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Dispute Resolution in Electronic Network Communities

Henry H. Perritt Jr.

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DISPUTE RESOLUTION IN ELECTRONIC NETWORK COMMUNITIES

HENRY H. PERRITT, JR.*

TABLE OF CONTENTS

I. INTRODUCTION ...................................... 350
II. DECENTRALIZED DECISIONMAKING IN INTERNETWORKS . 352
III. DISPUTES, RULES & ENFORCEMENT MODELS .......... 353
   A. The Authoritarian Rulemaking Model ............... 355
      1. Disconnection Enforcement Model ............... 356
      2. Legal Enforcement Model ....................... 357
   B. The Democratic Rulemaking Model .................. 359
      1. Social Enforcement ............................ 359
      2. Legal Enforcement ............................ 361
IV. CONTRACT’S ROLE ................................... 363
V. CONTRACT’S DOCTRINES ............................... 365
   A. Relational Contracts ............................ 366
   B. Contract Formation ................................ 372
      1. Advertisement Cases ........................... 373
      2. Credit Card Cases .............................. 376
      3. Employment Law ............................... 381
VI. ABSENCE OF PRIVITY IN INTERMEDIATE NETWORKS .... 384
VII. MODES OF DISPUTE RESOLUTION ....................... 388
    A. Rulemaking ...................................... 390
    B. Adjudication ................................... 391
    C. Factors in Designing Dispute Resolution Systems . 393
VIII. HYPOTHETICAL ..................................... 394
IX. HARM TO THIRD PARTIES ............................. 395
   A. Proposed Statute .................................. 396
   B. Alternative Dispute Resolution for Tort Claims .... 398
X. CONCLUSION ......................................... 400

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(349)
I. Introduction

This Article proposes a framework for resolving disputes that arise as a result of denial of access to electronic networks, or from the transmission of defamatory messages over such networks. It is part of a symposium held at Villanova Law School on November 7, 1992.1

One of the main conclusions of the symposium discussion was that the law has only a limited role to play.2 The best guarantee of the free flow of ideas and information is decentralized power in individual private network service suppliers to define and adapt the terms of their service. Moreover, in a “free market” consumers exercise power by electing one provider or another according to their wishes and differences in the types of service available.

Although the symposium participants agreed that the law has a limited role to play, this does not mean that the law has no role to play. In order for private choice to be meaningful, for the market dynamics to work, the law must enforce the bargains struck. Consequently, contract law must meet the realities of electronic networks. These changing realities require that the theories and principles of relational contract, contract formation, contract modification and contract interpretation adapt and expand. This Article considers this role for law.

There is a related role for the law discussed at the symposium, but it is beyond the scope of this Article. Because there will always be a possibility of bottlenecks in which the consumer or supplier wishing access has no realistic alternatives,3 the law must

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1. This Article builds upon equal access and third party liability concepts developed in an earlier article by the author: Henry H. Perritt, Jr., Tort Liability, the First Amendment, and Equal Access to Electronic Networks, 5 HARV. J. L. & TECH. 65 (Spring 1992).

2. The symposium featured a panel discussion of a hypothetical fact pattern. For a summary of the discussion, see Henry H. Perritt, Jr., Introduction, 38 VILL. L. REV. 319 (1993).

3. Under antitrust law, such a “bottleneck” may be determined to be an “essential facility.” In addressing a monopolization offense under § 2 of the Sherman Act, one court has stated: “Any company which controls an ‘essential facility’ or a ‘strategic bottleneck’ in the market violates the antitrust laws if it fails to make access to that facility available to its competitors on fair and reasonable terms . . . .” United States v. American Tel. & Tel., 524 F. Supp. 1336, 1352-53 (D. D.C. 1981), quoted in Michael Boudin, Antitrust Doctrine and the Sway of Metaphor, 75 GEO. L.J. 395 (1986).

In the network context, the term “bottleneck” describes control of an essential communication medium by a supplier. For example, for most small computer and modem users, the local telephone system represents a bottleneck through which all data communication must pass on its way to a multiplicity of
impose duties on the supplier with bottleneck power to provide access on reasonably equal terms. Mr. Stevens' article addresses this question.4

This Article begins where the symposium discussion left off with respect to enforcement of obligations in a reasonably free and competitive marketplace. It begins by explaining how decentralized decisionmaking, long characteristic of electronic communication, may not be viable as internetworking technologies come into wide use. Then, this Article briefly identifies the types of disputes that may arise in future network environments and discusses the kinds of institutional arrangements that can make and enforce rules for dealing with such disputes, while observing that contract law is the most appropriate legal doctrine for defining the interrelationship between the network institutions and the law. Relational contract offers ways of relaxing the rigors of traditional contract and of harmonizing them with the realities of networked communities. The Article then proceeds to evaluate specific contract doctrines to determine the prerequisites to formation of contract duties, and to specify how those duties are modified and interpreted, noting that the issues in the network environment are remarkably similar to issues in employment law. The Article also discusses the difficulty with using contract law to give effect to apparent duties of network intermediaries who do not have "privity of contract" with originators and consumers of traffic on the network.

The Article then looks more particularly at the two modes of dispute resolution, rulemaking and adjudication, and considers how they might work practically in networked environments, making use of the contract doctrines and of the technology configurations the first half of the Article develops.

Finally, the Article evaluates how liability for harm to third persons can be controlled through contract principles enforced through alternative dispute resolution. The Article then proposes statutory language that would create a limited immunity for providers of network services against liability to third parties, but only if they publish their terms of service in a central electronic bulletin board and adhere to those terms of service.

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II. DECENTRALIZED DECISIONMAKING IN INTERNETWORKS

In network communities, rule setting and rule enforcement are highly decentralized. Typically, the rules are made and enforced at the local area network (LAN) or "campus network" level. The university or the corporation setting up the LAN or cluster of LANs is both the legislator and the enforcer.

Decentralized rulemaking and enforcement are not problematic as long as the individual network communities are electronically isolated from each other. But as the communities begin to interconnect, for example, as part of the Internet, interdependence increases and the boundaries between LANs blur. Interdependence and inconsistent rules combine to create a problem.\(^6\)

Technology has increased network interdependence and at the same time made it more difficult to enforce rules because the network boundaries are not distinct now. Current Internet technology uses dynamic routing.\(^7\) This means that the path taken by any particular message is unpredictable. Thus, the sender is obligated to comply with the rules of intermediate nodes the identity of which the sender does not know and cannot know.\(^8\) This presents voluntary compliance problems. Similarly, dynamic routing puts the intermediate nodes in the position of handling traffic from persons they do not and cannot know. This presents enforcement problems.

The interdependence and fuzzy boundaries spawn problems like those arising under the Articles of Confederation after the

5. Dispute resolution in any context involves consideration of both rule setting (rulemaking) and rule enforcement.

6. The Internet architecture, like many other nonproprietary wide-area networks, relies upon many intermediate networks to transfer messages between the origin and destination. For example, a message originating at Villanova University, addressed to a computer at Harvard University, would transit computers at Drexel University, Princeton University and MIT before it arrived at Harvard.

7. Dynamic routing means that the path that a particular message takes—and sometimes different parts of the same message—is not predetermined. Rather, at the time the computer establishes the path for a particular message it simultaneously determines what path would be most efficient.

8. The near anonymity of originator and of intermediate handler is not limited to the Internet. A rapidly growing phenomenon among private dial-up electronic bulletin board operators is the automatic sharing of the contents of certain conferences and Usenet news groups. The bulletin boards automatically dial each other and exchange files falling within certain categories. This happens entirely without human intervention. To a considerable extent, a bulletin board participating in this automatic interconnection relays traffic the bulletin board operator never sees. Indeed, the only real difference between these interconnected bulletin boards and the Internet is that the bulletin boards are interconnected by the voice telephone system, while the Internet links are purely digital.
American Revolution. The individual colonies were feverently independent yet inexorably bound. Inconsistent rules for trade clogged commerce; long borders and coast lines made enforcing trade barriers impracticable.

Historically, problems like these tended to be resolved by the erection of an overarching scheme of governance: the National Government under the United States Constitution or the European Economic Community. Similarly, as networks become more and more interdependent, pressure will grow for some kind of higher level authority to step in and ensure that commerce flows freely through internetworks. What is not clear is whether this overarching authority will be a voluntary association, partnership, corporation or cooperative, or whether it simply will be a set of rules adopted by regular governmental institutions and enforced by agencies and courts.

III. DISPUTES, RULES & ENFORCEMENT METHODS

As networks grow, the following kinds of disputes are almost certain to arise: (1) someone not yet on the network wants to get on and one or more of the people already on the network want to keep him out; (2) someone wants to stop certain kinds of traffic moving on the network (or to recover damages because the traffic is moving) and the person moving the traffic wants to continue moving it; (3) someone on the network believes that someone else on the network has not lived up to his or her commitments.

Two received legal traditions offer useful frameworks for handling these types of disputes. The first is the proposition that certain kinds of promises should be enforced: those that are part of an exchange and those that reasonably induce detrimental reliance. The second is the proposition that governance of private associations should be accomplished under rules adopted by the

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10. The first type of dispute overlaps with the second type of dispute and potentially with the third type. Each type of dispute—attempts to join, denial of access, exclusion of messages—can be based on commitments between the affected parties.

11. See generally JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 28, at 51 (3d ed. 1990) (noting six elements to formation of contract); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (promise reasonably inducing detrimental reliance, action or forbearance, is enforceable when justice requires).
private association. The second proposition frequently implicates the first. Both, in effect, are ways of adopting and enforcing rules of conduct.

In both traditions, three basic models of rulemaking are useful:

- an authoritarian model, in which a supplier of network services, like a corporate employer, Compuserve or WESTLAW, sets rules for access and use unilaterally;

- a democratic model, in which a voluntary association of network users, bulletin board operators or trade association members set rules through informal social norms or more formally through multiparty agreements; and

- a formal legal model, in which contract offers and acceptances, tort law duties, legislative statutes and administrative agency regulations define acceptable conduct.

Making rules is not enough; they must be enforced. Technology makes enforcement more difficult at the same time it in-

12. The rules of private associations frequently are enforced through contract law. Members of associations make promises to each other when they constitute the association. Associations, as entities, make promises to individual members. Associations, as entities, make promises to outsiders on how they can qualify for membership. These promises are analogous to rules.

13. Historically, host-based electronic networks have followed the authoritarian model. Whoever owns the host hardware and software makes the rules. Commercial information services like CompuServe and WESTLAW have subscriber agreements that are executed before customers are permitted access to the networks. The terms of these agreements are expressed on preprinted forms written by the services provider and are supplemented by notices presented on user screens. Typically, when supplemental terms are presented on user screens, a user is asked to acknowledge assent to the displayed terms by typing "Y" or "Yes" and hitting the enter key.

14. Historically, wide area computer networks or internetworks have followed the democratic model. This includes Fido, the network of PC electronic bulletin board operators, and the Internet.

15. The rulemaking models are interrelated conceptually. As already pointed out, contract law governs private associations. Unilaterally imposed rules may be promulgated by providers, but they become enforceable because of user expectations and acceptance. Similarly, the common law frequently relies upon voluntary trade standards and general industry practice to interpret contracts and to set standards for conduct under tort law. Finally, legislatures draw on the common law when drafting statutes.

The rulemaking models are also beginning to overlap as a matter of technology. Authoritarian host-based systems are beginning to interconnect with internetworks following the democratic model.
creases pressure for overarching rules. The enforcement mechanisms fall into three basic categories:

- social forces in a cohesive community, beginning with informal disapprobation, and extending ultimately to expulsion (the “social enforcement model”);
- unplugging the offender, either vertically in the case of a host-based system, or horizontally by denying interconnections to an internetwork (the “disconnection enforcement model”);
- tort, contract, statute and criminal law working through the regular courts or through a combination of administrative agencies and courts (the “legal enforcement model”).

Rule sources and enforcement mechanisms can be combined in almost any permutation. As discussed below, however, certain pairings are more natural than others. The authoritarian rulemaking model associates well with the disconnection or legal enforcement model. The democratic rulemaking model associates well with the social enforcement or legal enforcement model. This Article discusses each of these combinations in turn, and then moves to explore contract law doctrines as ways of effectuating the major combinations.

A. The Authoritarian Rulemaking Model

David R. Johnson proposes that network access be governed according to statements of intention issued by service providers. A service provider would decide unilaterally what kinds of traffic the provider would handle or exclude and issue an appropriate statement of intention. The expectations of persons desiring access would be shaped by this advance notice. The Johnson proposal focuses on rulemaking and assumes that enforcement would occur through some appropriate mechanism.

Such a system has a number of advantages, including all those usually associated with market control rather than government regulation. But it is unclear whether the terms of the advance notice would be enforceable, and if they are, how would they be enforced. There are two basic ways through which the

17. Id. at 507-11.
statement of access terms could be enforceable: through direct action in a competitive market (the disconnection enforcement model) and through contract law (the legal enforcement model).

