

2014

# Boilerplate and Consent

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## Recommended Citation

Nancy S. Kim, Boilerplate and Consent, 17 Green Bag 2d 293 (2014).

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# BOILERPLATE AND CONSENT

Nancy S. Kim

**I**N MARGARET JANE RADIN'S BOOK, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Radin argues that boilerplate is a social problem leading to normative and democratic degradation of important rights. Although practitioners typically refer to "boilerplate" as the miscellaneous, standardized provisions at the end of a contract, Radin uses the term to refer to "standardized form contracts" which "like the rigid metal used to construct steam boilers in the past . . . cannot be altered."<sup>1</sup> Radin proposes an analytical framework for evaluating boilerplate and a bold panoply of alternatives to contract law to deal with the problem of boilerplate which includes private and public approaches, and a novel use of tort law to deter the most egregious rights-deleting terms.<sup>2</sup>

In his review of Radin's book, Omri Ben-Shahar outlines two approaches to regulation by boilerplate.<sup>3</sup> He labels the first as "autonomism," which asks "how such one-sided dictation of terms by firms fits within a liberal account of good social order, of democratic

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*Nancy Kim is a Professor of Law at California Western School of Law and the author of WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (Oxford 2013). © Nancy S. Kim, 2014.*

<sup>1</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) at 8-9.

<sup>2</sup> *Id.* at 154-242.

<sup>3</sup> Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, available at papers.ssrn.com/sol3/papers.cfm?abstract\_id=2255161t 2 (forthcoming, Michigan Law Review, 2013).

control and participation, and of individual autonomy.” Ben-Shahar views Radin as representative of the autonomists. The second way of viewing regulation-by-boilerplate is “to ask how it affects the well being and satisfaction of consumers who buy products co-packed with boilerplate.” Ben-Shahar identifies himself with “boilerplate apologists,” who are primarily concerned with “the substance of the deal, its costs to consumers, the ease by which profitable deals are formed, and the opportunities to realize benefits from trade” and who are “largely numb to the inherent political value of private order, control, or ‘voice.’”

Ben-Shahar sets up the two camps in order to frame his critique. But what he purports to accept as “the autonomists’ premise” – that there is “something offensive about being bound to terms that you did not know about” – is a belittling mischaracterization. Radin argues that some boilerplate strips consumers of important *rights* and is socially harmful, not that it is “offensive.” By downgrading the harm engendered by boilerplate from a rights violation to something akin to elbows on the table, he dismisses Radin’s premise at the same time that he purports to accept it. Ben-Shahar then reframes the discussion as one about the economics of boilerplate instead of Radin’s concern, which is the deletion of rights without consent, and the deletion of rights which are market-inalienable or partially market-inalienable.

According to Ben-Shahar, boilerplate apologists believe that boilerplate is welfare-enhancing because it reduces transaction costs and, presumably, prices. Therefore, he argues, boilerplate is what consumers want anyway – a generalization that Radin disputes.<sup>4</sup> More importantly, it ignores the larger questions raised by Radin’s book regarding the limits of consent: Even assuming that consumers want boilerplate, how much does that matter? Or, to put it differently, Are there limits to consent? Are there some things to which we, as a civilized society, should not permit consumers to consent?

This Essay does not attempt to answer those questions. Rather, it posits that they are unanswerable without a better, more nuanced

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<sup>4</sup> Radin devotes the entirety of chapter 6 to this issue. See Radin at 99-109.

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definition of consent – one that takes into account contracting realities such as contracting environment, contract presentment, the nature of rights affected, and the burdens created by boilerplate.

### I. INFORMATION AND CONSENT

Consent justifies judicial intervention into what is otherwise a private affair. Without consent, state enforcement of contracts amounts to state coercion. The central problem with regulation by boilerplate is consent and the importance of certain rights that should not be so easily waivable – or waivable at all. Radin cares about consent. She also cares about the varieties of nonconsent. One of those varieties, in addition to coercion and fraud, is sheer ignorance. There can be no consent – or there can only be nonconsent – where there is coercion, fraud, or sheer ignorance. In the context of boilerplate, it is sheer ignorance that rears its ugly head most often. Radin states that sheer ignorance occurs “where a person’s entitlement is being divested, but the person does not know that it is happening, or indeed, that anything is happening.”<sup>5</sup> Sheer ignorance is characterized by an absence of information, and without information a consumer cannot consent. As Radin notes, “for a consumer to make a free choice, that consumer must have some level of information.”<sup>6</sup>

Another category of consent that Radin refers to, “problematic consent,” results from decisionmaking impediments that prevent an informed choice. In this situation, such as where a user clicks “I agree” to the terms of use without reading them, she questions the validity of the consent.<sup>7</sup> Information asymmetry, which refers to recipients of boilerplate having much less information than do the firms that draft them, makes consent problematic.<sup>8</sup> In addition, heuristic bias, which refers to the cognitive limitations or “bounded rationality” of human beings, impedes decisionmaking and renders

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<sup>5</sup> *Id.* at 21.

