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# Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)

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# MUTUAL ASSENT, NORMATIVE DEGRADATION, AND MASS MARKET STANDARD FORM CONTRACTS—A TWO-PART CRITIQUE OF *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW (PART I)*

STEVEN W. FELDMAN\*

## ABSTRACT

Analyzing a difficult subject that pervades contract law and which is vital to the national economy, many scholars have written about boilerplate contracts. With her 2013 book, *Boilerplate: The Fine Print, Vanishing Rights and the Rule Of Law*, Professor Margaret Jane Radin weighs in on the discussion, rejecting utilitarian-welfare notions that economic efficiency can justify the extensive use of mass market boilerplate. In her main contention, Radin argues that mass market standard form contracts improperly degrade consumer rights in the area of voluntary consent (herein “normative degradation”).

Although her book has achieved great renown, receiving high praise from prominent commentators, with plaudits such as “groundbreaking,” “a great achievement,” and a “masterpiece,” I respectfully suggest that the book has problems on both doctrinal and normative grounds. In my Article, I summarize the author’s argument on normative degradation, identify my concerns, and propose an alternative formulation. My counter thesis is that both statute and court decisions properly support consumer rights in the area of voluntary consent for mass-market standard form contracts.

Besides being the first full-length critique of Boilerplate, this Article also has contributed some original observations to the secondary literature, most prominently identifying a division of authority on whether mutual assent and freedom of contract exist with adhesion contracts. I also provide a solution for these conflicts. Because a valid normative and legal argument must reflect accurate doctrinal principles, I question the views of those commentators praising Radin’s book as a valuable contribution to contract law.

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# I. INTRODUCTION

Analyzing a difficult subject that “pervades” contract law and which is “vital” to the national economy,<sup>1</sup> scholars over the years have produced a flood of articles covering boilerplate contracts.<sup>2</sup> With her 2013 book, *Boilerplate: The Fine Print*,

<sup>1</sup> E.g., Eyal Zamir, *Contract Law and Theory—Three Views of the Cathedral*, U. CHI. L. REV. (forthcoming 2014) (“Few topics in the past few decades have attracted more attention in contract scholarship than standard-form contracts, and rightly so.” Also stating, “there is hardly a more pressing challenge facing contract law.”); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 26 (2012) (“There is little doubt that the treatment of standard contracts is one of the most important puzzles facing modern contract law—and perhaps one of the most difficult.” Also stating, “Standard form contracts pervade the consumer arena.” and that they are “vital to the continued functioning of the economy.”); Michael M. Greenfield & Linda J. Rusch, *Limits on Standard-Form Contracting in Revised Article 2*, 32 U.C.C. L.J. 115, 115 (1999) (“[T]he use of standard-form documents pervades commercial transactions and is almost universal in consumer transactions.”).

<sup>2</sup> E.g., Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227 (2007) [hereinafter Barnes, *Fairer Model*]; Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174 (1983); W. David Slawson, *Standard Form Contracts*

*Vanishing Rights And The Rule Of Law*, Professor Margaret Jane Radin weighs in on the discussion, rejecting utilitarian-welfare notions that economic efficiency can justify the extensive use of mass market boilerplate. In her main contention, Radin argues that mass market standard form contracts improperly degrade consumer rights in the area of voluntary consent.<sup>3</sup>

Although her book has achieved great renown, receiving high praise from prominent commentators,<sup>4</sup> with plaudits such as “groundbreaking,” “a great achievement,” “eloquent and powerful,” and a “masterpiece,”<sup>5</sup> I respectfully suggest that the book has doctrinal and normative problems. In my Article, I summarize the author’s argument, identify my concerns, and propose an alternative formulation. My counter thesis is that both statute and case law properly support consumer rights in the area of voluntary consent for mass market standard form contracts.

A detailed overview of Radin’s thesis will aid the discussion. Radin begins by arguing that contracts inhabit Worlds A or B. Archetype World A contracts are

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and *Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>3</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (Princeton University Press 2013); *id.* at 19 (arguing that “normative degradation” has resulted in “delete[ion of] rights without consent in the name of contract”); *id.* at 29 (noting the “devolution of voluntary agreement”); *id.* at 82 (boilerplate contracts do not represent a true agreement); *id.* at 99-109 (arguing that utilitarian-welfare economic theory cannot justify boilerplate deletion of consumer rights); *id.* at 210 (stating boilerplate is “problematic on the issue of voluntary interaction”). Radin is the Henry King Ransom Professor of Law at the University of Michigan and William Benjamin Scott and Luna M. Scott Professor of Law, Emerita, at Stanford University. *Radin, Margaret Jane*, MICHIGAN LAW, <http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=mjradin>.

<sup>4</sup> See, e.g., David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 464 (2013) (a “dense and sprawling masterpiece”); Hugh J. Treacy, Benjamin J. Keele & Nick Sexton, Book Review, 105 L. LIB. J. 376, 376 (2013) (“[W]e now have a thoughtfully crafted work of scholarship that will challenge readers to achieve new understandings of contract law within our print and electronic boilerplate world.” Also calling her book “a groundbreaking work.”); Anon., *Recent Publications*, 126 HARV. L. REV. 1178, 1178 (2013) (“This insightful book engages with an omnipresent issue in the modern economy and will assist policymakers and courts alike in their attempts to protect consumers”); Robert Nagel, *Devil’s in the Small Print*, WALL ST. J., Dec. 20, 2012 (a “sophisticated and thought-provoking treatment”); Glenn C. Altschuler, *(Not So) Fine Print*, HUFFINGTON POST, Dec. 5, 2012 (“Radin makes a compelling case that boilerplate constitutes a clear and present danger to our core values.”); *Boilerplate Symposium VII: Oren Bar-Gill on Consent Without Reading*, CONTRACTSPROF BLOG (May 21, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-vii-oren-bar-gill-on-consent-without-reading-.html) (“Professor Radin’s book is an eloquent and powerful critique of the fine-term, boilerplate contracts that pervade modern life. . . . Radin’s book is a great achievement.”); *Boilerplate Symposium II: Theresa Amato on Remedies to the Problems Posed by Boilerplate*, CONTRACTSPROF BLOG (May 14, 2013), [http://lawprofessors.typepad.com/contractsprof\\_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html](http://lawprofessors.typepad.com/contractsprof_blog/2013/05/boilerplate-symposium-ii-theresa-amato-on-remedies-to-the-problems-posed-by-boilerplate.html) (“Professor Radin’s masterpiece *Boilerplate* sets forth the intellectual underpinnings for an energetic movement to correct the imbalance of power between corporations and consumers in fine print contracts.”).

<sup>5</sup> See *supra* note 4.

“bargained-for exchanges” between two parties where each party consents voluntarily and exercises “free choice” in a true agreement. This contract type is “typified” by a process of negotiation where under the ideal of “freedom of contract” both parties are satisfied with the deal.<sup>6</sup> Archetype World B contracts occur without “actual consent” where the consumer enters into contracts “without knowing it, or at least without being able to do anything about it.” “World B is the world of boilerplate”<sup>7</sup> and boilerplate “consistently shrinks legal rights to the vanishing point.” At the same time, Radin acknowledges that the law considers boilerplate to be a “valid method of contract formation.”<sup>8</sup>

Because of her contention that World B mass market boilerplate contracts lack the “indispensable” elements of a recognized contractual “bargain” and “voluntary” consumer choice, Radin posits that they are only “purported contracts.”<sup>9</sup> She criticizes the “defenders” of World B contracts because they have unsuccessfully tried to “shoehorn [or “gerrymander”] them into the World A “paradigm of contractual consent.”<sup>10</sup> She contends that these World B documents with their predominantly dense legalese often contain unfair terms that generally keep the consumer in the dark as they unduly favor the seller.<sup>11</sup> Radin terms this alleged devolution of voluntary consent “normative degradation.”<sup>12</sup>

While Radin focuses her critique of current contract law on normative grounds, she also recites and criticizes numerous doctrinal principles. Thus, for example, Radin in Chapter Seven, “Evaluating Current Judicial Oversight,” provides a twenty-page treatment of current judicial oversight of contract law and she includes a ten-page doctrinal discussion in Chapter Eight, “Can Current Oversight Be Improved?”<sup>13</sup> Radin acknowledges in Chapter Seven that it is proper to see how well current legal

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<sup>6</sup> RADIN, *supra* note 3, at 3, 14.

<sup>7</sup> *Id.* at 9, 31. Varieties of World B contracts include standardized adhesion contracts, offsite terms, shrinkwrap and clickwrap licenses, rolling contracts, and end user license agreements. *Id.* at 10-11.

<sup>8</sup> *Id.* at 12, 30.

<sup>9</sup> *Id.* at 3, 8, 10-12, 20, 22, 30, 158, 213; *see also id.* at 81 (World B contracts are based “on a ‘distorted’ notion of voluntariness”).

<sup>10</sup> *Id.* at 19, 31; *see also id.* at 82 (stating World B transactions use a “gerrymandered” concept of “agreement”).

<sup>11</sup> *Id.* at 30, 92, 128, 163; *see also id.* at 83 (discussing this phenomenon with insurance policies).

<sup>12</sup> *Id.* at 15-16, 19-32. Radin also argues that traditional contract theories cannot adequately address the problems of boilerplate contracts and that existing judicial remedies are largely ineffective in policing such unfair consumer transactions. Therefore, Radin suggests the expansion of tort law as her centerpiece reform strategy. In a complement to existing contract remedies, she posits a new tort, which she calls “intentional deprivation of basic legal rights.” This tort would also be a companion to another new tort that reconceptualizes abusive boilerplate as a defective “product” under the law of product liability. In Part II of this Article, to be published in 62 CLEV. ST. L. REV. (Forthcoming Fall 2014), I address Radin’s suggested tort reforms.

<sup>13</sup> Some of the black letter topics in these Chapters are unconscionability, limitation of remedies, the public policy defense, arbitration clauses, class actions, choice of forum clauses, exculpatory clauses, and software contracts. *Id.*

doctrine deals with the validity of boilerplate.<sup>14</sup> Ironically, she leaves out a number of legal arguments that would have aided her cause to a degree, which I have included in various sections below.

While Radin employs an accessible writing style with many interesting observations, her argument on normative degradation does not sufficiently address the core principles of mutual assent, most notably the objective theory of mutual obligation, the plain meaning rule, and the buyer's duty to read the contract. In effect, Radin's main doctrinal reform is to resurrect the discredited subjective doctrine as a general theory of voluntary assent<sup>15</sup> as she also misstates the objective doctrine of mutual assent.<sup>16</sup> Because of these inaccuracies (and others), she does not make her case that World B transactions are merely "purported contracts."

While no thoughtful proposed major shift in contract doctrine should be rejected out of hand, any credible new policy must be steeped in at least the fundamental doctrines of contract law to have any chance of adoption. No such possibility exists with Radin's radical overhaul of the guiding principles of contract. Because most scholars agree that approximately ninety-nine percent of all contracts in the national economy consist largely of standard forms,<sup>17</sup> Radin's challenge to mass market standard form contracts if implemented would mean a revamping for the worse of the American consumer contracting system.

In contrast, I will perform an intensive case law and statutory analysis emphasizing the fundamentals of contractual assent. I will also present a balanced discussion of the strengths and weaknesses of the arguments for or against her thesis. Thus, in the first section of this Article, I will discuss the differences between boilerplate, standard form, and adhesion contracts (Radin generally uses the terms interchangeably). My position is that Radin does not capture the distinct legal difference between adhesion contracts and standard form and boilerplate agreements. Therefore, I will show that the law already has doctrines in place to alleviate any issues of voluntary assent associated with mass market adhesion contracts.

The next major topic concerns the relation of the objective theory of mutual assent and mass market, standard form contracts. Subtopics will include the objective doctrine's elements and underlying policy; a comparison to the discredited subjective theory of assent; and a critique of Radin's view of the objective theory. Thereafter, I will unite these various strands of contractual assent as I address the objective theory and its connection to mutual assent and adhesion contracts.

I will then address whether Radin correctly argues that adhesion contracts are more accurately deemed "purported contracts." As part of this discussion, I will explore whether mutual assent can be present when actual, subjective agreement is missing. I will show that competing lines of authority have addressed whether legally valid consumer consent exists with adhesion contracts. I will further consider whether Karl Llewellyn's theory of "blanket assent" solves this conundrum for contracts of adhesion.

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<sup>14</sup> *Id.* at 123 ("Before considering what is to be done about boilerplate, we should take a look at what is now being done about it.").

<sup>15</sup> See *infra* Part III.D.3.

<sup>16</sup> See *infra* Part III.D.

<sup>17</sup> Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1148 (2008) [hereinafter Barnes, *Objective Theory*].

Next, I consider the unconscionability defense to the enforcement of adhesion contracts. This defense is far more robust than Radin's analysis would indicate. Lastly, I analyze the relation between freedom of contract and mutual assent versus Radin's approach in this area. Subtopics include the elements and policy behind freedom of contract and the connection to adhesion contracts. Because a valid normative argument about the contracting system must proceed from an accurate statement of the key doctrinal principles, my conclusion is Radin has not succeeded in showing that so-called World B contracts have caused normative degradation.

## II. BOILERPLATE, STANDARD FORM, AND ADHESION CONTRACTS: IS THERE A DIFFERENCE?

Radin makes numerous references to "boilerplate," "standard form contracts," and "contracts of adhesion." Her usage of these concepts, however, is inconsistent and confusing. The reason is for the most part, Radin equates the three categories even though—as I will demonstrate throughout this Article—adhesion contracts are the only type that arguably raise concerns about World B consumer assent.

### A. Radin's Inconsistent Usage

The inconsistency begins with the book cover. The title of Radin's book targets fine print "boilerplate"—not adhesion contracts—as the source of "vanishing rights" and a degradation of the "rule of law." In many passages, she criticizes "boilerplate" contracts without also calling them contracts of adhesion.<sup>18</sup> In other instances, she equates "boilerplate" and "standardized form" contracts<sup>19</sup> and she does the same for "standardized" and "adhesion" contracts.<sup>20</sup> Still again, she deems "boilerplate" contracts a subset of "contracts of adhesion"<sup>21</sup> as she elsewhere calls a boilerplate contract an adhesive contract.<sup>22</sup> In yet another instance she says that sometimes courts and scholars try to characterize a "boilerplate" contract as an adhesion contract.<sup>23</sup> At other times, however, she singles out contracts of adhesion as the overriding problem area for her theory of normative degradation<sup>24</sup> but then she says

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<sup>18</sup> E.g., RADIN, *supra* note 3, at 15 ("those who defend boilerplate must argue that boilerplate somehow meets the requirements of contract law"); *id.* at 16 ("In this book I will refer to this deletion of recipient's rights as the problem of boilerplate rights deletion schemes."); *id.* at 17 ("I will argue that attempts to bring boilerplate rights deletion schemes under the aegis of traditional contract theories by and large fail."); *see also id.* at 33 (deeming boilerplate contracts a subset of contracts of adhesion).

<sup>19</sup> E.g., *id.* at 8 ("This paperwork is boilerplate or, less colloquially, standardized form contracts."); *id.* at 102 ("[I]s a boilerplate scheme of standardized terms internal to a product efficient?").

<sup>20</sup> E.g., *id.* at 10 (twice referring to "standardized adhesion contracts"); *id.* at 9 ("standardized form contracts . . . have long been called contracts of adhesion").

<sup>21</sup> *See id.* at 33 (stating that mass market boilerplate rights deletion schemes are a type of contract of adhesion).

<sup>22</sup> *Id.* at 124 (calling boilerplate contracts "so-called contracts of adhesion").

<sup>23</sup> *Id.* at 222 (stating the authorities "try so hard" to force boilerplate into the adhesive contract category).

<sup>24</sup> *Id.* at 96 (stating that adhesion contracts have a shortfall of consent); *id.* at 128 (calling adhesion contracts the problem in unconscionability cases).

no problem exists with World A contracts “to some extent” being adhesion contracts.<sup>25</sup> In another place, she concedes that the world of truly-bargained for contracts can include adhesion contracts but she adds the proposed condition that the above principle is true only where the contract does “[n]ot purport to rearrange one party’s background legal entitlements in favor of the other.”<sup>26</sup> In another discussion point, she explicitly equates the three quoted concepts when she remarks,

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. . . . Such paperwork is often called boilerplate, because, like the rigid metal used to construct steam boilers in the past, it cannot be altered.<sup>27</sup>

Lastly, she asserts that her target for reform is “mass market boilerplate rights deletion schemes” that cancel “basic rights”<sup>28</sup> but she also heavily criticizes standard form and boilerplate contracts of a lesser character.<sup>29</sup> Indeed, she states that “the large scope of” World B contracts are “prima facie unjustified” because of “normative degradation.”<sup>30</sup>

It will be helpful to compare and contrast the established definitions of these three terms. “Boilerplate” means “fixed or standardized contractual language that the proposing party often views as relatively nonnegotiable.”<sup>31</sup> A “standard form” contract is “usually a preprinted contract containing set clauses, used repeatedly by a business or within a particular industry with only slight additions or modifications to meet the specific situation.”<sup>32</sup> While Radin in a footnote does define “adhesion contracts” as those “which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it”<sup>33</sup> she does not sufficiently compare adhesion contracts with standard form contracts and boilerplate.

Based on these inconsistencies, the reader will be confused in understanding Radin’s thesis on what differences, if any, exist between the above three categories. Put another way, is her main concern for normative degradation either “boilerplate,” “standard form” or “adhesion” contracts, or some combination of these concepts? Also, how is her classification consistent with the cases about the three categories and the applicable distinctions?

The upshot is that even taking as a given Radin’s theory that certain mass market consumer contracts cause normative degradation, Radin’s view of World B contracts

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<sup>25</sup> *Id.* at 210.

<sup>26</sup> *Id.* One example of an excluded contract in this category, Radin says, would be an insurance policy. *Id.*

<sup>27</sup> *Id.* at 9.

<sup>28</sup> *Id.* at 212.

<sup>29</sup> *See, e.g., id.* at 8-11.

<sup>30</sup> *Id.* at 97.

<sup>31</sup> BLACK’S LAW DICTIONARY 198 (9th ed. 2009).

<sup>32</sup> BLACK’S LAW DICTIONARY 373 (9th ed. 2009).

<sup>33</sup> RADIN, *supra* note 3, at 277 n.10 (quoting California case law).



sweeps too broadly and inconsistently. The reason is that she has sometimes included in this classification contracts that are merely standard form or boilerplate, which instruments under accepted legal definitions have fewer issues than adhesion contracts regarding voluntary assent.<sup>34</sup> As a result, her thesis is confusing on the nature of the instruments she finds questionable.

### *B. Radin on Adhesion Contracts*

A related flaw in Radin's mingling of the three categories is her minimal discussion of the legal elements and objectives of adhesion contracts. A careful examination of this vehicle and comparison to boilerplate and standard form contract will show why adhesion contracts are the only contract type under World B that might inherently call the consumer's assent into question.

Citing a leading California Supreme Court decision, the California District Court of Appeals in *Powell v. Central Cal. Fed. Sav. & Loan Assn.*<sup>35</sup> fully explained adhesion contracts:

The term 'contract of adhesion' refers to 'a standardized contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract, due to the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected by the second party on a 'take it or leave it' basis, without opportunity for bargaining and under such conditions that the 'adherer' cannot obtain the desired product or service save by acquiescing in the form agreement.

Adhesion contracts exist with consumer transactions whereby the merchant offers a form contract to the public on a "mass basis."<sup>36</sup> Here, "The dominant party knows that the other would not [necessarily] accept the term, and thus [the dominant party] employs the practices of minute print, unintelligible legalese, or high pressure sales technique."<sup>37</sup> Accordingly, adhesion contracts focus on the conduct of both parties where one party is the injured party and other is the injuring party. The weaker party must have had "no reasonable choice" but to sign the contract and the merchant seeking enforcement must have narrowed the consumer's choices of the

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<sup>34</sup> See *infra* Part II.B. Radin has taught a class at the Michigan Law School entitled, "Boilerplate: Legal Regulation of Adhesion Contracts." <http://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/AboutClass.aspx?term=1920&classnbr=10171>. Her own course-title focus on "adhesion contracts" confirms my view that she should have clearly and consistently identified adhesion contracts as the real area of potential concern.

<sup>35</sup> *Powell v. Cent. Cal. Fed. Sav. & Loan Assn.*, 130 Cal. Rptr. 635, 641 (Cal. Dist. Ct. App. 1976) (quoting *Steven v. Fidelity & Casualty Co.*, 377 P.2d 284, 297 (Cal. 1962)). For other jurisdictions relying upon this definition, see, for example, *SI Commc'ns, Inc. v. Nielsen Media Research*, 181 F. Supp. 2d 404, 413 n.8 (S.D.N.Y. 2002); *Abbott v. Amoco Oil Co.*, 619 N.E.2d 789, 794 (Ill. Ct. App. 1993); *Waltrip v. Osage Million Dollar Elm Casino*, 290 P.3d 741, 745 n.2 (Okla. 2012).

<sup>36</sup> *Burgess Constr. Co. v. State*, 614 P.2d 1380, 1384 (Alaska 1980).

<sup>37</sup> *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1180 (3d Cir. 1979).

first party by “illegitimate means.”<sup>38</sup> More specifically, the weaker party needing the goods or services ordinarily is in no position to “[s]hop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.”<sup>39</sup> Therefore, implicit with an adhesion contract is that the weaker party is unable to obtain the benefit of the bargain offered from an acceptable source.<sup>40</sup>

Radin only hints at other points of comparison as between adhesion contracts, boilerplate, and standard form instruments. Under the case law, numerous differences do exist among these contract types. First, when there is a standard form, small font contract, but the facts do not call the consumer’s consent into question, the contract is not automatically adhesive.<sup>41</sup> Fine print alone is not legally objectionable; it is only when coupled with other circumstances making comprehension difficult, such as “maze of fine print” hiding key terms, that there is potential for a legally viable objection.<sup>42</sup> Second, “take-it-or-leave-it” contracts under various decisions are not necessarily adhesion contracts—the reason is an adhesion contract requires proof that the stronger party has limited the weaker party’s liabilities or duties and the latter has experienced coercive economic pressure to sign.<sup>43</sup> Third, numerous cases have ruled that a boilerplate contract is *not* automatically adhesive.<sup>44</sup> Fourth, a mere inequality in bargaining power does not

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<sup>38</sup> *Id.* at 1174, 1179-80. For a discussion of the origins of adhesion contracts in contract law doctrine, see *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 35-36 (Mich. 2005).

<sup>39</sup> *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971).

<sup>40</sup> *Compare* *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 976 (6th Cir. 2007) (citing *Walker v. Ryan’s Family Steak Houses, Inc.*, 400 F.3d 380 (6th Cir. 2005)), *with* *Morris R. Cohen, The Basis of Contract*, 46 HARV. L. REV. 553, 588 (1933) (“he who is under economic necessity is not really free”).

<sup>41</sup> *Brown v. Pac. Life Ins. Co.*, 462 F.3d 384, 397 (5th Cir. 2006); *Rozeboom v. Nw. Bell Tel. Co.*, 358 N.W.2d 241, 242 (S.D. 1984) (simply because a contract is standardized and preprinted does not make it an adhesive contract).

<sup>42</sup> *Edart Truck Rental Corp. v. B. Swirsky & Co.*, 579 A.2d 133, 137 (Conn. Ct. App. 1990).

<sup>43</sup> *King v. Larsen Realty, Inc.*, 175 Cal. Rptr. 226, 232 (Cal. Dist. Ct. App. 1981); *Jones v. Dressel*, 623 P.2d 370, 375 (Colo. 1981) (even though a contract is a printed form and offered on a “take-it-or-leave-it” basis does not make it an adhesion contract). With an adhesion contract, “the offeree finds himself virtually compelled by economic necessity to accept a contractual term that he actively opposes, or would actively oppose if he thought opposition not futile.” *Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1179 (3d Cir. 1979). This reference to economic necessity should not be overconstrued, however, because otherwise an adhesive contract could be the same as a contract procured through economic duress. *See* *Wassink v. Hawkins*, 763 P.2d 971, 973-74 (Alaska 1988) (stating elements of economic duress).

