Consensus ad artificialis

Contract Theory Meets the GenAI Mind

Katie Szilagyi & Marina Pavlović

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Katie Szilagyi[α] & Marina Pavlović[β]

We are told that Contract, like God, is dead. And so it is.
Grant Gilmore[1]

No one has read the terms and conditions! No one in the world!
No one! Even the lawyers who wrote it!
Eddie Izzard[2]

Introduction

The advent of generative AI (GenAI) has generated shockwaves across industries. Many established professions are grappling with how GenAI's functionality transforms their daily activities, staying power, and *raison d'être*. GenAI's newfound facility with words and language has rapidly encroached upon the purview of lawyers, whose trade has long been expertise with words.[3] While some worry about lawyers' place in a GenAI-oriented future economy, others are optimistic about the transformative potential GenAI offers as a tool to the practicing lawyer. Legal service providers have been quick to adopt GenAI tools in the name of efficiency, harnessing its generative power for tasks including automated research memos, first drafts of documents, and even the prediction of case outcomes.[4] While ideal use cases are still being defined, many are enthusiastic about GenAI in contracting practice, achieving similar efficiencies to those offered by

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[1] Grant Gilmore, *The Death of Contract* (Columbus, OH: Ohio State University Press, 1974) at 1.

[2] Eddie Izzard, Stripped (2009) at 11:09-11:17.

[3] Katie Szilagyi, "Fragmenting Epistemologies: Toward Philosophical Foundations for Machine Learning in Law" in James Gacek & Richard Jochelson (eds), *Justice in the Age of Agnosis: Socio-Legal Explorations of Denial, Deception, and Doubt* (Cham, CH: Palgrave Macmillan, 2024).

[4] Jeremy Glaser and Sharzaad Borna, "AI: the new legal powerhouse — why lawyers should befriend the machine to stay ahead" Reuters (October 24, 2024) online: <https://www.reuters.com/legal/legalindustry/ai-new-legal-powerhouse-why-lawyers-should-befriend-machine-stay-ahead-2024-10-24/> [perma.cc/5HX8-BWXS].

contract boilerplates.[5] Others, so enthused about GenAI's capabilities, propose replacing lawyers altogether with automated outputs.[6] We ask: what does GenAI's sudden incursions into law and legal practice mean for the formation, performance, and eventual adjudication of contracts? Does it further amplify the issues raised by massively distributed boilerplate contracts or does it create a slate of new fundamental questions? We approach these questions from a theoretical point of view.

When Grant Gilmore posited that contract, like God, was dead, he was envisioning a legal system where torts took on a larger role in the allocation of liability, one where contract would be swallowed up by tort in an amalgamated hybrid: contorts.[7] This invocation of Nietzsche, essentially calling time of death on your own subject matter, is a serious charge.[8] Writing in 1974, Gilmore's analysis focused on the narrowing of the doctrine of consideration, beginning with Oliver Wendell Holmes' authoritative positioning that "loss must lie where it falls."[9] Conceptual incoherence in the contractual doctrine grew in case law over time, influenced by the choices of both judges and legal practitioners.[10] Today, it seems that significant existential threats to the law of contract are posed by our modern commercial environment. Contracts of adhesion, secured through massively distributed boilerplate text, bind consumers into contractual agreements absent actual negotiation or meaningful bargaining power.[11] Moving from the physical to the electronic domain, the advent of Internet commerce enabled a new shrinkwrapped contracting paradigm, one where clicking "I agree" was deemed sufficient to enter into a binding agreement.[12] The question of whether such agreements could really be thought to meet the strict doctrinal requirements of contract law was further complicated by new technologies. Were electronic contracts really contracts? As the scope of electronic contracting grew, so did the corresponding legal concerns.

Demonstrating his characteristic prescience in 1999, Ian Kerr observed how innovations in electronic commerce had enabled electronic devices to give the appearance of negotiating and creating contracts.[13] Timestamping the discussion with the hallmarks of the "cyberlaw" era, he

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[5] LegalTech, "Early-Stage Legaltech Generative AI Landscape" (June 2024) online: <https://www.legaltech.com/gated-content/early-stage-legaltech-generative-ai-landscape-(june-2024)> [perma.cc/L632-G2PS].

[6] This argument has recently gained traction in the access to justice space, with many legal innovators proposing that self-represented litigants would be better served by GenAI-powered chatbots able to assist them with legal concerns. See, e.g., Bob Ambrogi, "Can AI Bridge the Justice Gap? Legal Aid Lawyer and Innovator Sateesh Nori Thinks So" (21 January 2025), online: <https://www.lawnext.com/2025/01/can-ai-bridge-the-justice-gap-legal-aid-lawyer-and-innovator-sateesh-nori-thinks-so.html> [perma.cc/8HLV-Q44G]; Fife Ogunde, "Generative AI and Access to Justice in Canada: The Case of Self-Represented Litigants" (2024) 40 Windsor Y B Acess Just 211.

[7] Gilmore, *supra* note 1 at 98.

[8] Ian Kerr, "The Arrival of Artificial Intelligence and 'The Death of Contract'" (21 September 2015), online: uOttawa Technology Law, Ethics and Policy Blog <https://www.uottawa.ca/research-innovation/news-all/arrival-artificial-intelligence-death-contract> [perma.cc/KR7J-V4VW] [Kerr, "Arrival"].

[9] Gilmore, *supra* note 1 at 18.

[10] *Ibid* at 105-112.

[11] Friedrich Kessler, "Contracts of Adhesion—Some Thoughts About Freedom of Contract" (1943) 43 Colum L Rev 629 at 633.

[12] For typical early analyses of these challenges, see, *e.g.*, Anthony J. Bellia, "Contracting with Electronic Agents" (2001) 50 Emory LJ 1047.

[13] Ian R. Kerr, "Spirits in the Material World: Intelligent Agents as Intermediaries in Electronic Commerce" (1999) 22 Dalhousie Law Journal 189 [Kerr, "Spirits"].

noted these devices were poised to soon behave more like intermediaries than instruments, muddying the waters of how assent is appropriately attributed. In the decades that followed, other authors engaged related questions, including artificial agency,[14] boilerplate contract generation,[15] and smart contracts on the blockchain.[16] Most notably, Margaret Jane Radin raised the issue of doctrinal distortions and the core challenge of fitting these contracts into the existing theoretical constructs.[17]

GenAI changes the playing field, transforming the question from *whether AI can be used to form and analyze contracts* into whether *AI can be said to autonomously create and impart meaning within such contracts*. From this perspective, the move from simple bots to more sophisticated technology has meaningful ramifications for how contract theory houses contract law. Nonetheless, recent discussions of GenAI within legal spaces tend to omit these theoretical questions, instead treating GenAI-powered tools for lawyers as extensions of the human self, primed for increased organizational efficiency. The existing investigations of AI as a contracting agent tend to approach the problem from the perspective of robot rights or AI's perceived intentionality, which fail to engage key theoretical issues.

This paper aims to go beyond the baseline, asking and answering existential questions about contract law's future role in a GenAI-enabled legal practice. Marketing materials from leading law firms already claim that they are headed boldly into the future, harnessing GenAI's power to draft contracts.[18] Corresponding questions quickly arise, including the technology's capabilities and limitations; the use of ready-made proprietary GenAI solutions *versus* tailor-made in-house versions; the market power of individual users against large AI companies; and the difficulty of conveying specific legal meanings through automation. To answer these questions, we take a holistic view of the contract lifecycle and related case law, interspersed with a common-sense understanding of current GenAI technology.

We begin Part I with a technological *précis*, offering a brief overview of how GenAI technology works before focusing on how GenAI is being applied to contract drafting in the modern law firm. Then, in Part II, we offer a brief, plain-language backgrounder on contractual principles to allow interdisciplinary readers access to the legal point of view. Next, in Part III, we take a theoretical approach to contract law, mapping technological changes through relational aspects of contract doctrine, *i.e.*, trust, promise, consent, and enforcement. Finally, in Part IV, we offer a conceptual

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[14] Samir Chopra & Laurence F. White, *A Legal Theory for Autonomous Artificial Agents* (Ann Arbor, MI: University of Michigan Press, 2011).

[15] Jason Maclean, "The Death of Contract, Redux: Boilerplate and the End of Interpretation" (2016) 58:3 Can Bus LJ 289.

[16] Alexander Savelyev, "Contract Law 2.0: <<Smart >> Contracts as the Beginning of the End of Classic Contract Law" (December 14, 2016) Higher School of Economics Research Paper No. WP BRP 71/LAW/2016, online: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2885241> [perma.cc/EL93-YM6N].'

[17] Margaret Jane Radin, "The Deformation of Contract in the Information Society" (2017) 37:3 Oxford J Leg Stud 505 at 508.

[18] See, *e.g.*, Gowling WLG, "How we use artificial intelligence (AI)" (accessed March 21, 2015), online: <gowlingwlg.com/en-gb/footer/how-we-use-artificial-intelligence-ai> [perma.cc/5KEL-Y2X4]; Travers Smith, "Travers Smith spins off AI capability with the launch of Jylo, an independent technology enterprise powered by advanced AI" (22 May 2024), online: < https://www.traverssmith.com/knowledge/knowledge-container/travers-smith-spins-off-ai-capability-with-the-launch-of-jylo-an-independent-technology-enterprise-powered-by-advanced-ai/> [perma.cc/X8FF-XUX4].

framework for understanding GenAI's impact on contracts from three perspectives: that of the "**contract drafter**," the lawyer harnessing GenAI's power as a tool for legal practice; that of the individual "**contract taker**," the consumer enjoined by a GenAI-powered contract's terms; and that of the "**contract self-helper**," the self-represented litigant replacing legal expertise with a chatbot. These three legal personalities each offer different lenses on the challenges introduced to modern commercial practices by engaging GenAI, exacerbating and enhancing the existing literature on contracts of adhesion. In so doing, we seek to engage with both the fundamental theoretical concepts and the corresponding practical implications, offering a new way of thinking about the evolving landscape of GenAI.

Part I: When Bots Rewrite the Plot

Discussion of large language models (LLMs) has reached a fever pitch, with countless news articles[19] and shiny marketing materials[20] extolling the virtues of GenAI for law. Despite this newfound level of notoriety, LLMs' main technological mechanisms continue to be misunderstood by vocal commentators, who repeatedly overestimate their abilities or misapprehend their key features. Today's most well-known LLMs are powered by Generative Pre-trained Transformers (GPT), a model spearheaded by OpenAI.[21] The GPT acronym signals its three chief technological offerings: (G) it *generates* new text based on the examples it has seen before; (P) it does so quickly and convincingly due to the significant *pre-training* the model receives; and (T) it *transforms* words into tokens, which are then weighted probabilistically to determine what sort of token is likely to come next.[22] The GPT series of models excel at a process called *zero-shot learning*, *i.e.*, because of the fine-tuning the model receives during its pre-training process, it is usually able to produce high-quality results on its first interaction with a prompt, rather than needing multiple attempts.[23]

It is perhaps tautological to emphasize that large language models consist of large amounts of language. Yet, emphasizing this fact is imperative: for an LLM to be effective, it must contain

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[19] See, *e.g.*, Isabel Gottlieb, "Gen AI Cut Lawyers' Drafting Time in Half, UK's Ashurst Says" Bloomberg Law News (June 10, 2024) online: <https://news.bloomberglaw.com/artificial-intelligence/gen-ai-cut-lawyers-drafting-time-in-half-uks-ashurst-says> [perma.cc/X7KX-PZ4L]; Jane Wakefield, "Is AI about to transform the legal profession?" BBC (October 18, 2023) online: <https://www.bbc.com/news/business-67121212> [perma.cc/64AW-5CMT].

[20] See, *e.g.*, A&O Shearman, "ContractMatrix" (updated 2025) online: <https://www.aoshearman.com/en/expertise/markets-innovation-group/contractmatrix> [perma.cc/6NPJ-L45B]; Linklaters LLP, "Our approach to Generative AI" (updated 2024) online: <https://www.linklaters.com/en/about-us/genai> [perma.cc/L7RY-U8HQ]; Fennemore Craig, "Innovation" (2025) online: <https://www.fennemorelaw.com/about-us/innovation/> [perma.cc/6LTE-JZZ9].

[21] For a more thorough explanation of how LLM technology works, see Katie Szilagyi, "Regenerating Justice: ChatGPT and the Legal Minefield of Generative AI" (2025) 22 CJLT 109 [Szilagyi, "Regenerating"].

[22] Transformers are known to be effective models for tasks like "machine translation, document generation, and syntactic parsing." See Alec Radford et al, "Improving Language Understanding by Generative Pre-Training" (June 11, 2018) online (PDF): <https://cdn.openai.com/research-covers/language-unsupervised/language_understanding_paper.pdf> [perma.cc/L7EV-9T3C].

[23] Tom B. Brown et al, "Language Models are Few-Shot Learners" arXiv:2005.14165 (cs) online: *arxiv* <https://arxiv.org/abs/2005.14165> [perma.cc/K9Q9-C3A3].

vast quantities of sample text, typically drawn from Internet sources through text mining.[24] This sample text provides the training dataset for the LLM to "learn" how to replicate the way humans communicate with one another.[25] By access to large volumes of information, LLMs can develop an uncanny ability to approximate human communication. This process, however, works differently than some might expect: the LLM does not learn the meaning of words as words, but rather, the statistical likelihood of a token appearing next in a series of tokens. To do this, the LLM first breaks words down into tokens, which are then assigned a "weight" aligned with how likely that token is to appear in a series of words. By computing complicated probabilities, the LLM can generate statistically likely sentences, based on an array of factors including frequency of use, creativity of the model, and the context provided by the previous tokens.[26]

Contrasted against the effectiveness of LLMs for generating text is the possibility of the system hallucinating, *i.e.*, producing false or misleading content.[27] The prospect of hallucination flows from the degree of creativity permitted within the model: a characteristic known as temperature.[28] Technology creators and marketing materials developed in support of LLMs tend to emphasize efforts to reduce hallucination, but hallucination is a feature—not a bug.[29] For LLMs to perform effectively, they need to have a degree of freedom to generate net-new content. At least under current model capabilities, this means the possibility of hallucination will remain within LLMs as a matter of creative necessity. Lately, a process called retrieval-augmented generation has been proposed as a "solution" for the hallucination problem.[30] This process is especially useful for tailored enterprise solutions: the LLM is able to access information outside its training data, which allows it to obtain additional training for a specific organizational context.[31] Law firms creating in-house systems might employ this approach to enhance performance at the types of tasks

[24] Much of this data comes from the BooksCorpus 2 dataset. See Jack Bandy and Nicholas Vincent, "Addressing 'Documentation Debt' in Machine Learning Research: A Retrospective Datasheet for BookCorpus" arXiv:2105.05241v1 (cs) online: *arxiv* < https://arxiv.org/pdf/2105.05241v1> [perma.cc/U3SZ-MVNW. Text mining, put simply, involves amassing vast quantities of text, usually from the internet or repositories like BooksCorpus, in order to identify patterns and extract useful information. Unfortunately, the use of unreliable sources for this training data, like Reddit and other social media sites, can lead to discriminatory, incomplete, or otherwise-biased datasets being used by LLMs, resulting in "stochastic parrots", which may entrench biases in the perception of their users. See Mengting Wan et al, "TnT-LLM: Text Mining at Scale with Large Language Models" (March 18, 2024) arXiv:2403.12173 (cs) online: *arxiv* <https://arxiv.org/pdf/2403.12173> [perma.cc/4XDX-LGJL]; Emily Bender et al, "On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?" (2021) Association for Computing Machinery online: <https://doi.org/10.1145/3442188.3445922> [perma.cc/HC8R-XE3R].

