

Michigan Law Review

Volume 104 | Issue 5

2006

The Boilerplate Puzzle

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Recommended Citation

Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006).
Available at: <http://repository.law.umich.edu/mlr/vol104/iss5/5>

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THE BOILERPLATE PUZZLE

*Douglas G. Baird**

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The warranty that comes with your laptop computer is one of its many product attributes. The laptop has a screen of a particular size. Its microprocessors work at a particular speed, and the battery lasts a given amount of time between recharging. The hard drive has a certain capacity and mean time to failure. There is an instruction manual, online technical support (or lack thereof), and software. Then there are the warranties that the seller makes (or does not make) that are also part of the bundle. Just as I know the size of the screen, but nothing about the speed of the microprocessor, I know about some of the warranty terms that come with the computer and remain wholly ignorant of others.

With respect to some product attributes, the seller will give buyers a choice of options. For a higher price, I can buy a computer with a bigger screen. But with respect to others, there is no choice. A seller may offer laptop computers with only one type of battery. So too with the attributes that are legal terms. A seller may give me a choice: I can buy a service contract that extends the warranty. Other times, there will be no choice, as when the seller specifies that Delaware law governs any contract dispute between us. Similarly, some product attributes are readily apparent to everyone, such as the size of the screen and the availability of an expensive service contract. Other product attributes, like the speed of the microprocessor and the forum selection clause, are apparent only to those who spend time and energy looking for them.

To say that a product comes with boilerplate is to say that one of its attributes, along with many others, is partially hidden and is one over which there is no choice on the part of the buyer. But why should any of this raise special concern? The legislature can regulate microprocessor speeds or not. So too with boilerplate. But why is boilerplate any different? Legal scholars have long assumed that standardized contract terms in fine print are

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suspect,¹ but it is not at all obvious why they should be, given how readily we accept so much else about products that are standardized and hard to observe. This is the boilerplate puzzle.²

Part I of this Article rehearses ideas that have been well known for more than a quarter of a century.³ Legal academics too often exaggerate the dangers of boilerplate.⁴ 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. A seller can sell me a computer with a cheaper, slower microprocessor, just as it can sell me a computer with a bad forum selection clause in fine print. Indeed, at first blush the case for intervention is far weaker for boilerplate than for other product attributes. The ability to hide terms in fine print creates the potential for advantage-taking, but that potential is modest relative to all the other ways that a seller can take advantage of its buyers. Generic objections to the vices of boilerplate as contracts of adhesion ring hollow.

Nevertheless, we should resist the notion that nothing of note is happening. In this Article, I show that, while law professors' observations about boilerplate have missed the mark, their intuition that something is amiss is sometimes sound. When boilerplate appears troublesome, some other mischief is often afoot. Boilerplate, while not a vice itself, is frequently the symptom of a problem that the law should appropriately address. A review of the staples of the first-year contracts curriculum illustrates the point.

In Part II, I show how troublesome boilerplate can emerge from anti-competitive behavior. Legal intervention, however, must aim at the underlying anticompetitive conduct itself, not the boilerplate. *Henningsen v. Bloomfield Motors, Inc.*⁵ is the paradigmatic case. Part III focuses on a dif-

1. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 631–32 (1943); Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931). Part of the problem is that contract law focuses squarely on the interaction between two discrete individuals who engage in a bargained-for exchange. Contract terms that one of the parties does not even know about fit uncomfortably inside such a paradigm. For an elegant exploration of this theme, see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

2. This idea that contract terms are embedded in products, rather than the result of a discrete transaction between autonomous individuals, looms larger in the digital age. For a discussion of this point, see Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125 (2000).

3. See, e.g., Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979). For a lucid overview of the terrain, see Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743 (2002).

4. Again, this observation is not new. See Hillman, *supra* note 3, at 748. Others have made this point too. See, e.g., Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Example of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983); cf. Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 305–06 (1975).

5. 161 A.2d 69 (N.J. 1960).

ferent sort of problem. There are some rights for which we require a waiver to be a full and knowing one. U.S. law, for example, has always placed some types of property (such as wedding rings) off limits to creditors. We allow individuals to use such property as collateral for a loan, but we insist that, in such cases, legal formalities are met. The legal rule performs a cautionary function.⁶ In such cases, refusing to enforce fine print follows naturally from the decision to create the substantive right in the first instance. I explore this problem, again using a familiar case—*Williams v. Walker-Thomas Furniture Co.*⁷ The debate must be over the substantive policies themselves, not over boilerplate.

Part IV shows how the legal rules can dampen or enhance a seller's efforts to distinguish its products from those of others. *Carlill v. Carbolic Smoke Ball Co.*⁸ provides an illustration. Rules governing the enforceability of terms in a contract can amplify or dampen the signals that sellers are able to send. A warranty allows a high-quality seller to signal her type.⁹ To the extent, however, that the seller is able to qualify or modify the warranty in fine print, the signal loses its strength. By regulating fine print (by requiring, for example, discrete consequences to follow from the use of the word "warranty"), it is easier for sellers in the marketplace to distinguish themselves. Again, the 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.

I. ADVANTAGE-TAKING AND BOILERPLATE

Buyers often have little choice over the way that a particular seller bundles her product. You could buy Henry Ford's Model T in any color you wanted as long as it was black.¹⁰ There was no choice about any product feature. The inability to choose is a by-product of mass production. Goods are cheaper, but there is more uniformity. Moreover, the costs are not spread evenly. Those who care about color are worse off; the price-conscious are better off. But again, these trade-offs are inevitable in a world of mass production. The warranty that came with the Model T was just like its color. You could have any promises you wanted as long as they were Ford's.

When product attributes are hidden, the buyer is flying blind with respect to them. At some cost, of course, she can read the fine print or disassemble the product or ask the seller to make an explicit representation

6. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941).

7. 350 F.2d 445 (D.C. Cir. 1965).

8. (1893) 1 Q.B. 256 (U.K.).