<sup>6</sup> *Id.* at 103.

<sup>7</sup> *Id.* at 24.

<sup>8</sup> *Id.* at 24-25.

consent problematic.<sup>9</sup> Radin references the body of academic research and empirical studies that find that human beings are myopic and less than perfectly rational.<sup>10</sup>

The existence of heuristic biases casts doubt on the possibility of informed consent, which depends upon the consentor's ability to understand and assess risk. Radin argues that the fact that individuals only at best pay attention to whatever seems salient to them at the moment also means that certain rights that do not seem salient to individuals – such as viable rights to redress of grievances – should not be waivable on an individual-by-individual basis.

Ben-Shahar presents what he refers to as two myths pertaining to boilerplate and sheer ignorance. The first myth is that “boilerplate is more complex” than a simple agreement from a pre-boilerplate era. Because such a simple agreement does not address many of the issues addressed by boilerplate, it is subject to other legal sources such as default rules, gap fillers, regulations, and local customs and market norms. Thus, Ben-Shahar argues, the complexity of the simple agreement “is probably greater, compared to boilerplate, because the absence of a comprehensive sheet of terms opens the door for various and overlapping supplementary sources.”<sup>11</sup>

But complexity by itself is not the problem; complexity is problematic when it obscures important information relevant to a party's decision. It vitiates consent when the party would have made a different decision if the party had known of the information. What Ben-Shahar describes as the “complexity” of “supplementary sources” such as default rules and norms is not necessarily a problem for the non-drafting party because unlike boilerplate, supplementary sources are typically crafted to reflect the intent of reasonable parties in similar situations. Boilerplate, on the other hand, tends to favor the drafter and probably does not reflect the intent of the non-drafting party. Complexity matters to the nondrafting party if the information that it contains harms her. It is irrelevant if it says what

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<sup>9</sup> *Id.* at 26.

<sup>10</sup> *Id.* at 26-27.

<sup>11</sup> Ben-Shahar at 5.

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she intends. Furthermore, as Radin argues, default rules represent the past choices of legislatures and courts, and so at least have some democratic basis.

The second myth, according to Ben-Shahar, is that “boilerplate can be replaced with informed consent.” According to Ben-Shahar, this is a myth because 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.” But in many cases, it *is* the failure of the delivery template. Research shows that the nature of disclosure matters a great deal in educating consumers. As Archon Fung, Mary Graham, and David Weil argue, “targeted transparency policies succeed when they are *user-centered*.”<sup>12</sup> For example, the star rating system used to indicate the safety of sport utility vehicles (SUVs) successfully educated consumers and led to safer SUV models.<sup>13</sup> The disclosure system was effective both because the information was clearly communicated and the format was user-centered and allowed easy comparisons among different auto makers.<sup>14</sup>

When critics of disclosure like Ben-Shahar argue that it doesn’t “work,” what they really mean is that consumers fail to act differently as a result of the disclosure. But as Fung, Graham, and Weil demonstrate, it is only *some* disclosure that doesn’t work.

Furthermore, consumer inaction stems from a variety of complex causes, including heuristic biases. Collective action and coordination problems also impede action. A lack of reasonable alternatives presents yet another obstacle for the consumer. Ben-Shahar assumes competitive markets but as Radin notes, we cannot simply make that assumption nor can we assume that, even given a competitive market, we have not reached a “lemons equilibrium” where firms compete “by offering their worst contract, not their best.”<sup>15</sup>

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<sup>12</sup> ARCHON FUNG, MARY GRAHAM AND DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007).

<sup>13</sup> *Id.* at 1-4.

<sup>14</sup> *Id.* at 2-3.

<sup>15</sup> *See* Radin at 109.

