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DISTRIBUTIVE CONSEQUENCES OF BOILERPLATE: THEORIZING (LACK OF) REGULATION AS (REVERSE) INSURANCE

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Introduction

This chapter is about the distributive impact of boilerplate contracts.

Specifically, this chapter scrutinizes the role that Consumer Unfriendly Terms (hereinafter "the CUTs")[2] play in the distribution of wealth and risk in the consumer society, including e-commerce. It challenges the view dominant in some sectors of legal scholarship, according to which it is the least affluent consumers who benefit from the lack of regulation of standard terms (as the prices are lower, and more people can afford the product).[3] On the contrary, the chapter argues, what that mainstream account ignores is the fact that the poorest consumers – unlike the affluent middle class – often do not have the ability to internalize future damages, should an accident occur.[4]

Consequently, regulation of boilerplate contracts, guaranteeing consumers a right (and the factual ability) to seek damages (by, e.g., voiding clauses excluding liability for torts or class-action waivers) could be seen as a mandatory, collective "insurance," where all consumers chip-in a little for the benefit of the future injured party. The current situation in American contract law, i.e., the validity and enforceability of the CUTs, functions as "reverse insurance" – we all pay a slightly lower price while accepting that once someone gets injured – and someone will get injured – their chances in taking a dispute to court and being compensated are meager. The problem is that, for some, this will be just a minor nuisance, while for others, it might be a life-ruining event.

The problem of the "CUTs" precedes the internet and the growth of e-commerce in the last two decades.[5] Yet, the socio-technological changes intensify the CUTs' consequences while simultaneously offering a chance to combat them better. Large parts of our lives – from communication, travel, and shopping to dating and entertainment – are currently mediated by online platforms (whose boilerplate one needs to accept to use them).[6] Further, the ability to

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[2] "Consumer unfriendliness" is understood broadly, to encompass all kinds of contractual clauses that render consumer's position precarious vis a vis the entrepreneur. In particular, the term "CUTs" refers to clauses limiting consumers' remedies (exclusion of warranty or liability) and dispute settlement clauses (choice of law, choice of forum, mandatory arbitration, class-action-waivers. For a typology of such clauses regarding their legal status, see: Yehuda Adar & Shmuel Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 BOSTON COLLEGE LAW REVIEW 2405, 2415–2420 [2021] [distinguishing between "legally invalid terms," "voidable unconscionable terms" and "unfair terms."].

[3] *See infra*, Section 2.1.

[4] *See infra*, Section 2.2.

[5] *See infra,* Part 2.

[6] This has been dubbed by some commentators as the "platform economy," see: Julie E. Cohen, *Law for the Platform Economy*, 51 U.C. DAVIES LAW REVIEW 133 (2017); Natali Helberger, Jo Pierson & Thomas Poell, *Governing online platforms: From contested to cooperative responsibility*, 34 THE INFORMATION SOCIETY 1–14 (2018); Rory Van Loo,

purchase goods and services from all over the country (and the world) has increased due to the internet assuming a central role in our lives. Hence, on the one hand, we are bound by many more contracts than we used to in the 20th century, with parties located much further from us than when the current legal doctrines were forged. On the other hand, the ability for firms to compete with one another (also on boilerplate clauses) has significantly increased.

The primary goal of this chapter is to get the idea across: through unregulated boilerplate, lowering corporations' future costs and thereby retail prices, the poorest consumers subsidize the middle class. This is contrary to the basic principle of social solidarity. Now, what the regulatory consequence of this idea should be – whether the government should intervene and in what way – is a political question. I survey the possible reactions – ranging from regulation, over the reinterpretation of common law doctrines, to market solutions – in Part 3. In Part 2, I critique the mainstream distributive narrative surrounding the CUTs and offer an alternative. In Part 1, I begin by looking at the philosophy of consumer law in the US and EU, demonstrating how assumptions behind the American contract law are neither necessary nor necessarily correct.

1. The Transatlantic Split: Efficiency vs. Socialization of Risk

1.1. An Anecdote to Ponder

The story of this chapter begins with a glass of beer and one question that shook my mind.[7]

In the fall of 2018, as a freshly minted Yale's Fellow in Private Law, I spent an evening chatting with an American contracts professor about the projects we worked on at the time. I was passionately describing a revolution in consumer protection that technological advances could bring – a subject of a book chapter I was struggling to finish writing.[8] For context: before coming to the United States, I worked as a researcher at the European University Institute in Florence, Italy, where, with a team of lawyers and computer scientists, we have been trying to automate the evaluation of terms of service of online platforms using machine learning.[9] Evaluation according to what standard?

According to European consumer law, a particular class of standard clauses (the so-called "unfair terms")[10] – ranging from specific kinds of limitations of liability over companies' rights to

Federal Rules of Platform Procedure, 88 THE UNIVERSITY OF CHICAGO LAW REVIEW (2021); Nikolas Guggenberger, *Essential Platforms*, 24 STANFORD TECHNOLOGY LAW REVIEW (2021), https://papers.ssrn.com/abstract=3703361 (last visited Nov 17, 2020); Thomas Kadri, *Digital Gatekeepers*, 97 TEXAS LAW REVIEW (2021).

[7] One can only speculate how many (good and bad) ideas have not been born as the result the Covid-19 pandemic, which forced us into isolation and stripped us of the possibility of casually exchanging ideas in bars, as opposed of having each and every meeting planned and scheduled. For a theory of how unstructured interactions in non-work environments boost creativity, see: ANNIE MURPHY PAUL, THE EXTENDED MIND: THE POWER OF THINKING OUTSIDE THE BRAIN (2021).

[8] By now, fortunately, finished and published. See: Przemysław Pałka & Marco Lippi, *Big Data Analytics, Online Terms of Service and Privacy Policies*, *in* RESEARCH HANDBOOK ON BIG DATA LAW 115–134 (Roland Vogl ed., 2021).

[9] For the main output of the project, see: Marco Lippi et al., *CLAUDETTE: an automated detector of potentially unfair clauses in online terms of service*, 27 ARTIFICIAL INTELLIGENCE AND LAW 117–139 (2019); For a "manifesto" paper, outlining the future possible research paths and ways to transform the technical experiments into usable tools, see: Marco Lippi et al., *The Force Awakens: Artificial Intelligence for Consumer Law*, 67 JOURNAL OF ARTIFICIAL INTELLIGENCE RESEARCH 169–190 (2020).

[10] *See infra*, Section 1.2.

unilaterally change the contract to choice of forum or class action waivers – are unlawful.[11] Not only does the law deem them null and void should a dispute emerge, but it also empowers state administrative agencies to proactively seek out such clauses and order businesses to remove them from their boilerplate.[12] In the ideal world imagined by the European lawmakers, if only standard consumer contracts were publicly available, those contracts would not contain unfair terms, as administrative agencies would have them removed. And yet, as our empirical analysis found out, essentially all terms of service of online platforms were full of unfair terms.[13] How was this possible?

Our hypothesis, supported by anecdotal knowledge about the inner workings of consumer protection agencies, was that the problem was a lack of resources. Consumer protection bodies simply lacked the personpower necessary to go through thousands of documents and initiate the enforcement proceedings.[14] Such a task, quite dull and not very creative, while simultaneously laborsome, seemed like a perfect candidate to be automated. As we achieved some initial success in the project,[15] I was describing a grand vision of bots crawling the net in search of unfair terms and sending businesses messages about the imminent legal action (which should be sufficient to have them modify the contracts to avoid the proceedings). "Soon," I was almost preaching, "there will be no unfair terms used in online boilerplate contracts, the law will be respected, and the consumers will finally be protected!"

My colleague looked puzzled. He took a sip of beer and said: "yeah, but what if these terms are efficient?"

