

# Taking Notice Seriously: Information Delivery and Consumer Contract Formation

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*Courts in the United States are finding that recipients can be bound by fine-print terms (boilerplate) if they had notice of them. Without directly confronting the overarching normative question whether notice can cause contractual obligation, this Article takes notice seriously by focusing on how psychological characteristics of “HUMANS” suggest rethinking of when effective notice is (or is not) likely to occur.*

## INTRODUCTION

In the United States, mass-market contractual obligations between firms and individuals routinely include delivery of a set of terms in fine print (boilerplate). Sometimes the delivery is online, contained in browsewrap which the recipient will not see unless she clicks on a box that will open another page; and sometimes the delivery is online with a requirement that the user click “I agree,” and affirm that she has read the terms, even though most likely she has not. Sometimes such contracts consisting of massively delivered fine print are deployed offline in paper documents. In each type of boilerplate delivery situation, a question arises about whether a contract is formed, even if the user did not see or did not read the terms, or would not have understood the terms even if she did read them. At bottom, each of these procedures by which contracts are formed by deployment of boilerplate raises a question of what counts as effective notice to the recipients who are being held to have entered into contractual obligations. Such procedures stray far from the normative basis of contract as willing agreement between the parties. The focus on notice comes to the forefront particularly in the case

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of browsewrap, where judges have been led to argue explicitly over whether notice was or was not sufficiently present in order to form a contract. But the issue of notice in the sense of expected and actual understanding and uptake by a recipient is also very important in the other forms of fine print delivery.

In this Article I mean to take up the applicability of psychological dual process theory to consumer contracts, which involves questioning contractual obligation by notice (or “as if” notice), at least in many cases. That is, I want to question whether the mere delivery of boilerplate should be considered to form a contract between the firm deploying the boilerplate and the recipient, without inquiry about whether a person would be likely to be actually notified. I also allude to a topic related to the title of the Symposium in which this Article is included, *The Constitution of Information*: the question when constitutional considerations preclude using notice in this way. That topic includes considerations underlying the basic structure of civil society, whether or not in an actual constitution.

As boilerplate became more and more common in contemporary life, especially in the networked digital environment, investigation of its validity as a contract has traversed a slippery slope. The normative basis of contract is willing agreement between the parties, but many courts in the United States have endorsed notice or “constructive” notice as a method of contract formation.<sup>1</sup> “Constructive” notice is a legal fiction, in this context meaning that a reasonable person in the position of recipient (whose reasonableness is decided by the court proceeding) should have seen these terms. So the case will be judged as if this particular recipient did see them. For example, in the case of *Nguyen v. Barnes & Noble*, in which the recipient wished to avoid an arbitration clause in the Barnes & Noble website in order to bring a class action, Nguyen testified that he never clicked on the link to the terms, and he never saw the clause. On appeal, Judge Noonan for the Ninth Circuit Court of Appeals framed the issue this way:

Nguyen contends that he cannot be bound to the arbitration provision because he neither had notice of nor assented to the website’s Terms of Use. Barnes & Noble, for its part, asserts that the placement of the “Terms of Use” hyperlink on its website put Nguyen on constructive notice of the arbitration agreement. Barnes & Noble contends that this notice, combined with Nguyen’s subsequent use of the website, was

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1 See, e.g., *Register.com, Inc. v. Verio Inc.*, 356 F.3d 393 (2d Cir 2004); *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17 (2d Cir 2002); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (SDNY 2012); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362 (#DNY 2009); *Van Tassell v. United Mktg. Grp., LLC*, 795 F. Supp. 2d 770 (ND Ill. 2011).

enough to bind him to the Terms of Use. The district court disagreed, and Barnes & Noble now appeals.<sup>2</sup>

This form of reasoning illustrates how notice — and constructive notice — has become a part of the law of contractual validity and enforcement.

I take notice seriously by assuming *arguendo* that notice to a recipient that terms exist might result in a binding contract.<sup>3</sup> A question I consider in this Article is: under what circumstances can we say that a person had notice of a particular situation or disclosure? Or that a “reasonable” person would have had notice? In pursuing this question, I take cognizance of dual process theory, an important psychological mapping of human decision making. I consider contemporary ideas about the effectiveness of disclosure regimes. I suggest some avenues of thought about what kinds of contracts could perhaps be formed by notice, and suggest that a nuanced analysis is needed: the level of notice required in order to be effective might vary depending upon the subject matter, and the audience (that is, the targeted recipients). By way of conclusion, I also briefly outline concerns about individual rights that should not be subject to waiver on a mass-market basis.

## I. NOTICE AND ATTEMPTED CONTRACT FORMATION

### A. From ECONs to HUMANS

There has been a paradigm shift in the way psychology considers uptake (understanding) and action in response to receiving information. In what is now called dual process theory, it is widely understood that humans have

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2 Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1174-75 (9th Cir 2014). On appeal Nguyen prevailed and was allowed to bring a class action. The court endorsed the constructive notice procedure but still found reason that the user without actual notice should prevail, as apparently many courts have done. See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 477 (2006).

