargaining one's natural freedom away to society in exchange for the benefits of a cooperative life in society.⁴⁴

Professor Charles Fried, a leading late twentieth and early twenty-first century contract theorist, reprised this perspective for contemporary times, stating, "It is a first principle of liberal political

43. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 42 (C.B. Macpherson ed., Hackett Publ'g Co., 1980) (1690) ("G[od], having made man such a creature, that in his own judgment, it was not good for him to be alone, put him under strong obligations of necessity, convenience, and inclination to drive him into *society*, as well as fitted him with the understanding and language to continue to enjoy it."); see also JOHN STUART MILL, *ON LIBERTY* (1859), reprinted in *UTILITARIANISM AND ON LIBERTY: INCLUDING MILL'S 'ESSAY ON BENTHAM' AND SELECTIONS FROM THE WRITINGS OF JEREMY BENTHAM AND JOHN AUSTIN* 88, 96 (Mary Warnock ed., Blackwell Publ'g Ltd. 2d ed. 2003) ("But there is a sphere of action in which society, as distinguished from the individual, has, if any, only indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation."); HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, & THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* 8 (2005) ("The concept of an 'age of reason' became critical for determining who could give meaningful consent. . . . The changing status of childhood was a consequence of this emphasis on an age of reason, which arose as part of the new basis for political legitimacy."). But see H.L.A. HART, *LAW, LIBERTY AND MORALITY* 32-33 (1963) ("No doubt if we no longer sympathise with [Mill's criticism of paternalism] this is due, in part, to a general decline in the belief that individuals know their own interests best, and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent. . . . Underlying Mill's extreme fear of paternalism there perhaps is a conception of what a normal human being is like which now seems not to correspond to the facts.").

44. See LOCKE, *supra* note 43, at 52 ("M[en] being, as has been said, by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and puts on the *bonds of civil society*, is by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it."); see also WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA* 26 (Rita Kimber & Robert Kimber trans., The Univ. of N.C. Press 1980) (1973) ("It is certain, in theory," John Adams wrote in May 1776, "that the only moral foundation of government is, the consent of the people. But to what an extent shall we carry this principle?"); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* (1762), reprinted in *ON THE SOCIAL CONTRACT: WITH GENEVA TRANSCRIPT AND POLITICAL ECONOMY* 41, 110 (Roger D. Masters ed., Judith R. Masters trans., St. Martin's Press, Inc. 1978) ("There is only one law that, by its nature, requires unanimous consent. That is the social compact. For civil association is the most voluntary act in the world. Since every man is born free and master of himself, no one, under any pretext whatever, can subject him without his consent. To decide that the son of a slave is born a slave is to decide that he is not born a man." (footnote omitted)).

morality that we be secure in what is ours—so that our persons and property not be open to exploitation by others, and that from a sure foundation we may express our will and expend our powers in the world.”⁴⁵ For Fried, freedom rests upon a system that permits a person to be left alone to accomplish what his capacities permit and to suffer the responsibility of failures arising from free, active, and personal choice.⁴⁶ Fried described this as the “liberal ideal.”⁴⁷

In a similar vein, Philip Pettit has shaped a theory of republicanism around the notion that government power should, at the least, serve to broker relationships such that people are not subject to power dynamics that facilitate one party’s domination of another through the deployment of arbitrary authority.⁴⁸ His definition of coercion includes manipulation, which he describes as “usually covert and may take the form of agenda-fixing, the deceptive or non-rational shaping of people’s beliefs or desires, or the rigging of the consequences of

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

46. *Id.* at 8.

47. *Id.* at 7; *see also* CHARLES FRIED, *RIGHT AND WRONG* 2 (1978) (“Central to this account is the individual’s capacity to choose freely and effectively, to choose between right and wrong.”); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 35 (2013) (“The traditional liberal understanding of freedom of contract portrays individual freedom as effectuated by individual voluntary agreements, with the concomitant understanding that unfreedom will thereby be avoided.”). Professor Randy Barnett’s “consent theory” is a modification of this principle but is no less committed to the notion that evidence of capable individual agreement stands at the heart of a workable system of contract law. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 304 (1986) (arguing that “consent” rather than “intent” or “will” provides the best theoretical basis for a justifiable theory of contract law). P.S. Atiyah contests these accounts within the United Kingdom and has argued that reliance and unjust enrichment theories of contract law explain contract theory rather than these models. P.S. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 4 (reprint 1985) (1979) (“Much of this book is based on the conviction that this traditional attitude to promise-based obligations is misconceived, and that the grounds for the imposition of such liabilities are, by the standards of modern values, very weak compared with the grounds for the creation of benefit-based and reliance-based obligations.”).

48. PETTIT, *supra* note 42, at 52 (defining relationships of domination as a product of a parties’ capacity to arbitrarily interfere with the choices of others); *cf.* WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER, AND THE RISE OF AMERICAN CULTURE*, at xv (1993) (“[T]he culture of consumer capitalism may have been among the most nonconsensual public cultures ever created, and it was nonconsensual for two reasons. First, it was not produced by ‘the people’ but by commercial groups in cooperation with other elites comfortable with and committed to making profits and to accumulating capital on an ever-ascending scale. Second, it was nonconsensual because, in its mere day-to-day conduct (but not in any conspiratorial way), it raised to the fore only one vision of the good life and pushed out all others.”).

people’s actions.”⁴⁹ To take the contrary position would require a theorist to defend the exercise of power as a matter of public policy, within a government embracing republicanism, on theories that also would accept domination and manipulation of the sort Pettit disclaims.⁵⁰ This Article adopts a critical approach aligned with Pettit’s perspective.⁵¹ It grounds the concept of contract capacity in a more credible formulation: one that embraces the perspectives on freedom and autonomy supplied by Professor Fried and Pettit.⁵² This Article is therefore critical of a contract law formulation that amounts to a dictation of legal rights to individuals by private, multi-jurisdictional business actors with immense scale and unprecedented advantages with respect to concentrated wealth and experience in a series of business domains.⁵³

This Article criticizes an area of law that some might dismiss as mundane—the area of consumer contracting.⁵⁴ That area, however mundane, touches the lives of millions of people throughout the world,

49. PETTIT, *supra* note 42, at 53.

50. Cf. GÉRALDINE SCHWARZ, *THOSE WHO FORGET: MY FAMILY’S STORY IN NAZI EUROPE—A MEMOIR, A HISTORY, A WARNING* 2–3 (Laura Marris trans., Scribner 2020) (2017) (“But in the aftermath of the war, no one, or almost no one, in Germany, asked themselves what might have happened if the majority of citizens had not followed the current, but instead turned *against* a politics that had revealed relatively early its intention to crush human dignity under its heel.”).

51. Cf. BENJAMIN M. FRIEDMAN, *RELIGION AND THE RISE OF CAPITALISM* 8 (2020) (“A researcher investigating any specific question picks one set of beginning assumptions, or another, or perhaps another (each consistent with some more basic underlying presumptions, like purposeful human behavior).”).

52. See Lewis, *supra* note 1, at 114–16 (challenging the presumption of capacity applied to adults through a reformulation of capacity that takes environmental restrictions on consumer performance into consideration).

53. See, e.g., *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018) (“Respondents Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., are merchants with no employees or real estate in South Dakota. Wayfair, Inc., is a leading online retailer of home goods and furniture and had net revenues of over \$4.7 billion last year. Overstock.com, Inc., is one of the top online retailers in the United States, selling a wide variety of products from home goods and furniture to clothing and jewelry; and it had net revenues of over \$1.7 billion last year. Newegg, Inc., is a major online retailer of consumer electronics in the United States. Each of these three companies ships its goods directly to purchasers throughout the United States, including South Dakota. Each easily meets the minimum sales or transactions requirement of the Act, but none collects South Dakota sales tax.” (citing *State v. Wayfair, Inc.*, 901 N.W.2d 754, 759–60 (S.D. 2017), *vacated*, 138 S. Ct. 2080 (2018))).

54. So much of the air of the room with regard to law is being absorbed by public law questions, including, of late, those related to the continued existence of a constitutional republic in the aftermath of the Trump presidency. See, e.g., David French, *Trump’s Acquittal Exposed a Republic in Peril*, TIME (Feb. 16, 2021, 3:27 PM), <https://time.com/5939806/donald-trump-impeachment-acquittal-democracy/> [<https://perma.cc/2DMC-FE68>] (discussing how the Trump presidency exposed flaws in the current American system of government).

day in and day out.⁵⁵ It is the venue where we consumers are repeatedly presented with language implicating and describing our legal rights. The aggregate impact of these transactions on American society recently drew the *New York Times* editorial board to weigh in on the phenomenon in a piece titled, *What Happens When You Click 'Agree'?*⁵⁶

The *New York Times* editorial board commented on Amazon's terms of service: "[M]ost people have no idea what is signed away when they click 'agree' to binding terms of service contracts—again and again on phones, laptops, tablets, watches, e-readers and televisions."⁵⁷ They asserted that the drafters of such terms "feel emboldened to insert terms that advantage them at their customers' expense" and that customers would not "knowingly agree" to such terms.⁵⁸ The terms to which consumers are said to "agree" have ballooned in length and complexity, with some extending to Shakespearean play-length.⁵⁹

The "emboldened" position of these giants of commerce, the *New York Times* described, is a product of their power and status.⁶⁰ As one scholar has noted:

A few giant corporations, easily countable on a single hand, dominate the tech industry to an extent rarely before seen in the history of capitalism. Their names are familiar to us all: Facebook, Apple, Amazon, Netflix, Google. Their dominance is remarkable. Social media *is* Facebook. Online search *is* Google. Online shopping *is* Amazon. Apple and

55. See David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1596 (2016) ("Contracting has never flourished more than it does today. Consumers see a larger number of contracts daily than they used to, with longer terms and under novel conditions.").

