OF PRIORS AND OF DISCONNECTS

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Professor Michelle Boardman tells you up front that my book is "worth reading"![1] As an author, what more could I ask for?[2] Yet she came away with the idea that *Boilerplate* is a book whose "heart" is a new theory of consent.[3] That is not its "heart" at all. And she finds a "disconnect" between my consideration of contractual consent and my suggestion that certain types of mass-market boilerplate should not be regulated under contract law but rather in some other way. In turn I find a "disconnect" between what she thinks I said about consent and what I did say.

I am left wondering whether such a disconnect is related to the difference between Boardman's underlying conceptual commitments ("priors") and my own, and that's what I'll explore in this Response. Boardman is correct, I suppose, that my book will appeal more readily to those who agree with my arguments.[4] But she is wrong about what the main arguments of the book actually are. Boardman thinks that my central complaint with certain boilerplate mass-market rights-deletions schemes is that they lack a specially defined strict consent she calls "Radinian consent,"[5] and she therefore sees "disconnects" when some of my recommendations for improved legal treatment of boilerplate are not directed toward improvement of this hypothesized super-consent. But *Boilerplate* is much less about what consent is or should be than about two other things: (1) the disjuncture — the very

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[1] Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967, 1967 (2014) (reviewing MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)).

[2] I especially want to thank Professor Boardman for commending to the reader my three chapters on alternative methods that the legal system could consider for regulating mass-market boilerplate. *Id.* at 1983–84. Although she found much of what is in these chapters not easy to review, they are a quarter of the book and an important part of the book's purpose. I also want to thank her for appreciating the chapter explaining contract theory to the uninitiated, *id.* at 1969–70, — useful for students, at least — and I want to thank her for flagging what I say about the pernicious current use of the trope of "expectation," because of the ambiguity between positive and normative expectation. *Id.* at 1979. If we insist on treating mass-market boilerplate as a species of contract, governed by unconscionability and voidness as against public policy, common law judges can improve analysis of it; so I also want to thank Boardman for telling the reader about my long chapter proposing an analytical framework for how this might be done. *Id.* at 1982–83.

[3] *Id.* at 1982.

[4] *Id.* at 1989.

[5] *Id.* at 1967.

awkward fit, indeed the disconnect, if you will — between theory and practice when we attempt to apply contract theory to the phenomenon of mass-market boilerplate;[6] and (2) the possible improvement of legal treatment of mass-market boilerplate through approaches other than contract doctrines as we now interpret them, or other than contract at all.

In short, I think Boardman's priors have led her not only to misinterpret the major thrust of *Boilerplate* but also to misunderstand many of its details. In this Response I suggest that these priors, which are common in contemporary American legal thought, distort and obscure central issues relating to contract theory and practice.

I. PRIORS: BACKGROUND ASSUMPTIONS AND CONCEPTUAL COMMITMENTS

The fact that Boardman has misread the central thrust of *Boilerplate*, even though she has clearly read the book with care, led me to wonder what the source of her misreading might be. I suggest that her priors obscured the arguments and their premises. There's a lesson here for contract theory, because it shows just how hard it can be to put one's finger on emerging problems from inside a paradigm that is better adapted to other cases.

We all have underlying assumptions and conceptual commitments — "priors" — that don't (and can't) get revisited every time we read or write something. Sometimes our priors remain tacit and unexamined, and sometimes they have been examined previously but are not readily available for re-examination. Boardman's priors belong (in general) to "Chicago law-and-economics" ("Chicago" for short), whereas mine belong (in general) to "American philosophical pragmatism" ("pragmatism" for short). Boardman tends to think in terms of welfare maximizing and I tend to think in terms of human flourishing. She speaks in terms of paternalism and I speak in terms of polity. She holds (I think) that all values are commensurable and fungible, can be arrayed on a scale and traded off against one another; whereas I think it's not true that all values can be arrayed on a scale and traded off. Boardman is likely to see trade-offs more frequently than I do.[7]

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[6] Boardman knows this: "Rather, [Radin's] argument is that the *theoretical* support for contract enforcement in the world of Agreement, laid out in chapter four, does not apply to the *facts* on the ground in the world of Boilerplate." *Id.* at 1970. So why does she say so many things that relate instead to the mistaken view that the "heart" of the book is something about a new theory of consent? *See infra* notes 10–13 and accompanying text.

