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An Overview of Worlds A and B

ONCE UPON A TIME, it was thought that “contract” refers to a bargained-for exchange transaction between two parties who each consent to the exchange. This once-upon-a-time story is the ideal of contract. The story of bargained-for exchange represents contract as it is imagined to be in a world of voluntary agreement, the world I am calling World A (for Agreement). In this book I am referring to contracts, such as the one between Sally and John (in the invented story in the prologue), that actually look like the free exchanges imagined in liberal theory as contracts of World A.* This is still how many people understand contract (with good reason). And it still animates contract theories. Contract is supposed to involve consent by each party to give up something of his or her own to obtain something he or she values more. Sally values the bicycle more than she values her \$120; John values \$120 more than he values his bicycle. Contract, at least in this paradigm case, is typified by a process of negotiation that results in a bargain satisfactory to both parties. The paradigm case involving negotiation is not the only kind of contract that can be valid under the basic commitment to freedom of contract; but, as we shall see, the elements of the paradigm case involving a bargain and free choice or consent are indispensable.

* Liberal theory refers to the dominant strain of political theory stemming roughly from the time of the Industrial Revolution. Political liberalism is not “liberal” in the popular sense of opposed to “conservative.” Political liberalism is the theory that underpins much of our traditional legal structure, including contract law; and I will often use “liberal” interchangeably with “traditional” in this sense.

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Once upon a time, it was also thought that when a contract is broken, there will necessarily be a remedy available to the aggrieved person. If Sally hands over her \$120 but John fails to deliver the bicycle, Sally can bring John to court in a place convenient for her, and ask that John be found in breach of contract and have the court order John to make it up to Sally for his breach. Depending on the circumstances, the court will simply order John to refund Sally's money, or perhaps even to hand over the bicycle. What is important to understand is that the ideal of contract has as an important component the idea that if a contract is breached, there must be the opportunity to seek a remedy. The aggrieved party must have her day in court, and so must the party who allegedly breached. Courts, as an arm of the state, enforce contracts so that all of us may have confidence in dealing with one another. In order for the system of contract to function, there must be a viable avenue for redress of grievances in cases where the bargain fails; otherwise the trust that the ideal of contract imagines would be weakened and perhaps collapse.

The Stories of the Prologue: Issues
for the Basis of Contract

The Vanishing Right to Jury Trial

Tonya and Garrit's father both attempted to bring lawsuits to try their grievances before a jury. By using paperwork to shunt them to arbitration, the companies automatically cancelled their right to a trial before a jury of their peers. Jury trial vanishes in such cases, even if the claimant has not been informed that this will happen—in spite of the fact that most people don't know what arbitration is and have no idea that their right to jury trial is so fragile. In arbitration, the claimant must appear instead before one or more arbitrators, who are widely believed to be more favorable to businesses. No public record is made of the arbitrators' decision, and no class actions are permissible.

The holding in Garrit's father's case meant that henceforth in his state, at least, all parents can sign away the remedial rights of their

children as well as their own. It also meant that almost all tour companies would include this clause in their pretrip paperwork in the future, as indeed they now do. Companies are also trying the same thing in other states. Although other states are not bound by one state's holding, judges in other states often take opinions of sister states into account.

The appellate court in Tonya's case recited governing law in its jurisdiction suggesting that Tonya could have overturned the effect of the paperwork on her right to try her civil rights claim in federal court before a jury of her peers if she could have proved that she was not able to obtain some other job that did not force her to sign this paperwork. (It seems judges in many jurisdictions actually think that a \$7,000-per-year wage earner can look around for another job with less onerous clauses in its paperwork, and perhaps find such an employer if she does look.) Dismissals based on paperwork shunting those with grievances to arbitration are routinely upheld, though in rare cases (as I will describe later in this book) some lucky claimant may be able to overcome the loss of rights accomplished by the paperwork.¹

It is reasonable to infer that many claimants simply do not try to challenge the paperwork. Most people do not know what an arbitration clause is. Moreover, given the state of the law, lawyers would be remiss if they did not inform a client who is subject to an arbitration clause that very likely he or she should not bother to bring a wrongful death action or a civil rights action in federal court, unless there is something very special about the case.