56. Editorial Board, Opinion, *What Happens when You Click 'Agree'?*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html> [<https://perma.cc/DG96-M5T5>].

57. *Id.*

58. *Id.*

59. See *id.* (observing that online contracts contain more words than the play *Julius Caesar*); see also ALEC MACGILLIS, FULFILLMENT: WINNING AND LOSING IN ONE-CLICK AMERICA 10 (2021) ("Put most simply, business activity that used to be dispersed across hundreds of companies large and small, whether in media or retail or finance, was increasingly dominated by a handful of giant firms.").

60. Editorial Board, *supra* note 56.

Netflix have competitors, but they still manage to exert unrivaled control over their industries. These companies rule technology and, consequently, our lives. One cannot partake in the wonders of modern technology without going through them. Technology is, in a word, centralized.⁶¹

Control of this sort requires subjects. Its subjects are us.⁶² This Article argues, as others have, that as subjects to this control, we are debased.⁶³

This Article embraces, rather than rejects, the foundations of free-market economic principles. Indeed, consigning consumers to standing of the sort acknowledged by the *New York Times* is inconsistent with what Adam Smith envisioned when he laid the philosophical framework for the normative superiority of a liberal, free market economy.⁶⁴ Smith saw the marketplace as a source of individual empowerment and not as the reestablishment of structures of domination and centralized control.⁶⁵ Concerns over the extent to which firms use what they call contracts to move the free market away from Smith's conception are central to this Article's focus.

II. THE MASSACHUSETTS SUPREME JUDICIAL COURT'S RECENT

61. MAGNUSON, *supra* note 20, at vii.

62. See Rage Against the Machine, *Killing in the Name*, YOUTUBE (Mar. 26, 2011), <https://www.youtube.com/watch?v=bWXazVhlyxQ> [<https://perma.cc/Y6EV-8JHH>] (“And now you do what they told ya—now you’re under control!”).

63. See DANIEL HELLER-ROAZEN, ABSENTEES: ON VARIOUSLY MISSING PERSONS 8 (2021) (describing how persons may be rendered nonpersons when “their rights and prerogatives are reduced to the point at which their social, legal, and civil personalities may be nullified”); see also Danielle Allen, *The Road from Serfdom*, in THE AMERICAN CRISIS: WHAT WENT WRONG. HOW WE RECOVER 452, 459 (Cullen Murphy ed., 2020) (“No one wants to feel buffeted in this way—subject to, and at the mercy of, the will of powerful others, to whom they are invisible. There’s a word we can use to describe [this] condition The word is *serfdom*.”).

64. Cf. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT) 5 (2017) (“On his account, a successful bargain requires each to consider how they could bring some advantage *to the other*. Without a sympathetic appreciation for what might interest the other in transacting with oneself, and without acknowledging the independent standing of the other as someone whose property rights must be respected, no bargain will be struck. Smith, no less than Marx, reviled selfishness as a basis for relating to others.” (footnote omitted)).

65. See *id.* at 1–5.

EFFORTS TO RESTORE INTELLIGIBILITY TO CONTRACT LAW

Helpfully, the phenomenon I discuss in this Article arose, very recently, in a decision of the Massachusetts Supreme Judicial Court. That decision lays the groundwork for the solutions this Article proposes. In *Kauders v. Uber Technologies, Inc.*,⁶⁶ the court concluded that “Uber’s terms and conditions did not constitute a contract with the plaintiffs” because the “app’s registration process did not provide users with reasonable notice of the terms and conditions and did not obtain a clear manifestation of assent to the terms, both of which could have been easily achieved.”⁶⁷

In drawing this conclusion, the court marched readers through the numerous features of Uber’s app that facilitate consumer interaction.⁶⁸ Those features included fields designed to collect the consumer’s contact and billing information that the court noted facilitate Uber’s business in a manner eminently navigable to the consumer.⁶⁹ According to the court’s rendition, the consumer enters an email address, telephone number, and password.⁷⁰ The consumer then creates a profile.⁷¹ The consumer enters default payment information.⁷² Finally, the consumer clicks “DONE,” creating the consumer’s account.⁷³ This technological design, in the court’s view, makes it easy for the consumer to move through Uber’s registration process.⁷⁴

According to the court, “in remarkable contrast,” the terms and conditions containing waiver of rights provisions on the same platform “are obscured in the registration process.”⁷⁵ At the bottom of the payment screen, white text states, “By creating an Uber account, you

66. 159 N.E.3d 1033 (Mass. 2021).

67. *Id.* at 1039.

68. *See id.* at 1039–40.

69. *Id.* (describing Uber’s registration process).

70. *Id.* at 1040.

71. *Id.*

72. *Kauders*, 159 N.E.3d at 1040.

73. *Id.*

74. *See id.* at 1039–40.

75. *Id.* at 1039.

agree to the Terms & Conditions and Privacy Policy.”⁷⁶ By clicking on the white text, the user is “taken to a screen that contained other clickable buttons, labeled ‘Terms & Conditions’ and ‘Privacy Policy.’”⁷⁷ Clicking those buttons reveals the text of these provisions.⁷⁸

In the court’s words, “[t]he terms and conditions contain numerous provisions, many of which are extremely favorable to Uber[,]” including a “broad limitation of liability provision.”⁷⁹ “This provision purports to release Uber from all liability for”:

ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE). [UBER] SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU YOU EXPRESSLY WAIVE AND RELEASE [UBER] FROM ANY AND ALL ANY [sic] LIABILITY, CLAIMS OR DAMAGES ARISING FROM OR IN ANY WAY RELATED TO THE THIRD PARTY TRANSPORTATION PROVIDER.⁸⁰

The court described Uber’s terms and conditions as “extensive and far reaching, touching on a wide variety of topics.”⁸¹ It included waivers of liability both generally and specifically with regard to the conduct of Uber drivers, described as “THIRD PARTY TRANSPORTATION PROVIDER[S].”⁸²

The terms imposed indemnification responsibilities on the user for any breach of the terms or, amorphously, for any breach of “any

76. *Id.* at 1040.

77. *Id.*

78. *See Kauders*, 159 N.E.3d at 1040.

79. *Id.* at 1041.

80. *Id.* (alterations in original).

81. *Id.*

82. *Id.*

applicable law or regulation”⁸³ Further, the terms even bound users to future, unstated amendments to the terms not in existence at the time the user registered.⁸⁴ Users thus would be bound to mandatory arbitration for all disputes arising from or relating to the agreement containing the terms.⁸⁵ The agreement’s format leaves no room for negotiation with respect to its terms. The court noted that this approach is common within the domain of “similar online contracts.”⁸⁶

In assessing whether the terms and conditions were binding as a matter of contract law, the court concluded that “the fundamentals of online contract formation should not be different from ordinary contract formation.”⁸⁷ For the court, contract formation in this case turned on the test of whether the device at issue gave “reasonable notice of the terms and a reasonable manifestation of assent to those terms.”⁸⁸

“Reasonable notice” exists where the user reviews the terms or “somehow interact[s] with the terms before agreeing to them.”⁸⁹ In internet contracts, “the specifics and subtleties of the ‘design and content of the relevant interface’ are especially relevant in evaluating whether reasonable notice has been provided.”⁹⁰ Clarity and simplicity of the terms’ communication are benchmarks of reasonable notice. “Does the interface require the user to open the terms or make them readily available? How many steps must be taken to access the terms and conditions, and how clear and extensive is the process to access the terms?”⁹¹ As a general matter, the court’s analysis fails to provide clear answers to these questions.

83. *Id.* at 1042.

84. *See Kauders*, 159 N.E.3d at 1041, 1042.

85. *Id.*

86. *Id.* at 1042 n.13 (citing numerous law review articles on topic of online contracts).

87. *Id.* at 1048 (citing *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1034 (7th Cir. 2016)).

88. *Id.* at 1049 (first citing *Ajemian v. Yahoo!, Inc.*, 987 N.E.2d 604, 611–12 (Mass. App. Ct. 2013), *aff’d*, 84 N.E.3d 766 (Mass. 2017); then citing *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 120 (2d Cir. 2012); and then citing Kevin Conroy & John Shope, *Look Before You Click: The Enforceability of Website and Smartphone App Terms and Conditions*, BOS. BAR J., Spring 2019, at 23, 23)).

89. *Id.*

90. *Kauders*, 159 N.E.3d at 1050 (first quoting *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017); and then citing *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 233 (2d Cir. 2016)).

91. *Id.* (citing *Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018)).

