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"While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[1]

ABSTRACT

In their February 2019 article in the Harvard Law Review, Pseudo-Contract And Shared Meaning Analysis, *Professors Robin Bradley Kar and Margaret Jane Radin argued that, notwithstanding its physical presence in the document (or on a computer screen), boilerplate without actual agreement lacks contractual force.*

The authors advocated the technique of shared meaning analysis as a solution to the challenges presented by boilerplate contracts. By referring to "shared meaning," Kar and Radin proposed that courts enforce "[t]he meaning that parties produce and agree to during contract formation that is most consistent with the presupposition that both were using language cooperatively to form a contract."

I recommend that courts and legislatures reject shared meaning analysis. The likely practical ramifications of this empirically untested proposal – which is designed to delete numerous boilerplate contract terms – would be the roiling of markets by precluding buyers and sellers from maintaining confidence in their agreements. The current system provides more effective measures to safeguard private ordering.

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1. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2004).

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INTRODUCTION

Analyzing a difficult subject that "pervades" contract law and that is "vital" to the national economy,[2] scholars have produced scores of articles about the legal and societal aspects of boilerplate contract terms.[3] Professors Robin Bradley Kar and Margaret Jane Radin contributed to the conversation with their February 2019 article in the Harvard Law Review, *Pseudo-Contract And Shared Meaning Analysis*.[4] The authors argued that, notwithstanding its physical presence in the document (or on a computer screen),[5] boilerplate without actual agreement lacks contractual force.[6] The authors claimed that the widespread use of pseudo-contracts and their "fake terms" invited "burgeoning forms of [consumer] deception."[7] To Kar and Radin, the prevalence of boilerplate has so undermined mutual assent that it has jeopardized the legitimacy of contract itself.[8]

The authors advocated the technique of shared meaning analysis as a solution to the challenges presented by boilerplate contracts. By referring to "shared meaning," Kar and Radin proposed that courts enforce "[t]he meaning

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2. *See, e.g.*, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism, The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 26, 27 (2012) ("There is little doubt that the treatment of standard contracts is one of the most important puzzles facing modern contract law – and perhaps one of the most difficult." Also stating that "Standard form contracts pervade the consumer arena" and that they are "vital to the continued functioning of the economy."); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2096 (2014) ("Few topics in recent decades have attracted more attention in contract scholarship than standard-form contracts, and rightly so." Also stating, "there is hardly a more pressing challenge facing contract law.").

3. The articles addressing standard form contracts are legion and date back more than 100 years. *See, e.g*. Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Nathan Isaacs, *The Standardizing of Contracts*, 27 Yale L.J. 34 (1917); Friedrich Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

4. 132 HARV. L. REV. 1135 (2019). Robin Bradley Kar is Professor of Law and Philosophy at the University of Illinois. Margaret Jane Radin is Professor of Law at the University of Toronto and Professor of Law Emerita at both Stanford University and the University of Michigan.

5. *Id.* at 1138.

6. *Id*. at 1139–40.

7. *Id.* at 1140.

8. "We define 'boilerplate text' as any preformatted text that is provided to multiple parties or on multiple occasions or both during contract formation." *Id.* at 1219 n.8.

that parties produce and agree to during contract formation that is most consistent with the presupposition that both were using language cooperatively to form a contract."[9] The authors' legal theory for addressing unenforceable boilerplate was not reformation, where the moving party seeks a contract adjustment to ameliorate a mistake or fraud,[10] nor was it severance, where a party seeks to remove illegal terms – such as those that offend public policy.[11] Instead, the authors contended that much boilerplate should be judicially excised from the contract because it is usually outside the bounds of the parties' actual agreement.[12]

The authors declared that shared meaning analysis has a strong foundation in the traditional principles of contract interpretation, but that it also operates in a more refined way.[13] Kar and Radin believe that their "[d]efinition of shared meaning captures the most important considerations that have guided courts and helped them to discern the common meaning of the parties for *centuries* . . ."[14] In the authors' opinion, linguistics has much to offer in solving difficult matters of contract interpretation.[15] Kar and Radin argued, "Contract . . . has in many instances become pseudo-contract – a system of private obligations with expanding contents that are created unilaterally by one party."[16] Thus, the authors urged courts to adopt shared meaning analysis in place of the current judicial norms of contractual interpretation.[17]

I respectfully suggest that Kar and Radin's article is doctrinally and normatively unpersuasive,[18] most notably regarding its suggested approach to the

9. *Id.* at 1143, 1146, 1160, 1167, 1216 (adding qualification that the presupposition holds "even if one party was not acting fully cooperatively so long as the presupposition was warranted.").

10. CIGNA Corp. v. Amara, 563 U.S. 421, 440–41 (2011) (explaining reformation).

11. 1 SAMUEL L. WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:70 (4th ed. 2019) (explaining severance).

12. Kar & Radin, *supra* note 4, at 1166–68.

13. *Id.* at 1166.

14. *Id*. at 1143 (emphasis added).

15. *Id.*

16. *Id.* at 1140.

17. *Id.* at 1215 ("Shared meaning analysis . . . is grounded in core contract law principles and has sufficient scope and flexibility to solve many of the problems highlighted in this Article.").

18. In various ways, Kar and Radin rely on Professor Radin's book, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW (2014). For my critique of this book, which carries over in relevant part to the authors' present article, especially Part IX, *see* Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—A Two-Part Critique of* Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I), 62 CLEV. ST. L. REV. 373 (2014).

use of linguistics.[19] Because the authors have made a largely doctrinal argument in support of shared meaning analysis, I have made a largely doctrinal response opposing the validity of their reform.[20] Their proposal raises many other concerns as discussed below.

While no thoughtful proposal on contract doctrine should be rejected out of hand, my chief concern is any new approach must be rooted in the fundamental doctrines of contract law to have a fair chance of adoption. As will be shown, the traditional principles of contract as consistently implemented by the great majority of courts lend no support for the authors' suggestion that the law for "centuries" has comported with actual agreement and shared meaning analysis.[21]

The authors' proposed concept also clashes with the essential precepts of contract including the objective standard of contract, freedom of contract, and the duty to read and understand a contract. The likely practical ramifications of this empirically untested proposal – which is designed to delete numerous boilerplate contract terms – would be the roiling of markets by precluding buyers and sellers from maintaining confidence in their agreements. The inevitable consequence of Kar and Radin's sea change would be to undermine the two goals of contract, which are first, enforcing the contract accepted by the parties and second, ensuring the stability, certainty, and predictability of contract. For all these reasons, I recommend that courts and legislatures reject shared meaning analysis. The current system provides more effective measures in safeguarding private ordering.

This Article proceeds as follows. Part II summarizes the authors' extensive and detailed argument. Part III disputes Kar and Radin's reliance on linguistics as a valid aid to contract interpretation. Part IV discusses the authors' definition and classification of standardized contracts and explains the benefits and detriments for the commercial system. Part V addresses whether contract law has kept pace with twenty first century communications technology. Part VI considers the authors' argument about the centrality of "actual agreement" and "shared meaning analysis" for contract interpretation. This Part is the heart of the Article and covers the goals and components of shared meaning analysis: cooperation and good faith during contract formation; the *Restatement (Second) of Contracts* and the "common meaning" of the parties; the courts and "common meaning" of the parties; the competing standards of mutual assent; the objective and subjective theories; how much sharing is needed for shared

19. Kar and Radin are not saying basic contract law should be different based on shared meaning analysis. Kar & Radin, *supra* note 4, at 1215. Rather, they are contending that shared meaning analysis comports with the first principles of contract interpretation, but that courts and theorists have departed from its premises. *Id*. (arguing that "assimilationist" approaches "reduce" and even "eviscerat[e] the traditional requirement of actual agreement."). This Article will show the converse is true about which position is undermining the first principles of contract interpretation.

20. The authors assert that their proposal "raises a complex blend of linguistic, factual, conceptual, normative and doctrinal problems." *Id.* at 1137.

21. *Id*. at 1140, 1143.

meaning; and the ramifications of shared meaning analysis. Part VII covers shared meaning analysis and freedom of contract. Part VIII considers shared meaning analysis and a party's duty to read a contract. Part IX addresses the precedents challenging the use of boilerplate in contrast to the majority view. Based on the first principles of contract formation and interpretation, the majority view better reconciles the conflicting precedents in favor of the current system.

I. OVERVIEW OF "PSEUDO-CONTRACT AND SHARED MEANING ANALYSIS"

A detailed overview of Kar and Radin's eighty-five-page article will aid the discussion. Subtopics in this part include: Pseudo Contract and the Assimilationists, Shared Meaning Analysis, The Authors and Neo-Gricean Linguistics, and The Aims of Shared Meaning Analysis.

A. Pseudo-Contract and the Assimilationists

Kar and Radin first argued that an incremental but relentless "paradigm slip" has occurred where the widespread use of boilerplate over the last few decades has adversely transformed the nature of contracting.[22] The authors contended that, in terms of sufficiency to bind consumers, contract law has inappropriately moved from consent to assent, then from assent to fictive/hypothetical assent, and lastly from hypothetical assent to the purchaser's fictional or constructive notice.[23]

Kar and Radin argued, "Lacking any sound reason to replace contract, we must seek better methods of evaluating boilerplate text so as to bring contract law back into coherence with its core concepts, principles, and justifications."[24] The result of this doctrinal tipping point is "pseudo-contract" – an oppressive regime of boilerplate with only limited defenses to enforcement, such as unconscionability, duress, and illegality.[25] Otherwise, the authors argued that sellers have free rein to impose upon consumers highly detailed and heavily one-sided contract terms.[26] Indeed, Kar and Radin emphasized that the seller fully knows and expects that the typical consumer will sign (or click) without

22. *Id.* at 1137.
23. *Id.* at 1139–40.
24. *Id*. at 1142.
25. *Id*.
26. Kar and Radin assert that shared meaning analysis applies to all contracts. *Id.* at 1182. Because the authors devote most of their attention to consumer contracts, this Article will do the same.

reading the copious terms or having a subjective understanding of the transaction.[27]

Kar and Radin believe pseudo-contract distorts core contract law concepts, such as "assent," "agreement," and "interpretation."[28] This distortion now allows businesses to create legal obligations unilaterally without obtaining any actual agreement over many boilerplate terms.[29] While the authors acknowledged that "Boilerplate is not necessarily pseudo-contract," they still maintained that "[a] great deal of contemporary boilerplate text has become pseudo-contractual."[30]

The authors heavily criticized "assimilationist" courts and commentators whom they accused of defending the status quo on boilerplate and mutual assent.[31] The major problem with assimilationists, the authors claimed, is that they hold fast to nineteenth century contract doctrine in adjudicating the enforceability of the twenty first century's new mode: digital contracts.[32] As a result, the authors argued assimilationist theory has failed from both a "linguistic and normative point of view" because the law has yet to recognize the full depths of how much the "changes in technology" changed how people communicate.[33] In a recurring theme, Kar and Radin argued that the slow, incremental transformation of contract into fake contracts – called a "paradigm slip"

27. *Id.* at 1196 ("businesses now have incentives to make use of extensive pseudo-contractual text to take advantage of consumers' rationality in not reading an overwhelming amount of boilerplate text") (emphasis omitted).

28. *Id.* at 1214.

29. *Id.* at 1137. Although Kar and Radin are correct that merchants commonly draft the terms unilaterally, the *contracts* are formed bilaterally because the parties make reciprocal promises, i.e., payment of money for services rendered or goods delivered. *See Bilateral Contract*, BLACK'S LAW DICTIONARY (10th ed. 2014).

30. *Id.* at 1137–38 (asserting high-end boilerplate contracts between sophisticated parties are frequently contractual but the opposite conclusion applies to unread and unreadable boilerplate in consumer transactions).

31. "We define as 'assimilationist' as any court or theorist who treats all boilerplate as part of a 'contract' so long as it is delivered with actual or merely constructive 'notice' to a party who agrees to a more basic transaction.'" *Id.* at 1139.

32. "[T]echnological changes [are] transforming the uses of digital and written text and methods of communication in ways that [are] novel enough, and complex enough, that many courts [are] left without a clear understanding of how best to extend traditional contract law concepts and principles to these rapidly evolving settings." *Id.* at 1173.

33. *Id.* at 1144; *see also id.* at 1140 ("The fake 'terms' in a regime of pseudo-contract invite burgeoning forms of deception that are difficult for courts to discern because they are hidden under the mantle of "contract.").

[34] – has further facilitated a "fundamental break" from centuries of case law requiring contracts to be "significantly" grounded in "actual agreement."[35]

B. Shared Meaning Analysis

By referring to a "shared meaning," Kar and Radin advocated that courts enforce "[t]he meaning that parties produce and agree to during contract formation that is most consistent with the presupposition that both were using language cooperatively to form a contract."[36] According to Kar and Radin, their adaptation of "shared meaning analysis" is "consistent with long-standing approaches."[37] Thus, the authors contended that their formulation re-establishes the essence of contract such that the courts need to disregard all the non-consensual boilerplate found in modern contracts, except where the parties have reached actual agreement on specific boilerplate terms.[38]

The authors also argued that absent actual agreement that was freely reached, enforcing these pseudo-contracts violates the weaker party's freedom of contract.[39] In Kar and Radin's proposal, "freedom of contract" contemplates parties with equal capacities where the parties expect they will each realize expected gain.[40] Parties have this freedom only where they are able to safely trust that a "well-functioning legal system" will focus legal enforcement on "shared agreements."[41] These circumstances are said to be lacking in the modern contracting system, and the result is the purchaser's loss of liberty in contracting.[42]

Kar and Radin called the non-consensual boilerplate that accompanies the actual agreement "ride along" terms.[43] The authors contended that such boilerplate provisions can be non-contractual even where they physically appear in

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34. A "paradigm slip" in this context means that although the law strives to maintain the basic concepts of contract law, the result is a largely unintended drift, mostly unnoticed, and a deviation from fundamental doctrinal principles. *Id*. at 1141–42. They contrast this concept with a "paradigm shift" which is related to a "paradigm slip" except that in the former the proponent consciously intends a fundamental shift. *Id*.

35. *Id*. at 1142, 1143, 1169, 1173.

36. *Id*. at 1143, 1146, 1160, 1167, 1216 (adding qualification that the presupposition holds "even if one party was not acting fully cooperatively so long as the presupposition was warranted.").

37. *Id*. at 1143.

38. *Id*. at 1213.

39. *Id*. at 1161.

40. *Id*.

41. *Id*.

42. *Id*. at 1125

43. *Id*. at 1207, 1209. Boilerplate has contractual status only when it contributes shared meaning to the contract or the actual agreement. *Id*. at 1143. With online contracts, the parties can still clearly desire to form a contract and reach an actual agreement – but Kar and Radin say that the pact does not necessarily include copious pages

the contract's terms and conditions.[44] Accordingly, Kar and Radin believe terms that are merely informational and absent from the offer/acceptance process are within this ride-along category and cannot be used against the consumer. [45]

The authors were aware much boilerplate goes unread by the consumer, and this fact provided the impetus for their thesis.[46] Where the purchaser neither reads the term nor approves it as part of contract formation, the authors posited these terms should never be deemed part of the actual agreement.[47] Thus, "contract meaning" depends on linguistic cooperation – often in ways that are "[s] ubtle and difficult to recognize."[48]

C. The Authors and Neo-Gricean Linguistics

To lend additional appeal for their reform and to convince courts that shared meaning analysis has doctrinal and normative superiority to assimilationist approaches, the authors relied on the philosophy of language as expounded by the linguist Paul Grice, a pioneer in syntax and semantics.[49] For Kar and Radin, neo-Gricean linguistics is central – not tangential – to contract interpretation.[50] Grice primarily distinguished what words and sentences mean under their dictionary definitions versus what individuals mean when they use language to communicate in a particular context.[51] However, Grice did not seek to stamp his brand of linguistics upon contract interpretation and hence the term, "Neo-Gricean model of shared meaning analysis," refers to Kar and Radin's attempt to take Grice's model out of context.[52]

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of text included by hyperlink. *Id.* at 1210. The authors make numerous references to contracts that have "copious" amounts of boilerplate but where used, boilerplate often consists of just a few pages. *See, e.g.*, *Sample Timber Sale Contract*, AM. FOREST FOUND.: MY LAND PLAN, https://mylandplan.org/content/sample-timber-sale-contract [perma.cc/V4QB-FF9Y] (timber sale contract) (last visited June 29, 2019).

44. Kar and Radin, *supra* note 4, at 1194.

45. *Id.* at 1163.

46. *Id.* at 1198.

47. *Id*. at 1174.

48. *Id*. at 1156.

49. *Id.* at 1142.

50. *Id.* at 1144–45.

51. A good illustration of speaker meaning versus sentence meaning would be where a law professor states in writing a letter of recommendation for a third-year student seeking a judicial clerkship, "I support John Doe's application for a clerkship in your chambers. He has perfect class attendance and presents a well-groomed appearance." The reference's reliance on irrelevant considerations and the absence of reliance on the expected issues of John Doe's command of legal scholarship and general legal ability send an implied message that the law professor has little confidence in John Doe's candidacy. *See id*. at 1147 (offering a similar example).

52. *Id.* at 1145–46.

Grice also postulated the existence of conversational implicatures. These devices illustrate the distinction between what a speaker *says* and what he *implies* in light of the circumstances surrounding the communication.[53] These "implicatures" occur where the parties implicitly pre-suppose and rely upon cooperative norms that govern interpersonal exchanges.[54] The Gricean construct emphasizes that language properly understood exists in a social and interpersonal context as opposed to an abstract setting.[55]

Building upon Gricean doctrine, Kar and Radin argued that a mode of contract interpretation will be inferior when it considers only sentence meaning and logic but omits the more complex ways in which individuals naturally rely on the cooperative norms of language to communicate meaning.[56] While conceding assimilationist doctrine's "growing influence"[57] in resolving contract interpretation issues, the authors decried its alleged linguistic indeterminacy and absence of linguistic cooperation, which they said precluded effective communication.[58] Thus, the authors put forth their proposal for shared meaning analysis – which they indicated endorses neither the objective nor the subjective theory of contractual obligation and interpretation. [59]

"Shared meaning" of a contract occurs when parties produce and actually agree to terms during contract formation based on the pre-supposition that parties speak in social contexts using language cooperatively – as found in various norms – to form a contract.[60] Kar and Radin suggested that the "parties cannot both use language cooperatively to agree to enter into a contract and

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53. *Id*. at 1148.

