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I. Introduction

In the United States, many firms are using mass-market fine print "contracts" (boilerplate) to waive the remedies afforded by law to consumers and employees. Using the proliferation of mass-market rights deletions in the United States as a starting point, in this chapter I consider some implications for private ordering of viewing the State as fiduciary for its populace. American courts have shown themselves willing to recognize boilerplate rights deletions as enforceable contracts. Moreover, firms are widely deploying arbitration clauses to preclude consumers and employees from accessing courts, and from aggregative legal actions.

Paul Finn has said that "the most fundamental of fiduciary relationships in our society is that which exists between the community (the people) and the State and its agencies."[1] In this chapter, I argue that by allowing firms to foreclose access to the courts and legal remedies through boilerplate rights deletions, the American legal system is failing civil society, and its legal institutions are flouting their fiduciary obligation to the polity and to the American people. In addition, I suggest that firms have an

[1]Paul Finn, the Forgotten "Trust": The People and the State, in Malcolm Cope, ed., Equity: Issues and Trends (The Federation Press, 1995) at 131. This idea is elaborated in EVAN FOX DECENT, SOVEREIGNTY'S PROMISE: THE STATE AS FIDUCIARY (Oxford, 2011).

obligation not to deploy boilerplate so as to "defect" unilaterally from the legal infrastructure that makes it possible for firms to function in civil society.

A. The American Boilerplate Problem

Boilerplate rights deletions have burgeoned exponentially in the networked digital environment. Exclusion clauses are prevalent in transactions for services, such as those provided by nursing homes, day care centres, fitness facilities, and summer camps. These clauses routinely purport to exclude any and all liability of the firm, no matter how culpable its behavior. Many states enforce these clauses at least for negligence; and it seems that (to the extent that anyone reads them) they could deter legal action entirely. Even if legal action is brought against a service provider using a blanket exclusion clause,[2] plaintiffs will spend more time and money arguing for gross negligence. Also prevalent are mandatory pre-dispute arbitration clauses, which prevent class actions, thus precluding redress for recurring small harms. In practice such arbitration clauses seem largely to preclude any relief.[3] Other prevalent clauses include choice of forum far from

[2] Exculpation of behavior that causes personal injury to a consumer is prima facie unconscionable under the Uniform Commercial Code (UCC), a model statute that is enacted, with some variances, in all states. The UCC applies only to the sale of goods. There is no parallel statute governing services, and many service providers use blanket exculpatory clauses.

[3] See Judith Resnik, Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights, 124 Yale Law Journal 2804 (2015). Mandatory pre-dispute arbitration clauses when massively deployed are particularly dangerous for the rule of law. They prevent collective remedies, and override relief provided by legislatures for small recurring injuries. Arbitration has no precedential value and the results are often secret, which undermines the common law system in practice and fails to deter a firm that loses a case from trying again, and again, against others seeking remedies. In essence, mandatory pre-dispute arbitration as it is massively deployed in the US is replacing the precedent system by a system of ad hoc unreviewable

the place of domicile of the recipient[4]; one-sided unlimited modification clauses; curtailment of statutes of limitations; and other inventions of fertile legal minds.

In previous work I have argued that enforcing these clauses represents a corruption of contract law that I called normative degradation.[5] The normative backdrop of contract law is the basic idea of voluntary agreement or consent between the parties to become mutually obligated to each other through contract.[6] This normative underpinning of contract is being degraded by various workarounds.

One workaround is the objective theory of contract. I call this doctrine "as-if" consent: if a judge believes the situation would have seemed to an offeror like consent to his offer, the offeree is bound, as if she had consented. A further workaround is the idea that any time a recipient of fine print reasonably could have noticed it, the law will treat it "as if" he saw and consented to it. I call this a double "as-if" doctrine. These workarounds are of long standing in contract law, and they expose a fissure in contract doctrine between subjective normative underpinning and objective manifestation and

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unreported decisions. See MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (Princeton, 2013), 130-135.

[4] I am using the term "recipient" as a shorthand for the employee, or consumer, or firm in the position of consumer, who is delivered boilerplate by a firm.

[5] Radin, BOILERPLATE, supra n. 3; Radin, Boilerplate: A Threat to the Rule of Law?, in LISA AUSTIN & DENNIS KLIMCHUK, EDS, PRIVATE LAW AND THE RULE OF LAW (Oxford, 2014) (http://ssrn.com/abstract=2340005); Radin, Access to Justice and Abuse of Contracts, manuscript under submission, on file with author (2015).

[6] I take note that it is common for theorists to anchor contract in promising rather than in agreement per se, see, e.g., CHARLES FRIED, CONTRACT AS PROMISE (2d ed, Oxford 2015). Perhaps I should characterize the normative basis of contract simply in voluntariness of exchange between willing parties, because that could be exchange of voluntary promises just as well as exchange of something else.

implementation.[7] These doctrines largely developed in an earlier time, when traders probably knew each other, and understood each other's behavior in context. The use of fine print against employees and consumers and its exponential proliferation in the digital networked environment profoundly alters the picture.[8] Recipients are not fellow traders in the social milieu of firms, and firms have no basis to expect that recipients are signaling actual agreement to a particular offer. Furthermore, recipients are not making individual deals but are inundated with more boilerplate than anyone could read and understand.

