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Omri Ben-Shahar

University of Chicago Law School, omri@uchicago.edu

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REGULATION THROUGH BOILERPLATE: AN APOLOGIA

*Omri Ben-Shahar**

BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW. By *Margaret Jane Radin*. Princeton and Oxford: Princeton University Press. 2013. Pp. xvii, 248. \$35.

INTRODUCTION

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

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

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

* Leo and Eileen Herzel Professor of Law, University of Chicago Law School. I am grateful to Oren Bar-Gill, Robert Hillman, Carl Schneider, and Rip Verkerke for comments on an early draft of this Review.

1. For a previous articulation of this view, see, for example, W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 544–45 (1971).

background legal default rules” (p. 213). And to make sure that firms stop shoving such offensive paperwork in front of people, a new tort of “intentional deprivation of basic legal rights” should operate as a deterrent (p. 211).

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

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

Radin’s account projects the familiar complaint against “contracts of adhesion” and “unequal bargaining power” onto a foundational, liberal political mapping. Even within the dense autonomist literature bemoaning the evils of boilerplate, which now embraces vast legal commentary and court decisions, Radin’s account is a milestone because it does not shy away from raising the stakes. Because boilerplate allegedly destroys the very justification for enforcing private contracts, two implications for the appropriate legal response emerge: First, boilerplate contracts should not be enforced, period (p. 213). Gone is the hesitant voice of other autonomists who propose tentative tweaks and invoke subtle distinctions between garden-variety and truly harsh boilerplate. The scheme itself violates good social order and has to be outlawed. Second, in a bold and surprising move, Radin goes a step further. The practice of boilerplate deletion of rights, she argues, should be regarded as an intentional tort! (p. 211). Boilerplate renders the product to which it is attached *defective* because it makes the legal features nonfunctional, it makes the firm immune from liability and thus numb to its clients’ interests, and it makes the overall purchase less safe for consumers. “Being a recipient of boilerplate . . . is often more like being hit by a one of thousands of dumped projectiles than it is like entering into a relationship with the entity that dumped them” (p. 210). In the same way that the torts of defamation or deprivation of privacy protect people from nonphysical injuries, here, too, the harm inflicted by boilerplate is the degradation of basic rights secured by

2. See CARL E. SCHNEIDER, *THE PRACTICE OF AUTONOMY* (1998).

the polity. A commission of this tort of “intentional deprivation of basic legal rights” should lead to remedies like statutory damages and attorneys’ fees (pp. 212–13).

In contrast to autonomism and its focus on the ills of boilerplate as a *process* for contracting, a second approach to regulation-by-boilerplate asks how it affects the *outcome* of contracting. This is an approach largely numb to the inherent political value of private order, control, or “voice.” There is also no *per se* value in having some terms enacted by the polity rather than by the parties. Consumers don’t care who writes the terms; they only care how the terms influence their well-being or satisfaction from the product to which the terms are attached. This approach measures the boilerplate phenomenon merely by its effect on consumers’ “payoffs.” What matters is the substance of the deal, its cost to consumers, the ease by which profitable deals are formed, and the opportunities to realize benefits from trade. I also need a term for those who favor this perspective (myself—I’ll reveal now—among them), and I’ll borrow Radin’s somewhat derogatory term—“boilerplate apologists” (p. 198). Boilerplate apologists regard the fine print as merely a feature of mass-produced products, and a welfare-increasing feature at that—reducing transactions costs and prices and allowing firms to focus on improving product features that people actually care about.

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

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

I. BOILERPLATE AND THE PROBLEM OF IGNORANCE

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

rights” (p. 22). This ignorance is compounded by asymmetric sophistication, by the limited rationality of consumers, and by the striking absence of non-boilerplate alternatives. In all, self-serving drafters sit at their corporate headquarters and disseminate documents that override the democratically enacted law—the set of background rights that are granted to their customers.

