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CARRYING A GOOD JOKE TOO FAR

PETER A. ALCES* AND JASON M. HOPKINS**

When it came to the preemptive codification of payments law, commercial law spirits ran high in the early 1950s. Frederick Beutel, then a Professor of Law at the University of Nebraska,¹ had written in support of the argument that “[t]he Proposed Uniform [?] Commercial Code Should Not Be Adopted.”² He complained about the scope of the Code,³ its language,⁴ its un-Code-like character,⁵ and the impracticality of its rule of interpretation and application,⁶ but he saved his most powerful salvo for all of Article 4, which he famously described as “a piece of vicious class legislation.”⁷ Well, even making some allowance for scholarly hyperbole, it does warm the soul of a student of the commercial law to see any piece of commercial legislation generate such, let us say, excitement.

Beutel was sure that Article 4 was a “sellout” to the bank lobby by the sponsors of the Code to win that important constituency’s support for the balance of the U.C.C.⁸ In fact, he traced the bank lobby’s efforts to gain legislative blessing of banks’ efforts to impose contracts on their customers to the failed American Bankers’ Association Uniform Bank Collection

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1. Beutel’s staunch opposition to the U.C.C. engendered a certain amount of fame, or, perhaps, infamy. See, e.g., Frederick K. Beutel, *The Proposed Uniform Commercial Code as a Problem in Codification*, 16 L. & CONTEMP. PROBS. 141 (1951); Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 YALE L.J. 334 (1952) [hereinafter Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*]. He did, however, author a casebook on the subject. FREDERICK K. BEUTEL, *INTERPRETATION OF UNIFORM COMMERCIAL LAWS: CASES AND MATERIALS* (1950). His treatise on negotiable instruments, a primary area of interest for Beutel, remains in print today. FREDERICK K. BEUTEL, *BEUTEL’S BRANNAN NEGOTIABLE INSTRUMENTS* (Greenwood Press 7th ed. 1971) (1902).

2. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, *supra* note 1.

3. *Id.* at 336–37.

4. *Id.* at 337–39.

5. *Id.* at 348–50.

6. *Id.* at 350–52.

7. *Id.* at 357.

8. *Id.* at 362. In Beutel’s view, passage of the Article “raise[d] the question whether the American Law Institute has ceased to be a learned scientific body to become a plush pressure group dominated by reactionary financial interests.” *Id.* at 363.

Code.⁹ So Article 4 of the U.C.C. was, according to Beutel, just the banks' final vindication of the strong-arm tactics they had not been able to push through state legislatures on their own. As a part of "uniform" legislation, Article 4 could become part of a deal and would not have to stand on its own. The bank lobby had something to offer in exchange for its protective legislation: promulgation of comprehensive uniform commercial legislation, all the rest of the U.C.C.

Grant Gilmore, surely a giant of the commercial codification movement in this country,¹⁰ and, at the time, a Professor at the Yale Law School, responded to Beutel's attack on the proposed U.C.C.¹¹ He defended the Code's terminology,¹² conflict of laws provisions,¹³ and even disagreed with what Beutel had said about several provisions of Article 4,¹⁴ but, at the end of the day, his heart was just not in it: "I do not care to urge enactment of the present text of the Article . . . which Beutel draws in question, leaving that task to someone who can undertake it with a better heart."¹⁵ Gilmore's problem was not with all of the proposed Article; in fact, it was with one provision: section 4-103, providing that "banks may by general or special agreement contract out of any of the rules laid down in the balance of the Article, provided only that the bank may not disclaim responsibility for the exercise of good faith and ordinary care."¹⁶ This, Gilmore concluded, was "carrying a good joke too far."¹⁷ Over the course of the last more than half century, we have continued to carry the joke, and we argue here that it has not improved with age.

9. The Bank Collections Code, drafted by lawyers for the American Bank Association without the input of the ALI, attempted to "protect the banks throughout the process of collection, throwing the loss on the customers." *Id.* at 358. The legislatures in nineteen states adopted the Code, though the courts of some of those states eventually declared the Code unconstitutional. *Id.*

10. Gilmore was a member of the U.C.C. drafting committee from 1948–51, the time in which Article 4 was finalized.

11. Grant Gilmore, *The Uniform Commercial Code: A Reply To Professor Beutel*, 61 YALE L.J. 364 (1952) [hereinafter Gilmore, *A Reply*]. Gilmore characterized Beutel's attack as a "story about the young girl who was as good as she was beautiful, from whose mouth fell diamonds at every word. Her name was Commercial Law. This lovely maiden had an ugly stepsister, Commercial Code, whose mother was a wicked witch known professionally as the American Law Institute." *Id.* at 364. It merits mention that Gilmore, too, appreciated the difficulties in codifying the commercial law. See Grant Gilmore, *On the Difficulties of Codifying Commercial Law*, 57 YALE L.J. 1341 (1948).

12. Gilmore, *A Reply*, *supra* note 11, at 367.

13. *Id.* at 373–74.

14. *Id.* at 374 n.22.

15. *Id.* at 374.

16. *Id.* at 375. Both Gilmore and Beutel were discussing what they referred to as the "Summer, 1951" version of the Section. See *id.* at 374 n.23. Gilmore noted that certain alterations were made thereafter in an effort to "simplify the language," *id.*, but the substance of the section, if not the precise language, remains intact today. The current section, unchanged by the 2002 amendments to Article 4, is reproduced in the next textual paragraph.

17. *Id.* at 375.

Current 4-103(a) provides:

The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable.¹⁸

It is now a very old joke, and not even such a good joke any longer. The next iteration of the bank deposits and collections law ought to stop telling it.

This paper examines the effects of form terms in bank customer agreements and the role contract doctrine has (or should have) in policing those terms. Part I surveys some of the terms that are most disadvantageous to bank customers, as well as the courts' reaction to these terms. Part II attempts to shed some light on the reason such terms exist: an informational cross-subsidy that disadvantages some customers for the benefit of banks and their most sophisticated customers. Scholars' attempts to mitigate or explain away the effects of this cross-subsidy are explored in Part III, and Part IV offers a modest proposal to address the subsidization in the specific context of bank-customer agreements. Part V concludes.

I. THE POTENTIALLY OFFENSIVE TERMS

Start from the premise that some form terms are more problematic from the perspective of bank customers because those terms impose burdens on customers that they would not anticipate.¹⁹ This is akin to the "un-

18. U.C.C. § 4-103(a) (2005). An example of the invocation of 4-103 is found in *Fundacion Museo de Arte Contemporaneo v. CBI-TDB Union Bancaire Privee*, 996 F. Supp. 277 (S.D.N.Y. 1998). There, the court refused to find the bank liable for \$825,000 fraudulently debited from the customer's account because the customer had not reported the fraud to the bank within thirty days of the mailing (not receipt) of the account statement as required by the account agreement. *Id.* at 291. The court acknowledged that the bank customer, located in Venezuela, had exercised "reasonable care and promptness" as required by 4-406, especially given the unreliability of the Venezuelan mails. *Id.* at 290-91. Similarly, in *Lema v. Bank of America, N.A.*, 826 A.2d 504, 508 (Md. 2003), the court, citing a boilerplate provision in the deposit agreement, permitted the bank to charge back \$60,000 to Lema's account even though the deposit had become "final" under 4-214(a).

19. This premise is the subject of ongoing hearings in the U.S. Senate. Senator Dodd, chairman of the Senate Banking, Housing, and Urban Affairs Committee, doubts the ability of bank customers to understand their transactions with the bank:

We must closely examine the current disclosure regime. The current system of disclosure is outdated, has not kept pace with the variety of credit card practices, and consumers have little understanding of the terms and conditions of their credit card contracts. Despite the significant work of many . . . to provide consumers with clear, understandable, and consistent information, consumers are increasingly becoming confused and intimidated.

Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and Their Impact on Consumers: Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, 110th Cong. (2007) (statement of Sen. Dodd, Chairman, Senate Comm. on Banking, Housing, and Urban

fair surprise” element of unconscionability,²⁰ without concluding, of course, that the terms are in fact unconscionable. We cannot take “unfair surprise” too seriously without concluding that virtually all legal terms are in some respect surprising, often unfairly so, if our test of surprise is the customer’s expectations.²¹ How many bank customers really appreciate what is at stake if a choice of law or arbitration clause is enforceable? Indeed, how many lawyers could certainly tell them? How many bank customers have any idea that there is any limit on banks’ ability to propose and enforce potentially oppressive terms unilaterally?

So instead of unfair surprise in the unconscionability sense, we must settle on a different conception of what should and should not be enforceable. The problem is that we may not be able to do much better than the idea of agreement: why would we ever want the law to enforce a term that is not the product of agreement? But if we take agreement seriously in the bank-customer context, we might have to acknowledge that there is in fact no agreement, in any meaningful sense, between the contracting parties. Banks dictate and customers acquiesce. Most of the time that causes no problem, because nothing goes wrong, and if anything goes very wrong the customer will respond by changing banks. Certainly it is unlikely that the customer will pay any more attention to the form of agreement imposed upon her by the second bank than she did to the form proffered by the first

Affairs). Senator Dodd pointed to double cycle billing, penalty increases in interest rates, and the issuance of multiple low limit cards with exorbitant fees as but a few of the “controversial” and “pervasive” practices responsible for consumers’ confusion and intimidation. *Id.*

20. See U.C.C. § 2-302 cmt.1 (“The principle is one of prevention of oppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.”); see also *Waters v. Min Ltd.*, 587 N.E.2d 231, 233 (Mass. 1992) (“Unconscionability must be determined on a case-by-case basis, with particular attention to whether the challenged provision could result in oppression and unfair surprise to the disadvantaged party”); *Gillman v. Chase Manhattan Bank, N.A.*, 534 N.E.2d 824, 830 (N.Y. 1988) (“The aim of the Uniform Commercial Code unconscionability provision . . . is to prevent oppression and unfair surprise”).