In the court's view, regardless of what will ultimately pass muster as an enforceable contract, the design of the Uber website "enables, if not encourages, users to ignore the terms and conditions."⁹² From this observation, the court concluded that users may reasonably believe that they are signing up for a ride with Uber for a price, not a wholesale waiver of a series of other important legal rights set forth in the terms and conditions that are implicated if the user suffered some sort of injury.⁹³

"Reasonable notice" is just one step in the analysis. An enforceable contract must also give rise to a "reasonable manifestation of assent"⁹⁴ To pass this gauntlet, the court discusses some specific actions it would require of companies like Uber to ensure consumers manifest assent.⁹⁵ With regard to the minimum threshold the court imposed upon Uber, the *Kauders* court commented:

Requiring a user to expressly and affirmatively assent to the terms, such as by indicating "I Agree" or its equivalent, serves several important purposes. It puts the user on notice that the user is entering into a contractual arrangement. This is particularly important regarding online services, where services may be provided without requiring compensation or contractual agreements, and the users may not be sophisticated commercial actors. Without an action comparable to the solemnity of physically signing a written contract, for example, we are concerned such users may not be aware of the implications of their actions where agreement to terms is not expressly required.⁹⁶

The failure of the Uber platform to require any more affirmative indication of agreement beyond signing up for the service fell short of

92. *Id.* at 1053 (citing *Sgouros*, 817 F.3d at 1035).

93. *Id.* at 1041 (agreeing with trial court's observation that the "provision 'totally extinguishes any possible remedy'").

94. *Id.* at 1049.

95. *Id.* at 1050.

96. *Kauders*, 159 N.E.3d at 1050–51 (citing *Sgouros*, 817 F.3d at 1035).

the court's standard.⁹⁷ The court invalidated the terms and conditions, including the mandatory arbitration clause it contained, and the plaintiffs were able to proceed with their lawsuit, which included a claim under Massachusetts disability law.⁹⁸

The decision signals a split in jurisdictions over online contract formation. As recently as 2017, the Second Circuit, applying similar constructs, ruled that a similar Uber contract passed muster in terms of the law of contract formation.⁹⁹ There, the decision stipulated that the user did not read the terms and conditions and did not click through any specific website function in order to manifest assent in the manner demanded by the Massachusetts Supreme Judicial Court.¹⁰⁰ Following the Seventh Circuit's lead in a series of high-profile cases, the Second Circuit nevertheless enforced the terms and conditions against the user as a matter of contract.¹⁰¹ The ruling of the Massachusetts Supreme Judicial Court therefore appears as a salve to consumer rights activists hoping to salvage legal rights for consumers like the litigants in *Kauders*.¹⁰²

97. *Id.*

98. *Id.* at 1039, 1054–55; *see also* MASS. GEN. LAWS ANN. ch. 272, § 98A (West, Westlaw through Chapter 29 of the 2021 1st Annual Session) (entitling blind people accompanied by a “dog guide” with the same accommodations to which sighted people are entitled). For a further discussion of this case, see Mark E. Budnitz, *A Rose Is a Rose: Electronic Commerce Spawns Word Confusion*, GA. ST. U. L. REV. BLOG (Aug. 9, 2021), <https://gsulawreview.org/post/1111-a-rose-is-a-rose-electronic-commerce-spawns-word-confusion> [<https://perma.cc/5M2B-FC6X>], where the article discusses how *Kauders*'s precedential value is compromised because “a company's website design may change often. Consequently, a court could find that a website design initially met the legal requirements for containing the consumer's assent, but the website could later be found to be insufficient if the design is changed in a material way.”

99. *See Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 79–80 (2d Cir. 2017). The *Meyer* court expressed the following:

Although Meyer's assent to arbitration was not express, we are convinced it was unambiguous in light of the objectively reasonable notice of the terms

The fact that clicking the register button had two functions—creation of the user account and assent to the Terms of Service—does not render Meyer's assent ambiguous.

Id. (citations omitted).

100. *Id.* at 71.

101. *See id.* at 75, 79; *see also* ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449, 1455 (7th Cir. 1996) (finding shrinkwrap license on computer box enforceable and noting two-party contracts may be enforced outright); Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148, 1150 (7th Cir. 1997) (finding arbitration clause on computer box enforceable against consumer because consumer did not return computer within thirty days).

102. *See generally* Amy J. Schmitz, *Considering Uber Technologies Inc v Heller Under US Law*, 1

But the victory is a small one when considering the very low threshold that the *Kauders* decision appears to set. Assume Uber brings itself into compliance with the court's order. Assume Uber and others make their terms and conditions one or two layers more accessible to the consumer. Assume Uber and others require consumers to click "I Agree" to those terms. Uber's form would still present users with terms and conditions that they are unlikely to understand or properly evaluate and, for those few who do, are unable to alter or negotiate.¹⁰³

In other words, having analyzed the question through the traditional prism of reasonable notice and manifestation of assent, the Second Circuit failed to set a default position for the next case that will meaningfully impact the dynamic between Uber and its users. Even if, Uber and others apply what the *Kauders* court suggests will pass muster, consumers will still remain subject to opaque legal terms set unilaterally by repeat actors holding the keys to entry under a set of default rules that permit Uber and others to spread those terms throughout the market and limit the capacity of American citizens to obtain judicial relief for violations of the ADA and other statutes.¹⁰⁴

I have argued that courts should permit litigants to challenge the devices deployed by Uber at an even more basic stage: the stage of capacity.¹⁰⁵ Relying on a more persuasive definition of capacity, one that considers both the internal capabilities of parties and the ways in which domains permit or prevent parties to demonstrate those capabilities, I have argued that the current environment of consumer

CAN. J. COM. ARB. 163 (2020) (describing how the Canadian Supreme Court invalidated Uber's mandatory arbitration clause by applying the Canadian doctrine of unconscionability and analyzing U.S. cases that have challenged Uber's mandatory arbitration clause).

103. Cf. CASS R. SUNSTEIN, TOO MUCH INFORMATION: UNDERSTANDING WHAT YOU DON'T WANT TO KNOW 17 (2020) ("Much information does not enable people to do anything at all."). Sunstein approaches the question from the view that information either assists or fails to assist in decision-making, which assumes that one has the power to make a meaningful decision with information. *See id.* at 21 ("Under circumstances of poverty, deprivation, or discrimination, people might not have an interest in obtaining important information, and they might not have the capacity to get it even if they do have interest.").

104. *See* Hila Keren, *Separating Church and Market: The Duty to Secure Market Citizenship for All*, U.C. IRVINE L. REV. (forthcoming) (manuscript at 5), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788309 [<https://perma.cc/9G65-M2PX>] (observing how private law can undermine or buttress the status of citizens under our laws).

105. *See* Lewis, *supra* note 1, at 78–79.

contracting renders consumers pervasively incapacitated.¹⁰⁶ It presents them with forms they do not and will not read or understand and could not alter even if they tried.

This sort of arrangement, generally speaking, constitutes a day-in-and-day-out form of citizen domination by larger commercial actors that undermines their legal rights and standing, which in turn, undermines republicanism, a form of society that this Article adopts as a healthier and better form of existence.¹⁰⁷ This arrangement subjects citizens to a consumer culture of domination that discourages them from having a hand in the protection and definition of legal rights that define our legal identities.¹⁰⁸ Tracing the history of this development, one commentator stated that at the dawn of the twenty-first century, the United States had become “a place . . . where consumerism ha[s] so subsumed citizenship that it in fact became it.”¹⁰⁹ Framed with this in mind, it is fair to argue that our fates, as citizens, are now subject to the dominance and direction of large entities able to create a *de facto* legal regime through contracting practices that permit an end run around public, republican processes.

As a result, we are injured in our capacity as citizens if one takes seriously the importance of the rights citizens possess under American

106. *See id.* at 105–17 (discussing the factors that lead to an environment where consumers do not have the capacity to engage in modern contracts). Leading scholars have said as much without following their conclusions through to doctrinal conclusions around contracting capacity. *See* BAR-GILL, *supra* note 25, at 18 (“[The] rational consumer navigates complexity with ease The imperfectly rational consumer, [which is all of us], is less capable of such an accurate assessment [and] is unable to calculate prices that are indirectly specified through complex formulas.”).

107. *See infra* Part III.

108. *See* MICHAEL TOMASKY, *IF WE CAN KEEP IT: HOW THE REPUBLIC COLLAPSED AND HOW IT MIGHT BE SAVED* 124 (2019) (“We go through life wearing many identities. . . . But in terms of our public rather than private identities, we have two main ones: citizen and consumer. Not every single person is a citizen of course, but the vast majority of us—93 percent are. And we’re all consumers, whether we want to be or not.” (footnotes omitted)).