3 How in the world can notice that language exists become an agreement to be bound? That is a difficult question which courts in the United States are treating as an easy question, or not even a question. It is not the case, of course, that any time I know or should know that a document exists in my vicinity, I am bound to what it says; so there is a tendency to consider context to try to bridge this gap. Often the firm deploying the terms will try to bridge the gap by saying that whoever uses the website is bound by the terms even if they don't see them. It is not often that this by itself will work. In this Article I am not engaging the question of how notice could ever become binding (at least not much). *But see* MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19-32 (2013) [hereinafter RADIN, *BOILERPLATE*].

roughly two different methods of dealing with information, one of them instinctive and intuitional and the other more consciously thought through and reasoned.<sup>4</sup> It is also now widely understood that human reasoning under many kinds of circumstances is subject to stubborn faults or limitation in reasoning, often called heuristic or cognitive biases. The offering of information to a person, the person's receipt of the information, and the person's uptake of the information and further ability to act on it rationally have turned out to be very different things. Just telling a person something does not mean that she can understand it, nor does understanding it mean that she can or will act on it. We now cannot assume that the offering of information to a person will result in uptake and appropriate responsive action by that person.

Heuristic or cognitive biases are primarily — but not only — associated with the instinctive type of reasoning. Wikipedia provides a list of dozens of such biases.<sup>5</sup> Some of the better known ones are: anchoring effect (tending to rely too heavily or “anchor” on one piece of information we may have on hand); availability effect (tending to overestimate the probability of events having greater “availability” in memory); confirmation bias (tending to overweight or misconstrue evidence to confirm one's prior beliefs); framing effect (drawing different conclusions from the same information, depending upon how that information is presented); hindsight bias (tendency to consider past events as predictable at the time they occurred); and optimism bias (tendency to be over optimistic, overestimating favorable outcomes).

Daniel Kahneman's recent book, *Thinking, Fast and Slow*,<sup>6</sup> has made available to lay people and to scholars in many fields the important body of research he pursued with Amos Tversky over many years.<sup>7</sup> It had already become known that the reasoning capabilities of humans are limited in various ways. The term for this was (and is) “bounded rationality.” The terms used by Kahneman and Amos Tversky to describe the two types of reasoning and response to information were “System 1” for the intuitive instinctive response, and “System 2” for the more laborious process of conscious reasoning.<sup>8</sup>

Following this development in psychological understanding of human reasoning, the model of “rationality” assumed in law-and-economics reasoning

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4 See DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011).

5 *Cognitive Bias*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Cognitive\\_bias](https://en.wikipedia.org/wiki/Cognitive_bias) (last modified Apr. 2, 2016, 8:34 PM).

6 KAHNEMAN, *supra* note 4.

7 See Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCIENCE* 1124 (1974).

8 *Id.*

is, at least in academic circles, in the process of being rendered obsolete.<sup>9</sup> The assumption of rationality — in which human decision makers are presumed to act wholly in System 2 to perfection — is especially characteristic of what I like to call old-style Chicago law and economics.<sup>10</sup> The economist and behavioral scientist Richard Thaler has succinctly captured the distinction between the old-style Chicago model of rationality and the idea of bounded rationality by saying that “ECONs” are the hypothetical rational beings of Chicago economics, but “HUMANs” are the actual beings with whom we are dealing.<sup>11</sup> A new field called “behavioral economics” has been gradually replacing the old “rationality” assumptions, which we (that is, most of “us” academics) now realize describe “ECONs” but not “HUMANs.”

We have recently begun to see applications of bounded rationality, or more specifically dual process theory, in law. One area of research has to do with the effectiveness of required information delivery. In this Article I refer interchangeably to information delivery, information disclosure (or simply disclosure) and notice. It may turn out that these characterizations are subtly different in how they affect research and analysis, but for now I am interested in a certain kind of big picture. With respect to disclosures of the horrors of smoking, or other required disclosures (for example, disclosures aimed at fostering safe use of dangerous tools or safe work in dangerous environments), it has turned out that certain kinds of visual notice function much better than words.<sup>12</sup> Here a debate has developed over whether (roughly speaking) we should use more effective notice to give people the chance to choose dangerous (even fatal) behaviors once they understand the risk, or whether society should

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9 See KAHNEMAN, *supra* note 4, at 269 (reporting how astonished the author was when he discovered the psychological assumptions of economic theory).

10 For my list of premises of old-school Chicago economics, and how those premises contrast with my own, see Margaret Jane Radin, *Of Priors and Disconnects: How “Chicago” Premises Risk Distortion*, 127 HARV. L. REV. F. 259, 259, 261 (2014). I also laid out my view of the premises of that style of law and economics in RADIN, *BOILERPLATE*, *supra* note 3, at 63-66 (2013).

11 See RICHARD H. THALER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* (2015). Richard Thaler is described with approval in KAHNEMAN, *supra* note 4, and Thaler’s theory supplies much of the grounding of the book he co-authored with Cass Sunstein. See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2009). I should point out that the “nudge” model is controversial. See, e.g., Ryan Bubb, *TMI? Why the Optimal Architecture of Disclosure Remains TBD*, 113 MICH. L. REV. 1021 (2015).

12 See, e.g., Christine Jolls, *Debiasing Through Law and the First Amendment*, 67 STAN. L. REV. 1411 (2015).

attempt to reduce those behaviors by regulatory measures.<sup>13</sup> So far, less has been said about the impact of this paradigm shift on contract.