Boilerplate is not an agreement but rather a “devolution or decay of the concept of voluntariness” (p. 30). Destroyed in the course of boilerplate contracting, Radin argues, are not only the arrangements that background legal rules (like implied warranties and make-whole damages) offer. Rather, the process of deleting rights without informed consent also undermines “private ordering” (p. 33)—the regime empowering private parties to “legislate” their own affairs. If consumers don’t negotiate, don’t participate, and don’t even know the terms of a transaction—if these sacraments of contracting are replaced by post hoc paperwork—there is no meaningful private ordering. Without informed consent, freedom of contract is meaningless, and the ideal of individual autonomy that justifies the contractual framework is crippled.

There is a subtle notion of the “public” sphere that underlies Radin’s complaint against boilerplate. The terms that appear in boilerplates substitute an entire fabric of legal rules that would otherwise govern. While private parties are permitted to modify these background rules—they are default, not mandatory, rules—alienability should be a meaningful process of quid pro quo. Existing “right deletion schemes” condemn fallback entitlements without any fair compensation, political accountability, or transparency. Thus, for example, remedies for breach of contract, implied warranties, the right to control one’s personal data, the right to make fair use of purchased digital content, and the right to seek redress in a public forum—all are mechanisms granted to people by the polity through a democratic process for the purpose of maintaining a “grand bargain” and a balance of power between countervailing interests (pp. 166–78). “Firms that use contract to destroy the ideal of contractual ordering are effectively undermining the rule of law and contributing to democratic degradation” (p. 39).

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

This world of sheer ignorance is contrasted with the alternative of informed consent—the elaborate disclosure regime serving medical patients prior to health treatments. When informed consent is invited, the patient knows that something of significance is about to happen, that it entails risks, and that the option to forgo the treatment exists (pp. 21, 89). In fact, the

absence of informed consent could render the medical treatment a bodily assault, actionable in tort law. Because a boilerplate scheme denies people similar opportunity for informed consent—it is like wheeling people into operating rooms while unconscious—it defies the basis of an autonomous action and thus cannot be regarded as an agreement. And, like unconsented medical invasion, it should be penalized by tort law.

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

A. *Myth #1: Boilerplate Is More Complex*

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

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

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

John and Sally's contract does not have a warranty certificate in boilerplate language with ugly ALLCAPS, but if some defect surfaces, its resolution would depend on a set of provisions collected under the law of implied warranties. Specifically, because this is a sale of goods, it contains an implied warranty of merchantability, and truth be told, it is a fairly complex warranty since the bike is probably used, and in such cases it is hard draw the exact lines of the assurance that the buyer gets, if any.³ White and Summers's treatise on sales law covers 325 pages in describing the various contours of the law of product warranties.⁴ The warranty paragraph in the firm-drafted boilerplate is the acme of simplicity relative to this background legal mass.

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

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

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

3. See U.C.C. § 2-314, cmt. 3 (2012–2013) ("A contract for the sale of second-hand goods, however, involves only such obligation as is appropriate to such goods . . .").

4. 1 JAMES J. WHITE ET AL., UNIFORM COMMERCIAL CODE chs. 10–13 (6th ed. 2012).

5. Hadley v. Baxendale, (1854) 156 Eng. Rep. 145 (Ex.); 9 Ex. 341.

and “no oral modification” clauses). The village contract, by relying on customs to fill its gaps—by replacing the formalism of textual sources with the flexibility and realism of commercial practice as a source of obligation—allows for much more nuance. But it also leads to added complexity, given that the content of the obligation is so fluid.

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

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

B. *Myth #2: Boilerplate Can Be Replaced with Informed Consent*

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

In contract law, informed consent means that people should be able to opt out of legally supplied default rules and agree to the terms that the firm proposes, but such opt-outs cannot be done in wholesale boilerplate fashion. Instead, they have to be the result of an informed, deliberate action. Freedom of contract would be a caricature if, for example, the opt-outs were written in Chinese. The fact that the opt-outs are written in English makes

them no less blatantly inconsistent with the autonomy of consumers because the boilerplate legalese is similarly inaccessible. Thus, commentators who believe in the informed consent principle insist, for example, that borrowers' acceptance of nonstandard risky mortgages should be unenforceable unless they received "honest and comprehensible disclosures from brokers and or lenders about the terms and risks of the alternative mortgages."⁶

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

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

6. MICHAEL S. BARR ET AL., BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 9 (2008), available at http://www.newamerica.net/files/naf_behavioral_v5.pdf.

7. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (forthcoming 2014) [hereinafter BEN-SHAHAR & SCHNEIDER, MORE THAN YOU WANTED TO KNOW]; see also Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011).

8. *Know Before You Owe*, CONSUMER FIN. PROT. BUREAU, <http://www.consumerfinance.gov/knowbeforeyouowe> (last visited Oct. 14, 2013).

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

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

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

9. Tom Baker & Peter Siegelman, *Protecting Consumers from Add-On Insurance Products: New Lessons for Insurance Regulation from Behavioral Economics*, 20 CONN. INS. L.J. (forthcoming 2013) (manuscript at 11), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199569.

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

Indeed, Radin thinks that “[t]here are strong non-economic arguments against treating all baseline entitlements as easily waivable” (p. 107). In other words, these baseline entitlements ought to be regarded as stronger than default rules. Various such nonwaivable rights already exist in consumer contracts, such as the prohibition on usury and on various forms of discrimination, as well as mandatory cooling-off periods. In Radin’s autonomist regime, the right to a jury trial, to participate in a class action, to a substantial warranty, to expectation damages, to fair-use rights in digital content, and to various other ends, should be elevated to a quasi-mandatory status. No more boilerplate opting out.

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

II. THE PROBLEM OF INTOLERABLE TERMS

With the issue of ignorance set aside, we can turn to the heart of the debate over consumer contract protection. Should the law mandate a set of basic provisions that must be included in every mass-market contract and

10. See BEN-SHAHAR & SCHNEIDER, *MORE THAN YOU WANTED TO KNOW*, *supra* note 7, ch. 2.

cannot be waived by consumers? I will examine the case Radin makes for such intervention and discuss the inevitable trade-offs that such a regulatory technique entails.

A. *Which Terms Are Intolerable?*

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

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

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

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

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

12. *E.g.*, Council Directive 93/13/EEC, annex, 1993 O.J. (L 95) 29, 33. Radin proposes a similar framework in Chapter Twelve.

13. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1756–62 (2011) (Breyer, J., dissenting).

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

Privacy clauses. Boilerplate “privacy policies” attached to websites and digital services give firms rights to collect users’ personal information and profit from it in various marketing and data-sharing strategies. Since the information is “important to personal identity,” Radin considers privacy rights as good candidates for entitlements that are “fully inalienable”—something beyond the power of individuals to waive (p. 176). Perhaps “society as a whole might not agree that waiver of privacy rights should be entirely determined by individuals” (p. 177).

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

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

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

B. *Boilerplate and the “Price Effect”*

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

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

Let us begin by assuming that the rights that boilerplates delete are important. They are important because they affect, in an economically meaningful way, consumers’ surplus. If that were not the case, a book about boilerplate contracts would not be worth writing. The immediate implication of this assumption is that a product + boilerplate bundle that deletes these rights eliminates important fragments of value and thus saves the firms some of the costs of doing business. This cost saving allows firms that offer the depleted bundle to charge a lower price. Standard economics analysis shows that this implication holds regardless of the market power that firms have.¹⁶ It is possible that not all cost savings would accrue to consumers

14. E.g., *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, annex 1, arts. 2, 10, 22, 27, 28, 29, 47, 64, 69, 70, 71, 72, 74, 75, 77, 81, 84, 92, 99, 101, 102, 105, 106, 108, 111, 135, 142, 148, 150, 155, 158, 167, 171, 177, 179, 186.

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

16. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer–Seller Relationships*, 43 STAN. L. REV. 361 (1991); Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1071–76 (1977).

through lower prices. But it is hard to imagine that the savings due to, say, stingy warranties or restricted use of information products, would have no price effect.

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

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

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

17. *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (Easterbrook, J.).