Alternatives result from market competition and market competition arises from demand. This is how the issue of consumer choice is affected by lack of transparency or ineffective disclosure. As Radin argues, “Appropriate market functioning depends upon an acceptable understanding of the basis of demand. A market is not functioning properly if demand is based on completely erroneous notions about what the product is.”<sup>16</sup> If consumers don’t know about a harm, they won’t complain about it or demand alternatives, and there will be no market response to address that demand for alternatives. *Effective* disclosure, however, has the potential to raise awareness and create competition in the marketplace, such as with the star rating system mentioned above, which made rollover safety a salient consumer issue and, eventually, a competitive product feature.<sup>17</sup>

Disclosure won’t solve every instance of non-consent or problematic consent, but to dismiss it out of hand is an overreaction. Boilerplate is easy to ignore because it is hard to find and harder to understand. Would consumers care about arbitration if they had the right kind of information, such as “From 2010-2013, 200 consumers tried to sue us but were forced to arbitrate their claims. Of those claims, consumers prevailed on only 2 out of 200.”? Maybe some would, maybe some wouldn’t. Less probable is that they would purchase goods from a website if they knew its terms of use contained the following provision:

You agree not to file or initiate any complaint, chargeback, dispute, public comment, forum post, website post, social media post, or any claim related to any transaction with our website and/or company. By using our website, making any purchase, or conducting any transaction with us, you agree to all terms and conditions stated herein. Any action in breach of this

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<sup>16</sup> *Id.* at 103.

<sup>17</sup> Fung, Graham and Weil at 4 (noting that “SUV models had widely varying rollover rates – and most performed poorly. In 2001, thirty models received only one or two stars, meaning that they had a greater than 30 percent chance of rolling over, while only one model . . . earned a four-star rating, meaning that it had a less than 20 percent chance of rolling over. By 2005, however, only one model . . . received as few as two stars, while twenty-four models earned four stars.”)

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agreement that causes reversal of any payment in full or in part shall result in a collections action for the full or partial order total (the amount reversed) plus an additional \$50. You agree that any breach of this agreement shall also constitute liability in the amount of \$200 plus any related costs directly or indirectly relating from any such breach.<sup>18</sup>

Consumers don't read boilerplate now, but that doesn't mean they won't read any boilerplate in any form, *ever*. Ben-Shahar's claim of ineffectiveness merely absolves businesses of responsibility for the lousy job they are currently doing with conveying information. To ignore or discount the potential of disclosure to remedy informational asymmetries devalues the importance of consent. Disclosure requirements signalize that the quality of consent matters. Even if an individual consumer fails to take advantage of the opportunity to review relevant information, it should not be up to the drafting company to make the decision that the consumer will not do so – and so not even bother to try to make the information readable.

If the vast majority of consumers ignore certain information, there are two possibilities. Either the information is immaterial or that information is not presented in a reasonable manner. Elsewhere, I have proposed that the courts adopt a “duty to draft reasonably.”<sup>19</sup> Under the duty to draft reasonably, contract provisions would be categorized based upon their function (shield, sword or crook), with the taxonomy determining what type of information should be disclosed and *how* consent should be manifested.<sup>20</sup> If the

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<sup>18</sup> Terms of Use from Accessory Town, *available at* [acctown.com/pages/terms](http://acctown.com/pages/terms).

<sup>19</sup> NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013) at 176-192.

<sup>20</sup> *Id.* at 44-52. “Shield” terms protect the company’s proprietary interests and do not require the consumer’s consent. A business can, for example, unilaterally limit the scope of a license term, forbid smoking in hotel rooms, and prohibit bullying on its website. By contrast, “sword” provisions diminish consumers’ rights, such as the right to sue, or impose obligations, such as the obligation to pay fees in addition to the purchase price. Consequently, they require the consumer’s consent. The last category of terms, “crook” provisions, are terms that are not obviously part of the bargain. Examples of crook provisions include terms that claim a broad license to use personal information even though the website boasts

vast majority of consumers fail to read important information, the company has failed to meet the standard. Companies conduct focus group testing as part of their marketing efforts – they should put some of that skill and knowledge into testing the noticeability and comprehensibility of their contract terms.