[7] To think that disallowing a clause received in mass-market boilerplate that erases important rights would be "to improve welfare at the expense of autonomy" is pure Chicago. *Id.* at 1982. Non-Chicagoans tend not to endorse such a conception of tradeoff, but rather to think that

Boardman holds that individuals are mostly rational (maximizing their own welfare), though for Boardman and for many others with Chicago priors, behavioral economics has made inroads on this commitment. She holds that there is no fundamental distinction between individual decisionmaking and democratic ordering (conceived of as a lot of individual maximizers cooperating for individual gain). In addition to welfare maximization, commensurability, fungibility, methodological individualism, and rationality (bounded or not), there seem to be some other priors that often tag along with Chicago commitments. These are: a certain Manichean view (a tendency to consider everything as either black or white, separable into two opposite poles or two opposing conceptual boxes); a certain Panglossian status quo bias (that is, a tendency to consider that whatever is is right, at least presumptively); a certain foundationalism (a tendency to consider that reasoning should proceed from certain defined or root foundational premises, such as efficiency, commensurability, methodological individualism, rationality); a certain collapse of the public into the private[8] (government regulation is justified, if at all, by finding a collective action problem rather than thinking about the rule of law, the commitments of civil society, the functions that are inherent to polity); and a certain intuitive mapping of these premises onto human behavior (human choices are seen as trades).

As a pragmatist, instead of placing phenomena into one or another conceptual box (such as "alienable" vs. "inalienable"), I investigate the blurring of the lines delineating the boxes. Instead of taking the status quo as a position to which deference is routinely due, I think critique of the status quo is often warranted; we haven't reached the best of all possible worlds yet. I understand the law as a process of continuous reinterpretation, whose rules are mutable, where it seems that for Boardman the current law is "the law". To me this is a form of reification (sorry about the buzzword).[9]

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autonomy will be enhanced, not diminished, when proper safeguards of civil society are maintained by the polity.

[8] I have characterized this as collapse of the public/private distinction from the Right. *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 43–45 (2013). As a pragmatist, of course, I don't object to seeing a coordination problem (so-called prisoner's dilemma) where I think that conceptual framework is useful; an example is copyright user rights. *See id.* at 170–73.

[9] In the Florida arbitration clause case involving a child being mauled to death by hyenas, for example, Boardman says that a parent may sign away a child's right, "as the law allows," Boardman, *supra* note 1, at 1969, whereas whether or not the parent could do so was actually the issue that reached the state's Supreme Court. *See* Global Travel Mktg., Inc. v. Shea, 908 So. 2d 392, 394 (Fla. 2005) (deciding "[w]hether a parent's agreement in a commercial travel contract to binding arbitration on behalf of a minor child with respect to prospective tort claims arising in the course of such travel is enforceable as to the minor" (quoting *Shea v. Global Travel Mktg., Inc.*, 870 So. 2d 20, 26 (Fla. Dist. Ct. App. 2003)).

Boilerplate opens with a prologue describing "World A" (for "Agreement") and "World B" (for "Boilerplate"). World A and World B are introductory heuristics or archetypes through which we might begin to look at the disconnect between the premises of contract theory and the facts about certain phenomena that we — in the United States — are in the habit of calling contracts.[10] They do not delineate a fundamental fissure in some objective foundationalist conception of what contract "is" — I hold that there are no objective conceptual entities of that sort in law, and that legal concepts should be revisable in light of their usefulness. There is no disconnect between negotiated contracts and boilerplate, such that the former exhibit perfect agreement or consent and the latter exhibit perfect nonconsent. There is no black or white, either-or dichotomy: there is no battle between "Light and Dark,"[11] there is no "War of the Worlds."[12] There is no disconnect here but rather a continuum.[13]

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[10] The "invented story" about the mythical bicycle contract is just that, an invented story that would convey the *myth* that many people harbor about what a contract is (some common-sense idea of voluntary agreement). The story was not presented as a "real" description about negotiated contracts, open to full-fledged lawyerly debate about the complexity of the default rules of contract law. Boardman, *supra* note 1, at 1969–70. Perhaps I should have taken more explicit account of the Chicago tendency to collapse the public into the private, to put the background law of the state on the same footing as the private "law" of the boilerplate. In my book, however, I did not neglect to mention the difference between the public default rules of the state and the private "rules" imposed by boilerplate. *See* RADIN, *supra* note 8, at 94–95.

