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# The Error Theory of Contract

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## THE ERROR THEORY OF CONTRACT

MATTHEW A. SELIGMAN\*

### ABSTRACT

*Many people have false beliefs about contract doctrine. That pervasive phenomenon has profound practical, theoretical, and normative implications that neither courts nor scholars have recognized. This Article will make three contributions to fill that gap. First, it will establish just how widespread the phenomenon is among non-lawyers. After synthesizing the existing evidence of false beliefs about contract law, it will contribute a new empirical study showing that between one-third and one-half of people falsely believe specific performance rather than damages is the remedy for breach.*

*The Article will then argue that people's false beliefs about contract doctrine pose a fundamental challenge to prominent promise- and consent-based theories of contract, which serve as the principal theoretical alternative to law and economics theories of contract. Because people have false beliefs about aspects of contract doctrine that affect the value of the contract, the law enforces a bargain materially different from the one to which people thought they agreed. For example, they pay a contract price they think purchases them a guarantee of performance, but the law ultimately provides them only with money damages for breach. People thus did not actually promise or consent to the bargain the law enforces. For that reason, the normative justification for existing contract doctrine cannot be grounded in promise or consent.*

*Finally, the Article will explore the implications of that conclusion for ongoing doctrinal disputes. First, by removing promise or consent as a potential normative basis for contract doctrine, we may finally have grounds to settle long-standing disputes that ulti-*

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*mately depend on our choice of normative foundations about doctrines like consideration, mitigation, and unconscionability. Second, by failing to recognize the phenomenon of legal ignorance, the current debate about boilerplate misunderstood the problem it poses. If people are ignorant of, and, therefore, do not consent to, both boilerplate contract terms and the background law that would apply if boilerplate were not enforced, then refusing to enforce boilerplate does not solve the problem of lack of consent—it simply moves it from a lack of consent to fine-print terms to a lack of consent to gap-filling background law. The problem of the lack of consent is, therefore, one that banning boilerplate cannot solve. Instead, reform should focus on the remaining problem that boilerplate is substantively biased in favor of the firms that draft it. The solution, then, may be to allow boilerplate, but to regulate its content to ensure it offers terms that are not too slanted in the firms' favor.*

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## INTRODUCTION

Many people have false beliefs about contract law. They falsely believe contract formation depends on the agreement being signed and in writing.<sup>1</sup> They falsely believe unlawful terms, like a lease term that requires a tenant rather than the landlord to perform maintenance on an apartment, are legally enforceable.<sup>2</sup> They may falsely believe subjective rather than objective meanings of contract terms are legally binding.<sup>3</sup> And, they falsely believe specific performance rather than damages is the standard remedy for breach of contract.<sup>4</sup> Moreover, the phenomenon of false beliefs about contract doctrine is heterogeneous. Not everyone has these false beliefs, and people who hold one such false belief sometimes do not hold others. But the phenomenon is pervasive. A substantial proportion of the population is mistaken about one or more of the major elements of contract doctrine.<sup>5</sup>

Courts and scholars, with few exceptions,<sup>6</sup> have largely ignored these pervasive patterns of false beliefs about contract law.<sup>7</sup> Other areas of law, notably criminal law, have grappled with the potentially important implications of ignorance of law through their doctrines of mistake.<sup>8</sup> Contract law, for its part, has well-developed doctrines to handle mistakes of fact but failed

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1. Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1296, 1297 (2015); see *infra* Part I.A.

2. Meirav Furth-Matzkin, *On the Surprising Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market* 38 (Harvard John M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper No. 61, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2782987](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782987) (an updated version of this article was published in the *Journal of Legal Analysis* and a related piece is forthcoming in the *Alabama Law Review*); see also *infra* Section I.B. See generally Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009).

3. See *infra* text accompanying note 44.

4. See *infra* Section I.C.

5. See *infra* Part I.

6. See Wilkinson-Ryan & Hoffman, *supra* note 1 (providing the first empirical evidence of widespread false beliefs about contract formation).

7. *Id.* at 1271 (“To date, there has been almost no investigation of when individuals act like contracting parties” who formed a legally binding agreement).

8. For centuries, criminal law addressed how ignorance of the law should affect criminal liability by adopting the principle of *ignorantia juris non excusat*: ignorance of the law ordinarily does not excuse. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 41 (Boston, Little, Brown, and Company 1881); cf. Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 729 (2012). By contrast, courts have begun to excuse public officials’ ignorance of law in constitutional adjudication. See, e.g., *Heien v. North Carolina*, 135 S. Ct. 530, 540 (2014) (holding that a police officer did not violate the Fourth Amendment during a traffic stop where individualized suspicion depended on the officer’s reasonable but mistaken beliefs about the law). See generally Aziz Z. Huq & Genevieve Lakier, *The Triumph of Fault in Public Law*, 131 HARV. L. REV. (forthcoming 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2940016](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940016).

to address the problem of mistakes of law in a meaningful way.<sup>9</sup> A constellation of doctrines designed to account for mistakes of fact guide courts in deciding cases involving false beliefs about the facts underlying a contract<sup>10</sup>—for example, in the classic case, whether a cow the buyer purchased was barren.<sup>11</sup> But the courts' treatment of mistake of law in contracts cases is limited to situations involving false beliefs about areas of law *other than contract law*—for example, where the parties were ignorant of the rule against perpetuities.<sup>12</sup> In light of that limitation, contract doctrine does not concern itself with the question of whether the contracting parties know contract law or not. Scholarship on mistake in contract law mirrors that limitation by focusing on mistakes of fact to the exclusion of mistakes of law.<sup>13</sup> Despite that neglect by courts and commentators, the phenomenon of legal ignorance about contract law has profound, if unrecognized, practical and theoretical implications.

This Article will advance the error theory of contract to fill that gap. Similar to other error theories advanced in analytic philosophy, the error theory of contract provides a conceptual framework for determining how widespread false beliefs undermine prevailing justificatory theories of contract.<sup>14</sup> This Article's target is one of the most prominent and intuitive theories of

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9. See 27 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 70:123 (4th ed. 2003) ("There is no portion of the law of mistake more troublesome than that relating to mistake of law, by which is meant either ignorance of a rule or principle of law or an erroneous conclusion as to the operation of the law upon a known set of facts."); *id.* § 70:125 ("An overstated and legally common utterance, so often pompously pronounced, is that ignorance of the law is no excuse. While that seat-of-the-pants admonition is apropos and should be limited to criminal behavior, in the civil arena, this is a hard saying, much maligned and regularly relaxed in equity.").

10. See RESTATEMENT (SECOND) OF CONTRACTS §§ 151–58 (AM. LAW INST. 1981).

11. *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887); see also Eric Rasmusen & Ian Ayres, *Mutual and Unilateral Mistake in Contract Law*, 22 J. LEGAL STUD. 309, 313–14 (1993).

12. See, e.g., *Symphony Space, Inc. v. Pergola Properties, Inc.*, 66 N.E.2d 799 (N.Y. 1996) (mistake about rule against perpetuities); *Atchison v. City of Englewood*, 568 P.2d 13 (Colo. 1977) (same); *London Terrace Gardens, L.P. v. City of New York*, 953 N.Y.S.2d 28 (N.Y. App. Div. 2012) (mistake about rent control statute).

13. See, e.g., Melvin A. Eisenberg, *Mistake in Contract Law*, 91 CALIF. L. REV. 1573 (2003) (cataloguing types of mistakes in contract doctrine without considering mistakes of law); Rasmusen & Ayres, *supra* note 11.

14. The philosophical literature offers error theories of analogous structure for a wide range of subject matters, most prominently morality. See, e.g., RICHARD JOYCE, *THE MYTH OF MORALITY* 9 (2001) ("An error theory, then, may be characterized as the position that holds that a discourse typically is used in an assertoric manner, but those assertions by and large fail to state truths."); J. L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 35 ("[O]rdinary moral judgments include a claim to objectivity, an assumption that there are objective values in just the sense in which I am concerned to deny this.") (1977); Matthew A. Seligman, *The Moral Galilean Intuition: An Essay on Metaethics, Morals, and Colors* 43–44 (May 20, 2013) (unpublished Ph.D. dissertation, New York University) (on file with author), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2307039](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2307039) (arguing that moral judgments are systematically false because their representational content is metaphysically robust, akin to color perceptions).

contract law: the promise or consent theory of contract.<sup>15</sup> According to the theory, often called the “autonomy” theory,<sup>16</sup> the moral justification for the State holding people to contracts lies in their prior voluntary commitment to enter the agreement.<sup>17</sup> The promise- or consent-based autonomy theory is deeply intuitive to many. We must agree to enter a contract. And, if that voluntary commitment to enter the contract is compromised, for example through coercion, we cannot justifiably be held to it—a contract made with a gun to your head is no contract at all. The essential ingredient of contracts, what makes them different from other legal obligations, is their voluntary character. For that reason, the promise- or consent-based autonomy theory serves as the primary theoretical alternative to the law and economics analysis that otherwise dominates the discussion on the foundations of contract law.<sup>18</sup>

This Article will seek to show that the autonomy theory fails as a justification of existing contract law. To do so, this Article will establish three conclusions. First, there is pervasive error, a fact supported by empirically confirmable, robustly observed patterns of false beliefs about contract doctrine among non-lawyers. Second, pervasive error about contract doctrine undermines the viability of promise- and consent-based autonomy theories of contract in a wide range of cases. Third, the failure of those theories of contract has significant implications for ongoing disputes about contract doctrine and the problem of boilerplate.

This Article will proceed to those conclusions as follows. Part I will synthesize and contribute to the growing body of empirical evidence that many people have false beliefs about the content of contract doctrine. First, Section I.A will present the evidence of people’s widespread false beliefs about contract formation. That evidence will show that people often think that a contract is formed when they formally sign the contract, rather than when (as contract doctrine holds) the parties manifest mutual assent. Section I.B will then present the existing evidence that many people have false beliefs about whether particular invalid contract terms are legally enforceable, using the context of residential leases as an example.

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15. Professors Charles Fried, Seana Shiffrin, Randy Barnett, and Jody Kraus are among the most prominent promise or consent theorists. See generally CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269 (1986); Jody S. Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603 (2009); Seana Valentine Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007). The differences between Barnett’s “consent” theory and the “promise” theories offered by other scholars is not important for the arguments in this Article, and so I will treat them together.

16. Jody S. Kraus, *Philosophy of Contract Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 687–88 (Jules Coleman & Scott Shapiro eds., 2002).

17. See sources cited *supra* note 15.

18. Kraus, *supra* note 16, at 687–88.

Finally, Section I.C will report the results of a new empirical study regarding people's beliefs about contract remedies. The study surveyed a nationally representative sample of 1,000 subjects about whether they believe specific performance or damages is the typical remedy for breach of contract. The results of the study, the first of its kind, will indicate that (1) a substantial portion of the population falsely believes specific performance is the standard remedy for breach and that (2) an additional significant portion is simply ignorant of the correct legal answer. Moreover, the study's results will show that meaningful inequalities in the distribution of false beliefs and ignorance about contract remedies across educational level, income level, and gender.

Part II will then argue that widespread false beliefs and legal ignorance about contract doctrine poses a fundamental challenge to promise- and consent-based autonomy theories of contract law. Section II.A will present the core challenge to those theories: Under an autonomy theory, it is morally unjustifiable for the State to hold people to bargains with implied terms, supplied by the law, about which they are critically mistaken. Because people have false beliefs about the content of contract doctrine, they have false beliefs about implicit, legally-implied terms of the contract that they often find important to the value of the contract. For example, when people falsely believe the remedy for breach is specific performance, they believe their contract includes an implicit remedial term that differs importantly from the implicit remedial term the law actually provides. Contract doctrine thus enforces a bargain that is materially different from the one to which they thought they agreed: People pay a contract price they think purchases them a guarantee of performance, but the law ultimately provides them only with money damages. As a result, the normative basis for contract doctrine cannot be grounded in the parties' actual promise or consent—because many people, due to their false beliefs about contract doctrine, often do not actually consent to the terms of the bargain that contract doctrine enforces.

Sections II.B and II.C will in turn argue that the two strategies adopted by promise and consent theories to justify default doctrinal rules falter in light of widespread false beliefs and ignorance about contract doctrine. First, Professor Randy Barnett's consent-by-reference approach, which supposes that people give blanket consent to whatever rules the law imposes regardless of their content,<sup>19</sup> fails because people do not give blanket consent to terms that contradict their affirmatively false beliefs about the law. Second, Professor Charles Fried's appeal to secondary norms aside from autonomy, like efficiency or fairness,<sup>20</sup> fails because in order to succeed, its appeal to secondary

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19. See Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 828–29 (1992).

20. See FRIED, *supra* note 15, at 60, 69.

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norms would replace, not supplement, the autonomy norms that were supposed to be the core of the theory. Part II will, therefore, conclude that the promise- or consent-based autonomy theory fails to justify contract doctrine.

Finally, Part III will explore the practical implications of that failure of promise- and consent-based autonomy theories for ongoing debates about contract doctrine. Section III.A will argue that in light of pervasive false beliefs about important aspects of contract doctrine, the autonomy theory leads to the implication that vast numbers of contracts are voidable under the doctrine of unilateral mistake. That implication is unpalatable because it would undermine the reliable system of commercial transactions the law of contract must serve to support. For that reason, the proper move for the autonomy theorist is to turn to other, second-best normative theories as a foundation for contract law.

Section III.B will suggest that this argument may in turn provide a new basis for making progress in the long-running debate between different normative foundations for the doctrinal rules of contract. Those debates—most commonly between those who adopt an autonomy approach based on promissory morality and those who adopt a law and economics consequentialist approach—typically amount to fundamental disagreements about normative first premises. But if an autonomy theory cannot justify a workable system of contract, even on its own terms, then we may have no choice but to look to other norms to craft contract doctrine. That, in turn, has far-reaching doctrinal implications. Doctrines as diverse as consideration, mitigation, remedies, unconscionability, and the objective requirement of assent all plausibly depend on whether we start out with a promise- or consent-based normative foundation, or a law and economics foundation. The foundational failure of the autonomy theory might allow us to resolve those debates.

Section III.C will then explore the implications of legal ignorance about contract doctrine for the problem of boilerplate. One core problem with boilerplate, as several courts and scholars currently conceive it, is many people are ignorant of boilerplate terms and, therefore, do not consent to them. That focus misses the real problem. Because many people are *also* ignorant of the background contract doctrine that would apply in the absence of boilerplate terms, people are ignorant of, and, therefore, do not consent to, the relevant implicit or explicit terms either way. The unique problem presented by boilerplate is thus neither knowledge nor consent, but rather that boilerplate typically offers terms that are substantively slanted in favor of the firms that draft them. Once the actual problem comes into focus, we can see the crux of the solution is not to ban boilerplate, but to regulate its content so it is not so unfair. Finally, because non-lawyers often use the text of their contracts—even their boilerplate contracts—as reference tools to determine their legal



rights once a problem or dispute arises, it may even be beneficial to encourage well-regulated boilerplate to help to ameliorate the problem of legal ignorance after the fact.

This Article's conclusion will set the agenda going forward. It first frames the theoretical questions about how a justificatory theory of contract law must respond to the error theory in order to salvage its normative accounts of contract doctrine. That path is challenging but well-trodden for the law and economics approach, which has in recent years adapted to other forms of bounded rationality developed by the behavioral law and economics movement. But the challenge for an autonomy theory is more profound. Finally, the conclusion will offer some preliminary remarks on how the error theory of contract might serve as a model for theoretical and practical accounts of false legal belief and legal ignorance in other private law contexts, including tort, bankruptcy, and corporate law.

## I. THE EMPIRICAL EVIDENCE OF FALSE BELIEFS ABOUT CONTRACT DOCTRINE

The growing body of empirical evidence regarding people's beliefs about contract doctrine reveals a complicated factual landscape with contours of knowledge and ignorance. This Part synthesizes the existing empirical evidence on false beliefs and legal ignorance about contract law and contributes a new study to the literature. Sections I.A and I.B draw on empirical studies in the literature regarding people's beliefs about contract formation and the enforceability of certain unlawful contract terms. Section I.C presents the results of a new empirical study regarding people's false beliefs about contract remedies. In particular, the study tested whether people believe specific performance or damages is the remedy for breach of contract.

### A. Formation

Recent empirical studies show that many people have false beliefs about contract formation: They misunderstand what parties must do or say in order to form a legally binding contract. Doctrinally, the law is clear on this question: Parties form a contract through the manifestation of mutual assent to the exchange.<sup>21</sup> In the typical case of a bilateral contract, such manifestations of

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21. RESTATEMENT (SECOND) OF CONTRACTS § 3 (AM. LAW INST. 1981) ("An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances."); HOLMES, JR., *supra* note 8, at 307 ("[T]he making of a contract does not depend on the state of the parties' minds, it depends on their overt acts."). The formation of a contract also requires consideration. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration."). In the studies discussed in this Part, consideration is always present, so the presence or lack of the manifestation of assent is the only relevant variable.

assent proceed through the communication of an offer followed by the communication of an acceptance.<sup>22</sup> Yet the formation of most actual contracts in the world is cluttered with other acts, statements, and thoughts by the parties, some of which may be legally relevant but many of which are not. The empirical question is whether laypeople—that is, non-lawyers—correctly identify the manifestation of mutual assent to the exchange as the genesis of a contract, as opposed to the myriad legally irrelevant factual details scattered about their contracting experiences.

As part of a larger empirical project, Professors Tess Wilkinson-Ryan and David Hoffman conducted a series of studies that explored this question by presenting subjects with scenarios that temporally isolated the manifestation of assent that legally formed the contract from other, legally irrelevant events both before and after the moment of formation.<sup>23</sup> Their first study examined people's beliefs about when a contract is formed in a standard sequence of offer, acceptance, payment, and performance.<sup>24</sup> They presented subjects with a vignette with five stages: (1) Pam posts a notice online that she wants to sell her car; (2) Doug responds to the notice saying he will buy the car for \$2,000; (3) Pam replies "yes"; (4) Doug pays Pam; and (5) Pam gives Doug the car.<sup>25</sup> They then asked subjects when Pam and Doug entered a "binding contract."<sup>26</sup> Only 24% correctly identified stage three as the moment when the contract was formed. Moreover, the 76% with false beliefs about when the contract was formed were divided between those who thought

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22. See JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 94 (6th ed. 2009).

23. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1284.

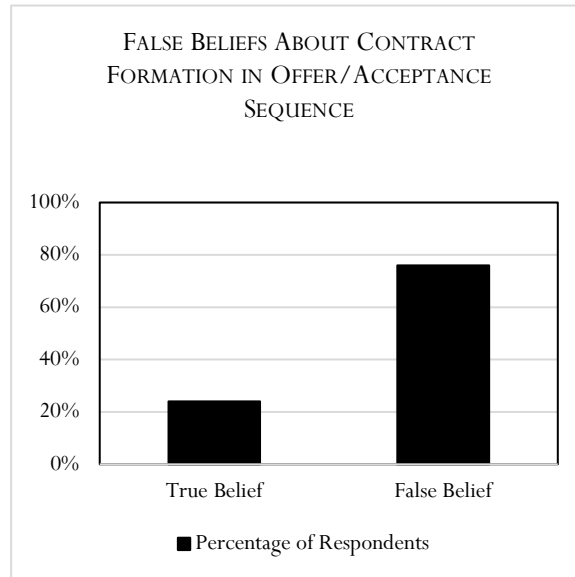
24. Wilkinson-Ryan and Hoffman recruited participants to their survey using Amazon Mechanical Turk. The Amazon service operates by matching a "requester"—that is, someone who needs a task performed—with one or more "workers" who perform the task in exchange for a (usually quite small) fee. That methodology is both increasingly popular among social scientists and increasingly the target of criticism. Compare Wilkinson-Ryan & Hoffman, *supra* note 1, at 1281 & n.67 (utilizing Amazon Mechanical Turk), and Gabriele Paolacci et al., *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411 (2010) (defending methodology of using Amazon Mechanical Turk in social science), with Yanna Krupnikov & Adam Seth Levine, *Cross-Sample Comparisons and External Validity*, 1 J. EXPERIMENTAL POL. SCI. 59, 65 (2014) (raising concerns about studies' reliance on online subjects); John Bohannon, *Psychologists Grow Increasingly Dependent on Online Research Subjects*, SCI. (June 7, 2016, 2:30 PM), <http://www.sciencemag.org/news/2016/06/psychologists-grow-increasingly-dependent-online-research-subjects> (same), and Dan Kahan, *Let's Keep Discussing M-Turk Sample Validity*, CULTURAL COGNITION PROJECT AT YALE L. SCH. (July 12, 2013, 9:40 AM), <http://www.culturalcognition.net/blog/2013/7/12/lets-keep-discussing-m-turk-sample-validity.html> (same). Among the core concerns that critics levy against using Amazon Mechanical Turk in social science research is that the samples of participants are not representative—they differ demographically from the United States, and (as Wilkinson-Ryan and Hoffman recognize) any sample drawn from Amazon Mechanical Turk is by definition limited to those who signed up for the service and decided to perform that particular task. The study presented in Section I.C minimized those methodological concerns by working with a professional polling firm to build a nationally representative sample of the American adult population. See *infra* note 85–86

25. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1284–85.

26. *Id.* at 1284.

the contract was formed *before* Pam accepted Doug's offer and those who thought it was not formed until *after* the acceptance: 51% falsely believed the contract was not formed until Doug paid Pam, and 18% falsely believed the contract was formed when Doug responded to Pam's online notice.<sup>27</sup>

TABLE 1



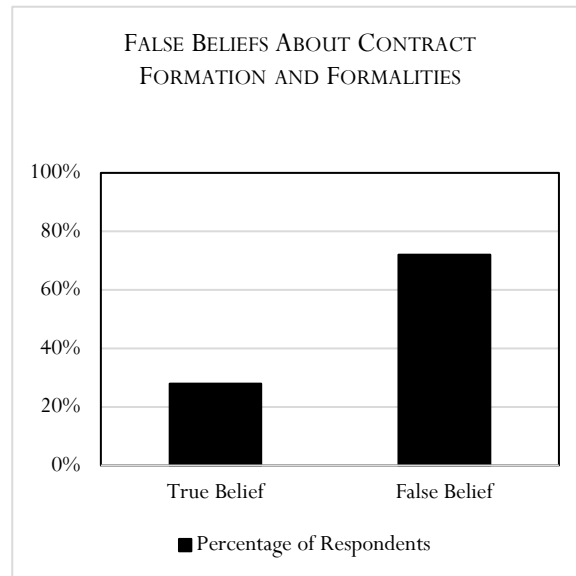
Wilkinson-Ryan and Hoffman's second study tested subjects' beliefs about the role of formalities in contract formation. They presented subjects with a vignette with four stages: (1) Tim, a contractor, presents a homeowner with a proposed written agreement; (2) the next day, the homeowner tells a friend she decided to hire Tim; (3) later that evening, the homeowner privately signs the paperwork Tim left with her; and (4) the following day, the homeowner calls Tim to tell him they have a deal.<sup>28</sup> Only 28% of subjects correctly responded that the contract was not formed until stage four, when the homeowner communicated to Tim her acceptance of his offer. Almost two-thirds (62%) believed the contract was formed when the homeowner signed the paperwork, even though she did so privately and without communicating that signature to Tim or anyone else until later.<sup>29</sup>

27. *Id.* at 1285.

28. *Id.* at 1286.

29. *Id.*

TABLE 2



Wilkinson-Ryan and Hoffman's third study tested people's beliefs about the mailbox rule: At what point is a contract formed when one party mails their acceptance of an offer? The vignette had four stages: (1) Janine, a homeowner, takes home a standard form contract drafted by Jayson, a contractor; (2) Janine signs the contract privately at home; (3) Janine mails the signed contract to Jayson; and (4) Jayson receives the signed contract in the mail two days later.<sup>30</sup> Only 9% of subjects correctly identified Janine mailing the signed contract as the point at which the contract was formed.<sup>31</sup> Two-thirds falsely believed the contract was formed when Janine privately signed the contract, and another 22% falsely believed the contract was not formed until Jayson received it.<sup>32</sup>

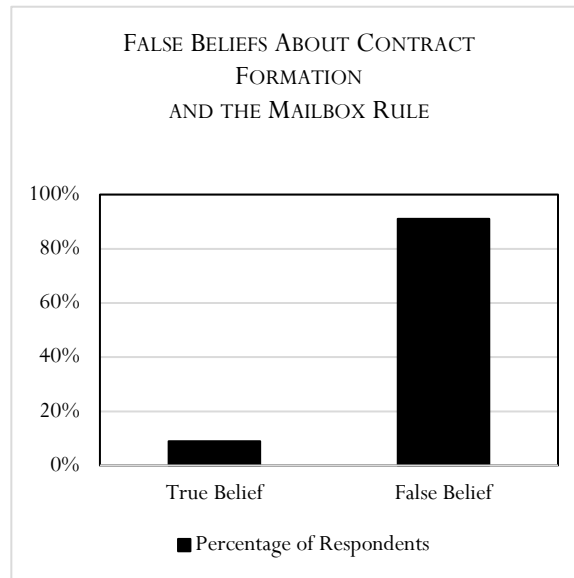
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30. *Id.* at 1287.

31. *Id.* at 1288.

32. *Id.*

TABLE 3



Wilkinson-Ryan and Hoffman's results show that most people have false beliefs about the law of contract formation.<sup>33</sup> They drew two primary conclusions from those results. First, they concluded, "Most people have a sense that the law of contracts is one of formality."<sup>34</sup> As they noted, people seem to show "a startling level of interest in contract formalities, including . . . an almost rigid refusal to acknowledge verbal agreements."<sup>35</sup> The widespread perception of the importance of formalities often focuses on the signature ritual: People "view their legal obligations as heavily dependent on formal manifestation of assent via signature."<sup>36</sup> That attention to ritual is a deeply ingrained cultural trope.<sup>37</sup> For example, shaking hands to bind a

33. *Id.* at 1297 ("Lay views about acceptance appear to diverge from the legal rule."). Wilkinson-Ryan and Hoffman also conducted a fourth study exploring people's beliefs about contract formation in a scenario where the parties agree with terms to follow. *Id.* at 1288–89. However, as they recognized, there is substantial disagreement among courts and commentators about when in such a sequence the contract becomes legally binding. *Id.* at 1289 & n.76. As a result, it serves as an uncertain example of legal ignorance.

34. *Id.* at 1300.

35. *Id.* at 1297.

36. *Id.*

37. See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 582–83 (1933) ("Ceremonies are the channels that the stream of social life creates by its ceaseless flow through the sands of human circumstance. Psychologically, they are habits; socially, they are customary ways of doing things; and ethically, they have . . . the normative power of the actual, that is, they control what we do by creating a standard of respectability or a pattern to which we feel bound to conform.").

promise is a formal ritual that, for many people, still carries moral, social, and even legal significance.<sup>38</sup>

Second, Wilkinson-Ryan and Hoffman concluded that these results, in conjunction with results in two separate studies,<sup>39</sup> indicated that “subjects themselves draw a distinction between legal and moral obligations,” so their perceived “moral obligations are attendant both to legal formalism . . . and also to more fine-grained moral norms.”<sup>40</sup> As a result, subjects will sometimes follow through on a deal they know is not yet legally binding in order to satisfy perceived social or moral norms based (perhaps) on promise, expectation, and fairness.<sup>41</sup>

Two further observations about Wilkinson-Ryan and Hoffman’s results warrant mention. First, their data show both that some people falsely believe a contract *does* exist when it has not (yet) been legally formed, and that some people falsely believe a contract *does not* exist even after it has been legally formed. For example, in their first study, 18% of subjects falsely believed a contract was formed upon the buyer’s offer, prior to the seller’s acceptance, and 51% falsely believed a contract was not formed until the buyer paid for the car, well after the seller accepted his offer.<sup>42</sup> We can call these two categories of false beliefs about formation “false positives” and “false negatives,” respectively. As discussed in Part II, that distinction isolates different ways in which individuals’ false beliefs about contract formation disadvantage them.

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38. See, e.g., Harold D. Hazeltine, *The Formal Contract of Early English Law*, 10 COLUM. L. REV. 608, 609 (1910) (“In its earliest history the Anglo-Saxon formal contract . . . viewed [the hand-grasp] as sufficient to create a binding contractual obligation.”). Consider also that we still talk of “sealing the deal”—a metaphor which itself harkens to medieval procedure that used wax seals to certify documents. 3 EDWARD COKE, *THE INSTITUTES OF THE LAWS OF ENGLAND* 169 (Professional Books Ltd. 1985) (1628) (“It is required, that the deed, charter, or writing must be sealed; that is, have some impression upon the wax, for *sigillum est cera impressa, quia cera sine impressione non est silligum* . . .”); Eric Mills Holmes, *Stature and Status of A Promise Under Seal As A Legal Formality*, 29 WILLAMETTE L. REV. 617, 631 n.46 (1993) (citing *Warren v. Lynch*, 5 Johns. 239 (N.Y. Sup. Ct. 1810) and translating Coke’s statement as “[i]mpressed wax is the signature and, without the impression of wax, there is no signature”); see also *Bank of the United States v. Dandridge*, 25 U.S. (12 Wheat.) 64, 67 (1827) (“In ancient times it was held, that corporations aggregate could do nothing but by deed under their common seal.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 158 (1803) (“The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.”); *Aller v. Aller*, 40 N.J.L. 446, 451 (N.J. 1878) (“If a party has fully and absolutely expressed his intention in a writing sealed and delivered, with the most solemn sanction known to our law, what should prevent its execution where there is no fraud or illegality?”).

39. Wilkinson-Ryan & Hoffman, *supra* note 1, at 1290–95 (presenting results of studies exploring whether subjects are more likely to perform even when (1) they know they are not legally bound and (2) their counterparty invested in reliance on a contract that is not yet legally binding).

40. *Id.* at 1297 (emphasis omitted).

41. *Id.* at 1271.

42. *Id.* at 1285.

Second, people's focus on contract formalities like signatures, even when performed privately, raises the intriguing possibility that what drives these results is an underlying belief that the real, legally relevant fact is subjective assent.<sup>43</sup> Although a physical ritual like a signature is quintessentially objective, the studies discussed here suggest that the ritual matters even when performed privately. What accompanies that private ritual, almost invariably, is the moment of subjective assent.<sup>44</sup> If people falsely believe subjective assent is the critical ingredient to contract formation, then they may well also believe subjective meanings of contract terms govern because both beliefs arise from the (doctrinally mistaken) idea that the normative basis of contract is subjective commitment. That latter belief would, too, be false<sup>45</sup> and could have profound practical and normative implications.<sup>46</sup> In light of those potential consequences, people's attitudes about subjective assent and the role of subjective meanings in contract interpretation warrants further empirical research.

### B. Enforceability

Many people also falsely believe certain sorts of contract terms are legally enforceable when, as a matter of law, they are not. Both at common

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43. Contracts professors may recognize the widespread belief that subjective assent is legally controlling in their first-year students' reactions to the casebook staple, *Lucy v. Zehmer*, 84 S.E.2d 516 (Va. 1954). Zehmer claimed, though he signed a written agreement to sell his farm to Lucy, "the whole matter was a joke," he "was high as a Georgia pine," and the putative sale "was just a bunch of two doggoned drunks bluffing to see who could talk the biggest and say the most." *Id.* at 518, 520. The court rejected that "unusual, if not bizarre, defense." *Id.* at 520. Many students find jarring the court's conclusions that "[t]he mental assent of the parties is not requisite for the formation of a contract," and, accordingly, the contract was enforceable even if Zehmer was "merely jesting." *Id.* at 522. If first-year law students find that result counterintuitive, it is plausible the general population of non-lawyers would as well.

44. And, if someone performed the ritual privately but without subjective assent—say, perhaps, she privately signed a form contract as a joke—one doubts that most people would consider the contract formed and legally binding.

45. See *Hotchkiss v. Nat'l City Bank of N.Y.*, 200 F. 287, 293 (S.D.N.Y. 1911) ("A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, *he would still be held*, unless there were some mutual mistake, or something else of the sort." (emphasis added)); PERILLO, *supra* note 22, at 24 ("A party's intention will be held to be what a reasonable person in the position of the other party would conclude the manifestation to mean."). *But cf.* *Raffles v. Wichelhaus* (1864) 159 Eng. Rep. 375, 375, 376; 2 H. & C. 906, 906, 908 (per curiam) (suggesting parties' differing subjective meanings of "Peerless," which was the name of two different ships carrying cotton from Bombay, defeated the formation of a contract due to mutual mistake); see also HOLMES, JR., *supra* note 8, at 309 (attempting to reconcile *Raffles* with the objective approach to contract); Melvin Aron Eisenberg, *The Responsive Model of Contract Law*, 36 STAN. L. REV. 1107, 1123 (1984) (criticizing Holmes' attempt as "precisely backward").

46. In short, the problem would be that contract doctrine would hold people to bargains with terms that differed from the terms that people thought they were agreeing to. That concern echoes the problem raised by false beliefs about contract remedies. See *infra* Part II.

law and by statute, the law forbids the enforcement of terms that violate public policy.<sup>47</sup> Usury laws are among the most prominent historical examples of such prohibitions in the United States. Prior to Independence, most of the Colonies enforced usury laws that prohibited creditors from charging a rate of interest exceeding the legal maximum.<sup>48</sup> The effect of such laws was to make the interest term of a loan contract unenforceable if the rate was too high. National financial institutions are largely exempt from usury laws,<sup>49</sup> and local institutions like pawn shops are regulated by a “complex hodge-podge of laws that states use to regulate interest rates.”<sup>50</sup>

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47. See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (AM. LAW INST. 1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”).

48. See Hugh Rockoff, *Prodigals and Projectors: An Economic History of Usury Laws in the United States from Colonial Times to 1900* (Nat’l Bureau of Econ. Research, Working Paper 9742, 2003), <http://www.nber.org/papers/w9742.pdf>. Massachusetts, for example, set a maximum interest rate of 8% in 1641, which it lowered to 6% in 1693, before repealing the usury law entirely in 1867. *Id.* at 19. Usury laws, of course, long pre-dated Colonial America: Both ancient Rome and ancient India had usury laws, *id.* at 1, and the Old Testament of the Bible prohibited charging interest, see *Exodus* 22:24 (“If thou lend money to any of My people, even to the poor with thee, thou shalt not be to him as a creditor; neither shall ye lay upon him interest.”); *Leviticus* 25:36 (“Take thou no interest of him or increase; but fear thy God; that thy brother may live with thee.”). Indeed, the modern field of Islamic finance reflects the interplay between modern economic demands for capital with the adherence to formal religious prohibitions on charging interest. See MAHMOUD A. EL-GAMAL, *ISLAMIC FINANCE: LAW, ECONOMICS, AND PRACTICE* 20, 25 (2006) (describing “Shari’a arbitrage” by which the practice of Islamic finance identifies financial products “deemed contrary to the percepts of Islamic Law” and then reverse-engineers a Shari’a-compliant analogue that abides by Shari’a law’s formal prohibitions). That long historical and cultural experience with legally invalid contract terms suggests a complex interaction between social customs, folk moral beliefs, and popular beliefs about what the law permits and requires.

49. The Supreme Court held in 1978 that the National Bank Act, 12 U.S.C. § 85 (1976), pre-empted the application of state usury laws to nationally-chartered banks located in other states. *Marquette Nat’l Bank of Minneapolis v. First of Omaha Serv. Corp.*, 439 U.S. 299, 318 (1978). As a result, most national banks relocated their credit-card operations to states like South Dakota that had extremely high or no interest rate caps. See Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 70 & n.227 (2008). The Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132 (codified as amended in scattered sections of 12 U.S.C.), then exempted federally chartered savings banks and other institutions from state usury laws, rendering them effectively pre-empted. See *id.* §§ 501–529, 94 Stat. at 161–68.

50. Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom of Contract*, 24 J. LEGAL STUD. 283, 301 (1995).



Beyond interest rates, modern statutory, regulatory, and common law regulates the substantive content of contract terms in a wide variety of contexts, including employment law,<sup>51</sup> landlord-tenant law,<sup>52</sup> consumer finance law,<sup>53</sup> and others.<sup>54</sup> Notwithstanding these clear prohibitions, many contracts continue to include unlawful terms.<sup>55</sup> As several commentators observed, “[T]he obvious reason why one party would seek a clause it knew to be unenforceable is that it believed the other party to be unaware of the fact and likely to remain unaware of it.”<sup>56</sup>

Recent empirical research supports that hypothesis in the context of lease contracts. Meirav Furth-Matzkin conducted an empirical study on residential leases in the Boston area.<sup>57</sup> Her research first replicated prior results showing the prevalence of unlawful terms in standard contracts.<sup>58</sup> She reviewed seventy residential leases and found that sixty-nine (or 99% of the

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51. For example, most jurisdictions hold that non-compete clauses in employment contracts are unenforceable if they are overly broad in duration, geography, or practical scope. *See, e.g.*, *RLM Commc'ns, Inc. v. Tuschen*, 831 F.3d 190, 196 (4th Cir. 2016) (holding that a covenant not to compete is valid under North Carolina law “only if [it is] ‘(1) in writing; (2) made a part of the employment contract; (3) based on valuable consideration; (4) reasonable as to time and territory; and (5) designed to protect a legitimate business interest of the employer’” and “must be no wider in scope than is necessary to protect the business of the employer” (emphasis added) (first quoting *Farr Assocs., Inc. v. Baskin*, 530 S.E.2d 878, 881 (N.C. Ct. App. 2000); and then quoting *Manpower of Guilford Cty., Inc. v. Hedgecock*, 257 S.E.2d 109, 114 (N.C. Ct. App. 1979))); *see also* Sullivan, *supra* note 2, at 1129 (discussing various types of unenforceable clauses employers frequently insert in employment contracts).

52. The provisions of the Uniform Residential Landlord and Tenant Act (“URLTA”), which twenty-one states adopted in whole and others in part, prohibit a wide range of lease terms. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 203 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAW 2015); *see also* Furth-Matzkin, *supra* note 2, at 5 (“During the 1960’s and 1970’s, the United States has experienced a revolution in Landlord and Tenant Law: the vast majority of states have adopted regulation armoring tenants with a variety of mandatory rights and remedies that cannot be disclaimed under any lease agreement.”).

53. *See, e.g.*, Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, §§ 163, 171, 123 Stat. 1734, 1736–37, 1742 (codified as amended at 15 U.S.C. §§ 1666b, 1666i–1 (2012)) (banning certain terms from credit card agreements, including those requiring payment sooner than twenty-one days after a bill is mailed and those that retroactively increase interest rates).

54. Invalid forum-selection clauses, excessive liquidated damages clauses that rise to the level of penalty clauses, and void waivers of prospective liability or unwaivable statutory rights may arise in almost any contractual context. *See* Sullivan, *supra* note 2, at 1130.

55. *See id.* at 1128 (“Contracts frequently contain clauses that are not enforceable—at least, not enforceable as written.” (footnote omitted)); Curtis J. Berger, *Hard Leases Make Bad Law*, 74 COLUM. L. REV. 791, 791–92 (1974) (finding residential form leases continued to contain unenforceable clauses even though landlords lost most cases in which such clauses were litigated).

56. Sullivan, *supra* note 2, at 1136; *see also* Furth-Matzkin, *supra* note 2, at 3–4; Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988). There are at least two other theoretically plausible explanations: the drafter hopes for a change in the law, or the sophisticated drafter was itself ignorant of the legal rule.

57. Furth-Matzkin, *supra* note 2, at 5–6.

58. *Id.*

total) included at least one “misleading” or outright unenforceable clause.<sup>59</sup> Furth-Matzkin defined a “misleading clause” as one which “misstate[s] the law by selectively disclosing only a particular part of it—namely, the tenant’s duties or the landlord’s rights and remedies,” as opposed to “unenforceable [clauses which] misstate the law by contravening it outright.”<sup>60</sup> Both types of clauses are relevant to the problem of legal ignorance, because as she noted, “both unenforceable and misleading terms are equally likely to generate [tenants’] misconceptions about the applicable legal framework.”<sup>61</sup>

Furth-Matzkin’s study “reveals that residential leases often contain unenforceable and misleading clauses, and systematically fail to disclose the vast majority of the tenant’s rights and remedies.”<sup>62</sup> Of the seventy total leases, fifty-one (or 73% of the total) contained at least one unenforceable clause, sixty-five (or 93% of the total) contained at least one misleading clause, and forty-seven (or 67% of the total) contained at least one clause of both types.<sup>63</sup> The seventy leases contained on average eight clauses regulated by local landlord and tenant law, of which an average of 1.39 clauses (or 17.38%) were unenforceable and 1.59 clauses (or 19.88%) were misleading.<sup>64</sup> For this sample of leases, the prevalence of unenforceable terms is, therefore, considerable: Almost 40% of the lease terms regulated by landlord and tenant law contravened it.<sup>65</sup>

The second stage of Furth-Matzkin’s study tested whether people are likely to have false beliefs about their legal rights due to misleading and unenforceable clauses.<sup>66</sup> She surveyed 279 resident tenants living in Massachusetts, presenting them with a two-part questionnaire.<sup>67</sup> The first part of the questionnaire asked them whether they had experienced any problem (like a maintenance issue) as a renter, and, if so, how the issue was addressed.<sup>68</sup> In particular, this part of the questionnaire sought to determine whether renters look at their leases in order to determine their legal rights when a problem arises.<sup>69</sup> That question matters because people’s false beliefs about the legal validity of the terms of their leases are irrelevant if they never read them—and it is well-established that few people read lengthy boilerplate

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59. *Id.* at 27.

60. *Id.* at 16.

61. *Id.*

62. *Id.* at 27.

63. *Id.*

64. *Id.*

65. *Id.* Because Furth-Matzkin’s definitions of “misleading” and “unenforceable” clauses are mutually exclusive—the former omits relevant legal context whereas the latter is flatly contrary to the law—a single clause cannot be both misleading and unenforceable.

66. *Id.* at 7.

67. *Id.* at 35. Like Wilkinson-Ryan and Hoffman, Furth-Matzkin recruited her survey participants via Amazon Mechanical Turk. *Id.* at 36; *see supra* note 24.

68. Furth-Matzkin, *supra* note 2, at 35.

69. *Id.*

contracts before signing them.<sup>70</sup> Furth-Matzkin's key result here was that, although renters may not read their leases *before* signing them, they *are* likely to do so when a problem arises in which their legal rights are implicated.<sup>71</sup> Her results indicate that approximately half of the survey respondents who experienced problems as a tenant consulted their leases, and only 7% of those who read their leases also consulted a lawyer.<sup>72</sup> As a result, many people's understanding of their legal rights once a problem arises depends on whether they recognize whether the terms of their leases are invalid.

The second part of the questionnaire directly tested the survey respondents' legal beliefs. The survey presented each respondent with one of five hypothetical lease clauses that are either misleading or unenforceable under Massachusetts landlord-tenant law: (1) a clause assigning all maintenance responsibility to the tenant; (2) a clause granting to the landlord attorney's fees incurred in enforcing the lease; (3) a clause stating that the landlord will return the security deposit (less any deductions) but does not provide that the landlord will pay interest or keep the deposit in a separate account; (4) a clause that conditions the landlord's covenant of quiet enjoyment on the tenant's payment of rent; and (5) a clause that disclaims the landlord's liability for injuries on the premises resulting from the landlord's negligence.<sup>73</sup> In each of the five cases, Massachusetts law sets a mandatory rule, not a default rule.<sup>74</sup> So, for example, the requirement under Massachusetts law that landlords repay a security deposit with interest cannot be altered by contract. Accordingly, each of the five clauses misrepresented the law that governs every landlord-tenant relationship, including those governed by a lease containing the hypothetical misleading or unenforceable clause. The survey then asked the respondent a question that targeted their beliefs about the legal issue addressed by the unenforceable clause. For example, a respondent presented with the clause purporting to assign all maintenance and repair responsibility to the tenant was asked: "According to the law, who do you believe is responsible to make repairs in the apartment?"<sup>75</sup>

Across the five scenarios, an average of almost 80% of the respondents answered incorrectly.<sup>76</sup> That is, almost 80% of the survey respondents had false beliefs about whether the invalid lease clause was legally enforceable. For example, 86% of survey respondents who were presented with a clause

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70. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

71. Furth-Matzkin, *supra* note 2, at 11, 37.

72. *Id.* at 7. Larger portions searched the web (24%) or consulted a friend or family member (33%) in addition to reading their leases. *Id.*

73. *Id.* at 35–36, 90–93.

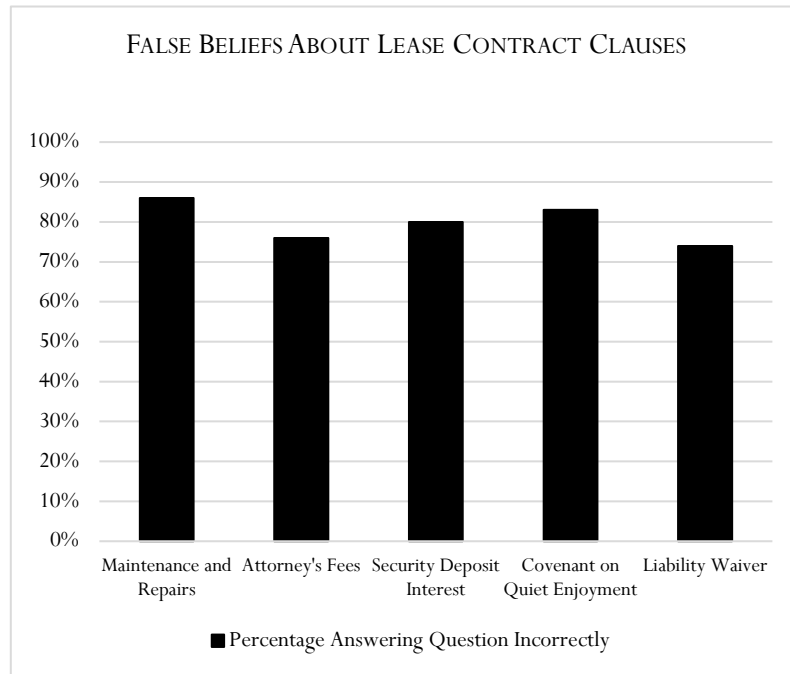
74. *Id.* at 3–4.

75. *Id.* at 36.

76. *Id.* at 33–39.

purporting to assign the responsibility for maintenance and repairs to the tenant believed, “according to the law,” the tenant was mostly or entirely responsible for maintenance and repairs—even though Massachusetts law assigns that responsibility to the landlord.<sup>77</sup> The following chart summarizes the results of Furth-Matzkin’s survey:

TABLE 4



As Furth-Matzkin concluded, “The vast majority of [the sampled] leases . . . overstat[e] the tenant’s obligations and the landlord’s corresponding rights and remedies” in ways that lead tenants to underestimate their own rights.<sup>78</sup> Moreover, if landlords “misrepresent the law” by including unenforceable clauses that convey false information about the relevant legal rule, “most tenants are likely to rely on the selective information provided to them in the contract rather than obtaining information independently on the assumption that their leases accurately represent the law.”<sup>79</sup> Accordingly, the inclusion of such clauses “is likely to generate misperceptions concerning

77. *Id.* at 38.

78. *Id.* at 40.

79. *Id.* at 41.

tenants' rights and duties, consequently affecting tenants and their behavior in detrimental ways."<sup>80</sup>

### C. Remedies

Finally, a new empirical study presented here for the first time shows that many people have false beliefs about contract remedies: It asked whether monetary compensation or specific performance is the standard remedy for breach of contract. Prior empirical research showed that most people think breach is morally wrong and the remedy for breach should reflect the moral culpability of the breaching party.<sup>81</sup> Moreover, most people prefer performance over fully compensatory damages.<sup>82</sup> Contract doctrine, however, reflects a strong preference for damages over specific performance.<sup>83</sup> A key empirical question the literature does not address is whether non-lawyers think contract law's doctrine of remedies matches their preferences and moral intuitions in favor of specific performance. The empirical study presented here is the first to address that question.<sup>84</sup>

#### 1. Methodology

The study was conducted with a professional polling firm<sup>85</sup> to survey 1,003 respondents that formed a representative sample of the American adult population.<sup>86</sup> The survey sample was drawn from a probability-based panel

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80. *Id.*

81. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405, 405 (2009).

82. *Id.* at 420; *see also* Tess Wilkinson-Ryan & David Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1013 (2010) ("[P]eople seem to prefer performance and disdain money damages as a remedy, even when the level of damages appears to be fully or even overly compensatory from an objective standpoint.").

83. RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (AM. LAW INST. 1981) ("Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.").

84. Wilkinson-Ryan performed some studies on this issue, but she has not published her full results. *See* Tess Wilkinson-Ryan, *Fault in Contracts: A Psychological Approach*, in *FAULT IN AMERICAN CONTRACT LAW* 289, 298 (Omri Ben-Shahar & Ariel Porat eds., 2010).

85. The survey was conducted by Ipsos using the web-enabled KnowledgePanel®, a probability-based panel designed to be representative of the U.S. general population, not just the online population. Initially, participants are chosen scientifically by a random selection of telephone numbers and residential addresses. Persons in selected households are then invited by telephone or by mail to participate in the web-enabled KnowledgePanel®. For those who agree to participate, but do not already have Internet access, Ipsos provides at no cost a laptop and ISP connection. People who already have computers and Internet service are permitted to participate using their own equipment. Panelists then receive unique log-in information for accessing surveys online, and then are sent emails throughout each month inviting them to participate in research.

86. The study was conducted online in Ipsos's Omnibus survey. It consisted of 1,003 nationally representative interviews conducted between September 15 and September 17, 2017 among adults aged 18+. The margin of error is +/-3 percentage points. A full description of the study's

of approximately 55,000 adults who were recruited through address-based sampling. This methodology built and maintained the panel each quarter by contacting randomly selected individuals whose residential addresses appeared in the most recent Delivery Sequence File of the U.S. Postal Service, which lists every residential delivery address in the United States. The panel's sample frame thus includes approximately 97% of the American population. All recruitment contact, both via mail and via telephone, was conducted in either English or Spanish as needed to ensure representativeness across those language populations. All panel members were recruited through this method; in contrast to opt-in survey methodologies, no one could volunteer to participate in the panel.<sup>87</sup> Once individuals were recruited into the panel, those that did not have internet access were provided with a free tablet computer and an internet connection in order to complete surveys. This methodology ensured that the panel sampled from difficult-to-reach populations, including households who do not have a landline (either because they have only a cell phone or do not have a telephone at all), and households that do not have internet access. The resulting panel and survey sample were then weighted to ensure representativeness for gender, age, race/ethnicity, education level, census region, household income, and several other geodemographic variables.

The survey presented each respondent with a vignette and then asked four questions.<sup>88</sup> First, the respondent was randomly assigned to one of two conditions: the Profit condition and the Avoid Loss condition. The survey provided each respondent with one of two variations of a vignette in which the respondent signed a contract with a contractor named Jones to build a deck for the respondent's house in time for the respondent's family reunion over Labor Day. In the Profit scenario, Jones breached the contract in order to complete a more profitable job building a deck for a different homeowner. In the Avoid Loss scenario, Jones breached the contract because the price of building materials went up, and so he would lose money if he completed the job. Both versions of the vignette told the respondent she sued Jones in court for breach of contract and won.

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methodology, including a description of statistical methods used in the analysis of the results, and the raw data is on file with the author.

87. As the American Association for Public Opinion Research explained, "One serious consequence" for non-probability-based, opt-in panels "is that only certain types of people may choose to opt into the survey and they may be different than those who do not in ways that could potentially bias the final results." *Sampling Methods for Political Polling*, AM. ASS'N FOR PUB. OPINION RES., <http://www.aapor.org/Education-Resources/Election-Polling-Resources/Sampling-Methods-for-Political-Polling.aspx> (last visited Oct. 5, 2018). As a result, it recommends that "[r]esearchers should avoid nonprobability online panels when one of the research objectives is to accurately estimate population values." Reg Baker et al., *Research Synthesis: AAPOR Report on Online Panels*, 74 PUB. OPINION Q. 711, 714 (2010).

88. The study instrument, including the full text of the two variations of the vignettes, appears in the Appendix.

This dual-vignette design allowed the study to determine whether people's beliefs about the legal remedy for breach vary between cases where the defendant breached to profit and cases where the defendant breached to avoid a loss.<sup>89</sup> Prior empirical research showed that people think breaching to profit is morally worse than breaching to avoid a loss.<sup>90</sup> The hypothesis for the experiment was that people assume the law of contract remedies tracks their moral intuitions about the wrongness of breach, and, therefore, a higher percentage of respondents believe specific performance is the legal remedy in the Profit scenario than in the Avoid Loss scenario.