<sup>44</sup> *See* *St. Jude Medical, S.C., Inc. v. Biosense Webster, Inc.*, No. 12-621 ADM/AJB, 2012 WL 1576141, at \*3 (D. Minn. May 4, 2012) (citing *Hauenstein & Bermeister, Inc. v. Met-Fab Indus., Inc.*, 320 N.W.2d 886, 889-90 (Minn. 1982) (boilerplate not always adhesive)); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 700 (10th Cir. 1989) (rejecting a claim that an arbitration agreement was a contract of adhesion simply because it contained boilerplate language); *Hardin v. Morningside of Jackson, L.L.C.*, 425 F. Supp. 2d 898, 904 (W.D. Tenn. 2006) (stating that although “adhesion contracts typically involve boilerplate,

result in an adhesion contract.<sup>45</sup> “Although some authors have used the terms ‘standard-form agreement’ and ‘contract of adhesion’ interchangeably, adhesion contracts are a special type of standard form agreement.”<sup>46</sup> Based on the above principles, an adhesion contract is not per se unenforceable.<sup>47</sup>

The next issue pertains to Radin’s critique that boilerplate results in “exploitation” of consumers.<sup>48</sup> While “exploitation” is never defensible,<sup>49</sup> she underplays a basic premise of our market economy that parties (including merchants) are entitled to take “aggressive positions” within the bounds of the law to maximize the benefits they believe they are entitled to receive under their contracts. After all, as an Alabama Supreme Court Justice cogently observed, “That is what parties to contracts are *expected* to do.”<sup>50</sup> In this same vein, the law generally does not seek to restructure the American economy but strives to work within it and to help the players flourish.

Radin appears to agree with the right of parties to take aggressive bargaining positions when she says solving wealth disparity in the United States is not a problem for the Constitution, statute or contract law.<sup>51</sup> Therefore, valid economic justifications can motivate a seller to protect an enforceable adhesion contract;

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take-it-or-leave-it terms offered by a ‘superior’ party, the ‘distinctive’ indicia of a true adhesion contract is that ‘the weaker party has no realistic choice as to [the] terms’”); *City of Gettysburg v. United States*, 64 Fed. Cl. 429, 452 (2005) (even where the contract language was boilerplate, “[t]his fact alone is not enough to support a claim of adhesion”); *Rassa v. Rollins Protective Servs. Co.*, 30 F. Supp. 2d 538, 543 (D. Md. 1998) (same); *Bevere v. Oppenheimer & Co.*, 862 F. Supp. 1243, 1250 (D.N.J. 1994) (same).

<sup>45</sup> *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 7 (Mont. 2002).

<sup>46</sup> Kaustuv M. Das, Comment, *Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test*, 77 WASH. L. REV. 481, 484 (2002).

<sup>47</sup> *Byrd v. SunTrust Bank*, No. 2:12-cv-02314-JPM-cgc, 2013 WL 3816714, at \*7 (W.D. Tenn. July 22, 2013); *Conseco Fin. Servicing Corp. v. Wilder*, 47 S.W.3d 335, 342 n.20 (Ky. Ct. App. 2001).

<sup>48</sup> RADIN, *supra* note 3, at 85, 151, 152.

<sup>49</sup> See BLACK’S LAW DICTIONARY 660 (9th ed 2009) (defining term as “the act of taking unjust advantage of another for one’s own benefit”).

<sup>50</sup> *Hunt Petroleum Corp. v. State*, 901 So. 2d 1, 15 n.12 (Ala. 2004) (Houston, J., concurring specially); see also *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128, 132 (7th Cir. 1996) (“Parties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress.”); *Fountain Leasing, LLC v. Kloeber*, No. 3:12-cv-317, 2013 WL 4591622, at \*6 (E.D. Tenn. Aug. 28, 2013) (“[P]arties engaged in a commercial transaction pursue their own self-interest and understand and expect that the parties with whom they are dealing are doing likewise.”); 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 1.2 at 6 (4th ed. 2004) (in a market economy, each party to a contract “[s]eeks to maximize its own economic advantage on terms tolerable to the other party”).

<sup>51</sup> RADIN, *supra* note 3, at 152.

nothing inappropriate will result when a merchant simply drafts terms that will strongly ensure that he or she would prevail in any litigation with a buyer.<sup>52</sup>

Lastly, Radin does not disclose that some jurisdictions have different elements in their definition of adhesion contracts. In Maryland, for example, the services under an adhesion contract are usually “essential in nature,” such as education, housing, hospital, and public utility services.<sup>53</sup> In the United States Court of Appeals for the Second Circuit, an adhesion contract exists only where the drafter uses “high pressure tactics” or “deceptive language in the contract” or where the contract is “unconscionable.”<sup>54</sup> In the United States Court of Appeals for the Ninth Circuit, a contract may be adhesive “even if the customer has a meaningful choice as to service providers.”<sup>55</sup> Tennessee decisions require proof that the consumer’s refusal to sign would have resulted in some detriment besides the consumer’s inability to obtain goods or services from the particular merchant.<sup>56</sup> The United States Court of Federal Claims requires the element for the plaintiff’s burden of proof that he or she was not given an opportunity for input or negotiation.<sup>57</sup> Under Colorado law, an adhesion contract is one “forced upon an unwilling and often unknowing public.”<sup>58</sup> In a final example, Minnesota adds to the multi-factor analysis the “business sophistication” of each party.<sup>59</sup> Ultimately, while a prominent commentator observes that “Probably most contracts of adhesion are simple and reasonable,”<sup>60</sup> courts are divided on whether adhesion contracts are intrinsically improper.<sup>61</sup> Given these nuances among

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<sup>52</sup> *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277, 282 (Ariz. 1987) (citing Rakoff, *supra* note 2, at 1237); *see also* Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 149 (2005) (“Contracts of adhesion are no longer merely a device to cut costs in a mass marketing situation. They are used for their substantive role of avoiding disagreements and imposing terms on the other party.”).

<sup>53</sup> *Seigneur v. Nat’l Fitness Inst., Inc.*, 752 A.2d 631, 638 (Md. Ct. App. 2000). In some courts, a contract is not adhesive where the subject matter does not satisfy a public necessity and the items can be obtained elsewhere. *Siebert v. Amateur Athletic Union of U.S., Inc.*, 422 F. Supp. 2d 1033, 1040 (D. Minn. 2006).

<sup>54</sup> *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997); *accord* *Sablosky v. Edward S. Gordon Co., Inc.*, 535 N.E.2d 643, 647 (N.Y. 1989).

<sup>55</sup> *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 985 (9th Cir. 2007).

<sup>56</sup> *Patteson v. McAdams Tax Advisory Grp., LLC*, No. 09-2085 Ma/P, 2010 WL 711161, at \*4 (W.D. Tenn. Feb. 14, 2010) (citing cases).

<sup>57</sup> *City of Gettysburg v. United States*, 64 Fed. Cl. 429, 452 (2005).

<sup>58</sup> *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981).

<sup>59</sup> *Interfund Corp. v. O’Byrne*, 462 N.W.2d 86, 89 (Minn. Ct. App. 1990).

<sup>60</sup> JOSEPH M. PERILLO, *CALAMARI AND PERILLO ON CONTRACTS* 348 n.3 (6th ed. 2009).

<sup>61</sup> *Compare* *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 147 (Pa. Super. 1985) (“The phrase ‘contract of adhesion’ and the evil it suggests have been familiar for many years.”), *with* *Klos v. Polskie Linie Lotnicze*, 133 F.3d 164, 169 (2d Cir. 1997) (adhesion contracts “offend[] basic notions of civility and fair play”), *and* *Powell v. Cent. Cal. Fed. Sav. & Loan Assn.*, 130 Cal. Rptr. 635, 642 (Cal. Dist. Ct. App. 1976) (“There is nothing sinful or illegal about a contract of adhesion.”), *and* *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 273 (W. Va. 2002) (the question for courts is distinguishing “good adhesion contracts which should be enforced from bad adhesion contracts which should not”).

the jurisdictions, care must be taken to avoid implying that the elements of an adhesion contract are a monolithic concept.

Conceding the merchant's significant advantages with adhesion contracts, are there any palliatives for consumers? The answer is that while courts expect and allow contracting parties to maximize their bargaining positions with adhesion contracts, the courts also apply a counterweight to this principle to protect the consumer against potential merchant overreaching. Most courts are quite sensitive to possible merchant misuse of adhesion contracts, which is why almost all courts scrutinize contracts of adhesion "skeptically."<sup>62</sup> Thus, a federal district court has observed that even if an arbitration agreement were adhesive, the court would not necessarily invalidate the agreement, but rather would give it "greater scrutiny."<sup>63</sup> Along similar lines, a case from California provides that where a contract limits the duties or liability of the stronger party, a court will not enforce it against the weaker party absent "plain and clear notification" of the terms and the adherent's "understanding consent."<sup>64</sup> The above rules of judicial skepticism are in addition to the consumer-friendly doctrine that ambiguities in an adhesion contract are construed in favor of the weaker party.<sup>65</sup> Therefore, Radin's thesis does not address

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<sup>62</sup> *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1185-86 (Cal. 1976); *Sekeres v. Arbaugh*, 508 N.E.2d 941, 946-47 (Ohio. 1987) (Brown, J., dissenting) (citing decisions); *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 52 n.13 (Mich. 2005) (Kelly, J., dissenting) (collecting cases applying rule of skepticism). *Contra id.* at 42 (majority opinion) ("Regardless of whether a contract is adhesive, a court may not revise or void the unambiguous language of the agreement to achieve a result that it views as fairer or more reasonable").

This Article unreservedly agrees that the law should not support unethical or improper practices and endorses the common statement that courts should examine adhesion contracts with greater scrutiny.

<sup>63</sup> *Wilkerson ex rel. Wilkerson v. Nelson*, 395 F. Supp. 2d 281, 289 (M.D.N.C. 2005); *see also* *First Ala. Bank v. First State Ins. Co.*, No. 83-G-2082-S, 1988 WL 192452, at \*11 (N.D. Ala. May 26, 1988) (adhesion contracts "[h]ave always been subjected to careful judicial scrutiny to avoid injury to the public"); *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 228 (W.Va. 2012) ("A contract of adhesion should receive greater scrutiny than a contract with bargained-for items to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person."); *Martin v. Educ. Testing Serv., Inc.*, 431 A.2d 868, 875 (N.J. Super. Ch. 1981) ("a contract of adhesion must at very least be closely scrutinized by the court to determine its reasonableness"), *overruled on other grounds sub nom. Brady v. Dept. of Pers.*, 693 A.2d 466 (N.J. 1997).

<sup>64</sup> *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 783-84 (Cal. Ct. App. 1976); *see also* *Gentry v. Superior Court*, 165 P.3d 556, 573 (Cal. 2007) ("Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced contain a degree of procedural unconscionability even without any notable surprises, and 'bear within them the clear danger of oppression and overreaching.'").

<sup>65</sup> *See New Castle Cnty. v. Nat'l Union Fire Ins. Co.*, 243 F.3d 744, 750 (3d Cir. 2001); *Karnette v. Wolpoff & Abramson, L.L.P.*, 444 F. Supp. 2d 640, 646-47 (E.D. Va. 2006); *In re Shirel*, 251 B.R. 157, 161 (Bankr. W.D. Okla. 2000). Radin has also overlooked that for adhesion contracts, courts impart a heightened merchant-implied duty of good faith and fair dealing. Thus, for the most common form of adhesion contracts, i.e. the insurance policy, one court has observed:

several crucial interpretive doctrines favoring consumers regarding judicial review of adhesion contracts.

The foregoing discussion has shown that adhesion contracts, and not boilerplate or standard form contracts, should be the true focus for whether the consumer in World B has given effective consent. Adhesion contracts are the only contract type that requires proof of economic pressures,<sup>66</sup> which could conceivably call into question the voluntariness of the consumer's assent. Nevertheless, because United States jurisdictions' understanding of adhesion contracts has variations, the different versions could lead to different outcomes on whether particular parties have formed a bona fide mutual assent. Radin's inconsistent emphasis throughout her book on boilerplate or standard forms instead of adhesion contracts and her failure to account for the differing judicial formulations of adhesion contracts create an unreliable doctrinal foundation for her theories of normative degradation.

### *C. The Utility of Boilerplate (and Adhesion) Contracts*

To her credit, Radin does mention to an extent the recognized benefits of boilerplate (which in this section includes standard form and adhesion contracts). Thus, echoing numerous decisions,<sup>67</sup> she acknowledges that "Yet, if all attempts to use boilerplate were to be declared unenforceable, that would cause a considerable disruption of current commercial practice."<sup>68</sup> Further, she admits that "In the abstract standardization is neither good nor bad," and she concedes that a standardized form can promote knowledge and ease of use, reduce uncertainty, and lower transaction costs for all parties.<sup>69</sup> She also cites with approval the example of an insurance policy and how it facilitates commercial transactions.<sup>70</sup>

Nevertheless, Radin consistently argues that boilerplate contracts are "harmful" to consumers.<sup>71</sup> While it is always possible for any contract type to produce failed or unfair transactions, the best argument in favor of mass market boilerplate is the courts' conclusion that these agreements are "very useful" and have "advantages" that benefit merchants, consumers and the national economy.<sup>72</sup> As stated by the

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In all insurance contracts, particularly where the language expressing the extent of the coverage may be deceptive to the ordinary layman, there is an implied covenant of good faith and fair dealing[—the "utmost good faith"—]that the insurer will not do anything to injure the right of its policyholder to receive the benefits of his contract.

Hall v. Liberty Ins. Corp., No. 3:13-cv-206-TAV-HBG, 2013 WL 6571928, at \* 7 (E.D. Tenn. Dec. 13, 2013) (quoting decisions).

<sup>66</sup> See *supra* notes 37-42 and accompanying text.

<sup>67</sup> "[S]ince the bulk of contracts signed in this country, if not every major Western nation, are adhesion contracts, a rule automatically invalidating adhesion contracts would be completely unworkable." Pingley v. Perfection Plus Turbo-Dry, LLC, 746 S.E.2d 544, 550 (W. Va. 2013); accord Swain v. Auto Servs., Inc., 128 S.W.3d 103, 107 (Mo. Ct. App. 2003).

<sup>68</sup> RADIN, *supra* note 3, at 15, 42.

<sup>69</sup> *Id.* at 42.

<sup>70</sup> *Id.* at 15; see also *id.* at 42 (similar observations).

<sup>71</sup> *Id.* at 85, 214; see also *id.* at 85 (boilerplate "unjustly treat[s]" citizens).

<sup>72</sup> See *infra* notes 74-75.

South Carolina Court of Appeals, “Form contracts obviously serve a very useful purpose in commerce.”<sup>73</sup> Also, the United States Court of Appeals for the Seventh Circuit has cited the improvements to the contracting system brought about by boilerplate: “Contractual language serves its functions only if enforced consistently. This is one of the advantages of boilerplate, which usually has a record of predictable interpretation and application.”<sup>74</sup> Courts also recognize the financial advantages to consumers; the United States Court of Appeals for the Seventh Circuit has observed that standard forms “[r]educe transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices.”<sup>75</sup> Lastly, the American Law Institute, the promulgator of the *Restatement (Second) of Contracts* and hardly a radical change agent, concurs regarding the benefits of boilerplate contracting: “Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. . . . Operations are simplified and costs reduced, to the advantage of all concerned.”<sup>76</sup> Thus, it can be seen that, as compared with Radin, many authorities give far more emphasis to the systemic benefits of boilerplate.

Radin also would have greatly improved her book had she responded in more depth to those commentators with a different perspective on the nature and utility of boilerplate. An excellent example of this missed opportunity is her failure to engage Jason Scott Johnston, who wrote a well-known 2006 article on boilerplate in the *Michigan Law Review*. In his article, which predates Radin’s book, Johnston challenged the notion commonly accepted by judges, attorneys and legal academics that standard-form contracts have eliminated bargaining in consumer contracts.<sup>77</sup> Relying on empirical studies in various industries, Johnston argued that standard-form contracts “[f]acilitate bargaining and are a crucial instrument in the establishment and maintenance of cooperative relationships between firms and their customers.”<sup>78</sup> Johnston studied some common forms of consumer contracts,

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<sup>73</sup> Lackey v. Green Tree Fin. Corp., 498 S.E.2d 898, 906 (S.C. Ct. App. 1998).

<sup>74</sup> Rissman v. Rissman, 213 F.3d 381, 385 (7th Cir. 2000).

<sup>75</sup> Carbajal v. H & R Block Tax Servs., Inc., 372 F.3d 903, 906 (7th Cir. 2004).

<sup>76</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (1981) (emphasis supplied) (approved in Sutton v. Banner Life Ins. Co., 686 A.2d 1045, 1049 n.3 (D.C. App. 1996)); see also E. ALLAN FARNSWORTH ET AL., CONTRACTS: CASES AND MATERIALS (7th ed. 2008) (noting that standard form contracts “enable a judicial interpretation of one contract to serve as an interpretation of all contracts” as they “simplify planning and administration and make superior drafting skills more widely available”).

<sup>77</sup> Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857 (2006); see also *id.* at 858 (“On this view, which I elaborate below, firms use clear and unconditional standard-form contract terms not because they will insist upon those terms, but because they have given their managerial employees the discretion to grant exceptions from the standard-form terms on a case-by-case basis.”). Radin contributed an article to the same *Michigan Law Review* issue, and even cited Johnston’s article in her piece, so it cannot be said she was unaware of the Johnston article. See Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1228 n.17 (2006).

<sup>78</sup> Johnston, *supra* note 77, at 858.

including hospital bills, consumer credit cards, home-mortgage and home-equity lending, the rent-to-own industry and retail sales return policies.<sup>79</sup> Other writers similarly rely on empirical arguments that mass market boilerplate contracts are much more negotiable in fact than they are in theory.<sup>80</sup> Radin does not directly contest these empirical findings but is content merely to inject a side issue that such practices can hide discriminatory or anticompetitive behavior.<sup>81</sup>

The point remains that while Radin is correct that boilerplate contracts often strongly favor the seller (even as empirical research indicates that this tilt is absent in the online retail environment<sup>82</sup>) whether a contract strongly favors one party over another is not strong evidence of normative degradation. The United States free market economy would be diminished and become inefficient if the law disallowed parties from maximizing their perceived interests through hard, but fair, bargaining.<sup>83</sup> Thus, courts accept the principle that “[i]ndividuals usually benefit when left free to maximize their own interests in negotiating the terms of a contract.”<sup>84</sup>

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<sup>79</sup> *Id.* at 857.

<sup>80</sup> *E.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006) (arguing that based on reputational concerns, some merchants selectively enforce standard form contracts against purchasers).

<sup>81</sup> RADIN, *supra* note 3, at 229.

<sup>82</sup> Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 993 (2008) (“Retailers have rarely designed interfaces to obtain assent to their posted terms, and the posted terms rarely include harsh pro-retailer terms.”); *id.* at 998 (“Perhaps the most surprising finding is that arbitration clauses appear in less than one-tenth of the contracts (only 44 of 500 retailers).”); *id.* at 999 (jury trial waivers found in less than one percent of the contracts (6 of 500 retailers)). These findings contradict Radin’s broad generalization that “boilerplate consistently shrinks legal right to the vanishing point.” RADIN, *supra* note 3, at 30. The only significant support Radin musters for unfairness in standard form contracts is the assertion that in the telecom consumer credit and financial industries, avoiding class actions is the principal purpose of many arbitration clauses. *Id.* at 280 n.26.

<sup>83</sup> “[H]ard bargaining . . . is acceptable, even desirable, in our economic system.” *Rich & Whillock, Inc. v. Ashton Dev., Inc.*, 157 Cal. App. 3d 1154, 1159 (Cal. Dist. Ct. App. 1984).

<sup>84</sup> *Kakaes v. George Washington Univ.*, 790 A.2d 581, 585 (D.C. App. 2002). Prominent commentators have noted that criticisms of boilerplate are often economically unsound because they misconstrue market operations. Professor Douglas Baird, former Dean of the University of Chicago Law School, has observed:

Legal academics too often exaggerate the dangers of boilerplate. They become completely caught up in a framework in which everything reduces to the rights of A against B, a framework that is out of touch with how mass markets work. To be sure, sellers can engage in advantage-taking with respect to boilerplate, but they can do this with other product attributes as well.

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[T]he focus should not be on how boilerplate operates in a world in which we assume A and B ought to negotiate with each other, but on how the market as a whole is best regulated in an environment in which discrete arms-length negotiations are impossible.

Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 934, 935 (2006).



### III. MASS MARKET STANDARD FORM CONTRACTS AND THE OBJECTIVE THEORY OF MUTUAL ASSENT

Part III covers the general topic of the objective theory of mutual assent for boilerplate and standard form contracts. A frequently cited working definition of the “objective theory” of contracting assent is that “Under the objective theory of mutual assent followed in all jurisdictions, a contracting party is bound by the apparent intention he outwardly manifests to the other contracting party. To the extent that his real secret intention differs therefrom, it is entirely immaterial.”<sup>85</sup>

After explaining the objective standard, Part III will set forth the doctrine’s underlying policy and compare it with the discredited subjective theory as an overarching concept of mutual assent. Thereafter, Part III will critique Radin’s view of the objective standard in some key areas. The analysis below will prove that Radin, in considering mass market consumer contracts, gives insufficient weight to the objective theory of mutual assent and its sound policies. Part IV will address the related topic of adhesion contracts and mutual assent.

#### *A. The Objective Theory Explained*

Courts commonly state that “[t]he primary purpose in contract construction is to ascertain and give effect to the parties’ mutual intent”<sup>86</sup> but this statement should not be taken literally. The parties to most contracts give both actual and apparent assent and yet both processes need not be present.<sup>87</sup> The pivotal point is whether the parties have joined in objective mutual assent.

Under the objective doctrine, one party to a contract may rely on the outwardly manifested assent demonstrated by the other party’s signature (or his other words and actions signifying agreement) regardless of the latter’s unexpressed subjective intentions.<sup>88</sup> “The true test is not what the parties to the contract intended it to mean.”<sup>89</sup> Case law provides, “The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their

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<sup>85</sup> *In re McLean Indus., Inc.*, 90 B.R. 614, 621 (Bankr. S.D.N.Y. 1988) (quoting *Cohn v. Fisher*, 287 A.2d 222, 224 (N.J. Super. Div. 1972)).

<sup>86</sup> *E.g.*, *Ecorp, Inc. v. Rooksby*, 746 N.E.2d 128, 131 (Ind. Ct. App. 2001) (citing *Hutchinson, Shockey, Erley & Co. v. Evansville-Vanderburgh Cnty. Bldg. Auth.*, 644 N.E.2d 1228, 1231 (Ind.1994)); *accord* *Wonderland Shopping Ctr. Venture Ltd. P’ship v. CDC Mortg. Capital, Inc.*, 274 F.3d 1085, 1092 (6th Cir. 2001).

<sup>87</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17, cmt. c (1981).

<sup>88</sup> *Newkirk v. Village of Steger*, 536 F.3d 771, 774 (7th Cir. 2008); *D’Antuono v. Serv. Road Corp.*, 789 F. Supp. 2d 308, 323 (D. Conn. 2011) (signature usually conclusive evidence of consent); *Wash. Greensview Apartment Assocs. v. Travelers Prop. Cas. Co.*, 295 P.3d 284, 292 (Wash. Ct. App. 2013); 11 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 31:4 (4th ed. 2004) (also stating it is not the real intent, but the intent expressed or apparent in the writing that controls); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 481 (2002) (“For many people, a signature denotes a binding commitment and is the essence of a contract.”).

<sup>89</sup> *Rhone-Poulenc Basic Chems. Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992).

manifestation of assent,”<sup>90</sup> agreement does not “consist of harmonious intentions or states of mind.”<sup>91</sup> Accordingly, it will suffice that the one party had *a reason to believe* that the second party had the requisite intention with no further requirement that the first party had an *actual belief* regarding the second party’s assent.<sup>92</sup> So long as one party’s outward manifestation of assent is sufficient to create the second party’s “reasonable reliance,” contracting consent will be found.<sup>93</sup> In essence, the “objective” element of this doctrine means that

A party cannot escape the natural and reasonable interpretation which must be put on what he says and does by showing that his words were used and his acts done with a different and undisclosed intention. . . . It is not the secret purpose, but the expressed intention, which must govern in the absence of fraud or mutual mistake. A party is estopped to deny that the intention communicated to the other side was not his real intention.<sup>94</sup>

Next, it is worth mentioning one of the most enduring phrases in all of contract law, the “meeting of the minds.” The modern case law still frequently refers to mutual assent as constituting a “meeting of the minds,”<sup>95</sup> but the better approach correctly calls this usage “disfavored”<sup>96</sup> and even “inaccurate and misleading.”<sup>97</sup> As Farnsworth explains, this metaphor has a “faulty etymology” because early authorities “wrongly supposed” that the word “agreement” was derived from the Latin *agregatio mentium*, a meeting of the minds.<sup>98</sup> Thus, the better view rejects this description because some courts seem to imply erroneously that parties must have the same subjective understanding of the contract.<sup>99</sup> The discerning decisions further

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<sup>90</sup> *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 190 (D.C. App. 2009). “The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs—not the parties having meant the same thing but on their having said the same thing.” *Gendzier v. Bielecki*, 97 So. 2d 604, 608 (Fla. 1957) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897)).

<sup>91</sup> *Devlin v. Ingram*, 928 F.2d 1084, 1095 (11th Cir. 1991) (citing *Lilley v. Gonzales*, 417 So.2d 161, 163 (Ala. 1982)).

