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Regulation through Boilerplate: An Apologia

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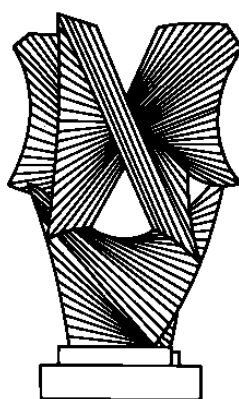
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Regulation through Boilerplate: An Apologia

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THE LAW SCHOOL
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**REGULATION THROUGH BOILERPLATE:
AN APOLOGIA**

*Omri Ben-Shahar**

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ABSTRACT

This essay reviews Margaret Jane Radin's *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (Princeton Press, 2013). It responds to two of the book's principal complaints against boilerplate consumer contracts: that they modify people's rights without true agreement to, or even minimal knowledge of, their terms; and that the provisions they unilaterally enact are substantively intolerable. I argue, counter-intuitively, that contracts with long fine prints are no more complex and baffling to consumers than any alternative boilerplate-free templates of contracting. Therefore, there is no alternative universe in which consumers enter simpler contracts better informed of the legal terms. In addition, I argue that any policy that mandates consumer-friendlier arrangements (such as ones that eliminate boilerplate arbitration clauses, warranty disclaimers, or data collection) would hurt consumers in an unintended but potentially costly way.

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REGULATION THROUGH BOILERPLATE: AN APOLOGIA

*Omri Ben-Shahar**

Review of
*Margaret Jane Radin, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE
RULE OF LAW (Princeton University Press 2013)*

INTRODUCTION

You have to salute Peggy Radin. She has said what others who agree with her have for so long been hesitant to utter out loud: the fine print is not a contract.¹ There is no agreement to it, no real consent, not even “blanket assent.” It is nothing but paperwork and should have the legal effect of junk mail.

Those lengthy, unreadable pages with terms and conditions that come pre-packed with consumer products, or demand to be clicked (“I Accept”) on computer screens – does any one really think that they contain arrangements that people knowingly agreed to? How is it, then, that such unreadable and unread documents have become so powerful and effective in regulating the rights and obligations of contracting parties? Entire areas of law—contract default rules, sales law, privacy law, and copyright fair use (to name a few)—have been “deleted” by carefully drafted documents that replace the pro-consumer provisions of these laws with pro-business arrangements. And if the fine print is so offensive to our legal universe of fair and balanced default rules, why is it so radical to propose that it should be invalid? Is the practice of fine print so deeply rooted in our commerce—so much of our economy relies on the fine print as the ultimate regulation of trade—that it is too big to curtail?

Let’s end the pretense, says Radin, and restore a sensible conception of “agreement” to our commercial life. Because boilerplates do not represent informed consent, because they are divorced from our intuitive understanding of agreement, because they divest people of their democratically enacted entitlements, they degrade the institution of contract that is justified by its respect for individual autonomy and private control. Therefore, boilerplates should be powerless to govern people’s rights. “They should be declared invalid in toto, and recipients should be governed by the

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¹ There were, of course, similar previous opinions. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529 (1971).

background legal default rules” (p. 213). And to make sure that firms stop shoving such offensive paperwork in front of people, a new tort of “intentional deprivation of legal rights” should operate as a deterrent.

There are two ways to assess the phenomenon of regulation-through boilerplate. The first approach is to ask how such one-sided dictation of terms by firms fits within a liberal account of good social order, of democratic control and participation, and of individual autonomy. Many of those adopting this perspective, and Radin prominently among them, are critical of boilerplate and find the process as well as its consequences intolerable. I need a term for those favoring this approach, and I will borrow the term “Autonomists.”² It necessarily includes a variety of views about the role of regulation in safeguarding the autonomy of individuals, but it is a useful generalization because so many commentators share a basic commitment to it as a foundation for normative claims.

Radin’s book is an autonomist manifesto, in that it identifies the normative and democratic “degradation” that boilerplates impose. It views the exercise of boilerplate contracting as anything but a dignified, autonomous, agreement. Boilerplates destroy both the public aspects of private law, namely, those “placed in the care of the polity for the benefit of the polity as a whole” (p. 212), as well as the possibility of meaningful private ordering. Bilaterally negotiated agreements are replaced by unilateral directed take-it-or-leave-it corpuses of legal terms.

Radin’s account projects the familiar complaint against “contracts of adhesion” and “unequal bargaining power” onto a foundational liberal political mapping. Even within the dense autonomist literature bemoaning the evils of boilerplate, now embracing vast legal commentary and court decisions, Radin’s account is a milestone because it does not shy away from raising the stakes. Because boilerplate allegedly destroys the very justification for enforcing private contracts, two implications for the appropriate legal response emerge. First, boilerplate contracts should not be enforced, period. Gone is the hesitant voice of other autonomists who propose tentative tweaks, and invoke subtle distinctions between garden variety and truly harsh boilerplate. The scheme itself violates good social order and has to be outlawed. Second, in a bold and surprising move, Radin goes a step further. The practice of boilerplate deletion of rights should be regarded as an intentional tort! Boilerplate renders the product to which it is attached *defective* because it makes the legal features nonfunctional, it makes the firm immune from liability and thus numb to its clients’ interests, and the overall purchase becomes less safe for consumers. “Being a recipient of boilerplate, . . . is often more like being hit by a one of thousands of dumped projectiles than it is like entering into a relationship with the entity that dumped them” (p. 210). In the same way that the torts of defamation or deprivation of privacy protect people from non-physical injuries, here, too, the harm inflicted by boilerplate is the degradation of basic rights secured by the

² See Carl E. Schneider, *The Practice of Autonomy* (1998).

polity. A commission of this tort of “intentional deprivation of basic legal rights” should lead to remedies like statutory damages and attorney fees.