After reading the vignette, the survey asked each respondent a series of questions. These questions probed respondents' beliefs about the law of contract remedies in two ways: by asking them (1) to predict the legal outcome of a case arising in the specific factual context presented by the vignette and (2) their general belief about what remedy a court typically orders in a contract case. For both vignettes, the survey asked respondents the substantive questions and then asked on a separate screen how confident they were in their answer to the substantive questions on a 4-level Likert scale.<sup>91</sup>

The four questions were:

- (1) When a court rules in favor of the plaintiff—that's you, the party suing in court—it typically awards a "remedy" that orders the defendant to pay money or to do something. Of the following two options, which remedy do you think the court will award to you in your case against Jones?
  - a. The court will order Jones to build the deck for you by Labor Day in exchange for the agreed-upon price.
  - b. The court will order Jones to refund your \$5,000 and to pay you an additional amount of money to compensate for not having the deck in time for the family reunion.
- (2) How confident are you in your answer about which remedy the court will award you in your case against Jones?
  - a. Very confident.
  - b. Somewhat confident.
  - c. Slightly confident.
  - d. Not at all confident.
- (3) In general, in breach of contract cases, what do you think the court would award the plaintiff if he or she wins?

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89. The random assignment of respondents to the Profit vignette or the Avoid Loss vignette, combined with statistical weighting, ensured that each group remained representative of the total population.

90. Wilkinson-Ryan & Baron, *supra* note 81, at 419–23.

91. A Likert scale question asks a subject to indicate their response on a spectrum. See I. Elaine Allen & Christopher A. Seaman, Column, *Likert Scales and Data Analyses*, QUALITY PROGRESS, July 2007, <http://rube.asq.org/quality-progress/2007/07/statistics/likert-scales-and-data-analyses.html> (explaining the use of Likert scales in survey research).

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- a. The court would order the defendant to do what he/she agreed to do in the contract.
  - b. The court would order the defendant to pay monetary compensation to the plaintiff.
- (4) How confident are you in your answer about which remedy the court typically awards a plaintiff in a breach of contract case?
- a. Very confident.
  - b. Somewhat confident.
  - c. Slightly confident.
  - d. Not at all confident.<sup>92</sup>

## 2. Results

The survey results show that many people falsely believe specific performance is the typical remedy for breach of contract. The results further show that people with less education or lower household income are significantly more likely to have false beliefs about contract remedies than people with more education or higher household income. Women are also significantly more likely than men to falsely believe that specific performance is the remedy for breach. Moreover, the results reveal that in addition to those with false beliefs about contract remedies, a substantial portion of those who answered correctly have little or no confidence in their response. This latter group might represent those who are ignorant of the law but guessed correctly when asked.

### a. General Contract Results

Based on responses to the questions about the general contract case, the survey results indicate a substantial segment of the population has false beliefs about contract remedies and a further substantial segment is legally ignorant. In response to question three, 31.03% of all respondents said the typical remedy for breach of contract is specific performance.<sup>93</sup> In addition, another 18.15% of all respondents correctly answered that the typical remedy is damages but had little or no confidence in their answer.<sup>94</sup> Together, 49.18% of all respondents either reported false beliefs about the typical contract remedy or demonstrated ignorance of the legal rule. The overall population is, therefore, almost exactly divided between those who know damages

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92. See Appendix.

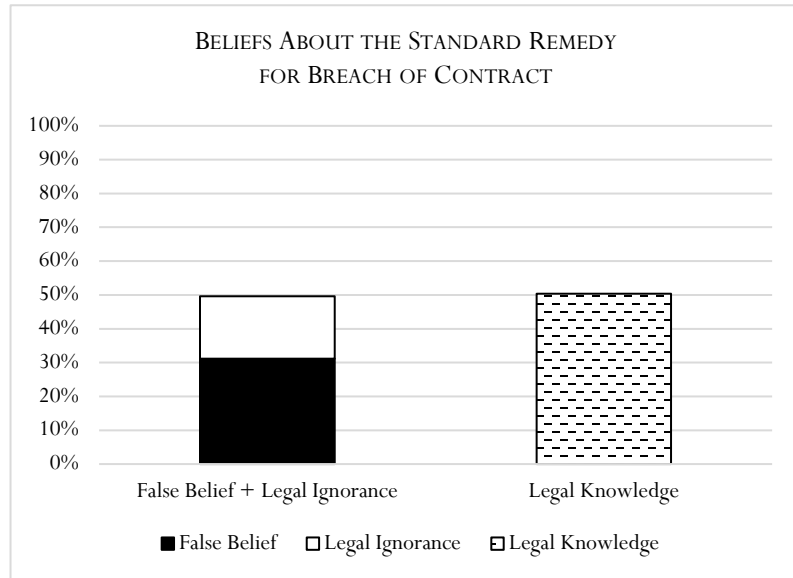
93. Three hundred and eight respondents answered that the court would order the defendant to perform what they had agreed to do in the contract, 680 answered that the court would order the defendant to pay money to compensate the plaintiff, and 14 declined to answer the question.

94. Of the 608 respondents who answered that damages are the typical remedy for breach, 41 said they were not at all confident in their answer and 141 said they were slightly confident in their answer.



is the standard remedy for breach of contract and those who do not. The following chart summarizes those results<sup>95</sup>:

TABLE 5

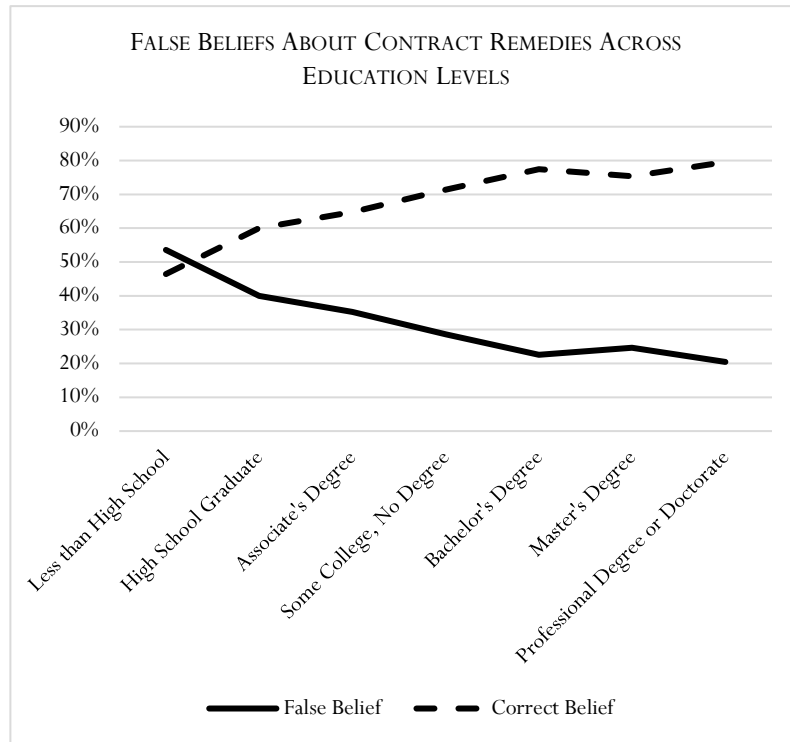


The prevalence of false beliefs and legal ignorance about contract remedies is strongly correlated with educational level. Over half (53.57%) of respondents who did not graduate from high school falsely believed the typical remedy for breach is specific performance. The next chart shows the trend of false beliefs alone (*not* including those who answered correctly with little or no confidence) across education levels<sup>96</sup>:

95. The margin of error for false legal belief was +/- 2.9%. The margin of error for legal knowledge was +/-3.1%.

96. A regression of correct belief about contract remedies on education level yielded a positive association of 5.23%, statistically significant at the .001 level.

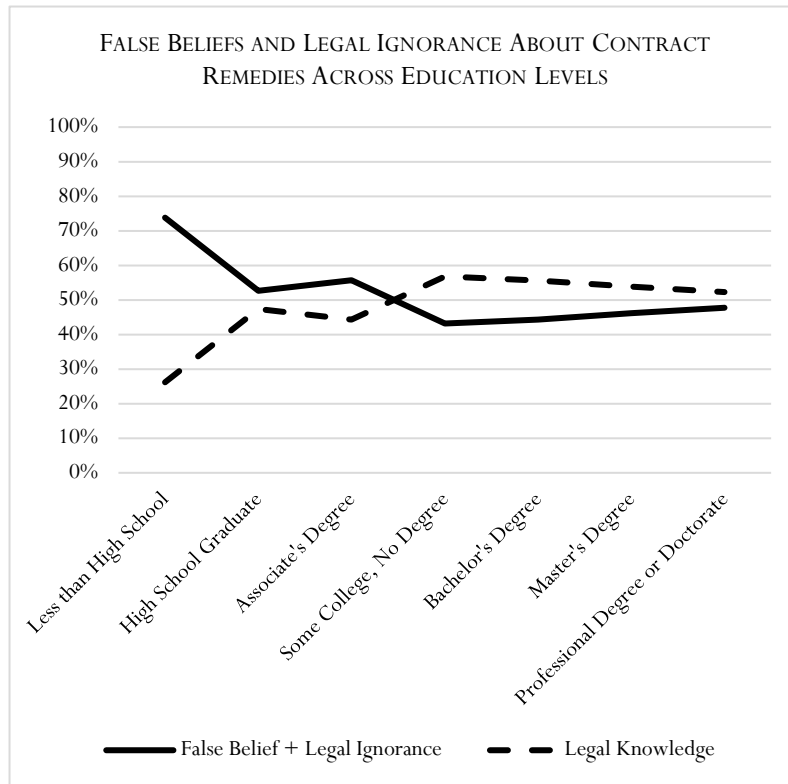
TABLE 6



The educational gap persists when we consider both those who had false beliefs and those who answered correctly with little or no confidence, but it narrows at the highest education levels. Almost three-quarters (73.81%) of respondents who did not graduate from high school falsely believed the standard remedy for breach is specific performance or reported little or no confidence in their correct answer. The next chart shows the trend of false beliefs and those who answered correctly with little or no confidence across education levels<sup>97</sup>:

97. A regression of legal knowledge about contract remedies on education level yielded a positive association of 3.70%, statistically significant at the .001 level.

TABLE 7

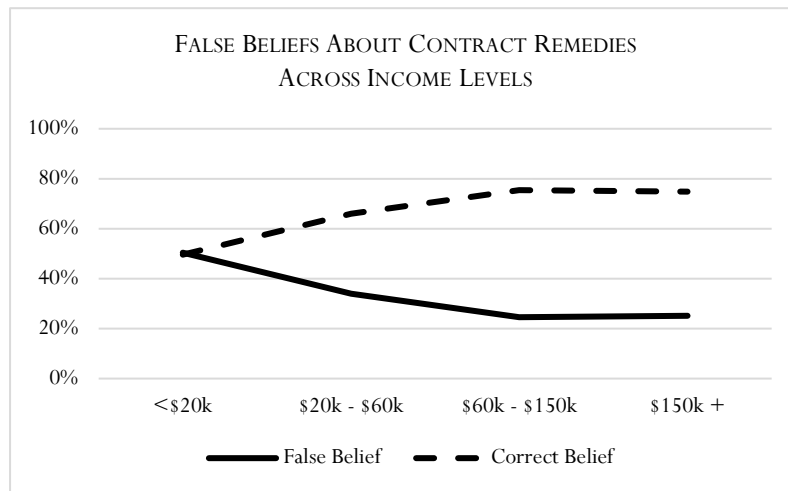


The narrowing at the top end of the educational spectrum is driven by the fact that those with graduate degrees are more likely than others to have correct beliefs about contract remedies but with low confidence, while those with moderate levels of education—less than a graduate degree but more than a high school diploma—are more likely to have high confidence in their incorrect answer. That finding may be the result of the Dunning-Kruger effect, a cognitive bias by which those with modest levels of ability systematically overestimate themselves in their self-assessments.<sup>98</sup> Nonetheless, even taking into account confidence levels, those with the least education were still far more likely to report false beliefs.

98. See Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1122 (1999); see also PLATO & ARISTOPHANES, *FOUR TEXTS ON SOCRATES* para. 21d (Thomas G. West & Grace Starry West trans., rev. ed. 1998) (“For my part, as I went away, I reassured with regard to myself: ‘I am wiser than this human being. For probably neither of us knows anything noble and good, but he supposes he knows something when he does not know, while I, just as I do not know, do not suppose that I do. I am likely to be a little bit wiser than he in this very thing: that whatever I do not know, I do not even suppose I know.’”).

False beliefs about contract remedies also strongly correlate with income level. Just over half of those with household incomes below \$20,000 reported false beliefs about the remedy for breach. The level of false beliefs dropped to below 25% for those with incomes above \$150,000. The next chart shows the relationship between household income level and false beliefs<sup>99</sup>:

TABLE 8

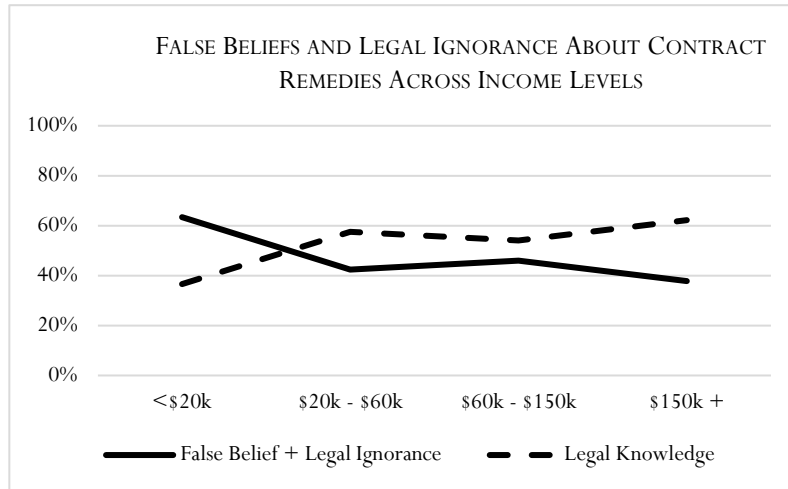


That trend persists when we also consider legal ignorance across income levels. Almost two-thirds (63.4%) of those whose households make \$20,000 or less per year either falsely believed specific performance is the typical remedy for breach or had little or no confidence in their correct answer. The next chart shows the trend of false beliefs and those who answered correctly with little or no confidence across household income levels<sup>100</sup>:

99. A regression of correct belief about contract remedies on income level yielded a positive association of 8.66%, statistically significant at the .001 level.

100. A regression of legal knowledge about contract remedies on income level yielded a positive association of 7.38%, statistically significant at the .001 level. Interestingly, the trend line would be much starker if we eliminated respondents with incomes above \$175,000 a year. The very wealthy appear to be significantly more likely than the moderately wealthy to falsely believe specific performance is the remedy for breach. Indeed, almost half (44.8%) of those with household incomes over \$250,000 a year had that false belief. The only other income strata in which false beliefs were that frequent was the very poor, with income levels below \$20,000 a year. As with any subgroup analysis, this could simply be the result of random variation in the data. But the stark and consistent trend upward beginning at incomes of \$175,000 suggests the intriguing possibility of a deeper social explanation—the very rich generally expect to get what they pay for without exception.

TABLE 9

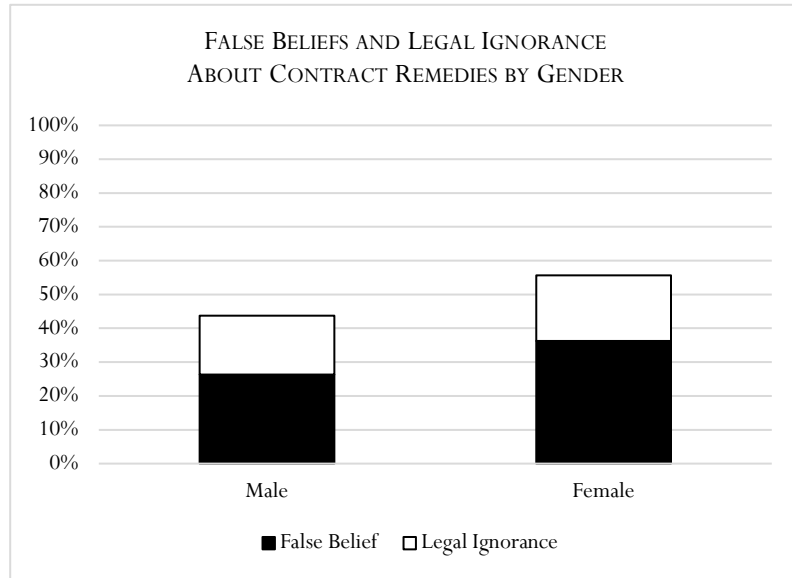


Finally, false beliefs and legal ignorance of contract remedies correlates with gender. Regarding false beliefs, 36.23% of women falsely believed specific performance is the standard remedy, as opposed to 26.34% of men.<sup>101</sup> Regarding legal ignorance, 55.69% of women either answered incorrectly or had little or no confidence in their correct answer, as opposed to 43.76% of men.<sup>102</sup> The next chart shows the relationship between false beliefs and gender:

101. These results were statistically significant at the .001 level.

102. These results were statistically significant at the .001 level.

TABLE 10



### *b. Vignette Results*

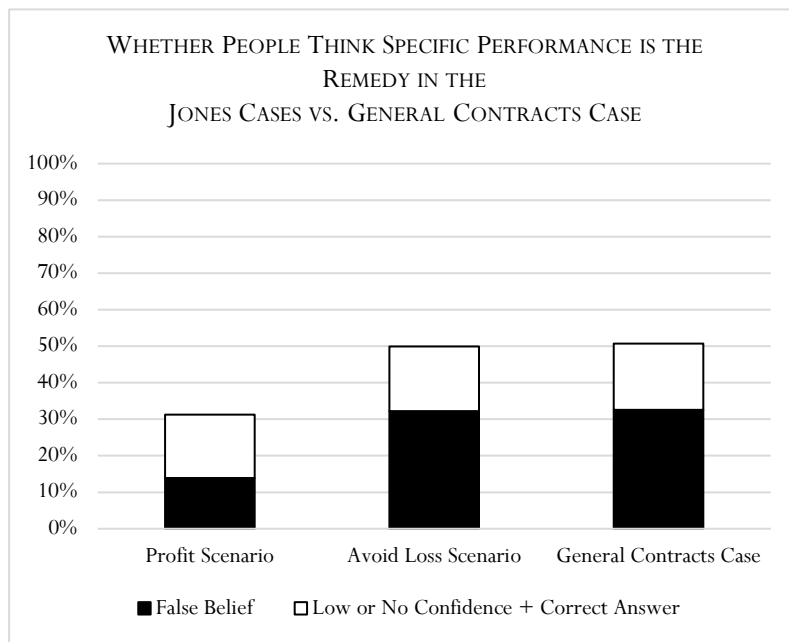
The survey returned much more surprising results for the questions regarding the vignettes about Jones. The results were surprising in two respects. First, *fewer* respondents thought specific performance was the remedy in the vignette cases than in the general contracts case. One would anticipate the opposite result. Both versions of the vignette present factual scenarios that one would expect to elicit greater moral intuitions in favor of specific performance than in the general case—the contract is framed as time-sensitive because of the upcoming family reunion over Labor Day, and most respondents would likely find performance of the contract personally important. Nonetheless, aggregating across the Profit and Avoid Loss scenarios, 23.09% of respondents thought specific performance was the remedy for breach in the case against Jones, as opposed to 31.03% who thought specific performance was the remedy in the general breach of contract case.<sup>103</sup> That difference persists but narrows if we add those who had little or no confidence in their correct answer: Again aggregating across the Profit and Avoid Loss scenarios, 43.47% of respondents either falsely believed specific performance was the remedy in the case against Jones or had little or no confidence

103. Of the total sample, aggregating the results across the two vignettes involving Jones, 227 respondents thought specific performance was the remedy, 756 respondents thought damages was the remedy, and 19 did not answer.

in their correct answer, as opposed to 49.18% of respondents who gave those responses for the question asking about the general contracts case.