[11] Boardman, *supra* note 1, at 1970.

[12] *Id.* at 1968.

[13] Boardman thinks there is a disconnect between talking about problematic consent of purported contracts in practice and talking about the nature of the right that boilerplate waives (whether we should consider it inalienable). Putting it into two disconnected boxes, Boardman says: The issue is not whether recipients do not or should not consent to bad clauses, it's whether they can (are permitted to) consent to them, or whether particular clauses are outside the realm of permissible individual consent. *See id.*

Indeed I do say this, but applicable only to a limiting circumstance. This is not a disconnect, because it is not an either/or, black or white, boxlike proposition. Instead, as I was at pains to say in the analytical framework developed in chapter 9, adjudication should take into account the nature of the right *and* the quality of consent *and* the extent of social dissemination. A purported waiver of a right that really is market-inalienable, non-waivable in a monetary trade, indeed makes the other parameters irrelevant. To place this issue on a continuum rather than seeing it as two boxes, however, I add the important intermediate continuum of "partially inalienable" (subject to stricter scrutiny, more thought).

When reasonable minds can differ about alienability, we should at least investigate more carefully what type of right we are dealing with and the pros and cons of making waiver difficult or impossible. Why would we consider at the same time (factor in) how dubious or how clear consent looks? That pushes risk of error in one direction or the other (dubious consent bolsters the case for market-inalienability and vice versa). And why would we consider how large a swath of the population is subject to the clause? Whether the number of those who may be being unjustifiably deprived of a right is large or small also pushes risk of error in one direction or the other. In addition, although the rule of law doesn't require strict compliance with its precepts, once millions of people have lost a right, the legal system seems to have subjected them to arbitrary power and to have lost connection in practice with the principle of equality before the law. For more on

II. CONTRACT THEORY AND JUSTIFICATION OF ENFORCEMENT

The apparent disconnect between contract mythology and boilerplate reality — more clearly, the disconnect between, on the one hand, the contract theory that must justify coercive state enforcement, and, on the other hand, the state enforcement of mass-market boilerplate under its aegis in practice — is a jumping-off point for the gravamen of *Boilerplate*. To put the problem most simply, (1) enforcement of contract is a form of government coercion;[14] (2) what is supposed to justify that coercion is the liberal story that undergirds private ordering; (3) that liberal story assumes that parties to contracts have voluntarily agreed to an exchange for mutual benefit; (4) that rationale is spread thin beyond the breaking point when it comes to much of the mass-market boilerplate world; and (5) so far, we don't have a better rationale.[15]

Boardman does not think that the current rationale for what constitutes voluntariness in the theory of voluntary exchange is spread thin beyond the breaking point, and does not think, therefore, that we need to rethink the current rationale. This is where Boardman and I should have joined issue, but I think her priors may have prevented that, or at least caused distortion. Perhaps "Radinian" consent represents her understanding of the rethinking of contract theory that I argue is needed, filtered through her priors. It may seem to Boardman, reflecting a status-quo bias, that my argument must be that all boilerplate just "is" contractual but needs much stricter consent, whereas, of course, I am open to rearranging what is inside and what is outside contract, and also open to admitting nuances in what kind of consent is required depending on what kind of contract we are talking about. But reflecting the prior I called "Manichean" (that concepts must fit into opposing boxes), there is no room for rethinking the level of consent necessary depending on the nature of the right and other factors including social dissemination.

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the effect on the rule of law of mass-market boilerplate rights deletions, see Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, *in* PRIVATE LAW AND THE RULE OF LAW (Lisa M. Austin & Dennis Klimchuk eds., forthcoming 2014), *archived at* http://perma.cc/YP5P-9V9V.

[14] State enforcement of contracts is dependent on versions of the liberal story for justification. Otherwise enforcement is unjustified state coercion, an unjustified transfer of defendant's entitlement to plaintiff. The liberal story is about voluntary exchange. What happens if the story is not plausible for a substantial percentage of alleged contracts? That is the question raised by certain varieties of mass-market boilerplate.