9. See Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461 (1981).

10. See DOUGLAS BRINKLEY, *WHEELS FOR THE WORLD: HENRY FORD, HIS COMPANY, AND A CENTURY OF PROGRESS 1903–2003*, at 181–82 (2003).

about the warranty term or the magneto coils. But in many cases, the benefit to the buyer is too small to justify the expense. The costs include not only obtaining the information, but gaining enough expertise to make sensible judgments. After a buyer discovered that the Model T had a magneto radically different from that in any car, she still needed to figure out whether it was better or worse than a more conventional design. The typical buyer had no way of doing this.

The typical buyer cannot rely on her own expertise or her ability to dicker with her seller. When the market works effectively, however, she benefits from the presence of other, more sophisticated buyers.¹¹ A seller in a mass market often cannot distinguish among her buyers. To make a profit, she cannot focus exclusively on the unsophisticated. As ignorant of computers as I am, I can always see whether the more knowledgeable are buying a particular model. When the seller decides on the microprocessor to use in her new computer, she has to worry about making a choice that suits not only the buyers who do not know about microprocessors, but also those who do. As long as there are enough sophisticated buyers aware of the importance of having the right microprocessor, the seller must choose well. The sophisticated buyer provides protection for those that are entirely ignorant.

Indeed, at first approximation, boilerplate is something the typical consumer can safely ignore most of the time. Consider the following example. I have a choice between two computers. With the first computer comes a tough, nonwaivable warranty that is written by a law professor and applies equally to computers and children's pajamas. The second comes with a warranty buried in fine print and written in ancient Greek. All I know about this warranty is that it is the same one that Steve Jobs, Bill Gates, and half the people in Silicon Valley insist upon when buying computers of this type for their computer-illiterate friends and relatives. The two computers otherwise look identical and cost the same. If forced to make a choice, I have no doubt which computer I would choose, even if I did not read ancient Greek.

Law, of course, has a role to play here. Laws can make it harder or easier for the sophisticated buyer to search. Laws that put sellers in jail if they tell outright lies make searching easier. Instead of running her own test on the microprocessor, a sophisticated buyer can ask the seller for technical specifications and tests that the seller has run. If the law enables the sophisticated buyer to learn about product attributes more easily, sellers will be under greater pressure to build computers that meet such a buyer's expectations.

The law works identically with respect to contract terms and other hidden product attributes. Instead of reading the fine print or disassembling the product herself, the sophisticated buyer can simply ask the seller. The repre-

11. Again, this idea has been well known for a long time. See, e.g., Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1253-55 (1982); Victor P. Goldberg, *The "Battle of the Forms": Fairness, Efficiency, and the Best-Shot Rule*, 76 OR. L. REV. 155 (1997); Schwartz & Wilde, *supra* note 3, at 636-39.

sentation about the warranty or microprocessor is credible because the law imposes penalties on sellers that induce truth-telling. There is nothing particularly special about what the law is doing with respect to fine print as opposed to other hidden product attributes.

Of course, there may not be enough sophisticated buyers to give a seller the right incentives. There are computers with microprocessors that are too slow and warranties that are too stingy that are sold to people like me every day. But the question is not whether the market is perfect, but how we should shape legal rules to make markets work more effectively with respect to all product attributes.

Prohibitions against lying advance two goals simultaneously. They make it easier for sophisticated buyers to search, and they protect unsophisticated buyers from advantage-taking. Other kinds of protection for unsophisticated buyers are worth having because they come at little cost. For example, there are few downsides to making an implied warranty of merchantability hard to waive as long as the warranty provides a baseline that everyone with any knowledge or sophistication would demand. Surely every knowledgeable buyer would insist on a warranty that ensures that the computer passes without objection in the trade and is suitable for the purposes for which such computer is typically used. Mandatory warranties become problematic only when they insist on provisions that might or might not sensibly allocate responsibilities between buyer and seller.

Sellers can shape fine print to suit them and work to the disadvantage of their buyers. Knowing this, however, does not tell us the extent to which preventing sellers from playing games with fine print should be the focus of the regulator.¹² Protecting against this form of potential abuse may be inconsistent with creating rules that make it easy for sophisticated buyers to search. We need to know something about how powerfully the forces of competition push sellers to offer efficient terms and how much they are tempted to engage in advantage-taking. There is no way to answer this question with certainty, but the risk of advantage-taking with respect to boilerplate seems less than with respect to other hidden attributes. One can cheat buyers by exploiting their ignorance of a product attribute, but everything suggests that an unscrupulous seller is likely to gain more from hidden attributes other than boilerplate. Sellers inclined to mischief will direct their attention to the places where the potential gains are the largest and the costs smallest. By this standard, fine print is an exceedingly poor candidate for would-be advantage-takers.

Legal rules already constrain those who are tempted to play games with fine print. A seller cannot promise the moon during the course of selling a product and then seek to escape legal liability by adding terms in forms. We do not need to reach any issues about disclaimers or the parole evidence rule. Rules governing false advertising and fraud prevent such deliberate

12. I developed this idea in Douglas G. Baird, *Commercial Norms and the Fine Art of the Small Con*, 98 MICH. L. REV. 2716 (2000).

misconduct.¹³ Even if the consumer would not have any cause of action based on breach of contract, sellers are still held in check. There are many ways, apart from contract law, in which the state deters sellers from advantage-taking, and one of them is in Lewisburg, Pennsylvania.¹⁴

A seller profits from using tricky fine print only when buyers use the product and discover that it does not work and would otherwise seek recourse against the seller. As such, fine print is only useful for sellers who are around for the long term. But those interested in making a quick killing are likely to be judgment proof or out of the jurisdiction by the time people catch up with them.¹⁵ But even when a seller with no conscience is around for the long-term, fine print is not the only concern. Those who are in business for any length of time must worry about their reputations. Playing games with fine print is a profitable strategy only if it can be done in a way that does not undermine the seller's ability to attract new customers.¹⁶ Moreover, parties have the largest incentive to invest in their reputations in environments in which the other party fears advantage-taking. When customers know they are at the mercy of their sellers, they will buy only from those who can convince them that they stand behind what they sell. Sellers who use too much fine print are shunned.

