

**RECONSIDERING BOILERPLATE:
CONFRONTING
NORMATIVE AND DEMOCRATIC DEGRADATION**

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I. INTRODUCTION

Most of us are used to receiving paperwork (or its electronic equivalent) during transactions. We are given forms to sign when we rent an automobile or an apartment, and piles of forms to sign when we buy an automobile or a house. We are given forms to sign when we get a job, when we join a gym, when we go skiing, or when we take a cruise. Most of us do not read all of these forms we receive and would not understand them if we did. We click “I agree” to buy products or services on the Internet after being shown lists of fine-print terms which we do not read. We receive forms even when we do not sign them or click “I agree,” such as the fine-print terms of service (TOS) interior to websites, or the fine print on everything from parking lot tickets to theater tickets to sporting events tickets.¹

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¹ For example, a typical concert ticket may read, in almost unreadable fine print:

The holder of this ticket is not allowed to transmit or aid in transmitting any picture, video, audio reproduction, or other such replication of the event (including pre-and post-event activities). The holder grants unrestricted right and license to use the holder’s likeness incidental to any broadcast, telecast, photograph taken, or other transmission or reproduction in connection with the event or otherwise to the producers, presenters, and news media. Date and time subject to change. Holder of this ticket assumes all risk and danger incidental to any event for which this ticket is issued. All children, regardless of age, must have a ticket. No food or beverage allowed in the facility. Not responsible for lost, stolen, or destroyed tickets. No artificial noisemakers allowed.

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Businesses use forms such as the ones most of us receive almost every day to change the legal infrastructure applicable to us. They use these forms to create their own legal universe. Instead of the set of rights given to individuals by the legal system, we have only the constricted set of legal rights as rearranged by the firms who deliver forms to us. Instead of warranty, we have warranty disclaimers; instead of full consequential damages, we have severe remedy limitations; instead of the right to sue, we have mandatory arbitration. Many forms, such as those commonly used by cell phone providers, declare that they are contracts that can be modified unilaterally at will by the service provider.² That is not what is taught in first-year contracts class.³

Although lay people may not consider these forms to be contracts,⁴ they are treated as contracts by our legal system.⁵ They have been called adhesion contracts,⁶ and more colloquially, boilerplate⁷ or “take-it-or-

Price includes gross receipts tax. Tickets bought from unauthorized sources may have been lost, stolen, or obtained improperly. Management reserves the right to deny admission to the holder of any such ticket. Any purchase from unauthorized sources are at your own risk. This ticket may not be used for advertising, promotions (including contests, prizes or sweepstakes), or other trade purposes without the express written consent of the [sponsoring entity]. No Refunds, No Exchanges.

² *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

³ See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 89 (1981). The contract at issue in *AT&T Mobility* is described in the majority opinion as modifiable at will by the firm. *AT&T Mobility*, 131 S. Ct. at 1744.

⁴ When I ask a class of new first-year law students whether they have entered into any contracts during the past week, many of them say “No.” Of course, they at least have clicked “I agree” here, there, and everywhere. “By using” the mail server of the university, they have “agreed” to its terms.

⁵ See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631 (1943).

⁶ In the above article, Friedrich Kessler attributes the first use of “contract of adhesion” to Edwin Patterson in 1919. *Id.* at 632 n.11.

⁷ According to Wikipedia: “The term dates back to the early 1900s, referring to the thick, tough steel sheets used to build steam boilers. From the 1890s onwards, printing plates of text for widespread reproduction such as advertisements or syndicated columns were cast or stamped in steel (instead of the much softer and less durable lead alloys used otherwise) ready for the printing press and distributed to newspapers around the United
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leave-it” contracts.⁸ Adhesion contracts have long been problematic for the traditional justification of contract enforcement based on voluntary commitment by willing parties.⁹ The fact that consent to these forms is lacking or at best seriously problematic is a normative degradation for the legal system.

Mass-market adhesion contracts also give rise to a democratic degradation. Forms promulgated by firms to govern the rights of users of products and services are removing rights that are granted through democratic processes and substituting the constricted system of rights that the firm wishes to impose.

In reconsidering boilerplate, I seek to raise the following questions: To what extent should firms be permitted to create their own legal universe in this way? What justifications can be brought forward in favor of firms creating their own legal universe? What limits should exist on such universe-creation? How can these limits best be implemented? This article focuses primarily on the degradation—normative and democratic—associated with boilerplate regimes. It also proposes a few suggestions for ameliorating the situation.¹⁰

II. BOILERPLATE AND CONTRACT

The law considers boilerplate to be a method of contract formation.¹¹ That is, the law usually holds that a contract is formed between the firm

States. They came to be known as ‘boilerplates’. Until the 1950s, thousands of newspapers received and used this kind of boilerplate from the nation’s largest supplier, the Western Newspaper Union. Some companies also sent out press releases as boilerplate so that they had to be printed as written. The modern equivalent is the press release boilerplate, or ‘boiler,’ a paragraph or two that describes the company and its products.” *Boilerplate (text)*, WIKIPEDIA, http://en.wikipedia.org/wiki/Boilerplate_text (last visited Feb. 17, 2012).

⁸ *Standard Form Contract*, WIKIPEDIA, http://en.wikipedia.org/wiki/Standard_form_contract (last visited Jan. 5, 2012). See also Kessler, *supra* note 5, at 632.

⁹ Kessler, *supra* note 5, at 632.

¹⁰ See Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (forthcoming 2012) (on file with author). The book will cover the topics of this article in greater depth, as well as topics that are not within the scope of this article, such as regulatory solutions.

¹¹ See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 774 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 *U. CHI. L. REV.* 1203, 1204 (2003) (citing *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (1981)).

and the recipient, and the terms of the contract are the fine print in the boilerplate.¹² Even when there is no signature, such as when we click “I agree” online, courts are likely to find that a contract has been formed unless there is some other reason for invalidating the terms.¹³ Boilerplate has really come into its own in the online environment. Firms use other online procedures that are even further removed from the kind of consent we normally suppose is required for a contract, such as, “By browsing our website, you have agreed to all of the terms we have placed in the link entitled Terms of Service, together with any changes that we make from time to time.” Courts may be less likely to find that these procedures form an enforceable contract.¹⁴ Firms today, however, are hopeful that courts will rule in their favor if these procedures are challenged—hopeful enough to use these procedures very widely.

In the United States, most consumers are subject to one or more of the following: arbitration clauses, choice-of-forum clauses, exculpatory clauses, disclaimers of warranty, limitations of remedies, divestments of information user rights, or a variety of other onerous clauses.¹⁵ Even though I know more than most recipients about the legal significance of these clauses, I cannot do anything about them. So, just like almost everyone else, I do not read them.¹⁶ I must take them or forego the transaction, just like everyone else. I cannot employ a financial management firm for my retirement account without accepting its

¹² See Korobkin, *supra* note 11 (citing *Graham*, 623 P.2d at 172).

¹³ See Anthony M. Balloon, *From Wax Seals to Hypertext: Electronic Signatures, Contract Formation, and a New Model for Consumer Protection in Internet Transactions*, 50 EMORY L.J. 905, 905 (2001) (citing 15 U.S.C. § 7001 (2006)).

¹⁴ See, e.g., *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002). The judges may inquire how many clicks it would take to see the terms and from that information may reason that the recipient did or did not have a reasonable opportunity to see the terms, always assuming that this type of an opportunity would amount to consent. See *id.* at 32, 35.

¹⁵ See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

¹⁶ Even Judge Richard A. Posner, Chief Judge of the Seventh Circuit Court of Appeals and someone who has opportunities to judge cases involving boilerplate, does not read the forms he signs. David Lat, *Do Lawyers Actually Read Boilerplate Contracts? Richard Posner and Evan Chesler Don't; Do You?*, ABOVE THE L. (June 22, 2010, 2:42 PM), <http://abovethelaw.com/2010/06/do-lawyers-actaully-read-boilerplate-contracts-judge-richard-posner-doesnt-do-you/>.

arbitration clause. I cannot use iTunes without clicking “I agree” to its TOS.¹⁷ I cannot proceed with an exercise class without signing a form that exculpates the provider for any injury to me no matter how caused.¹⁸

Our basic conventional understanding of freedom of contract is at odds with this reality. Most people still think that a contract is a voluntary transaction, a consensual exchange. Indeed, the basis of contract law is the idea of free exchanges between willing parties.¹⁹ “Freedom of contract” is a revered ideal.²⁰ Let me call the traditional world of our conventional understanding, and of contract theory, World A. World A is the world in which the revered ideal resides, the world of Agreement, the world of voluntary exchanges. It is sometimes the world of actual pre-exchange negotiation, but at minimum the world of realistic choice on whether to transact.

World B is another world, the world of Boilerplate, of fine-print schemes. World B does not fit the theory or the rationale of contract law, which developed to justify the scenarios of contract enforcement of World A. Yet World B is the primary world in which consumers transact in the

¹⁷ In what is no doubt a good development for making people aware of the contents of boilerplate schemes, some with access to media exposure have taken to satirizing boilerplate TOS. See, e.g., Alexia Tsotsis, *South Park Scares You into Reading Apple's Terms and Conditions*, TECH CRUNCH (Apr. 28, 2011), <http://techcrunch.com/2011/04/28/south-park-scares-you-into-reading-apples-terms-and-conditions/>; Rafe Needleman, *Richard Dreyfuss Reads the iTunes EULA*, CNET (June 8, 2011, 4:00 AM), http://www.cnet.com/8301-30976_1-20068778-10348864.html; Miles Lothe, *The Entire Facebook Terms of Service in Bro Speak*, SLACKTORY (Aug. 10, 2011, 12:59 PM), <http://slacktory.com/2011/08/entire-facebook-terms-of-service-in-bro-speak/>.

¹⁸ Once I tried to tell a person presenting paperwork to me that the exculpatory clause would be unenforceable if her studio harmed me intentionally or through gross negligence rather than mere negligence. I took out a pen and offered to emend the clause, but the person presenting the form was not into legal niceties. It was take it or leave it. Actually, she had no idea what the form was for. She told me that her insurance company requires her to use the form and that she is required to prohibit clients from changing it in any way. Perhaps the insurance company uses exculpatory clauses to incentivize recipients to buy their own insurance, or maybe it just wants to prevent any recipient from being able to rely on the insurance it is supplying to the firm.

¹⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 18 (1981) (“Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.”); Slawson, *supra* note 15, at 542.

²⁰ See RESTATEMENT (SECOND) OF CONTRACTS § 189.

marketplace.²¹ This article and the corresponding book essentially ask: What (if anything) should be done about this disconnect between theory and practice and between justification and reality?