18. James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 742.

Even when they pay top price for premium products, few consumers would regard the overall value of the deal as based on anything that boilerplate regulates, or the alleged havoc it wreaks on their “important legal rights” (p. 32). Consider Apple’s boilerplate, one of the most grotesque, mentioned in Radin’s book as an exemplar of a nasty rights-deletion scheme (p. 86). Are consumers exploited by Apple? Is their situation equivalent to coercion or fraud? Not by what this picture tells:



This is the line of eager consumers outside one of Apple’s stores, on the rainy day that the iPhone 5 was launched. Lines like this were a global phenomenon. It is *not* a picture of a market failure or of gullible consumers divested of their rights. Is Apple a tortfeasor? Do these people look “more like being hit by a one of thousands of dumped projectiles”? (p. 210).

Do not be mistaken: the boilerplate that these people are going to “accept” will likely deny them the right to sue in a convenient court, will limit their warranties, will prompt them to let Apple and its affiliates harvest their private information and geo-locations, and will restrict their intellectual property rights in the content they will be posting with their iPhones.¹⁹ When their turn in the queue comes to purchase the device, these people will be entering the world of boilerplate horrors, “transport[ed] . . . to a different legal universe where many of their background rights are deleted” (p. 210). To my unsophisticated eye, less trained in autonomists’ notions of self-determination versus disenfranchisement, this picture tells a story of people delighted to purchase a product, which they regard as enhancing their capabilities and which they will brandish around victoriously. If polled, do you think that these consumers would support legal protections that might make them wait longer in line and force them to pay more for the device? Would they be eager to disable popular (and free) mobile applications like Apple Maps or Google Local, which give them real-time directions and locations, in return for GPS tracking?

True, one cannot simply infer from consumers’ eagerness to purchase that all aspects of the product are to their liking. Oren Bar-Gill successfully shows how bad and even inefficient features can coexist with the popularity

19. *iOS Software License Agreement*, APPLE, <http://www.apple.com/legal/sla/docs/iOS7.pdf> (last visited Oct. 14, 2013).

of products.²⁰ But many of these bad features do end up biting the consumers over time as their latent effect emerges. They thus shape the consumers' propensity to repurchase products from the same vendor. What distinguishes the iPhone queue is the presence of *repeat* buyers.²¹ Autonomists have yet to reconcile their concern for degradation with the consistently high satisfaction scores, and product loyalty patterns, among the recipients of boilerplates like the ones attached to the iPhone.

Ironically, it is likely that the worst deal these Apple customers can make is to purchase *better* legal terms from Apple. In fact, they do have this choice: they can buy the manufacturer's extended warranty plan ("AppleCare").²² Instead of the standard terms (a one-year limited warranty), they can pay an additional ninety-nine dollars and receive a more generous warranty plan: two years, with coverage extended to include accidental damage to the device. In supplying higher-end legal terms, Apple's scheme would probably satisfy the "meaningful choice" that autonomists advocate. But it is a bad deal because it is an *expensive* insurance. It may be beneficial for clumsy users who tend to accidentally drop their devices into the toilet, but to most other buyers a scheme of self-insurance (and greater care) is a smarter choice. In fact, even those who want the added coverage can obtain it more cheaply through SquareTrade or through the consumer's credit card that offers free extended-warranty protection.²³ When there is demand for better legal protections, markets often supply them in separate, unbundled packages.²⁴

People buying popular product + boilerplate packages are demonstrating that they don't care about the autonomists' concerns over the legal rights that boilerplate deletes. But maybe they *should* care. Maybe the rights to sue, to powerful warranties, to be free from data mining, and to enjoy the full spectrum of fair-use rights in information should not be optional but rather mandatory. Even if people want to thoughtlessly trade away these rights for the superficial allure of a trendy gadget, or for the short-lived satisfaction of a petty discount, maybe the law should deny them this option. What is implicated, perhaps, is more than the hedonistic gratification of iPhone users: it is the rule of law, the "ideal of contractual ordering" (p. 39), and "the apparatus of democratic governance" (p. 40).

