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## RESPONSE

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### THE LONG SHADOW OF DOCTRINE

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In response to Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. Pa. L. Rev. 2109 (2015).

#### INTRODUCTION

This Symposium presents an imagined conflict and then a puzzle. The conflict dates back to the 1930s, when American Legal Realism challenged the (old) doctrinalism, a creaky relic of a bygone era. For decades, the two schools clashed over the importance of doctrine in determining the outcome of legal disputes. One side insisted that doctrine is essential. The other countered that rules are indeterminate and decide few cases.<sup>1</sup> Along the way, interdisciplinary scholarship joined the fray, on the side of Realism. Yet, doctrinalism proved a stubborn adversary. It remains unvanquished. To the contrary, a “New Doctrinalism” has taken the place of the old.

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<sup>1</sup> The real story is a bit more complicated than the imagined one. In fact, many Realists took doctrine seriously and actively pursued doctrinal reform efforts. See, e.g., Dan Ernst, “*The New Doctrinalism*” at *Penn Law*, LEGAL HISTORY BLOG (Sept. 26, 2014), <http://legalhistoryblog.blogspot.com/2014/09/the-new-doctrinalism-at-penn-law.html>, archived at <http://perma.cc/UL2Z-FSBM> (arguing that the opposition between Legal Realism and doctrinalism is “overstated”).

Doctrinalism's persistence is the mystery the symposium contributors hope to solve.

In Professor Tess Wilkinson-Ryan's contribution, *Intuitive Formalism in Contract*, she describes the continuing "doctrinalism" of consumer contract law and the failure of legal rules to adapt to "our changing contractual culture."<sup>2</sup> Based on her own empirical investigations into the psychology of consumer contracting, she concludes that consumers think contract law is highly formalistic. Moreover, consumers seem to make contractual decisions based on their formalist intuitions.<sup>3</sup> Although Wilkinson-Ryan cannot yet pinpoint the source of consumers' legal instincts, they likely derive from the "consumer experience with contract law."<sup>4</sup> She observes that a consumer "discerning a law of contracts from a sample comprised almost entirely of boilerplate would come quickly to the conclusion that contract law is highly formal."<sup>5</sup>

This Response draws on Professor Wilkinson-Ryan's essay, as well as other interdisciplinary scholarship, to assess whether interdisciplinary ideas really pose a threat to contract "doctrinalism," as the Symposium organizers suggest. The Response argues against that premise, finding that interdisciplinary scholars take doctrine seriously. Doctrine often matters in the stories they tell, just not, perhaps, in the way that doctrinalists would predict. This research finds doctrine's influence to be deep and broad, casting a shadow that reaches far beyond the judicial resolution of disputes. The Response concludes with a brief reflection on the policy implications of contract doctrine's long shadow.

## I. INTUITIVE FORMALISM

By now, the limits of human rationality and cognitive capacity are common knowledge. Consumers are prone to make errors of judgment, and have finite time to devote to reading contracts and disclosures.<sup>6</sup> Less well understood, however, are some of the other factors that drive consumers'

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<sup>2</sup> Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2111 (2015).

<sup>3</sup> *Id.* at 2126.

<sup>4</sup> *Id.* at 2109.

<sup>5</sup> *Id.*

<sup>6</sup> See, e.g., Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1143 (2000) ("To save time, avoid complexity, and generally make dealing with the challenges of daily life tractable, actors often [sic] adopt decision strategies . . . that lead to decisions that fail to maximize their utility.").

contracting behavior. These are the subjects of Professor Wilkinson-Ryan's research. In addition to cognitive and resource limits, she reports that a person's intuitions about the law also guide his or her behavior. These intuitions include ideas about what constitutes a contract and about the reach of contractual obligations. In her original experimental research, Professor Wilkinson-Ryan finds that consumers are surprisingly "formalistic" in their understanding of contract doctrine. For example, many people think that a signature creates a contract and that contracts must be in writing.<sup>7</sup> They also believe that all the terms of a contract are enforceable, and that courts can require specific performance of ordinary contractual obligations.<sup>8</sup>