Our courts consider boilerplate schemes contractual, but should they? Perhaps they should not, or at least not always. Meanwhile, as long as boilerplate terms are considered contractual, as our legal system currently does, that means that boilerplate is regulated under contract law. Why is boilerplate “regulated”? It is regulated because not everything that is *called* a contract actually *is* one. A purported contract obtained by coercion or fraud is not an enforceable contract,²² nor is a contract for an illegal purpose,²³ a contract that is too indefinite,²⁴ or a contract that lacks consideration.²⁵

If boilerplate schemes should not be regulated by contract law, that does not mean that boilerplate should not be regulated at all, or that boilerplate should not exist. If boilerplate schemes were not regulated at all but could still be freely used by firms to divest people of legal rights, we would not be living under the rule of law. If, however, all uses of boilerplate schemes to create an alternative legal universe for a firm were suddenly declared unenforceable, that would impose a disruption of current commercial practice.

Because boilerplate is regulated by—or, in other words, evaluated under—contract law, those who defend boilerplate schemes must argue that boilerplate schemes somehow meet the requirements of contract law. Thus, they must argue that recipients somehow agree to, or consent to, its terms. Or they must argue that there can be such a thing as a contract without consent. This is contrary to the basic rationale of contract law. Some, however, would argue that a contract without consent can be rescued by hypothetical consent.²⁶ These arguments may be succeeding

²¹ As Justice Scalia observes in passing in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011), “the times in which consumer contracts were anything other than adhesive are long past.”

²² MELVIN A. EISENBERG, *GILBERT LAW SUMMARIES: CONTRACTS* 157 (Richard J. Conviser et al. eds., 14th ed. 2002); *CONTRACTS, THE EMANUEL LAW OUTLINES SERIES* 456 (Steven L. Emanuel et al. eds., 9th ed. 2010).

²³ EISENBERG, *supra* note 22, at 177.

²⁴ *Id.* at 135, 137.

²⁵ *Id.* at 2.

²⁶ Hypothetical consent treats World B purported contracts as if they were consented to, so I refer to hypothetical consent as “as-if” consent. As-if consent is not a convincing basis
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with U.S. courts because judges apparently believe that a boilerplate form signifies that the recipient has exercised freedom of contract.

Businesses that use forms to construct their own legal universe, and others who argue in defense of this practice, usually say something like the following: “We need to constrict recipients’ legal rights to contain costs. When we reduce costs, we pass on our savings to recipients, so recipients benefit with lower prices.²⁷ Furthermore, recipients, if given a choice, would choose lower prices over legal rights.²⁸ So we are not really interfering with people’s freedom of choice.” Thus, hypothetical consent is often premised on the idea that firms pass on to recipients the money they save by curtailing recipients’ rights.²⁹ Therefore, recipients, if economically rational, “would” choose these passed-on savings and “would” consider it appropriate “compensation” for their loss of rights.³⁰

upon which to deprive recipients of important rights. *See infra* Part III.B. For more on this topic, see Radin, *supra* note 10.

Hypothetical consent should not be conflated with the objective theory of contract. The objective theory of contract is a way of interpreting people’s words and actions, in context, to signify real (not as-if) consent. *See* EISENBERG, *supra* note 22, at 58–59. In my view, the objective theory of contract is akin to the objective theory of language. If someone utters certain words, the meaning is a matter of social understanding, not whatever was intended inside the person’s mind—always assuming that relevant matters of immediate context are taken into account. (For example, “Yeah, right,” uttered in a certain tone of voice, does not mean “Yes, that’s true.”) Analogously, the objective theory of contract holds that if a reasonable person would understand the words and actions of another to be consent to a deal, the deal is deemed consented to, no matter what was actually inside the mind of the other. *Id.* In my view, the reasonable person in this formulation should be interpreted as one socialized into a particular form of life that is relevant under the circumstances, such as, a usage of trade. Firms and consumers are not socialized into a shared practice and discourse. It is difficult to imagine that a firm using boilerplate can reasonably be understanding the recipient to have consented to the terms in its scheme.

²⁷ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991).

²⁸ *See, e.g., Omri Ben-Shahar & James J. White, Boilerplate and Economic Power in Auto Manufacturing Contracts*, 104 MICH. L. REV. 953, 954 (2006) (claiming that under a law and economics approach, parties would be expected to accept “standard-form terms” unless they “cost more than they save”).

²⁹ *Id.* (noting that in a law and economics approach, parties would be expected to redraft boilerplate “warranties and remedies” provisions if it would be efficient to do so).

³⁰ *Id.*

There is a lot wrong with this argument. Whether savings to firms are passed on and whether they would be equal to just the right amount of compensation is a difficult empirical question; it is not one that is properly answered by convenient assumption. Moreover, the argument does not take into account that some rights cannot be sold, even for just compensation. Furthermore, even if it were true that firms pass on savings that amount to just compensation, and that the rights are saleable, there is still the question of “private eminent domain”: our legal system normally does not allow private parties (such as firms) to divest other private parties (such as consumers) of entitlements if compensation is paid.³¹

We should not ignore the argument that adhesion contracts are justified as enforceable contracts because firms pass on to recipients the savings they realize from boilerplate schemes that delete legal rights. The argument should be reconsidered, however, in light of four factors: (1) the varying market circumstances that can make its premises true or untrue; (2) the nature of the various legal rights that firms are negating by using boilerplate schemes (for example whether the rights can be traded off); (3) the dubious normative premises that opportunity to read incomprehensible terms amounts to choice; and (4) that hypothetical choice is as good as real choice.³² This article focuses primarily on the third and fourth factors.

III. NORMATIVE DEGRADATION: THE CHALLENGE TO THE IDEAL OF FREEDOM OF CONTRACT AND PRIVATE ORDERING

A. *Decay of the Idea of Voluntary Choice*

Given that firms are using boilerplate schemes to transport us into an alternative legal universe, why don't we read these things? Here are seven possible answers. First, we would not understand these things if we did read them, so it is not worth our time.³³ Second, we may need the product or service and have no access to a supplier that does not impose onerous clauses, so reading the terms would not make a difference.³⁴ Industry-wide

³¹ See *infra* Part IV.B.

³² See *supra* note 26.

³³ See, e.g., Ben-Shahar & White, *supra* note 28, at 957 (noting that in contracts involving “ultra-sophisticated parties,” the parties do “read the contracts and assess the cost of the terms”).

³⁴ See, e.g., *Millet v. Truelink, Inc.*, 533 F. Supp. 2d 479, 485 (D. Del. 2008) (rejecting a plaintiff's assertion that a credit-monitoring service's use of boilerplate terms that incorporated “industry-wide standards” entitled the plaintiff to summary judgment on a claim of unconscionability).

standardization is common, so alternative terms are often not available. Third, sometimes we do not even know that we are being made subject to these terms, so we do not know that there is anything to read.³⁵ Fourth, we trust that the company did not include anything harmful.³⁶ Fifth, we think that anything harmful would be unenforceable.³⁷ Although this thought is common, it is wrong; many harmful clauses are often enforced. Sixth, we think that the company has power over us, and we are stuck with what it imposes on us. Finally, an important reason we do not read boilerplate is that we do not believe we will ever be in need of exercising our background legal rights.³⁸ We do not expect to have misfortune befall us. As psychological research has shown, we are not able to make an accurate assessment of the risks.³⁹

Given the seven reasons why we do not read boilerplate schemes, they are problematic on the issue of consent. Because boilerplate schemes do not demonstrate the kind of consent that is presupposed by the notion of freedom of contract, they can be understood as a “normative degradation” of our legal system. Legal theorists and market apologists have attempted to cope with this degradation in various ways that amount to a devolution or decay of the idea of voluntary choice. This is a serious decay because

³⁵ See, e.g., *Jelcich v. Warner Bros., Inc.*, No. 95 CIV. 10016(LLS), 1996 WL 209973, at *2 (S.D.N.Y. Apr. 30, 1996) (finding that enforcing a forum-selection clause would be unreasonable because the plaintiff had not even read it).

³⁶ Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 447 (2002) (citing Daniel T. Ostas, *Postmodern Economic Analysis of Law: Extending the Pragmatic Visions of Richard Posner*, 36 AM. BUS. L.J. 193, 229 (1998); Stephen J. Ware, *A Critique of the Reasonable Expectation Doctrine*, 56 U. CHI. L. REV. 1461, 1482 (1989)).

³⁷ *Id.* (citing Ostas, *supra* note 36, at 229; Ware, *supra* note 36, at 1481).

³⁸ See Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. CONT. L. 1, 15 (2009).

³⁹ See generally DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); Christine Jolls, Cass R. Sunstein & Richard H. Thaler, *A Behavioral Approach to Law and Economics*, in *BEHAVIORAL LAW AND ECONOMICS* 38 (Cass R. Sunstein ed., 2000). The body of psychological research investigating heuristic biases or bounded rationality has become relevant to legal analysis, particularly as a challenge to assumptions of rationality made by theorists of law and economics. *Id.* at 1. See also RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 25–26 (2008).

the idea of voluntary choice is at the root of the underlying commitment to freedom of contract.

The boilerplate schemes in World B use the word “agreement” because that is the traditional word used for a contract. They are, however, using it in an Orwellian manner. The usual software End User License Agreement (EULA) is not what normal speakers would consider an agreement on the part of the user.⁴⁰

Procedures construed as acceptance have also been transmogrified. It has always been possible in traditional contract law to signify voluntary acceptance by a specified procedure, such as, signifying agreement to purchase by retaining or modifying a product sent on approval.⁴¹ Consider, however, the following (paraphrased) statement: “By looking at this website, you have agreed to a lot of internal boilerplate you do not know is there, as well as whatever changes the website owner might make from time to time.” That pushes the traditional possibility of specified agreement procedure to an absurd length. One cannot make something into an agreement just by using that word.

The gerrymandering of the word agreement, along with the various other attempts to fit World B into the World A paradigm of voluntary transfer by agreement can be viewed as a sort of devolution or decay of the concept of voluntariness. Agreement gets assimilated to consent, and then to assent. Assent then becomes blanket assent to unknown terms, provided they are what a consumer might have expected.

The notion of blanket assent was apparently introduced by the great contract reformer, Karl Llewellyn.⁴² Llewellyn described blanket assent as follows:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the more broad type of the transaction, but one thing more. The one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent term the seller

⁴⁰ Lothar Determann & Aaron Xavier Fellmeth, *Don't Judge a Sale by Its License: Software Transfers Under the First Sale Doctrine in the United States and European Community*, 36 U.S.F. L. REV. 1, 18 (2001).

⁴¹ See RESTATEMENT (SECOND) OF CONTRACTS § 30 (1981).