20. See generally OREN BAR-GILL, *SEDUCTION BY CONTRACT* (2012).

21. See, e.g., Michael Williams, *iPhone Owners Best Repeat Customers*, TECHIEINSIDER, www.techieinsider.com/news/12761/iphone-owners-best-repeat-customers (last visited Oct. 14, 2013); *Apple iPhone Owners Most Likely to Repeat Purchase*, STRATEGY ANALYTICS (Mar. 9, 2010), www.strategyanalytics.com/default.aspx?mod=pressreleaseviewer&a0=4870.

22. *AppleCare+ for iPhone*, APPLE, <http://store.apple.com/us/product/S4575LL/A/apple-care-for-iphone> (last visited Oct. 14, 2013).

23. For a comparison of available warranty plans for iPhones, see Josh Smith, *Top 5 iPhone 5 Warranty Options Compared*, GOTTA BE MOBILE (Sept. 14, 2012), <http://www.gottabemobile.com/2012/09/top-5-iphone-5-warranty-options-compared>.

24. See Omri Ben-Shahar, *One Way Contracts: Consumer Protection Without Law*, 6 EURO. REV. CONT. L. 221 (2010).

These are weighty arguments that view a liberal society as more than the free exercise of bargain-hunting consumerism. It is a view that runs deeply through Radin's book. For example, "In order to preserve a widely valued aspect of social affairs, a society as a whole might not agree that waiver of privacy rights should be entirely determined by individuals" (p. 177). Entitlements should be nonwaivable when they are "components of 'public' regimes underwritten by the polity for the sake of the structure of the polity itself" (p. 173). Because of their mass-market character, boilerplates are deleting entire legislative schemes that are "properly 'public' (placed in the care of the polity, for the benefit of the polity as a whole)" (p. 212).

It is beyond the scope of this Review to enter this debate on moralism and paternalism in private law—whether the maintenance of "widely valued aspects of social affairs" justifies limits on contracting, even in the absence of personal injury or of traditional forms of negative externalities. Similar debates have been thoroughly consummated in the literature on informed consent. Should patients, for example, have the right to waive the ritual of informed consent? There, too, a version of "mandatory autonomism" regards the stakes as "public"—reaching beyond what individuals should be allowed to forgo. To me, such views of informed choices and mandatory autonomism, when applied to consumer boilerplate, "look more like threats to autonomy than protections of it."²⁵ Because the issues governed by boilerplate are complex and largely unfamiliar, being occupied by them can *detract* from one's sense of control. And having to pay higher prices unless people are smart and sophisticated enough to thoughtfully waive these rights would make most people feel *less* autonomous. For many, the choice not to bother is the ultimate liberator.

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

25. BEN-SHAHAR & SCHNEIDER, MORE THAN YOU WANTED TO KNOW, *supra* note 7, at 63. For related views, see EDWARD C. ROSENTHAL, THE ERA OF CHOICE (2005), and BARRY SCHWARTZ, THE PARADOX OF CHOICE (2004).

C. *The Problem of Regressive Cross-Subsidies*

Not all people, however, value their legal rights as cheaply as White does (recall his metaphorical nickel-or-dime). There may be a minority of citizens—I would guess part of a sophisticated elite—for whom the boilerplate rights-deletion bargain is undesirable and even offensive. For them, the degradation of consent and of legal entitlements cannot be priced. They want the right to sue in courts, they want firm accountability measured by full consequential damages for their harms, they want personal data to remain personal, and they want access to information to be regulated by intellectual property law, not by license agreements. If they must, they are willing and able to pay more for this bundle of upgrades.