[25] Note that most LLMs are trained on English language models; even when they communicate in other languages, they tend to "think" in English, relying on their English training data. See, e.g., Simultrans Team, "Limitations of Language Models in Other Languages" (April 25, 2025) online: <https://www.simultrans.com/blog/limitations-of-language-models-in-other-languages> [perma.cc/68A5-23LX].

[26] Joshua Davis et al., ''The Temperature Feature of ChatGPT: Modifying Creativity for Clinical Research" (2024) 11 JMIR Hum Factors, doi: 10.2196/53559.

[27] According to Minhyeok Lee, "The hallucination phenomenon has been attributed to the model's inherent limitations, particularly its inability to discern when there is no well-defined correct answer for a given input. See Minhyeok Lee, ''A Mathematical Investigation of Hallucination and Creativity in GPT Models" (2023) 11:10 Mathematics at 1.

[28] Joshua Davis et al., ''The Temperature Feature of ChatGPT: Modifying Creativity for Clinical Research" (2024) 11 JMIR Hum Factors, doi: 10.2196/53559.

[29] Lee, *supra* note 27.

[30] Varun Magesh et al, ''Hallucination-Free? Accessing the Reliability of Leading AI Legal Research Tools" (2024), online: arXiv <https://arxiv.org/abs/2405.20362> [perma.cc/V82E-5DEW] at 5.

[31] *Ibid.*

common to modern law firms.[32] Importantly, however, retrieval-augmented generation is a separate programmatic approach which is scaffolded onto the LLMs, rather than a tweak to the core LLM process itself.[33] It offers a functional workaround, as opposed to a foundational change in how the LLMs operate.

A. That New New: GenAI for Contracting Services

Marketing materials for law firms seem to suggest that we are on the precipice of a sea change in the offering of legal services.[34] As of 2024, 43% of the 200 largest law firms have created dedicated budgets for GenAI investments, with 53% of those large firms having already purchased various "legal AI" tools.[35] Venture capitalists have focused in on AI-powered offerings for the legal technology sector.[36] Within the next ten years, the global GenAI legal market is expected to be worth approximately $992.1 million (in USD).[37]

For contract law, there is considerable enthusiasm about GenAI-powered automation for tasks including contract drafting, review, analysis, and benchmarking. Many new companies have entered the market in the past few years, with most offering similar features.[38] The more successful marketplace entrants have raised tens of millions from investors, signifying confidence in both their current capabilities and future potential, and attracting high-profile clients from top law firms.[39] Many of the widely used tools offer Microsoft Word integration, meaning that the products coalesce seamlessly with the word processing software that is already industry standard.[40]

One of the industry leaders in the contracting space is Spellbook, which offers five unique features in an "AI suite," which it calls "spells,"[41] evoking contracts as a special kind of magic.[42] The five spells are: Review, Draft, Ask, Benchmarks, and the newly-added Associate.[43] Review purports to

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[32] *Ibid.*

[33] Szilagyi, "Regenerating," *supra* note 21 at 122.

[34] LexisNexis, "Biggest Law Firms Making Major Investments in Generative AI" (February 9, 2024) online: <lexisnexis.com/community/insights/legal/b/thought-leadership/posts/biggest-law-firms-making-major-investments-in-generative-ai> [perma.cc/6M83-YGMS].

[35] *Ibid.*

[36] According to Shubham Datta of Clio Ventures, VCs are only interested in AI-powered legal technologies right now, eschewing other offerings. "It's like when the cloud was getting started—it would have been foolish to invest in technologies that weren't cloud-based." See Robert Lavine, "AI accelerated legal tech funding – this is how it takes the next step" (November 18, 2024) online): <https://globalventuring.com/corporate/information-technology/ai-startups-legal-tech-funding/> [perma.cc/8L8U-49R2].

[37] Market.us, "Generative AI in Legal Market" (August 2024) online: <https://market.us/report/generative-ai-in-legal-market/#:~:text=The%20Global%20Generative%20AI%20in%20Legal%20Market%20size%20is%20projected,period%20from%202024%20to%202033.> [perma.cc/TVV7-VP9C].

[38] LegalTech, *supra* note 5.

[39] Caroline Hill, "Legaltech Latest: Launches and fundraises for Ctrl AI; Eudia; SpotDraft and Aracor AI" (February 17, 2025) online: <https://legaltechnology.com/2025/02/17/legaltech-latest-launches-and-fundraises-for-ctrl-ai-eudia-spotdraft-and-aracor-ai/> [perma.cc/Q5TH-X6ZM].

[40] Spellbook, Robin AI, DraftWise, and ContractKen, among others, tout their ability to integrate with Microsoft Word as a key selling feature in their marketing materials.

[41] Spellbook, "Spellbook Reviews - #1 in AI Contract Review" online: <https://www.spellbook.legal/features/review> [perma.cc/EF8X-N6VY].

[42] Ian Kerr's syllabus for 1L staple "The Law of Contracts" used to refer to contracts as a special kind of magic.

[43] Spellbook, *supra* note 41. Associate is perhaps better described as agentic AI, further explained below.

offer a "second set of eyes for any agreement," offering error spotting, risk identification, and redlined suggestions similar to "track changes" in a word document.[44] Draft creates tailored contract content based on the user's preferred terms and past work, alleviating the burden of drafting from scratch by populating a contract based on details like contract type, jurisdiction, party details, and user writing style.[45] Ask enables users to receive answers to queries pulled from within the contract itself.[46] Benchmarks permits comparison of draft contracts with a library of over 2300 example "market standards," alleging to ensure comprehensive and comparable text.[47] Finally, Associate goes beyond the Microsoft Word plug-in to provide multi-document capabilities; still in its nascent stages, the feature's lofty claims include making connections and fixing issues across document sets, and executing complete projects.[48] Taken together, Spellbook's suite of spells offers a glimpse at impending changes to the contracting model enabled with GenAI as a not-so-silent partner in the process.

Other GenAI for contracting services make similar sorts of promises. Robin AI offers a "Report" function that can analyze anywhere from a single contract to hundreds of contracts simultaneously, generating a summary table of its results.[49] SpeedLegal focuses on risk management, allowing users to upload their own contract templates for AI comparison with other contracts; this permits analysis of key variables like dates, monetary values, and contracting parties, and provides tailored recommendations for contract enhancement (to be either approved or rejected by the user).[50] In the same vein, ContractKen claims to identify "risky" aspects of the contract, accompanied by brief explanations of the risk, as well as notifying the user of missing terms and providing redrafts.[51] DraftWise boasts linkages to a database, allowing comparison by search criteria including author, client, opposing counsel, and deal size, as well as identifying issues, generating revisions, and answering user questions about negotiation history.[52]

B. Is the Old Road Rapidly Aging?

Intense periods of technological progress and advances in automation have always transformed the scope of human actions, with the legal profession continuously undergoing renovation based on the scope of available tools. That is to say: there is nothing new under the sun. As early as the

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[44] *Ibid.*

[45] Spellbook, "Spellbook Drafting – Draft Contracts 10x Faster" online: <https://www.spellbook.legal/features/draft> [perma.cc/6PA2-ZSKC]

[46] Spellbook, "GPT-4 for Lawyers: There's an AI for That" online: <https://www.spellbook.legal/features/ask> [perma.cc/8PAQ-5WX7].

[47] Spellbook, "Benchmarks – Match Contracts to Industry Standards in Word" online: <https://www.spellbook.legal/features/benchmarks> [perma.cc/PQ38-JZB3]

[48] Spellbook, "Spellbook Associate – The First AI Agent for Law" online: <https://www.spellbook.legal/associate> [perma.cc/S5P9-53X2]

[49] Users can select what information will be in the report by choosing from pre-made templates or by creating a template from scratch. See Robin AI, "Robin AI Reports – Generate and Review Reports 50x Faster – Legal AI" online: <https://www.robinai.com/reports> [perma.cc/Y5X6-5PA7]

[50] Speedlegal, "Risk Analysis" online (website): <https://speedlegal.io/platform/risk-analysis> [perma.cc/Y4TF-QP5Q]

[51] ContractKen, "ContractKen – AI Powered Contract Drafting & Review Tool for Lawyers" online: <https://www.contractken.com/#wordken> [perma.cc/3WT6-E3ZN].

[52] Draftwise, "Draftwise – How it Works" online (website): <https://www.draftwise.com/how-it-works> [perma.cc/22X8-PR5T].

1940s, proponents of "jurimetrics" advocated for a greater degree of "scientification" in law-making and law-application.[53] Throughout the 1950s, jurimetrics grew to include behavioural analysis, with scientific approaches to studying the decisions made by judges and legal actors; and legal information retrieval, which involved the first iterations of storing and searching electronic legal documents.[54] By the 1970s, legal informatics had replaced jurimetrics, working on problems including electronic retrieval of legal documents and literature; computational approaches to legal reasoning, and automating legal office work.[55] Through the early 1980s to the mid 1990s, the growth of the personal computer created a veritable revolution in the culture of office work and word processing.[56] Importantly, the transition of lawyers drafting their own written materials was accompanied by outcry and charges of time-wasting: clients complained that word processing was secretarial work.[57] Less than 30 years later, it is inconceivable to imagine a lawyer at work without a personal computer. While lawyers of an older generation might still dictate letters or ask legal assistants to transcribe handwritten notes,[58] most consider typing a part of the writing process, inextricable from the intellectual activity of legal work. Some industry forecasters say we are now at a similar crossroads with GenAI.[59]

The pace of change is swift. Before the ink has dried on new ideas about the transformative nature of GenAI, another new technology is already being touted: agentic AI. Claims abound that agentic AI represents an altogether new frontier in AI-powered applications, with AI "agents" having the ability to use "sophisticated reasoning and iterative planning to autonomously solve complex, multi-step problems."[60] In the legal world, this may take the form of AI agents and attorneys working "hand in robot hand," with the AI agents performing their specified tasks and checking their own work before handing it in to their human counterparts for a final review.[61] Many such AI agents are already being offered by legal tech companies. LexisNexis, which previously introduced Lexis+ AI, has recently added Lexis Protégé, an agentic AI assistant that promises

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[53] Jorg Pohle, "A Legal Discipline of the Future" (May 2022), online: <ssrn.com/abstract=4186814> [perma.cc/5VEB-KCD4] at 2.

[54] Hans W. Baade, "Law and Contemporary Problems" (1963), online: <scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2944&context=lcp > [perma.cc/EN23-GQX8] at 6-9. Pohle explains that in the 1960s, these "jurimetrics" approaches gave rise to "legal cybernetics", which distinguished between two types of "law machines," an information machine to "support work on legal texts (searching, finding, sorting, organising, writing, etc.)" to bring information overload under control, and a consultation machine, also ironically called a "judgement machine" to mechanize legal thinking and argument. Legal cybernetics lost traction and died out as a specialized subfield; Pohle notes even as the names go out of fashion, "they leave traces and be it in the names and titles of journals and conferences, research institutes or software systems and services."

[55] Pohle, *supra* note 53 at 11.

[56] Ron Friedmann, "A History of Legal Technology" (December 2004) online: <https://prismlegal.com/back_to_the_future-a-history-of-legal-technology/> [perma.cc/WCC4-DMT5].

[57] Eric Veith, "What it was like to practice law 25 years ago without the use of any computers," (26 October 2007), online: <https://dangerousintersection.org/2007/10/26/what-it-was-like-to-practice-law-25-years-ago-without-the-use-of-any-computers/> [perma.cc/7MWX-EUHQ].

[58] Indeed, transcription of dictated voice notes or scribbled handwritten notes is also increasingly done with AI, a significant shift within the last ten years.

[59] Thomson Reuters, "How AI is transforming the legal profession (2025)" (January 16, 2025) online: <https://legal.thomsonreuters.com/blog/how-ai-is-transforming-the-legal-profession/> [perma.cc/4QYA-DTLR].

[60] Erik Pounds, "What Is Agentic AI?" (October 22, 2024), online: <https://blogs.nvidia.com/blog/what-is-agentic-ai/> [perma.cc/ZX7P-NABC].

[61] Zach Warren, "Agentic AI in legal: What it is and why it may appear in law firms soon" (December 9, 2024) online (website): <https://www.thomsonreuters.com/en-us/posts/technology/agentic-ai-legal/> [perma.cc/RX25-JEQM].

increased efficiency through automated discovery and deposition preparation, next-level drafting for litigation and contracts, and personalized, proactive recommendations.[62] Similarly, Spellbook's new "Associate" feature is described as "the first AI agent that can work through multi-document legal matters, with your oversight."[63] While these novel modes of AI utilization certainly make a lot of promises about increased efficiency, the fact that each of these agents offer their products to perform *supervised* work is indicative of the same kinds of issues that plague "conventional" (if a few-year-old technology can even be referred to as such) GenAI.

Perhaps the advent of GenAI is simply the next step in a long progression of automation in the culture of work and provision of legal services. Perhaps we will look back on this essay in 30 years' time and roll our eyes at how it extols the imagined virtues of a long-forgotten workplace. Perhaps, by the time this essay is published several months from now, the conversation about GenAI will have been replaced entirely with one about Agentic AI. Perhaps we are treating contracting with an unearned romanticism that has no place in modern commerce. Already, AI is widely used in legal practice in other areas where it has been a crucial time-saver, like electronic discovery,[64] where boardrooms full of boxes have been replaced by tranches of digital documents.[65] But, in our view, there is something different going on between lawyers using computers to sort litigation materials *versus* lawyers using GenAI to draft its own contracts. The scintilla of intellectual contribution shifts from the human to the automation. What GenAI for contracting proposes to offer is not merely the automation of mundane tasks: the automation captures the essence of the human participation. As we discuss in the next sections, this matters for contract doctrine—for trust, for promise, for consent, and for enforcement.

Part II: When Contract Law Is No Longer What We're Taught

Contract tends to be mythologized as a true pillar of private law: a legal instrument that allows parties to voluntarily enter binding legal relations. Theoretical approaches to contract have conceptualized the key aspects of this legal relationship differently, but the core aspects typically remain the same. Fried conceptualizes the contract as a promise, zeroing in on the moral nature of the promissory exchange between the contracting parties, and the corresponding trust that must exist between them.[66] MacNeil argues that relationality is a key aspect to understanding the

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[62] "LexisNexis Protégé – AI Assistant for Legal & Business Professionals" online: <https://www.lexisnexis.com/en-us/products/protege.page> [perma.cc/SKL3-LMFV].

[63] Spellbook, "Spellbook Legal AI Agent – The First AI Associate for Lawyers" online: <https://www.spellbook.legal/associate>.

[64] KPMG, "How AI transforms document review in eDiscovery", online: <https://kpmg.com/ch/en/insights/cybersecurity-risk/e-discovery.html> [perma.cc/YQ5G-VQCJ].