B. Undermining the Legal Infrastructure

In previous work I also argued that firms that deploy mass-market deletions of remedies are undermining the legal infrastructure of contract.[9] They are privatizing what must remain public. This undermining of the state's legal infrastructure I have called democratic degradation.

When the State enforces a contract, it takes an entitlement from A against her will, and delivers it to B. For this involuntary redistribution to be consistent with legality, there must be a legal infrastructure of rules governing contract enforcement. Furthermore, this infrastructure must be one that participants recognize as existing for the benefit of all citizens, and which each is thereby committed to support. Hence the

[7] I do not want to make too much of a subjective/objective dichotomy. Perhaps consent itself is neither subjective nor objective, but rather conditioned both by our own preconceptions and our social milieu. At any rate, consent is philosophically a difficult concept; and consent is often not an either/or decision for observers in practice.
[8] Radin, BOILERPLATE, supra n. 3 at 89-90; Radin, Access to Justice, supra n. 5.
[9] BOILERPLATE, supra n. 3, at 33-36.

nonwaivable requirement of good faith in contract law. The infrastructure of contract recognition and enforcement is in the care of the State. The State depends upon contract participants to use and support the infrastructure in good faith. The State also depends upon contract participants to argue for and against enforcement where there is a dispute.

When firms deploy exclusions that eliminate or diminish rights of recourse that enable recipients to challenge their behavior, and when courts as institutions of the State enable them to do this, each is at fault for undermining the infrastructure of private law. Just as parties cannot waive the requirement of good faith, so too they should not be able to waive provisions that are critical to the legal infrastructure that supports the institution of contract. The possibility of a legal infrastructure for contract is still accepted as one of the reasons for exiting the state of nature, creating a political state, and submitting to its power. When firms undermine the infrastructure of contract, and are permitted by the apparatus of the State itself to do this, the rationale for the existence of the State is eroded.

Thus, it bears emphasizing that the narrative of traditional liberalism implies that individuals cannot be divested of rights to redress of grievances without undermining the very structure of rights that the State is charged with maintaining in order to foster individual freedom. Freedom of contract is of course among these rights. To the extent that remedies for breach of contract are foreclosed, or sham contracts are treated as real and binding, the liberal ideal of private ordering cannot be implemented. In a sense, then, recipients of fine print exclusions who have lost their right to redress of grievances have

been forced back into a quasi state of nature, where they must fend for themselves rather than trust that they can rely upon the State for redress.[10]

C. Rights Permanently in the Care of the Policy

On the basis of these arguments, I have argued that remedial rights should be market-inalienable, at least when deleted on a mass-market basis. Market-inalienability refers to an entitlement that cannot be traded off by the holder, even if consideration is given and consent is impeccable.[11] The duty of good faith is an example of market-inalienability. The argument is that market-inalienable rights should remain permanently in the care of the polity.[12]

I take the area of remedial rights as the first avenue of analysis because I see no argument available that would affirm that a State can be justified in abolishing legal redress of grievances for its citizens. Again, making such remedies available has traditionally been treated as a primary rationale for the State's existence. More speculatively, below I will consider other matters that should remain permanently in the

[10] See Radin, Boilerplate: A Threat to the Rule of Law? supra n. 5

[11] In practice, of course, it is hard to see what the consideration is for the exclusions. Proponents of the exclusions are likely to argue that the recipients are being compensated in lower prices for the product or service being purchased, and/or that recipients do not value remedies ex ante. As I have argued previously, insofar as these arguments rest on empirical assumptions, they cannot be true of all markets, and are probably false in many. Radin, From Baby-Selling to Boilerplate: Reflections on the Limits of the Infrastructures of the Market, manuscript under submission 2015, at 36-41 ("Flawed Arguments in Defense of Boilerplate"). As I have also argued previously, it does not follow from the fact that individuals do not subjectively value remedies before they are needed that the availability of remedies is not valuable to all individuals. (Id. at 37) The existence of legal remedies is valuable to all individuals whether they realize that or not

[12] See Radin, Boilerplate: A Threat to the Rule of Law? supra n. 5. Note that I have not argued against standardized contracts per se, only those that interfere with market-inalienable rights.

care of the polity. In this regard, I consider three areas of analysis that often overlap: implications of our commitment to the rule of law, protecting basic human rights, and situations in which a coordination problem means that the state must take responsibility. Matters that must remain permanently in the care of the polity must be so understood because of the fiduciary duties that the State owes to its people.

II. The State as Fiduciary and the Rule of Law

To the extent that the State forecloses access to remedies, it undermines the rule of law and the rationale for its own existence. Therefore, the State is obligated to maintain the legal infrastructure that supports redress of grievances. The obligation requires availability of redress in fact, in practice, not merely in theory. The State must recognize and make allowance for the fact that humans, being human, will make mistakes or act wrongly. A State that does not take account of actual – and perfectly ordinary – human frailties is only a pretense.