## **B. Two Current Approaches to Disclosure**

So far there have been two general approaches to efficacy of communication by disclosure of sets of terms: (1) all notice (in sets of terms) is effective; and (2) all notice (in sets of terms) is useless. I consider these approaches over-general, and I argue that more nuanced analysis is needed, both theoretical and empirical.

The first over-general approach is taken by one form of advocacy for the “free market.” Proponents of this approach tend to think that recipients of boilerplate sets of terms are exercising their autonomy by choosing to accept the terms, so that if regulation disallowed some of the terms, it would diminish autonomy. Such proponents tend to limit their assumption that disclosure is effective to “market” or “private” disclosure. That is, the disclosure in boilerplate deployed by firms is assumed to promote our autonomy, whereas government disclosures represent paternalism. And, of course, this approach tends to assume that HUMANS are ECONs, or at least that a savvy subset of HUMANS in a given market are actually ECONs, or at least that firms have the right to act as if HUMANS are ECONs.

The second over-general approach is taken by another form of advocacy for the “free market.” In a recent book by Omri Ben-Shahar and Carl Schneider, “mandated” disclosure is vociferously declared to be a failure.<sup>14</sup> By limiting their anti-disclosure jeremiad to “mandated” disclosure, the authors mean to limit their critique to disclosures that are required by government regulations. Thus, they are not specifically targeting disclosures meant to create enforceable contracts. Ben-Shahar and Schneider found that various issues function together to make understanding and acting upon disclosures largely impossible for consumers. The issues are related primarily to the massive amounts of information (information overload) combined with deficits characteristic of the recipients (widespread functional illiteracy and innumeracy).<sup>15</sup>

13 *See, e.g.*, Bubb, *supra* note 11, at 1035-39.

14 OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014). For my response, see Margaret Jane Radin, *Less Than I Wanted to Know: Why Do Ben-Shahar and Schneider Attack Only “Mandated” Disclosure?*, 11 *JERUSALEM REV. LEGAL STUD.* 51 (2015).

15 *Cf.* Julie E. Cohen, *The Regulatory State in the Information Age*, 17 *THEORETICAL INQUIRIES L.* 369, 370-71 (2016) (“The ongoing shift from an industrial mode of development to an informational one, and to an informationalized way of

The solution Ben-Shahar and Schneider advocate is to do away with mandated disclosure and replace it with — *nothing*. Presumably, the authors assume that competition among firms and reputational harm would function better than any mandated disclosure to keep firms' mass-market deletions of consumers' rights within bounds. In the end the authors admit that some government regulation may be needed, but characterize this in old-style Chicago terms as a "tradeoff" between paternalism and libertarianism.<sup>16</sup> In short, the anti-disclosure jeremiad by Ben-Shahar and Schneider claims that no one can count on uptake of "mandated" disclosure. Therefore, they seem to argue, all mandated disclosure should be abolished and consumers should be left to deal — "rationally"? — with the unmandated disclosures of firms. They seem to deny old-school Chicago rationality with one hand and endorse it with the other. At any rate, the authors' critique of mandated disclosure does not focus on heuristic biases or bounded rationality to any significant extent, even though they include a chapter outlining the theory.<sup>17</sup>

Ben-Shahar and Schneider did not take up the information disclosures used by private firms to form (alleged) contracts with their customers — i.e., adhesion or boilerplate (alleged) contracts, the topic that I am addressing. Ironically, many of the disclosures mandated by government agencies are aimed at trying to curtail the worst aspects of the information disclosures — i.e., the notice of terms — deployed by firms in their boilerplate.

In short, both prevalent over-general approaches represent attempts to revert to the "free market" that is populated with hardcore System 2 rational ECONs. I am hoping in this Article to suggest starting points for a more nuanced approach to disclosure (notice) to HUMANS.

### C. Disclaimers (Please Take Notice Before Proceeding)

There are certain parameters of this Article that I should make clear before proceeding. First, I focus on mass-market delivery of boilerplate to those I call recipients of boilerplate (consumers, employees, and businesses in the position of consumers). In commercial one-off contracting, boilerplate may or may

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understanding development's harms, has created existential challenges for regulatory models and constructs developed in the context of the industrial economy." In an analogous way, the ongoing shift from the industrial society to the information society is creating challenges for previous practices relating to contracts.

16 BEN-SHAHAR & SCHNEIDER, *supra* note 14, at 192.

17 *Id.* ch. 7.

not be deployed,<sup>18</sup> and boilerplate may be subject to different considerations if it is not deployed as a mass-market phenomenon. Moreover, it may be the case (subject to empirical investigation) that people employed in sales or purchasing for firms will be utilizing System 2, or learned responses derived from System 2 originally. For these reasons I omit from consideration in this Article the issues that may arise in business-to-business contract formation, unless one of the parties is in the position of a consumer with respect to the other.