⁴² KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (William S. Hein & Co. 1996) (1960).

may have on his form . . . [that does] not alter or eviscerate the reasonable meaning of the dickered terms. The fine print that has not been read has no business to cut under the reasonable meaning of those dickered terms which constitute the dominant and only real expression of agreement, but much of it commonly belongs in.⁴³

Llewellyn excluded “unreasonable” or “indecent” terms from enforceability under blanket assent. Whatever Llewellyn may have meant by “indecent” in this context, his notion of blanket assent has played out in subsequent attempts to provide for exceptions to enforceability for unknown terms not within the recipient’s “reasonable expectations,”⁴⁴ or for unknown terms not “radically unexpected.”⁴⁵ Assent devolves to fictional or constructive assent, then to fictional or constructive opportunity to assent, then to notice that the terms exist, and then to fictional or constructive notice of terms.⁴⁶ Fictional or constructive notice further devolves to as-if or hypothetical consent, and from there to the elimination of consent entirely; that is, to mere (allegedly) efficient rearrangement of entitlements.⁴⁷

Rather than explore in more detail the devolution of consent and the various attempts to assimilate receipt of boilerplate to consensual transacting, which must await fuller treatment in my book, this article summarizes and critiques the three strategies used by those who wish to find that everything is all right in boilerplate land—those who wish to find that World B schemes by and large fulfill the requirements of consent inherent in the theory of contract.

⁴³ *Id.*

⁴⁴ RESTATEMENT (SECOND) OF CONTRACTS § 211. The “reasonable expectations” doctrine is now largely limited to insurance contracts. *Id.* at cmt. c. *But see* W. David Slawson, *BINDING PROMISES: THE LATE 20TH CENTURY REFORMATION OF CONTRACT LAW* 52 (1996) (commenting that the reasonable expectations are the contract, not the written contract). Courts, however, may and often do consider consumers’ reasonable expectations from a service provider when adjudicating cases under other doctrines, such as unconscionability. *Id.* at 143.

⁴⁵ Randy Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 637–43 (2002).

⁴⁶ *Id.* at 638, 640–43.

⁴⁷ *Id.* at 643.

1. *Strategy One: Expand the Meaning of Consent to Terms to Mean Keeping a Product Without Reading the Terms, or Performing Some Other Action Specified by the Sender as Signifying Agreement*

Rolling contracts (money now, terms later) use this procedure.⁴⁸ By keeping the product for a certain amount of time, says the boilerplate accompanying the shipment, the recipient “agrees” to be bound by the boilerplate.⁴⁹ By browsing this site, the TOS on an interior page of the website announces, the user “agrees” to be bound by the boilerplate on that interior page.⁵⁰ This strategy may seem plausible if the recipient actually knows that the terms exist or will be coming later, and if she actually knows what they might contain. These are big “ifs.” The TOS strategy simply ignores the existence of situations that I call sheer ignorance—situations in which recipients do not know that rights are being divested. It also ignores the fact that routine actions that people perform cannot by fiat be taken to signify agreement. By walking past a sign have you agreed?⁵¹ By sneezing have you agreed?

2. *Strategy Two: Expand the Meaning of Consent to Terms to Include Assumption of the Risk that the Terms Are Onerous*

In this strategy, the reasoning is that if you know there are terms, then you must also know you are risking something by not reading them. The knowledge that a risk exists is enough to bind you to the terms.⁵²

Two ways of questioning this reasoning are by arguing that the recipient may not know there are terms,⁵³ and if the recipient knows that there are terms, the recipient may not know the nature of the risk. For

⁴⁸ See, e.g., Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 743–44 (2002).

⁴⁹ *Id.* at 744. See also the contract validated by Judge Easterbrook in *Hill v. Gateway*, 105 F.3d 1147, 1148, 1151 (7th Cir. 1997).

⁵⁰ See, e.g., *Legal Restrictions*, CGI, <http://www.cgi.com/en/legal-restrictions> (last visited Jan. 22, 2012).

⁵¹ See, e.g., ‘*Covert Affairs*’ Not Covert About Filming in D.C., *THE EXAMINER* (Aug. 31, 2011, 12:10 PM), <http://washingtonexaminer.com/blogs/yeas-nays/2011/08/covert-affairs-not-covert-about-filming-dc> (describing a sign alerting people in D.C. that they are being photographed by the television show, “Covert Affairs,” and “they might unintentionally end up in the background of the TV series”).

⁵² See Ben-Shahar, *supra* note 38, at 9–10.

⁵³ *Id.* at 12.

example, the recipient may not know that very important rights, such as the right to redress of grievances or the right to jury trial, are at stake.⁵⁴

With respect to a recipient who knows that there are terms, defenders of boilerplate schemes have analogized the situation to a risk that one knows, such as buying a lottery ticket when one knows there is a significant risk of losing.⁵⁵ The lottery analogy is inapt if one does not know what the risk is, or if the risk impacts an important right, such as loss of all remedies besides repair or replacement or loss of right to sue in court. Would these defenders wish to argue that a person can be “consenting” to take a serious type of risk (loss of right to bring action to court) when the only risk the person knows about—or “the reasonable person” knows about—is another type of less serious risk (product may not perform optimally)? If these theorists wish to argue this persuasively, they have yet to do so.

Next, what if a person allegedly subject to the boilerplate terms does not even know of their existence? That is, what if the case is one of sheer ignorance? As mentioned, it is one thing if the recipient knows what the risk is, and it is another thing if the person does not. It is yet another thing if one does not even know one is taking a risk. Can you choose to take a risk if you do not know there is a risk? Does this mean you are taking the risk that you might be taking a risk?

How would we know that someone—or “the reasonable person”—meant to do that? Even if we could know that someone meant to assume the risk of taking a risk, or even if we imagined we could impute such intent to that person based upon what we think a “reasonable” person would intend, we would be on very thin ice to assume that this imputation could be the basis to find real consent to affirm divestment of significant legal rights. If a scholar or a judge says that this is freedom of contract, the scholar or judge is indulging in legal fiction.

Finally, a third strategy, finds consent to boilerplate schemes by retreating to the notion of hypothetical consent. This can also be referred to as as-if consent.

⁵⁴ *Id.* at 14.

⁵⁵ *Id.* at 9.

3. *Strategy Three: Resort to Hypothetical Consent: A Reasonable Person in Your Position Would Have Consented, Therefore Action Affecting You Is Justified as if You Consented*

As mentioned earlier, a common defense of boilerplate schemes is that creating a constricted legal universe for recipients saves money for the firm, and the firm passes those savings on to recipients in the form of lower prices. These recipients would then choose (if they had the choice, and if they were “rational” economic actors) to trade their rights for the lower prices. In other words, a reasonable person—meaning the economically rational person—would choose this.⁵⁶ This is the final stage in the decay of the idea of agreement; the attempt to do away with individual consent altogether.⁵⁷

B. *Hypothetical Consent: To The State, To Laws, To Boilerplate?*

Many liberal political theories rely on hypothetical consent to arrive at justification of the political state based upon consent of the governed. John Rawls’s theory of justice is an example.⁵⁸ It is disputed, of course, whether hypothetical consent is a proper procedure for arriving at the parameters of a just political state.⁵⁹ Even if hypothetical consent is an appropriate procedure for justifying a form of political state, can hypothetical consent also be an appropriate procedure for justifying individual contracts under the enforcement rules of the state?

Our consent to the state is hypothetical or weak at best, and our consent to the operation of the laws of the state upon us is hypothetical or weak at best. It might be thought that because consent to a boilerplate

⁵⁶ See *id.* at 15–16 and *supra* text accompanying notes 27–29.

⁵⁷ It is important to note that hypothetical consent is distinct from the objective theory of contract, which is a way of interpreting a person’s words and actions as amounting to actual (not as-if) consent. See *supra* note 26 and accompanying text.

⁵⁸ JOHN RAWLS, A THEORY OF JUSTICE (1972). By “liberal” I do not mean here the opposite of “conservative,” but rather the traditional western theories of political thought, based on the rule of law, consent of the governed, and private ordering by individuals exercising freedom of contract under a system maintained by the state.

⁵⁹ See, e.g., Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 313–16 (2000) (discussing actual consent theorists such as John Locke, Jean-Jacques Rousseau, and Ronald Dworkin); Ronald Dworkin, *The Original Position*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS’ A THEORY OF JUSTICE* 16, 17–18 (Norman Daniels ed., Stanford Univ. Press 1989) (1975) (“[H]ypothetical contracts do not supply an independent argument for the fairness of enforcing their terms.”).

scheme is dubious, but allegedly no weaker, there is no problem or no greater problem with holding these contracts to be just as binding on us as the laws of the state.

This line of thought is questionable. There is no easy parallelism between consent to the existence of the state and consent to be bound by the laws of the state on the one hand, and consent to purportedly contractual terms promulgated by firms using a boilerplate scheme on the other. In a democracy, we have a voice to try and change the character of the state and the laws of the state.⁶⁰ That is difficult in practice, but it is the bedrock commitment of democracy.⁶¹ By contrast, in boilerplate schemes that replace the entitlements of the state with the entitlements desired by firms, we have an available exit (we can refuse to buy the product or service), but we have no voice.⁶² That is why they are called take-it-or-leave-it contracts.

More important for distinguishing between consent to the state and its laws versus consent to boilerplate is the distinction between public and private ordering. The laws of the state are expected to be promulgated in the public interest, not in the private interest of a particular firm.⁶³ Boilerplate schemes are in the interest of the firm, its market strategy, and its profits.⁶⁴ We should not routinely justify private schemes promulgated by boilerplate schemes in the same way we justify public regimes promulgated by the state. To do so leads to democratic degradation, as discussed in Part IV.

Finally, at least in modern theories, the notion of consent when talking about justification of the state and its laws functions only as a metaphor, a

⁶⁰ See ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 30–32 (1970).

⁶¹ See *id.* at 31–32; THE FEDERALIST NO. 10 (James Madison).

⁶² See HIRSCHMAN, *supra* note 60, at 21.

⁶³ See, e.g., 21 C.F.R. § 10.40(a)(ii) (2011) (“The petition substantially shows that the proposal is in the public interest and will promote the objectives of the act and the agency.”).