Goods that are fungible are easy to inspect and hence the implied warranty matters little. For complex goods such as a computer, it is easier to shave costs by using low-quality materials than by using fine print. A seller that uses the cheaper (and slower) microprocessor makes additional money on every computer she sells. By contrast, legal terms matter only when something goes wrong. For most goods, the chance of encountering defects that give rise to warranty actions and the like is low. It is far easier and more profitable to build a reliable computer and persuade a naïve consumer into buying an overpriced service contract that she will never use, than to build an inferior computer and rely on fine print when the buyer comes to complain.

Boilerplate terms that let the seller off the hook are valuable only to the extent that the buyers would otherwise take the seller to court. If the buyers never learn that their goods are defective, their inability to hold the seller legally liable for the defect is irrelevant. When the buyer learns about the defect and asks the seller to make amends, the seller can often mollify the buyer at little cost. If satisfying the buyer is costly and will have little effect on other customers, the seller can refuse to do so, regardless of what warranties she has made or disclaimed. Most buyers will not go to court and the seller knows it.

13. See, e.g., N.Y. GEN. BUS. LAW § 350-a (McKinney 2004).

14. For a useful overview of this and other federal correctional facilities, see Fed. Bureau of Prisons, USP Lewisburg, <http://www.bop.gov/locations/institutions/lew/index.jsp> (last visited Oct. 20, 2005).

15. From the time of Charles Ponzi to the present day, con artists are usually broke by the time they can be brought to court. See *Cunningham v. Brown*, 265 U.S. 1 (1924).

16. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

In the rare cases in which the unscrupulous seller is brought to court, we may find that the fine print proves ineffective, as considerable discretion is embedded in virtually all legal rules.¹⁷ In other words, sellers are unlikely to invoke fine print and when they do, it often doesn't help them. Hence, those intent upon mischief are unlikely to be attracted to this form of advantage-taking. It runs counter to the basic principles of con artistry.¹⁸ There are many other ways of exploiting people that are easier and more lucrative.

Of course, if it were costless to prevent advantage-taking with boilerplate, we would want to do so. Advantage-taking through fine print is still advantage-taking, even if the stakes are small. But there are two problems. First, identifying advantage-taking is not simple. Terms that seem unfavorable may in fact be part of a sensible bargain.¹⁹ Second, and much more important, legal rules can do only so much work. Focusing on advantage-taking may come at the expense of vindicating some other objective through legal rules. Fine print matters much less than former generations of law professors thought. Hidden product attributes over which sellers give potential buyers no choice are a commonplace, necessary, and entirely unobjectionable feature of mass markets. Legal rules play a useful role in regulating the marketplace, but one can make no progress in understanding this role through blanket assertions about the evils of boilerplate and contracts of adhesion. Legal intervention must be based on something more concrete. At the very least, one should pay attention to whether the market is one in which sellers can discriminate between those buyers who are sophisticated and those who are not. Other things equal, regulation targeted at payday lending²⁰ or door-to-door sales²¹ are to be preferred to a broad judicial power to second-guess boilerplate.

17. As Hillman notes, courts have "ample ammunition when sellers become too greedy." Hillman, *supra* note 3, at 748.

18. Again, fine print matters only when buyers are disgruntled and intent on justice. Experienced swindlers do not leave their victims in such a state. This principle—the necessity of "cooling off" the mark—is widely recognized in the standard texts. See, e.g., DAVID W. MAURER, *THE BIG CON: THE STORY OF THE CONFIDENCE MAN AND THE CONFIDENCE GAME* 157 (1940) ("If the insideman handles the blow-off properly, the mark hardly knows he has been fleeced. No good insideman wants any trouble with a mark. He wants him to lose his money the 'easy way' rather than the 'hard way' . . .").

19. For example, disclaimers of liability for consequential damages in consumer transactions might seem a form of advantage-taking, but such disclaimers are commonplace between sophisticated parties and likely show that buyers are better positioned to guard against them than sellers. More generally, there are many risks that buyers are simply better positioned to bear than sellers. See George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297 (1981). I return to this point below in the context of *Henningsen*.

20. Payday lending is a potential place for useful regulation precisely because of the danger that the borrowers in such a market (those who live from one pay check to the next) are not likely to include any sophisticated parties. See Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 *MINN. L. REV.* 1 (2002). One cannot justify regulation on this account alone, but it becomes a factor to consider once one pays attention to the market as a whole.

21. See, e.g., FTC Rule Concerning Cooling-Off Period for Sales Made at Homes or Certain Other Locations, 16 *C.F.R.* § 429 (2005).

II. COLLUSION AND STANDARDIZED TERMS

In *Henningsen v. Bloomfield Motors, Inc.*,²² the buyers of a car sued a carmaker for the consequential damages from an accident caused by a defective steering mechanism. By their account, the car had been traveling on a smooth, paved highway at twenty miles an hour. Suddenly there was a loud noise. The steering wheel spun, and the car veered and crashed into a highway sign and a brick wall. The front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident.²³ The carmaker defended on the ground that the buyers waived any right to sue for consequential damages in fine print.²⁴ The court ruled in favor of the buyers, holding the waiver ineffective. The court focused on “[t]he gross inequality of bargaining position,”²⁵ and explained:

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position.²⁶

The reasoning that the court uses here is dated, naïve, and hard to take seriously for all the reasons discussed in Part I. Mass markets produced standardized products with standardized terms. Standardization has nothing to do with bargaining power. All carmakers sell cars with four wheels, rather than three or five. Anyone who wants to buy a car has to buy one with four wheels, on a take-it-or-leave-it basis. We could mandate the production of three-wheeled or five-wheeled cars, but we should have a better reason than superior bargaining power or armchair notions of car design. The same may be true of a warranty. Carmakers may disclaim liability for consequential damages because it represents a sensible trade-off between the risks that the carmaker is equipped to bear and those the consumer can bear.²⁷

It does not seem wildly implausible that a carmaker would want to disclaim liability for consequential damages. The driver will carry insurance. While it is possible that the steering mechanism was defective, it is also possible that something else caused the accident. In a world in which juries resolve factual disputes, consumers may be better off accepting a disclaimer rather than paying the higher price that covers the cost of paying for acci-

22. 161 A.2d 69 (N.J. 1960).