## II. TRANSPARENCY, CHOICE AND COMPETITION

Radin’s proposed analytical framework consists of evaluating (i) the nature of the right to determine whether it is one that is alienable or whether it is market-inalienable; (ii) the quality of consent by the recipient; and (iii) where relevant, the extent of social dissemination of the rights deletion.<sup>21</sup> She proposes that “*either* non-consent or market-inalienability will invalidate any purported contract, whether mass-market or not, whether boilerplate or not.”<sup>22</sup>

Ben-Shahar warns against the unintended consequences of Radin’s proposal. The first such unintended consequence is the “price effect,” which is basically the effect that boilerplate deletion will have upon the price consumers will be expected to pay. His assumption is that better terms will result in higher prices. Yet, there is no evidence to support that any cost savings from the use of boilerplate are passed on to consumers instead of pocketed by the company. It is a common assumption made by apologists, which Radin observes is “not validated in practice to any significant extent” and which demonstrates a “breathhtaking coup of armchair economics.”<sup>23</sup>

Ben-Shahar argues that people have varying preferences for legal rights. Some may sell their rights cheaply, others at a greater discount, and a few not at all. He argues that market-inalienability would prevent firms from price differentiating to reflect these preferences. But most vendors do not now price differentiate based up-

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that its services are “free and always will be.” See [www.facebook.com/](http://www.facebook.com/). A duty to draft reasonably would seek specific assent to sword and crook provisions but require only notice of shield provisions.

<sup>21</sup> Radin at 155.

<sup>22</sup> *Id.* at 159.

<sup>23</sup> *Id.* at 290-291, fn. 21.

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on legal rights. Companies may offer variable pricing, but almost always it pertains to the product itself and not to ancillary legal rights. Furthermore, this argument does not respond to Radin's central argument that some rights should not be saleable.

According to Ben-Shahar, mandating certain terms would lead to regressive cross-subsidies. He uses as an example privacy policies, which he argues are a concern of the "sophisticated elite" but that most people could not afford the increased cost that would presumably result if data collection were restricted or prohibited. But this claim is unfounded. In fact, it may be that the sophisticated elite are simply better informed about the consequences than the majority of consumers. Perhaps if the majority of consumers understood how their data was being collected and used, they would object (or be willing to pay more to do business with companies with less intrusive data collection policies). Will the collection of data mean that less wealthy consumers won't be able to get a mortgage in the future? That they will be turned down for health insurance? That they won't get the job they want? If it did, and consumers knew that it did, it would be safe to say that most consumers would care and that many would pay more to protect their information. The lack of transparency (What do companies do with our information anyway? What will they do with it in the future?) and heuristic biases make it hard to make generalizations about consumer preferences. In addition, Ben-Shahar's approach ignores the effect that greater transparency has on shaping public opinion. The majority of consumers may not be willing to pay more for privacy now, but that doesn't mean they won't in the future if they understood how their information is used.

Ben-Shahar presents a picture of consumers lining up outside of an Apple store the day the iPhone 5 was launched. He states that it is "not a picture of market failure, nor of gullible consumers divested of their rights." But the fact that many consumers love the iPhone reveals nothing about Apple's contract. If — as Ben-Shahar admits — few consumers read boilerplate, the number of people outside of Apple's stores is not indicative of their feelings about Apple's boilerplate. They don't love Apple *despite* its boilerplate, they love Apple products *without regard* for its boilerplate.

Furthermore, what choice do these consumers have? Some might be willing to buy a Samsung Galaxy instead of an iPhone 5 if it had better boilerplate terms. The problem is that the Samsung Galaxy doesn't have better boilerplate terms. There is no need for companies to compete on boilerplate because nobody knows what it says and everyone assumes that it says the same thing.

## CONCLUSION

According to Ben-Shahar, “Radin’s argument poses two challenges for the boilerplate apologist”:

The first challenge is the problem of ignorance – how can people be obligated to terms that are impossible to know and appreciate in advance? How could such terms match their preferences? The second challenge is the problem of intolerable terms – why should baseline legal entitlements be replaced with harsh one-sided arrangements?

His arguments, however, answer another question: Is boilerplate socially beneficial? Rather than acknowledging the lack of alternatives, the forced choices, and the judicial construction of consent, he discusses economic justifications for the reallocation of entitlements. But he bases these justifications upon conjectures and, compelling and insightful though they may be, they do not answer the question – Does consent matter *all the time*? Are there some rights that should not be saleable and if so, which ones? More importantly, who decides?

Despite their differences, Radin and Ben-Shahar share a similar view of boilerplate – it is not a contract. A contract depends upon consent – this is not wishful thinking on the part of idealistic autonomists but *the* core tenet of contract law. The difference is that Radin believes that it matters that boilerplate is not a contract and Ben-Shahar does not. Ben-Shahar seems to adopt the view, *So what if it is not a contract?* For Ben-Shahar, the important question isn't why boilerplate is contractual but whether it should nonetheless be enforced because it is socially beneficial. Ben-Shahar's arguments in

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favor of boilerplate presume to know what the consumer would prefer rather than seeking ways to enable the individual to make better choices for herself.