1. **Disconnection Enforcement Model**

The disconnection enforcement model has the following components. The supplier of the network service unilaterally issues a statement declaring the terms governing access. The statement primarily emphasizes terms that protect the supplier and so it reserves the power to cancel or modify the terms and obligates the supplier to little. Rather, the statement emphasizes the customer's obligations and waives any implied or pre-existing customer rights. The nature of the service to be provided is implied in the accompanying description of the service.

Without regard to the legal effect of such a unilateral declaration, the supplier is not in fact completely unrestrained when choosing the contents of such a declaration. Competitive forces will drive users to suppliers offering better terms. Thus, suppliers offering better terms will have a larger market share and may be able to charge a higher price than suppliers offering less favorable terms. Similarly, a supplier earning the reputation of living up to his commitments will have a larger market share and be able to charge higher prices than a supplier with a reputation for reneging on its commitments. These market forces operate entirely independently of the law.\(^\text{18}\)

If a network user does not follow the rules, the remedy for the network owner is simple: disconnect the user and take away his or her password.

This simple remedy hides the fact, already noted, that the user of network services is not really at the mercy of the rule setter, the supplier. If the user does not like the content of the rules, if the maker of the rules does not follow them or if the user is wrongfully disconnected, the user simply switches to another network. In a perfectly competitive market, this is not a problem for the user. It is as painless as calling one telephone number instead of another.

Despite the supplier's simple remedy and the equally obvious user alternatives, the law may have a role to play in protecting the

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\(^{18}\) The law does have a role to play, however. Markets are not perfect, disputes do arise and loss must be allocated when injury occurs. For a discussion of the role law has to play in this type of dispute resolution, see *infra* notes 19-24 and accompanying text.
parties' expectancies. Real markets are imperfect, and there are potentially significant transaction costs associated with searching for and changing to an alternative service provider. In a market environment, these transaction costs may exceed the costs associated with the legal process. This is likely to be the case when a network user makes a significant investment in network specific software or hardware, in other words, when there is significant detrimental reliance on the network's service terms.

On the other hand, there also are transaction costs associated with the legal process. Depending on the market structure and the technologies involved, these transaction costs may be greater than those associated with market reliance. If architectures are relatively open, and the degree of dependence by a customer on a particular service provider is otherwise relatively low, market transaction costs may be low. If the number of service providers and of customers is high and the regulatory regime is formal, the transaction costs of legal regulation of the common carrier form may be high, and the disconnection enforcement model may be attractive.

2. Legal Enforcement Model

When the balance of transaction costs militates toward a role for the law, the second possibility is enforcing the terms of provider notices under contract law. There are several doctrinal difficulties with this approach, but none of them are insuperable. First, the relationship between the service provider and the network users may or may not satisfy the conditions of a bargained for exchange.\(^{19}\) It is contemplated that the service provider unilaterally announces access terms, probably without knowing the identities of the people who may use the network and certainly without the give and take that most people associate with bargaining. On the other hand, the bargain theory may be satisfied by the publication of the advanced notice for the purpose of in-

\(^{19}\) Justice Holmes described the bargained-for exchange as follows: No matter what the actual motive may have been, by the express or implied terms of the supposed contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting. Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903).

Under the Restatement (Second) of Contracts, a promise is bargained for if "it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." \textit{Restatement (Second) of Contracts} § 71(2) (1981).
ducing an exchange. It is likely that the motive of a network service provider in publishing the advance notice is to induce people to pay the provider money to use the network. This is an exchange, at least if the customers pay their money and subscribe because of the terms of the notice.

A second legal enforcement theory is promissory estoppel. Under section 90 of the Restatement (Second) of Contracts, the person making a promise may be bound to perform the promise if someone else reasonably relies on the promise to the second person's detriment. To create an enforceable agreement, the second party's detrimental reliance must have been reasonably foreseeable. The user of a network would argue that the terms of the advance notice are legally enforceable because the user detrimentally relied on them. However, the user may have difficulty showing detrimental reliance, although passing up other network subscription opportunities or going to the trouble to arrange telecommunication scripts and distributing information about EMail addresses based on a particular network may suffice.

A third possibility is more novel, but also has support in the history of relationships like those involved in electronic networks. This approach imposes on the supplier common law common carrier obligations based on the holding out represented by the network service provider's advance notice. The holding out theory is not so much an independent theory for making service provider notices enforceable as it is a factor reinforcing adaptation of the bargain or promissory estoppel theories.

21. The elements of the equitable doctrine of promissory estoppel are: 1) a promise reasonably expected to induce action or forbearance (reliance); 2) action or forbearance (reliance) by the promisee; 3) injustice can be avoided only by enforcement of the promise. Id. § 90(1) (1981).
22. The promise is one that the "promisor should reasonably expect to induce action or forbearance on the part of the promisee." Id.; see, e.g., Oates v. Teamster Affiliates Pension, 482 F. Supp. 481, 489 (D.D.C. 1979) (stating that James Hoffa, Teamsters president, should have reasonably expected leader of local union to rely on promise of pension coverage).
23. Note that under the doctrine of promissory estoppel, the plaintiff can only recover for actions induced by the promise. See, e.g., Stacy v. Merchants Bank, 482 A.2d 61, 64-65 (Vt. 1984) (in action against bank for breach of promise to lend money, recovery limited to expenses incurred after bank's promise). In the network context, the user would have to articulate actions or forbearances induced by the advance notice.
24. There is a considerable body of nineteenth century case law on common-law common carrier obligations; ordinarily, these were not imposed in contract or assumpsit causes of action. See Perritt, supra note 1, at 73-84 (discussing
The bargain theory, promissory estoppel theory and holding out concept are developed more fully in later sections of this Article.\textsuperscript{25}

B. The Democratic Rulemaking Model

Private associations with more than a handful of members function through rules. These rules can be made with varying degrees of formality and enforced socially or legally.

1. Social Enforcement

The democratic rule making model and the social disapproval enforcement mechanism are natural partners. Together they are more democratic, and more decentralized, which places them above the alternatives. The problem is that social norms are enforceable through social disapproval only in special situations, which are probably becoming less common.

It is widely recognized that informal communities can make and enforce rules without much assistance from formal law. Yale Professor Robert C. Ellickson\textsuperscript{26} is one of the more recent students of this phenomenon. He notes a number of pervasive examples in which the law plays a de minimis role: the development of language, the development of cities and the distribution of food.\textsuperscript{27} It is possible that informal ground rules for governing electronic networks would work the same way.

Professor Ellickson and all the other commentators writing on this subject also recognize, however, that there are important

\textsuperscript{25}. For a discussion of the bargain theory, see infra notes 56-57 and accompanying text. For a discussion of the promissory estoppel theory, see infra notes 80-82 and accompanying text.


\textsuperscript{27}. Id. at 5 (discussing everyday appearance of "order" in nonhierarchical, nonlegal environment).
preconditions for informal community governance without a major role for law.\textsuperscript{28} Most important among these is the likelihood of continuing relationships among the people making, enforcing and violating the rules and the existence of multidimensional relationships in the community.\textsuperscript{29}

While the first of these prerequisites may be met in electronic network communities, the second usually is not. Participants in electronic network communities may have continuing relationships, but their relationships are unidimensional; they involve only a particular type of communication and no other important human activities. This unidimensionality greatly weakens the force of informal community sanctions such as social disapprobation by other members of, and ultimately expulsion from, the community. If a violator of network community norms gets expelled, he simply can connect to another network. At least, he can do this if the market structure is as competitive as opponents of traditional common carrier regulation assert.\textsuperscript{30}

As the scope of networking increases, the likelihood that users will share values and feel membership to be essential decreases. This weakens the power of the social group to enforce its norms. The Santa Monica municipal network experience demonstrates how demand can increase for external intervention, not so much to make rules but to enforce existing rules.\textsuperscript{31} On the other hand, MITnet, which operates in a community with a strong sense of shared values and with interaction occurring in multiple dimensions, finds it relatively easy to enforce its rules without calling on authority from outside the MIT community of which it is a part.\textsuperscript{32}

\textsuperscript{28} Id. at 8 (noting that law-and-society scholars have better understanding of informal social controls than law-and-economics scholars, and citing as exemplary Stewart Macaulay, \textit{Non-Contractual Relations In Business: A Preliminary Study}, \textit{28 Am. Soc. Rev.} 55 (1963) and H. Laurence Ross, \textit{SETTLED OUT OF COURT} (rev. ed. 1980).

\textsuperscript{29} See generally Ellickson, supra note 26, chs. 11-14, at 184-264 (introducing norms that groups must generate to create social order without law).

\textsuperscript{30} See Perritt, supra note 1, at 92-95 (discussing application of common carrier regulation to digital networks.)

\textsuperscript{31} The City of Santa Monica, California's Public Electronic Network (PEN) permits citizens to access governmental information via home computer or via 20 terminals in 16 public locations. PEN offers electronic transactions with city departments, electronic mail and access to public electronic files. A 1992 study by William H. Dutton at the Annenberg School for Communication, University of Southern California, University Park, Los Angeles, CA 90089-0281 showed that users of the system wanted more control to ensure civil discussion and decorum.

\textsuperscript{32} In a seminar sponsored on November 7, 1992 by the National Academy
2. Legal Enforcement

Another practical, and democratic, possibility is that an association of networks, or of network users or network service providers, could both make and enforce rules. Under one set of assumptions, this mode of rulemaking and enforcement would be extremely informal, making the association model indistinguishable from the social community enforcement model. In a more formal model, sufficiently distinct from the other two to make it an interesting analytical category, the private association would make rules through a mechanism defined in the association's constitution and bylaws, and enforce the rules either through internal disciplinary sanctions, backed up by the ultimate power of expulsion, or through contract law.

Courts long have reviewed decisions by private associations, basing their jurisdiction on the property, contract or per-

of Sciences, in which the author participated, discussions with the supervisors of the campus wide network at MIT indicated that rules for network use by students and others are enforced by reliance on social norms in the MIT community.

33. Private associations like fraternities, churches, athletic leagues, country clubs and trade associations are largely self-governing, both with respect to rulemaking and adjudication. See Perkaus v. Chicago Catholic High School Athletic League, 488 N.E.2d 623, 627 (Ill. App. Ct. 1986) (duties of athletic league to student injured in high school rugby game determined in part by bylaws); Lozanoski v. Sarafin, 485 N.E.2d 669, 760-71 (Ind. Ct. App. 1985) (relationship between local church and national church defined by acceptance of national "statute" by local church). Courts get involved only to enforce compliance with association rules. See Rowland v. Union Hills Country Club, 757 P.2d 105, 109 (Ariz. Ct. App. 1988) (reversing summary judgment in favor of country club officers because of factual question of whether club followed bylaws in expelling members); Straub v. American Bowling Congress, 353 N.W.2d 11, 13-14 (Neb. 1984) (rule of judicial deference to private associations, and compliance with association requirements, counselled affirmance of summary judgment against member of bowling league who complained his achievements were not recognized). But see Wells v. Mobile County Bd. of Realtors, Inc., 387 So. 2d 140, 144-45 (Ala. 1980) (reversing declaratory judgment for defendant association; claim of expulsion of realtor from private association was justiciable because associations constitution, bylaws, rules and regulations requiring arbitration were void as against public policy).

sonal rights of members. For example in *Reid v. Gholson*, the Virginia Supreme Court affirmed the appointment of a commissioner in chancery to preside over a church meeting to ensure fair treatment of dissenters who were threatened with expulsion by the pastor and his adherents. "Simple and fundamental principles of democratic government which are universally accepted in our society" can be enforced by a court of equity. Ordinarily, however, because of First Amendment considerations, courts are especially reluctant to intrude into functions like internal church controversies involving pastor selection.

When courts exercise jurisdiction over intra-associational disputes, they employ standards for review analogous to judicial review of decisions of administrative agencies. Courts examine the association's authority to act, examine compliance with the association's own rules and compare the procedures under which the association acted with common law due process standards. Occasionally courts invalidate associations' acts on the ba-

35. *Id.* at 998-1005. The author states: "While disputes involving associations sometimes may be resolved with the guidance of statutes, for the most part courts have had to rely on common law principles to decide such controversies." *Id.* at 998 (footnote omitted).

Courts utilize several theories for jurisdiction because each theory has deficiencies. See Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 137 (1974); see generally Willard Hurst, *Commentary: Constitutional Ideals and Private Associations*, in NOMOS XI, VOLUNTARY ASSOCIATIONS 63 (J. Roland Pennrock & John W. Chapman eds., 1969) (public has insisted through legal process that private organizations be required to exercise their powers responsibly).


37. *Id.* at 115.

38. *Id.* at 113.

39. See Minker v. United Methodist Church, 894 F.2d 1354, 1356-58 (D.C. Cir. 1990) (affirming dismissal of age discrimination and contract claims based on church bylaws because First Amendment prohibits intrusion into selection of pastors); *Reid*, 327 S.E.2d at 115 ("We agree that the role of the court in resolving disputes in this area is circumscribed by the constitutional guarantees of religious freedom, and that a court must exercise great restraint in this area . . . ."); Robert J. Bohner, Jr., Note, *Religious Property Disputes and Intrinsically Religious Evidence: Towards a Narrow Application of the Neutral Principles Approach*, 35 VILL. L. REV. 949 (1990) (reviewing various approaches used by state and federal courts to resolve disputes over church property).