<sup>92</sup> 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 210 (3d ed. 2004).

<sup>93</sup> *McDonald v. Mobil Coal Producing, Inc.*, 820 P.2d 986, 990 (Wyo. 1991); *see also* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 210 (3d ed. 2004).

<sup>94</sup> *Woburn Nat’l. Bank v. Woods*, 89 A. 491, 493 (N.H. 1914).

<sup>95</sup> *E.g.*, *Smith v. Jenkins*, 732 F.3d 51, 75 (1st Cir. 2013); *Potts Constr. Co. v. N. Kootenai Water Dist.*, 116 P.3d 8, 11 (Idaho 2005) (“The minds of the parties must meet as to all the terms before a contract is formed.”).

<sup>96</sup> *Shea v. Riley*, 954 S.W.2d 951, 953 (Ark. Ct. App. 1997); 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 4:1 (4th ed. 2007).

<sup>97</sup> *Holt v. Swenson*, 90 N.W.2d 724, 728 (Minn. 1958).

<sup>98</sup> 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6 (3d. ed. 2004).

<sup>99</sup> *Baker v. Elmwood Distrib., Inc.*, 940 F.2d 1013, 1017 (7th Cir.1991) (citing *Midland Hotel v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 65 (Ill. 1987)).

caution that this phrase is a “much-abused metaphor” that should be “abandoned for purposes of clarity.”<sup>100</sup>

In sum, the objective standard of mutual assent closely aligns with the plain meaning rule of contract interpretation. The latter doctrine requires that “where the language employed in a contract is unambiguous, a court shall give effect to its plain meaning.”<sup>101</sup> In so doing, the majority of courts have no need either for “further construction” or consideration of “extrinsic evidence.”<sup>102</sup> Thus, as will be explained in more detail below, the objective standard expresses high confidence that the unambiguous words the parties have chosen are the most reliable proof of their contemporaneous intent at contract formation.

### *B. The Objective Theory's Underlying Policy*

Radin fails to discuss in any depth the policy for the objective theory. Understanding its rationale, however, clarifies why this doctrine has succeeded as the prevailing mode for ascertaining the existence of mutual assent even for standardized or boilerplate agreements.

The objective test protects the “fundamental principle” of the security of contracting actions as it maintains a workable system of commerce and economic exchange.<sup>103</sup> The goal of the objective test is that by requiring evidence beyond litigation-motivated, *post hoc* descriptions of the parties' earlier states of mind, the judicial system is able to increase the reliability of its decision making process in contract litigation.<sup>104</sup> A related policy is the objective test allows the first party to have little or no reason to fear that the second party may thereafter void the contract

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<sup>100</sup> State v. Heisser, 249 P.3d 113, 120 (Or. 2011); see also Colfax Envelope Corp. v. Local No. 458-3M, 20 F.3d 750, 752 (7th Cir.1994) (“The premise—that a ‘meeting of the minds’ is required for a binding contract—obviously is strained.”).

<sup>101</sup> Wells v. Chevy Chase Bank, F.S.B., 768 A.2d 620, 630 (Md. Ct. App. 2001).

<sup>102</sup> Griggs v. Evans, 43 A.3d 1081, 1087 (Md. Ct. App. 2012); see also Barron Bancshares, Inc. v. United States, 366 F.3d 1360, 1375 (Fed. Cir. 2004) (“If the terms of a contract are clear and unambiguous, they must be given their plain meaning—extrinsic evidence is inadmissible to interpret them.”); *infra* notes 198-200 and accompanying text (explaining plain meaning rule).

In construing mutual assent, a minority of courts give more weight to the circumstances surrounding the contract terms. See, e.g., Adler v. Fred Lind Manor, 103 P.3d 773, 784 (Wash. 2004) (“[U]nder the ‘context rule’ a court determines ‘the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.’”). For additional discussion of this “context rule,” see Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 94-111 (2013).

<sup>103</sup> Barnes, *Objective Theory*, *supra* note 17, at 1129; see also Brian A. Blum, *Assent and Accountability in Contract: An Analysis of Objective Standards in Contemporary Contract Adjudication*, 59 ST. JOHN'S L. REV. 1 (1984) (extensive analysis).

<sup>104</sup> Lawrence M. Solan, *Contract As Agreement*, 83 NOTRE DAME L. REV. 353, 380 (2007).

by his claiming either a failure to read or a subjective misunderstanding of the agreement.<sup>105</sup> As Grant Gilmore has opined,

[I]f “the actual state of the parties minds” is relevant, then each litigated case must become an extended factual inquiry into what was “intended,” “meant,” “believed” and so on. If, however, we can restrict ourselves to the “externals” . . . , then the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedent about recurring types of permissible and impermissible “conduct.”<sup>106</sup>

Because it emphasizes external, ascertainable events regarding the deal, the objective test upholds the value of unbiased adjudication and readily captures the parties’ manifested intent before a dispute. Various courts have observed that absent a facial ambiguity, the contract’s actual language is the “best evidence of the intent of the parties” and therefore the “plain meaning is controlling.”<sup>107</sup> Indeed, under the strict version of the objective theory, the courts examining mutual assent are generally limited in their evidentiary scope of review to the four corners of an unambiguous document.<sup>108</sup>

In essence, the objective theory of contracts comports with the need and reason for voluntary assent. The rule preserves the ideal of individual autonomy because the coercive power of the state allows the parties to exercise their personal freedom with the result that “[c]onsent is the human vehicle for exercising freedom or autonomy.”<sup>109</sup> Also, the objective doctrine enhances the freedom of contract because the law allows parties the increased ability to manage their business relationships “[b]y limiting operative manifestations to those that are received and known by the parties to the negotiation.”<sup>110</sup> Lastly, it protects the parties’ reliance and expectation

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<sup>105</sup> *Allied Office Supplies Inc. v. Lewandowski*, 261 F. Supp. 2d 107, 112 (D. Conn. 2003); *see also Apeldyn Corp. v. Eidos, LLC*, 943 F. Supp. 2d 1145, 1149 (D. Or. 2013) (statements of a party’s subjective intent that were not expressed or communicated at the time the contract was formed are not permissible evidence of intent).

<sup>106</sup> GRANT GILMORE, *DEATH OF CONTRACT* 42 (1974).

<sup>107</sup> *See Acceleration Nat’l Serv. Corp. v. Brickell Financial Servs. Motor Club, Inc.*, 541 So.2d 738, 739 (Fla. Dist. Ct. App.), *rev. denied*, 548 So.2d 662 (Fla. 1989); *see also Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980) (“The strongest external sign of agreement between contracting parties is the words they use in their written contract.”). Therefore, the cases say “[e]xtrinsic evidence of intent is admissible only if the contract is ambiguous on its face.” *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 283 (Tex. 1996); *accord Press Mach. Corp. v. Smith R.P.M. Corp.*, 727 F.2d 781, 784 (8th Cir. 1984). These decisions further exemplify the strong connection between the objective theory and the plain meaning rule.

<sup>108</sup> “[T]he objective theory of contracts . . . limits the court to the four corners of [a clear and definite] contract in determining the intention of the parties” *In re Federated Dept. Stores, Inc.*, 240 B.R. 711, 722 (Bankr. S.D. Ohio 1999) (calling this position “the majority view”); *see also Munro v. Beazer Home Corp.*, No. U608-03-081, 2011 WL 2651910, at \*5 (Del. Com. Pl. June 23, 2011) (same).

<sup>109</sup> Barnes, *Objective Theory*, *supra* note 17, at 1129.

<sup>110</sup> *Id.* at 1131.

interests.<sup>111</sup> Regrettably, Radin mentions none of these salutary principles in her book.

### *C. The Subjective Theory Compared*

The (former) competitor to the objective standard, the subjective theory of obligation, looks to actual, shared mental assent. This theory seeks to discover such intent “[e]ven at the expense of unambiguous language to the contrary.”<sup>112</sup> Under the subjective construct, the parties’ external acts are merely necessary evidence to prove or disprove the requisite state of mind.<sup>113</sup> Radin’s book contains no express reference to the subjective theory.

Since the end of the nineteenth century, the objective doctrine as a general theory of obligation has prevailed in the United States.<sup>114</sup> Accordingly, it remains a truism that courts and commentators have “roundly rejected” the subjective theory of consent as an overarching principle.<sup>115</sup> Thus, in ascertaining binding assent, courts have observed, “What is looked to in determining whether an agreement has been reached is not the parties’ after-the-fact professed subjective intent, but their objective intent as manifested by their expressed words and deeds at the time.”<sup>116</sup> A famous case also comments that the actual subjective intent of the parties “[c]an neither make [a] contract, nor prevent one, if [the] words used were sufficient to constitute [a] contract.”<sup>117</sup> The courts are also careful to emphasize that they “[r]efuse to inquire into the subjective mental processes of each of the parties to a contract, except in the most compelling circumstances.”<sup>118</sup>

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<sup>111</sup> *Id.* at 1157; *see also* *Empro Mfg. Co. v. Ball-Co Mfg., Inc.*, 870 F.2d 423, 425 (7th Cir. 1989) (“[I]f intent were wholly subjective there would be no parol evidence rule, no contract case could be decided without a jury trial, and no one could know the effect of a commercial transaction until years after the documents were inked. That would be a devastating blow to business.”); *Universal Studios, Inc. v. Viacom, Inc.*, 705 A.2d 579, 589 (Del. Ch. 1997) (“The necessity of preserving predictability and stability in commercial transactions is fostered by this objective view of contracts.”).

<sup>112</sup> *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1166 (1st Cir. 1994) (citing *Hershon v. Gibraltar Bldg. & Loan Ass’n*, 864 F.2d 848, 851 (D.C. Cir. 1989)).

<sup>113</sup> *Newman v. Schiff*, 778 F.2d 460, 464-65 (8th Cir. 1985).

<sup>114</sup> *Id.*

<sup>115</sup> *Luden’s Inc. v. Local Union No. 6 of Bakery, Confectionery & Tobacco Workers’ Int’l Union of Am.*, 28 F.3d 347, 363 n.29 (3d Cir. 1994); *see also* *Bennett v. Emerson Elec. Co.*, 186 F. Supp. 2d 1168, 1171 (D. Kan. 2002) (“This subjective theory of contract formation has been rejected by contemporary contract experts and the *Restatement*.”) (citing authorities).

<sup>116</sup> *Reprosystem, B.V. v. SCM Corp.*, 522 F. Supp. 1257, 1275 (S.D.N.Y. 1981), *modified on appeal*, 727 F.2d 257 (2d Cir. 1984) (citing *Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp.*, 361 N.E.2d 999, 1001 (N.Y. 1977)); *see also* *Hancock Paper Co. v. Hancock Int’l Corp.*, 424 F. Supp. 285, 289 (E.D. Pa. 1976) (examining a party’s subjective intent violates “basic contract law”).

<sup>117</sup> *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777, 778 (Mo. Ct. App. 1907); *see also* *Newman*, 778 F.2d at 465 (deeming *Embry* a “classic decision” illustrating the objective test).

<sup>118</sup> *Sutton v. Banner Life Ins. Co.*, 686 A.2d 1045, 1051 (D.C. App. 1996).

Perhaps the major practical reason for the objective theory's dominance and the decline of the subjective doctrine is that strict reliance on the subjective test and any effort to delve into the minds of the parties is futile insofar as "[c]ourts neither claim nor possess psychic power."<sup>119</sup> As Judge Frank Easterbrook said in his pithy way, "Yet [contract] 'intent' does not invite a tour through [a party's] cranium, with [that party] as the guide."<sup>120</sup> Because the subjective approach relies on evidence directly inaccessible to the other party, much less to third parties, broad judicial consideration of subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments.<sup>121</sup> Also, a party's subjective mental assent is not generally needed as evidence in a contract dispute because contract law protects reasonable expectations.<sup>122</sup>

While the subjective theory as a general doctrine of assent no longer prevails, vestiges have survived. The key exception permitting subjective evidence is where the contract is ambiguous, i.e., open to two or more reasonable interpretations.<sup>123</sup> One significant embellishment exists to this exception. Unless the second party knows or has reason to know of the particular meaning attached by the other party manifesting assent, the latter party's subjective understanding is not controlling on the scope of the agreement.<sup>124</sup>

Some courts attribute the move from the subjective doctrine to the objective doctrine as tracking the broader societal transition from the 19th-century's emphasis on that century's philosophical individualism to the 20th century's emphasis on the need for the greater security of contracts in a commercial economy.<sup>125</sup> In any event, most notably where the contract is unambiguous, the subjective doctrine today has little more than historical importance.<sup>126</sup>

#### *D. Radin's View of the Objective Theory*

Radin's explanation of the objective theory of contract is brief. She defines it as where a person in the position of the offeror is entitled to understand that the person

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<sup>119</sup> *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980). "[T]he controversy has been resolved. Contract law abandoned the theory of subjective intention as unworkable." JOHN EDWARD MURRAY, JR., *MURRAY ON CONTRACTS* § 30, at 61-64 (4th ed. 2001).

<sup>120</sup> *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987).

<sup>121</sup> Solan, *supra* note 104, at 367 (citing Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 273 (1986)).

<sup>122</sup> 1 E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.6, at 209 (3d ed. 2004).

<sup>123</sup> *Glenn Defense Marine (Asia) PTE, Ltd. v. United States*, 97 Fed. Cl. 311, 321-22 (2011) (citing decisions); *see also* *Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, 743 F. Supp. 2d 1235, 1255 (D.N.M. 2010) ("Where the contract language is ambiguous—i.e., subject to two or more reasonable interpretations—the court may consider things outside the text of the contract to determine its meaning.").

<sup>124</sup> *Brokers Title Co. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1181 (3d Cir. 1979).

<sup>125</sup> *Kabil Devs. Corp. v. Mignot*, 566 P.2d 505, 507 (Or. 1977).

<sup>126</sup> Barnes, *Objective Theory*, *supra* note 17, at 1123; *see also supra* notes 120-21 and accompanying text.

in the position of the offeree has agreed to enter into a contract on the terms proposed if a reasonable person in the position of the offeror would have understood the offeree's words and conduct as signaling agreement to the offeror's terms.<sup>127</sup> While she says that the "meeting of the minds" terminology is no longer important, she also observes that if the reasonable person would have understood the other person's words and actions in the context to accept the deal, the deal is in effect, "no matter what was actually inside the mind of the other."<sup>128</sup>

While Radin's summary has some validity, she also calls the objective theory a "search for actual consent."<sup>129</sup> One of her major points is that the objective theory of contractual consent "does not make sense" for boilerplate contracts.<sup>130</sup> Her reasoning is that consumers have not been "socialized into a common form of life" with the sellers of boilerplate such that the language is "mutually intelligible."<sup>131</sup> She further contends that the objective theory should control only for buyers and sellers who are in a "community of traders."<sup>132</sup> As will be shown below, Radin's analysis contradicts established doctrine in various respects.

The first area where Radin's discussion is incomplete is her treatment of the "meeting of the minds." Radin errs in two ways in her discussion of the quoted concept. First, she calls it "peripheral to standard contract doctrine" only used "sometimes."<sup>133</sup> In fact, the appellate decisions use this phrase practically every day.<sup>134</sup> Second, she says courts use the concept from a "pocket of subjectivity"<sup>135</sup> when the truth is that numerous courts consider "meeting of the minds" as being consistent with the objective theory. As the Georgia Court of Appeals recently observed,

In determining if parties had the mutual assent or meeting of the minds necessary to reach agreement, courts apply an objective theory of intent whereby one party's intention is deemed to be that meaning a reasonable [person] in the position of the other contracting party would ascribe to the first party's manifestations of assent.<sup>136</sup>

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<sup>127</sup> RADIN, *supra* note 3, at 86.

<sup>128</sup> *Id.*; *see also id.* at 124.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 87.

<sup>131</sup> *Id.* at 86-87.

<sup>132</sup> *Id.* at 87.

<sup>133</sup> *Id.* at 124.

<sup>134</sup> A Westlaw search for October 2013 using the search field "allcases" revealed 49 contract decisions referencing the phrase "meeting of the minds."

<sup>135</sup> RADIN, *supra* note 3, at 124.

<sup>136</sup> *Graham v. HHC St. Simons, Inc.*, 746 S.E.2d 157, 160 (Ga. Ct. App. 2013); *accord Laserage Tech. Corp. v. Laserage Labs., Inc.*, 972 F.2d 799, 802 (7th Cir.1992) (construing Illinois law); *Crain Indus., Inc. v. Cass*, 810 S.W.2d 910, 915-16 (Ark. 1991); *see also Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 888 (Wis. Ct. App. 2004) ("[T]he fact that the service agreement is a boilerplate contract does not prevent a true meeting of the minds.").

Radin's erroneous reading of the cases about the supposedly subjective nature of "meeting of the minds" has led to her making incorrect comments about other basic principles of assent. First, she says that "the search for actual consent" occurs by "means of the objective theory."<sup>137</sup> True enough, the parties to most contracts give both actual and apparent assent and yet both processes need not be present.<sup>138</sup> The pivotal point, however, is whether the parties have joined in the *manifestation* of objective mutual assent (which is not the same as actual subjective assent).<sup>139</sup> Second, Radin has a difficulty with the established common law doctrine that a binding contract can result when a party accepts offered benefits from the first party with knowledge of the terms of the offer and where the second party's actions manifest binding acceptance.<sup>140</sup> This doctrine is sound because both parties are signaling their agreement to the deal. While Radin denigrates this last variety of consent as "constructive," "hypothetical," or "fictional" acceptance, she overlooks the above well-settled nature of this type of manifested assent and how it falls comfortably within the objective doctrine.<sup>141</sup>

Building on her position that courts enforce hypothetical or fictional acceptance, Radin travels an unusual path in challenging the courts' treatment of assent under the objective doctrine. Radin indicates that she is mainly concerned with whether the objective theory of assent seriously disadvantages consumers and is less concerned with citing precedents.<sup>142</sup> She builds an elaborate argument addressing some important topics but without any citation to case law or other legal sources on why the law on mutual assent needs to adopt her reforms and how her proposal passes muster under core legal doctrine.<sup>143</sup>

In the analysis below, I address the following special topics that pertain to Radin's criticisms: social understanding and the objective theory; when consumers click "I agree"—is this an ambiguous action?; her resurrection of the subjective theory; and mutual assent and party information asymmetry.

### 1. Social Understanding and the Objective Test

In seeking the logical basis for the objective test, Radin points to the "objective theory of language" and the notion that "meaning depends on social

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<sup>137</sup> RADIN, *supra* note 3, at 86, 124.

<sup>138</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. c (1981).

<sup>139</sup> 17A AM. JUR. 2D *Contracts* § 33 (2013) ("The question of whether a contract has been made must be determined from a consideration of the expressed or manifested intention of the parties."); *see also id.* ("This mutual assent cannot be based on subjective intent, but must be founded on an objective manifestation of mutual assent to the essential terms of the promise.").

<sup>140</sup> *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004) (citing authorities); *Boomer v. AT & T Corp.*, 309 F.3d 404, 415 (7th Cir. 2002); *Ragan v. AT & T Corp.*, 824 N.E.2d 1183, 1188 (Ill. Ct. App. 2005).

<sup>141</sup> *Compare* RADIN, *supra* note 3, at 30, 83, 84, 93, 97 (criticizing so-called "fictional," "hypothetical," or "constructive" consent).

<sup>142</sup> *Id.* at 82-84, 96-97.

<sup>143</sup> *Id.* at 85-90.



understanding.”<sup>144</sup> Therefore, Radin contends that the objective theory of assent as it relates to the reasonable person should be “[i]nterpreted as one socialized into a particular form of life relevant under the circumstances.”<sup>145</sup> In this way, she believes the objective theory “more readily applies” to a situation where there are mutual understandings among a community of traders, i.e., understandings pertaining to established trade usages.<sup>146</sup> Radin specifically applies this “community of traders” argument to Internet sale contracts.<sup>147</sup>

As a matter of precedent, Radin’s conclusion is not supported because courts commonly apply the objective standard to boilerplate.<sup>148</sup> To the extent that Radin in applying the objective test relies on “socialization,” rather than the canons of contract interpretation, her argument is more suited to an intellectual realm other than the law of contracts.<sup>149</sup> While Radin is clearly knowledgeable in the social sciences—which defines the quoted term as “a continuing process whereby an individual acquires a personal identity and learns the norms, values, behavior, and social skills appropriate to his or her social position”<sup>150</sup>—no cases were found considering this “socialization” theory in the context of contract interpretation. Radin nevertheless does raise a legal argument when she says the objective test makes sense only for traders in the same commercial community.<sup>151</sup>

In point of fact, the precedents already account for her concerns. The general rule is that absent express or implied contract terms to the contrary, when parties form a contract that is governed by a general usage, the parties impliedly agree to be bound by the usage in question.<sup>152</sup> In an important qualification, however, the law provides that an uninformed consumer generally will not be bound by trade usages where he

<sup>144</sup> *Id.* at 86.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 86-87. A “trade usage” generally refers to a uniform course of conduct in some particular business or trade. 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 34:2 (4th ed. 2012). An example of a trade usage is in the paper trade where “no. 1 heavy book paper guaranteed free from ground wood” means paper not containing over 3% ground wood. RESTATEMENT (SECOND) OF CONTRACTS § 222, illus. 6 (1981).

<sup>147</sup> RADIN, *supra* note 3, at 87-88.

<sup>148</sup> *E.g.*, *Amco Ins. Co. v. Haht*, 490 N.W.2d 843, 845 (Iowa 1992) (applying objective standard to an insurance policy, which is a contract of adhesion); *Amera-Seiki Corp. v. Cincinnati Ins. Co.*, 721 F.3d 582, 585 (8th Cir. 2013) (same); *Mogil v. Cal. Physicians Corp.*, 267 Cal. Rptr. 487, 493 (Cal. Dist Ct. App. 1990) (same).

<sup>149</sup> Technically, Radin is advocating the use of concepts from the field of sociolinguistics, i.e., the study of language as it functions in society. As one commentator notes, however, courts thus far have not expressly adopted these sociological concepts for contract interpretation. *See* Jiri Janko, Note, *Linguistically Integrated Contractual Interpretation: Incorporating Semiotic Theory of Meaning-Making into Legal Interpretation*, 38 RUTGERS L.J. 601, 602 (2007).

<sup>150</sup> *Socialization Definition*, DICTIONARY.COM, <http://dictionary.reference.com/socialization>. Compare RADIN, *supra* note 3, at 87 (using this term).

<sup>151</sup> RADIN, *supra* note 3, at 87.

<sup>152</sup> 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 34:3 (4th ed. 2012) (discussing incorporation of trade usages into contracts; also including the U.C.C. approach).

is not a member of the particular community of traders.<sup>153</sup> As stated by the California District Court of Appeals, “[t]he rule [deeming parties bound by trade usages] is not operative against one who is not a member of the trade or profession ‘unless he in fact knows it or has such reason to know it that the member reasonably believes that he knows it.’”<sup>154</sup> A substantial number of decisions also state that a court should accept evidence of trade practice only where a party makes a showing that it relied reasonably on a competing interpretation of the words when it entered into the contract.”<sup>155</sup> Both principles have a limiting effect upon the stronger party’s ability to employ a trade usage against the weaker one.

Based on the above sources, Radin’s concerns about the possible unfair impact of trade usages upon the consumer are misplaced. The reason is the law adequately protects the weaker party when he lacks actual knowledge or a reason to know of particular trade usages.

## 2. When Consumers Click “I Agree”—An Ambiguous Action?

In one of her main disputes with the objective theory, Radin questions whether a merchant would be justified in concluding that the consumer (recipient) who clicks the “I agree” button in an online computer contractual transaction is manifesting binding assent.<sup>156</sup>

Although she says “clicking ‘I agree’ is not an idiosyncratic procedure,” she still contends that when the buyer clicks “I agree” in on-line computer sales contracts that the seller is not justified in concluding that the buyer is necessarily signaling his consent.<sup>157</sup> Her reason is consumers “are almost certainly not thinking about or intending to consent [or able to understand] to terms that may deprive them of important legal rights . . .”<sup>158</sup> Because the words in mass market boilerplate contracts are not “mutually intelligible” to sellers and consumers, and because the seller has reason to believe the user has engaged in “mindless clicking,” her argument (with no

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<sup>153</sup> *Id.*

<sup>154</sup> *Wooley v. Schilder*, 327 P.2d 198, 201 (Cal. Dist. Ct. App. 1958); *see also* RESTATEMENT (SECOND) ON CONTRACTS § 222(3) (1981) (“Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.”). *Compare* 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 34:1 (4th ed. 2012) (“However, as is the case with the interpretive function of usage, before custom and usage can supplement or qualify an agreement, each party must ordinarily know or have reason to know of the usage. Furthermore, any term to be established as part of a contract by custom and usage of trade must not be inconsistent with other contract terms, must be well-settled, and must be acted on uniformly.”).