54. Gricean implicatures stem from the "cooperative principle," which governs where the speaker makes his conversational contribution by the accepted purpose or direction of the talk exchange in which he is engaged. *Id.* at 1148. The cooperative principle in turn forms the basis of the various maxims or norms of speech engagement between the speaker and the listener.

55. *Id*. at 1147, 1216.

56. *Id*. at 1148.

57. *Id*. at 1156

58. *Id*. at 1153–54; *see also id*. at 1146–48 (a primary linguistic problem with assimilationist approaches to boilerplate – as well as other traditional tests for contract interpretation – is that they fail to distinguish between sentence meaning, speaker meaning, and what the authors have called the shared meaning of a contract).

59. *See id*. at 1143, 1194 (discussing objective/subjective theories of contractual theories of party assent).

60. *Id*. at 1146. Some examples of these norms are (1) *The Maxim of Manner*, which requires clarity and the avoidance of obscurity, ambiguity, undue length, and incoherence, and (2) *The Maxim of Quality*, which tells parties to avoid contributions to conversations that the speaker either believes are false or that lack adequate evidence. *Id*. at 1151. These so-called "norms" do not fit the dictionary definition of being a "general level" or "average." *See Norm*, DICTIONARY.COM, https://www.dictionary.com/browse/norm# [perma.cc/BU7H-7FN3] (last visited June 29, 2019). These norms lack an effective enforcement mechanism and are frequently honored more in the breach than in the observance. Kar & Radin, *supra* note 4, at 1152–53.

fail to produce an actual agreement that each is committed to playing his or her respective part to perform in good faith."[61] The authors further claimed that their model builds upon the "consensus ad idem" (agreement to the same thing), which is also the legal basis for the oft-used (and misleadingly-termed) formulation of the "meeting of the minds."[62]

D. The Aims of Shared Meaning Analysis

Kar and Radin's proposal is no mere refinement of the law in this area. The authors' radical plan is to revamp contract law by replacing its very foundations. The authors ask a new threshold question: Is any of the boilerplate text in dispute part of an actual agreement that the parties reached when they used language to form a contract?[63] If there is an excessive amount of "ride along" boilerplate that raises a doubt about the sufficiency of the remaining terms of the actual agreement, no enforceable contract would arise.[64]

II. THE USE OF LINGUISTICS IN CONTRACT INTERPRETATION

Because linguistics occupies such an important place in Kar and Radin's shared meaning analysis, this Part will first focus on the broader issue of the relevance and utility of linguistics to contractual interpretation. As will be shown in extensive detail below, the authors' linkage between linguistics and contract lacks merit for several reasons. Kar and Radin also failed to cite or otherwise dispute the views of commentators who have analyzed – and rejected – the relation of linguistics and contract generally and the Grice/contract interpretation/intersection specifically.[65]

Still deeper – and again unmentioned – issues pervade Kar and Radin's new construct. As will be analyzed below, these issues are first, the likely inadmissibility at trial of shared meaning analysis under the rules of evidence and second, the authors' reliance on linguistics reveals undue favoritism for the consumer and little or no regard for the merchant's valid interests.

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61. *Id.* at 1152–53.

62. *Id*. at 1154, n.64. For criticisms of this usage, see 1 WILLISTON ON CONTRACTS *supra* note 11, §§ 3:4, 3:5, 4:1, 4.3.

63. Kar & Radin, supra note 4, at 1155.

64. *Id*. at 1167–68, 1192; *cf. infra* notes 294–95 and accompanying text (discussing the requirement for definite contracts).

65. *See infra* Part III.A.

A. Linguistics and Contract Interpretation: A Controversial Relationship

Linguistics is the science of language and constitutes phonetics, phonology, morphology, syntax, semantics, pragmatics, and historical linguistics.[66] "[I]n the field of corpus linguistics, scholars . . . determine . . . [either] those meanings that are consistent with common usage," or "the term's ordinary or most frequent meaning" based on empirical data rather than personal intuition.[67] Regarding the utility of linguistics, the late Professor E. Allan Farnsworth of the Columbia Law School – former Reporter for the *Restatement (Second) of Contracts* and the author of a widely cited three-volume treatise on contract law – noted the controversial tie between linguistics and the philosophy of language on the one hand and contract interpretation on the other hand:

> Philosophers and semanticists have debated at length the proper use of [these disciplines], if any [in relation to contract interpretation]. It is tempting to look to these discussions for help in dealing with contract language. Most of [these discussions], however, are wide of the mark because they concentrate on language as it is used in science to describe experience. The concern of the philosopher or semanticist is with the truth of such language. The terms of a contract . . . may be similar in form to the laws of science . . . but they are fundamentally different in significance. The language of a contract is directed not at describing experience but at controlling human behavior, ordinarily the behavior of the contracting parties. The concern of a court is not with the truth of the language but with the expectations that it aroused in the parties. It is therefore to these expectations, rather than to the concern of the philosopher or semanticist, that we must turn in the search for the meaning of contract language.[68]

Professor Farnsworth went on to state:

> That is not to say that contract law has no concern for truth. If the seller sells wood as "braziletto," a court may be called upon to decide whether it is in fact braziletto or peachum. [citation omitted] But such questions of fact, which concern truth, arise only after

66. *See Linguistics*, THE FREE DICTIONARY, https://www.thefreedictionary.com/linguistics [perma.cc/25XL-F4WX] (last visited June 29, 2019).

67. Fire Insurance Exchange v. Oltmanns, 416 P.3d 1148, 1163 n.9 (Utah 2018) (quoting Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L REV. 156, 160–61 (2012)) (internal quotations omitted).

68. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS §7.7 (3d ed. 2004). Kar and Radin do not mention or critique Farnsworth's criticism of the misuse of linguistics.

> questions of interpretation, which go in part to the expectations of the parties, have been answered: Was the seller bound to deliver braziletto rather than peachum?[69]

As Professor Farnsworth correctly points out, linguistics is generally unhelpful in resolving issues of contract interpretation because linguistics focuses mainly on the truth of communication whereas the primary point of contract law is to control the behavior of the parties.[70] In the above passage, Professor Farnsworth also acknowledged that contract law does have some concern for the truth, such as giving a remedy when a defendant misrepresented the nature and quality of goods delivered to the plaintiff, but this issue is a secondary concern. By comparison, Kar and Radin – for both sentence meaning and speaker meaning – analyze only truth telling.[71]

What is missing from Kar and Radin's linguistic model is the enforcement of the reasonable expectations and behavior of the parties.[72] Professor Farnsworth is not alone in his skepticism about the use of linguistics in the interpretation of legal texts. Other commentators have observed linguistics is ill-suited for understanding contracts because linguistics explains generalizations in the structure and use of language but not how language should be used to manage contractual expectations and party behavior, which is the point of contract interpretation.[73] Other authorities contend that "linguistics may well misunderstand the legal process"[74] or "get in the way of moral knowledge."[75] Still, other

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69. *Id.*

70. *See* Lawrence M. Solan, *Can the Legal System Use Experts on Meaning*?, 66 TENN. L. REV. 1167, 1170 (1999) (noting that linguists analyze and explain generalizations in the structure and use of language); *Id*. at 1176 ("It is not the goal of linguistic theory to tell people how they should understand language.").

71. *See supra* Part II (summarizing the elements of the authors' thesis).

72. *See* Midwest Division-OPRMC, LLC v. Dep't of Soc. Servs., Div. of Med. Servs., 241 S.W.3d 371, 379 (Mo. Ct. App. W.D 2007) (stating, "with all contracts, the courts seek to enforce the reasonable expectations of the parties").

73. Jiri Janko, Note, *Linguistically Integrated Contractual Interpretation*, 38 RUTGERS L.J. 601, 628 (2007).

74. *Id.* at 628 (citing Francis J. Mootz III, *Desperately Seeking Science*, 73 WASH. U. L.Q. 1009, 1014–17 (1995)); *see also* Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 565, 603 (2006) (stating "Grice's maxims are often vague, and could even be contradictory as applied in any given case"); Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation From the Philosophy of Language*, 69 FLA. L. REV. 1409, 1437 n.40 (2017) (commenting on the "unwieldy and unclear" nature of Grice's maxims).

75. Janko, *supra* note 73, at 628 (citing Michael S. Moore, *Plain Meaning and Linguistics – A Case Study*, 73 WASH. U. L.Q. 1253, 1261–62 (1995) (arguing that a morally desirable meaning should compete with linguistic determination of the ordinary meaning)).

writers object to linguists' self-designation of having the utmost expertise in the interpretation of ordinary meaning.[76]

The authors did not mention or otherwise rebut Professor Farnsworth's conclusion about the poor fit between linguistics and contract interpretation. For the reasons given in this section, courts should not enact Paul Grice's theory of linguistics as part of the law of contract interpretation, especially where Grice had no intent that other writers should use his philosophy in that manner.

B. Shared Meaning Analysis as Evidence at Trial

The authors overlooked that shared meaning analysis would be quite challenging to prove at trial. For example, subjective evidence provided through the testimony by a party on the meaning of a contract is invariably self-serving and inherently difficult to verify.[77] Accordingly, a party's testimony of his or her prior subjective intent that was not expressed or communicated when the contract was formed is not admissible evidence of intent.[78] Given these obstacles, it would be very difficult for either party to submit admissible evidence of his or her subjective mindset regarding the "actual agreement" unless the party had manifested this subjective interpretation to his counterpart during negotiations.[79]

Assuming that the party somehow gets past the above obstacles, another major evidentiary weakness of shared meaning analysis is the movant would need to use an expert witness to explain this linguistic theory and its application to a particular contract. Shared meaning analysis falls within the category of evidence outside the understanding of most factfinders. Rejecting this type of proof, the California Second District Court of Appeal has said, "The opinion of a linguist or other expert as to the meaning of contract language is irrelevant to the court's task of interpreting the plain language of the contract."[80] This principle draws upon the notion that expert testimony of issues of law, either in the form of legal conclusions or discussion of the legal implications of evidence, is inadmissible.[81]

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76. *Id.* at 628, n. 168.

77. SR Int'l. Bus. Ins. Co., Ltd. v. World Trade Center Properties, LLC, 467 F.3d 107, 127 (2d Cir. 2006); Dugan v. Smerick Sewerage Co., 142 F.3d 398, 403–04 (7th Cir. 1998); Apeldyn Corp. v. Eidos, LLC, 943 F. Supp. 2d. 1145, 1149 (D. Or. 2013).

78. *Apeldyn Corp.*, 943 F. Supp. 2d. at 1149. Another bar to judicial consideration of a party's subjective intent is where the evidence arises during settlement discussions. *See* FED. R. EVID. 408 (stating evidence of conduct or a statement made in compromise negotiations is not admissible).

79. *See infra* Part VI.E

80. *See* Jordan v. Allstate Ins. Co., 116 Cal. App. 4th 1206, 1217–18 (Cal. Dist. Ct. App. 2004); CAL. EVID. CODE § 801 (insurance policy).

81. Marx & Co., Inc. v. Diners' Club, Inc., 550 F.2d 505, 510 (2d Cir. 1977) ("The question of interpretation of the contract is for the jury and the question of legal effect is for the judge. In neither case do [courts] permit expert testimony") (quoting Loeb v.

The second flaw in Kar and Radin's use of linguistics is the authors' bias in favor of consumers and against merchants. Kar and Radin consistently analyzed the concept of "shared meaning" analysis just from the perspective of the consumer – who is only one of the two parties to the contract.[82] For Kar and Radin, the term "speaker meaning," refers to the consumer because the speaker whose views take pre-eminence is *always* the consumer.[83] This emphasis on the favored consumer in contract interpretation is incorrect because the "*mutual intent*" of the parties is controlling.[84] As the Tennessee Court of Appeals has stated, "In construing contracts, the words expressing the parties' intentions should be given their usual, natural and ordinary meaning, *and neither party is to be favored in the construction*."[85] The authors' thesis did not sufficiently heed that there are always two speakers – the promisor and a promisee – under a contact and that the voices of both the seller and the buyer merit due consideration.[86]

In *IFC Credit Corp. v. United Business & Industrial Federal Credit Union*,[87] then-Chief Judge Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit focused on the harm to the contracting system when a court favors one party over another in commercial transactions:

Hammond, 407 F.2d 779, 781 (7th Cir. 1969)); Nieves–Villanueva v. Soto–Rivera, 133 F.3d 92, 99 (1st Cir. 1997); Sparton Corp. v. United States, 77 Fed. Cl. 1, 8 (2007) (stating it is inappropriate to have experts opine as to the legal obligations of the parties under contract).

82. Kar & Radin, *supra* note 4, at 1143.

83. *See, e.g.*, *id.* at 1139 (Apple iTunes consumer); *id.* at 1192–96 (used car purchaser); *id.* at 1210 (E-book purchase); *id*. at 1199–1201 (business premises insurance).

84. "[T]he fundamental goal of contract interpretation is to give effect to the mutual intent of the parties as it existed at the time of contracting." U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc., 281 F.3d 929, 934 (9th Cir. 2002).

85. Forrest Constr. Co., LLC v. Laughlin, 337 S.W.3d 211, 220 (Tenn. Ct. App. 2009); Rainey v. Stansell, 836 S.W.2d 117, 119 (Tenn. Ct. App. 1992) (emphasis added); *see also* Burke v. Reiter, 42 N.W.2d 907, 912 (Iowa 1950) ("The law knows no such thing as a rich man or a poor man, but seeks to treat all alike to the end that even justice may be dispensed.").

86. Courts (and commentators) correctly construe reasonable understanding from the vantage point of both parties. *See, e.g.*, Int'l Marine Underwriters v. ABCD Marine, 313 P.3d 395, 399 (Wash. 2013) (the primary objective in contract interpretation "is to ascertain the mutual intent of the *parties* at the time they executed the contract") (emphasis added); *see also* Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 334 (1997) ("The reasonable person is a product of the creative efforts of the promisor *and* promisee. As such, neither party's perspective *alone* can adequately serve the interpretive mandate of the reasonable person.") (emphasis added).

87. 512 F.3d 989 (7th Cir. 2008).

> As long as the price is negotiable and the customer may shop elsewhere, consumer protection comes from competition rather than judicial intervention. Making the institution of contract unreliable by trying to adjust matters *ex post* in favor of the weaker party will just make weaker parties worse off in the long run.
>
> . . . .
>
> The idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power. It comes from failing to consider the full consequences of legal decisions. Courts deciding contract cases cannot durably shift the balance of advantages to the weaker side of the market; they can only make contracts more costly to that side in the future, because [the other side] will demand compensation for bearing onerous terms.[88]

Regrettably, the merchant's valid objectives and society's interests in a stable, predictable contracting environment merit little weight in Kar and Radin's equation.

III. BOILERPLATE, STANDARD FORM CONTRACTS, AND ADHESION CONTRACTS: DEFINITIONAL ISSUES

This Part addresses the adequacy of Kar and Radin's definition of boilerplate and their failure to employ established definitions of this concept. This Part also takes issue with their consistently unfavorable treatment of boilerplate and failure to cite the many benefits of this staple of commercial relationships.

A. The Overly Broad Definition of Boilerplate

The authors defined "boilerplate text" as "any preformatted text that is provided during contract formation to multiple parties, on multiple occasions, or both."[89] At best, this formulation is idiosyncratic. The mere existence of preformatted or standardized contract terms alone is benign and not objectionable; it is the contractual content that determines whether boilerplate facilitates or impedes the goals of the contracting system. Surprisingly, the authors failed to mention by name or to explain in any depth the most commonly encountered contract type in this area: the so-called contract of adhesion. These contracts incorporate – and go beyond – the elements of 'boilerplate' and 'standard' forms.[90]

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88. *Id.* at 993 (quoting Original Great Am. Chocolate Chip Cookie Co. v. River Valley Cookies, Ltd., 970 F.2d 273, 282 (7th Cir. 1992)).

89. Kar & Radin, *supra* note 4, at 1139 n.8.

90. *See* Max True Plastering Co. v. U.S. Fidelity and Guar. Co., 912 P.2d 861, 864 (Okla. 1996).

Unlike standard form contracts, "adhesion contracts" characteristically reflect a definite market advantage in favor of the merchant and his superior bargaining power. A leading decision explains the prevailing understanding of adhesion contracts:

> An adhesion contract is a standardized contract prepared entirely by one party to the transaction for the acceptance of the other. These contracts, because of the disparity in bargaining power between the draftsman and the second party, must be accepted or rejected on a "take it or leave it" basis without opportunity for bargaining – the services contracted for cannot be obtained except by acquiescing to the form agreement.[91]

Contrary to Kar and Radin's suggestion that "assimilationists" have done little to counter the potential adverse impacts of boilerplate, the majority of courts give weight to possible merchant misuse of adhesion contracts, which is why these jurisdictions scrutinize contracts of adhesion "skeptically."[92] Thus, the Supreme Judicial Court of Appeals of West Virginia observed that it gives "greater scrutiny" to an adhesive contract."[93] Along similar lines, case law from California provides that where a contract limits the duties or liability of the stronger party, a court will not enforce it against the weaker party absent "plain and clear notification" of the terms and the adherent's "understanding consent."[94] Additionally, a boilerplate contract that a merchant offers to consumers on a take it or leave it basis can be procedurally unconscionable.[95]

Next, consider the interpretive maxim of contra proferentem. Under this principle, when a standardized contract between parties of unequal bargaining power is ambiguous because it is open to two reasonable interpretations, but

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91. *Id.* A standard form contract is similar to, though not identical with, a contract of adhesion. *See* Rudbart v. N. Jersey Dist. Water Supply Comm'n, 605 A.2d 681, 685 (N.J. 1992) (stating that the "essential nature of a contract of adhesion is that it is presented on a take-it-or-leave-it basis, commonly in a standardized printed form, without opportunity for the 'adhering' party to negotiate except perhaps on a few particulars."). Because Kar and Radin are quite concerned with the economic plight of consumers when faced with standardized contracts, I believe the authors would similarly be concerned with adhesion contracts.