⁶⁴ Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1227 (2006) (citing Robert B. Ahdeih, *The Strategy of Boilerplate*, 104 MICH. L. REV. 1033, 1035 (2006); Ben-Shahar & White, *supra* note 28, at 965; David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 1009 (2006)).

device to facilitate political reasoning.⁶⁵ For example, John Rawls does not suggest that his “original position” exists in real life, but rather he explains that it is merely a heuristic device to help us reason about the proper general principles applicable to a justifiable political state.⁶⁶ By contrast, the features of the state that are supported and justified by this sort of heuristic reasoning are justified only if they really exist in practice, not merely if they can be posited as a metaphor to assist reasoning.⁶⁷ The rule of law, for example, is expected to exist in practice in a justified state, not merely as a metaphor or a reasoning device; to the extent that states fail to follow the precepts of the rule of law, they may be considered unjustified.⁶⁸

The background theory that justifies exchanges under consensual transfers (contracts) is another example. A liberal state that fails to set up proper rules for enforcing contracts that are instantiations of freedom of contract, and that does enforce those that are not instantiations of freedom of contract, would not, at least in that respect, be a justified state.⁶⁹ The underlying theory of contract that is derived from the general notions of the parameters and functions of a liberal state (individual freedom in particular) involves consent to divestment of individual entitlements by means of contract; that consent is still meant to be real.⁷⁰ Freedom of contract is not a metaphorical, heuristic reasoning device. It is expected to exist in real life. Hypothetical consent does not substitute for real consent when it comes to freedom of contract.

⁶⁵ Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 12 (1989–1990).

⁶⁶ RAWLS, *supra* note 58, at 12. Rawls’s “original position” is a situation in which we imagine that people come together to reason about justice under circumstances in which people do not know what their status in life would be. It is supposed to make it easier to formulate general principles applicable to all, whether well or poorly endowed, lucky or unlucky in life, etc. *Id.* at 17–22.

⁶⁷ *Id.* at 13.

⁶⁸ On the precepts of the rule of law, see, for example, Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 782–83 (1986). See also LON L. FULLER, *THE MORALITY OF LAW* 122 (1964).

⁶⁹ Therefore, if our legal system is in practice deeming millions of transactions that are not instantiations of freedom of contract, to be enforceable divestment of entitlements, the justification of the underlying political state is thereby undermined.

⁷⁰ See A. John Simmons, *Consent Theory for Libertarians*, 22 SOC. PHIL. & POL. 330, 341–43 (2005).

Using the terms agreement, consent, freedom of contract, and others for procedures that are not actually consensual in any normal sense causes normative degradation for the system. Efforts to assimilate World B procedures to the consent envisioned in World A remain unconvincing. Without mental slight of hand—which, being a mental activity, perhaps we should call slight of brain—delivery of boilerplate just does not *ipso facto* assimilate to freedom of contract. These considerations lead us to the issue of democratic degradation.

IV. BOILERPLATE AND DEMOCRATIC DEGRADATION

The problem of democratic degradation caused by some instances of mass-market boilerplate schemes has been less noticed than the problem of normative degradation caused by the lack of real consent. Mass-market boilerplate schemes can delete large swaths of legal rights that are granted through democratic processes and instead substitute the system of rights that the firm wishes to impose.⁷¹

Just as we are required to obey the law if we want to live where that law holds sway, firms that promulgate boilerplate terms require us to be bound by their terms if we want to engage in the transaction. I call this deletion of legal rights a problem of promulgated superseding rights regimes. Such regimes, when they are unchallenged or when courts uphold them, replace or supersede the law of the state with the “law” of the firm.⁷² A firm supersedes the basic right to jury trial when it promulgates an arbitration clause causing the right to jury trial to “vanish” (to quote several U.S. federal appellate courts).⁷³ A firm supersedes the individual’s right to bring suit for harm caused by the fault of another by promulgating a different regime in which the firm cannot be sued for injuries caused by the firm’s fault.⁷⁴ Recipients must enter the firm’s legal universe to engage in transactions with the firm.

⁷¹ See Radin, *supra* note 64, at 1233.

⁷² See Margaret Jane Radin, *Regime Change in Intellectual Property: Superseding the Law of the State with the “Law” of the Firm*, 1 U. OTTAWA L. & TECH. J. 173, 178 (2003–2004).

⁷³ See, e.g., *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 506 (6th Cir. 2004) (quoting *Bank One, N.A. v. Coates*, 125 F. Supp. 2d 819, 834 (S.D. Miss. 2001), *aff’d*, 34 F. App’x 964 (5th Cir. 2002); *Marsh v. First USA Bank*, 103 F. Supp. 2d 909, 921 (N.D. Tex. 2000)).

⁷⁴ Many courts in the United States are now upholding some kinds of exculpatory clauses releasing a tortfeasor for liability for its own negligence, especially with respect to summer camps, workout facilities, ski resorts, travel, and other places people might get
(continued)

A. *Deleting Rights*

The most obvious democratic degradation is the way boilerplate schemes bypass political debate and procedures. The entitlement regimes that boilerplate schemes delete have been enacted through democratic processes—often with extended debate and fierce political struggle—while deleting them only requires drafting boilerplate (or indeed just copying someone else's). Why did the U.S. Congress debate reform of the Copyright Act for years,⁷⁵ for example, if the resulting legislative regime can be restructured in minutes by a firm promulgating a boilerplate regime? When firms can easily divest recipients of entitlements that are part of a scheme that democratic processes have arrived at only after difficulty, debate, and compromise, it makes the apparatus of democratic governance look like a sham. All of the public input, hard-fought compromises, and trade-offs seem like an ironic form of theatrics. What is worse is that well-funded interests lobbying in the legislative arena may be debating and entering into compromises just for show.⁷⁶ These firms may reasonably expect that whatever political compromises they make can be easily rescinded with a boilerplate scheme.

hurt. *See, e.g.,* *Newton's Crest Homeowners' Ass'n v. Camp*, 702 S.E.2d 41, 47 (Ga. Ct. App. 2010) (quoting Lanier at *McEver v. Planners & Eng'rs. Collaborative, Inc.*, 663 S.E.2d 240, 242 (Ga. 2008)) ("As a general rule, a party may contract away liability to the other party for the consequences of his own negligence without contravening public policy, except when such an agreement is prohibited by statute."), *aff'd*, *Kennedy Dev. Co., Inc. v. Camp*, No. S11G0274, 2011 WL 5830482, at *1 (Ga. Nov. 21, 2011); *City of Santa Barbara v. Superior Court*, 161 P.3d 1095, 1102–03 (Cal. 2007). Generally, however, medical negligence cannot be excused by an exculpatory clause, though that position is being questioned. *See, e.g.,* William H. Ginsburg et al., *Contractual Revisions to Medical Malpractice Liability*, LAW & CONTEMP. PROBS., Spring 1986, at 253, 255. *See also* THALER & SUNSTEIN, *supra* note 39, at 207. Moreover, courts have not held that a firm can release itself from gross negligence, recklessness, or intentional harm—but firms put blanket releases into their boilerplate anyway. *See, e.g., City of Santa Barbara*, 161 P.3d at 1097, 1102.

⁷⁵ *Lotus Dev. Corp. v. Paperback Software Int'l*, 740 F. Supp. 37, 47 (D. Mass. 1990).

⁷⁶ Thanks to Professor Kim Krawiec for this suggestion. *Cf.* Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663, 673–76 (2004) Powerful interest groups frequently compromise on legislation, portray the results as a big victory, and then take advantage of uninformed voters by undermining the legislative mandates in disputes before courts and agencies. *Id.*

Democratic ordering as we know it is certainly non-ideal. Why should we care about this sort of democratic degradation?⁷⁷ We should care because democratic procedures at least give us voice in the structuring of regimes we must live under—not ideally, but not wholly theoretically either.⁷⁸ We can “vote ‘em out” if we do not like what “they” enact. We do not have a voice when we are made subject to take-it-or-leave-it boilerplate schemes. We have an exit—we can leave it rather than take it—but we cannot change it.⁷⁹ We have an exit in that we can refuse to buy the product or service, but we do not have a voice.⁸⁰

Sometimes defenders of boilerplate schemes say that exit from form contracts is easy,⁸¹ but actually exit is often almost impossible.⁸² Exit may be almost impossible because of the seven reasons not to read the terms mentioned earlier⁸³—especially the leading one that the recipient would not understand the terms if the recipient did read them, so why waste the time? Also important is our stubborn tendency to feel that misfortune or serious difficulties will befall other people but not ourselves.⁸⁴ When buying a product, most people do not think that they may later have to sue someone about it.⁸⁵

Exit may be almost impossible for market structural reasons as well. Many products that consumers need to purchase are sold by only one supplier, or by a group of suppliers who all use the same set of terms.⁸⁶ If

⁷⁷ Someone might well argue that there are worse degradations, such as the increasing role of private corporate money in all aspects of U.S. political structure. Privatization of prisons, armies, and police, might all be worse than privatization of legal rule-promulgation. These are topics that I must leave to other scholars. See, e.g., William J. Novak, *Public-Private Governance: A Historical Introduction*, in *GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 23 (Jody Freeman & Martha Minow eds., 2009).

⁷⁸ HIRSCHMAN, *supra* note 60, at 30–32.

⁷⁹ *Id.* at 3–4.

⁸⁰ *Id.*

⁸¹ See *id.* A common response is often, “What is the problem? Just don’t buy the product or service to which the form contract is attached.”

⁸² See *supra* Part III.A.

⁸³ See *supra* Part III.A.

⁸⁴ See Ben-Shahar, *supra* note 38, at 15.

⁸⁵ See *id.*

⁸⁶ See James McI. Henderson & William H. Henderson, *The Race to Oligopoly*, 1968 *DUKE L. J.* 637, 644 (1968).

something important to life or work is sold with a restricted legal universe promulgated by a monopoly supplier, or one that is the same for all suppliers, it is not a realistic option for the recipients to do without the product because they do not want to have their rights divested,⁸⁷ even if they can, and do, read and understand the boilerplate. Two examples that illustrate these issues relate to information user rights and rights to redress of grievances.

1. Example One: Federal IP Regimes and User Rights

The primary intellectual property regimes are comprehensive schemes of positive law enacted by Congress.⁸⁸ They grant certain entitlements to holders and withhold others.⁸⁹ In other words, the federal regimes of information propertization have left some uses free of ownership and therefore have created user rights. Anyone may make, use, and sell someone else's obvious product, and a patent on such a product would be invalid; anyone may copy and publish ideas rather than expression of ideas because there is no copyright on ideas; and anyone may use a trademark (such as "aspirin") that has become a generic descriptor.

These types of user rights are the rights that firms seek to cancel by means of boilerplate schemes.⁹⁰ Many of us are governed by the Microsoft EULA and not by the Congressional law of copyright. This EULA greatly expands the rights granted by Congress to copyright holders, and greatly diminishes the rights of users.⁹¹ For example, we are routinely told that nothing on a site can be copied, even if some of the information is in the public domain. Some EULAs attempt to eliminate reverse engineering of the software,⁹² or even preclude publishing a critical review.⁹³

⁸⁷ See Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 1009 (2006).

⁸⁸ Paul J. Heald & Suzanna Sherry, *Implied Limits on the Legislative Power: The Intellectual Property Clause as an Absolute Constraint on Congress*, 2000 U. ILL. L. REV. 1119, 1119–20 (2000).

