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DANGEROUS OR BENIGN LEGAL FICTIONS, COGNITIVE BIASES, AND CONSENT IN CONTRACT LAW

CHUNLIN LEONHARD[†]

INTRODUCTION

Some scholars hate legal fictions with a passion. Jeremy Bentham, a vocal critic of legal fictions, denounced fictions as “a syphilis,”¹ an “opiate,” a “subterfuge for legislation” and a “wilful falsehood.”² Even supporters of legal fictions endorse their use cautiously, with warnings of “danger[]” or “grave risks.”³ Professor John C. Gray described fictions as handy, but “dangerous tools.”⁴ Unsurprisingly, the word “fiction” is often used in a pejorative manner.⁵ Professor Lon Fuller described

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¹ LON L. FULLER, *LEGAL FICTIONS* 2 (Stanford Univ. Press 1967).

² Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE L.J.* 1, 3–4 (1990).

³ FULLER, *supra* note 1, at 9; Harmon, *supra* note 2, at 15, 61 (pointing out that a “legal fiction may be benign in one context, and dangerous or brutal in another”); Alina Ng Boyte, *The Conceits of Our Legal Imagination: Legal Fictions and the Concept of Deemed Authorship*, 17 *N.Y.U. J. LEGIS. & PUB. POL’Y* 707, 709 (2014) (expressing concerns about use of legal fictions without a clear understanding of their purpose when “fundamental questions about human ontology . . . remain shrouded by a cloak of falsity” and urging vigilance in using legal fictions); Note, *Lessons from Abroad: Mathematical, Poetic, and Literary Fictions in the Law*, 115 *HARV. L. REV.* 2228, 2249 (2002) [hereinafter Harvard Note].

⁴ JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 37 (Roland Gray ed., Columbia Univ. Press 2d ed. 1921).

⁵ FULLER, *supra* note 1, at 3; Ibrahim J. Wani, *Truth, Strangers and Fiction: The Illegitimate Uses of Legal Fiction in Immigration Law*, 11 *CARDOZO L. REV.* 51, 53–54 (1989) (immigration law fictions); Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 *HARV. L. REV.* 1745, 1750 (2001) (discussing corporate personality). See, e.g., *Faretta v. California*, 422 U.S. 806, 821 (1975) (“An unwanted counsel ‘represents’ the defendant only through a

legal fictions as “a disease or affection of language” or a “pathology of the law.”⁶ Nonetheless,⁷ legal fictions exist in every corner of the law in the United States.⁸ Judges routinely rely on them to resolve disputes.⁹ Legislators rely on them to draft laws and statutes.¹⁰

Despite the strong concerns and prevalence of legal fictions in our courts,¹¹ no one has elaborated on exactly how we can recognize a “dangerous” legal fiction. If a legal fiction is dangerous, should we not try to find out how to identify one? Professor Fuller began the process in the early 1930s by recognizing fiction as a linguistic phenomenon and a tool for understanding our reality.¹² He pointed out that if a fiction is taken “seriously,” it becomes “dangerous.”¹³ He cautioned against “unjustified transference of assumptions, which may be useful and productive in one field, to another field” with possibly “highly dangerous” or “disastrous” consequences.¹⁴ He suggested, without any elaboration, that there would be sufficient safeguards against harm if there was an awareness of the fiction’s falsity and that the more users were aware of the falsity,

tenuous and unacceptable legal fiction.”); *Mrvica v. Esperdy*, 376 U.S. 560, 572 (1964) (Goldberg, J., dissenting) (characterizing as a “mere legal fiction” the majority’s finding that the petitioner’s voyage on an allied merchant marine ship had terminated his U.S. residency).

⁶ FULLER, *supra* note 1, at viii, 11.

⁷ This Article does not intend to engage in a debate about the use of legal fictions or over their proper definition. For a summary of the debates concerning the legal fictions, see generally Harmon, *supra* note 2; see also Harvard Note, *supra* note 3, at 2229–49 (summarizing historical discussions and the type of legal fictions); Aviam Soifer, *Reviewing Legal Fictions*, 20 GA. L. REV. 871, 876 (1986).

⁸ FULLER, *supra* note 1, at 1–2; Nancy J. Knauer, *Legal Fictions and Juristic Truth*, 23 ST. THOMAS L. REV. 1, 17 (2010) (noting that legal fictions are often used by judges in common law, but also in statutes); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435 (2007) (attempting to classify legal fictions into classic legal fictions and new legal fictions).

⁹ FULLER, *supra* note 1, at 1–2; Knauer, *supra* note 8, at 17.

¹⁰ Knauer, *supra* note 8, at 17.

¹¹ FULLER, *supra* note 1, at 21 (commenting that it is impossible “and inadvisable if it were possible” to reject fictions completely); see also *id.* at 94 (commenting that “[t]he age of the legal fiction is not over”).

¹² *Id.* at 11, 93, 106, 114–15.

¹³ *Id.* at 9–10.

¹⁴ *Id.* at 107.

the less dangerous the fiction would be.¹⁵ He concluded that a fiction became completely safe if users were fully aware of its falsity.¹⁶

Professor Fuller stopped short of offering a systematic approach to identifying when a fiction can be “dangerous.”¹⁷ His observations raise more questions. Why are legal fictions dangerous? Why does awareness of falsity render a legal fiction safe? If awareness of falsity renders a fiction safe, how do people become aware of the falsity? How do we otherwise identify dangerous legal fictions?

Since Professor Fuller’s time, legal academia has paid scant attention to legal fictions.¹⁸ However, there has been growing curiosity in how humans, including judges, think and make decisions.¹⁹ The last four decades saw a group of psychologists and behavioral economic experts engaging in numerous scientific studies on understanding how humans think and make decisions.²⁰ These studies have shown that humans most frequently think intuitively and that although intuition may be correct at times, intuitive thinking also consistently leads to decisional mistakes.²¹

Building on existing scholarship on legal fictions and empirical psychological research about human decision making processes, this Article offers a systematic approach to distinguishing a dangerous legal fiction from a benign one.²²

This Article begins by summarizing scholarly discussions about legal fictions in general, courts’ typical uses of legal fiction, and more general concerns with legal fictions. Part II of the Article summarizes scientific findings about how humans think

¹⁵ *Id.* at 10.

¹⁶ *Id.*

¹⁷ Harmon, *supra* note 2, at 15–16. In one passage in his book, Professor Fuller seemed to suggest that one could identify the “dangers of concepts” by examining “(1) their centripetal force; (2) their capacity for inducing reification; and (3) their metaphorical contamination.” FULLER, *supra* note 1, at 123. It is not clear whether Professor Fuller was talking about legal fictions in particular. He also did not elaborate on how one can identify those dangerous characteristics. *Id.*

¹⁸ Harmon, *supra* note 2, at 1 (lamenting the little interest in legal fictions on the jurisprudential agenda).

¹⁹ FULLER, *supra* note 1, at 1–2; Knauer, *supra* note 8, at 17.

²⁰ See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 4 (2011).

²¹ Daniel Kahneman won the Nobel Prize in economics for his work on human judgment and decision making in 2002. *Id.* at 10.

²² Fictions have been used by legislators when drafting laws. However, this Article focuses only on use of legal fictions by the courts.

and what our common cognitive biases are. It then explains how findings regarding the human decision-making process may shed light on why certain legal fictions can be dangerous. This Section also discusses how we can overcome cognitive biases and answers the question why awareness of the fictitious nature of a doctrine may make it “safe.” Studies have shown that judges may be reminded of their own decision making process and be able to engage in more critical analyses to ameliorate the concerns regarding legal fictions.²³

Part III offers a systematic approach to distinguishing benign from dangerous legal fictions based on a review of selected legal fictions.²⁴ This Article suggests that a benign fiction comes with some built-in reminders of its fictional nature while a dangerous fiction does not. A fiction may be benign or dangerous depending on the presence of any or all of the following characteristics: Whether or not the fiction (1) is labeled explicitly as a fiction; (2) rests on complete factual falsity instead of reduction of evidentiary proof; or (3) allows the court to reach a result consistent with well-established legal or other social values. The presence of one or more of these factors creates awareness that the doctrine is a fiction and thus safeguards against uncritical excessive use.²⁵ Without those reminders, legal fiction can become “dangerous.” Lack of built-in reminders makes it more likely judges may use legal fictions for purposes not intended by the fictitious doctrine.²⁶

Finally, Part IV uses the consent doctrine in contract law as an example of a dangerous fiction. This Section briefly traces the evolution of the consent doctrine from the early twentieth century and shows how consent in many situations has evolved

²³ See *infra* text accompanying notes 143–149.

²⁴ This Article does not intend to classify or categorize the legal fictions being relied upon by courts these days, an impossible task. Life has a tendency of presenting myriad problems implicating unanticipated factual situations which require a legal solution. As our society develops and things change, legal fictions come and go. Some legal fictions are no longer applicable and new legal fictions appear continuously. FULLER, *supra* note 1, at 14. Any attempt to capture all legal fictions is difficult because there is no agreed upon definition and is complicated by the fact that some writers have used the word “fiction” broadly to describe certain ideas, for example legal institutions and presumptions. *Id.* at 38, 40.

²⁵ *Id.* at 107; Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 821–22 (2001) [hereinafter *Inside the Judicial Mind*].

²⁶ FULLER, *supra* note 1, at 107; *Inside the Judicial Mind*, *supra* note 25, at 821–22.

into a legal fiction due to technological advances, in particular e-commerce. Part V offers an example of how the consent fiction, when uncritically adopted, poses a “danger” to our society and has become a tool to deprive many people of their day in court because of courts’ willingness to enforce arbitration “agreements” based on the fiction.

I. LEGAL FICTIONS AND JUDICIAL RELIANCE

Legal fictions are ubiquitous in law.²⁷ They have engendered a lot of criticisms and concerns and they have defied precise definitions and classifications.²⁸ Despite their prevalence, a review of scholarly discussions on legal fictions reveals that legal fictions are treated with suspicion at best.²⁹ To provide a context for our discussion, this section briefly summarizes previous attempts to define legal fictions and scholarly concerns about them.

A. *Legal Fictions, A Definitional Challenge*

Despite their prevalence in our law, there does not appear to be a unanimous definition for a legal fiction.³⁰ Professor Fuller provided the most widely accepted definition.³¹ He defined a fiction as either “(1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.”³² For Professor Fuller, a statement needs to be false to qualify as a fiction.³³ Professor Fuller recognized that part of the definitional challenge is that whether a doctrine qualifies as a fiction often depends on properties of language and terminology.³⁴

²⁷ FULLER, *supra* note 1, at 1–2; Knauer, *supra* note 8, at 17.

²⁸ FULLER, *supra* note 1, at 1–2; Knauer, *supra* note 8, at 17.

²⁹ This Article does not intend to engage in a debate about the use of legal fictions or over their proper definition. Legal fictions have been debated elsewhere. See Harvard Note, *supra* note 3, at 2229–47 (summarizing historical discussions about and types of legal fictions); Harmon, *supra* note 2, at 2–16; Soifer, *supra* note 7, at 876. This Article also does not attempt to classify legal fictions. For an attempt to classify legal fictions into classic and new categories. See generally Smith, *supra* note 8.

³⁰ See Harmon, *supra* note 2, at 2–16 (summarizing various historical debates related to legal fictions).

³¹ FULLER, *supra* note 1, at 9.

³² *Id.*

³³ *Id.* at 11.

³⁴ *Id.* at 11–12, 30–31.