This remark caught me off guard. I knew the typical objections to the grand vision – that companies will reword the boilerplate in a way that makes unfair clauses harder to detect, that Europe's multilingualism will be a problem, in essence: that this won't work – but did not expect anyone to question the normative premise of the project. "What do you mean "they are efficient," they're illegal!" I answered. "Well, maybe they shouldn't be illegal," – my colleague responded – "maybe corporations value having these clauses included in boilerplate very highly, as they drive their future costs down, while consumers do not really care. If they cared, companies would

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[11] *Id*. For a doctrinal and policy discussion of these regulations, see: Hans W. Micklitz & Norbert Reich, *Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive (UCTD), The*, 51 COMMON MARKET L. REV. 771–808 (2014); Peter Rott, *Unfair contract terms*, RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW (2016); Marco Loos & Joasia Luzak, *Wanted: a Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers*, 39 J CONSUM POLICY 63–90 (2016).

[12] *See* Hans-W. Micklitz, Przemysław Pałka & Yannis Panagis, *The Empire Strikes Back: Digital Control of Unfair Terms of Online Services*, 40 J CONSUM POLICY 367–388 (2017); see also: Stephanie Law, *The Transformation of Consumer Law in Times of Crisis: The Ex Officio Control of Unfair Contract Terms*, *in* TRANSFORMATION OF CIVIL JUSTICE: UNITY AND DIVERSITY 283–307 (Alan Uzelac & Cornelis Hendrik (Remco) van Rhee eds., 2018)..

[13] *See* Lippi et al., *supra* note 9 at 127.

[14] For an overview of challenges to consumer law enforcement at the time, see: Hans-W. Micklitz & Geneviève Saumier, *Enforcement and Effectiveness of Consumer Law*, *in* ENFORCEMENT AND EFFECTIVENESS OF CONSUMER LAW 3–45 (Hans-W. Micklitz & Geneviève Saumier eds., 2018) (providing an overview of state-specific problems discussed throughout the book). Ever since, the European Union has adopted a directive aimed at improving enforcement, see the Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, December 18, 2019, OJ L 328/7. To what extend these changes will be sufficient remain to be seen.

[15] *See* Lippi et al., *supra* note 4 at 131-133. We achieved 80% overall effectiveness of the system, trained on a relatively small sample of contracts, suggesting that improvements can easily be made when increasing the size of the training set and using more sophisticated NLP techniques. For certain kinds of unfair clauses (choice of law, choice of forum, and limitation of liability) the effectiveness was higher than 93%.

compete on consumer-friendliness of their boilerplate; as they don't, it means that top-down regulation of boilerplate is inefficient." I had no idea what to say to that.

You might be surprised that I was surprised.[16] In the end, "efficiency" is a concept taught in torts or contracts 101.[17] Ever since the success of law and economics in American law and legal scholarship,[18] "efficiency" has been a part of the language we speak and the air we breathe. Of course, one might contest the weight that law or lawyers ascribe to "efficiency" as a guiding normative principle. However, one knows that it must be addressed, doesn't one?

Well, not in the EU. Believe it or not, in continental Europe (jurisdictions like Germany, France, Poland, etc.), one can graduate from law school, specialize in contract law and consumer law, and not stumble upon the concept of "efficiency" once. One can think of several possible explanations. First, a movement akin to legal realism (which paved the way for the success of law and economics in the US)[19] never took place in the EU; we are still, essentially, formalists here. Second, European contract law has been expressed in civil codes for centuries now, and so when we study the general principles governing private law, we focus on those expressed in the codification, and efficiency is not there.[20] We care about autonomy and interpersonal justice, not efficiency.

The reason why I wanted to begin with this story, and not just a dry statement to the effect of "efficiency has been a guiding principle in the US consumer contract law, but not in Europe," is to encourage the reader to ponder upon the collective mindset. Both the European and the American legal consciousness can be subjected to critical scrutiny. And as it is the Americans I take to be the primary audience of this book, I want to invite you to imagine a contract law community that does not speak of "efficiency." It is perfectly possible to run a country – and one cannot accuse places like Germany, Norway, or France of not being affluent or having a starkly lower standard of living than the United States – without giving one thought to the efficiency of its contract law system. It is not that the system necessarily ends up being inefficient (it might, through legislative amendments and judicial decisions, tacitly gravitate towards efficiency)[21] but that other values serve as the normative threshold.

1.2.Substance and Philosophies of Consumer Contract Law in the US and the EU

[16] If you are from the United States. If you are from outside of the United States, I might share my confusion from back then.

[17] *See*, e.g., DANIEL MARKOVITS, CONTRACT LAW AND LEGAL METHODS 19-512. (2012).

[18] For a discussion of how the economic analysis of law has become of the paradigms of American legal scholarship and practice, see: GUIDO CALABRESI, THE FUTURE OF LAW AND ECONOMICS: ESSAYS IN REFORM AND RECOLLECTION (2016).

[19] *See* Joseph William Singer, *Legal Realism Now*, 76 CALIFORNIA LAW REVIEW 465–544, 515 (1988) (writing "Law and economics theory is very much an exercise in legal realism. [...] [E]fficiency theorists reject the idea that one can deduce the meaning of legal entitlements from abstract concepts. Nor do they believe that one can understand how the legal system operates, as well as the kinds of considerations judges take into account in deciding cases, simply by reading judicial opinions.").

[20] For example, in Polish law, constituting an interesting mixture of rules and doctrines enshrined in French Code Civil and German Bürgerliches Gesetzbuch, one focuses on the principles of (1) will's autonomy, (2) primacy of subjective rights, (3) trust in commercial practices, and (4) social justice in legal relations. See: MAREK SAFJAN, SYSTEM PRAWA PRYWATNEGO, T. 1, PRAWO CYWILNE – CZĘŚĆ OGÓLNA (2012); In European civil law, these principles are: (1) framed autonomy, (2) protection of the weaker party, (3) non-discrimination, (4) effectiveness, (5) balancing, (6) proportionality, and (7) good faith. See: NORBERT REICH, GENERAL PRINCIPLES OF EU CIVIL LAW (2014).

[21] As Richard Posner has been arguing since 1973, see RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3rd ed. 1986).

The contents and structure of consumer laws in the US and the EU are similar. On both sides of the Atlantic, we have rules to combat unfair and deceptive commercial practices,[22] enact product safety regulations[23] and mandatory consumer rights,[24] and heavily rely on mandated disclosures as means of consumer protection.[25] However, we significantly differ in consumer contract law.

In the EU, the primary legislative instrument is Directive 93/13 on Unfair Terms in Consumer Contracts.[26] It defines "unfair terms" as follows:

> A contractual term that has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.[27]

This is a general clause, in principle, allowing courts to consider any kind of contractual term as "unfair." In addition, the UCTD also contains an Annex listing an open catalog of clauses presumed to be "unfair." These are, among others, terms excluding the company's liability for personal injury[28] or non-performance of the contract,[29] enabling businesses to unilaterally change the contract[30] or the service provided,[31] or limiting consumers' ability to take legal action or exercise legal remedy (including choice of law clauses, mandatory arbitration or class action waivers).[32] As disputes emerge, the final say on what terms must be considered "unfair"

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[22] For a recent analysis of the American doctrine, see Lauren Willis, *Deception by Design*, 34 HARVARD JOURNAL OF LAW & TECHNOLOGY 116–190 (2020) and; Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431 (2021); For an overview of the European one, see: WILLEM VAN BOOM & AMANDINE GARDE, THE EUROPEAN UNFAIR COMMERCIAL PRACTICES DIRECTIVE: IMPACT, ENFORCEMENT STRATEGIES AND NATIONAL LEGAL SYSTEMS (2016) and; Elisabet González Pons, *Addressing aggressive commercial practices: Some critical aspects of its regime in the Unfair Commercial Practices Directive*, 6 FINANCE, MARKETS AND VALUATION 27–36 (2020).

[23] Luke Nottage, *Product safety regulation*, HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW, SECOND EDITION (2018), https://www.elgaronline.com/view/edcoll/9781785368202/9781785368202.00015.xml (last visited Jan 31, 2022); Duncan Fairgrieve & Geraint Howells, *General Product Safety: A Revolution through Reform?*, 69 THE MODERN LAW REVIEW 59–69 (2006); Eileen Flaherty, *Safety First: The Consumer Product Safety Improvement Act of 2008*, 21 LOY. CONSUMER L. REV. 372 (2008); Jukka Ruohonen, *A Review of Product Safety Regulations in the European Union*, ARXIV:2102.03679 [CS] (2021), http://arxiv.org/abs/2102.03679 (last visited Apr 2, 2022).