Second, although the hypothesis was that more people would think specific performance was the remedy in the Profit scenario than in the Avoid Loss scenario,<sup>104</sup> the survey results show precisely the opposite. Respondents were substantially *less* likely to think specific performance was the remedy when Jones breached to avoid a loss than they were to think it was the remedy in the case when Jones breached to profit more. Only 13.88% of respondents who saw the Profit scenario thought the remedy in their case against Jones was specific performance. By contrast, 32.25% of respondents who saw the Avoid Loss scenario thought the court would award them specific performance, approximately the same as the 31.03% of respondents who thought specific performance is the remedy in the general contracts case. The following chart summarizes these results<sup>105</sup>:

TABLE 11



104. See *supra* note 90 and accompanying text (discussing empirical findings that most people find breach-to-profit more morally objectionable than breach-to-avoid-loss).

105. The difference in false beliefs between the Avoid Loss and Profit scenarios was statistically significant at the .001 level. The difference in false beliefs plus legal ignorance between the Avoid Loss and Profit scenarios was statistically significant at the .001 level.

Overall, these results show that a substantial portion of people falsely believe specific performance is the typical remedy for breach and significantly more either have false beliefs or do not know the typical remedy for breach. The results also show, as we might expect, that false beliefs about contract remedies, along with ignorance of contract remedies, tracks low education levels, low household income levels, and gender.

## II. AUTONOMY THEORIES OF CONTRACT IN THE SHADOW OF ERROR

A critical question that flows from these patterns of pervasive false beliefs and legal ignorance about contract law is whether they undermine the justification for contract doctrine offered by the traditional theories of contract. That such a question arises reflects a novel implication of the error theory of contract compared to error theories of other discourses. Error theories of morality,<sup>106</sup> mathematics,<sup>107</sup> and color<sup>108</sup> claim people have false beliefs about an aspect of the world that is typically understood to be outside of human creation and control. What mathematical facts there are or color properties physical objects have does not depend on what people believe. So too with moral facts, at least according to the traditional moral realist views to which the error theory of morality is directly opposed.<sup>109</sup> Law, by contrast, is a human practice that calls for justification both in its existence and in its specific content. For any justificatory theory of contract law, the rationale for contract doctrine may rely on the beliefs and attitudes of the parties to which it applies. Whether or not a particular legal rule is efficient or reflects the parties' actual promises, for example, plausibly depends on whether those parties have accurate beliefs about that legal rule. As a result, we must examine whether and how false beliefs and legal ignorance about contract doctrine affect, or even undermine, the existing doctrine's justification.

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106. See, e.g., JOYCE, *supra* note 14.

107. See generally HARTRY FIELD, REALISM, MATHEMATICS, AND MODALITY (1989); HARTRY FIELD, SCIENCE WITHOUT NUMBERS (1980); HARTRY FIELD, TRUTH AND THE ABSENCE OF FACT (2001). Philosophers of mathematics typically refer to such theories as "fictionalist" accounts. See, e.g., Gideon Rosen, *Nominalism, Naturalism, Epistemic Relativism*, 15 PHIL. PERSP. 69, 75–76 (2001).

108. See generally Paul A. Boghossian & J. David Velleman, *Colour as a Secondary Quality*, 98 MIND 81 (1989); Paul A. Boghossian & J. David Velleman, *Physicalist Theories of Color*, 100 PHIL. REV. 67 (1991).

109. The moral case is more complicated than the mathematical case or color case. Moral realist views claim moral facts exist independently of human beliefs or attitudes. Various moral relativisms or subjectivisms, by contrast, hold that moral truths depend in some way on people's attitudes. See Seligman, *supra* note 14, at 12–13. The case of moral constructivisms, like the views held by Tim Scanlon and Christine Korsgaard, is more complicated still—philosophers debate whether those views are best understood as depending on actual and hypothetical human beliefs and attitudes. *Id.* at 35–37.



This Part argues that pervasive false beliefs about contract doctrine undermine promise- and consent-based theories' justifications of existing contract doctrine.<sup>110</sup> Because those theories, typically referred to as "autonomy" theories,<sup>111</sup> ground the normative justification for contract law in people's actual promise or consent, people's false beliefs about the substance of what they are agreeing to—and whether they are agreeing at all—threaten to topple the viability of autonomy theories entirely.

Section II.A advances the core challenge against the viability of autonomy theories arising from false beliefs and legal ignorance. It addresses how false beliefs about formation, the enforceability of unlawful terms, and the default remedy for breach each undermine the theories' claim that contract doctrine is justified on the basis of people's voluntary normative commitment. False beliefs about the default remedy for breach, in particular, pose a fundamental and widespread challenge to autonomy theorists' justification of contract doctrine.

Sections II.B and II.C examine whether autonomy theorists' existing approaches to the justification of default rules can succeed in light of pervasive false beliefs about the default remedy for breach. Section II.B argues that pervasive false beliefs about contract doctrine defeats Barnett's consent-by-reference approach to justifying background and default rules. Section II.C argues that an appeal to secondary norms to justify default rules, considered in light of pervasive false beliefs about contract doctrine, amounts to abandoning autonomy as the primary normative basis for contract law. The conclusion of this argument is that appeal to individual autonomy cannot justify existing contract doctrine in a substantial number of core cases because contract doctrine conflicts with, rather than respects, the freely expressed choices of many contracting parties. The moral case for an autonomy-based justification of existing contract law is, accordingly, weak, and so the primary normative basis of contract doctrine must be found elsewhere.

#### *A. The Failure of Autonomy Theories of Contract in Light of False Beliefs About Contract Doctrine*

Autonomy theories of contract, the primary philosophical alternatives to law and economics consequentialist theories,<sup>112</sup> claim that the moral foundation of contract law is grounded in the normative capacity of individuals to bind themselves through an exercise of will. Fried and others believe that

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110. Law and economics based consequentialist theories of contract, for their part, must account for people's false beliefs about contract doctrine in their analysis of how people will respond to the incentives that contract doctrine creates. That analysis may, in turn, recommend that contract doctrine and regulation of contracts should be reformed to better promote efficient outcomes in light of those false beliefs. That analysis, which mirrors existing behavioral law and economics analyses of bounded rationality, is the subject of a future project.

111. See Kraus, *supra* note 16, at 688.

112. See *id.* at 687–90.

normative capacity is expressed through making a promise;<sup>113</sup> Barnett views it as consenting to be legally bound;<sup>114</sup> Professor Peter Benson recognizes it as forming a present intention to transfer a right.<sup>115</sup> These varying autonomy theories are unified in their conception of contract law as an expression of self-determination. For all autonomy theories, contract doctrine must “respect . . . a person’s autonomy [by] respect[ing] . . . his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him.”<sup>116</sup> As Fried put it, contract law’s enforcement of voluntary normative commitments is “a fair implication of liberal individualism” because it “carries to its natural conclusion the liberal premise that individuals have rights” by “respect[ing] the dispositions individuals make of their rights.”<sup>117</sup> Accordingly, a core normative challenge for autonomy theories of contract is to reconcile contract doctrine’s coercive character—it must hold people to contracts, sometimes over their objections—with its moral foundation in the freedom of the parties to which it applies.

Autonomy theories of contract easily meet that challenge with respect to a contract’s explicit terms of which the parties are aware. The explicit terms of the contract, at least those known to and understood by the parties,<sup>118</sup> form the core content of a contracting party’s normative commitment, whether that commitment is thought of as a promise, consent, or something else. For example, Fried’s “promise principle,” according to “which persons may impose on themselves obligations where none existed before,” provides a basis for holding parties to the explicit terms of their contracts because a contract “is first of all a promise,” and, therefore, “the contract must be kept because a promise must be kept.”<sup>119</sup> In other words, the law should enforce

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113. See FRIED, *supra* note 15, at 1 (“The promise principle . . . is the moral basis of contract law.”); *id.* at 40 (stating that contract is “grounded in the primitive moral institution of promising”); see also Charles Fried, *The Convergence of Contract and Promise*, 120 HARV. L. REV. F. 1, 3 (2007) (“[C]ontract [is] rooted in, and underwritten by, the morality of promising . . . .”); Kraus, *supra* note 15, at 1607–08; Shiffrin, *supra* note 15, at 709.

114. See Barnett, *supra* note 15, at 319; Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK L. REV. 647, 647 (2012) [hereinafter Barnett, *Contract Is Not Promise*].

115. See, e.g., Peter Benson, *The Unity of Contract Law*, in THE THEORY OF CONTRACT LAW 169, 191–95 (2001).

116. Kraus, *supra* note 15, at 1608, 1648 (citing 3 JOEL FEINBURG, THE MORAL LIMITS OF THE CRIMINAL LAW 68 (1986)); see also FRIED, *supra* note 15, at 57 (“The moral force behind contract as promise is autonomy: the parties are bound to their contract because they have chosen to be.”).

117. Fried, *supra* note 113, at 2; Charles Fried, *The Ambitions of Contract as Promise*, in THE PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 21 (2014) (“[P]romissory obligation . . . ha[s] its roots in [the] deeper moral soil” of “trust and respect for persons”).

118. This qualification recognizes the challenges that boilerplate terms, which are often unknown to the less sophisticated party who does not read them, pose to autonomy-based theories of contract. Section III.B addresses Barnett’s approach to unknown terms and its potential application to false beliefs.

119. FRIED, *supra* note 15, at 1, 17.

contractual promises because it should respect individuals' moral capacity to bind themselves through their promises, the scope of which includes at the very least the known and understood explicit terms of the contract that embodies the party's promise. If the law failed to enforce a contract, with a scope at least as broad as those explicit terms, it would fail to respect our moral agency and the resulting capacity to make binding promises. Barnett's view that contract is based on consent to be legally bound has a similar moral basis: "To consent to a contract is to commit to be legally responsible for nonperformance of a promise."<sup>120</sup> And like the scope of a promise, the scope of that consent-based normative commitment is defined, at the very least, by the explicit terms of the contract which are known to and understood by the parties. Accordingly, on either Fried or Barnett's version of the autonomy theory of contract, the moral justification for holding people to the express terms of their contracts, even over their objections, is based on their free and voluntary assumption of that obligation.

False beliefs and legal ignorance about contract doctrine complicate that justificatory story considerably when it is extended beyond the explicit terms of a contract. Contract doctrine provides the rules that govern the exchange and supplement the explicit terms of the contract. As Professor Richard Craswell explained, people's normative commitment to the explicit terms of their contracts does not necessarily entail that they promised or consented to the governing rules, whether those rules are unalterable background rules or default rules that the parties can modify by explicit agreement.<sup>121</sup> In the terminology that Craswell used, whenever the parties do not address a particular issue in the explicit terms of the contract (either because they attempted to but failed to resolve the issue or because they simply neglected to consider it), the resulting contract has a "gap" that must be filled.<sup>122</sup> Contract doctrine fills those gaps by providing background and default rules that govern, for example, interpretation, formation, remedies, excuse, and so on. Those rules, in effect, provide implicit, legally implied terms to the contract that remain unstated on the contract's face. For example, consider the default rule in the

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120. Barnett, *Contract Is Not Promise*, *supra* note 114, at 655 (emphasis omitted). Barnett distinguishes his view from Fried's promise theory by emphasizing that his conception of consent "is a commitment in addition to whatever moral commitment inheres in a promise." *Id.*; see also Barnett, *supra* note 15, at 270.

121. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489-90 (1989); Kraus, *supra* note 16, at 715-30. Autonomy theorists offered responses to Craswell's point, which I address below. Craswell's primary point was that, because background and default rules by definition fall outside of the scope of the explicit terms of the contract, and, therefore, outside of what he understood to be the scope of the normative commitment of the parties, the autonomy theory of contract could tell us nothing about what the background and default rules ought to be. Craswell, *supra* note 121, at 490. Indeed, he argued, because parties can contract around default rules, an autonomy theory of contract is consistent with *any* set of default rules. *Id.* That, in his view, was a serious theoretical shortcoming of the theory that left us no option but look to other normative foundations for background and default rules. *Id.*

122. *Id.*

Uniform Commercial Code (“UCC”) that performance is excused when it becomes impracticable due to the failure of a basic assumption of the contract or as a result of good faith compliance with a governmental regulation.<sup>123</sup> When a contract does not, by its express terms, address the conditions under which performance is excused, the default rule plays the role of an implicit, legally implied term: Its legal effect is the same as if it were included as an express term in the contract.<sup>124</sup> Pervasive false beliefs about contract doctrine are thus false beliefs about those implicit, legally implied terms in contracts.

If people are mistaken about the substance of the implicit, legally implied terms in a contract, then they have not agreed to the contract as it would be legally enforced. Just as it would be contrary to the promise or consent of a party to hold people to doctrinally-imposed terms that contradicted the express terms of the contract,<sup>125</sup> it would be contrary to their promise or consent to enforce implicit, legally implied terms that contradict what people thought they agreed to. That is true even though an issue governed by a background or default rule was not addressed in the express terms of the contract—if a default rule implies an implicit term into a gap in the contract, that rule does so contrary to the consent of a party who believed the rule was different.

The literature addressed a corresponding problem in the context of unread boilerplate terms.<sup>126</sup> When people do not read boilerplate terms and are, therefore, unaware of their content, then at least at first glance they have not promised or consented to the boilerplate terms. Autonomy theorists thus face

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123. U.C.C. § 2-615(a) (AM. LAW INST. 2014). (“Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.”).

124. See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (explaining that default rules provide gap-filling implicit contract terms).

125. That is not to say such reformation is never justified, as when a court finds that the written expression of the contract does not reflect what the parties actually intended. See RESTATEMENT (SECOND) OF CONTRACTS §§ 155 (AM. LAW INST. 1981). Nonetheless, absent a more complicated story (which scholars attempted to offer at least in the case of unconscionability), the justification for departure from the express terms to which the parties agreed is typically not based on the promise or consent of the party against whom it is enforced. See Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 221–30 (2000).

126. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631, 632 (1943); Karl Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 737 (1931); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983). Economically oriented contract theorists have argued for decades, by contrast, that criticisms of adhesion contracts with boilerplate terms are overblown. See, e.g., Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 933–34 (2006) (arguing that although traditional arguments against boilerplate are “exaggerate[d],” it can result in inefficient outcomes due to, among other things, anticompetitive conduct). The problem of legal ignorance has implications for the proper response to the problem of boilerplate. See *infra* Section III.C.

a significant challenge in explaining how contract doctrine is morally justified in holding people to those terms.<sup>127</sup> Similarly, at least at first glance, autonomy theorists face a significant challenge in explaining how contract doctrine itself is morally justified when people are mistaken or ignorant about that doctrine because the application of contract doctrine amounts to holding people to implicit, legally implied terms they have false beliefs about and, therefore, to which they did not promise or consent. Accordingly, when a court enforces a contract against a party who was mistaken or ignorant of the doctrinal rule governing the issue in dispute, it does so without the moral basis of the party's promise or consent.

Consider first false beliefs about contract formation. Contract doctrine establishes background rules that govern which statements and conduct suffice to form a contract. The background rules of formation do not typically appear as explicit terms in a contract, so those rules apply to the contract as implicit, legally implied terms. Accordingly, if a party has false beliefs about the substance of those implicit, legally implied terms governing formation, they have not promised or consented to them. Recall that people's false beliefs about the doctrine of formation divide into two categories: false positives, in which a party falsely believes the contract is formed when by law it is not; and false negatives, in which a party falsely believes the contract is *not* formed when by law it is.<sup>128</sup> The problem false negatives pose for an autonomy theory of contract is clear: If someone believes they have not yet entered a contract, then they have not yet made whatever normative commitment the autonomy theory requires in order to justify holding people to a contract. This issue is related to but distinct from the much-discussed problem of contract doctrine's focus on objective rather than subjective assent.<sup>129</sup> The problem in false positive formation cases is not simply that subjective assent may be lacking, though that is certainly true. The problem runs deeper. If, for example, a person falsely believes one cannot create a legally binding agreement without a written signature, then they have affirmative false beliefs about the *objective* acts required to form the contract. Because they do not think they have done what is required to reach an agreement, the doctrine

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127. As with the challenge posed by default rules, autonomy theorists offered theoretically similar attempts to answer the challenge posed by boilerplate. See, e.g., Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 627 (2002). The alternative approach is to suggest that boilerplate terms should often be unenforceable. See, e.g., RADIN, *supra* note 70; Robin B. Kar & Margaret J. Radin, *Pseudo-Contract & Shared Meaning Analysis*, 132 *HARV. L. REV.* (forthcoming 2019).