A. Legal Remedies and Fiduciary Duties Regarding the Rule of Law

I regard access to legal remedies as a demand of the rule of law. In order for the State rightly to honour a commitment to the rule of law, including the principle of equality before the law, all rights holders must have reasonable access to remedies.[13]

[13] It does not follow that a single breach of this principle means that a State is not justified. If a judge in one case wrongly deprives an individual of a right that should be recognized, the decision is itself wrong but absent a broader pattern of rights deprivations there is not necessarily an affront to the rule of law.

It is true that the rule of law is an ideal. But it is an ideal that structures relationships between a State and its subjects in the real world, a world in which complete fulfillment of ideals is never possible. For example, retroactive operation of law is presumptively inconsistent with the rule of law, because compliance with a rule cannot precede existence of that rule, but some measure of retroactivity can be tolerated before we conclude that a State in general has failed to abide by the rule of law. Nevertheless, there is a point at which deviations from rule of law norms become indefensible.

The rule of law is a contested set of ideas and ideals featuring various formal and substantive views. The formal views refer to the principles by which a system of law may be useful for governing human behavior: a rule must exist in advance of the behavior it is supposed to regulate; it must be understandable and susceptible of being followed by humans; and it must in some way promote human welfare. The substantive views refer to the principles by which a system can implement goods held to be essential to human flourishing, such as principles of democratic government, constitutional principles, and commitment to recognition of basic human rights.[14]

However the rule of law is construed, commitment to it and maintenance of it of is a responsibility of the State acting on behalf of its people. For these reasons, Evan Fox-Decent characterizes commitment to rule of law values as a matter implicating the fiduciary responsibilities of the State to its people.[15] Fox-Decent explains:

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[14] I wrote more about the formal and substantive ways of thinking about rule of law in a 1989 article, Reconsidering the Rule of Law, 69 Boston U. L. Rev. 781 (1989), in which I attempted to imagine what the rule of law would look like if we abandoned traditional conceptions of rules and instead think of rules in a holistic, social constructivist context. I did not mean to adopt the formal conception of rule of law, but rather to use it as the more challenging case for my social constructivist suggestion.

[15] FOX-DECENT, supra n. 1

> [T]he state's overarching fiduciary obligation to its people is to secure legal order, to govern through the rule of law on behalf of the people. … As private parties, legal subjects cannot announce or enforce law, nor adjudicate their own disputes. A law-making public authority is required to specify the limits of permissible action. An administrative public authority is required to enforce the law. A law-interpreting public authority is required to judge alleged transgressions. The fiduciary principle entrusts the state to play these law-giving roles on behalf of the people, but at the same time encumbers the state with rule-of-law obligations to ensure that the state's agents govern impartially, as public authorities rather than as private parties.[16]

I argue that at least one implication of a commitment to the rule of law -- access to redress of grievances -- must remain permanently in the care of the polity. Rights of access to redress ought not to be subject to exclusion by participants of the polity: private parties should not be allowed to use instruments provided for the well-being of all against the rights of some by seeking to exclude rights on a mass-market basis. Where the State permits – and indeed, participates, in such significant derogation from rule of law principles, it fails to comply with its fiduciary responsibilities to its citizens and thereby undermines the legitimacy of its claim to sovereignty.

Fox-Decent devoted much of his analysis to defending common law constitutionalism in light of the State's fiduciary relationship with its people, whereas I focus primarily on the State's duty to maintain access to public redress of grievances. In particular, I claim that rule of law norms are violated where private entities are permitted, with the complicity of the State, to accomplish large-scale deletion of rights of access to remedies. This practice undermines the value of equality before the law and abrogates the responsibility of the State to prevent the exercise of arbitrary power. The State should insist that rights of access to remedies are market-inalienable in the context of mass-

[16] Id. at 128.

market deployment of boilerplate rights deletions. Even if they wished to do so, recipients may not en masse trade off remedial rights for money.[17]

An implication is that the courts should not focus exclusively on contractual formation and consent. They should instead focus first on the nature of the right that is the subject of exclusion. If the right is market-inalienable, consent to a purported exclusion is irrelevant. If courts accepted this responsibility, we could avoid arguments about whether clicking "I agree" to a document one hasn't read--and wouldn't understand in any event--constitutes consent. We could also avoid arguments that the recipient, if reasonable, could have found and could have read a document, that he therefore should be treated as if he had read it, and as if he had understood it, and thus as if he had consented to it.[18] In the American context, the doctrine requiring aggrieved recipients of boilerplate rights deletions to prove both "substantive" and "procedural" unconscionability in respect of their "decision" to exclude those rights could be bypassed.[19]

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[17] In fact the "trade-off" may be a ruse. See n. 11, supra. It may yield no money to recipients, depending on the market structure and particularly its level of information asymmetry. In practice, it may often be the case that firms simply pocket their savings and pass on nothing to recipients in the form of lower prices. Also, I should note here that in the rule of law context I am speaking of mass-market pre-dispute relinquishment of remedies, not about settlement of disputes once initiated, and not about a de minimis individual case, unless it leads to proliferation..

[18] These are the kind of arguments that embarrass the law. I have never understood why anyone thinks that if I know a list of statements exists in my surroundings I have thereby agreed to it, but I am not debating this question here.