[24] *See*, e.g., J. A. Luzak, *To Withdraw Or Not To Withdraw? Evaluation of the Mandatory Right of Withdrawal in Consumer Distance Selling Contracts Taking Into Account Its Behavioural Effects on Consumers*, 37 J CONSUM POLICY 91–111 (2014); Sanford Shatz & Susan E. Chylik, *The California Consumer Privacy Act of 2018: A Sea Change in the Protection of California Consumers' Personal Information Survey - Consumer Financial Services*, 75 BUS. LAW. 1917–1924 (2019).

[25] In the EU called "information duties," see e.g. Monika Namysłowska & Agnieszka Jabłonowska, *Information Obligations and Disinformation of Consumers: Polish Law Report*, *in* INFORMATION OBLIGATIONS AND DISINFORMATION OF CONSUMERS 301–337 (Gert Straetmans ed., 2019), https://doi.org/10.1007/978-3-030-18054-6_8 (last visited Sep 7, 2020); For the classic analysis of how this works in the US, see OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[26] COUNCIL DIRECTIVE 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 21.4.1993, OJ L 95/29, available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31993L0013&from=EN [hereinafter "the UCTD."]

[27] *See* the UCTD art. 3.1.

[28] *See* the UCTD, Annex, p. (a).

[29] *Id.* p. (b).

[30] *Id.* p. (j).

[31] *Id.* p. (k).

[32] *Id.* p. (q).

throughout the Union is with the Court of Justice of the EU, which has already ruled on dozens of kinds of clauses.[33]

Unfair terms in a contract do not bind European consumers.[34] If a contract law dispute emerges, courts consider them null and void (this is the so-called "individual control.") In addition, various bodies (both administrative agencies and civil society organizations) have the competence to seek out unfair terms and order companies to remove them (or initiate proceedings to have them removed; this is the so-called "abstract control.")[35] This is supposed to prevent the use of the so-called *in terrorem* clauses, disincentivizing consumers from going to court.[36]

In short, the European Union has substantive and procedural rules in place to ensure that no contractual terms "causing a significant imbalance of rights and duties to the detriment of the consumer" bind the latter.

The legal situation in the United States is different. First, no general statute outlawing any kinds of contractual terms exists at the federal or state level. In common law, one can find the "unconscionability" doctrine;[37] however, the threshold for considering a clause unconscionable is much higher, and courts are reluctant to use it.[38] Second, the US Supreme Court has proactively deemed many consumer-unfriendly terms enforceable. These include choice-of-law and choice-of-forum clauses[39] or mandatory arbitration and class-action-waiver clauses.[40] Further, state and federal courts have generally enforced many other kinds of terms – like limitations of liability or unilateral alteration clauses.

Clearly, there are doctrinal reasons behind these decisions; the American contract law is simply different from the European one. However, there's also a difference in philosophy. Americans and Europeans hold divergent beliefs and assumptions about the overall purpose of consumer law.

The mainstream theory behind consumer law in the US is what Luke Herrine calls the "consumer sovereignty framework."[41] In his words, this framework:

> [T]reats the purpose of regulating consumer markets as trying to make them work as much as possible like a utopian market in which rational informed choices of consumers drive outcomes through the decentralized force of free competition.[42]

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[33] For an overview, see: Hans-W. Micklitz & Betül Kas, *Overview of cases before the CJEU on European Consumer Contract Law (2008–2013) – Part I*, 10 EUROPEAN REVIEW OF CONTRACT LAW 1–63 (2014).
[34] *See* the UCTD, art. 6.
[35] *See* Law, *supra* note 12.
[36] For an overview of the concept, see: Colin P. Marks, *Online Terms as in Terrorem Devices*, 78 MD. L. REV. 247 (2018).
[37] See, e.g. Paul J. Morrow, *Cyberlaw: The Unconscionability/ Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 PITT. J. TECH. L. & POL'Y [i] (2011).
[38] *Id*.
[39] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).
[40] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); American Express v. Italian Colors, 570 U.S. 228 (2013).
[41] *See* Luke Herrine, *What is Consumer Protection For?*, 33 LOYOLA CONSUMER LAW REVIEW, 4 (2022, forthcoming), https://papers.ssrn.com/abstract=3781762.
[42] *Id.*

Such a world would be the efficient one, with consumer products ending up in the hands of consumers who value them the most,[43] while the prices would be the lowest possible. Rory van Loo sees this latter quality, i.e., lowering of prices, as the primary goal of the American consumer law.[44] Ramsi Woodcock, albeit suggesting a radical idea of banning targeted online advertising as a policy means, reiterates the view that the goal of regulation is to facilitate informed decisions by consumers and lower prices.[45]

This view has profound consequences. First, note that the source of normative judgments about the value of particular products is the aggregate of individual consumers expressing their personal preferences. What matters in determining the prices and product allocation is not a collective, political decision of the community[46] but the normative choices of individuals acting in their own best interest. The mainstream philosophy behind American consumer law sees such a state of affairs as normatively superior to collective decisions, not just technically more efficient.[47] Second, the role of consumer law in this framework is not to replace any consumer choices with government decisions but rather to enable the former. If individual consumers choose boilerplate terms that favor the businesses, and one can expect that they do so due to the lower prices of such products (as lowering prices is the goal of consumer law), the government should think twice before meddling with these choices.

Within this philosophy, the legislature's choice to refrain from enacting something akin to the EU's UCTD, and courts' decisions to enforce consumer-unfriendly clauses in boilerplate, can be presented as pro-consumer measures. Absent decisive evidence of market failures or monopolies, stronger regulation of consumer contracts would make it harder for consumers to choose what they really want (as these choices would now be unlawful) and drive prices up (as the businesses' expected costs of future legal proceedings would increase and be shifted onto the consumers). Now, whether American consumers actually prefer marginally lower prices in exchange for unfavorable contract terms is beyond my ability to know. It is also not entirely clear to me what "actually preferring," in the world of cognitive bias and less-than-perfectly-competitive

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[43] *Id.*

[44] *See*Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211, 213 (2019) ["[M]any consumer protection and antitrust laws reduce the prices that people pay by removing overcharge (…) Although the field often focuses on goals other than lowering prices, many consumer laws nonetheless lower overcharge in diverse ways, including by addressing monopoly power, preventing deception, and removing entry barriers that get in the way of full competition."]

[45] *See* Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L. J. 2270–2341, 2306 (2017) ["A ban on advertising outside of "add to cart" pages and firm websites would benefit consumers and improve efficiency in three ways. First, by eliminating the harmful effects of manipulative advertising on technological innovation, the prohibition would increase consumer welfare (...). Second, the lower prices associated with a reduction in the anticompetitive effects of advertising would represent an efficiency gain because part of those lower prices would be made possible through the avoidance of wasteful advertising costs. Firms would no longer waste billions of dollars on seduction. Third, a ban would create an immediate efficiency gain by eliminating what economists call obtrusive advertising, advertising that is forced on consumers, preventing them from consuming product information at the times and places that they prefer."].

[46] Herrine believes that this should be the goal of consumer law, proposing a "moral economy" theory. S*ee* Herrine, *supra* note 39 at 5 ["[M]oral economy view treats the purpose of consumer markets as ensuring that goods and services are provided in a way that comports with the values of those whom the political system represents. That is to say: a moral economy view treats consumer markets as contingent ways to solve problems of social provision, to ensure that the right goods and services get to the right people in accordance with principles of fairness."].

[47] For an overview of normative and technical reasons to prefer markets over command economies, and the other way round, see Przemysław Pałka, *Algorithmic Central Planning: Between Efficiency and Freedom*, 83 LAW & CONTEMP. PROBS. 125–150, 126–134 (2020).

markets, means. However, even if we assume that all the descriptive assumptions here are correct – i.e., a significant number of individual consumers consciously choose worse contract terms in exchange for lower prices – honoring that choice is not the only possibility for consumer law. The philosophy in the EU is very different.