23. *Henningsen*, 161 A.2d at 75.

24. *Id.* at 95.

25. *Id.* at 87.

26. *Id.* at 86.

27. See Priest, *supra* note 19.

dents caused by the carelessness of others, but for which a jury will hold the carmaker liable. Neither the inability of buyers to dicker nor that all carmakers disclaim liability for consequential damages proves such disclaimers are bad.

Although not the focus of the opinion, the court does note that the carmaker used a standard warranty issued by the Automobile Manufacturers Association.²⁸ Standing alone, this is not problematic either. There are economies of scale in developing contract terms. A trade association can call on the collective expertise of everyone in the business to develop an efficient set of terms. If it does a good job, everyone will use these terms. If it does a bad job no one will. Even a monopolist looks for efficient warranty terms. Using inefficient terms compromises the monopolist's ability to extract rents. She is much better off providing quality goods and efficient terms and charging as much as she can from them.

Trade associations, however, create opportunities for anticompetitive behavior.²⁹ Assume, for example, that there are three sellers in an industry and they enter into a cartel agreement with each other in which they agree to fix prices. They face a familiar problem. Every cartel member has an incentive to cheat by lowering prices and gaining a higher market share for itself. Hence, each must monitor the other two to prevent cheating. When goods are as complex as a car, however, the ability to change the quality of the goods increases the monitoring problem. Raising the quality of the goods has the same effect as lowering the price. It allows one member of the cartel to gain market share at the expense of the others. Hence, members of such a cartel would like to devise mechanisms to minimize cheating over this dimension. A standardized warranty suits this purpose admirably.

When each member of the cartel agrees to use the same warranty and to bind its dealers never to go beyond it, they can no longer use a warranty to signal product quality.³⁰ With less ability to signal quality, they have less incentive to compete over product quality. To be sure, members of the cartel have no reason to choose a standard warranty that is suboptimal but they do want the warranty to be one that can be easily monitored. Uniform and simple warranties might emerge in such environments. These are not necessarily inefficient, but they are not necessarily efficient either. Even if one might question whether such an agreement would have the anticompetitive effect suggested here, banning such agreements is unproblematic.

At the time of *Henningsen*, three manufacturers made substantially all of the cars sold in the United States, and they entered an explicit agreement to

28. *Henningsen*, 161 A.2d at 87.

29. The idea that the activities of trade associations raise antitrust concerns goes back for decades. See, e.g., *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

30. For a discussion of how warranties serve this function, see Grossman, *supra* note 9.

provide the same warranty and require their dealers to do the same.³¹ There does not seem to have been an explicit price-fixing cartel, but tacit collusion can easily arise in such markets. We ought to be on our guard when the members of the industry reach an explicit agreement with each other about anything. Such agreements make tacit collusion easier. Again, the problem here was not that General Motors, Ford, and Chrysler used the same warranty (the vice the court in *Henningsen* focused upon), but that they *bound themselves* to use the same warranty.

One cannot say for certain that this agreement among carmakers in the automobile industry was intended to facilitate a scheme that left the industry less competitive, but it is plausible that it did. In any event, it is hard to see how barring such explicit agreements could leave consumers worse off. In short, the standardized warranty in *Henningsen* is suspect. The problem, however, has nothing to do with lack of sophistication or an inability to bargain. An infinitely sophisticated and savvy car purchaser, completely aware of every term of the warranty, is as subject to cartel behavior as anyone else. But this does not mean that if carmakers vigorously competed with respect to warranties that the plaintiff in *Henningsen* would have received the promise she sought—liability for consequential damages. Such liability is regularly and consistently disclaimed, across all products in all markets against all types of buyers of whatever sophistication. There is little to suggest that a carmaker would ever make this promise, no matter what the bargaining environment was. A sophisticated buyer with bargaining power does not demand a promise that she values less than it costs the seller.

III. FINE PRINT AND WEAK PATERNALISM

Making contracts legally enforceable is a serious business. We are allowing private individuals to call upon the state to use force, if necessary, against another private individual. There is nothing foreordained about the extent to which creditors should be able to call upon the state to collect their debts, and the rights extended here have always been carefully limited. In particular, we have always restricted the sorts of assets that creditors can seize after they reduce their claims to judgment. Clothes, household furnishings, tools of trade, and wedding rings are off limits.

We deny creditors the ability to reach some assets because we are too inclined to make borrowing decisions without taking full account of the long-term consequences.³² We misjudge the likelihood of future hard times at the time we borrow. We do not fully realize that while the chance of any particular reverse of fortune might be small, the chance that at least one

31. The minutes survive from the meeting in which it was discussed and voted upon. The 4,000-mile warranty that was to persist until the 1960s was put in place in the 1930s. See FED. TRADE COMM'N, REPORT ON THE MOTOR VEHICLE INDUSTRY 56–57 (1939).

32. I develop this idea at greater length in Douglas G. Baird, *Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Creditor Law*, 73 U. CHI. L. REV. 17 (2006).

comes to pass is substantial.³³ Moreover, we do not appreciate the value of being able to keep such property in hard times. The place to draw the line between property that creditors can reach and property they cannot is neither foreordained nor obvious, but there is a difference between a Ferrari on the one hand and the family Bible on the other. Most individuals put property of the latter sort at risk in a marketplace transaction only after careful consideration or under unusual circumstances.