The experimental evidence cannot tell us why consumers have these intuitions about contract doctrine, only that the lay understanding of legal rules has behavioral effects. As Professor Wilkinson-Ryan finds, when consumers report how they would act in a given contractual situation, their reported actions follow their formalist intuitions about contract law, however mistaken they may be. For instance, consumers report they would behave differently when they are party to a written—rather than a verbal—agreement.<sup>9</sup> As compared to those with a verbal agreement, consumers with an otherwise-identical written contract were less likely to renege on a deal and required a higher competing offer to back out.<sup>10</sup> Professor Wilkinson-Ryan further cautions that firms may seek to turn these behavioral trends to their advantage. For example, companies could observe certain formalities in order to discourage consumers from terminating their agreements.<sup>11</sup> Moreover, her findings might also make us more skeptical of "the right to exit" a contract as a meaningful consumer protection.

## II. THE INTERDISCIPLINARY THREAT

How has this type of interdisciplinary scholarship influenced the legal academy's understanding of contract law? Does it suggest that doctrine does not really matter in the resolution of disputes? Put another way, does interdisciplinary scholarship pose a threat to "doctrinalism"?

To the extent that Professor Wilkinson-Ryan's work is representative of the growing body of interdisciplinary research, it indicates that this scholar-

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<sup>7</sup> Wilkinson-Ryan, *supra* note 2, at 2126.

<sup>8</sup> *Id.* at 2122.

<sup>9</sup> *Id.* at 2126.

<sup>10</sup> *Id.* at 2125. This was true even when the consequences for backing out were the same for both the written and verbal agreements.

<sup>11</sup> *Id.* at 2126.

ship cuts both ways. She finds that people rely on considerations other than actual contract doctrine in deciding how to navigate contractual relationships. Just as real legal doctrine—"the law on the books"—guides judges, everyday consumers are guided by their own intuitions about legal rules. These intuitions likely inform their decisions about whether and when to breach a contract or terminate a relationship, and whether to complain about the other party's behavior. As a result, the law as it operates in the real world, often called "the law in action," may bear little resemblance to the law on the books.

So far, Professor Wilkinson-Ryan's research might sound a lot more like a "New Legal Realism" project,<sup>12</sup> rather than a "New Doctrinalism" one. Like the (Old) Legal Realism, the New Legal Realism rejects the claim that law is nothing more than doctrine. Rooted in the law-and-society tradition, Realists embrace interdisciplinary approaches to legal scholarship, especially the use of social science methods to empirically test assumptions about the operation of the legal system and the influence of law on the behavior of contracting parties.<sup>13</sup> While attentive to doctrine, New Realists are also quick to highlight the many factors other than doctrine that determine the outcome of disputes, such as the involvement of repeat players, the cost of legal representation and litigation, the need to maintain ongoing relationships, and the role of reputational sanctions.<sup>14</sup>

Indeed, New Legal Realists would likely applaud Professor Wilkinson-Ryan's work, for several reasons. First, it uses empirical research methods to study how consumers report they would behave in certain legal relationships.<sup>15</sup> Second, it engages with "law in action" rather than just "law on the books." Finally, it recognizes that consumer perceptions about law are often all that matter in resolving a contract dispute.<sup>16</sup> For a variety of reasons, such disputes are unlikely to reach a court, so their resolution will

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<sup>12</sup> See Howard Erlanger et al., Foreword, *Is It Time for a New Legal Realism?*, 2005 WIS. L. REV. 335, 337 ("[N]ew legal realist scholars bring together legal theory and empirical research to build a stronger foundation for understanding law and formulating legal policy.").

<sup>13</sup> *Id.* at 336.

<sup>14</sup> Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 468-70 (considering the effects of costs, sanctions, and reputation on contract disputes); Stewart Macaulay, *Contracts, New Legal Realism, and Improving the Navigation of The Yellow Submarine*, 80 TUL. L. REV. 1161, 1174 (2006) (discussing non-doctrinal influences complicating the concept of efficient breach).