92. Rory v. Continental Ins. Co., 703 N.W.2d 23, 52 n.13 (Mich. 2005) (Kelly, J., dissenting) (collecting numerous cases applying rule of skepticism).

93. Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 228 (W. Va. 2012) ("A contract of adhesion should receive greater scrutiny than a contract with bargained-for items to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.").

94. Wheeler v. St. Joseph Hosp., 133 Cal. Rptr. 775, 783–84 (Cal. Dist. Ct. App. 1976).

95. Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 853 (Cal. Ct. App. 2001); Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 227 (W. Va. 2012) (stating that procedural unconscionability "often begins with a contract of adhesion").

the use of the established canons of construction fail to resolve the inconsistency, a reviewing court may interpret the contract in the manner least favorable to the merchant as the stronger party who was the drafter of the agreement.[96]

The above rules of skepticism in various jurisdictions are in addition to the consumer-friendly general doctrine in a number of states that ambiguities in an insurance contract are construed in accordance with the reasonable expectations of the insured.[97] Indeed, some decisions go beyond insurance law and tilt more strongly in favor of the consumer by making general allowances for a consumer's having a lesser "level of sophistication" when courts determine the existence of mutual assent.[98] Kar and Radin's omission of these various consumer-oriented doctrines calls into question the authors' objections to the so-called assimilationist position.

B. The Benefits and Detriments of Boilerplate

In contrast with Kar and Radin's heavy criticism of consumer contracts merely because these instruments have boilerplate terms, courts and commentators have pointed out the value-added nature of boilerplate contracting.

Courts have acknowledged the benefits of such standardized contracts as being part of the "fabric of society."[99] For one, they can eliminate some everyday frustrations. As an example, most persons would find it highly annoying to stand in a long line at the airport car rental desk where every traveler took his time seeking to negotiate a tailored rental car agreement. To avoid such

96. Savedoff v. Access Grp., Inc., 524 F.3d 754, 764 (6th Cir. 2008); Ohio Cas. Ins. Co. v. Holcim, 744 F. Supp. 2d 1251, 1260 (S.D. Ala. 2010).

97. *See e.g.*, New Castle Cnty. v. Nat'l Union Fire Ins. Co., 243 F.3d 744, 750 (3d Cir. 2001); Karnette v. Wolpoff & Abramson, L.L.P., 444 F. Supp. 2d 640, 646–47 (E.D. Va. 2006). Some jurisdictions extend the principle to unambiguous insurance policies in "exceptional" cases. *See* Mitchell v. Providence Washington Ins. Co., 255 F. Supp. 2d 487, 494 (E.D. Pa. 2003). However, courts are divided on this doctrine. *See* Arthur J. Park, *What to Reasonably Expect in the Coming Years from the Reasonable Expectations of the Insured Doctrine*, 49 WILLAMETTE L. REV. 165 (2012). Kar and Radin discuss this doctrine but conclude that it is mostly confined to the interpretation of insurance policies. Kar & Radin, *supra* note 4, at 1201.

98. *See* Wright v. SSC Nashville Operating Co., No. 3:16-cv-00768, 2017 WL 914586 at *2 (M.D. Tenn. Mar. 8, 2017) (ruling that "an individual consumer may be held not to have assented in a situation where a more sophisticated commercial entity would [have been deemed to concur on the contact].") (citing Wofford v. M.J. Edwards & Sons Funeral Home Inc., 490 S.W.3d 800, 812 (Tenn. Ct. App. 2015)). "An ever-growing body of case law and scholarship has fashioned a rigid dichotomy between sophisticated and unsophisticated parties in a wide array of contract inquiries." Meredith R. Miller, *Contract Law, Party Sophistication and the New Formalism*, 75 MO. L. REV. 493, 493–94 (2010).

99. Goodwin v. Ford Motor Co., 970 F. Supp. 1007, 1015 (M.D. Ala. 1997) (quoting Roberson v. Money Tree of Ala., Inc., 954 F. Supp. 1519, 1528 (M.D. Ala. 1997)).

problems, standardization of forms for contracts is a rational and economically efficient response to the rapidity of market transactions and the high costs of negotiations, such that the drafter can rationally calculate the costs and risks of performance. This process in turn contributes to reasonable pricing.[100] The Seventh Circuit commented,

> Phrases become boilerplate when many parties find that the language serves their ends. That's a reason to enforce the promises, not to disregard them.
>
> . . . .
>
> Contractual language serves its functions only if enforced consistently. This is one of the advantages of boilerplate, which usually has a record of predictable interpretation and application.[101]

Furthermore, the absence of back-and-forth bargaining – as frequently occurs with boilerplate contracts – is not necessarily unfair to consumers. As Judge Richard Posner put it, "[W]hat is important is not whether there is haggling in every transaction but whether competition forces sellers to incorporate in their standard contracts terms that protect the purchasers."[102]

Indeed, the vast majority of form contract terms deployed in the American commercial system are not problematic. Generally, these boilerplate terms are legitimate and reasonable components of the agreement, which means these provisions usually are unobjectionable.[103] Typically, merchants do *not* use these instruments to oppress consumers as Kar and Radin repeatedly alleged.[104] As a pair of commentators writing in the Columbia Law Review observed:

> For many years, contract literature focused on the idea that sellers with market power draft contracts that are disadvantageous to consumers.

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100. 1 CORBIN ON CONTRACTS § 1.4 (rev. ed 1993); *see also* RESTATEMENT (SECOND) OF CONTRACTS 211 cmt. a (AM. LAW. INST. 1981)) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions."); John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 289 (2000).

101. Rissman v. Rissman, 213 F.3d 381, 384–85 (7th Cir. 2000).

102. Scott R. Peppet, *Freedom of Contract in Augmented Reality: The Case of Consumer Contract*s, 59 UCLA L. REV. 676, 711 (2012) (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 144 (8th ed. 2011)).

103. *See* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, 348 n.3 (6th ed. 2009) ("Probably most contracts of adhesion are simple and reasonable.").

104. *See, e.g.*, Kar & Radin, *supra* note 4, at 1140 ("The fake 'terms' in a regime of pseudo-contract invite burgeoning forms of deception that are difficult for courts to discern because they are hidden under the mantle of 'contract.'").

> Law and economics scholars, however, have been skeptical about that hypothesis, pointing out that a strategy of dictating pro-seller contract terms would rarely be the optimal technique for exploiting market power.[105]

Professor M.J. Trebilcock has made a similarly well-reasoned economic analysis of standard form contracts, concluding:

> *[T]he proposition that the use of consumer standard-form contracts is the result of the concentration of market power is entirely without factual foundation.* The reason why such contracts are used is . . . to reduce transaction costs . . . [S]tandard forms are used (for this reason) in countless contexts where no significant degree of market concentration exists . . . The fact that in these cases a supplier's products are offered on a take-it-or-leave-it basis is evidence not of market power but of a recognition that neither producer – nor consumer – interests in aggregate are served by incurring the costs involved in negotiating separately every transaction. *The use of standard forms is a totally spurious proxy for the existence of market power.*[106]

Kar and Radin did not meaningfully support their theme that boilerplate unfairly gives sellers a market advantage over consumers by imposing onerous, one-sided terms.[107] Nevertheless, to her credit, Radin, in her prior publications, did mention the recognized benefits of boilerplate.[108] She acknowledged, "In the abstract standardization is neither good nor bad," and she conceded that a standardized form can promote knowledge and ease of use, reduce uncertainty, and lower transaction costs for all parties.[109] She also cited with approval the example of perhaps the most prevalent type of standard form contracts – the insurance policy – and how it facilitates commercial transactions.[110] Radin has

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105. Ronald J. Mann & Travis Siebeinicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 984–85 (2008). The actual incidence of merchant abuse is far less than indicated by Kar and Radin. *Supra* note 4, at 1174–75. Some experts dispute the frequent contention that corporations misuse boilerplate and thereby increase profits and market share. *See, e.g.*, Douglas G. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933, 938 (2006).

106. Michael J. Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords*, 26 U. TORONTO L. J. 359, 364 (1976)).

107. *See e.g.*, Kar & Radin, *supra* note 4, at 1145 (stating businesses often create legal obligations "[u]nilaterally without obtaining any actual agreement over many boilerplate "terms"); *id*. at 1196 ("market forces have begun to interact with assimilationist legal doctrine to create powerful incentives for businesses systematically to mislead consumers through what is sometimes called careful contract design.").

108. *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW 42 (2014).

109. *Id*.

110. *Id*.

repeatedly endorsed the general concept of contract standardization in her prior publications[111] and no apparent reason exists for her shift in position.

Despite Kar and Radin's contention that some boilerplate is unfair and borders on being fraudulent,[112] case law and many commentators accept that form contracts are not "inherently sinister" and "any rule automatically invalidating adhesion contracts would be 'completely unworkable.'"[113] The Seventh Circuit recognized that no reason existed to treat "adhesion contracts or form contracts differently" from other contract types.[114] In fact, over the last thirty-five or so years, "[i]t has been hard to find decisions holding terms invalid on the ground that something is wrong with non-negotiable terms in form contracts."[115]

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111. *See* Margaret Jane Radin, *The Deformation of Contract in the Information Society*, 37 J. LEGAL STUDIES 534, 543 (2017) ("I am not arguing against standardization, nor am I arguing against all standardization in the field of contracts."); MARGARET J. RADIN, *supra* note 108, at 42 ("Yet, if all attempts to use boilerplate were to be declared unenforceable, that would cause a considerable disruption of current commercial practice.").

112. *See supra* note 107 and accompanying text.

113. Swain v. Auto Servs., Inc, 128 S.W.3d 103, 107 (Mo. Ct. App. 2003). A host of prominent commentators rejects the abolition of boilerplate:

> Robert Hillman declares that "because of the efficiencies and benefits of standard forms, it is not a reach to predict that the economy would come to a screeching halt without them." Arthur Leff states that living entirely without boilerplate is "commercially absurd" due to "the economics of the mass distribution of goods." Nancy Kim hypothesizes that "failure to recognize contracts of adhesion would mean slowing down and perhaps even stifling the growth of a valuable industry." Eric Posner asserts that "[c]ontracts are long and detailed by necessity."

And David Slawson sums up the consensus:

> The predominance of standard forms is the best evidence of their necessity. They are characteristic of a mass production society and an integral part of it . . . These services are essential, and if they are to be provided at reasonable cost, they must be standardized and mass-produced like other goods and services in an industrial economy.

James Gibson, *Boilerplate's False Dichotomy*, 106 GEO. L.J. 249, 264 (2019).

114. Heller Fin., Inc. v. Midwhey Powder Co., Inc. 883 F.2d 1286, 1292 (7th Cir. 1989).

115. IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 993 (7th Cir. 2008). Older cases divided on the propriety of adhesion contracts. *Compare* Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 147 (Pa. Super. 1985) ("The phrase 'contract of adhesion' and the evil it suggests have been familiar for many years."), *with* Klos v. Lotnicze, 133 F.3d 164, 169 (2d Cir. 1997) (adhesion contracts "offend[] basic notions of civility and fair play"), *and* Powell v. Cent. Cal. Fed. Sav. & Loan Assn., 130 Cal. Rptr. 635, 642 (Cal. Dist. Ct. App. 1976) ("There is nothing sinful or illegal about a contract of adhesion.") *and* State ex rel. Dunlap v. Berger, 567 S.E.2d 265, 273 (W. Va. 2002) (the question for courts is distinguishing "good adhesion contracts which should be enforced from bad adhesion contracts which should not.").

While the authors complained that boilerplate unfairly grants sellers a substantial economic advantage,[116] despite any appeal this fact might have politically or socially, their claim has no legal traction. Courts consistently rule that it is not their place to remedy disparities of wealth in society, the levels of information known to each party, or the comparative bargaining skills of buyers and sellers.[117] Aggressive bargaining positions alone in boilerplate contracts are proper and advance the objectives of our free market economy.[118] Because nothing inappropriate would result when a merchant simply drafts terms that will strongly ensure that the seller would prevail in any litigation with a buyer, Kar and Radin's doctrinal and normative critique of modern-day standardized contracting is unpersuasive. [119]

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116. Kar & Radin, *supra* note 4, at 1140.

117. *See* Schreiber Foods, Inc. v. Lei Wang, 651 F.3d 678, 683 (7th Cir. 2011) (also noting without objection that "[t]here is often an extreme asymmetry of information between seller and buyer when the seller is the provider of a professional service."); PXRE Reinsurance Co. v. Lumbermen's Mut. Cas. Co., 342 F. Supp. 2d 752, 761 (N.D. Ill. 2004) ("Transactions almost always begin with asymmetry of information, but that [fact] does not eliminate the need for the less-informed party to exercise ordinary prudence."); Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. MIAMI L. REV. 553, 581 (2013) (arguing that information asymmetry is the norm in contracting).

118. Industrial Representatives, Inc. v. CP Clare Corp., 74 F.3d 128, 132 (7th Cir. 1989) ("Parties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress."); Dick Broad. Co., Inc. of Tennessee v. Oak Ridge FM, Inc., 395 S.W.3d 653, 671 (Tenn. 2013) ("[P]arties engaged in a commercial transaction pursue their own self-interest and understand and expect that the parties with whom they are dealing are doing likewise.").

119. Several commentators have challenged the prevailing view that standard-form contracts have eliminated bargaining in consumer contracts. Citing empirical studies, Jason Scott Johnston argued that standard-form contracts "[f]acilitate bargaining and are a crucial instrument in the establishment and maintenance of cooperative relationships between firms and their customers." Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006). Professor Johnston studied widely used consumer contracts, including hospital bills, consumer credit cards, home-mortgage and home-equity lending, the rent-to-own industry and retail sales return policies. *Id*. at 864. Other writers similarly have relied on empirical findings that mass-market boilerplate contracts are much more negotiable in fact than they are in theory. *See* Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 828 (2006) (contending that based on reputational concerns, some merchants selectively enforce standard form contracts against purchasers). Kar and Radin do not mention these empirical findings but merely assume that boilerplate terms are typically non-negotiable. *See supra* note 4, at 1137, 1140.

IV. ASSIMILATIONIST CONTRACT THEORY AND BOILERPLATE: HAS THE LAW KEPT PACE WITH TWENTY FIRST CENTURY COMMUNICATIONS TECHNOLOGY?

Kar and Radin noted the rapid developments in technology that have changed how parties communicate to form contracts.[120] The authors focused on electronic-commerce and clickwrap, browsewrap, and shrinkwrap transactions.[121] Thus, even as courts have tried "valiantly" to extend traditional contract law doctrines to the new technology, Kar and Radin asserted that the judiciary has failed to make the transition.[122] They contended that courts have overlooked the effects of technology, thereby causing a fundamental "break in function" in the institution of contract itself.[123]

As indicated above, Kar and Radin claimed that courts have "struggled" in the application of standard common law principles to modern day boilerplate.[124] Beyond observing that the cases "are not altogether satisfying,"[125] the authors failed to explain why the few cases they cited show that courts misunderstand boilerplate or why traditional common law principles for interpreting boilerplate are deficient in the modern-day setting.

Contrary to the authors' observations, courts are competent in their understanding of the technological changes in contracting. The judicial consensus is that these developments have not rendered traditional interpretive principles obsolete.[126] Thus, courts have made statements such as, "While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract."[127] As shown below, two

120. Kar & Radin, *supra* note 4, at 1139.

121. Kar & Radin, *supra* note 4, at 1141 n.15, 1176, 1198, 1208. "Shrinkwrap" is a type of license printed on the outside of a package wrapper, especially a software package, to advise the buyer that by opening the package, the buyer becomes legally bound to abide by the terms of the license. *Shrinkwrap Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014). "Clickwrap" is an electronic version of a shrinkwrap license in which a computer user agrees to the terms of an electronically displayed agreement by pointing the cursor to a particular location on the screen and then clicking. *Point and Click Agreement*, BLACK'S LAW DICTIONARY (10th ed. 2014). A "browsewrap" agreement does not require the user to manifest assent to the terms and conditions expressly; a party instead gives his assent simply by using the website. Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1176 (9th Cir. 2014).

122. Kar & Radin, *supra* note 4, at 1141–42.

123. *Id.* at 1142.

124. *Id.*

125. *Id*. at 1141 n.15.

126. Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 403 (2d Cir. 2003); Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1175 (9th Cir. 2014); Treiber & Straub, Inc. v. U.P.S, 474 F.3d 379, 385 (7th Cir. 2007).

127. *Register.com, Inc.*, 356 F.3d at 403.

leading decisions that the authors criticized – *Specht v. Netscape Communications Corp.*[128] and *ProCD, Inc. v. Zeidenberg*[129] – illustrate this truth in various ways.