109. *Id.* at 151 (emphasis deleted). From one perspective, the connection between consumer autonomy and political identity goes back to the foundations of the nation. *See* MARY BETH NORTON, *1774: THE LONG YEAR OF REVOLUTION* 4–10 (2020) (describing how the events leading to the American Revolution were rooted in American consumption of tea and policies surrounding access to the market for tea). There is reason to believe that a reassertion of core liberal values is of more general concern to the health and well-being of the world’s democracies. *See* Jennifer Rubin, Opinion, *It Is Not Hard to Figure Out Why Freedom Is in Decline*, WASH. POST. (Mar. 4, 2021, 10:30 AM), <https://www.washingtonpost.com/opinions/2021/03/04/freedom-house-less-free-world/> [<https://perma.cc/46UF-S2RP>] (describing evidence of the decline of democracies worldwide and some forces that explain the decline).

law that define us as a people and as individual citizens. Instead, we are subject to a regime in which large private actors dictate our legal identities through processes that amount to the private repeal of publicly promulgated protections, such as the right to a jury trial or the right to merchantable goods.¹¹⁰

The economic damage, caused by such arrangement, is also manifest. At a microeconomic level, Professor Oren Bar-Gill has demonstrated how the enforcement of form devices results in an across-the-board extraction of inefficient pricing in high-volume consumer contracting domains.¹¹¹ Bar-Gill and others have argued that the macroeconomic effects of these form devices include the aftermath of the 2008 financial collapse, particularly as it relates to consumer debt in the mortgage markets.¹¹²

Commerce will continue, however, and electronic contracts will continue to be an important part of permitting parties to define the scope of the agreements they enter. Can commerce continue in a manner that realistically addresses the problem of consumer incapacity identified above, or must we cede to the consumer domination that these contracts induce?

Building on the Massachusetts Supreme Judicial Court's observations, which borrow from developments in consumer product safety law within the area of torts, this Article proposes a solution that will help to restore consumer capacity by harnessing developments that have otherwise exacerbated it.

110. See *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 174 (Iowa 1975) (“But the inevitable result of enforcing all provisions of the adhesion contract . . . delivered subsequent to the transaction and containing provisions never assented to, would be . . . a recognition that persons’ rights shall be controlled by private lawmakers without consent, express or implied, of those affected.”); see also Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, WASH. POST (Oct. 27, 2021, 7:00 AM), <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/> [https://perma.cc/PH7P-MMPD] (“U.S. employers relied heavily on arbitration in the first months of the pandemic, pushing a record number of complaints involving discrimination, harassment, wage theft and other grievances through a closed-door system largely weighted against consumers and workers, according to a report being released this week.”).

111. See, e.g., BAR-GILL, *supra* note 25, at 3 (“As contractual complexity increases in response to consumers’ imperfect rationality, the cost of comparison shopping also increases, resulting in hindered competition.”).

112. See *id.* at 117 (discussing connection between distortions in consumer contracting market and collapse of world economy in 2008).

This Article further proposes a default rule that permits the law to rely upon technology we know has been imported or could be imported into form contracts that would facilitate greater negotiation. This Article thus proposes a standard that would require behavior beyond clicking, “I Agree,” as a threshold to a finding of a manifestation of mutual assent. This proposal will ensure consumer engagement and mitigate the dominance that currently defines the law of consumer contracts.¹¹³

III. THE NEGOTIABLE INSTRUMENT: A SAFER CONTRACT FOR CONSUMERS IN A LIBERAL DEMOCRACY THAN WHICH *KAUDERS* SECURES

A. *What Emerging Gaming Technology Demonstrates About the Possibility for Greater Consumer Engagement*

The technology now available to ordinary consumers and sellers in the marketplace by which consumers can facilitate precise transactions online around dynamic pricing tracked to risk, opting in and out of various consumer options, is astonishing. To sample this phenomenon, one need only to visit the recreational training platform for risk calculation provided by DraftKings, an online sports betting business.¹¹⁴

In New Hampshire and other states, consumers may now legally access DraftKings to place wagers on the outcomes of various sporting events.¹¹⁵ The platform allows consumers to deposit credit in an

113. See RESTATEMENT (SECOND) OF CONTS. § 18 (AM. L. INST. 1981) (requiring manifestation of mutual assent to obtain a formed contract); see also *id.* § 19(1) (describing how assent by conduct may arise but that conduct need not signal assent “wholly” as opposed to “partly”).

114. See *Who We Are*, DRAFTKINGS, <https://www.draftkings.com/about/who-we-are/> [https://perma.cc/28SH-R9FH].

115. See *Sports Betting in New Hampshire Expands with Opening of Draftkings Sportsbook at Manchester*, DRAFTKINGS (Sept. 3, 2020), <https://www.draftkings.com/about/news/2020/09/sports-betting-in-new-hampshire-expands-with-opening-of-draftkings-sportsbook-at-manchester/> [https://perma.cc/AG5Z-N6S9].

In the interest of full disclosure, the law firm that I work for represents DraftKings in the government affairs domain. I have not participated in that representation and have not interacted with DraftKings except for personal, recreational purposes. None of the information outlined in this Article is the product of any professional interface with DraftKings as a client. In this Article, I use

account, place wagers on outcomes at various levels, calculate favorable outcomes based upon odds, track odds as they change over the life of the wager, and calculate the value of “cashing out” mid-bet.¹¹⁶

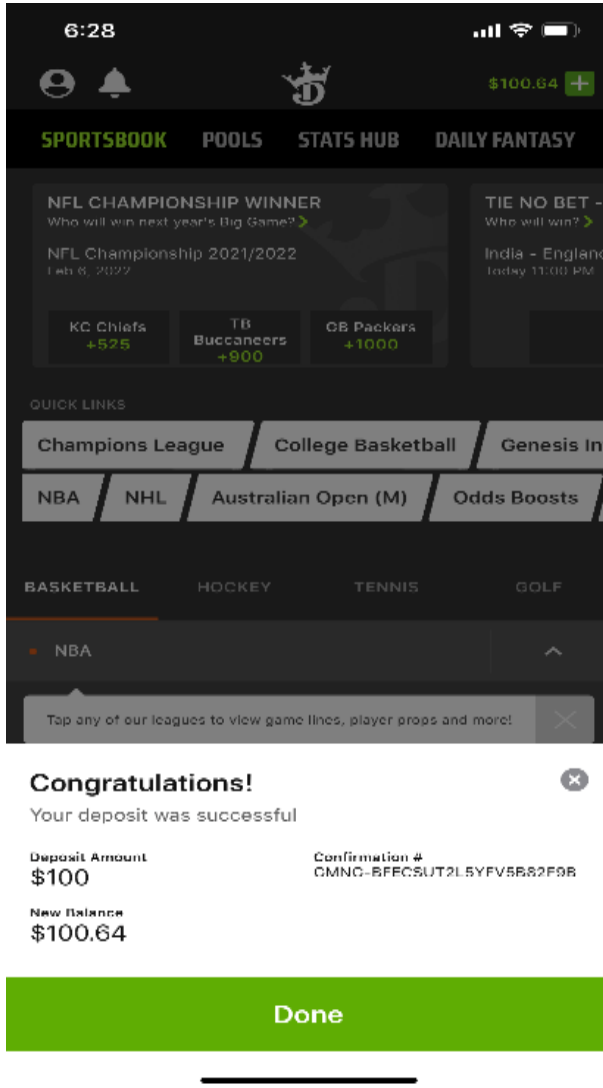
Consider the following life of a wager permitted on DraftKings from the standpoint of a consumer. On February 16, 2021, a consumer deposits one-hundred dollars in a DraftKings account.¹¹⁷

DraftKings for pedagogical purposes. The availability of ever greater technology around contracting, contract terms, and contracting pricing is a widely acknowledged phenomenon. *See What Is Contract Negotiation?*, IRONCLAD, <https://ironcladapp.com/blog/what-is-contract-negotiation/> [<https://perma.cc/5Q87-LNZH>] (describing emerging contracting software as “powerful and highly customizable”). The phenomenon of “smart contracting” in which technology facilitates self-enforcing transactions that are rule-based and automated has been the grist for substantial academic discussion. *See generally* Max Raskin, *The Law and Legality of Smart Contracts*, 1 GEO. L. TECH. REV. 305 (2017) (analyzing “smart contracts” with reference to traditional contract law).

116. *See How to Bet 101: Sports Betting Explained*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/how-to-bet> [<https://perma.cc/7TVY-8TXD>].

117. *See infra* [Figure 1](#).