[19] I believe that this two-pronged view of unconscionability is borrowed from a widely adopted American approach.. The doctrine requires both "procedural" and "substantive" unconscionability to be found in order to rule for the consumer. "Procedural" means, roughly, does the court think there was adequate consent or agreement? If a court judges the recipient to have consented, even if by means of this "double as-if" doctrine, it will not have to investigate whether the contract is substantively bad, including the question

B. Human Rights and Public Fiduciary Duty

The responsibility to secure human rights might (and I think ought to be) be considered part of the State's fiduciary duty toward its subjects.[20] Here I will only gesture at the issue of how far the State's fiduciary duty extends. Human rights may include individual autonomy, equality, dignity, and personal identity; freedom of expression, religion, and thought; freedom of movement; privacy and intimate and family relations; cultural or group identity; maintenance of the natural environment that supports human life; and satisfaction of basic human needs through access to resources including food, water, shelter.[21] In keeping with my emphasis here on the fiduciary responsibility of the State to create and appropriately administer the legal infrastructures of contract, I will briefly consider individual autonomy, freedom of speech, and privacy.

First, it seems clear that routine enforcement of boilerplate by the courts undermines autonomy and respect for individual choice. Freedom of contract is based on

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whether the recipient has signed away a right that is not subject to recipient choice because it is permanently in the care of the polity.

[20] See Paul Finn, Public Trust and Public Accountability, 3 Griffith L. Rev. 224 (1994) at 232, asking to what extent the fiduciary idea limits Parliaments: "Beyond any question of its [Parliament] merely acting unfairly or partially, does its trustee obligation to serve the people preclude it from acting so as to offend grievously against human rights deep rooted in the society we have created?" An answer to this question suggested by Evan Fox-Decent and Evan J. Criddle is Yes, according to a fiduciary theory of the obligations of public entities: "The fiduciary theory views human rights as the consequence of persons' moral capacity as self-determining agents to place public institutions under legal obligations. Human rights protect individual dignity against state domination and instrumentalization by entitling all persons to be treated in certain ways by public institutions as a matter of right." Evan Fox-Decent and Evan J. Criddle, The Fiduciary Constitution of Human Rights, 15 Legal Theory 301 (2009).

[21] A starting point is the United Nations Universal Declaration of Human Rights of 1948. See ohchr.org.

the idea of individual autonomy (freedom of the will) embodied in the notion of reciprocal agreement. Individual autonomy is not honoured when courts declare that recipients "agreed" to contractual terms that they did not read and would not have comprehended had they done so.

Freedom of contract is the centerpiece of private ordering. Again, in traditional liberal theory, the need for impartial interpretation and enforcement of contracts is a basic reason for the State's existence. Thus, the exercise of coercive state powers to enforce (purported) contracts that derogate from values and principles underlying the institution of contract undermines the State's claim to commitment to individual autonomy. Doctrines attempting to assimilate agreement to consent, and consent to notice, and notice to constructive notice, attest ironically to the centrality of actual agreement in the justification of contract enforcement. These doctrines are like epicycles created for the purpose of propping up a paradigm that does not do the work it was supposed to do.

Second, consider freedom of speech. Relinquishment of freedom of speech may cause concern because of its fundamental importance as a human right in many legal and political systems. Boilerplate sometimes interferes with freedom of speech; consider a clause providing that the recipient will not publish a critical comment on a product or service. Clauses invoking intellectual property can also significantly restrict freedom of speech. For example, when a EULA declares that a user "agrees" not to copy or distribute anything on a website, that "agreement" supersedes the law of copyright. The law of copyright would have allowed not only fair use or fair dealing, but also copying of facts and ideas (rather than expressions of ideas). Courts faced with mass-market boilerplate that interferes with freedom of speech should at least be wary of enforcing it.

Third, consider individual privacy. Privacy is widely recognized as important to personal identity. Yet, individual privacy rights are especially sensitive to cognitive biases on the part of rights holders. People often do not understand the personal significance of privacy rights or the extent to which they might later regret waiving them.

Privacy waivers are of particular concern where a waiver scheme is widespread. Consider Facebook's Terms of Service. Facebook retains a right to use without consent certain materials relating to a user, even after the user has terminated her account. "Information associated with your account will be kept until your account is deleted, *unless* we need the data to provide products and services." (emphasis added) Moreover, "information that others have shared about you is not part of your account and will not be deleted when you delete your account." In other words, Facebook will, if it chooses, feature your stories and photos in advertisements without your consent. We should not accept the proposition that when Facebook posted new Terms of Service at the beginning of 2015, users who continued to use the service had thereby subjected themselves to everything in those terms.

C. Coordination Issues and the State's Fiduciary Role

Sometimes a right enacted or protected by the State is a solution to a coordination problem. The purpose of this kind of right is defeated if it is alienable. In order to maintain the coordination solution, the State must generally disallow waivers (unless in an unusual situation a waiver is really de minimis). The rule about which side of the road to drive on is an easy example of a nonwaivable rule that is essential to coordination, because without such a fixed rule chaos would ensue.