128. See *supra* note 42 and accompanying text.

129. For example, Barnett claimed that one of the principal advantages of his consent theory over Fried's promise theory is that, in his view, it explains why contract doctrine adopts an objective rather than subjective approach. See, e.g., Barnett, *supra* note 15, at 270. Fried and others dispute whether Barnett's theory actually explains contract doctrine, or if it too is committed to a subjective approach. See, e.g., Charles Fried, *Contract as Promise Thirty Years On*, 45 *SUFFOLK L. REV.* 961, 973-74, 974 n.50 (2012).

that holds them to the contract cannot be justified on the basis of their autonomy, even if the autonomy theory adopts an objective approach to assent.

False positive formation cases present a subtler problem for autonomy theories. In such cases, because people's belief that they are in a binding contract is false, contract doctrine would not hold them to a contract to which they had not promised or consented—if a contract is not (yet) formed, contract doctrine will not hold them to anything at all. As a result, it may seem that false positive formation cases pose no problem for autonomy theories. Because contract doctrine is not forcing the party with mistaken beliefs to do anything, there is nothing that requires normative justification. There is, nonetheless, a sense in which contract doctrine's divergence from people's beliefs in false positive cases undermines those parties' autonomy outside the context of a court's coercive judgment.

People contract in the shadow of the law. Law is a human institution embedded in a broader society that must be normatively justified both with respect to what courts do to litigants *and* with respect to how we know contract doctrine affects what people do of their own accord outside of court. In false positive formation cases, contract doctrine releases the ignorant party's counterparty from liability while the ignorant party falsely believes themselves to be bound. But because they believe the contract to be formed, they *also* falsely believe their *counterparty* to be bound. If the ignorant party knew their counterparty was not bound, they would probably consider themselves released as well. Contract law's infringement of the ignorant party's autonomy lies not in forcing them to do something, as in a false negative formation case, because it does not force them to do anything at all. Rather, it lies in the law's unilateral elimination of their counterparty's obligations under the agreement the parties thought they reached.

Consider next false beliefs about unlawful terms. As with false positive formation cases, the problem is subtle because contract doctrine does not force the ignorant party to do anything. The problem is not that contract doctrine enforces a term against a party's will; the problem is people *falsely believe* contract doctrine would enforce a term against them when actually it will not. Because unlawful terms typically appear in boilerplate, there is a real question as to whether people consent to most of the unlawful terms that appear in actual contracts. But even if they consented to those unlawful terms, they will abide by an agreement the law disallows due to their false beliefs. Sometimes the policy of disallowing certain contract terms is itself justified by autonomy considerations—for example, some scholars argue that unconscionability doctrine is grounded in the law's suspicion that the very presence of certain highly objectionable terms in a contract indicate a failure of consent or a disrespect for the party's autonomy.<sup>130</sup> Accordingly, in those

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130. See, e.g., Shiffrin, *supra* note 125, at 221–30.

cases, contract doctrine's acquiescence to the presence of unlawful terms people falsely believe bind them and, therefore, abide by is an affront to the autonomy values that justified the law's prohibition of the unlawful term in the first place, even if a court would never enforce the term if the case were litigated.

Finally, consider false beliefs about the default remedy for breach. At first glance, the threat to autonomy may seem elusive. If a party with false beliefs about the default remedy for breach is a defendant, they will be surprised to learn that they are liable for (what most people consider to be) a *lesser* remedy than they anticipated: They are liable only for damages, not for specific performance. That unexpected leniency hardly seems problematic for an autonomy theory because the defendant promised or consented to a harsher remedy than the law subjects them to. If they are a plaintiff, then the court does not force them to do anything at all. It awards them a disappointing remedy, but because the court exercises no coercion against them, that award does not seem contrary to their normative commitment in entering the contract. And so, as with the cases in which the party is a defendant, the doctrine of expectation damages may not appear to be in tension with the autonomy theory of contract.

That appearance is mistaken: The threat to autonomy posed by false beliefs about the default remedy for breach is both profound and widespread. The default remedy for breach, like any background or default rule, operates as an implicit, legally implied term in a contract. When people enter an agreement expecting that implicit term to award them specific performance, the expectation likely affects the price they are willing to pay for the contract. Because people almost always prefer specific performance to damages, people would be willing to pay less for a contract that provides for damages than an otherwise identical contract that provides for specific performance.<sup>131</sup> So, if a contract, including the implicit, legally implied terms created by default rules, actually provides only for damages when a party falsely believed it provided them with specific performance, then the contract extracts a price higher than what they would be willing to pay for the remedy that they will actually get. As a result, in cases where a party falsely believes the law will provide them with specific performance, the doctrinal default rule of expectation damages enforces a bargain different from the agreement they thought they entered with respect to two of its most essential terms: price and remedy. That problem affects every case in which a party has false beliefs about the default remedy for breach because in every such case both the remedy term and the price term are skewed by those false beliefs. Accordingly, an autonomy theory of contract appears to fail to justify that central aspect of contract doctrine in a vast number of cases.

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131. See Wilkinson-Ryan & David Hoffman, *supra* note 82, at 1013.

The widespread skewing of bargains in light of people's false beliefs about contract remedies thus poses a fundamental challenge to the autonomy theory. That, however, is not the end of the story. For decades, autonomy theorists<sup>132</sup> and their opponents<sup>133</sup> recognized that background and default rules present a particular challenge to their theories. The initial challenge does not depend on the existence of false beliefs about contract doctrine. Rather, the initial challenge is simply that people do not appear to promise or consent to the background law in the way they do to the explicit terms of a contract.<sup>134</sup> In response to that challenge, autonomy theorists deployed two approaches. Barnett's approach, which I call the "consent-by-reference" approach, argues that the initial impression that background and default rules fall outside the scope of parties' consent is mistaken.<sup>135</sup> Fried's approach, which I call the "secondary norms" approach, concedes that the justification of background and default rules of contract cannot rest on the voluntary normative commitment of the parties. He, therefore, appeals to other normative considerations—like the parties' expectations, moral notions of "fault," economic efficiency, and others.<sup>136</sup>

The remainder of this Part considers the viability of those two strategies in light of pervasive false beliefs about the default remedy for breach. It ultimately argues that neither approach to reconciling the autonomy theory of contract with pervasive false beliefs about contract remedies can salvage its success as a justification for contract law.

### *B. The Consent-By-Reference Approach*

The consent-by-reference approach infers parties' actual consent to default rules provided by contract doctrine from the fact that they entered the contract and did not alter the default rule by express agreement.<sup>137</sup> As Barnett stated the view, "[B]y invoking the system of legal enforcement, one is implicitly accepting that the legal system may be called upon to interpret the agreement and fill any gaps. Silence in the face of this prospect manifests a

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132. Fried, for example, saw the problems in applying his promise principle to justify background and default rules in the first edition of *Contract as Promise*. See FRIED, *supra* note 15, at 60, 69.

133. See generally Craswell, *supra* note 121.

134. *Id.* at 489–90.

135. See *infra* notes 137–143 and accompanying text.

136. See *infra* notes 148–155 and accompanying text.

137. See Barnett, *supra* note 19, at 867–69. That argument does not apply to unalterable background rules of contract law. *Id.* Partially for that reason, Barnett expresses a strong preference for default rules over background rules. *Id.* The consent-by-reference approach might nonetheless claim, in a similar vein to its treatment of default rules, people consent to the application of what few unalterable background rules are found in contract law because they chose to enter the contract at all. But, given the practical inevitability of entering contracts in the modern world, the resulting conception of consent is thin to the point of implausibility.



consent to those gap-filling provisions that one might have changed by speaking up.”<sup>138</sup> He applied this argument, in the first instance, to well-lawyered and sophisticated parties who have both the means and the motivation to know the default rules and to contract around them. In such cases, “[p]arties who do not contract around these default rules can realistically be said to have objectively manifested their consent to them.”<sup>139</sup>

But for contracts in which one or both parties are not so sophisticated or not so well-lawyered, that straightforward inference to the parties’ actual consent to a default rule cannot work. Barnett recognized the threat to consent posed by legal ignorance about default rules, so he adopted a strategy to minimize the number of cases in which contract doctrine enforces an agreement that departs from the consent of the parties. To do this, he endorsed conventionalist default rules: those rules that “reflect[] the commonsense expectations within the relevant community of discourse.”<sup>140</sup> When a default rule matches those “commonsense expectations,” he argued, it “is likely to satisfy the parties’ intentions as well [as] . . . any rival default rule.”<sup>141</sup> Accordingly, he claimed,

If a goal of a consent theory is to have the law of contract honor the subjective consent of the parties to the extent possible in a world of limited access to personal knowledge of intentions, default rules reflecting the commonsense expectation within the relevant community of discourse will lead to fewer interpretive mistakes than some other type of rule.<sup>142</sup>

The shape of the argument, then, is that the presence of default rules in contract law is a practical necessity, and conventionalist default rules are consistent with the parties’ consent in more cases than any alternative default rule. Because conventionalist default rules best advance the normative aims of a consent theory of contract, Barnett concluded, those are the sorts of default rules contract doctrine should adopt.<sup>143</sup>

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138. *Id.* at 865; *see also* Barnett, *Contract Is Not Promise*, *supra* note 114, at 660 (“Notwithstanding that the rules of contract law are supplied by the courts or legislature rather than by the parties, under certain circumstances, the parties can be said to have consented to the application of those background rules by remaining silent and accepting their operation.”); *id.* (“By remaining silent, they have consented to whatever term the law supplies as a gap-filler and the conflict between freedom from and freedom to contract is ameliorated.”).

139. Barnett, *Contract Is Not Promise*, *supra* note 114, at 660; *see also* Barnett, *supra* note 19, at 894 (“[I]n cases where both parties are rationally informed and can be counted on both to know the law and to contract around any default rules that do not reflect their subjective preferences, whatever default rule the law selects can be viewed as consensual.”).

140. Barnett, *supra* note 19, at 882.

141. *Id.*

142. *Id.*; *see also id.* at 897 (“[N]ested within this overall consent are default rules that are chosen to reduce the disparity between the objective meaning of consent and the subjective intentions of the parties.”).

143. *Id.* To some commentators, this approach awkwardly combines deontological and consequentialist considerations: It appears to argue that the law should minimize the number of times (a

The heterogeneity of false beliefs and legal ignorance about contract doctrine thwarts the effectiveness of conventionalist default rules for an autonomy theory of contract. The standard argument in favor of conventionalist default rules, which the literature more often refers to as “majoritarian” default rules,<sup>144</sup> is that they conform to what most people prefer the rule to be and, thereby, minimize the transaction costs associated with contracting around the default.<sup>145</sup> Barnett repurposed the notion of majoritarian defaults to serve his theoretical ends: Instead of focusing on which rule most people *prefer*, he focused on which rule most people *already think is the rule*. Adopting such a default rule, at first glance, appears to minimize the number of cases in which contract doctrine enforces an implicit, legally implied term against the consent of the parties.

The empirical results presented in Section I.C show that this strategy fails. Those results illustrate that the population is sharply divided between those who falsely believe the standard remedy for breach is specific performance; those who correctly believe the remedy is damages but with little or no confidence in their belief; and those who are confident in their correct belief that the remedy is damages. Across the entire population, more than 30% of people have false beliefs about the remedy and nearly 20% have little or no confidence in their correct answer. Depending on the subgroup, as few as 20% or as many as almost 75% of people have that false belief.<sup>146</sup> Accordingly, *any* default rule for breach would conflict with the expectations of a substantial portion of the population.<sup>147</sup>

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consequentialist notion) it violates people’s autonomy (a deontological notion). See Kraus, *supra* note 16, at 689 and n.7. To the extent that observation of his theory holds true, Barnett’s view “no longer clearly qualifies as a purely deontic theory.” *Id.* The upshot here is Barnett’s “silent consent” approach would collapse into a “secondary norms” approach I address in Section III.C.

144. See, e.g., Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591 (1999).

145. *Id.* at 1591–92.

146. See *supra* Section I.C.

147. Moreover, because the parties can alter majoritarian defaults, if contract doctrine adopted a default for specific performance, sophisticated parties would simply insert a boilerplate term switching the remedy back to damages. Because most people do not read boilerplate, they would remain ignorant of the governing legal rule. See Bakos et al., *supra* note 70, at 2. A penalty default rule would fail for the same reason. Penalty defaults are selected to conform to the *opposite* of what sophisticated parties prefer, which induces them to explicitly contract around the default rule and, thereby, inform their counterparty of the governing legal rule. See generally Ayres & Gertner, *supra* note 124 (discussing penalty default rules). As with a majoritarian default, that approach would fail here because, at best, a penalty default rule induces sophisticated parties to insert a boilerplate term to switch the remedy for breach back to damages. Requiring or inducing parties to include an express term governing the remedy for breach shows promise in aligning people’s beliefs about the law and contract doctrine itself. See Matthew A. Seligman, *Moral Diversity and Efficient Breach*, 117 MICH. L. REV. (forthcoming 2019) (arguing that consumer contracts should be required to include an express exit clause setting an exit fee equivalent to expectation damages in order to align the scope of people’s perceived moral obligations with firms’ approach to breach). But that approach works only if the express clause actually informs parties of the governing legal rule.

Even by his own metric—limiting to some tolerable level the number of cases in which contract doctrine contradicts the parties’ consent—the heterogeneity of people’s pervasive false beliefs about the default remedy for breach defeats Barnett’s consent-by-reference approach. Although he never specified the threshold number of non-consensual cases below that he would count his consent theory as successful in justifying contract doctrine, the empirical results show that any reasonable threshold is exceeded. An autonomy theory of contract that would enforce contract doctrine against people’s promise or consent in at least 20% of cases and as many as 75% of cases among certain demographic groups cannot qualify as a success.

### C. *The Secondary Norms Approach*

If a pure autonomy theory cannot itself justify contract doctrine’s default rule about the remedy for breach, then an autonomy theorist might seek to rely on secondary norms to justify that aspect of contract doctrine. Fried took this secondary norms approach in *Contract as Promise* with respect to other aspects of contract doctrine.<sup>148</sup> He recognized that “all contracts fail to specify the parties’ intentions in respect to matters that *ex ante* seem quite remote and, at any rate, not worth spelling out.”<sup>149</sup> As a result, “courts are regularly called upon to fill in details that only *ex post* may loom large.”<sup>150</sup> When the contract fails to address an issue, “the court is forced to sort out the difficulties that result when parties think they have agreed but actually have not. The one basis on which these cases cannot be resolved is on the basis of the agreement—that is, of contract as promise.”<sup>151</sup> Because, Fried conceded, the autonomy principle cannot justify the application of background and default rules to fill “gaps” in the normative commitment of the parties, he must rely on other normative considerations to do that justificatory work: fairness, altruism, economic efficiency, and so on.<sup>152</sup>

Fried initially argued that the expectation remedy followed from the promise principle:

If I make a promise to you, I should do as I promise; and if I fail to keep my promise, it is fair that I should be made to hand over the equivalent of the promised performance. In contract doctrine this proposition appears as the expectation measure of damages for breach. The expectation standard gives the victim of a breach no

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148. See FRIED, *supra* note 15, at 60–69.

149. Fried, *supra* note 129, at 971.

150. *Id.*

151. FRIED, *supra* note 15, at 60; see also *id.* at 69 (“The gaps cannot be filled, the adjustments cannot be governed, by the promise principle.”); *id.* at 72 (“Obviously some standard of sharing *external* to the intention of the parties must control.”).

152. *Id.* at 69–73.

more or less than he would have had had there been no breach—in other words, he gets the benefit of his bargain.<sup>153</sup>

Since Fried's initial statement of his position, and in view of the "the moral criticism and economic defense of expectation damages," he modified his stance to sever "the connection between the promise principle and expectation damages."<sup>154</sup> If the remedy for breach is not governed by the promise principle, then it falls within the class of default rules that Fried argued must be justified by secondary norms.<sup>155</sup>

This secondary norms approach fails because it sees "gaps" where frequently there are none. That there are gaps in the express terms of a contract does not mean there are gaps in the content of the normative commitment a party made when they entered the contract. The default rule of expectation damages does not imply a term into an empty space in a contract. As the empirical results in Section I.C show, people are not blank slates on the issue of contract remedies. Most people have an affirmative belief about what remedy they will receive if their counterparty breaches, and in a great many cases, those beliefs are false. As a result, contract doctrine's default remedy of expectation damages does not fill a gap; it imposes an implicit, legally implied term that contradicts the content of the normative commitment the party made in entering the agreement.<sup>156</sup>

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153. *Id.* at 17; *see also id.* at 19 ("[I]f a person is bound by his promise and not by the harm the promisee may have suffered in reliance on it, then what he is bound to is just its performance. Put simply, I am bound to do what I promised you I would do—or I am bound to put you in as good a position as if I had done so."); Kraus, *supra* note 16, at 728 (arguing that the expectation remedy is consistent with the promise principle if people's promises include second-order content that sets compensation as the moral remedy for breaking the promise).

154. Fried, *supra* note 129, at 968.

155. *Id.*; *see also* FRIED, *supra* note 15, at 60, 69. Barnett argued that Fried's secondary norms approach relegates the promise theory to irrelevance:

But "contractual accidents" not covered by express agreements fill the pages of every contracts casebook. Indeed, very few of the classic cases of contract law would have existed had the parties expressly anticipated what precisely occurred. In effect, Fried must consider most of the actual law of contract to be noncontractual *because it is not based on promise.*

Barnett, *Contract Is Not Promise*, *supra* note 114, at 661. This criticism misses the mark. Fried's aim was not only (or even primarily) to justify the doctrinal choice of rules that govern the hard cases finding their way into the casebooks. Rather, he sought to find whether there is a moral foundation for the existence of the coercive institution of contract law *at all*, including for the vast majority of cases that are too doctrinally simple to warrant much attention. Barnett's criticism, so far as it goes, does not join issue with Fried's argument on that more basic normative aim. But, as I shall argue, the pervasive presence of false beliefs about the default remedy for breach undermines Fried's justificatory story even in the easy cases.