[15] I am hoping that *Boilerplate* will encourage scholars to reconsider contract theory and develop new approaches. For a promising recent example of rethinking contract theory, see Robin Bradley Kar, *Contract as Empowerment* (unpublished manuscript) (on file with author). Although Professor Kar has not yet extended this theory to boilerplate, it appears to provide an approach that would allow for a different way of handling boilerplate problems than what can be gleaned from the existing theoretical literature.

Placing concepts into opposing boxes also makes it difficult to consider the problem of "fit" raised by mass-market boilerplate. The "fit" problem refers to the gap between an ideal justification and the circumstances of real life. How far can a practice diverge from its ideal justificatory story — fail to be described by this story — and still be considered justified as an instance of that story? How good a "fit" between theory and practice do we need? Certainly not 100%, as Boardman seems to think I am saying. But I would conjecture that from her priors, "fit" is an either/or proposition: either some phenomena we currently dub contractual fit the paradigm unproblematically, or they don't. For her there's no problematized grey area in between, where we must revisit underlying contract theory and doctrines, and reconsider whether on balance those theories and doctrines justify state enforcement of certain things that we now regard as contractual; and where we must even consider moving certain things out of contract and into some other legal category if another category fits the phenomenon better.[16]

So I conjecture that Boardman's invention of "Radinian" consent stems from this particular prior. In the prologue and opening two chapters from which I think Boardman must have inferred this "Radinian" theory, I was not seeking a theory of consent but rather setting up the disconnect between justificatory theory and practice by showing how out of sync with people's ordinary understanding of agreement the treatment of boilerplate as contractual is. I did not say anything about consent to each and every specific clause, or any of the other definitional attributes Boardman adduces. They are Boardman's own inferences.

In *Boilerplate* I did not treat the general problem of "fit" between justificatory theory and practice. "Fit" is a difficult and rather abstract issue in political theory. It is critical to keep in mind, however, that I did not argue that all contracts that don't fit the justificatory story perfectly are thereby to be deemed unjustified and unenforceable. Perhaps no contracts in the real world ever reflect the level of information and understanding on each side that would fulfill the ideal —

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[16] Boardman fears that readers of *Boilerplate* will fail to grasp the widespread enforceability of boilerplate rights deletion clauses in the United States. Boardman, *supra* note 1, at 1977 n.18. Are readers prone to mistake critique for statement of "the law"? I hope this fear is unfounded. I did say quite clearly that boilerplate is routinely enforced in the United States. *See* RADIN, *supra* note 8, at 12–14 ("[T]he law considers boilerplate to be a valid method of contract formation. . . . [A]s long as boilerplate is considered contractual, as it is in our current legal system, it is regulated under contract law."); *see also id.* at 19 ("widely enforced in the U.S."); *id.* at 96 ("U.S. Courts have validated as enforceable contracts . . . ."); *id.* at 131 ("In many jurisdictions it is at best an uphill battle for any plaintiff who has received an arbitration clause in a form contract to avoid getting her lawsuit dismissed from court."); *id.* at 139 ("Exculpatory clauses for merely negligent harm-causing behavior are upheld against public policy challenge in many states.").

the level of information and understanding on each side that would fit the liberal justification story perfectly. Yet we do think that many real-world contracts are close enough.

Which those are, and why, would inhabit a book that is yet to be written.[17] Meanwhile, certain phenomena might not match the justificatory rationale closely enough for justifiable enforcement to look at all plausible; they might fall off the end of the continuum of "fit," so to speak. Without a complete theory of "fit," a theory I imagine will prove difficult to come by, we can still consider certain phenomena as not within the ballpark. That is how I view certain varieties of mass-market boilerplate rights deletions, and setting that up was the point of my introductory chapters. Those varieties — such as clauses that recipients are made subject to without ever knowing that there are clauses, or clauses that deprive recipients of all viable avenues of redress — are not within the ballpark of justification as we can understand it from the body of contract theory, at least not without tortured reasoning and gerrymandered conceptualizations. It is no accident that philosophical contract theorists have not yet published books about boilerplate. If we don't regulate mass-market boilerplate under contract theory, which demands so many doctrinal epicycles and kluges, that doesn't mean we will do away with boilerplate altogether. Rather, we will regulate some of it by means of other background regimes.