Once one business firm finds that courts will enforce dismissal of suits such as these, other businesses will use the same forms. Terms that are favorable to businesses will spread, because they serve the firms' economic interests. Any term that a court (in a rare case) finds questionable will disappear. All of which means that most people in Tonya's position would indeed be unlikely to find another employer that did not use the same type of waiver of legal grievance rights that she encountered, or one even more robust. Likewise, most parents wanting to avoid the unhappy position of Garrit's father in case an unimaginable loss were to befall them

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would be unlikely to find another tour company that did not impose an arbitration clause.

Making Redress Remote

A legislature provides for class actions when it intends for people in its jurisdiction to have the opportunity to seek a remedy, even if the harm to each person is too small to make it worthwhile for that individual to bring suit alone. Class action remedies also are intended to deter companies from reaping large profits by unjustly extracting small overages from large numbers of customers. In the case of Jeffrey K., it is reasonable to infer that the legislature's intent was thwarted by a choice of forum/choice of law clause that forced the plaintiff into another state.

Another means whereby a choice of forum clause can effectively deny a remedy to injured parties is by limiting claimants to bringing suit in a jurisdiction that is very far away.² Federal courts are very favorable to choice of forum clauses, based on a famous US Supreme Court case of 1991, *Carnival Cruise Lines v. Shute*,³ which validated a choice of forum clause forcing injured claimants to bring suit in Florida. In that case, Mrs. Shute was injured on a cruise ship and tried to sue the company in her home state of Washington. The Shutes did not sign anything. The choice of forum clause that prevented Mrs. Shute from suing in Washington was in fine print on the last page of her ticket, which she received after booking the cruise, and which was nonrefundable. Nevertheless, the reasoning upholding the choice of forum clause was based on the assumption that the claimants had willingly accepted the clause. In their enthusiasm for choice of forum clauses, federal courts routinely cite *Carnival Cruise* as precedent for upholding choice of forum clauses, even in situations where consent by recipients is problematic.

Escape from Fault

Michael J., who was injured by the rented Bobcat, was subject to an exculpatory clause. This type of clause waives (cancels) the usual legal rights an injured party would have against a company that was at fault in causing the injury, thus exculpating the company

from its own fault. An exculpatory clause goes even further than an arbitration clause, because instead of merely depriving the injured party of a remedy in court, it deprives the injured party of all remedies. Many tour companies, as well as many other proprietors of activities such as camping trips or physical fitness training, are using exculpatory clauses instead of, or in tandem with, arbitration clauses. At this point, parents wanting to escape what happened to Garrit's father if such a terrible loss were to befall them would be unlikely to find a tour company, or a sports camp, or a training facility, that did not have a clause exculpating itself from liability for any harm suffered by the child while participating in its program, no matter how that harm was caused.

In some cases a court can hold an exculpatory clause unenforceable (as I will describe later in this book).⁴ In such a case, an injured party would have to litigate, perhaps all the way to a state supreme court or a federal appellate court, before knowing whether he would have the right to hold the company responsible for his injury if he could prove the company was at fault. A litigant could only succeed in achieving this result if he could afford the time and money to litigate or, more likely, if the situation were extreme enough that lawyers who work on a contingency fee basis were willing to take the case. We may safely assume that in cases where the injury is not serious enough (or the injured party is not rich enough), exculpatory clauses will prevail. In general, in situations without the kind of special circumstances that might ultimately persuade a court that the case is exceptional, many people injured through the fault of a business they deal with are precluded by the company's paperwork from holding the company legally accountable.

Alternative Legal Universes Created by Forms

Like the injured parties in the stories of the prologue, most of us are used to receiving paperwork (or its electronic equivalent) during transactions. We are given forms to sign when we rent an automobile or an apartment, and piles of forms to sign when we buy an automobile or a house. Most of us don't read them, and most

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of us wouldn't understand them if we did. We are given forms to sign when we get a job, when we join a gym, when we send our kids to camp. We click "I agree" to buy products or services on the Internet, after being shown lists of fine-print terms that we don't read. We receive forms even though we don't sign them or click "I agree," such as the fine-print terms of service interior to websites, or the fine print on everything from parking lot tickets to theater tickets to sports events tickets. Illustrations of some of these commonly used forms are shown on pages 117–119.