For centuries, our law has assumed that individuals should not be able to put their family Bibles, their wedding rings, the clothes on their backs, or basic necessities at risk in ordinary, run-of-the-mill credit transactions. Given the high value we would place on having such assets no matter how bad things might become, we should worry that those who put such property at risk were not acting out of deliberate and careful reflection. One can argue against such limitations on the rights of creditors, but in doing so one is taking on a policy that has been deeply embedded in Anglo-American law for centuries.

Once some property is insulated from creditor levy, we have to decide how to treat security interests in such property. Empowering a debtor to grant a security interest in exempt property has the effect of allowing an individual to waive her right to keep it beyond the reach of creditors. There are reasons to allow such waivers. A wedding ring makes for an excellent hostage.³⁴ The borrower knows that the creditor has little temptation to abscond with it, while the lender knows that the borrower will go through great lengths to repay the loan and retrieve the ring. By her willingness to put such an asset at risk, an individual debtor can signal her confidence that she can repay her obligations by allowing creditors to reach such assets. The challenge, however, is allowing individuals to create such security interests without at the same time undercutting the rationale that led to exempting the property from creditor levy in the first place.

It makes no sense to exempt property from creditor levy to protect debtors from their own inability to assess the chances and consequences of default without worrying at the same time about regulating waivers of the right. If debtors are likely to undervalue the importance of household goods, they will also be too quick to grant a security interest in them. At the very least, the law needs to ensure that waivers are done with sufficient reflection and deliberation. The law here, in other words, needs to perform what Lon

33. See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124, 1129 (1974). Russell Korobkin provides an excellent overview of behavioral economics and standard-form contracts in Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003). The approach offered here differs importantly from Korobkin's in two ways. First, it uses principles already embedded in the law (such as the rules governing exempt property and concerns about due process) to identify those terms we need to worry most about when consumers are boundedly rational. Second, it explicitly considers the extent to which the legal enforcement of standard terms should embrace nonutilitarian objectives.

34. See Robert E. Scott, *A Relational Theory of Secured Financing*, 86 COLUM. L. REV. 901, 930 (1986).

Fuller called a cautionary function.³⁵ By requiring that a formal ritual accompany the grant of a security interest, we ensure that the debtor reflects on the act and its consequences. The ritual is costly. It is much cheaper to sign a document than to melt wax and use a signet ring. But this is the point. To ensure debtors make such decisions deliberately, we need to force them out of their routine. Justifying formal rules in this environment is straightforward once we accept the underlying policy that governs exempt property.

Thinking about exempt property in this fashion allows us to make sense of one of the other classic cases involving boilerplate and fine print—*Williams v. Walker-Thomas Furniture*.³⁶ Williams bought a number of pieces of household furniture from Walker-Thomas for about \$1300. After having paid all but \$164 of this amount, she bought a stereo from Walker-Thomas for \$514. The contract she signed included a cross-collateralization clause. This provision gave Walker-Thomas a security interest in both the stereo and all the other furniture she bought from it over the years.³⁷ The case turned on the question of whether this clause in fine print was enforceable.³⁸ To understand the case, one has to understand the work the clause is doing.

If the household furniture that Walker-Thomas had previously sold Williams were ordinary property subject to creditor levy, the cross-collateralization clause would be meaningless. If Williams fails to pay for the stereo, Walker-Thomas can reduce its claim to judgment, obtain a writ of execution, and require the sheriff to seize all of Williams's nonexempt assets, including the furniture. A security interest gives other rights, but they do not matter here.³⁹ Walker-Thomas took the security interest in Williams's other household goods because these assets were exempt. It had to take a security interest in them in order to be able to reach them in the event of default. The cross-collateralization clause served this purpose and no other.

Given the rationale behind the long-standing legislative policy of putting Williams's household goods beyond the reach of creditors, it makes little sense to allow Walker-Thomas to obtain a waiver of the right in fine print. A waiver of such a right must be done in an environment that allows for reflection and deliberation. If Williams is to give up her right to protect exempt

35. See Fuller, *supra* note 6, at 800.

36. 350 F.2d 445 (D.C. Cir. 1965).

37. *Williams*, 350 F.2d at 447.

38. *Id.* at 447.

39. A secured creditor has a right to repossess in the event of a default provided it can be done without a breach of the peace, U.C.C. § 9-609(b)(2) (1998), and a breach of the peace includes unauthorized entry into a private home. See 4 JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 385–86 (5th ed. 2002). Hence, the secured creditor's ability to repossess without going to court is relevant when the collateral is a car parked on the street, not when the collateral is household furniture.

Some readers of the case are left with the impression that the cross-collateralization provision functions as a penalty clause, that it gives Walker-Thomas the right to keep all of the property in the event of default independent of how much it is worth. This is wrong. A secured creditor has a right to repossess only to the extent necessary to recover what it is owed and no more. Indeed, as long as the debtor insists, the seller is obliged to sell the property and return any surplus to the debtor.

property, she should know that she has the right and that she is giving it up. A clause buried in a purchase agreement whose legal consequences are not self-evident (even to many contracts professors who have taught the case for many years) cannot serve that purpose and hence should not be enforced.

One can also take this argument a step further. In a mass market, credit transactions are so routine that it is hard to craft any formal rule that works. The formality must give enough salience to the waiver to ensure that it is done with deliberation. Requiring a cross-collateralization to be disclosed conspicuously or made the subject of explicit negotiation is not enough. Explaining the connection between cross-collateralization clauses and exemption laws is not easy even in the law school classroom. Devising a rule that brings about a fully informed waiver on the floor of an inner-city furniture store is just not possible.