21. See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) & cmt. f (1981) (prohibiting the enforcement of “terms which are beyond the range of reasonable expectation”). Commentators disagree on the proper application of this section. Professor Hillman argues that “so long as the consumer has had a reasonable opportunity to read the standard terms, courts should find tacit or ‘blanket’ assent to conscionable standard terms.” Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 748 (2002). Professor Rakoff concludes that “form terms present in contracts of adhesion ought to be considered presumptively (although not absolutely) unenforceable.” Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 *HARV. L. REV.* 1173, 1176 (1983).

For cases applying the reasonable expectation formulation of unconscionability, see *Vicksburg Partners, L.P. v. Stephens*, 911 So. 2d 507, 523 (Miss. 2005) (“the doctrine of substantive unconscionability invalidates oppressive terms . . . such as terms which violate the reasonable expectations of parties”); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (quoting *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981)) (“a contract or provision which does not fall within the reasonable expectations of the weaker or ‘adhering’ party will not be enforced against him”); *Broemmer v. Abortion Servs.*, 840 P.2d 1013, 1016 (Ariz. 1992) (quoting *Graham*, 623 P.2d at 172) (same).

bank. But, after all, there is the “principle of the thing,” and hope springs eternal that the new bank will be “nicer.” So to the extent customers vote with their feet, there is a (very artificial) way to find something redolent of agreement, just not agreement itself. The object of our exercise should be to draw the distinction that 4-103 obscures—to decide when it is appropriate to enforce the terms of the bank-customer agreement against the party who did not draft, that is, against the customer—and we need to get rid of 4-103 in order to do so.

Before suggesting the contours of a calculus that could supplant current 4-103, it is necessary to consider briefly the range of terms such a calculus would police. Among the most often litigated terms contained in run-of-the-mill bank-customer agreements are provisions concerning a customer’s right to a jury trial in the event of litigation related to the account²² and the ability of the bank to change the terms of the account agreement.²³ Clearly, these are not the only potentially pernicious provisions contained in bank agreements, but they are some of the most challenged terms. While it may be the case that some consumer would have some idea of how these terms would operate, it is quite unlikely that the terms—or the agreements themselves—would ever be read or, if read, understood by the vast majority of bank customers. For the most part, though, that would not distinguish bank-customer agreements from any other form agreement between parties of unequal sophistication and bargaining power: no one really understands the agreement to be the product of “agreement,” in any meaningful sense.²⁴

22. See, e.g., SUMMIT COMMUNITY BANK, CONSUMER DEPOSIT ACCOUNT AGREEMENT AND DISCLOSURES 1 (2006) (“You waive your right to a jury trial in any dispute with us.”); BB&T, BANK SERVICES AGREEMENT 12 (2006), available at <http://www.bbt.com/bbt/about/privacyandsecurity/completeclientprotection/BSA.pdf> (“You are waiving rights you may have to litigate . . . before a jury.”); SUNTRUST BANK, RULES AND REGULATIONS FOR DEPOSIT ACCOUNTS 9 (2006), available at <https://www.suntrust.com/portal/server.pt> (select “Business Banking,” then “Banking,” then “Rules and Regulations for Deposit Accounts” hyperlink) (“Depositor and Bank hereby . . . waive the right to a trial by jury in respect to any litigation based hereon or arising out of these rules and regulations.”).

23. See, e.g., JP MORGAN CHASE BANK, ACCOUNT RULES AND REGULATIONS (ILLINOIS MAJOR MARKET) 32 (2006) (“We may change the terms of this Agreement . . . upon notice sent to you via ordinary U.S. mail . . . By maintaining your Account after the effective date of any change, you agree to be bound by the changes.”); BANK OF AMERICA, DEPOSIT AGREEMENT AND DISCLOSURE 1, 11 (2006) (“We may change this Agreement at any time. . . We generally send you advance notice of an adverse change. . . If a change is not adverse to you, however, we may make the change at any time without advance notice,” and “we may post a notice of a change in our banking offices or on our website.”).

24. See generally Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Margaret Jane Radin, *Commentary, Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387 (1983).

Courts asked to enforce the terms of bank-customer agreements do not quibble about the reality of agreement. They focus instead on surrogates for agreement—essentially, conceptions of fairness. Consider, for example, waivers of the right to a jury trial, one of the most pervasive form terms.²⁵ Courts acknowledge that such a waiver is rarely the subject of real agreement in the sense of a bargained-for exchange. Instead, drawing on language used in the criminal law to determine the validity of a defendant's waiver of his constitutional right to counsel,²⁶ courts ask simply whether a pre-litigation contractual jury trial waiver was entered into “knowingly, voluntarily, and intelligently.”²⁷ In determining whether a waiver was knowing, voluntary, and intelligent, courts employ multi-factor analyses reminiscent of those used to determine the validity of boilerplate generally. Oft-used factors include the conspicuousness of the waiver term²⁸ and the

25. See, e.g., *Morgan Guaranty Trust Co. v. Crane*, 36 F. Supp. 2d 602, 604–05 (S.D.N.Y. 1999) (enforcing a waiver contained in a promissory note); *Nat'l Westminster Bank, U.S.A. v. Ross*, 130 B.R. 656, 667 (S.D.N.Y. 1991) (“[T]he Court cannot find a single reported New York decision in which a court refused to enforce a jury trial waiver provision in a bank loan agreement or guarantee”); *Uribe v. Merchants Bank*, 642 N.Y.S.2d 23, 24 (N.Y. App. Div. 1996) (enforcing a waiver contained in a safety deposit box agreement); *Brian Wallach Agency, Inc. v. Bank of N.Y.*, 428 N.Y.S.2d 280, 282 (N.Y. App. Div. 1980) (upholding waiver contained in a deposit agreement).

26. See, e.g., *Iowa v. Tovar*, 541 U.S. 77, 88 (2004) (“any waiver of the right to counsel [must] be knowing, voluntary, and intelligent”); *Moran v. Burbine*, 475 U.S. 412, 452 n.37 (1986) (quoting *Solem v. Stumes*, 465 U.S. 638, 641, 647–48 (1984)) (same); *Estelle v. Smith*, 451 U.S. 454, 471 n.16 (1981) (“Waivers of the assistance of counsel . . . must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege”) (quotation omitted). The Court has noted that the ability to waive due process rights to notice and hearing prior to a civil judgment “parallels the recognition of waiver in the criminal context where personal liberty, rather than a property right, is involved.” *D. H. Overmyer Co. Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972).

27. See, e.g., *Phoenix Leasing Inc. v. Sure Broadcasting, Inc.*, 843 F. Supp. 1379, 1384 (D. Nev. 1994) (“The federal standard for determining the validity of a contractual waiver of the right to jury trial requires us to determine if the waiver was knowing, voluntary and intelligent.”); *Standard Wire & Cable Co. v. AmeriTrust Corp.*, 697 F. Supp. 368, 375 (C.D. Cal. 1988) (“For a jury trial waiver to be effective, it must be knowing, voluntary and intelligent.”); *L & R Realty v. Connecticut Nat'l Bank*, 699 A.2d 291, 297 (Conn. App. Ct. 1997) (“the contractual jury trial waiver must be made knowingly, voluntarily and intelligently”).

28. See, e.g., *Nat'l Equip. Rental, Ltd. v. Hendrix*, 565 F.2d 255, 258 (2d Cir. 1977) (holding that a waiver clause “set deeply and inconspicuously in the contract” did not constitute a knowing and intelligent waiver); *Gaylord Dep't Stores v. Stephens*, 404 So. 2d 586, 588 (Ala. 1981) (because the “jury waiver provision is buried in paragraph thirty-four in a contract containing forty-six paragraphs . . . it does not appear that the waiver by Stephens was intelligently or knowingly made”). Cf. *Phoenix Leasing*, 843 F. Supp. at 1384 (upholding a waiver printed in capital letters which was “the only material contractual clause appearing on the signature page and [was] located directly above the signature line”).

New York law mandates that consumer transaction contracts and residential leases be printed in no less than eight-point typeset. N.Y. C.P.L.R. § 4544 (McKinney 2007). Courts have had little difficulty voiding jury waivers that do not comport with this requirement. See, e.g., *Monarch Prop. Assoc. v. Benjamin*, 454 N.Y.S.2d 173 (N.Y. Sup. Ct. 1982); *Koslowski v. Palmieri*, 414 N.Y.S.2d 599 (N.Y. Sup. Ct. 1979); *Street v. Davis*, 542 N.Y.S.2d 968 (N.Y. Civ. Ct. 1989); *Balram v. Etheridge*, 449 N.Y.S.2d 389 (N.Y. Civ. Ct. 1982).

disparity in bargaining power or knowledge between the parties.²⁹ The process of adapting these deal-policing analyses to evaluate the knowledge, voluntariness, or intelligence supporting a waiver is somewhat circuitous: a waiver is analytically no different from any other contract term;³⁰ indeed, all contract terms “waive” something insofar as they allocate risk. And the analysis is not uniform across all waiver terms: courts analyze waivers of the right to proceed as a class not under criminal law notions of waiver, but under the contract doctrine of unconscionability.³¹ Some courts acknowledge that determining whether a waiver was knowing, voluntary, and intelligent is just a roundabout way of determining whether a party agreed to the waiver.³² As one court put it, “[i]nherent in the concept of waiver is the notion of assent.”³³ More accurately, waiver *requires* assent.