This reasoning can readily be extended to many kinds of rights that depend on coordination, including rights to clean air and water, and to amelioration of climate change. With rights of this sort, efforts at mass-market exclusion undermine collective commitment to rule-based social coordination. A State that takes seriously its fiduciary duties toward those subject to its power should not allow this to happen.

III. Duties of Firms to Support Background Legal Infrastructure

Firms that deploy boilerplate to rearrange the rights of recipients in ways they consider suitable for their own business goals are beneficiaries of the State's legal infrastructure themselves. Do they have any reciprocal duties toward the State, toward other market actors, and toward the general populace?

Of course they have a duty to obey the law. But I think that firms must also be precluded from derogating from legal infrastructure in ways that undermine the commitment of other firms to that structure and that undermine efforts by the State to maintain it. In competitive markets where boilerplate exclusions become common,, its prevalence alone will undermine the commitment of competing firms to honour the State's legal infrastructure, because in a competitive market firms will be incentivized to offer worse terms[22] to avoid being driven from the market . Such a situation tends to lead to a race to the bottom. Firms must not be allowed to instigate this result, which undermines the infrastructure of private law, undermines the rule of law, and trenches upon rights that are permanently in the care of the polity.

[22] Firms could also meet the competitors' cost-saving bad terms by offering lower quality products, but this would probably be more obvious to customers.

A. An Analogy: Deceptive Advertising

Seana Shiffrin has recently developed a parallel argument regarding deception in the law of commercial misrepresentation.[23] Consumers' misunderstanding of an advertisement may sometimes be considered deceptive even if deception was not purposeful or knowing. For example, an advertisement may not be purposely deceptive when it makes a truthful but artfully worded claim that causes some consumers to understand it mistakenly due to lack of attention or "intellectual fault."[24] Shiffrin points out that for many forms of liability for deception the law "looks more to the effect of the speech on the audience [rather] than to the intent of the speaker."[25] She explains: "Statements that are true and might be meaningfully advanced for their literal truth may still be illegal because they have a tendency to mislead listeners, even [sic, especially (?)] those listeners who are not attentive or careful and who make mistaken inferences."[26]

Shiffrin suggests that there is an "implicit picture of moral relations between speaker and listener embedded in the law."[27] In support of this picture she argues that "the listener is not welcome to become equally expert on the issues" and further that "in a

[23] Seana Shiffrin, Deceptive Advertising and Taking Responsibility for Others, in TYLER DOGGETT, ANNE BARNHILL & MARK BUDOLFSON, EDS, OXFORD HANDBOOK OF FOOD ETHICS (forthcoming 2016); available at http://ssrn.com/abstract=2658450
[24] Id. at draft p. 14.
[25] Id. at draft p. 8.
[26] Id at draft p. 13. For example, Gerber claimed its Fruit Snacks were made with "real fruit juice and other all natural ingredients," which was true, but it was not true that all of their ingredients were natural, which a philosopher or logician would have realized and which the consumer could have found out by reading the nutrition label. A federal appellate court held that consumers do not have to look beyond the front of the box to be considered reasonable consumers. (And by implication, it seems, consumers do not have to be able to parse implicatures.) Williams v. Gerber Products Co. 552 F.3d 934 (2008).
[27] Id. at draft p. 17.

well-operating economic system, [the listener's] efforts would not importantly enhance the public dialogue but would detract from the achievement of the cooperative ends and the listener's individual chosen ends that our economic division of labor should facilitate."[28] In the food product context which gives rise to Shiffrin's discussion of deceptive advertising, people who buy food products have to buy so many of them that it would be unduly time-consuming, and thus wasteful and detrimental to basic human projects, for them to investigate claims about those products. Furthermore, firms through maneuvers such as "ag-gag" laws make it more rather than less difficult to do so.

Thus, Shiffrin argues:

> "Rather than expecting the parties to check one another and to stand in an adversarial relation to one another given that the non-expert party also has her hands tied behind her back, it makes more sense to complement the property right and the ability to exclude with a quasi-fiduciary duty towards the excluded who the property owner hopes to entice into a commercial relationship. *This quasi-fiduciary duty involves, among other charges, not providing the occasion in which one party might predictably make a mistake to the other party's benefit."* [29] [emphasis added]

B. Deceptive Boilerplate

I think that the same arguments about deception apply here, at least to the extent that recipients actually read the boilerplate.[30] Surely firms that deploy boilerplate rights

[28] Id. draft at p. 25
[29] Id. draft at p. 28.
[30] Perhaps deployment of boilerplate should not properly be called deception when the boilerplate is not even read; can someone be deceived by a text of which he is unaware? If so, this would be a different kind of deception than the kind Shiffrin is talking about. Perhaps deception in this situation is the mistaken trust the recipient may have that the firm would not use indecipherable fine print to divest core rights, coupled with the inference that firms know this. When the boilerplate is not read, the argument is also available that receipt of boilerplate is not a contract at all--unless we subscribe to the double as-if doctrine and charge the recipient both with having read and having understood the boilerplate. I think we should not subscribe to that doctrine; but if we did,

exclusions are providing occasions "in which one party might predictably make a mistake to the other party's benefit." With fine print, it is not merely the case that the recipient will make a mistake about food ingredients, or about the superiority of one brand of acetaminophen over another. Instead, those who lose their right to pursue legal recourse may lose their homes or have to forego necessary medical care, or may find their children or elderly parents negligently injured by a firm whose exclusion clause has diminished its response to legal deterrence.