42. Medical Center Hosp. v. Terzis, 367 S.E.2d 728, 729 (Va. 1988) (holding hospital bylaws were contract between suspended physician and hospital, and bylaws precluded judicial review).
sis of public policy.43

The associational approach is more formal than the informal social conception, but both are democratic in character. The associational model relies on law to enforce its rules; the informal social conception abstains from legal remedies.

IV. CONTRACT'S ROLE

Both of the basic models considered so far are contractual in nature: they rely on voluntary relationships with privately defined rules and some means of enforcement.44 The genealogy of modern contract law, and actions in assumpsit, implicate the same issues raised by electronic network rules.

Professor Simpson traces the emergence of the action of assumpsit from trespass on the case.45 Trespass on the case relates to medieval markets and fairs, special bodies of law applicable to colleges and religious organizations and the law merchant. ALFRED W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 4 (1975).


When hearing intra-association disputes, courts act much as they do in administrative law cases by refusing a de novo decision on the facts of the disputes, relying instead upon internal factfinding procedures. See Coveney v. President of Holy Cross College, 445 N.E.2d 136, 138-39 (Mass. 1983) (holding college may not dismiss student arbitrarily or capriciously, but when acting in good faith and on reasonable grounds, decisions are not subject to challenge); see also Dowd v. Society of St. Columbans, 861 F.2d 761, 763 (1st Cir. 1988) (applying res judicata and rejecting priest's claim against religious order for abandonment; deferring to internal conciliation procedures). Courts defer to the rules of the associations, as they do to rules of administrative agencies, and permit associations to change rules. See Coveney, 445 N.E.2d at 139 ("A college must have broad discretion in determining appropriate sanctions for violations of its policies."). Compare Randolph v. First Baptist Church, 120 N.E.2d 485, 488-96 (C.C.P. Ohio 1954) (holding church could not expel member in complete disregard of its constitutional provisions governing expulsion) with Gillespie v. Elkins S. Baptist Church, 350 S.E.2d 715, 719 (W. Va. 1986) (approving decision of congregational church to terminate pastor because pastor could show no breach of contract, jeopardy to public policy, or irregularity in church procedures).

44. Professor Simpson noted that there always have been an assortment of systems for dealing with contractual obligation, including the courts of Piepowder relating to medieval markets and fairs, special bodies of law applicable to colleges and religious organizations and the law merchant.

45. Id. at 199. Professor Simpson states: The characteristic feature of these actions was that in them a plaintiff was allowed to claim damages by way of compensation for a wrong which had been done to him. In this respect trespass actions embodied a legal technique which was quite different from the technique of the ancient real actions, in which the claimant demanded the seisin of land, and quite different also from the technique of the ancient contractual
quired the plaintiff to allege the factual circumstances giving rise to the claim so that the defendant could appear and show cause why he should not be held liable, and also required the plaintiff to explain why the alleged facts showed violation of a duty.\(^{46}\) In other words, the plaintiff had to plead the existence of a rule, a duty, and that the defendant had violated the duty.

One way the plaintiff could show that the defendant was under a duty was through prior transactions between plaintiff and defendant.\(^{47}\) Some of the earliest cases in which prior transactions established a duty involved suits against ferrymen and smiths.\(^{48}\) A duty was also imposed upon innkeepers apparently based on "a general custom of the realm which required innkeepers to look after their guest's goods."\(^{49}\) The innkeeper's duties based on the law of realm included a duty to "receive guests whether he liked it or not."\(^{50}\) Although ferrymen, doctors, smiths and others who engaged in "common callings" could have had obligations based on external law rather than on past transactions, the earliest basis for liability was transactional—a basis looking remarkably like the modern idea that conduct, course of dealing, and custom and practice can give rise to contractual obligations.\(^{51}\) A common hostler had a duty to provide food for horses at the market price and a duty to receive guests and their horses.\(^{52}\) A common galor was obligated to receive certain actions of debt, detinue, and covenant, where the claimant demanded the specific recovery of the debt, the chattel or charter, or the actual performance of the covenant.

\(^{46}\) Id. at 200.
\(^{47}\) Id. at 205. This duty arising from prior transactions was a development of the fourteenth century. Id. It is distinguished from duties arising out of external law (based on property rights and customs). "At the end of the fourteenth century it came to be established that such persons could be sued by action on the case for their misconduct, and their liability was based upon the prior informal transaction which they had entered into with the plaintiff." Id. at 205-06.

\(^{48}\) Id. at 204 (noting that liability stemmed from incompetence in handling animals).
\(^{49}\) Id. at 205.
\(^{50}\) Id. at 206.

\(^{51}\) Id. at 206-207 (noting alternative basis for liability of persons engaged in common callings). It is appropriate to acknowledge Professor Simpson's early assumpsit examples involving past transactions involve liability for loss of goods rather than liability for performance of a bargain. Id. at 210-222 (discussing cases including loss of mare on ferry). Professor Simpson is careful to rebut the notion that duties of those engaged in common callings were based on special skill. Id. at 231. He explains that common laborers were under a duty to serve whomever offered to retain them under the statutes of laborers. Id.
\(^{52}\) Id. at 231.
classes of prisoners, and if offered ready money, a common victualler had a duty to sell food in the market at the market price. 53

The historical emergence of assumpsit from dependent, though voluntarily defined, commercial arrangements is a model for emergence of appropriate contract law.

V. CONTRACT’S DOCTRINES

Contract law permits suppliers and their customers to decide for themselves what terms of access are appropriate and how the risk of liability resulting from messages handled should be allocated between them. 54 It accommodates and shapes both the authoritarian and the democratic models of rulemaking for electronic networks.

There are four major contract law issues that are likely to be involved in disputes between network service providers and their customers:

1. To what extent is a relational contract view more appropriate than a neo-classical view? This is the relational contract issue.

2. Is a declaration of service terms unilaterally issued by the service provider a contract at all? This is the contract formation issue.

3. How much power has the service provider reserved to terminate the contract or to modify it? This is the contract modification question.

4. How should the express terms of any contractual relationship be interpreted, how should missing terms be supplied and who should do this interpreting? These are contract interpretation questions.

The relational contract issue is of importance to both the authoritarian and the democratic model, and the contract formation issue is of particular importance to the authoritarian model. The contract modification and interpretation issues are of equal importance to both rulemaking models. The following sections of the Article explore these issues in the following way. First, the Article introduces the relational contract theory, and explains

53. Id. at 232. It is not clear whether these obligations were enforceable on the case or through criminal proceedings. Id. at 231-32. This history is somewhat blurry because the modern distinction between tort and contract did not exist at all, and duties based on explicit promises or undertakings were only gradually emerging from trespass on the case.

54. Contract cannot, however, bind third parties, which leaves a major gap in regulating liability for injury resulting from messages.
how it guides relaxation of some of the formal rules of classical contract law.

The Article then considers contract formation, modification and termination in the context of three different bodies of case law which are analogous in some ways to the electronic network setting: advertisement cases, credit card cases and employment cases. These bodies of caselaw support two opposing views of the contract between service provider and user. One view, most favorable to the provider, treats each network transaction as a separate contract, and permits the provider to modify the terms of the contract, or to disconnect the user between any two transactions. This view is supported by the advertisement and credit card cases. The opposing view, drawn from the employment cases, would interpret the contract to limit both modification and termination powers in the service provider.55

A. Relational Contracts

The relational view of contract disputes the implicit model of the bargain theory of contract, which presupposes that two parties with roughly equivalent bargaining power sit down across a table and negotiate contract terms, and sue for breach of contract if the terms are not honored.56 The bargain theory of contract

55. All of the case law would permit the default arrangements to be changed by explicit terms in the service provider’s specification. For example, under the advertisement and credit card cases, a service specification could specifically state that it becomes enforceable as soon as a request for service is made. For a discussion of these cases see, infra notes 83-133 and accompanying text. Similarly, the contract formed by a request for service could be terminable or modifiable only under certain conditions if the specification says so.


The relational contract “school,” that characterized Macaulay and MacNeil from the 1960s onward, grew out of the Legal Realism movement of the 1920s and 1930s. Id. at 566. The Legal Realists undertook two projects that had the result of significantly altering contract law. The first project was to critique the classical contract model by contextualizing its application. Id. By analyzing the application of classical contract principles by courts, it became apparent that classical contract law was inadequate in its ability to confront different fact situations. The second project undertaken was to replace existing notions of contract with “a law that would be more solidly founded on the empirical regularities observed in the decided cases.” Id. “The result was a body of distinguished work . . . showing that contextual considerations . . . both did and should influence judicial decisions whether contracts had been formed, modified, breached, or excused, and what remedies should be given.” Id. at 566-67.
envisions a relationship that is far removed from reality. In this idealized relationship, the supplier of service and each customer negotiate each term of their contract, memorializing it in a document that both sign. They anticipate each significant contingency and each area of possible dispute and address them in explicit terms of the contract. 57

In contrast, the relational school recognizes that many contracts involve unilateral specification of terms as well as continuing relationships during which modifications are made and assented to, sometimes formally and sometimes informally. 58 The relational school also emphasizes that the relevant sanction for an unacceptable violation of expectations is to terminate the relationship. 59 The threat of a lawsuit plays only a background role. 60

These realities link the relational view of contract with both the authoritarian and democratic models of rulemaking for networks. Termination of the relationship, rather than a lawsuit, is the usual remedy in both authoritarian and democratic models. Informal practice is the core idea of the democratic model, while unilateral rule specification defines the authoritarian model. Both these opposing practices are relational, compared with the idealized formal negotiation model. 61

Under the relational theory, obligations are not frozen in an

57. For a discussion of the concept of classical contract law, see Gordon, supra note 56, at 568-69.
58. Id. at 569.
59. Id.
60. Relational contract proponents Stewart Macauley and Ian Macneil emphasize that parties to real-world transactions do not concern themselves with the classical model of contract formation and administration; rather, they work things out in order to maintain continuing relationships. Gordon, supra note 56, at 569. Macaulay in particular pictures the occasional resort by private parties to formal legal sanctions as mostly opportunistic and tactical: by going to law, the parties are not appealing to shared values embodied in legal rules, or seeking moral vindication of their position or a just settlement of their disputes; they are usually engaged in maneuvers to improve their bargaining positions. Id. at 572.
61. Applying contract doctrine to all kinds of transactions is becoming more relational in character as time passes. The Restatement (Second) of the Law of Contracts (1981) cites the Uniform Commercial Code (U.C.C.) as an example of the kinds of relational contract doctrines that should be applied to contracts in general. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS, § 19 cmt. b (1981) (citing U.C.C. § 1-201(25)); id. § 22 reporter’s note (citing U.C.C. §§ 2-204(2), 2-206, 2-207(3)); id. §§ 200-17 (frequently referring to U.C.C.); id. §§ 220-23 (same).
initial bargain. They evolve over time as circumstances change, guided by norms of the particular community within which the relation exists. "Parties treat their contracts more like marriages than like one-night stands." 62

The object of contracting is to establish and define a cooperative relationship, not merely to allocate risk. If performance falls short on either side, the parties are expected to accommodate each other rather than insisting on technical performance. The sanction for unacceptable performance is to terminate the relationship and to refuse to deal in the future. 63

The coercive power of the state, activated through breach-of-contract litigation, sits in the background as a means of changing bargaining power, but it does not preoccupy the parties in defining their relationship or in seeking remedies for disappointment. 64


63. Id.

64. Id. at 572. For a discussion of relational contracts, see supra note 56 and accompanying text. Labor and employment contracts fit comfortably within the relational contract model. See Ian R. Macneil, Relational Contract: What We Do and Do Not Know, 1985 Wis. L. Rev. 483, 497 [hereinafter Relational Contract] (noting Lon Fuller and Karl Llewellyn incorporated relational contract ideas into promise-centered neoclassical contract theory); id. at 498 (citing HAROLD HAVIG-HURST, THE NATURE OF PRIVATE CONTRACT (1961) as another work dealing with relational aspects of promise-centered contract); id. at 494 n.40 (citing Clyde W. Summers, Collective Agreements and the Law of Contracts, 78 Yale L.J. 525 (1969)); id. at 498 n.59 (citing Harry Shulman, Reason, Contract, and Law in Labor Relations, 68 Harv. L. Rev. 999 (1955) and Archibald Cox, The Duty to Bargain in Good Faith, 71 Harv. L. Rev. 1401 (1958)).

David Feller notes that the Supreme Court, while acknowledging that some aspects of labor law continue to embrace a contract notion, tends to view collective bargaining agreements as governmental codes rather than as contracts. David Feller, A General Theory of the Collective Bargaining Agreement, 61 Cal. L. Rev. 663, 704 (1973) (noting rejection of Black and Fortas views embracing self-government view of collective agreement). Feller also notes that when union presents an employee's claim, the collective agreement is viewed as instrument of government, but when an employee sues both union and employer, the collective agreement is viewed as a contract. Id. at 718. Feller emphasizes that employers and unions do not write collective bargaining agreements primarily as documents to be applied in court; they write them to establish a system of ongoing rules to govern the workplace. Id. at 720-71 (identifying function of rules, rule-modifying and rule-applying institutions in meeting needs of employers, unions and employees in ongoing relationship).