Arbitration clauses, choice of forum/choice of law clauses, and exculpatory clauses, such as those that figured in the stories in the prologue, are common components of the alternative legal universes created by firms. Most readers, I expect, are subject to one or more of them. But there are many other ways in which fine print has the effect of deleting recipients' legal rights. One common provision limits remedies for losses caused by a defective product or service to the replacement, repair, or reimbursement for the cost of the product itself, thus eliminating damages for injurious consequences of the product's failure. Another deletes ("disclaims") warranty coverage. Another says the firm will continue billing you forever for whatever you have purchased unless you notify it that you wish to terminate. Yet another waives recipients' user rights in information not protected by the law of intellectual property and otherwise free for public use; and still another waives information privacy rights. (These practices are widespread in the US. Countries other than the US do not make as ubiquitous use of such clauses against consumers. Later in this book I will consider some solutions to boilerplate issues that prevail outside the US.)

In short, if you are like most US consumers, you enter into "contracts" daily without knowing it, or at least without being able to do anything about it. The purported contracts come in the form of paperwork that you receive and are asked to sign, or that contain terms supposedly binding without your signature, and sometimes even without their your knowing this is happening. This paperwork is boilerplate, or, less colloquially, standardized form contracts. These are the contracts—the *purported* contracts—that belong to World B.

Standardized form contracts, when they are imposed upon consumers, have long been called “contracts of adhesion,” or “take-it-or-leave-it contracts,” because the recipient has no choice with regard to the terms.⁵ “It’s my way or the highway,” says the firm to the recipient. Such paperwork is often called boilerplate, because, like the rigid metal used to construct steam boilers in the past, it cannot be altered. I have been calling boilerplate “paperwork” because “paperwork” is a neutral term, but you will have noticed that courts most often treat boilerplate as if it were a contract. The law considers boilerplate to be a method of *contract* formation. World B is the expanding universe of purported contracts that don’t look or act like those of World A.⁶ World B is the world of boilerplate.

Some of you may belong to firms that impose boilerplate on their customers. But even if you are the CEO, you are subject to boilerplate from other firms, just like everyone else. I myself am subject to many of these clauses. Even though I know more about their legal significance than most people, I can’t do anything about them, so, just like almost everyone else, I don’t read them.⁷ I must, like everyone else, accept them or forego the transaction. I can’t employ a financial manager for my retirement account without accepting an arbitration clause. I can’t use iTunes without clicking “I agree” to its terms of service. I can’t proceed with an exercise class until I’ve signed a form that exculpates the provider for any injury to me no matter how caused. Once I tried to tell a person presenting paperwork to me that the exculpatory clause would be unenforceable if her studio harmed me intentionally or through gross negligence rather than mere negligence. I took out a pen and offered to emend the clause, but the person presenting the form would not hear of legal niceties. It was take it or leave it.*

*Actually she had no idea what the form was for. She told me that her insurance company requires her to use the form and that she is required not to allow clients to change it in any way. As I will mention later in this book (in chapter 7), the effect of such an exculpatory clause is to incentivize recipients to buy their own insurance rather than relying on the firm’s insurance, which according to economic theory may (or may not) be deemed efficient.

Varieties of World B (Purported) Contracts

Here is an overview of the varieties of World B contracts we are seeing in practice. (I will stop calling them “purported” contracts, but please understand that labelling something a “contract” does not necessarily make it one.)

1. Standardized Adhesion Contracts of the traditional variety: An example is the parking lot ticket. (See examples on page 117.) It’s a contract of adhesion because either you “adhere” to it by taking hold of it and then driving your car into the lot, or else you don’t park there. The ticket often says, “This contract limits our liability. Read it.” Hardly anyone does so. The online analogue is clicking on-screen buttons to signify receipt of contractual terms. By clicking, it says, you are saying that you’ve read the terms and “agree” to them. It is doubtful that many people are truthful in saying this, though, because very few people read them.*
2. Offsite Terms: Refers to terms that are a part of standardized adhesion contracts but that are not stated in the document you can see. An example is the airline ticket. It says you are bound by the set of terms that make up the airline’s tariff and that you can find them somewhere else—in the airline’s office, perhaps, or online. Who knows what background legal rights have been given up in favor of the airline?
3. “Shrink-wrap Licenses”: So called because they originated with the shrink-wrapped commercial software products that you buy in a box. The idea is that if you break the wrapper you are bound to the terms that are printed below it. By tearing cellophane you have “agreed” to a bunch of boilerplate.

*To test this assumption, a software company named PC Pitstop inserted a reference to “financial compensation” midway through its nine-hundred-word boilerplate, along with an invitation to contact the company for more information. After four months and over three thousand sales, the company received its first inquiry. The company rewarded the lone customer’s reading of its boilerplate with a check for \$1000. Jeff Gelles, “Don’t Ignore Those Click-and-Agree Contracts,” *Philadelphia Inquirer*, Sept. 15, 2005, at C01.