A. Specht v. Netscape Communications Corp.

In *Specht v. Netscape Communications Corp.*, the consumer was a user of Netscape software and contended that he was not bound by a provision requiring him to arbitrate disputes with the company.[130] The issue was whether the seller adequately disclosed the term as part of the transaction.[131] Netscape merely posted the terms of its offer of the software – including the obligation to arbitrate disputes – on the website from which users downloaded the software.[132] In resolving this dispute about the licensing of consumer software and the enforceability of an arbitration clause, the *Specht* court relied heavily on common law principles of contract.[133]

In *Specht*, the U.S Court of Appeals for the Second Circuit – in an opinion written by then Judge Sonia Sotomayor – began by stating that under the established objective theory of contract formation, "Mutual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract."[134] In keeping with these traditional principles, the court observed, "At bottom, the objective standard . . . considers both what the offeree said, wrote, or did and the transactional context in which the offeree verbalized or acted."[135] Yet, the *Specht* court properly cautioned, "The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents."[136]

The *Specht* court accepted the general propositions that (a) "[a] voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting,"[137] and (b) "[a] party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing the document."[138] However, Judge Sotomayor was quick to add: "An exception to this

128. 306 F.3d 17 (2d Cir. 2002).
129. 86 F.3d 1447 (7th Cir. 1996).
130. 306 F.3d at 27.
131. *Id.*
132. *Id.*
133. *Id.* at 35.
134. *Id.* at 30.
135. *Id.*
136. *Id.* at 29.
137. *Id.* at 30 (quoting CAL. CIV. CODE § 1589 (2018)).
138. *Id.* at 39 (quoting Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, 89 Cal. App. 4th 1042, 1049 (Cal. Ct. App. 2001)).

general rule exists when the writing does not appear to be a contract and the terms are not called to the attention of the recipient. In such a case, no contract is formed with respect to the undisclosed term." [139]

Accordingly, Kar and Radin were off-base in contending without any analysis that the unanimous *Specht* panel "struggled" to reach its decision or that it "misunderstood" the particulars of modern day contracting and computer technology.[140] The Second Circuit's opinion in *Specht* displayed a complete command of how modern-day technology differs from "the world of paper contracting."[141] The *Specht* court mentioned the "emergent world of online product delivery, pop-up screens, hyperlinked pages, clickwrap licensing, scrollable documents, and urgent admonitions to 'Download Now.'"[142] While it endorsed the longstanding principle that the consumer can be bound where the merchant sufficiently placed the buyer on notice to inquire further about the terms, the Second Circuit concluded that Netscape had failed to make a sufficient disclosure to the consumer of the arbitration clause at issue.[143] Indeed, nowhere in their article did Kar and Radin cite a single case where a court misunderstood the computer technology at issue and how that lack of knowledge tainted the court's analysis and decision.[144]

The *Specht* case and decisions like it have relied upon long-established common law principles of mutual assent – including the rules on inquiry notice – dating back almost one hundred years.[145] Notably, the high quality of *Specht'*s factual and legal analysis fully supports the idea that courts are up to the task of deciding controversies involving e-commerce.[146] Accordingly, the

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139. *Id*. at 30.

140. *See also* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Ag*e, 77 N.Y.U. L. REV. 429, 478 (2002) (computer technology has not radically changed consumer contracting).

141. *Specht*, 306 F.3d at 32 (comparing digital and paper contracts). For another insightful opinion from the Second Circuit that thoroughly and persuasively considered the enforceability of shrinkwrap, *see* Schnabel v. Trilegant Corp., 697 F.3d 110 (2d Cir. 2012).

142. *Specht*, 306 F.3d at 31.

143. *Id*. at 32.

144. The authors do not mention the increased convenience to consumers associated with modern e-commerce methods. It seems logical that most consumers would much rather be able to download software or media off the internet than go to a store and buy a disk. It also seems paradoxical that something that makes consumers lives easier requires harsher contractual interpretations against sellers.

145. *See Specht*, 306 F.3d at 28 (citing Windsor Mills, Inc. v. Collins & Aikman Corp., 101 Cal. Rptr. 347, 350 (1972)).

146. 2 SAMUEL L. WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 6:3 (4th ed. 2019). The current version of the Williston treatise also gives *Specht* high praise, stating it is "[a]n exceptional case, with far-reaching implications regarding electronic contracting, containing an excellent discussion of the objective theory as it pertains to the law of offer and acceptance and to the developing law of electronic contracting." *Id.*

Specht court properly held against Netscape and in favor of the software user because the evidence did not demonstrate that the user who downloaded Netscape's software had necessarily seen the terms of the company's offer, including the arbitration clause.[147]

B. ProCD, Inc. v. Zeidenberg

In *ProCD, Inc. v. Zeidenberg*,[148] the Seventh Circuit held, in a unanimous opinion by Judge Frank Easterbrook, that a buyer of software was bound by an agreement that was included within the packaging and that later appeared when the buyer first used the software.[149] Here, the consumer purchased software in a box containing license terms that the software company – the offeror – displayed prominently on the computer screen every time the user opened the software program.[150] The consumer failed to return the software in accordance with the instructions.[151] The *ProCD* court held that because the user under the inquiry notice doctrine had sufficient opportunity to review the terms and to return the software, the consumer was contractually bound after retaining the product past the point allowed by the vendor.[152]

The *ProCD* court recognized the major challenge in these cases is that the consumer's assent is largely passive with no requirement for the buyer to make an overt response in rejecting the offer.[153] Thus, the question of the buyer's acceptance of the license terms frequently turns on whether a reasonably prudent consumer – offeree – would be on inquiry notice of the term at issue.[154] Under the common law, a party may exhibit assent through words or silence, action or inaction, but with one important qualification: "[t]he conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer

147. *Specht*, 306 F.3d at 32. The authors' remark that *Specht's* analysis "struggled" and is not "altogether satisfying" is unjustified. *See* Kar & Radin, *supra* note 4, at 1141 n.15. Oddly enough, given that the Second Circuit sided with the consumer in ruling the arbitration clause was in effect a ride along clause, the reader would have expected Kar and Radin to make this influential case the showcase precedent in support of shared meaning analysis. *See Specht*, 306 F.3d 20–21.

148. 86 F.3d 1447 (7th Cir. 1996).

149. *Id.*

150. *Id.* at 1450.

151. ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644–45 (W.D. Wis. 1996), *rev'd,* 86 F.3d 1447 (7th Cir. 1996).

152. *ProCD*, 86 F.3d at 1452. The agreement included the following language: "By using the discs and the listings licensed to you, you agree to be bound by the terms of this License. If you do not agree to the terms of this License, promptly return all copies of the software, listings that may have been exported, the discs and the User Guide to the place where you obtained it." *Id.*

153. *ProCD*, 86 F.3d at 1451.

154. *Id.*

from his conduct that he assents."[155] In other words, to constitute inquiry notice, to manifest his agreement, the purchaser must have actual notice of circumstances that would be adequate to place upon a prudent person the obligation to make further inquiry into the matter. If the purchaser lacked such means of knowledge, the purchaser has not adequately manifested agreement to the packaged terms.

The *ProCD* result comports with the general common law rule that an offeree cannot actually assent to an offer unless the offeree first has notice of its existence and terms.[156] Therefore, assent will occur based on the "[s]tandard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree."[157] It bears repeating: each case is fact specific regarding the offeree's notice of the terms in question.

Because the product in question – computer software – is a "good" under the Uniform Commercial Code ("UCC"),[158] the *ProCD* court turned to the UCC for guidance in resolving the issue of consumer assent.[159] The court first held that UCC § 2–207 – Additional Terms in Acceptance or Confirmation – was inapplicable because the UCC § 2-207 "battle-of-the-forms" provision was irrelevant in cases involving only one form.[160] The *ProCD* Court then evaluated the agreement under UCC § 2–204. Here, the court reasoned that based on the latter Code section (which accepts the common law rule), "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance."[161] Accordingly, the *ProCD* court found UCC § 2-204 dispositive.[162]

In a subsequent decision, *Hill v. Gateway 2000, Inc.,*[163] the Seventh Circuit relied heavily on *ProCD* in explaining the fit between the contract analyzed in that decision, common law principles, and the need for a smoothly running economy:

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155. Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012). Thus, "a person who accepts the benefit of services rendered may be held to have impliedly made a promise through conduct to pay for them . . . [if] the offeree . . . knew or had reason to know that the party performing expected compensation." *Id.*

156. *Id.*

157. *Id.* at 128.

158. *ProCD*, 86 F.3d at 1450 ("[s]oftware licenses . . . [are] governed by the common law of contracts and the Uniform Commercial Code").

159. *Id.*

160. *ProCD*, 908 F. Supp. at 655.

161. *ProCD*, 86 F.3d at 1452. Under the traditional rules of contract formation, ProCD created the power of acceptance and could dictate the mode of assent. *Id.*

162. *Id.*

163. 105 F.3d 1147 (7th Cir 1997).

> Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers . . . Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread. [164]

Although many commentators and some courts have criticized the *ProCD* decision,[165] *ProCD* represents the majority view in the United States.[166] The main disagreement is whether the consumer's merely accepting delivery of the product and failing to return the items as required by the agreement reasonably manifests consent to the additional terms in the "shrink wrapped" box.[167]

The Rhode Island Supreme Court has explained that *ProCD's* perspective is well reasoned and "[m]ore consistent with contemporary consumer transactions."[168] Specifically, the Rhode Island court pointed out that it is "[s]imply unreasonable to expect a seller to apprise a consumer of every term and condition at the moment he or she makes a purchase."[169] To the same effect, Professor Randy Barnett has succinctly argued in defense of *ProCD* that the decision comports with settled law regarding the process of acceptance.[170] As Barnette concluded, "This insight is neither revolutionary nor reactionary."[171]

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164. *Id.* at 1149.

165. Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 839 (2007) ("As many scholars have noted, the *ProCD* court's analysis of the U.C.C. leaves much to be desired.").

166. DeFontes v. Dell, Inc., 984 A.2d 1061, 1069–71 (R.I. 2009).

167. *Id.* Professor Randy Barnett has argued in defense of *ProCD* that the decision comports with settled law regarding the process of acceptance. Barnett, *supra* note 3, at 644. First, he mentions that under UCC § 2-204, a party can manifest acceptance "in any manner sufficient to show agreement, including the conduct of the parties. *Id.* at 643–44. Second, he follows the principle that offer and acceptance can occur in stages, provided the circumstances or prior practice makes this point clear or adequate notice is provided. *Id.* at 644.

168. *Defontes*, 984 A.2d at 1071.

169. *Id*. at 1071.

170. Barnett, *supra* note 3, at 644.

171. *Id.*

C. Boilerplate and Computer Technology

In today's world of tech-savvy consumers, the authors' contention is unsupported that fact finders and reviewing courts make poor decisions on the factual and legal issues because they do not understand changes in computer technology and on-line contracting.[172]

Undoubtedly, the general topic of cognitive heuristics biases (the construct from psychology that people irrationally underestimate the possibility of adverse consequences, such as illnesses, accidents, and errors), sometimes lead people to make faulty choices.[173] Nonetheless, consumers as a class are not so benighted as to qualify for the outdated paternalistic viewpoint that they are incapable of making their own fully rational and informed choices regarding electronic commerce.[174] If the buyer is a "competent adult," courts should not become a member of the buyer's team at the "negotiation table."[175]

A commentator noted the economic downside of failing to enforce otherwise legitimate adhesive terms:

> [A] refusal to enforce adhesive terms is just as bad as imposing price controls on products. Both actions substitute the top-down, paternalistic judgment of lawmakers for the bottom-up, nuanced judgment of the marketplace – preventing consumers from acting on their own individualized preferences and myopically privileging contract *content* over contracting *process*.[176]

If judges and juries can understand complex factual issues in patent, antitrust, and tax litigation, they can comprehend the much simpler workings of browsewrap, clickwrap, and shrinkwrap in retail online computer contracting.[177]

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172. *See* Kar & Radin, *supra* note 4, at 1139 (noting impact of "momentous changes in communications technology").

173. *Id*. at 1196.

174. *See generally* Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) ("Courts have been reluctant to assume consumers are too ignorant and benighted to fend for themselves merely because they are poor.").

175. Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir 1997); Rothe v. Revco D.S., Inc., 148 F.3d 672, 675–76 (7th Cir. 1998); *see also* Bank of Maryville v. Topping, 393 S.W.2d 280, 284 (Tenn. 1965) (improper for courts to draft contracts for parties).

176. Gibson, *supra* note 113, at 254.

177. The authors claim that ours "is a computer-based information society," but this statement is exaggerated. Kar & Radin, *supra* note 4, at 1139. The secondary literature's near-obsession with online contracting over-emphasizes the importance of Internet commerce. While this form of contracting certainly is substantial, a study in 2016 revealed that e-commerce accounted for only 15.6% of consumer transactions. *See* Amy Gesenhues, *Report: E-Commerce Accounted for 11.7% of Total Retail Sales in*

V. ACTUAL AGREEMENT, SHARED MEANING ANALYSIS, AND CONTRACT INTERPRETATION

Kar and Radin said that "an actual agreement with common meaning is central to the normative justification of contract."[178] The authors' bold position was that, notwithstanding physical presence in the document – or on a computer screen – boilerplate without actual agreement lacks contractual status.[179] The authors said this widespread use of pseudo-contracts and their "fake terms," i.e., not actual terms, invited "burgeoning forms of [consumer] deception."[180] Kar and Radin were especially critical of the "assimilationist" courts and commentators whom the authors said embrace fictionalized purchaser assent as the basis for mutual obligation.[181]

The gist of the authors' proposal was that by referring to "shared meaning," a concept that "builds" on linguistics, Kar and Radin advocated that courts enforce "[t]he meaning that parties produce and agree to during contract formation that is most consistent with the presupposition that both were using language cooperatively to form a contract."[182] Culling concepts from linguistics, this process requires an understanding of two key Gricean concepts – speaker meaning and sentence meaning. "Speaker meaning" is what a speaker intends when he or she utters a sentence.[183] "Sentence meaning" is what a sentence means independent of its occasion of use.[184] Kar and Radin argued this distinction is critical for a proper identification of the scope and content of the parties' actual agreement and shared meaning of the contract.[185] Stated

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2016, up 15.6% over 2015, MARKETING LAND (Feb. 20, 2017), https://marketingland.com/report-e-commerce-accounted-11-7-total-retail-sales-2016-15-6-2015-207088 [perma.cc/YDXV-34LF].

178. Kar & Radin, *supra* note 4, at 1139.

179. *Id.* Shared meaning analysis does not stand for the idea that boilerplate is part of the contract but is unenforceable for supervening reasons. *Id.* at 1142–43. Instead, the authors argue that the offending terms were never part of the contract in the first place because they are not within the bounds of the parties' actual agreement. *Id.* at 1210–12. Accordingly, the authors' legal theory for addressing unenforceable boilerplate is not reformation, where a party seeks a contract adjustment to ameliorate a mistake or fraud and neither is it severance, where a party seeks to remove illegal terms, such as those that offend public policy. CIGNA Corp. v. Amara, 563 U.S. 421, 440–41 (2011) (explaining reformation); 8 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 19:70 (4th ed. 2019) (explaining severance).

180. Kar & Radin, *supra* note 4, at 1140.

181. *Id.* at 1143, 1161, 1173 (criticizing Hill v. Gateway, 2000, Inc., 105 F.3d 1147 (7th Cir. 1997)).

182. *Id.* at 1143, 1146, 1160, 1167, 1216 (adding qualification that the presupposition holds "even if one party was not acting fully cooperatively so long as the presupposition was warranted").

183. *Id.* at 1145–46.

184. *Id.*

185. *Id.* at 1165.

differently, "speaker meaning" is what a speaker intends to convey to another person within an interpersonal conversation, which often depends upon both parties relying on implicit presuppositions of linguistic cooperation to form a contract. Simply put, for Kar and Radin, a contract formed through actual agreement exists when the individual speaker meanings unite to form a shared meaning.[186] The authors' argument lacks legal force as described below.

A. The Goals and Components of Shared Meaning Analysis

In their focus on doctrine, Kar and Radin contended that an incremental but relentless "paradigm slip" in the principles of contractual obligation has gone from (a) seller and buyer mutual consent to (b) assent by the buyer as the party to be charged to (c) the buyer's fictional/constructive/hypothetical assent, and then to (d) the purchaser's mere fictional or constructive notice of the terms.[187] Kar and Radin argued that consumer contracting has become an intolerable system of "pseudo-contract" where sellers impose private obligations upon consumers without a supporting "actual agreement."[188]

The authors said pseudo-contract distorts core contract law concepts, such as "assent," "agreement," and "contract."[189] While the authors acknowledged

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186. *Id.* at 1139. "By using language to make offers and acceptances, the two [parties] have formed a contract, which includes a shared meaning to which both parties have actually agreed." *Id.*

187. *Id.* at 1139–40. Regarding the dilution of assent, the authors cite no cases establishing that the law has proceeded in the linear manner as described above.

188. *Id.* at 1160–1161. Throughout their article, the authors compare modern day boilerplate contracts with an 1883 logging contract agreement based on a Minnesota Supreme Court decision, *Thompson v. Libby*. 26 N.W 1 (Minn. 1885); *see e.g.*, Kar & Radin, *supra* note 4, at 1139, 1180. The facts in the authors' example were that a builder and a logger agreed that if the logger "[w]ould give me all your logs marked H.C.A, cut from the last two winters, [t]he builder would] pay [him] ten dollars per thousand feet, boomscale at Minneapolis, Minnesota." *Id.* at 1139. The authors' reliance on this logging contract is unpersuasive because the logging contract reflects a similar, if not a greater, incidence of gaps and omissions:

> [A] superficial comparison between the two templates of a deal is incorrect. In fact, both deals are similarly complex, and in both deals people harbor just as much "sheer ignorance." In general, the complexity of the contract, and the resulting level of ignorance, has nothing to do with the boilerplate scheme. The ordinary contracts from the romantic era of pre-boilerplate . . . are surprisingly complex and sometimes leave more uncertainty than the thick boilerplate of the mass-contract era.

Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 887 (2014).