⁸⁹ See *id.* at 1165–66.

⁹⁰ See Hillman & Rachlinski, *supra* note 36, at 468.

⁹¹ Rebecca K. Lively, *Microsoft Windows Vista: The Beginning or the End of End-User License Agreements as We Know Them?*, 39 ST. MARY'S L. J. 339, 346–47 (2007).

⁹² Roger E. Schechter, *Unfairness of Click-On Software Licenses*, 46 WAYNE L. REV. 1735, 1738 (2000).

⁹³ Genelle I. Belmas & Brian N. Larson, *Clicking Away Your Speech Rights: The Enforceability of Gagwrap Licenses*, 12 COMM. L. & POL'Y 37, 38 (2007).

To be sure, the criticism here might be inapposite or overblown if users routinely had a choice to purchase or use whatever goods are covered by these mass-market boilerplate schemes under other more user-friendly terms. So far, we do not observe, even at a higher price, widespread user-friendly terms available to those who dislike the terms in boilerplate waivers.⁹⁴

2. *Example Two: Redress of Grievances*

Mass-market boilerplate schemes in the United States routinely have the user “agreeing” to arbitration as the sole remedy in case of dispute, precluding litigation and class actions.⁹⁵ Our current Supreme Court strongly favors these “agreements.”⁹⁶ Many mass-market schemes limit remedies to the amount paid for the product, thereby attempting to exclude any kind of consequential damages.⁹⁷ The presence of these limitations, combined with a ban on class actions, renders a suit against a firm almost never worthwhile.⁹⁸ Arbitration clauses in practice eliminate the remedy.⁹⁹

The boilerplate schemes limiting or eliminating redress of grievances pose troubling questions for the rule of law. How much can a “private” scheme be allowed to undermine “public” remedies for abuse of that very private scheme? If all firms can individually disclaim the public rules of the road, or rather, the legal infrastructure of contract, then we would not be living under a rule of law that makes possible a realm of private ordering.

B. Boilerplate Schemes as Private Eminent Domain

Let us consider the analogy between boilerplate deletions of individual background rights and the taking of property rights. The right to a remedy in court, for example, is an entitlement of the individual which is “taken”

⁹⁴ See Hillman & Rachlinski, *supra* note 36, at 446.

⁹⁵ Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 516–18 (2008).

⁹⁶ See, e.g., *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

⁹⁷ David A. Rice, *Lessons About the Realities of Contract for U.C.C. Article 2 Revision and a Future Software Contract Statute*, 18 RUTGERS COMPUTER & TECH. L.J. 499, 503 (1992).

⁹⁸ Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 324 (2010).

⁹⁹ See, e.g., *AT&T Mobility*, 131 S. Ct. at 1756–62 (Breyer, J., dissenting).

by an arbitration clause.¹⁰⁰ If the government takes property rights, which it may do for public use, that is an exercise of the public power of eminent domain, allowing the government to take private property provided that just compensation is paid.¹⁰¹ A private party has no eminent domain power over another private party, even if just compensation is paid;¹⁰² a private party may not grab something that belongs to you and justify the action by paying you the market price for the object taken. Property rights are expected to change hands between private parties only with the owner's consent, even if a non-consenting owner is paid compensation.¹⁰³

This principle of private ordering puts a significant crimp in the argument that those who lose rights through boilerplate schemes are actually being compensated with cheaper prices, which they arguably would (if they were rational economic actors) have consented to. Even if we believe all of the premises of this argument—that recipients are rational economic actors, that firms are passing on savings, that the amount of savings is equal to the amount appropriate to compensate individuals for the divestment of their entitlements—the boilerplate scheme looks like private eminent domain. The acceptance of such an argument shows both the extent to which the distinction between public and private ordering is being undermined by the practice of promulgating boilerplate schemes, and the threat that this practice poses to the ideal of a realm of private ordering. Widespread private eminent domain by firms divesting people of important legal rights is a democratic degradation that should be confronted explicitly rather than dismissed by claiming that compensation is being paid (a claim which in fact is dubious).

V. WHAT SHOULD BE DONE?

A. *If It Ain't Broke, Don't Fix It?*

So far, this article draws attention to the fact that World B contracts—particularly to the extent that they are part of a promulgated superseding rights regime—place the legal system in a condition of normative and democratic degradation. It therefore becomes necessary to ask the question: What, if anything, can or should be done about it?

¹⁰⁰ See, e.g., David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV., 49, 54 (2003).

¹⁰¹ 26 AM. JUR. 2D *Eminent Domain* § 2 (2004).

¹⁰² 63C AM. JUR. 2D *Property* § 24 (2009).

¹⁰³ *Id.*

One possible answer is, of course, nothing. Perhaps some judges, lawyers, and legal academics—though I suspect not lay people—are quite satisfied with the gerrymandering of consent, such that something a recipient does not read, and would not understand if the recipient did read, can be held to amount to consent.¹⁰⁴ Likewise, perhaps some are quite happy with the idea of hypothetical consent or private eminent domain (liability rules, in the terminology of Calabresi & Melamed¹⁰⁵) replacing the notion of actual consent. I suspect, though, that many who accept the gerrymanders do not find them all that satisfactory, but rather think that it is not worth the time and effort it would take to treat the World B “contracts” according to the traditional rationale of contract law; in other

¹⁰⁴ Of course, we certainly might increase regulation of boilerplate schemes by legislative or administrative legal entities, ranging from piecemeal interventions into particular markets to the European Union’s scheme of comprehensive regulation. Regulation of various kinds is well-worth exploring, and I will do so in my forthcoming book. See Radin, *supra* note 10. Consumer advocates might well think that the most straightforward solution would be for the Federal Trade Commission to develop a list of clauses that will be prima facie considered an unfair method of doing business. At present, calls for regulation tend to receive a hostile reception in the United States and the prospect of achieving a regulatory solution is not hopeful.

¹⁰⁵ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1107 (1972). The term “liability rules” has proved enormously popular for describing situations, such as eminent domain, in which a party can be divested of rights upon payment of compensation determined by a third party, such as a court or an agency. The term was meant to contrast with “property rules,” in which an entitlement holder may sell an entitlement at any price the holder determines, and indeed need not part with an entitlement at all if the holder does not wish to do so. Calabresi & Melamed wrote that liability rules would be justified in situations where property rules would fail (that is, operate inefficiently) because of economic difficulties, particularly coordination costs. They certainly did not expect or attempt to justify massive devolution of consumers’ property-rule entitlements into liability-rule entitlements. Normally freedom of contract implies a property rule: one is free not to sell off one’s entitlements, as well as free to set the price at which the holder would agree to an exchange. Massive changing of property rules into liability rules would mean that those more powerful, if only they paid compensation, could “rip off” others at will. Worse, in the boilerplate situation, the “compensation” is determined by the powerful parties themselves and not by a third party such as a court. Still worse, we have no way of knowing if in fact there is any actual compensation being paid because we have no way of knowing whether and to what extent firms pass on savings versus whether they just pocket them.

words, we will just have to put up with the normative degradation. So much of market trading depends on these types of “contracts” that it would be an economic disaster to undermine their enforceability.¹⁰⁶

By the same token, perhaps some lawyers and academics find it quite satisfactory to collapse the distinction between entitlement rules promulgated by the state through democratic processes, supposedly for the benefit of everyone, and entitlement rules promulgated by a firm, decidedly for the benefit of the firm alone. In particular, some public choice or political economy theorists might be happy with this collapse. For political economists, actions taken through democratic processes are appropriately conceived of as maximization of preference satisfaction by political actors,¹⁰⁷ in the very same way that actions by persons or firms are described as maximization of preference satisfaction by persons or firms. This way of thinking imagines that a firm’s managers would ask themselves, “Shall we purchase legislation deleting user rights by contributing to politicians (whose votes are for sale because they too are maximizing profit), or shall we delete our customers’ legal rights by using a boilerplate scheme?” The firm’s managers would then likely say to themselves, “Even if it causes some harm to our reputation, boilerplate deployment is cheaper than legislation, so let’s go with that.”

Lay people may be dismayed by the normative degradation of widespread and routine gerrymandering of the idea of consent. I do not, however, think that many lay people are dismayed by the widespread and routine devolution of basic entitlement structuring to private firms, because I do not think they realize that it is happening. I think that many lay people do not realize that private firms, by promulgating incomprehensible boilerplate schemes, can easily do away with basic legal rights such as adequate redress of grievances.

B. Sturdy Indefensible?

Fowler’s *Modern English Usage*, a classic book on English grammar and style, refers to a concept of “sturdy indefensibles.”¹⁰⁸ Sturdy indefensibles are ungrammatical expressions which we nevertheless admit

¹⁰⁶ See, e.g., Stephen J. Choi & G. Mitu Gulati, *Contract as Statute*, 104 MICH. L. REV. 1129, 1130 (2006).

¹⁰⁷ Lillian R. BeVier, *The Issue of Issue Advocacy: An Economic, Political, and Constitutional Analysis*, 85 VA. L. REV. 1761, 1779–80 (1999).

¹⁰⁸ H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE xvii (Sir Ernest Gowers ed., Oxford University Press 2d ed. 1965) (1926).

to English usage, such as “It’s me” instead of “It’s I.” The notion of sturdy indefensibles also appears in the iconic American cookbook, *The Joy of Cooking*,¹⁰⁹ to describe a cookie recipe that is not especially good, but uses up egg yolks that the cook has on hand after making angel food cake or meringues with the egg whites.¹¹⁰ Shall we say that mass-market World B schemes that delete important rights are another form of sturdy indefensible? They do not fit the grammar of the legal infrastructure of contract law as it is used as part of the private ordering regime that justifies the state in the ideals of political liberalism that undergird our system. Nevertheless, they are thoroughly ensconced in practice. Shouldn’t practice win out over theory? Shouldn’t widespread usage win out over “grammar”?

English grammar is one thing, and so are recipes, but the rule of law and the justifiability of divestment of entitlements are another thing entirely. For anything that is economically necessary, upon full consideration, there should be some solution that does not make us apply the word “indefensible” to it. If firms must have some ability to restructure the legal environment for themselves, there must exist legal solutions more compatible with the underlying commitments of legal infrastructure and the rule of law.¹¹¹ It is also possible that some of the “sturdy indefensible” practices may not actually be economically necessary. The practices considered necessary in the United States are not considered necessary in other places whose economies function just as well, if not better, than ours.¹¹²

¹⁰⁹ IRMA S. ROMBAUER & MARION ROMBAUER BECKER, *THE JOY OF COOKING* (PLUME 1973) (1931).

¹¹⁰ *Id.* at 663.

¹¹¹ Part of my general project is to canvass these possibilities. See Radin, *supra* note 10. I briefly describe a few of them in this article.