Archibald Cox, writing earlier, agrees. See Archibald Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 605 (1956) (noting that principles for handling collective agreements should not be imposed from traditional legal doctrine, but should be "drawn out of the institutions of labor relations and shaped to their needs").

Of course, the Supreme Court's treatment of collective agreements as a kind of "constitution" for the workplace in the Steelworkers trilogy is highly relational in outlook. See Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) (holding that judiciary has no business weighing merits of grievance when deciding whether to compel arbitration pursuant to collective bargaining agreement);
Because, under the relational theory, the parties expect that the terms of their relationship will evolve, there is no need for formalities to validate new practices in order to make those practices part of the contract. The central idea of the relational theory is that the parties are obligated to behave in a way that promotes the relationship and is consistent with the needs and expectations of both parties. Simply doing something becomes a stronger part of the contractual relationship (if it is unobjectionable) the longer it continues.

The classical contract-as-promise theory is able to accommodate the modification-through-conduct idea, but with more difficulty. Classical and neoclassical theories use course-of-dealing and trade usage evidence as means of interpreting the terms of preexisting contracts. The broad use of extrinsic evidence like this is a relational approach.

Three norms describe the relationship between the parties to a contract and the resulting need for sovereign intrusion into that relationship:

65. Relational contract theorists have not yet developed a comprehensive body of legal rules and doctrine to replace the classical and neoclassical doctrines they criticize. Relational contract theory has, however, helped to legitimate some doctrines already recognized. The implied covenant of good faith and fair dealing under the Restatement (Second) of Contracts § 215 (1981) is one such doctrine.


67. See Gordon, supra note 56, at 569 ("Obligations grow out of the commitment that [the parties] have made to one another, and the conventions that the trading community establishes for such commitments . . . .").

68. See Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981). Professor MacNeil argues that for contract-as-promise proponents, the "promise, and promise alone is the dogmatic base" on which contractual analysis rests. *Values in Contract*, supra note 66, at 390. Thus, to include an obligation that is external to the initial set of promises in the contractual relationship, additional promises must be made. *Id.*


70. Dean Murray emphasizes the difference between the first and second Restatements of Contracts, noting that the second is significantly more hospitable to extrinsic evidence as a guide to interpretation. John E. Murray, Jr., *Murray on Contracts* §§ 106-07, 109-14 (3d. ed. 1974) [hereinafter *Murray on Contracts*]. This interpretation approach is limited as it has difficulty dealing with consensual practices that deviate significantly from the express terms of the written instrument. It is ironic to say that conduct "interprets" terms when it practically rebuts express terms or dramatically changes them.

Macneil characterizes the Restatement (Second) of Contracts as "the largest body of American relational contracts scholarship." *Relational Contract*, supra note 64, at 497.
relationship: the reciprocity norm, the power relationship norm and the legitimacy of means norm.

The reciprocity norm in relational contracts is more flexible than the traditional consideration concept.\textsuperscript{71} The parties deal with each other in the context of a relationship that gives validity to the commitments they make to each other. In a network services context, the reciprocity norm implies obligations on both parties derived from the context of their past dealings with each other, regardless of explicit promises and without a requirement of formal consideration.

The power relationship norm describes sovereign regulation of the relative power of the parties to a contract.\textsuperscript{72} In a contract sense, power can be thought of as the ability to alter the relationship between the parties so as to benefit the party possessing more relative power. Sovereign regulation of the relationship is necessary if there is no counterpoise to the power held by one party.\textsuperscript{73} If, however, an adequate counterpoise exists, either because of bargaining power evidenced through an individual contract or because of an established procedure for participating in decisionmaking, then there is less need to impose limitations, to reallocate power, through legal default rules. In the network context, if the explicit terms of the contract protect only the interests of the network service provider, the power relationship norm suggests that the law supply terms that protect the network user.

The legitimacy of means norm\textsuperscript{74} requires something like

\textsuperscript{71} The imposition of reciprocity stems from an analysis of the imposition of sovereign values on contract. \textit{Values in Contract}, supra note 66, at 374. Reciprocity is imposed where it is believed (by the sovereign in some legislative, administrative or judicial capacity) that it would not occur in absence of the imposition. \textit{Id.} The reciprocity norm means that past exchange between the parties justifies imposing future restrictions on one party’s rights in the contractual relation, including the right to terminate. \textit{Id.} at 374-75. The requirement of consideration in the formation of a contract is a reflection of the reciprocity norm identified in the relational contract literature. \textit{Id.}

\textsuperscript{72} \textit{Values in Contract}, supra note 66, at 375-76.

\textsuperscript{73} Otherwise, the counterpoise is put into operation by the sovereign. For example, the National Labor Relations Act “aims largely to increase the power of employees over their employers.” \textit{Values in Contract}, supra note 66, at 376.

One way that the power relationship norm differs from the reciprocity norm is in the context of party choice. “When the sovereign creates countervailing power, it also reduces the choices available to the parties.” \textit{Id.} Reciprocity limits the choices of one of the two parties in a contractual relationship. For a discussion of reciprocity, see supra note 71 and accompanying text. Thus, reciprocity concerns the substantive terms of the contractual relationship while the power norm regulates the ability on the part of one party to have excessive control over substantive terms.

\textsuperscript{74} Professor MacNeil refers to this norm as the “propriety of means.” \textit{See
what arbitrators require as "due process." If a network services provider promises a facially fair procedure for deciding disputes and commits at least to an objectively reasonable basis for decisions under the procedure, then the law should not substitute a different standard of conduct. If, however, the express contract is silent on these matters, the requirements of the legitimacy of means norm must be imposed from outside the relationship.

In an electronic network context, relational contract theory is a useful aid to understanding the interrelationship among these three norms. Relational contract theory treats the legal relationship like a continuing community relationship rather than an arms length one-shot commercial deal. As a result, relational contract theory represents an intellectual bridge between the two natural persons negotiating the terms of a contract across a bargaining table.

Relational contract theory also recognizes the realities of the agreement process. It contemplates unilaterally suggested terms, accepted by a member of an undefined class, which are then modified from time to time by the original proposer of the terms. In other words, relational contract makes it easier to harmonize neoclassical contract theories with the realities of electronic networks. Thus, relational contract theory justifies implied terms to protect consumers of network services and justifies scrutiny of dispute resolution processes.

Relational contract is highly pertinent to some, but not all, of the electronic network models discussed above. The relational model fits the democratic rulemaking model, with either social or formal legal enforcement. Also, the authoritarian rulemaking model with formal legal enforcement and a view of the contractual

Values in Contract, supra note 66, at 378. This norm refers to government intervention directed at "changing the means by which parties conduct themselves, rather than the substance of their conduct." Id.

75. In fact, the norm itself may be defined in different contexts by reference to due process requirements. See, e.g., Owen Fairweather, Practice and Procedure in Labor Arbitration 312-56 (2d ed. 1981) (discussing borrowing and modifying of criminal due process concepts to apply in labor arbitration forum).

76. See Values in Contract, supra note 66, at 378. ("The effect of due process on choice is clear enough respecting the party upon which it is imposed, at least in the short run: it curtails choice whenever that side would not have introduced such process on its own initiative . . . .").

77. Relational contract also harmonizes neoclassical contract theory with reality in the employment context. In the employment context, as in the network services context, the more powerful party sets the terms unilaterally. The challenge for contract law is to set criteria for deciding when these terms are enforceable without relying unduly on incongruent artificial theories of actual bargaining between equal parties.
relationship that results in ongoing contracts between service providers and network users is relational. On the other hand, the authoritarian rulemaking model with formal legal enforcement is not relational if the contract is one in a series of one shot contracts limited to the duration of each network transaction. Lastly, the authoritarian rulemaking model with disconnection enforcement is not relational because it is not contractual.

B. Contract Formation

Any contract-law model for regulating electronic networks necessitates attention to contract formation. If the legal requirements for formation of a contract are not satisfied in usual network relationships, the contract model is of no use.

Contract law is reasonably flexible on how contracts can be formed. Whenever someone makes an offer, that person can specify the way in which the offer is to be accepted and also indicate by the content of the offer, the circumstances under which it is made and what sort of an exchange is sought. The offer can specify that it may be accepted by conduct (e.g., hitting the enter key on one's computer) or by making a promise (e.g., giving a credit card number representing an implied promise to pay).

When the party to whom the offer is addressed (the offeree) performs the conduct specified or makes the promise specified, he or she accepts the offer. Typically, this conduct or promise also constitutes the offeree's half of the desired exchange. The offeree's half of the exchange is frequently called consideration.

As discussed above, there is another way a promise can be enforced, even without specifications for methods of acceptance or exchanges: through detrimental reliance. The description

78. See, e.g., Restatement (Second) of Contracts § 30 (1981). This section states in part: “An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.” Id. § 30(1).

79. See id. § 30 cmt. a (1981) (“The offeror is the master of his offer. The terms of the offer may limit acceptance to a particular mode. . . . “); id. § 60 (1981) (“If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract.”).

80. See, e.g., id. § 32 (1981) (“In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering performance, as the offeree chooses.”).

81. Murray on Contracts, supra note 70, § 28, at 51 (noting consideration among six essential elements to formation of contract).

82. For a discussion of the authoritarian rulemaking model introducing detrimental reliance, see supra notes 20-23 and accompanying text.
of the authoritarian rulemaking model with legal enforcement provides an overview of both the bargained-for-exchange concept and the detrimental reliance or promissory estoppel concept. Both concepts fit, albeit imperfectly, the realities of the authoritarian electronic network model.

Electronic network transactions share some factual characteristics with mass advertisement, credit card and employment transactions. Contract formation cases in those areas thus are useful.

1. Advertisement Cases

Statements made in advertisements and made with respect to goods displayed in stores traditionally were construed as solicitation of offers rather than offers.\(^{83}\) The significance of this characterization is that a solicitation is not an offer; it does not create a power of acceptance in a person desiring to buy on the terms expressed in the advertisement. Rather, the power of acceptance comes into being only when a subsequent offer actually is made, perhaps by the purchaser, which the seller then accepts. This general rule is inapplicable, however, when the advertisement makes a promise, for example a statement of definite price, accompanied by the phrase, "first come, first served."\(^{84}\)

The justification for the general rule is a concern that treating an advertisement as an offer would expose the advertiser to unpredictably large liability for breach of contract; neither the identity nor the number of offerees is known when the advertisement is published.\(^{85}\) The most famous case rejecting the general rule is *Carlill v. Carbolic Smoke Ball Co.*,\(^{86}\) in which an advertisement promised to pay a 100 pound reward to anyone contracting a cold after using the advertised smoke ball. Evidencing promissory intent, the advertisement also said that it had deposited 100 pounds with a bank as a kind of escrow agent.\(^{87}\) The court found that the nature of the communication evidenced an intent to take on the risk of a large number of offerees.\(^{88}\)

The danger of treating advertisements as offers is illustrated,

\(^{83}\) Murray on Contracts, *supra* note 70, § 34, at 69 (citing Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534 (9th Cir. 1983)).

\(^{84}\) Murray on Contracts, *supra* note 70, at 69 (citing Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689 (Minn. 1957)).

\(^{85}\) Murray on Contracts, *supra* note 70, § 34, at 70.

\(^{86}\) 1 Q.B. 256 (1893), discussed in Murray on Contracts, *supra* note 70, § 34, at 70.

\(^{87}\) Murray on Contracts, *supra* note 70, § 34, at 70.

\(^{88}\) Id. at 71.
but avoided, by the results in *Mesaros v. United States*. The United States Mint, a federal government instrumentality, published and mailed advertisements for commemorative Statue of Liberty coins. The advertisement contained language suggesting a contract: "Please accept my order . . . . I understand that all sales are final . . . . If my order is received by December 31, 1985, I will be entitled to purchase the coins . . . . I have read, understand and agree to the above." Other parts of the circular, however, expressly reserved the right to limit quantities "subject to availability."

The orders for a particular coin (a $5.00 gold piece) exceeded the supply. When the value of these coins went up by 200% within a few months, the disappointed potential buyers sued. Further motivation to sue came when the potential buyers learned that credit card orders placed earlier than orders with checks and money orders were not filled while the later orders including checks and money orders were filled.