For this reason, it may make sense to ban such clauses altogether. Someone in Williams's position might want to waive her right to exempt property even if she were fully informed. As noted, the household furniture is a good hostage. Her willingness to give up the furniture in the event of default sends a powerful signal that default is unlikely. But we cannot be sure that she will in fact be well-informed and, if we cannot be sure, the game may not be worth the candle. We might prefer weak paternalism, but when that avenue is not available, strong paternalism is a sensible course.⁴⁰

Once we embed a particular policy in the law, consequences follow. Insisting on legal formalities is an appropriate way to ensure that some decisions are made with sufficient deliberation. If you want to use your wedding ring as collateral for a loan, the law will let you, but only if you jump through enough hoops so that we can be confident that you have thought carefully about what you are doing. The only way to give a lender a security interest in it is by parting with possession. An individual can borrow using her wedding ring as collateral, but she must go to a pawnshop, take the ring off her finger, and hand it over to the pawnbroker.⁴¹ Such a rule is costly and makes it hard for debtors to create a security interest in their wedding rings, but this is the point. We don't want it to be easy.

This argument against enforcing some kinds of fine-print terms works because of the connection it makes with another substantive legal policy, not because of vague and abstract notions of bargaining power. Giving effect to fine print can undercut other substantive policies embedded in the law as well. Process rights are a case in point. From the beginning, we have always

40. Sunstein and others have unpacked the idea of paternalism into strong and weak forms. See Cass R. Sunstein, *Boundedly Rational Borrowing*, 73 U. CHI. L. REV. 249 (2006).

41. Taking a nonpossessory, nonpurchase money security interest in a wedding ring and other household goods is an unfair credit practice. See FTC Credit Practices Rules, 16 C.F.R. §§ 444.1(i), 444.2(a)(4) (2005). Apart from purchase money security interests, such security interest is voidable under 11 U.S.C. § 522(f)(1)(B), (f)(4)(A)(xiv) (2000). The exception for purchase money security interests makes sense as the loan enables the debtor to acquire the property in the first instance. While Walker-Thomas cannot take back other goods if Williams fails to make payments on the stereo, it can take back the stereo itself. Williams should not be able to keep something without paying for it.

required creditors to cut square corners. If they could not serve their debtors with process and bring them into court, they were out of luck. Such rules can be justified on utilitarian grounds. A court is less likely to make a mistake when both litigants are present. But part of the rationale for these rules is decidedly not utilitarian.

Our conception of limited government requires that before it brings force to bear on any citizen, the state must follow procedures that respect individual autonomy. State power will not be used against an individual until that individual has notice and is given a chance to be heard.⁴² These rights are not absolute, but the exceptions are narrowly crafted. Many of these rights can be waived, but the waivers must be deliberate.⁴³ It is impossible to make sense of much of criminal procedure on narrow utilitarian grounds. Even if with respect to some kinds of serious crimes a trial did nothing to ensure that only the guilty were punished, we would still insist on a right to a trial nevertheless. Criminal punishment without due process is barbaric, no matter how efficient it might be.

The procedural hoops through which creditors must jump to invoke the aid of the state rest similarly on both utilitarian and nonutilitarian rationales. The sheriff cannot enter into my home unless I first have chance to say why he should not. To the extent that we base this right on nonutilitarian grounds, we can argue that we cannot leave the waiver of such rights to the forces of competition in the marketplace. Even if the efficient contract would lead to a waiver of the right, our conception of government and individual autonomy might still require that each waiver be a conscious and deliberate act. From this perspective, a confession-of-judgment clause is fundamentally different from a warranty disclaimer. Because the use of force by the state is implicated, it is not simply another hidden product attribute.

The question that needs to be confronted squarely here is how far such arguments should be pressed.⁴⁴ The formal rule needed to ensure that a debtor's acceptance of a confession-of-judgment clause is done with sufficient deliberation may be different from the one we put in place for other process rights (such as arbitration clauses or forum selection clauses). The rights implicated are more important with respect to the former, and it may make sense to ban waivers altogether. With respect to the latter, we might

42. The use of state force is precisely what animates *Fuentes v. Shevin*, 407 U.S. 67 (1972).

43. The idea that waivers of such things as the right to counsel must be deliberate is a dominant theme of the Supreme Court's criminal procedure jurisprudence. See, e.g., *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) ("To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.")

44. See Radin, *supra* note 2, at 1161.

conclude that a formal rule that worked would be too costly or that it might be enough merely to require that such clauses be conspicuous.

The law vindicates a number of noninstrumentalist objectives, and doing this is not always consistent with individual perceptions of self-interest. Process rights and privacy rights are embedded in the warp and woof of a society. Each decision about the procedures that suit her or the information she is willing to disclose may not lead to the amount of process or privacy that is best for the society as a whole. Boilerplate terms might thus compromise process or privacy values and might be regulated on that account, but it is not a rationale that applies broadly across all types of boilerplate. More to the point, boilerplate is neither where such an inquiry should begin nor end.

IV. FINE PRINT AND SIGNAL DAMPENING

In a mass marketplace in which there is little dickering or negotiating, legal rules should focus not on discrete transactions, but on ensuring the smooth operation of the market as a whole. The paradigmatic examples of competitive markets—such as the Chicago Board of Trade—can come into being only after an elaborate web of rules is generated through private contract. Trading in commodities is possible only when contracts are standardized and the rules of the game are well understood. A futures market cannot exist without a high degree of regulation, often (and perhaps best) imposed from within. Much of the law merchant concerned itself with the regulation of the marketplace as a whole. Buyers could keep goods when there was a thief in their chain of title if, but only if, they bought in an open market. This regime both made life harder for thieves and better for buyers. Thieves could find no buyers outside the market, because such buyers could not be sure they could keep what they bought, and thieves could not sell inside the market because their open display of stolen goods made it too likely they would be caught. At the same time, buyers who played by the rules were sure to get good title.⁴⁵

As part of making a market work effectively, legal rules should make it easy for buyers to identify different sellers and learn about the attributes of their products. Many legal rules serve this function. The law of trademark and unfair competition is the most conspicuous example. These laws allow a buyer to find a product she likes and tell others about it. Trademark law does nothing to ensure product quality directly, but it works indirectly. With a trademark, sellers with quality products can set themselves apart.