Unfortunately, meeting the preferences of such groups would require the entire pool of consumers, including the vast majority indifferent to such privileges, to pay more as well. And so everyone would pay for benefits that some are disproportionately likely to enjoy. For example, allowing parties to recover unlimited consequential damages would mean that high-loss types would be subsidized by those with lower losses, or more disturbingly, by those who took more care and thus suffered less injury.²⁶ Currently, most people can ship mail packages cheaply without much insurance, unless they pay more for the coverage. A legal rule mandating full consequential damages for delayed package shipping would spread the cost of such insurance across all customers, benefitting those who ship more expensive items. Similarly, mandatory rights to withdraw from a contract would benefit those more likely to exercise such an option. Leisure travelers, for example, prefer to make careful plans and purchase nonrefundable air travel rather than pay for the right to withdraw. Business travelers who value and exercise such a withdrawal right more often end up paying large premiums for it. With a mandatory rule, the leisure travelers would cross-subsidize the (more affluent) business clientele. And a legal rule that mandates access to court litigation and prohibits arbitration clauses might also impose a cross-subsidy. If this is more costly to firms, and if they cannot charge differentiated prices based on people's propensity to sue, consumers with a higher propensity would be cross-subsidized by everyone else.²⁷

26. Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105, 111 n.18 (1989); see also William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. LEGAL STUD. 241 (1983); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629, 659 (1988); Gwyn D. Quillen, Note, *Contract Damages and Cross-Subsidization*, 61 S. CAL. L. REV. 1125 (1988).

27. See Omri Ben-Shahar, *Arbitration and Access to Courts: Economic Analysis*, in REGULATORY COMPETITION IN CONTRACT LAW AND DISPUTE RESOLUTION 447 (Horst Eidenmüller ed., 2013).

Cross-subsidies are everywhere, but they should be particularly troubling when they are regressive—when weaker and poorer consumers subsidize the sophisticated and wealthier ones.²⁸ The legal rights that boilerplates delete, if mandated, would disproportionately benefit the elite. First, the value of warranties or of remedies is greater to those with larger consequential losses, and we know that the affluent have more to lose than the poor. Second, to pursue any legal right—a warranty, litigation in court, or even the right to know—an aggrieved party has to understand what her rights are and that they were violated, and she must be sophisticated and patient enough to successfully invoke the legal procedures for redress. She also needs to find an attorney who would take the case. On each of these counts, sophisticated (that is, educated and wealthy) consumers fare comparatively better. They are therefore the primary beneficiaries of mandated protections.

Protective policies are regressive in a way that is even more offensive to notions of distributive fairness when the protection they secure, even if furnished to all, is ranked low in the order of priorities by lower income people. Privacy rights are an example. The case against firms collecting big data has more to do with the interest in “preserv[ing] a widely valued aspect of social affairs” than with any individual harm (p. 177). It is the concern over the “character of . . . society” (p. 178) that a sophisticated elite demands but that most citizens do not recognize and would have a hard time even articulating, not to mention affording. Mandating such a conception of autonomy on the entire citizenry and asking the lower middle class to finance this arrangement by paying higher prices is inequitable and coercive.

The happy news is that even without mandatory protections, those who seek them can often purchase the “premium” versions of products, which guarantee better legal terms. They might be charged higher prices for better remedial terms, for a fully refundable right to withdraw, for a right to terminate the contract prematurely, or for less restricted uses of intellectual property. They might secure better privacy protection by carefully opting out of the default data-harvesting settings of web services and mobile applications. They might bank with credit unions that, unlike commercial banks, employ less of the hidden-boilerplate nastiness.²⁹ Without mandated protections, and despite the nonnegotiability and the one-sidedness of most boilerplate, market segmentation is possible.

CONCLUSION: WHAT IS THE HARM?

Boilerplate goes out with a bang. The degradation fine print is alleged to bring about calls for regulation, but the tools of contract law (especially the doctrine of unconscionability) are too limp. If the fine print is part of the product that people purchase, why not regulate it the way product safety is

28. See Omri Ben-Shahar, *The Uneasy Case for Equal Access Law* (Univ. of Chi. Inst. for Law & Econ. Olin Research Paper No. 628, 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197013.

29. See Ryan Bubb & Alex Kaufman, *Consumer Biases and Mutual Ownership*, 105 J. PUB. ECON. 39 (2013).

regulated, through products liability law? If widespread denial of legal rights is equivalent to the mass distribution of defective products, isn't tort law more appropriate than contract law to regulate the effects of such widespread harms? (pp. 209–16).