<sup>15</sup> Wilkinson-Ryan, *supra* note 2, at 2124-25.

<sup>16</sup> *Id.* at 2126; see also Richard E. Speidel, *Afterword: The Shifting Domain of Contract*, 90 NW. U. L. REV. 254, 259 (1995) (observing that "where fewer contract disputes are actually adjudicated by courts, the arena for contract behavior in the shadow of the law and beyond expands").

take place without judicial oversight.<sup>17</sup> Outcomes may very well turn on how consumers understand their legal obligations, however mistaken their intuitions may be. Thus, Professor Wilkinson-Ryan's research would seem to suggest that contract doctrine is largely irrelevant to the resolution of consumer disputes outside the courts.

But there is more to her story. Although Professor Wilkinson-Ryan cannot tell us exactly what gives rise to lay understandings of contract law, she posits that experience with actual contracts likely informs lay intuitions.<sup>18</sup> As she observes, consumers regularly encounter lengthy, boilerplate-filled written contracts drafted by legally sophisticated actors.<sup>19</sup> Consumers signify their assent to the (largely unread) contract terms through a signature or the electronic equivalent.<sup>20</sup> Only in rare cases are the terms of such deals publicly challenged and found unenforceable.<sup>21</sup> Professor Wilkinson-Ryan notes that real legal doctrine allows this form of consumer contracting to flourish.

Thus, doctrine may indirectly shape lay intuitions about contract law and consumer behavior based on those intuitions.<sup>22</sup> This is not quite "bargaining in the shadow of the law," where the parties know the legal rules and behave in accord with their predictions about how a court would apply them.<sup>23</sup> Rather, it is one step farther removed—more like bargaining

<sup>17</sup> See generally Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 172-73 (2006) (discussing the effect of mandatory arbitration clauses on removing contract cases from the courts); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761 (2002) (analyzing the growth of arbitration clauses as a factor in reducing contract litigation); Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845 (1988) (considering the inclusion of unenforceable, pro-drafter terms to discourage pursuit of claims); Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423 (1992) (discussing recent opinions on forum selection clauses); Edward L. Rubin, *The Nonjudicial Life of Contract: Beyond the Shadow of the Law*, 90 NW. U. L. REV. 107, 119 (1995) (listing a variety of different judicial enforcement costs for consumer cases); Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & LAW 83 (1997) (investigating through survey data the effect of exculpatory clauses on consumers' decisions to seek contract enforcement).

<sup>18</sup> Wilkinson-Ryan, *supra* note 2, at 2114-15.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 2112.

<sup>21</sup> *Id.* at 2114.

<sup>22</sup> *Id.* at 2123.

<sup>23</sup> The most widely-cited source of this phrase is Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979), which argues that divorcing parents "bargain in the shadow of the law" and that the legal rules give each side "bargaining chips" in negotiation. The idea that events take place in "the shadow of the law" has since appeared in numerous places. See, e.g., Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 165 (2002) (examining the role of

in the shadow of the shadow of the law. Doctrine matters in Professor Wilkinson-Ryan's story, just not, perhaps, in the way that doctrinalists would predict.

In my own work, I have also found that doctrine matters, albeit sometimes in unexpected ways. For example, a court decision invoking a novel doctrine might increase public awareness of the case and the underlying dispute. This publicity might then spark a movement either to codify or override the court's decision through the legislative process. As I have argued elsewhere, the now-famous *Williams v. Walker-Thomas Furniture Co.* litigation catalyzed such a reaction.<sup>24</sup> In that story, the doctrine of unconscionability did two things. The D.C. Circuit relied on the doctrine to justify vacating the lower court's decision in favor of Walker-Thomas and remanding the dispute to the trial court.<sup>25</sup> The more notable effect, however, was to draw greater attention to the case, raise public awareness of the practices of stores like Walker-Thomas, and galvanize a movement to reform the D.C. law governing retail installment sales.<sup>26</sup>