If autonomism focuses on the degradation of passive surrender to the fine print, the second approach to the phenomenon of regulation-by-boilerplate is to ask how it affects the well being and satisfaction of consumers who buy products co-packed with boilerplate. It is an approach largely numb to the inherent political value of private order, control, or “voice.” There is also no per se value in having some terms enacted by the polity, rather than by the parties. Instead, this approach measures the boilerplate phenomenon by its effect on consumers’ “payoffs.” What matters is the substance of the deal, its cost to consumers, the ease by which profitable deals are formed, and the opportunities to realize benefits from trade. I also need a term for those who favor this perspective (myself—I’ll reveal now—among them), and I’ll borrow Radin’s somewhat derogatory term —“Boilerplate Apologists.” Boilerplate apologists regard the fine print as merely a feature of mass-produced products, and a welfare-increasing feature at that—reducing transactions costs, prices, and allowing firms to focus on improving product features that people actually care about.

Radin’s argument poses two challenges for the boilerplate apologist. The first challenge is the problem of ignorance—how can people be obligated to terms that are impossible to know and appreciate in advance? How could such terms match their preferences? The second challenge is the problem of intolerable terms—why should baseline legal entitlements be replaced with harsh one-sided arrangements? In the course of addressing these issues, the wisdom of Radin’s proposed remedies—non-enforceability of boilerplate and the tort remedy—will be evaluated.

In the hope that this Essay will not merely reproduce the autonomist versus apologist shouting match, my plan is to accept the autonomists’ premise. That is, I will assume that there is something offensive about being bound to terms that you did not know about. The social experience of receiving fine print is annoying, alienating, and even degrading. But what can be done about it? Do the reforms and remedies proposed by autonomists improve people’s well-being? Their sense of dignity and control? Or, in an unintended fashion, might they make things worse? I will offer words of caution, urging autonomists to consider some of the less desirable but inevitable consequences of a boilerplate-free universe.

I. BOILERPLATE AND THE PROBLEM OF IGNORANCE

The problem with boilerplate begins with the assertion that there is no consent to it. The basic problem is what Radin calls “sheer ignorance.” (p. 21) Because consumer transactions may be completed without even seeing and signing the fine print, and surely without reading it, people don’t know that it exists, what it says, or that “they are being divested of important legal rights.” (p. 22) This ignorance is compounded by asymmetric sophistication, by the limited rationality of consumers, and by the striking

absence of non-boilerplate alternatives. In all, self-serving drafters sit at their corporate headquarters and disseminate documents that override the democratically enacted law—the set of background rights that are granted to their customers.

Boilerplate is not an agreement, but rather a “devolution or decay of the concept of voluntariness” (p. 30). Destroyed in the course of boilerplate contracting, Radin argues, are not only the arrangements that background legal rules (like implied warranties and make-whole damages) offer. Rather, the process of deleting rights without informed consent undermines “private ordering”—the regime empowering private parties to “legislate” their own affairs. If consumers don’t negotiate, don’t participate, and don’t even know the terms of transaction—if these sacraments of contracting are replaced by post-hoc paperwork—there is no meaningful private ordering. Without informed consent, freedom of contract is meaningless, and the ideal of individual autonomy that justifies the contractual framework is crippled.

There is a subtle notion of the “public” sphere that underlies Radin’s complaint against boilerplate. The terms that appear in boilerplates substitute an entire fabric of legal rules that would otherwise govern. While private parties are permitted to modify these background rules—they are default, not mandatory, rules—alienability should be a meaningful process of quid pro quo. Existing “right deletion schemes” condemn fallback entitlements without any fair compensation, political accountability, or transparency. Thus, for example, remedies for breach of contract, implied warranties, the rights to control one’s personal data, to make fair use of purchased digital content, or the rights to seek redress in a public forum—all are mechanisms granted by the polity through a democratic process to people for the purpose of maintaining a “grand bargain” and a balance of power between countervailing interests. “Firms that use contracts to destroy the ideal of contractual ordering are effectively undermining the rule of law and contributing to democratic degradation” (p. 39).

“Sheer ignorance” is the most intense state of non-consent – a “situation where a person’s entitlement is being divested, but the person does not know that it is happening” (p. 21). Radin illustrates this degradation by a case in which a hospital used cell tissue that it removed from a person’s body to develop therapy and make profit, without the person’s knowledge. Such sheer ignorance undermines the validity of a contract in the same way that coercion and fraud do—and they all lack the normative underpinning for contractual enforcement.

This world of sheer ignorance is contrasted with the alternative of informed consent—the elaborate disclosure regime serving medical patients prior to health treatments. When informed consent is invited, the patient knows that something of significance is about to happen, that it entails risks, and that the option to forgo the treatment exists (pp. 21, 89). In fact, the absence of informed consent could render the medical treatment a bodily assault, actionable in tort law. Because a boilerplate scheme denies people similar opportunity of informed consent—it is like wheeling people into

operating rooms while unconscious—it defies the basis of an autonomous action and thus cannot be regarded as an agreement. And, like unconsented medical invasion, it should be penalized by tort law.

Unfortunately, this dichotomy—boilerplate’s ignorance versus informed consent—is based on at least two misguided perceptions, two myths. The first myth has to do with boilerplate’s complexity. It emerges from a naïve notion that in the non-boilerplate world people know the terms of their contract better. The second myth has to do with the possibility of informed consent, as a true alternative to the world of boilerplate. Let me examine, and dispel, these two myths.

Myth #1: Boilerplate is more Complex

There is a compelling logic and evidence supporting autonomists’ claims that boilerplate is a more complex and therefore a less comprehensible template than a simple agreement between, say, Sally and John, to purchase John’s bicycle for \$120 (this is Radin’s generic example). The difference in complexity is obvious: a dozen pages of legal language in small print versus a candid “OK, it’s a deal, I’ll buy your bike for \$120.”

But this superficial comparison between the two templates of a deal is incorrect. In fact, both deals are similarly complex, and in both deals people harbor just as much “sheer ignorance.” In general, the complexity of the contract, and the resulting level of ignorance, *have nothing to do with the boilerplate scheme*. The ordinary contracts from the romantic era of pre-boilerplate—the client who hires a local messenger to deliver a package to a nearby village, or agrees with a small time carpenter to construct a cabinet (let’s call these the “village contracts”)—are surprisingly complex, and sometimes leave more uncertainty than the thick boilerplate of the mass-contract era.