[65] Courts have acknowledged legal counsel's appropriate use of data sampling through technology assisted review, stressing the importance of ensuring lawyers remain involved in setting search terms and reviewing culled documents. For some recent examples see, *e.g.*, *H2 Canmore Apartments LP v Cormode & Dickinson Construction Edmonton Ltd*, 2024 ABKB 424; *Deren v SaskPower*, 2017 SKCA 104.

[66] Fried emphasizes trust as a moral obligation, going beyond the mere effort to predict what another party might do. He writes: "But trust allows a particular kind of prediction, coordination, and collaboration based on a recursive and transparent mirroring of mutual recognition and respect. We start with respect, which allows trust, which allows language, which finally allows the institution of promising." Charles Fried, *Contract As Promise: A Theory of Contractual Obligation*, 2ed (Oxford, UK: Oxford University Press) at 138.

law of contract, emphasizing the social relationships that enable people to enter contractual relationships.[67] Posner's law and economics-fueled explanations of contracting prioritize practicality over morality, highlighting the efficiencies sometimes made possible through a strategic breach of contract.[68] And Gilmore, as we have already mentioned, eulogizes the law of contract, lamenting a near-future where it is entirely consumed by tort, no longer a core offering for eager 1L students.[69]

Brownsword succinctly summarizes the diversity of perspectives:

> [W]hilst we might hope to construct a definition of a "contract" around the shared idea of an enforceable transaction, there is little agreement about how this is best articulated. Some definitions might centre on the idea of an enforceable agreement; others might be anchored to the concept of an enforceable promise (or set of promises); and others might emphasise that contracts are essentially exchanges, or perhaps bargained-for exchanges.... In practice, it might be thought, it cannot matter whether a contract is conceived of in terms of promise, agreement, bargain, or whatever.... On occasion, however, the way in which we conceive of a contract does have a practical bearing.[70]

For our purposes, we require a definition of contract's chief offerings. Helpfully, Margaret Jane Radin pares down these fundamental aspects into seven key criteria, which she offers as a "bare-bones list," a conceptual framework capturing the central offerings of contract law and avoiding additional trappings. This bare-bones list begins with (1) a shift of entitlements between two private parties engaged in some sort of exchange, where (2) the parties are human beings who possess autonomy (or corporations operating as legal entities).[71] These parties (3) agree to a specific exchange, arriving at *consensus ad idem*, the meeting of the minds, by exercising that free will and autonomy.[72] In the context of this relationship, a core contract arises when (4) the shifting entitlements happening under the parties' voluntary *consensus ad idem* happens in accordance with rules under a legal infrastructure established and managed by the State.[73] This so-called legal infrastructure includes: (5) publicly recognizable rules and methods for confirming both the formation of a contract and the extend of the corresponding contractual obligations; (6) accessible remedies for a breach of the contract; and (7) a certain degree of trustworthiness, allowing the contracting parties to rely on the legal infrastructure.[74] This list is sufficiently broad to be

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[67] Ian R MacNeil, "The Many Futures of Contracts" (1973) 47 S Cal L Rev 691 at 720.
[68] *Ibid* at 141-142.
[69] This would be replaced by a class on the amalgam, "Contorts." Gilmore, *supra* note 1 at 98.
[70] Roger Brownsword, Contract Law, Themes for the Twenty-First Century (London, UK: Butterworths, 2000).
[71] Radin, *supra* note 17 at 508.
[72] *Ibid.*
[73] *Ibid.*
[74] Radin, *supra* note 17 at 508.

relatively uncontroversial. We adopt Radin's characterization of the life of the contract here because it leads us to her helpful analytical framework for modern contract varietals.[75]

Armed with her bare-bones list, Radin goes on to define four different contract varietals: bespoke, machine rule, high-end boilerplate, and massively distributed boilerplate.[76] Through this lens, she aims to consider how well each of these types of contracts manages to conform with the seven foundational precepts. On one end of the continuum are the *bespoke* contracts, the specific negotiated private arrangements that epitomize traditional contract theory: they allow for private ordering of legal obligations.[77] Yet even though these sorts of contracts are at the heart of most theoretical analyses, adhering perfectly to the idealized principles, very few contracts actually look like this in practice: bespoke contracts are far too expensive, requiring specialized lawyering, making them unavailable for most commercial transactions.[78] At the other end of the continuum are *machine rule* contracts, which allow for completely automated, mechanical outcomes, obviating human involvement in contractual ordering altogether.[79] While machine rule contracts do little to uphold the ideals propagated within contract theory, they are also not that commonplace—at least, not yet.[80] Most of the issues arise in the messy middle, the domain of *high-end boilerplate* or *massively distributed boilerplate* contracts.[81]

High-end boilerplate contracts arise where legal service providers retain a database of previously used provisions to be deployed for analogous situations.[82] A routine aspect of many modern commercial agreements is negotiations over the incorporation of these well-trodden provisions, which are now digitally stored and inserted into contracts with "the press of a key."[83] One can easily imagine the large library of carefully drafted provisions drafted by lawyers who have been in this business awhile, ready for reuse when similar circumstances arise. Law firms often refer to previously used contracts as precedents. While quick and efficient, this ready availability of previously used provisions means they are not necessarily carefully considered for the new circumstances presented by the contracting parties at hand.[84]

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[75] And her insights on normative degradation, which set the stage for new issues created by GenAI. *Ibid* at 531.
[76] *Ibid* at 510.
[77] *Ibid* at 510–511.
[78] *Ibid* at 510.
[79] *Ibid* at 511.
[80] Although, they are perhaps now a bit more commonplace than they were at the time Radin set out this bare-bones list, given the rise of cryptocurrencies and smart contracting. Alison R. Manzer et al, *Law in International Finance*, Release No 2 (Toronto: Thomson Reuters Canada, 2024) at Appendix 6:22.
[81] Radin, *supra* note 17 at 513–517.
[82] *Ibid* at 513. For an empirical view of high-end boilerplate, see Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28:1 American Sociological Review 55. [Macaulay, "Non-Contractual Relations"]; Mitu Gulati and Robert E. Scott, *The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design* (Chicago, IL: University of Chicago Press, 2012).
[83] Radin emphasizes that the digitization of contracts has transformed the nature of including such previously used provisions: the ease with which they can be newly deployed differs from past precedents that needed to be copied by hand or typed into new contracts. Radin, *supra* note 17 at 513.
[84] Radin, *supra* note 17 at 514–515. See, in particular, Gulati & Scott, *supra* note 82 at ch 3. We discuss the use of precedents in section The Contract Drafter below.

These issues are further heightened by massively distributed boilerplate contracts, or contracts of adhesion.[85] Parties to such contracts are simply consumers, who have no choice but to accept the offered terms if they wish to engage in the commercial relationship.[86] Emerging as ticket-contracts in the late 1880s, they are now more commonly called "clickwrap" or "shrinkwrap" contracts. These sorts of contracts bring to mind the 1990s software boxes from which their name derives: as soon as the shrinkwrap was removed from the box, you were deemed to have accepted the contractual terms.[87] Significantly, most people subject to these contracts are not sophisticated parties; they have no control over the disseminated boilerplate language and might not understand its contents.[88] Referring to these types of agreements as contracts in the classical sense strains the theoretical underpinnings of contractual obligation to an almost nonsensical conclusion. What's more: massively distributed boilerplate tends to involve restrictions or deletion of legal rights and remedies, through mandatory arbitration clauses and various exclusion clauses in the context of services that many people require.[89] Julie Cohen has evocatively referred to such contracting parties as "contract takers," emphasizing the degree to which parties have no choice but to take the terms with which they are presented.[90] This riff on "contract makers" reminds readers that parties entering into such contractual arrangements are not truly equal parties: they must take what they are given.

This swing on the spectrum from individually negotiated bespoke contracts to massively distributed boilerplate gives rise to what Radin calls a "normative degradation" of contractual obligation.[91] Watering down the consent traditionally needed to enter into a contract has a transformative impact on the nature of the promissory relationship lauded by contract law, which has its roots in the autonomy of the individual. Especially in light of the lack of bargaining power of modern contract takers[92] and the percentage of contract takers who do not read the terms and conditions with which they are presented,[93] it is difficult to say that the core theoretical requirement of *consensus ad idem* is satisfied in contracts of adhesion. Courts' efforts to uphold

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[85] Radin, *supra* note 17 at 515.

[86] Massively distributed boilerplate may be delivered digitally, asking users to click "I agree" in their online interaction, or may be later transmitted to users in physical space. *Ibid* at 517. See also: Margaret Jane Radin, "Boilerplate: the Good, the Bad and the Ugly" (19 June 2016), online (article): <allard.ubc.ca/about-us/news-and-announcements/2016/boilerplate-good-bad-and-ugly>. We discuss the emergence of massively distributed boilerplate below in section The Contract Taker below.

[87] See *Century 21 Canada Ltd Partnership v Rogers Communications Inc.*, 2011 BCSC 1196 at paras 84–91 [*Century 21*].

[88] Radin, *supra* note 17 at 515.

[89] *Ibid.*

[90] Cohen writes: "In the mass market, consumers are contract takers; they can refuse to buy, or hold out for a lower price, but they generally cannot demand a particular package of contract terms or product characteristics." Julie E Cohen, "Copyright and the Jurisprudence of Self-Help" 13 BTLJ (1998) 1089 at 1125.

[91] Radin, *supra* note 17 at 522.

[92] The SCC discusses the inequality of bargaining power in *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 63-72 [*Uber Technologies*]. In *Uber*, the SCC has emphasized that the doctrine of unconscionability may step in to protect parties who "are vulnerable *in the contracting process* from loss or improvidence to that party in the bargain that was made." (see *Uber* at para 60).

[93] Omri Ben-Shahar & Carl E. Schneider, "The Failure of Mandated Disclosure" (2011) 159 U Pa L Rev 647 at 671. For an empirical confirmation of the conventional wisdom that contract takers do not read contracts, see, for example, Yanis Bakos, Florencia Marotta-Wurgler, & David R Trossen, "Does anyone read the fine print: Consumer attention to standard-form contracts" (2014) 43:1 Journal of Legal Studies 1; Jonathan A. Obar & Anne Oeldorf-Hirsch, "The Clickwrap: A Political Economic Mechanism for Manufacturing Consent on Social Media" (2018) 4:3 Social Media + Society.

such contracts often engage an evidentiary standard of constructive notice, further confirming that contract takers often neither see nor understand the contractual terms they have purportedly agreed to uphold.[94] This recognition of contract takers' limited abilities to consent or communicate their needs in contractual formation strain aspects of doctrine, calling voluntariness into question. From this perspective, it may simply be incorrect to call modern contracts of adhesion true contracts, given all the foundational legal fictions this term is expected to convey. In later work, Radin, joined by co-author Robin Bradley Kar, reframes boilerplate text as *pseudo-contract*, "resembling contract without fulfilling its necessary conditions of validity."[95]

Such contractual critiques, while compelling, are far from universally accepted. Naysayers tend to emphasize the commercial necessities of boilerplate text in allowing our modern marketplace to function.[96] We need contracts of adhesion, the argument goes: they are simple, efficient, and despite some doctrinal deficiencies, most consumers would freely choose them over time-consuming and expensive mechanisms of negotiating their own rights. Critics have charged Radin with overly romanticizing a pre-boilerplate era: even without common boilerplate language, it is still likely that some contracting parties would be unable to understand complex modern contractual terms.[97] Others are unconvinced by Radin's overall argument of normative degradation: for instance, Brian Bix accuses as her characterization of boilerplate provisions as not being truly contractual as having "the rhetorical and paradoxical force of 'property is theft' or 'an unjust law is not a law.'"[98] While agreeing that massively distributed boilerplate limits bargaining and free choice, Bix deems any devolution of doctrine an overstatement, reminding readers of the economic efficiencies enabled by the facility of modern business; as he puts it: "[t]he limited evidence indicates that much more often than not, consumers and employees would take the economic benefit now rather than the greater rights later."[99] In a similar vein, Steven Feldman argues against Radin's emphasis on autonomy as being a doctrinal necessity for achieving mutual consent through contract.[100] He also notes that constructive notice is a well-settled instantiation of "manifested assent" falling

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[94] Radin, *supra* note 17 at 522. For an empirical assessment of the unreadability of boilerplate, see, for example, Uri Benoliel & Shmuel I Becher, "The Duty to Read the Unreadable" (2019) 60 Boston College Law Review 2255; Michael L Rustad & Koenig, Thomas H., "Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices" (2014). 49 Wake Forest Law Review 1431.

[95] Margaret Jane Radin & Robin Bradley Kar, "Pseudo-Contract and Shared Meaning Analysis" (2019) 132 Harv L Rev 1135 at 1137.

[96] As Steven Feldman writes: "While "exploitation" is never defendable, she underplays a basic premise of our market economy that parties (including merchants) are entitled to take "aggressive positions" within the bounds of the law to maximize the benefits they believe they are entitled to receive under their contracts. After all, as an Alabama Supreme Court Justice cogently observed, "That is what parties to contracts are expected to do." In this same vein, the law generally does not seek to restructure the American economy but strives to work within it and to help the players flourish." Steven W. Feldman, "Mutual Assent, Normative Degradation, and Mass Market Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I) The Fine Print, Vanishing Rights and the Rule of Law (Part I)" (2014) 62:2 Clev St L Rev 373 at 382.

[97] Omri Ben-Shahar, 'Regulation Through Boilerplate: An Apologia' (2014) 112 Mich L Rev 883 at 887.

[98] Brian H. Bix, "Boilerplate, Freedom of Contract, and 'Democratic Degradation'", (2013) 49 Tulsa L Rev 501, online: <https://scholarship.law.umn.edu/faculty_articles/196.> at 506.

[99] *Ibid* at 507.

[100] Feldman, *supra* note 100 at 402.

comfortably within contract doctrine.[101] The underlying implication is clear: contracts of adhesion give parties enough of a reason to believe that contractual formalities are met, even if no actual belief can be demonstrated.[102] Through this lens, the mythological meeting of the minds is exaggerated within theoretical accounts: a plain reading of the contract's offerings is deemed more than sufficient for delineating the scope of the contract taker's reliance.[103]

Similarly, reducing everyday consumers to contract takers has been reconceptualized as a fundamental aspect of the freedom of contract. Other contingencies are in place to keep commercial parties and large companies' power in check, like reputation and third-party evaluations, which allow consumers to solve problems of imperfect information.[104] Taking Cohen's contract takers to task, David Friedman is altogether unconvinced that freedom of contract requires parties to actively participate in bargaining, or that bargaining offers some inherent advantage rooted in consent or voluntariness.[105] Standard form contracts offer key efficiencies, he reasons, outweighing the advantages of bespoke agreements: "the point of choosing as default terms the terms most parties would bargain to is to avoid the cost of bargaining."[106] Once again, the freedom of contract seems to be extolled as key virtue; inequality in bargaining power is no match for the efficient consumer eager to access what they want online.

Of course, this terrain has all been traversed before. Why offer such a lengthy recitation of well-known academic arguments on contracts of adhesion? The push-and-pull between the freedom of contract, consent, and autonomy, as the overarching principles on the one side, and the practical and doctrinal constraints posed by boilerplate contracts on the other side, provide essential framing for understanding and evaluating the role of GenAI-powered contracts. This set of arguments offers a helpful vantage point for assessing the role of GenAI-powered contracts. Do GenAI-powered contracts bring the final death of contracts or do they further reinforce contracts as essential and impactful regulating mechanism of private relationships? And, as we see in the next section, courts have recently extended some of these arguments in the context of decisions about technological systems.