<sup>155</sup> *Jowett, Inc. v. United States*, 234 F.3d 1365, 1368 (Fed. Cir. 2000) (quoting *Metric Constructors, Inc. v. Nat’l Aeronautics & Space Admin.*, 169 F.3d 747, 752 (Fed. Cir. 1999)). *Compare* 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 34:5 (4th ed. 2012) (evidence of usage is admissible under the Uniform Commercial Code and the *Restatement (Second) of Contracts* to explain or interpret contractual terms and provisions even if the terms or provisions are not ambiguous).

<sup>156</sup> RADIN, *supra* note 3, at 89.

<sup>157</sup> *Id.* at 88.

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

supporting precedents) is “the objective theory of contract . . . is not applicable to boilerplate.”<sup>159</sup>

Radin further posits that a “[r]easonable recipient in this culture would be likely to know (if she did think about it) that firms are in the habit of exploiting consumers with boilerplate terms and thereby depriving them of important legal background rights.”<sup>160</sup> She also contends that the reasonable merchant would not conclude that the buyer has sufficiently assented under the objective test merely by clicking “I agree.”<sup>161</sup>

In making her case, Radin implies that the law is incapable of dealing with online contracts but she does not account for the frequent judicial statement, “While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.”<sup>162</sup> Even though there is case law she could have (but did not) cite to bolster her argument,<sup>163</sup> the decisions generally have specifically approved assent in this on-line scenario. Again, because Radin’s normative argument has a strong doctrinal component, it is incumbent for her to convince the reader how her argument satisfies core legal doctrines. Radin should also have disclosed the contrary legal authority and attempted to distinguish or reject the courts’ reasoning, but she did not do so.

The general reason the consumer’s clicking “I agree” suffices to form a binding agreement is because the consumer’s informing the merchant “I agree” is the consumer’s unambiguous, voluntary and affirmative act of assent that equates to a signature. It should not be required for the consumer to make an online statement to the effect that “I consent—and I really mean it.” As one commentator observes, “Many courts . . . have found the act of clicking an ‘I agree’ button to be an express manifestation of assent to contract terms. Some opinions have said so explicitly, while others seem to assume without discussion that when an offeree is required to click an ‘I agree’ button, she knows that she is entering into a contract.”<sup>164</sup> In essence, courts rule that binding the consumer to his voluntary external manifestation of assent satisfies the core principle of the objective test.

Nevertheless, Radin insists that the meaning of clicking “I agree” is “something that can have different meanings.”<sup>165</sup> From a legal standpoint, Radin’s characterization of the effect of clicking “I agree” is unpersuasive. When the consumer tenders this “explicit acceptance” of a license agreement, numerous courts properly indicate that this conduct raises no contestable issues of fact upon a motion

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<sup>159</sup> *Id.* at 86-89.

<sup>160</sup> *Id.* at 88.

<sup>161</sup> *Id.* at 88-89.

<sup>162</sup> *E.g.*, *One Beacon Ins. Co. v. Crowley Marine Servs., Inc.*, 648 F.3d 258, 268 (5th Cir. 2011); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004); *Bob Montgomery Chevrolet, Inc. v. Dent Zone Cos.*, 409 S.W.3d 181, 193 n.6 (Tex. Ct. App. 2013).

<sup>163</sup> *See Williams v. First Gov’t Mortg. & Investors Corp.*, 225 F.3d 738 (D.C. Cir. 2000) (analyzed in notes 251-53 *infra* and accompanying text).

<sup>164</sup> Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1323-24 (2005). For a discussion of “clickwrap,” see *supra* Part IV.D.

<sup>165</sup> RADIN, *supra* note 3, at 90.

for summary judgment.<sup>166</sup> The exception is that a consumer's (offeree) clicking the "I agree" button does not manifest assent to contractual terms in the rare circumstance where the seller's offer did not inform the consumer that this action would signify assent to the terms. Accordingly, the consumer will be bound only if the license terms were reasonably conspicuous to an average user<sup>167</sup> but it should be emphasized that "Most e-businesses, however, currently carefully signal the significance of clicking 'I agree.'"<sup>168</sup>

Statutes also support that the on-line consumer in this way manifests his assent. By law in several jurisdictions, a party that clicks "I agree" necessarily assents to the license and adopts its terms under the Uniform Computer Information Transactions Act (UCITA).<sup>169</sup> Based on this established case and statutory law for these jurisdictions, Radin's argument is without merit that a consumer's clicking the "I agree" button in a computer transaction is inherently ambiguous to the merchant who characteristically carefully advises the consumer of the consequences of this action.

In contrast with Radin, Randy Barnett has offered a powerful legal argument on why the consumer's clicking "I agree" satisfies the manifested assent element under the objective theory and the plain meaning rule<sup>170</sup>:

When one clicks "I agree" to the terms on the box, does one usually know what one is doing? Absolutely. There is no doubt whatsoever that one is objectively manifesting one's assent to the terms in the box, whether or not one has read them. The same observation applies to signatures on form contracts. Clicking the button that says "I agree," no less than signing one's name on the dotted line, indicates unambiguously: I agree to be legally bound by the terms in this agreement.

If consent to be legally bound is the basis of contractual enforcement, rather than the making of a promise, then consent to be legally bound seems to exist objectively. Even under the modern objective theory, there

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<sup>166</sup> See *I.Lan Sys. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass. 2002); see also *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012); *Kraft Real Estate Invests., LLC v. HomeAway.com, Inc.*, No. 4:08-CV-3788, 2012 WL 220271, at \*7-8 (D.S.C. Jan. 24, 2012); *DeJohn v. The TV Corp. Int'l.*, 245 F. Supp. 2d 913 (N.D. Ill. 2003). Compare Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 466 (2006) ("Because the user has 'signed' the contract by clicking 'I agree,' every court to consider the issue has held clickwrap licenses enforceable. *There is nothing inherently troubling about enforcing clickwrap licenses.*" (emphasis added)).

<sup>167</sup> *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 29-32 (2d Cir. 2002) (applying objective theory; excusing consumer from using a scroll bar to ascertain whether contract terms existed below the web site's "fold").

<sup>168</sup> Hillman & Rachlinski, *supra* note 88, at 481.

<sup>169</sup> UNIF. COMPUTER INFO. TRANSACTIONS ACT (UCITA) § 112, cmt. 5, illus. 1 (1999). A model act proposed by the National Conference of Commissioners on Uniform State Laws and originally submitted as draft Article 2B to the Uniform Commercial Code, UCITA is a comprehensive contracts code for computer information transactions that has been enacted in Virginia and Maryland. See MD. CODE ANN. COM. LAW §§ 22-101 *et seq.*; VA. CODE ANN. §§ 59.1-501.1 *et seq.*; see also 15B AM. JUR. 2D *Computers and the Internet* § 107 (2013).

<sup>170</sup> Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002).

is no reason for the other party to believe that such subjective consent is lacking. Even if one does not want to be bound, one knows that the other party will take this conduct as indicating consent to be bound thereby.<sup>171</sup>

While Radin mentions Barnett's approach on consent to Internet contracts, and concedes that American judges "often" agree with it, she does not offer an effective rebuttal. Her legal argument is that those persons who espouse the Barnett position do so by using the "trope" (rhetorical device) of "reasonable expectation."<sup>172</sup> What she leaves out is any case in the Internet contract context that has used this trope to impose a finding of assent<sup>173</sup> and Barnett does not use this device. Otherwise, Radin is content merely to criticize the Barnett position largely by arguing that "[i]nformation and prevalent heuristic biases undercut any simple interpretation of the behaviors of signing or clicking."<sup>174</sup> Because "heuristic bias"—the construct from psychology that persons irrationally underestimate the frequency of adverse outcomes, such as illness or accidents (or from boilerplate)—by itself is not a defense to contract enforcement, this argument is unpersuasive.

Radin further believes that the objective theory of contract "does not help" in the effort to construe the effect of where the recipient clicks "I agree." Her reason is that the objective theory of consent does not relate to the reasonable understanding of the recipient.<sup>175</sup> Instead, she claims the objective theory pertains only to the reasonable understanding of the merchant who Radin believes could not reasonably conclude that the purchaser was manifesting assent.<sup>176</sup> My response from the case law is that the better vantage point on the objective theory takes into account the perspective of *both* parties.<sup>177</sup> Accordingly, no serious doubt can exist in all jurisdictions, given the

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<sup>171</sup> *Id.* at 635.

<sup>172</sup> RADIN, *supra* note 3, at 163.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*; *see also id.* at 103 (explaining "heuristic bias").

<sup>175</sup> *Id.* at 89.

<sup>176</sup> *Id.*

<sup>177</sup> The more persuasive cases construe reasonable understanding from the vantage point of *both* parties. *See, e.g.,* DLY-Adams Place, LLC v. Waste Mgmt. of Md., Inc., 2 A.3d 163, 166 (D.C. 2010); Rhone-Poulenc Basic Chems. Co. v. Am. Motorist Ins. Co., 616 A.2d 1192, 1196 (Del. 1992); Gen. Motors Acceptance Corp. v. Daniels, 492 A.2d 1306, 1310 (Md. 1985); *see also* Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 598 (Mich. 1993) ("To determine whether there was mutual assent to a contract, 'we use an objective test, 'looking to the expressed words of the parties and their visible acts.'"). As Larry DiMatteo points out, "[t]he reasonable person is a product of the creative efforts of the promisor and promisee. As such, neither party's perspective alone can adequately serve the interpretive mandate of the reasonable person." Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 334 (1997). Further, the single party-only perspective is inconsistent with the very nature of contract which, as Arthur Allen Leff observed many years ago, "is the product of a joint creative effort." Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 138 (1970). Indeed, the single party theory contradicts the courts' essential "role" in contract construction, which is to "effectuate the intent of the parties." *E.g.,* Yellowbook Inc. v. Brandeberry, 708 F.3d 837, 844 (6th Cir. 2013); Koch Indus., Inc. v. Sun Co., 918 F.2d 1203, 1208 (5th Cir.1990); Frost Nat'l Bank v. L & F Distribs., 165 S.W.3d 310, 311 (Tex. 2005) (emphasis added).

care that goes into the creation of today's software, that clicking "I agree" to readily discoverable terms is generally an unambiguous assertion of consent.<sup>178</sup>

### 3. Radin's Resurrection of the Subjective Theory

In more subtle ways, Radin in her critique of the objective theory and in her zeal to protect consumers (with little, if any, mention of legitimate vendor interests) has suggested a strategy damaging to general contract doctrine and, ultimately, to the consumer as well.

On the one hand, Radin correctly states that mutual assent can be present "no matter what was actually inside the mind of the other."<sup>179</sup> If she had stopped there, no issues would be present. Overlooking the common law checks and balances on the objective doctrine, however, Radin necessarily has embraced the discredited subjective standard of obligation. The proof for this assertion is that her book contains numerous arguments based on the consumer's "real consent," "actual consent," "actual agreement," or "actual assent."<sup>180</sup> Courts and commentators agree that these terms relate *only* to the offeror's personal state of mind and his subjective understandings.<sup>181</sup> Radin even concedes that she endorses a theory of assent dependent upon the party's "free will" and a "subjective basis (or better a basis internal to personhood)."<sup>182</sup> Again, Radin in effect has bypassed the objective theory of assent.

Perhaps her clearest endorsement of this incorrect subjective standard is her comment above that "consent depends on the processes internal to a person"<sup>183</sup> even though the law consistently says to the contrary that actual mental impressions of a party without more are *not* the source of contractual obligation.<sup>184</sup> In this regard, while Radin at one point correctly observes that the objective theory "does not

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<sup>178</sup> See *supra* note 157 and accompanying text.

<sup>179</sup> RADIN, *supra* note 3, at 86.

<sup>180</sup> *Id.* at 20, 31, 72, 75, 77, 81, 84, 86, 89, 90, 93, 96, 102.

<sup>181</sup> Compare *Newman v. Schiff*, 778 F.2d 460, 464 (8th Cir. 1985) ("The subjectivists looked to actual assent."); *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987) ("It must be emphasized that the assent analysis is not premised upon the actual assent of the parties."); *Laserage Tech. Corp. v. Laserage Labs.*, 972 F.2d 799, 802 (7th Cir.1992) ("[W]hether [the parties] had a 'meeting of the minds' . . . is determined by reference to what the parties expressed to each other in their writings, not by their actual mental processes."); *Farmington Police Officers Ass'n Local 7911 v. City of Farmington*, 137 P.3d 1204, 1211 (N.M. Ct. App. 2006) ("Application of an objective standard does not require inquiry into the actual understandings of the parties."); see also 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6, at 208 (3d ed. 2004) (actual assent on the part of both parties "was necessary" under the subjective view); Barnes, *Objective Theory*, *supra* note 17, at 1123 (subjective theory focuses upon "actual assent"); Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 808 n.36 (2008) (a proposal that Internet contracting should require actual consent is "contrary to current contract law").

<sup>182</sup> RADIN, *supra* note 3, at 89.

<sup>183</sup> *Id.* at 23.

<sup>184</sup> See 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:5 (4th ed. 2012) (extensive discussion of rule).

require subjective understanding,”<sup>185</sup> the remainder of her argument still insists that actual consent is needed. Also, Radin fails to mention that “[i]t is the manifestation of mutual assent, and not its genuineness, that is essential.”<sup>186</sup>

As Judge Learned Hand stated in a 1917 opinion that continues to resonate with current-day courts:

A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.<sup>187</sup>

By stating the contract is dependent upon the parties’ actual intent, Radin ignores foundational elements of mutual assent.

What then is the formal version of Radin’s theory for mutual assent? Without citation to authority, Radin insists that “autonomy theory” (subjective free will and intent) remains the “primary theory” for justifying “the institution of contract.”<sup>188</sup> The Reporter to the *Restatement (Second) of Contracts*, however, states that this same “subjective” will theory from the 1800s has been “displaced.”<sup>189</sup> As another commentator observes:

The will theory of contract--and its logical corollary, a subjective approach to contract formation--never found much traction with the courts in the United States, and it fizzled as a contract theory largely because it was inconsistent with the objective theory of contract formation, which was needed in “an increasingly national corporate economy . . . .”<sup>190</sup>

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<sup>185</sup> RADIN, *supra* note 3, at 89-90.

<sup>186</sup> 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:4 (4th ed. 2012); *see also id.* (“If it were true that subjective mental assent were the vital matter, it would follow that, absent reasonable detrimental reliance on the outward manifestation, there would be no obligation. . . . There is little if any support for such a doctrine . . .”).

<sup>187</sup> *Hotchkiss v. Nat’l City Bank*, 200 F. 287, 293 (S.D.N.Y. 1911), *aff’d*, 201 F. 664 (2d Cir. 1912), *aff’d*, 231 U.S. 50 (1913). For examples of modern cases citing *Hotchkiss* with approval, *see* *Travelers Cas. & Sur. Co. v. United States*, 75 Fed. Cl. 696, 706 (2007); *Zheng v. City of New York*, 973 N.E.2d 711, 716 (N.Y. 2012); *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 190 n.6 (D.C. App. 2009).

<sup>188</sup> RADIN, *supra* note 3 at 90.

<sup>189</sup> RESTATEMENT (SECOND) OF CONTRACTS § 17 Reporter’s Note, cmt c. (1981).

<sup>190</sup> Daniel P. O’Gorman, *Contract Theory and Some Realism About Employee Covenant Not to Compete Cases*, 65 SMU L. REV. 145, 165 (2012); *see also* E. Allan Farnsworth, “Meaning” in the Law of Contracts, 76 YALE L.J. 939, 943 (1967) (subjective theory was conjoined with the “will” theory of contracts in the late eighteenth and nineteenth centuries); Michael P. Van Alstine, *Consensus, Dissensus, and Contractual Obligation Through the Prism of Uniform International Sales Law*, 37 VA. J. INT’L L. 1, 55 n.205 (1996) (will theory is the “purest form” of party autonomy theory).

From a practical perspective, Radin's advocacy for the incorrect standard for consent would imperil the ultimate validity of the great majority of consumer contracts. All mass market contracts with vendors of credit cards, cell phones, and new automobiles, among numerous other items, could be in jeopardy in litigation if the consumer simply has a change of heart. Radin's theory makes the contract's enforcement hang upon the consumer's *post hoc* description of his true intent, which could increase the temptation for dissembling testimony and even perjury. One must recall that this potential danger is exacerbated by the fact ninety nine percent of all contracts are standard form mass market consumer contracts.<sup>191</sup>

Radin's argument further leads to a legal principle that I doubt she would endorse if asked. Again, the issue here is that if the law required evidence of a party's actual state of mind, a contract could be deemed unenforceable in litigation where a party later testifies he did not give his actual consent.<sup>192</sup> If subjective intent were the standard for mutual assent, then both sides can claim the same rights and remedies in the contract on this issue. Radin further appears to overlook that if there is no contract, the consumer lacks the legal predicate for bringing an action for breach of contract. Merchants would have the same incentive to dissembling testimony and even perjury. While giving the merchant the same ability as the consumer to disclaim its actual intent is fair to both parties, and meets the rule that courts favor neither party in contract construction,<sup>193</sup> such a development giving the merchant a significant potential escape hatch from the deal is certainly an unintended consequence of Radin's proposed standard.

#### 4. Mutual Assent and Information Asymmetry

In the final issue on Radin's view of the objective doctrine, she believes that mutual consent and "free choice" is lacking with significant information asymmetry between the two sides.<sup>194</sup> The law has no difficulty, however, that one party may have a significant and even commanding information advantage regarding the subject matter, with an exception for one side's fraud or where the discrepancy is so extreme that the law creates a fiduciary relationship (most commonly seen with the sale of professional services).<sup>195</sup> The United States Court of Appeals for the Seventh Circuit has ruled that

[P]arties to a contract often have unequal information going in, and ordinarily a party with superior information is entitled to exploit it in negotiations. Otherwise businessmen's incentives to obtain commercially valuable information, and by doing so speed the adjustment of prices to new conditions of supply and demand, would be impaired.<sup>196</sup>

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<sup>191</sup> Barnes, *Objective Theory*, *supra* note 17, at 1148.

<sup>192</sup> See *supra* note 103 and accompanying text; Barnes, *Objective Theory*, *supra* note 17, at 1127 (similar point).

<sup>193</sup> See *Rainey v. Stansell* 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992).

<sup>194</sup> RADIN, *supra* note 3, at 24-26 (noting how consumers have less training and ability than merchants to understand technical terms); *id.* at 102-03.

<sup>195</sup> *Schreiber Foods, Inc. v. Lei Wang*, 651 F.3d 678, 683 (7th Cir. 2011).

<sup>196</sup> *Id.* (also noting without objection that "[t]here is often an extreme asymmetry of information between seller and buyer when the seller is the provider of a professional



Radin's comment also has no support on policy grounds. Radin overlooks that, even with a major informational discrepancy between buyer and seller, there is patent unfairness (absent that party's fraud and the like) in precluding parties from using their fairly earned skills and knowledge in a market economy. I would add that allowing each party to take advantage of its lawful talent, insight, or expertise is the hallmark of freedom of contract.<sup>197</sup> For all the doctrinal and practical considerations discussed above, Radin's misplaced requirement for actual subjective consent seriously detracts from her argument that contract doctrine has suffered normative degradation.

#### IV. ARE ADHESION CONTRACTS "PURPORTED CONTRACTS?"

As compared with Part III, this section analyzes and resolves the related topic of what Radin terms the "purported contract" nature of adhesion contracts.<sup>198</sup> A separate analysis is needed in Part IV because adhesion contracts, unlike boilerplate and standard form agreements, will likely raise the most significant potential issues of mutual assent.<sup>199</sup> The unifying theme for both sections, however, is that even accepting Radin's attempt to engraft the Worlds A and B construct upon the law of contracts, the objective theory of mutual assent is versatile enough to bind parties to the instruments in both World A and World B.

One of Radin's major themes is her repeated argument that mass-market boilerplate agreements are only "purported contracts" because they are not bargains that reflect the buyer's knowing and voluntary consent.<sup>200</sup> Based on this alleged aspect of mass market boilerplate contracts, her contention is courts have improperly watered down mutual assent.<sup>201</sup> Therefore, for Radin, "a purported contract

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service."); *see also* PXRE Reinsurance Co. v. Lumbermen's Mut. Cas. Co., 342 F. Supp. 2d 752, 762 (N.D. Ill. 2004) ("Transactions almost always begin with asymmetry of information, but that does not eliminate the need for the less-informed party to exercise ordinary prudence.").

<sup>197</sup> *See* 7 JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 29.4, at 393 (rev. ed. 2002) (freedom of contract necessarily recognizes that parties can properly employ superior analytical, tactical, and other resources as compared with others).

<sup>198</sup> *See infra* Part IV.E.

<sup>199</sup> *See supra* Part II.B.

<sup>200</sup> RADIN, *supra* note 3, at 30-31, 83, 84, 93. Radin uses the term "purported contract" fifteen times and emphasizes that this description applies in her book even when not specifically called out. *Id.* at 10.

<sup>201</sup> Radin sees a difference between agreement and the notions of consent or assent. Radin contends that agreement is a bilateral exchange whereas consent and assent are more of a one-sided process where one party proposes and the other side "says OK." *Id.* at 83. In point of fact, the concepts are closely linked because an "agreement" is a "manifestation of mutual assent by two or more persons." RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981); *see also* Weddington Prod., Inc. v. Flick, 71 Cal. Rptr. 2d 265, 277 (Cal. Dist. Ct. App. 1998) (creation of a valid contract requires "mutual consent").

Radin also argues that consent and assent are different concepts in the law of contracts whereby "assent" is more passive than "consent." Radin further states that assent may require less information than consent regarding whether the assent is valid. Radin, *supra* note 3, at 83. To the contrary, as stated by the Mississippi Court of Appeals, the two quoted concepts are "interchangeable." *Hugh Dancy Co., Inc. v. Mooneyham*, 68 So. 3d 76, 80 (Miss. Ct. App.

containing offending boilerplate should be declared “invalid *in toto*” which necessarily means she believes these contracts are void *ab initio*.<sup>202</sup>

On the other hand, she backs away from this broad voidness argument as she clarifies in a footnote that she actually opposes making all adhesion contracts *prima facie* unenforceable because that result would be “overkill.”<sup>203</sup> Her rationale for the revised statement is that her “concern” is not just with contracts lacking dickered terms but with “some adhesion contracts” creating normative degradation, especially those contracts that are “mass market rights deletion schemes.”<sup>204</sup>

As stated above,<sup>205</sup> Radin has created confusion in her discussion of the relationship between adhesion contracts, standardized contracts and boilerplate. I have also shown that she wavers on whether offending boilerplate contracts are always or sometimes void *ab initio*. Because in at least one place Radin deems boilerplate to be a subset of adhesion contracts, and because she equates boilerplate and adhesion contracts in several others, my critique on whether World B contracts are purported contracts will center on adhesion contracts (which I contend is the legal system’s real concern with mass market standard form contracts). I also believe this topic is also Radin’s implicit preferred area for analysis. She states that her “focus” is on “adhesion contracts” that are mass market boilerplate rights deletion schemes.<sup>206</sup>

As explained below, the decisions are split on the nature and validity of consumer assent in mass market contracts of adhesion. Diligent research has not shown that another commentator has identified (or resolved) this division in the cases.

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2011). Both terms mean “agreement, approval, or permission.” BLACK’S LAW DICTIONARY 346, 132 (9th ed. 2009).

<sup>202</sup> RADIN, *supra* note 3, at 213; *see also In re Cross*, 290 B.R. 157, 160 (Bankr. D. Nev. 2001); *State ex rel. Ne. Transp. Co. v. Superior Court of King Cnty.*, 77 P.2d 1012, 1020 (Wash. 1938) (cases equating void *ab initio* and invalid *in toto*). Actually, the decisions indicate that a contract lacking mutual assent is voidable at the option of the party that did not give binding assent. *See* 12 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:4 (4th ed. 2012).

<sup>203</sup> RADIN, *supra* note 3, at 302. Radin wisely recedes from her initial conclusion that offending adhesion contracts are void. The voiding of a contract can be a harsh remedy, *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 566 (1961), and as a species of forfeiture, this sanction must be strictly construed, *cf. DeVito v. United States*, 413 F.2d 1147, 1153 (Ct. Cl. 1969) (remedy of default termination). The cases have repeatedly recognized that voiding a contract is a drastic and extraordinary remedy that should be reserved only for those cases plainly calling for its application. *E.g.*, *Godley v. United States*, 5 F.3d 1473, 1475-76 (Fed. Cir. 1993); *John Reiner & Co. v. United States*, 325 F.2d 438, 440 (Ct. Cl. 1963), *cert. denied*, 377 U.S. 931 (1964) (illegality must be plain and palpable to void a contract).

<sup>204</sup> RADIN, *supra* note 3, at 302 n.42.