Second, in questioning some types of mass-market boilerplate, I do not mean to deny the important role of standardization in contemporary markets. Instead, my project is to look at the borders or the limits of standardization. Commercial contracts today are (almost always) repetitive collections of terms which are not handmade each time — just as the mill shaft in *Hadley v. Baxendale*<sup>19</sup> had to be handmade in the era in which contract theory has its roots, but would not be handmade today. Moreover, more and more commercial contracts today are machine-made, deals arrived at by the interaction of computers. I believe that policing such transactions by means of contract law is obsolete, at least in many types of situations. But that does not mean their boundaries of acceptability should not be policed.<sup>20</sup>

Third, there remains a basic issue whether the theory justifying contract enforcement can accommodate contract formation by notice at all. The underlying theory that justifies the State in enforcing (or refusing to enforce) disputed contracts is based on the principle that contracts are formed by voluntary agreement of the two parties, not by one party giving the other party notice of its terms. Whether the theory justifying contract formation can accommodate formation by notice is a serious issue, involving a significant

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18 On the topic of whether problematic boilerplate occurs in contracts between sophisticated parties, see MITU GULATI & ROBERT E. SCOTT, *THE 3½ MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* (2012) (noting that a “sticky” boilerplate clause keeps reappearing in sovereign bond contracts even though specialist law firms and underwriters believe it is wrong and has created a bad precedent).

19 *Hadley v. Baxendale*, 9 Exch. 341, 156 Eng. Rep. 145 (1854) (Eng.).

20 As I have written elsewhere, and need not recapitulate here, I do think the dominant role of standardization in contemporary markets tends to render the model of one-off negotiation between two parties obsolete, thereby rendering contract theory out of touch with what is happening in practice. See RADIN, *BOILERPLATE*, *supra* note 3, at 86-87; see also Margaret Jane Radin, *The Fiduciary State and Private Ordering*, in *CONTRACT, STATUS, AND FIDUCIARY LAW* (Paul B. Miller & Andrew S. Gold eds., forthcoming 2016), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2735022](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2735022).

disjuncture between the justificatory theory and the practice it is supposed to justify. I think the disjuncture is prominent today in our burgeoning information society where in effect everyone is a constant market actor with or without knowing it. This is a very different world from the society in which contract theory had its origins.<sup>21</sup> But for the most part I am going to leave aside this overarching issue here, in order to focus on a different question. Even if we can assume that some contracts can be formed by notice, which ones are they, and what kind of notice should be required? In particular, can notice to a recipient be presumed when a website has terms the recipient does not see? Can notice be presumed when a recipient clicks “I agree” to terms she does not read? (Indeed, can notice be presumed when a recipient receives hard copy documents she does not read?)

## II. RECONSIDERING APPROACHES TO CONTRACT FORMATION BY DISCLOSURE OF TERMS

### A. Salience

The two types of over-general approaches mentioned above represent attempts to revert to a market that is populated with System 2 rational ECONs. Meanwhile, an emerging literature seeking to observe the existence of salience (or lack of salience) is getting closer to implementing dual process theory, because it considers situations where a certain kind of uptake is easy for HUMANS (salient) but other kinds of uptake is difficult or impossible for HUMANS (not salient). HUMANS can easily understand an initial teaser rate on a credit card but cannot project what will happen if they miss a payment, even though the disclosure notifies them that it will be very expensive, because they do not imagine that they will miss a payment and cannot accurately predict the chances of doing so. HUMANS can easily understand low payments for initial years of a mortgage, but not the balloon payment that will come much later.

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21 In the era in which contract theory developed, few people were traders — market actors — except for a group of men who knew each other and who often interacted with each other. The amount of information in markets today and the number of people involved in markets today is orders of magnitude different from the type of society that gave rise to the contract theory that still prevails. In that earlier society actual notice to a counterparty might well be taken for acceptance, but that is not the case for delivery of boilerplate to a consumer, especially in the context of the inundation of boilerplate to which consumers are subjected.

The concept of salience was stressed by Oren Bar-Gill in his book, *Seduction by Contract*,<sup>22</sup> in which he analyzed terms prevalent in markets for credit cards, mortgages, and cell phones. Salience has now become part of current legal discourse about contracts, though not yet the discourse of the judiciary.<sup>23</sup> In order to make progress on this project of determining when cognitive biases will constrain HUMANS in uptake of notice intended to form a contract, I think it might well be helpful to break down the concept of salience into its constituent cognitive biases. For example, failure to predict that one will miss payments might be attributed to anchoring or confirmation bias; and failure to understand the significance of a later balloon payment might be attributed to availability bias.<sup>24</sup>

It seems at least that a firm that wishes its terms to achieve effective notice should make an affirmative effort to overcome the known cognitive biases of its intended recipients. It used to be thought that printing something in bold or in larger letters made notice more effective. That avenue has not worked well, for various reasons, including the information overwhelm that causes recipients not to read anything they are given and the situation of widespread marginal literacy in the United States. In addition, the mass migration of terms to electronic documents is especially significant in its impact on notice.<sup>25</sup> Large

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22 OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* (2012); see also Margaret Jane Radin, *An Analytic Framework for Legal Evaluation of Boilerplate*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 215 (George Letsas, Prince Saprai & Gregory Klass eds., 2014); Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, in *PRIVATE LAW AND THE RULE OF LAW* 288 (Lisa M. Austin & Dennis Klimchuk eds., 2014) [hereinafter Radin, *Threat*].