Figure 1



2022]

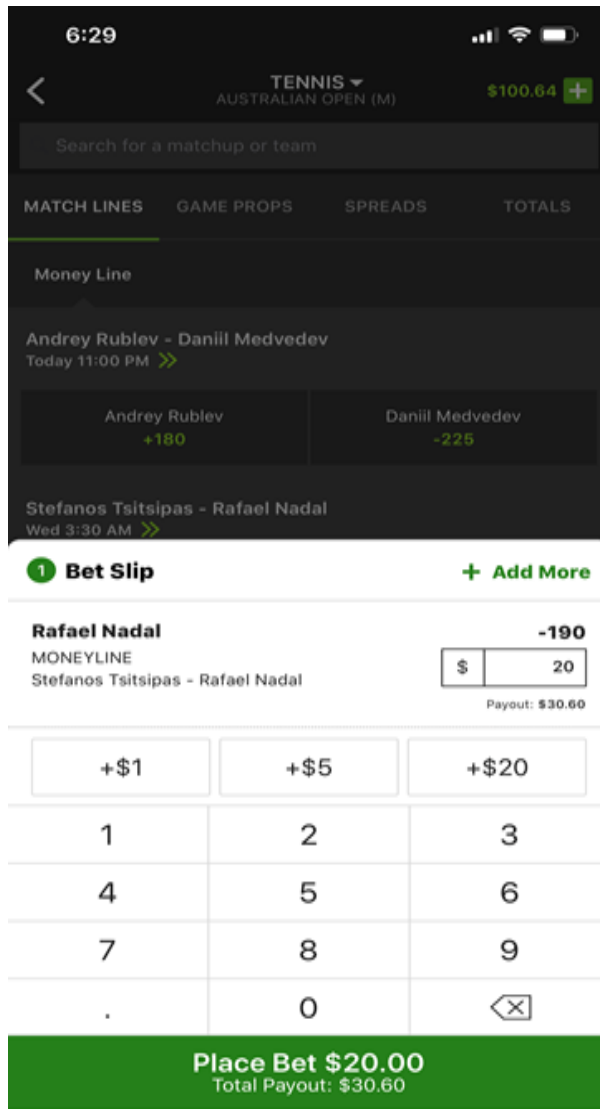
A NEGOTIATED INSTRUMENT

433

That evening, at 6:30 p.m., the consumer places a twenty-dollar bet on Rafael Nadal to defeat Stefanos Tsitsipas in the Quarterfinals of the 2021 Australian Open.¹¹⁸

118. *See infra* [Figure 2](#).

Figure 2



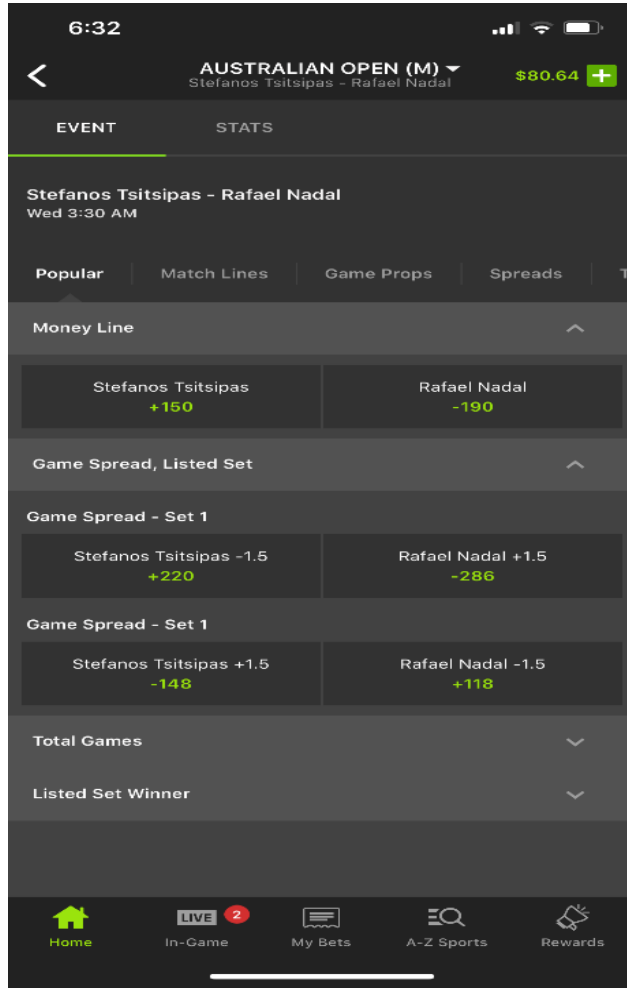
In this way, the technology permits the consumer to “opt in” to a wager at the price of their choosing, which also demonstrates to the consumer the real-time costs and benefits of doing so.¹¹⁹

The consumer’s bet constitutes a choice among a host of different options for betting and risk-taking, which the consumer may view among a host of “opting in” possibilities.¹²⁰

119. See Cass. R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 20–21 (2014) (discussing psychological features surrounding choices that facilitate opting in and out of transactions and the extent to which those features may bolster choice in response to failures of cognition).

120. See *supra* [Figure 2](#).

Figure 3



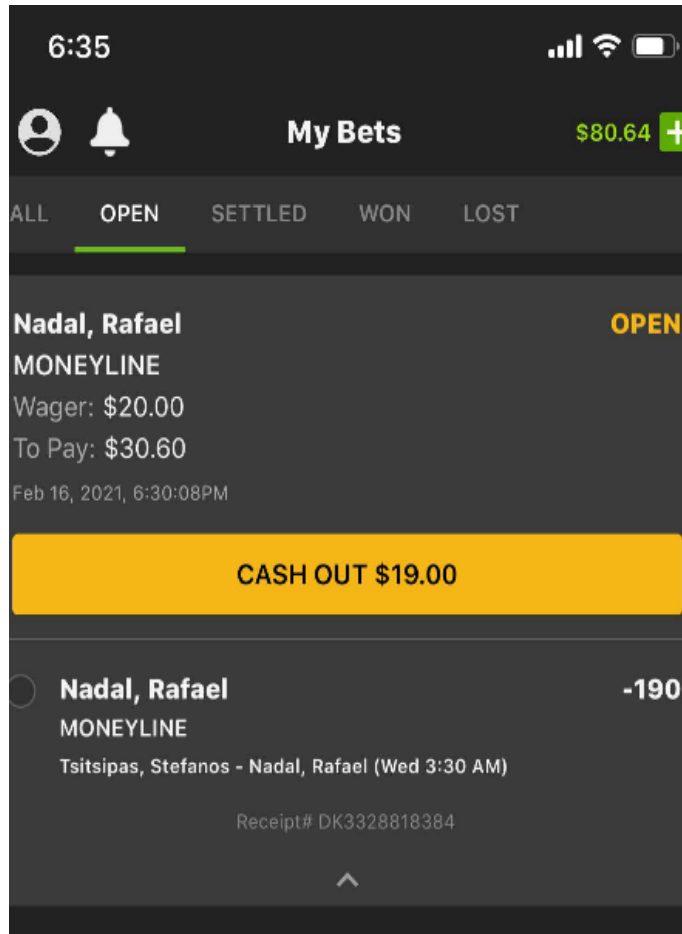
When the consumer enters the wager in the appropriate field after selecting the chosen risk, an internal function indicates to the consumer the payout the consumer stands to receive if the consumer is successful.¹²¹

At 6:35 p.m., the consumer checks on the bet and observes that they can “cash out” for nineteen dollars.¹²²

121. *See supra* [Figure 2](#).

122. *See infra* [Figure 4](#).

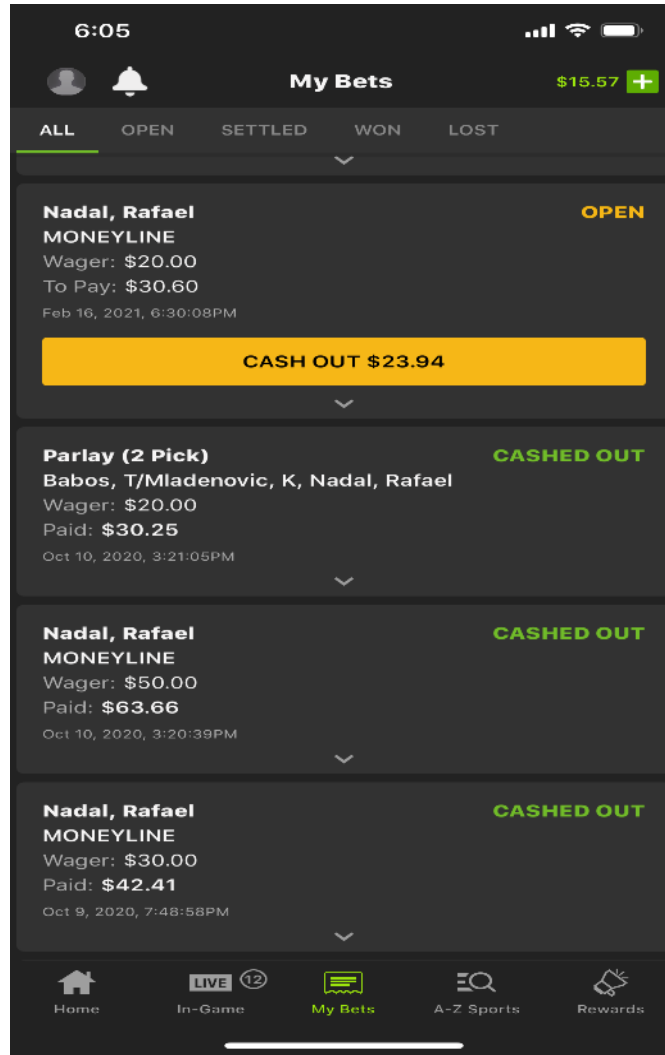
Figure 4



At 6:05 a.m. the next day, the consumer checks again—during the match—and determines that they can “cash out” for \$23.94.¹²³ The match odds changed considerably since 6:35 p.m. the previous day. A consumer tracking the transaction can make a series of decisions to act or not act at various times around the developing risks of doing so.