<sup>205</sup> *See supra* Part II.

<sup>206</sup> RADIN, *supra* note 3, at 33; *see also supra* note 34 (noting that Radin teaches a course on boilerplate at the Michigan Law School making “adhesion contracts” her focus for analysis).

*A. Adhesion Contracts and Mutual Assent—The Competing Lines of Authority*

The possibility of merchants overreaching with adhesion contracts ups the ante for courts ascertaining the existence of mutual assent for these instruments.<sup>207</sup> Therefore, the important question is whether the objective theory (and cognate principles) can support mutual assent for an adhesion contract. The proper resolution of this issue is subject to the general task of the law which is, wherever possible, to deem a contract enforceable rather than unenforceable.<sup>208</sup>

1. Cases Upholding Mutual Assent

One line of authority would definitely reject the Radin “purported contract” theory as applied to adhesion contracts. These decisions state that “contracts of adhesion are well accepted in the law and routinely enforced.”<sup>209</sup> Numerous cases further hold that the objective, plain meaning of the unambiguous words in the contract rather than the parties’ subjective intent or understandings supply the requisite consent that will govern an adhesion contract<sup>210</sup> (typically but not always insurance policies).<sup>211</sup>

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<sup>207</sup> See *supra* Part II.

<sup>208</sup> See *Schnall v. AT & T Wireless Servs., Inc.*, 259 P.3d 129, 131 (Wash. 2011) (“We interpret contract provisions to render them enforceable wherever possible.”); *Homes of Legend, Inc. v. McCollough*, 776 So. 2d 741, 746 (Ala. 2000) (“[W]here there is a choice between a valid construction and an invalid construction the court has a duty to accept the construction that will uphold, rather than destroy, the contract and that will give effect and meaning to all of its terms.”); 12 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 32:11 (4th ed. 2012) (“interpretations which render the contract fair and reasonable are preferred to those which render the contract harsh or unreasonable to one party”).

<sup>209</sup> *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 355 (Cal. Dist. Ct. App. 2007), *cert. denied*, 553 U.S. 1067 (2008).

<sup>210</sup> See *Mission Viejo Emergency Med. Assocs. v. Beta Healthcare Grp.*, 128 Cal. Rptr. 3d 330, 337 (Cal. Dist. Ct. App. 2011); *Maloney-Refaie v. Bridge at Sch., Inc.*, 958 A.2d 871, 879 (Del. Ch. 2008); *Harrington v. Citizens Prop. Ins. Corp.*, 54 So.3d 999, 1001-02 (Fla. Ct. App. 2010); see also *Craft Mach. Works, Inc. v. United States*, 926 F.2d 1110, 1113 (Fed. Cir. 1991) (“In contract interpretation, the plain and unambiguous meaning of a written agreement controls.”).

See also *Graham v. Scissor-DTail, Inc.*, 623 P.2d 165, 172 (Cal. 1981) (describing a contract as adhesive “[i]s not to indicate its enforceability” because this description “[i]s the beginning and not the end of the analysis”); *Broemmer v. Abortion Servs. of Phoenix, Ltd.*, 840 P.2d 1013, 1016 (Ariz. 1992) (“[A] contract of adhesion is fully enforceable according to its terms unless certain other factors are present which, under established legal rules-legislative or judicial-operate to render it otherwise.” (citations omitted)); *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 30 (Mich. 2005) (an unambiguous contractual provision is reflective of the parties’ intent as a matter of law).

<sup>211</sup> E.g., *Hamrick v. Aqua Glass, Inc.*, No. 07-3089-CL, 2008 WL 2853992, at \*1 (D. Or. Feb. 20, 2008); *Mission Viejo Emergency Med. Assocs.*, 128 Cal. Rptr. 3d at 337; *Maloney-Refaie*, 958 A.2d at 879; *Harrington*, 54 So.3d at 1002; see also *Gianetti v. Riether*, No. CV020398555S, 2011 WL 4347211, at \*3-4 (Conn. Super. Ct. Aug. 24, 2011); *Energy Home v. Peay*, 406 S.W.3d 828, 834 (Ky. 2013); *Riehl v. Cambridge Court GF, LLC*, 226 P.3d 581, 584 (Mont. 2010) (cases ruling that adhesion contracts can meet the requirement for offer and acceptance). For other cases expressly applying the plain meaning rule to support the objective theory of mutual assent, see, for example, *Stamas v. Cnty. of Madera*, 795 F. Supp.

The above “plain meaning” rule provides that “[i]f a writing, or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence.”<sup>212</sup> This theory of assent generally holds that if the writing conveys an unmistakable meaning, the four corners of the writing itself is the “sole source” for gaining an understanding of intent.<sup>213</sup> The plain meaning rule applies equally to the existence of mutual assent and the validity of a particular contract interpretation.<sup>214</sup>

Other cases explicitly draw the connection between the “plain meaning” rule and the “objective theory.”<sup>215</sup> Noted commentators do so as well. Thus, in commenting that “[I]t remains the case that a completely objective approach to promise would also vindicate form contracts,” Randy Barnett correctly concludes that the text-driven version of the objective theory fully explains mutual assent for adhesion contracts.<sup>216</sup> Most importantly for purposes of this discussion, case law reaches the same conclusion.<sup>217</sup>

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2d 1047, 1081, 1083 (E.D. Cal. 2011); *Cochran v. Norkunas*, 919 A.2d 700, 709-10 (Md. 2007).

<sup>212</sup> BLACK’S LAW DICTIONARY 1267 (9th ed. 2009); *see also* *BLGH Holdings LLC v. enXco LFG Holding, LLC*, 41 A.3d 410, 414 (Del. 2012); 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.7, at 33 (rev. ed. 1998) (“Courts that subscribe to the ‘plain meaning rule’ hold that if a ‘clear, unambiguous’ meaning is discernible in the language of the contract, no extrinsic evidence of surrounding circumstances may be admitted to challenge this interpretation.”).

<sup>213</sup> *City Investing Co. Liquidating Trust v. Cont’l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993) (stating rule) (emphasis added); *Mellon Bank, N.A. v. Aetna Bus. Credit, Inc.*, 619 F.2d 1001, 1009 (3d Cir. 1980) (“Absent illegality, unconscionableness, fraud, duress, or mistake the parties are bound by the terms of their contract.”); *Coast Fed. Bank v. United States*, 323 F.3d 1035, 1038 (Fed. Cir. 2003) (en banc) (When “the provisions of the Agreement are phrased in clear and unambiguous language, they must be given their plain and ordinary meaning, and we may not resort to extrinsic evidence to interpret them.”); *see also* *City of Golden v. Simpson*, 83 P.3d 87, 93 (Colo. 2004) (en banc) (“To ascertain [contracting] intent, the courts turn to the plain and ordinary meaning of its terms. If the terms are clear, a court will neither look outside the four corners of the instrument, nor admit extrinsic evidence to aid in interpretation.”). This four corners rule of interpretation of unambiguous contracts applies to insurance policies, *JNJ Logistics, L.L.C. v. Scottsdale Ins. Co.*, No. 2:10-cv-02741-JPM-cgc, 2013 WL 6903937, at \*9 (W.D. Tenn. Dec. 31, 2013), the most well-known example of an adhesion contract. *See infra* note 375.

<sup>214</sup> *See, e.g., Independence Twp. v. Reliance Bldg. Co.*, 437 N.W.2d 22, 24 (Mich. Ct. App. 1989) (“No contract can arise except on the express mutual assent of the parties. . . . We are bound to construe an unambiguous agreement according to its plain meaning.”).

<sup>215</sup> *Cnty. Comm’rs of Charles Cnty. v. Panda-Brandywine, L.P.*, 663 F. Supp. 2d 424, 428 (D. Md. 2009) (citing *Nova Research, Inc. v. Penske Truck Leasing, Co.*, 952 A.2d 275, 283 (Md. 2008)).

<sup>216</sup> *See* Barnett, *supra* note 171, at 630 n.10. For further discussion of the policy for the objective theory, *see supra* Part III.B. *See also* Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 479-80 (2012) (extensive analysis for why the objective theory supports enforcement of adhesion contracts). Dissenting Justices Marshall and Stevens in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 600 (1991) (Marshall J., Stevens, J., dissenting), were unimpressed with the views of some academic writers that adhesion

The rationale for the plain meaning rule—which is a corollary of the objective theory of contractual assent<sup>218</sup>—is that courts should honor the freedom of private contracts and not redo the parties' bargain where the parties have lawfully expressed their intent by clear and unambiguous language.<sup>219</sup> The plain meaning rule also derives from the conclusive presumption followed by some courts that absent mistake, fraud, and the like, parties understand their contractual obligations and have imputed knowledge of the reasonable meaning of their words and actions.<sup>220</sup> The plain meaning doctrine in some form is the majority rule in the United States.<sup>221</sup>

The objective theory and its emphasis on the four corners of the document<sup>222</sup> give rise to another principle of construction supportive of mutual assent for adhesion contracts. Absent an invalidating cause, such as the other party's fraud, a party has a broad duty "to read its contract and to learn its contents before signing it."<sup>223</sup> This "duty to read" is a "basic tenet of contract law"<sup>224</sup> and is closely aligned with the plain meaning rule.<sup>225</sup> The main consequence will be that absent the other side's

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contracts are not enforceable under traditional contract theory. Rejecting what they called this "extreme" position, the two justices concluded that that standardized form contracts account for a significant portion of all commercial agreements and also reflect legally sufficient assent.

<sup>217</sup> *E.g.*, *Harrington v. Citizens Prop. Ins. Corp.*, 54 So.3d 999, 1002 (Fla. Ct. App. 2010) (objective theory applies to insurance policies); 100 *Inv. v. Columbia Town Ctr. Title Co.*, 60 A.3d 1, 22 (Md. 2013) (same); *see also Clark v. Sputniks, LLC*, 368 S.W.3d 431, 441 (Tenn. 2012) ("Insurance contracts are subject to the same rules of construction as contracts generally.").

<sup>218</sup> *See Cnty Comm'rs of Charles Cnty v. Panda-Brandywine*, 663 F. Supp. 2d 424 428 (D. Md. 2009) (citing *Nova Research, Inc. v. Penske Truck Leasing, Co.*, 952 A.2d 275, 283 (Md. 2008)) (under the objective theory of contract interpretation an unambiguous contract must be given the effect of its plain meaning in context and without regard to the parties' subjective intent at the time of formation).

<sup>219</sup> *See Prestige Valet, Inc. v. Mendel*, 14 So. 3d 282, 283 (Fla. Dist. Ct. App. 2009); *Betz v. Diamond Jim's Auto Sales*, 825 N.W.2d 508, 512 (Wis. Ct. App. 2012).

<sup>220</sup> *Tattoo Arts, Inc. v. Tat Int'l, LLC*, No. 2:10CV323, 2011 WL 1304910, at \*7 (E.D. Va. Feb. 28, 2011); *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn. Ct. App. 1981); *Dunn v. United Sierra Corp.*, 612 S.W.2d 470, 474 (Tenn. Ct. App. 1980); *McQuiddy Printing Co. v. Hirsig*, 134 S.W.2d 197, 204 (Tenn. Ct. App. 1939). In contract interpretation, "[a]bsent fraud, duress, mutual mistake, or ambiguity, the parties' intent will be determined from the plain meaning of the language used in the contract." *Close v. Fisette*, 776 A.2d 131, 134 (N.H. 2001).

<sup>221</sup> 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.12 at 308 (3d ed. 2004) ("[T]he overwhelming majority of courts retains some kind of plain meaning rule.").

<sup>222</sup> *See supra* note 214 and accompanying text.

<sup>223</sup> *Burwell v. S.C. Nat'l Bank*, 340 S.E.2d 786, 789 (S.C.1986); *see also Roberts v. Roberts*, 618 S.E.2d 761, 764 (N.C. Ct. App. 2005) ("Absent fraud or oppression, 'parties to a contract have an affirmative duty to read and understand a written contract before signing it.'").

<sup>224</sup> *Woodruff v. Bretz, Inc.*, 218 P.3d 486, 495 (Mont. 2009).

<sup>225</sup> *See In re Kaiser Aluminum Corp., Inc.*, Nos. 02-10429(JFK) & 02-6531(JFK), 2004 WL 97658, at \*3 (Bankr. D. Del. Jan. 16, 2004) (linking concepts).

fraud, misrepresentation or similar defense, a party to a contract is legally bound by its terms whether he or she has actually read or understood them.<sup>226</sup> In *Pietroske, Inc. v. Globalcom, Inc.*,<sup>227</sup> the court commented:

Failure to read a contract, particularly in a commercial contract setting, is not an excuse that relieves a person from the obligations of the contract. “Men, in their dealings with each other, cannot close their eyes to the means of knowledge equally accessible to themselves and those with whom they deal, and then ask courts to relieve them from the consequences of their lack of vigilance.”<sup>228</sup>

Notably, the *Pietroske* court also ruled that “the fact that the service agreement is a boilerplate contract does not prevent a true meeting of the minds.”<sup>229</sup>

The duty to read and understand a contract rests on sound economic and policy principles. Depending on the jurisdiction, one or more rationales supply the basis for the duty. Thus, courts have noted that the ignorant party is estopped from raising the defense of the lack of consent to unread terms; the party is bound by a conclusive presumption of knowledge; the uninformed signatory is held to the terms because he was negligent or assumed the risk; and a contrary rule would destroy the value of all written contracts.<sup>230</sup> A Texas court opined that a person has an obligation to protect his or her own interests.<sup>231</sup> Additional legal principles support the duty to read. For example, a New Mexico case reasoned that, absent fraud or similar invalidating clause, the contract signatory “owes it to the other party to read or have read, the contract . . . because the other party has a right to and does conform his own conduct to the requirements of the contract . . .”<sup>232</sup> Another supporting principle would be that the duty to read and understand the terms preserves fairness to merchants

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<sup>226</sup> See 17A C.J.S. *Contracts* § 193 (2012); see also *Uhar & Co. v. Jacob*, 840 F. Supp. 2d 287, 292 (D.D.C. 2012).

<sup>227</sup> *Pietroske, Inc. v. Globalcom, Inc.*, 685 N.W.2d 884, 889 (Wis. Ct. App. 2004).

<sup>228</sup> *Id.* (quoting *Nauga, Inc. v. Westel Milwaukee Co.*, 576 N.W.2d 579 (Wis. Ct. App. 1998)).

<sup>229</sup> *Id.* at 888; cf. *Sherman v. Lunsford*, 723 P.2d 1176, 1178 (Wash. Ct. App. 1986) (“Although the parties may not have fully understood the legal significance of each and every term, they knew they were signing a binding contract.”).

<sup>230</sup> *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) (assumption of the risk); *Giles v. Allstate Ins. Co.*, 871 S.W.2d 154, 156 (Tenn. Ct. App. 1993) (estoppel, conclusive presumption, and negligence theories); *Busching v. Griffin*, 542 So.2d 860, 865 (Miss. 1989) (quoting *Alliance Trust Co., Ltd. v. Armstrong*, 186 So. 633, 635 (Miss. 1939)) (contrary rule would “absolutely destroy the value of all contracts”); *Moody Realty Co., Inc. v. Huestis*, 237 S.W.3d 666, 676 (Tenn. Ct. App. 2007) (“Otherwise, written contracts would be worthless.” Also noting an exception where a person is a victim of trick or artifice by the party seeking to enforce the contract.).

<sup>231</sup> *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962) (“parties to a contract have an obligation to protect themselves by reading what they sign”).

<sup>232</sup> *Morstad v. Atchinson T. & S.F. Ry. Co.*, 170 P. 886, 889 (N.M. 1918).

because the law should preclude the consumer from accepting the benefits under the contract while selectively denying the existence of disliked provisions.<sup>233</sup>

Furthermore, some courts say the law must permit the other party to trust the first party's manifested assent as demonstrated by the first party's signature (or other approving action) so that parties in general can rely on the predictability and enforceability of contracts.<sup>234</sup> All told, the duty to read and understand properly shifts the risk of misunderstanding the contract from the merchant as the drafter to the consumer where the latter fails to take proper measures to protect his own interests—which includes the need for a party (even an illiterate person) to seek assistance if he does not understand the contract terms.<sup>235</sup>

As indicated above, the duty to read a contract is closely associated with the plain meaning rule. A sensible plain meaning rule is superior to a more liberal view giving weight to the circumstances extrinsic to the contract terms.<sup>236</sup> As one commentator argues, “By letting in all extrinsic evidence of the intent of the parties, the context rule unmoors the courts from shared and public standards of meaning and thereby invites gamesmanship and creates uncertainty.”<sup>237</sup> When courts go beyond the parol evidence rule<sup>238</sup> and freely allow the examination of extrinsic evidence to the contract, courts undermine “[t]he parties' ability to firmly and effectively set their agreement into writing in a manner that would be predictably enforced by the court.”<sup>239</sup>

The plain meaning rule simplifies contract litigation and protects a party “against being blindsided by evidence,” possibly self-serving, intended to undermine the deal that the party thought it “had graven in stone by using clear language.”<sup>240</sup> Failing to

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<sup>233</sup> See *Colony Ins. Co. v. Jack A. Halprin, Inc.*, No. 3:10-CV-1059 CSH, 2012 WL 2859085, at \*10 (D. Conn. July 11, 2012) (consumer may not pick and choose the contract terms he wishes would be enforced); *Graham v. State Farm Mut. Auto. Ins. Co.*, 565 A.2d 908, 911 (Del. 1989) (“adhesive nature of a contract does not allow the non-drafting party to reject contract terms that he later finds unappealing”).

<sup>234</sup> *Colony*, 2012 WL 2859085, at \*10; *Miner v. Farm Bureau Mut. Ins. Co.*, 841 P.2d 1093, 1102-03 (Kan. Ct. App. 1992) (linking duty to read and need for commercial stability); see 17A C.J.S. *Contracts* § 193 (2012) (same; also stating duty to read “[r]emove[s] the temptation and possibility of perjury, which would be afforded if parol evidence were admissible to vary the terms of such instrument”).

<sup>235</sup> *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1292 (7th Cir. 1989); *Nw. Nat'l Ins. Co. v. Frumin*, 739 F. Supp. 1307, 1310 (E.D. Wis. 1990); *Clay v. First Family Fin. Servs., Inc.*, No. 4:02CV169-P-B, 2006 WL 2404682, at \*2 (N.D. Miss. Aug. 18, 2006) (“If one cannot understand [the contract], he or she must seek assistance in understanding it by a third party.” Also extending rule to an illiterate person.).

<sup>236</sup> See *supra* notes 214-16 and accompanying text.

<sup>237</sup> Goldstein, *supra* note 102, at 96.

<sup>238</sup> “As a general rule, parol evidence is inadmissible to contradict, vary, or alter a written contract when the written instrument is valid, complete, and unambiguous, absent fraud or mistake or any claim or allegation thereof.” *Harry J. Whelchel Co., Inc. v. Ripley Tractor Co., Inc.*, 900 S.W.2d 691, 692-93 (Tenn. Ct. App. 1995).

<sup>239</sup> Goldstein, *supra* note 102, at 98.

<sup>240</sup> *Beanstalk Grp, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 859 (7th Cir. 2002); *Air Line Pilots Ass'n Int'l v. Midwest Exp. Airlines, Inc.*, 279 F.3d 553, 556 (7th Cir. 2002).

deal in any substantive way with the duty to read doctrine or the plain meaning rule, Radin also pays inadequate attention to the objective theory.<sup>241</sup> In effect, Radin has foregone the opportunity to argue why her position on mutual assent deserves to modify general contract law.

## 2. Cases Contesting Mutual Assent

A second line of cases travels a different path from those decisions emphasizing the objective theory of contract, the plain meaning rule, the duty to read and finding consumer assent for adhesion contracts. Various decisions pre-dating her book (and unmentioned by Radin) actually share her concerns that mass market adhesion contracts do not fit the traditional model of offer and acceptance in a bargained-for exchange. Radin's book would have become much more provocative if she had contrasted the majority rule with those decisions favoring her position.

In a representative 1981 Missouri Court of Appeals case, the court observed:

Our law distinguishes . . . between a contract consented to by negotiation and a contract assented to by adherence. The one (at least, as paradigm) describes a bargain between equals; the other, a form with standard terms imposed upon the applicant to take or leave.

. . . .

In an adhesion contract, . . . the assent is resembled rather than actual. The printed words are not enough to disclose the expectations of the parties. The court must look for that purpose to the full circumstances of the transaction whether the written words of the contract be ambiguous or unambiguous.<sup>242</sup>

Interestingly, whether the consent arises through adherence or negotiation, Missouri courts apply the same rules of contract construction that will implement as much as possible the "expectations which induced [the] agreement."<sup>243</sup>

Still other decisions rule that adhesion contracts are not agreements under the traditional bargain model. They state, With an adhesion contract, "[a]ssent and volition and, therefore, agreement are absent."<sup>244</sup> Another case observes that

<sup>241</sup> Radin refers one time to the plain meaning rule, saying only that "[o]ne judge's definite plain meaning is another judge's incomplete interpretive morass." RADIN, *supra* note 3, at 124. Although Radin correctly states that judges sometimes disagree in contract cases, such disagreements on plain meaning are the exception and not probative by themselves. *See also In re Utneher*, 499 B.R. 705, 716 (9th Cir. BAP 2013) ("An agreement is not ambiguous merely because the parties (or judges) disagree about its meaning.").

<sup>242</sup> *Spychalski v. MFA Life Ins. Co.*, 620 S.W.2d 388, 392-93 (Mo. Ct. App. 1981); *see also Estrin Const. Co. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 422 (Mo. Ct. App. 1981) ("These [adhesive] terms are not the result of formal assent but are imposed. The other party does not agree to the transaction, but only adheres from want of genuine choice.").

<sup>243</sup> *Spychalski*, 620 S.W.2d at 392.

<sup>244</sup> *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 147 (Pa. Super. 1985); *see also Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1180 (3d Cir. 1979) ("essence of assent is absent [in a contract of adhesion]"); *Trentacost v. Brussel*, 412 A.2d 436, 442 (N.J. 1980) ("contracts of adhesion cannot be relied upon to represent a genuine meeting of the minds"); *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277, 282-83 (Ariz. 1987) ("an adhesion contract is a different creature than the traditional bargained-for exchange of terms to which the courts apply the ordinary meeting of the minds contract rules"); Galligan



standard form adhesion contracts “are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered.”<sup>245</sup> Yet another decision has concluded regarding adhesion clauses, “The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance.”<sup>246</sup> A fourth case even implicitly rejects the plain meaning rule, observing that “A court should disregard [the parties’] stated intent when it is contained in an adhesion contract.”<sup>247</sup> These courts would seem to agree that “The process of entering into a contract of adhesion . . . is not one of haggle or cooperative process but rather of a fly and flypaper.”<sup>248</sup>

This second line of cases echoes Radin’s refrain that contract law has lost sight of the moral premise that contracts are enforceable only when each side has voluntarily exchanged one item of value for another.<sup>249</sup> Indeed, an Arizona case observes in language very close to Radin’s critique, “To apply the old rule and interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule.”<sup>250</sup> These cases further indicate that an adhesion contract is not a sufficiently pure form of private ordering. By not relying on the above authorities, Radin has missed an opportunity to make a respectable argument that the objective theory does not support the existence of mutual assent in consumer mass market adhesion contracts.

Radin also has missed that an influential tribunal has seemingly decided the above issue against the existence of manifested intent under the objective theory. The United States Court of Appeals for the District of Columbia Circuit said in *Williams v. First Government Mort’g. and Investors Corp.* that “[w]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.”<sup>251</sup> Put another way, the *Williams* court indicated that a reasonable party

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v. Arovitch, 219 A.2d 463, 465 (Pa. 1966) (exculpatory clause did not represent a meeting of the minds but in effect was a mere contract of adhesion).

<sup>245</sup> Rudbart v. N. Jersey Dist. Water Supply Comm’n, 605 A.2d 681, 686 (N.J. 1992).

<sup>246</sup> C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 173, 175 (Iowa 1975).

<sup>247</sup> Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 411 n.8 (Mass. 2013).

<sup>248</sup> Woodruff v. Bretz, Inc., 218 P.3d 486, 491 (Mont. 2009) (citing A. CORBIN, CORBIN ON CONTRACTS § 1.4, 13–14 (rev. ed. 1998)).

<sup>249</sup> RADIN, *Boilerplate*, *supra* note 3, at 15.

<sup>250</sup> Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 399 (Ariz. 1984).