Other writers have approached the definitional task from a functional perspective,³⁵ defining legal fiction as “any assumption which conceals a change of law by retaining the old formula after the change has been made.”³⁶ The result “is the expansion of law, whilst leaving it formally intact.”³⁷ Another defined legal fictions as devices for attaining desired legal consequences or avoiding undesired legal consequences.³⁸

Despite differences in definitional approaches, legal fictions share common characteristics: They rest on a false factual assumption and their use excuses courts from having to explain the rationale for their decisions.³⁹

B. *When Do Courts Use Legal Fictions?*

Courts typically resort to legal fictions when faced with a dispute that they cannot resolve without violating an existing well-established legal principle.⁴⁰ All legal fictions implicate the following scenario: The court is faced with a dispute that it needs to resolve and the dispute implicates a well-established legal principle. For ease of reference, consider the well-established principle as Principle A and the factual context giving rise to Principle A as Fact A. Consider the dispute before the court as Scenario B and the facts giving rise to the dispute as Fact B. Under the doctrine of *stare decisis*, courts are obligated to apply Principle A to resolve the similar dispute in Scenario B.⁴¹

To illustrate, consider the context in which the attractive-nuisance doctrine, a well-known legal fiction, came into existence.⁴² Historically landowners owed no duty to trespassers,

³⁵ See, e.g., Jeremiah Smith, *Surviving Fictions*, 27 YALE L.J. 147, 150 (1917) [hereinafter *Surviving Fictions*].

³⁶ *Id.*

³⁷ *Id.*

³⁸ Oliver R. Mitchell, *Fictions of the Law: Have They Proved Useful or Detrimental to its Growth?*, 7 HARV. L. REV. 249, 253 (1893).

³⁹ To complicate the definitional issue further, some writers seem to use the word “fiction” to describe certain abstract concepts which do not exist in reality in any form except for words used, conflating the idea of fiction with reification. For an example of the use of the word “fiction” for that purpose see FULLER, *supra* note 1, at 98–103, 130 n.65. This Article focuses only on legal fictions that assume falsely the existence of a fact, not those fictions which concretize abstract concepts.

⁴⁰ Smith, *supra* note 8, at 1437.

⁴¹ 20 AM. JUR. 2D CTS. § 128 (2017).

⁴² D. E. Buckner, Annotation, *Age and Mentality of Child as Affecting Application of Attractive Nuisance Doctrine*, 16 A.L.R. 3d 25, § 2(a) (1967) (exploring the background of the attractive-nuisance doctrine).

including children, other than to refrain from injuring them intentionally.⁴³ For centuries, landowners enjoyed the protection under the no duty rule and relied on the rule defensively against liability for injuries due to the dangerous conditions of their premises.⁴⁴ This rule governed unless the injured persons could be fitted into certain limited categories, for example, an invitee to the owner's land. The well-established no duty principle is an example of a Principle A.

Further consider a court presented with a dispute involving children who trespassed onto a landowners' land and were injured as a result,⁴⁵ an example of a Scenario B. If the court were to apply Principle A in this scenario, the landowner would not be held liable for the children's injuries. Also note that even though common law courts recognized children's welfare was worthy of the law's protection, courts were reluctant to admit that a negligent landowner could be held liable to a trespasser.⁴⁶

This dilemma led to the judicial invention of a legal fiction—the “attractive- nuisance” doctrine.⁴⁷ This doctrine rests on a fiction that the injured child was invited to the defendant's land even though there was no factual dispute that the child was a trespasser.⁴⁸ Under this doctrine, courts reasoned situations created by the landowners were attractive to children and the attraction was an implied invitation to them to come on the premises.⁴⁹ This fiction thus allowed courts to raise the injured child to the status of an invitee, resulting in courts then justifiably holding landowners liable to “invitees.”⁵⁰ The fiction thus allows courts to give protection to injured children without ostensibly sacrificing Principle A.⁵¹ However, by relying on the legal fiction in Scenario B, courts reach a result which actually

⁴³ Leon Green, *Landowners' Responsibility to Children*, 27 TEX. L. REV. 1, 2 (1948).

⁴⁴ William E. Townsley, Note, *Negligence—Duty of Landowners to Infant Trespassers—Attractive-Nuisance Doctrine Discarded—Submission of Issues—Eaton v. R. B. George Investments, Inc.*, 260 S.W.2d 587 (Tex Sup. 1953), 32 TEX. L. REV. 348, 349 (1954).

⁴⁵ *Sioux City & P. R. Co. v. Stout*, 84 U.S. 657, 657 (1873); *Keffe v. Milwaukee & St. Paul Ry. Co.*, 21 Minn. 207, 208 (Minn. 1875).

⁴⁶ *Sioux City*, 84 U.S. at 660–61; Green, *supra* note 43, at 6–7.

⁴⁷ Green, *supra* note 43, at 7.

⁴⁸ *Id.* at 2; Townsley, *supra* note 44, at 349.

⁴⁹ *Banker v. McLaughlin*, 208 S.W.2d 843, 846–47 (1948).

⁵⁰ Green, *supra* note 43, at 7.

⁵¹ *Id.*

undermines Principle A—courts impose liability on the landowner defendant even though the plaintiff was a trespasser.⁵²

C. *Scholarly Concerns—Lies and Masks*

The above example shows why many scholars are skeptical of courts' use of fictions.⁵³ The attractive-nuisance doctrine rests on a complete factual falsehood and allows courts to reach a desired result without addressing a change of law.⁵⁴ Because of their patent falsehood and ability to mask true judicial reasoning, legal fictions have engendered many concerns. Indeed, scholars' attitudes towards legal fictions have ranged from pure hatred and disdain,⁵⁵ to cautious endorsement.⁵⁶

Some writers are skeptical of legal fictions because they may mask the true reasons for courts' decisions.⁵⁷ These scholars view courts' reliance on legal fictions as attempts to avoid having to justify their decisions.⁵⁸ They see the courts' use of legal fictions as inconsistent with some of our fundamental values—honesty, candor, and transparency.⁵⁹ For our system of democracy to function properly, the government has to conduct

⁵² *Id.*

⁵³ This Article does not join in the debate about whether or not judicial use of legal fictions in general is desirable.

⁵⁴ Shannon F. Eckner, Comment, *Safeguard Trespassing Children and Preserve Property Rights: The Ohio Supreme Court Decision in Bennett v. Stanley to Implement the Second Restatement of Torts' Version of the Attractive Nuisance Doctrine*, 71 U. CIN. L. REV. 255, 269 (2002).

⁵⁵ FULLER, *supra* note 1, at 2.

⁵⁶ Sir William Blackstone, a supporter of legal fictions, is quoted as saying “while we may applaud the end, we cannot admire the means” in reference to legal fictions. *Id.* at 3.

⁵⁷ Robin Matthews, *Legal Fictions: Critical Theory Criticality and the State of Economics and Management*, in CRITICAL THEORY ETHICS FOR BUSINESS AND PUBLIC ADMINISTRATION (ETHICS IN PRACTICE) 159, 160 (David M. Boje ed., 2009) (“Legal fictions are a form of organizational grammar, a veil, a mask such that, though it is merely one of many masks, can appear to be the only mask: a mask that can be confused with reality or even become reality itself.”); Daniel Hinkle, Note, *Cynical Realism and Judicial Fantasy*, 5 WASH. U. JURIS. REV. 289, 329 (2013).

⁵⁸ See Matthews, *supra* note 57; Hinkle, *supra* note 57.

⁵⁹ Avidan Y. Cover, *Presumed Imminence: Judicial Risk Assessment in the Post-9/11 World*, 35 CARDOZO L. REV. 1415, 1458 (2014) (commenting that courts would do well to be candid and issue opinions that would reveal their own doubts and difficulties to facilitate a civic dialogue over the risk we will or will not tolerate in regard to terrorism threats); Hinkle, *supra* note 57, at 329; Smith, *supra* note 8, at 1441.

its business openly and transparently.⁶⁰ Transparency allows the people to hold the government accountable.⁶¹ Because legal fictions allow courts to avoid articulating the reasons for decisions, the perception may be created that the judge is trying to hide something that undermines the legitimacy of our courts.⁶²

In addition, all legal fictions involve some sort of a falsehood.⁶³ Judges represent the government and how they decide cases is fundamentally important to the rule of law in our society.⁶⁴ Judges telling “lies” can be seen as discrediting the justice system.⁶⁵

Despite those concerns, scholars recognize the utility of legal fictions.⁶⁶ Fuller, for example, described legal fictions as “the cement that is always at hand to plaster together the weak spots in our intellectual structure” and “the product of the law’s struggles with *new* problems.”⁶⁷ He called fiction a “fundamental trait of human reason.”⁶⁸ He suggested that engaging in legal fiction is our brain’s capacity to simplify and organize our reality and to understand reality through analogies.⁶⁹

⁶⁰ Memorandum on Transparency and Open Government, 74 Fed. Reg. 4,685 (Jan. 21, 2009).

⁶¹ FULLER, *supra* note 1, at 97 n.6.

⁶² Hinkle, *supra* note 57, at 329.

⁶³ For example, Bentham calls “legal fiction” “the most pernicious and the basest sort of lying.” 6 Jeremy Bentham, *Of Offices for Conservations of Transcripts of Contracts*, in THE WORKS OF JEREMY BENTHAM 575, 582 (John Bowring ed., 1843). And he further says: “It affords presumptive and conclusive evidence of moral turpitude in those by whom it was invented and first employed.” 9 Jeremy Bentham, *Delusion*, in THE WORKS OF JEREMY BENTHAM 76, 77 (John Bowring ed., 1843).

⁶⁴ Hinkle, *supra* note 57, at 290.

⁶⁵ Mitchell, *supra* note 38, at 254; *see also* Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2222–23 (2015) (pointing out that our system of law is one that is built on trust for it to function).

⁶⁶ FULLER, *supra* note 1, at 21–22; Harmon, *supra* note 2, at 6–8 (noting Blackstone’s comments related to legal fictions as “highly beneficial and useful”); GRAY, *supra* note 4, at 37; Knauer, *supra* note 8, at 3; Harvard Note, *supra* note 3, at 2249.

⁶⁷ FULLER, *supra* note 1, at 52, 94.

⁶⁸ *Id.* at 94.

⁶⁹ *Id.* at 104, 106, 113–114.

D. Warnings of Dangers

However, the general recognition of legal fictions' utility is tinged with warnings of danger.⁷⁰ Professor Gray described fictions as handy if "skillfully and wisely" used.⁷¹ He also commented that fictions can be "dangerous[] tools."⁷² He suggested that when using a legal fiction, one should always be conscious of the fact that one is using a fiction and be able to articulate the doctrine for which it stands.⁷³

Professor Fuller also warned about relying on a fiction in situations not anticipated by those who developed the fiction.⁷⁴ In Fuller's mind, legal fictions can be "highly dangerous" when used in this manner.⁷⁵ He also stated that full awareness of the falsity of a doctrine rendered a fiction safe.⁷⁶ He noted that awareness of the fiction's falsity would offer sufficient safeguards against harm and that the more users were aware of the falsity, the less dangerous the fiction was.⁷⁷ He commented that "[a] fiction if taken seriously, i.e., 'believed,' becomes dangerous and loses its utility."⁷⁸ Professor Fuller did not elaborate on how someone can become aware of a fiction's falsity or how and why awareness would make a fiction less dangerous.

More recently, some scholars have singled out certain legal fictions as dangerous by focusing on the consequences of courts' reliance on them.⁷⁹ For example, Professor Kuckes pointed out that the legal fiction of grand jury independence allowed the courts to justify giving the grand jury broad investigative powers not given to law enforcement directly.⁸⁰ Professor Harmon suggested that the fiction of the substituted judgement doctrine was dangerous because of its "borrowability" from the law of

⁷⁰ Harmon, *supra* note 2, at 15; *see id.* at 61 ("A legal fiction may be benign in one context, and dangerous and brutal in another.")