¹¹² See, e.g., *Unfair Contract Terms Directive (93/13)*, EC CONSUMER L. COMPENDIUM, http://www.eu-consumer-law.org/consumerstudy_part2c_en.pdf (last visited Jan. 26, 2012) (disallowing in European Union consumer contracts many of the boilerplate terms that are common in the United States). The varying implementation of the Directive by member states is described in STUDY GROUP ON A EUROPEAN CIVIL CODE & RESEARCH GROUP ON EC PRIVATE LAW (ACQUIS GROUP), *PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE 628–67* (Christian von Bar and Eric Clive eds., 2010).

C. Could We Reconceptualize Boilerplate as Governed by Tort Rather than Contract Law?

Most law and economics scholars view the terms that come with a product as part of the product, not a contract about the product.¹¹³ The terms, they say, are not contracts as we have previously conceived contracts—a set of words delineating a bargained-for exchange constituting a transactional deal that is about something else.¹¹⁴ That something else is an object or procedure, a product or service that is the object of the transaction.¹¹⁵ Instead, as an oft-quoted judge wrote in an opinion considering a sale of software, the composite product is really the

¹¹³ Baird, *supra* note 87, at 933–34. For example, this prevailing contemporary view is espoused by Douglas G. Baird, a former Dean of the University of Chicago Law School, as follows:

The warranty that comes with your laptop computer is one of its many product attributes. The laptop has a screen of a particular size. Its microprocessors work at a particular speed, and the battery lasts a given amount of time between recharging. The hard drive has a certain capacity and mean time to failure. . . . Then there are the warranties that the seller makes (or does not make) that are also part of the bundle. Just as I know the size of the screen, but nothing about the speed of the microprocessor, I know about some of the warranty terms that come with the computer and remain wholly ignorant of the others. . . . To say that a product comes with boilerplate is to say that one of its attributes, along with many others, is partially hidden and is one over which there is no choice on the part of the buyer. But why should any of this raise special concern? . . . Hidden product attributes over which sellers give potential buyers no choice are a commonplace, necessary, and entirely unobjectionable feature of mass markets.

Id. at 933, 939. This view causes Baird to think that the debate surrounding lack of consent to boilerplate terms is puzzling. *Id.* at 933, 950–52. This view originated with Arthur Leff in 1970 and was further developed by Lewis Kornhauser in 1976. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 146–47 (1970); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1168 (1976). It has steadily gained adherents and today is the most commonplace view among adherents of economic analysis of contract law. See Baird, *supra* note 87, at 939.

¹¹⁴ Leff, *supra* note 113, at 146–147; Kornhauser, *supra* note 113, at 1168.

¹¹⁵ Leff, *supra* note 113, at 146–147; Kornhauser, *supra* note 113, at 1168.

“bundling of hardware and legal-ware.”¹¹⁶ One might say that clauses internal to a product are no different from gears or printed circuits that are inside a product; either way the recipient need not know much about them, at least in a properly functioning market.¹¹⁷

Given that law and economics is reconceptualizing boilerplate terms into components of a composite product, we should recognize that, like any other product, this composite product could be defective. Thus, we might regulate the practice of firms changing the legal universe applicable to them under the primary legal regime applicable to defective products. In other words, they could be regulated under tort law rather than under contract law, and therefore, with the limitations and safeguards provided by tort law rather than by contract law. I find this idea more promising than trying to strengthen and rationalize contract policing tools.¹¹⁸

The boundary between contract and tort is not hard and fast. The idea of detaching certain doctrines and practices from contract law and assimilating them to tort law has a long history.¹¹⁹ Perhaps the most well-known example is the progress from warranty to product liability.¹²⁰

¹¹⁶ Hill v. Gateway, 105 F.3d 1147, 1150 (7th Cir. 1997).

¹¹⁷ See Baird, *supra* note 87, at 933–34. Of course, we should not assume that all or most markets are properly functioning in the sense needed; that is an empirical and not a theoretical question. It depends upon (at least) the existence of at least some segment of the demand curve with sufficient understanding of the product attributes to arrive at the competitive price, plus a reasonably competitive market structure. Kornhauser, *supra* note 113, at 1170, 1179, 1181.

¹¹⁸ Contract policing tools include primarily the doctrines of unconscionability and voidness as against public policy. For reasons that I am not addressing in this article, I do not have much hope that the traditional policing tools of contract law can be reformed to take care of whatever is troublesome about boilerplate regimes.

¹¹⁹ See, e.g., George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461–62 (1985).

¹²⁰ Warranty began as a contract doctrine. RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965). The seller promises to the buyer, the person actually party to the contract of sale, that the product will function as promised (or as impliedly promised, or as it is expected to). JOSEPH M. PERILLO, CALAMARI & PERILLO ON CONTRACTS 309–10 (6th ed. 2009). Warranty migrated into an area more like tort when warranty became applicable to parties remote from the original seller, such as, on the seller’s side, the manufacturer, and on the buyer’s side, a person who receives the product from the original buyer or from someone further down a chain of distribution; or (most tort-like) a person who finds the
(continued)

Mass-market boilerplate schemes are not about two parties bargaining with each other; by definition, these boilerplate schemes are take-it-or-leave-it delivery of terms by the firm to the recipient.¹²¹ They are brought

product in the street (where it blows up and injures him). RESTATEMENT (SECOND) OF TORTS § 402A cmts. b, c. The reason that warranty can be seen as migrating toward tort is because contract is supposed to be about deals between two parties (a situation called privity), whereas tort is supposed to cover other situations of injury.

Exactly how far producers and sellers of products can be liable to anyone who claims that the product is non-functional, not just the immediate buyer, is still a matter of much dispute. See Debra L. Goetz et al., *Article Two Warranties in Commercial Transactions: An Update*, 72 CORNELL L. REV. 1159, 1310–11 (1987). Much of the dispute is now located in the tort category of liability for defective products. *Id.* at 1311. Nevertheless, the overlapping contract category of breach of warranty still exists as well. DAN. B. DOBBS, *THE LAW OF TORTS* 972 (2000). When a non-functional product meets legal criteria for being defective and causes personal injury, that is most likely to be seen as a tort cause of action, whereas when a non-functional product causes economic loss, that is more likely to be seen as a warranty problem in the realm of contract. *Id.* Warranty has been extended by the legal system in some areas to apply to those who are not parties to the original deal but located somewhere else in the chain of distribution. Goetz et al., *supra* at 1312–13. Tort remedies for economic damages, however, are limited in some cases, so a plaintiff who has suffered only economic damages may fare better in contract even if the plaintiff is not a party to the contract, where breach of warranty is involved. See Patricia M. McEntee, *Products Liability—Warranties—the Uniform Commercial Code Provides an Alternative Remedy to Strict Liability in Tort Regarding Injuries Suffered from a Defective Product Without Requiring Privity*, 13 ST. MARY'S L.J. 196, 202–03 (1981).

As the development of the tort doctrine of liability for defective products was developing out of the contractual notion of warranty, warranty itself was expanding beyond the parties to the original transaction. Goetz et al., *supra* at 1310–13. Not only the immediate seller can be held liable but also the manufacturer and perhaps other intermediaries in the supply chain. *Id.* at 1312, 1317. Likewise, not only the immediate purchaser can be the beneficiary of the protection but also those further down the distribution chain, or indeed those unrelated to either the supply chain or the distribution chain (e.g., someone who finds the product on the street). RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965). The expansion of liability to those who are not part of the original transaction, and indeed to those who are strangers to it, makes the notion of warranty a hybrid between contract principles and tort principles. See Richard E. Speidel, *Warranty Theory, Economic Loss, and the Privity Requirement: Once More into the Void*, 67 B.U. L. REV. 9, 25 (1987).

¹²¹ See *supra* notes 6–9 and accompanying text.

into the contract paradigm only with great difficulty, by gerrymandering the notion of consent.¹²² These regimes are more like something happening to a stranger, or at least to someone in less contact with the instigator of the happening than the conceptions underlying contract allow. In other words, these regimes are more like the relationship between the manufacturer of a product and the end user who might wish to claim that the product is defective and has caused him injury, than they are to bargains, exchanges, or voluntary transfers.

Moreover, tort law has developed at least some legal infrastructure (though not without its difficulties) for dealing with mass torts,¹²³ but contract law has not developed an infrastructure for dealing with mass purported contracts.¹²⁴ Because contract law has not developed an infrastructure for aggregate consideration of boilerplate schemes, the structure of contract law makes courts ignore the mass-market aspect of any promulgated superseding boilerplate scheme that comes before them.¹²⁵ Courts are therefore forced to ignore the aspect of democratic degradation caused by mass-market boilerplate schemes, because the doctrinal edifice of contract law gives them no place to put this issue.

Reconceptualizing some mass-market boilerplate schemes under tort law would have the advantage of being able to apply the same body of law to technological protection measures (TPMs). In the digital world, a TPM is often a substitute for a mass-market boilerplate scheme.¹²⁶ For example, instead of using boilerplate terms to announce that a user agrees not to copy a piece of software, the software purveyor can insert code in the software that will disable it if copying is attempted.¹²⁷ In the case of a TPM, the curtailing of user rights is much more literally a part of the product than is a set of boilerplate terms that comes with the product.¹²⁸ If

¹²² See *supra* Part III.B.

¹²³ See, e.g., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). There are other difficulties with application of tort law, such as the economic loss doctrine, and the wariness of some courts of encroachment on what they see as the proper domain for contract.

¹²⁴ David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609 (2010).

¹²⁵ *Id.* at 629.

¹²⁶ See generally John A. Rothchild, *Economic Analysis of Technological Protection Measures*, 84 OR. L. REV. 489, 494–96 (2005).

¹²⁷ *Id.*

¹²⁸ *Id.* at 494–95.

TPMs, or some of them, are more like machines controlling users' range of activities than they are like contracts, then it is not a strain on language and tradition to consider them under the rubric of products that are potentially defective or likely to cause injury to the user.

Therefore, if one accepts the prevalent economic view that boilerplate terms are part of the product that a recipient is purchasing, it seems to make sense to regulate boilerplate by the law that regulates products. Legal argument would be relieved of the need for gerrymandered definitions of agreement, which is no small benefit.

D. What About Market Initiatives?

Market solutions would be a welcome development for many scholars and business people in the United States. Market solutions would appeal not only to those who favor market solutions in general for most issues, as a matter of political principle, but also to those companies or entrepreneurs positioned to profit from such markets. Market solutions, however, tend to raise issues of their own which must be addressed.