189. Kar & Radin, *supra* note 4, at 1140. The idea that standard form contracts differ from the common understanding of a "contract" is not new. *See* John J. A. Burke, *Contract as Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 308

that "Boilerplate is not in and of itself pseudo-contract,"[190] they still maintained that "[a] great deal of contemporary boilerplate text has become pseudo-contractual."[191] As prime examples of this type of boilerplate, the authors slammed clickwrap contracts – such as Apple's iTunes licensing service – and contracts specifying mandatory arbitration – such as contracts subject to the Federal Arbitration Act.[192] By comparison, Kar and Radin insisted that the essence of contract is where the parties cooperatively communicate their shared meaning, excluding the unread – and frequently unreadable – boilerplate.[193] Accordingly, the authors contended that boilerplate text that was never cooperatively communicated between the parties cannot contribute to a shared meaning of the parties. Kar and Radin said the same is true for boilerplate where it is merely "informational (fact-stating)" and creates no contractual commitments.[194]

The authors' position that boilerplate must be more than just physically included in the text but must be co-operatively communicated to form an enforceable agreement lacks support.[195] Where parties bind themselves to a contract that appears regular on its face and contains boilerplate, a prima facie case exists that the parties have an actual agreement on all terms, even in the sense used by Kar and Radin.[196] By their signatures – or other conduct manifesting assent – both parties have united in producing and approving a single document

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(2000) (stating "[A] standard form contract is not a contract as that word is normally understood"); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 144–47, 155 (1970) (because no real bargaining occurs over standard form contract terms, these instruments are best understood as "things" – that is, as part of the product being sold).

190. Kar & Radin, *supra* note 4, at 1155.

191. *Id*. at 1155, 1182 (high end boilerplate contracts between sophisticated parties are frequently contractual).

192. *Id*. at 1203–04, 1208.

193. *Id*. at 1139–40, 1155–56.

194. *Id*. at 1163. The authors are unduly broad in their definition of mere informational terms. They quote ten examples of boilerplate sentences from iTunes' online "terms and conditions," which they say merely convey information, i.e., they are just fact-stating. *Id.* at 1162, 1219 n. 82. But consider the following hypothetical: One provision from the iTunes listing states, "If you turn off automatic renewal, [then] you will continue to have access to the Apple Service for the remainder of your Apple Music Subscription term." *Id.* at 1219 n. 82. Contrary to the authors' assertion, if Apple stopped access after the customer turned off the automatic renewal before term cessation, the quoted language does implicitly create a substantive contractual right in the customer and a substantive contractual obligation in the service provider regarding the service. *See* Fed. Ins. Co. v. Winters, 354 S.W.3d 287, 291 (Tenn. 2011) ("In addition to the explicit terms, contracts may be accompanied by implied duties, which can result in a breach.").

195. *Id*. at 1163–64.

196. *See* PLAINTIFF'S PROOF PRIMA FACIE CASE § 2:9 (West 2019).

containing the entire scope of their agreement, including the contract's boilerplate.[197] Moreover, where parties include an integration clause stating that a contract contains all the terms of the agreement, the parties thereby concur that every word matters regarding the parties' full and final intent on the scope of the agreement.[198] The frequent use of integration clauses in American commerce easily defeats Kar and Radin's thesis that where the contract contains superfluous boilerplate, those terms generally are not part of the actual agreement.[199]

Because many, if not most, boilerplate contracts lack a separate clause stating that boiler plate is enforceable, the authors' have signaled their desire to eliminate most forms of boilerplate as part of the American contracting system.[200] From a practical stand point, the authors left unexplained how their actual agreement/shared meaning analysis proposal for revising (they would say clarifying) contractual assent could be implemented in the face of likely staunch resistance from industry groups and their allies in federal and state legislatures.[201] Also missing is the authors' thoughts on the framework for a viable replacement system for the derided "assimilationist" system that could timely assure sellers and buyers that they will have enforceable and complete agreements in a manner agreeable to both sides.

B. Cooperation and Good Faith during Contract Formation

The authors argued that one normative objective of shared meaning analysis is that the parties are (or should be) in a "cooperative" relationship before they enter a contract.[202] The authors stated, "Contract meaning depends on an implicit presupposition of cooperative language use to form a contract"[203]

197. *Id.*

198. *See* Bandera Drilling Co. v. Sledge Drilling Corp., 293 S.W.3d 867, 871–72 (Tex. App. 2009) (adopting this view of integration clauses).

199. Kar & Radin, *supra* note 4, at 1155 (indicating boilerplate can become part of the actual agreement when cooperatively communicated between the parties).

200. *Id.*

201. *Id.* at 1135. Another (unmentioned) limiting principle for "actual agreement/shared meaning" analysis is that it cannot contravene statute. Thus, the authors' proposal is problematic because it would entail impermissible changes to Article Two of the UCC, the sales article, which currently has no requirement for an actual agreement or a process congruent with shared meaning analysis. The UCC version does not include the idea of an "actual agreement" as used by the authors. UCC 1-201(b)(3) defines "agreement," as distinguished from "contract," to mean the "bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance, course of dealing, or usage of trade as provided in UCC 1-303." U.C.C. § 1-201 (Am. Law Inst. & Unif. Law Comm'n 1977).

202. *See* Kar & Radin, *supra* note 4, at 1216.

203. *Id.* at 1144. The authors go on to say, "Contract meaning has always properly depended on shared meaning in this sense . . ." *Id.* at 1146.

They also commented, "Breach of the cooperative norms relating to truth can be understood as a form of bad faith during the process of negotiation."[204] As authority for this proposition, the authors cited section 205, cmt. c. of the *Restatement (Second) of Contracts*.[205] This provision addresses the implied contractual duty of good faith and fair dealing generally and includes one definition of "good faith" as "honesty in fact as related to the transaction" specifically.[206]

The authors misconstrued section 205 as being relevant in any sense to a breach of a cooperative norm of good faith arising during contract negotiations.[207] Section 205, comment c, explicitly says, "This Section, like Uniform Commercial Code § 1-203, *does not* deal with good faith in the formation of a contract."[208] Many cases are to the same effect and say Section 205 and UCC § 1-203 presuppose an existing valid contract.[209] Although section 205 is relevant to contract modifications, Kar and Radin only invited confusion by implying this *Restatement* section applies across the board to contract formation.[210] Consequently, the authors' reliance on Section 205 of the *Restatement (Second) of Contracts* was misplaced.

Apart from their questionable use of the *Restatement*, the authors misdescribed the extent of the cooperative "norms" and the duty of good faith and fair dealing that exists during the negotiation stage.[211] Contrary to the impression left by the authors, the pre-award version of good faith and fair dealing is much narrower than the contractual version. In *Market Street Associates Ltd. Partnership v. Frey*,[212] the Seventh Circuit did not recognize a general duty for a cooperative relationship during contract formation akin to the broad duty advocated by Kar and Radin.[213] The court said:

> Before the contract is signed, the parties confront each other with a natural wariness. Neither expects the other to be particularly forthcoming, and therefore there is no deception when one is not. Afterwards the

204. *Id*. at 1152.
205. *Id*.
206. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).
207. *Id.* at cmt. c.
208. *Id.* (emphasis added).
209. Courts agree, "because the existence of th[e] covenant [of good faith and fair dealing] depends on the existence of an underlying contractual relationship, there is no claim for a breach of this covenant where a valid contract has not yet been formed." Scott Timber Co. v. United States, 692 F.3d 1365, 1372 (Fed. Cir. 2012) (quoting Mountain Highlands, LLC v. Hendricks, 616 F.3d 1167, 1171 (10th Cir. 2010)) (internal quotation marks omitted).
210. RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1981).
211. Kar & Radin, *supra* note 4, at 1154.
212. 941 F.2d 588 (7th Cir. 1991).
213. *Id.*

> situation is different. *The parties are now in a cooperative relationship* the costs of which will be considerably reduced by a measure of trust.[214]

The Seventh Circuit in *Market Street* made plain that before the contract is formed the parties deal at arms' length and the trust factor is naturally low.[215] Contrary to the authors' conclusion, a general cooperative relationship arises only after contract execution and *not* beforehand.[216] The Seventh Circuit then explained how parties may take legitimate advantage of their counterpart during contract formation:

> In fact, the law contemplates that people frequently will take advantage of the ignorance of those with whom they contract, without thereby incurring liability. The duty of honesty, of good faith even expansively conceived, is not a duty of candor. You can make a binding contract to purchase something you know your seller undervalues. That of course is a question about formation, not performance, and the particular duty of good faith under examination here relates to the latter rather than to the former.
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> . . . .
>
> *The formation or negotiation stage is precontractual, and here the duty is minimized* . . . .[217]

The authors cited none of these cases mentioned in this section setting a relatively low bar for the degree of cooperation required before contract execution. Instead, Kar and Radin emphasized that parties "with equal capacities to enter into all and only trades they actually agree will offer expected gains for each . . . ."[218] By emphasizing a co-operative process aimed at achieving party equality, Kar and Radin would erase the advantages that merchants legitimately can have over consumers in terms of hard but fair bargaining in a free market economy.[219] The real world is not – and never will be – populated by parties with "equal capacities" reaching "actual agreements" to enter just the trades that will offer expected gains for each party.[220] Cases are even

214. *Id.* (emphasis added).
215. *Id.* at 595.
216. *Id.* at 594.
217. *Id.* at 593–94 (emphasis added).
218. Kar & Radin, *supra* note 4, at 1161.
219. "Hard bargaining . . . [is] acceptable, even desirable in our economic system." Rich & Whillock, Inc. v. Ashton Dev., Inc., 157 Cal. App. 3d 1154, 1159 (Cal. Ct. App. 1984).
220. *Cf.* Kar & Radin, *supra* note 4, at 1161; *but see* Kessler, *supra* note 3, at 640 ("Society, when granting freedom of contract, does not guarantee that all members of

rare that a party with a legitimate advantage would readily give it up. Courts should leave parties where they find them in terms of their talents, abilities, and resources; judges should not become players in renovating the existing American economy to pass into law a party's social or economic theories.

Quite likely, merchants would object to the Kar and Radin view of cooperation that sellers should do business only with parties with "equal capacities" and where the parties agree the trade will offer "expected gains for each party."[221] Additionally, companies include boilerplate clauses for a definable business reason. If a court or legislature outlawed boilerplate – which is permissible[222] – firms likely would either leave that market or charge higher prices to account for the greater risk flowing from the loss of these boilerplate clauses. As one commentator observed,

> In short, if a term is efficient, it should be enforced whether it emerges by sheer luck from a dysfunctional market for lemons or by design from a functioning market with robust competition and universal salience of product features. The alternative is to allow consumers to have their cake and eat it too-i.e., to enjoy the lower price but then escape enforcement of the term. Faced with that possibility, sellers would change the boilerplate to allocate such risks to themselves, inefficiently, and charge higher prices to make up for it. Such an outcome would do no favors for seller or consumer.[223]

C. The Restatement (Second) and 'Common Meaning' of the Parties

Relying upon the *Restatement (Second) of Contracts*, Section 201(1), comment c,[224] Kar and Radin posited that the traditional and "primary search"

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the community will be able to make use of it to the same extent."). For additional discussion of freedom of contract, see Part VII.

221. Kar & Radin, *supra* note 4, at 1161.

222. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996) ("Doubtless a state could forbid the use of standard contracts . . . .").

223. *See* James Gibson, *Vertical Boilerplate*, 70 WASH & LEE L. REV. 161, 214 (2013); *see also* Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 236 (2007) ("Businesses use these forms to insert clauses which reduce or eliminate a myriad of risks. By reducing risks, businesses using standard forms are able to reduce prices charged for goods and services. The prevalent use of standard form contracts is indicative of their near-indispensability to commerce.").

224. Section 201(1) states, "Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning." RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981). Cmt. c provides:

> Subsection (1) makes it clear that the primary search is for a common meaning of the parties, not a meaning imposed on them by the law. To the extent that a mutual understanding is displaced by government regulation, the resulting obligation does not rest on "interpretation" in the sense used here.

in contract interpretation is to identify the "common" (or "shared") meaning of the parties.[225] As discussed below, the authors' argument was not persuasive.

Despite the Restatement's comment about the search for the common meaning of the parties, Kar and Radin supported their case with a section of the *Restatement* that is misleading at best.[226] The current Williston treatise cogently summarized the status of the Restatement's "common meaning" principle of Section 201(1) of the *Restatement (Second) of Contracts:*

> [I]t will indeed be a rare instance when it is appropriate to apply the subjective, mutual standard, for it involves the situation in which both or all the parties to the contract attach the same meaning to words, yet nevertheless some dispute has reached the courts. It is therefore not too surprising that most of the cases invoking the mutual standard of the Restatement Second [Section 201] do so either by way of dictum, with the court actually applying some other, typically objective, standard; or do so without much in the way of analysis, the appellate court merely indicating its affirmance of the trial court; or finally, do so in the infrequent situation in which its use is most appropriate: When the parties to the contract agree as to the meaning of the term or agreement, but one of the parties due to a change of circumstances or a third party . . . is arguing for a more favorable meaning . . . .
>
> Aside from these few situations, the courts have not discussed or applied the subjective, mutual standard. Thus, the mutual standard advocated by the Restatement Second remains a minority rule . . . .[227]

Read in its entirety, the *Restatement (Second) of Contracts*, Section 201(1) is not – as Kar and Radin contended – the overarching principle or the "central focus" of contractual obligation and assent.[228] The most that can be

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> The objective of interpretation in the general law of contracts is to carry out the understanding of the parties rather than to impose obligations on them contrary to their understanding: "the courts do not make a contract for the parties."

Id. at cmt. c.

225. *See* Kar & Radin, *supra* note 4, at 1146 n.24. Kar and Radin rely repeatedly on the *Restatement (Second) of Contracts* and cite no supporting cases.

226. One commentator has noted the tendency of the Restatement (Second) of Contracts in some instances to draw erroneous conclusions about the state of the law. *See* W. Noel Keyes, *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 PEPP. L. REV. 23, 24 (1985).

227. 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 31:14 (4th ed. 2007).

228. Kar & Radin, *supra* note 4, at 1138.

said about the "minority standard" of Section 201(1) is that it addresses an "infrequent" issue and is not the bedrock concept as advertised by Kar and Radin.[229]

D. The Courts and "Common Meaning" of the Parties

According to the authors, "common meaning of the parties" is the meaning the parties subjectively assign to the contract terms.[230] Repeatedly, the authors highlighted the essence of contract as reflecting the parallel mental operations and understandings of the parties.[231] The authors were incorrect in stressing a subjective theory of assent.

The experience of one jurisdiction's use of the phrase "common meaning of the parties" proves the point. In a 2007 Delaware Court of Chancery decision, the court said, "The primary search is for the *common meaning of the parties*, not a meaning imposed on them by law."[232] This passage does not support the authors' thesis because the court of chancery simply meant that courts distinguish between meaning supplied by the parties or by the law.[233] The real issue becomes how does a state such as Delaware – a jurisdiction where many large corporations are headquartered and whose state law controls the interpretation of numerous contracts – understand "common meaning of the parties?"

> [Section 1.01] The Delaware Supreme Court has answered this question. In a 2014 decision, the high court concisely summarized the principles linking contract and common meaning . . . .
>
> [Section 1.02] Contract terms themselves will be controlling when they establish the parties' common meaning so that a reasonable person in the position of either party would have no expectations inconsistent with the contract language. *Under standard rules of contract interpretation, a court must determine the intent of the parties from the language of the contract.*[234]

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229. *Cf.* Binder v. Aetna Life Ins. Co., 89 Cal. Rptr. 2d 540, 552 (Cal. Ct. App. 1999) ("Almost never are all the connotations of a bargain exactly identical for both parties").

230. *See* Section IV.E (collecting references showing the authors' reliance on the subjective standard of assent).

231. Kar & Radin, *supra* note 4, at 1163.

232. Seidensticker v. Gasparilla Inn, Inc. No. CIV.A. 255-CC, 2007 WL 4054473 at *3 n.13 (Del. Ch. Nov. 8, 2007) (quoting Klair v. Reese, 531 A.2d 219, 223 (Del. 1987)) (emphasis added).

233. *Id.*

234. Salamone v. Gorman, 106 A.3d 354, 368 (Del. 2014) (emphasis added); *see also* In re Silverstein, 37 A.3d 382, 385 (N.H. 2012) (the parties' intent "is determined

Therefore, Kar and Radin were only half-right when they contended that courts seek a common meaning. Judges do not seek *common meaning* of the *parties* in a *subjective* sense but instead seek *the common meaning* of the *words* used by the parties *in an objective sense* unless the agreement provides to the contrary. Significantly, the authors cited no decisions indicating their construct has been the dominant view for "centuries."[235] By following the minority view of the *Restatement (Second) of Contracts*, Section 201, Kar and Radin revealed their preference for the subjective standard over the objective standard in determining mutual assent.[236] The next section will contrast and compare the two standards and will demonstrate the superiority of the objective test for assessing the obligations of the parties.

E. The Competing Standards of Contractual Assent: The Subjective and Objective Theories

As stated above, the authors contended that shared meaning analysis endorses neither the objective nor the subjective theory of contractual obligation and assent.[237] This assertion cannot be accepted. When it comes to contractual boilerplate, Kar and Radin's article repudiated foundational principles of contract interpretation and disregarded the objective theory as it seeks to revive the defunct subjective theory of assent as the general basis for contractual obligation.[238]

Their article contains numerous legal conclusions based on the consumer's "actual agreement," or "knowing assent."[239] The quoted terms relate to the

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from the agreement taken as a whole, and by construing its terms according to the common meaning *of their words and phrases*.") (emphasis added); Grosse Pointe Park v. Mich. Mun. Liab. and Prop. Pool, 702 N.W.2d 106, 124 (Mich. 2005) ("The law presumes that the contracting parties' intent is embodied in the actual words used in the contract itself. A rule to the contrary would reward imprecision in the drafting of contracts."); 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 30:1 (4th ed. 2019) (contract interpretation "is the ascertainment of [a contract's] meaning by determining the meaning of the words employed.").

235. *See* Kar & Radin, *supra* note 4, at 1140, 1154.

236. RESTATEMENT (SECOND) OF CONTRACTS § 201 (1981).

237. Kar & Radin, *supra* note 4, at 1143 n.18, 1160.

238. *Id.*

239. Kar and Radin mention "actual agreement" 78 times and the equivalent concept "knowing assent" three times. *See* Kar & Radin, *supra* note 4. "Knowing consent" requires subjective agreement with the course of action. *Knowing Consent*, BLACK'S LAW DICTIONARY (10th ed. 2014). A commentator notes that imposing a knowing consent standard could "require proof not only that the consumer knew there was a [particular] clause in the contract, but that the consumer read and understood the clause." Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 L. & CONTEMP. PROBS. 167, 175 (2004). Accept-

offeror's personal state of mind and his subjective understandings.[240] In essence, Kar and Radin said that shared meaning exists where parties have parallel speaker meaning.[241] Unfortunately, Kar and Radin devoted just a few sentences to explaining the objective and subjective theories of mutual assent, even though the choice of doctrine would decide the viability of boilerplate as a feature of the contracting system.[242] Thus, my discussion will comprehensively compare the two schools of thought.