29. See, e.g., *Gaylord Dep't Stores*, 404 So. 2d at 588 (refusing to enforce a waiver where “the equality of the bargaining power of the parties is questionable”); *Fairfield Leasing Corp. v. Techni-Graphics, Inc.*, 607 A.2d 703, 706 (N.J. Super. Ct. Law Div. 1992) (“[A] non-negotiated jury waiver clause [that] appears inconspicuously in a standardized form contract entered into without assistance of counsel . . . should not be enforced.”). Cf. *Cook v. Hibernia Nat'l Bank*, 847 So. 2d 617, 617 (La. Ct. App. 2002) (enforcing a waiver because “Plaintiff is an experienced business woman in these documents”).

30. Perhaps there is something “special” about a jury trial waiver. When courts refuse to enforce them, opinions are cast in consumer protection language, though given the proliferation of these waivers, courts may be engaged in a species of self-protection. The supreme courts of Georgia and California, for example, have declared that all contractual jury trial waivers entered into before litigation is contemplated are invalid. *Grafton Partners, L.P. v. Superior Court*, 116 P.3d 479, 481 (Cal. 2005) (concluding that a statutory list of permissible methods of waiver—which does not include pre-litigation contractual waiver—is exhaustive); *Bank South, N.A. v. Howard*, 444 S.E.2d 799 (Ga. 1994) (finding that because the opposite code sections permit jury waivers only when litigation is contemplated, blanket waivers are invalid).

31. Cases finding these waivers unconscionable include *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005) (finding a class waiver in a credit card agreement to be unconscionable because “class actions and arbitrations are, particularly in the consumer context, often inextricably linked to the vindication of substantive rights”); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 278 (W.Va. 2002) (finding a class waiver to be unconscionable because “the availability of class action relief is a *sine qua non* to permit the adequate vindication of consumer rights”); *Discover Bank v. Shea*, 827 A.2d 358, 368 (N.J. Super. Ct. Law Div. 2001) (“The requirement for a cardmember to pursue a claim against Discover on an ‘individual’ basis . . . is an unconscionable restriction that should not be enforced.”). Cases reaching the opposite result include *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 896 (Ill. App. Ct. 2003) (“we do not find the no-class-action provision to be so one-sided or oppressive as to render the agreement unconscionable”); *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1261 (Del. Super. Ct. 2001) (“The surrender of that class action right was clearly articulated in the arbitration amendment. The Court finds nothing unconscionable about it and finds the bar on class actions enforceable.”).

32. See, e.g., *Novella v. Hartford Accident & Indem. Co.*, 316 A.2d 394, 400 (Conn. 1972) (“Waiver involves the idea of assent, and assent is an act of understanding.”) (quotation omitted); *Soares v. Max Serv., Inc.*, 679 A.2d 37, 52 (Conn. App. Ct. 1996) (same). Cf. *Allyn v. Western United Life Assurance Co.*, 347 F. Supp. 2d 1246, 1253 (M.D. Fla. 2004) (upholding a waiver after finding a “pattern of assent to the waiver provisions in other loan transactions”); *In re Ball*, 665 N.Y.S.2d 444, 447 (N.Y. App. Div. 1997) (upholding a waiver because the plaintiff had made a “conscious and deliberate decision to consent to arbitration”).

33. *L & R Realty v. Connecticut Nat'l Bank*, 699 A.2d 291, 294 (Conn. App. Ct. 1997) (quoting *Fisette v. DiPietro*, 611 A.2d 417 (1992)).

The standard term that is perhaps most likely to upset the reasonable expectations of bank customers is the ubiquitous provision allowing banks to unilaterally modify the terms and conditions of account agreements. These terms are the primary means for the adjustment of rates and fees on bank deposit and credit card accounts, a practice with which customers rarely quibble.³⁴ Customers object more often, though, when the modification imposed by the bank is the addition of an arbitration agreement. Arbitration clauses not only drive the law of contract underground,³⁵ they may result in collusion among banks attempting to capture those customers that care enough to shop for banks that do not require arbitration.³⁶ Arbitration clauses may be pernicious in a negotiated contract setting, but they cause even more concern when unilaterally imposed upon customers via a modification clause contained in a form contract.

The cases determining the validity of inserted arbitration clauses can be reduced to two groups: those in which an apposite statute supports the result, and those in which traditional principles of contract law govern. The discussion that follows will focus largely on decisions involving bank credit agreements, rather than deposit agreements, because credit agreements are more often litigated. The analogy is apt: banks rely on non-uniform state statutes for authority to modify the terms of credit agreements in the same manner they rely on 4-103 when modifying the U.C.C.'s effect on deposit agreements.

Banks that incorporate Delaware law into their credit agreements thereby have statutory authority to add arbitration clauses to those agreements, even if the agreement itself contains no modification clause.

Unless the agreement governing a revolving credit plan otherwise provides, a bank may at any time and from time to time amend such agreement in any respect . . . [including] the addition of new terms . . . or

34. Though customers may complain if the bank overreaches. See *Rossman v. Fleet Bank* (R.I. Nat'l Ass'n, 280 F.3d 384, 395–400 (3d Cir. 2002) (reversing dismissal of a suit alleging a “bait-and-switch” scheme in which Fleet Bank lured customers in with a no-fee credit card and thereafter imposed a fee via the modification clause).

35. Charles Knapp argues that the non-precedential nature of arbitration results in decisions that “neither follow the law, nor contribute to it.” Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 785 (2002). At common law, arbitration agreements were unenforceable because they deprived courts of rightful jurisdiction. See John R. Allison, *Arbitration of Private Antitrust Claims in International Trade: A Study in the Subordination of National Interests to the Demands of a World Market*, 18 *N.Y.U. J. INT'L L. & POL.* 361, 369 (1986) (citing LON L. FULLER & MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* 432–34 (3d ed. 1972)).

36. This antitrust claim was made by the plaintiff class in *In re Currency Conversion Fee Antitrust Litigation*, No. 05 Civ. 7116(WHP), 2006 WL 2685082 (S.D.N.Y. Sept. 20, 2006). The court dismissed the claim because the plaintiffs had not satisfied the injury-in-fact requirement of Article III standing: The banks had not invoked the arbitration agreements in this particular suit. *Id.*

modification of existing terms, whether relating to . . . *arbitration or other alternative dispute resolution mechanisms*³⁷

Courts applying this law are left with little choice but to enforce the arbitration “agreement.”³⁸ And while the law governs only credit accounts, banks can effect the same result by including similar language in the boilerplate of their initial deposit accounts.³⁹ In the absence of an apposite statute or pre-modification agreement, however, courts view the addition of an arbitration clause through the same prism as any other contractual modification: mutual consent is required.⁴⁰ A North Carolina appellate court, after distinguishing the cases that relied upon the Delaware statute, found that customers “are not bound to unknown [arbitration] terms which are beyond the range of reasonable expectation.”⁴¹ In California, the enforceability of unilaterally imposed arbitration clauses is determined by reference to classical conceptions of contract agreement:

37. DEL. CODE ANN. tit. 5, § 952(a) (2006) (emphasis added). That section applies specifically to bank issuers; other lenders are governed by identical language in DEL. CODE ANN. tit. 5, § 2224 (2006). Colorado has a similar statute, though it does not by its express terms extend to the addition of arbitration clauses. COLO. REV. STAT. ANN. § 5-3-103 (West 2006).

38. See, e.g., *Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 466 (S.D.N.Y. 2004) (“continued charges by authorized users, coupled with plaintiff’s failure to submit to defendant the required written objection, evinces plaintiff’s consent to the arbitration amendment”); *Marsh v. First USA Bank, N.A.*, 103 F. Supp. 2d 909, 915 (N.D. Tex. 2000) (“Plaintiff was statutorily and contractually bound by a valid amendment by virtue of the use of the credit card.”); *Joseph v. M.B.N.A. Am. Bank, N.A.*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (“M.B.N.A. included an opt-out clause for Joseph, but he did not use it. Consequently, he must be held to the amendment of the credit card agreement.”).

At least one court has refused to apply the Delaware law on the ground that a “bill stuffer” does not constitute mutual agreement. *Discover Bank v. Shea*, 827 A.2d 358, 363 (N.J. Super. Ct. Law Div. 2001) (“the Delaware law [Title 5, § 952] clearly violates New Jersey Public policy and under New Jersey law that choice of law provision cannot be given effect.”).

39. In *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026 (S.D. Miss. 2000), the court found that when the customers “signed their initial signature cards, they agreed that the terms and conditions of their deposit accounts could change in the future upon sufficient notice.” *Id.* at 1030. Because the plaintiffs maintained their accounts under the revised deposit agreements, the court found that “the plaintiffs agreed to arbitrate their disputes.” *Id.* at 1032. The court cited *Hill v. Gateway 2000 Inc.*, 105 F.3d 1147 (7th Cir. 1997), in support of its conclusion that a bank customer need not read an arbitration clause to be bound by it. *Id.* at 1031.

40. Banks may argue that a failure to immediately pay an outstanding balance constitutes assent to the arbitration provision. The court in *Shea v. Household Bank (SB) National Ass’n*, 129 Cal. Rptr. 2d 387, 389 (Cal. Ct. App. 2003), after noting that consent to modification may be inferred from conduct, concluded: “The question then becomes whether plaintiff’s failure to immediately pay off the balance and cancel the card amounted to a ratification. Our answer is no.”

41. *Sears Roebuck & Co. v. Avery*, 593 S.E.2d 424, 431 (N.C. Ct. App. 2004) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. F (1981)). The court continued:

Nor do we believe that allowing Sears to change or amend its agreement without any limitation is within the reasonable expectations of its cardholders. A customer would not expect that a major corporation could choose to disregard potential contractual opportunities and then later, if it changed its mind, impose them on the customer unilaterally.

Id. at 432.