⁷¹ GRAY, *supra* note 4, at 37.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ FULLER, *supra* note 1, at 107.

⁷⁵ *Id.*

⁷⁶ *Id.* at 10.

⁷⁷ *Id.*

⁷⁸ *Id.* at 9–10.

⁷⁹ Harmon, *supra* note 2, at 68; Niki Kuckes, *The Useful, Dangerous Fiction of Grand Jury Independence*, 41 AM. CRIM. L. REV. 1, 38 (2004).

⁸⁰ Kuckes, *supra* note 79, at 38.

lunacy into the law of informed consent, which allowed the state to invade the bodily integrity of the incompetent without having to provide an explanation.⁸¹

In sum, scholarly discussions of legal fictions reveal the difficulty of identifying precisely what a legal fiction is.⁸² Despite concerns, legal fictions can be useful intellectual tools.⁸³ Notwithstanding their usefulness, legal fictions can be used in a dangerous manner.⁸⁴

II. HOW WE THINK AND OUR BLIND SPOTS

Because legal fictions are used as analytical tools in the decision-making process, it is helpful to have a better understanding of how humans make decisions in general. Luckily, during the last four decades, psychologists and behavioral economists have undertaken numerous scientific studies on how we humans think and make decisions.⁸⁵ Such scientific studies find that humans most often think intuitively and, although our intuition may be correct at times, intuitive thinking consistently leads to decisional errors.⁸⁶ This Article suggests that our flawed minds may render a legal fiction dangerous. As we shall discuss in more detail in Part III, in light of our cognitive biases, certain characteristics of legal fictions may make them benign or dangerous.⁸⁷

A. *System 1 Intuitive Versus System 2 Deliberative Thinking*

Studies have shown that human beings have two different modes of thinking: intuitive and deliberate.⁸⁸ Scientists refer to the intuitive mode as System 1.⁸⁹ System 1 operates automatically and quickly, with little or no effort and no sense of

⁸¹ Harmon, *supra* note 2, at 63–66.

⁸² See *Surviving Fictions*, *supra* note 35, at 150.

⁸³ Harvard Note, *supra* note 3, at 2235.

⁸⁴ See Harmon, *supra* note 2, at 14–15, 61 (arguing that substituted judgment is a useful fiction that may be dangerous when applied in the wrong context).

⁸⁵ KAHNEMAN, *supra* note 20, at 4–5.

⁸⁶ *Id.*

⁸⁷ See *infra* Part III.

⁸⁸ KAHNEMAN, *supra* note 20, at 20–23.

⁸⁹ *Id.* at 20–21.

voluntary control.⁹⁰ The other mode of thinking is more deliberate and careful.⁹¹ Scientists refer to this mode as System 2.⁹²

System 1 plays the dominant role in our thinking.⁹³ It operates constantly and automatically and implicates innate skills we share with animals, as well as uniquely human mental activities that become fast and automatic through experience and prolonged practice—skills such as reading and understanding nuances of social and cultural situations.⁹⁴ We cannot turn off System 1 at will.⁹⁵ System 1 produces answers quickly and often relies on mental shortcuts called “heuristics” to reach conclusions and make decisions.⁹⁶ It views reality by looking for coherence.⁹⁷ In other words, System 1 refers to the type of thinking often described as “a machine for jumping to conclusions.”⁹⁸

In contrast, System 2 involves conscious reasoning addressing difficult topics. Because this mode requires more effort and is more difficult, this mode is activated when our brain detects something that violates the cognitive model of the world that System 1 maintains.⁹⁹ System 2 regulates instinctive impulses and actions suggested by System 1, allowing some to be expressed while suppressing or modifying others.¹⁰⁰ Because System 2 can apply rules, compare objects across multiple attributes, and deliberately choose between options, it is uniquely suited for complex reasoning and mathematical prediction.¹⁰¹ In other words, System 2 thinking is the type of thinking required for legal reasoning.¹⁰²

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 26–28.

⁹⁴ *Id.* at 21–22.

⁹⁵ *Id.* at 25, 28.

⁹⁶ *Id.* at 95–99.

⁹⁷ *Id.* at 80.

⁹⁸ *Id.* at 79–80.

⁹⁹ *Id.* at 20–21, 80–81.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

Thinking intuitively has some advantages.¹⁰³ It can be highly efficient because it operates quickly and requires little effort.¹⁰⁴ However, problems are often created due to over reliance on initial solutions generated by System 1 and failure to invoke System 2 thinking because of the hard work and deliberate effort required to activate it.¹⁰⁵ System 1 thinking is constantly generating intuitive thoughts and suggestions when faced with challenges.¹⁰⁶ As a result, System 1 tends to govern most decision making even though it is not well equipped for complex tasks.¹⁰⁷

B. Common Cognitive Biases

Because of our tendency to rely heavily on intuition, when making complex decisions we make systematic and predictable judgment errors due to System 1's inability to perform complex reasoning and its reliance on heuristics—mental shortcuts.¹⁰⁸ Such biases make us “predictably irrational” in several ways.¹⁰⁹

One of the mental short cuts is our tendency to automatically substitute an easy question for a more difficult one if we cannot easily come up with a satisfactory answer to the difficult question.¹¹⁰ System 1's preference for quick answers predisposes it to find a related, easier question.¹¹¹ Then, instead of answering the difficult question, we will find a related question and answer it.¹¹² For example, when asked how child molesters should be punished, people will automatically answer the easier question of how they feel about child molesters, rather than considering the complicated issues raised by the question.¹¹³ Because System 1 is often not directly answering the relevant question, its solutions are understandably imprecise.¹¹⁴ System 2 can always reject or

¹⁰³ *Id.* at 20–21, 105.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 81.

¹⁰⁶ *Id.* at 24, 28.

¹⁰⁷ *Id.* at 21–22, 24, 28.

¹⁰⁸ *Id.* at 80; DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS 5–7 (Harper Perennial, rev. & expanded ed. 2010).

¹⁰⁹ ARIELY, *supra* note 108, at xx, 5–7.

¹¹⁰ KAHNEMAN, *supra* note 20, at 97.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *See id.* at 98–99.

¹¹⁴ *Id.*

modify these intuitive solutions. However, because it requires more effort to activate System 2, System 1's solutions are often accepted without modification.¹¹⁵

Another way we automatically substitute a difficult question with an easier one is reflected through the "availability heuristic."¹¹⁶ The availability heuristic refers to our tendency to estimate the likelihood of an event by the ease with which instances of it come to mind.¹¹⁷ It is more difficult to answer the likelihood question by examining the statistical data.¹¹⁸ Instead, we answer the easier question: Can we recall instances of the event?¹¹⁹ The easier it is to recall the event, the more likely that we will overestimate its occurrence.¹²⁰ While this substitution may be efficient in some instances, it often distorts our estimations because events can be memorable for reasons having nothing to do with their general prevalence.¹²¹

"Predictably irrational" decision biases may also occur due to reliance on stereotypes as mental shortcuts—referred to as the "representativeness heuristic."¹²² This shortcut leads us to ignore data in favor of what is consistent with our stereotypes—a substitution that frequently leads to mistakes.¹²³ Most notably, relying on the representativeness heuristic causes people to neglect objective data in favor of superficially self-apparent, similarities.¹²⁴

Another cognitive bias is the "anchoring effect."¹²⁵ This refers to the impact of a particular numeric value on people's estimation of quantity.¹²⁶ Studies have shown that when litigants were initially offered one of two amounts, either \$10,000 or \$2,000, the litigants who received the \$2,000 offer were more likely to settle at \$12,000 than those who received the initial

¹¹⁵ *Id.* at 99.

¹¹⁶ *Id.* at 130.

¹¹⁷ *Id.* at 129.

¹¹⁸ *Id.* at 130.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 129, 132.

¹²¹ *See id.* at 130.

¹²² *Id.* at 147–51.

¹²³ *Id.*

¹²⁴ *Id.* Fuller recognizes that the human mind is a machine subject to certain limitations. Human beings understand anything that is unfamiliar to them by analogy to the known world. FULLER, *supra* note 1, at 65.

¹²⁵ KAHNEMAN, *supra* note 20, at 119.

¹²⁶ *Id.*

offer of \$10,000.¹²⁷ The litigants who settled at \$12,000 were affected by the initial value of \$2,000.¹²⁸ In other words, people make decisions by starting from an initial value, with System 1 automatically adjusting to yield the final answer. This anchoring effect exists even though the initial number is random and unrelated to the question at hand.¹²⁹ The studies found that judges also suffered from the same anchoring effect.¹³⁰

Similar to the anchoring effect, our thoughts and behaviors may also be influenced subtly through priming without us being conscious of it.¹³¹ Scientists call this the priming effect.¹³² Research on the priming effect suggests that actions can be affected by what we see or hear, without us being aware of it.¹³³ For example, exposure to advertisements can trigger the priming effect within System 1 and result in consumers unconsciously choosing related brands of merchandise.¹³⁴

Furthermore, human beings are naturally inclined to interpret facts to support their own positions.¹³⁵ System 1 is generally insensitive to the quantity and quality of information underlying its decisions and tends to suppress doubt in favor of coherence and easy solutions.¹³⁶ When faced with potential uncertainty, System 1 comes up with a coherent story.¹³⁷ Even if based on minimal evidence because of insensitivity to informational quality, the confidence that individuals have in their answers depends largely on the story's quality, not the evidence's strength.¹³⁸ Thus, even when a person is only exposed to limited evidence, thereby increasing the chance of missing critical information, as long as System 1 constructs a good story based on that evidence, the individual will express unjustified confidence in the decision.

¹²⁷ *Inside the Judicial Mind*, *supra* note 25, at 789.

¹²⁸ *Id.*

¹²⁹ *Id.* (noting the same effect even if the damages requests were "silly and outrageous"); *see also* KAHNEMAN, *supra* note 20, at 125.

¹³⁰ *Inside the Judicial Mind*, *supra* note 25, at 792–93.

¹³¹ KAHNEMAN, *supra* note 20, at 52–53.

¹³² *Id.*

¹³³ *Id.* at 53–54.

¹³⁴ *Id.* at 57–58.

¹³⁵ *See id.* at 45.

¹³⁶ *Id.* at 80–82.

¹³⁷ *Id.* at 80.

¹³⁸ *Id.* at 87.

Studies have shown that people tend to interpret information in a self-serving manner, a phenomenon also referred to as self-serving or confirmatory bias.¹³⁹ For example, a series of studies reported that a group of law students were given identical factual information about a dispute. The students who were told that they represented the plaintiff interpreted the information as favorable to the plaintiff while the group told to represent the defendant viewed the same information as favorable to the defendant.¹⁴⁰ Similarly, when supplied with the same facts about the death penalty, people initially against the death penalty reported that the information supported their initial position while those in favor of the death penalty reported that the information supported their initial pro death penalty position.¹⁴¹ “[W]e can be blind to the obvious, and we are also blind to our blindness.”¹⁴²

Judges, being human, are not immune from the way human beings make decisions and the resulting cognitive biases.¹⁴³ Despite their specialized training, judges are inclined to make intuitive judgments.¹⁴⁴ The law does not and cannot address all real-life situations.¹⁴⁵ Therefore, judges must fill in the gaps and in so doing grapple with the same kinds of perception biases as anyone else.¹⁴⁶

Legal fictions, then, are one thinking tool that judges rely on as they evaluate highly complex cases.¹⁴⁷ Legal fictions are System 1 mental shortcuts that judges rely upon to solve a dispute in front of them.¹⁴⁸ A legal fiction may become dangerous if human cognitive biases lead judges to excessively rely on the

¹³⁹ *Id.* at 81; Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1093 (2000).