The United States Court of Appeals for the Federal Circuit reviewed case law that overwhelmingly favored the general rule—that advertisements are initiations to deal or solicitations of offers and not offers themselves. The court reiterated this rationale as applied to the facts of the case. "Otherwise, the advertiser could be bound by an excessive number of contracts requiring delivery of goods far in excess of amounts available." The Mint was lim-

89. 845 F.2d 1576 (Fed. Cir. 1988) (affirming summary judgment for defendant).
90. Id. at 1578 (quoting advertising circular).
91. Id. at 1578 n.2.
92. Id. at 1578-79 (describing background facts).
93. Id. The record showed a significant amount of confusion relating to the processing of credit card orders. Id. The disappointed credit card customers were sent form letters informing them either that the mint "tried but was unable" to process their credit card orders or that the gold coins sold out. Id. However, the record indicates that the rejection of collector's credit cards was not based on any shortage of credit or on any inaccuracies in the information provided to the mint. Id.
94. Id. at 1580-81 (citing cases and SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACT § 27 (3d ed. 1957) and ARTHUR L. CORBIN, CONTRACTS §§ 25, 28 (1963 ed.)). The court of appeals accepted that jurisdiction existed in the claims court because a claimant alleged breach of contract against the government. Id. at 1580 (jurisdiction based on Tucker Act, 28 U.S.C. § 1346(a)(2)).
95. Id. at 1581. The court noted that in the instant case, the advertisement stated that production of the gold coins was limited to 500,000 by an act of Congress. Id. The court also noted that the order form included the language, "please accept my order," which the court concluded was an offer from the buyer to the mint to purchase the coins. Id. (citing 1 ARTHUR L. CORBIN, CONTRACTS § 88, at 375-76 (1963)). Finally, the court distinguished the case from
ited by Congressional authorization to 500,000 coins, and the number of people seeking the coins did in fact exceed the supply.

A leading commentator, Dean Murray, suggests that the appropriate inquiry to distinguish offers from solicitation of offers is the definiteness of the communication. Dean Murray’s approach is entirely consistent with the Restatement of Contracts’ proviso: offers must manifest a willingness to enter into a bargain that would justify the offeree believing that his assent to a bargain is invited. 96 While the Restatement presumes that advertisements are intended as solicitations of offers rather than offers, 97 it also acknowledges that it is possible to make an offer by an advertisement directed to the general public. 98 Also, a communication not in and of itself an offer may contain promises or representations that are incorporated in a subsequent offer and thus become part of the eventual contract. “Indeed, the preliminary communication may thus form part of a written contract, or of a memorandum satisfying the statute of frauds, or of an integrated contract.” 99 As with other offers, the crucial inquiry is what intent was manifested by the words of the offer and the circumstances under which it was made. 100

This approach is appropriate in the network services context and is supported by common policy concerns. What happens if an unexpectedly large number of persons “accept” the “offer” made by the published terms of service? If a large number of people “accept,” is it a breach of contract for the network services

Lefkowitz v. Great Minneapolis Surplus Store, 86 N.W.2d 689 (Minn. 1957), in which the court held that an advertisement constituted an offer. In Lefkowitz, a store advertised a fur stole worth $139.50 for sale for $1.00 on a first-come, first-served basis and then refused to sell the stole to the first potential buyer. Id. at 690. The Mesaros court distinguished Lefkowitz in that in Mesaros the advertisement did not include the words “first-come, first-served.” Mesaros, 845 F.2d at 1581.

96. Murray on Contracts, supra note 70, § 34, at 73 & n.85 (citing Restatement (Second) of Contracts § 24 (1981)).
98. Id. (referring to § 29). Section 29 of the Restatement explicitly acknowledges that an offer may create a power of acceptance in a specified group or class of persons. Id. § 29. A comment notes that an offer may create separate powers of acceptance in an unlimited number of persons, and the exercise of the power by one person may or may not extinguish the power of another. Id.
99. Id. § 26 cmt. f. This idea is crucial in contract interpretation in the network context. Hitting the enter key may be an offer that is accepted when the remote computer responds. The terms of the cryptic contract are those expressed in advertisements and other pre-contractual service specifications.
100. Id. § 24 (“An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.”)
provider not to provide service or to provide materially worse service than that "promised?"

Considering the underlying policy concerns, it is better to conclude that the contract for network services is formed, not when the network user makes a request for service, but when the network accepts the request for service. A statement of terms is a solicitation of offers, a request for service is an offer to make a contract on the terms represented by the service providers unilateral specification of those terms. The commencement of service by the network is an acceptance of the offer on those terms.

Yet, once a contract is formed, two related issues remain unresolved: Did the service provider reserve the power to change the terms of the agreement, and are there limitations on the power of the service provider to disconnect service? These issues should be considered in the context of the following discussion of credit card and employment cases.

2. Credit Card Cases

Terms of access published by a network services provider are not unlike the terms published by the issuer of a credit card. The issuer intends to communicate with a very large number of people, who subsequently enter into discrete transactions, presumably under the published terms. There are differences, however. Usually, full credit card terms are published only to someone who the credit card issuer selects to receive a card. The terms of network access well may be published to a larger universe of people who then decide whether they use the network. In this respect, the published terms of network service look more like an advertisement than the terms of credit card usage.

The prevailing view is that credit card terms do not constitute enforceable contracts. 101 Rather, they are revocable offers of contracts, which the card holder accepts each time he or she uses the credit card. 102 "The credit card relationship, properly analyzed, should be viewed as an offer by the issuer to create the opportunity for a series of unilateral contracts which are actually formed when the holder uses the credit card to buy goods or serv-

101. See, e.g., Garber v. Harris Trust & Sav. Bank, 432 N.E.2d 1309, 1312 (Ill. App. Ct. 1982) ("[P]revailing view in this country is that the issuance of credit card is only an offer to extend credit.").

102. See In re Ward, 857 F.2d 1082, 1087 (6th Cir. 1988) (Merritt, J., dissenting) ("[U]nilateral contracts are formed each time the card is used.").
ices or to obtain cash."\(^\text{103}\)

For example, *Garber v. Harris Trust & Savings Bank*\(^\text{104}\) involved a lawsuit by a class of credit card holders who claimed that the card issuers breached the card holder agreement by changing the terms on which the issuer would extend credit.\(^\text{105}\) The plaintiffs argued that the card holder agreements were binding contracts that required the issuer to continue to extend credit on the terms stipulated therein.\(^\text{106}\) They argued that applications, brochures, and advertisements by the issuers were solicitations of offers.\(^\text{107}\) The credit applications submitted by potential card holders were offers, and issuance of the credit card accompanied by the published terms constituted acceptances.\(^\text{108}\)

The card issuers argued that the issuance of the card was the offer to extend credit, and that the user accepts this offer by use of the card.\(^\text{109}\) Only upon use of the card did the published terms become a binding contract.\(^\text{110}\) The *Garber* court affirmed dismissal.\(^\text{111}\) The court discussed Georgia and New Jersey cases that supported the card issuer's position.\(^\text{112}\) The terms of credit card

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103. *Id.* at 1087 (Merritt, J., dissenting) (arguing that bank did not assume risk of nonpayment when card was issued).


105. *Id.* at 1310.

106. *Id.* at 1312. The plaintiffs argued that *Steinberg v. Chicago Medical School*, 371 N.E.2d 634 (Ill. 1977), supported their theory. *Garber*, 432 N.E.2d at 1312. *The Steinberg* court found a cause of action existed for breach of contract when an applicant to medical school submitted an application in response to an invitation expressed in the medical school catalogue, but the medical school failed to evaluate the application according to the criteria set forth in the catalogue. *Steinberg*, 371 N.E.2d at 638. *The Steinberg* court concluded that the submission of the application and the payment of fee was an offer to apply, which was accepted by receipt of the application and acceptance of the fee. *Steinberg*, 371 N.E.2d at 641. The *Garber* court rejected *Steinberg* as applicable, noting that *Garber* did not allege a refusal to accept an application for a credit card under the advertised terms. *Garber*, 432 N.E.2d at 1312-13.

107. *Garber*, 432 N.E.2d at 1311. The court's opinion does not indicate whether the advertisements and brochures were sent directly to the plaintiffs.

108. *Id.* (characterizing plaintiff's argument).

109. *Id.*

110. *Id.* ("In other words, each use of the credit card constitutes a separate contract between the parties.").

111. *Id.* at 1316.


In *City Stores*, the plaintiffs brought an action for tortious misconduct based upon an alleged refusal, without prior notice of revocation, by a store clerk to extend further credit to one of the plaintiffs when she sought to charge purchases at the store. *City Stores*, 156 S.E.2d at 820. The court, discussing the
usage could not provide the basis for a contract, even if they were intended as an offer, because there was no consideration. No performance or return promise existed until the credit card was used and there was no obligation to use the card. Moreover, if the terms did support a contract, the contract was of indefinite duration and thus, terminable at will. Because the contract is terminable at will, the contract terms "can be modified at any time by either party." Notwithstanding the power to modify a terminable-at-will contract, in this case, the court noted that modifications were permitted because they were expressly provided for in the original published terms.

In a later case, with similar facts, a federal court reached a contrary conclusion. Gray v. American Express Company involved a breach of contract action brought by a card holder whose card had been canceled. The card issuer refused to authorize a particular charge after an unresolved dispute over some earlier and unrelated charges. The plaintiff claimed that the cancellation

nature of the relationship between a cardholder and a card issuer stated: "The issuance of a credit card is but an offer to extend a line of open account credit. It is unilateral and supported by no consideration . . . and its withdrawal breaches no duty." Id. at 825.

The City Stores language was quoted with approval in Novack v. Cities Service Oil Co., 374 A.2d 89 (N.J. Super. Ct. Law Div. (1977)), aff'd, 388 A.2d 264 (N.J. Super. Ct. App. Div.), cert. demnd, 396 A.2d 583 (N.J. 1978), in which the plaintiff argued that the cancellation of his credit card breached the contractual relationship between the company and himself. The court found that no contractual relationship was created by the issuance and receipt of the credit card. Id.

Garber, 432 N.E.2d at 1313. The court stated: "Mutuality of obligation is lacking. Such mutuality exists when both parties to an agreement are bound." Id. The court further stated that though mutuality of obligation is not essential to the validity of a contract, it can substitute for consideration when there is no other consideration for a contract. Id.

Id. Id. The court stated: "Where no definite time is fixed during which an executory contract shall continue in force, it is terminable at the will of either party." Id. at 1313-14 (quoting Gage v. Village of Wilmette, 146 N.E. 325 (Ill. 1924)).

Id. at 1314.

Id. The court noted that the challenged modifications were expressly listed as provisions in the cardholder agreement. Id. The agreement included "change of terms" and "cancellation" provisions. Id. The agreement also contained language indicating that the credit company could amend the cardholder agreement with respect to future purchases and could amend the agreement to limit or terminate the cardholder's privileges. Id.

743 F.2d 10 (D.C. Cir. 1984).

Id. at 13. Following billings arising out of deferred travel charges by Gray, disputes arose regarding the amount due to American Express. Id. After considerable correspondence, American Express decided to cancel Gray's card. Id. Gray was not notified of the cancellation until he attempted to use his card to
violated the terms of a contract represented by the card member agreement.\textsuperscript{120}

Much of the analysis in \textit{Gray} involved application of a federal statute that prohibited termination of a credit card agreement until certain procedural steps were taken with respect to disputed charges.\textsuperscript{121} The status of the card member agreement pertained to the statutory claim because American Express argued that, in the agreement, American Express expressly reserved the power to cancel the agreement with or without cause and thus was permitted to cancel the agreement notwithstanding the limitation in the statute, an argument the court of appeals characterized as "audacious."\textsuperscript{122} The court of appeals concluded that the act's notice provision applied and remanded the statutory claim for trial.\textsuperscript{123}

In \textit{Gray}, the plaintiff also brought an independent state law contract claim arguing that the issuer was not free to cancel the right to use the card "without notice."\textsuperscript{124} The court of appeals reversed the district court's determination that the termination-at-will and without-notice provision in the cardholder agreement was enforceable.\textsuperscript{125} Without addressing the issue directly, it is apparent from the court's analysis that the \textit{Gray} court began this section of the opinion with the assumption that the cardholder agreement was a contract.\textsuperscript{126} Having assumed that a contract existed, the \textit{Gray} court distinguished earlier cases, including \textit{Garber},

\begin{itemize}
\item pay for a wedding anniversary dinner and the restaurant informed Gray that American Express had refused to accept the charges for the meal and had instructed the restaurant to confiscate and destroy the card. \textit{Id.} At that time, Gray spoke to the American Express representative on the phone who informed him that his account was canceled. \textit{Id.}
\item \textsuperscript{120} \textit{Id.}
\item \textsuperscript{122} 743 F.2d at 15.
\item \textsuperscript{123} \textit{Id.} at 16.
\item \textsuperscript{124} \textit{Id.} (concluding that choice of law principles require application of New York law).
\item \textsuperscript{125} \textit{Id.} at 20.
\item \textsuperscript{126} \textit{Id.} at 17. After discussing the choice of law question, the court identified the applicable issue as whether the "without notice" termination provision in the cardholder agreement was enforceable. \textit{Id.} The court then applied contract principles to reach the conclusion that the provision was unenforceable. \textit{Id.} at 17-20. Implicit is this identification of the issue and in the subsequent analysis is the fact that the court considered the agreement to be a contract.
\end{itemize}
in which the courts concluded that the agreement did not represent a contract.\(^{127}\)

A subsequent case, *Feder v. Fortunoff, Inc.*,\(^{128}\) prompted an annotation.\(^{129}\) Mr. Feder sued a department store after the department store, following instructions from Citicorp, seized his Citicorp credit card.\(^{130}\) He asserted conversion and prima facie tort claims.\(^{131}\) The appellate division agreed with the trial court that Mr. Feder had no cause of action: "The issuance of a credit card constitutes an offer of credit which may be withdrawn by the offeror at any time prior to acceptance of the offer through the use of the card by the holder."\(^{132}\) Consequently, once Citicorp revoked the offer of credit, it had a superior property interest in the card.\(^{133}\)

Followed strictly in the authoritarian model of electronic network services, the credit card cases would permit the service provider to change the terms of the contract virtually continuously. Each request for service would be an offer of a new contract. If the network provided service on that occasion, a contract would be formed only for the duration of that particular transaction on the network. Because no contract would be in existence otherwise, the service provider would remain free to disconnect at al-

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\(^{129}\) Gregory G. Sarno, Annotation, *Credit Card Issuer's Liability, Under State Laws, for Wrongful Billing, Cancellation, Dishonor, or Disclosure*, 55 A.L.R.4th 291 (1987). The only case, other than *Gray v. American Express*, cited in the annotation supporting a breach of contract claim against an issuer canceling a credit card is one in which the only issue was whether the applicable statute of limitations was one for contract or one for tort. The appellate court's conclusion that the action sounded in contract for statute of limitation purposes did not reach the merits of the contract claim. 53 A.L.R.4th § 4(a) at 251 (1987).