Kar and Radin's proposal asserted that there must be an "actual" agreement, and it is apparent that this adjective qualifies the concept of an "agreement." The authors did not specifically discuss the meaning of "actual," but the dictionary definition is clear enough.[243] I agree with Randy Barnett who stated that "actual" consent means "subjective" consent.[244]

Regarding the determination of contractual assent, the true test is *not* what the parties to the contract intended it to mean from a subjective viewpoint but what intent the parties manifested from an objectively verifiable perspective.[245] The objective test theory of assent comes in two variations, literalism – the majority view – and contextualism.

First, under literalism, "[a] cardinal rule of contractual interpretation is to ascertain and give effect to the intent of the parties. [Courts] determine the parties' intent by examining the plain and ordinary meaning of the written words from the contract document. If the language is clear and unambiguous, the literal meaning of the contract language controls." [246]

Second, under contextualism, parties' intentions are to be determined from the four corners of the contract when the contract is clear and unambiguous.[247] However, even when the agreement is unambiguous, the court may "consider the situation of the parties and the accompanying circumstances at

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ing this knowing consent standard also would undermine the duty to read and understand the contract where a consumer argues he did not read or understand the boilerplate. *See infra* Section VIII.

240. *See* Kar & Radin, *supra* note 4, at 1154.

241. *Id.*

242. *Id.*

243. *Actual*, DICTIONARY.COM, https://www.dictionary.com/browse/actual (last visited June 30, 2019) [perma.cc/XW6J-77RJ] ("actual" means "existing in fact" or "real").

244. Barnett, *supra* note 3, at 629.

245. *Id.* at 635.

246. Allmand v. Pavletic, 292 S.W.3d 618, 630 (Tenn. 2009) (citations omitted); Employers Ins. of Wausau v. Constr. Mgmt. Eng'rs of Fla., Inc., 377 S.E.2d 119, 121 (S.C. Ct. App. 1989).

247. Hamblen Cty. v. Morristown, 656 S.W.2d 331, 333 (Tenn. 1983).

the time it was entered into, not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the contract's meaning."[248]

In various decisions, courts have considered the standards under the rubric of "objective" standard of interpretation.[249] Courts also have applied the objective theory to standard form contracts.[250]

1. The Objective Theory Further Explained

Under the objective theory, "a contracting party is generally bound by the apparent intention he outwardly manifests to the other contracting party."[251] Courts have said, "The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their manifestation of assent."[252] To the extent that a party's real but secret intention differs from the contract terms, it is "entirely immaterial."[253]

The most common way parties express this intent is to sign the contract, but a court might deem a party equally bound by his other words and actions

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248. *Id*. at 334 (quoting RESTATEMENT (FIRST) OF CONTRACTS § 235 (1932)); Bokor v. Holder, 722 S.W.2d 676, 679 (Tenn. Ct. App. 1986). This definition of contextualism defeats any argument that courts are unconcerned with speaker meaning.

249. *See* City Investing Co. v. Cont'l Cas. Co., 624 A.2d 1191, 1198 (Del.1993); Myers v. Myers, 408 A.2d 279, 281 (Del.1979) (where a contract is clear on its face, the Court should rely solely on the clear, literal meaning of the words as they would be understood by an objective reasonable third party); Brown Bros. Elec. Contractors, Inc. v. Beam Constr. Corp., 361 N.E.2d 999, 1001 (N.Y. 1997) (courts rely on the "objective manifestations" of the parties as expressed by the contract terms and "attendant" circumstances).

250. *E.g.*, Amco Ins. Co. v. Haht, 490 N.W.2d 843, 845 (Iowa 1992) (applying the objective standard to an insurance policy, which is a contract of adhesion); Amera-Seiki Corp. v. Cincinnati Ins. Co., 721 F.3d 582, 585 (8th Cir. 2013).

251. Janssen Biotech, Inc. v. Celltrion Healthcare Co., 296 F. Supp. 3d 336, 342 (D. Mass. 2017).

252. Tsintolas Realty Co. v. Mendez, 984 A.2d 181, 190 (D.C. App. 2009).

253. In re McLean Indus., Inc., 90 B.R. 614, 621 (Bankr. S.D.N.Y. 1988) (quoting Cohn v. Fisher, 287 A.2d 222, 224 (N.J. Super. Div. 1972)). In *Skycom Corp. v. Telstar Corp*., the U.S. Court of Appeals for the Seventh Circuit explained the policy against the recognition of secret intent:

> The objective approach is an essential ingredient to allowing the parties jointly to control the effect of their document. If unilateral or secret intents could bind, parties would become wary, and the written word would lose some of its power. The ability to fix the consequences with certainty is especially important in commercial transactions that are planned with care in advance.

813 F.2d 810, 815 (7th Cir. 1987).

signifying agreement.[254] Thus, the law does not demand that the parties had "[h]armonious intentions or states of mind."[255] Citing a famous law review article by Oliver Wendell Holmes, the Florida Supreme Court concisely summarized the applicable law: "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs – *not the parties having meant the same thing but on their having said* the same thing."[256]

As indicated by the above observation from the Florida Supreme Court, evidentiary concerns explain the pre-eminence of the objective standard.[257] In a frequently cited opinion, the U.S. Court of Appeals for the Third Circuit commented in *Mellon Bank, N.A. v. Aetna Business Credit, Inc.*,[258]

> It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent.[259]

2. When Consumers Click "I Agree" – An Ambiguous Action?

In a key unexamined issue, Kar and Radin did not address whether a merchant would be justified in concluding that the buyer who clicks the "I agree" button in an online computer contractual transaction is necessarily manifesting binding assent. Where the merchant sufficiently discloses the terms of an offer to the offeree, the consumer's clicking "I agree" is the consumer's unambiguous, voluntary, and affirmative act of assent that equates to a signature. It should not be required for the consumer here to make an online statement to the effect that "I consent – and I really mean it."

As one commentator observed:

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254. *See* Newkirk v. Vill. of Steger 536 F.3d 771, 774 (7th Cir. 2008); D'Antuono v. Serv. Rd. Corp., 789 F. Supp. 2d 308, 323 (D. Conn. 2011) (signature usually conclusive evidence of consent); Wash. Greensview Apartment Assoc. v. Travelers Prop. Cas. Co., 295 P.3d 284, 292 (Wash. Ct. App. 2013).

255. Devlin v. Ingrum, 928 F.2d 1084, 1095 (11th Cir. 1991) (citing Lilley v. Gonzales, 417 So. 2d 161, 163 (Ala. 1982)).

256. Gendzier v. Bielecki, 97 So. 2d 604, 608 (Fla. 1957) (citing Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897)).

257. *Id.* at 608.

258. 619 F.2d 1001 (3d Cir. 1980).

259. *Id*. at 1009.

> Many courts . . . have found the act of clicking an "I agree" button to be an express manifestation of assent to contract terms. Some opinions have said so explicitly, while others seem to assume without discussion that when an offeree is required to click the "I agree" button, she knows that she is entering into a contract.[260]

For instance, when the consumer tenders this "explicit acceptance" of a software license agreement, numerous courts properly indicate that this conduct raises no contestable issues of fact upon a motion for summary judgment.[261] An exception would be where a consumer – the offeree – clicks the "I agree" button would not manifest assent to contractual terms in the relatively infrequent circumstance where the seller's offer fails to inform the consumer that this action would signify assent to the terms or where the consumer's response both affirms and contradicts the manifestation of assent.

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

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

If consent to be legally bound is the basis of contractual enforcement, rather than the making of a promise, then consent to be legally bound seems to exist objectively. Even under the modern objective theory, there is no reason for the other party to believe that such subjective consent is lacking. Even if one does not want to be bound, one knows that the other party will take this conduct as indicating consent to be bound thereby.[262]

3. The Policy of the Objective Theory

Kar and Radin did not discuss in any depth the policy for the objective theory. Understanding its rationale clarifies why this doctrine has succeeded as the prevailing mode for ascertaining the existence of mutual assent even for standardized or boilerplate agreements.

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260. Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1323–24 (2005).

261. *See* i.Lan Sys. v. Netscout Serv. Level Corp., 183 F. Supp. 2d 328, 338 (D. Mass. 2002); *see also* Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 837 (S.D.N.Y. 2012).

262. Barnett, *supra* note 3, at 635.

The objective test protects the "fundamental principle" of the security of contracting actions as it maintains a "[w]orkable system of commerce and economic exchange."[263] The goal of the objective test is that by requiring evidence beyond litigation-motivated, post hoc descriptions of the parties' earlier states of mind, the judicial system increases the reliability of its decision-making process.[264] A related policy is that the objective test allows the first party to have little or no reason to fear that the second party may thereafter void the contract by his claiming either a failure to read or a subjective misunderstanding of the agreement.[265]

As Grant Gilmore opined,

> [I]f "the actual state of the party's minds" is relevant, then each litigated case must become an extended factual inquiry into what was "intended," "meant," "believed" and so on. If, however, we can restrict ourselves to the "externals" . . . then the factual inquiry will be much simplified and in time can be dispensed with altogether as the courts accumulate precedent about recurring types of permissible and impermissible "conduct."[266]

Because it emphasizes external, ascertainable events regarding the deal, the objective test upholds the value of unbiased adjudication and readily captures the parties' manifested intent before a dispute arises between the parties.[267]

The root cause of the authors' detour from prevailing law was that Kar and Radin overlooked the nature of contract as expounded by Learned Hand in a 1911 case still cited regularly in the 21st century:

> *A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties.* A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, if it were proved by twenty bishops that either party, when he used the

263. Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1129 (2008).

264. Solan, *supra* note 70, at 380.

265. Allied Office Supplies Inc. v. Lewandowski, 261 F. Supp. 2d 107, 112 (D. Conn. 2003); *see also* SR Int'l. Bus. Ins. Co., v. World Trade Center Props., LLC, 467 F.3d 107 (2d Cir. 2006); Dugan v. Brunswick Sewerage Co., 142 F.3d 398 (7th Cir. 1998) (subjective evidence made through the testimony by a party on the meaning of a contract is invariably self-serving and inherently difficult to verify); Apeldyn Corp. v. Eidos, LLC, 943 F. Supp. 2d. 1145, 1149 (D. Or. 2013) (statements of a party's subjective intent that were not expressed or communicated when the contract was formed are not permissible evidence of intent).

266. GRANT GILMORE, DEATH OF CONTRACT 47 (2d ed. 1995).

267. *Id.*

> words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appears by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.
>
> . . . .
>
> Yet the question always remains for the court to interpret the reasonable meaning to the acts of the parties, by word or deed, *and no characterization of its effect by either party thereafter, however truthful, is material*. The rights and obligations depend upon the law alone.[268]

As Professor Lawrence A. Solan commented, Judge Hand rejected the inherently unreliable party testimony about an intent that the party never manifested in contemporaneous – and verifiable – fashion to the opposing party during contract formation.[269] Indeed, under the strict or literal version of the objective theory, the courts examining mutual assent are generally limited in their evidentiary scope of review to the four corners of an unambiguous document.[270] These decisions further exemplify the strong connection between the objective theory, the plain meaning rule, and the nature of contract (per Judge Hand).

Finally, the objective theory of contracts comports with the need and reason for voluntary assent.[271] The rule preserves individual autonomy because the coercive power of the state allows the parties to exercise their personal freedom with the result that "[c]onsent is the human vehicle for exercising freedom or autonomy."[272] Also, the objective doctrine enhances the freedom of contract because the law allows parties the increased ability to manage their business relationships "[b]y limiting operative manifestations to those that are

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268. Hotchkiss v. Nat'l City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) (emphasis added); Chesapeake Energy Corp. v. Bank of N.Y. Mellon Tr. Co., N.A., 773 F.3d 110, 120 (2d Cir. 2014); Galvin v. EMC Mortg. Corp., 27 F. Supp. 3d 224, 230 (D.N.H. 2014); *see also* Grosse Pointe Park v. Mich. Mun. Liab. and Prop. Pool, 702 N.W.2d 106, 123 (Mich. 2005) ("[I]t is during litigation that a party's motivations are the most suspect and the party's incentives the greatest to attempt to achieve that which the party could not during the give-and-take of the contract negotiation process.").

269. Solan, *supra* note 70, at 379–80.

270. "[T]he objective theory of contracts . . . limits the court to the four corners of [a clear and definite] contract in determining the intention of the parties." In re Federated Dep't Stores, Inc., 240 B.R. 711, 722 (Bankr. S.D. Ohio 1999) (quoting Cloverland Farms Dairy, Inc. v. Fry, 587 A.2d 527, 529–30 (Md. 1991)) (calling this position "the majority view").

271. Barnes, *supra* note 263, at 1154.

272. *Id*. at 1129.

received and known by the parties to the negotiation."[273] Lastly, it protects the parties' reliance and expectation interests.[274] Regrettably, Kar and Radin mentioned none of these salutary principles in their article.

F. The Subjective Theory Compared

The main reason for the demise of the subjective theory was that courts "[r]efuse to inquire into the subjective mental processes of each of the parties to a contract, except in the most compelling circumstances."[275] As Judge Frank Easterbrook said in a colorful way, "Yet [contract] 'intent' does not invite a tour through [a party's] cranium, with [that party] as the guide."[276] Another risk is that reliance on the subjective test could create what one commentator called a "de facto option" in the promisor. As Randy Barnett stated: "Such a strategy might create a de facto option in the promisor. The promisor could insist on enforcement if the contract continued to be in her interest, but if it were no longer advantageous, she could avoid the contract by producing evidence of a differing subjective intent."[277] Because the subjective approach relies on evidence directly inaccessible to the other party, much less to third parties, broad judicial consideration of subjective intent would undermine the security of transactions by greatly reducing the reliability of contractual commitments."[278] For many decades, "[t]he controversy has been resolved. Contract law abandoned the theory of subjective intention as unworkable."[279]

In arguing that the boilerplate in most standard form contracts does not lead to actual assent, Kar and Radin's argument led inexorably to the conclusion that they endorsed the subjective view of contractual assent with respect to boilerplate. In a commentary directly on point for this issue, Randy Barnett stated,

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273. *Id.* at 1131.

274. *Id*. at 1157.

275. While the subjective theory as a general doctrine of assent no longer prevails, vestiges have survived. One qualification is "The subjective meaning attached by either party to a form of words is not controlling on the scope of the agreement between the parties unless one party knows or has reason to know of a particular meaning attached by the party manifesting assent." Brokers Title Co. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1181 (3d Cir. 1979).

276. Skycom Corp. v. Telstar Corp., 813 F.2d 810, 814 (7th Cir. 1987). The court further observed: "Secret hopes and wishes count for nothing. The status of a document as a contract depends on what the parties express to each other and to the world, not on what they keep to themselves." *Id.* at 814–15.

277. Randy Barnett, *Contract is not Promise; Contract is* Consent, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW, 45–46 (Gregory Klass et al., eds 2014).

278. *Id.*

279. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 30, at 61–64 (4th ed. 2001).

> *[I]f a subjective view of contractual assent is taken, then form contracts pose a very serious problem*. If a person must consciously have had the particular terms in mind when signifying agreement to them, then most terms in most form contracts lack assent. Most people fail to read most terms most of the time and no person can credibly claim to read all of the terms in form contracts all of the time . . . *Hence the problem: How can someone be said to have "actually"– meaning subjectively – consented to terms of which one was completely unaware?* To impute subjective assent to the person indicating consent to a form is obviously to engage in a fiction. Under a subjective theory of contractual assent, very few, if any, of the terms in a form contract would be assented to.[280]

Barnett repeatedly notes that "actual" consent specifically means "subjective" assent to boilerplate.[281] Because a pillar of shared meaning analysis is an "actual agreement," which was the linchpin of their thesis, Kar and Radin fully embraced the "unworkable" subjective theory as the foundation for their proposal.

G. How Much Sharing is Needed for Shared Meaning?

The next flaw in the authors' "shared meaning" doctrine conflicts with the principle that "[c]ourts must give effect to the manifest intent of the parties as it existed at the time of contract formation."[282] Unfortunately, no objective way exists for the parties to know *ex ante* what terms a court *ex post* would rule constitutes the actual agreement versus the "ride along" text. Under the authors' shared meaning analysis, as critiqued above, Kar and Radin run headlong against the reality that "[o]nly rarely can one party show that the meaning that it asserts at the time of the dispute was shared by both parties at the time the contract was made."[283] The parties will know for sure which clauses are either part of the actual agreement or ride along terms only by the settlement or after the conclusion of litigation, which is costly and time-consuming. Accordingly, under a shared meaning analysis regime, boilerplate contracts from the moment of formation would exist under a cloud of uncertainty over which terms are judicially enforceable, which would further impair the predictability and reliability of contractual relationships. Kar and Radin did not examine this flaw in their theory.

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280. Barnett, *supra* note 3, at 626–29.

281. *Id.*

282. Associated Mgmt. Servs., Inc. v. Ruff, 424 P.3d 571, 586 (Mont. 2018); Thor Seafood Corp. v. Supply Mgmt. Servs., 352 F. Supp. 2d 1128, 1131 (C.D. Cal. 2005).

283. 2 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.9 (3d ed. 2004); *see also* Baladevon, Inc. v. Abbott Labs., Inc., 871 F. Supp. 89 (D. Mass. 1994).