The initial step in determining whether there is an enforceable ADR agreement between a bank and its customers involves applying ordinary state law principles that govern the formation and interpretation of contracts in order to ascertain *whether the parties have agreed* to some alternative form of dispute resolution.⁴²

One Pennsylvania federal court not bound by Delaware law⁴³ reached the (perhaps overzealous) conclusion that under that statute, “credit card holders would find themselves in an Orwellian nightmare, trapped in agreements that can be amended unilaterally in ways they never envisioned.”⁴⁴ Other cases discussed in the footnotes demonstrate that courts, when not constrained by statute, apply traditional contract principles and attempt to find real, bargained-for agreement supporting the addition of arbitration clauses to bank credit agreements.⁴⁵

The foregoing survey demonstrates the methods used by courts to evaluate boilerplate terms in bank-customer agreements. Surrogates for agreement such as principles of waiver and statutes that mandate agreement miss the point. Only when agreement—actual knowing understanding—determines the validity of the term is the fundamental purpose of the contract law vindicated. Having examined the offensive terms themselves, a brief explanation of the economics that explains the ubiquity of these terms is apposite.

42. *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 278 (Cal. Ct. App. 1998) (emphasis added). The court found nothing to “support the proposition that ADR can be imposed on a bank’s customers without their consent.” *Id.* at 279.

43. “Courts applying a state law that explicitly authorizes this practice have upheld it, while courts that are not similarly bound have often struck down attempts to add wholly new provisions to cardholder agreements.” *Perry v. FleetBoston Fin. Corp.*, No. Civ.A.04-507, 2004 WL 1508518, at *3 (E.D. Pa. July 6, 2004).

44. *Id.* at *4. The court here dropped a footnote: “The Court is reminded of George Orwell’s 1946 work, *Animal Farm*, in which the pigs assume power and change the terms of the animals’ social contract, reducing the original Seven Commandments, which included ‘All animals are equal,’ to one—‘All animals are equal, but some animals are more equal than others.’” *Id.* at *4 n.5.

45. The court in *Stone v. Golden Wexler & Sarnese, P.C.*, 341 F. Supp. 2d 189 (E.D.N.Y. 2004), started from the proposition that “[a]scertainment of the intent of the contracting parties is the cardinal rule in the construction of agreements.” *Id.* at 197 (quotation omitted). The court’s analysis employs classical contract doctrine.

It is undisputed that plaintiff made no express, affirmative assent to the addition of the arbitration clause. There is also little evidence to suggest that plaintiff implicitly consented, much less the “clear, unequivocal, and convincing evidence” required under Virginia law. . . . Therefore, the arbitration clause does not constitute a binding modification under general principles of Virginia contract law.

Id. at 192; see also *Long v. Fidelity Water Sys., Inc.*, No. C-97-20118 RMW, 2000 WL 989914, at *3–4 (N.D. Cal. May 26, 2000) (finding that the modification clause “is reasonably construed as allowing Household [Bank] to . . . change financial terms of the account. It cannot be reasonably construed as explicitly allowing the insertion of an arbitration clause. . . . Accordingly, the court finds that Mr. Continolo did not consent to arbitrate this dispute.”); *Victoria v. Superior Court*, 710 P.2d 833, 834 (Cal. 1985) (“[T]he policy favoring arbitration cannot displace the necessity for a voluntary *agreement* to arbitrate.”) (quotations omitted).

II. GUERILLA TERMS AND SHROUDING

Elsewhere one of us has introduced the “guerilla term,” a term whose presence or effect is inadequately advertised so that the result is, for reasons discussed below, an exploitation of unsophisticated consumers.⁴⁶ That exploitation redounds to the benefit of sophisticated consumers and also to the benefit of form drafters who incorporate guerilla terms. While bank-customer agreements may include guerilla terms, not all boilerplate in those agreements acquires guerilla status. Account agreements about which there is competition *and* advertisement are examples of form terms that would not (for the most part) be guerilla terms.⁴⁷ However, when the bank hides a term in the math for the purposes of exploiting less-sophisticated consumers, that term may be a guerilla term.⁴⁸

A recent contribution to the economic literature described the *modus operandi* of such merely ostensible “agreements.” Professors Xavier Gabaix and David Laibson discovered in shrouded product attributes a market in misinformation.⁴⁹ They conclude that not only do market incentives fail to deter firms from engaging in unscrupulous behavior, but that those same incentives instead encourage firms to engage in unconscientious advantage-taking: “We show that informational shrouding flourishes even in highly competitive markets, even in markets with costless advertising, and *even when the shrouding generates allocational inefficiencies.*”⁵⁰ Their analysis centers on the pricing of base goods (“loss leaders”) and necessary accessories (“add-ons”); but because price and risk are directly correlated,⁵¹ their conclusions apply equally to bank-customer agreements.⁵² Banks that engage in “shrouding”⁵³ effectively hide the true cost of con-

46. Peter A. Alces, *Guerilla Terms*, 56 EMORY L.J. 1511 (2007). The discussion in this Part largely retraces that argument.

47. Such as a free-with-direct-deposit checking account term.

48. See *infra* notes 59–65 and accompanying text.

49. Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. OF ECON. 505 (2006).

50. *Id.* at 505 (emphasis added).

51. That is, the more risk you assume, the lower the price you pay; conversely, the less risk you assume, the higher the price you pay.

52. In modern contractual contexts, it is impossible to ignore the interrelatedness of contract and product. See, e.g., Radin, *supra* note 24, at 1229 (arguing that add-ons and hidden contract terms are, “for economic purposes . . . both just features of the product.”); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1453 (7th Cir. 1996) (“Terms of use are no less part of ‘the product’ than are [the product’s physical attributes].”). Gabaix and Laibson implicitly acknowledge the contract-product connection in their discussion of credit cards, where the terms and conditions *are* the product. See Gabaix & Laibson, *supra* note 49, at 509.

53. Succinctly, “a shrouded attribute is a product attribute that is hidden by a firm, even though the attribute could be nearly costlessly revealed.” Gabaix & Laibson, *supra* note 49, at 512 (footnote omitted).

tracting. So customers making the initial purchase decision, i.e., opening the checking account, may not consider shrouded attributes such as maintenance costs and hidden fees for account-related services.⁵⁴

Banks, and firms generally, are able to exploit the naiveté of their customers because incentives to alert myopic customers to the operation and impact of the terms contained in bank-customer agreements do not exist in equilibrium, that is, even in a competitive market. Gabaix and Laibson explain two kinds of exploitation: “Firms exploit myopic consumers. In turn, when consumers become sophisticated, they take advantage of these exploitative firms.”⁵⁵ Obviously, banks have no incentive to drive out of the market those myopic customers who unknowingly pay hidden fees and account charges. But perhaps more importantly, banks have no incentive to alert those same myopic customers to the existence of the subsidy that redounds to the benefit of the banks’ sophisticated customers, who might not pay account fees at all. Sophisticated customers, then, may take advantage of their banks’ exploitation of myopic customers. The sophisticated are complicit in the exploitation of the myopic because the welfare loss that is born by the myopic redounds to the benefit of the sophisticated. But the shrouding effect is not just a case of the law helping those who help themselves, i.e., of allowing the sophisticated to take advantage of the expertise that they have developed over time and, presumably, at some cost. Indeed, the subsidy benefits the sophisticated only because the myopic are essentially duped into subsidizing them by banks that set the price of the base good⁵⁶ (the checking account) below its true cost, while the price of the shrouded add-on⁵⁷ (hidden fees) is set well above its true cost.

Applied to bank checking accounts, the standard account service (collections and payments) is the base good and “hidden” fees are the add-on. At Bank of America, for example,⁵⁸ a myopic customer might enroll in an ostensibly free⁵⁹ “Regular” checking account and then pay that account’s \$7 monthly “maintenance fee.” A sophisticated customer will understand

54. *Id.* at 507–08.

55. *Id.* at 509.

56. Gabaix and Laibson offer printers, hotels, car rentals, and financial services as examples. *Id.* at 518 n.33.

57. Such as a printer cartridge, hotel phone call, or gas charge. *Id.*

58. The examples that follow are taken from Bank of America’s checking account webpage, Bank of America, Checking Account Overview, <http://www.bankofamerica.com/deposits/checksave/in dex.cfm> (last visited Mar. 22, 2008).

59. On Bank of America’s checking account page, *id.*, every one of their five checking account types is advertised as either “free” or having “no monthly maintenance fee.” These words appear in bold type; the qualifications—e.g., direct deposit, balance transfer, age 55 or older—appear either in fine print or not at all.

that the account is “free” only if she maintains a minimum daily balance of \$750 (or \$2,500 in a “linked” savings account). Or she might realize that with an automatic deposit she can avoid the fee entirely by enrolling in a “MyAccess” checking account. A more sophisticated customer might opt instead for the “Advantage” checking account, which pays 0.05% APY on deposits, but carries a \$20 monthly fee unless the customer maintains one of four different (and higher) minimum balances.⁶⁰ Neither the bank nor its sophisticated customers have any incentive to alert the myope to these methods of maintenance fee avoidance. Indeed, as Gabaix and Laibson show, the incentive is *not* to educate: the sophisticated customer enjoys the benefit of a no-cost checking account at the expense of myopic customers, who (perhaps quite rationally⁶¹) failed to understand the restrictions placed on the “free” account.⁶² The bank realizes an increase in accounts resulting from the failure of its myopic customers to understand the terms and conditions of their accounts.⁶³

At this juncture, it is appropriate to consider what might be termed the apologies for standard form contracts and determine whether the defenses work very well in the bank-customer agreement setting. The presentations that follow are necessarily succinct, but sufficient to reveal the ultimate

60. As if that were not enough obfuscation, the “Advantage” minimum account balance is calculated as the average over the month (average daily balance), while the “Regular” account looks to the lowest of a month’s daily balances (minimum daily balance). So an Advantage account with a zero balance for half the month and twice the required minimum for the other half will incur no fee; a Regular accountholder in the same circumstances will owe \$7.