<sup>251</sup> *Williams v. First Gov’t Mort’g. & Investors Corp.*, 225 F.3d 738, 748 (D.C. Cir. 2000) (emphasis added). *Accord In re Strong*, 356 B.R. 121, 141 (Bankr. E.D. Pa. 2004) (citing *Williams*, 225 F.3d 738). *See also* *Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co.*, 610 F.2d 1174, 1180 (3d Cir.1979) (“[t]he dominant party realizes that the weaker party’s assent is not genuine”). The Arizona Supreme Court observed in *Gordinier v. Aetna Cas. & Sur. Co.*, 742 P.2d 277 (Ariz. 1987):

[C]ourts will enforce a boilerplate term unless the drafter had reason to believe that the adhering party would not have assented to the particular term had he or she known

in the position of the seller, knowing that consumers rarely if ever read and understand the particular mass market contract of adhesion, would not necessarily construe the consumer's acceptance of the contract as manifesting concurrence.<sup>252</sup> The traditional run of cases rarely, if ever, attempts to rebut this argument and Radin does not reference this helpful D.C. Circuit case in her analysis.

While the D.C. Circuit in *Williams* essentially rejected the existence of consumer assent in adhesion contracts under the objective theory, the case could be distinguishable. The court strongly indicated that the contract was unconscionable based on the consumer's "[l]ack of education, his ability to understand the transaction, his overall bargaining power, and the fairness of the merchant's sales practices."<sup>253</sup> By definition, no meaningful assent occurs with an unconscionable contract.<sup>254</sup> Thus, this decision arguably offers inconclusive support for the Radin viewpoint.

Although generally a pro-merchant policy, the duty to read doctrine<sup>255</sup> in one iteration comports with Radin's position. In contesting the use of the objective theory for adhesion contracts, Radin could have profitably cited those decisions that lessen the duty to read either when the party signs an adhesion contract<sup>256</sup> or when enforcing the duty to read would be "unfair under the circumstance" or cause "great

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of its presence. The drafter's reason to believe that the adhering party would not have assented to the term can be shown through prior negotiations or inferred from various facts.

*Id.* at 283; *see also* *Klos v. Lotnicze*, 133 F.3d 164, 168 (2d Cir. 1997) ("The concept of adhesion contracts introduces the serpent of uncertainty into the Eden of contract enforcement. At the very least, it represents a serious challenge to orthodox contract law that a contract is to be interpreted in accordance with the objective manifestation of the parties' intent.").

<sup>252</sup> On a related point, as one commentator points out, many consumers would rather be rationally ignorant of an adhesion contract than to take the time and trouble to read and understand all terms:

Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, which involve risks that probably will never mature, which are unlikely to be worth the cost of search and processing, and which probably aren't subject to revision in any event, a rational form taker will typically decide to remain ignorant of the preprinted terms.

Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995).

<sup>253</sup> *Williams*, 225 F.3d at 749 (remanding to district court on these issues)

<sup>254</sup> *See generally Ex parte Foster*, 758 So.2d 516, 520 n.4 (Ala.1999) (unconscionability is a "deficiency in the contract-formation process result[ing] in a lack of meaningful assent").

<sup>255</sup> *See Merit Music Serv., Inc. v. Sonneborn*, 225 A.2d 470, 474 (Md. 1967) ("the law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms"); *Vincent v. Palmer*, 19 A.2d 183, 189 (Md. 1941) (stating that, "as a general rule, when one signs a release or other instrument, he is presumed in law to have read and understood its contents, and he will not be protected against an unwise agreement").

<sup>256</sup> *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 785 (Cal. Dist. Ct. App. 1976); *see also Rempel v. Nationwide Life Ins. Co.*, 370 A.2d 366, 369 (Pa. 1977) (given the adhesive nature of an insurance policy the insured is under no duty to read the document).

hardship.”<sup>257</sup> These courts further reason in an exception to the duty to read that “[w]here a contractual provision would defeat the ‘strong’ expectation of the weaker party, it may also be necessary [for the merchant] to call [the consumer’s] attention to the language of the provision.”<sup>258</sup> Indeed, under New Jersey case law, an insurer must disclose to the insured those policy terms that might vary from the insured’s reasonable expectations.<sup>259</sup> Thus, Radin overlooks that some cases in certain instances lessen the importance of the duty to read as a barrier for consumers seeking to overturn their adhesion contracts.

Apart from these qualifications to the duty to read, even when the contract terms are unambiguous, Radin could have argued further that those jurisdictions strictly relying upon the four corners rule regarding the contract document, the objective theory, and the duty to read, employ an overly formalistic approach without due consideration for the surrounding circumstances of contract formation and performance.<sup>260</sup> These latter decisions indicate that they will not perform contract construction in an “unreal” (and even “fictitious”) manner.<sup>261</sup> This broader view of contract-as-transaction could support the position that irrespective of dry words on inert paper, the particular parties in the full context of their living relationship never intended a free and open transaction. Authority also exists for the proposition that the duty to read merely states a rebuttable presumption that cannot stand where dispelled by direct uncontradicted evidence that the person never read the document in question.<sup>262</sup>

Ultimately, the policy and legal and policy argument can be made that notwithstanding the objective theory, when a court finds that a party has ignorantly signed a contract, and the other party knows it or has reason to know it, then enforcement of such a contract *undermines* reliance on the stability of commercial transactions. As stated by the District of Columbia Court of Appeals,

The [problem is that the] written term asserted by one party is contained in a form contract, in circumstances where the party asserting the term has no reasonable basis to believe that the other party had knowingly or

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<sup>257</sup> *Heller Fin., Inc. v. Midwhey Powder Co., Inc.*, 883 F.2d 1286, 1292 (7th Cir. 1989).

<sup>258</sup> *Wheeler*, 133 Cal. Rptr. at 785.

<sup>259</sup> *Bowler v. Fid. & Cas. Co. of N.Y.*, 250 A.2d 580, 588 (N.J. 1969).

<sup>260</sup> A number of courts give these extrinsic considerations important weight. *See Muchesko v. Muchesko*, 955 P.2d 21, 24 (Ariz. App. 1997) (in determining mutual assent, courts may consider the language of the agreement, the parties’ conduct and other circumstances); *Adler v. Fred Lind Manor*, 103 P.3d 773, 784 (Wash. 2004) (Under the “context rule” a court determines “the intent of the parties by viewing the contract as a whole, which includes the subject matter and intent of the contract, examination of the circumstances surrounding its formation, subsequent acts and conduct of the parties, the reasonableness of the respective interpretations advanced by the parties, and statements made by the parties during preliminary negotiations, trade usage, and/or course of dealing.”). For additional discussion of this “context rule” of interpretation, see Goldstein, *supra* note 102, at 94-111.

<sup>261</sup> *Perma Research & Dev. v. Singer Co.*, 542 F.2d 111, 118 (2d Cir. 1976) (using the quoted terms). *Compare* *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 35, 42 (Mich. 2005) (applying plain meaning rule to adhesion contracts).

<sup>262</sup> *Wheeler v. St. Joseph Hosp.*, 133 Cal. Rptr. 775, 791 (Cal. Dist. Ct. App. 1976).

would knowingly assent to the term. *In such circumstances, enforcement of the written term does not further the policies underlying contract law, [which are] to “promot[e] and facilitat[e] reliance on business agreements.”*<sup>263</sup>

*B. Explaining Mutual Assent when Actual Agreement is Missing*

If various courts under the second line of authority accept that agreement is missing for adhesion contracts, how do these decisions rationalize the existence of mutual assent? The possible obstacle here is that if there is no evidence of mutual assent, then there is no contract and no agreement to enforce by either side.<sup>264</sup> While Radin cites no case law either way on this issue, the decisions—which predate her book—do address this problem.

Some cases indicate that consent is merely assumed:

[Consumers] trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.<sup>265</sup>

Citing the example of insurance policies, courts in another line of cases concede that mutual consent is missing for adhesion contracts and that it is necessary to substitute for consent the role of public expectations and commercially-accepted standards:

By traditional standards of contract law, the consent of both parties, based on an informed understanding of the terms and conditions of the contract, is rarely present in insurance contracts.... Because understanding is lacking, the consent necessary to sustain traditional contracts cannot be presumed to exist in most contracts of insurance. Such consent can be inferred only to the extent that the policy language conforms to public expectations and commercially reasonable standards. . . . In instances in which the insurance contract is inconsistent with public expectations and commercially accepted standards, judicial regulation of insurance contracts is essential in order to prevent overreaching and injustice.<sup>266</sup>

Still other courts in finding a binding agreement reason that the merchant creates consent through de facto legislation. The argument here centers on the point that one predominant unilateral will—the merchant’s—effectively legislates terms to an

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<sup>263</sup> *Sutton v. Banner Life Ins. Co.*, 686 A.2d 1045, 1052 (D.C. App. 1996) (emphasis added).

<sup>264</sup> *Rory*, 703 N.W.2d at 42 n.84; *see also Muchesko*, 955 P.2d at 24 (“mutual assent is an essential element of any enforceable contract”).

<sup>265</sup> *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 274 (W. Va. 2002) (quoting *Mitchell v. Broadnax*, 537 S.E.2d 882, 898 (W. Va. 2000)) (Starcher, J., concurring).

<sup>266</sup> *Vargas v. Calabrese*, 714 F. Supp. 714, 720 (D.N.J. 1989) (citing New Jersey decisions); *see also Vasquez v. Glassboro Serv. Ass’n, Inc.*, 415 A.2d 1156, 1165 (N.J. 1980) (“There being no private consent to support a contract of adhesion, its legitimacy rests entirely on its compliance with standards in the public interest.”).

undetermined number of persons rather than to just one individual; accordingly, these adhesive instruments are more akin to “[a] law rather than a meeting of the minds.”<sup>267</sup>

What can we make of these cases conceding the lack of conventional mutual assent to adhesion contracts but enforcing them anyway? From a strict theoretical perspective, the decisions contesting the lack of mutual assent with adhesion contracts could be flawed—they say the consumer does not give sufficient assent but they hold him bound nonetheless under consent-substitutes, such as public expectations and commercially reasonable standards or de facto legislation. So, the following question may be asked: If a court rejects the plain meaning rule, and also rejects consent substitutes such as de facto legislation, is there a theory that accurately reflects the realities of adhesion contracts consistent with the traditional objective doctrine of assent?

### *C. Llewellyn’s Theory of “Blanket Assent”*

For many years, courts and commentators have considered the theory of buyer consent for adhesion contracts. In reality, some say, the consumer in a contract of adhesion generally assents only to the few dickered terms, such as price, delivery, or quantity.<sup>268</sup> As for the rest of the terms—which the consumer likely leaves unread or not understood—Professor Karl Llewellyn, who was a legal realist and the principal drafter of Article Two of the U.C.C., proposed one such theory. Followed by a few courts, the basis for his construct is the consumer gives the merchant “blanket assent.”

The above theory holds that the consumer assents in principle to the arrangement except to unreasonable or indecent terms that would alter or eviscerate the reasonable meaning of the dickered terms.<sup>269</sup> Llewellyn observed:

Instead of thinking about “assent” to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all.<sup>270</sup> What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms.<sup>271</sup> The fine print which has not been read has no business to cut under the reasonable meaning of those

<sup>267</sup> *Siegelman v. Cunard White Star*, 221 F.2d 189, 206 (2d Cir.1955) (Frank, J., dissenting) (cited with approval in *Boase v. Lee Rubber & Tire Corp.*, 437 F.2d 527, 530 (3d Cir.1970)); *Henningesen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 273 n.4 (W. Va. 2002).

<sup>268</sup> See Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 *FORDHAM L. REV.* 761, 769-70 (2002).

<sup>269</sup> *Home Fed. Sav. & Loan Ass’n of Algona v. Campney*, 357 N.W.2d 613, 618 (Iowa 1984) (quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 370 (1960)).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

dickered which constitutes the dominant and only real expression of agreement. . . .<sup>272</sup>

The Llewellyn “blanket assent” theory comports with the rational, social, and cognitive facts that consumers characteristically do not read standardized terms because of the well-known problem of transaction costs and the consumer’s difficulties in understanding and interpreting complex documents.<sup>273</sup> Simply put, the typical consumer “satisfices:” he or she responds to the overwhelming information costs and tries to make “[a] satisfactory choice by sacrificing inquiry into certain features in favor of pursuing inquiry into few, salient others.”<sup>274</sup> As one commentator has pointed out, however, “Llewellyn’s theory thus stands out as a rejection of the strict application of the objective theory of contract formation and the duty to read as applied to consumer form contracts . . . .”<sup>275</sup> The reason is that Llewellyn’s theory holds “unreasonable” terms unenforceable despite “external indications of assent.”<sup>276</sup> Llewellyn’s implicit disavowal of the objective theory of contract probably explains why it has so few judicial adherents and only passing importance in the area of boilerplate and mutual assent.<sup>277</sup>

Without comment on Llewellyn’s partial rejection of the objective doctrine, Radin prominently mentions Llewellyn’s blanket assent theory.<sup>278</sup> She argues that it has significantly contributed to the deterioration of party assent such that it takes on fictional forms of voluntariness.<sup>279</sup> Even though Radin and other commentators certainly emphasize Llewellyn’s theory,<sup>280</sup> only a few courts explicitly accept the

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<sup>272</sup> *Id.*; Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc., 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987) (quoting KARL LLEWELLYN, *THE COMMON LAW TRADITION—DECIDING APPEALS* 370 (1960)). For a good discussion, see Robert M. Lloyd, *The “Circle of Assent” Doctrine: An Important Innovation in Contract Law*, 7 Transactions: Tenn. J. Bus. L. 237 (2006).

<sup>273</sup> See Hillman & Rachlinski, *supra* note 88, at 463; Lonegrass, *supra* note 1, at 33 (“psychologists who study consumer cognition and decision making have demonstrated that consumers suffer from a range of limitations on their capability to understand the risks inherent in contracting”).

<sup>274</sup> James Gibson, *Vertical Boilerplate*, 70 Wash. & Lee L. Rev. 161, 177 (2013).

<sup>275</sup> Lonegrass, *supra* note 1, at 42.

<sup>276</sup> *Id.*

<sup>277</sup> Llewellyn’s theory also has much in common with *Restatement (Second) of Contracts* § 211(3) and cmt. f (1981), which states that a consumer does not assent to a form contract term if “the other party has reason to believe that the [consumer] would not have accepted the agreement if he had known that the agreement contained the particular term.” Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With A Contractualist Reply to Carrington & Hagen)*, 29 McGEORGE L. REV. 195, 202 (1998). As another commentator points out, however, Section 211 has gained comparatively few judicial adherents. Barnes, *Fairer Model*, *supra* note 2, at 249-50 (noting that most cases are from Arizona and that most deal with insurance policy disputes).

<sup>278</sup> RADIN, *supra* note 3, 82.

<sup>279</sup> *Id.* at 30, 82-84.

Llewellyn notion excusing the consumer from “unreasonable” or “indecent” terms.<sup>281</sup> Instead, the contemporary interpretation is that the real value of the Llewellyn’s theory is the contribution to the unconscionability defense.<sup>282</sup>

*D. Shrinkwrap, Clickwrap, and Browsewrap: Purported or Actual Contracts?*

Radin saves much of her criticism of “purported” boilerplate contracts for shrinkwrap, clickwrap, and browsewrap in computer software and Internet transactions.<sup>283</sup> While the authorities are not unanimous, a number of courts and commentators have characterized all three types as adhesion contracts.<sup>284</sup>

“*Shrinkwrap* agreements “typically involve[ ] (1) notice of a license agreement on product packaging (i.e., the shrinkwrap), (2) presentation of the full license on documents inside the package, and (3) prohibited access to the product without an express indication of acceptance.”<sup>285</sup> A “*clickwrap* agreement” occurs where a website user typically clicks an ‘I agree’ box after being presented with a list of terms and conditions of use.<sup>286</sup> A “*browsewrap* agreement” occurs when website terms and conditions of use are prominently posted on the website, typically as a hyperlink at the bottom of the screen.<sup>287</sup> Hybrid arrangements of these products are also possible.<sup>288</sup> Despite the differences in these agreements, “[t]he central issue is the same: whether the consumer manifested the necessary assent to make a valid and

<sup>280</sup> *Id.*; see also, e.g., Jarrod Wong, *Arbitrating in the Ether of Intent*, 40 FLA. ST. U.L. REV. 165, 193 (2012); Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 746-52 (2002).

<sup>281</sup> Only two jurisdictions appear to adopt the Llewellyn doctrine. *Home Fed. Sav. & Loan Ass’n of Algona v. Campney*, 357 N.W.2d 613, 618 (Iowa 1984); *Parton v. Mark Pirtle Oldsmobile-Cadillac-Isuzu, Inc.*, 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987).

<sup>282</sup> See, e.g., *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 146 (Pa. Super. Ct. 1985).

<sup>283</sup> RADIN, *supra* note 3, at 10-12.

<sup>284</sup> E.g., *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 269 (5th Cir. 1988); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrinkwrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319, 321 (1999) (shrinkwrap); *TradeComet.com LLC v. Google, Inc.*, 693 F. Supp. 2d 370, 381 (S.D.N.Y. 2010); Timothy J. Calloway, *Cloud Computing, Clickwrap Agreements, and Limitation on Liability Clauses: A Perfect Storm?*, 11 DUKE L. & TECH. REV. 163, 168-69 (2012) (clickwrap); Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1053 (2005) (browsewrap).

<sup>285</sup> *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428-29 (2d Cir. 2004).

<sup>286</sup> *Hines v. Overstock.com*, 668 F. Supp. 2d 362, 366 (E.D.N.Y. 2009).

<sup>287</sup> *Register.com, Inc.*, 356 F.3d at 428-29; *Zaltz v. JDATE*, 952 F. Supp. 2d 439, 452 (E.D.N.Y. 2013). “Such terms of use often begin with a statement that use or browsing of the web site constitutes agreement to the terms, hence the name “browse-wrap.” Juliet M. Moringiello, *supra* note 164, at 1318; see also Oakley, *supra* note 284, at 1050-61 (comparing shrinkwrap, clickwrap, and browsewrap agreements).

<sup>288</sup> See, e.g., *Vernon v. Qwest Commc’ns Int’l, Inc.*, 857 F. Supp. 2d 1135, 1149-50 (D. Colo. 2012) (clickwrap/browsewrap combination).

enforceable contract.”<sup>289</sup> Absent a violation of a rule of positive law or a finding of unconscionability, shrinkwrap agreements are “generally enforceable.”<sup>290</sup>

In this section, I will focus on shrinkwrap agreements (even as these agreements have elements of assent in common with clickwrap and browsewrap). To facilitate the analysis, I will rely extensively upon the United States Court of Appeals for the Second Circuit’s comprehensive decision in *Schnabel v. Trilegant*.<sup>291</sup> This decision provides an outstanding discussion of mutual assent in online contracting and merits an extensive treatment. Notably, the *Schnabel* court relied on established common law principles to decide contracts based on new computer technology.

With a shrinkwrap license, the Second Circuit observed, where the consumer has purchased and received the package, the offer will be enforceable upon the consumer’s failure to return the item after reading, or having a realistic opportunity to read, the contract’s terms and conditions.<sup>292</sup> Thus, the offer commonly is *not* that the consumer will be bound to the agreement (and the license terms) where he consents and pays at the time of purchase. Instead, the merchant’s offer generally is that the consumer may have the item and will be held to the license if he pays now and takes later action confirming his acceptance of the offer.<sup>293</sup>

Regarding the legal effect of shrinkwrap, the court said, these instruments are enforceable depending upon the parties’ outward manifestations of assent as interpreted through an objective standard of review.<sup>294</sup> A party may exhibit his assent through words or silence, action or inaction, but with one important qualification: “[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other

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<sup>289</sup> William J. Condon, Jr., Note, *Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements?*, 16 REGENT U. L. REV. 433, 434-35 (2003/2004); see also *Vernon*, 857 F. Supp. 2d at 1149; *Traton News, LLC v. Traton Corp.*, 914 F. Supp. 2d 901, 909 (S.D. Ohio 2012) (clickwrap agreement is formed when the website visitor is required to explicitly manifest assent to the website’s terms and conditions by requiring some affirmative act (e.g., clicking “I agree” or entering one’s initials) before the visitor can proceed further on the website); *Schnabel v. Trilegant Corp.*, 697 F.3d 110, 129 (2d Cir. 2012); *Zaltz*, 952 F. Supp. 2d at 452 (“[C]ourts have enforced browsewrap agreements where the website users must have had actual or constructive notice of the site’s terms, and have manifested their assent to them.”). Compare *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 32 (2d Cir. 2002) (“[A] reference to the existence of license terms on a submerged screen is not sufficient to place consumers on inquiry or constructive notice of those terms.”).

<sup>290</sup> *ProCD v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996); *Wold v. Dell Fin. Servs., L.P.*, 598 F. Supp. 2d 984, 987 (D. Minn. 2009) (courts routinely enforce so-called ‘shrinkwrap’ accept-or-return arbitration agreements); 15B AM. JUR. 2D *Computers and the Internet* § 106 (2011). In the federal circuits, shrinkwrap agreements are valid and enforceable contracts. *TracFone Wireless, Inc. v. SND Cellular, Inc.*, 715 F. Supp. 2d 1246, 1259 (S.D. Fla. 2010).

<sup>291</sup> See *Schnabel*, 697 F.3d 110.

<sup>292</sup> *Id.* at 122.

<sup>293</sup> *Id.* at 121-22. *Accord Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 428 (2d Cir. 2004).

<sup>294</sup> *Schnabel*, 697 F.3d at 119.



party may infer from his conduct that he assents.”<sup>295</sup> Thus, a person who accepts the benefit of services rendered may be held to have impliedly made a promise through conduct to pay for them . . . [if] the offeree . . . knew or had reason to know that the party performing expected compensation.”<sup>296</sup>

The *Schnabel* court also said the major problem in these cases is the consumer’s assent is largely passive in terms of an overt response.<sup>297</sup> Thus, the question of the buyer’s acceptance of the license terms frequently turns on whether a reasonably prudent consumer (offeree) would be on notice of the term at issue. This principle is tied to the general common law rule that an offeree cannot actually assent to an offer unless the offeree first knows of its existence and all of its terms.<sup>298</sup> To add to these complexities, the consumer in litigation will usually deny having actual notice of the term.<sup>299</sup> Therefore, each case is fact specific regarding the offeree’s notice of the terms in question.<sup>300</sup>

*Schnabel* further noted that under settled common law principles, an offeree is bound by the shrinkwrap provisions if he or she is on “inquiry notice” of the terms.<sup>301</sup> In other words, the person has actual notice of circumstances adequate to place upon a prudent person an obligation to make further inquiry into the matter.

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<sup>295</sup> *Id.* at 120 (citing RESTATEMENT (SECOND) OF CONTRACTS §19(2)).

<sup>296</sup> *Id.* at 119-21. *Accord* RESTATEMENT (SECOND) OF CONTRACTS § 69(1)(a) (1981). Peter Linzer properly points out that courts have neglected the issue of default terms in relation to adhesion contracts. Peter Linzer, “Implied,” “Inferred,” and “Imposed”: Default Rules and Adhesion Contracts—The Need for Radical Surgery, 28 PACE L. REV. 195 (2008).

<sup>297</sup> *Schnabel*, 697 F.3d at 120.

<sup>298</sup> *Id.* at 121.

<sup>299</sup> *Id.* at 120.

<sup>300</sup> Regarding these software and on-line transactions, Radin emphatically states her concerns that courts have distorted the concept of mutual assent by allowing proof of the consumer’s “sheer ignorance”: i.e., a person does not know what, if anything, is happening as his rights are being divested. *See* RADIN, *supra* note 3, at 21-23, 87. She singles out browsewrap and rolling contracts (money now and terms later) as supposed examples of this phenomenon. *Id.* at 22, 88. Radin later acknowledges, however, that courts do not enforce these contracts where the consumer is totally unaware that his rights are being divested because she concedes that the courts require that the consumer knew or should have known of the terms. *See id.* at 93 n.21 (citing *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 28-34 (2d Cir. 2002) (browsewrap case)). Radin further leaves out that cases such as *Specht* tie their analysis to evaluating the browsewrap under traditional contract principles of offer, acceptance, and the consumer’s manifestation of assent to the merchant. *Id.* at 28-34. No cases were found where a court bound a party under circumstances of “sheer ignorance” in Radin’s parlance and Radin’s conclusory comment otherwise is unpersuasive.

Other courts also couch their approval in this area on the consumer’s manifestation of mutual assent. *See AvePoint, Inc. v. Power Tools, Inc.*, No. 7:13CV00035, 2013 WL 5963034, at \*8 (W.D. Va. Nov. 7, 2013) (browsewrap case); *see also* *Van Tassell v. United Mktg. Group, LLC*, 795 F. Supp. 2d 770, 790 (N.D. Ill. 2011); *Cvent, Inc. v. Eventbrite, Inc.*, 739 F. Supp. 2d 927, 937 (E.D. Va. 2010). For cases upholding “money now and terms later” contracts and finding the consumer’s consent, *see, for example*, *Schacter v. Circuit City Stores, Inc.*, 433 F. Supp. 2d 140 (D. Mass. 2006) (citing decisions).