How can this be? The reason is simple. While not summarized in a long preprinted form, the deal between Sally and John, or any village contract, are far richer than their express terms reveal. True, the express terms are often no longer than one sentence: the identification of the good (“my bike”), the price (“\$120”), and a statement of consent (“it’s a deal”). The express terms include none of the staples of boilerplate contracting: none of the legal terms, the conditions, the assumptions of risk, the instructions for courts. But the legally enforceable contract—the set of obligations that John and Sally undertook by manifesting their one sentence assent—*does* include an abundantly complex legal matter. Rather than provided and summarized by one party in a term sheet, the legal matter of the village contract is provided by other legal sources: default rules and gap fillers, local customs and market norms, and an intense fabric of regulations governing the trade of that particular good.

John and Sally’s contract does not have a warranty certificate in boilerplate language with ugly ALLCAPS, but if some defect surfaces, its resolution would depend on a set of provisions collected under the law of implied warranties. Specifically, because

this is a sale of goods, it contains an implied warranty of merchantability, and truth be told it is a fairly complex warranty since the bike is probably used, and in such cases it is hard draw the exact lines of the assurance that the buyer gets, if at all.³ White & Summers treatise on sales law covers 254 pages in describing the various contours of the law of product warranties.⁴ The warranty paragraph in the firm-drafted boilerplate is the acme of simplicity relative to this background legal mass.

Similarly, John and Sally's contract does not stipulate expressly the damage measures for its breach, but it of course contains all the legally supplied default remedies, including expectation and consequential damages, reliance and restitution damages, and the substantive rules concerning the election of remedy. Unlike the boilerplate remedy clauses, which are often short and plain (even if stingy)—repair-or-replace, or restitution of the price paid—the legally supplied damages that attach to the village contracts are quite complex given that the liability for consequential damage is notoriously hard to draw. Just ask the ultimate villagers, Hadley and Baxendale.⁵ For example, is John liable for Sally's injuries if the wheel of the bike is shabbily attached and she falls and gets hurt? Or, what is Sally obligated to do to mitigate her losses in case John is late in the delivery of the bike?

Boilerplates are loaded with terms governing contingent and remote problems in performance, but these contingencies are just as probable (or improbable) in the village contract. And so the village contract contains terms derived from background legal principles regarding countless "just-in-case" issues: rejection of nonconforming goods, inspection rights, seller's right to cure nonmaterial defects, what constitutes material breach, interest for delayed payment, risk of loss in the interim period prior to delivery, passage of title, and lots more. None of these terms are mentioned expressly between the parties, but they are no less part of the relationship as are boilerplate terms attached to the mass contract.

In fact, the complexity of the romantic village contract is probably greater, compared to boilerplate, because the absence of a comprehensive sheet of terms opens the door for various and overlapping supplementary sources. The village contract, for example, is supplemented by customary terms and local norms. This means that the parties' obligations are to be found not in a printed text, but in unwritten "context"—in some empirical regularity generally followed by people in this market, or by the present parties in their past dealings. Boilerplate is simpler because it often excludes such moving targets, such fuzzy sources of obligation (hence the "no waiver" and "no oral modification" clauses). The village contract, by relying on customs to fill its gaps—by replacing the formalism of textual sources with the flexibility and realism of commercial

³ See Uniform Commercial Code 2-314, official comment 3 ("A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods").

⁴ James J. White and Robert Summers, 1 *Uniform Commercial Code* 599-852 (5th Ed. 2006).

⁵ *Hadley v. Baxendale*, (1854) 156 ER 145.

practice as a source of obligation—allows for much nuance. But it also leads to added complexity, when the content of the obligation is so fluid.

What about choice of law and arbitration? Boilerplates, recall, often include paragraphs assigning jurisdiction over the disputes to an arbitration forum and choosing a particular state law. John and Sally's bike contract says nothing about these issues and so, as Radin explains in her Prologue, "Sally can bring John to court in a place convenient for her" (p. xiii). The default arrangement is public courts jurisdiction, under the rules governing conflicts of laws. This regime incorporates common law standards of convenient forums and choice of law—an entire area of (often complex) jurisdiction principles. Is the boilerplate paragraph stipulating arbitration really more complex? Longer? Less understandable? Does it engender more "sheer ignorance" than the village contract's dispute resolution gap fillers?

While not written in a preprinted form, the one sentence village deal precipitates a lengthy and complicated contract. Regulation by boilerplates means that one web of terms collected from many sources of law (the legally supplied default provisions) is replaced with a fairly comprehensive but concise substitute (boilerplate). The boilerplate version *appears* more complicated, but this is a superficial veneer, due to the fact that boilerplates reproduce the entire set of governing rules in print. In fact, the boilerplate version is often less complicated because the legally supplied default rules that are part of the village contract are more vague and open-ended (i.e., standard-based) than the mass-market fine print with its bright line, rule-based arrangements.

Myth #2: Boilerplate Can Be Replaced with Informed Consent

Autonomists think that deals can be done differently. Instead of shoving lengthy piles of paperwork in front of ignorant consumers, meaningful agreement has to be thoughtfully and individually obtained. The "sheer ignorance" that pervades boilerplate is contrasted with the principle of informed consent, whereby "the information required about what is happening to the patient must be detailed and understood by the patient before consent will be deemed to exist" (p. 89). Sheer ignorance is "similar" to lack of informed consent because in both "the information needed in order to understand significant parameters of a situation are not available to a person" (pp. 21-22). If informed consent could govern medical relationships, why not all contracts?