Thus, interdisciplinary scholarship does not suggest that doctrine is irrelevant. To the contrary, it uses a longer yardstick in measuring the scope of doctrine's influence, reaching beyond the realm of judicial resolution of disputes. Doctrine can grab headlines and direct public attention to reform efforts. It can indirectly shape lay perceptions of legal rules. Indeed, some would argue that doctrine helps constitute our sense of reality, structuring patterns of "thought and talk about social problems" more generally.<sup>27</sup> In other words, doctrine casts a long shadow.

## CONCLUSION

If interdisciplinary scholarship argues for a more expansive view of contract doctrine's reach, it then also raises the stakes for law reform efforts,

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legal doctrine on mediation and other forms of private negotiation). *But see* ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 52 (1991) (arguing that field evidence casts doubt on realism of Mnookin and Kornhauser's assumptions due to the existence of significant transaction costs); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 *HARV. L. REV.* 2464, 2467 (2004) (arguing that "many plea bargains diverge from the shadows of trials," in that they may not be strongly related to the strength of the case at trial).

<sup>24</sup> Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 *GEO. L.J.* 1383 (2014).

<sup>25</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 450 (D.C. Cir. 1965).

<sup>26</sup> Fleming, *supra* note 25, at 1424.

<sup>27</sup> Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 *NOTRE DAME L. REV.* 886, 895 (1989).

especially in the realm of consumer contracts. As Professor Wilkinson-Ryan observes, the common law of contracts is ill-equipped to regulate contemporary practices of consumer contracting, at least in its present form.<sup>28</sup> Reform has come from other sources, however. There are now a vast array of consumer protection statutes and regulations that make up the modern law of “consumer contracts.” These include state and federal Unfair or Deceptive Acts or Practices statutes (known as UDAP laws),<sup>29</sup> rules about “cooling off” periods for door-to-door sales,<sup>30</sup> and federal regulation of credit card contracts.<sup>31</sup>

Although common law rules and consumers’ formalist intuitions may discourage consumers from challenging or exiting form contracts, statutory consumer protection rules provide an alternative mechanism to prevent companies from overreaching. These rules constrain firm behavior by imposing limits on what terms a company may dictate to consumers. They blunt or displace the old common law rules, developed for a different form of contracting, by policing agreements from the drafter’s side of the bargaining table. In this way, they may help compensate for consumers’ mistaken intuitions about the formalism of contract law.<sup>32</sup>

Furthermore, if common law doctrines have shaped consumers’ formalistic intuitions about the law, the gradual erosion of the common law over time promises to shift those intuitions as well. The common law’s long shadow will almost certainly shrink with the passage of years, as the body of consumer protection law grows. Restatement and reform projects, like the American Law Institute’s current project *Restatement of the Law, Consumer Contracts*,<sup>33</sup> may speed the process along or try to hold back the tide. Depending on the course of future events, consumer intuitions about contract law could prove to be quite different twenty years from now, if they are in some way grounded in actual contract doctrine. Time will tell. Until then, we eagerly await the next iteration of Professor Wilkinson-Ryan’s study.

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<sup>28</sup> Wilkinson-Ryan, *supra* note 2, at 2129.

<sup>29</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 93A, § 11 (West 2015) (state UDAP law).

<sup>30</sup> See, e.g., 16 C.F.R. § 429.0 (2015) (FTC door-to-door sales rule).

<sup>31</sup> Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24 (123 Stat. 1734) (2009).

<sup>32</sup> See, e.g., Jay M. Feinman & Stephen R. Brill, *Is an Advertisement an Offer? Why It Is, and Why It Matters*, 58 HASTINGS L.J. 61, 79 (2006) (“The effect of [statutes which place constraints on advertising] is to render inoperative the common law rule about the status of advertisements.”).

<sup>33</sup> This project was formerly known as *Restatement of the Law Third, The Law of Consumer Contracts*.

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