The mainstream theory behind the consumer contract law in the EU boils down to two propositions: protection of the weaker party & socialization of risk.[48] The former, mainly stressed by civil lawyers (so people who study civil codes, including rules of property, contract, and tort; this encompasses consumer contract law), has been succinctly phrased by Norbert Reich:

> EU civil law has emerged not so much as a body of rules with an objective of enabling citizens to use their autonomy for purposes (...) to be determined by themselves, but rather as a body of provisions that tries to protect the weaker party and to combat discrimination.[49]

One of the goals of private law in Europe has been to establish a society of equals, where every individual enjoys the same rights, duties, and the autonomy to shape their lives as they please.[50] This ideal – which needs to be judged against the preceding social structures of a formally enshrined class system, differentiating between the rights of aristocracy, clergy, and peasants[51] – has been enshrined in the civil codes establishing the formal equality of persons. However, as the realities of the industrial revolution and the emergence of mass consumer markets made clear, formal equality does not translate into material equality.[52] On the contrary, given the structural differences in parties' bargaining positions, formal equality in the contract often leads to relations of domination.[53] Hence, the European legislatures, first on the state level and then on the Union level, decided to grant the structurally weaker parties, including consumers, more rights than businesses enjoy.[54] The goal of the private law in the EU is not formal equality; it is material

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[48] As long as substantive principles are considered. There is a third goal, where consumer law has been used as one of the tools for constructing the internal market. Through harmonization and unification of consumer laws of various Member States, the EU has hoped to both remove barriers to trade and increase consumers' trust in transnational commerce. See: GERAINT HOWELLS, CHRISTIAN TWIGG-FLESNER & THOMAS WILHELMSSON, RETHINKING EU CONSUMER LAW 23 (1st edition ed. 2017).

[49] *See* NORBERT REICH, GENERAL PRINCIPLES OF EU CIVIL LAW 38 (2014); see also; Stephen Weatherill, Stefan Vogenauer & Petra Weingerl, *Private Autonomy and Protection of the Weaker Party*, *in* GENERAL PRINCIPLES OF LAW: EUROPEAN AND COMPARATIVE PERSPECTIVES , 261 (Stephen Weatherill & Stefan Vogenauer eds.) (writing: "There is no better example of the combination of legislative initiative and judicial interpretation in the protection of the weaker party than that which is provided by Directive 93/13 on unfair terms in consumer contracts.").

[50] This is what Franz Bohm has called "a private law society" (ger. Privatrechtsgesellschaft). For an exposition of this view in English, and comparison with Anglo-Saxon views, like e.g. that of John Rawls, see STEFAN GRUNDMANN, HANS-W. MICKLITZ & MORITZ RENNER, NEW PRIVATE LAW THEORY: A PLURALIST APPROACH 131–155 (2021).

[51] *See*, e.g., Robert Millward, *The early stages of European industrialization: Economic organization under serfdom*, 21 EXPLORATIONS IN ECONOMIC HISTORY 406–428 (1984).

[52] *See* HANS-W MICKLITZ, THE POLITICS OF JUSTICE IN EUROPEAN PRIVATE LAW: SOCIAL JUSTICE, ACCESS JUSTICE, SOCIETAL JUSTICE 7–10 (2018).

[53] In the US the landmark case supporting this proposition has been *Lochner v. New York*; for its recent re-reading in the context of the current state of capitalism in the US, see: K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEX. L. REV. 1329 (2015).

[54] For a detailed account of this process, see MICKLITZ, *supra* note 56 at 45-160. Also, notice how the UCTD outlaws standard terms, creating an imbalance of rights and duties of the parties "to the detriment of the consumer." However, there's nothing wrong with terms imbalanced to the detriment of businesses.

equality, and the protection of the weaker party in contract relations is seen as a means to achieving this goal.

Notice how, within this mindset, the concept of "efficiency" never comes up. Of course, one could try to rephrase it in such terms by, for example, trying to claim that to express their true preferences, consumers need not only information but also legal recourse and certain decisions, clearly against their interests, taken off the table. However, the European legislatures do decide for their citizens on the minimum acceptable standards in a contract. Even if this choice is overall inefficient, the law sees material equality in transactions as a higher value.

The second proposition guiding the European consumer contract law is the socialization of risk. To understand it, one needs to remember that in the EU, consumer law, alongside with labor law, social security, nationalized healthcare, etc., has always been treated as an integral part of the welfare state project.[55] This collective perspective, drawing not on the ideal of equality but social solidarity, can be well captured by the quote from some leading European scholars of consumer law:

> Things go wrong in the market either through incompetence, fraud or chance. Some risks consumers might have to accept as simple lessons to be learned, but others need to be redressed either because of the harm caused or to clean up the market going forward. This socialisation of risk underpins many consumer rules. (…) All inalienable consumer rights could be viewed as enforced insurance as the potential liability has to be factored into the price of goods and services.[56]

Within this perspective, economic factors become much more salient. Indeed, we accept that prices might rise if the government regulates standard contracts to favor the consumers. And that is the point of regulation. What matters is primarily not the price but the fact that, when a consumer suffers injury as a result of market transactions, she has redress. As that consumer can be anyone, it is the role of society to "chip in" to ensure that redress is available when needed.

Is it possible that this market is inefficient? Absolutely yes. One can imagine a situation where a significant number of consumers prefer lower prices in exchange for a detrimental legal position in the future, should injury happen. In this sense, the EU consumer law makes it impossible for these consumers to act upon their actual preferences. However, the role of the EU consumer contract law is not to enable each individual to express their preferences to the fullest; it is to safeguard the rights of these least well-off.

Both philosophies – the American and the European – strike me as acceptable. In what follows, I will argue in favor of the latter, based on what I perceive to be the distributive consequences of its adoption. However, the purpose of this part – and, as a matter of fact, of this chapter – is not to land a, unhelpful and most probably false claim to the effect of "Europeans do consumer contract law better than the Americans." Far from it. My goal has been instead to show, by drawing attention to the differences (1) what the implicit normative assumptions in American consumer contract law are and (2) that a completely different philosophy is possible not only in theory but also as a matter of practice of the second-largest economy in the world.[57]

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[55] *See e.g.,* Iain Ramsay, *Consumer Credit Law, Distributive Justice and the Welfare State*, 15 OXFORD J. LEGAL STUD. 177 (1995).

[56] HOWELLS, TWIGG-FLESNER, AND WILHELMSSON, *supra* note 48 at 8. British spelling in original.

[57] The GDP of the world's largest economy, the United States, has been $20,893.75 billion in 2020, whereas the third economy, China, scored $14,866.74 billion, see *The 20 countries with the largest gross domestic product (GDP) in*

2. Distributive Consequences of (not) Regulating Boilerplate

Boilerplate contracts (or contracts of adhesion) have been a subject of legal scholarly interest for several decades.[58] Lately, given the rise of e-commerce and platform economy, many tremendous doctrinal[59] and empirical[60] works have been published. In addition, scholars have been debating the normative question of how the American law should (or should not) be reformed to better address the problems of boilerplate.

On the one hand, scholars have marshaled many arguments for stricter legal control of boilerplate clauses. Probably the most well-known account has been offered by Margaret Jane Radin in her 2013 monograph.[61] Radin, having discussed the widespread use of consumer-unfriendly terms, argues against their enforcement, as they contribute to the normative degradation[62] (the meaninglessness of "consent" and "freedom of choice") and democratic degradation[63] (replacement of the Rule of Law with the rule of the corporations) in our society and

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2020, Statista (October 2021), available at https://www.statista.com/statistics/268173/countries-with-the-largest-gross-domestic-product-gdp/. The combined GDP of the EU member states, for the same year equaled $17,078.38 billion, see *European Union: Gross domestic product (GDP) from 2016 to 2026*, Statista (October 2021), available at: https://www.statista.com/statistics/527869/european-union-gross-domestic-product-forecast/.

[58] For inspiring and informative early contributions, see: Friedrich Kessler, *Contracts of Adhesion--Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM L. REV. 1072 (1953); Arthur Lenhoff, *Contracts of Adhesion and the Freedom of Contract: A Comparative Study in the Light of American and Foreign Law*, 36 TUL. L. REV. 481 (1961); Alfred W. Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964); TODD D. RAKOFF, CONTRACTS OF ADHESION: AN ESSAY IN RECONSTRUCTION (1983); For a classic symposium on the matter, see the articles discussed in Omri Ben-Shahar, *Foreword to Boilerplate: Foundations of Market Contracts Symposium*, 104 MICHIGAN LAW REVIEW 821 (2006).