A. Boilerplate Contracts in Case Law

Courts typically uphold the freedom of contract as a prevailing principle of private law. Doctrinally, the motivations are clear: the law of contract is intended primarily as a commercial

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[101] *Ibid* at 395.

[102] Feldman paraphrases this part of the argument from Farnsworth on Contracts. *Ibid* at 389.

[103] *Ibid.*

[104] David D. Friedman, "In Defence of Private Orderings: Comments on Julie Cohen's "Copyright and the Jurisprudence of Self-Help" (1998) 13 BTLJ 1151 at 1157.

[105] *Ibid* at 1156.

[106] He continues: "If you want to encourage bargaining, the way to do it is to have the legal system set default terms that nobody wants, making it necessary to negotiate and explicitly agree to every detail of every contract. That may be a desirable policy from the standpoint of lawyers and law professors, since it would greatly increase the demand for the services of both, but it is an undesirable policy from the standpoint of everyone else." *Ibid* at 1158.

mechanism, one that allows losses to fall where they occur.[107] Too much judicial intervention in this contracting space risks commerce grinding to a halt. At least in theory, this means that people are allowed to make bad deals, and no court is going to step in simply because a bad deal has been made,[108] absent some other legal transgression.[109] This viewpoint has held true even for contracts of adhesion: even commentators in the first half of the 20th century observed the growing divide between courts attempting to keep the doctrinal rules of contracts intact while still stepping in to occasional assist weaker parties.[110]

The emergence and development of standard-form contracts and their migration from purely commercial relationships to consumer environment closely follows the developments of various technologies. In the commercial sphere, standard-form contracts, as non-negotiated contracts, emerged in maritime shipping as "bills of lading," regulating the terms of a shipping contract. There are records of similar standardized contracts as far as ancient Greece (if not earlier),[111] as well as their use by the East India Shipping Company and the Hudson's Bay Company in the 1800s.[112] However, the advent of the printing press and the resulting reduction in the cost of producing standardized pre-printed forms enabled the efficient production and widespread use of standard-form contracts in commercial settings. While their form was different from the typical bespoke individually negotiated contracts, their use in commercial settings did not challenge the underlying tenets of contract law.[113] Arguably, the parties had sufficient business acumen to decide if using the other side's pre-printed terms was worth the business risk. Commercial actors were not overly fussed by the use of standard form contracts, including resolving the "battle of forms" to decide which of the two competing set of standard form contracts prevails. Commercial actors mainly focused on the essential elements that make the transaction work. As Stewart Macaulay put it, "[e]ven when a purchase order and acknowledgment have conflicting provisions printed on the back, almost always the buyer and seller will be in agreement on what is to be sold and how much is to be paid for it."[114]

The shift from high-end boilerplate in commercial contexts to massively distributed boilerplate in consumer settings began in the late 1880s with early "ticket" cases that corresponded with the

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[107] Take, for example, this statement from Jessel M.R. in the 1875 case, *Printing & Numerical Registering Co. v. Sampson* (1875), L.R. 19 Eq. 462 at 465: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contracts when entered into freely and voluntarily should be held sacred."

[108] See for example, *Bhasin v Hrynew*, 2014 SCC 71 ("In commerce, a party may sometimes cause loss to another — even intentionally — in the legitimate pursuit of economic self-interest. Doing so is not necessarily contrary to good faith and in some cases has actually been encouraged by the courts on the basis of economic efficiency."); *Bowlay Logging Limited v. Domtar Limited* (1982) 135 DLR (3d) 179 at para 4 ("The law of contract compensates a plaintiff for damages resulting from the defendant's breach; it does not compensate a plaintiff for damages resulting from his making a bad bargain.")

[109] Transgressions might include mistake, inequality of bargaining power, unconscionability, or violation of various duties imposed on contracting parties, like fiduciary duties, the duty of honest performance, and more recently, the duty of good faith.

[110] Kessler, *supra* note 11; see also Gilmore, *supra* note 1 at 79-91.

[111] See, Voudouris and Evi Plomaritou, "Documents of the Shipping Transport: Historical Origins, Legal Validity & Commercial Practice" (2020) 10 Journal of Shipping and Ocean Engineering 47.

[112] Gabriel Rauterberg, "The Rise of Form Contract: Contract Design and Enforcement in the First Corporations" (2023).

[113] H. B. Sales, "Standard Form Contracts" (1953) 16 Modern Law Review 318 at 318-319.

[114] Macaulay, *supra* note 82 at 60.

emergence of the steam engine.[115] Rail passengers leaving luggage in station cloakrooms received tickets. Some tickets had the terms printed on the back, while in other instances, the terms were posted beside or behind the counter. The terms typically disclaimed liability for lost or stolen items. These tickets were treated as contracts, raising the legal question of whether and how such terms are part of the agreement. If the limitation of liability was validly incorporated, the consumer was deemed to have accepted the contract, absolving the cloakroom of responsibility for any loss.[116] The emergence of automated parking machines in 1970s raised similar issues.[117] As in the original ticket cases, the focus was on whether consumers had notice of the terms, either through presumed knowledge or because the terms were reasonably brought to their attention. The level of notice was supposed to be commensurate to the onerous nature of the term. The more onerous the clause, the more prominent the notice.[118] Where such notice was established, courts applied the legal fiction of consent, assuming that consumers had agreed to the terms, regardless of whether they had actually read or understood them. Using Radin's bare-bones list, courts enforced ticket contracts mainly through principle (3)—by accepting a ticket, consumers exercised free will and there was a meeting of the minds about the contract.[119]

The same principles and the legal fiction of consent continued with shrinkwrap contracts, the pre-printed terms accompanying computer software.[120] The software was available on floppy discs or CDs inside a box, shrinkwrapped in plastic. As above, consumers could only access the terms after the shrinkwrap was broken. Building on the ticket cases, the courts found these agreements enforceable.[121]

The Internet and digitization drastically changed the environment of ticket contracts. They have pushed them from what were, arguably, areas of leisure, to an unavoidable pre-condition of pretty much every good and service we use.[122] Over the last two decades, Canadian courts largely prioritized commercial certainty and party autonomy when deciding the enforceability of consumer standard form contracts. *Rudder v. Microsoft* was the first Canadian case involving electronic standard-form contracts.[123] It exemplifies the approach that consumer contracts are just a subvariant of commercial contracts and do not require special enforcement rules. In what is now

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[115] *Parker v South Eastern Railway Co* (1877) 2 CPD 416.
[116] *Ibid.*
[117] *Thornton v. Shoe Lane Parking Ltd.* (1970), [1971] 1 All E.R. 686.
[118] For a detailed overview of the cases about notice, see *Apps v. Grouse Mountain Resorts Ltd.*, 2020 BCCA 78.
[119] The first mention of a contract of adhesion at the SCC was in a forgery case: *Arrow Transfer v. Royal Bank of Canada*. Arrow's accountant had been forging cheques and embezzling money from the company's RBC account, which was not discovered for five years. The dispute centered on the validity of a "verification agreement" that required parties to notify the bank within 30 days of "any alleged omissions from or debits wrongly made to or inaccurate entires in the account as so stated." Since Arrow had failed to notify the bank within 30 days of the fraudulent cheques, the majority held that the contract prevailed and they were unable to recover the vast majority of the funds. *Arrow Transfer Co. v. Royal Bank of Canada*, [1972] SCR 845.
[120] *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996). See also *Century 21*, *supra* note 87.
[121] *Ibid.*
[122] Marina Pavlovic, "Consumers first, digital citizenry second: Through the gateway of standard-form contracts" in Elizabeth Dubois and Florian Martin-Bariteau, eds, *Connected Canada: A Research and Policy Agenda for Digital Citizenship* (University of Ottawa Press, 2020) 157.
[123] *Rudder v Microsoft Corp* (1999), 2 CPR (4th) 474, 40 CPC (4th) 394 (Ont Sup Ct) at para. 16.

an oft-cited paragraph, Justice Winkler prioritized party autonomy and the classic paradigm of the sanctity of contract:

> Neither the form of this contract nor its manner of presentation to potential members are so aberrant as to lead to such an anomalous result. To give effect to the plaintiffs' argument [to not enforce the forum selection clause] would, rather than advancing the goal of "commercial certainty" ... move this type of electronic transaction into the realm of commercial absurdity. It would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered through this medium. On the present facts, the Membership Agreement must be afforded the sanctity that must be given to any agreement in writing.[124]

When the case was decided in 1999, electronic commerce and electronic consumer contracts were nascent, and it may have been difficult (though not impossible) to imagine how pervasive these contracts and the goods and services they accompany would become in the daily lives of individuals. This decision set a course for judicial oversight of consumer standard form contracts by focusing on commercial certainty. In *Kanitz v. Rogers Cable* (2002)[125] and *Dell Computer v. Union des consommateurs* (2007),[126] courts further entrenched the view that these contracts are about freedom of choice and party autonomy and, as such, should be given the same effect as freely negotiated contracts in the commercial environment.

The Supreme Court of Canada (SCC) has traditionally been reluctant to confirm unconscionability as arising merely due to imbalance in the parties' bargaining power. However, recent SCC jurisprudence has begun to reflect a shift toward ensuring that the level of scrutiny of standard form contracts reflects their social and regulatory role as well as the lived realities of consumers. In *Douez v. Facebook*, the majority of the SCC recognized that the contemporary environment of consumer contracts is distinct from the commercial environment in which the traditional rules of contract developed over the years. The majority recognized that these contracts are now ubiquitous and based on an inequality of bargaining power.[127] The majority found Facebook's terms of service to be a valid agreement but did not enforce the forum selection clause, thus permitting the class action against Facebook to proceed in British Columbia. In concurrence, Abella J. found that the forum selection clause was unconscionable and, therefore, unenforceable.

The SCC's decision in *Douez v. Facebook* marked a fundamental shift in the jurisprudential approach to consumer contracts and the SCC seems more willing to intervene where the implicated contracts of adhesion move to limit consumers' legal rights within the civil justice system. In her concurrence, Abella J notes that courts ought to "intensify the scrutiny for clauses that have the

[124] *Ibid.*
[125] *Kanitz v. Rogers Cable Inc.* (2002) 58 OR (3d) 299.
[126] *Dell Computer v. Union des consommateurs*, 2007 CSC 34.
[127] *Douez v. Facebook*, 2017 SCC 33 at para 53-55.

effect of impairing a consumer's access to possible remedies."[128] This line of reasoning was further strengthened several years later in *Uber v. Heller*, in which the SCC struck the applicability of a contract of adhesion when a large corporation attempted to enforce an expensive, foreign arbitration as a mechanism for seeking remedy as a driver for Uber Eats.[129] In which the majority judgment, written by Abella and Rowe JJ lays out a modern version of the unconscionability test that is particularly tailored to standard-form contracts in the mass-market environment. Concurring, Brown J agreed with the unenforceability of the arbitration clause, but on the ground that it "undermine[d] the rule of law by denying access to justice.[130]" On the opposite end, the dissenting opinion by Coté J is a treatise on freedom of contract and party autonomy. Coté J's dissenting opinion is a very vivid illustration of what Radin called doctrinal distortion of standard form contacts into the existing theoretical concepts.[131]

Layered on top of this recognition is the duty of good faith, recognized as an organizing principle of contract law for the first time in the 2014 case *Bhasin v. Hrynew*.[132] At least since Bhasin, contracting parties have been put on notice of their requirement to engage in good faith with the other contracting party, taking "appropriate regard" for the legitimate interests of their contracting partners, which vary based on context.[133] Although good faith as an organizing principle typically manifests through established contractual doctrines like honest performance,[134] the SCC emphasized that this list is not closed.[135] This acknowledgement underscores the possibility that the duty of good faith may be implicated in various ways, perhaps even subject to expansion through new digital technologies.

If this degree of discord is possible through contracts of adhesion in meatspace,[136] what then of the digital variant? Boilerplate has already chipped away at the relational aspect of contract creation to a considerable degree. Electronic distribution and execution of contracts has further modified the nature of the relationship, making meaningful negotiation or *consensus ad idem* unavailable in almost all circumstances. How are these issues supercharged through the addition of AI to the legal playbook? We take up these issues in the next section.

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[128] *Ibid* at 99.

[129] *Uber Technologies*, *supra* note 92.

[130] *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 101.

[131] See note 17 and accompanying text.

[132] *Bhasin v Hrynew*, *supra* note 108 at para 64.

[133] *Ibid* at para 65.

[134] In *Bhasin*, SCC articulated that the good faith as the organizing principle is manifested in through these four doctrines: 1) parties must cooperate in order to achieve the objects of the contract; 2) a party must exercises a discretionary power under the contract; 3) where one party seeks to evade contractual duties, and 4) duty of honest performance. *Ibid* at paras 47, 92.

[135] *Ibid* at para 66.

[136] Radin distinguishes between problems that occur in "cyberspace" from those that occur in "meatspace," or "ordinary physical space." Radin, *supra* note 17 at 516.

Part III: When Bots Call the Shots

While contracts of adhesion were becoming business as usual, the world's increased connectivity enabled digital replacements for many aspects of contracting practice. Beyond and in parallel to shrinkwrap and clickwrap came the spectre of automated contracting, allowing contractual bonds to form autonomously, challenging the second principle in Radin's bare-bones conceptual framework, where the parties are human beings who possess autonomy.[137] Ian Kerr took an early analytical lens to the problems of electronic contracting in his 1999 piece, "Spirits in the Material Word."[138] At this time, global lawmakers were grappling with how to best respond to innovations in electronic commerce that enabled contracts to be formed online, with the aid of autonomous digital agents.[139] To allow agents to capably participate in electronic commerce, the transactions and contracts generated through such agents had to be considered legally enforceable.[140] However, barriers interfere with a neat application of traditional contract doctrine to automated electronic commerce. Electronic devices are not persons and do not have legal power to provide consent, nor manifest intention to create legal relations.[141] The traditional view of contract requires mutual concordance between the parties regarding the nature and scope of the rights and obligations that coincide with the exchange of promises, leading to a meeting of the minds to achieve the proverbial *consensus ad idem*.[142] If electronic devices were to become more than mere conduits for commercial transactions, able to make animated autonomous decisions rather than simply accept unilateral offers, what would this do to the soundness of contract theory?[143]

Kerr's piece pays careful attention to whether electronic devices might be thought to have legal personality.[144] He worried about whether extension of legal duties to electronic devices might then offer them the flip side of the coin: corresponding legal rights.[145] Even if this could be determined, there would be difficulties with holding electronic devices liable.[146] Instead, he posited, the law of agency could be invoked to interpret computer-initiated agreements as legally binding without needing to personify electronic devices.[147] Taking this approach, any autonomy was disregarded: electronic devices were communication tools, mere extensions of human action, serving as intermediaries on behalf of contract principals.[148]

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[137] Radin, *supra* note 17 at 508.
[138] Kerr, "Spirits," *supra* note 13.
[139] *Ibid* at 193.
[140] *Ibid* at 194.
[141] *Ibid* at 210.
[142] *Ibid* at 212.
[143] *Ibid* at 211.
[144] Kerr notes there are three usual justifications to attributing legal personality to an entity. These are (1) moral entitlement, which arises if a machine exhibits some *de minimus* threshold of sentience or consciousness; (2) social capacity, which arises if it makes sense to treat an electronic interlocutor *as if* it is a human due to its convincing mimicry; or (3) legal convenience, which arises if there are sound commercial reasons for "treating electronic devices as independent legal subjects capable of holding rights and owing duties." *Ibid* at 215.
[145] "[i]t is odd to think of a legal person who is subject to legal duties but enjoys no independent legal rights." *Ibid* at 217.
[146] *Ibid* at 218.
[147] *Ibid* at 217.
[148] *Ibid* at 220, 241.