III. PRIORS IN ACTION: TWO EXAMPLES

Boardman's reading of *Boilerplate* demonstrates how important issues for contract theory and practice can be papered over by Chicago priors. I will take two example texts from her review to examine how this happens in specific instances. First, Chicago priors can prevent someone from seeing beyond a supposed immediate subjective individual valuation of a transaction; and, second, Chicago priors can lead someone to infer that a status quo set of circumstances is obviously and without analysis normatively justified.

First example:

> Where Radin sees [heuristic] bias, I see truth. It *is* unlikely that a consumer will experience a loss under a contract severe enough to warrant suit and *even more* unlikely that the average consumer would choose to

[17] There is certainly a book that is yet to be written about boilerplate as it exists in negotiated contracts, which often consist of pasted-together boilerplate clauses (as I mentioned in *Boilerplate*, *see id.* at 14). That book would explore how those uses of boilerplate, taken in the context of power imbalances, information impactedness, and "agency costs," do or do not jibe with contract theory. I understand why Boardman wishes I had written that book in addition to the one I wrote — contract theory would benefit greatly from that book — but the one I wrote was the best option for my allotted 100,000 words.

> sue in response. In other words, the expected value of retaining the right to sue is tiny. In addition, if the exchange is for an arbitration clause, the consumer has exchanged something of tiny expected value for something of teeny expected value.[18]

Here we see the Chicago subjective individualist premise. In looking at this transaction, Boardman sees an individual engaged in exchange; she doesn't at the same time take into account that mass-market deletion of remedies is important to the polity, and not just to individuals. She knows it's true that someone will be unlucky, will be injured, and will want to sue someone. She believes that a boilerplate recipient realizes at some level that this will happen to some people; and that heuristic bias makes the recipient assume it won't be himself; so his ex ante valuation of legal remedy, if he had thought of it, would be "tiny." (Unspoken here is that even the recipient's assumption that he would be unlikely to need a legal remedy later is very unlikely to be mentally present at the point of sale.[19])

The ex ante value of legal remedy to individuals is indeed tiny if all we care about is the individual's subjective value qua individual, because often any given individual has a small probability of needing a legal remedy,[20] and because each individual has a built-in bias against thinking that he may be the unlucky one. But the value of legal remedy to each individual when considered as a member of civil society is not so tiny. Civil society exists in order to protect individuals from the types of harm that may be inflicted by others when civil society does not exist. Civil society exists, among other reasons, so that each individual doesn't have to watch his back all the time. Each individual has an important interest in maintaining civil society, even if she doesn't subjectively realize that.

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[18] Boardman, *supra* note 1, at 1972.

[19] In a similar vein, Boardman has the intuition that "in the safari example . . . the family surely understood that the biggest risk the exchange carried was the risk of death." *Id.* at 1977. This intuition may stem from stubborn priors about rationality and presumptions about possession of information. When sending my children off to summer camp, I never "understood" at any level available to my consciousness, at the point of sale or thereafter, that I was risking their death. Who has? This is what heuristic bias means.

[20] In some cases all recipients of a mass-market boilerplate, not just unlucky ones, would need a legal remedy; for example, when there is massive small gouging (such as unjustified bank fees). This is the situation that class actions were intended to address, but which the U.S. Supreme Court has undercut with expanded enforceability of individual arbitration and waivers of aggregate relief. *See, e.g.*, *The Supreme Court, 2012 Term — Leading Cases*, 127 HARV. L. REV. 198, 278 (2013). By the way, I don't believe, as Boardman apparently does, that the extremely expansive interpretation of the Federal Arbitration Act of 1925 by five members of the current Court means that the question whether aggregative relief is necessary has "already been decided through the American democratic process." Boardman, *supra* note 1, at 1985. Nor do I believe that Congress's failure so far to pass the Arbitration Fairness Act mean that either. Boardman is correct, however, that this topic demands more space than I was able to give it in *Boilerplate*.