¹⁴⁰ Korobkin & Ulen, *supra* note 139, at 1093.

¹⁴¹ *Id.*

¹⁴² KAHNEMAN, *supra* note 20, at 24.

¹⁴³ Hinkle, *supra* note 57, at 291; Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 43 (2007); Smith, *supra* note 8, at 1480–81.

¹⁴⁴ Guthrie et al., *supra* note 143, at 27–28.

¹⁴⁵ Hinkle, *supra* note 57, at 291.

¹⁴⁶ *Id.*; *Inside the Judicial Mind*, *supra* note 25, at 821.

¹⁴⁷ Hinkle, *supra* note 57, at 291.

¹⁴⁸ *See* GRAY, *supra* note 4, at 37.

legal fiction.¹⁴⁹ The following section discusses how we can distinguish a benign legal fiction from a dangerous legal fiction in light of human cognitive biases.

III. DANGEROUS OR BENIGN LEGAL FICTIONS

Professor Fuller suggested that legal fictions become “wholly safe” if users are fully aware of their falsity.¹⁵⁰ Empirical psychological research supports Professor Fuller’s observation in that awareness can help judges overcome System 1 intuitive thinking and trigger more deliberate System 2 thinking processes.¹⁵¹

A natural question to ask at this point is: How do judges become aware that a doctrine is fictitious? One obvious answer is that maybe judges can educate themselves.¹⁵² The problem with the preceding answer is that it requires a judge to recognize a legal fiction and further realizes that she suffers from certain cognitive biases and there is a need for further education. In other words, System 2 thinking needs to be triggered to engage in more deliberative thinking.¹⁵³ That, however, is precisely where the rub is.

A close examination of legal fictions reveals that some fictitious legal doctrines have built-in reminders of their falsity.¹⁵⁴ This Article suggests that the built in reminders serve to remind judges of the fictitious nature of the doctrine and the need to engage in more deliberative thinking. That awareness, therefore, offers some safeguards against excessive reliance on the fictitious legal doctrines. In other words, the built in

¹⁴⁹ *Id.*

¹⁵⁰ FULLER, *supra* note 1, at 10. Professor Fuller did not provide any guidance, however, how one may become aware of a fiction’s falsity.

¹⁵¹ Hinkle, *supra* note 57, at 329; *Inside the Judicial Mind*, *supra* note 25, at 821–22.

¹⁵² *Inside the Judicial Mind*, *supra* note 25, at 821–22.

¹⁵³ KAHNEMAN, *supra* note 20, at 80–81.

¹⁵⁴ This Article discusses certain types of legal fictions as illustrations; it does not intend to capture all possible legal fictions. For one thing, it is impossible to identify all legal fictions in different areas of law. The big challenge with any discussion related to legal fictions is that legal fictions’ complexity defies any easy categorization. Categorization is also difficult because of lack of a precise definition of what a legal fiction is.

reminders may render a legal fiction benign.¹⁵⁵ Legal fiction without such built-in reminders may be dangerous because of the risk that judges may rely on the fiction excessively and uncritically because of their cognitive biases.¹⁵⁶

This section identifies certain groups of legal fictions with such built-in reminders of their falsity. This Article suggests that this may be one way for us to systematically identify when a legal fiction is benign or dangerous.

A. *Linguistic Clues of Falsity*

Some legal fictions come with labels identifying them as fiction. Those legal fictions come with the words such as “implied,” “quasi,” or “constructive.” These words remind judges that the doctrine is fictitious. For example, in contract law, courts have found enforceable contracts by relying on the fiction of “implied” contracts.¹⁵⁷

There are two types of implied contracts fictions under contract law. The first is a contract implied in fact. This contract is a fiction because the parties did not enter into an express agreement. Rather, the courts inferred from the parties’ conduct that the parties meant to enter into a contract.¹⁵⁸ For example, courts have found a contract implied in fact where a person performs services at another’s request, or “where services are rendered by one person for another without his expressed request, but with his knowledge, and under circumstances” fairly raising the presumption that the parties understood and intended that compensation was to be paid.¹⁵⁹

The second is a contract implied in law, sometimes also referred to as quasi contract. The “contract” here is not based on parties’ agreement; rather, it is an obligation created by the

¹⁵⁵ This Article does not suggest that a legal fiction with built in reminders can never be applied dangerously. For an example of a legal fiction that became dangerous because of its borrowability, see Harmon, *supra* note 2, at 63.

¹⁵⁶ See *Inside the Judicial Mind*, *supra* note 25, at 779–80.

¹⁵⁷ 1 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:6 (4th ed. 2017).

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., Lewis v. Meginniss, 12 So. 19, 21 (Fla. 1892). In these circumstances, the law implies the promise to pay a reasonable amount for the services. *Id.*

law.¹⁶⁰ Judges adopted the fiction to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation.¹⁶¹ To find a contract implied in law, courts must find that (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it.¹⁶²

Words such as “implied,” “quasi,” or “constructive,” then serve as linguistic reminders that the doctrines we are dealing with are fictitious. These reminders may trigger more deliberative System 2 thinking as they remind judges to apply the doctrines cautiously.¹⁶³ Therefore, legal fictions that come with linguistic reminders of their falsity are benign legal fictions because judges are more likely to be aware of their cognitive biases and as a result, engage in more deliberative System 2 thinking.¹⁶⁴

B. Complete Factual Falsity

Some legal fictions rest upon complete factual falsity, such that everyone knows that it is false and no one is deceived by its falsity.¹⁶⁵ For example, the attractive-nuisance doctrine rests on a fact that is totally false—the child was invited to the land when there was no dispute that the landowner did not invite the child.¹⁶⁶ Everybody knows that the landowner did not invite the child to the land.¹⁶⁷ The legal fiction of corporation as a person is another example.¹⁶⁸ In that case, everyone knows corporations are not human beings.¹⁶⁹

¹⁶⁰ 1 SAMUEL WILLISTON & RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 1:6 (4th ed. 2017).

¹⁶¹ *Wright v. Pennamped*, 657 N.E.2d 1223, 1229 (Ind. Ct. App. 1995).

¹⁶² *Hillman Constr. Corp. v. Wainer*, 636 So. 2d 576, 577 (Fla. Dist. Ct. App. 1994).

¹⁶³ Guthrie et al., *supra* note 143, at 27–28, 41.

¹⁶⁴ *Inside the Judicial Mind*, *supra* note 25, at 26–27.

¹⁶⁵ *See, e.g.*, Eckner, *supra* note 54, at 269.

¹⁶⁶ *See Green*, *supra* note 43, at 2; Townsley, *supra* note 44, at 348–49.

¹⁶⁷ *See Green*, *supra* note 43, at 2; Townsley, *supra* note 44, at 348–49.

¹⁶⁸ Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 563 (1986–1987).

¹⁶⁹ *Id.*

The complete factual falsity serves as a reminder of the doctrine's fictional nature because everyone knows it to be false.¹⁷⁰ The risk that anyone would be deceived by the fiction is small because of how humans think. System 1 thinking tries to understand the world through coherence.¹⁷¹ Complete factual falsity is inconsistent with System 1's worldview.¹⁷² The complete falsity presents a jarring picture of the world to human intuition, System 1, and serves as a reminder that the doctrine is a fiction.¹⁷³ This awareness may serve to activate System 2 thinking as it reminds courts to apply the doctrine cautiously and limit its application.¹⁷⁴

C. *Ideological Inconsistency*

Some legal fictions allow courts to reach results inconsistent with well-established legal or social values. For example, the application of the attractive-nuisance doctrine allows the court to impose liability on the landowner.¹⁷⁵ The imposition of liability violated a well-established principle that a landowner owed no duty to trespassers, including children.¹⁷⁶

Vicarious liability is another legal fiction which allows courts to impose liability upon one person because of another person's misdeeds.¹⁷⁷ The result is inconsistent with our belief that one should not be held liable for the acts of a third party.¹⁷⁸ The ideological inconsistency is in conflict with System 1, resulting in cognitive dissonance.¹⁷⁹ To use Professor Fuller's words, the inconsistency makes the fiction a "bitter pill to swallow."¹⁸⁰

The "bitter pill" effect can serve as a trigger to activate System 2 thinking and thus offers some necessary checks and balances against overuse, for example, by reminding judges to

¹⁷⁰ FULLER, *supra* note 1, at 10.

¹⁷¹ KAHNEMAN, *supra* note 20, at 105.

¹⁷² *See id.* at 59–62.

¹⁷³ *See id.*; FULLER, *supra* note 1, at 10.

¹⁷⁴ Guthrie et al., *supra* note 143, at 27–28, 41.

¹⁷⁵ Green, *supra* note 43, at 2; Townsley, *supra* note 44, at 348–49.

¹⁷⁶ Eckner, *supra* note 54, at 269.

¹⁷⁷ DelSanto v. Hyundai Motor Fin. Co., 882 A.2d 561, 565 (R.I. 2005).

¹⁷⁸ FULLER, *supra* note 1, at 26.

¹⁷⁹ KAHNEMAN, *supra* note 20, at 59–70.

¹⁸⁰ FULLER, *supra* note 1, at 26.

engage in a sophisticated cost-benefit analysis in applying the doctrine. Because of the inconsistency, one can expect the judges to be cautious when applying the principle.¹⁸¹

In sum, legal fictions that have some built-in reminders are benign because the reminders serve to activate System 2 thinking, resulting in better decision making. On the other hand, legal fictions that do not have any reminders of their falsity have the potential to be overused uncritically as a result of human cognitive biases. Judicial reliance on legal fictions exacerbates concerns about legal fictions. The next Section focuses on consent in contract law as an example of a legal fiction that does not have any built-in reminders and the potential dangers it presents to our society.

IV. THE MAKING OF THE CONSENT FICTION IN CONTRACT LAW

In contract law, consent of the parties¹⁸² remains the justification for courts to exercise state power to enforce contracts.¹⁸³ Even though commercial transactions have undergone fundamental changes—from face-to-face dealings in physical space to digital transactions in cyberspace—over the last century,¹⁸⁴ requirements for enforcement of those contracts have by and large remained the same.¹⁸⁵ Because consent refers to a human mental state and one cannot read a human mind,¹⁸⁶

¹⁸¹ *Id.* (“The harshness involved in visiting the consequences of one man’s misdeeds upon another has seemed to call for repeated explanation and apology.”); Guthrie et al., *supra* note 143, at 27–28, 41.

¹⁸² My scholarship interest on consent in contract law focuses on “consent” as when parties agree to a certain transaction. In that sense, consent in this Article is used interchangeably with “assent” or “agree.” Consent is often used in its more abstract sense as the central concept of a broader consent theory. The broader consent theory portrays the society as consisting of free, independent individuals who control their own destiny, providing the theoretical foundation for the consent approach in contract law. DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 1* (1989).

¹⁸³ Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 *BROOK. L. REV.* 1381, 1394–95 (1996).

¹⁸⁴ Gary E. Sullivan, *Purchasing from Merchants on eBay® and the Implied Warranty of Merchantability: An Overview*, 70 *ALA. LAW.* 266, 266 (2009).

¹⁸⁵ *Forrest v. Verizon Commc’n, Inc.*, 805 A.2d 1007, 1011 (D.C. 2002) (“A contract is no less a contract simply because it is entered into via a computer.”).