But a contract's validity depends upon consent, not conjecture about what consumers would or should want. Without consent, boilerplate that reallocates rights is not a contract – it is a taking. The pervasiveness of boilerplate makes consent in the mass consumer context – actual consent, not legally constructed consent – fantastical. Companies use fine print, legalese, and excess verbiage which render their contracts incomprehensible to most people (including lawyers). There should be no “duty to read” without a “duty to draft reasonably.” The expectation that consumers read all the fine print thrust their way is unreasonable, especially when there is no similar expectation that businesses present and draft their contracts so they are readable.

Technology has exacerbated matters. Boilerplate insinuates itself on all of our digital devices. It comes between us and every company we do business with online. These terms often incorporate hyperlinked pages by reference, creating a disruptive reading experience for consumers. To make matters worse, these terms often incorporate “modification at will” clauses which require consumers to read the terms each time they visit the website. The benefit of standard forms was supposed to be that they were efficient, but it is hardly efficient or rational for the consumer to read every contract she encounters online, every time she ventures online. The social cost would be overwhelming if consumers read every contract presented to them. So the consumer does what any rational actor would do – clicks “agree” without reading and surrender to the oppressive contracting environment.

But companies are not the primary culprits here – they are merely exploiting the advantage that the courts have given them. Courts fail to consider how, in the aggregate, mass consumer contracts create a coercive contracting environment. They construct assent through actions which are divorced from meaning or intent by the actor, such as clicking to remove an obstruction. If no one reads wrap contracts, how can courts find a “reasonable person”

would have done so? How can a definition of reasonable contracting behavior be so removed from the way people actually behave?

The enforceability of boilerplate should depend first of all upon the quality of consent. Courts now construe consent as a conclusion – either the consumer did or did not consent to the contract. But consent is non-linear and, as Radin writes, occupies “a continuum from clear consent to clear nonconsent.”<sup>24</sup> It is also scattershot, and variable. A consumer may consent to some things (the price, the return policy) but not others (the non-disparagement clause, the refund policies). Contract doctrine has always recognized this continuum through doctrines like unconscionability and mistake – but courts have sometimes been reluctant to apply them. The problems of boilerplate cannot be so easily divided into autonomist and consequentialist silos given the limits of human cognition, and the problems with the current judicial construction of consent.

The better question then is how to improve the quality of consent? This can be done by making important information more salient by imposing a duty to draft reasonably along with a requirement of specific assent to provisions that reallocate rights or assign unallocated rights. Increasing salience, both in terms of noticeability and relevance, through reasonable drafting is one way to improve the quality of consent. Noticeability and relevance can interrelate;<sup>25</sup> as previously noted, making it easier for consumers to compare SUV rollovers *made consumers care more* about the issue of rollovers.

Courts should also recognize that consent is less vital for some terms than for others. It doesn't matter whether a shopper “consents” to a store's “NO SMOKING” policy – it's within the store's rights to impose it or eject the shopper. Similarly, it doesn't matter whether Facebook's users consent to its policy that users shall not

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<sup>24</sup> *Id.* at 158.

<sup>25</sup> See, for example, OREN BAR-GILL, *SEDUCTION BY CONTRACTS: LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER MARKETS* (2012). Bar-Gill proposes disclosure requirements to help consumers make better decisions about cellphone contracts, mortgages and credit card contracts.

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bully or post pornographic materials.<sup>26</sup> Facebook can impose that conduct limitation without users' consent.

A proprietor's rights, however, are not boundless. A consumer may consent to a store's prominently displayed "NO RETURN ON SALE ITEMS" policy but not the provision buried in the notice that returns on all products are subject to a \$20 restocking fee. A storeowner has certain proprietorship rights with respect to her store or business, but other ownership rights are unclear or belong to the consumer. In some areas, the law is unclear about who owns rights, such as the right to personal information. Provisions affecting unallocated rights, or reallocating rights, should require specific assent. A storeowner does not have the right to charge a \$20 restocking fee without consent because that \$20 belongs to the consumer. Similarly, Facebook's users presumably own their personal data and it is unclear whether Facebook has the right to use it without user permission.

Courts should replace the notion of blanket assent with specific assent and presumed assent requirements, depending on the nature of the provision. A specific assent requirement increases salience while a presumed assent requirement acknowledges that not all terms require consent. A more nuanced, specific assent/presumed assent analysis would render contracts more readable while more evenly balancing the benefits and burdens of boilerplate between the consumer and the drafting company.