Application of the law of agency to autonomous contracting agents was developed more carefully by Samir Chopra and Laurence White in their 2011 book, *A Legal Theory for Autonomous Artificial Agents*, which analyzed the growing reliance on artificial agents within the social and economic aspects of everyday life.[149] Chopra and White recognized that contractual agreements with artificial agents had become ubiquitous within the digital marketplace.[150] Even at that time, most contracts concluded on the internet employed an electronic intermediary that set out the terms of the transaction, with little to no actual control given to the operator.[151] Arguing for legal reform in a more recent contribution, Lauren Henry Scholz explores the challenges and implications of algorithmic contracts.[152] Scholz emphasized that some algorithms used in contract formation have been delegated a level of responsibility that justifies the use of agency principles, acting analogously to human agents for contract formation.[153] Establishing a strong link between the actions of the algorithms and the intentions of the contracting party could foster greater algorithmic accountability.[154]

Other authors added additional nuance, often heralding the arrival of automated contracts by extolling similar virtues to those proffered for contracts of adhesion: efficiency, affordability, and even personalization. Casey and Niblett examine developments with "self-driving contracts," their term for automated private agreements.[155] Such contracts use AI-augmented algorithms or "micro-directives" to fill gaps and adapt contracts based on data and the purpose of the contract.[156] By considering advancements in existing self-driving contracts, such as dynamic pricing models or litigation analytics, Casey and Niblett argue that advanced self-driving contracts would proliferate and outperform human-drafted content "one provision at a time."[157] Similarly, Ben-Shahar and Porat argue that with the increased availability of consumer information, legal protections could be personalized to correspond to the predicted needs of contracting parties.[158] Mandatory rules in contract law protect a minimum bundle of rights but could have unintended consequences such as raising prices and shrinking markets.[159] Ben-Shahar and Porat claim that personalizing mandatory protections may mitigate these downsides by adapting the strength of protections based on the needs of the parties, ultimately increasing encouraging more people to enter into contracts.[160] Relatedly, Pascale Chapdelaine analyzes the rise of algorithmic personalized pricing ("APP"), a form of discriminatory pricing where suppliers set prices based on the consumers' personal

[149] Chopra & White, *supra* note 14.
[150] *Ibid* at 29.
[151] *Ibid.*
[152] Lauren Henry Scholz, "Algorithmic Contracts" (2017) 20 Stan Tech L Rev 128 at 131–132.
[153] *Ibid* at 132-3.
[154] *Ibid* at 169.
[155] Anthony J. Casey & Anthony Niblett, "The Present and Near Future of Self-Driving Contracts" in Ernest Lim & Phillip Morgan, eds, *Private Law and Artificial Intelligence* (Cambridge: Cambridge University Press, 2021) 93 at 94–95.
[156] *Ibid* at 94.
[157] *Ibid* at 94–106, 112.
[158] Omri Ben-Shahar & Ariel Porat, "Personalizing Mandatory Rules in Contract Law" (2019) 86:2 U Chicago L Rev 256 at 256.
[159] *Ibid.*
[160] *Ibid* at 256–257.

information to reach their reservation price.[161] Chapdelaine suggests that the ability to conceal APP is fundamental to its success, which could give rise to issues of pre-contractual misrepresentation or unconscionable agreements.[162] Notably, Chapdelaine observes gaps in the statutory and common law regimes that may limit protections for consumers subject to APP based contracts.[163]

The specifics of LLMs are also extended for contractual language, with some scholars championing accessibility and automation. Harry Surden suggests that representing contractual obligations as computer-processable data rather than natural language allows for novel and expanded contractual properties.[164] Specifically, Surden argues that this process of "data-oriented contracting" could lead parties to design systems that make automated assessments about the conformance or non-conformance with the contractual terms.[165] More recently, Noam Kolt examines whether computational language models such as GPT-3 (as it then was) could understand consumer contracts.[166] Kolt found that while language models have potential to empower consumers by assisting them in understanding their contractual rights, there are several risks, such as the amplification of bias and the spread of misinformation.[167] Overall, it is worth noting, Kolt advocates for further research into the safety and reliability of using such technologies before fully integrating them into legal practice.[168]

Apart from the early work on intermediaries,[169] none of these more recent scholarly efforts have taken a deep dive on the doctrinal aspects of contract law implicated in automation contexts. From a theoretical perspective, upholding Radin's seven key criteria constituting contracting had already become ever more fraught in the era of high-end and massively distributed boilerplate. That is to say: if contract law is not dead yet, then contracts of adhesion have given it a real run for its money.

Acknowledging these challenges, Ian Kerr reflected:

> Self-executing contracts, like the DRM-systems upon which they are built, are specifically designed to promote the wholesale replacement of relational aspects of contracts such as **trust, promise, consent, and enforcement.** As such, they do injury to traditional contract theory and practice.[170]

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[161] Pascale Chapdelaine, "Algorithmic Personalized Pricing: A Personal Data Protection and Consumer Law Perspective" (2024) 102:1 Can Bar Rev 1 at 3–4.
[162] *Ibid* at 6, 16.
[163] *Ibid.*
[164] Harry Surden, "Computable Contracts" (2012) 46 UC Davis L Rev 629 at 637.
[165] *Ibid.*
[166] Noam Kolt, "Predicting Consumer Contracts" (2022) 37:71 BTLJ 71 at 71.
[167] *Ibid* at 77
[168] *Ibid* at 133.
[169] By Kerr, "Spirits," *supra* note 13, and Chopra and White, *supra* note 14.
[170] Kerr, "Arrival," *supra* note 8.

Implicit in Kerr's framing is an acknowledgment of a relationality of contract law, a viewpoint that borrows from MacNeil.[171] We like this framing because it helps to sharpen the focus on the problems we argue are generated by using GenAI in the contracting context. In the following sections, we consider the tensions imposed on these relational aspects of contract law as automation continues to encroach upon the core of contracting practice.

A. Trust & Promise

Trust and promise are mutually dependent and mutually reinforcing. The entire foundation of contracts rests on the relationship of trust that leads parties to make promises and "mortgaging the interest of [their] future self in favor of [their] present self." While this vision of contracts and the related contract theory may perhaps rest on a somewhat idealistic view of human relationships, it has nonetheless been a basis for contract theory and jurisprudence for centuries. Fried's *Contract as Promise* links classical theory of contract inextricably to an underlying morality of contractual promises.[172] As Radin identified in her bare-bones conceptual framework, contracts require degree of trustworthiness, allowing the contracting parties to rely on the legal infrastructure. The rise of boilerplate and the introduction of electronic agents in the early 1990s, described above, altered the significance of trust and promise in contracts.

Judicial enforcement of boilerplate led to the erosion of trust in both the legal infrastructure and the mutual trust between the parties. The judicial consideration of boilerplate from 1990s onward that we briefly discussed above, was mainly about whether boilerplate contracts can limit access to courts through arbitration clauses or forum selection clauses. In the context of contracts, and as Radin identified in her bare-bones conceptual framework, accessibility of remedies for a breach of the contract is essential for enforcing promises. Paradoxically, in enforcing boilerplate since its inception as ticket contracts to the Supreme Court's decision in *Uber v. Heller*, the courts, which Neil Postman considered a part of the "immune system,"[173] have, in effect, considerably contributed to erosion of trust in the legal infrastructure. As aptly noted Brown J in *Uber*, "contractual stipulations that foreclose access to legally determined dispute resolution — that is, to dispute resolution according to law are unenforceable not because they are unconscionable, but because they undermine the rule of law by denying access to justice, and are therefore contrary to public policy."[174] The courts have also contributed to the erosion of trust between the parties, through enforcing terms that allow contract drafters to unilaterally change the terms of a contract.[175] Unilateral changes severely undermine the promissory foundation of a contract. The contract taker's trust in a promise erodes if a contract drafter can unilaterally change the original promises without negative consequences.

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[171] MacNeil, *supra* note 67.

[172] Charles Fried, *Contract as a Promise: A Theory of Contractual Obligation* 2nd ed (New York: Oxford Academic, 2015) at 14.

[173] Neil Postman, *Technopoly: The Surrender of Culture to Technology* (New York: Alfred A Knopf, 1993) at 72–76.

[174] *Uber*, *supra* note 92 at para 101.

[175] See, for example, *Kanitz v. Rogers Cable Inc.* (2002) 58 OR (3d) 299.

Trust and promise underpin the relational nature of contracts between persons. While the boilerplate structure has significantly eroded the trustworthiness of promises, boilerplate remains premised on the relationships that exist between, as Radin explains in her conceptual framework, human beings who possess autonomy (or corporations operating as legal entities).[176] The introduction of electronic agents in the early 1990s has further transformed the nature of the trustworthiness of promises. However, given the limited abilities of electronic agents at the time to enter into routine transactions within prescribed parameters (think of a contract with an online vendor who sells thousands if not millions of goods in a day), the technology did not appear to erode the trustworthiness of promises beyond what boilerplate had already done in the preceding decades.

However, the rise of more sophisticated algorithms for automated contracting put new strain on the trust and promise relationship. We have moved from the trust in humans towards the (mis)trust into the AI, allowing the original moral significance of the contract to be fully replaced by a "regulation by machine" mentality.[177] In the move toward automated and self-executing contracts, trust, promise, and the relational foundation of contracts are lost and replaced by automated execution and enforcement.

B. Consent

Contracts are legally enforceable agreements freely entered into between the parties. Classical contract theory is grounded in party autonomy and freedom of contract, with consent as the foundation of the contractual relationship. By consenting to an agreement, parties exercise their free will in shaping and governing their legal obligations. This consent-based framework is pivotal to characterizing the freedom of contract. In Radin's bare-bones conceptual framework, parties' voluntary consensus is at the core. [178]

Similarly to the erosion of trust and promise, the rise of boilerplate has significantly eroded (if not fully eliminated) meaningful consent for contract takers. In her concurring opinion in *Douez*, Abella J encapsulate the reality of these contracts and lack of true consent: there is "no bargaining, no choice, no adjustments."[179] Historically, "necessity cases" (such as situations involving parties stranded at sea) were seen as instances where extreme circumstances left one party with no real choice but to accept any terms. In such cases, the law recognized the absence of true consent and would intervene to void the contract. [180] Writing for the majority in *Uber*, Abella and Rowe JJ, noted that while boilerplate contracts are not considered true necessity cases, in which "the weaker party is so dependent on the stronger that serious consequences would flow from not agreeing to

[176] Radin, *supra* note 16 at 508. This remains true even if the relationships boilerplate contracts are comparatively weak to those in bespoke contracts.
[177] Margaret Jane Radin, "Regulation by Contract, Regulation by Machine" (2004) 160 Journal of Institutional and Theoretical Economics 142.
[178] *Ibid.*
[179] *Douez*, *supra* note 127.
[180] *Uber Technologies, supra* note 92 at paras 69–70.

a contract,"[181] they come very close to meeting the requirements. While contract takers have an apparent choice not to accept the terms and conditions, that choice is neither meaningful nor practical. In certain instances, there are no alternatives, or the alternatives that do exist come with similar terms and conditions.

Throughout the history of judicial interpretations of boilerplate contracts, their legitimacy has often been upheld based on the judicial misconception that consent equates to true agreement, creating a false equivalence between mere acceptance and *consensus ad idem*, the meeting of the minds. As we briefly explained above,[182] in enforcing boilerplate contracts, courts upheld the illusion of consent, first by stretching, then by fictionalizing the notion of mutual agreement and *consensus ad idem*, where it did not exist. A significant body of literature examines the erosion of consent, challenging the status quo by examining the absence of meaningful consent in boilerplate contracts.[183] However, the most significant contributions to the erosion of meaningful consent arise in the area of privacy, [184] particularly related to users consenting to privacy policies, which are often used to circumvent and alter statutory privacy protections.

In the eyes of many, true consent and, by extension, true meeting of the minds has ceased to exist in boilerplate and, perhaps even, in contracts writ large. The emergence of electronic agents in the early 1990s has also challenged that premise but GenAI brings the final decline of consent as the foundational principle of contract law. In a human-human interaction through boilerplate and in a human-machine interaction of a massively distributed boilerplate (for example an automated contract generated when a user purchases an item on an online sale platform), the consent is already illusory. The human-AI or an AI-AI interaction generates *consensus ad artificialis*—a manufactured (and not genuine) consent and an agreement between AI/machines rather than humans.

C. Enforcement

With the concomitant erosion of trust and promise on the one side and consent on the other, the power of boilerplate, particularly AI-assisted boilerplate, now largely rests on enforcement. However, rather than transforming boilerplate into a new category of legal relationships and calling

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[181] *Ibid* at para 69.

[182] See *supra* section Boilerplate Contracts in Case Law.

[183] Two leading texts are Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013) and Omri Ben-Shahar, ed, *Boilerplate: The Foundation of Market Contract* (Cambridge: Cambridge University Press, 2007). For a review and comparison of the two texts, see, Nancy S. Kim, "Boilerplate and Consent" (2014) 17 Green Bag 2d 293. See also Neil M. Richards and Woodrow Hartzog, "The Pathologies of Digital Consent" (2019) 96 Washington University Law Review 1461. For earlier criticism see, for example, Todd D. Rakoff, "Contracts of Adhesion: An Essay in Reconstruction" (1983) 96 Harv. L. Rev. 1173; Michael J.Trebilcock, "Critiques of the Limits of Freedom of Contract: A Rejoinder" (1995) 33Osgoode Hall Law Journal 353. The issue of fit has been identified much earlier in French civil law, notably by Raymond Saleilles, *De la Déclaration de volonté (*1901), https://archive.org/details/de-la-declaration-de-volonte and, as a result "contracts of adhesion" are much more heavily regulated in both continental Europe and Quebec.

[184] For example, see Daniel J. Solove, "Privacy Self-Management and the Consent Dilemma" (2013) 126 Harv L Rev 1880; Daniel J. Solove, "Murky Consent: An Approach to the Fictions of Consent in Privacy Law" (2024) 104 BU L Rev 593.

for "the death of contract", AI-facilitated enforcement pushes them squarely back into the fold, creating a whole new category of super-contracts that are virtually impenetrable.

As legally enforceable promises, contracts but they have not been designed (or evolved) to be virtually impenetrable or self-executing. Some contractual promises will inevitably get broken, whether under Fried's theory of contract as a morally binding promise, or under Posner's more utilitarian law and economics approach. The difference between the two approaches is in the degree of permissibility: Fried's approach is narrower, while the Posnerian law and economics approach is more expansive.[185] Both approaches also recognize that the appropriate penalties for breaking a contractual promise are monetary damages. Contract breakers are generally required to compensate the innocent party for the breach,[186] although they may be rarely required to perform the broken promise.[187] Through this flexibility, the law acknowledges that people's freedom of contract includes the ability to repudiate those contracts.[188] Both the contractual breach and the judicially assessed damages for the breach are highly discretionary and leave room for accommodating the circumstances of each case.