123. See *infra* [Figure 5](#).

Figure 5



2022]

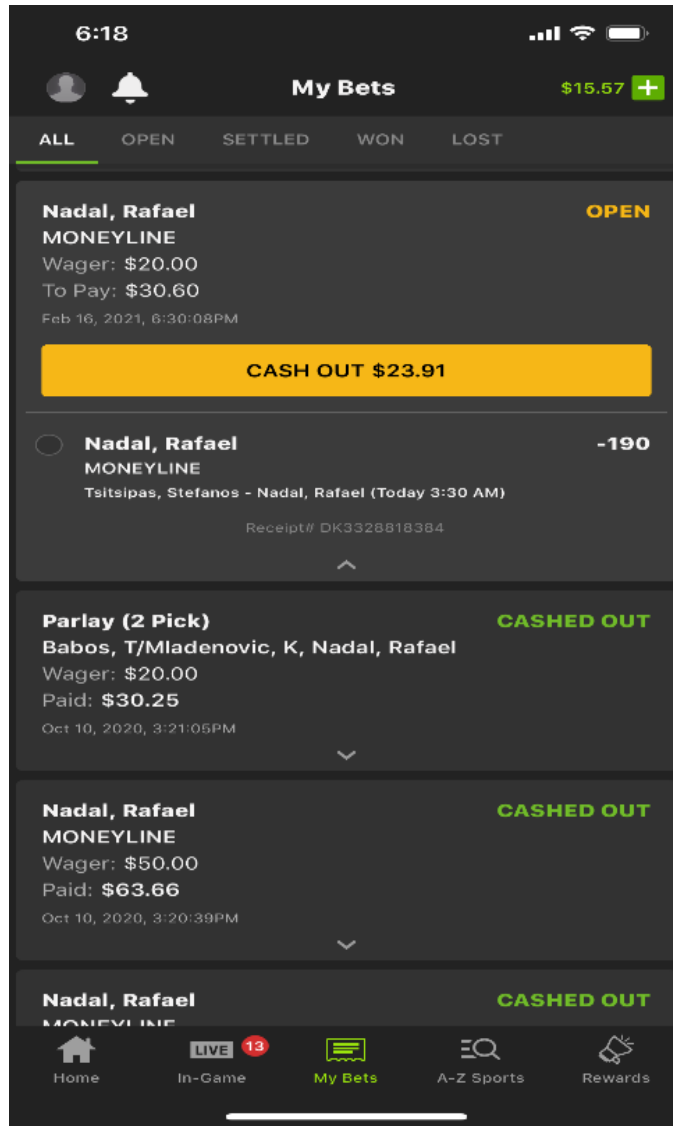
A NEGOTIATED INSTRUMENT

441

The consumer ultimately cashes out a few minutes later for \$23.91.¹²⁴ The consumer, once again, has the option of negotiating with the platform in real time to facilitate a transaction.

124. See *infra* [Figure 6](#).

Figure 6



The “cash out” amount available to the consumer modulates based upon the changing odds of the outcome, in real time, over the life of the bet, as are other aspects of what DraftKings calls “In-Game Bets.”¹²⁵

Throughout the process, the consumer is negotiating terms, expressly or implicitly, through the functionality of the DraftKings platform, which permits negotiation against fluctuating price and risk information that the platform incorporates into its gaming system.¹²⁶ What this functioning indicates is that technology has advanced to such an extent that online sellers can calculate the price of qualitative positions adopted by consumers, in real-time, based upon data the seller can mine from the world of information about the transaction and the evolving or changing market surrounding the transaction. The platform’s functioning thus demonstrates that technology has, in fact, advanced to the extent that it permits substantial negotiation around risk and risk calculation, including through functions that permit ever more tailored interactivity between the seller and consumer of risk positions.¹²⁷

To be clear, DraftKings is not offered here as an example of a platform that is consumer-friendly to all consumers in every way.¹²⁸ Nor is it offered as the perfect fit for all markets and transactions

125. See *Live In-Game Bets*, DRAFTKINGS SPORTSBOOK, <https://sportsbook.draftkings.com/help/how-to-bet-live-bets> [<https://perma.cc/3JKT-4FLH>]. DraftKings describes live betting as the following:

Live betting allows you to bet in real time while the action is unfolding. . . .
Odds will be representative of the likelihood of any of those events occurring, but beware; as live odds are dynamic, they are constantly going up and down. So, if you see something juicy, make sure you take it.

Id.

126. See *id.* Nadal ultimately lost the match, and so the consumer’s decision to cash out turned out to be a good risk assessment given the trajectory of the match and the timing of the consumer’s decision. See Jack Michaels & Matt Walsh, *The Four Keys to Stefanos Tsitsipas’ Australian Open Comeback over Rafael Nadal*, ESPN (Feb. 17, 2021), https://www.espn.com/tennis/story/_/id/30917486/the-four-keys-stefanos-tsitsipas-australian-open-comeback-rafael-nadal [<https://perma.cc/664U-BKNA>] (“The Greek joined Roger Federer and Fabio Fognini as the only players to ever come from two sets down to defeat the 20-time Grand Slam Champion Rafael Nadal.”).

127. See Kyle Scott, *DraftKings Sportsbook Review: Why It’s the Best Online Sportsbook*, CROSSING BROAD, <https://www.crossingbroad.com/sports-betting/draftkings-sportsbook-review> [<https://perma.cc/QCM3-7GY8>] (Sept. 3, 2021) (discussing this functionality, along with an explanation of odds calculations and array of betting options).

128. See *id.* (“The interface is not perfect, but it’s clean and usable and instantly familiar to casual and experienced bettors alike.”).

facilitated by e-commerce. Instead, DraftKings is offered as an example of the technology available to businesses throughout the marketplace that has the ability to generally facilitate greater transparency and interactivity when it comes to consumer-facing, moment-to-moment choice and valuation. In other words, the existence of this technology in a mass consumer market designed for the millions of sports gamblers demonstrates the functional marketability of such platforms.

One can therefore safely assume that even far more minimal functionality than what DraftKings permits, specifically around price disaggregation and opt in, opt out functionality on the consumer side, could cross domains in various forms for various purposes. As a further example, individuals familiar with the functionality of online travel companies, the dynamic contracting options, and the capacity for negotiation of various terms and conditions permitted by these online travel companies also know that this more interactive functionality has existed, with regard to some aspects of the consumer experience, for some time.¹²⁹

When one thinks about these commerce-facilitating, mutable, and negotiable consumer forms, one can imagine, with regard to the Uber terms and conditions described in *Kauders*, how Uber could use similar but less mutable technology to put a price on any term or condition that demands a waiver or limitation of liability, a disclaimer of warranty, or a requirement of mandatory arbitration that one may opt in or out of in a more itemized way that discloses price. Uber, after all, is in possession of an enormous amount of information about its consumers, its drivers, and its market; so, Uber should be in a position

129. See, e.g., Jessica MacDonald, *The 8 Best Online Travel Agencies of 2021*, TRIPSAVVY, <https://www.tripsavvy.com/best-online-travel-agencies-4776301> [<https://perma.cc/K34Q-59S2>] (Feb. 8, 2021). The article describes one online travel company as the following:

The interface is also easy to use. On the home page, search for a hotel by entering your chosen destination and dates. Then, use the extensive list of filters to narrow the results down and find the best fit for you. You can also search for a specific hotel, or seek inspiration by clicking through portfolios grouped by destination or property type. The flights, car rental, and other tabs are just as intuitive.

Id.

to price and render negotiable each term valuable to it.¹³⁰ The changing nature of this data may even explain why its terms and conditions also change so often, consistent with an observation the *Kauders* court made about Uber's terms and conditions.¹³¹

Given the mutability of its forms, the law could and should require Uber to use its own data to disaggregate price and permit greater interaction and choice among terms from consumers. Such an approach would put the burden on Uber to disclose to the consumer the price it places on any given term and condition. It would permit greater consumer scrutiny into the pricing position of Uber and permit the consumer more agency in the negotiation over terms and conditions.

For instance, imagine combining DraftKings' apparent functionality with Uber's policy regarding its liability for its drivers. Instead of presenting terms as a *fait de accompli*, the terms would include an opt-in functionality that shifts price based on actuarial data. So, the provisions quoted above¹³² might be separated as follows:

ANY INDIRECT, PUNITIVE, SPECIAL, EXEMPLARY, INCIDENTAL, CONSEQUENTIAL OR OTHER DAMAGES OF ANY TYPE OR KIND (INCLUDING PERSONAL INJURY, LOSS OF DATA, REVENUE, PROFITS, USE OR OTHER ECONOMIC ADVANTAGE).

[Field allowing a consumer to purchase these rights from the provider at a price that the consumer can compare to prices offered by other providers]

[UBER] SHALL NOT BE LIABLE FOR ANY LOSS, DAMAGE OR INJURY WHICH MAY BE INCURRED BY YOU . . . YOU EXPRESSLY WAIVE AND RELEASE [UBER] FROM ANY AND ALL ANY [sic]

130. See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1627–28 (2017).

131. *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1041 (Mass. 2021).

132. *Id.*; see also *supra* text accompanying note 80.

LIABILITY, CLAIMS OR DAMAGES ARISING FROM
OR IN ANY WAY RELATED TO THE THIRD PARTY
TRANSPORTATION PROVIDER.