23 The concept of salience is now included in a draft Restatement 3d of Consumer Contract Law, prepared for the American Law Institute (ALI), for which Ben-Shahar and Bar-Gill are the primary Reporters. The ALI is an influential American NGO that produces Restatements for the clarification of the law and for the use of judges. The introduction of the salience concept into a document that is supposed (at least primarily) to restate the law has caused debate within the ALI, and it remains to be seen whether the ALI Council will adopt salience as a way of interpreting certain consumer contracts.

24 Delving more deeply and explicitly into specific kinds of biases and correlating them with specific markets and recipients seems to be a worthy project. It is a project, however, that I do not undertake at this point.

25 For data on information overload and widespread marginal literacy in the United States, see BEN-SHAHAR & SCHNEIDER, *supra* note 14. For data on the mass migration of terms to electronic documents, see, for example, NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* (2013).

print in an online document that no one accesses does not provide notice, whether the terms are in browserwrap or subject to clicking “I agree.”

Further, recent research has strongly suggested that visual notice is more effective than written notice. Visuals could include color contrasting with black and white, photos, videos, and graphics. These kinds of notification may function better than print for formation of contracts that are held to be of a type that can be formed through effective notice.<sup>26</sup>

Research is needed — both theoretical and empirical — that is more nuanced with regard both to contracts that can or cannot be formed with effective notice, and also to variances between markets and classes of recipients. It might be helpful, on the one hand, to foreground certain types of consumer transactions that are particularly susceptible to ineffective notice; and also, on the other hand, to be aware that there are certain types of consumer transactions in which even fine print is likely to succeed in delivering effective notice.

## **B. Effective Notice and System 2**

Assuming that there is a category of contracts that can be formed by effective notice, two basic questions remain: How should we delineate the category of contracts that can be permissibly formed by effective notice? And, how should we evaluate what is to be considered effective notice? Because there is a difference between information delivery and information uptake by the recipient, an important question is, when can the noticing party count on uptake by the receiving party? Put this way, the question may be aligned with the traditional objective theory of contract formation, which prompts us to ask under what circumstances an offeror is justified in concluding that an offeree is agreeing to the offeror’s proposed contract terms. I think this objective theory of contracts depends upon social understandings of a bygone era. But even if we still fully accept objective theory, if the notice-delivering party knows or should know that it cannot count on uptake then it seems that the notice-delivering party should not be allowed to claim that its notice is effective.

Some commercial contracts are formed by actual agreement. Negotiation and serious risk management do exist. Also, standardization is, under appropriate circumstances, and within appropriate parameters, important for efficient market activity. It also may often be the case that standard terms are exchanged repetitively between equal partners, without much dispute, or with internal dispute resolution already programmed into agreements. In addition, I suggest that employees whose duty is commercial contracting might be found to be reasoning in System 2, though this is a suggestion which needs to be researched.

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26 See, e.g., Bubb, *supra* note 11, at 125; Jolls, *supra* note 12.

Moreover, there are probably situations where instinctive understanding is spread throughout the population in a way that yields accurate rather than inaccurate expectations. An example might be an item being sold “as is” under conditions where it is evident that there has been a significant price reduction.

I do not mean to deny a priori that there are situations in which *some* consumers can use System 2. Law school graduates who are computer experts can probably rationally buy a computer, and a professor of philosophy who has previously been employed in auto leasing is likely to understand and weigh all the hidden costs and come-ons in auto lease offers. But since we are talking about mass markets, we must consider how unlikely it is that System 2 will be engaged on a general basis. I think empirical research could tell us more about how or when this will happen. But meanwhile, I believe that each of us knows how we ourselves rely on System 1, and will understand that almost everyone often does so.

Yet there are situations in which even fine print is likely to deliver effective notice, situations in which a recipient is likely thinking in System 2 mode. That includes recipients who know their own danger. Diabetics, and those with life-threatening allergies, for example, know how to scrutinize labels to avoid sugar, peanuts, tree nuts, or seafood. We could also consider mountain climbing equipment and bulletproof vests. Recipients who have expertise in a particular subject matter — from investment (if a sophisticated investor) to tools (if an experienced furniture-maker), etc. — are also not likely to be in System 1.<sup>27</sup> Also, perhaps some routine repetitive transactions can be assimilated to System 2 without distortion caused by cognitive biases. Perhaps there are situations where a term is socially well-known, too. That does not apply to “merger,” “indemnification,” or even “arbitration,” but it might apply to “as is.”

### C. Ineffective Notice and System 1

It seems that when consumers, employees, and businesses in the position of consumers are dealt standardized terms, the terms are more likely to be either ignored or understood by means of System 1. This hypothesis would be subject to empirical verification, which might vary between markets and classes of consumers. So far, however, the empirical work considering

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27 Here we should note that long experience in a field can create thought that is the fruit of System 2 but comes automatically to mind from long practice, such as the ability of a musician to play a G-sharp minor scale without thinking about it, or the ability of a seasoned investor to evaluate a hedge without rethinking how exactly hedging works.

markets for financial products and cell phones by Bar-Gill,<sup>28</sup> as well as the empirical work by Yannis Bakos, Florencia Marotta-Wurgler and David Trossen examining the market for software licensing,<sup>29</sup> does show that it is unlikely that boilerplate provides effective notice to recipients, at least in the kinds of markets that these scholars have researched.