[59] *See* Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1 (2010); NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (1st edition ed. 2013); Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much about Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215 (2017); Gregory Klass, *Boilerplate and Party Intent*, 82 LAW AND CONTEMPORARY PROBLEMS 105–137 (2019); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019).

[60] For empirical studies focusing on whether consumers read boilerplate (and showing that they do not), see: Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 THE JOURNAL OF LEGAL STUDIES 1–35 (2014); Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFORMATION, COMMUNICATION & SOCIETY 128–147 (2018). For contributions discussing the effect of boilerplate on the socioeconomic reality, see: Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017); David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395 (2018); Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GEORGIA LAW REVIEW 657–730 (2021).

[61] *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013).

[62] *Id.* at 19–32 (writing: "Our legal system adheres to an ideal of private ordering and its importance to individual freedom. Within this system, freedom of contract is a core value, and 'involuntary' or 'unfree' contract is a contradiction in terms. […] A system in which rights could be taken from people without their consent if they were paid the alleged market price for those rights would be a major departure from our own. If our system is tending in that direction because millions of people are without their consent being made subject to boilerplate that erases important legal rights, then surely our system of contract law, in which consent is essential, is being degraded.").

[63] *Id.*at 33 (writing "When a firm's mass-market boilerplate withdraws a number of important recipients' rights—such as rights of redress granted by the state, or user rights that are free of owner control under intellectual property regimes—it is displacing the legal regime enacted by the state with a governance scheme that is more favorable to the firm. It is transporting recipients to a firm's own preferred legal universe. I am not referring here to all "contracts of adhesion." Rather I mean to focus on mass-market boilerplate rights deletion schemes: the deployment of boilerplate

political economy. Others have followed suit. Eric Encarnacion maintains that stripping consumers of their rights via boilerplate cannot be reconciled with their dignity.[64] Yehuda Adar and Shmuel Becher argue that enforcing boilerplate clauses leads to be financial and non-financial costs to consumers.[65]

On the other hand, the proponents of enforcing boilerplate in its current form usually make the arguments from efficiency and price effects.[66] The idea here is simple: by including consumer-unfriendly clauses like limitations of liability, class action waivers, mandatory arbitration, etc., corporations lower their expected future costs of legal proceedings and therefore are able to offer their services at a lower price.[67] Since lower prices are the goal of consumer law, any legal intervention countering the achievement of that goal should be seen as anti-consumer interest. Now, without a doubt, the ability to use the abovementioned boilerplate clauses drives the costs of running a business down. The question is: who reaps the benefits?

On its face, the argument seems to boil down to one fundamental question: are we willing, as a political community, to tolerate boilerplate contracts stripping consumers of their rights, as long as this translates into lower consumer prices? In other words, what do we care more about: lower prices or material equality in rights and duties? This is a political question where both sides have convincing arguments and where the American and European lawmakers went in different directions.

However, there is one deeper assumption in the "price effects" view, the one I'd like to attack in this chapter. This assumption is: lower consumer prices, resulting from consumer-unfriendly boilerplate, favor the least affluent consumers, whereas it's mostly the lawyerly elite that cares about their rights. I don't think that is correct. So let us take a closer look at this narrative.

2.1.Standard Narrative: Unregulated Boilerplate Favors the Less Affluent

In his review of Radin's treatise on boilerplate, Omri Ben-Shahar – labeling himself a "boilerplate apologist"[68] – encapsulated the view widespread among the proponents of the CUTs

to rework a system of recipients' rights that are guaranteed by the polity in order to divest recipients of those rights, or of some substantial portion of them, for the benefit of a firm.").

[64] *See* Erik Encarnacion, *Boilerplate Indignity*, 94 IND. L.J. 1305 (2019).

[65] *See* Yehuda Adar & Shmuel Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 BOSTON COLLEGE LAW REVIEW 2405, 2422 (2021) (writing: "For example, the inability to fully recover for an injury or an expense that was unjustly imposed on the consumer may lead to feelings of frustration, anger, alienation, bitterness, and other forms of mental distress or inconvenience. In some cases, it may even result in the consumer being unable to obtain compensation for a serious personal injury or a property loss that the seller or supplier inflicted.").

[66] See supra part I. See also: Omri Ben-Shahar, *Regulation through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 895 (2013) (writing: "one cannot evaluate whether boilerplate deletion of legal rights is good or bad for consumers without also looking at the price people are asked to pay for the 'product + boilerplate' package.").

[67] This view is, sometimes, explicitly included in the text of the boilerplate itself. For example, Bumble, a popular dating app, states "THE LIMITATION OF LIABILITY HEREIN IS A FUNDAMENTAL ELEMENT OF THE BASIS OF THE BARGAIN AND REFLECTS A FAIR ALLOCATION OF RISK. THE APP AND SITE WOULD NOT BE PROVIDED WITHOUT SUCH LIMITATIONS," see: Bumble's Terms and Conditions, updated on November 19, 2021, available at: https://bumble.com/en/terms (caps original).

[68] *See* Ben-Shahar, *supra* note 66 at 900.

toleration, namely that they distribute wealth from the more affluent consumers to the poorer ones. Or, at least, they do not distribute it the other way round.

Ben-Shahar concedes that certain rights deleted by boilerplate contracts – to sue in one's place of residence, to seek damages for breach of contract or tort, to have control over one's data usage, etc. – are important.[69] However, he observes that deletion of these rights comes with price consequences.[70] For example, a firm that does not fear litigation (due to mandatory arbitration or choice-of-forum clauses, as well as liability and warranty waivers) will have lower costs of business. Similarly, a firm that can benefit from using consumers' data and IP will enjoy higher revenue. Hence, the price that it directly charges its consumers can be lower.

Conversely, removing the CUTs (and thereby increasing the chance of litigation) will increase business costs. The firms will shift the costs onto the consumers by charging them higher prices. When the prices are higher, the least well-off consumers will no longer be able to afford the product. As a result, the affluent members of the society will spend more money (in exchange for better legal protections) while the poorer ones will not be able to afford the product in the first place.[71]

Ben-Shahar illustrates this view by pointing to the repeat customers of Apple. Despite knowing the ToS of iOS and other software (including the infamous "iTunes EULA"), they keep buying Apple products.[72] He argues that people purchasing the iPhones are happy to be charged a lower price in exchange for their rights' limitation. Further, in Ben-Shahar's words: "it is likely that the worst deal these Apple customers can make is to purchase better legal terms from Apple."[73] In the end, most iPhones won't malfunction, and most people will not suffer any damage. So, the chance that they will have to sue is so low that keeping a right to do so is not worth the necessary increase in the price—especially given that it would mean pricing some consumers out of the market.

The choice of the example is very telling. Ben-Shahar further writes:

> There may be a minority of citizens— I would guess part of a sophisticated elite— for whom the boilerplate rights-deletion bargain is undesirable and even offensive. For them, the degradation of consent and of legal entitlements cannot be priced. They want the right to sue in courts, they want firm accountability measured by full consequential damages for their harms, they want personal data to remain personal, and they want access to information to be regulated by intellectual property law, not by license agreements. If they must, they are willing and able to pay more for this bundle of upgrades. Unfortunately, meeting the preferences of such groups would require the entire pool of consumers, including the vast majority indifferent to such privileges, to pay more as well. And so everyone would pay for benefits that some are disproportionately likely to enjoy.[74]

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[69] *Id.*at 895.
[70] *Id.*at 895.
[71] *Id.*at 896 (writing "But self-selection is not feasible when firms cannot price differentiate, or when transaction costs constrain firms to offer a uniform package. In this situation, a desirable solution, both efficient and consistent with democratic values, is for vendors to offer the bundles that match majoritarian preferences. Allowing a small minority to impose its preferences on the majority price of consumers, by enacting rules that mandate the quality bundle that this small subgroup prefers, would likely expel many who cannot afford this package out of the market.").
[72] *Id.*at 897.
[73] *Id.*at 898.
[74] *Id.*at 900.