In contract law, informed consent means that people should be able to opt out of legally supplied default rules and agree to the terms that the firm proposes, but such opt-outs cannot be done in wholesale boilerplate fashion. Instead, they have to be a result of an informed, deliberate action. Freedom of contract would be a caricature if, for example, the opt-outs are written in Chinese. The fact that the opt-outs are written in English is no less blatantly inconsistent with the autonomy of consumers, because the boilerplate legalese is similarly inaccessible. Thus, commentators who believe in the

informed consent principle insist, for example, that borrowers' acceptance of non-standard risky mortgages should be unenforceable unless they received "honest and comprehensible disclosures from brokers and or lenders about the terms and risks of the alternative mortgage."⁶

In my work with Carl Schneider, we have sharply disputed the premise that such "comprehensible" or "meaningful" disclosures exist.⁷ Even in the area of medical treatments, informed consent practices fail to accomplish autonomists' naïve notions of meaningful shared decisionmaking. In fact, we argued that informed medical consent is no different than consumer boilerplate, or any other mandated disclosure. We marshaled mountains of social science evidence showing that the vast majority of patients don't read or use the medical disclosures. We argued that these consent forms are strikingly similar to boilerplate, written (often by lawyers) in the same technical language, and at comparable lengths, as loan agreements and software licenses. We showed that people's levels of numeracy and literacy make even the simplest of these "informed" consent documents largely impenetrable and useless to them. But most fundamentally, we argued that the ideal of informed consent is impossible to achieve when a true understanding of the decision requires experience, background knowledge, intuition, and technical mastery, which only experts have. Put simply, to decide whether a particular loan is a good idea, or whether a particular medical treatment is suitable, requires far more tutoring than even the most "meaningful" or "heightened" ritual of disclosure can accomplish. It is the complexity of the decision that undermines the project of informed consent, not some technical failure in the delivery template of the disclosure.

This is truly bad news for autonomists. It suggests that the state of ignorance among consumers when facing complex transactions is not reparable by tweaking the process of consent. No amount of precontractual targeted "education" or simplified disclosures can solve the complexity paradox—the fact that a good autonomous decision can only be made by experts, or by spending more time than people sensibly care to. No amount of laboratory testing by the FTC of new disclosure forms for residential mortgages can simplify what is at its core a dramatically complex and multi-dimensional decision problem—taking a home loan.⁸ And even the most lucid "know before you owe" disclosure form will be only one of dozens—sometimes over 50!—separate disclosures that borrowers receive at the loan closing.

⁶ Michael S. Barr, Sendhil Mullainathan, and Eldar Shafir, *Behaviorally Informed Financial Services Regulation* 9 (New America Foundation, 2008).

⁷ Omri Ben-Shahar and Carl E. Schneider, *More than You Wanted to Know: The Failure of Mandated Disclosure* (Forthcoming, Princeton Press 2013); See also Omri Ben-Shahar and Carl Schneider, *The Failure of Mandated Disclosure*, 159 U. of Penn. L. Rev. 647 (2011).

⁸ <http://www.consumerfinance.gov/knowbeforeyouowe/>.

This is not to say that people are unable to make satisfying choices. They can, and they often do (even in the mortgage setting) by relying on various cues: advice, ratings, indexes, reputation, and their own experience. What the failure of mandated disclosure suggests, however, is that the regulatory paradigm of informed consent—the autonomists’ vision of a non-boilerplate universe—is not feasible. The regulatory agenda that requires the sophisticated party to provide comprehensive information to its clients so as to help the clients reach autonomous educated choices has never worked—not in medicine, not in consumer loans, not in privacy, not in a long list of fields in which it was and continues to be practiced. True, this agenda might fit better with ideal notions of democratic process and personal empowerment or with shallow notions of transparency, but the complexity of the decisions rips a cleft between the vision and the reality.

Can informed consent to contract boilerplate succeed where medical informed consent failed? In an important way, making a good decision about legal terms of consumer contracts is *more* difficult than making an informed consent to a medical treatment. The risks and rewards affected by the medical decision are far more intuitive and significant to most people than those implicated by consumer boilerplates. People care more about physical pain and good health than damages for breach of contract or arbitration.

Further, it is more difficult to make an informed choice of boilerplate terms because the tradeoffs are less clear. When making a medical decision, the patient can safely request the best procedure, which will yield the highest chances of success and health. Cost of treatment, while an important issue, need not be traded off because it is a matter to be settled by the insurance administrators and policy makers, not by the doctor and patient. In consumer contracts, a good decision for the consumer does have to trade off quality against the price. Many consumers, for example, prefer to buy airfares that are cheaper even if nonrefundable. They opt for a harsh legal restriction—an entire loss of an unused ticket—to enjoy the substantial price reduction it comes with. And smart consumers (should be advised to) turn down extended warranties offered by retailers because the price is a rip off.⁹ As products become more complex, the price/rights tradeoffs are harder to make. Is the discounted cellphone worth the early termination penalty? Is a lower mortgage APR worth the prepayment penalty? Is the insurance on a rental car worth the premium? People vary in ways that make the answers to these dilemmas dependent on subtle factors, most of which are hard to quantify and resolve methodically. Do we really think that there is a way to prepare people, through a better precontractual disclosure ritual, towards a meaningful informed trade off of such complex tradeoffs?

⁹ Tom Baker and Peter Siegelman, *Protecting Consumers from Add-On Insurance Products: New Lessons for Insurance Regulation from Behavioral Economics* (Mimeo, 2013).

To her remarkable credit, Radin never once in the book refers to informed consent, or to other versions of “heightened” disclosure, as the cure-all to the problem of boilerplate elimination of default legal rights. This restraint deserves mentioning because disclosure and informed consent have become the predominant instinct of many prominent autonomists, the fallback regulatory cure to various actual perceived consumer protection shortcomings.¹⁰ Perhaps Radin is persuaded, like I am, that disclosures cannot solve the problem she diagnoses, of non-consent. But I suspect that she does not advocate informed consent because her preferred intervention is more ambitious. Firms would be happy to abide by any heightened disclosure standard, as long as they can safely muscle in their terms to regulate the deal. It is exactly this objection to firms’ power to regulate that justifies Radin’s preference for a more powerful regulatory response. Rather than regulate the information and the consent process, the polity should regulate the *substance* of contracts. Because the substance of boilerplates is so intolerable—boilerplates drafted by profit seeking firms replace the more equitable baseline entitlements that the polity chose to offer as a benchmark to all consumers—not even informed agreement could make it kosher.