With fine-print rights exclusions, it is not merely that recipients have "intellectual faults" (Shiffrin's term) such as not being able to parse implicatures. Instead recipients are --we all are-- subject to well-known and stubborn cognitive biases. There is now ample evidence that individuals are unable to reason well in certain circumstances.[31] There is also evidence that firms take advantage of cognitive biases.[32] In fact there is a relatively new field of marketing research and practice called neuromarketing, in which market actors take advantage of customers' cognitive biases and other subconscious

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perhaps we should further posit that the cognitive and other factors Shiffrin has identified suggest that we should also assume that the recipient would have been deceived.

[31] Please see Daniel Kahneman's masterful book, THINKING, FAST AND SLOW (Farrar, Strauss & Giroux, 2011). See also, RICHARD H. THALER, MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS (Norton, 2015), and GEORGE AKERLOF AND ROBERT J. SHILLER, PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION & DECEPTION (Princeton, 2015).

[32] For example, upon opening a checking account John doesn't expect he will ever bounce a check, so even if he knows that the bank is making a large percentage of its profit on $45 fees for bounced checks, John will accept their policy. Upon opening a credit card account, Sue doesn't expect to carry a balance, so she doesn't properly factor in big increases in interest rates on the card if she carries a balance after the first few months. See OREN BAR-GILL, SEDUCTION BY CONTRACT (Oxford, 2012). (I am sorry Bar-Gill did not call the book Deception by Contract, but I suppose "Seduction" was a more alluring title.)

inclinations.[33] It does not seem far-fetched to speculate that knowledge developed for advertising will be—is being-- put to work in deployment of boilerplate rights deletions.

Recipients will be hampered by cognitive biases if they do try to read fine print. Firms know this. They learned by honing successful practices and dropping unsuccessful ones long before neuromarketing was developed. Most recipients do not try to read fine print, because it is not a good use of their time. Firms that deploy fine print know this too. In fact, in today's economy, many recipients cannot read much of anything (the illiteracy rate is high in the United States, and the innumeracy rate is even higher). Firms that deploy fine print know this as well. Even assuming we read boilerplate we cannot spend our lives protecting ourselves from all of the self-exonerated firms we deal with. It is not merely that we have better uses for our time, as Shiffrin argues is the case for people subject to potentially misleading labels or advertising. If we are forced to protect ourselves and our families from harm caused by any of the many firms we deal with, there may be a point where no other use of our time would be possible.

We ought not to be required to go to such lengths to protect ourselves. We could not even do this well if we had to try. That is what the State is for. Especially in today's world in which recipients are inundated with boilerplate, it seems apt to consider recipients of boilerplate rights deletions as being in the position of the unfairly disappointed beneficiary of a fiduciary relationship. Hampered by cognitive biases and the burdens of life priorities, recipients of boilerplate are in a position of having their vulnerabilities catalogued and systematically exploited by firms. We should rightly

[33] See, e.g., Natasha Singer, "Making Ads That Whisper to the Brain," The New York Times, 13 Nov 2010.

expect that, rather than implicitly condoning this state of affairs, the State should live up to its fiduciary responsibilities.

C. Duties of Market Actors with Regard to the State's Fiduciary Duty

Lest it be thought that the burden of responsibility falls on the State alone, it must be added that firms have responsibilities of their own. At the very least, they must not interfere with the State's fulfilling its fiduciary responsibilities. It may be helpful to put this issue in terms of public choice theory: firms and other market actors are party to a general hypothetical bargain in which they are granted the advantages of participating in market activity in a civil society organized and maintained by the State by means of its administrative function of underwriting an infrastructure of private law. Given that the hypothetical bargain relates to and provides benefits to all market actors, individual actors may not defect from it. If they could, the bargain would collapse.

This duty of firms dovetails with that of the State to maintain the recipients' right to the redress of grievances and other background rights that are critical to the infrastructure of private law. Firms are beneficiaries of these rights just as much as others. Under the rule of law, firms must accept that they are equal – but no more than equal -- before the law. They cannot themselves rely on legal infrastructure to their own advantage while seeking to undermine that legal infrastructure (e.g., contracts) to the disadvantage of others. The State should preclude the use of boilerplate to exclude market-inalienable rights. But equally, firms ought to recognize the dangerous hypocrisy involved in deploying these exclusions with recipients. If every firm were to do this, the benefit of civil society in supporting the marketplace and protecting the State's

beneficiaries collapses; and if a substantial portion of firms but not all firms do this, the State's benefits are seriously undermined, and the situation may tend toward ever greater degradation of those benefits.[34]

IV. Practical Considerations: What Should the State and Its Judicial, Legislative, and Administrative Branches Do?

Suppose one accepts the arguments that the State is a fiduciary of its people. Suppose one accepts that there is widespread lack of compliance by firms with their own civic duties, making it less possible for the State to fulfill its fiduciary responsibilities. What can the fiduciary State do in response to this problem?