Nevertheless, the authors indicated that sufficient common meaning either exists between the parties or can usually be unearthed upon diligent review.[284] Contrary to the impression left by Kar and Radin about a discoverable common meaning, it bears repeating that "[i]n practice, only rarely can one party show that the meaning that it asserts at the time of the dispute was shared by both parties at the time the contract was made."[285] In fact, the chances of parties sharing the same interpretation of a particular issue are very low because contracts are structurally incapable of addressing the myriad circumstances that can arise. Professors Coyle and Wedemaier commented:

> Everyone knows that contracts are incomplete, in that they do not describe and discount "all relevant future contingencies . . . with respect to both likelihood and futurity." One reason for incompleteness is that parties do not have complete presentation. Even if this were not so – that is, even if parties could assign a probability and value to all possible future states of the world – it would be prohibitively costly to negotiate and draft a contract covering such an infinitude of possibilities.[286]

The above conclusion raises another issue under shared meaning analysis; namely, once a court deletes the non-binding boilerplate, are the admissible portions of the contract sufficient to constitute a binding contract? According to *Restatement (Second) of Contracts* § 33(2), the general rule is that a contract is sufficiently definite and certain to be enforceable where, based upon the agreement's terms, the rules of construction, and principles of equity, a court can ascertain what the parties have agreed to do.[287] Whether these terms are sufficiently definite is a different inquiry than what terms the parties considered material and essential to that agreement. In considering enforceability, the court may opine that striking these terms could leave the parties with an inadequate shell of a contract if the application of shared meaning analysis eradicates essential terms.[288]

The authors' suggestion that courts may routinely excise ride-along terms as being non-consensual runs counter to fundamental polices that courts do not ignore or delete contract terms except for strong reasons. Thus, the settled rule is courts prefer an interpretation that gives reasonable meaning to all provisions to one that leaves a portion of the agreement useless, meaningless, without

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284. *See* Kar & Radin, *supra* note 4, at 1165.

285. *See supra* note 283 and accompanying text.

286. John F. Coyle & W. Mark C. Weidemaier, *Interpreting Contracts Without Context*, 67 AM. U. L. REV. 1673, 1677 (2018).

287. Eagle Force Holdings, LLC v. Campbell, 187 A.3d 1209, 1232 (Del. 2018).

288. *See* Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 587–88 (2d Cir. 1998) (stating, "if the terms of the agreement are so vague and indefinite that there is no basis or standard for deciding whether the agreement has been kept or broken . . . then there is no enforceable contract").

force and effect, or inexplicable.[289] No term – including boilerplate terms – should be rejected as surplusage if the court in examining the whole instrument can discover a reasonable purpose for the words.[290] These last mentioned principles alone would be a strong reason for a court to reject shared meaning analysis and its treatment of boilerplate. In a ruling especially damaging to Kar and Radin's thesis, the United States District Court for the District of Massachusetts observed, "All parts of a contract are to be given effect, whether 'boilerplate' or not."[291]

Further, courts are to "assume that the parties intended that a binding contract be formed," and "[t]hus, any choice of alternative interpretations, with one interpretation saving the contract and the other voiding it, should be resolved in favor of the interpretation that saves the contract."[292] Considering that Kar and Radin's apparent objective was to void most or all boilerplate contracts, with the inevitable impact of leaving the U.S economy in distress, courts should strive to enforce these contracts to the greatest extent possible.

H. The Ramifications of Shared Meaning Analysis

Because 99% of all contracts are consumer/vendor boilerplate transactions, [293] if Kar and Radin's approach to reforming boilerplate was first implemented on a limited basis and studied, a likely ramification would be a skyrocketing in transaction costs of contracting – and of the prices of most goods

289. Hunt Constr. Group, Inc. v. United States, 48 Fed. Cl. 456, 459 (Fed. Cl. 2001), *aff'd*, 281 F.3d 1369 (Fed. Cir. 2002); Bombay Realty Corp. v. Magna Carta, Inc., 790 N.E.2d 1163, 1165 (N.Y. 2003); *cf.* Robinson v. Tate, 236 S.W.2d 445, 450 (Tenn. Ct. App. 1950) (courts should make a reasonable construction of a contract and should not "deliberately emasculate" the agreement).

290. 17A AM. JUR. 2d CONTRACTS § 387 (1991); *see also* Eastman Kodak Co. v. STWB Inc., 232 F. Supp. 2d 74, 92 (S.D. N.Y. 2002) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981)).

291. Girardi Distributors, Inc. v. Truck Drivers Union, Local 170 Intern. Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am., 1989 WL 200979 (D. Mass. June 15, 1989) (also stating "Many contracts are pre-printed standard forms, i.e., all boilerplate. Try telling your mortgagee that its note and mortgage are unenforceable because they are 'boilerplate'"); Pietroske, Inc. v. Globalcom, Inc., 685 N.W.2d 884, 888 (Wis. Ct. App. 2004) ("[T]he fact that the service agreement is a boilerplate contract does not prevent a true meeting of the minds."). For other cases stating without qualification that boilerplate terms can be binding, *see, e.g.*, JPMorgan Chase Bank, N.A. v. Winget, 602 Fed. Appx. 246 (6th Cir. 2015); Albany Ins. Co. v. MV SEALAND URUGUAY, No. 00CIV.3497 2002 WL 1870289 at *3 (S.D.N.Y. Aug. 13, 2002); Carolina Cas. Ins. Co. v. Sharp, 940 F. Supp. 3d 569, 577 (N.D. Ohio 2013).

292. Stevens Aviation, Inc. v. DynCorp Int'l LLC, 756 S.E.2d 148, 153 (S.C. 2014).

293. Stephen J. Ware, Comment, *A Critique of The Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461, 1463 (1989) (citing W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971)).

and services. The length of contracts would necessarily double or triple, and the time needed to enter contracts could be indeterminable until such time that merchants and consumers could validate an "actual agreement."

Such a pilot study also would likely provide important evidence that, given the breadth and depth of the effects of shared meaning analysis, the chances are very high that the authors' proposal would fall victim, in whole or in part, to unforeseen effects pursuant to the law of unintended consequences:

> The law of unintended consequences is a frequently-observed phenomenon in which any action has results that are not part of the actor's purpose. The superfluous consequences may or may not be foreseeable or even immediately observable and they may be beneficial, harmful or neutral in their impact. In the best-case scenario, an action produces both the desired results and unplanned benefits; in the worst-case scenario, however, the desired results fail to materialize and there are negative consequences that make the original problem worse.[294]

Such adverse outcomes are increasingly likely to occur when a deceptively simple solution – such as shared meaning analysis – seeks to regulate the highly complex world of commercial purchasing.[295] Nevertheless, without any evidence, the authors confidently proclaimed, "Not enforcing these pseudo-contract provisions will not only help return contract regimes to the core of private ordering but it will also help produce more efficient markets."[296] How Kar and Radin reached this conclusion is unclear, but as pointed out elsewhere in this Article, Kar and Radin subscribe to the romantic myth that contracts with minimal content necessarily lead to superior results.[297] This reasoning is errant because "ordinary contracts from the romantic era of pre-boilerplate . . . are surprisingly complex and sometimes leave more uncertainty than the thick boilerplate of the mass-contract era."[298]

The final problem is that, from a practical standpoint, courts are naturally going to resist adopting a theory that 99% of all consumer contracts in the

294. Margaret Rouse, *Law of Unintended Consequences*, WHATIS.COM (Feb. 2016), https://whatis.techtarget.com/definition/law-of-unintended-consequences [perma.cc/AX3Y-W7WC].

295. *See* In re Schwartz, 461 B.R. 93, 98 n.4 (Bankr. D. Mass. 2011) (noting similar observation about the typical impact of the law of unintended consequences).

296. Kar & Radin, *supra* note 4, at 1179–80, n.127. The authors also observe, "Shared meaning analysis offers courts a general and flexible way to avoid legal errors that can result from failures to recognize and eliminate hidden conflicts." *Id.* at 1192. Kar and Radin set up a false dilemma when discussing the resolution of conflicts between the actual agreement and the ride-along text. Put another way, there can never be a conflict between the actual agreement and ride along terms when the latter have no salience of any kind to the agreement.

297. *Id.* at 1180 (giving an example of a "short and clear" timber sales contract in rural Minnesota from 1885).

298. *See supra* note 188 and accompanying text.

United States might not be enforceable in whole or in part because of the lack of shared meaning.[299] The common law generally prefers incremental changes to doctrine as compared to demolishing one legal regime and replacing it with another. Based on the many concerns discussed above, the wholesale application of shared meaning analysis would disturb the rights and responsibilities the parties allocated at contract formation and increase the unpredictability and uncertainty of contractual relations – which would contradict two of contract law's most important normative goals.[300]

VI. SHARED MEANING ANALYSIS AND FREEDOM OF CONTRACT

Kar and Radin argued that the current system deprives consumers of their freedom of contract.[301] They also contended that shared meaning analysis does not interfere with the established principles of freedom of contract but facilitates economic liberty because the parties are able to execute the actual agreement.[302] Before delving into the authors' argument, this Section will summarize the established elements of freedom of contract.

A. General Principles of Freedom of Contract

"Freedom of contract" is a fundamental aspect of American commerce. The doctrine represents a party's "power to decide whether to contract and to establish the [contract] terms."[303] Many courts have commented:

> [I]f there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred, and shall be enforced by courts of justice. Therefore, you have this paramount public policy to

299. *See* Eric A. Zacks, *The Restatement (Second) of Contracts § 211*: *Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 733 (2016) ("judges historically have been reluctant to disturb standardized consumer contracts, regardless of the applicable doctrine").

300. *See* Anthony J. Bellia, Jr., *Contracting with Electronic Agents*, 50 EMORY L.J. 1047, 1073 (2001) (noting these two normative bases of contract).

301. Kar & Radin, *supra* note 4, at 1214 ("Because of these conceptual distortions [in current law], many legal actors, as well as the public, have begun to lose track of what contract and freedom of contract even are.").

302. *Id.* at 1138. ("Without the presence of an actual agreement freely reached, the state is not easily justified in enforcing a contract, because instead of enhancing the parties' freedom of contract, the legal system would be limiting it.").

303. Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues*, 77 UMKC L. REV. 647, 654 (2009).

> consider,[] that you are not lightly to interfere with this freedom of contract.[304]

Freedom of contract balances party autonomy and party accountability. First, with the autonomy component, parties have the right to bind themselves legally; it is a judicial concept that contracts are based on mutual agreement and free choice.[305] Importantly, parties may exercise their liberty to contract even if the agreement "may not seem desirable or pleasant to outside observers [such as law professors]."[306] Second, under the accountability component, parties must accept the consequences of their voluntary choices. The general rule of freedom of contract includes the need for a party to accept a possible bad bargain without court interference or paternalism.[307]

To accomplish this goal, freedom of contract confines courts to their judicial function and dictates that they should not rewrite contracts to make them more equitable[308] or reallocate the rights and obligations the parties have accepted under their agreement.[309] This judicial self-restraint is so strong and the public interest in contract enforcement is so important[310] that "[t]he fairness or unfairness, folly or wisdom, or inequality of contracts are questions exclusively within the rights of the parties to adjust at the time the contract is made."[311]

Freedom of contract also has a *societal impact* as it promotes "[t]he necessary certainty, stability and integrity of contractual rights and obligations."[312] On the one hand, the public interest demands that "individuals have broad powers to order their own affairs by making legally enforceable promises."[313] Liberty of contract allows both buyers and sellers to benefit from a productive commercial environment.[314] To the same end, the law encourages parties to

304. *See e.g.*, Balt. & Ohio Southwestern Ry. v. Voigt, 176 U.S. 498, 505–06 (1900); *see also*, First Ala. Bank of Montgomery v. First State Ins. Co., 899 F.2d 1045, 1085–86 (11th Cir. 1990); Baugh v. Novak, 340 S.W.3d 372, 382 (Tenn. 2011).

305. *Autonomy*, BLACK'S LAW DICTIONARY (9th ed. 2009).

306. Guiliano v. Cleo, Inc., 995 S.W.2d 88, 100 (Tenn. 1999).

307. *Id.*

308. *See* Morta v. Korea Ins., 840 F.2d 1452, 1460 (9th Cir. 1988); Westmoreland v. High Point Healthcare Inc., 721 S.E.2d 712, 722–23 (N.C. Ct. App. 2012); *see also* CHARLES FRIED, CONTRACTS AS PROMISE 113 (1981) ("If we take autonomy seriously as a principle for ordering human affairs . . . people must abide by the consequences of their choices . . . .").

309. *See* Marriott Corp. v. Dasta Constr. Co., 26 F.3d 1057, 1068 (11th Cir. 1994) (internal citations omitted).

310. El Paso Field Servs., L.P. v. MasTec N. Am., Inc., 389 S.W.3d 802, 811–12 (Tex. 2012).

311. Barnes v. Helfenbein, 548 P.2d 1014, 1021 (Okla. 1976).

312. McCall v. Carlson, 172 P.2d 171, 187–88 (Nev. 1946).

313. Kona Vill. Realty, Inc. v. Sunstone Realty Partners, XIV, 236 P.3d 456, 458 (Haw. 2010) (quoting City Express, Inc. v. Express Partners, 959 P.2d 836, 840 n.4 (Haw. 1998)).

314. *Id.*

maximize their personal objectives – "striving for that advantage is the source of much economic progress."[315] On the other hand, "the freedom to contract is not unlimited and . . . contracts that are contrary to public policy will not be enforced."[316]

The upshot is that "hard bargaining is not only acceptable, but indeed, desirable, in our economic system, and should not be discouraged by the courts."[317] The ordinary consumer has no special immunity from the consequences of his or her choices.[318] Accordingly, a fundamental principle of contract law is "[w]ise or not, a deal is a deal."[319]

B. Freedom of Contract and Boilerplate

With respect to boilerplate, the Michigan Supreme Court, in a wide-ranging analysis of the issues, has been emphatic that freedom of contract is fully available with adhesion contracts.[320] In considering an insurance policy – a ubiquitous adhesion contract[321] – the Michigan high court observed: "When a court abrogates unambiguous contractual provisions based on its own inde-

315. Indust. Representatives, Inc. v. CP Clare Corp., 74 F.3d 128, 131–32 (7th Cir.1996); *see also* Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 466 (2005) ("A long held assumption about market behavior is that optimal results on the whole obtain when each individual actor in the market chooses the best option for that individual.").

316. Lewis v. Giordano's Enterprises, Inc., 921 N.E.2d 740, 753 (Ill. Ct. App. 2009); *see also* DeVetter v. Principal Mut. Life Ins., 516 N.W.2d 792, 794 (Iowa 1994) ("For a court to strike down a contract on [public policy] grounds, it must conclude that the preservation of the general public welfare imperatively . . . demands invalidation so as to outweigh the weighty societal interest in the freedom of contract.").

317. 28 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 71:7 (4th ed. 2003); *see also* Cabot Corp. v. AVX Corp., 863 N.E.2d 503, 512 (Mass. 2007) ("Absent any legally cognizable restraint," both parties remain "free to drive whatever bargain the market [will] bear.").

318. Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) ("Courts have been reluctant to assume consumers are too ignorant and benighted to fend for themselves merely because they are poor.").

319. United Food & Com. Workers Union v. Lucky Stores, Inc., 806 F.2d 1385, 1386 (9th Cir. 1986).

320. Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 35 (Mich. 2005); *see also* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 563, 588 (1932) (extensive statement of the "all important" role standardization plays in safeguarding freedom of contract).

321. *See e.g.*, Max True Plastering Co. v. U.S. Fidelity & Guar. Co., 912 P.2d 861, 864 (Okla. 1996) ("Insurance contracts are contracts of adhesion because of the uneven bargaining positions of the parties.").

pendent assessment of 'reasonableness,' the court undermines the parties' freedom of contract."[322] Thus, Michigan and other jurisdictions see no contradiction between adhesion contracts and the freedom of contract.[323] Similarly, courts should construe standard form contracts and individually negotiated contracts under the same general principles.[324]

Kar and Radin did not address these perspectives. Even where the contracting parties have manifested their assent to standardized adhesion clauses, Kar and Radin created what amounts to a public policy defense against the enforcement of boilerplate in the guise that these terms are outside the parties' actual agreement.[325] Even assuming that consumers in this situation are making a poor choice, a Florida District Court of Appeals decision explained: "People should be entitled to contract on their own terms without the indulgence of paternalism by courts [or commentators] in the alleviation of one side or another from the effects of a bad bargain."[326] Put another way, the consumer has the right to make up his own mind about the risks and benefits of a contract notwithstanding the opinions of outside persons who believe that a non-negotiable contract with captive prospective buyers is the sheerest of follies.[327]

Finally, in keeping with their consistent tilt in favor of consumers, Kar and Radin offered little, if any, discussion of the merchant's right of freedom of contract in boilerplate. For the authors, the *merchant's* freedom of contract in this area need go only so far as complying with what the *buyer* determines to be the boundaries of the actual agreement.[328] This theme is apparent from

322. *See Rory*, 703 N.W.2d at 33.

323. *See also* Bailey v. Lincoln Gen. Ins. Co., 255 P.3d 1039, 1047 (Colo. 2011) ("The freedom to contract is especially important in the insurance industry, as insurance policy terms are the primary means by which parties distribute and shift risk."); Forecast Homes, Inc. v. Steadfast Ins. Co., 105 Cal. Rptr. 3d 200, 213 (Cal. Dist. Ct. App. 2010).

324. *See Rory*, 703 N.W.2d at 31, 35, 42 (standard form contracts are contracts subject to traditional principles of contract interpretation).

325. *See* Kar & Radin, *supra* note 4, at 1202.

326. Fotomat Corp. of Fla. v. Chanda, 464 So. 2d 626, 630 (Fla. Dist. Ct. App. 1985); *see also* Honorable v. Easy Life Real Estate Sys., 100 F. Supp. 2d 885, 888 (N.D. Ill. 2000) ("Courts have been reluctant to assume consumers are too ignorant and benighted to fend for themselves merely because they are poor."); Johnson v. Fireman's Fund Ins. Co., 272 N.W.2d 870, 875–76 (Iowa 1978) (Reynoldson, C.J., concurring) ("A jurist's personal disdain for any particular clause is wholly irrelevant if the contracting parties have agreed to include it in their contract.").