Indeed, Radin thinks that “there are strong non-economic arguments against treating all baseline entitlements as easily waivable” (p. 107). In other words, these baseline entitlements ought to be regarded as stronger than default rules. Various such non-waivable rights already exist in consumer contracts, such as the prohibition on usury, on various forms of discrimination, or mandatory cooling off periods. In Radin’s autonomist regime, the right to jury trial, to participate in a class action, to a substantial warranty, to expectation damages, to fair use rights in digital content, and various others, should be elevated to a quasi-mandatory status. No more boilerplate opting out.

The problem of ignorance of the legal terms, then, is a distraction, and Radin’s case against boilerplate does not rest on it, nor does it purport to solve it. It is a distraction, because equal or even greater levels of ignorance would persist even in a non-boilerplate world (this is the conclusion of my Myth #1). It is a distraction because there is no way to solve the state of ignorance, given the failure of informed consent (this is the conclusion of my Myth #2). And it is a distraction because the objective of the book is not to solve consumers’ ignorance through some hocus-pocus “best practices” for meaningful consent. Rather, the objective is to replace the firm-favored terms with a bundle of guaranteed rights that no mass-market contract can delete.

II. THE PROBLEM OF INTOLERABLE TERMS

With the issue of ignorance set aside, we can turn to the heart of the debate over consumer contract protection. Should the law mandate a set of basic provisions that must be included in every mass-market contract, and could not be waived by

¹⁰ See Ben-Shahar and Schneider, *More Than You Wanted To Know*, supra note ___, Chapter 2.

consumers? I will examine the case Radin makes for such intervention, and discuss the inevitable trade-offs that such regulatory technique entails.

A. *Which Terms are Intolerable?*

The first thing that jumps at you when you examine any firm-drafted boilerplate is how shamelessly uncharitable it is. “Nothing in fine print is ever good news” is a prevalent sentiment among consumers—everything is drafted to serve the firm. Needless to say, boilerplates are far more firm-friendly than the background default rules that they replace. Florencia Marotta-Wurgler measured this bias and confirmed it empirically in a large sample of software licenses.¹¹ This is not unique to consumer contexts; battles of the forms between sophisticated commercial parties are a direct artifact of one-sided B2B boilerplates.

This does not mean that the deals firms offer consumers are always one-sided, even in the legal terms. Firms offer a variety of consumer-friendly legal arrangements, such as generous return policies, long-term express warranties, and free early termination. But when they do, they make sure not to hide such attractive perks in the fine print. They paste them, instead, in huge letters on storefronts and billboards. It is mostly the stuff that consumers might not like (if they took the time to understand) that is quietly tucked into the fine print.

So the great majority of the fine print terms are tacky. But a few are regarded as truly intolerable. In recent years, several categories of terms have made it into what are known as “black lists” (and “gray lists”).¹² These are the terms that autonomists consider most harmful to consumers, and which ought to be presumptively (and sometimes irrebuttably) unenforceable. What are some of these allegedly intolerable terms?

Arbitration clauses and class-action waivers. Probably the most notorious fine print term of present day is the mandatory arbitration provision, which eliminates consumers’ access to a judicial forum, and often to class action. Autonomists view arbitration as an inaccessible, expensive, procedurally limited forum, where underfunded claimants are at disadvantage. They worry primarily about the class action bar.¹³ When many consumers have similar small claims, pursuing them in arbitration one by one is not a viable redress strategy. Largely for this reason, Radin argues that “mandatory arbitration clauses should be disallowed in mass-market deletion schemes” (p. 183).

¹¹ Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. Legal. Stud. 309 (2009).

¹² See, e.g., Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Annex 1. Radin proposes a similar framework in Chapter Twelve, pp. 227-232.

¹³ See *AT&T v. Concepcion*, 131 S.Ct. 1740 (2011) (Breyer J., dissenting).

Exculpatory clauses. A long-standing staple of the consumer fine print are the exculpatory clauses: disclaimers of warranties, limitations on remedies, “hold harmless” provisions (relieving the firm of any future liability for injury), and various indemnification terms. With so little to gain in redress, consumers have little incentive to initiate any proceedings against the firm. Radin stops short of proposing to outlaw these clauses outright, but insists that they should be disallowed unless consumers “really are trading off rights for a lower price” (p. 185). A pattern of widespread use of exculpatory clauses would be regarded as prima facie evidence that they are not “chosen” by consumers, and prominent disclosures alone would also not suffice in rendering these clauses enforceable. As a result, the law’s implied warranties and generous remedies would be more than “sticky”—they would effectively become nondisclaimable.

Privacy clauses. Boilerplate “privacy policies” attached to websites and digital services give firms rights to collect personal information of users and profit from it in various marketing and data sharing strategies. Since the information is “important to personal identity,” Radin considers privacy rights as good candidates for entitlements that are “fully inalienable”—something beyond the power of individuals to waive. “Perhaps society as a whole might not agree that waiver of privacy rights should be entirely determined by individuals” (pp. 176-77).

Intellectual property rights. Copyright law allows users to make various fair uses, but boilerplate license terms override these permissions and replace them with express prohibitions. Likewise, content that is otherwise not protected by IP law—such as databases—is regularly protected by restrictive license agreements written by firms that assembled these databases from public open sources. Radin thinks that when consumers have no choice but to purchase access subject to such restrictions, their “user rights should be treated as at least partially market-inalienable.” They “are not just any old default rules” because “a clause cancelling fair use and other user rights . . . destroys, or at least destabilizes, the commitment enacted in legislation.” And so, “widespread boilerplate schemes that obviate the legislated nonproprietaryization should perhaps be disallowed, or at least be scrutinized carefully” (p. 172). Again, the hurdles an agreement needs to clear before meeting her standard of negotiated mutually beneficial bargain would make most mass-market boilerplate restrictions on use unenforceable.