\(^{130}\) *Feder*, 494 N.Y.S.2d at 42. The credit card was subject to a $1,600.00 credit limit, and at the time of the alleged conversion, the credit card number appeared on a restricted card list because the charges against the account exceeded the limit. *Id.*

\(^{131}\) *Id.* Prima facie tort is a catch-all category of intentional tort. It requires the plaintiff to show intentional injury to a legally recognized interest without legally sufficient justification. *Restatement (Second) of Torts* § 870 (1979).

\(^{132}\) *Feder*, 494 N.Y.S.2d at 42.

\(^{133}\) *Id.* at 42-43.
most any time, between the end of one transaction and the commencement of the next. This result would create enormous problems for users, who would be subject to ever changing use and access requirements. As is discussed below, the law developed in the area of employment relations offers a more useful model.

3. Employment Law

A conclusion that the contractual relationship between network service provider and network user is a series of one shot contracts is not terribly useful. It transforms the formal legal enforcement submodel into the disconnection enforcement model by creating an ongoing right to terminate the relationship. If the formal legal enforcement model is to have utility, it must be based on legal relations that continue past the end of a particular network transaction.

Contract formation, interpretation and modification questions present in the network services context are remarkably like those that arise in the employment context. Employers typically define terms of employment unilaterally and publish those to employees in employee handbooks and personnel policies. Sometimes the terms involve employee benefit plans, implicating ERISA, and sometimes they involve promotional policies, disciplinary procedures and the grounds for which an employer may terminate employment.134

Traditionally, such informal statements of employment policy and the terms of the employment contract were entirely unenforceable under the employment at will rule and a set of associated assumptions and virtually irrebuttable presumptions.135 Thus, no contract could be based on the unilaterally published terms because they were not promissory in expression, because there was no mutuality of contract or because the employee gave insufficient consideration merely by performing his


135. See id. § 1.6, at 13. The employment-at-will rule dictates that a "general hiring is to be construed as a hiring at will under which either party may at any time determine the employment." Id.; see also Bernard v. IMI Systems, Inc., 618 A.2d 338, 342 (N.J. 1993) (discussing history of employment at will rule); see generally Jay M. Feinman, The Development of the Employment at Will Rule, 20 Am. J. Legis. Hist. 118 (1976) (tracing employment at will rule back to its origin in English law and noting that rule was adopted in United States without "serious consideration of its theoretical support or potential impact").
During the last twenty years, however, courts in virtually all the states have abandoned these specialized rules and have brought informal employment law into the mainstream of contract law. Now, unilaterally published employment terms may be sufficiently promissory to be enforced, employees can accept the published terms by performing their regular duties, and consideration is present when employees pass up other job opportunities or do not exercise their power to quit.

Some states have gone further and are willing to enforce employer policies merely because they are issued in a relatively formal way, without individualized inquiry into employee knowledge or detrimental reliance. Similarly, ERISA takes the contract formation questions out of the equation by making employee benefit promises enforceable merely because they are contained in a plan. Under both ERISA and prior judicial decisions, what is important is the publication of the terms of the relationship by one party—the employer. Any terms published with the requisite formality become enforceable, regardless of whether the party seeking to enforce them (the employees and benefit plan participants) provides consideration in the traditional sense, and even regardless of whether he can show actual knowledge of the terms.

136. EMPLOYEE DISMISSAL, supra note 134, § 1.6, at 15 ("[T]here were two interrelated theories for preventing recovery for wrongful dismissal on a contract theory: the presumption of an employment at will, and the stringent application of an independent consideration requirement.").

137. See id. § 1.9, at 18-20.

138. See, e.g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980) (noting that legitimate employee expectations of employment tenure based on employer's policy statements and handbooks are enforceable in breach of contract action).


140. Section 1132 of title 29 of the United States Code provides that a civil action may be brought in state or federal court "to recover benefits due to him under the terms of his plan, or to enforce his rights under the terms of the plan . . . ," 29 U.S.C. § 1132(a)(1)(B) (1988). Section 1102(a)(1) provides that every plan shall "be established and maintained pursuant to a written instrument." Id. § 1102(a)(1) (1988). The courts have interpreted these provisions to create an entitlement to benefits provided for in the plan documents without any inquiry into the presence of consideration under common-law contract principles. See generally Henry H. Perritt, Jr., EMPLOYEE BENEFITS CLAIMS LAW AND PRACTICE §§ 3.13-3.18 (1990) (discussing role of consideration in plan modification).

141. In Woolley, a "Personnel Policy Manual" was found to constitute an
Once employer statements of employment policy and terms of employment became legally enforceable, questions arise about how to interpret and modify a contract. There is a split of authority as to whether employers get substantial deference in interpreting the terms of the employment contracts they established or whether judges and juries apply de novo interpretations. However, under ERISA, the Supreme Court has decided that the terms of employee benefit plans must be interpreted de novo by courts unless the plans delegate discretion to plan administrators to interpret them.

Modification questions involve whether the employer reserved the power to modify the contract. This question is implicated whenever an employer changes a provision of an employee handbook or whenever employers change employee benefits, quite often by reducing or eliminating retiree health care benefits. Obviously, if an employer expressly reserves the power to modify, such a reservation is given affect.

More often, however, the dispute resolution tribunal must decide whether there has been an implied reservation. This issue frequently requires reference to actual practice. Conduct under a contract indicates intent, and it also may defeat employee arguments of reasonable detrimental reliance. If an employer regularly has changed the terms of an employment contract or benefit plan unilaterally, with no protest from employees, it is implausible for an employee to argue that he reasonably relied on the absence of an expressed power to modify.

All of these issues and the ways in which they have been re-offer. Woolley, 491 A.2d at 1266. The offer was construed as "seek[ing] the formation of a unilateral contract—the employees’ bargained-for action needed to make the offer binding being their continued work when they have no obligation to continue." Id. at 1267. The court rejected the argument that the job security provision was unenforceable because the balance of the agreement was indefinite and that, as a result, the issue of whether "good cause" for termination was operating without standard. Id. at 1269. "[T]he fact that in some cases the [termination] 'for cause' provision [in the job security provision] may be difficult to interpret and enforce should not deprive the employees in other cases from taking advantage of it." Id.


solved in the employment context involve mainstream contract law and analysis. They form the appropriate starting point for evaluating contract law as a means of enforcing rights in the electronic network context. The statement of terms for network access seems remarkably like an employee handbook or a set of personnel policies, with respect to its unilateral character, with respect to the likelihood it would be changed from time to time and with respect to the way in which the recipient “accepts” it.

To the extent that differences between network and employment environments are appropriate, they must be justified based on identifiable differences between the two contexts. Obviously, one difference is that ERISA exists in the employment context and not in the network context. Of course, it may be desirable to develop an ERISA analogue in the network context, but such a statute does not exist now. Nevertheless, ERISA covers only a part of the employment relationship; the rest of it—at least the contract issues—are purely matters of common law.

The imbalance in bargaining power between employees and employers is replicated in many cases in the electronic network context. Many employees, like many network customers, have to take it or leave it with respect to the terms offered by large employers and network service providers. On the other hand, in both the network and the employment context, there are times when the customer, or employee, has at least as much economic power as the supplier, or employer.

Employees are thought to lack bargaining power vis-a-vis employers because the transaction costs are higher for employees looking for other jobs than they are for employers looking for new employees. In network markets, where the transaction costs for a network user to switch networks are similarly high relative to the costs of the network, the employment law model may be appropriate. Unlike the advertisement cases and the credit card cases, the employment law model recognizes that it may be appropriate to interpret unilateral specifications as binding once the weaker party “accepts” by entering into the relationship and giving up options.

VI. ABSENCE OF PRIVITY IN INTERMEDIATE NETWORKS

All of the legal analysis in the Article so far addresses the legal relation between an information producer or consumer and the originating or terminating network. It does not address the
rulemaking and enforcement activities with respect to intermediate networks. This is an important omission.

The architecture of the future is an internetworking architecture in which information is handled through a number of different networks all linked together through protocols functionally equivalent to the Internet’s Transmission Control Protocol/Internet Protocol (TCP/IP) protocols. The architecture is somewhat like the architecture involved in placing a telephone call from an originating Local Exchange Carrier (LEC), such as Bell of Pennsylvania, through at least one interexchange carrier such as MCI, to another LEC such as Pacific Bell.

The originating and terminating networks have a relationship with, respectively, the sender and receiver of traffic, and that relationship will be governed by terms established under one of the mechanisms discussed so far in the Article. The networks that connect the originating and receiving networks do not necessarily have any legal relationship with the originator or the ultimate consumer. An example from the telephone context is illustrative. When I place a call through Bell of Pennsylvania, I have a contractual relation with Bell of Pennsylvania, but I do not have a direct contractual relationship with Pacific Bell, and may not have a contractual relationship with MCI. You receive the call through California Bell, with which you have a contractual relationship, but you do not have a contractual relationship with Bell of Pennsylvania, and are even less likely than I to have a contractual relationship with MCI because your long distance carrier may be AT&T.

So it is with digital networks. The originating and terminating LANs are likely to have contractual relationships with their immediate participants. The intermediate networks may have contractual arrangements with all networks that connect to them,

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144. TCP/IP refers to the two protocols that make up Internet services that include electronic mail, file transfer and remote log in (Telnet) on an internet connecting computer systems supplied by different vendors. The IP part permits connected computers or computer networks to establish connectionless packet delivery service. 1 DOUGLAS E. COMER, INTERNETWORKING WITH TCP/IP 5 (1991). TCP/IP supplies reliable stream transfer service, imposing an error-detection-and-correction connection on top of the IP service. TCP/IP, popularized by ARPAnet and Internet, is used much more widely now. It is a major feature of many local area networks, providing them with the capability to connect with other local area networks and computers using different operating systems, regardless of proprietary features.

like New England Area Regional Network (NEARnet), but they are unlikely to have contractual relationships with the originator and consumer. The service providers with some of the greatest practical rulemaking and enforcement power lack privity with the actual consumers of their services.

The legal problem is worse than this. As the networking technology improves, the routing between originating and terminating networks becomes increasingly dynamic. Dynamic routing means that the route that any particular message—or even any particular packet—takes is determined by traffic loads and delays on alternative links at any point and time. Routing software selects the optimal route, which may involve one combination of intermediate networks one time and an entirely different combination for another message. If legal rights and duties are to be defined only by contract, there is a sort of combinatorial explosion with respect to contract transactions. In any event, the transaction costs rise rapidly.

This reality militates in favor of at least a standard set of terms for network service providers handling intermediate traffic. But who specifies these terms and who enforces compliance with the standard terms? Who deprives an intermediate network of its usual power to set whatever terms it wants for a particular connection?

One answer may be that it does not matter. The market for intermediate networking services may be such that one can survive as a provider of these services only by offering essentially open terms resembling what traditional common carriage would impose. Also, the possibility of discrimination may not matter because of the multiple alternative paths available. Thus, if a particular originating or terminating network is denied a connection to an intermediate network, it simply can find another connection. But legal doctrine that could force connections may be necessary

146. NEARnet is a "regional" or "midlevel" network in the Internet. Such a midlevel network connects the backbone NSFnet to individual nodes or local area networks. In addition to serving as simple intermediaries for handling traffic, midlevel networks add value in the form of user support services and various kinds of local connections. Increasingly, as federal support for the backbone declines and commercial use of the Internet increases, midlevel networks connect directly to each other and to several different backbones. For example, most midlevel networks now connect to the noncommercial NSFnet backbone, run by ANS, to the ANS commercial backbone and to CIX (Commercial Internet Exchange).