It seems possible to delineate certain types of consumer transactions that are particularly susceptible to ineffective notice. Certain big-ticket transactions that are infrequent for consumers are susceptible to ineffective notice because of traditional limitations (such as overwhelm, reading ability, etc.) and also because of cognitive biases. This category would apply, *inter alia*, to home purchases and mortgages (including refinancing), auto purchase and leasing, retirement account selection and maintenance, and nursing home buy-in. Few if any of these contracts would be subject to validation under the doctrine of contract formation by notice of terms. Thus there is an important category of notice to consider: to what extent should the law presume that recipients of boilerplate terms either online or in hard copy are actually being notified, in the sense of comprehension and uptake of information?

There seems also to be another category of consumer transactions particularly susceptible to ineffective notice, and that is where the consumer's action is subject to hurried decision, even where the terms are visible at the time of formation. This situation occurs when the consumer is at the car-rental counter or anywhere other customers are lined up behind her waiting for her to read (or fail to read) the fine print.<sup>30</sup> In fact, it seems that, barring special expertise, anytime HUMANS are subject to hurried decisions, we are prone to activate System 1.

#### **D. Can PNTL or Browsewrap Constitute Effective Notice?**

Particular notice issues are posed by situations in which contract formation through delivery of terms is claimed by firms even where the terms are not present or not available to be seen at the time formation is claimed to take place. All of the caveats about System 1 decision making apply to this situation.

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28 BAR-GILL, *supra* note 22.

29 Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEGAL STUD. 1 (2014).

30 The famous Canadian case of *Tilden Rent-a-Car v. Clendenning*, (1978), 83 D.L.R. 3d 400 ONCA 1978 (Can.), stands for the proposition that it is especially important to draw specific attention to an onerous condition if a recipient is in a situation in which he has no time to read and understand how the condition might affect him. (This is not the type of rhetoric usually found in U.S. cases.)

But in addition, there are serious issues with how exactly formation by means of notice might be construed with either pay-now-terms-later (PNTL) or browsewrap. With PNTL, the contract is alleged to form when the customer pays for the product, but to include the terms that arrive later (unless the consumer then reads them and rejects them and returns the product). There is a great deal that is problematic with this procedure: questions such as how long the consumer has before the product must be returned if the terms are rejected, and who owns the product during the interim when a (putative?) contract has been formed but can still be retracted, and whether the consumer is expected to accomplish the return at her own expense.

But once we are willing to say that contracts can be formed by notice of terms, is there a convincing rationale that the terms must arrive before the contract is formed? That would have been true for traditional contract, when the recipient receives terms and then must perform the task of agreeing to them, but when we substitute notice for agreement it is not so clear why the notice of the terms would have to be before the formation takes place. Yet it does seem logical that if notice is now substituting for agreement, then notice should be prior in time to the onset of contractual obligation. If so, then PNTL should not be a valid formation procedure. Proponents of the PNTL procedure, including a prestigious U.S. court,<sup>31</sup> have not yet thought this through in theory, though the procedure is prevalent in practice.

With respect to browsewrap, the problem is that the terms are on a website but the recipient does not see them. American courts have taken to deciding cases involving certain instances of click-wrap as well as browsewrap on the basis of whether a reasonable user would have seen the terms, even if the actual user did not.<sup>32</sup> This situation raises questions: Can contracts be formed by notice that the recipient does not see, but (in the court's judgment) ought to have seen? Can effective notice include the idea of a duty of reasonable attentiveness on a recipient's part? If so, that duty might result in many click-wraps being enforceable (as indeed many U.S. courts believe them to be), but it is unclear what the theoretical basis of such a duty would be.<sup>33</sup> Even

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31 See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997); *ProCD v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

32 See, e.g., *Nguyen v. Barnes & Noble, Inc.*, 763 F.3d 1171 (9th Cir. 2014); *supra* note 2 and accompanying text; see also *KIM*, *supra* note 25.

33 In the days in which contracts were largely formed within communities of traders who knew each other, conventions arose that became enshrined in law (such as the objective theory of contract by which an offeree is deemed to have accepted an offer if his actions or words looked like acceptance to the offeror). Under that kind of social community of contracting, it can make sense to put a duty of reasonable care on a recipient with regard to his actions or lack of actions.

if contract can be formed by effective notice to a recipient, in other words, it is unclear why the recipient (rather than the firm) would have any duty to ensure the effectiveness of such notice.

### E. Factors That Defeat Effective Notice

Some factors about a specific market or firm should negate effective notice. First of all, when the party delivering the notice is deceiving the receiving party on purpose, that would not be effective notice for contract formation, and would indeed invalidate the contract. Yet there may be many terms which a consumer would consider deceptive but which might not amount to deception in legal terms. The gradual disclosure of extra fees in an auto-leasing deal, after the terms designed to suck a customer in are initially disclosed, comes to mind. The general question is: Should it amount to legal deception if a firm is obviously structuring its fine print to take advantage of cognitive biases? An example would be disclosing extra fees once anchoring has taken effect or once the availability bias has determined the recipient's evaluation of the deal, when the firm knows from experience that the optimism bias or the confirmation bias most likely will prevent the recipient's withdrawal from the deal.<sup>34</sup> This course of conduct could be considered tortious, because it is purposely deceptive; or at least unfair advantage-taking based upon the recipient party's known reasoning deficits.