¹⁸⁶ Morris R. Cohen, *On the Logic of Fiction*, 20 *J. PHIL.* 477, 478 (1923) (“Indeed, whenever we speak of the mind doing anything, collecting its data, perceiving the external world, and the like, we are using the metaphor of reification,

courts have always looked for outward indicia, such as reifications, of consent when deciding whether contracts should be enforced.¹⁸⁷

In the late 19th century, contractual transactions were often face-to-face dealings.¹⁸⁸ In such cases, a party's signature is treated as reification of consent.¹⁸⁹ As business grew and used standard agreements, courts began accepting notice or purchase of goods as evidence of consent.¹⁹⁰ Nowadays, many commercial transactions occur in the digital world and courts have found consent where a party clicked on an "Accept" button or browsed a website.¹⁹¹

Growing evidence shows that usual reifications of consent—signatures, clicking buttons, browsing websites—in modern consumer transactions do not necessarily mean that the party consented to the business terms.¹⁹² Many consumers do not read the agreements when they sign or when they click "I accept," and with good reason.¹⁹³ By now, few would dispute that consent as

just as we use the metaphor of personification whenever we speak of bodies attracting and repelling each other.").

¹⁸⁷ *Alexander v. Codemasters Grp. Ltd.*, 127 Cal. Rptr. 2d 145, 152 (Cal. Ct. App. 2002); *see also Meyer v. Benko*, 127 Cal. Rptr. 846, 848–49 (Cal. Ct. App. 1976).

¹⁸⁸ Nora K. Duncan, *Adhesion Contracts: A Twentieth Century Problem for a Nineteenth Century Code*, 34 LA. L. REV. 1081, 1095 (1974).

¹⁸⁹ Marie-Andrée Jacob, *Form-Made Persons: Consent Forms as Consent's Blind Spot*, 30 POL. & LEGAL ANTHROPOLOGY REV. 249, 256 (2007).

¹⁹⁰ J. P. Ludington, Annotation, *Construction and Effect of UCC Art. 2, Dealing with Sales*, 17 A.L.R.3d 1010, § 7 (1968).

¹⁹¹ *Bassett v. Elec. Arts, Inc.*, 93 F. Supp. 3d 95, 105 (E.D.N.Y. 2015); *Nicosia v. Amazon.com, Inc.*, 84 F. Supp. 3d 142, 152 (E.D.N.Y. 2015), *aff'd in part, rev'd in part*, 834 F.3d 220 (2d Cir. 2016).

¹⁹² Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1749 (2014).

¹⁹³ One famous example of this was reported in the *Guardian* about an experiment where everyone clicked "I accept" even though the terms of the agreement obligated the users to give up their first born or, if they don't have any children, their most beloved pet. John Naughton, *State Surveillance Is Enabled by Our Own Sloppy Habits*, *GUARDIAN* (Dec. 13, 2014, 2:00 PM), http://www.theguardian.com/technology/2014/dec/13/state-surveillance-enabled-by-own-sloppy-habits?CMP=share_btn_link; *see also Wilkinson-Ryan, supra note 192*, at 1749.

applied in contract law is mostly a legal fiction.¹⁹⁴ Many scholars, myself included, have criticized courts for indulging in the consent legal fiction.¹⁹⁵

A. *Reifications of Consent*

1. You signed and therefore you consented.

Courts have widely adopted the rule that a party's physical signature represents the party's consent to the terms of the agreement.¹⁹⁶ Courts treat written contracts as the highest evidence of the terms of an agreement and impose a duty on every contracting party to learn and know its contents before signing.¹⁹⁷ Courts would enforce a contract against a party where the party signed the agreement even though the party claimed she did not read it.¹⁹⁸

The above rule made a lot of sense in the early days of contract law when commercial transactions were completed in person. The rule also promotes diligence by requiring parties to act prudently when entering into a contract.¹⁹⁹ A contrary rule would have destroyed the utility of the contract mechanism because, as Justice Hunt put it, "If this were permitted, contracts would not be worth the paper on which they are written."²⁰⁰

¹⁹⁴ John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 287 (2000); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOT. L. REV. 171, 192 (2003) (calling the fiction of consent "ludicrous").

¹⁹⁵ FULLER, *supra* note 1, at 3 (noting the general tendency of scholars to criticize a legal doctrine on the basis that it is a "fiction"); Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 78 (2012).

¹⁹⁶ *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875); *Hawkins v. Capital Fitness, Inc.*, 29 N.E.3d 442, 446 (Ill. App. Ct. 2015).

¹⁹⁷ *Vargas v. Esquire, Inc.*, 166 F.2d 651, 654 (7th Cir. 1948).

¹⁹⁸ *Upton*, 91 U.S. at 50; *see also* MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova D'Agostino, S.P.A., 144 F.3d 1384, 1387 n.9 (11th Cir. 1998) ("[P]arties who sign contracts will be bound by them regardless of whether they have read them or understood them.").

¹⁹⁹ Stewart Macaulay, *Private Legislation and the Duty To Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051, 1058 (1966).

²⁰⁰ *Upton*, 91 U.S. at 50.

2. You saw the terms and therefore you consented.

As the economy developed, more and more businesses began adopting form contracts as an economical way to convey identical terms to large groups of people.²⁰¹ Courts adopted the position that by noticing the terms and not returning the product, the buyer agreed to the terms of the contract.²⁰² By equating notice with consent, courts moved a step closer to the fictionalization of consent.

In *Carnival Cruise Lines, Inc. v. Shute*, the United States Supreme Court enforced a forum-selection clause included among three pages of terms attached to a boarding ticket for a cruise ship vacation. The plaintiff boarded the cruise ship in California to sail to Puerto Vallarta, Mexico.²⁰³ While the ship was in international waters, the plaintiff fell and injured herself.²⁰⁴ The Shutes filed suit in the United States District Court in Washington claiming injuries caused by defendant Carnival Cruise Line's negligence.²⁰⁵ The defendant moved for summary judgment, contending that the forum-selection clause in plaintiff's ticket required the Shutes to bring their suit in a Florida court.²⁰⁶

The majority of the Court did not address the question of whether the buyer had sufficient notice of the forum-selection clause before entering into the contract. The Court noted that the buyers had essentially conceded they had notice of the forum-selection clause.²⁰⁷ The majority did concede that the buyers did

²⁰¹ RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 4.9 (9th ed. 2014); *Nw. Nat'l Ins. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) ("Form contracts . . . enable enormous savings in transaction costs . . .").

²⁰² *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991); *see, e.g.*, *Bowen v. Norwegian Cruise Line, Inc.*, 52 Va. Cir. 314, 315 (Va. Cir. Ct. 2000) (passengers received tickets ten days before sailing, after the fare had been paid in full, and prices were non-refundable); *Golden v. Celebrity Cruises Inc.*, 4 Misc. 3d 33, 36; 780 N.Y.S.2d 701, 704; 2004 N.Y. Slip Op. 24154 (Sup. Ct. App. T. 2nd Dep't 2004) (passenger had ticket for two to three weeks before learning of father's illness necessitating cancellation).

²⁰³ *Shute*, 499 U.S. at 588.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 590. Justice Stevens, in his dissenting opinion, disagreed with the majority's assumption and pointed out that only the most meticulous passenger is likely to become aware of the forum-selection provision. *Id.* at 597 (Stevens, J., dissenting). To demonstrate the point, he noted that he "appended to [his] opinion a facsimile of the relevant text, using the type size that actually appears in the ticket

not have an opportunity to negotiate with the cruise line the terms of a forum-selection clause in an ordinary commercial cruise ticket.²⁰⁸

The Supreme Court never questioned whether the plaintiffs actually consented to those terms and instead assumed that notice of the terms equaled “accession [sic]” to the terms.²⁰⁹ The majority justified its decision by providing several reasons as to why the clause should be enforced.²¹⁰ The Court reasoned that a cruise line had a special interest in limiting the fora in which it could be potentially sued, because a cruise ship carried passengers from many locations and a mishap on a cruise could subject the cruise line to litigation in several different locations.²¹¹ In addition, the Court found that the forum-selection clauses could save litigants time and expense and conserve judicial resources by dispelling any confusion about where the lawsuits had to be filed.²¹² Finally, the Court added that the passengers benefited from a forum-selection clause because of reduced fares as a result of the limitation imposed by the forum-selection clause.²¹³

3. You were informed of the terms and therefore you consented.

Subsequent to the *Carnival Cruise Lines* cases, courts began enforcing agreements wrapped or packaged within products even though a buyer could not see the terms at the time of purchase.²¹⁴ These cases typically enforce the terms against the buyer who purchased the product and was presumed to have had an

itself. A careful reader will find the forum-selection clause in the 8th of the 25 numbered paragraphs” because

[o]f course, many passengers, like the respondents in this case . . . will not have an opportunity to read paragraph 8 until they have actually purchased their tickets. By this point, the passengers will already have accepted the condition set forth in paragraph 16(a), which provides that “[t]he Carrier shall not be liable to make any refund to passengers in respect of . . . tickets wholly or partly not used by a passenger.”

Id.

²⁰⁸ *Id.* at 593 (majority opinion).

²⁰⁹ *Id.* at 595.

²¹⁰ *Id.*

²¹¹ *Id.* at 585.

²¹² *Id.*

²¹³ *Id.* at 586.

²¹⁴ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

opportunity to read the terms later at home.²¹⁵ By keeping the product after reading the terms, courts reasoned that buyers agreed to be bound by the terms.²¹⁶

In *ProCD v. Zeidenberg*, Plaintiff ProCD produced a CD-ROM, entitled SelectPhone, containing the database of information from telephone directories and a proprietary search engine.²¹⁷ The court pointed out that the database in SelectPhone (trademark) cost more than \$10 million to compile and was expensive to maintain.²¹⁸ ProCD offered a consumer version of its product at a substantially lower price than the commercial version for sale.²¹⁹ Plaintiff sold the compact disc in retail software packages covered in plastic and each package stated that the software was subject to an enclosed license.²²⁰

Defendant Zeidenberg purchased a consumer copy of SelectPhone. In violation of the enclosed license, he resold the information contained in the SelectPhone database to the public at a price less than that ProCD charged its commercial customers.²²¹ ProCD filed suit to obtain an injunction prohibiting any distribution of the product in violation of the license agreement.²²² The district court held that the license terms were invalid because they did not appear on the outside of the package.²²³ Zeidenberg, the district court reasoned, could not have agreed to such hidden terms at the time of his purchase.²²⁴ Rather, the court determined that only terms disclosed prior to purchase formed part of the contract.²²⁵

The Seventh Circuit reversed.²²⁶ Judge Easterbrook analyzed the enforceability of the license by ostensibly applying common law contract law principles and the Uniform

²¹⁵ Roger C. Bern, "Terms Later" Contracting: Bad Economics, Bad Morals, and A Bad Idea for a Uniform Law, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL'Y 641, 644 (2004).

²¹⁶ *ProCD, Inc.*, 86 F.3d at 1453.

²¹⁷ *Id.* at 1449.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 1450.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.* at 1455.

Commercial Code.²²⁷ In an apparent effort to justify his decision, Judge Easterbrook reasoned that “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike.”²²⁸ He found that the defendant was bound by the license terms by conduct.²²⁹ The defendant purchased the product, and by keeping the product after having had a chance to read the license terms, he accepted those terms.²³⁰

4. You clicked and therefore you consented.

With the advent of the digital age, businesses have established an online presence. Courts were again presented with enforcing digital agreements, many of them standard form agreements with many boilerplate clauses.²³¹ Website users are sometimes required to click an “I agree” box after being presented with a list of terms and conditions of use. Such agreements are referred to as “clickwrap” agreements.²³² Sometimes, users do not see the terms and conditions of use, but can access them through a hyperlink at the bottom of the screen; those are often referred to as “browsewrap” agreements.²³³

In *Swift v. Zynga Game Network, Inc.*, the plaintiff was required to click on an “Accept” button to serve as consent to the YoVille terms of service, which followed a blue hyperlink to those

²²⁷ *Id.* at 1450.