In order to take into account that society as a whole might need to declare a clause unenforceable, the solution we will turn to, if we have Chicago priors, is to look for individualist market failures — a "free-rider problem" or a "collective action problem."[21] If we have Chicago priors, we might consider that problem separately, which Boardman says she would do if it is "proven."[22] But otherwise we "see truth" in individual interactions with mass-market boilerplate rights deletion. If we see this "truth" as a purely descriptive truth with clear but implicit normative implications, we fail to recognize that we are treating it as deciding a further and much more controversial question: whether facts about the ex ante subjective "expected value" of a trade to an individual always bear on questions of legal enforceability, and whether they do so exclusively.

Second example:

> My own view is that whatever *legal* force it may have, general assent is accurate as a *descriptive* matter. . . .
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> Consumers mean to agree to the basic bargain they can see and touch, including individually chosen terms (length of warranty) or traits (the smallest size, the middle quality) . . . . Consumers agree to the fine print as well, knowing it is there, that it remains unread, expecting *to gain* from some clauses, and *on the understanding* that it does not greatly deviate from what the consumer thinks may be there. Radin will reject this as a definition of "agree," but I don't see how. In the realm of adults, one agrees to a trade if (a) one prefers it to *not* trading, (b) one has not been coerced or deceived, and (c) *one makes the trade*.[23]

I have trouble making sense of this passage, whereas Boardman's italics show that she thinks it's a self-evident slam dunk. In this passage Boardman says that I will reject this as a definition of agreement, but that she doesn't see how.[24]

Here's a stab at how:

"Basic bargain" and "trade" seem conclusory. When Boardman observes things changing hands, what causes an inference that their change of hands resulted from a bargain or that there has been a trade? When someone hands over her wallet in response to "Your money or your life," a real observable choice has been made, but probably not something we would call a "bargain" and perhaps not a "trade" either.

A lot, then, must hang on "(b) absence of coercion or deception." Yet neither deception nor coercion is normally observable. There is a substantial philosophical literature on consent showing that whether

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[21] Boardman, *supra* note 1, at 1972 n.7, 1974–75.

[22] *Id.* at 1982 n.26.

[23] *Id.* at 1978–79 (footnote omitted).

[24] *Id.* at 1979.

an interaction reflects consent or whether it reflects coercion cannot be simply read off from circumstances. Moreover, there are circumstances other than coercion or deception that would preclude a valid trade, some of them of long standing (such as mental disability, minority) and some of them of more recent and controversial vintage (such as undue influence, failure to disclose). The controversial ones will give rise to arguments that defeat mere observation. Does Boardman think she can directly read off from what someone can "see" and "touch" the nonexistence of one of these invalidating causes as a *descriptive* matter?[25] (Does she not understand that "seeing" and "touching" are metaphorical here, used to lend solidity to her tacit assumptions?)

In addition to believing that nonexistence of invalidating causes can be read off from an interaction between two humans — or indeed, I imagine, between a human and a computer — does Boardman believe that invalidating causes just are "the law" — not even controversial? That there's not even a gray area where the read-off could go one way or the other? A Chicago prior seems to be at work here: anytime one person gives up a value and receives some other value, it's assumed to be a "trade-off," because all choices of one thing instead of another thing tend to be seen as trade-offs when one's underlying assumptions are value commensurability and fungibility.[26]

Next, why does Boardman believe that a boilerplate recipient has an "*understanding*"[27] that the fine print does not greatly deviate from what the recipient thinks may be there? I don't know of any empirical research that would confirm this as generally true for all markets, and anecdotal evidence makes me think it often isn't true. At least, it would have to be investigated market by market. Nor to my knowledge has it been shown to be generally true that a recipient expects "*to gain*"[28] from some clauses. These are convenient assumptions, then, but conclusory. I am pretty sure that Boardman doesn't think a court in trying to adjudicate whether a consumer agreed would deem it necessary to investigate whether the consumer had such an "understanding" or such an expectation of "gain" from some clauses, in which case these assumptions are makeweights to bolster Boardman's intuition that it must be so.

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[25] *Id.* at 1978.

[26] People may have very stubborn priors about whether choices represent trade-offs. Professor Joseph Raz, in discussing incommensurability, raised a hypothetical: when a man takes a job in a distant city that will require him to be absent from his spouse, is he trading off his spouse's company against the job, thereby demonstrating that he values his spouse's company less than the job? JOSEPH RAZ, THE MORALITY OF FREEDOM 348–50 (1986). In presenting this example in seminars I found that each student had a strong intuition one way or the other that did not change through argument.