147. See Meza v. General Battery Corp., 908 F.2d 1262, 1266 (5th Cir. 1990) ("Privity is merely another way of saying that there is sufficient identity between parties prior and subsequent to suits for res judicata to apply.").
if a group of services controls a bottleneck or concertedly or in parallel denies access.

One way that an originator or consumer could enforce duties of network intermediaries is through third party contract beneficiary theory.\textsuperscript{148} This would be effective only if the intermediary had entered into a contract with someone—presumably other intermediaries or an originating or terminating network. Under certain circumstances, the contract to which the intermediary was a party could be interpreted as conferring benefits on the originator or consumer.\textsuperscript{149} If prerequisite conditions are met, "a promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty."\textsuperscript{150}

It is not necessary that the beneficiary be identifiable at the time the contract is made,\textsuperscript{151} but only intended beneficiaries may enforce the contractual duties.\textsuperscript{152} An intended beneficiary need not be identified expressly on the contract. It is enough that recognizing a right in the beneficiary furthers the intentions of the parties and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance."\textsuperscript{153}

Under these criteria, whether the originator or consumer of information has standing would depend on an interpretation of the contract entered into by the network intermediary. In a suit by the originator or consumer against the intermediary, the inter-

\textsuperscript{148. See} Restatement (Second) of Contracts § 304 (1981) (recognizing creation of duty to intended beneficiary).

\textsuperscript{149. Only one of the illustrations to § 304 is particularly analogous to the network intermediary situation. It hypothesizes that a common carrier contracts for liability insurance covering claims for bodily injury arising out of the common carrier's operations. If such liability insurance is required as a condition of the common carrier's license, it is plausible that the contracted insurance was intended to benefit the persons injured by the common carrier, and therefore, such an injured person may maintain a direct action against the insurance company. Id. § 304 illus. 9 (1981).}

\textsuperscript{150. Id. § 304. The drafters of the Restatement explained this proposition as deriving from "the basic principle that the parties to a contract have the power, if they so intend, to create a right in a third person." Id. § 304 cmt. b.}

\textsuperscript{151. Id. § 308 (discussing identification of beneficiaries).}

\textsuperscript{152. Id. § 315 (noting that incidental beneficiary acquires no right against the promisor by virtue of contract).}

\textsuperscript{153. Id. § 302 (distinguishing intended from incidental beneficiaries). For example, an industrial concern contracting to use a municipality sewage system to prevent harm to downstream landowners creates rights in the downstream landowners as intended beneficiaries. Id. § 302 illus. 10. Additionally, an employee is an intended beneficiary of a collective bargaining agreement entered into between the employee's union and the employer. Id. § 302 illus. 14.}
mediary would argue that the contract was only meant to create rights in the intermediary and the other party to the contract. The only benefit meant to be conferred was one on the connecting network. The intermediary defendant would argue that retail customers are not intended beneficiaries of all contracts between the retailer and the retailer suppliers, and that the network intermediary contract is most analogous to such a retailer/wholesaler contract.

Conversely, the plaintiff would argue that the only reason for including terms relating to nondiscrimination against traffic would be to assure persons at the end points of a virtual connection of a clear channel for their traffic as they define it.\(^{154}\)

Third party beneficiary theory can also apply when the intermediary's contract is with the government, as might be the case with certain Internet or NREN intermediaries. Section 313 of the Restatement says that the general third party beneficiary rules apply except that “a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless” the contract explicitly provides for such liability or a direct action against the promisor is consistent with the purpose of the contract and public policy.\(^{155}\) A strongly analogous illustration shows that an entity contracting to carry mail over a certain route does not, by virtue of that contract, become liable to a member of the public injured by the entity's failure to perform its contract.\(^{156}\)

While it is conceivable that a user of network services could enforce access rights against intermediaries based on third party beneficiary theories, such a result is speculative, to say the least. Because the Restatement puts so much weight on policy considerations, contract-based theories do not make results much more predictable than tort or statutory based theories, although they do permit effect to be given to explicit manifestations of intention either affirmatively or negatively.

**VII. Modes of Dispute Resolution**

When developing the basic models, earlier parts of this Arti-

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154. Because that is the only conceivable purpose of including such terms, they would argue, the tests of Restatement § 302 are met.
155. See Restatement (Second) of Contracts § 313.
156. Id. § 313 illus. 1.
cle distinguished between rulemaking and rule enforcement. The earlier discussion also supports the proposition that some enforcement role for legal institutions is likely in most real world electronic networks. That discussion did not, however, consider the actual procedures through which rules would be made or enforced. This part probes rulemaking procedures and enforcement procedures. Enforcement in formal legal systems involves some kind of adjudication, and the term adjudication is used in this section to emphasize the procedural nature of the inquiry.\textsuperscript{157}

Although rulemaking and adjudication are conceptually distinct modes of decisionmaking they can be combined in practice. An adjudicator may make new rules just as a traditional common law court makes new rules to fit cases of first impression. It is possible to have a system in which there is only adjudication. A claimant need not make a claim of right in the sense that the claimant identifies some pre-existing rule under which his case falls. In such a system the adjudicator would have very broad discretion to decide whether a particular transaction is "fair." For example, a dispute arises over acceptable use of internetworking facilities, and a committee of members of the Internet meet to decide how the dispute should be resolved fairly, without reference to any pre-existing rules, because there are none.

Alternatively, a system can be envisioned in which the rules are flexible and easily changed and in which no one is given adjudicatory power and thus the rules have only some kind of moral force. This happens in the authoritarian rulemaking model with disconnection enforcement, and in the democratic rulemaking model with social enforcement.\textsuperscript{158} If a new case arises that seems anomalous under the pre-existing rules, the rulemaker simply makes a new rule dealing with the case as the rulemaker thinks appropriate.

Moreover, there is a trade off between specificity of rules and discretion of adjudicator. When rules are very general, they require much interpretation when they are applied and the adjudicator has, correspondingly, greater discretion. Conversely, when the rules are very specific and narrowly drawn, the adjudicator has

\textsuperscript{157} In the context of administrative law, the term adjudication indicates a proceeding involving adversary parties appearing before a tribunal to present evidence and/or make legal arguments; this tribunal has the authority to decide the dispute. See, e.g., \textsc{Bernard Schwartz}, \textsc{Administrative Law} § 4.16 (2d ed. 1984) (distinguishing adjudication from rulemaking).

\textsuperscript{158} For a discussion of the authoritarian and the democratic rulemaking models, see \textsc{supra} notes 10-43.
less discretion, frequently being empowered to do no more than resolve factual disputes.

Electronic network dispute resolution thus can span the range from a complete absence of rules with a neutral party empowered to resolve disputes on some kind of general fairness basis to a system in which the rules are highly specific and a factfinder is empowered to apply them in a final and binding way. Obviously, in some configurations, the specificity of rules and character of adjudication are independent variables. A network could have a set of very specific rules with all disputes being resolved in the regular law courts. On the other hand, it is hard to envision a system with no rules producing justiciable causes of action to be heard in courts.

A. Rulemaking

If network access is to be a matter of enforcing expectations induced by terms defined unilaterally in advance, as under all of the contract theories considered above, there must be some means of deciding what is entitled to the status of an advance "term." This implicates "rules of recognition" or "secondary rules" in the terminology of some scholars of jurisprudence.\(^{159}\)

In contract law, this is the contract interpretation question introduced previously. There are a number of ways to identify legally significant rules or terms. Publication in the Federal Register is the way selected for rules by Federal Administrative Agencies. In an electronic network context, there could be some electronic bulletin board on which the terms of engagement would be posted.

It is not difficult to envision how rulemaking can work in an electronic environment.\(^{160}\) All that is necessary for electronic rulemaking is to designate a particular area such as a bulletin


board\textsuperscript{161} or a conference\textsuperscript{162} on which proposed and final rules will be posted and, if an interactive rulemaking process is envisioned, a mailbox for the receipt of EMail messages,\textsuperscript{163} commenting on proposed rules.

Rules would be modified by the expedient of changing the posting. Actual and constructive notice to users would be facilitated by having a single place for posting. Bureaucratic costs and delay would be reduced by using electronic methods.

\textbf{B. Adjudication}

Deciding that network users have rights not to be excluded from networks in some circumstances, such as when network service providers grant those rights, does not entirely resolve the enforcement question. The rights must be applied to concrete factual situations and disputes over whether rights have been violated must be resolved. The two phrases in the preceding sentence are just two different ways of describing the adjudication process.

The need for adjudication does not imply, however, that all disputes and all applications of rights must turn into lawsuits in federal or state court. There are a variety of nonjudicial dispute resolution techniques that are worthy of consideration. One obvious possibility is arbitration under the rules of the American Arbitration Association (AAA) or a similar group promoting arbitration. Another possibility is resolution by some private process established by the network services provider or by the participants in the network. A mechanism set up unilaterally by the network services provider would look rather like employer-sponsored procedures for resolving employment claims, or the procedures that employee benefit plans are required to set up for

\begin{footnotesize}
\begin{enumerate}
\item[161.] An electronic bulletin board system consists of computer hardware, software and communications connections that permit users to post messages so that all other users can see them. For a further discussion of bulletin boards and related systems, see Ethan Katsh, \textit{Law in A Digital World: Computer Networks and Cyberspace}, 38 \textit{Vill. L. Rev.} 403 (1993).
\item[162.] An electronic conference is similar to an electronic bulletin board except that the posted messages typically are organized by subject matter, facilitating interactive exchange on the same subject.
\item[163.] EMail stands for electronic mail. An electronic mail system, consisting of computer hardware, software and communications connections, permits individual users to send messages to other predefined addressees. Messages may be sent to one or multiple addressees. The addressee need not be connected to the system at the time a message is sent in order to receive it. Rather, messages are stored in "mailboxes" until an addressee is ready to read her accumulated messages.
\end{enumerate}
\end{footnotesize}
handling benefit claims under ERISA. Collective dispute resolution processes would have the same status as private association dispute resolution tribunals, prominently involved in professional sports leagues and churches, and discussed in section III(B)(2) of this Article.

The legal position of arbitration is representative of the legal position of most kinds of contractual dispute resolution procedures. Arbitration produces a final and binding decision by a neutral. An arbitration award is entitled to res judicata effect in any subsequent judicial proceeding as long as the process that produced the award had the essential attributes of adjudication. A party refusing to arbitrate has committed a breach of contract. A party seeking to avoid arbitration by suing directly in court faces dismissal of the judicial action on the grounds that, by agreeing to arbitrate, the party waived the right to sue immediately. Moreover, the Federal Arbitration Act and the Uniform Arbitration Act, adopted in about half the states, make arbitration awards enforceable, require legal action sidestepping arbitration to be stayed and strictly limit the grounds for which arbitration awards may be overturned by courts. Indeed, international arbitration awards may be more predictably enforceable across international boundaries than judgments of courts in individual countries.

A contractual dispute resolution process that produces a nonfinal or a nonbinding decision has less effect in subsequent or collateral judicial proceedings. Nevertheless, the results of the process should be admissible in evidence and may significantly

164. See, e.g., 29 U.S.C. § 1133 (1990) (setting forth process due to beneficiaries whose claims have been denied).
166. See Restatement (Second) of Judgments § 84 (1982) ("[A] valid and final award by arbitration has the same effects under the rules of res judicata . . . as a judgment of the court.").
168. See, e.g., Sanders v. Washington Metro. Area Transit Auth., 819 F.2d 1151, 1157 (5th Cir. 1990) (holding that plaintiffs estopped from litigating negligent termination claims because they had opportunity to raise claims during arbitration).
169. See, e.g., Uniform Arbitration Act § 2, 7 U.L.A. 60-68 (discussing proceedings to compel or stay arbitration).
171. Such a dispute resolution does not have the res judicata effect on a judgment. See Restatement (Second) of Judgments § 84 (1982).
affect the judicial outcome, and a failure to participate in the process may be an independent breach of contract. The existence of the process should be a waiver of the right to sue immediately for breach of the underlying agreement.

Whether a particular process has the status of arbitration depends on how neutral the decisionmaker is. Parties wanting to ensure the status of arbitration should select decisionmakers through the AAA or a similar organization. The creators of the dispute resolution process have considerable discretion with respect to procedural details. Similarly, the failure of the decisionmaker to give reasons or to make findings of fact and conclusions of law, and the absence of a formal record do not impair the legal quality of the ultimate decision. On the other hand, if the procedure gets too far away from an adversarial presentation of material facts and does not provide an opportunity to make legal arguments, the essential characteristics of adjudication may not be present and the finality of the award may be questionable under the *Restatement (Second) of Judgments* as well as the status of the process as arbitration under the Arbitration Acts.

**C. Factors in Designing Dispute Resolution Systems**

Given the wide range of dispute resolution possibilities, it is appropriate to consider why a network would choose one or another form. Expertise is one possibility, including greater familiarity with the norms and the patterns of conduct in that particular network or kind of network.