## III. CONSTITUTIONAL CONCERNS: THE LIMITS OF NOTICE

Under the heading of entitlements of persons that simply cannot be relinquished by contract formed by notice, I think we can distinguish two subheadings: First, under what circumstances can no level of consent by the recipient result in contract formation? Such entitlements are market-inalienable, not transferable by contractual agreement of even the most willing seller, and thus a fortiori not transferable by effective notice given by the firm deploying the boilerplate. And second, under what circumstances can some higher level of consent by the recipient result in contract formation, but not the lower level

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But this sort of duty on the recipient does not make sense in the era of copious receipt of boilerplate by consumers not socialized into a common discourse of contracts. *See supra* note 21.

34 *See Radin, supra* note 20; Seana Shiffrin, *Deceptive Advertising and Taking Responsibility for Others*, in OXFORD HANDBOOK OF FOOD ETHICS (Tyler Doggett, Anne Barnhill & Mark Budolfson eds., forthcoming 2016), <http://ssrn.com/abstract=2658450s>.

afforded by notice? Such entitlements can be transferred by contract, but only with “real” consent of the recipient.<sup>35</sup>

### A. Market-Inalienability

The issue of how to distinguish which entitlements of individuals cannot be relinquished even with actual consent is a nuanced problem. But one way to launch consideration of the problem is to consider which rights of individuals are in fact crucial to the maintenance of the polity (civil society) as a whole. Mass-market pre-dispute waivers of redress of grievances should not be recognized and enforced as contractual because reasonable availability of redress of grievances is a central tenet of the Rule of Law in practice.<sup>36</sup> If individuals do not have access to reasonable redress of grievances, they are left to their own protection from predations of others, and are thus relegated to what I consider a state of quasi-anarchy, having to be entirely responsible for protecting themselves from predations of others. Redress of grievances is constitutional for any State claiming to instantiate the Rule of Law, because a primary reason individuals submit to the State’s jurisdiction over them is the State’s protection against predation of others. State protection provides for more freedom and self-fulfillment. (So, anyway, runs the classical liberal story, and so far we have no other that is as deeply embedded in law.)

Individual rights that are not subject to individual waiver on a mass-market basis are constitutional in nature, which is why it is not surprising that most of them are Constitutional as well (i.e., explicitly stated in various Constitutions). Rights to due process of law include the right to fair procedures

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35 Of course, if you believe that no contract can be justifiably formed without what I am here calling “real” consent, because the basis of justification rests on bilateral agreement, then the second category here will include all valid contracts and exclude contracts formed by notice. This is the question that I am bracketing for this Article. That is, for purposes of argument, I’m assuming that there could be contracts that can be formed by notice, and seeking to explore which those could be. There is a large philosophical literature on consent, *see, e.g.*, FRANKLIN MILLER & ALAN WERTHEIMER, *THE ETHICS OF CONSENT* (2009), and I have added my views on varieties of consent as they relate to contract in RADIN, *BOILERPLATE*, *supra* note 3, at 157-64.

36 *See, e.g.*, RADIN, *BOILERPLATE*, *supra* note 3; Radin, *Threat*, *supra* note 22. Even a single isolated pre-dispute fully consensual waiver of redress of grievances could be violative of individual rights that are stronger than freedom of consent to deprive oneself of rights important to the polity; but a single such waiver would not necessarily implicate the Rule of Law, for reasons I have argued in Radin, *Threat*, *supra* note 22.

and the right to one's day in court, which in turn include reasonable statutes of limitations (not too short), and reasonable limits on choice of forum (not unreasonably far away from recipients' homes), as well as unbiased judges, non-exorbitant fees for access, and (in the United States) the right to jury trial. Access to redress of grievances is also a constitutional right, which may include — absent another way to redress recurring and/or widespread small claims — a procedural right to aggregate claims, without which repetitive and widespread small claims will never be redressed.

Particularly invidious under these criteria is the tsunami of mass-market mandatory pre-dispute arbitration clauses that is now inundating the United States. Enforcing these clauses denies large numbers of consumers, as well as businesses in the position of consumers, of the constitutional right to jury trial, and the right to a reasonable forum, as well as a procedural right of aggregation without which repetitive small claims will go unredressed.<sup>37</sup> In a legal system more attuned to justice and the Rule of Law, these mass-market waivers would not suffice to alienate basic legal rights.

## B. “Real” Consent (and Its Limits)

Outside of entitlements that cannot be relinquished at all in a mass-market context, are there some entitlements that can be relinquished, but not by mere notice? That is: Under what circumstances can some higher level of consent by the recipient result in contract formation, but not the lower level afforded by notice? It is not too difficult to find examples of this category outside of contract law. For example, consent to surgery requires “real” consent to specifics of procedures and risks, and not merely notice of what the surgeon intends to do, even if the notice is effective. It also seems clear that consent to sexual relations requires more than mere notice of what one party intends to do, even if the notice is effective.