61. It is irrational for bank customers to read boilerplate for a variety of reasons: the language is difficult for them to understand, they are unlikely to be affected by any specific term, the bank’s representative is not authorized to change the terms, and they believe that courts will not enforce overly harsh terms. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 446–47 (2002). Hillman and Rachlinski conclude that “[f]or any single consumer, the costs of monitoring a business’s standard-form contract outweigh the benefits.” *Id.* at 447; see also Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 631 (2002) (quoting Rakoff, *supra* note 21, at 1226) (“[T]he rational course is to focus on the few terms that are generally well publicized and of immediate concern, and to ignore the rest.”).

62. Shrouded fees also arise frequently in the online banking context, where the myopic may be less able to detect and understand them. Examples include the NSF charges debited to an account enrolled in an automatic bill payment service when the account has insufficient funds available to pay the bill, the requirement that a user download (and pay for) the software necessary to carry out the online bill payment, and the “excess transaction fees” that can result when a bank customer’s online bill payments exceed the number of transactions allowed by the terms of her account. See Bank of America, Online Banking Service Agreement, http://www.bankofamerica.com/onlinebanking/index.cfm?template=service_agreement#4b (last visited Mar. 22, 2008).

63. Banks and other firms have become adept at preventing customer education, and thereby maintaining the size of the pool of myopic customers. See Alces, *supra* note 46, at 1527 (“Form drafters can use a kind of ‘three card Monty’ game to assure maintenance of the pool of naïve: Each time consumers discover a particularly egregious term, hide the risk-shifting card by reshuffling the deck or by slight of hand.”).

inadequacy of each theory so far as boilerplate in bank-customer agreements is concerned.

III. THE APOLOGIES

Scholarly commentary has recognized the challenge forms present contract law, and has responded by focusing on the extent to which the market can police forms⁶⁴ and then proposing methods to address the apparently aberrational case of market failure. But the analyses that preceded Gabaix and Laibson's identification of shrouding reached efficiency conclusions insupportable now that the shrouding mechanism is manifest. Nevertheless, review of one of those perspectives serves as a backdrop for an evaluation of the post-Gabaix and Laibson apologies.

A. *Unconscionability*

Professor Russell Korobkin has argued that the unconscionability doctrine is capable of policing form drafter overreaching.⁶⁵ Specifically, an "inefficient" form term ought to be deemed unenforceable because it is unconscionable, while "efficient" form terms ought to be enforced. Unconscionability and inefficiency, then, are equivalent.⁶⁶ Korobkin starts from the unassailable premise that transactors (bank customers) rely on imperfect heuristics and therefore make imperfect choices.⁶⁷ Indeed, reliance on heuristics is entirely rational when the cost of making an entirely informed choice is prohibitive.⁶⁸ Form drafters, understanding that (and also quite rationally), exploit their customers' reliance on heuristics by imposing low-

64. Advertising has long been the policing mechanism of choice. Gabaix and Laibson, however, demonstrate convincingly the sellers' incentive *not* to advertise: Sophisticated buyers do not want them to do so. Advertising, of course, would reduce the number of myopes, and therefore, the benefit realized by the sophisticated on account of the cross-subsidy. Gabaix and Laibson refer to this phenomenon as "the curse of debiasing," the tendency of educated consumers to pool with myopes in order to maximize the cross-subsidy. Gabaix & Laibson, *supra* note 49, at 519.

It is probably impossible to ignore the inability of advertising to police form terms. Consider, for example, the absurdity of an advertising strategy in which Princess Cruise Lines pointed out that although their fares were identical to Carnival's, Princess customers in fact got a better deal because in the event of an accident, those injured on a Princess ship could sue the cruise line in their home state, while Carnival's customers are required to travel to a courthouse in southern Florida. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

65. Korobkin, *supra* note 24, at 1206. For a discussion of Professor Korobkin's unconscionability analysis applied to form contracts more generally, see Alces, *supra* note 46, at 1539-47. Portions of that analysis are reproduced here.

66. *See id.* at 1279.

67. *Id.* at 1292.

68. *Id.*

quality, non-salient terms.⁶⁹ The imposition of these terms, Korobkin concludes, promotes misinformation and inefficiency.⁷⁰ From Korobkin's perspective, because both firms and their customers suffer from the inefficiency, a bilateral incentive to ensure nonenforcement of these inefficient non-salient terms exists.⁷¹

Korobkin believes that a determination of unconscionability, and therefore inefficiency, should be left to courts asked to determine the enforceability of non-salient terms.⁷² He notes, though, that "[j]udicial determinations of which contract terms are efficient and which terms are inefficient are subject to a high likelihood of error."⁷³ To overcome the probability of judicial error, Korobkin proposes that boilerplate terms carry a presumption of enforceability.⁷⁴ Such a presumption would reduce the number of decisions that refuse to enforce (what turn out to be) efficient terms, findings Korobkin calls "false positives."⁷⁵ However, Korobkin offers no reason to assume that erroneous findings of *inefficiency* (false positives) would occur with any more frequency than erroneous findings of *efficiency* (false negatives). It would seem that if courts are not particularly good at making efficiency determinations, they are no more likely to get the math right in one direction than the other.

To appreciate the impact of Korobkin's reliance on the unconscionability doctrine, consider how his analysis would operate to determine the efficiency of a term (a checking account overdraft protection charge, say) worth \$15 to bank customers that it costs the bank \$10 to provide. Under Korobkin's unconscionability-as-inefficiency formula, the term is efficient and should be enforced. But to posit the value of overdraft protection as \$15 for every customer is a somewhat arbitrary assumption. It is much more likely that each customer will value the term differently,⁷⁶ with customers who routinely bounce checks willing to pay more for the term than

69. Korobkin is concerned only with inefficient non-salient terms because he believes the market will effectively police inefficient terms that are salient. *Id.* at 1207. Salient terms are less problematic in the bank-customer context because they are more often accompanied by competition and advertisement. See *supra* text accompanying note 47.

70. Korobkin, *supra* note 24, at 1234–35.

71. *Id.*

72. *Id.* at 1279 (“[T]he courts’ approach to substantive unconscionability analysis is not well-suited to separating terms that are detrimental to buyers as a class from those beneficial to buyers as a class.”).

73. *Id.* at 1285.

74. *Id.*

75. *Id.*

76. The buyer's sophistication might well determine the efficiency of a particular term. For example, the lawyer who enrolls in a checking account that contains an arbitration clause might be less troubled by the impact of that clause on her ability to obtain legal representation in an arbitration proceeding than would a non-lawyer without the same ability to represent herself.

customers who never bounce checks. Korobkin determines the efficiency of a term by reference to the term's average value to an average customer.⁷⁷ When we understand that terms are worth more to some customers than others—and therefore efficient to some, but not others—the failure of his thesis becomes clear.

Korobkin's efficiency-in-the-aggregate analysis fails on another front. If the value of a term that matters for efficiency purposes is not the value to the individual customer, there is no reason courts should be doing the value analysis on an *ad hoc* basis. Korobkin's presumption of enforceability acknowledges that courts are not particularly adept at making efficiency determinations in individual cases. Surely, then, courts cannot make across-the-board determinations about the aggregate efficiency of terms generally. A small-claims court judge⁷⁸ is just not in the best position to decide that forum selection clauses, say, will *never* be efficient. If aggregate efficiency is the goal, then the job of policing inefficient terms should be left to a regulatory agency. Undoubtedly, the Federal Reserve Board is in a better position than a trial court to decide the aggregate efficiency of a particular term contained in a bank-customer agreement.

Now that the shrouding function of guerilla terms is manifest, the failure of Korobkin's aggregate efficiency analysis is readily identifiable. Recall, firms exploit myopic customers, while sophisticated customers benefit from, and perhaps encourage, that exploitation. The myopic are left to fend for themselves by filing an action in a common law court and persuading the judge that the term to which they fell victim is inefficient in the aggregate, therefore unconscionable, and should not be enforced. But keep in mind, it would have been irrational for the myopic to have read the form in the first place⁷⁹ and neither the firm nor its sophisticated customers had any reason to alert them to the term and every reason to hide it from them. For this reason, scholars writing after Gabaix and Laibson look to the effects sophisticated customers may have on guerilla terms. Perhaps the sophisticated can act as a barrier between the myopic and the terms that would exploit them.

77. Such a determination may be impossible. See generally Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 840–42 (2003) (arguing that “there is no way to measure the variables that determine the relative efficiency” of a rule of contract interpretation).

78. Given the small amounts of money involved in most bank-customer disputes, small claims court is the most likely forum.

79. See *supra* notes 24, 61.

B. Agency Theory

Professor Douglas Baird offered a solution to “the boilerplate puzzle” in his contribution to a recent Michigan Law Review Symposium issue.⁸⁰ Baird argues that “[a]s long as there are enough sophisticated buyers aware of the importance of having the right [product], the seller must choose well. The sophisticated buyer provides protection for those that are entirely ignorant.”⁸¹ Well, as we have seen, that is in fact not true. Baird’s analysis ignores the effect of shrouding on form contracts and so undermines his conclusion about the dynamics of form contracting. Further, he states categorically that “fine print is an exceedingly poor candidate for would-be advantage-takers.”⁸² That ignores the reality of business-to-consumer form contracting, and so offers no explanation for the proliferation of shrouded terms.⁸³

It could be, though, that Baird’s conclusions are misleading because he generalizes too much about the operation of fine print boilerplate. He considers the case in which a seller markets a deficient product and includes terms in the sales agreement that prejudice the buyer’s interests. Baird observes that “it is easier to shave costs by using low-quality materials than by using fine print.”⁸⁴ That may be true; we are not sure that we can know for certain as an actuarial matter. But the fact remains that in many consumer contracts, particularly contracts that exact fees that the bank can collect relatively effortlessly (e.g., by debiting the customer’s account) the terms *are* the product.⁸⁵ If we apply Baird’s analysis to bank-customer agreements, perhaps even he would support more robust regulation: “At the very least, one should pay attention to whether the market is one in which sellers can discriminate between those buyers who are sophisticated and those who are not.”⁸⁶ Of course, banks can and do discriminate between their sophisticated and their less-sophisticated customers. Indeed

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

81. *Id.* at 936. For a similar pre-shrouding agency theory, see Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679. Gillette’s conclusions are discussed in Alces, *supra* note 46, at 1533–39.