[Field allowing a consumer to purchase these rights from the provider at a price that the consumer can compare to prices offered by other providers].¹³³

A similar modification could be applied to the electronic hospital form presented to me and served as the introductory anecdote to this Article. The following clause would be enforceable if the form conveying it permitted some amount of negotiation to the patient as follows:

I understand and acknowledge that [hospital] cannot be held . . . liable for the conduct of these providers.

[Field allowing a consumer to purchase these rights from the provider at a price that the consumer can compare to prices offered by other providers].¹³⁴

The approach of disaggregating price and terms and permitting an “opt-in” option is not foreign to the consumer market or Uber’s market—the short-term car possession and transportation market. Consumers who have rented cars at the airport are very familiar with the process of deciding whether to purchase insurance and whether to prepay on gas under disadvantageous terms; however, consumers still have the choice to opt out from purchasing these options.¹³⁵

133. See discussion *supra* Part III.A.

134. *Treatment Authorization*, *supra* note 7; see *supra* text accompanying notes 8–15. For a discussion of the Author’s modification of the terms of the form, see *infra* Part III.B.

135. See Ed Perkins, 9 *Nasty Truths About Car Rental Insurance*, SMARTERTRAVEL, <https://www.smartertravel.com/car-rental-insurance/> [https://perma.cc/8469-MNCG] (Aug. 5, 2021) (describing insurance transactions in the car-rental industry). One account indicates that the terms for purchasing car rental insurance exceed actuarial pricing by many multiples. *Id.* (“Typically, a CDW starts at around \$30 per day and can go higher. It sometimes costs even more than the base car rental rate. The

Conversely, Uber’s approach, and the approach of most online commercial sellers, effectively strips the consumer of their power to negotiate around similar terms by demanding that the consumer purchase a type of insurance through a mandated, one-sided statement of changing terms and conditions without even providing its consumers with the limited options available with respect to car rentals.¹³⁶

B. How Emerging Technology Can Serve as a Benchmark for Restoring Intelligibility to the Law of Consumer Contracts

Considering what this Article has demonstrated, the question it now raises is whether the law should demand innovation of this sort from the marketplace that invalidates the one-sided approach described immediately above. The argument this Article advances is that it must do so for the law of consumer contracts to remain intelligible.¹³⁷

From this standpoint, the law of consumer contracts must make sense within the two domains in which it is situated. It must make sense within a defensible definition of the law of consumer protection and within a defensible description of the law of contracts.

In the first domain, the law of consumer protection has developed such that liability attaches where consumer products either fail to abide

actuarial cost to the rental company—the amount it would allocate toward a damage pool based on risk experience—is probably just a few dollars a day; the rest is theirs to keep. No wonder the agents push it so hard: It’s clearly a lot more profitable than the car rental alone.”); see Linkov, *supra* note 25 (recommending that consumers refuse to engage in negotiations with dealers on terms in which dealers aggregate a series of contract proposals into one lump-sum price). Real-time price calculation is also the hallmark of online travel reservations, more generally. See, e.g., *Low Fare Tips*, KAYAK, <https://www.kayak.com/help/lowfares> [<https://perma.cc/Y8ZP-WYG9>] (discussing how prices change for travel depending on certain circumstances). At least one problem scholars have identified in the field of consumer contracting is the disparity between perceived price and actual price in a series of consumer markets where form contracting has proliferated. See BAR-GILL, *supra* note 25, at 10 (“Benefits and prices are a function of product attributes and use patterns. Product attributes define what a product is and what it does. They include product features, contract terms, and prices. . . . Product attributes affect the total benefit and total price. Misperceptions about product attributes lead to misperceptions of the total benefit and total price.”).

136. See MICHAEL I. KRAUSS, *PRINCIPLES OF PRODUCTS LIABILITY* 49–50 (3d ed. 2019) (discussing how liability rules result in the consumer marketplace imposing an insurance effect by spreading risk and cost of injury through the market to one degree or another).

137. Cf. Danielle D’Onfro, *Error-Resilient Consumer Contracts*, DUKE L.J. (forthcoming) (manuscript at 6), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785020 [<https://perma.cc/V6GP-RNK8>] (arguing that it is a “mistake” for courts to “ease up” on contract formalities as technology develops).

by industry custom or fail to keep pace with advances in the marketplace—recognizing the capacity of industry to deliver safer products into the marketplace.¹³⁸ Standards of liability shift with technological innovation.¹³⁹ Thus, where once we asked and answered the question, “Should manufacturers place seatbelts in cars?,” we can expect to ask the question in the near term, “Should manufacturers produce cars that humans, and not robots, may drive?”¹⁴⁰

In conveying a car as a matter of law, however, the transaction conveys the physical object of the car as well as the series of legal rights, privileges, and obligations that comprise the legal identity of the car.¹⁴¹ For instance, in conveying a car, the seller provides the full gamut of legal rights, privileges, and obligations that comprise the

138. See DAVID G. OWEN, PRODUCTS LIABILITY LAW 658–60 (3d ed. 2015) (describing “state of the art” tests as requiring that products be designed to meet standards of safety reasonably knowable to designers based upon evolving technology (footnotes omitted)); WAYNE E. LEWIS & GARY L. MONSERUD, SALES: CASES AND PROBLEMS 240 (2017) (“Strict liability arose as a way to shift the burden of loss for defective and unsafe products that cause injury, to the manufacturers and sellers who: (1) created the risks by placing the goods in the marketplace; (2) were in the best position to detect, assess and prevent those risks before the products were made available to the public; (3) induced the purchase of the products and the reasonable expectations that they were safe and suitable for use; (4) profited from their sale; and (5) have the best potential to spread the loss.”); Parchomovsky & Stein, *supra* note 22, at 309–10 (identifying jurisdictions where industry custom is the standard and proposing a standard for tort liability that encourages innovation for the purpose of encouraging ever more inventive strategies to deliver safer products); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL’Y L. & ETHICS 587, 587 (2005) (“Both the tort system and the FDA seek to protect consumers of medical products. The tort system provides compensation when a consumer is harmed by a defective product and sets incentives for companies to design safer products.”).

139. See OWEN, *supra* note 138, at 658–59; Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320, 1388 (2017) (using the example of increased understanding of brain injuries from football due to innovation in understanding brain injuries but noting that liability may depend upon the values of the community where the injury took place). Judge Learned Hand noted, however, that a “whole calling may have unduly lagged in the adoption of new and available devices.” Harry M. Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME LAW. 1, 4 (1965) (quoting *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)).

140. See Tania Leiman, *Law and Tech Collide: Foreseeability, Reasonableness and Advanced Driver Assistance Systems*, 40 POL’Y & SOC’Y 250, 263 (2021) (“Data shows it is foreseeable that human error is likely to cause motor vehicle crashes and that ADAS can significantly reduce both likelihood of collision and the capacity for that error to adversely impact vehicle operation.”).

141. See ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 77 (5th ed. 2007) (“From a legal viewpoint, property is a *bundle of rights*. These rights describe what people may and may not do with resources they own: the extent to which they may possess, use, develop, improve, transform, consume, deplete, destroy, sell, donate, bequeath, transfer, mortgage, lease, loan, or exclude others from their property.”); see also STEPHEN R. MUNZER, A THEORY OF PROPERTY 17–22 (1990) (describing vocabulary of rights, privileges, duties, and obligations developed by Prof. Hohfeld with respect to American law).

ownership package, including warranties that the car is in working condition.¹⁴² Baked into these rights, privileges, and obligations are a series of underlying default legal rights, privileges, and expectations that include the right to seek relief if the conveyance causes injury.¹⁴³

In the context of an online transaction like the one facilitated by Uber's service contract, the conveyance is the service of facilitating a car ride online. Analogizing to the conveyance of the car itself, one would expect that the service, which includes the mechanism of purchasing and securing the ride, would be safe for the consumer of Uber's services. So one would expect, at least, that this service is provided in a manner that is safe and consistent with industry practices.

The *Kauders* court indicated that this is its view when it relies upon evidence of technology that Uber deploys to demonstrate greater engagement with the contracting process, through click-through manifestations of assent.¹⁴⁴ The *Kauders* court thus verifies its assessment of online forms, like those presented by Uber, are subject to the sort of analysis imposed within the domain of consumer protection law, more generally, when assessing the entire gamut of rights, obligations, and privileges a contract seeks to convey, including rights to a jury trial (as opposed to mandatory arbitration).¹⁴⁵

But the *Kauders* court stops short of verifying whether it is correct about whether the baseline standards it sets gives us credible assurance that consumers are assenting. It equates the "click through" function with a manifestation of assent, even though "click through" does not indicate engagement, understanding, or even attention, as studies on these ubiquitous so-called agreements indicate.¹⁴⁶ It is doubtful that

142. See, e.g., *Felley v. Singleton*, 705 N.E.2d 930, 934 (Ill. App. Ct. 1999) (citing *Weng v. Allison*, 678 N.E.2d 1254, 1255–56 (Ill. App. Ct. 1997)) (car conveyed with the promise that it was in good condition transferred the subsidiary right to expect that the car had workable brakes).

143. See, e.g., U.C.C. § 2-314 (AM. L. INST. & NAT'L CONF. OF COMM'RS OF UNIF. STATE L. 2020) (describing the implied warranty of merchantability).