Rules of contract also affect the ability of sellers to set themselves apart. Recall the facts of *Carlill v. Carbolic Smoke Ball Co.*⁴⁶ In *Carlill*, the seller ran an advertisement that promised £100 to anyone who used its influenza

45. See Saul Levmore, *Variety and Uniformity in the Treatment of the Good-Faith Purchaser*, 16 J. LEGAL STUD. 43 (1987).

46. (1893) 1 Q.B.256 (U.K.).

remedy but nevertheless caught the flu. *Carlill* used the smokeball and later caught the flu. When she sued, the seller defended on the ground that the promise was not legally enforceable. The court rejected the company's claim, relying in part on the notion that enforcing such a promise allowed sellers whose products worked to distinguish themselves from sellers whose products did not.⁴⁷ Allowing the Carbolic Smoke Ball Companies of this world to escape liability would deprive honest sellers of a way to distinguish themselves. By making such promises enforceable, those with effective cold remedies have an additional way of convincing people that they work.

For our purposes, the aftermath of *Carlill* is the most interesting. After the litigation, the seller ran the same newspaper advertisement and increased the reward to £200, but it added fine print.⁴⁸ To be eligible to collect, individuals had to come to the company's offices and sign an application and be subject to the undisclosed conditions set out in the application.⁴⁹

In a circumstance such as this one, the seller is using fine print to undercut the representation that is made conspicuously. If fine print is enforced in such circumstances, we are back in the same position we are in if the promise is not enforced at all. The signal sent by the offer of the reward is nullified by the fine print. A buyer in such a world who reads the reward offer or hears about it does not take it seriously unless she has also invested the time to read the fine print. Without reading the fine print, she has no way of telling whether the promise means anything. Not only do quacks get away with sham promises, but those with quality goods no longer are able to use the promise of a reward to differentiate themselves from others, at least not without taking the second step of convincing people that fine print does not render the promise meaningless.

The costs of search go up when buyers cannot trust any representation without first reading fine print. A promise that appears terrific, but is subject to whatever appears in fine print sends only a weak signal. Buyers want to be able to rely on representations that exist apart from the fine print. A legal regime that strictly enforces fine print can make this difficult. A buyer has no way of telling what obligations the seller is undertaking without investing additional time and effort.

Assume that the seller promises to repair its product free of charge if it fails for any reason for five years. In a world in which fine print is not enforced, a sophisticated buyer could take this language and plug it into the background rules that govern in the absence of explicit agreement. She could evaluate this warranty relative to the price that is being charged and the warranties that competitors are offering. In a world with fine print, it is more difficult for the seller to make the same promise credibly. To be sure,

47. See, e.g., *Carlill*, 1 Q.B. at 264 (discussing, in the course of establishing the requisite consideration, the seller's need for the public to have confidence in the efficacy of the product).

48. See A.W.B. Simpson, *Quackery and Contract Law: The Case of the Carbolic Smoke Ball*, 14 J. LEGAL STUD. 345, 372 (1985).

49. *Id.*

the seller cannot deliberately promise one thing in an advertisement and something quite different in the fine print. Rules against fraud prevent this. But even the fine print in *Carlill* (conditioning the warranty on buyers coming to the company's offices and filling out an application before using the ball) does not directly contradict the promise of the reward. And fine print does not need to be nearly as crude as that language in *Carlill* to alter the conspicuous promise fundamentally. Many other terms can have profound effects on the power of the signal that the seller is sending.

The power of a warranty, especially one of any complexity, turns in significant measure on forum selection and choice-of-law provisions. The chosen jurisdiction may measure damages in a different way. It may or may not provide for trial by jury. It may be more or less convenient for the buyer. The fine print may provide for arbitration of disputes. Arbitration might ensure inexpensive and expert decisionmaking. But it might also steer the litigation toward a forum that will be strongly biased in favor of the seller.

Enforcing fine print makes the entire contract harder to understand. It makes it harder for sellers to set themselves apart from each other. A sensible approach to fine print in this context must account for forces that pull in opposite directions. In a market where search costs are low, fine print allows sellers to customize contract terms to everyone's benefit. By enforcing fine print that most never read, we may be enabling sellers to customize terms and offer a package that is far better than one that imposed only a general obligation to conform to generally recognized norms. If there are enough sophisticated buyers in the marketplace and it is easy enough for them to understand what is in the fine print, the forces of competition will drive sellers toward efficient terms. But there is a dark side here as well. Fine print makes it harder for sellers to send clear signals. Sellers that want to send signals have to devise ways of assuring buyers that the promise is not being undercut by what is in fine print.

Effective legal rules in this environment should make it easy for buyers to shop. At the same time, they should ensure, or at least not significantly undercut, the ability of sellers to customize their terms. The Magnuson-Moss Warranty Act⁵⁰ can be justified using this rationale. A seller of consumer products that uses the word "warranty" commits itself to a number of substantive promises, independent of anything that is said in the fine print.⁵¹ Such a rule has obvious costs, of course. A seller that wishes to make fine-tuned promises with respect to the quality of her goods has more trouble doing so. For example, an efficient warranty might involve a co-payment on the part of the buyer. If she wants to do this, she must conspicuously state that she is offering only a limited warranty.

But the benefits may offset this cost. If a seller uses the word "warranty," buyers know that the seller will repair or replace any defect without cost to them. This right cannot be taken away in fine print. Blocking the operation

50. 15 U.S.C. §§ 2301–12 (2000).

51. § 2304.

of fine print makes it cheaper for sellers to distinguish themselves. Similarly, the Uniform Commercial Code does not provide for disclaimers of express warranties.⁵² Any representation that becomes part of the basis of the bargain binds the seller. Moreover, a sophisticated buyer that inspects technical specifications knows that the seller cannot cut back on them in fine print that gives the seller the right to make substitutions or alterations.⁵³

One can also argue that limitations on arbitration and forum selection clauses serve the same purpose. A warranty does no good unless one can be confident that the threat to enforce it is credible. A great warranty enforceable only after arbitration in Nepal is not worth much. If we require any change in the forum selection, choice-of-law, or arbitration provisions to be conspicuous or put minimum standards in place, we again make it easier for the sophisticated buyer to know that the warranty she sees has teeth.