The challenge (and potential danger) or AI-facilitated enforcement is that automation eliminates any room for judicial discretion. Courts will not always enforce a contract as a whole or particular contractual clauses. For example, the doctrine of unconscionability or public policy render certain clauses unenforceable. In *Uber v Heller,* the Supreme Court recast both doctrines. A contractual clause is unconscionable, and therefore unenforceable, when there when there is both an inequality of bargaining power and a resulting improvident bargain that unduly benefits the stronger party.[189] The doctrine of public policy serves to "protects the integrity of the justice system"[190] writ large. The challenge to justice system may manifest itself differently. In *Uber*, Brown J found that Uber's arbitration agreement was so restrictive that it was "not an agreement to arbitrate, but rather not to arbitrate."[191] As such, it was undermining access to justice and the rule of law and was, therefore, against public policy and unenforceable. Both unconscionability and public policy are assessed through a holistic and qualitative analysis of the facts of each case. What may be unconscionable in one set of circumstances, may not necessarily be so in another. Conversely, while an arbitration agreement in Uber's terms of service was against public policy, not every arbitration agreement will be against public policy.

Three recent high-profile cases involving technology companies and their massively distributed boilerplate agreements highlight trends that go far beyond initial sensational and high profile

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[185] Fried, *supra* note 172; Posner, *Economic Analysis of Law*, 9th ed (2014) at 150-151.

[186] The classical text on contract damages is Lon L. Fuller and William R. Perdue, "The Reliance Interest In Contract Damages" (1936) 46 Yale L.J. 52.

[187] For a short explanation on specific performance in contract law, see Stephanie Ben-Ishai, "Remedies" in Stephanie Ben-Ishai and David R Percy, *Contracts: Cases and Commentaries*, 11th Edition at 992–994.

[188] These rights of repudiation have been outlined in numerous cases heard by the Supreme Court of Canada. See *Kloepfer Wholesale Hardware v. Roy*, [1952] 2 S.C.R. 465 at 466; *Farber v. Royal Trust Co.*, [1997] 1 S.C.R. 846 at para 33.

[189] *Uber, supra* note 92 at paras 54–91.

[190] *Ibid* at para 110.

[191] *Ibid* at para 102.

nature of these cases. In our view, they illustrate how enforcement is highly fact-specific and requires judicial (human) discretion. AI-powered enforcement, by contrast, risks producing rigid outcomes with potentially far more harmful consequences for individual parties.

In August 2024, Disney found itself at the centre of a controversy of its own making as it attempted to use a contract of adhesion to avoid the trial process. In February 2024, Jeffrey Piccolo filed a wrongful death lawsuit against Disney after his wife, Dr. Kanokporn Tangsuan, died of anaphylaxis as a result of being served a meal containing allergens at a restaurant located at Disney Springs, an outdoor shopping complex in Orlando, Florida.[192] In their response, Disney claimed that Piccolo was not able to pursue a court hearing, as he had signed up for a free trial of Disney+ years before.[193] The terms of use that must be accepted when using Disney+ stipulate that the signees agree to waive their rights to any potential class-action lawsuits or jury trials.[194] Disney further argued that Piccolo agreed to these terms again when he purchased park tickets from the Walt Disney website.[195] However, in response to significant public backlash, Disney relented, waiving their arbitration rights and allowing the suit to progress through the courts.[196]

In the aftermath of the realization that the use of Disney+ may leave limited recourse for any possible wrongdoing by Disney, Internet users began calling for piracy of Disney+ titles as a means of protecting themselves from Disney's predatory contracting. In a Reddit post on the Piracy subreddit, users echoed this sentiment, with comments like "Sail the high seas to protect your loved ones from Disney!!"[197], and "...If anyone ever has any sense of guilt pirating Disney content then this proves we are 100% correct to not have a Disney+ account. Screw Disney. Pirate Away."[198] One user even posted an image with the message "If using a streaming service means letting Disney get away with killing your wife, then piracy is completely justified"; it received over 30,000 upvotes and is the 5th-most popular post of all time on that subreddit, which has over 2 million subscribers.[199]

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[192] Associated Press, "Disney drops bid to have allergy-death lawsuit tossed because plaintiff signed up for Disney+" (August 20, 2024) online: <apnews.com/article/disney-allergy-death-lawsuit-b66cd07c6be2497bf5f6bce2d1f2e8d1> [perma.cc/6A7Y-BBPG].
[193] Global News, "Disney wants wrongful death lawsuit tossed due to widower's Disney+ trial" (August 15, 2024) online: <globalnews.ca/news/10698866/disney-plus-wrongful-death-lawsuit/> [perma.cc/8WPJ-CQ6M].
[194] *Ibid.*
[195] *Ibid.*
[196] Associated Press, *supra* note 192.
[197] User Popular-Locksmith55, "Nah they can kill anyone they want. It's their loved ones that must be Disney+ subscribers for it to be repercussion-free. Sail the high seas to protect your loved ones from Disney!!", Comment on [So apparently Disney just argued that they should not be held liable for killing you if you are a Disney+ subscriber. Piracy has just become a matter of survival.] Reddit (September, 2024), online: <reddit.com/r/Piracy/comments/1erwbn1/so_apparently_disney_just_argued_that_they_should/> [perma.cc/28D7-DLP2].
[198] Username Deleted, "I came here to post this very story. If anyone ever has any sense of guilt pirating Disney content then this proves we are 100% correct to not have a Disney+ account. Screw Disney. Pirate Away." Comment on [So apparently Disney just argued that they should not be held liable for killing you if you are a Disney+ subscriber. Piracy has just become a matter of survival.] Reddit (September, 2024), online: <reddit.com/r/Piracy/comments/1erwbn1/so_apparently_disney_just_argued_that_they_should/> [perma.cc/HTB6-BNL8].
[199] User timsfm, "Agreed." Post on Reddit, (September 2024) <reddit.com/r/Piracy/comments/1ev59lj/agreed/> [perma.cc/PRR6-M2RT].

In other instances, its arbitration clause has been enforced in somewhat dubious circumstances. Recently, a New Jersey appeals court ruled that a couple injured in an Uber crash cannot sue the company because they were bound by Uber's arbitration agreement.[200] Uber argued that Georgia McGinty had accepted the terms of service multiple times, most recently through an Uber Eats order placed by their minor daughter on Georgia's phone.[201] The court upheld the arbitration clause, forcing the dispute out of court. The enforceability of the arbitration clause seemed to hinge on the court's inference that the daughter had acted knowingly on Georgia's behalf, supported by statements by the McGintys that their daughter was capable of frequently ordering food on Georgia's phone for them, and their statements that they did not remember whether they had helped their daughter order food on the alleged incident of acceptance of Uber's terms.[202] In a more recent case, *Cheryl Walker v. Uber Technologies, Inc,* the District Court found that a passenger riding in an Uber ordered by his wife was not bound by the arbitration clause present in Uber's terms of agreements, finding that there could be no contract between the passenger (a non-signing third party) and Uber.[203] This was differentiated from another, similar case wherein the passenger was found to be party to the contract, as the passenger in this case had never previously had an Uber account, indicating that he could not have had constructive notice of the terms of the agreement.[204] Ultimately, the application of Uber's arbitration clauses are highly case-specific.

Uber has also found itself embroiled in legal battles involving its use of mandated arbitration clauses in its user agreements, to mixed results. In 2016, in the Uber won a case in the U.S. which determined that their arbitration clauses were enforceable as part of their contract with Uber drivers.[205] Flash forward to 2020, when a law firm representing Uber Eats customers filed over 31,000 separate arbitration demands with the American Arbitration Association (AAA), an arbitration administrator in the Uber's terms of use.[206] According to the structure of the Uber arbitration agreement the initial fee included a filing fee, a standard case management fee, and an arbitrator fee, totalling $3300 per case.[207] These individual filings resulted in AAA invoicing Uber for over $90 million, to which Uber responded by filing for injunctive relief.[208] However, the Court found that not only were the legal arguments for injunctive relief undeserving of acceptance, their equitable arguments fell short of the mark, because the situation was one of Uber's making, stating "While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims

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[200] Rachel Treisman, "A court blocks a couple from suing Uber over a crash, citing terms and conditions" (Updated October 2, 2024) online : <www.npr.org/2024/10/02/nx-s1-5136615/uber-car-crash-lawsuit-uber-eats-arbitration-terms> [perma.cc/HE9M-6BKT].
[201] *Ibid.*
[202] *Ibid.*
[203] *Cheryl Walker v. Uber Technologies, Inc. et al*, 2024 WL 4553987.
[204] *Ibid.*
[205] *Suarez v. Uber Techs., Inc.*, 2016 U.S. Dist. LEXIS 59241
[206] Brian A. Berkley and Richard Mason, "The Remarkable Story of Uber's Fight to Enforce Class Action Waivers and the Unforeseen Consequences that Ensued" (2024) online: <www.foxrothschild.com/publications/the-remarkable-story-of-ubers-fight-to-enforce-class-action-waivers-and-the-unforeseen-consequences-that-ensued> [perma.cc/38EW-S96V].
[207] *Ibid.*
[208] *Ibid.*

in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision."[209] Uber's insistence on the breaking up of claims by its users seems to have hoisted it by its own petard in that case.

In our view, these cases demonstrate several important trends that go far beyond initial sensational and high-profile nature of these cases. First and most troubling is that these cases, particularly the one involving Disney, are visceral reminders of the pervasiveness of boilerplate and their far-reaching effect beyond the original purposes of the parties' relationship. These cases are indeed, contorts, but they are the opposite from what Gilmore envisioned when he coined the portmanteau. Declaring the death of contracts, Gilmore envisioned torts taking a large role in allocating liability and swallowing contracts as a result. These contorts are the opposite. The contract reigns supreme and has swallowed up and significantly contracting the reach of torts. A boilerplate accompanying a streaming service and food delivery is used to significantly limit access to remedies for wrongful death or serious bodily injuries.

Second, while the enforceability of arbitration clauses varied, it raises an important issue of judicial discretion (even if it may seem misguided). In a world of AI-powered automatic enforcement, none of that discretion would exist. It is conceivable that through an AI-powered enforcement, parties would be automatically enrolled in an arbitration proceeding, without any assessment whether the underlying arbitration clause is enforceable in the first place, whether parties had capacity to enter into a contract, or whether the contract is binding on non-signatories. Public backlash raised by these cases was strong and fierce and it goes far beyond the reputational damages. Public backlash led Disney to back out of arbitration in favour of litigation. Humans making decisions understood the reputational damage and exercised discretion. They prioritized reputation over dogged enforcement of their own boilerplate. Would AI-powered enforcement calculate those same risks?

Third, what we find most fascinating is that the public (or at least the subset of Reddit users) identified the irreparable breach of trust that occurred through the use boilerplate to regulate tortious conduct unrelated to the original relationship except through the boilerplate itself. That breach of trust provoked skepticism and also showed that broken trust may lead to radical behavioral modification such as content piracy. Piracy is justified, the Reddit users seemed to decry, in light of the rote application of massively distributed boilerplate. Such citizen action, while perhaps understandable given Disney's callous positioning, engages the foundational contracting principle of good faith. The corporatization of modern contracting has already strained this principle far beyond its original purposes. The SCC's explanation of good faith in *Bhasin* emphasized its utility as an organizing principle: "a standard that helps to understand and develop the law in a coherent and principled way."[210] Given more recent case law attempting to temper unfettered corporate power, at least through arbitral clauses, it seems antithetical to allow a move towards automation that would undercut the possibility of achieving good faith in contractual

[209] *Ibid.*
[210] *Bhasin*, *supra* note 108 at para 64.

negotiation. Developing the law in a coherent and principled way is an important, ongoing project. We look at how GenAI might compromise this project in the next section.

Part IV: When Bots Usurp Our Thoughts

Since their emergence as ticket contracts in the 1880s, the judicial treatment of massively distributed boilerplate has raised concerns about normative degradation of contracts and fitting these contracts into existing theoretical frameworks.[211] By contorting the boilerplate to fit the fundamental notion of consent, courts have often ignored the social and economic realities within which boilerplate contracts operate. To understand the impact on GenAI on contracts, we look at not only the underlying technology and the judicial treatment of contracts, but also at the three main personalities in the life of a boilerplate, in order to understand the context and dynamic and how GenAI fits and whether it will continue to entrench the status quo or contribute to change.

Through this lens, we aim to elucidate three instances of the life of the contract. First, we approach the lawyer as "contract drafter." This hypothetical lawyer is educated on the relevant mores of contract law, with corresponding professional expertise on how contracts are made. Yet, a not-so-subtle institutional pressure, compounded by slick marketing and a duty of technological competence, has resulted in chatbots entering the chat. Powered by an in-house proprietary digital assistant solution, our hypothetical lawyer has a new junior associate aiding in drafting the contract, bringing new advantages and disadvantages to the working relationship. Second, we approach the contract through the eyes of the "contract taker," borrowing Julie Cohen's evocative term for those with no choice but to agree with a standard form contract's prescribed terms. Sophisticated or unsophisticated, the contract taker has minimal bargaining power *vis-à-vis* the entity they are contracting with. Finally, we approach the contract through the perspective of the "contract self-helper," the self-represented litigant replacing professional legal expertise with a chatbot. Unable to afford access to a lawyer, or the latest in special purpose legal chatbots, we assume this self-represented litigant is accessing one of the freely available web-based versions of a LLM, likely ChatGPT, Gemini, or Claude.

A. The Contract Drafter

There is limited empirical research on how lawyers approach the mechanics of contract drafting and what guides their decisions to include particular clauses in contracts. The two main studies, conducted fifty years apart, describe very different realities on the role of contracts in business relationships and the corollary lawyer's role within them. Stewart Macaulay's seminal 1960s study[212] is historically situated within early days of law and society movement that was instrumental in bringing social context into understanding the law. It is also situated during the shift from bespoke individually negotiated contracts towards the high-end boilerplate. Mitu Gulati and Robert E. Scott's 2010s study (and their continuing work since),[213] may appear, on the surface,

[211] Radin, *supra* note 17 at 508.
[212] Macaulay, *supra* note 82 at 55.
[213] Gulati & Scott, *supra* note 82.

to focus on high-end boilerplate contracts, but in fact reveals that even the highly specialized business environment now operates within the realm of massively distributed contracting.