82. Baird, *supra* note 80, at 937.

83. A term may be every bit as shrouded on account of its non-salience (in the Korobkin sense) as it would be were it in barely legible fine print. Font size just is not determinative of anything in a contracting world where terms can be very effectively hidden in plain sight.

84. Baird, *supra* note 80, at 938.

85. See Radin, *supra* note 24, at 1229 (noting the modern “collapse of the contract-product distinction”).

86. Baird, *supra* note 80, at 939. Baird mentions “payday lending,” where borrowers “are not likely to include any sophisticated parties,” as an example of such an industry. *Id.* at 939 & n.20. In such a setting, he argues, regulation would be appropriate. *Id.*

banks, insofar as they are in possession of a large percentage of a customer's liquid assets (likely a good measure of "sophistication"), are perhaps in a better position than any other business to determine which of their customers are sophisticated and which are not.⁸⁷ The ability to discriminate in favor of the sophisticated will be manifest not just in reduced account fees,⁸⁸ but also in the increased willingness of banks to forego enforcement of a term that is particularly prejudicial to customer interests.⁸⁹

Baird's conclusion rests on an economic argument that unravels when one takes into account the shrouding device. In a discussion of *Henningsen v. Bloomfield Motors, Inc.*,⁹⁰ he suggests that sophisticated car buyers would not bargain for the availability of consequential damages because the seller would have to increase the cost of the car to compensate itself for assuming such liability.⁹¹ And that cost would be greater than the benefit to the buyer: "In a world in which juries resolve factual disputes, consumers may be better off accepting a disclaimer rather than paying the higher price that covers the cost of paying for accidents caused by the carelessness of others, but for which a jury will hold the carmaker liable."⁹² That is, consumers would prefer to assume the lesser cost of such consequential loss themselves (through their own insurance) rather than have the seller assume liability for such loss and pass the greater cost on to the consumer.⁹³ The consumer could be the cheaper cost avoider.⁹⁴

Baird makes the point that consumers can buy insurance to compensate themselves for consequential loss that results from a product's failure.

87. Nearly all banks provide extra services, usually in the form of "preferred banking" accounts, to high net-worth individuals, likely the most sophisticated of bank customers. These accounts provide perks such as free travelers' checks, reduced interest rates on loans, and higher interest rates on money market accounts, CDs, and IRAs. See, e.g., Community First Bank, Preferred Banking, <http://www.community1st.com/preferred.html> (last visited Mar. 22, 2008).

88. See, e.g., Huntington National Bank, Total Relationship Banking, https://www.huntington.com/pas/total_relationship.htm (last visited Mar. 22, 2008) ("Your Total Relationship Balance can qualify you for waiver of certain fees on an applicable checking account . . ."); Chase Bank, Premier Platinum Banking, http://www.chase.com/ccp/index.jsp?pg_name=ccpmapp/platinum/checking/page/checking (last visited Mar. 22, 2008) (customers with a \$75,000 "combined monthly average balance" pay no service fees, no fees for overdraft protection transfers, and get a free small safe deposit box).

89. See *infra* text accompanying note 106.

90. 161 A.2d 69 (N.J. 1960).

91. Baird, *supra* note 80, at 940-42.

92. *Id.* at 940-41.

93. "Carmakers may disclaim liability for consequential damages because it represents a sensible trade-off between the risks that the carmaker is equipped to bear and those the consumer can bear." *Id.* at 940 (citing George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981)).

94. See generally Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-19 (1961).

And it is not difficult to appreciate that those who own two cars or live within a short walk of public transportation do just that, at least in some rough form. Of course, there is no reason why a consumer would necessarily want to pay a premium for a product to buy consequential loss coverage at a price determined by reference to the average consequential loss suffered by the average consumer. But personal injury is a form of consequential loss against which consumers quite often insure. If your car malfunctions and you are injured in the resulting accident, both your automobile and your general health insurance policy will likely cover virtually all of your medical expenses. So if insurance is the answer, it does not too obviously matter, so far as economic analysis is concerned, whether the question is property or personal injury loss. The availability of insurance overcomes any suggestion that it is necessarily in the best interest of consumers to provide them a non-disclaimable right to consequential damages for personal injury as a matter of law. Baird's reliance on the availability of insurance to limit the reach of *Henningsen* goes too far.

Henningsen, ultimately, is about the power of agreement, and the normative imperative of agreement in contract law. The court's conclusion was cast in terms of immanent *justice*.⁹⁵ Baird's analysis of the case does nothing to support his incorrect empirical judgment that "[t]he sophisticated buyer provides protection for those that are entirely ignorant."⁹⁶ He has repeated as a truism something that is just not true. So long as the sophisticated are not agents, in any meaningful sense, of myopic principals, there is no basis to find agreement in the type of standardized form used in *Henningsen*.

Baird next turns to the treatment of exemption waivers, such as that in the (in)famous *Williams v. Walker-Thomas Furniture Co.*⁹⁷ case. He concludes that *Williams* came out the way it did—invalidating the cross-collateralization provision of the consumer contract—because the court wanted to police what amounted to an exemption waiver.⁹⁸ The debtor simply did not understand what she had agreed to, which is, of course, an-

95. 161 A.2d at 80, 83–85, 93, 99–101; see Peter A. Alces, *On Discovering Doctrine: "Justice" in Contract Agreement*, 83 WASH. U. L.Q. 471, 492–95 (2005).

96. Baird, *supra* note 80, at 936.

97. 350 F.2d 445 (D.C. Cir. 1965).

98. Baird, *supra* note 80, at 951. The purpose of the creative payment allocation terms employed by Walker-Thomas was to "keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated," *Williams*, 350 F.2d at 447, thereby preserving the consensual collateral interest in each item and effectively acquiring a waiver by Williams of her exemptions. Terms such as these are now prohibited by law. See Unfair Credit Practices, 16 C.F.R. § 444.2(a)(2) (2007) (exemption waivers are unenforceable "unless the waiver applies solely to property subject to a security interest executed in connection with the obligation.").

other way of saying there was no “agreement.” Here, though, Baird tries to scale a slippery slope.

If Williams did not understand well enough what she was agreeing to in order for the law to enforce her undertaking—if there was no agreement—then we must acknowledge that some consumers may assume obligations that they do not understand. It is not enough in Ms. Williams’s case to say that we would enforce the term because the existence of sophisticated consumers operates to protect the Ms. Williamses of the world. The fact that the objectionable clause found its way into the agreement should be proof enough that Baird’s agency argument is fallacious: where were the sophisticated consumers who would impose the pressure to keep it out? Nonetheless, the case is quite helpful because it demonstrates the wisdom of Gabaix and Laibson’s shrouding conclusion: sophisticated buyers would agree to the cross-collateralization provision and then avoid its enforcement; alternatively, sophisticated consumers would know enough not to agree to such a clause and would buy from a seller who would not insist upon it. And sellers could afford to sell to such sophisticated buyers at a lower price because the myopic consumers, like Ms. Williams, would be subsidizing their purchase.

But Baird, perhaps unwittingly, gets the agreement calculus right in the context of the *Williams* case and with regard to exemption waivers generally: agreement, real agreement, matters. And the law does not mind at least a little bit of paternalism to make sure that agreement matters:

Her willingness to give up the furniture in the event of default sends a powerful signal that default is unlikely. But we cannot be sure that she will in fact be well-informed and, if we cannot be sure, the game may not be worth the candle. We might prefer weak paternalism, but when that avenue is not available, strong paternalism is a sensible course.⁹⁹

Baird acknowledges that for us to be able to infer anything about what someone in Ms. Williams’s position is trying to signal about the likelihood of her own default, she first has to *know* what she is giving up if she contractually gives up some right. That is, the term to which a contracting party is willing to agree may well signal something valuable to the counterparty. But a waiver signals nothing reliably if the waiver is not effected knowingly: “Devising a rule that brings about a fully informed waiver on

99. Baird, *supra* note 80, at 945. A distinction between weak and strong paternalism is found in Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249 (2006). “[S]trong paternalism forecloses choice, typically on the ground that all or most people will choose unwisely,” *id.* at 254, while weak paternalism “steer[s] people in welfare-promoting directions” while still permitting individual decision-making, at least to some degree. *Id.* at 256. Sunstein describes bans on the use of cocaine as strongly paternalistic, and automatic savings plans as weakly paternalistic. *Id.* at 254–56.

the floor of an inner-city furniture store is just not possible. For this reason, it may make sense to ban such clauses altogether."¹⁰⁰

We do not have to go much further to show that Baird's conclusion about absolutely banning certain clauses undermines his argument about sophisticated transactors being agents for the unsophisticated. If whenever the circumstances are such as to cast doubt on a contracting party's understanding, even awareness, of the terms of a form agreement we have reason to "ban such clauses altogether," then we have good reason to ban the enforcement of such terms generally, because the whole point of forms is that it is irrational to read them. That is, if there is one thing we know about forms, it is that they are not read. Further, we can also be quite confident that, even if they are read, the consequences of even their most pernicious terms will not be understood. Baird concludes that even many contracts professors who have taught *Williams* for many years fail to understand that the case is essentially about the waiver of the exemptions, and he sees reason to refuse to enforce the cross-collateralization provision at issue in the case.¹⁰¹ Is it likely true that most of the more oppressive terms in consumer form contracts are not understood by the consumers who ostensibly agree to them? Indeed, how many attorneys would know, without doing some research, whether a particular term is enforceable and what it would mean to enforce it? So ultimately Baird is after contract in terms of agreement. He just takes a more circuitous route.¹⁰²

But might there remain a way to argue for the enforcement of guerilla terms *because* they favor the sophisticated? That is, can we find in the enforcement (or lack thereof) of oppressive terms a reason for the law to be indulgent of them? At least one commentator has tried to make the case.