A later variant, sometimes called “shrink-wrap of the second kind,” seeks to bind you to terms that you can’t see *until* you run the software and look at the first screen. An online analogue to the standard adhesion contract, sometimes called “click-wrap,” is also considered shrink-wrap of the second kind; it refers to terms that you adhere to by clicking a box onscreen that says “I agree.” Here the recipient affirms that she has read the terms—but, again, most likely she has not.

4. “Rolling Contracts” (also called “money now, terms later”): Perhaps the earliest example of this variant is the insurance contract. The agent sells you a policy, but when the pages of fine print arrive, they contain (if you read and can understand them) a lot of exclusions and wrinkles that you didn’t know about. You are still bound to the purported contract, even though you signed it *before* the terms were delivered to you.

Another example is ordering a product by telephone or online. You select the product and give the seller your credit card information, the company charges your card, receives the funds, and ships the product. When the product arrives, you open the box and a piece of paper with a lot of fine print falls out. It informs you that you have relinquished background legal entitlements, such as the right to sue the seller (by limiting you to arbitration), the right to copy material that is not under copyright, and so on.

A parallel example in the software world is the set of terms often called EULA (“End User License Agreement”); you see this (purported) contract when you fire up the product, which is *after* you’ve paid for it, not before. That is, these terms are often received under the “shrink-wrap of the second kind” procedure.

5. Then there is the Unwitting Contract: Most websites have a small link called something like “terms of service” (TOS). If one were to click on it, which most users don’t (in fact, most probably don’t even notice the link), one would see pages of boilerplate open out, telling the user that she is bound to these terms, that she has “agreed” to them simply by the act of looking at the site, and, moreover, that the owner may

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change the terms from time to time and that the user will then be bound by the new terms as well. This strategy has been dubbed “browsewrap.” With browsewrap you are clueless unless you find and click on the link that opens it.

I am sure that most readers will recognize many of the contract varieties listed in the foregoing typology. (Some examples appear on pages 111–119.) It should be clear now that many interactions that are called “contracts” these days are very far from the traditional notion of a contract, the idea of bargained exchange by free choice, that still holds sway in our imaginations. Contract reality belies contract theory in many situations where consumers receive paperwork that purports to alter their legal rights. In these situations, contract theory becomes contract mythology.

Why Don't We Read Boilerplate?

Given that firms regularly use boilerplate to transport us into an alternative legal universe, why don't we read these things? Here are seven answers: (1) We wouldn't understand the terms if we did read them, so it isn't worth our time. (2) We need the product or service and have no access to a supplier that does not impose onerous clauses, so reading the terms wouldn't make any difference. (3) We are not even aware that we are becoming subject to these terms, so we don't know that there is anything to read. (4) We trust the company not to have included anything harmful. (5) We suppose that anything harmful would be unenforceable. (6) We think that the company has power over us, so that we are simply stuck with what it imposes on us. (7) Yet another reason, and an important one: we don't believe that we will ever need to exercise our background legal rights. We don't expect misfortune to befall us. As psychological research has shown, we are not able to make accurate assessments of risks. All of these issues will be explored in the course of this book.

Boilerplate and Contract Formation

Because the law considers boilerplate to be a valid method of contract formation, the law usually holds that a contract has been

formed between the firm and the boilerplate recipient, and that the terms of the contract are the fine print in the boilerplate. Garrit's mother, Tonya, Michael, and the others were held to have relinquished their legal rights by contract with the firms whose terms they tried to contest. (The question of what these people may have received as bargained-for exchange for giving up their legal rights will be difficult to answer, as we shall see.)

Even when there is no signature, as when we simply click "I agree," courts are likely to find that a contract has in fact been formed. Firms use other procedures online that are even further removed from the kind of consent we normally suppose is required for contract. Consider the declaration, "By using our e-mail server, you have agreed to all of the rules we have placed in a separate document that you can access by clicking here." Courts may be somewhat less likely to find that these procedures result in an enforceable contract, but firms today are hopeful that courts will rule in their favor when and if the procedures are challenged, hopeful enough that they use such procedures very widely. Of course, even if a firm is less than confident that a court would enforce its clauses if they were challenged, it might reason that the attempt was worth trying: "It can't hurt to stick this in. It might prevent someone from suing us, if indeed someone were to read it. And nothing bad is going to happen to us if we use an unenforceable term. At worst, some court will declare it unenforceable, but it will still probably work against other recipients. Might as well give it a try."