This is an immensely creative idea, likely to become a legacy of the book, and it deserves careful attention beyond what I can offer in the remaining pages.³⁰ To be practical, it would have to overcome doctrinal distinctions reflecting deep-rooted policies that partition the universe of private actions between contract and tort law. And to be relevant, it would have to capture wrongful behavior not currently actionable under state consumer protection statutes. My comments in the previous Part are meant to highlight the potential unintended consequences of such a liability scheme on prices, affordability, and cross-subsidies. And so while I am deeply skeptical whether the proposed tort would benefit consumers, it no doubt benefits the discussion. It is a welcome new framework, if only because it focuses the debate on the fundamental issue: *What is the harm?* It thus offers a common language for autonomists and boilerplate apologists. So let me say, in concluding, a few words on where this conversation might go.

To promote a new tort claim, autonomists will have to develop an account of harm that has real victims. They will have to identify better poster cases than they currently have. For two decades, the wrath of autonomists writing in the consumer contracts area has been aimed at the case of *ProCD, Inc. v. Zeidenberg*, the precedent that allowed firms to “shrinkwrap” the fine print with the product without giving customers the opportunity to read it prior to purchase.³¹ But the plaintiff in the case, Mr. Zeidenberg, evokes very little sympathy. He bought a \$150 CD-ROM that contained digital phone listings from over 3,000 directories, assembled laboriously by ProCD at a cost of over 10 million dollars. Opportunistically, he then began to sell commercial access to these data, in competition with ProCD, despite the unsurprising contractual prohibition in the shrinkwrap license. It is also worth mentioning that a less restrictive, but far more expensive, license was obtainable from ProCD, but Zeidenberg—the ultimate free rider—decided to buy the cheaper, personal-use package. He then had the chutzpah to argue that he did not have an opportunity to read the fine print in advance (because it was sealed in the package) and therefore should not be bound to it.

Or take another major exhibit in autonomists' hall of shame: the Supreme Court case *AT&T Mobility LLC v. Concepcion*, which required state courts to enforce mandatory arbitration clauses.³² The Concepcions' complaint was that they were charged sales tax on cell phones that they received when signing up for AT&T service, cell phones that were promised to be free. The Concepcions did receive two free cell phones; the tax charge of

30. For a previous articulation of this view, see, for example, Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389 (2007).

31. 86 F.3d 1447 (7th Cir. 1996).

32. 131 S. Ct. 1740 (2011).

\$30.22, however, was based on the cell phones' retail value (and was passed on to the government). Is this deception? Fraud? Even if the advertisement of "free phones" is incomplete in leaving out the tax charge, this is hardly a banner case for the plight of consumers. AT&T could have added (and now adds) an asterisk indicating that "taxes and other charges may apply," but recall that autonomists don't like fine print in advertising either. All this is to show that the Concepcions, leading a well-oiled class-action charge, suffered as microscopic an injury as one could imagine.

The focus on "what is the harm" also has important implications for boilerplate apologists. It is already recognized that in areas such as consumer credit and insurance, fine print has the potential to undermine the value that people believe they purchased. Firms, for example, should not be able to run advertisements promising castles in the sky and then disclaim them in fine print. Laws against fraud and deception deal with such practices. But boilerplate can inflict more elusive forms of deceit and harm, which escape the rigor of antifraud law. In his important work on boilerplate, Bar-Gill shows how firms reduce the perceived price of their products by hiding various charges in the fine print, particularly by backloading costs onto long-term price dimensions.³³ These are harms not due to "baseline entitlements" like arbitration or exculpatory clauses. Rather, such practices are harmful because they undermine the price-effect dynamics, they disrupt competition, and they impose disproportionate burdens on the least sophisticated consumers. Boilerplate apologists would be wise to assess these potential harms and examine Radin's mass-enforcement scheme as one possible framework for addressing them.

33. See BAR-GILL, *supra* note 20, at 21–23.