156. To situate my argument in relation to Craswell's critique of autonomy theories: Craswell argued that autonomy theories lack explanatory power because they do not give us any reason to adopt one default rule over another because default rules lie outside the content of the parties' normative commitment. *See* Craswell, *supra* note 121, at 689. He concluded that an autonomy theory is, therefore, consistent with any default rule. *Id.* By contrast, I argue that parties' affirmative false beliefs about the default remedy for breach, which partially define the content of their normative

That contradiction between contract doctrine's default rule about the remedy for breach and the content of a party's normative commitment in entering the contract creates a fundamental problem for the secondary norms approach. An autonomy theory of contract like Fried's may coherently rely on secondary, non-autonomy norms to supply answers to doctrinal questions that simply are not addressed by the theory's primary autonomy norm. But if the content of a person's normative commitment associated with their contract includes a commitment to a particular remedy—as is the case for the many people who falsely believe the law will provide them with specific performance—then for the theory to rely on non-autonomy norms to justify the default remedy for breach is not to supplement the autonomy norm. It is to supersede it. The problem is thus that relying on secondary norms to justify the default remedy for breach relegates an autonomy principle to the sidelines not in only marginal cases, not in only a few cases, but in every case in which a party has a false belief about the default remedy for breach. When people have false beliefs about the default remedy for breach, they have not consented to two of the most essential terms in the contract: the price and the remedy for breach. The result is that an autonomy theory of contract that attempts to justify the default rule of expectation damages on the basis of secondary norms abdicates its central normative role in contract theory not merely for peripheral cases. It no longer provides a moral foundation for the core of orthodox contract doctrine in a vast number of cases.

### III. THE IMPLICATIONS OF ERROR

This Article has argued thus far that an autonomy theory of contract, based on the normative foundation of promise or consent, cannot justify orthodox contract doctrine in the vast number of cases in which one of the parties has false beliefs about certain core aspects of contract doctrine. That problem surfaces with respect to false beliefs about contract formation and enforceability but arises in the greatest number of cases with respect to the default remedy for breach. The conclusion thus far is a domain restriction: It demarcates the range of cases in which the autonomy theory of contract can, and cannot, serve to justify orthodox contract doctrine.<sup>157</sup> As a result, this

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commitment in a contract, entails that the default rule is affirmatively inconsistent with an autonomy justification for contract doctrine. In other words, Craswell's critique of the autonomy theory is based on the idea that the promise principle does not cover the question of contract remedies; my critique is based on the empirically-supported claim that it does.

157. Cf. Daniel Markovits & Alan Schwartz, *The Expectation Remedy Revisited*, 98 VA. L. REV. 1093, 1093–94 (2012) [hereinafter Markovits & Schwartz, *Expectation Remedy Revisited*] (explaining that their view on the myth of “efficient breach” depends on four “domain assumptions,” which entails their conclusion holds only in that range of cases for which those assumptions are true); see also Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011). Markovits and Schwartz argued that the expectation default is a good rule on the ground that if (but only if) the four domain assumptions are satisfied, then parties would choose expectation damages as a contract term. *Id.* at 1977–79. From that, they

Article makes no claim about the autonomy theory's viability with respect to, for example, well-lawyered firms that know all the relevant background law. But the range of cases in which the autonomy theory does fail is broad and important: most cases involving non-lawyers.

The next task is to identify the practical legal implications of that conclusion for the range of cases in which the autonomy theory of contract fails. The remainder of this Part begins charting those implications. Section III.A unfolds the doctrinal price of autonomy by examining the doctrinal implications that would follow from a principled adherence to the autonomy theory in light of widespread false beliefs about contract doctrine. The result would be the unacceptable conclusion that vast numbers of contracts are voidable. Rather than accept that unpalatable conclusion, we ought to abandon the autonomy theory that led there. Section III.B explores the doctrinal implications of that move by examining two contexts: contract doctrine and contract boilerplate.

#### A. *The Doctrinal Price of Autonomy*

One way to see the gravity of the problem for the autonomy theorist is to ask: Once we recognize the problem of false beliefs and legal ignorance about contract doctrine, what results would a truly autonomy-based contract doctrine yield when applied to those cases? What doctrinal results would an autonomy theorist be committed to if they followed their theory to its ultimate conclusion? The answer to those questions, applying the doctrine of mistake, may be that vast numbers of contracts are voidable. The unpalatability of that radical conclusion, in turn, suggests that we ought to abandon the autonomy theory as the normative basis for contract doctrine.

The core moral idea demarcating the metes and bounds of voidability under the doctrine of unilateral mistake is one of simple fairness.<sup>158</sup> On the one hand, it seems unfair to hold a mistaken party to a contract when they did

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inferred that certain real parties *actually* intend to enter agreements in which the expectation remedy is an implicit term:

[I]f promisee sophistication is assumed, the [expectation remedy] term arises out of the parties' actual intentions and not just out of intentions that it would be rational for them to have or fair to impute to them. The [expectation remedy] promise, that is, is as real, as much a product of the parties' actual intentions, as the promises that constitute the action and price terms.

*Id.* at 1978. That conclusion may appear to conflict with the empirical data and ensuing arguments presented in this Article. But as their conclusion indicated, the first of Schwartz and Markovits's "domain assumptions" is that "[c]ontracting parties are sophisticated and rational," which must include the assumption that the parties know what the default remedy is. Markovits & Schwartz, *Expectation Remedy Revisited*, *supra* at 1093–94. The paradigmatic example of such a party is a well-lawyered firm. The upshot is that Markovits and Schwartz are talking about a different set of parties than those on which this Article focuses: laypeople without lawyers, many of whom lack the legal knowledge that more "sophisticated" parties possess.

158. This discussion focuses on the situation where only one party is mistaken about the law—which, in many contexts like consumer law, will be the standard case.

not agree to its substance. On the other hand, it is also perhaps equally unfair to the counterparty to cancel the contract on which they relied—after all, the counterparty was not the one who was mistaken. As Fried put it, “As the parties [did not] agree, the court can only look to extrinsic standards of fairness for a solution.”<sup>159</sup>

That notion of fairness, as manifest in the doctrine of unilateral mistake, is at least in part grounded on notions of fault. Contemporary contract doctrine provides that, under certain circumstances, when one party is mistaken about a basic assumption of a contract, the contract is voidable at the option of the mistaken party.<sup>160</sup> But if it is only a unilateral mistake, the mistaken party may not void the contract unless (1) mistake enforcing the contract notwithstanding the mistake would be unconscionable or (2) the non-mistaken party either had reason to know of the mistake or his fault caused the mistake.<sup>161</sup> These latter two conditions reflect the requirement of fault to justify canceling the contract for the mistaken party’s benefit. It would be unfair to hold someone to a contract to which they did not fully consent due to their mistake when their non-mistaken counterparty had reason to know of the mistake or actually precipitated the mistake because the mistake would, in that case, be the counterparty’s fault. Similarly, although the notion of unconscionability is inchoate and underdeveloped, especially in the context of unilateral mistake, it too seems to rest on some notion of fault.<sup>162</sup> As Melvin Eisenberg explained the idea, in cases of unilateral mistake, “[T]he concept of unconscionability refers to cases where it is morally improper to seek full enforcement of a promise that was based on such an error,”<sup>163</sup> and that moral impropriety—“what kind of conduct is not conscionable”—in turn “must depend on what kind of conduct involves moral fault.”<sup>164</sup>

The notion of fault could provide powerful ammunition for the autonomy theorist who would maintain the doctrinal status quo notwithstanding

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159. FRIED, *supra* note 15, at 63.

160. RESTATEMENT (SECOND) OF CONTRACTS § 153 (AM. LAW INST. 1981). Recall that the Restatement treats mistakes of law and mistakes of fact the same. *Id.* § 151 cmt. b. And there appears to be no principled reason to treat them differently: In both cases, the mistaken party failed to consent to some aspect of the agreement due to a false belief about the relevant context in which the contract was putatively formed.

161. *Id.* § 153(a)–(b).

162. See Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1418 (2009) (“Although the essential role of moral fault is not as explicit under American law as it is under some civil-code and civil-code-based rules, it is implicit in the concept of unconscionability: what kind of conduct is not conscionable must depend on what kind of conduct involves moral fault.”).

163. *Id.* at 1427–28; see also *id.* at 1428 (“In these cases, the nonmistaken party will be restored to his precontract wealth by an award of reliance damages. A fair-minded person who has been made whole in this way would not try to take advantage of a mechanical error by inflicting a further loss on the mistaken party so as to make a gain that is not earned by knowledge, skill, or diligence.”).

164. *Id.* at 1418.

people's pervasive false beliefs about the default remedy for breach. The reason is that those with such false beliefs may seem to be at fault for having them. Unlike many cases of mistake of fact, where the mistaken party had no practicable way of discovering the fact of which they were ignorant, the law is in the public domain. All one needs to do is look. And, unlike those few cases of mistake of law recognized by the courts, which concern relatively obscure concepts of law, like the rule against perpetuities,<sup>165</sup> the law of expectation damages, for example, is among the more straightforward aspects of contract law.<sup>166</sup> And so, this argument goes, people who are ignorant of contract law are at fault for their own mistake. It, therefore, may hardly seem "morally improper" to enforce a bargain against someone who had mistaken beliefs about the content of law that was so easily accessible to them.

Notwithstanding that people could, theoretically, discover the content of contract doctrine through the investigation of legal sources, I think the stronger argument is laypeople are blameless for their false beliefs about contract law. The likely explanation for *why* so many people have false beliefs about contract law goes a long way toward showing why those false beliefs are reasonable. Most people—indeed, essentially everyone aside from lawyers—do not learn the content of the law by reading cases and treatises. Rather, it is more plausible that they assume the content of the law reflects their pre-existing social, cultural, and moral norms. And so, the reason many people falsely believe specific performance is the remedy for breach may be that they assume contract law reflects commonsense promissory morality. They infer what we can call "folk legality" from their "folk morality."<sup>167</sup> That inference often misfires, perhaps particularly frequently in private law.<sup>168</sup> But it would, nonetheless, be difficult to argue that laypeople are unreasonable to assume the content of law reflects the content of morality. And, it would be particularly odd for an autonomy theorist like Fried to make that argument: A central aspect of the moral force of contract as promise is precisely the fact

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165. See *supra* note 12 and accompanying text.

166. This argument has less purchase regarding, for example, false beliefs about the mailbox rule. But note the dynamic between the accessibility of legal knowledge and the number of cases which will be afflicted by legal ignorance: Part of the reason the mailbox rule is difficult to know is because it affects so few cases in practice. As a result, the aspects of legal ignorance that pose the greatest threat to the autonomy theory by affecting the most cases are precisely those aspects that concern contract doctrines that are easiest for laypeople to know.

167. "Folk morality" (or "folk moral theory") is a widely discussed notion in the philosophical literature referring to the moral beliefs most people, untrained in moral philosophy, hold. See, e.g., Frank Jackson & Phillip Pettit, *Moral Functionalism and Moral Motivation*, 45 PHIL. QUARTERLY 20, 24 (1995). The phrase "folk legality" is my own and refers to the legal analogue of folk morality—the legal beliefs that most people, untrained in the law, hold.

168. Inferring the content of criminal law from folk morality will often be reliable, especially with respect to *malum in se* crimes, like murder or physical assault, that are crimes precisely because they are morally wrong. But, as many legal scholars noted, many aspects of private law diverge from folk morality. See, e.g., Shiffrin, *supra* note 15.



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that, on his view, contract law *does* reflect morality.<sup>169</sup> To avoid the bite of this problem, the autonomy theorist would have to argue that contract doctrine should (and often does) reflect the commonsense morality of promising, but where contract doctrine *diverges* from promissory morality, people are unreasonable in failing to recognize the exception. That, I think, is an unreasonable standard to hold people to.

The upshot, then, is people are often reasonable in their false beliefs about contract doctrine because it is reasonable for them to think the content of law reflects commonsense morality. Because those false beliefs are reasonable, they are not at fault for holding them. Accordingly, it would be morally improper to hold people to contracts based on that mistake. Applying the contemporary doctrine of mistake, understood in a way that reflects the autonomy theory of contract, that conclusion likely entails that contracts are voidable whenever people reasonably have false beliefs about the remedy for breach.

The question remains what to do in response to that radical conclusion. One response for the autonomy theorists would be to bite the bullet and concede that their view, combined with the phenomenon of pervasive false beliefs about contract doctrine, entails that vast numbers of contracts are voidable. That radical implication would render the commercial system based on ubiquitous contracting unacceptably unstable. Commercial parties would have no way of knowing whether their counterparty could later void their contract, introducing intolerable uncertainty into ordinary contracting situations. They could do their best to put their counterparties on notice of the remedy for breach, but experience shows that attempts at disclosure have modest effect.<sup>170</sup> Moreover, courts would have limited ability to determine *ex post* whether a contracting party really did believe the remedy was specific performance. Especially in larger transactions, that problem invites strategic behavior by unscrupulous parties seeking to escape an onerous contract through feigned ignorance. The result of the autonomy theorist following their principle to its conclusion would thus be an unworkable system of contract law.

The alternative approach for the autonomy theorist is to concede that the theory cannot serve as the normative foundation for a workable system of contract law in a world beset by legal ignorance and mistake. That is not to say the theory was normatively flawed from the outset. Nor is it to say autonomy considerations have no role to play in the crafting of contract doctrine. But it does mean the autonomy theorist would have to rely on a second-best normative theory to serve as the principal foundation for contract law.

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169. See FRIED, *supra* note 15, at 17.

170. See OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 14–32 (2014).

*B. Implications for Contract Doctrine*

That move—the autonomy theorist shifting to what is, on their view, a second-best normative theory—might provide an opportunity to make progress in longstanding doctrinal disputes, the resolution of which ultimately depends on which foundational normative theory we accept. Since the dawn of the common law of contracts, cases have involved a tension between promissory or consent-based normative justifications for particular doctrinal rules and opposing normative justifications that support opposing doctrinal rules.<sup>171</sup> That opposing normative foundation is, but not always, economic efficiency. Sometimes the opposing norm is instead fairness to a disadvantaged party, distributional considerations, or something else. In such doctrinal disputes, a court must decide whether to adopt a rule supported by a promissory or consent-based rationale or a different rule supported by some other normative rationale, like efficiency. Perhaps the most prominent example of such a dispute is about the default remedy for breach: A promissory rationale seems (at least to many, like Shiffrin) to entail that specific performance should be the remedy, whereas many courts and scholars agree that an efficiency rationale supports the expectation remedy.<sup>172</sup> Other examples of such doctrinal questions abound: whether a non-breaching party has a duty to mitigate the harm caused by a breach;<sup>173</sup> whether punitive damages should be available for willful breaches;<sup>174</sup> whether the law should require consideration to make a contract enforceable;<sup>175</sup> whether excess liquidated damages

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171. See generally Shiffrin, *supra* note 15.

172. Compare Shiffrin, *supra* note 15, at 722 (“Absent the consent of the promisee, the moral requirement would not be satisfied if the promisor merely supplied the financial equivalent of what was promised.”), with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 133 (9th ed. 2014) (explaining that expectation remedy is efficient), and Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 *YALE L.J.* 1261 (1980) (same), and Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 *U. COLO. L. REV.* 683 (1986) (same).

173. Compare Shiffrin, *supra* note 15, at 724 (“Contract law requires the promisee to mitigate her damages. . . . As a general rule, [promissory] morality does not impose such requirements on disappointed promisees.”), with Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 *MICH. L. REV.* 1349, 1359 (2009) (proffering an anti-monopolistic economic rationale for the duty to mitigate).

174. Compare Shiffrin, *supra* note 15, at 723 (“[I]ntentional promissory breach is not subject to punitive damages, that is, to those legal damages that express the judgment that the behavior represents a wrong.”), with POSNER, *supra* note 172, at 140 (opposing punitive damages for breach on the ground that “penalty would deter efficient . . . breaches by making the cost of the breach to the contract breaker greater than the cost of the breach to the victim”).

175. See FRIED, *supra* note 15, at 37–39 (doubting that the doctrine of consideration is grounded in promissory morality); Shiffrin, *supra* note 15, at 728, 736–37 (same).

should be invalidated as penalty clauses;<sup>176</sup> whether subjective or objective assent and meanings should govern;<sup>177</sup> and so on.

One constant in those doctrinal disputes is that the choice of legal rule typically turns on the choice of underlying normative theory. If one is committed to a pure promissory theory of contract, then it might follow that the proper legal remedy for breach is specific performance because it enforces a promise.<sup>178</sup> By contrast, if one is a law and economics theorist, then it might follow that the proper legal remedy for breach is expectation damages because it yields efficient outcomes.<sup>179</sup> The choice of contract remedy thus depends on the choice between adopting promissory morality or consequentialism as one's underlying normative theory. But neither courts nor legal scholars typically provide a reason—or at least, not an ultimately persuasive reason—to choose one or the other foundational normative theory in the first place. It is, instead, simply a matter of choosing different first principles from which to begin.<sup>180</sup> As a result, though contract doctrine may have trended in one direction or another, the absence of an ultimate rationale for why we should choose a legal rule on the basis of efficiency rather than promissory morality (or vice versa) yielded a debate with no final answer. Judges or scholars who begin with a different normative theory could simply say (although, it is typically left unsaid) the doctrinal rule with which they disagree was based on the wrong moral premises and so should be reformed.