A. (Back to) the American Problem(s)

[34] A label on a product may be called "disclosure," and terms of service may be called "contract," but whatever label is attached they are fine print that exclude market-inalienable rights and therefore undermine the legal infrastructure upon which markets and civil society depend. In MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (Princeton, 2014), Omri Ben-Shahar and Carl Schneider declared "disclosure" by government entities worse than useless, owing to many factors about American recipients, including overload and illiteracy, but did not recognize that the same critique applies to "contracts" deployed by private parties. Given the reality that there often is no significant difference between fine print that is merely "disclosure" and fine print that is labeled contractual, this book leads to the need to pay attention to the question whether (or when) fine-print terms that come with transactions should properly be enforced as contracts, a topic that the authors did not cover. The same facts that the authors marshal, about American illiteracy, innumeracy, lack of salience, and general fine-print overload apply to the many consumer contracts that (in the US) are largely enforceable. See Radin, Less Than I Wanted To Know: Why Do Ben-Shahar and Schneider Attack Only 'Mandated' Disclosure? ssrn abstract =2462818 (2014), in 11 Jerusalem Rev. of Legal Studies 51-62 (2015)(under title Less Than I Wanted to Know: The Submerged Issues in *More Than I Wanted to Know*).

Perhaps the first thought is that the State should declare certain kinds of clauses unacceptable. A federal administrative agency, for example the US Federal Trade Commission (FTC), has the power to declare certain behaviors an unfair method of doing business. So far the FTC has not declared that mass-market waivers of remedial rights are unfair. Why not? That is a political, not a legal problem. Another federal agency, the recently organized Consumer Financial Protection Bureau (CFPB), has been considering the use of onerous clauses in some industries, and some regulation may result, especially with regard to mortgages and perhaps other situations where recipients are particularly vulnerable. But if the Republicans win the presidency in 2016, given that they will retain majorities in Congress for at least two years, the CFPB is likely to be abolished, defunded, or stripped of some of its power.

Meanwhile, as most readers will know, in the European Union the Commission promulgated a Directive in 1993 against unfair consumer contracts, with an attached list of terms that could be considered unfair. As the Member States have worked toward compliance with this Directive, and as the EU has done more work on the problem, the regime has gotten stricter and more unified.[35] Other countries, such as Australia, have

[35] See, e.g., CHRISTIAN VON BAR AND ERIC CLIVE, EDS., PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE (DCFR), 6 vols, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). [Dates?] See Jules Stuyck, Unfair Terms, in MODERNISING AND HARMONISING CONSUMER CONTRACT LAW (GERAINT HOWELLS AND REINER SCHULZE, EDS. 2009), 115 (providing a summary of the similarities and differences between the 1993 Directive, the DCFR, and the (then) proposed Consumer Rights Directive. The Consumer Rights Directive took effect in 2011.

moved to ameliorate the situation consumers face, including providing for significant fines to be levied against firms that use illegal clauses.[36]

Given that federal administrative amelioration of the problem in the United States is uncertain at best, might the courts deal with the problem? Unfortunately, the prospects are rather grim. Federal courts seem to ignore due process of law in this field. Yet, notwithstanding the failure of the federal courts to do so, it seems clear that exclusions that undermine rights of redress should be analyzed under constitutional due process of law. American constitutional law, under a principle of fundamental fairness, holds that every injured party must have her day in court. American constitutional law is in the guardianship of the federal courts. All people subject to US jurisdiction are supposed to be beneficiaries of that guardianship. Yet federal courts have failed to meet their fiduciary responsibilities as guardians of the constitution and its protections. Instead, they have held that many rights associated with due process, such as the right to jury trial, may be disposed of in indecipherable boilerplate.

Furthermore, often these issues do not come before a court; "contractual" (boilerplate) arbitration clauses that deny jury trial, aggregative relief, and designate arbitrators whose impartiality is suspect are widespread in the United States. The conservative activist majority of the United States Supreme Court has reinterpreted an early 20th century statute to essentially immunize arbitration clauses against consumers, employees, and businesses in the position of consumers. There is a pre-emption clause in

[36] Australian Consumer Laws, Schedule 2 to the Competition and Consumer Act 2010, administered jointly by the Australian Competition and Consumer Commission (ACCC) and the State and Territory consumer protection agencies. A new law effective 12 November 2016 extends protection against unfair terms in boilerplate to small businesses..

the US Constitution providing that federal law is the supreme law of the land, and state law conflicting with federal law cannot stand. The Supreme Court has interpreted that clause to mean that states do not have power to outlaw arbitration clauses, to treat them as prima facie unconscionable, or to subject them to stricter treatment of any sort.