The ultimate use of "By doing X you have agreed . . ." was received by an academic author friend of mine a few years ago after he had an article accepted for publication in a prestigious journal and transferred his copyright to the publisher. The publisher sent him a PDF copy of the article with an accompanying list of terms and conditions. The terms included permission to use copies only for his own teaching and research, disallowed his reselling the copies, and disallowed updating the PDF. At the bottom of this list appeared, in boldface type: "Upon reading of this page, you agree to be bound by these terms and conditions."

"By reading the above you have agreed to it" doesn't really fulfill what most people think of as the main prerequisite of an

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agreement. That is, for something to count as agreement, whatever you are agreeing to has to be presented to you as a matter for your decision before, not *after*, the agreement takes place. Declaring that you've agreed to something before you could have known that that is what you were doing has an Alice-in-Wonderland quality to it. The fact that the sender thought it was creating a contractual obligation for the recipient speaks volumes about the state of contract in our legal system. "Agreement" has become a talismanic word merely indicating that the firm deploying the boilerplate wants the recipient to be bound.

Our conventional understanding of contract is at odds with this reality. Most people still think that a contract is a voluntary transaction, a consensual exchange. Indeed, contract law is itself based on the idea of free exchanges between willing parties. "Freedom of contract" is a revered ideal underlying World A, the world of voluntary exchanges, the world of Agreement. World B is another world, the world of Boilerplate. In practice some contracts reflecting voluntary exchanges between willing parties may nevertheless consist partly or wholly of a collection of form clauses, yet belong to world A. Nevertheless the archetypes of World A and World B will be useful for analysis, if only because of the large realm of purported contracts that do consist entirely of nonnegotiated boilerplate.

World B, the world of boilerplate, doesn't fit the theory, the rationale, of contract law. Many people are surprised when they find out that boilerplate is treated as a contract. Even incoming law students, who are college graduates and curious about law, are astonished when they find out that everything they have signed, clicked "I agree" to, or otherwise been deemed to accede to in the week before our class starts is supposedly a contract between them and the firm deploying the form.

One task of this book is to think again about whether boilerplate should be considered contractual. Indeed, I want to urge that it should not, at least not in all of its manifestations. Meanwhile, however, as long as boilerplate *is* considered contractual, as it is in our current legal system, it is regulated under contract law. Why

“regulated”? Because not everything that is *called* a contract actually *is* a contract, and the law needs to be able to distinguish between those that are valid (and therefore enforceable) and those that are not. A purported contract obtained by coercion or fraud is not an enforceable contract, for example. Because boilerplate is regulated by—that is, evaluated under—contract law, those who defend boilerplate must argue that boilerplate somehow meets the requirements of contract law. Thus, they must argue that recipients somehow agree to or consent to its terms.⁸

Normative and Demographic Degradation

Normative Degradation

Boilerplate is, to say the least, problematic when it comes to the issue of agreement or consent. In this book I am going to call this problem of consent a “normative degradation” for our legal system. “Normative degradation” refers to the fact that our system is committed to the moral premise that justifies our legal structure of contract enforcement, that premise being that people who enter contracts are *voluntarily* giving up something in exchange for something they value more.⁹ Moreover, a legal system that would allow people to take away the rights of others without their consent, even if compensation is paid, is contrary to another basic premise of our own system: “private eminent domain” is normally not allowed.

If boilerplate were not regulated by contract law, that would not mean either that boilerplate should be unregulated or that boilerplate should be entirely eliminated. If boilerplate were not regulated at all but could be used freely by firms to divest people of legal rights, we would not be living under the rule of law. Indeed, as things stand, we risk losing our claim to being a society observant of the rule of law when our courts permit too free a rein to boilerplate. Yet, if all attempts to use boilerplate were to be declared unenforceable, that would cause a considerable disruption of current commercial practice.

Businesses that use forms to construct their own legal universe, and others who argue in defense of this practice, usually say

something like this: “We need to constrict recipients’ legal rights in order to contain costs. When we reduce costs, recipients benefit with lower prices. Furthermore, recipients, if given a choice, would choose lower prices over legal rights. So we are not really interfering with people’s freedom of choice.”