This Article's conclusion may provide some traction in the debate that was previously elusive. The error theory of contract, and its implications for the viability of an autonomy theory, might offer an alternative way to adjudicate that fundamental normative dispute in the context of the choice of doctrinal rules for the class of cases to which it applies. The error theory entailed that, among the domain of cases in which one of the parties has false beliefs about the default remedy for breach, the autonomy theory cannot justify orthodox contract doctrine because that set of people did not promise or consent to the bargain to which contract doctrine holds them. If an autonomy theory grounded in promise or consent cannot support a workable legal system of

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176. See Kraus, *supra* note 15, at 1635 n.63 (“[C]ontract law’s refusal to enforce an express penalty damages clause (in excess of expectation damages) clearly fails to enforce the parties’ moral obligations.”).

177. See, e.g., Kraus, *supra* note 16, at 723 (“Fried’s [promise] theory clearly requires that contractual obligation be based on shared subjective intentions, and therefore rejects the objective theory of contract because it imposes contractual liability in the absence of such intentions.”).

178. See Shiffrin, *supra* note 15, at 722.

179. See, e.g., POSNER, *supra* note 172, at 133.

180. Adjudicating the dispute between foundational normative theories is the province of philosophers. If a philosopher offered a definitive—or even sufficiently compelling—argument that, say, Kantian moral theory is correct and consequentialism is misguided, then that philosophical result would have profound downstream implications for the law. But philosophers have not yet settled those disputes among themselves.

contract for the range of parties within the domain of the error theory's conclusion, then even those committed to an autonomy theory as a first-best normative foundation for contract law may have to look to other norms. In other words, an autonomy theorist who recognizes that their primary normative principle cannot ground a workable system of contract and, therefore, cannot answer which doctrinal rules that workable system should adopt, may instead look to a different, second-best norm like efficiency or fairness to provide answers. The implication is that we may, at least in some cases, be able to adjudicate the doctrinal disputes that *arose* from fundamental disagreements about foundational normative theories *without* needing to resolve the underlying foundational normative dispute *itself*. Accordingly, we may be able to conclude, for example, that a non-breaching layperson ought to have a legal duty to mitigate their harm—because the autonomy theory that might conflict with that doctrinal rule could not justify the application of contract doctrine to them anyway, we instead look to a second-best norm, like efficiency, that supports the rule.

### C. Implications for Boilerplate

Finally, the phenomenon of false beliefs and legal ignorance about the background rules of contract may have important and unexpected implications for the proper response to the problem of boilerplate. Courts and scholars have long seen boilerplate terms, buried in the fine print of contracts of adhesion, as problematic.<sup>181</sup> They offered several different accounts of the source and nature of the problem of boilerplate: people's ignorance of the content of those terms, which vitiates consent; the substantive unfairness of those terms, which are typically heavily slanted in favor of the drafting party; and the unilateral and potentially coercive replacement of democratically enacted law by the more powerful contracting party.<sup>182</sup> These problems are related. People's ignorance of unfair boilerplate terms facilitates their inclusion in form contracts because the disciplining function of competitive markets is impaired when purchasers do not know the relevant terms of the contract.<sup>183</sup> And, we have no quarrel with parties electing to override certain background, democratically-enacted default rules as long as both parties know what they are doing and do so freely; the democratic problem with boilerplate is that such knowledge and consent are lacking.<sup>184</sup>

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181. See, e.g., RADIN, *supra* note 70, at 24; Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632–33 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174–76 (1983).

182. See generally RADIN, *supra* note 70.

183. See, e.g., OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012).

184. Contract law limits parties' ability to override certain terms through its mandatory rules, like the rules governing formation and the rules of unconscionability doctrine. The point, however,

Accordingly, the core of the problem, as Professor Margaret Jane Radin put it, is “sheer ignorance.”<sup>185</sup> If people do not know the content of boilerplate terms—indeed, if they do not know those terms even exist in the fine print—then they cannot and do not consent to those terms. Or more precisely, perhaps, the degree to which people consent to boilerplate terms is only that minimal sense that arises from clicking “I accept” on a pop-up window with terms of service that they do not read. And so, in addition to the subtler problems Radin identified about the replacement of democratically-enacted law with unilaterally-imposed terms,<sup>186</sup> the inclusion of unknown boilerplate terms represents the “devolution or decay of the concept of voluntariness.”<sup>187</sup> Radin followed the autonomy theory of contract to its ultimate conclusion about boilerplate: If people do not consent to boilerplate terms, those terms should be legally unenforceable.<sup>188</sup>

The phenomenon of legal ignorance show that Radin and others who share her autonomy-based aversion to boilerplate have actually underestimated the scope of the problem they identified. If people are also ignorant of background legal default rules, like the law’s preference for expectation damages over specific performance, then they consented to the legally-implicit, implicit remedy term in a non-boilerplate contract no more than they consented to a boilerplate remedy clause.<sup>189</sup> Indeed, at least with boilerplate terms people click “I accept” and are put on notice that they are formally assenting to a long list of terms, the substance of which they know they are ignorant. That thin form of consent is, for the reasons Radin offered, normatively impoverished relative to the ideal of informed consent we demand in

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is that the justification for allowing the parties to alter background rules *where the law permits* is frequently absent in boilerplate cases.

185. RADIN, *supra* note 70, at 21.

186. *Id.* at 24.

187. *Id.* at 30.

188. *Id.* at 213 (arguing that boilerplate terms “should be declared invalid in toto, and recipients should instead be governed by the background legal default rules”). Radin also proposed the creation of an intentional tort of the “deprivation of basic legal rights” to discourage boilerplate-drafting parties from engaging in the practice. *Id.* at 211.

189. This problem is related to one identified by Omri Ben-Shahar. See Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 887 (2014) (“Rather than provided and summarized by one party in a term sheet, however, the legal matter of the [non-boilerplate] contract is provided by other legal sources: default rules and gap fillers, local customs and market norms, and an intense fabric of regulations governing the trade of that particular good.”). Ben-Shahar characterized the problem as primarily one of “complexity”—background legal rules, including both gap-filling default rules and the social customs and commercial customs against which contracts are formed are, in his view, just as difficult to understand as boilerplate. *Id.* at 888–89. The pervasiveness of legal ignorance shows that the problem is sharper than Ben-Shahar suggested: It is not just that the background law is complex, difficult to understand, and in some instances (like the magnitude of expectation damages) even difficult to predict *ex ante*; rather, it is that many people have affirmatively false beliefs about the core question of what remedy the law provides for breach, which vitiates consent in a much more direct way.

other contexts, like medical procedures.<sup>190</sup> But it is more consent than we can see with respect to background legal rules about which people have affirmatively false beliefs.<sup>191</sup> The upshot is that Radin's proposed solution—making boilerplate unenforceable to clear the way for the application of background legal rules—does not solve the problem so much as moves it: What was a lack of informed consent to boilerplate becomes a lack of informed consent to background legal rules. And so, from the perspective of a promise- or consent-based autonomy theory of contract, her proposed solution does not improve matters and may even make them worse.

The better solution to the problem of boilerplate may instead be an unexpected one: Instead of *banning* boilerplate, the law should *require* it and *regulate* it. Radin and other opponents of boilerplate, I just argued, cannot justify a preference for the application of background law on the basis of promise or consent because it is lacking in either case. The remaining problem with boilerplate—and it is a profound problem—is that the content of much boilerplate is intolerably unfair in substance. It deprives people of legal rights (like data privacy rights through waiver clauses) and legal remedies (like access to courts through arbitration clauses) in ways that are unfair and harm both the parties to those boilerplate contracts and society more broadly.<sup>192</sup> But the normative basis of that intolerability is not, ultimately, just the lack of promise or consent. Consider an arbitration clause that limits a person's access to court and prohibits them from proceeding as a class. What is worse about that clause, relative to the background law of contract, is not consent: People may not have consented to the arbitration clause because they did not know it existed, but many also did not consent to expectation damages because they falsely believed the remedy at law is specific performance. Rather, what is worse about the arbitration clause is that it is less fair, harms people by reducing their access to justice, and is quite possibly economically inefficient because it allows businesses to sell defective products at inflated prices without facing the real prospect of liability.<sup>193</sup> On each

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190. RADIN, *supra* note 70, at 89.

191. Radin's other argument—that boilerplate replaces democratically-enacted legal regimes with unilaterally-imposed terms—may appear to undermine this point. See RADIN, *supra* note 70, at 24. Even if people do not consent to the background legal rules in the narrow context of a particular contract, they at least, in a broader sense, participate in a democratic process that resulted in those legal rules while, in contrast, they participate not at all in the drafting of contracts of adhesion. So those legal rules may have a consent-like legitimacy after all. But if people are ignorant of the legal rules, and especially if those legal rules conflict with their commonsense notions of moral right and wrong, then the democratic process is malfunctioning in a way that prevents it from conferring the sort of legitimacy on contract doctrine that can substitute for consent. In that respect, people are hoodwinked by courts and legislatures, who impose default rules and thus implied contract terms that people do not know, just as much as the drafters of boilerplate are hoodwinking them.

192. See, e.g., RADIN, *supra* note 70, at 183 (referring to “mandatory arbitration clauses” as “mass-market [remedy] deletion schemes”).

193. *Id.*

of those measures, expectation damages (and class litigation) is superior to individual arbitration.<sup>194</sup> But none of those measures is promise or consent.

The best approach, in a world beset by legal ignorance, may, therefore, be to require boilerplate terms whose content is regulated according to non-promissory or consent-based norms, including efficiency, fairness, and so on. From the perspective of promise or consent, it ultimately does not matter whether background law or boilerplate provide a given set of legal rules because many people are ignorant of both.<sup>195</sup> If anything, the thin notion of promise or consent that arises from the formal assent of acceding to boilerplate (that is, from clicking “I accept”) is more than most people give towards the background rules of contract law.<sup>196</sup> And, it may be better to provide a given set of legal rules in boilerplate than it would be to have no explicit terms on the issue and provide the exact same legal rules only in background law.

People sometimes use contracts as reference documents, after the fact, to determine their legal rights when a problem arises.<sup>197</sup> As long as the text of the contract provides accurate legal information, that method of acquiring legal knowledge is significantly more accessible to most people than consulting statutes, cases, and regulations. And, it would not require hiring a lawyer, a step that exceeds the means of many. As a result, in those cases where people consult their contracts to determine their legal rights,<sup>198</sup> people may be better equipped to vindicate those legal rights if the text of the contract itself provides that information. The best legal rule, on the basis of efficiency and fairness, may well ultimately be to prohibit arbitration clauses. But there is little to gain, and potentially much to lose, by requiring background law to provide the best legal rule rather than in the adequately regulated text of contract boilerplate.

#### IV. CONCLUSION

This Article’s central normative conclusion is that promise- or consent-based autonomy theories of contract cannot justify existing contract doctrine in light of pervasive and heterogeneous false beliefs and legal ignorance

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194. See, e.g., *id.*; Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

195. See Bakos et al., *supra* note 70, at 2; see also *supra* Section I.C.

196. Moreover, once the law adequately regulates the substance of contract boilerplate, that boilerplate gains a measure of democratic legitimacy because the regulation ensures that boilerplate terms must fall within a range the legislature or agency determined is, for example, fair. Radin’s preference for background law over boilerplate on democratic grounds would thus lose its bite.

197. See *supra* text accompanying note 71–72 (presenting results of a survey indicating that most people consult their residential leases to determine their legal rights after a problem arises with their apartment).

198. See *supra* Section I.B.

about that doctrine. If the Article's argument is right, then the natural alternative is to do what we can to prompt people to revise their false beliefs. That strategy is appealing, but it likely lies outside our grasp. In light of the deeply entrenched social, cultural, and moral norms that inform folk legality, there is little hope that lawmakers or courts could take any step to cure pervasive false beliefs and legal ignorance about contract doctrine. At best, we might hope for modest improvement in the accuracy of laypeople's beliefs about contract law. Nor can we revise contract doctrine to conform to their existing beliefs about contract law. People's beliefs about contract law are heterogeneous,<sup>199</sup> so many will have false beliefs about the law no matter which legal rules we adopt.

The remaining alternative for contract theorists to adopt a different, viable justificatory theory for contract law, a strategy outlined in Section III.A. Then, we must explore what doctrinal reforms such a theory entails. That task is challenging for law and economics theories of contract, but it finds a useful model in behavioral law and economics' analyses of bounded rationality.<sup>200</sup> That project seeks to determine which legal rules—for example, which default rules of contract—are efficient in light of pervasive human errors of rationality. One such error, for example, is an optimism bias that leads people to discount the probability of bad outcomes. That sort of cognitive error can lead to inefficiency because “[s]ophisticated sellers facing imperfectly rational consumers will seek to reduce the perceived total price of their products without reducing the actual total price that consumers pay . . . by back-loading costs onto long-term price dimensions” in ways that ultimately reduce welfare.<sup>201</sup> The behavioral law and economists' solution to the inefficiencies introduced by bounded rationality is to “debias”—that is, to craft legal rules in such a way that accounts for and counteracts humans' imperfect rationality.<sup>202</sup> Similarly, a law and economics theory of contract can seek to “debias” the law to account for people's pervasive false beliefs and legal ignorance about contract doctrine. That project, whether it is founded on a consequentialist, law and economics foundation or some other normative theory, is ripe for execution.

The error theory of contract, and its implications for the viability of prominent justificatory accounts of contract doctrine, can also serve as a model for error theories of other areas of private law. People's knowledge of the law derives not from any careful attention to the case reporters or statute rolls. Rather, when people know what the law is, it is usually because they assume the law reflects the social, cultural, and moral customs with

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199. See *supra* Section I.C.

200. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 200 (2006). See generally RICHARD THALER & CASS SUNSTEIN, *NUDGE* (2008).

201. BAR-GILL, *supra* note 183, at 23, 23–26.

202. See, e.g., Jolls & Sunstein, *supra* note 200, at 230.



which they are already familiar. That inference—from non-legal norms to the content of the law—often (but not always) yields correct beliefs about criminal law<sup>203</sup> but frequently leads people astray with respect to private law. As a result, there is reason to suspect that people may also have false beliefs about the law of bankruptcy, tort, corporations, and so on. All of these doctrinal areas govern matters about which people likely have pre-existing social, cultural, and moral ideas. Those false beliefs about other areas of private law in turn generate serious normative implications that warrant our attention. This Article took the first step in that broader project by exploring the contours and implications of widespread error about contract law.

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203. Even in the context of criminal law, the principle that ignorance of the law ordinarily does not excuse came under renewed criticism due to the expansion of criminal law's prohibitions. *See, e.g.*, Dan M. Kahan, *Ignorance of the Law Is an Excuse—But Only for the Virtuous*, 96 MICH. L. REV. 127, 129 (1997) (arguing for an “anti-Holmesian account” that seeks to explain “why ignorance of the law is *not* ordinarily regarded as an excuse” and “why it sometimes *is*”); Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 729 (2012) (“Legislatures and courts have made vast changes to the structure of the criminal justice system, to the officials who comprise that system, and to the procedures that govern how those actors play their roles. Those developments may have greatly altered the landscape that gave rise to the common law mistake of law rule—so much so, in fact, that it might no longer make sense to follow the rule.”).

## APPENDIX—STUDY TOOL FOR CONTRACT REMEDIES SURVEY

*First, each subject was randomly presented with one of the following two scenarios:*

**PROFIT**

You decided to add a backyard deck to your house, and you hope to have it finished in time for the end of the summer. You called Jones, who is a contractor specializing in building decks. You and Jones signed a contract for him to build the deck by Labor Day weekend in exchange for \$5,000, which you paid immediately. When you signed the contract, you told Jones that in anticipation of using the deck over Labor Day weekend, you planned a family reunion and invited relatives from out of town who you haven't seen in many years.

After you and Jones signed the contract, however, another homeowner approached Jones and offered him much more money to build a deck for his house by Labor Day. Jones did not have time to complete both jobs by Labor Day. He told you that he decided he would build a deck for the other homeowner and would not build the deck for you. You sued Jones in court for breach of contract. The court ruled in your favor.

**AVOID LOSS**

You decided to add a backyard deck to your house, and you hope to have it finished in time for the end of the summer. You called Jones, who is a contractor specializing in building decks. You and Jones signed a contract for him to build the deck by Labor Day weekend in exchange for \$5,000, which you paid immediately. When you signed the contract, you told Jones that in anticipation of using the deck over Labor Day weekend, you planned a family reunion and invited relatives from out of town who you haven't seen in many years.

After you and Jones signed the contract, however, the price of lumber materials increased significantly. Because of the increase in costs, if Jones built the deck for you, he would lose money on the job. After Jones learned of the increased cost of lumber, he told you that he would not build the deck. You sued Jones in court for breach of contract. The court ruled in your favor.

*Then, all subjects were asked the following questions:*

(1) When a court rules in favor of the plaintiff—that's you, the party suing in court—it typically awards a "remedy" that orders the defendant to pay money or to do something. Of the following two options, which remedy do you think the court will award to you in your case against Jones?

a. The court will order Jones to build the deck for you by Labor Day in exchange for the agreed-upon price.

b. The court will order Jones to refund your \$5,000 and to pay you an additional amount of money to compensate for not having the deck in time for the family reunion.

(2) How confident are you in your answer about which remedy the court will award you in your case against Jones?

- a. Very confident.
- b. Somewhat confident.
- c. Slightly confident.
- d. Not at all confident.

(3) In general, in breach of contract cases, what do you think the court would award the plaintiff if he or she wins?

- a. The court would order the defendant to do what he/she agreed to do in the contract.
- b. The court would order the defendant to pay monetary compensation to the plaintiff.

(4) How confident are you in your answer about which remedy the court typically awards a plaintiff in a breach of contract case?

- a. Very confident.
- b. Somewhat confident.
- c. Slightly confident.
- d. Not at all confident.

*For questions (1) and (3), the order of the options was randomized so half of the subjects saw a/b/a/b, and half saw b/a/b/a.*