[27] Boardman, *supra* note 1, at 1978.

[28] *Id.*

Perhaps Boardman believes that *most of the time* there won't be any invalidating cause, that her statement (b) will not be implicated. But it seems to me that too is conclusory. I think she already intuitively believes that most of these situations represent valid trades, so it follows that a particular instance before her must be a valid trade. If this is her view, however, the "descriptive" inference would be that it is *very likely* that the instance before her is a valid trade, not that it *must* be one.

Perhaps Boardman's "descriptive" inference only means, therefore, that if we observe someone delivering money and receiving a product or service along with boilerplate, there is presumptively a valid trade of product-plus-boilerplate, unless the recipient brings evidence or arguments to the contrary. But then we are licensed to ask: what will count as arguments to the contrary? By labeling her conclusion descriptive, Boardman evades this question. The label is question-begging — with regard to the existence of invalidating cause, with regard to what the recipient can "see" and "touch," and, of course, with regard to whether or not whatever is inside the boilerplate is included or excluded from the observed "trade."

IV. STATUS QUO VS. CRITIQUE OF CONTRACT DOCTRINE

What should we make of the different ways that priors can lead one to view boilerplate? When it comes to boilerplate, I see epicycles and kluges — such as the "duty to read," the "reasonable opportunity to have seen," "the objective theory," and "blanket assent" — where Boardman sees perfectly normal contract doctrines. Boardman's view seems likely to stem from status quo biases: the belief that everything we now consider a contract *must* be amenable to being brought into the fold of contract theory, and every "contractual" doctrine we now utilize *must* be correct and just about written in stone. Although some of the facts on the ground might be changing, this view assumes that we already know what contracts are and how they should be handled. When something is labeled a contract, whatever it presents us with must already fit into our standing doctrines and theories.

To the contrary, in some speculative passages of my book,[29] I proposed some doctrinal critiques. I proposed a critique of the doctrine of "objective theory of contract" whereby an offeree is deemed to have agreed to an offer, and thereby deemed to have entered into a contract, if a reasonable person in the position of the offeror would be justified in understanding the offeree's behavior as acceptance. In my critique I suggested that such a standard might well have its origin in what is

[29] *E.g.*, RADIN, *supra* note 8, at 82–90.

understood within a shared linguistic and cultural community, such as might have been true of the men who were involved in the practice of contracting before the contemporary era. But in contemporary market society there is no shared linguistic and cultural community between recipients of mass-market boilerplate and firms that deploy that boilerplate. In the same vein, I proposed a critique of the doctrine of "duty to read." Such a duty could have made sense within a shared linguistic and cultural community of traders, but arguably doesn't make sense today, with the immense diversity of firm size and power, and the vast variance among consumers with respect to culture, education, and experience. Likewise, I proposed that "reasonable opportunity to read" has lost its former meaning where everyone knows — especially the firms deploying it — that boilerplate terms are not read and would not be understood if read.

Is there a good reason to keep using these doctrines to find that a contract has been formed against recipients of mass-market boilerplate when we can pretty well infer that recipients are not in a shared linguistic and cultural community with firms that deploy boilerplate? The fact that these doctrines are time-honored and often used does not reach a conclusion that they are correct, unless . . . whatever is, is right. Now, sometimes what exists seems upon reflection to be right, true, and sometimes what exists seems at least to have evolved over time into a better position than in the past. That doesn't rule out critique rather than mere assumption. The fact that *sometimes* what exists might be right is not a blanket rule that whatever exists is ipso facto right.[30]

Boardman also endorses Karl Llewellyn's theory of "blanket assent." That too I think we should reconsider as applied to the varieties of contemporary mass-market boilerplate. We should not in today's circumstances give that theory a blanket assent. According to Llewellyn, "blanket assent" to boilerplate terms that are "not unreasonable or indecent" and "do not alter or eviscerate the reasonable meaning of the