What forms might market solutions take? Advocacy groups such as the Electronic Frontier Foundation or the Electronic Privacy Information Center sometimes monitor firms' TOS and can highlight terms that firms should either be proud of or ashamed of.¹²⁹ In this sense, they can be watchdog groups. Firms may then develop best practices of using terms that users would find reasonable. Seals of approval such as Consumer Reports or Verisign might be developed to alert purchasers, either online or offline, that the firms' terms are user-friendly. Internet users themselves might alert each other to threatening terms or changes in terms and push back against the promulgator. Rating agencies might be organized for the purpose of reviewing and rating the terms offered by various firms. Technological filtering approaches or machine bargaining developments can help recipients avoid terms they do not want and select sets of terms they prefer.

¹²⁹ See *The Terms of Service Tracker*, ELECTRONIC FRONTIER FOUND., <http://www.tosback.org/about.php> (last visited Jan. 27, 2012). The Terms of Service tracker was created to help individuals monitor the policies of widely used websites, and show how those websites policies change over time. *Id.* See also *Facebook Privacy*, ELECTRONIC PRIVACY INFO. CENTER, <http://epic.org/privacy/facebook/> (last visited Jan. 27, 2012) (discussing various privacy issues with regard to Facebook, including Facebook changing its users' privacy settings without users' consent).

1. Reputation and Consumer Push-Back

All of the approaches mentioned are private, or market suggestions for improving the normative and democratic acceptability of adhesion contracts. One potentially important private tool is reputation. If watchdog groups monitor firms' TOS and develop lists of onerous terms that users may wish to avoid, firms may wish to avoid being on such a list, because being on such a list may hurt the firm's reputation with its customers.¹³⁰ Similarly, firms may wish to develop best practices, including use of terms that recipients would consider reasonable, and then publicize that fact. Perhaps firms can be encouraged to develop best practices by legal "safe harbors" such as the one proposed by the ALI's Principles of Software Contracting for terms that are made available electronically.¹³¹

Some firms (in specific kinds of markets) will be especially cognizant of the need to maintain good relationships with their users, and therefore responsive to the threat of reputational harm. This will be especially true for firms possessing three characteristics: (1) a business model that requires the presence of users who participate continually; (2) likelihood that the firm's users are reasonably savvy about issues of user rights such as data privacy, information copying, or opportunities for redress of grievances; and (3) the need to survive in a market structure that is reasonably competitive.

Firms that require the presence of users who participate continually are primarily online sites whose revenues are derived from delivering advertising to their users.¹³² Firms whose users are reasonably savvy about

¹³⁰ It is possible to use legislation to bolster this kind of reputational deterrence. For example, a statute can provide that if a firm is found to have engaged in actions that violate consumer protection law, part of the remedy is to publicize the firm's deviations from good practice. See, e.g., the British Columbia Consumer Protection Act, discussed in *Seidel v. TELUS Commc'n Inc.*, [2011] S.C.R. 531, 5–6, 35 (Can.).

¹³¹ PRINCIPLES OF THE LAW OF SOFTWARE CONTACTS § 2.02(c) (2010).

¹³² See Henry H. Perritt Jr., *New Architectures for Music: Law Should Get Out of the Way*, 29 HASTING COMM. & ENT. L.J. 259, 298 ("[M]ajor e-commerce sites such as eBay, Yahoo!, Google, and MSN, offer . . . [advertising] on their Websites."); Sander J.C. Van Der Heide, *Social Networking and Sexual Predators: The Case for Self-Regulations*, 31 HASTINGS COMM. & ENT. L.J. 173, 188 (discussing that because social networking sites do not charge people to use their sites, their operations are financed by selling advertising space and sites that have more users can command higher prices).

user rights are likely to be firms with purely online business models.¹³³ This is because users of these firms' services are likely to be experienced computer and software users and likely have some awareness of user rights issues involving intellectual property, data privacy, and perhaps remedies.¹³⁴ Savvy users may exercise "voice" against such a firm, pushing back against imposition of terms they dislike.¹³⁵ They may also exit if their desires are ignored—something a firm in this position particularly wishes to avoid.¹³⁶ The considerations conducive to consumer pushback will also have more relevance if the market is reasonably competitive, because the incentive to avoid reputational harm is likely to be muted or erased in non-competitive markets.¹³⁷

These three considerations suggest that social networking sites are particularly likely to experience user pushback and be responsive to it.¹³⁸ Indeed, this sort of thing is exactly what happened to Facebook when it tried to impose new rules about privacy.¹³⁹ Other sites with social

¹³³ See Hillman & Rachlinski, *supra* note 36, at 467 ("[E]-consumers must have the understanding and means to own and operate new technologies, [and] tend to be . . . bettered educated . . ."); *Id.* at 478 ("[E]-consumers tend to be better educated and wealthier than paper-world consumers, suggesting that they can better fend for themselves in the marketplace.").

¹³⁴ *Id.*

¹³⁵ See *id.* at 470 ("E-businesses realize that with a few mouse clicks, disgruntled e-consumers can broadcast their dissatisfaction to thousands of potential customers."); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-standard Terms Backfire?*, 104 MICH. L. REV. 837, 839 (2006) (discussing that e-consumers can easily spread information about business terms and this can create an incentive for businesses to write favorable terms for consumers).

¹³⁶ See Hillman, *supra* note 135, at 839 ("[M]andatory website disclosure would help motivate businesses to write fair terms in order to avoid losing customers to competitors with better terms . . .").

¹³⁷ See *id.* at 843 ("[M]arket pressure may be insufficient to discipline businesses." If the market is not competitive "businesses can afford to lose the small cadre of readers and dictate onerous terms to the nonreaders.").

¹³⁸ See Van Der Heide, *supra* note 132 (stating that if social networking sites violate their TOS, they "will likely suffer from user discontent, media scrutiny, and user defection to other sites").

¹³⁹ For a summary of Facebook's privacy problems, see *Criticism of Facebook*, WIKIPEDIA, http://en.wikipedia.org/wiki/Criticism_of_Facebook (last visited Jan. 27, 2012).

networking components, such as LinkedIn, Yahoo!, Google, and perhaps eBay, may also be likely to receive user pushback and be responsive to it.

Cell phone service providers, on the other hand, are apparently less responsive to widespread consumer unhappiness with their contracts.¹⁴⁰ Cell phone companies want to hang on to their customers; indeed, they impose boilerplate provisions that lock customers in, such as large fees for failing to remain with the service provider for two years.¹⁴¹ Cell phone service providers often do not, however, face the other conditions required for successful consumer pushback to police boilerplate schemes: their customers by and large are not savvy about the system and its parameters the way users of social network sites are. It also seems that their market is not competitive in the way that would be necessary for consumer preferences to matter enough to change practice.¹⁴² The bad reputation of cell phone service providers is apparently not harming them enough—relative to the amounts they can save by imposing onerous fees and incomprehensible terms with regard to data transmission, etc.—to incentivize a change in practice.¹⁴³

Cell phone service providers are apparently not worried much about reputational harm.¹⁴⁴ Firms that lack the two characteristics of requiring

¹⁴⁰ Often when I tell people I am writing a book about boilerplate, they tell me, sometimes in awesome detail, about how terrible their cell phone contract is. This is not because they read the fine print before clicking “I agree,” of course, but rather because they were later harmed in some way by it, sometimes over and over again.

¹⁴¹ See *id.* at 503 (discussing early termination fees).

¹⁴² See James P. Nehf, *Shopping for Privacy Online: Consumer Decision-Making Strategies and Emerging Market for Information Privacy*, 2005 U. ILL. J.L. TECH. & POL’Y, 1, 9 (2005) (explaining some experts believe competition among vendors will prevent onerous form contracts).

¹⁴³ See Abdolreza Eshgi et al., *Determinants of Customer Loyalty in the Wireless Communications Industry*, 31 TELECOMM. POL’Y 93, 95, 101 (2007) (arguing data suggests restrictive cell phone contracts and bad reputations are costly to cell providers, but companies nevertheless use these tactics). Someone might argue that cell phone service would have to be even more expensive if the providers were precluded from some of their onerous terms, and that consumers actually prefer the onerous terms because they are saving money that compensates them for the rights they are losing; I have not seen empirical data to support this argument.

¹⁴⁴ See, e.g., Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 352 (2011) (stating that while “businesses concerned with their reputation will . . . be reluctant to enforce harsh contractual terms,” depending on
(continued)

repetitive business and savvy customers may be less inclined to try to keep recipients happy; or, they may be less inclined to feel that their users will notice the terms or be able to do anything about them, especially in a market that is not competitive.¹⁴⁵

In addition to telephone service providers, other providers generally known to have onerous terms are Internet service providers, banks, and other financial firms.¹⁴⁶ For these kinds of firms, private watchdog groups or user pushback are less likely to be efficacious.¹⁴⁷

2. Rating Agencies, Seals of Approval, and Other Approaches

Another private or market approach that can be considered involves rating agencies or stamps of approval by third parties. Under this approach, a disinterested third party can evaluate the terms offered by firms and make it easy for recipients to comprehend whether the terms that come with a product are or are not generally acceptable for users. Firms' boilerplate schemes could be rated in the same manner as bonds, for example, from AAA to CCC or D, and those that are highly rated might be encouraged to advertise that fact. Recipients would know without reading that they are unlikely to find horrible surprises in an AAA rated contract.

Firms' boilerplate schemes could be evaluated and monitored in the way that security structures and precautions are monitored and certified by independent third party entities.¹⁴⁸ Most firms that employ independent security certification entities, however, require security certification to attract customers to deal with them.¹⁴⁹ Customers want to be sure that there are no weaknesses or secret back-door entries in either physical

the "munificence of businesses as protection against legally enforceable harsh terms" is unreliable).

¹⁴⁵ See *id.* at 349–50.

¹⁴⁶ See *id.*; Dodd-Frank Wall Street Reform and Consumer Protection Act § 1011, 12 U.S.C. § 5491 (Supp. IV 2010); RONALD J. MANN, CHARGING AHEAD: THE GROWTH AND REGULATION OF PAYMENT CARD MARKETS AROUND THE WORLD 129–32 (2006); Kate Davidson, *Supreme Court Gives Banks a Win on Arbitration, But Will CFPB Trump It?*, FIN. PLAN., 2011 WLNR 8241900 (Apr. 28, 2011).

¹⁴⁷ See *id.*

¹⁴⁸ See THOMAS J. SMEDINGHOFF, INFORMATION SECURITY LAW: THE EMERGING STANDARD FOR CORPORATE COMPLIANCE 86 (2008).

¹⁴⁹ *Id.* at 65, 89–108 (discussing various types of physical and technical security controls companies should consider implementing).

layout or digital systems.¹⁵⁰ There may be less incentive for firms marketing products or services with boilerplate attached to employ independent certification authorities, because in most cases recipients of boilerplate are not (or not yet) demanding that the boilerplate they receive be certified as safe, user-friendly, or free of horrible surprises. Nevertheless, some firms might get reputational mileage out of doing this and out of advertising it. If that were to happen, others might need to follow to compete effectively. Perhaps this type of a practice could snowball.