According to this view, a right to receive compensation for damages, a right to a class action, or to sue in one's state are some luxury goods that only the "sophisticated elite" wants to retain. However, most iPhone users do not need such luxuries. Notably, within this particular example, Ben-Shahar is probably right. It might just as well be the case that, if given the option to get a cheaper iPhone with CUTs, or a more expensive iPhone with consumer-friendly ToS, many people would choose the former. The question is: why?

What this argument overlooks is that Apple customers are already more affluent than many members of society. Their ability to internalize the future loss is much higher than everyone else's.[75] Hence, they can afford to be risk-tolerant in their choices.

Indeed, understood in this way, the CUTs' presence in boilerplate functions as a kind of "reverse insurance." With regular insurance, many people pay some premium so that the unfortunate (and supposedly random) individual who suffers damage (through an accident or other supposedly random event) can be compensated. The premium, obviously, needs to be lower than the loss expected from the accident. It makes more sense within the insurance logic to pay some premium and receive compensation for the future loss (even if the chance of it materializing is low) than to face the uncertainty stemming from a possible high loss. Yet, some people do not buy insurance, even health insurance.[76] Is it because they value the premium as not worthy? Some of them. Others, however, might simply not be able to afford it.[77]

"Reverse insurance" means that many people all decide to pay a lower price – a "negative premium" – in exchange for accepting that once a (supposedly random) individual suffers a future loss, she will not be compensated (or at least have a much lower chance of receiving compensation). So instead of everyone paying a higher price, and everyone retaining a right to a class action, we all accept that most of us will not suffer damage, but once one does, she will not be able to recover it.

However – and this is crucial – someone will suffer the loss. Someone's phone will malfunction. Someone will get addicted to an app using her data to personalize the experience.[78]

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[75] See MARIANNE BERTRAND & EMIR KAMENICA, *Coming Apart? Cultural Distances in the United States over Time*, 20 (2018), https://www.nber.org/papers/w24771 (last visited Mar 17, 2022) (the Authors empirically show the correlation between owning an iPhone and affleunce. They write "Knowing whether someone owns an iPad in 2016 allows us to guess correctly whether the person is in the top or bottom income quartile 69 percent of the time. Across all years in our data, no individual brand is as predictive of being high-income as owning an Apple iPhone in 2016.").

[76] In 2020, 31.6 million Americans were uninsured. See: Jenny Yang, *Number of people without health insurance in the United States from 1997 to June 2021*, (November 17, 2021), STATISTA, https://www.statista.com/statistics/200955/americans-without-health-insurance/.

[77] For the discussion of when consumers' purchases (or lack thereof) signify their willingness to buy, and when their ability to buy, see: MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012) (writing "But this argument is unconvincing. Even if your goal is to maximize social utility, free markets may not do so more reliably than queues. The reason is that the willingness to pay for a good does not show who values it most highly. This is because market prices reflect the ability as well as the willingness to pay. Those who most want to see Shakespeare, or the Red Sox, may be unable to afford a ticket. And in some cases, those who pay the most for tickets may not value the experience very highly at all.)."

[78] For evidence of social media addiction, see: Vikram R. Bhargava & Manuel Velasquez, *Ethics of the Attention Economy: The Problem of Social Media Addiction*, 31 BUSINESS ETHICS QUARTERLY 321–359 (2021); for a legal analysis of the problem, see: Allison Zakon, *Optimized for Addiction: Extending Product Liability Concepts to Defectively Designed Social Media Algorithms and Overcoming the Communications Decency Act*, 2020 WIS. L. REV. 1107 (2020).

Someone will realize that the actual price they are being charged is higher than what they expected.[79]

The affluent consumers are better equipped to tolerate the damage. You might want to call them "cheaper cost internalizers."[80] If their phone breaks down and they cannot get it replaced, they will get upset but ultimately buy a new one. If they realize that they misunderstood a contract and are being charged a higher price than expected – they will be angry but, eventually, pay the bill and move forward. If they develop a mental health problem by interacting with a service addictive by design, they will go see a therapist. However, someone who lives paycheck to paycheck will not see the lack of ability to sue for damages as a "missing luxury." Instead, they will – very personally – experience the pain stemming from the inability to join the class action.

Yes, the presence of CUTs has price consequences. However, the beneficiaries of these consequences are not the least well-off members of society. They are the primary victims, subsidizing the lower price with the future losses they will incur. These lower prices seem like a good deal to the affluent consumers who, should the future loss actually occur, will get upset but ultimately accept it and move on. The story we tell ourselves – that the CUTs benefit the poor – is based on an unrealistic view of how their livelihoods are funded – paycheck to paycheck and food stamps.[81]

2.2. Alternative Narrative: Boilerplate Transfers Wealth from the Poorer to the Wealthier

Let me tell you another story. Imagine you are buying a laptop and the seller gives you the following choice. You can either pay $290, but the consequence will be that one family, somewhere in the US – a family you don't know and will never meet – will go bankrupt and be forced out of their home. Or you can pay $300, and that event will not take place. What would you choose? What is the morally right option to choose?

"Why would that happen?" – you might wonder – "what is the link between me buying the laptop and someone losing their livelihood?" The seller answers: "you know, these things sometimes malfunction. There is a very low but real chance that the laptop's charger will break, burning the electric installation in the household and ruining the computer. In our boilerplate, we exclude all liability linked to the damages stemming from your use of the laptop. We also stipulate that to sue us, you need to travel all across the country. If that event happens to a family who has insurance and can easily buy another laptop, good for them. However, statistically speaking, we know that at least one poor household will have that accident happen to them. This family needs a laptop to look for jobs and for children to study. They took a payday loan to buy the product. Yet, when the installation burns (making their fridge or AC unusable), as they don't have insurance,

[79] For a discussion of "overcharge" in consumer retail markets, see: Van Loo, *supra* note 44.

[80] A variation of the "cheapest cost avoider" concapt introduced by Guido Calabresi, see: GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 35–95 (2008).

[81] See MARK ROBERT RANK, LAWRENCE M. EPPARD & HEATHER E. BULLOCK, POORLY UNDERSTOOD: WHAT AMERICA GETS WRONG ABOUT POVERTY 134 (2021), https://oxford.universitypressscholarship.com/10.1093/oso/9780190881382.001.0001/oso-9780190881382 (last visited Mar 26, 2022) writing ("Median wages for full- time male employees are actually lower today than they were in 1973. Furthermore, the stability of jobs has become more precarious. Likewise, the social safety net has been weakened considerably over time. As a result, greater numbers of Americans are living one paycheck away from poverty. A recent study from the Federal Reserve found that 37 percent of Americans do not have enough savings put aside to protect them from a $400 emergency.)."

they'll spend all the little cash they have[82] on fixing it and foreclose on the payday loan. If not for the boilerplate, the legal aid office in their state would sue us and recover the damages. But that office does not have the resources to travel out of state and challenge our exculpatory clauses, so tough luck. But don't worry, you'll never meet them and will save ten bucks!"

Of course, there are many "ifs" in this story. And, admittedly, it is a bit unfair – appealing to emotions and vilifying consumers who simply look for the lowest prices. Yet, is it fair to claim that the right to sue for damages – according to some, the bedrock of American tort law rising up to the level of a constitutional principle[83] – is a luxury good appealing only to the "lawyerly elite?"[84] Who cares about lawyers and professors? They have money; they will be fine. Why would I spend a dime to help them? Yet, if it is about helping my high school friend, a good guy who had it tough, or a vet who fought for our freedom, I might happily show some solidarity. I don't have a preference to help the well-off. I might very much have a preference for social solidarity. You see, it's all about the narrative.

However, maybe the price effect of having the CUTs in boilerplate is not $10 but $100 on one laptop. Then, indeed, some people would be priced out of the market, and the problem becomes more nuanced. This is an empirical question, an answer to which will depend on the specific circumstances. Yet, what is clear is that the more people chip in, the smaller the effect on the price will be. If everyone buys insurance, the premium goes down. Hence, it will be cheaper to help the unfortunate folks who suffer future damage if everybody pays the premium. Can we expect that of the individual consumers?