A conversation between Macaulay, a law professor, and his father-in-law, a retired business executive, sparked the original study.[214] His father-in-law described a very different approach to doing business and using contracts than what Macaulay observed teaching contracts. The dissonance between these two worldviews prompted Macaulay to interview business executives and lawyers to better understand what was actually happening in practice.[215] While his work was pioneering at the time, helping bridge the gap between the contract theory and the reality of business relationships, Macaulay's study focused primarily on understanding how and what role formal contracts play in the parties' relationship. Macaulay found that businesses do not often engage in "careful planning," which is almost a shorthand for contractualizing and legalizing the relationship.[216] Instead, businesses care about fostering the relationship, both when building a deal and whenever problems needing resolution arise.[217] Careful planning, in the form of elaborate contracts, was reserved for highly complex and unusual (as opposed to routine) transactions.[218] Macaulay observed that in larger firms, in-house or external counsel drafted boilerplate, while in smaller firms the boilerplate was drafted by "trade associations, may be copied from a competitor, or may be found on the forms purchased from a printer."[219] While used, boilerplate contracts did not really run the relationships. Even when forms conflicted, commercial actors mainly focused on the essential elements that make the transaction work.[220] Macaulay's work underscored the importance of a relational vision of contracting. Reflecting on his original work twenty years later, Macauley observed significant changes in the social and legal structures, through an increased use of both more formalized contracts to govern the relationship and the use of litigation for resolving contract disputes.[221] His work did not examine the role of lawyers and how they approach drafting. However, it is instrumental that in twenty years, from his original study in 1963 to 1983, he observed a significant reliance on formal contracts as regulatory mechanisms of the relationship.[222]

Gulati and Scott's work picks up where Macaulay left off. Both analyses recognize shifts in the social and economic role of contracts, while also confirming a significant shift towards dominant use of boilerplate.[223] The environment from Macaulay's original study typifies Radin's bespoke contracts.[224] Such contracts became rare when Macaulay reflected on his work; they are now virtually extinct. and business have shifted to Radin's high-end boilerplate.[225] Lawyers heavily rely

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[214] Stewart Macaulay, "Crime and Custom in Business Society" (1995) 11 Journal of Law and Society 248.
[215] *Ibid* at 248–249.
[216] Macaulay, "Non-Contractual Relations" *supra* note 82 at 62.
[217] *Ibid* at 58–62.
[218] *Ibid* at 57.
[219] *Ibid* at 58.
[220] See *supra* note 114 and accompanying text.
[221] Stewart Macaulay, "An Empirical View of Contract" (1985) Wisconsin Law Review 465 at 471.
[222] *Ibid.*
[223] *Ibid.* Stewart Macaulay," Notes on the Margins of Lawyering, in Three and a Half Minutes" (2011) 40 Hofstra Law Review 25; Gulati & Scott, *supra* note 82 at ch 2.
[224] Radin *supra* note 17 at 510.
[225] *Ibid.*

on sample contracts from their repository of precedents, adjusting them as needed. Gulati and Scott's work focuses on understanding how lawyers draft standard form agreements, including what drives the inclusion of particular clauses. Their analysis focused on *pari passu* clauses, which ensure the equal treatment of assets within sovereign debt contracts (agreements involving the debts of sovereign countries).[226]

Gulati and Scott coined the term "stickiness of contracts" to describe how lawyers exclusively rely on precedents without critically examining whether a clause is fit for purpose.[227] With repetition, these clauses become calcified and suspended in time and thus indispensable. This summary of their findings encapsulates the problem and is illustrative of the several forces that drive the repeated use of boilerplate:

> "Three and a half minutes" is one explanation that was candidly offered to us by a lawyer who sought to explain the trade-off between the time it took to "draft a new contract" and the effort costs of redesigning boilerplate that was widely used and had been part of the standard-form contract for many years. But "three and a half minutes" is also a metaphor for a business model that relies on herd behavior, fails to provide incentives for innovation and thus rises and falls on volume-based, cookie-cutter transactions. To be sure, we found that in a few instances individual lawyers, who appreciated the litigation risk, did adapt by redesigning sovereign debt contracts (often by adding new terms rather than correcting perceived errors in existing terms). But our evidence suggests that in the great majority of firms, lawyers rely on the herd and on their myths: The returns to the firm in terms of volume transactions outweigh the present value of the risk. This is despite the fact that a social planner seeking to maximize the joint interests of lawyers and their clients would likely choose a different business model. In short, we conclude that social welfare is less than it would be under a different regime, even though the private benefits of volume transactions over careful design may explain the firm behavior that we see.[228]

Over time, the clauses have often lost their original meaning as very few lawyers know what they were originally drafted and intended to be used for.[229] However, they are repeatedly used as inclusion in precedents, giving a perception of their value. There is very little incentive for contract drafters to deviate from the standardized language of the precedents. Precedents are used as "plug and play," and contract drafting is automated to a rapid "three-and-a-half minute" transaction.[230]

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[226] Gulati & Scott, *supra* note 82 at 10–18.
[227] *Ibid* at ch 3.
[228] *Ibid* at 15–16.
[229] *Ibid* at ch 9.
[230] *Ibid* at 15–16.

Gulati and Scott observe a significant disconnect between the commercial/drafting and litigation silos in typical modern law firms.[231] The commercial lawyers are the contract drafters working from plug-and-play precedents, while the litigation lawyers are the problem solvers when contracts go wrong. There is no feedback loop between the two silos and any lessons learned from litigation, including interpretation of clauses or factual circumstances, are not fed back into the precedents.[232] As a result, contract drafting remains removed from the clients' realities. Contract law as understood by the contract drafters remains static, perpetuating clauses that may not even serve the client's interests.[233] Gulati and Scott also observed that the nature of a modern-day law firm, with a focus on efficiency and billable hours, discourages investment into what they label as "research and development" of contracts to improve precedents to be dynamic and agile and better respond to the client's real needs and the ongoing developments in law.[234]

Against the background identified by Scott and Gulati, our own anecdotal observations confirm that this separation into commercial/litigation silos continues.[235] As long as contract drafters who integrate GenAI into their practice remain isolated from their litigation counterparts and doctrinal developments in law, any output, while being produced faster and more efficiently will continue to be detached from the economic and social reality in which the parties operate—as well as any legal developments related to the interpretation and enforceability of specific contractual clauses. Ultimately, adoption of GenAI and AgenticAI by contract drafters would enable a move from a three-and-a-half-minute transaction to a 30-second transaction (and perhaps, eventually, a 3-second transaction).

GenAI and AgenticAI have a potential to disrupt the *status quo*. However, as long they are used to replicate the current processes, where old precedents continue to be used without any reality checks, AI-generated contracts will conform to the "garbage in, garbage out" principle.[236] In fact, they will be worse than *status quo*, as AI-driven enforcement which we discussed above, will make those contracts virtually implementable. Another important insight from Gulati and Scott's work, as well as Russell Korobkin, is that the conventional law-and-economics assumption that the market will eliminate inefficient clauses does not hold up in practice.[237] That holds even more true in the environment of massively distributed boilerplate, where there is significant informational and knowledge disparity between the contract drafters and the contract takers.

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[231] *Ibid* at 14 and ch 10.

[232] *Ibid* at 149.

[233] *Ibid* at 147–148.

[234] *Ibid* at ch 10. Gillian Hadfield, *Rules for a Flat World: Why Humans Invented Law and How to Reinvent It for a Complex Global Economy* (Oxford University Press, 2017) also observed that the structure of modern law firms acts as a barrier too innovation.

[235] Our next project will undertake an S study of GenAI and AgenticAI uses in modern law firms, attempting to acquire measurable data about uses of these new technologies by law firms, as well as to understand contract drafters' practical and ethical considerations when drafting contracts and using GenAI and AgenticAI.

[236] Reflecting on Gulati and Scott's work, Macaulay himself used this expression. See Stewart Macaulay," Notes on the Margins of Lawyering, in Three and a Half Minutes" (2011) 40 Hofstra Law Review 25 at 28.

[237] Gulati & Scott, *supra* note 82 at ch 5; Russell Korobkin, "Bounded Rationality, Standard Form Contracts, and Unconscionability" (2003) 70:4 U Chi L Rev 1203; Russell Korobkin, Status Quo Bias and Contract Default Rules, (1998) 83 Cornell L. Rev. 608.

B. The Contract Taker

When Julie Cohen coined the term "contract takers" in 1998, massively distributed boilerplate in a digital context was just warming up and it was largely confined to software and e-commerce.[238] The term aptly describes individuals who can only accept a contract on a take-it-or-leave-it basis, without any ability to influence their terms. Still, these problems emerged long before migration to the digital realm. Contract takers, as distinct category of parties to contracts, as we described above, emerged in the late nineteenth century in the context of ticket cases. The ticket cases involved a commercial party (the cloakroom) on the one side and an individual consumer on the other. Unlike a business contract, the informational and bargaining power in ticket cases was significantly unequal. Consumers had two choices—to *take* the service under the terms dictated by the cloakroom or to *leave* the service (and presumably make different arrangements with their luggage). If there were options, such as different cloakrooms, their services were accompanied by similar, if not identical, terms.

Modern boilerplate contracts are, on the one hand, similar to traditional ticket contracts in that they still operate in the take-it-or-leave-it environment. Yet, on the other, they differ in important ways from those original ticket contracts in ways that further amplify lack of meaningful choice for contract takers. As mentioned above, digital technology and the Internet have made boilerplate omnipresent. Boilerplate now governs virtually every aspect of people's life—from social[239] and cultural life[240] to work,[241] healthcare,[242] implantable devices,[243] education,[244] agriculture,[245] access to news,[246] or government services,[247] and everything in between. Meaningful alternatives have considerably diminished over time, with significant market concentration in certain sectors. In some cases, there may be no alternatives. Where alternatives exist, they are accompanied by virtually identical terms and conditions due to the contract drafter's extensive use of precedents.[248]

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[238] See *supra* section Boilerplate Contracts in Case Law.

[239] For example, Tinder, "Tinder Terms of Use", (Updated: June 1, 2024) online: <policies.tinder.com/terms/intl/en/> [perma.cc/HB62-PK69]; Grindr, "Grindr Terms and Conditions of Service", (updated: December 23, 2024) online: <www.grindr.com/terms-of-service> [perma.cc/BW3M-B3B5].

[240] For example, Netflix, "Netflix Terms and Conditions", online: <brand.netflix.com/en/terms/> [perma.cc/DL3Y-ZMYY].

[241] For example, Microsoft, "Microsoft Services Agreement", (Updated: July 30, 2024) online: < www.microsoft.com/en-ca/servicesagreement> [perma.cc/9K2H-2SHZ].

[242] For example, blood glucose monitors come with terms and conditions, which are not publicly available.

[243] Similarity to blood glucose monitors, various MedTech implantable devices, such as cochlear implants, passive defibrillators, etc, come with terms and conditions, which are not publicly available.

[244] For example, Google, "Google Classroom Policies and Guidelines – Transparency Center", online: <https://transparency.google/our-policies/product-terms/google-classroom/> [perma.cc/WA3U-SUNQ].

[245] For example, John Deere, "John Deere User Account Terms and Conditions", (Updated: June 1, 2024) online: <https://www.deere.com/en/privacy-and-data/myjohndeere/terms/index.html> [perma.cc/W6RZ-EEWG].

[246] For example, CBC, "CBC Gem Premium Services Subscription Conditions" online: <gem.cbc.ca/l/toc> [perma.cc/NP9H-4T7H].

[247] For example, Government of Canada, "Terms and conditions of use for a CRA account" (Updated: February 10, 2025) online: <canada.ca/en/revenue-agency/services/e-services/cra-login-services/terms-conditions-use.html> [perma.cc/N3NP-T5ET].

[248] Courts have often used the illusion of choice of an alternative provider to describe how consumers had a choice. Our analysis of boilerplate in several sectors showed that when there are alternatives they often come with identical terms. For example, see Marina Pavlovic, Contracting out of access to justice: Enforcement of Forum Selection Clauses in Consumer Contracts" (2017) 62:2 McGill Law Journal 389 at 424, footnote 183, finding that all major cruise lines' ticket contracts include exclusive forum-selection clauses nominating the business's home jurisdiction.

Boilerplate contracts have become extremely long,[249] written in complex language virtually incomprehensively to most of the population.[250] Even if contract takers would be able to understand the terms, the time it would take to read each and every boilerplate (or privacy policy) and the cost of lost time for contract takers would not be worth it on its own,[251] and particularly not given that there is no opportunity meaningfully change the terms.

The emergence of GenAI and LLMs promises to empower contract takers. GenAI can quickly parse and (arguably) demystify complex contractual language, personalize disclosures[252] and explain the meaning of contractual terms in plain language.[253] It may also offer advice on the implications of particular clauses, although the advice may not always be reliable due to frequent hallucinations.[254] or jurisdictional issues. A plain language explanation of the terms and conditions may boost consumer confidence and understanding of what they agree to do. Even if the GenAI produces perfect results in interpreting the terms, it will not alter any of the underlying issues contract takers face. GenAI may somewhat remedy the information imbalance between the parties by allowing contract takers to understand the terms of use and their implications on their rights. With the development of further tools, it may also be possible to compare and contrast the terms of competitor services relatively accurately. However, while those tools may help contract takers to be better informed, by providing more accessible and more comprehensible information, that information will not necessarily lead to contract takers choosing services whose contracts are better suited for their need. Most risks addressed by boilerplate agreements are remote and intangible. For example, assessing a likelihood and cost of an event in which a limitation of liability clause will be engaged is virtually impossible. Furthermore, as we have learned from behavioural economics, people make decisions with immediate gratification or reward instead of long-term

[249] See for example, Amazon Kindle Terms of Service are 73,198 words long and would take 8h59min to read, Choice Australia, "How long does it take to read Amazon Kindle's terms and conditions? – CHOICE" (March 14, 2017) at 00h: 00m: 57s, online (video): <https://www.youtube.com/watch?v=sxygkyskucA>; Rich Parris, "Paypal's T&C's are longer than Shakespeare's Hamlet" (1 March 2012) Which? Conversation, online : [web.archive.org/web/20120304094007/http://conversation.which.co.uk/technology/length-of-website-terms-and-conditions/].

[250] Uri Benoliel & Shmuel I Becher, "The Duty to Read the Unreadable" (2019) 60 *Boston College Law Review* 2255; Michael L Rustad & Koenig, Thomas H., "Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices" (2014). 49 *Wake Forest Law Review* 1431.

[251] See, for example, Aleecia M McDonald & Lorrie Faith Cranor. "The Cost of Reading Privacy Policies" (2008) 4:3" I/S: A Journal of Law and Policy for the Information Society 540; Nate Anderson, "Study: Reading online privacy policies could cost $365 billion a year" (8 October 2008) Ars Technica; Alexis C Madrigal, "Reading the Privacy Policies You Encounter in a Year Would Take You 76 Work Days" (1 March 2012), online: <www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-workdays/253851/> [perma.cc/N8FZ-QSHM].

[252] Ben-Shahar & Porat, *supra* note 158 at 256–257.

[253] Most notably, see Noam Kolt, *supra* note 166. There are currently several services that label themselves as contract/terms of service analyzers; for example, iWeaver, "Analyze Terms of Service with iWeaver AI", online: <https://www.iweaver.ai/agent/terms-of-service-analyzer/> [perma.cc/2V9D-Z9S8]; YesChat AI, "Terms of Service Analyzer - Legal Document Simplification" online: <www.yeschat.ai/gpts-9t55QZdM6W1-Terms-of-Service-Analyzer> [perma.cc/QHS4-BN9Z].

[254] Kolt, *supra* note 166.

benefits (called hyperbolic discounting).[255] As a result, AI-explained contracts terms aside, most people will choose goods and services offering immediate gratification in the form of reduced price.