To what extent do these areas of requirements of “real” consent carry over to (other kinds of) agreements, and particularly to contract formation? This is another big topic that needs more elaboration, but I can say preliminarily

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37 See, e.g., *Am. Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013) (holding that Amex's federal right to the “contractual” [i.e. boilerplate] choice of arbitration notified in the contract with restaurants offering use of its card excludes the aggregation needed in order for plaintiffs to prove up their antitrust claim; arbitration clauses would also trump other federal rights). For a thorough treatment of the problems for due process and redress of grievances created by mandatory pre-dispute arbitration clauses deployed in mass-market boilerplate, see Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804 (2015).

that a contract that would permit actions that might be invasive or harmful to the person, either physically or psychologically, should be subject at least to “real” consent, not merely notice. That would be true on an individual basis, and not just when the contract is distributed massively. In my view, a contract containing a waiver of redress against bodily harm or death at the hands of a service provider (such as a recreational facility or daycare or nursing home) should probably be made subject to “real” consent, if not disallowed outright. Consider that one reason liberal mythology says we have left the state of nature and established the political State is to gain protection from predation of others. In fact, I think that a contract by means of which parents waive the rights of their children should be disallowed outright. That is, I think that an approach based on the constitution of civil society should not allow rights of children against physical harm or death to be waived by contract.

The law on this issue has changed over time. Exculpatory clauses (also known as exclusion clauses) for a firm’s own negligence were formerly unenforceable in the United States, but they are now largely enforceable with respect to services. (With respect to sale of goods, the Uniform Commercial Code provides that a contract term waiving liability for personal injury or death is *prima facie* unconscionable.<sup>38</sup>) A few states are even enforcing parental waivers of their children’s rights as well as the parents’ own rights. Most of these exculpatory clauses are written as if to exculpate for any harm caused by the firm deploying the waiver, no matter what the level of scienter on the part of the harm-causing service provider. I believe it remains true, however, that courts would disallow enforcement of the waiver in a case involving a level of fault or scienter greater than negligence, regardless of the recipient’s level of consent.<sup>39</sup> Still, to the extent that courts are willing to allow that a provider may be negligent with impunity, we have traveled some distance from the idea of the state backstopping its citizens against harms.<sup>40</sup>

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38 U.C.C. § 2-719(3) provides: “Consequential damages may be limited or excluded unless the limitation or exclusion is unconscionable. Limitation of consequential damages for injury to the person in the case of consumer goods is *prima facie* unconscionable but limitation of damages where the loss is commercial is not.”

39 The perceived level of consent may influence a court in deciding whether or not to enforce an exculpatory clause. In *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 B.C.C.A. 122 (Can. B.C.), for example, the court was impressed with the level of consent of the victims, and allowed defendant to enforce the exculpation of its own negligence. (One of the victims was a law student who read and understood the clause but believed the clause might be unenforceable.)

40 We have also undermined the idea of deterrence. Plus, we have discarded the economic recommendation to place liability on the best cost avoider, because a firm that serves consumers is almost always the best cost avoider for preventing

## CONCLUSION

Even after we have solved the constitutional problem, if we do, and find that there are subsets of contracts that can be formed by notice, we still have to consider how we can decide when purported notice is effective notice. When a party delivering notice takes advantage of traditional and well-known notice failures — overwhelm, marginal literacy, marginal numeracy — this should count as ineffective notice. Fine print that is at a reading level substantially above the average of the public addressed, or that is too long even to consider reading, falls under this category.

To this we should now add the important category of cognitive biases. When a party delivering notice is taking advantage of any of the known cognitive biases, whether or not that party's state of mind rises to actual intent, the situation should still negate effective notice for contract formation. This should be the result even in situations in which — as I have assumed, but only *arguendo*, in this Article — contract formation by means of notice to recipients might otherwise be possible.

Moreover, awareness of the prevalence of System 1 reasoning is likely to reinforce conclusions of market-inalienability. Earlier I said that redress of grievances is a fundamental right under the Rule of Law which should not be cancellable by means of mass-market boilerplate even with consent of individual recipients. These rights benefit all in the polity, and they are valuable to everyone, even if they are not valued by each and every individual before their exercise is needed. Individual consent drops out of the analysis.

Accepting this much would have a good effect on adjudication: we would no longer have the problem that arises when a judge finds no “procedural” unconscionability because consent of the recipient seems likely, and then finds that it is unnecessary to evaluate “substantive” unconscionability because both “procedural” and “substantive” unconscionability are needed in order for the recipient to prevail. This doctrine privileges consent over substantive rights that should take precedence — that is, the core rights that cannot be subject to mass-market waiver even with consent, or such rights that should be at least subject to “real” consent rather than the presumed consent related to the current jurisprudence of “notice.” But let us assume that this doctrinal commitment to adjudicate “procedural” consent and not just “substantive” rights is not going away. In that context, perhaps the idea that many recipients are entrapped in System 1 reasoning when it comes to waiver of avenues of redress will help the adjudicator look more carefully at consent. It might not

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its own negligence, since the firm is in control of the training and skill of its employees, the quality and maintenance of its equipment, and so on.

be appropriate to take alleged “consent” by means of notice as seriously as “real” consent, which would be analogous to informed consent to surgery, or to sexual relations. The adjudicator (herself subject to cognitive biases) would know what would be salient to a consumer. In particular, the adjudicator would know that consumers are unable to value remedial rights before they are needed. An adjudicator trained in the law would also know that remedial rights are nevertheless crucial to civil society.