I think it is immoral to do so. Why should a consumer – often struggling herself – bear the weight of the moral choice of paying more to show solidarity or not? This is where the government should step in. If we mandate the "insurance" by making the CUTs unenforceable – as we already do with product-safety legislation – people won't need to decide whether they want to subsidize the future legal recourse of a poor household. They will simply have to do so when buying the product. Will this be contrary to the preferences of some individuals? Certainly yes. But should the law honor the preference for a marginally lower price if the consequence of meeting that preference is that someone will, without their fault, lose their livelihood? I am far from certain.

This is the logic of the European consumer contract law. This is what the "socialization of risk"[85] means in practice. And yes, some very affluent people would also benefit from it. A law professor will sue Apple if she wishes to, and all the iPhone users will have subsidized her right to do so. At the same time, a poor household whose livelihood depends on the legal aid office's ability to sue for damages will not go bankrupt. And all the consumers will have subsidized this ability as well.

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[82] Let us remember that more than 1/3 of Americans cannot afford more the $400 in emergency spending. *Id.*at 134.

[83] *See* JOHN C. P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 31 (2020) (writing "The idea behind the principle of civil recourse is straightforward. Our legal system recognizes in various ways that each of us is entitled to be free of certain kinds of interferences [or to have certain things done for us]. The more serious government is about enjoining these interferences, and the more serious each of us is about complying with the relevant norms of conduct, the more powerful is the argument that rights are at stake. When a right of this sort is violated, the victim should be able to demand certain things from the wrongdoer. Yet a demand of this kind would be hollow if the wrongdoer were simply free to ignore it. Thus, the state renders the victim's demand legally enforceable, so long as it is authenticated through the judicial process. In opening courthouse doors, government gives victims an avenue of civil recourse.").

[84] *See* Ben-Shahar, *supra* note 71 at 900.

[85] *See* HOWELLS, TWIGG-FLESNER, AND WILHELMSSON, *supra* note 48 at 8.

3. Possible ways out

The primary aim of this chapter has been to get the idea across. My goal has been to demonstrate that the distributive consequences of enforcing the CUTs in boilerplate are such that the least-well-off consumers disproportionately bear the costs and subsidize those more affluent. I believe that the stories we tell ourselves, and the paradigmatic examples we rely on, do influence the political process. For the CUTs to go, people need to want them to go. How exactly this goal is achieved concerns me less. Yet, it just so happens that in legal scholarship, one's expected to offer solutions to the problems one identifies. In the remainder of the chapter, I suggest some possible pathways. However, I'd like the reader to bear the distinction in mind – just because one might disagree with any of the means listed below, it should not yet translate into questioning the ultimate goal.

3.1. A direct challenge to CUTs in boilerplate

The first possibility is for the law to render the CUTs in the boilerplate void/illegal directly. One can conceive of two pathways: legislative intervention and common law. Let us look at each.

The most straightforward move would be to adopt legislation akin to the European Union's Unfair Terms Directive.[86] Such an act could outlaw unfair terms as a matter of a general clause (like the EU does) or just focus on specific categories of CUTs. This is the classic "standards vs. rules" problem.[87] The latter approach could single out the most harmful clauses, like class-action waivers or exclusion of tortious liability, without creating the legal uncertainty associated with newly adopted vague norms. It does risk, however, that businesses will try to game the system by creating new hurdles in their boilerplate.

Further, one could imagine both a federal statute outlawing the CUTs in the whole country, and state legislatures experimenting with different approaches. The appeal of the former is that consumers would receive equal protection regardless of their place of domicile. The problem, on top of the difficulty of having such an act pass through Congress, is that, once passed (in a compromise version), further interventions on the state level could be preempted. The appeal of states acting in their own capacity, on the other hand, is the ability to observe the effects of such a law on prices and consumer disputes.[88] Maybe the "boilerplate apologists" are correct, and the effects on prices would be immense. Or perhaps, as the examples of countries having such legislation in place seem to suggest, the impact would be minimal. We do not know yet, though we could test this.

There is also the institutional choice to be made. Should we rely solely on courts to enforce such statutes, or are there reasons to engage in administrative oversight akin to the "abstract control" in the European Union? The latter approach has been recently suggested by Yehuda Adar and Shmuel Becher.[89] Among several reasons to favor it, like speed or expertise, administrative oversight would also help eliminate the "in terrorem" clauses that, as of today, companies can include in the boilerplate without costs.[90]

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[86] The idea has been discussed in American legal scholarship. See, e.g., RADIN, *supra* note 61 at 233–239; Adar and Becher, *supra* note 2 at 2431–2432.

[87] For the classic treatment of the subject, see Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379 (1985); see also: Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

[88] The "law as a product" approach, see Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. ECON. & ORG. 225 (1985).

[89] See Adar and Becher, *supra* note 2 at 2441–2460.

[90] Marks, *supra* note 36.

However, legislative intervention is not the only path forward. Fortunately, one might say, given how difficult it would be to have it passed (at least on the federal level). Several suggestions on how common law could step up to combat the CUTs have been suggested in the literature.

Nancy Kim, writing specifically about online "wrap" contracts, suggested reconsidering the rules on assent to boilerplate.[91] As of today, courts look at boilerplate contracts as either assented to by consumers in toto or not assented to at all and thereby not binding.[92] To throw away an entire agreement, with all the consequences of doing so, is a difficult decision for a judge. Yet, if a court could find some clauses null and void because a consumer had no idea they were there, it could be more willing to step in. What would be the material ground to question some of the clauses?

Kim suggests reinvigorating the common law doctrine of unconscionability. As of today, the threshold for declaring a clause unconscionable is very high, as both procedural and substantive grounds need to be established. However, the courts (and the Restatement) have spelled out these requirements in a different socio-economic reality. The same high-level goals would possibly be better advanced by a different reading of the unconscionability doctrine.[93]

Margaret Jane Radin has advanced another interesting idea for common law, relying on tort rather than contract. Why would one do so when dealing with boilerplate? Radin writes:

> Receipt of boilerplate is often more like an accident than a bargain. What follows from this fact for legal oversight of boilerplate? Bargains come under contract law; accidents come under tort law.[94]

This, admittedly, is a bit of a stretch, but only a bit. As a matter of fact, consumers neither read the boilerplate nor know what's in there, not to mention that they often have no real choice. So you "bump into" your boilerplate as much as you accept it.

Under Radin's conception, the courts should start recognizing the tort of "intentional deprivation of basic legal rights."[95] In her words:

> A firm that imposes severe remedy deletions of rights that are at least partially market-inalienable, under circumstances of nonconsent and mass-market distribution, could be liable in tort for intentional deprivation of basic legal rights (…) [P]reliminary suggestion is that a purported contract containing offending boilerplate should be declared invalid in toto, and recipients should instead be governed by the back-ground legal default rules.[96]

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[91] KIM, *supra* note 59 at 193.
[92] *Id.*at 193 (writing "The problems created by contracts of adhesion in general, and wrap contracts in particular, stem from contract law's failure to provide a middle ground between assent and no assent").
[93] *Id.*at 208 (In Kim's words: "I propose that the doctrine of unconscionability be looked at more holistically. Although consistent with the sliding-scale approach, it would not require an express finding of both procedural and substantive unconscionability. Unconscionability in many cases cannot be so easily divided. Courts are generally reluctant to assess the substance of terms. Furthermore, substantive unconscionability relies on norms which may be inappropriate in wrap contracting scenarios. Norms reflected in online terms may not evidence fairness or efficient business practices; rather they may be the product of anticompetitiveness. Standard terms that are adopted by all companies in a market segment result in de facto term fixing that, like price fixing, is suboptimal and eliminates consumer choice.").
[94] RADIN, *supra* note 61 at 197.
[95] *Id.*at 211.
[96] *Id.*at 211–213.

Relying on tort rather than contract common law comes with the same advantage as the "abstract control" under statutory law. One does not need to go to court to remove the CUTs from the boilerplate. Simply including such clauses, regardless of whether actual harm has materialized or not, is sufficient for the legal system to step in.