In addition to these primary examples, autonomists want to see many other consumer rights immune from opt-out by boilerplate. For example, the proposal for Common European Sales Law includes 81(!) mandatory rules, going far beyond the examples above. They include all of the consumer’s remedies, withdrawal rights, disclosure rules, interpretation rules, restitution rules, risk of loss provisions, limitations

on sellers' right to cure, rules relating to notices and communications, interest for late payments, grace periods, and much more.¹⁴

B. Boilerplate and the "Price Effect"

The point I am about to make about the "price effect" is not original. It is simple, but far-reaching in its implications. In a sentence, the "price effect" means that one cannot evaluate whether boilerplate deletion of legal rights is good or bad for consumers, without also looking at that price people are asked to pay for the product+boilerplate package. This is not an "efficiency" perspective. It focuses solely on the consumers' well-being, not on the firms' profits. It identifies inevitable trade-offs, by asking what would consumers have to give up to secure the added protections that autonomists want to mandate.

Despite this being a familiar perspective, I will reexamine it, for two reasons. First, while the "price effect" is recognized by Radin, its implications are never confronted in the book.¹⁵ The book never makes the argument that the proposed protections will either have no price effect, or that consumers would be happy to pay the price charged for them. Second, when the implications of the price effect are taken into account—when it becomes somewhat clearer what consumers have to surrender in order to enjoy the anti-boilerplate protections—boilerplate arrangements might no longer seem quite so repelling. While it is not my goal to determine which way the trade off goes, the framework I adopt of recognizing the trade-offs would help us see which sub-groups of consumers are more, and which are less, likely to benefit from the mandatory first-class legal terms that autonomists favor.

Let us begin by assuming that the rights that boilerplates delete are important. They are important because they affect in an economically meaningful way consumers' surplus. If that were not the case, a book about boilerplate contracts would not be worth writing. The immediate implication of this assumption is that a product+boilerplate bundle that deletes these rights eliminates important fragments of value, and thus saves the firms some of the costs of doing business. This cost saving allows firms that offer the depleted bundle to charge a lower price. Standard economics

¹⁴ *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law, COM (2011) 635 final, Annex I: Common European Sales Law, Arts. 2,10,22,27,28,29,47,64,69,70,71,72,74,75,77,81,84,92,99,101,102, 105, 106, 108, 111, 135, 142, 148, 150, 155, 158, 167, 171, 177, 179, 186.*

¹⁵ Chapter 6 of the book discusses the view that boilerplate is merely a feature of the product. But the chapter focuses on only one debate—whether competition can guarantee efficient boilerplate terms—and argues that it would not, due to imperfect information. The chapter does not address the other, more pressing question of the price effect—whether purchasers of products are well-served by mandatory high quality terms.

analysis shows that this implication holds regardless of the market power that firms have.¹⁶

How should we think about this tradeoff, of rights versus discounts? Unfortunately, there is no formula for an optimal balance. People might vary in their preferences for legal rights. As Judge Frank Easterbrook recognized: “in competition, prices adjust and both sides gain. ‘Nothing but the best’ may be the motto of a particular consumer but is not something the legal system foists on all consumers.”¹⁷ If, in fact, the rights boilerplates delete are pricey, many people would be happy to buy products and services stripped of the baseline entitlements the law provides, so long as they are rewarded with a significant price discount. Some, like James J. White, might sell away their legal rights cheaply: “for a nickel or a dime, almost all of us would give up our right to resell software and would agree to arbitrate.”¹⁸ Others might only do so for a more significant discount. And a few, Radin probably among them, might find the contractual rights so fundamental to their dignity that no discount would prompt them to waive these entitlements. Ideally, people would be able to self-select along quality/price traits, and would not be forced to buy the package that fits a different sub-group, even if that package has the superficial allure of “protection.” Indeed, this is the ultimate practice of autonomy, for a consumer to hold the metaphorical “dimmer” that increases (or decreases) contractual protections, and with them the price paid.

But self-selection is not feasible when firms cannot price differentiate, or when transactions costs constrain firms to offer a uniform package. In this situation, a desirable solution, both efficient and consistent with democratic values, is for vendors to offer the bundles that match majoritarian preferences. Allowing a small minority to impose its preferences on the majority of consumers, by enacting rules that mandate the price/quality bundle that this small sub-group prefers, would likely expel many who cannot afford this package out of the market.

There is plenty of reason to think that for most people, getting a lower price is the overriding goal. People shop at Walmart and at bargain basements, fly economy class, stay at Motel 6, and send packages by ground shipping, knowing that higher quality is available. They choose high deductibles for auto insurance, forgo the right to return products bought from clearance aisles, and make nonrefundable deposits to lock in low rates. In short, people seek price bargains everywhere. Why should they not seek bargains also in the legal rights? Is there a sense in mandating minimum quality to the very aspects of the deal that, truth be told, people care least about?

¹⁶ Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 Va. L. Rev. 1053, 1071-76 (1977); Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *Stan. L. Rev.* 361 (1991).

¹⁷ *Carbajal v. H&R Block*, 372 F.3d 903 (2004) (Easterbrook, J.).

¹⁸ James J. White, *Contracting Under Amended 2-207*, *Wis. L. Rev.* 723 (2004).

Even when they pay top price for premium products, few consumers would regard the overall value of the deal based on anything that boilerplate regulates, and the alleged havoc it wreaks with their “baseline legal entitlements.” Consider Apple’s boilerplate, one of the most grotesque boilerplates, mentioned in Radin’s book as an exemplar of a nasty rights-deletion scheme (p. 86). Are consumers exploited by Apple? Is their situation equivalent to coercion or fraud? Not by what this picture tells:



This is the line of eager consumers outside one of Apple’s stores, on the day that the iPhone 5 was launched. Lines like this were a global phenomenon. It is *not* a picture of a market failure, nor of gullible consumers divested of their rights. Is the Apple store a tortfeasor? Do these people look “more like being hit by a one of thousands of dumped projectiles”? (p. 210).