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[30] Similarly, the blanket assumptions of the market defense of widespread boilerplate cannot always be right. We can't assume that lousy terms *necessarily* result in lower prices. (For some reasons why not, see *Boilerplate*, chapter 6.) The assumptions of the market defense can be right sometimes, but that will take empirical research, market-by-market. Economists who are empiricists appropriately investigate one market at a time, and generalizations are made tentatively, if at all. *See* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (finding that only one or two out of every thousand retail software shoppers chooses to access the license agreement, and those few that do spend too little time, on average, to have read more than a small portion of the license text; casting doubt on the relevance of the informed minority mechanism in a specific market where it has been invoked by both theorists and courts and, to the extent that comparison shopping online is relatively cheap and easy, suggesting limits to the mechanism more generally).

dickered terms,"[31] should be recognized as legitimately part of a contractual transaction. How would we decide whether a blanket exculpatory clause did or did not "alter or eviscerate the reasonable meaning" of dickered terms? A blanket exculpatory clause deployed by daycare providers or nursing homes — which might tend to incentivize these providers not to take proper care — could indeed alter or eviscerate what purchasers think they are buying, because the lack of deterrence could cause the quality of care to be much lower than what the dickered terms promise. Llewellyn developed his ideas based on an earlier practice; for example, insurance policies that in the dickered terms cover "burglary" but then in the fine print use a narrow definition that excludes much of what we normally think of as burglary. In a case of that sort we can understand what evisceration of a dickered term means, but cases of today may be harder to classify that way.

So I would suggest that twenty-first-century practice has outrun the Llewellyn of the mid-twentieth century. Perhaps a Llewellyn of today, if he were as responsive to real-world practice as the Llewellyn of the 1950s was, might counsel that remedy-deleting mass-market boilerplate does tend to alter or eviscerate the dickered terms, and is not merely ancillary, as firms would have it. Even if practice were reformed according to what the idealized contemporary Llewellyn might say, however, my view is still that many instances of mass-market boilerplate deployment are not best seen as a vast congeries of individual transactions, most of which will never reach a court, but rather would be best regulated in ways other than by individual contractual analysis.

Meanwhile, if much of boilerplate is to remain in the care of courts under doctrines of unconscionability and voidness as against public policy, I hope they might adopt a better analysis. I hope judges might avoid the doctrine of "procedural" versus "substantive" unconscionability, which causes a finding of consent (however problematic) to eliminate any investigation of the nature of the right being waived, and I hope judges might avoid the ambiguity inherent in the idea of reasonableness or reasonable expectation.[32] I am afraid that

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[31] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (Little, Brown, 1960).

[32] *See* RADIN, *supra* note 8, at ch. 9. For further elaboration, see Margaret Jane Radin, *An Analytic Framework for Evaluation of Boilerplate*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (Gregory Klass, George Letsas & Prince Saprai eds., forthcoming 2014), *archived at* http://perma.cc/WPB6-ZVGC. Boardman thinks my proposed analytic framework would "invite a . . . great increase in litigation by opening clauses up to de novo judicial review." Boardman, *supra* note 1, at 1975 n.14. That increased review might be called for if courts exist to do justice; and perhaps it would cause more consideration of less expensive ways to regulate mass-market boilerplate than case-by-case litigation. I wonder, however, whether the framework I recommend could actually cut down on litigation expenditures. Given that unconscionability

Llewellyn's conceptualizations — both of what is "reasonable" and of the idea of "blanket assent" — have over time led to these unfortunate doctrinal developments. At least, we should not view them as immovable, permanent features of the landscape.

CONCLUSION

Boardman says "free-riders" and "collective action problems," and I say "rule of law" and "in care of the polity." These differences are probably not merely semantic, because they are bound up with complex sets of priors, which can make it easier or more difficult to identify certain classes of problems, and which can presumptively privilege one position or another. Maybe in the end Boardman and I will still arrive at something close to the same place: some way to curtail mass-market boilerplate rights deletion schemes of the worst sort.[33] As a pragmatist, I'm good with that. As an author, though, I can't help wanting prospective readers to find out what my book is really about!

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requires fact-specific investigations in almost every case, it is not adapted to establishing precedent; whereas it could turn out that when one court reasons well about whether a right should be market-inalienable or at least partially inalienable, the reasoning could be adopted by other courts.

[33] *See* Boardman, *supra* note 1, at 1974 & n.12; *id.* at 1981; *id.* at 1983 ("the negative externality from a widespread reduction in the threat of consumer suit will not be solved by consumer choice because of free riding"); *id.* at 1987.