Unfortunately, private rating agencies or security certifiers cannot always be trusted to be unbiased. Those who use them will have to be wary of capture. For example, a third party certification agency may have a stake in a security product and may for that reason boost the rating it delivers to those who purchase that product. Those who use such rating agencies will also have to be wary of ideological bias—an independently organized rating group may have as its goal the eradication of the doctrine of unconscionability, for example.¹⁵¹

3. *Automated Filtering or Choice Systems*

Automated contracting—“machine bargaining”—could have the effect of enabling parties who have the capability of using such a system to get terms they want by programming computers with sets of terms acceptable to them and having the machines communicate with each other to create transactions. This type of protocol would cut the cost of many routine transactions. That is the reason why automated supply chain management is an important topic in contemporary operations management engineering.¹⁵² This kind of automated procedure holds out hope for using private market methods for coming to an actual agreement rather than being stuck with possibly conflicting boilerplate terms which tend to create

¹⁵⁰ *See id.*

¹⁵¹ A cautionary tale from the environmental field of forest management can be gleaned from BENJAMIN CASHORE ET AL., *GOVERNING THROUGH MARKETS: FOREST CERTIFICATION AND THE EMERGENCE OF NON-STATE AUTHORITY* 29 (2004). It is evident from the authors’ research that in many areas, forestry firms themselves set up rating agencies to certify themselves. Thanks to Professor Edward A. Parson for this reference.

¹⁵² Michael N. Huhns & Larry M. Stephens, *Automating Supply Chains*, IEEE INTERNET COMPUTING (July–Aug. 2001), <http://cse.sc.edu/~huhns/journalpapers/V5N4.pdf>.

conflict when a particular risk comes to pass.¹⁵³ It seems, however, to be more readily adaptable to firms doing repetitive transactions that can be automated. It is less likely to be available to boilerplate recipients who are consumers. Consumers usually do not engage in repetitive transactions of sufficiently large scale, and therefore consumers normally do not have computer systems that automate transactions (beyond the fact that their personal computers show them boxes to click signaling agreement to terms that they have not read). Is it possible to use automation to enable consumers to get terms they would actually prefer?

There are a few possibilities. Filtering systems could be implemented for personal computers. A filtering system might be one that would alert the user if an arbitration clause, for example, was included in the boilerplate terms attached to the product by the online retailer the user was thinking of purchasing from. Or, such a system could just screen out suppliers whose boilerplate terms were unacceptable to the online shopper. Or, the recipient's computer could filter out products offered for sale having sets of terms that are not the set (or sets) that the user has previously programmed the system to accept. Online systems could also be developed that would enable users to customize their own terms.

Filtering systems on personal computers would be market solutions because computer users would be free to use them or not use them, depending on their willingness to pay for them. Computer firms' trade associations might develop an engineering standard available for industry-wide use, and might make implementation of them standard in, or bundled with personal computers.¹⁵⁴ This would make it easier for users to decide

¹⁵³ E. ALLAN FARNSWORTH ET AL., CONTRACTS 188–91 (Robert C. Clark et al. eds., 7th ed. 2008). A beneficial side effect would be elimination of the “battle of the forms” in which each of two contracting firms uses boilerplate terms favorable to itself on all of its forms such as orders, confirmations, and invoices. *Id.* A system of “machine bargaining,” in which computers belonging to one party with sets of acceptable terms could seek out contracting partners' computers with at least a set of terms in common would result in actual agreement in the sense that each side ends up with terms that it has previously determined are acceptable to it. *See id.*

¹⁵⁴ Standard-setting by a trade association or by a group of firms can raise an antitrust issue of collusion. *See, e.g.,* Erica S. Mintzer & Logan M. Breed, *How to Keep the Fox Out of the Henhouse: Monopolization in the Context of Standard-Setting Organizations*, 19 INTELL. PROP. & TECH. L.J. 1, 5 (2007). *See generally* Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CAL. L. REV. 1889 (2002).

to turn them on rather than if the software were offered for users to purchase separately.

One kind of filtering system would be analogous to systems proposed for protecting online privacy, or for preventing children from viewing pornography.¹⁵⁵ In such an implementation, teams have been employed to judge whether certain websites contained pornography.¹⁵⁶ In an analogous variety of filter, users could set their computers to flag arbitration clauses, or no-copying clauses, or whatever clauses they wanted to be sure not to subject themselves to unwittingly.

A slightly different variety of filter would screen out products offered by firms whose complete set of terms contained one or more clauses previously determined to be unacceptable. If many recipients implemented such a filter, it would amount to a boycott of firms offering boilerplate terms unacceptable to a significant number of users. Perhaps whatever incentive exists for entrepreneurs to design and manufacture this type of system might be overwhelmed by the disincentive created by the fact that other firms might themselves boycott the designer or manufacturer of a boycott-machine.

Increased customization of transactions can also be considered. When buying a product online, sometime during the checkout process, a consumer could check a box to pay an extra \$2.19 to extend the warranty from one year to two, or an extra \$0.52 to have dispute resolution by litigation rather than arbitration. The determination of what the consumer should pay for each clause, and what should be the total charged for the contract with the selected clauses, could be outsourced in real time to an actuarial intermediary, and the customized terms could be presented to the recipient in printable form very quickly. There is an analogous market

¹⁵⁵ See *Epic Online Guide to Practical Privacy Tools*, ELECTRONIC PRIVACY INFO. CENTER, <http://epic.org/privacy/tools.html> (last visited Jan. 27, 2012); *Internet Filter Software Review*, TOP TEN REVIEWS, <http://internet-filter-review.toptenreviews.com/> (last visited Jan. 27, 2012) (listing some software tools that are expected to screen out pornography).

¹⁵⁶ See Nick Farrell, *UK Hands Censorship Over to Barely Trained Kids: Cheaper That Way*, TECH EYE.NET (Oct. 18, 2011, 09:40 AM), <http://news.techeye.net/internet/uk-hands-censorship-over-to-barely-trained-kids>. Of course, a porn filtering technology is only as good as its accuracy in labeling sites as porn. Techniques for doing this either by machines or humans are not foolproof. See CRYSTAL ROBERTS, COPA COMM'N, INTERNET FILTERING AND BLOCKING TECHNOLOGY: THE MOST EFFECTIVE METHODS OF PROTECTING CHILDREN FROM PORNOGRAPHY 12 (1999).

offline for extended warranties and service on items such as cars, computers, and washing machines.¹⁵⁷ The online market would be able to accomplish the customization with much more granularity; that is, it could accomplish customization for smaller items and smaller changes in price.¹⁵⁸

Why are these possible automated systems not in use? Perhaps they are more difficult to develop than I realize.¹⁵⁹ Perhaps there is not a market for these systems—or other systems that are better than the ones I can think of. Or at least, perhaps it is believed that there is not a market for them. In other words, perhaps recipients do not really care what terms are inside the boilerplate they do not read or cannot understand, or at least firms believe that they do not.

It may be true that almost all recipients really do not care at all about what terms are inside the boilerplate at the outset. It is, however, also true that they do care when they find out later that they cannot bring their case before a jury, that they have waived their information privacy rights, or that they are subject to being cut off as a user for exercising rights that copyright law grants to users. In other words, this could be a classic case of heuristic bias or bounded rationality. Recipients do not know what their risks are and do not think they need to know, until it is too late. Most people do not believe that an unexpected loss will befall them, or that they

¹⁵⁷ See Radin, *supra* note 64, at 1225.

¹⁵⁸ *Id.* This idea has a possible serious drawback. Firms may offer the worst terms that would not turn away the bottom part of their demand curve, and allow more well-off recipients to buy their way to a better set of terms. *Id.*

A related worry arises from the practice described or suggested by a number of law and economics writers, who argue that firms can maximize profit by promulgating a seemingly rigid boilerplate scheme, but in practice relaxing it in situations favorable to the firm. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 707–10. It might turn out that firms can maximize profit by promulgating onerous terms to poor people while routinely relaxing them for wealthier people who might buy more and become repeat customers. Or it may turn out that selective implementation of boilerplate terms can facilitate anti-competitive behavior by firms. See Gilo & Porat, *supra* note 64, at 1013. It could turn out in some instances that firms can practice racial or gender discrimination by routinely singling out people from a preferred group to benefit by non-enforcement of its ostensibly strict rules. This type of practice might be difficult to perceive and remedy.

¹⁵⁹ Needless to say, I am not a software engineer.

will have to sue someone. Should the legal system try to correct for this type of bias?

VI. CONCLUSION

The question whether the legal system should try to correct for prevalent heuristic biases does not have a consensus answer. Heuristic bias affects consent because it fosters disadvantageous behavior by individuals in the presence of unknown risks. Maybe courts should be attentive to heuristic biases of recipients when evaluating enforceability of onerous clauses. Courts should at least do this if they are willing to honor the background principles of contract by looking for actual, real consent rather than being content to assume some species of hypothetical consent or liability-rule non-consent. If courts wish to accept the theory that onerous clauses are part of the product, just like poor-quality chips, they should also accept that products can be defective, and perhaps consider using tort law to evaluate some of these “products” and their effects on consumers.

Meanwhile, we should not forget that even where consent of various individuals is unproblematic (contrary to the situation with boilerplate schemes), and even where each instance of consent could be appropriately evaluated on an individual basis (again, contrary to the situation with boilerplate schemes), important issues for society exist relating to the kinds of entitlements that cannot be waived, even with consent, regardless of whether they are affected by heuristic biases. These are the kinds of waivers that consent will not cure. Many of these waivers have already been outlawed, such as waiver of the right to be represented by an attorney, the right not to be charged a usurious interest rate, and the right not to be provided uninhabitable housing under a rental agreement. But what about a category of waivers that not-quite-consent or merely-hypothetical consent will not—and should not—cure? These are the waivers that raise the issue of normative degradation, the waivers routinely found in boilerplate schemes: onerous choice of law and choice-of-forum clauses, over-reaching exculpatory clauses, and mandatory arbitration clauses that eliminate the possibility of aggregative remedies. Courts have yet to confront the normative degradation associated with the problematic consent to these waivers by recipients.

At the same time, these waivers are also the sort of divestment of legal background entitlements that create democratic degradation. Courts should be aware of the democratic degradation caused by the fact that a firm can wipe out an entire legislative schema for large numbers of people by the simple expedient of promulgating a boilerplate scheme. It will be important in the future for courts to address the mass-market nature of

boilerplate regimes because the individual transaction focus of contracts cannot do so.