144. See *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1050–51 (Mass. 2021).

145. See generally *id.* at 1047–55 (analyzing rights people have under contracts, reasonable notice, and manifestation of assent and applying these rights to Uber's terms and conditions).

146. See *id.* at 1051 ("Requiring an expressly affirmative act, therefore, such as clicking a button that states 'I Agree,' can help alert users to the significance of their actions. Where they so act, they have reasonably manifested their assent."); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine*

“clicking through” even demonstrates “notice” if one considers how people generally engage with this sort of form when they transact.¹⁴⁷ In this way, the *Kauders* court sets standards that continue to facilitate an unsafe environment for consumers’ contract rights, which are central to their ability to exert agency and control over their lives.

If the *Kauders* court approach seeks to take contracts and contract law seriously, the example it provides, looking to available technology to determine how to approximate assent, would instead ask if there is available technology that would serve as a more reliable proxy for determining assent. Other than by citing to precedent that does not update its thinking around technology and behavior proxies for states of mind, the court does not explain why in doing so a court must confine itself to technology deployed by Uber.¹⁴⁸ Platforms like those developed by DraftKings, online travel companies, or other online businesses suggest that technology facilitating a far greater capacity for negotiation and engagement by the consumer (1) exists, (2) is well-known, and (3) could serve as one benchmark for measuring engagement, decision-making capacity, and assent.¹⁴⁹

Indeed, this Article illustrates one potential example of an electronic form that would facilitate negotiation at a rudimentary level from a design standpoint.¹⁵⁰ The contract I described at the beginning of this Article incorporated an even more rudimentary form of what

Print, 99 IOWA L. REV. 1745, 1747 (2014) (“The proposition that most people do not read the small print, heed the warning labels, or review the ‘Terms and Conditions’ links, is no longer controversial. Nonetheless, the barrage of fine-print disclosures continues unabated, and enforcement of universally unread terms is assumed.”).

147. See Wilkinson-Ryan, *supra* note 146, at 1777–78.

148. See *Kauders*, 159 N.E.3d at 1050–51 (citing to cases that found users assented to online agreements when they clicked that they agreed to the terms and conditions).

149. See, e.g., Leonard L. Riskin & Rachel Wohl, *Mindfulness in the Heat of Conflict: Taking STOCK*, 20 HARV. NEGOT. L. REV. 121, 123 (2015) (“Mindfulness—a certain way of paying attention—can help overcome these obstacles and improve decision-making in negotiations and other conflict-related situations.”). The same article discusses well-known findings in the area of behavior economics demonstrating how deliberative and more “mindful” decisionmaking leads to better decisionmaking but is obstructed by how cognition defaults to intuition in a manner that leads to poorer decisionmaking. *Id.* at 127 (citing DANIEL KAHNEMAN, THINKING, FAST AND SLOW 13, 20–30, 85–88 (2012)). We might also consider other goals when we think about shaping our society and its governing rules. See ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY, at xxiii (2018) (ebook) (“What can be done to make [the digital world] as functional, pleasant, dignified, humane, and creative as possible?”).

150. See *supra* Part I.

DraftKings' technology indicates exists.¹⁵¹ Instead of presenting the consumer with a take-it-or-leave-it waiver of their rights against third-party employees, the law should demand that the form permit the consumer to access a data field that prices the value of that right to the healthcare provider.¹⁵² As the consumer, I could then choose to opt in to or opt out of the liability waiver, and I (and regulators) would know how the hospital values the liability waiver.¹⁵³

This option would not only assure that I had greater agency in the transaction by requiring greater engagement (for example, that I choose to purchase the right), but permitting choice beyond the take-it-or-leave-it standard would also take a substantial step toward creating an environment in which a consumer could demonstrate restored capacity through the act of using intelligence to choose or reject terms. This injects (1) dynamic choice and (2) the possibility of minimal levels of finer-tuned negotiation around terms that seek to remove protections otherwise conferred upon individuals by the public into the contract through pricing and even dynamic pricing with opt-in functionality of the sort we see with DraftKings' technology. In other words, it does so through recordable mechanisms indicating better evidence of engagement and thus better and more reliable evidence of assent.¹⁵⁴

The option to opt in or opt out does not cave to the sort of inertia around consumer engagement that has given rise to the notion, proposed within the ALI—that “blanket assent” is the best or better solution possible for American consumers.¹⁵⁵ It even has the benefit of turning gaming, or other recreational technology meant to attract consumers to one sort of activity, into a device for engaging consumers around an exercise in the pricing out of their legal rights; perhaps initiating in the consumer a greater investment in what these rights are

151. *See supra* Part III.

152. *See supra* INTRODUCTION.

153. *See supra* INTRODUCTION.

154. This low-level indication of agreement pales in comparison to what courts demand of parties by way of negotiation to settled terms in business to business agreements. *See Choi & Triantis, supra* note 25, at 444–46 (describing stages of negotiation, preliminary agreement, and final agreement and describing interaction of the law of contract formation with each stage of negotiation).

155. *See infra* Conclusion.

and why they may be important to a citizen in a society embracing republicanism.¹⁵⁶

The purveyors of electronic form contracts may object that demanding this, more generally, would cause contracts to become unmanageable, unmanageably long, or an inefficient device for facilitating transactions. But this objection does not deal with the central conceptual problem that, whether the contract is efficient, manageable, or neither, these forms are not contracts at all under any realistic and defensible understanding of the concept but rather one-sided term sheets foisted upon increasingly incapable and disabled consumers by large-scale sellers of goods and services.¹⁵⁷ If purveyors of these forms truly care about the rights they are asking consumers to waive and believe that these rights must apply in a transaction, purveyors should choose those rights carefully and ensure that they are credibly salient and understood¹⁵⁸ or make the decision to assume the

156. Cf. D’Onfro, *supra* note 137 (manuscript at 33) (noting that some consumer contracts are “barely voluntary, particularly in the medical and utilities context”).

157. See ANDERSON, *supra* note 64, at 66 (“The rule of law is a complex ideal encompassing several protections of subjects’ liberties[,] . . . [including that] [a]uthority may be exercised only through laws duly passed and publicized in advance”); see also Lewis, *supra* note 1, at 130 (“Consumer contracts are not contracts. They are one-sided expressions of a more powerful party’s preferences drafted by attorneys working for companies and foisted on consumers who have no idea what they mean and no ability to negotiate as coequal parties to the deal.”); cf. ANDERSON, *supra* note 64, at 44–45 (describing the definition of private government and the proliferation of efforts to impose private government on people within the employment context).

158. See, e.g., BAR-GILL, *supra* note 25, at 91. Bar-Gill describes the situation as the following:

Faced with the complex, multidimensional credit card contract, imperfectly rational consumers will not be able to focus equally on all terms. Only a handful of terms will be salient.

. . . Salient features will be made attractive by lowering prices on these features and increasing the benefits that they provide. Non-salient features, on the other hand, will constitute revenue centers. They will be designed to cover the issuer’s costs and pay for the salient benefits.

Id. Some jurisdictions have adopted plain language requirements in certain contracts, implicitly recognizing the problem of consumer incapacity with regard to many consumer contracts. See Plain Language Consumer Contract Act, 73 PA. Stat. and Cons. Stat. § 2202(b) (West, Westlaw through 2021 Regular Session Act 70) (“By passing this act, the General Assembly wants to promote the writing of consumer contracts in plain language. This act will protect consumers from making contracts that they do not understand. It will help consumers know better their rights and duties under those contracts.”). Laws like these have existed for some time and do not appear to have altered consumer contracting practices. See Rosemary Moukad, Note, *New York’s Plain English Law*, 8 FORDHAM URB. L.J. 451, 451 (1980) (describing New York’s law which was promulgated in the late 1970s).

risk in favor of the overall benefit of selling goods and services in a marketplace governed by publicly promulgated default rules.¹⁵⁹

CONCLUSION

Courts have set too low a credible threshold when seeking evidence of consumer interaction with electronic contracts sufficient to demonstrate a manifestation of mutual assent. Technological innovation illustrates far greater possibility for establishing benchmarks that achieve real assent. The law of consumer protection provides an intelligible conceptual mechanism for “truing up” what contract law should demand in this domain, and the negotiability of any given form contract should become the standard for contract formation if the definition of what it means to contract is to retain any level of integrity. Normative reasons connecting consumerism, republicanism, and the health of a liberal democracy indicate that it would be in the best interests of a credible legal system for the law to adopt the framework proposed in this Article. This framework will create incentives to secure a more engaged, dynamic, and capable consumer population and will combat efforts to quell the consumer population into domination thus weakening the legal standing of Americans under circumstances where threats to democracy require a more engaged, individualist, and empowered consumer public.

159. See Lewis, *supra* note 1, at 129 (proposing that different default rulesets will impact the contracting practices of what sellers propose to consumers). The notion that some terms may become part of a deal because a party has not accepted the contract as a whole is acknowledged by law. See RESTATEMENT (SECOND) OF CONTS. § 19(1) (AM. L. INST. 1981) (describing how assent by conduct may arise but that conduct need not signal assent made “wholly” as opposed to “partly”).