100. Baird, *supra* note 80, at 945. In a more complete discussion of signaling in the context of the *Carbolic Smoke Ball* case, Baird concludes that fine print may actually impair the *seller's* ability to signal: "Blocking the operation of fine print makes it cheaper for sellers to distinguish themselves." *Id.* at 949–50. If so, it would seem that even sellers should support a rule invalidating boilerplate, if, as an empirical matter, they gain more by being able to signal than they lose in not being able to tailor their deal to specific customers or customer groups.

101. "A clause buried in a purchase agreement whose legal consequences are not self-evident (even to many contracts professors who have taught the case for many years) . . . should not be enforced." *Id.* at 945.

102. Baird concludes that some standard terms—forum selection, choice-of-law, and arbitration provisions, for example—are "special" and so should be "disclosed conspicuously or meet minimum standards." *Id.* at 950. But if terms are not truly conspicuous, surely it is wrong to assume agreement and enforce them. The "minimum standard" Baird seems to be after is agreement.

C. “The Squeaky Wheel Gets the Grease”

Professor Jason Johnston offers a sophisticated “defense” of boilerplate¹⁰³ based on the ability of sophisticated parties to bargain around boilerplate: “[R]ather than precluding bargaining and negotiation, standard-form contracts in fact facilitate bargaining and are a crucial instrument in the establishment and maintenance of cooperative relationships between firms and their customers.”¹⁰⁴ After first offering empirical evidence that firms routinely permit their agents to relax the enforcement of potentially oppressive terms,¹⁰⁵ Johnston suggests that firms offer discretionary benefits and discretionary forgiveness to their customers who call to complain or ask for a favor, something like a “squeaky wheel gets the grease” theory of boilerplate non-enforcement:

The strategy of allowing employees the discretion to grant case-specific benefits beyond those that are required by the standard-form contract can be seen to be a sophisticated way for the firm to grow its revenues by gaining the loyalty of existing customers and establishing a good reputation that will attract new customers.¹⁰⁶

The fallacy, or at least economic error, of Johnston’s thesis is starkly captured in his conclusion that “the most important type of customer to keep happy is the customer who is relatively knowledgeable, persuasive, and strategic—a sharp bargainer.”¹⁰⁷ That is, Johnston theorizes that firms want to attract and retain *precisely* those customers whom Gabaix and Laibson’s theory tells us they would want to repel: the sophisticated. But while Gabaix and Laibson offer formulaic support for their conclusion, Johnston offers none and does not evidence any appreciation of the shrouding phenomenon. Instead he opines that it is by complaining that the most desirable customers identify themselves, and he describes those complaining customers as the “high-value, high-information consumers”¹⁰⁸ that

103. Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Business and Consumers*, 104 MICH. L. REV. 857 (2006).

104. *Id.* at 858.

105. Johnston concludes that “[t]he common practice among firms is to give their employees the discretion to depart from these standard-form terms and to deliver more than the firm has actually promised if deemed in the firm’s best interest to do so.” *Id.* at 865.

106. *Id.* at 877.

107. *Id.* at 881. Professor Bebchuk and Judge Posner contradict this assertion directly. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006). Bebchuk and Posner argue that reputational concerns drive firms to rigidly enforce potentially oppressive form terms against strategic bargainers, while relaxing (or foregoing entirely) enforcement against customers who trigger the operation of those terms “in good faith and for good reason.” *Id.* at 834.

108. Johnston, *supra* note 103, at 881.

firms want to attract and maintain. So he contradicts Gabaix and Laibson just about as directly as he can. Indeed, if we follow Johnston's logic, firms want to avoid the same myopic customers whom the shrouding theory identifies as most profitable.¹⁰⁹

Johnston does somewhat cryptically allude to Gabaix and Laibson's shrouding thesis, but he does not seem to appreciate its impact on his discrimination theory. After observing that "[u]nless there are barriers to entry, or consumers have very high switching costs, the discretionary-benefits strategy will be undermined by the entry of no-frills, low-price providers,"¹¹⁰ he offers a brief footnote to accompany that text.¹¹¹ In that footnote, Johnston cites Gabaix and Laibson only in order to dismiss, cryptically and in conclusory terms, the application of shrouding to his discovery: "Discretionary benefits are in this important sense quite different than the case of shrouded costs considered by Gabaix and Laibson."¹¹² Johnston's conclusion, then, is that the "two-part standard-form contracting practice should exhibit long-term survival only in industries that are relatively non-competitive."¹¹³ That would seem to be an admission that, in competitive industries, shrouding overwhelms his theory.¹¹⁴ So what would explain the vibrancy of oppressive boilerplate in competitive industries? Shrouding, we think. And recall, shrouding is inefficient at equilibrium.

Johnston also seems to ignore aspects of the cross-subsidization Gabaix and Laibson identified in the course of their shrouding exposition. Recall that it is the presence of myopic consumers that enables sophisticated consumers to get the favorable deal that shrouding provides. Johnston refers to the myopic consumers as "low-value, low-sophistication consumers."¹¹⁵

[W]hereas under the discretionary strategy high-value customers were met with an ex-post willingness to bargain, they will often encounter pre-

109. Johnston acknowledges that "the complaint-based benefits strategy not only allows the firm to retain and add sophisticated, influential customers, but effectively gives those customers a price subsidy that is paid for by less-well-informed, or simply more acquiescent, consumers." *Id.* at 882. Those "less-well-informed, or simply more acquiescent, consumers" are the myopes of Gabaix and Laibson's shrouding theory. It is curious that Johnston describes the sophisticated customers as those the firms would want to retain when it is clear, even from his own analysis, that firms make more money on the myopes.

110. *Id.* at 883.

111. *Id.* at 883 n.102. While we have no way of knowing whether this might be the case, Johnston's footnote reads like an afterthought, as though he discovered Gabaix and Laibson too late to take account of their conclusions.

112. *Id.*

113. *Id.* at 884.

114. We have trouble thinking of a non-competitive industry in which the enforceability of boilerplate is problematic.

115. *Id.* at 885.

cisely the opposite, unreasonable insistence upon narrow interpretations of standard-form obligations, in the world of mandatory standard-form terms. This makes it much more likely that the high-value, high-sophistication types will drop out of the market for the firm's product or service and switch their business to a more expensive higher-quality provider, a provider whose prices are so high that low-value, low-sophistication customers are not part of the market. In such a case, mandating generous standard-form terms may induce a kind of adverse selection; as higher-value customers drop out, and the ostensibly generous standard-form terms offered to remaining low-value, low-sophistication customers are in practice degraded further and further.¹¹⁶

Now think about that for a minute. First, it is just not clear how the sophisticated would be worse off if the law mandated that they be given what they otherwise would have to spend time negotiating for. More importantly, Johnston's supposition flies in the face of the cross-subsidization theory that explains shrouding: the very *reason* that the sophisticated are able to get what they get in a shrouded regime is *because* they are subsidized by the myopic, the "low-value, low-sophistication customers." The inefficiency only works in the contract drafters' and sophisticated customers' favor as it does because there is a large enough pool of myopes.¹¹⁷ There is a wealth transfer from the myopic to the sophisticated. It is not clear that Johnston appreciates the attendant socioeconomics.

Johnston indulges supposition further when he tries to imagine the circumstances of the customer most likely to benefit from the discretionary forgiveness strategy:

It might well be that it is the middle-income customer who is most familiar with and adept at bargaining with the firm when something goes wrong with her or the firm's performance. . . . If this is so, then the tough standard form combined with discretionary forgiveness strategy may be one which especially benefits customers who are keen but not wealthy. . . . [I]t will be such smart but middle-income customers who will be most harmed by a legal rule mandating generous standard-form terms.¹¹⁸

Such imagination is sufficiently divorced from any empirical basis—including any measure of the socioeconomic status of those who complain in various contexts¹¹⁹—as to be useless as argument. It might also be the case that the very terms the enforcement of which causes customers to call

116. *Id.* at 885–86.

117. See Gabaix & Laibson, *supra* note 49, at 510.

118. Johnston, *supra* note 103, at 886.

119. Johnston's survey of hospital billing procedures, for example, finds that "most hospital customers negotiate discounts off charges," *id.* at 865, but we are left to wonder whether the customers who did in fact negotiate were those who could not pay the full amount (myopes?) or those who simply did not wish to pay the full amount (sophisticated?).

and complain are the same terms that the wealthy (including the relatively wealthy in the middle class) just do not have occasion to care about as often as do the myopes who might be more regularly affected.¹²⁰ And, of course, if you understand shrouding, you understand that it is *precisely* the terms that adversely and disproportionately affect the myopes that are most likely to be imposed on them. To the extent that we can trust intuition, it would seem that the more likely valid intuition would be that the less wealthy you are, the less sophisticated you are, and in turn, the more vulnerable you are to terms that could negatively impact one of more marginal economic status. The point is not that one intuition is necessarily more right than the other; the point is that there is no empirical basis to conclude that either is accurate. And it matters: if Johnston's intuition is wrong, his argument fails.