<sup>301</sup> *Schnabel*, 697 F.3d at 126.

The consumer will thereby be bound if his conduct thereafter would convince a reasonable observer that the consumer's conduct manifests assent. The clarity and conspicuousness of the license term can be determinative in leading to such a conclusion, along with the course of dealing between the parties and the impact of industry practices.<sup>302</sup>

The above principles align with the concept that the seller (when acting as the offeror) is "master of the offer" and can prescribe the terms of acceptance.<sup>303</sup> Thus, the courts' treatment of shrinkwrap comports with the settled common law doctrine that "[w]hen a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."<sup>304</sup>

Besides being consistent with established common law principles, current practice on shrinkwrap avoids undue transaction costs as it helps facilitate a smoothly running economy:

Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. An

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<sup>302</sup> *Id.* at 120.

<sup>303</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997). Radin correctly views the seller as the offeror and the buyer as the offeree. RADIN, *supra* note 3, at 86. The UCC default rule is the converse, except the UCC recognizes that where the circumstances unambiguously so demonstrate, the seller will be the offeror and the buyer is the offeree. *See, e.g., Kloczek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1340 (D. Kan. 2000); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 140 (Me. 2005); *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1067 (R.I. 2009) (construing U.C.C. § 2-204). Merchants characteristically get around this issue in almost all online and computer software transactions by having the customer sign a terms document in the store or by having the customer click "I agree" on the browsewrap before paying. By definition, the party that states "I agree" or "I accept" is the offeree. *See Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2000); *Autzen v. John C. Taylor Lumber Sales, Inc.*, 572 P.2d 1322, 1325 (Or. 1977). For commentary disagreeing with the *Hill* approach to the sellers being the master of the offer, see Roger C. Bern, "Terms Later" *Contracting: Bad Economics, Bad Morals, And A Bad Idea For A Uniform Law*, *Judge Easterbrook Notwithstanding*, 12 J.L. & POL'Y 641 (2004).

<sup>304</sup> *Schnabel*, 697 F.3d at 128; *Register.com, Inc.*, 356 F.3d at 403; *Burcham v. Expedia, Inc.*, No. 4:07CV1963, 2009 WL 586513, at \*3 (E.D. Mo. Mar. 6, 2009); *see also* Leon Trakman, *The Boundaries of Contract Law in Cyberspace*, 38 PUB. CONT. L.J. 187, 201 (2008):

There is nothing remarkable in the observation that judges construe wrap contracts in accordance with whether the parties have a serious intention to contract, as distinct from their motive in contracting. Nor can one reasonably object to courts deciding on the basis of objective evidence whether purchasers have assented to material terms in their contracts.

oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.<sup>305</sup>

As indicated above, shrinkwrap licenses are generally enforceable.<sup>306</sup> Nevertheless, some courts have struck down shrinkwrap licenses. These decisions usually reason that these instruments are unacceptable pursuant to the Uniform Commercial Code (U.C.C.) and Section 2-207 with its policy on the battle of the forms between offeror and offeree and the effect in this situation of the offeree's attempted imposition of additional terms upon acceptance.<sup>307</sup>

The cases relying on the binding effect of the Code and U.C.C. § 2-207 (which are two different issues) are not persuasive. The U.C.C. applies only to the sale of goods<sup>308</sup> (and it should be noted that the Second Circuit in *Schnabel* never referenced the U.C.C.). By definition, the Code does not apply, as here, to a pure license agreement where no transfer of title occurs with the subject matter of the transaction.<sup>309</sup> Even if the Code applies, the majority rule appears to be that U.C.C. § 2-207 is not applicable because the offeree does not submit a form in response to the offer.<sup>310</sup> According to the United States Court of Appeals for the Seventh Circuit in the leading case, *ProCD*, there can be no "battle of the forms" under the text of U.C.C. § 2-207 with only one document from a single party.<sup>311</sup> More appropriately,

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<sup>305</sup> *Hill*, 105 F.3d at 1149. For additional discussion of the practical reasons for upholding shrinkwrap agreements, see Robert W. Gomulkiewicz & Mary L. Williamson, *A Brief Defense of Mass Market Software License Agreements*, 22 RUTGERS COMPUTER & TECH. L.J. 335 (1996).

<sup>306</sup> See *supra* note 291 and accompanying text.

<sup>307</sup> See *Wachter Mgmt. Co. v. Dexter & Chaney, Inc.*, 144 P.3d 747, 752-54 (Kan. 2006) (citing decisions).

<sup>308</sup> *Geneva Int'l. Corp. v. Petrof, Spol, S.R.O.*, 608 F. Supp. 2d 993, 999 (N.D. Ill. 2009); see also U.C.C. § 2-102 (unless the context otherwise requires, Article 2 applies to transactions in goods); U.C.C. § 2-106(1) (defining contract for sale to include both a present sale of goods and a contract to sell goods at a future time; the term "sale" consists in the passing of title from the seller to the buyer for a price).

<sup>309</sup> See *Berthold Types Ltd. v. Adobe Sys., Inc.*, 101 F. Supp. 2d 697, 698 (N.D. Ill. 2000) (citing decisions). But see *Colonial Life Ins. Co. of Am. v. Electronic Data Sys. Corp.*, 817 F. Supp. 235, 238-39 (D.N.H. 1993) (transactions in goods under U.C.C. § 2-102 includes license agreements in computer software) (citing authorities). See generally Holly K. Towle, *Enough Already: It is Time to Acknowledge that U.C.C. Article 2 Does Not Apply to Software and Other Information*, 52 S. TEX. L. REV. 531 (2011).

<sup>310</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

<sup>311</sup> *Id. Contra Kloczek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (No requirement for two parties' forms under U.C.C. § 2-207 because comment one states that § 2-207 will apply "where an agreement has been reached orally . . . and is followed by one or both of the parties sending formal memoranda embodying the terms so far agreed and adding

if the U.C.C. is applicable, the correct method of analysis is to rely upon U.C.C. § 2-204(1) for the concept that the seller may invite acceptance of its offer, and thereby form a contract, where the agreement arises based on the shrinkwrap terms and not the consumer's payment.<sup>312</sup> Thus, the *ProCD* court cited U.C.C. § 2-606, the section defining acceptance of goods, whereby the consumer's failure to reject the software as prescribed by the offer implied his acceptance of the item and its terms.<sup>313</sup>

In a cautionary note, the *Schnabel* court correctly concluded, "While new commerce on the Internet [and elsewhere] has exposed courts to many new situations, it has not fundamentally changed the principles of contract."<sup>314</sup> Radin does not address in any depth the above common law or U.C.C. doctrines. She also overlooks that these bedrock principles as applied to the new modes of commerce are a sound fit. These case law doctrines are not predicated on any theory of "hypothetical" or "fictional" consent as she alleges, but are based instead on enforcing the objectively manifested assent and effectuating the reasonable expectations of the parties.

#### *E. Resolution of the Conflicting Decisions*

As compared with the majority view supporting bona fide mutual assent for adhesion contracts, the minority position challenging the existence of consent for these contracts is not persuasive. The minority rule has erred by stating that "quite apart" from the existence of any ambiguity, or the written words of the contract, "The printed words are not enough to disclose the expectations of the parties."<sup>315</sup> The correct position is that the printed words and their plain meaning are generally adequate under the objective doctrine to establish mutual assent. In effect, the minority line of decisions requires proof of the consumer's subjective knowing assent.<sup>316</sup> Accordingly, the minority position directly contradicts the established test,

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terms not discussed."); 1 JAMES J. WHITE, ROBERT E SUMMERS & ROBERT HILLMAN, UNIFORM COMMERCIAL CODE § 2:33 (6th ed. 2013) (disagreeing with *ProCD*).

<sup>312</sup> See *ProCD, Inc.*, 86 F.3d at 1452.

<sup>313</sup> *Id.* at 1452 ("A buyer accepts goods under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1)."). While *ProCD* is the majority rule, *DeFontes v. Dell, Inc.*, 984 A.2d 1061, 1069 (R.I. 2009), some courts follow a different doctrine. See *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332 (D. Kan.2000) (buyer's keeping of the computer beyond five days insufficient to demonstrate agreement to the standard terms).

<sup>314</sup> *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 124 (2d Cir.2012); see also *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 28-30 (2d Cir. 2002) (evaluating validity of an internet contract under traditional contract principles of offer, acceptance, and the manifestation of assent).

<sup>315</sup> *Spychalski v. MFA Life Ins. Co.*, 620 S.W.2d 388, 393-94 (Mo. Ct. App. 1981); see also *supra* Part IV.A (comparing majority and minority positions).

<sup>316</sup> For a specific example of this inappropriate approach, see *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 24 A.3d 777, 790-91 (N.J. Super. Ct. App. Div. 2011) ("Because arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring the *knowing assent* of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent." (emphasis added)); see also *Peoples Mortg. Co. v. Fed. Nat'l Mortg. Ass'n*, 856 F. Supp. 910, 927 (E.D. Pa. 1994) (similar statement).

which looks to “objective” manifestations of “voluntary mutual assent” through the medium of the contract document in the context of “an offer and reciprocal acceptance.”<sup>317</sup>

Furthermore, the minority position overlooks the prevailing rule, “The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their manifestation of assent;”<sup>318</sup> agreement does not “consist of harmonious intentions or states of mind . . . .”<sup>319</sup> When the parties affix voluntary signatures on a document unambiguously presented to them known to be a contract, and no recognized defense upsets the legal existence of joint assent, no real question should exist on mutual assent.

This last argument draws support from the theory that adhesion contracts with a knowing exchange of money for goods or services are a contractual “bargain” in the sense of the *Restatement (Second) of Contracts*. The *Restatement* defines a “bargain” as an “[a]greement to exchange promises or to exchange a promise for a performance or to exchange performances.”<sup>320</sup> In this respect, a bargain is also commonly a contract where it provides “[a] remedy for its breach or recognize performance as a legal duty.”<sup>321</sup> Therefore, when a consumer knowingly pays for a service or product after signing what he understands to be a contract, even if there is some form of economic pressure, or if the consumer is not fully conversant with all terms, it is difficult to contend under a flexible but realistic view of the law that there is no “bargain” (and no “contract”) in the sense of the *Restatement*.<sup>322</sup>

Besides reflecting the legal tenets of the objective doctrine (including the plain meaning rule and the duty to read and understand a contract), and qualifying as an

<sup>317</sup> *Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003) (citing RESTATEMENT (SECOND) OF CONTRACTS 18 (1981)). The courts commonly apply the standard objective test to insurance policies, e.g., *Harrington v. Citizens Prop. Ins. Corp.*, 54 So. 3d 999, 1002 (Fla. Dist. Ct. App. 2010), which courts have construed as a category of adhesion contracts, e.g., *U.S. Fire Ins. Co. v. Fleekop*, 682 So. 2d 620, 627 (Fla. Dist. Ct. App. 1996).

<sup>318</sup> *Tsintolas Realty Co. v. Mendez*, 984 A.2d 181, 190 (D.C. Cir. 2009).

<sup>319</sup> *Devlin v. Ingram*, 928 F.2d 1084, 1095 (11th Cir. 1991) (citing *Lilley v. Gonzales*, 417 So.2d 161, 163 (Ala. 1982)).

<sup>320</sup> RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) (construed in *Franklin Fed. Sav. Bank v. United States*, 431 F.3d 1360, 1367 (Fed. Cir. 2005)).

<sup>321</sup> See Daniel P. O’Gorman, *Redefining Offer in Contract Law*, 82 MISS. L.J. 1049, 1054 (2013) (noting definition of “contract” under RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981)).

<sup>322</sup> Cf. *Sherman v. Lunsford*, 723 P.2d 1176, 1178 (Wash. Ct. App. 1986) (“Although the parties may not have fully understood the legal significance of each and every term, they knew they were signing a binding contract.”); see also *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 377 (7th Cir. 1990) (“Form contracts, and standard clauses in individually negotiated contracts, enable enormous savings in transaction costs, and the abuses to which they occasionally give rise can be controlled without altering traditional doctrines, provided those doctrines are interpreted flexibly, realistically.”).

If one were to take literally Radin’s argument that World B contracts are not contracts, then she would need to concede that the law should not recognize a remedy for their breach committed by either party. I doubt Radin would subscribe to leaving consumers in such a lurch.

enforceable bargain, the majority doctrine draws support from the strong policies of the sanctity of contract and the need for preserving commercial stability.<sup>323</sup> It also implements the rule that wherever possible, courts should strive to uphold, rather than to defeat, an otherwise binding contract.<sup>324</sup> As the decisions recognize,

In the overwhelming majority of circumstances, contractual promises are to be performed, not avoided: *pacta sunt servanda*, or, as the Seventh Circuit loosely translated it, “a deal’s a deal.” This is an eminently sound doctrine, because typically. . . [A] court cannot improve matters by intervention after the fact. It can only destabilize the institution of contract, increase risk, and make parties worse off. . . .<sup>325</sup>

Therefore, where the issue is in doubt, the majority position is sounder than the minority rule because the prevailing test better promotes the fundamental values of the contracting system.

#### V. MUTUAL ASSENT AND UNCONSCIONABILITY

Unconscionability is an affirmative defense to the enforcement of a contract and is an exception to the duty to read and understand the document.<sup>326</sup> Briefly put, an unconscionable contract “[i]s one which no man in his senses, not under delusion, would make, on the one hand, and which no fair and honest man would accept, on the other.”<sup>327</sup> Radin believes that contemporary adherents to classical contract

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<sup>323</sup> See generally *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (emphasizing policies underlying sanctity of contract as a “civilizing concept”); *Universal Studios, Inc. v. Viacom, Inc.*, 705 A.2d 579, 589 (Del. Ch. 1997) (emphasizing the “necessity of preserving predictability and stability in commercial transactions”).

<sup>324</sup> See *supra* note 209.

<sup>325</sup> *Specialty Tires of Am., Inc. v. CIT Group/Equip. Fin., Inc.*, 82 F. Supp. 2d 434, 437 (W.D. Pa. 2000) (citing *Waukesha Foundry, Inc. v. Indus. Eng’g, Inc.*, 91 F.3d 1002, 1010 (7th Cir.1996)).

Val D. Ricks makes the interesting argument that “assent is not an element of contract formation.” See Val D. Ricks, *Assent is not an Element of Contract Formation*, 61 U. KAN. L. REV. 591, 593 (2013). He writes, “[b]ecause assent can exist without consideration but consideration, when it exists, necessarily implies assent, of these two parts of contract formation consideration is the one both necessary and fundamental. So long as the law requires consideration, an additional assent requirement is superfluous.”

Professor Ricks acknowledges, however, that almost all authorities take the opposite view, *id.* at 591-93, and so it is quite unlikely that his “No Assent/Consideration” argument would work in a litigated case.

<sup>326</sup> *Bull HN Info. Sys., Inc. v. Hutson*, 229 F.3d 321, 331 (1st Cir. 2000); *Graham v. Scissor-Tail, Inc.*, 623 P.2d 165, 172 (Cal. 1981); *Todd Heller, Inc. v. United Parcel Serv.*, 754 A.2d 689, 700 (Pa. Super. 2000); *Bayne v. Smith*, 965 A.2d 265 (Pa. Super. 2009). Rescission can be a proper basis for relief from an unconscionable contract. *E.g.*, *In re Checking Account Overdraft Litig.*, 883 F. Supp. 2d 1251, 1255 (S.D. Fla. 2012). Compare *Sprague v. Quality Rests. Nw., Inc.* 162 P.3d 331, 334 (Or. Ct. App. 2007) (“Unconscionability may involve deception, compulsion, or lack of genuine consent, although usually not to the extent that would justify rescission under the principles applicable to that remedy.”).

<sup>327</sup> *Smith v. Mitsubishi Motors Credit of Am., Inc.*, 721 A.2d 1187, 1190 (Conn. 1998).

doctrine interpret unconscionability narrowly, focusing on the procedural aspect and discounting the substantive one.<sup>328</sup> Unconscionability, she says, is a process of “relentless” case by case adjudication which makes cases extremely unpredictable and not a strong defense to abusive boilerplate.<sup>329</sup> As will be shown below, Radin’s recitation is wanting in key respects.

Hard bargaining differs from unconscionable oppression. Even a strongly pro-vendor-friendly clause can be completely legitimate, stem from perfectly natural and moral self-interest, and therefore rest beyond the reach of the unconscionability defense.<sup>330</sup> As one court observed, “[T]he law attaches no onus to any party which takes full advantage of the strengths of his bargaining position.”<sup>331</sup> To the same end, the U.C.C. section on the defense states the general policy of the law is to prevent oppression and unfair surprise but not to disturb the allocation of risks because of one side’s superior bargaining power.<sup>332</sup> Only where the pro-seller clause is one-sided, oppressive and unfairly surprising as opposed to being a “simple old fashioned bad bargain” could the issue rise to the level of unconscionability.<sup>333</sup> Because of this high bar, an adhesion contract is not necessarily unconscionable.<sup>334</sup>

The unconscionability doctrine generously favors the consumer in various respects. To establish this defense to contract enforcement, the movant as explained below must show both procedural unconscionability and substantive unconscionability—even as this borderline is often blurred.<sup>335</sup>

*Procedural unconscionability* deals with procedural deficiencies in the contract formation process, such as seller deception or a refusal to bargain over contract terms, which thereby caused the imposed-upon party to lack meaningful choice about whether and how to enter into the transaction.<sup>336</sup> This element of

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<sup>328</sup> Radin cites no cases for the claim that courts focus unduly on the procedural element and discount the substantive requirement. See RADIN, *supra* note 3, at 125. Compare Lonegrass, *supra* note 1 (“[V]ery few courts have actually invalidated contracts on the basis of purely procedural defects.”). In fact, one commentator says that “[w]ith respect to most adhesive arbitration agreements, the focus is entirely on substantive unconscionability.” Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251 (2006).

<sup>329</sup> RADIN, *supra* note 3, at 129.

<sup>330</sup> *Allen v. Prudential Prop. & Cas. Ins. Co.*, 839 P.2d 798, 815 (Utah 1992) (Durham, J., dissenting).

<sup>331</sup> *Weidman v. Tomaselli*, 365 N.Y.S.2d 681, 686 (N.Y. Co. Ct. 1975).

<sup>332</sup> U.C.C. § 2-302 cmt. 1.

<sup>333</sup> *Hathaway v. Eckerle*, 336 S.W.3d 83, 88 (Ky. 2011).

<sup>334</sup> *Walther v. Sovereign Bank*, 872 A.2d 735, 743 (Md. 2005); *Todd Heller, Inc. v. United Parcel Serv.*, 754 A.2d 689, 700 (Pa. Super. Ct. 2000); *Bayne v. Smith*, 965 A.2d 265, 270 (Pa. Super. Ct. 2009).

<sup>335</sup> *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 227 (W.Va. 2012). For most courts, both elements are required and the absence of either element will defeat the claim. *Alexander v. Anthony Int’l, L.P.*, 341 F.3d 256, 265 (3d Cir. 2003); *Ulbrich v. Overstock.com, Inc.*, 887 F. Supp. 2d 924, 932 (N.D. Cal. 2012). But see Lonegrass, *supra* note 1 (noting cases upholding defense based on one element or the other).

<sup>336</sup> *Ex parte Thicklin*, 824 So. 2d 723, 731 (Ala. 2002); see also *Bank of Ind., N.A. v. Holyfield*, 476 F. Supp. 104, 109-10 (S.D. Miss. 1979) (indicators of procedural

unconscionability can include various deficiencies, such as party illiteracy, hidden or unduly complex contract terms, or unfair bargaining tactics.<sup>337</sup> *Substantive unconscionability* pertains to the contract terms and whether they are unreasonably favorable to the more powerful party, such as where the terms contravene public policy.<sup>338</sup> Both elements need not be present in the same degree.<sup>339</sup>

After they assess the presence of both elements, courts typically apply a “sliding scale” mode of analysis; thus, the more evidence of substantive unconscionability, the less evidence of procedural unconscionability is required to establish the defense, and vice versa.<sup>340</sup> While an adhesion contract is often procedurally unconscionable,<sup>341</sup> this fact does not automatically mandate a finding of substantive unconscionability.<sup>342</sup> In sum, the unconscionability defense has two essential elements: (1) terms that are grossly favorable to a party that has (2) overwhelming bargaining power<sup>343</sup> under the particular facts.<sup>344</sup>

One of Radin’s major concerns—the relation of unconscionability, adhesion contracts, and contractual arbitration—arises frequently in the cases.<sup>345</sup> In many respects, the law favors the weaker party. Thus, in one example, a primary indicator of procedural unconscionability is whether the consumer must agree to an arbitration clause before he can obtain the product or service.<sup>346</sup> More specifically, an arbitration provision within “a contract of adhesion renders the agreement procedurally unconscionable where the stronger party’s terms are unnegotiable and ‘the weaker party is prevented by market factors, timing[,] or other pressures from being able to

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unconscionability generally fall into two areas: (1) lack of knowledge, and (2) lack of voluntariness).

<sup>337</sup> *Muhammad v. Cnty. Bank*, 912 A.2d 88, 96 (N.J. 2006).

<sup>338</sup> *Ex parte Thicklin*, 824 So. 2d at 731; *see also Holyfield*, 476 F. Supp. at 109-10 (extensive treatment of substantive unconscionability).

<sup>339</sup> *Cordova v. World Fin. Corp. of N.M.*, 208 P.3d 901, 908 (N.M. 2009).

<sup>340</sup> *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 227 (W. Va. 2012).

<sup>341</sup> *Flores v. Transamerica HomeFirst, Inc.*, 93 Cal. App. 4th 846, 853 (Cal. Ct. App. 2001); *Brown*, 729 S.E.2d at 228 (stating that procedural unconscionability “often begins with a contract of adhesion”); *see also Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 145 (Pa. Super. Ct. 1985) (noting parallels between unconscionability and fraud).

<sup>342</sup> *Walther v. Sovereign Bank*, 872 A.2d 735, 743 (Md. 2005).

<sup>343</sup> *Ryan’s Family Steakhouse, Inc. v. Kilpatric*, 966 So. 2d 273, 285 (Ala. Civ. App. 2006).

<sup>344</sup> *Ex parte Foster*, 758 S.2d 516, 520 n.4 (Ala. 1999).

<sup>345</sup> RADIN, *supra* note 3, at 125-28, 278-79 n.21. *Compare* *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 785 (9th Cir. 2002) (stating arbitration clause that exempts the merchant but not the consumer from arbitration is most likely to be unconscionable); *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 940-41 (9th Cir. 2001) (finding an arbitration clause allowing the drafter to bring claims in court unconscionable); *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000) (finding that a unilateral obligation to arbitrate is “itself so one-sided as to be substantively unconscionable”); *Flores*, 113 Cal. Rptr. 2d at 382 (finding an arbitration clause invalid because it lacked a “modicum of bilaterality”).

<sup>346</sup> *Am. Gen. Fin., Inc. v. Branch*, 793 So. 2d 738, 750 (Ala. 2000) (quoting *Green Tree Fin. Corp. v. Wampler*, 749 So. 2d 409, 415 (Ala. 1999)).



contract with another party on more favorable terms or to refrain from contracting at all.”<sup>347</sup> Radin does not mention the law’s special concern for the consumer in this situation.

The law favors the consumer in other applications of the unconscionability defense to adhesive arbitration agreements. A good example is that an agreement under a number of decisions will be tainted by substantive unconscionability absent sufficient mutuality. For example, where the contract gives the stronger party the choice of forums, including the courts, but where the contract restricts dispute resolution brought by the consumer just to arbitration.<sup>348</sup> Indeed, an employer-employee arbitration term in some jurisdictions creates a rebuttable presumption of substantive unconscionability.<sup>349</sup> Furthermore, the standard form contract will be unconscionable—and subject to excision—where it includes a material, risk-shifting clause which the consumer would not reasonably expect to encounter in such a transaction.<sup>350</sup>

Although Radin criticizes the allegedly low success rate of unconscionability claims—she calls it a “wild card” doctrine because of its purported “extreme unpredictability”<sup>351</sup>—she cites no empirical data or case law statistics for this argument. Indeed, it would be passing strange if unconscionability claims were routinely successful against adhesion contracts. Although courts examine the terms of adhesion contracts with extra scrutiny, these agreements are “generally enforceable because it would be impractical to void every agreement merely because of its adhesive nature.”<sup>352</sup> Thus, the seeming one-sidedness and perceived unfair advantage often seen with adhesion contracts must be construed to give breathing room to the practicalities of commerce and the vendor’s right of freedom of contract (discussed in Part VI below). In any event, available studies show a surprisingly significant success rate for all unconscionability claims—33%—with “the vast majority” of plaintiff victories occurring with standard form contracts.<sup>353</sup> Based on these statistics, as stated by one commentator, the current case law on

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<sup>347</sup> *Caplin Enters., Inc. v. Arrington*, Nos. 2011-CA-01332-COA & 2011-CA-01932-COA, 2013 WL 1878879, at \*6 (Miss. Ct. App. May 7, 2013).