This rationale for excluding such clauses from the operation of fine print dovetails with the argument that fine print should not undercut substantive policies embedded elsewhere in the law. An arbitration clause may be problematic along both fronts. Because arbitration clauses are ultimately legally enforceable, we have to worry that an effective arbitration clause undercuts process rights that the law regards as particularly important. Some types of arbitration lack many of the features that are fundamental to our notions of process. In the rules of screenwriter arbitration, for example, the litigants do not even know the names of the three arbiters.⁵⁴ The arbiters themselves do not meet. Indeed, they do not even know each other's names.⁵⁵ Opting in to such an enforcement regime should not be done in fine print. Moreover, the type of arbitration used to litigate disputes will also affect the way a sophisticated buyer assesses the explicit representations the seller is making. Hence, it may make sense to require that arbitration or other forum selection rules be disclosed conspicuously or meet minimum standards. The argument is not that fine print is special, but rather that among hidden product attributes (including fine print), arbitration is special. The speed of a microprocessor does not undercut any substantive legal policies nor dampen any signals in a way that an arbitration clause might.

CONCLUSION

The boilerplate puzzle has lasted entirely too long. The leading exemplars of the judicial treatment of fine print—*Henningsen* and *Walker-Thomas*—are more than forty years old. The problems they addressed have long since disappeared. Cartels are unstable, and agreements like the one in

52. U.C.C. § 2-316 (2000).

53. U.C.C. § 2-317(a) (2000).

54. See Writers' Guild of America, West, Screen Credits Manual II.A.d.1 (2002), available at http://www.wga.org/subpage_writersresources.aspx?id=170.

55. *Id.* For a case upholding these rules, see *Ferguson v. Writers Guild of Am., W., Inc.*, 277 Cal. Rptr. 450, 453 (Ct. App. 1991).

Henningsen usually have a limited life. It collapsed in 1962 when Chrysler, the defendant in *Henningsen*, broke with the others and started to offer its extended power train warranty.⁵⁶ In today's radically different environment, there is vigorous competition over this product dimension.⁵⁷

The court's rationale in *Walker-Thomas*, one that focused on vague notions of unconscionability, did little to protect those in the position of Mrs. Williams. More to the point, the particular practice at issue in that case—the cross-collateralization clause—is a dead letter. It was banned outright a quarter of a century ago in an uncontroversial regulation issued during the Reagan Administration.⁵⁸ The problem of protecting Mrs. Williams today has nothing to do with boilerplate, but rather with the best way to regulate the multi-billion dollar rent-to-own industry. This business did not even exist at the time of *Walker-Thomas*.⁵⁹

In both *Henningsen* and *Walker-Thomas*, the court's focus on the absence of a dickered bargain blinded it to the aspects of the case that were indeed troublesome. In *Henningsen*, the court did not see that anticompetitive behavior, indeed an outright violation of the Sherman Act, was at work, not unfair bargaining power and the helplessness of consumers in mass markets. In *Williams v. Walker-Thomas Furniture*, the court did not seem to understand what cross-collateralization clauses did. That the judges made these errors is perfectly explicable. At the time these judges went to law school, Arthur Corbin and Fritz Kessler's efforts to understand how the law worked in mass markets, as primitive as they seem today, were state of the art.⁶⁰ What remains deeply troubling, however, is the extent to which two such outdated cases continue to define the contours of the debate. In few other fields, even in law, has conventional thought been so fused in amber. Much of the problem is a view of the law that reduces everything to rights

56. See FED. TRADE COMM'N, REPORT ON AUTOMOBILE WARRANTIES 11 (1970).

57. See, e.g., Les Jackson, *Warranties Get Better With Cars*, WASH. TIMES, Jan. 16, 2004, at G10.

58. See FTC Credit Practices Rules, 16 C.F.R. §§ 444.1(i), 444.2(a)(4) (2005).

59. See Susan Lorde Martin & Nancy White Huckins, *Consumer Advocates vs. the Rent-to-Own Industry: Reaching a Reasonable Accommodation*, 34 AM. BUS. L.J. 385 (1997). The abuse in this industry first came to light in an exposé in the *Wall Street Journal*. See Alix M. Freedman, *Peddling Dreams: A Marketing Giant Uses Its Sales Prowess to Profit on Poverty*, WALL ST. J., Sept. 22, 1993, at A1.

60. These two scholars were among those upon whom Justice Francis relies explicitly in his opinion in *Henningsen*. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960). They were cutting edge even at the time of the opinion itself and relatively new in the late 1940s when he was in law school. No one can doubt Corbin and Kessler's place in the pantheon of contract scholars, but we should not neglect the progress made since. Indeed, the critical insight—the need to look at the effect of legal regulation on markets as a whole—comes in large measure from Alan Schwartz, one of Corbin's successors in the Townsend chair at the Yale Law School. Of course, a principal theme of this essay is that the key contributions of Schwartz and other law-and-economics scholars here, now twenty-five years old, are not the last word either. There is still much about the regulation of markets that we do not understand. The recent work of Schwartz's own successor in the Townsend chair strongly suggests that we can make use of additional tools, especially those in behavioral economics, as we continue to advance the frontier. See, e.g., Ian Ayres, *Menu Matter*, 73 U. CHI. L. REV. 3 (2006).

that *A* and *B* have against each other. From here, it is but a short step to view any troublesome transaction in which there is boilerplate to be the result of boilerplate and the absence of a fully dickered bargain between two equals. The boilerplate puzzle, in other words, arises from a failure to go beyond the symptom to examine the underlying problem.