As the foregoing discussion demonstrates, the varied attempts to craft a trust-the-market solution to the shrouding effect of guerilla terms fail because they lack an appreciation of the cross-subsidy that accounts for that shrouding. If the market cannot alleviate the pernicious effects of these terms, what can? A return to contract doctrine, where agreement means real, bona fide agreement, may just provide the means, at least in the context of bank customer agreements.

IV. THE POWER OF AGREEMENT

Contract, as distinguished from tort, is about consensual obligations. Contract doctrine requires "bargain" and "agreement" between the parties before a promise acquires legal enforceability. But the pace of modern contractual contexts just does not permit reflected inquiry into the "real" intent of the parties. It has become commonplace, and perhaps unavoidable, to demand less than real agreement and instead to settle for terms to which the parties would have, could have, or should have agreed if they had thought about it. When transactors have acted as though they have agreed, courts are comfortable assuming sufficient agreement and enforcing the contract. But real agreement and inferred agreement are not one and the same, and we cannot "trust the market" to deliver the term that is best for all concerned. So whether you believe that contract should vindicate autonomy or efficiency, the reality is that in modern bank-customer transactional settings it vindicates neither.

120. It would seem that myopes would be affected in greater numbers by, for example, provisions governing double cycle billing and penalty increases in interest rates. *See supra* note 19.

If there is no real agreement between banks and their customers about account terms, and the market fails to weed out those terms that have pernicious effects on consumers—whether myopic, sophisticated, or both¹²¹—then we must find some other mechanism to police these agreements. Article 4 of the Uniform Commercial Code was an attempt to create just such a mechanism: a laundry list of acceptable terms that would regulate the bank-customer relationship and prevent banks from gaining too much power over their customers. But like all paternalistic legislation,¹²² the terms of Article 4 would be disadvantageous to some banks and their customers. The escape clause of section 4-103 provided the means to circumvent those effects. When the escape clause becomes the rule rather than the exception, however, a reexamination is due.

At the time of Article 4's enactment, no viable means existed of educating bank customers about the effects of the form terms contained in their agreements. Recall, the pernicious effects of guerilla terms in bank agreements derive from their shrouded nature, and so can be undone if exposed to light.¹²³ Technological advances, particularly the Internet, that now have become commonplace can provide that light. That is, the very modern transactional realities that spawned the guerilla term may provide a means to mitigate its effects.

Perhaps the greatest difficulty facing bank customers is a lack of information. How many people know how much their bank will charge them for using another bank's ATM or for stopping payment on an outstanding check, for example? One readily available solution to customers' ignorance is an online clearinghouse in which banks are required by law to reproduce the terms of their agreements.¹²⁴ Such a clearinghouse would be a small

121. If banks collude so that they may provide terms especially beneficial to themselves without worrying about competition from others, they disadvantage all customers, irrespective of status. See *supra* note 36.

122. For a discussion of the paternalism underlying the *Williams* case, see *supra* note 99 and accompanying text.

123. Here, Justice Brandeis's famous observation that sunlight is the most powerful disinfectant is apt. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 305 (1964) (Goldberg, J., concurring) (citing FREUND, *THE SUPREME COURT OF THE UNITED STATES* 61 (1949)).

124. The Fair and Accurate Credit Transactions Act of 2003 provides legislative precedent for such an idea. Under that law, credit reporting companies are required to make yearly credit reports available to consumers at no charge. See 15 U.S.C. § 1681 (Supp. IV 2004).

At the 2005 AALS mid-year meeting, Professor William Whitford argued that the complexities inherent in effectively policing oppressive form terms make that task best suited to a legislative body. The outline Professor Whitman prepared for the talk is available at <http://www.aals.org/2005midyear/commercial/WhitfordOutline.pdf>. Rather than opting for direct regulation of the content of form terms, we are making the somewhat more modest point that regulation can be used to bring the effect and operation of these terms to the attention of customers, thereby making the non-salient salient and reducing the potentially pernicious effects of otherwise hidden form terms.

addition to the responsibilities of the Federal Reserve Board, which already exercises extensive supervisory and regulatory authority over deposit banks.¹²⁵ Once all bank terms were collected, charts allowing customers to compare the terms offered by their banks with the terms offered by others could be created easily.¹²⁶ By visiting a single web source,¹²⁷ bank customers could educate themselves (almost) costlessly. The Federal Reserve already maintains such a database for banks' financial information.¹²⁸ With a database providing information that explained the effects of the terms of bank-customer agreements, people who use banks—and not just those who invest in them—would better understand the nature of the transactions (and accounts) they enter into. Providing accessible, comprehensible information to bank customers would place the risk of guerilla terms in bank-customer agreements on those in the best position to avoid their pernicious effects: the individual customers. With such an educational forum, guerilla terms could not so easily hide in the “jungle” of contract doctrine.

The benefits of disclosure are twofold. Most obviously, bank customers who educate themselves about the effect and operation of the terms in their account agreements would shed their myopic status, thereby minimizing the cross-subsidy perpetuated by guerilla terms. Of course, self-education is not the absolute solution: the limitations of disclosure have been well documented,¹²⁹ and not all bank customers will take the time to educate themselves. The benefits of education, though, are not limited to a

125. Indeed, part of the Federal Reserve's mission is the education of bank customers. In the Federal Reserve's words, “Well-educated consumers are the best consumer protection in the market. They know their rights and responsibilities, and they use the information provided in disclosures to shop and compare.” BD. OF GOVERNORS OF THE FEDERAL RESERVE SYS., THE FEDERAL RESERVE SYSTEM, PURPOSES & FUNCTIONS 76 (2005), available at http://www.federalreserve.gov/pf/pdf/pf_6.pdf. This proposed next step, which amounts to little more than additional disclosures, provides consumers more information with which to protect themselves.

126. The Federal Reserve Board has undertaken similar public education programs aimed at helping consumers understand mortgages, electronic transfers, and credit protection laws. See Federal Reserve Board, Consumer Information Brochures, <http://www.federalreserve.gov/pubs/brochure.htm> (last visited Mar. 22, 2008).

127. Undoubtedly, third-party sites would take the information contained in the Federal Reserve repository and synthesize it (perhaps for a charge), thereby further facilitating bank customer education.

128. The database, known as the National Information Center, contains financial data and institutional characteristics collected by the Federal Reserve System. See The National Information Center, Home Page, <http://www.ffiec.gov/nicpubweb/nicweb/nichome.aspx> (last visited Mar. 22, 2008). The FDIC maintains a similar database. Federal Deposit Insurance Corporation, Statistics on Depository Institutions, <http://www2.fdic.gov/sdi/index.asp> (last visited Mar. 22, 2008).

129. For a general discussion of the potential difficulties in educating customers via disclosures and warning labels, see Jennifer J. Argo & Kelley J. Main, *Meta-Analyses of the Effectiveness of Warning Labels*, 23 J. PUB. POL'Y & MARKETING 193 (2004). The Internet may itself pose some distinct problems for the effectiveness of disclosures. See Jean Braucher, *Rent-Seeking and Risk-Fixing in the New Statutory Law of Electronic Commerce: Difficulties in Moving Consumer Protection Online*, 2001 WIS. L. REV. 527. Nevertheless, while dissemination of information to bank customers is not the entire solution, it retains some utility in combating the problems inherent in a shrouding regime.

reduction in the number of myopic bank customers. Once it is obvious to many customers—those who took the time to educate themselves—how the terms of their agreements work, competition and advertisement will ensue among banks seeking to attract these customers. Because competition and advertisement transform a guerilla term into a salient term,¹³⁰ education has the effect of reducing both the number of myopic customers as well as the number of guerilla terms that would disadvantage the myopes that remain.

We do not mean to suggest that the Federal Reserve Board should police inefficient bank terms. What is efficient for one bank customer may not be efficient for another. Indeed, conceptions of “aggregate efficiency,” such as that offered by Korobkin, miss the point: they do not reflect the rational, informed choice of the contracting parties. Aggregate efficiency does no better than terms unilaterally added to bank-customer agreements: both ignore the conceptions of individual autonomy at the foundation of contract law. And there is no reason that contract must settle for efficiency in the aggregate when it can do better.

A method by which bank customers can educate themselves permits a return to contract doctrine in which “agreement” means real understanding. Contract would once again vindicate the consent of the transactors. Now, taking agreement seriously does not require unyielding deference to customers’ assertions that they did not in fact understand and agree to the terms of their agreement. Quite the opposite: when a customer has available all the necessary information with which to make an informed decision about which bank and which account to choose, it may be entirely appropriate to determine that the customer did agree even if, after the fact, she protests that she did not. This determination is one that courts have made for centuries, and they once again should be given the means to make the determination accurately.

CONCLUSION

Shrouding is what banks do—what they always have done—when there is more money to be made by maintaining a pool of customers in which the myopic subsidize the sophisticated. Banks are better off *not* advertising, *not* increasing the pool of sophisticated. But “shrouding” also results in welfare losses: hidden and oppressive terms result in some customers being victimized by bank accounts that they should not have opened.

130. See *supra* text accompanying note 47.

The deficiency of the current trust-the-market solutions is that they fail to take seriously contract doctrine in terms of “bargain” and “agreement,” relying instead on inferred assent and constructive agreement. The prevailing incentive structure established by shrouding has, of course, been in place as long as transactors of unequal bargaining power have entered into contracts and sellers have been able to exploit informational asymmetries. At equilibrium, there is no incentive to educate the myopic.

We have proposed to supply that incentive. When bank customers have in hand the means to alleviate the effects of informational cross-subsidies, the attendant welfare losses will be minimized. The only myopes that remain will be the willfully myopic, a group to whom contract historically has offered little assistance. Once the shroud is lifted, bank-customer agreements, like any other contract, can be evaluated by reference to classical notions of bargain and agreement.