Do not be mistaken: the boilerplate that these people are going to “accept” will likely deny them the right to sue in a convenient court, will limit the warranty, will prompt them to let their private information and geo-locations be harvested by Apple and its affiliates, and will restrict people’s IP rights in the content they will be posting with their iPhones.¹⁹ When their turn in the queue will come to purchase the device, these people will be entering the world of boilerplate horrors, “transport[ed] . . . to a different legal universe where many of their background rights are deleted” (p. 210). To my unsophisticated eye, less trained in autonomists’ notions of self-determination versus disenfranchisement, this picture tells a story of people delighted to purchase a

¹⁹ <http://www.apple.com/legal/sla/docs/ios6.pdf>

product, which they regard as enhancing their capabilities, which they will brandish around victoriously. If polled, do you think these consumers would support legal protections that might make them wait longer in line, and would force them to pay more for the device? Would they be eager to disable popular (and free) apps like Apple Maps or Google Local, which give them real time directions and locations, in return for GPS tracking?

Ironically, it is likely that the worst deal these Apple customers can make is to purchase from the Apple store better legal terms. In fact, they do have this choice: they can buy the manufacturer's extended warranty plan ("Apple Care").²⁰ Instead of the standard terms (one year limited warranty), they can pay \$100 extra and receive a more generous warranty plan: two years, and coverage extended to include accidental damage to the device. In supplying higher-end legal terms, this scheme would probably satisfy the "meaningful choice" that autonomists advocate. But it is a bad deal, because it is an *expensive* insurance. It might be beneficial for clumsy users who accidentally drop their devices into the toilet, but to most other buyers a scheme of self-insurance (and greater care) is a smarter choice. In fact, even those who want the added coverage can obtain it more cheaply through SquareDeal, or through the consumer's credit card that offers a free Extended Warranty Protection.²¹ When there is demand for better legal protections, markets often supply them in separate, unbundled packages.

People buying popular product+boilerplate packages are demonstrating that that they don't care about the autonomists' concerns over the legal rights that boilerplate deletes. But maybe they *should* care. Maybe the rights to sue, to powerful warranties, to be free from data mining, and to enjoy the full spectrum of fair use rights in information should not be *optional*, but rather *mandatory*. Even if people want to thoughtlessly trade away these rights for the superficial allure of a trendy gadget, or for the short-lived satisfaction of a petty discount, maybe the law should deny them this option. What is implicated, perhaps, is more than the hedonistic gratification of iPhone users. It is the rule of law, the "ideal of contractual ordering," and "the apparatus of democratic governance" (p. 40).

These are weighty arguments that view a liberal society as more than the free exercise of bargain-hunting consumerism. It is a view that runs deeply through Radin's book. For example, "in order to preserve a widely valued aspect of social affairs, a society as a whole might not agree that waiver of privacy rights should be entirely determined by individuals" (p. 177). Entitlements should be non-waivable when they are "components of 'public' regimes underwritten by the polity for the sake of the structure of the polity itself" (p. 177). Because of their mass-market character, boilerplates are

²⁰ <http://www.apple.com/support/products/iphone.html>.

²¹ For a comparison of warranty plans for iPhone, see www.gottabemobile.com/2012/09/top-5-iphone-5-warranty-options-compared/

deleting entire legislative schemes that are “properly public (placed in the care of the polity, for the benefit of the polity as a whole)” (p. 212).

It is beyond the scope of this essay to enter this debate on paternalism in private law—whether the maintenance of “widely valued aspects of social affairs” justify limits on contracting, even in the absence of personal injury or of traditional forms of negative externalities. Similar debates have been thoroughly consummated in the literature on Informed consent. Should patients, for example, have the right to waive the ritual of informed consent? There, too, a version of “mandatory autonomism” regards the stakes as “public,” reaching beyond what individuals should be allowed to forgo. I have written elsewhere that such views of informed choices and mandatory autonomism, when applied to consumer boilerplate, “look more like threats to autonomy than protections of it.”²² Because the issues governed by boilerplate are complex and largely unfamiliar, mastering them can *detract* from one’s sense of control. And having to pay higher prices unless you are smart and sophisticated enough to thoughtfully waive these rights would make most people feel *less* autonomous. For many, the choice not to bother is the ultimate liberator.

When people buy phones and iPads with superior functional features and inferior boilerplate, for a price they consider worth waiting in a long line on a rainy day to pay, and when they diligently return to this line every two years, knowing all too well that there is a grotesque fine print attached, what breach of autonomy occurs? What is the consumer protection crisis that would justify punishing their vendors with tort liability, exemplary damages, and attorney fees? When these consumers install apps that provide them with useful daily service, and instead of paying the service providers they allow them to collect location and other personal data, what is the liberal theory that renders such currency unacceptable? What is the public value that tells people that they can no longer enjoy such bargains, and must instead pay for mandated modules of these services with top money and real sacrifice?

C. *The Problem of Regressive Cross Subsidies*

Not all people, however, value their legal rights as cheaply as Jim White does (his metaphorical nickel-or-dime). There may be a minority of citizens, I am guessing part of a sophisticated elite, for whom the boilerplate rights-deletion bargain is undesirable and even offensive. For them, the degradation of consent and of legal entitlements cannot be priced. They want the right to sue in courts, they want firm accountability measured by full consequential damages for their harms, they want personal data to remain

²² Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: the Failure of Mandated Disclosure* 63 (Forthcoming 2013); For related views, see Barry Schwartz, *The Paradox of Choice: Why More is Less* (HarperCollins, 2004); Edward C. Rosenthal, *The Era of Choice: The Ability to Choose and Its Transformation of Contemporary Life* (MIT Press, 2005).

personal, and they want access to information to be regulated by IP law, not by license agreements. If must, they are willing and able to pay more for this bundle of upgrades.