In our view, GenAI does not and cannot eliminate the structural barriers in which contract takers can accept boilerplate. The boilerplate contracts will continue to embody the "no bargaining, no choice, no adjustments" paradigm.[256] In fact, we are concerned that the widespread availability of GenAI tools, which can create the illusion of understanding contracts, may have the opposite effect and lead courts to treat contract takers as informed consumers who willingly consented to the terms and could have declined the service if dissatisfied with the terms.[257] Put differently, GenAI may further stretch the legal fiction of consent beyond its current (already expansive) limits, once again supercharging contracts as powerful regulatory tools.

C. The Contract Self-Helper

Socio-legal research provides a rich picture of how ordinary people understand, experience, and engage with legal problems and the legal system.[258] Coupled with wide range empirical studies on justiciable problems—problems that have a legal underpinning—we learn that people experiencing legal problems overwhelmingly rely on self-help strategies, often as the first, and sometimes as the only, form of response.[259] This reliance on self-help is shaped by a range of systemic and personal factors, including the high cost of legal services, limited availability of legal assistance, and the psychological burden of navigating formal systems. Self-help encompasses a wide array of actions: seeking advice from friends or family, searching online for legal information, using community forums, or directly contacting the other party involved in the dispute.[260] Self-help is a critical mode of problem-solving that often gives people agency and sense of control.

People do not typically conceptualize problems as legal problems unless they are rather visceral or plainly obvious (such as loss of a job, breakdown of a family, etc.). Instead, they frame them

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[255] See, for example, Benjamin Enke, Thomas Graeber, and Ryan Oprea, "Complexity and Hyperbolic Discounting" (2023), NBER Working Paper Series, Working Paper 31047; David Laibson, "Golden Eggs and Hyperbolic Discounting" (1997) 112 The Quarterly Journal of Economics 443.

[256] *Douez*, *supra* note 127.

[257] See for example, *Allen v Carnival Corporation*, (2007), 162 ACWS (3d) 374, in which the court stated that a "was not in an unreasonable position having to sue in Florida because she signed the contract with the opportunity to turn it down and not go on the cruise."

[258] The classic work is Patricia Ewick & Susan S. Silbey, *The Common Place of Law: Stories from Everyday Life* (University of Chicago Press, 1998).

[259] For the first study of this kind see, Hazel Genn, Paths to Justice: What People Do and Think About Going to Law (Hart, 1999). The first Canadian study is, Ab Currie, "The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians (Department of Justice Canada, 2007); Ab Currie, "The legal problems of everyday life" in Rebecca Sandefour, ed., *Access to Justice* (2009) 12 Sociology of Crime, Law and Deviance 1–41; Ab Currie, Nudging the Paradigm Shift, Everyday Legal Problems in Canada. (2016) Canadian Forum on Civil Justice. For a relatively recent overview of the Canadian studies, see Julie Mathews and David Wiseman, *Shifting the Paradigm: Exploring Opportunities for Community Justice Help* (2021).

[260] Ab Currie, "The legal problems of everyday life" in Rebecca Sandefour, ed., *Access to Justice* (2009) 12 Sociology of Crime, Law and Deviance 1–41; Ab Currie, Nudging the Paradigm Shift, Everyday Legal Problems in Canada. (2016) Canadian Forum on Civil Justice; Trevor CW Farrow et al, Everyday Legal Problems and the Cost of Justice in Canada: Overview Report (Toronto: Canadian Forum on Civil Justice, 2016)

as stories: personal accounts of what happened, how they were wronged, or what they believe is unfair.[261] Information plays a foundational role in self-help and assists people in transforming their experience and conceptualizing it as legal problems.[262] The ability to recognize a problem, understand one's rights, and identify available remedies is often the first and most critical step in resolving a dispute. The emergence of GenAI brings considerable promise in assisting people in these initial stages of problem solving and possibly providing pathways to resolving problems. We have identified two main instances in which GenAI may assist: as one-off problem-solving chatbots and as possible litigation assistants providing ongoing help to self-represented litigants.

The use of chatbots by organization to triage questions and offer solutions is certainly not new.[263] GenAI, however, brings new capabilities that may give users a false sense of certainty. A recent case decided by the BC Civil Resolution Tribunal, acting as a small claims court, brings all these challenges to the forefront.[264] Following the death of their grandmother, Jack Moffatt used Air Canada's website to book flights and consulted its chatbot, which stated bereavement fare applications could be made retroactively within 90 days. Relying on this information, Moffatt booked two last-minute flights, then submitted a refund request within the stated window. Air Canada later denied the claim, stating retroactive applications were not permitted and that its policy required pre-approval of bereavement rates, arguing that it should not be liable for the information provided by its chatbot.

The case raises a plethora of interesting issues that, unfortunately, were neither properly argued nor addressed by the CRT, most likely because Air Canada perceived the matter as a low-risk small claims proceeding. However, there are interesting nuggets that go to the heart of the issue. The CRT found that Air Canada had made a negligent misrepresentation, breaching its duty of care to provide accurate information on its website, including through its chatbot. The Tribunal rejected Air Canada's argument that the chatbot should be treated as separate from its own corporate liability, calling the suggestion "remarkable."[265] The Tribunal held that it was reasonable for Moffatt to rely on the chatbot's instructions and found Air Canada liable for the difference between what Moffatt paid and what they would have paid under the bereavement fare, plus pre-judgment interest and fees. What we find especially interesting is that Air Canada relied on the

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[261] See, generally, William LF Felstiner, Richard L Abel, and Austin Sarat, "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming ...," in Joel B Grossman and David M Trubek, eds., *Dispute Processing and Civil Litigation*, Special Issue (1980–1981) 15:3–4 Law & Society Review 631–654.

[262] There is a robust literature in information studies that looks at people's information seeing behaviour. For an overview, see H Julien & K Williamson, "Discourse and Practice in Information Literacy and Information Seeking: Gaps and Opportunities" (2010) 16:1 Information Research, online: http://InformationR.net/ir/16-1/paper458.html; Konstantina Martzoukou & Elham Sayyad Abdi, "Towards an Everyday Life Information Literacy Mind-Set: A Review of Literature" (2017) 73:4 Journal of Documentation 634.

[263] See, for example, Chiara Valentina Misischia, Flora Poecze & Christine Strauss, "Chatbots in Customer Service: Their Relevance and Impact on Service Quality" (2022) 201 Procedia Computer Science 421. See also, California legislation that requires that users are informed when they are interacting with a bot. US, SB 1001, *An act to add Chapter 6 (Commencing with Section 17940) to Part 3 of Division 7 of the Business and Professions Code, Relating to Bots*, 2017-2018, Reg Sess, Cal, 2018 (enacted).

[264] *Moffatt v. Air Canada*, 2024 BCCRT 1. For further discussion on this case, see Szilagyi, "Regenerating", *supra* note 21 at 139-140.

[265] *Ibid* at para 27.

terms and conditions of its domestic tariff to exclude its liability. However, since the tariff was not filed, the CRT did not take it into consideration.[266]

Over the last two decades, the number of self-represented litigants in Canada has rapidly risen. The high cost of legal services is considered the most significant driver.[267] Courts and public interest organizations alike have created numerous resources to assist self-represented litigants in understanding the process, the role of parties and evidence, and in drafting submissions.[268] Canadian courts are still struggling to understand and map out appropriate uses of AI in its processes, with the main focus being on directives to legal professionals.[269] The Federal Court of Canada's recent practice direction on disclosing the use of AI in legal proceedings specifically addresses the use of AI by self-represented litigants as follows:

> The Court recognizes that counsel have duties as Officers of the Court. However, these duties do not extend to individuals representing themselves. It would be unfair to place elevated AI-related responsibilities only on these self-represented individuals and allow counsel to rely on their duties. Therefore, the Court provides this Notice to ensure fair treatment of all represented and self-represented parties and interveners.[270]

Presumably, this statement is intended to level the playing field between legal professionals and self-represented litigants. While there have been few resources articulating the benefits and risks of AI for self-represented litigants,[271] we are of the view that GenAI is likely to further exacerbate the differences that the Federal Court was attempting to address and put self-represented litigants in an even more vulnerable position. Already, self-represented litigants have an uphill battle navigating the judicial system. Faced with digital information with a veneer of accuracy, these

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[266] *Ibid* at para 31. As a point of reference, Air Canada's Domestic Tariff General Rules Applicable To The Transportation Of Passengers And Baggage is 96 pages long. Air Canada, online: <aircanada.com/content/dam/aircanada/portal/documents/PDF/en/ac_domestic_tariff_en.pdf> [perma.cc/29UJ-QA6Y].

[267] See, for example, Office for the Commissioner for Federal Judicial Affairs Canada, Applying The Canadian Judicial Council's Statement Of Principles On Self-Represented Litigants And Accused Persons, <https://www.fja.gc.ca/COVID-19/CJC-Statement-of-Principles-Principes-du-CCM-eng.html at Background> [perma.cc/Y478-2CX2] ; Noel Semple, "The Cost of Seeking Civil Justice in Canada" (2016) 93:3 Can Bar Rev 639; see also Ogunde, *supra* note 6.

[268] See for example, Canadian Judicial Council's Civil law handbook, Criminal law handbook, and Family law handbook at Canadian Judicial Council, "Representing yourself in court" (2025), online: <cjc-ccm.ca/en/what-we-do/initiatives/representing-yourself-court> [perma.cc/58FU-DZTF]. See also numerous resources created by the National Self Represented Litigant Project: NSRLP, "SRL Resources" (2024), online: < representingyourselfcanada.com/our-srl-resources/> [perma.cc/3JMH-M786].

[269] See, for example, Office of the Commissioner for Judicial Affairs in Canada, Action Committee on Modernizing Court Operations, "Use Of Artificial Intelligence By Court Users To Help Them Participate In Court Proceedings" (2024), online: <www.fja.gc.ca/COVID-19/Use-of-AI-by-Court-Users-Utilisation-de-lIA-par-les-usagers-des-tribunaux-eng.html> [perma.cc/3JMA-QNC5].

[270] Federal Court of Canada, "Notice to the Parties and the profession: The Use of Artificial Intelligence in Court Proceedings" (7 May 2024), online: <fct-cf.gc.ca/Content/assets/pdf/base/FC-Updated-AI-Notice-EN.pdf> [perma.cc/LCB3-4FFV] at section 3.

[271] Rachel Patterson, A Digital Wolf in Sheep's Clothing: How Artificial Intelligence Is Set to Worsen the Access to Justice Crisis (5 June 2024), online:<https://representingyourselfcanada.com/a-digital-wolf-in-sheeps-clothing-how-artificial-intelligence-is-set-to-worsen-the-access-to-justice-crisis/> [perma.cc/68YR-ET8Q]; David Lundgren, "Technology Is Changing, and So Should Our Approach to the Self-Representation Problem: Artificial Intelligence for SRLs" (14 October 2023), online: <representingyourselfcanada.com/technology-is-changing-and-so-should-our-approach-to-the-self-representation-problem-artificial-intelligence-for-srls/> [perma.cc/WZ5K-L39Z]. For a more optimistic perspective, see Ambrogi, *supra* note 6.

inexperienced individuals are likely to simply copy and paste material with which they are presented, demonstrating overreliance.[272]

This matters especially because self-represented litigants are more likely to rely on free versions of GenAI tools, which are more prone to hallucinations.[273] While hallucinations can occur even with higher-end GenAI tools used by lawyers, they are more likely to be minimized by retrieval-augmented generation,[274] or caught through the human oversight of a trained professional. Moreover, GenAI tools are governed by their own terms and conditions, which self-represented litigants must accept. These often include extensive limitation of liability clauses and restrictive arbitration clauses,[275] effectively supercharging standard-form contracts in ways that further erode the position of self-represented litigants. Absent meaningful legal advice, sharing sensitive or personally identifiable information within GenAI data environments risks data protection problems, especially given the prevailing social norms for sharing sensitive information in the traditional solicitor-client context.

Conclusions & Future Directions

GenAI is disrupting legal processes and destabilizing the doctrinal and normative foundations of contract law. As this discussion reveals, the cornerstones of contractual theory—trust, promise, consent, and enforcement—are increasingly strained and eroded when GenAI inserts itself at every stage of the contract lifecycle. What emerges is not merely the next phase of digital contracting but a deeper transformation: contracts that look and feel legitimate but are, in substance, products of *consensus ad artificialis.* These AI-powered contracts offer a mere facsimile of what contracts traditional offered; in this new incarnation, contracts are agreements crafted by machines, for machines, remaking contracts into self-executing, machine-mediated instruments of control.

Seen through Radin's criteria, we argue that contracts powered by GenAI increasingly resemble *consensus ad artificialis*, a manufactured agreement devoid of human relationality and steeped in procedural opacity. While courts have recently begun recognizing the limits of classic contract doctrine in dealing with boilerplate, GenAI compounds the problem by mechanizing the formation and enforcement of contracts. The risk is that courts, presented with AI-generated contracts and enforcement systems, may retreat even further from doctrinal scrutiny, accelerating a shift toward a form of private law that appears neutral and efficient but is, in fact, increasingly unaccountable.

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[272] In a human-automation interaction context, this sort of overreliance stems from the twin phenomena of automation bias and automation complacency. Katie Szilagyi, "Maintaining the Rule of Law in the Age of AI" (October 9, 2024), online: <www.justsecurity.org/103777/maintaining-the-rule-of-law-in-the-age-of-ai/> [perma.cc/TA5T-M3MB].

[273] Anecdotally, we were told by a friend, a practicing lawyer, that they have received a factum by a self-represented litigant which cited to non-existent case law.

[274] Magesh, *supra* note 30

[275] See, for example, OpenAI, "Terms of Use" (11 December 2024), online: <openai.com/policies/row-terms-of-use/>; Microsoft, "Microsoft Service Agreement" (30 July 2024), online: <https://www.microsoft.com/en-ca/servicesagreement> [perma.cc/5W3Z-TE82] and Copilot, "Copilot AI Experiences Terms" (1 October 2024), online: <www.bing.com/new/termsofuse#content-policy> [perma.cc/5W2R-JE69].

Our framework of the contract drafter, the contract taker, and the contract self-helper reveals how GenAI reconfigures relational dynamics within private law ordering. Drafters may now produce contracts at unprecedented speed, but when those contracts replicate flawed precedent, the velocity of error increases. Contract takers may receive algorithmic assistance in decoding terms, but without any bargaining power or real alternatives, the illusion of choice only deepens the fiction of consent. Self-helpers may turn to GenAI for guidance, but they do so in an asymmetrical information environment governed by platform-generated contracts that further entrench liability disclaimers and arbitration clauses. In each of these roles, GenAI risks converting contract from a mutual, relational instrument into an extractive, one-sided regime of control masquerading as consent.

Moving forward, we suggest that the most immediate site of intervention lies not with contract takers or self-helpers but with the contract drafters themselves. GenAI has the capacity to become more than a tool for efficiency. It could be deployed as an opportunity to redesign precedent libraries, reintroduce relationality, and reintegrate litigation feedback into drafting workflows. Regulatory attention may be required to oversee how such tools are trained and deployed, particularly in legal contexts, but meaningful change may come faster from within the profession than from without. Reinvigorating doctrinal commitments to fairness, good faith, and voluntariness—particularly at the drafting stage—may offer a pathway to resisting the slow ossification of contract law into algorithmic command.