This argument should not be ignored. But it should be reconsidered, not only in light of the varying market circumstances that can make its premises true or untrue, but also in light of the nature of the various legal rights that firms are negating by using boilerplate, together with the questionable normative premise that hypothetical choice is as good as real choice. These questions are considered in chapters 2 and 3, and indeed throughout this book.

Democratic Degradation

There is a second problem with some form contracts, one that, although it has so far been less noticed than the problem of normative degradation caused by the question of agreement or consent, is in my view equally serious. This is the problem I will call “democratic degradation.” Mass-market systems of form contracts that restructure the rights of users of products and services operate to undermine or cancel the rights of users granted by legislatures. In other words, these systems of contracts can delete rights that are granted through democratic processes, substituting for them the system that the firm wishes to impose.

In this book I will refer to this deletion of recipients’ rights as the problem of boilerplate rights deletion schemes. The terms of such schemes are imposed by firms. Just as the law requires us to obey its dictates if we wish to live where it holds sway, these terms require us to be bound by them if we wish to engage in a transaction with the firm. Mass-market boilerplate rights deletions, when the courts uphold them, replace (supersede) the law of the state with the “law” of the firm. The boilerplate received by Tonya, Garrit’s family, Michael, and the others, operated to supersede their legal rights. A firm supersedes the right to jury trial, a basic right underwritten by the polity, when it deploys a different scheme in which jury trial “vanishes” and those with grievances against it

must use arbitration. By deploying an arbitration clause, a firm also deletes recipients' right to bring a class action suit. By deploying an exculpatory clause, it supersedes their right to bring suit for harm caused by another, a right underwritten by the polity for situations that satisfy legal parameters such as causation of the harm by fault of the defendant. Instead of the set of rights given to each of the recipients by the legal system, recipients have only the constricted set of legal rights as rearranged by the firms who deliver boilerplate to them. Recipients must enter a legal universe of the firm's devising in order to engage in transactions with the firm.

Reconsidering Theory and Practice

In order to think about how to respond to the issues I have posed in this introductory chapter, I will begin (in chapter 2) with the normative degradation caused by the apparent lack of consent to boilerplate, or at least by the problematic nature of recipients' consent to boilerplate. Then (in chapter 3) I will describe the democratic degradation that may be caused by the apparent replacement of the law of the state with the "law" of the firm when boilerplate is deployed in mass markets.

In Part II, I will consider matters of a more theoretical nature. As one might expect, there is a legal and philosophical literature focusing on contracts. Many theorists do not take heed of the existence of World B. In their writings we might imagine boilerplate as a philosophical elephant in the room. But some legal scholars do attempt to use traditional theory to justify firms' imposition of boilerplate on consumers. I will review the main theories of contractual ordering, and I will explore to what extent boilerplate's alternative legal universes can be justified under those theories. I will argue that attempts to bring boilerplate rights deletion schemes under the aegis of traditional contract theories by and large fail. In reviewing these attempts to justify boilerplate, I will consider different boilerplate procedures—such as clicking "I agree" versus merely visiting a website that posts "Terms of Service"—and consider to what extent the procedures make a difference in justification and enforceability.

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In Part III, this book will come to grips with the issues posed in practice by the widespread deployment of boilerplate rights deletion schemes. What is being done about mass-market systems of boilerplate deletion of rights? I will consider how the legal system now treats boilerplate, reviewing judicial oversight of boilerplate through the legal doctrines of unconscionability and voidness as against public policy, among others. (A court may invalidate a contract as unconscionable if it finds that one party lacked meaningful choice and the terms unreasonably favor the other party. A court may find a contract void if it transgresses a specific and important public policy.) I will consider as well whether the current system of judicial oversight could be improved, and I will offer an analytical framework that might be helpful to courts faced with questions of the validity of rights deletion by means of boilerplate.

In Part IV, I will leave contract and its oversight doctrines behind. I will consider other alternatives that might alleviate some of the problems posed by mass-market boilerplate. When and how might the market alleviate some of the problems raised by boilerplate rights deletion schemes? Is regulation by legislatures or administrative agencies on balance necessary, and if so, can such regulation transcend the categories of contract and individual bargaining? Can common-law courts themselves make improvements in the current situation? I will look at solutions such as rating organizations and filtering systems; consider the advantages that might be achieved by evaluating some types of boilerplate under tort law rather than contract law; and review varieties of regulatory solutions from piecemeal to comprehensive.

Agreement or consent of the parties is the bedrock principle of contract, so that is where we will begin.