²²⁸ *Id.* at 1451.

²²⁹ *Id.* at 1452.

²³⁰ *Id.* at 1452–53.

²³¹ *See Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369–70 (S.D. Fla. 2011) (sellers accepted marketplace website’s terms and conditions, including forum-selection clause); *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213, 1227 (D. Haw. 2010) (clickwrap agreement valid under Texas law); *Hughes v. McMenamon*, 204 F. Supp. 2d 178, 181 (D. Mass. 2002) (applying Massachusetts law holding that an Internet service provider’s terms of service applied, and that a forum-selection clause required dismissal of the case); *Kilgallen v. Network Solutions, Inc.*, 99 F. Supp. 2d 125, 129–30 (D. Mass. 2000) (applying Virginia law holding that a clickwrap domain renewal agreement was binding on a domain name owner); *America Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. Dist. Ct. App. 2001) (holding that an Internet service provider’s terms of service were found to be a “freely negotiated agreement” that the plaintiffs had not shown was unreasonable or unjust). *See generally Storm Impact, Inc. v. Software of the Month Club*, 13 F. Supp. 2d 782 (N.D. Ill. 1998) (applying Illinois law to hold that shareware license restrictions were enforceable against a defendant that bundled shareware for profit).

²³² *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

²³³ *Id.*

terms.²³⁴ The terms of service, which included an arbitration clause, were not visible to the plaintiff.²³⁵ The plaintiff admitted that she did click on the “Accept” button.²³⁶ On these facts, the court found that the plaintiff was provided with an opportunity to review the terms of service and held that a binding contract was created.²³⁷ The court rejected the plaintiff’s argument that the click did not put her on notice of what she was assenting to and that she was not bound by the terms.²³⁸ In other cases, courts found apparent consent where the business websites stated that website visitors agree to the terms by browsing the website content.²³⁹

In conclusion, current case law shows that courts are assuming the existence of consent where web users clicked on “Accept” or “I Agree” boxes.²⁴⁰ Courts appear to be satisfied that consent exists where a user has adequate notice of the terms, “evidenced by the reasonable placement of such terms on the website, and an adequate time to object to such terms.”²⁴¹

B. Consent—From Reification to Fiction

Studies have demonstrated that the reifications of consent relied upon by courts do not mean that the person truly consented to those terms.²⁴² By relying on the reifications of consent as actual evidence of consent, courts are indulging in a fiction of consent.²⁴³ Many have pointed out that the consent doctrine as applied in contract law has become a legal fiction.²⁴⁴

²³⁴ Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911 (N.D. Cal. 2011).

²³⁵ *Id.* at 910.

²³⁶ *Id.* at 911.

²³⁷ *Id.* at 912.

²³⁸ *Id.*

²³⁹ Hines v. Overstock.com, Inc., 668 F. Supp. 2d 362 (E.D.N.Y. 2009). Courts usually uphold browsewraps, where assent is shown by using the website, “if the user ‘has actual or constructive knowledge of a site’s terms and conditions prior to using the site.’” Major v. McCallister, 302 S.W.3d 227, 230 (Mo. Ct. App. 2009) (finding that failure to read the online agreement will not excuse compliance with its terms).

²⁴⁰ Deborah Davis Boykin, *Survey of E-Contracting Cases: Browsewrap, Clickwrap, and Modified Clickwrap Agreements*, 68 BUS. LAW. 257, 262 (2012).

²⁴¹ *Id.*

²⁴² See Bern, *supra* note 215, at 644.

²⁴³ Professors Peter Smith and Knauer probably would have preferred to call the consent doctrine as a “new legal fiction” or “empirical legal error.” See Smith, *supra* note 8, at 1441–45; Knauer, *supra* note 8, at 6, 22–23. Professor Peter Smith

The previous case review shows that courts have treated physical signatures as evidence of consent.²⁴⁵ In some cases, courts have treated notice of the terms plus keeping the product as evidence of consent.²⁴⁶ In some cases where buyers purchased shrink-wrapped products, courts have taken the position that consent exists if a buyer has notice of the existence of an agreement when he purchased the product, had the opportunity to read it after the purchase, and had a right to return the product.²⁴⁷

In reality, many consumers do not read the terms before signing or clicking.²⁴⁸ Scholars have pointed out that consumers do not bother to read the terms because they are not subject to negotiation and are presented on a take-it-or-leave-it basis.²⁴⁹

In some situations, consumers sign without reading the terms because they would not understand much of the boilerplate language even if they took the time to read it.²⁵⁰ Furthermore, if they read the terms and do not like the terms, consumers have nowhere else to turn to because businesses offering the same services or products usually employ comparable terms.²⁵¹ Often, the consumer is also under some pressure from the business's agent to sign quickly.²⁵²

suggested that a new legal fiction exists if a judge relies on a factual premise that is false or inaccurate. Smith, *supra* note 8, at 1470 (“[W]hat characterizes most new legal fictions is that the learned reader of the law would *not* have explicit or implicit indication that the court is simply deeming to be true that about which we know otherwise. In addition, new legal fictions are not simply a device for softening (or, depending on one’s perspective, obscuring) the effects of legal *change*—that is, departure from a regime already established—but rather are instrumental in *justifying* doctrine, whether received or newly established.”). This Article does not intend to address the issue of how to classify the consent doctrine.

²⁴⁴ Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 79 (2011).

²⁴⁵ *Supra* Part IV.A.1.

²⁴⁶ *Supra* Part IV.A.3.

²⁴⁷ Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 428 (2d Cir. 2004); Schnabel v. Trilegiant Corp., 697 F.3d 110, 122 (2d Cir. 2012).

²⁴⁸ Burke, *supra* note 194, at 295; Goldman, *supra* note 194, at 190–92 (calling the fiction of consent “ludicrous”).

²⁴⁹ Wilkinson-Ryan, *supra* note 192, at 1749.

²⁵⁰ *Id.*

²⁵¹ See *id.* at 1753 (“The reality is that . . . *everything* comes with extensive standard terms.”); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 212, 243–44 (1995); Hart, *supra* note 244, at 17–18 (describing “the extensive use of certain boilerplate contract clauses”).

²⁵² Wilkinson-Ryan, *supra* note 192, at 1749; Eisenberg, *supra* note 251, at 242.

In addition to such marketplace realities, humans' decision-making biases also contribute to consumers' decision not to read the terms before signing or clicking "I accept."²⁵³ For example, one human bias is the tendency to be overconfident.²⁵⁴ When a boilerplate agreement contains an arbitration clause, warranty disclaimer, or forum-selection clause, we tend to automatically dismiss the risks that stem from those provisions.²⁵⁵

Another reason to be suspicious as to whether common reifications of consent—signatures, clicking, browsing—can truly be taken as indications of actual consent are the powerful commercial forces manipulating consumers.²⁵⁶ Subprime mortgage transactions offer an example of such manipulations.²⁵⁷ Subprime mortgage lenders manipulated those with less information through deliberate contract design.²⁵⁸ Subprime loan products with cost-deferral features took advantage of people's tendency to focus on short-term benefits and underestimate future risks.²⁵⁹ Such mortgage products were also deliberately designed to be so complicated that borrowers could not properly assess the risks, further calling into question whether borrowers truly consented.²⁶⁰

In sum, it is clear that consent, as applied in contract law, often rests on the false assumption that reifications of consent are sufficient evidence of consent. At least in many consumer transactions, courts have enforced terms against consumers where they did not consent to the specific terms, even though they may have signed the agreements, clicked on a button, or browsed a website. Therefore, consent may be called a fiction in those cases.²⁶¹

²⁵³ See KAHNEMAN, *supra* note 20, at 199–208.

²⁵⁴ *Id.* at 261–65.

²⁵⁵ Wilkinson-Ryan, *supra* note 192, at 1749.

²⁵⁶ See Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1120–21 (2009); Alan M. White, *Behavior and Contract*, 27 LAW & INEQ. 135, 158–60 (2009) (pointing out that the marketing industry spends billions of dollars on behavioral research to devise marketing strategies, which can increase sales).

²⁵⁷ Bar-Gill, *supra* note 256, at 1079–80; White, *supra* note 256, at 158–60.

²⁵⁸ Bar-Gill, *supra* note 256, at 1079–80; White, *supra* note 256, at 158–60.

²⁵⁹ For a detailed discussion of how lenders exploited these decisional biases in consumer contract contexts, see White, *supra* note 256, at 158–160.

²⁶⁰ EDMUND L. ANDREWS, *BUSTED: LIFE INSIDE THE GREAT MORTGAGE MELTDOWN* 77 (2009).

²⁶¹ This Article does not intend to debate the issue of whether consent qualifies as a legal fiction at all because signatures in business-to-business context can still

V. CONSENT—A DANGEROUS LEGAL FICTION

The above discussion shows that some legal fictions come with built-in reminders of their fictitious nature—linguistic clues, complete factual falsity, or ideological inconsistency.²⁶² Such reminders render legal fictions benign because they prompt judges to engage in their System 2 thinking and to be more deliberative when applying the fiction.²⁶³

The consent doctrine, however, has no such built-in reminders of its fictitious nature. The lack of any reminders of its falsity makes the consent fiction “dangerous.”²⁶⁴ There is a great risk judges will over-rely on this fiction. As explained below, judges’ System 1 intuitive thinking will tend to lead to excessive reliance on the consent fiction.²⁶⁵ A selected case review demonstrates courts and lawyers alike are accepting the consent fiction without any critical analysis.²⁶⁶ This uncritical reliance on the consent fiction by the courts has undermined the fundamental right to a day in court.

A. *The Consent Doctrine Has No Built-In Reminders*

The consent doctrine has none of the built-in reminders of its falsity that render some legal fictions benign. The consent doctrine does not have any linguistic reminders of its falsity. In cases where courts enforced express agreements between the parties, courts have done so by finding consent, not implied or constructive, where the parties signed an agreement, noticed a term or clicked a button.²⁶⁷

The consent doctrine also does not rest on complete factual falsehood. As previously discussed, a signature or click can be evidence of consent.²⁶⁸ In some cases, such reifications falsely

serve as evidence of consent. Whether or not the consent doctrine qualifies as a fiction depends on whose definition one chooses to rely on. In addition, we should always keep in mind that a signature, at best, is only a reification of consent because no one can observe what is going on in the signor’s mind.

²⁶² See *supra* Part III.

²⁶³ This does not mean that a benign legal fiction cannot be applied dangerously. For an example of a legal fiction that became dangerous because of its borrowability see Harmon, *supra* note 2, at 63–66.

²⁶⁴ FULLER, *supra* note 1, at 9; Harmon, *supra* note 2, at 15, 61.

²⁶⁵ See *infra* Part V.B.

²⁶⁶ See generally Hart, *supra* note 244, at 4–5.

²⁶⁷ *Supra* Part IV.A.