The last interesting proposal – aimed less at having the law remove the CUTs from the boilerplate but rather at facilitating market pressure – comes, again, from Nancy Kim. Noticing that courts impose the "duty to read" on consumers,[97] Kim believes that a corresponding duty – the duty to "draft reasonably" – should befall the businesses:

> The standard of reasonable drafting would require that businesses take specific measures to make their contracts noticeable. There are several aspects to this duty to draft reasonably. The first is visibility. The terms should be presented to attract the attention of the nondrafting party (...) The second aspect of reasonable drafting is that the drafting party should make reasonable efforts to present the terms in a way that makes it likely that the other party will *read* them, not simply *see* them (…) Another final aspect of the duty to draft reasonably is testing. There are many ways that companies can test the effectiveness of their contracts.[98]

With a reasonably drafted contract, consumers would be more aware of what exactly they assent to. This approach sees the market, not the law, as the primary vehicle for combatting the CUTs. Let us then look at that alternative.

3.2. Indirect challenges: more competition

As already discussed, the European Union has put in place a substantive regulation of consumer contracts, rendering the CUTs unenforceable and, sometimes, actively combating their continued use. Moreover, European consumers enjoy the "right to withdrawal," i.e., a right to walk back from a contract, without any reason, for up to 14 days after concluding it.[99] Further, consumers also enjoy sector-specific rights. For example, airline passengers have a right to compensation (ranging from 250 to 600 euro per person, depending on the distance) if their flight is delayed more than 3 hours.[100] All these measures clearly come with price effects, don't they?

Here's a puzzle: air travel in Europe is cheaper than in the United States.[101] The last flight I took from Krakow PL to Bologna IT (600 miles) in March 2022 cost $10 each way. Cell phone contracts and data plans are cheaper as well.[102] My unlimited data, calls, and texts cellphone plan in Poland costs $20 a month. Of course, some things – like fast food – are more expensive (not

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[97] For a discussion of the doctrinal arguments behind the duty to read, see: Benoliel and Becher, *supra* note 59 at 2260–2266.

[98] KIM, *supra* note 59 at 186–189 (emphasis original).

[99] For an overview and disucssion, see: Marco B. M. Loos, *The Modernization of European Consumer Law (Continued): More Meat on the Bone After All*, 28 EUROPEAN REVIEW OF PRIVATE LAW (2020).

[100] See Jeremias Prassl, *Reforming Air Passenger Rights in the European Union*, 39 AIR AND SPACE LAW (2014).

[101] *See* Rick Noack, Why are flights so much cheaper in Europe than in the U.S.?, WASHINGTON POST, https://www.washingtonpost.com/news/worldviews/wp/2017/10/12/why-are-flights-so-much-cheaper-in-europe-than-in-the-u-s/ (last visited Mar 30, 2022).

[102] *See* Sam Morris, *Are Your Country's Cellphone Plans a Rip-off? – The Markup*, https://themarkup.org/2020/09/03/cost-speed-of-mobile-data-by-country (last visited Mar 30, 2022).

least because of the value-added tax in most EU countries), but life in Germany is generally cheaper than life in the US.[103] And this is the case despite the fact that European businesses cannot rely on the CUTs available to their American counterparts. How is that possible?

The answer is simple: competition. With its more fragmented market, paired with the European Commission's strict approach to antitrust enforcement and merger control, Europe's markets see many more companies fighting for a consumer than in America.[104] And the cost of compliance with strict consumer protection law is not high enough to render European consumer prices higher than in the US. It really seems that, from this simple comparative analysis, if one cares about lowering consumer prices, one should join the neo-Brandeisian crowd trying to reinvigorate antitrust in America[105] and not defending corporations' ability to strip consumers of their rights in boilerplate.

From this perspective, competition can be seen to fulfill two objectives: offsetting the costs of consumer rights' regulation or substituting this regulation in the first place. What could the latter look like?

If we assume that people care about their rights not being taken away, and assume a competitive market, then we should observe corporations competing on their standard terms' consumer-friendliness. Both assumptions are bold, not to say counterfactual.

Regarding the latter, what would be needed is a (i) preference and (ii) knowledge. Could we get people to care? Could we do something for consumers to develop a preference for fair boilerplate? The narrative presented in this chapter is one possible piece in the quest to do so. "By preferring a consumer-friendly boilerplate, you're doing your part!" a nicely done video about a family being able to recover after their home burned down could state.

As for knowledge – i.e., consumers' understanding of the available boilerplates' contents – technology, discussed towards the very beginning of the chapter, could be helpful. NLP-powered applications can be used not only to assess the fairness of boilerplate under some legal standards but could also (i) summarize them[106] or (ii) look at them purely from the consumers' interest point of view.[107] It is not at all clear that consumers should learn about the contents of boilerplate by reading them – why not learn it from a summary/evaluation prepared by a third party?

As for the competitiveness of markets, we're currently in an era that several commentators have dubbed the "new gilded age."[108] The FTC allowed several controversial mergers to go through, and the market concentration is very high in some sectors. A revival of a more interventionist antitrust doctrine is one possible path to stopping or reversing this trend.[109] This, however, is a whole separate discussion to be had, beyond the argument of this chapter.

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[103] *See* Cost of living in Germany compared to United States, https://www.mylifeelsewhere.com/cost-of-living/germany/united-states (last visited Mar 30, 2022).

[104] For a tremendous overview of data, as well as the analysis of legal and economic causes, see: THOMAS PHILIPPON, THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS (First Printing edition ed. 2019).

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[106] *See* Razieh Nokhbeh Zaeem, Rachel L. German & K. Suzanne Barber, *PrivacyCheck: Automatic Summarization of Privacy Policies Using Data Mining*, 18 ACM TRANS. INTERNET TECHNOL. 53:1-53:18 (2018); Hamza Harkous et al., *Polisis: Automated Analysis and Presentation of Privacy Policies Using Deep Learning*, ARXIV:1802.02561 [CS] (2018), http://arxiv.org/abs/1802.02561.

[107] *See* Yonathan Arbel & Shmuel Becher, *Contracts in the Age of Smart Readers*, 90 GEORGE WASHINGTON LAW REVIEW (2022).

[108] *See* Rahman, *supra* note 53; TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (Illustrated edition ed. 2018).

[109] For a paper widely seen as the first big splash, see: Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE LAW JOURNAL (2016), https://digitalcommons.law.yale.edu/ylj/vol126/iss3/3 see also; Ramsi A. Woodcock, *Big Data,*

Conclusion

"Maybe they shouldn't be illegal," – said my colleague in the Fall of 2018 about the terms considered "unfair" by the EU – "don't consumers prefer to have them in, in exchange for lower prices?"

Some do. The question is: should the law, or should we as a society, honor this preference? In this chapter, I provided one argument for the negative answer: unregulated boilerplate might lead to lower prices, but once an accident befalls a consumer unable to internalize the damage, me saving a couple of bucks seems irrelevant when someone else is losing their home. We should stop repeating the story according to which all "the consumers" benefit from the price effects of boilerplate, while the only losers are the "lawyerly elite" whose preference for having an ability to sue is not met. The real victims of boilerplate are the least affluent among us, who won't be able to shake off an accident as a small nuisance, and will suffer the consequences of the affluent consumers' preference for lower prices.

What exactly is the best way for the CUTs to go away is of secondary importance to me. I'm sure that technological advances can support the quest for market pressure. Personally, I believe that legal intervention – either legislative or by the courts – is necessary. Yet, I'm happy to be proven wrong. What matters, for now, is the realm of the mind: if we believe that the CUTs cannot be tolerated, the first step in the process is behind us. It's my hope that, with this chapter, I've convinced at least some readers to subscribe to this view.

Price Discrimination, and Antitrust, 68 HASTINGS L.J. 1371 (2016); Jonathan B. Baker, Jonathan Sallet & Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 YALE L. J. 1916 (2017); WU, *supra* note 108; HERBERT HOVENKAMP, *The Warren Campaign's Antitrust Proposals*, (2019), https://papers.ssrn.com/abstract=3353716 (last visited Feb 1, 2021); Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, FACULTY SCHOLARSHIP AT PENN LAW (2019), https://scholarship.law.upenn.edu/faculty_scholarship/2113.