Forced arbitration most of the time means no remedy,[37] especially since the Court has held that the "contract" right to compel arbitration trumps state rights and other federal rights too (such as rights under competition law and antidiscrimination law).[38] Congress would have to amend the federal statute on arbitration to say, for example, that cases involving civil rights or anticompetitive behavior cannot be made subject to arbitration. So far a bill that would do that has been unsuccessfully submitted to Congress in each year since 2007.[39]

I don't know of another developed country that has the problem with mandatory pre-dispute arbitration clauses that the United States Supreme Court has enabled. In Canada arbitration is viewed favorably by the Canadian Supreme Court. Nevertheless, partly because Canada does not have the constitutional preemption provision that the United States has, the provinces have the power to decide whether mandatory pre-dispute arbitration provisions can be deployed against consumers. A few provinces have legislated against it.[40]

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[37] For details on the Supreme Court rulings, and much more, see Resnik, supra n. 3.
[38] American Express v. Italian Colors Restaurant, 135 S.Ct. 2304 (2013) (restaurants subject to boilerplate arbitration clause could not bring class action for antitrust relief under federal law, even though no individual plaintiff would be able to afford the development of economic evidence that would be needed for the vindication of this federal right). Scalia, J, thereby elevated "contractual" boilerplate over federal rights.
[39] Another such effort is pending as I write this.
[40] For a bit more on this, see Radin, Access to Justice and Abuses of Contract, supra n. 5 at 22-25.

B. A Tort of Deprivation of Basic Legal Rights

Under these circumstances it is worthwhile to consider whether there could be a remedy in tort against a firm deploying clauses that exclude access to redress. It is possible to view mass-market exclusion clauses as a deceptive business practice and thus a form of tortious behavior. Indeed, it is more realistic to view mass-market rights deletions as a deceptive business practice than to view them as millions of separate identical contracts. If "deceptive" is defined here as it is in the law of advertising, it would be possible to find many boilerplate exclusion clauses to be deceptive. It is clear that firms know what they are doing when they price mortgages or auto leases or cell phones the way they do.[41] They have honed these practices over a long time.[42] It is clear that firms know that consumers do not know what the firms are doing, and that it would be very difficult for consumers to find out and to act appropriately on that information.

The tort law analysis would be most convincing if there were evidence that firms are actually intending to deceive recipients of boilerplate. But do firms consciously intend to deceive? They do intend to persuade, and have manipulative methods of doing so. So far I have not found a smoking gun where a corporate principal says something

41 For example: even if you are a contracts professor, it is impossible to find out what an auto lease will cost either by reading the dealer's advertised price, or by hearing a quote on the telephone. Once you get to the dealership, where they want to have you, you will learn about some large fees that were not previously revealed, but you still won't know the actual price until you read all of the boilerplate that will be handed to you casually when the deal is complete (for example, the fact that the dealership will charge you a substantial fee when you return the car at the end of the lease if you do not lease another car from them).

42 For literature on how advertising can be and has been used manipulatively in light of consumer cognitive biases, see AKERLOF AND SHILLER, PHISHING FOR PHOOLS, supra n. 29.

like: "Let's deceive consumers about how we are secretly raising the aggregate price of our product and subjecting them to danger, while depriving them of viable methods of relief against us."[43] We know that firms know about recipients' cognitive biases and make use of them. Perhaps a whistleblower will turn up with solid evidence of intent to deceive.[44] Though there are obstacles, I have not given up on the idea that boilerplate rights exclusions can be tortious.[45] Judges in some states, especially in California, might be receptive to this analysis, which suggests a way to get around the arbitration clause problem.[46]

Conclusion

If we grant that the State is a fiduciary of its people, the fiduciary frame of reference helps us to understand what is broadly and deeply problematic about privatization of public functions in the United States. Private armies, private prisons,

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[43] There are other problems with considering use of boilerplate rights deletion as tortious. One is the economic loss doctrine, a judge-made doctrine precluding relief in tort for mere economic loss. I have attempted to reply to this and other doctrinal defenses; see BOILERPLATE, supra n.3, ch. 11.

[44] Analogously, Shiffrin found very useful quotes from industry managers about the high priority of minimizing customer service. As one quoted industry source said, avoiding phone calls and deflecting e-mails about customer issues would enable support workers to stop helping customers in order "to spend time on cross-selling and up-selling." Shiffrin, supra n. 22, draft at p. 26.

[45] In addition to the deception analysis discussed above, judges could consider a product that comes with onerous clauses attached to it that harm the recipient (and the public system of redress of grievances) to be a unified defective product capable of harming the recipient (and the public system of redress of grievances). The idea that the physical product and its boilerplate can be amalgamated to be considered a composite product stems from a law-and-economics view. (Of course, that law-and-economics view does not say that the composite product might be defective. That is my addition.) See Radin, Access to Justice and Abuses of Contract, supra n. 5, draft at pp. 7-10; Radin, BOILERPLATE, supra n. 3, ch. 6.

[46] See Resnik, supra n. 3.

private police, private housing compounds, private ownership of roads and bridges—all avoid the safeguards that the State is obligated to provide, and had previously attempted to provide in constitutional safeguards and other regulations. In the same way, excessive privatization of the legal infrastructure of contract law through widespread exclusion of recipients' rights to redress undermines the possibility of private ordering by contracts properly administered by the State. Privatization in this context means ceding powers that are properly public to private firms' self-interest, enabling the exertion of arbitrary power that the rule of law opposes. When the State condones excessive privatization, it condones arbitrary power, undermining the rule of law and the fiduciary foundation of its own claim to legitimate possession and exercise of public authority.