Unfortunately, meeting the preferences of such groups would require the entire pool of consumers, including the vast majority indifferent to such privileges, to also pay more. And so everyone will pay, for benefits that some are disproportionately likely to enjoy. For example, allowing parties to recover unlimited consequential damages would mean that high-loss types would be subsidized by those with lower losses, or more disturbingly, by those who took more care and thus suffered less injury.²³ Currently, most people can ship mail packages cheaply without much insurance, unless they pay more for the coverage. A legal rule mandating full consequential damages for delayed package shipping would spread the cost of such insurance across all customers, benefitting those who ship more expensive items. Similarly, mandatory rights to withdraw from a contract would benefit those more likely to exercise such option. Leisure travelers, for example, prefer to make careful plans and purchase nonrefundable air travel, rather than pay for the right to withdraw. Business travelers who value and exercise such withdrawal rights more end up paying large premiums for it. With a mandatory rule, the leisure travelers would cross subsidize the (more affluent) business clientele. And a legal rule that mandates access to court litigation and prohibits arbitration clauses might also impose a cross-subsidy. If this is more costly to firms, and if they cannot charge differentiated prices based on people's propensity to sue, consumer with higher propensity would be cross-subsidized by everyone else.²⁴

Cross-subsidies are everywhere, but they should be particularly troubling when they are regressive—when weaker and poorer consumers subsidize the sophisticated and wealthier ones. The legal rights that boilerplates delete, if they were mandated, would benefit the elite disproportionately more than others. First, the value of warranty or of remedies is greater to those with larger consequential losses, and we know that the affluent have more to lose than the poor. Second, in order to pursue any legal right—a warranty, litigation in court, or even the right to know—an aggrieved party has to understand what her rights are, and that they were violated, and be sophisticated and patient enough to successfully invoke the legal procedures for redress. She also needs to find an attorney that would take the case. On each of these counts, sophisticated (that is, educated and wealthy) consumers fare comparatively better. They are therefore the primary beneficiaries of the mandated protections.

²³ Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. Legal Stud. 105, 111 (1989). See also William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. Legal Stud. 241 (1983); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. Cal. L. Rev. 629, 659 (1988); Gwyn D. Quillen, *Contract Damages and Cross-Subsidization*, 61 S. Cal. L. Rev. 1125 (1988).

²⁴ Omri Ben-Shahar, *Mandatory Arbitration and Distributive Equity: An Essay on Access-to-Justice* (unpublished manuscript, 2013).

Protective policies are regressive in a way that is even more offensive to notions of distributive fairness when the protection they secure, even if furnished to all, is ranked low in the order of priorities by lower income people. Privacy rights are an example. The case against firms collecting big data has to do more with the interest “to preserve a widely valued aspect of social affairs” than with any individual harm (p. 177). It is the concern over the “character of society” that a sophisticated elite demands, but that most citizens do not recognize and would have a hard time even articulating, not to mention affording. Mandating such conception of autonomy on the entire citizenry and asking the lower middle class to finance this arrangement by paying higher prices is inequitable and coercive.

CONCLUSION: WHAT IS THE HARM?

“Boilerplate” goes out with a bang. The degradation fine print is alleged to bring about calls for regulation, but the tools of contract law (especially the doctrine of unconscionability) are too limp. If the fine print is part of the product that people purchase, why not regulate it the way product safety is regulated, through products liability law? If widespread denial of legal rights is equivalent to the mass-distribution of defective products, isn’t tort law more appropriate than contract law to regulate the effects of such widespread harms? (pp. 209-216)

This is an immensely creative idea, surely to become a legacy of the book, and it deserves careful attention beyond what I can offer in the remaining pages. My comments in the previous section meant to highlight the unintended consequences of such liability scheme on prices, affordability, and cross-subsidies. And so while I am skeptical whether the proposed tort would benefit consumers, it no doubt benefits the discussion. It is a welcome new framework, because it focuses the debate on the fundamental issue: what is the harm. It offers a common language for autonomists and boilerplate apologists. So let me say, in concluding, a few words on where this conversation might go.

To promote a new tort claim, autonomists would have to develop an account of harm that has real victims. They will have to identify better poster cases than they currently have. For two decades, the wrath of autonomists has been aimed against the case of ProCD v. Zeidenberg, the precedent that allowed firms to “shrinkwrap” the fine print with the product without giving customers the opportunity to read it prior to purchase.²⁵ But the plaintiff in the case, Mr. Zeidenberg, evokes very little sympathy. He bought a \$150 CD-ROM that contained digital phone listings from over 3000 directories, assembled laboriously by ProCD at a cost of over \$10 million. Opportunistically, he then began to sell commercial access to these data, in competition with ProCD, despite the not surprising contractual prohibition in the shrinkwrap license. It is also worth mentioning that a less restrictive, but far more expensive, license was obtainable from

²⁵ ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

ProCD, but Zeidenberg—the ultimate free rider—decided to buy the cheaper, personal use package. He then had the hutzpah to argue that he did not have an opportunity to read the fine print in advance (because it was sealed in the package) and therefore should not be bound to it.

Or take another major exhibit in autonomists' hall of shame: the Supreme Court case, *AT&T Mobility v. Concepcion*, which required state courts to enforce mandatory arbitration clauses.²⁶ The Concepcions' complaint was that they were charged sales tax on phones that were promised to be "free," which they received when signing up for AT&T service. The Concepcions did receive two free phones, and the charge \$30.22 was based on the phones' retail value (and was passed on to the government). Is this deception? Fraud? Even if the ad of "free phones" is incomplete in leaving out the tax charge (but recall that autonomists don't like fine print in advertising either), this is hardly a banner case for the plight of consumers. The Concepcions, leading a well-oiled class action charge, suffered as microscopic an injury as one could imagine.

The focus on "what is the harm" has important implications also for boilerplate apologists. It is already recognized that fine print has the potential to undermine the value that people believe they purchased, in areas such as consumer credit and insurance. Firms, for example, should not be able to run ads promising castles in the sky and then disclaim them in fine print. Laws against fraud and deception deal with such practices. But boilerplate can inflict more elusive forms of deceit and harm that escape the rigor of anti-fraud law. In another important work on boilerplate, Oren Bar-Gill has shown how firms reduce the perceived price of their products by hiding various charges in the fine print, particularly by back-loading costs onto long-term price dimensions.²⁷ These are harms not due to "baseline entitlements" like arbitration or exculpatory clauses. Rather, such practices are harmful because they undermine the price effect dynamics, they disrupt competition, and impose disproportionate burdens on the least sophisticated consumers. Boilerplate apologists would be wise to assess these potential harms, and harness Radin's tort-law framework in addressing them.

²⁶ *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).

²⁷ Oren Bar-Gill, *Seduction By Contract* 21-23 (2012).

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