²⁶⁸ See discussion *supra* Part IV.A.4.

create the illusion of consent because studies have shown that people do not read terms before they sign or click.²⁶⁹ Complete factual falsity would undermine the coherence that judges intuitively seek when their System 1 thinking is engaged and would serve as a reminder that the doctrine is a fiction. Instead of complete falsity, the consent doctrine rests on apparent indicia of consent—signature, notice, clicking or browsing—which are insufficient evidence of a party's actual consent. The consent fiction thus serves to reduce the courts' evidentiary burden of proof in the dispute and promotes System 1 heuristic thinking by making it easier for a judge to rely on the fiction—a text book example of the natural tendency to substitute an easier question for a more difficult one.²⁷⁰

Finally, the consent doctrine allows courts to reach a result that is ideologically consistent with well-established legal and moral principles: enforcing the contract as agreed upon by the parties and keeping one's promises.²⁷¹ This result ostensibly promotes individual autonomy and freedom of contract.²⁷² A result inconsistent with well-established principles would have served as a reminder of its falsity; it would have made it a "bitter pill" to swallow, activating judges' System 2 thinking mode.²⁷³ The ideological consistency, however, makes the consent fiction a sweet pill, much more palatable to be swallowed. This would not trigger the System 2 thinking because the consent fiction offers the coherence that System 1 thinking automatically seeks.²⁷⁴

Because the consent doctrine lacks any built-in reminders of its falsity, there is a great risk that judges with only their System 1 thinking mode engaged will rely on the fiction excessively.²⁷⁵ This risk is especially great in light of cognitive biases as discussed below.

²⁶⁹ Burke, *supra* note 194, at 294; Goldman, *supra* note 194, at 189.

²⁷⁰ KAHNEMAN, *supra* note 20, at 97.

²⁷¹ Leonhard, *supra* note 195, at 59.

²⁷² *Id.*

²⁷³ See FULLER, *supra* note 1, at 26 (talking about the various fictions behind the notion of vicarious liability).

²⁷⁴ KAHNEMAN, *supra* note 20, at 80.

²⁷⁵ Harmon, *supra* note 2, at 15, 60–61, 63.

B. Consent and Our Cognitive Biases

The consent fiction offers coherence to members of our society where the consent concept occupies a special place. We pride ourselves on individual autonomy and freedom.²⁷⁶ The consent concept in many ways allows us to embrace a world view coherent with the ideal image that we would like to have.²⁷⁷ And coherence is the guiding principle underlying the maintenance of “quick judgment” System 1 heuristic thinking.²⁷⁸ Judges, like all other humans, have a strong need for coherence.²⁷⁹ Respect for consent means respect for our individualism and autonomy.²⁸⁰ Judges intuitively rely on consent as the basis for enforcing agreements when there is nothing reminding them that signature, clicking, and browsing are only reifications of consent, not complete proof of actual consent.²⁸¹

Because of the emotional appeal of the consent concept, there is a risk that judges, when deciding whether a party consented, will be unaware of the operation of a System 1 heuristic and will over-rely on the consent fiction to enforce an agreement. As discussed earlier, human beings—judges are no exception—have a tendency to automatically substitute an easier question for a more difficult one.²⁸² In this case, the question of whether there is any sign that the party agreed substitutes the more difficult question of whether the party actually consented.²⁸³ Since judges cannot read a party’s mind, it is easier to assume that the party consented to the agreement when he or she signed or clicked a button.

²⁷⁶ HERZOG, *supra* note 182, at 215.

²⁷⁷ Don Herzog in his book *Happy Slaves* has described this “familiar figure” that “haunts modern society . . . [as] the free agent, bound only by his own choices. He chooses a career, a spouse, a religion, a lifestyle, and more. He animates our moral and political arguments, our very idea of what a person is, and our social lives.” *Id.* at ix.

²⁷⁸ See KAHNEMAN, *supra* note 20, at 80 (explaining how System 1 thinking lacks conscious doubt and uncertainty).

²⁷⁹ See *id.* at 79–88 (discussing the human tendency for preferring consistency of information over completeness, and yearning for a generally coherent pattern).

²⁸⁰ Erin Talati, *When A Spoonful of Sugar Doesn't Help the Medicine Go Down: Informed Consent, Mental Illness, and Moral Agency*, 6 IND. HEALTH L. REV. 171, 174 (2009).

²⁸¹ See Boykin, *supra* note 240, at 262.

²⁸² KAHNEMAN, *supra* note 20, at 97.

²⁸³ *Id.*; see also FULLER, *supra* note 1, at 122 (noting “the inveterate hang of the human mind toward simplicity”).

By choosing to accept the consent fiction and to enforce agreements on that basis, judges are able to avoid many difficult and fundamental questions. Should the terms be imposed on the party when the party did not voluntarily consent to them? What interests are being promoted when terms are imposed on parties even though they did not consent to those terms? Are those interests worth the price of not honoring individual freedom of contract? Is it fair to impose the terms on parties when they did not consent to them?²⁸⁴

Relying on the consent fiction is also culturally expedient and safe. No one can fault a judge for holding parties liable for what they signed.²⁸⁵ After all, individual freedom comes with individual accountability. If you sign something, it is only natural that you are held to your promises. The System 1 thinking mode will ignore the little voice that says that the party may have signed the agreement without truly consenting and often even without reading or understanding the terms.²⁸⁶

Some judges have gone to extraordinary length to maintain the consent fiction. For example, in *ProCD v. Zeidenberg*, Judge Easterbrook announced that he merely was applying common law contract principles and the Uniform Commercial Code.²⁸⁷ He acknowledged that under Wisconsin law, “a contract includes only the terms on which the parties have agreed.”²⁸⁸ Judge Easterbrook nonetheless enforced a license against the purchaser even though the purchaser did not see the license terms at the time of purchase.²⁸⁹ It would have been illogical to claim that the buyer could consent to terms that he did not see at the time of purchase.²⁹⁰ Undeterred by the logical problem, Judge Easterbrook invented the “[n]otice on the outside, terms on the inside, and a right to return” as basis to enforce the contract

²⁸⁴ See *Surviving Fictions*, *supra* note 35, at 326 (“Incidentally, it may be noted that this resort to fiction sometimes relieved the court from giving reasons for the existence of an obligation (from inquiring carefully into reasons for imposing absolute liability).”).

²⁸⁵ FULLER, *supra* note 1, at 59 (describing the “motive of convenience”).

²⁸⁶ KAHNEMAN, *supra* note 20, at 81–82.

²⁸⁷ *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 1455.

²⁹⁰ Bern, *supra* note 215, at 650–51, 708–09.

against the plaintiff.²⁹¹ He never addressed the logical dilemma and instead justified the result by pointing out that enforcing the agreement benefitted both the businesses and consumers alike.²⁹²

Judge Easterbrook's stated rationale misses the point. The fact that enforcement of the terms may be beneficial does not shed any light on whether the buyer in that case voluntarily accepted those terms.²⁹³ A more intellectually honest approach would have been to acknowledge that the buyer did not consent and justify the enforcement of the license because it was beneficial to the society as a whole.²⁹⁴ That, however, would have meant giving up the consent fiction, and Judge Easterbrook would have had to justify his choice of the identified social benefits over individual autonomy.

In *Carnival Cruise v. Shute*, the majority of the Supreme Court did not address the issue of whether the plaintiff had sufficient notice of the forum-selection clause. The Court conveniently assumed that the plaintiff had consented by relying on the plaintiffs' apparent concession that they had notice of the terms.²⁹⁵ The Supreme Court drew this conclusion by relying on the statement from the plaintiffs' brief: "The respondents do not contest the incorporation of the provisions nor [sic] that the forum selection clause was reasonably communicated to the respondents, *as much as three pages of fine print can be communicated.*"²⁹⁶ From that slender reed of evidence, the Supreme Court enforced the forum-selection clause

²⁹¹ *ProCD*, 86 F.3d at 1451.

²⁹² *Id.* at 1455; *see also* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149–50 (7th Cir. 1997); O'Quin v. Verizon Wireless, 256 F. Supp. 2d 512, 516–17 (M.D. La. 2003) (following the "money now, terms later" approach even though the court admitted that it was "unseemly" to enforce "terms and conditions contained in a product box that were not clearly pointed out at the time of sale.").

²⁹³ I am not challenging Judge Easterbrook's result. I am just questioning the process through which he arrived at the result. I have previously advocated giving up the consent focused approach and enforcing an agreement based on a totality of circumstances test. Leonhard, *supra* note 195, at 85.

²⁹⁴ Bern, *supra* note 215, at 644.

²⁹⁵ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 590 (1991).

²⁹⁶ *Id.* (emphasis added) (quoting Brief for Respondents at 26, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (No. 89-1647) 1990 WL 10012717, at *26). The dissenting justices noted that "only the most meticulous passenger is likely to become aware of the forum-selection provision." *Id.* at 597 (Stevens, J., dissenting).

and justified the enforcement by saying that enforcing the clause would benefit the passengers because of reduced fares and the cruiseliner's forum-selection clause was not in bad faith.²⁹⁷

Because of its intuitive appeal as a System 1 heuristic, consent can act as an intellectual shortcut. Professor Fuller describes fiction as "the cement that is always at hand to plaster together the weak spots in our intellectual structure."²⁹⁸ In our culture, no one is likely to challenge the notion that people should be held accountable. For this reason, the consent fiction is very tempting. Judges can easily be persuaded they are doing the right thing to enforce a contract and pay little attention to the fairness of its terms once they are comfortable that the other party has "consented" to the terms. In other words, it can easily win over a judge's conscience.²⁹⁹

In attempting to explain judges' motives in adopting a fiction, Professor Fuller used the analogy of an elderly woman invited to a ball and having to decide whether she should wear her only evening gown, which was three years old.³⁰⁰ He compared the legal fiction to the three-year-old gown that was slightly out of style.³⁰¹ Following the same analogy, the consent fiction would be analogous to a beautiful evening gown. Instead of being out of style, the gown would be in the most popular style. Putting on that gown would make the judge feel elegant and emotionally secure because it is consistent with how she would view herself and consistent with how and what the society at large would view and expect of her.³⁰² Like all human beings, this elderly lady would succumb to temptations of the consent fiction. Those are the fictions that we have to watch out for because they dull the senses and allow us to indulge contentedly in the coherent world constructed by System 1 thinking.

C. *The Dangers of Consent*

Because contractual agreements permeate every aspect of our economic relationships, courts' indulgence in the consent fiction has had profound negative consequences in many

²⁹⁷ *Id.* at 594–95 (majority opinion).

²⁹⁸ FULLER, *supra* note 1, at 52.

²⁹⁹ *Id.* at 64.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

important areas.³⁰³ It has become a dangerous legal fiction relied upon excessively when it should not have been. The consent fiction has become an unwitting tool to undermine values important to us. This Section focuses on courts' enforcement of arbitration agreements as an example of how a legal fiction can be dangerous.³⁰⁴

The Supreme Court has frequently announced that the right to a jury trial is one of the rights guaranteed by the United States Constitution.³⁰⁵ It has described plaintiffs' right to a jury trial as a "fundamental guarantee of the rights and liberties of the people."³⁰⁶ Any attempt to encroach upon this right is to be "watched with great jealousy"³⁰⁷ and "scrutinized with the utmost care."³⁰⁸

A party can voluntarily waive its right to jury trial by agreeing to resolve the dispute in an alternative forum such as binding arbitration.³⁰⁹ However, to overcome constitutional concerns, the key question is whether the claimant voluntarily agreed to give up its right to its day in court.³¹⁰ Despite the

³⁰³ See *id.* at 65 (stating that legal fictions remade "legal categories" like "possession," "estate," and "delivery" to "fit new conditions.>").