<sup>348</sup> *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 228 (W. Va. 2012); *see also* *Taylor v. Butler*, 142 S.W.3d 277, 286 (Tenn. 2004) (citing cases requiring mutuality principle of relief). *But see id.* at 287-88 (Holder, J., concurring and dissenting in part) (citing cases rejecting the mutuality principle).

<sup>349</sup> *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101, 1108 (9th Cir. 2003); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1179 (9th Cir. 2003); *Taylor*, 142 S.W.3d 277. *But see* *Cooper v. MRM Investment Co.*, 367 F.3d 493, 502 (6th Cir. 2004) (stating that to find a particular contract adhesive requires the employee to produce evidence that she would be unable to find suitable employment if she refused to sign the agreement).

<sup>350</sup> *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 146 (Pa. Super. Ct. 1985).

<sup>351</sup> RADIN, *supra* note 3, at 124-129.

<sup>352</sup> *State ex rel. Johnson Controls, Inc. v. Tucker*, 729 S.E.2d 808, 821 (W. Va. 2012).

<sup>353</sup> Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1096-98 (2006); *see also* Lonegrass, *supra* note 1 (number of claims for unconscionability has dramatically increased with plaintiffs prevailing in the years 2002 and 2003 in approximately 43% of the time with most claims addressing arbitration clauses).

unconscionability is “workable.”<sup>354</sup> Accordingly, contrary to Radin’s portrayal, unconscionability is not an unpredictable wild card but is frequently an effective tool to ready merchant overreaching on mass market boilerplate agreements.

## VI. FREEDOM OF CONTRACT AND MUTUAL ASSENT

Radin argues that “boilerplate alternative legal universes simply do not assimilate to freedom of contract.”<sup>355</sup> Because our legal system adheres to the ideal of private ordering, she contends, the involuntary loss of consumer rights brought on by adhesion contracts means that authentic freedom of contract is no longer a core value.<sup>356</sup> She even indicates that World B contracts are “a new kind of serfdom” for the consumer.<sup>357</sup> Notably, she does not limit this phenomenon to abusive mass market standard form contracts. Radin’s critique, however, does not capture the case law construing freedom of contract.

### A. Elements and Policy

Under the concept of “freedom of contract,” “parties bargaining at arm’s-length may generally contract as they wish, subject only to traditional defenses such as fraud, duress, illegality or mistake.”<sup>358</sup> Mutual assent and freedom of contract are closely aligned because freedom of contract cannot exist without mutual assent.<sup>359</sup> Public policy “strongly favors” freedom of contract<sup>360</sup> because “it is in the best interest of the public not to restrict unnecessarily” this ability.<sup>361</sup> Thus, a party’s ability to enter and enforce contracts both reflects and promotes liberty, but also increases the production of wealth to the benefit of the general welfare.<sup>362</sup>

As stated in the decisions, “One does not have ‘liberty of contract’ unless organized society both forbears and enforces, forbears to penalize him for making

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<sup>354</sup> Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 324 (2010).

<sup>355</sup> RADIN, *supra* note 3, at 98.

<sup>356</sup> *Id.* at 19, 56.

<sup>357</sup> RADIN, *supra* note 3, at 92 (referencing cell phone contracts with AT&T). In the dictionary definition, “a person in a condition of servitude, required to render services to a lord, commonly attached to the lord’s land and transferred with it from one owner to another.” *Serfdom Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/serfdom?s=t>. Query whether most independent observers would agree that a person entering an adhesion contract is akin to a serf.

<sup>358</sup> *Marcinczyk v. N.J. Police Training Com’n*, 5 A.3d 785, 788-89 (N.J. 2010).

<sup>359</sup> *Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 258 (Mich. 2003).

<sup>360</sup> *Green v. Safeco Life Ins. Co.*, 727 N.E.2d 393, 396 (Ill. App. Ct. 2000). *Accord* *Kunda v. C.R. Bard, Inc.*, 671 F.3d 464, 470 (4th Cir. 2011); *In re Mabray*, 355 S.W.3d 16, 29 (Tex. Ct. App. 2010).

<sup>361</sup> *Trimble v. Ameritech Pub., Inc.*, 700 N.E.2d 1128, 1129 (Ind. 1998).

<sup>362</sup> *Ryan v. Weiner*, 610 A.2d 1377, 1380 (Del. 1992); RESTATEMENT (SECOND) OF CONTRACTS § 72 cmt. b (1981) (“bargains are widely believed to be beneficial to the community in the provision of opportunities for freedom of individual action”).

his bargain and enforces it for him after it is made.”<sup>363</sup> Other courts generally point out the need for freedom of contract to promote “[t]he necessary certainty, stability and integrity of contractual rights and obligations.”<sup>364</sup> Indeed, respected commentators have argued that preserving party autonomy on whether to enter an agreement should be the primary goal of contract law.<sup>365</sup>

Based on the above-quoted language, there are two aspects of freedom of contract. First, under the *accountability* component, parties must accept the consequences of their voluntary choices in ordering their personal affairs, which means that the general rule of freedom of contract includes the ability and need for a party to accept a bad bargain.<sup>366</sup> This judicial self-restraint is so strong that courts hold that a contract must be interpreted and enforced as written, even though it contains terms that may seem harsh or unjust.<sup>367</sup> Second, with the *autonomy* component, parties have the right to bind themselves legally; it is a judicial concept that contracts are based on mutual agreement and free choice, and should be unhampered by external controls such as governmental interference, except where the contract violates established law or public policy.<sup>368</sup> Perhaps even more importantly, liberty of contract is a fundamental individual right (subject to

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<sup>363</sup> *Rory v. Cont'l Ins. Co.*, 703 N.W.2d 23, 31 (Mich. 2005).

<sup>364</sup> *ARC LifeMed, Inc. v. AMC-Tennessee, Inc.*, 183 S.W.3d 1, 26 (Tenn. Ct. App. 2005) (quoting *McCall v. Carlson*, 172 P.2d 171, 187-88 (Nev. 1946)).

<sup>365</sup> Charles Fried, *Contract As Promise: A Theory of Contractual Obligation*, 95 HARV. L. REV. 509 (1981).

<sup>366</sup> *Morta v. Korea Ins. Corp.*, 840 F.2d 1452, 1460 (9th Cir. 1988) (also stating “a deal’s a deal”); *see also* *Wellington Power Corp. v. CNA Sur. Corp.*, 614 S.E.2d 680, 686 (W. Va. 2005) (“Where parties contract lawfully and their contract is free from ambiguity or doubt, their agreement furnishes the law which governs them.”) (analyzing freedom of contract); *Nawaz v. Universal Prop. & Cas. Ins. Co.*, 91 So. 3d 187, 189 (Fla. Dist. Ct. App. 2012) (“It is well settled that courts may not rewrite a contract or interfere with the freedom of contract or substitute their judgment for that of the parties thereto in order to relieve one of the parties from the apparent hardship of an improvident bargain.”).

<sup>367</sup> *See* *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 511 (Tenn. 2001). In *El Paso Natural Gas Co. v. Minco Oil & Gas Co.*, 964 S.W.2d 54, 62 (Tex. App. 1997), *rev'd on other grounds*, 8S.W.3d 309 (Tex.1999), the court cautioned,

Our court system cannot act as the mother hen watching over its chicks, standing ready to ameliorate every unpleasant circumstance which might befall them. One's right to negotiate a bargain, to exercise free will, to choose a path, and to even make a bad deal must be admitted and respected.

*See also* *Hillsboro Plaza Enters. v. Moon*, 860 S.W.2d 45, 47 (Tenn. Ct. App. 1993) (stating that courts may not make a new contract for parties who have spoken for themselves and may not relieve parties of their obligations simply because these obligations later prove to be burdensome or unwise).

<sup>368</sup> *J.F. v. D.B.*, 879 N.E.2d 740, 742 (Ohio 2007) (Cupp, J., dissenting) (citations omitted); *Marshall v. Kan. Med. Mut. Ins. Co.*, 73 P.3d 120, 128 (Kan. 2003); *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124, 129 n.11 (Tex. 2004); BLACK'S LAW DICTIONARY 154 (9th ed. 2009).

governing law and other public policies) and is protected by the federal and various state constitutions.<sup>369</sup>

Radin repeatedly leaves out the accountability element as she considers only the autonomy component of freedom of contract in her criticisms of mass market consumer contracting.<sup>370</sup> Nevertheless, Radin raises a valid question about adhesion contracts: Can freedom of contract exist for contracts that many analysts believe have substantial barriers to being negotiable? The next section of the Article analyzes this issue.

### *B. Freedom Of Contract and Adhesion Agreements*

Adhesion contracts are known for the reality that consumers generally do not read these agreements in any depth before signing them. Where a consumer knowingly signs such a form contract without reading or understanding it, a good argument exists that the consequences of the “duty to read” doctrine are consistent with the autonomy strand of freedom of contract. Robert E. Scott and Jody S. Kraus have commented,

The duty to read doctrine provides individuals with an incentive not to sign agreements unless they have read and understood them first. In this sense, it increases the likelihood that enforceable agreements will be informed *and thus serve the value of autonomy*. By increasing the likelihood that agreements are mutually informed, this rule would also increase the probability that agreements enhance social welfare [(i.e., the consumer will be better off economically)].<sup>371</sup>

Based on Scott and Kraus’s observation, the conclusion arises that the law in this way preserves the individual’s right of autonomy while advancing society’s interest in the enforcement of valid contracts.

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<sup>369</sup> See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972) (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)) (construing the Due Process Clause of the Fifth and Fourteenth Amendments to the Constitution)); *I.C.C. Protective Coatings, Inc. v. A.E. Staley Mfg. Co.*, 695 N.E.2d 1030, 1036 (Ind. Ct. App. 1998) (construing federal and Indiana constitutions); *Am. Tours, Inc. v. Liberty Mut. Ins. Co.*, 338 S.E.2d 92, 98 (N.C. 1986) (construing N.C. CONST. art. I, § 17); 16B AM. JUR. 2D *Constitutional Law* § 641 (2013) (“The freedom to contract is . . . safeguarded by the constitutions of most of the states.”).

<sup>370</sup> See RADIN, *supra* note 3, at 19, 34-35, 56-59. Interestingly, an early commentator argued that standardized contracts actually promote freedom of contract because of the utility of tried and tested forms:

The notion that standardization is necessarily inimical to real freedom is a fallacy of the same type as the one that habits are necessarily hindrances to the achievements of our desires. There is doubtless the real possibility of developing bad social customs, as we develop bad individual habits. But in the main, customs and habits are necessary ways through which our aims can be realized. *By standardizing contracts, the law increases that real security which is the necessary basis of initiative and the assumption of tolerable risks.*

Cohen, *supra* note 40, at 589 (emphasis added).

<sup>371</sup> ROBERT E. SCOTT & JODY S. KRAUS, *CONTRACT LAW AND THEORY* 436 (4th ed. 2007) (emphasis added).

As always, we must turn to the case law to inform this discussion. Although Radin has not analyzed the relevant decisions, it turns out that the case law discusses the relation of freedom of contract and adhesion contracts, most notably insurance policies.

With respect to this contract type, the Michigan Supreme Court has argued emphatically that freedom of contract is indeed fully associated with adhesion contracts.<sup>372</sup> In considering an insurance policy, the Michigan court observed: “When a court abrogates unambiguous contractual provisions based on its own independent assessment of ‘reasonableness,’ the court undermines the parties’ freedom of contract. . . .”<sup>373</sup> Thus, this jurisdiction and others see no contradiction between adhesion contracts and the freedom of contract.<sup>374</sup>

If the contracting parties have truly manifested their assent to an adhesion clause in their contract, Radin’s attempt at channeling all similarly situated parties’ desires to her own philosophical viewpoint would damage the contracting system.<sup>375</sup> Where a party verifiably wishes to sign an adhesion contract, and fully manifests his desire to do so, then cutting off this choice deprives such parties of their freedom to contract irrespective of the view of outsiders that the person is making a poor choice. The irony here is that it is Radin’s standard prohibiting the latter arrangements that runs contrary to private ordering and which undermines the core value of freedom of contract.

Nevertheless, several decisions uncited by Radin directly support her argument that mass market adhesive agreements can impair the consumer’s freedom of contract under the autonomy theory. Thus in a 1978 Illinois Court of Appeals case, the court said that “Freedom of contract simply does not exist” where the merchant draws up the terms and the consumer who merely ‘adheres’ to it has little choice as

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<sup>372</sup> *Rory v. Cont’l Ins. Co.*, 703 N.W.2d 23, 35 (Mich. 2005).

<sup>373</sup> *Id.* at 31.

<sup>374</sup> See *Bailey v. Lincoln Gen. Ins. Co.*, 255 P.3d 1039, 1047 (Colo. 2011) (“The freedom to contract is especially important in the insurance industry, as insurance policy terms are the primary means by which parties distribute and shift risk.”); *Forecast Homes, Inc. v. Steadfast Ins. Co.*, 105 Cal. Rptr. 3d 200, 213 (Cal. Dist. Ct. App. 2010) (California courts consistently admonish judges against rewriting insurance policy language to deny parties their general freedom to contract.). Many—but not all—courts recognize that insurance policies and binders are not ordinary contracts but are “contracts of adhesion.” Compare *Berger v. U.S. Fid. & Guar. Co.*, 834 F.2d 1154, 1162 (3d Cir. 1987); *Allen v. Metro. Life Ins. Co.*, 208 A.2d 638, 644 (N.J. 1965) (yes), with *Marez v. Dairyland Ins. Co.*, 638 P.2d 286, 288-89 n.1 (Colo. 1981), *overruled on other grounds sub nom.* *Friedland v. Travelers Indem. Co.*, 105 P.3d 639 (Colo. 2005) (no).

<sup>375</sup> Even assuming that consumers in this situation are making a poor choice, the law is: “People should be entitled to contract on their own terms without the indulgence of paternalism by courts [or commentators] in the alleviation of one side or another from the effects of a bad bargain.” *Fotomat Corp. of Fla. v. Chanda*, 464 So. 2d 626, 630 (Fla. Dist. Ct. App. 1985); see also *Honorable v. Easy Life Real Estate Sys.*, 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) (“Courts have been reluctant to assume consumers are too ignorant and benighted to fend for themselves merely because they are poor.”); *Johnson v. Fireman’s Fund Ins. Co.*, 272 N.W.2d 870, 875-76 (Iowa 1978) (Reynoldson, C.J., concurring specially) (“A jurist’s personal disdain for any particular clause is wholly irrelevant if the contracting parties have agreed to include it in their contract.”).

to its terms.”<sup>376</sup> Another case observes that the “marketplace reality” suggests that freedom of contract in the sale of goods under an adhesion contract is actually “nonexistent.”<sup>377</sup> Other courts state that the consumer has little freedom of contract when he has no real avenue to look elsewhere for a more favorable contract.<sup>378</sup> In sum, a number of courts rule that the autonomy concept of freedom of contract is absent for standardized mass market consumer contracts because free choice is lacking—these courts reason that (1) the play of the market does not bring the parties together, (2) the parties do not meet each other on an approximately equal economic footing, and (3) the two sides do not enter their contract as the result of free bargaining.<sup>379</sup>

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<sup>376</sup> *Tibbs v. Great Cent. Ins. Co.*, 373 N.E.2d 492, 498 (Ill. App. Ct. 1978).

<sup>377</sup> *Cate v. Dover Corp.*, 790 S.W.2d 559, 565 (Tex. 1990).

<sup>378</sup> *Madden v. Kaiser Found. Hosps.*, 552 P.2d 1178, 1186 (Cal. 1976).

<sup>379</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960); *Price v. Gatlin*, 405 P.2d 502, 507 (Or. 1965); *Gautreau v. S. Farm Bureau Cas. Ins. Co.*, 410 So. 2d 815, 818-19 (La. Ct. App. 1982), *rev'd on other grounds*, 429 So. 2d 866 (La. 1983); *see also* Kessler, *supra* note 2, at 632 (observing that the weaker party needing goods or services is frequently not in a position to obtain better terms from alternative sources either because the supplier has a monopoly or because all suppliers use the same terms). Along similar lines, Peter Linzer observes,

The great justifications of freedom of contract are the intrinsic value of the exercise of free will and the efficacy of individuals planning their individual lives as opposed to legislatures working en masse. Neither of these justifications has any relevance to contracts of adhesion. The mass marketing contract has nothing to do with freedom of contract: the non-dominant party has neither free will nor an opportunity for individual planning.

Linzer, *supra* note 296, at 213.

For a sampling of other cases disassociating freedom of contract and adhesion contracts, see, for example, *Tibbs*, 373 N.E.2d at 498 (“Freedom of contract simply does not exist in a typical relationship between an insurer and insured.”); *Gonzalez v. Cnty. of Hidalgo*, 489 F.2d 1043, 1046 (5th Cir. 1973) (recognizing that poor tenants, such as migrant farm workers, are often compelled to sign form leases “without any real freedom of contract”); *First Ala. Bank v. First State Ins. Co.*, No. 83-G-2082-S, 1988 WL 192452, at \*14 (N.D. Ala. May 26, 1988) (“Without bargaining the public policy favoring the freedom of parties to contract is not implicated.”); *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970) (stating that consumer has only the freedom to adhere to the adhesive terms); *Strauch v. Charles Apartments Co.*, 273 N.E.2d 19, 23 (Ill. App. Ct. 1971) (discussing freedom of contract illusory in form leases); *Schmidt v. Midwest Family Mut. Ins. Co.*, 413 N.W.2d 178, 181 (Minn. Ct. App. 1987) (“Freedom of contract . . . is a less persuasive factor when unequal bargaining power exists.”); *Perkins v. Standard Oil Co.*, 383 P.2d 107, 112 (Or. 1963) (“[adhesive] contracts are regarded by some authorities as anachronistic or inconsistent with real freedom of contract”); *Estep v. State Farm Mut. Auto. Ins. Co.*, 703 P.2d 882, 886 (N.M. 1985) (opining that in consumer insurance transactions “to say there is freedom of contract ‘is to ignore reality’”); *Pigman v. Ameritech Pub., Inc.*, 641 N.E.2d 1026, 1035 (Ind. Ct. App. 1994) (discussing freedom of contract “illusory” with a contract of adhesion); *Cate v. Dover Corp.*, 790 S.W.2d 559, 565 (Tex. 1990) (Spears, J., concurring) (stating that the “marketplace reality” suggests that freedom of contract in the sale of goods is “actually nonexistent”).

Furthermore, Radin could have pointed out that the consumer's weaker bargaining position has prompted some jurisdictions to institute a higher level judicial review and policing of the adhesion contract<sup>380</sup> to help preserve freedom of contract.<sup>381</sup> Thus, Radin could have maintained that the courts are realists about the potential that merchants can be tempted to go over the line of fair bargaining and therefore true freedom of contract is lacking in such a one-sided environment.

In some respects, the debate over adhesion contracts and freedom of contract is a variation of the debate over whether consumers can give effective consent to a mass market form contract. Substantive arguments exist on both sides, but there are other considerations present in the freedom of contract setting that impact the proper resolution of this question. Radin would have strengthened her argument by rephrasing and making more precise the question as whether adhesion contracts sufficiently safeguard the parallel right of freedom *from* contract. The reason is that under some decisions, the consumer cannot obtain the needed product or service save by acquiescing in the form agreement.<sup>382</sup> As Randy Barnett<sup>383</sup> has noted, and as courts<sup>384</sup> have observed, the law protects both freedom to contract *and* freedom from contract.

The position that enforceable adhesion contracts reflect the parties' freedom of contract carries the day. Radin (and courts in her camp) overlook that where, as here, the law widely approves a contract type, it would be anomalous to hold that a valid contract violates the right to freedom of contract.<sup>385</sup> A contract on the same issues cannot be both consistent and inconsistent with public policy. Therefore, Radin's analysis on this topic has some merit but more weighty shortcomings.

## VII. CONCLUSION

In her concerted efforts to categorize mass market standard form contracts in terms of normative degradation,<sup>386</sup> Radin has missed numerous lines of case law

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<sup>380</sup> See *Pickering v. Am. Emp'rs Ins. Co.*, 282 A.2d 584, 593 (R.I. 1971) (stating that there is a higher burden to declare forfeiture of consumer rights); *Perkins v. Standard Oil Co.*, 383 P.2d 107, 112-13 (Or. 1963).

<sup>381</sup> *Medovoi v. Am. Sav. & Loan Ass'n*, 152 Cal. Rptr. 572 (Cal. Dist. Ct. App. 1979) (Thompson, J., concurring) (limiting adhesion contracts "necessary to preserve freedom of contract in fact").

<sup>382</sup> See *supra* Part II.B.

<sup>383</sup> Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 828 (1992) ("Freedom of contract entails both freedom to contract—the power to effect one's legal relations by consent—and *freedom from contract*—the immunity from having one's right to resources transferred without one's consent." (emphasis added)).

<sup>384</sup> *Elda Arnhold & Byzantio, L.L.C. v. Ocean Atl. Woodland Corp.*, 284 F.3d 693, 705 (7th Cir. 2002) ("Freedom not to contract should be protected as stringently as freedom to contract.").

<sup>385</sup> E.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 241 (E.D. Pa. 2007).

<sup>386</sup> Radin confines her analysis to mass market consumer standard form contracts but devotes almost no attention to the many business-to-business boilerplate contracts that constitute a significant portion of the American contracting system. The closest she comes is a footnote in Chapter One commenting that contracts between business entities "are more likely

authority that generally would have contradicted (but occasionally supported) her thesis. Some good examples of these oversights are (1) the division of authority on whether adhesion contracts fit within the mutual assent model, (2) her contention that courts rarely use the term “meeting of the minds” and that the phrase represents a pocket of subjectivity, (3) her failure to apply the plain meaning rule and the duty to read doctrine, (4) a contract of adhesion must at the very least be closely scrutinized by the court to determine its reasonableness, (5) her failure to recognize the contrasting arguments on freedom of contract in mass market adhesion contracts, and (6) the law in various ways favors the consumer in the application of the unconscionability defense to adhesive arbitration agreements.

Because almost all courts regularly uphold adhesion contracts absent a recognized bargaining defect, the clear judicial message is that when it comes to this contract type, “The law will give enforcement where the contract is a legitimate statement of rights and duties.”<sup>387</sup> Courts further emphasize that “Rational personal and economic behavior in the modern post-industrial world is only possible if agreements between parties are respected.”<sup>388</sup> These decisions implement the general policy that wherever possible, courts should strive to uphold, rather than to defeat, an otherwise binding contract.<sup>389</sup> Radin’s book does not appropriately consider these significant policies.

Backed by numerous statutes and cases, I have provided a balanced analysis of the law’s role in supporting voluntary consent in standard form consumer contracting. Besides being the first full length critique of *Boilerplate*, this Article also has contributed original observations to the secondary literature, most prominently the existence of a division of authority on whether mutual assent and freedom of contract exist for adhesion contracts and I also provide a solution for the conflict.<sup>390</sup>

For all of her criticisms, Radin does not grapple with the question why at numerous key turns are the courts solidly aligned against her legal interpretations of

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to instantiate freedom of contract than those involving consumers.” RADIN, *supra* note 3, at 251 n.6. Radin’s book would have benefited from a comparison of boilerplate consumer contracts with boilerplate business contracts. Many questions arise from this issue. For example: Can these boilerplate business contracts ever be “purported” contracts? Can a corporate business also be a “consumer” within Radin’s model, such as a small business single proprietorship? Do these boilerplate business contracts ever cause normative degradation? While Radin is entitled to establish the scope of her analysis, the answers to these questions would have broadened the value of her book.

Interestingly, Radin teaches a class at the Michigan Law School on boilerplate, and the course description specifically mentions this issue. See <http://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/AboutClass.aspx?term=1920&classnbr=10171> (“Should boilerplate used between commercial parties be treated differently from boilerplate between a firm and consumers?”).

<sup>387</sup> *Estrin Const. Co., Inc. v. Aetna Cas. & Sur. Co.*, 612 S.W.2d 413, 422 (Mo. Ct. App. 1981).

<sup>388</sup> *Dearnley v. Mountain Creek*, No. A-5517-10T1, 2012 WL 762150, at \*3 (N.J. Super. Ct. A.D. Mar. 12, 2012).

<sup>389</sup> See *supra* note 209.

<sup>390</sup> See *supra* Part IV.A., E.



mutual assent. Is her point that U.S. courts are the captives of corporate interests? Radin never gives a reason. Because the accurate recitation of legal principles is the predicate for any valid normative criticism of the contracting system, and especially considering that courts follow numerous pro-consumer doctrines, Radin has not succeeded in showing that boilerplate, standard form, or adhesion contracts have caused normative degradation.