In an electronic conference during the Fall of 1992, some people suggested that disputes among participants in electronic networks could be subjected to electronic dispute resolution.

172. See, e.g., Alexander v. Gardner-Denver Co., 415 U.S. 36, 60 (1974) (holding that nonbinding arbitral decision may be admitted as evidence in Title VII case; weight attached to evidence to be decided by trial court).

173. It is quite clear, for example, that the unavailability of discovery does not impair the finality or enforceability of the resulting decision.

174. See Gonce v. Veterans Admin., 872 F.2d 995, 999 (Fed. Cir. 1989) (holding arbitrator under no duty to set forth findings of fact to support award); Lisbon Sch. Comm. v. Lisbon Ed. Ass'n., 438 A.2d 239 (Me. 1981) (holding arbitrators have no duty to give reasons for decision).

175. See Racine v. State Dept. of Trans. and Pub. Facilities, 663 P.2d 555, 557 (Alaska 1983) (noting that arbitration process does not permit dispute resolution involving substantial rights "without regard to constitutional safeguards.").

176. This conference involved both law professors and practicing attorneys. For a discussion of the lessons the participants learned, see Katsh, *supra* note 161.
Some people envision this as involving a kind of polling to determine the appropriate resolution of a particular dispute.\textsuperscript{177} It is interesting to speculate on the pros and cons of a system that uses a plebiscite for adjudication.

Adjudication is no more difficult to implement electronically than rulemaking. There needs to be a particular kind of message and a specified manner of "serving" it\textsuperscript{178} and a way for the pleading, discovery and trial functions to be performed. Pleading is easy because it simply envisions the exchange of electronic documents setting out the facts and legal theories supporting a claim and the response. Discovery, at least in the form of interrogatories, similarly is simple to accomplish through an electronic network.

The trial function envisions an adversarial presentation before a neutral decisionmaker who has some formal way of signifying his decision. Modern litigation is becoming more focused on discrete issues decided largely on paper submissions, with the single-event, face-to-face trial playing less of a role.\textsuperscript{179} This trend and single issue decisions based on written submissions can be accommodated nicely in an electronic network environment.

The face-to-face portions are more difficult. As multimedia becomes common, recorded audio and video testimony within the adjudication database is conceivable. Until then, the most that can be done in a purely networked environment is interactive argument and presentation through a "chat" feature. It is far from clear, however, that this mode of electronic dispute resolution would be efficient because people type more slowly than they talk.

\textbf{VIII. HYPOTHETICAL}

The following hypothetical makes more concrete the concepts discussed in this Article.

VillaNet posts its terms of service in a special notice area available to anyone, nonsubscribers as well as subscribers. A person wishing to subscribe must read the notice area and then can

\textsuperscript{177} The electronic conference was established by Trotter Hardy, Associate Professor of Law at the Marshall-Wythe School of Law, College of William and Mary.

\textsuperscript{178} Service of process conceptually signifies only predefined formalities so that the person served knows that it is legal process being delivered to him or her and that someone testifies that delivery has been made.

subscribe on line by responding to prompts that signify knowledge and acceptance of the terms of service as well as providing for payment. The terms of service explicitly reserve the power to modify those terms by giving notice to subscribers and the subscribers explicitly signify their acceptance of the reserved power to modify when they subscribe. As modifications to the terms of service are adopted, a notice is automatically given to all subscribers on log in.\textsuperscript{180} When comments on proposed rules are solicited, they are solicited in the same way that notices of final modifications to rules are given.

This describes the rulemaking process; it does not determine who has authority to make rules. Rules could be made unilaterally by the “owner” of VillaNet or they could be made through some democratic voting process implemented on the network. If a democratic process were provided for, some means of narrowing the issues and framing the questions for a vote would be necessary, a kind of electronic Robert’s Rules of Order. Anyone claiming that a subscriber has violated the terms of service, or that service is not being provided according to the terms of service, would file an electronic complaint after which the matter would be handled through the electronic adjudicatory process described in section VII of this Article.

IX. HARM TO THIRD PARTIES

A network services provider cannot eliminate the possibility of tort liability by the content of any notice. While the principles discussed in earlier sections of this Article permit the publication of a notice to result in a contract waiving certain rights, this result can apply at most to persons having actual notice and acting in response to the notice or with knowledge of it. Frequently, the injured party with a potential tort claim is someone who has no immediate dealings with the network. For example, the person defamed by a message handled on a network or whose copyright is infringed by a file maintained on a network is someone who does not use the network and may not even know if its existence until after the injury has occurred.

Nevertheless, notices by network service providers can narrow the range of possible tort liability. Network operators can

\textsuperscript{180} It makes no difference whether subscribers obtain access to VillaNet through the Internet, through a Public Data Network (PDN) like Tymnet or Sprintnet or by dial up telephone connection. In each case they must log in, giving their user names and passwords.
tailor operations so as to conform to the common carrier model. Or, notice can defeat expectations of privacy, eliminating network users as potential plaintiffs in invasion of privacy actions. A notice can make it clear that the network reserves the power to refuse traffic, that in the sole opinion of the provider, might expose it to criminal or tort liability. These opposite approaches avoid the conundrum in which a services provider is obligated to handle traffic that exposes it to criminal or tort liability. A notice can offer the possibility of alternative dispute resolution of third party tort claims as discussed in section IX(B). Finally, a notice can make it clear that the services provider does not vouch for the accuracy of any traffic handled on the network, thus reducing the likelihood that the services provider would be found to be a republisher of defamatory information.

A. Proposed Statute

Existing common law concepts may not be adequate to protect network services providers from tort liability and also to ensure the fulfillment of reasonable expectations by network customers.

In this event, the proposed statute provides a choice. A network services provider can obtain a limited immunity or safe harbor from tort liability by posting terms of service on the electronic bulletin board. No administrative agency or court would have authority to scrutinize the content of the terms of service in advance, and any claim for failure to afford the published terms would be through civil actions in the regular courts.

The proposed system would be different from a traditional tariff system in three important ways. First of all, posting would be voluntary. Second, there would be no authority to suspend rates or other terms as unreasonable. Third, there would be no exclusivity of published terms; the purpose of the posting is not to eliminate discrimination, it is to channel expectations and enforce their realization.

The proposed statute would appear as follows:

§ 1 Terms of Service & Liability

Any network services provider who posts "Terms of Service" on the electronic bulletin board provided for that purpose by the Federal Communications Commission and provides service according to the posted Terms of Service, shall not be liable to any person for injury
caused by messages or files handled by that provider according to the posted Terms of Service, unless in violation of an injunction obtained by the person alleging harm.

§ 2 Enforcement of Terms of Service

Suits for enforcement of Terms of Service may be brought in any United States District Court or in any State court with jurisdiction of the parties.

The proposed statute would not face serious First Amendment challenges because any obligation to provide service and handle content is voluntary. The terms of service are those determined unilaterally by the person subject to the duty. Moreover, filing the electronic notice and therefore coming within the statute's enforcement provisions also is voluntary. The statute actually is little more than a contract enforcement statute and contractual obligations do not infringe First Amendment free speech rights.

The statute would reduce uncertainty with respect to enforcement of access rights. While a number of common law theories exist for enforcing such rights, there also are uncertainties with respect to contract formation and contract modification, as explained in sections IV & V of this Article. By reducing these uncertainties, the proposed statute is like section 301 of the Labor Management Relations Act (LMRA), which made collective bargaining agreements enforceable under federal law.181 Such agreements already were enforceable to a significant degree under state law, but there were common law doctrines that created uncertainty.182

With respect to tort and criminal liability, the statute can be understood as codifying certain parts of the common law, as expressed in the Restatement (Second) of Torts, immunizing common carriers, except for one important difference. The common law immunity for common carriers presumably depended upon an externally imposed obligation to serve all who apply. The proposed statute extends this immunity to obligations derived from contract.


B. Alternative Dispute Resolution for Tort Claims

As an alternative, or in addition, to the proposed statute, a network service provider worried about tort liability could design and implement an alternative dispute resolution system. The rulemaking component would elaborate on the rulemaking activities suggested in section VII(A) of this Article. It would involve the development and publication of a clear set of ground rules as to what content is permissible and not. In some network environments, where there is a sense of community and shared cultural values, collaboration in developing the rules, and knowledge of them will be enough by itself: separate enforcement activities will be necessary in only the smallest fraction of instances. The rulemaking part of this approach should explicitly address the major categories of information that might produce legal liability, including defamatory communications, communications infringing intellectual property rights, communications invading privacy, communications involving material restricted from export and communications violating anti-obscenity statutes.

The second component of a dispute resolution system, the notice component, is a procedure by which someone alleging injury from communications handled on the network can give the network services provider notice of that belief. A useful analogy is the system for complaint and notice to employers of sexual harassment in the workplace.\(^{183}\) The notice and complaint procedure should be published to anyone who might be harmed by information handled on the network—within reason. In any event, anyone making a complaint should be informed of the procedure.

In addition to being a procedural prerequisite to recovery, notice of a complaint also modifies the application of existing legal analysis. For example, once the network service provider has notice of the defamatory content of a message, the provider has a duty to remove the message from circulation.\(^{184}\) The continued intentional circulation of defamatory material will cause the provider to be liable as a republisher.\(^{185}\)

This "with knowledge" element of tort analysis creates the possibility that providers will overreact and remove material that

\(^{183}\) See Employee Dismissal, supra note 134, § 2.5, at 101-07 (explaining sexual harassment complaint procedure).

\(^{184}\) See Perritt, supra note 1, at 106-08 (discussing application of common law rules of libel to network users and operators).

\(^{185}\) Id.
does not create legal harm but that is deemed unpopular or offensive by the majority, or indeed by an outspoken minority. One notice of complaint, no matter how unfounded, will undoubtedly give rise to the desire to protect against a tort claim by removing the material.

The adjudicatory process must take this substantive aspect of notice into account. One possibility is to provide for the temporary removal of the material pending an accelerated review by an independent arbitrator. This approach parallels steps an employer should take after receiving a complaint about sexual harassment. Of course, a network provider would be free to leave the material in place, if, in its opinion, the material does not give rise to legally recognized harms.

The third element is an adjudicatory mechanism. This should be implicated whenever a complaint is received through the procedure established in the second element. The easiest kind of adjudicatory arrangement is arbitration, which can be effected by a one sentence term saying simply: "The network services provider agrees to final and binding arbitration of any claim of harm resulting from traffic along the network, under the rules of the American Arbitration Association." The American Arbitration Association handles the rest.

The advantage of such a procedure is that it channels disputes in a way that leads to appropriate results, while avoiding an overly intrusive and defensive censorship policy. It is highly likely that an arbitration award would be respected by a court hearing any subsequent tort claim, although the arbitration award would be entitled to res judicata effect only if the complaining party also agreed to arbitration.

In summary, there are four things a network intermediary worried about tort liability can do:

1. Do not worry. The likelihood of liability under common law rules is relatively low for network intermediaries who truly are not in the content censoring business and for whom it truly is impracticable to police content.

2. Tailor operations so as to conform to the common law common carrier model. When such a network intermediary is sued for tort, the intermediary can defend on the grounds that it is a common law common carrier.

3. Seek legislation resembling the Proposed Statute.

4. Design and implement a dispute resolution system with
three components: a rulemaking component, a notice component and an adjudicatory component.

X. CONCLUSION

As wide area electronic networks become more important in society, producers and consumers of network services need to have reliable expectations about the status of their commitments. Commitments come in two forms: representations made by the service provider as to the terms of service and practical arrangements made by consumers of network services to use the service, frequently in reliance on the representations.

Efficiency is served by minimizing the role of the law. Nevertheless, entirely informal governance of the terms of service is likely to work only in networks having the attributes of real social communities. As the geographic and subject matter extent of electronic networks becomes greater, these attributes are not likely to exist. The need for the law to be involved is commensurately greater.

Most matters involving network participants, including both suppliers and consumers of network services can be handled appropriately through contract law models. Contract law can accommodate both an authoritarian model, in which a single provider of network services makes the rules, retains the power to modify them and to terminate services, but the rules as they exist from time to time are enforceable as contract terms by consumers of the services. The advertising and credit card cases yield a result that is inconsistent with formal legal enforcement under the authoritarian rulemaking model. Rather, those cases are more compatible with a disconnection enforcement model. Instead of these sets of authority for the legal enforcement model, this Article suggests an analogy to the employment relationship. The contract model also can accommodate a more democratic model in which all of the participants of a network, including both producers and consumers, make rules through whatever procedures and mechanisms they agree to and the rules are enforceable as rules of a private association.

Electronic methods can be used both for rulemaking and rule enforcement, and rule enforcement can be accomplished through arbitration as well as through the regular courts.

There are limitations on the contract approach, however. It does not fully deal with potential tort liability to third parties.
Tort claims can, however, be channeled in two ways. First, tort immunity basically resembling what is available under the common law can be preserved for network service providers publishing terms of service that handle traffic without discrimination or content control. This requires a statute, a preliminary draft of which is included in this Article. Alternatively, tort claims can be channeled into an alternative dispute resolution system.