³⁰⁴ This Article focuses only on the courts' reliance of the consent fiction in adjudicating arbitration agreements. The consent doctrine has also been applied in ways that undermine other areas of law. For example, some companies sought to prevent consumers from posting negative online reviews through contract provisions known as "gag orders" or "non-disparagement clauses" within the fine print of the purchase contracts or terms of service. *A Victory for Free Speech*, CONSUMER REPORTS (Feb. 2, 2017), <https://www.consumerreports.org/consumer-protection/building-a-better-world-together-march-2017>. The consent fiction allowed the courts to enforce the agreements. After courts enforced those agreements, Congress stepped in and passed the Consumer Review Fairness Act, which President Obama signed into law in December 2016. *Id.*

³⁰⁵ Stempel, *supra* note 183, at 1389–90.

³⁰⁶ Cory Tischbein, Comment, *Animating the Seventh Amendment in Contemporary Plaintiffs' Litigation: The Rule or the Exception?*, 16 U. PA. J. CONST. L. 233, 233 (2013) (quoting *Parsons v. Bedford*, 28 U.S. 433, 446 (1830)).

³⁰⁷ *Slocum v. N.Y. Life Ins.*, 228 U.S. 364, 378 (1913) (quoting *Parsons*, 28 U.S. at 446).

³⁰⁸ *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

³⁰⁹ Stempel, *supra* note 183, at 1391.

³¹⁰ *Id.* at 1392; Margaret L. Moses, *Privatized "Justice"*, 35 LOY. U. CHI. L.J. 535, 544 (2005).

constitutional dimension of consent in this context, courts have routinely enforced arbitration clauses by indulging in the consent fiction.³¹¹

The Supreme Court has always purported to examine the validity of arbitration clauses under contract law principles.³¹² Arbitration under the Federal Arbitration Act (“FAA”), the Supreme Court announced, is “a matter of consent, not coercion.”³¹³ In practice, the Supreme Court, and federal courts following its example, often gave short shrift to the threshold question of whether there existed an agreement under contract law.³¹⁴ Their analyses often began with the assumption that there was a valid agreement.

For example, in *AT&T Mobility LLC v. Concepcion*, the majority of the Supreme Court held the FAA preempted California state case law, which had found class action waivers unconscionable.³¹⁵ The California cases reasoned that such waivers so effectively insulated companies from class-based claims that they “cheat[ed] large numbers of consumers out of individually small sums of money”³¹⁶ Relying on the “liberal federal policy favoring arbitration,”³¹⁷ the Supreme Court held that the FAA preempts such state laws because they present an obstacle to the FAA’s accomplishment and execution.³¹⁸ The majority did not query whether plaintiffs actually consented to the arbitration clause printed at the bottom of a one-page, legal-sized paper with approximately 5/16-inch side margins, completely filled with terms printed in small font.³¹⁹ The only

³¹¹ Tischbein, *supra* note 306, at 248–49; Stempel, *supra* note 183, at 1392–93 (finding it “more than a little disturbing that the Court seems unwilling to make a sustained examination of consent issues”).

³¹² Tischbein, *supra* note 306, at 252–53; *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (noting that courts must treat arbitration agreements like other contracts “and enforce them according to their terms”).

³¹³ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

³¹⁴ Stempel, *supra* note 183, at 1430.

³¹⁵ *AT&T Mobility LLC*, 563 U.S. at 352.

³¹⁶ *Id.* at 340 (internal quotations omitted).

³¹⁷ *Id.* at 346.

³¹⁸ *Id.* at 352.

³¹⁹ *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB) 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008), *aff’d*, 584 F.3d 849, *rev’d on other grounds*, 563 U.S. 333 (2011). Justice Thomas in his concurring opinion noted that the FAA required enforcement of an agreement to arbitrate “unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud,

evidence suggesting an agreement was that the defendant provided plaintiffs with a copy of the one-page wireless service agreement at the time of purchase.³²⁰

The same apathy is evident in lower federal courts.³²¹ One court found an arbitration agreement where there was evidence credit card holders received the insert containing amendments to a credit card agreement requiring arbitration and enforced the arbitration clause on that basis.³²²

Many have noted the Supreme Court's apparent indifference or unwillingness to examine the consent issue.³²³ Arbitration clause cases show courts have bought into the consent fiction—the idea that signature, notice, receipt, purchase, or failure to cancel are sufficient evidence of consent. Because the consent fiction has been so often repeated, it has become institutionalized as part of the arbitration law jurisprudence.³²⁴

Occasionally, a court will acknowledge consumers might not have consented because they did not read the agreement, but would nevertheless dismiss the concern by saying that a party's failure to read an agreement is not sufficient to prevent its enforcement.³²⁵ Courts, however, fail to recognize that the duty-to-read rule was developed in the late nineteenth century, when transactions were primarily face-to-face, parties had the opportunity to read prior to signing, and contracts presented

duress, or mutual mistake." *AT&T Mobility LLC*, 563 U.S. at 355 (Thomas, J., concurring). Those defenses are all related to a defect during the formation process, that is, whether or not the parties consented to the agreement knowingly and voluntarily.

³²⁰ *Laster*, 2008 WL 5216255, at *9.

³²¹ Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 799 (2012) [hereinafter Stempel, *Tainted Love*]; Stempel, *supra* note 183, at 1392; Tischbein, *supra* note 306, at 248.

³²² *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 917, 926 (N.D. Tex. 2000); see also *Knutson v. Sirius XM Radio Inc.*, No. 12cv418 AJB (NLS), 2012 WL 1965337, at *1–8 (S.D. Cal. May 31, 2012), *rev'd*, 771 F.3d 55 (9th Cir. 2014) (enforcing the arbitration agreement where the plaintiff failed to cancel his trial subscription); Tischbein, *supra* note 306, at 252–53.

³²³ Stempel, *Tainted Love*, *supra* note 321, at 799; Stempel, *supra* note 183, at 1392; Tischbein, *supra* note 306, at 248.

³²⁴ See Hope M. Babcock, *The Stories We Tell, and Have Told, About Tribal Sovereignty: Legal Fictions at Their Most Pernicious*, 55 VILL. L. REV. 803, 819 (2010) (explaining “[w]hen courts so often repeat legal fictions . . . the factual distortions become institutionalized . . .”).

³²⁵ *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–49 (7th Cir. 1997); *O’Quin v. Verizon Wireless*, 256 F. Supp. 2d 512, 517 (M.D. La. 2003).

meaningful choice.³²⁶ Courts did not pause to ponder whether the justification still applies where consumers have no meaningful choice and enforcing the clause is insufficient to motivate the consumers to behave differently.³²⁷

As a result of courts' willingness to enforce arbitration agreements, businesses have inserted arbitration clauses, including class arbitration waivers, in all transactions affecting modern necessities of life such as borrowing money, buying consumer goods including cell phones and computers, or entering into employment relationships.³²⁸ The arbitration clause is often among the fine print and not subject to negotiation.³²⁹ Courts' reliance on consent fiction has effectively deprived consumers of their constitutional right to have their day in court.³³⁰

Excessive judicial reliance on the consent fiction is dangerous not only because it results in deprivation of a fundamental right, but also because it allows courts to avoid having an open debate about the pros and cons of enforcing arbitration clauses where consumers have no meaningful choice. In our pluralistic society, it is inevitable that different ideals, including freedom of contract and right to a jury trial, conflict with each other.³³¹ When such conflicts happen, courts should

³²⁶ Sullivan, *supra* note 184, at 268.

³²⁷ See Theodore Eisenberg et. al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 (2008).

³²⁸ Tischbein, *supra* note 306, at 237–38. Elizabeth Dias & Eliana Dockterman, *The Itsy-Bitsy-Teensy-Weensy, Tiny Fine Print that Can Allow Sexual Harassment To Go Unheard*, TIME (Oct. 21, 2016), <http://time.com/4540111/arbitration-clauses-sexual-harassment> (discussing how arbitration clauses in employment contracts are preventing women's sexual harassment claims from being heard in court); CONSUMER REPORTS, *supra* note 304 (pointing out that after the Wells Fargo's fake-account scandal, the bank is trying to avoid lawsuits because of the arbitration clauses in the agreements with its customers). A study released by Professor Imre S. Szalai of Loyola University New Orleans College of Law found that eighty percent of the Fortune 100 companies have used arbitration clauses in connection with work related disputes. Imre S. Szalai, *The Widespread Use of Workplace Arbitration Among America's Top 100 Companies*, EMP. RTS. ADVOC. INST. L. & POL'Y 2 (Sept. 27, 2017), <http://employeeightsadvocacy.org/publications/widespread-use-of-workplace-arbitration/>.

³²⁹ Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 432–34 (2008) (noting the degree to which modern arbitration is often imposed en masse upon consumers or employees rather than being agreed to as part of contract negotiations).

³³⁰ Tischbein, *supra* note 306, at 256–57.

³³¹ GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 116–17 (1st ed. 1985) (noting that the

engage in an open and honest debate about the conflicting ideals. The consent fiction allows courts to avoid that debate to the detriment of our society.³³²

CONCLUSION

Despite concerns and criticism, legal fictions are analytical tools that judges need to resolve complex legal issues.³³³ They are a necessary part of the legal landscape. Humans' ability to think in abstract terms sets us apart from other animals. At the same time, our very humanity makes some legal fictions dangerous unless we are constantly vigilant. In sum, legal fictions may be dangerous not because they are legal fictions, but because of our flawed human mind.

This Article proposes a systematic approach to distinguishing benign legal fictions from dangerous ones. Legal fictions can be benign if they come with some built-in reminders of their falsity. The reminder can be linguistic labels. The reminders can also be complete factual falsity or ideological inconsistency, both of which create cognitive dissonance that alert judges to be deliberate in their approaches rather than to rely on intuition. Such reminders are needed because an overreliance on intuitive decision making instead of deliberate complex analysis invites severe decision-making biases. Conversely, awareness of the falsity of a legal fiction alerts judges to engage in complex and deliberate decision making, thus overcoming common heuristic decision-making biases and improving the overall quality of judicial decision making.³³⁴

Without such reminders, a legal fiction can be dangerous. This Article suggests that the consent fiction is a textbook example of a dangerous legal fiction, using courts' enforcement of arbitration clauses as an example. Consent as used in contract law does not come with a linguistic label to remind us of its falsity. What is more, this fiction does not rest on complete factual falsity; instead, it reduces the evidentiary proof burden for judges. Finally, this fiction allows courts to reach a result that is ideologically consistent with the fundamental values that

danger of using legal subterfuges to evade collective responsibility for the value being suppressed).

³³² *Id.*

³³³ FULLER, *supra* note 1, at 52, 94.

³³⁴ *Inside the Judicial Mind*, *supra* note 25, at 822–23.

we share in this society. Without any built-in reminders, there is a high risk that judges will rely on the consent fiction excessively and uncritically. That is exactly what happened with the courts' treatment of arbitration clauses.

Courts' excessive and uncritical reliance on the consent fiction prevents courts from engaging in an open and honest debate about the conflicting ideals implicated in the arbitration jurisprudence.³³⁵ Had the courts not indulged in the consent fiction, they would have had to talk about possible justifications for endorsing arbitration where the consumers did not consent to the clause.³³⁶ Maybe judges can begin by explicitly recognizing the reifications of consent as a legal fiction.³³⁷ Only then can courts begin to engage in a debate to weigh the costs and benefits of enforcing agreements where one party has not actually consented.

³³⁵ CALABRESI, *supra* note 331.

³³⁶ *Id.* (advocating for honest discussions so that deeply held convictions can survive in tension with each other instead of obscuring the conflicts by subterfuges).

³³⁷ Harvard Note, *supra* note 3, at 2249 ("Many of the concerns can be alleviated by openly acknowledging legal fictions *as fictions* and by evaluating these devices in terms of fiction, so that their utility can then be appreciated.").