Radin's book prompts another important question that the apologist response deflects and that is, *Are there rights that are so fundamental to society that we should not allow individuals to waive them?* While Ben-Shahar refers to Radin as an autonomist, her argument regarding market inalienability is in fact a significant limitation on the ability of an individual to make decisions that affect legal rights affecting important societal values. The issue of inalienability forces us to ask, *Are there certain rights that should not be subject to contract? Even with consent?* And if so, how to determine which ones and, importantly, who should decide? These are important questions which require

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<sup>26</sup> Facebook Statement of Rights and Responsibilities, *available at* [www.facebook.com/legal/terms](http://www.facebook.com/legal/terms).

consideration of the long term consequences to society, not only the short term costs or benefits to individual consumers. Ben-Shahar's response weighs the economic benefits of boilerplate, but does so without considering non-economic concerns. Yet social, political, behavioral, and economic issues are intertwined, and cost is a complicated calculation that includes more than what's listed on a price tag. Discussions about the benefit of economic policies should not occur in a vacuum if the objective is maximizing consumer welfare.

A serious discussion about boilerplate's effect on consumers must also consider the useful functions it serves for businesses and, by extension, society. U.S. contracts might compare unfavorably with those in more regulated, consumer-friendly countries, but then again, in many of those same countries, social norms and legislation limit a business's potential liability for damages and restrict the ability to bring class-action lawsuits. The problem of boilerplate cannot be resolved without taking into account the liability that businesses might be asked to bear without it and the impact that such a burden might have on the economy and innovation. Given our litigious culture, I am not willing to throw the boilerplate baby out with the bathwater, however dirty it may be. Any regulation of boilerplate terms would have to consider limitations on companies' liabilities and the possibility of consumer (or attorney) opportunism. Yet, the current judicial trend discounts too heavily opportunism by businesses in exploiting their contractual advantage.

Although I can't here answer the question of what rights should be inalienable (primarily because rendering rights inalienable requires a case-by-case substantive inquiry), I believe the issue of market inalienability is directly tied to the quality of consent: The better the quality of consent, the smaller the sphere of inalienability.<sup>27</sup> Similarly, the more inferior the quality of consent, the more protection required and the greater the sphere of market inalienability.

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<sup>27</sup>In an ideal world, equally matched (resources, information, emotional well-being) individuals with the same socio-political-economic status should be able to allocate their rights without intervention from the state. But we don't live in a perfect world.

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There are ways to enhance the quality of consent by making the process of contracting better and fairer. One way is to acknowledge contracting realities such as context and presentation. Judges should acknowledge their own experiences to admit that, Yes, they don't read boilerplate either,<sup>28</sup> and No, that doesn't make them unreasonable. The burden should not be upon the non-drafter to read a contract that no "real" reasonable person would read.

On the other hand, a failure to read should not excuse adherents from every obligation in every circumstance. In the context of standard form contracts, it may even be that whether an adherent consented is the wrong inquiry. Because of the all-or-nothing nature of assent, too much rides on the outcome of such an inquiry. A finding of "consent" means that all terms are included; a finding of "no consent" means that no terms are included. Consent should not be required for every contractual provision, but for certain provisions consent should not be constructed or implied, but specifically and actually granted.

While I continue to believe that contract law has the potential to address many of boilerplate's ills, it is the judiciary that gives me pause. Cases like *ProCD, Inc. v. Zeidenberg*<sup>29</sup> bend doctrinal rules in favor of businesses, making consent more attenuated than when standard form contracts first made their efficient entrance. Too many courts have become enamored of apologist conjectures without regard to the coercive contracting environment faced by consumers. They consider the business and economic benefits of boilerplate without acknowledging the hardships to consumers. They ignore that there is so much more that businesses can do to make their contracts more noticeable, more understandable and more reasonable.

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<sup>28</sup> Judge Richard Posner of the 7th Circuit Court of Appeals revealed that he didn't read the hundreds of pages for his home equity loan before signing the contract. Debra Cassens Weiss, *Judge Posner Admits He Didn't Read Boilerplate for Home Equity Loan*, ABA JOURNAL, June 23, 2010, available at [www.abajournal.com/news/article/judge\\_posner\\_admits\\_he\\_didnt\\_read\\_boilerplate\\_for\\_home\\_equity\\_loan/](http://www.abajournal.com/news/article/judge_posner_admits_he_didnt_read_boilerplate_for_home_equity_loan/).

<sup>29</sup> 86 F.3d 1447 (7th Cir. 1996).