327. *See* Guiliano v. Cleo, Inc., 995 S.W.2d 88, 100 (Tenn. 1999) ("Generally, the parties to a contract are free to agree upon . . . terms that may not seem desirable or pleasant to outside observers").

328. *See* Kar & Radin, *supra* note 4, at 1179 ("[parties] cannot create a common meaning of the parties without actually creating that common meaning.").

Kar and Radin's claim that shared meaning analysis purportedly does not "regulate parties' actual agreements for fairness or on any other ground."[329] However, the above statement lacks support because the authors' primary reason for shared meaning analysis is, in fact, to regulate the market by preventing what they considered to be exploitation of consumers.[330] While there will always be the potential for merchant abuses of consumers, just as there will always be the potential for consumer abuses of corporations,[331] the authors got too close to – and perhaps went over – the line of denying businesses their valid rights in boilerplate merely because such recognition could impair consumer bargaining power.

Without empirical support, the authors subscribed to a normative ideal that markets function better when consumers and merchants bargain as free and equal parties, thereby leading to a favorable bargain for each side.[332] Kar and Radin further believed that it is feasible and desirable to level out merchant advantages through shared meaning analysis.[333] Thus, the authors would significantly restrain the merchant's freedom of contract with no guidance over what constitutes the seller's "most essential" terms. Implicitly, these terms are "few" in number, and their purpose is to avoid "battles" between the parties, all subject to the consumer's satisfaction.[334] Given the subjective nature of shared meaning analysis, established above, this proposal further shows Kar and Radin's slanted definition of freedom of contract.

VII. A PARTY'S DUTY TO READ AND UNDERSTAND CONTRACTS

Boilerplate contracts are known for the reality that consumers generally do not read these agreements in any depth before signing them.[335] Where a consumer signs such a form contract without reading or understanding it, some

329. *Id*.

330. *Id*. Kar and Radin argue that assimilationist approaches improperly invite new and expanding forms of market deception. According to the authors: "[M]arket forces have begun to interact with assimilationist legal doctrine to create powerful incentives for businesses systematically to mislead consumers through what is sometimes called careful contract design." *Id*. at 1196.

331. *See* Katie Reilly, *Shoplifting and Other Fraud Cost Retailers Nearly $50 Billion Last Year*, MONEY.COM (June 22, 2017), http://time.com/money/4829684/shoplifting-fraud-retail-survey/ [perma.cc/95RD-3VF6] (loss of inventory from shoplifting alone cost the U.S. retail industry approximately $18 billion in 2016).

332. Kar & Radin, *supra* note 4, at 1161 (stating the premises of the American market economy as focusing on "parties with equal capacities to define and enter into only those terms that both agree offer expected gains for each").

333. *Id*.

334. *Id*. at 1179.

335. David v. M.L.G. Corp., 712 P.2d 985, 992 (Colo. 1986) ("It is common knowledge that the detailed provisions of standardized contracts are seldom read by consumers.").

contemporary courts continue to cite nineteenth century precedents that "[i]t will not do for a man to enter a contract, and, when called upon to respond to its obligations, to say he did not read it when he signed it, or did not know what it contained."[336] This principle subsequently became known as the "duty to read" doctrine[337] – better stated as the duty to read *and* understand the contract because merely reading the contract is no defense to liability.[338] Absent an invalidating cause for modifying or overturning an agreement a party has a broad duty "to read its contract and to learn its contents before signing it."[339] This "duty to read" is a "basic tenet of contract law"[340] and is closely aligned with the plain meaning rule.[341] The main consequence will be that absent the other side's fraud, misrepresentation, or similar misbehavior, a party to a contract is legally bound by its terms whether or not she has actually read or understood them.[342]

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336. Upton v. Tribilcock, 91 U.S. 45, 50 (1875). For a sampling of decisions relying on *Upton*, *see* K–Con Bldg. Sys., Inc. v. United States, 131 Fed. Cl. 275, 318 (Fed. Cl. 2017); Bell v. Land Title Guarantee Co., 422 P.3d 613, 616 (Colo. Ct. App. 2018); ABM Farms, Inc. v. Woods, 692 N.E.2d 574, 579 (Ohio 1998); *cf.* Clayton P. Gillette, *Rolling Contracts As An Agency Problem*, 2004 WIS. L. REV. 679, 680 (explaining why consumers can be "perfectly rational" not to read or understand the terms, "[e]specially given the inability to negotiate around terms, if the buyer accurately predicts that the costs of review exceeds its benefits"); Melvin Aron Eisenberg, *The Limits of Cognition and the Limi*ts of Contract, 47 STAN. L. REV. 211, 243 (1995).

337. John D. Calamari, *Duty to Read – A Changing Concept*, 43 FORDHAM L. REV. 341, 341 n.4 (1974) (a party generally owes this so-called duty to himself as opposed to a third party); *see also* Charles L. Knapp, *Is There a "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1085–86 (2015) ("A person signing an agreement has a duty to read it and, absent a showing of fraud, if the person is capable of reading and understanding the contract then he is charged with the knowledge of what the contract says . . . He cannot avoid the consequences of what he signed by simply saying that he did not know what he signed.").

338. *See, e.g.*, Dasz, Inc. v. Meritocracy Ventures, Ltd., 969 N.Y.S.2d 653, 655 (N.Y. App. Div. 2013) (stating a "duty to read and understand" the agreement).

339. Burwell v. S.C. Nat'l Bank, 340 S.E.2d 786, 789 (S.C. 1986); *see also* Roberts v. Roberts, 618 S.E.2d 761, 764 (N.C. Ct. App. 2005).

340. Woodruff v. Bretz, Inc., 218 P.3d 486, 495 (Mont. 2009) (internal citations omitted).

341. *See* Kaiser Aluminum Corp., Inc., No. 02-10429, 2004 WL 97658, at *3 (Bankr. D. Del. Jan. 16, 2004).

342. The authors rely upon *Restatement (Second) of Contracts* Section 211(3), which closely resembles shared meaning analysis. Kar & Radin, *supra* note 4, at 1202. The *Restatement* provides that regarding unread or misunderstood boilerplate, "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement." RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981). Most commentators have concluded that Section 211 has been a failure because it contradicts the objective theory of mutual assent. *See, e.g.*, Zacks, *supra* note 299, at 747–

Other rationales for the duty are: the ignorant party is estopped from raising the defense of the lack of consent to unread terms;[343] the party is bound by a conclusive presumption of knowledge of the terms;[344] the uninformed signatory is held to the terms because he was negligent or assumed the risk of unfavorable terms;[345] or the promisee failed unjustifiably to protect his or her own interests.[346] In fact, a party's testimony or other evidence to prove his prior uncommunicated subjective understanding of his contract is inadmissible.[347]

Kar and Radin did not delve into the doctrinal basis for the duty to read or the sound policies it advances. Instead, the authors argued that the increased complexity and length of modern contracts makes the duty to read an unfair, impracticable relic.[348] The only circumstances that they said would justify invocation of this principle is for text that has been "cooperatively communicated, i.e., the parties specifically agreed to the wording"[349]

Kar and Radin further criticized this line of authority by complaining that when a merchant delivers copious boilerplate to consumers during the formation stage of contracting, "[i]t is typically the *business* that is behaving *badly* by violating the cooperative norms of language use – not the consumer who cannot but fail to read all this copious boilerplate text and live a normal life."[350] Respectfully, this passage is hyperbole – the authors strained credulity as they inferred a merchant's lack of good faith and fair dealing based largely on the proposed contractual page count. In many sectors of the economy, lengthy contracts are necessary given the complexity of the subject matter, an example would be a contract for the sale of a residence. Moreover, given the

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48; Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article* 2 *of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 899–901 (2016). Kar and Radin say that the commentators are only "partially right" insofar as assimilationist courts fail to embrace shared meaning analysis. Kar & Radin, *supra* note 4, at 1202–03.

343. Knapp, *supra* note 337, at 1086.

344. Barnes, *supra* note 223, at 250–51.

345. Calamari, *supra* note 337, at 341.

346. Allied Office Supplies Inc. v. Lewandowski, 261 F. Supp. 2d 107, 112–13 (D. Conn. 2003).

347. Apeldyn Corp. v. Eidos, LLC, 943 F. Supp. 2d. 1145, 1149 (D. Or. 2013) ("Statements of a party's subjective intent that were not expressed or communicated when the contract was formed are not permissible evidence of intent.").

348. Kar & Radin, *supra* note 4, at 1181.

349. *Id.*

350. *Id.* By making the point that consumers lack the time to read copious boilerplate, the authors' argument contains a questionable implicit premise, namely, consumers would benefit if the law required merchants to give the consumer a more substantial opportunity to read and understand boilerplate. *Id.* at 1140. This conclusion is dubious. Greater disclosure requirements are "useless" because they would not produce more consumer readership of contracts or more robust mutual assent in contract formation. Omri Ben Shahar, *The Myth of the Opportunity to Read in Contract Law*, 5 EUR. REV. CONT. L. 1, 6, 20 (2009) (stating "there is some evidence that the availability of terms in advance of the purchase does nothing to improve their content").

time and expense companies devote to the preparation of standardized forms that must address the company's entire customer base, it is counter-intuitive to contend that companies "typically" desire to harass their customers.

The duty to read and understand a contract rests on sound legal and economic policies. As shown above, the authors' rejection of the fundamental premise that the law holds a party responsible for reading and understanding its contract would impair the party's exercise of autonomy, thereby undermining the stability and predictability of contracts.[351] Absent enforcement of the purchaser's duty to read and understand the agreement, merchants would lack confidence in the commercial system.[352] The seller's fear would be that the purchaser could too easily complain that he had not read or understood the fine print in the contract; this argument would effectively stymie commercial activity in the marketplace.[353] Because a consumer would evidence such a contention largely or even solely on his subjective intent, no reliable method exists to sort out meritorious claims that a consumer failed to understand the terms.[354]

Additional legal principles support the duty to read and understand the contract. For example, the New Mexico Supreme Court in *Morstad v. Atchison, T. & S. F. Railway Co.* reasoned that, absent fraud or similar invalidating cause, the contract signatory "owes it to the other party to read or have read, the contract . . . because the other party has a right to and does conform his own conduct to the requirements of the contract . . . ."[355] Another supporting principle is that the duty to read and understand the terms preserves fairness to merchants because the law should preclude consumers from accepting the benefits under the contract while selectively denying the existence of disliked provisions.[356]

Lastly, the "[d]uty to read rule derives from the objective theory of contract."[357] The consequences of the "duty to read" doctrine are consistent with

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351. Kar and Radin's attack on the cases following the duty to read and the consequences to the consumer fails to account for the numerous exceptions to the doctrine in addition to fraud or mistake. The leading contracts treatise mentions the various causes in this category, for example, the print is too fine to be legible or is so cramped to be unreadable. 2 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 6:47 (4th ed. 2018).

352. *See* Barnes, *supra* note 223, at 237–38.

353. ABC Farms, Inc. v. Woods, 692 N.E.2d 574, 579 (Ohio 1998) (quoting Upton v. Tribilcock, 91 U.S. 45, 50 (1875)).

354. *See supra* Part III.C.

355. Morstad v. Atchison, T. & S. F. Ry. Co., 170 P. 886, 889 (N.M. 1918).

356. *See* Colony Ins. Co. v. Jack A. Halprin, Inc., No. 3:10-CV-1059, 2012 WL 2859085, at *10 (D. Conn. July 11, 2012) (stating that not enforcing the duty to read would make attempts to enter into contracts "futile"); Graham v. State Farm Mut. Auto. Ins. Co. 565 A.2d 908, 911 (Del. 1989) ("adhesive nature of a contract does not allow the non-drafting party to reject contract terms that he later finds unappealing").

357. Allied Office Supplies, Inc. v. Lewandowski, 261 F. Supp. 2d 107, 112 (D. Conn. 2003).

the autonomy strand of freedom to contract.[358] Professors Robert E. Scott and Jody S. Kraus commented,

> The duty to read doctrine provides individuals with an incentive not to sign agreements unless they have read and understood them first. In this sense, it increases the likelihood that enforceable agreements will be informed and thus serve the value of autonomy. By increasing the likelihood that agreements are mutually informed, this rule would also increase the probability that agreements enhance social welfare (i.e., the consumer will be better off economically.).[359]

Based on Scott and Kraus's observation, the law preserves the purchaser's right of autonomy while advancing society's – and the merchant's – interest in the enforcement of valid contracts.[360]

VIII. PRECEDENTS CHALLENGING THE USE OF BOILERPLATE

Cases from various American jurisdictions comport with several themes in Kar and Radin's article. After summarizing the cases espousing the minority view, I will show why the majority view more faithfully supports the essential nature of contract.

A. Freedom of Contract

A surprising number of decisions or judicial observations directly support Kar and Radin's argument that standard form agreements can impair the consumer's freedom of contract under the autonomy principle.

A judge on the Illinois Court of Appeals once said, "Freedom of contract simply does not exist" where the merchant draws up the terms and the consumer who "merely 'adheres' to it has little choice as to its terms."[361] Another case observed that the "marketplace reality" suggests that freedom of contract in the sale of goods under an adhesion contract is actually "nonexistent."[362] Other courts stated that the consumer in this circumstance has little freedom of

358. Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts–A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law (Part I)*, 62 CLEV. ST. L. REV. 373, 408 (2014).

359. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 436 (4th ed. 2007).

360. Wayne R Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 865 (2010).

361. Tibbs v. Great Cent. Ins. Co., 373 N.E.2d 492, 498 (Ill. Ct. App. 1978) (Moran, J., dissenting) (quoting Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 22 (1920)).

362. Cate v. Dover Corp., 790 S.W.2d 559, 565 (Tex. 1990).

contract with no ability to look elsewhere for a more favorable contract.[363] In sum, a number of courts rule that free choice is lacking where (a) the play of the market does not bring the parties together, (b) the parties do not meet each other on an approximately equal economic footing, and (c) the two sides do not enter their contract as the result of free bargaining.[364]

Furthermore, Kar and Radin could have pointed out that the consumer's frequently weaker bargaining position has prompted some jurisdictions to institute a stricter level of judicial review and policing of an adhesion contract to help preserve freedom of contract.[365] These decisions would have bolstered the authors' argument that freedom of contract is largely a mirage for consumers given that merchants can be tempted to go over – and sometimes will go over – the line of fair bargaining. Therefore, true freedom of contract – from the authors' standpoint – is lacking in such a one-sided environment.

B. Cases Contesting Mutual Assent

A second line of cases uses a different mode of analysis from those decisions emphasizing the objective theory of contract, the plain meaning rule, the duty to read, and the existence of consumer assent for adhesion contracts. Various decisions pre-dating Kar and Radin's article shared their concerns that adhesion contracts do not fit the traditional model of offer and acceptance in a bargained-for exchange.

For example, the Tennessee Court of Appeals follows a unique theory of assent where one party signs a standard form contract furnished by the other party.[366] In this "circle of assent" doctrine, a party that signs such a document will be bound by the provisions in the form over which the parties actually bargained and by such other terms that are not unreasonable in view of the circumstances surrounding the transaction.[367]

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363. Madden v. Kaiser Found. Hosps., 552 P.2d 1178, 1186 (Cal. 1976).

364. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960); Price v. Gatlin, 405 P.2d 502, 507 (Or. 1965) (en banc); Gautreau v. S. Farm Bureau Cas. Ins. Co., 410 So. 2d 815, 818–19 (La. Ct. App. 1982), *rev'd on other grounds*, 429 So. 2d 866 (La. 1983); Pickering v. Am. Emp'rs Ins. Co., 282 A.2d 584, 593 (R.I. 1971) (stating that there is a higher burden to declare forfeiture of consumer rights); Perkins v. Standard Oil Co., 383 P.2d 107, 112–13 (Or. 1963) (stating adhesion contracts should be "construed with an awareness of the inequality of the bargainers"). For other decisions disassociating freedom of contract and adhesion contracts, *see* Feldman, *supra* note 358, at 436 n.379.

365. Medovoi v. Am. Sav. & Loan Ass'n, 152 Cal. Rptr. 572, 584 n.2 (Cal. Dist. Ct. App. 1979) (Thompson, J., concurring) (limiting adhesion contracts to those "necessary to preserve freedom of contract in fact").

366. *See* Bd. of Dirs. of Harriman Sch. Dist. v. Sw. Petroleum Corp., 757 S.W.2d 669, 675 (Tenn. Ct. App. 1988).

367. *Id.* at 674; Parton v. Mark Pirtle Oldsmobile–Cadillac–Isuzu, Inc., 730 S.W.2d 634, 637–38 (Tenn. Ct. App. 1987), *overruled by* Copeland v. Healthsouth/Methodist

Striking parallels exist between the Tennessee circle of assent doctrine and shared meaning analysis. Both concepts allow subjective assent, i.e., "apparent and genuine assent."[368] Both standards mandate that merchants make extensive disclosures to consumers.[369] Both standards show hostility to boilerplate terms.[370] Both doctrines oppose what they see as the imposition of abnormal risks upon consumers.[371] Lastly, both formulations allow judges to rewrite the contract by the deletion of boilerplate if it fails to meet the above requisites.[372]

Other decisions reveal concerns about the use of standardized contract forms. In a representative 1981 Missouri Court of Appeals case, the court observed:

> Our law distinguishes . . . between a contract consented to by negotiation and a contract assented to by adherence. The one (at least, as paradigm) describes a bargain between equals; the other, a form with standard terms imposed upon the applicant to take or leave . . . In an adhesion contract . . . the assent is resembled rather than actual. The printed words are not enough to disclose the expectations of the parties. The court must look for that purpose to the full circumstances of the transaction whether the written words of the contract be ambiguous or unambiguous.
>
> Interestingly, whether the consent arises through adherence or negotiation, Missouri courts apply the same rules of contract construction that will implement as much as possible the "expectations which induced [the] agreement."[373]

Rehab. Hosp., 565 S.W.3d 260, 274 (Tenn. 2018); *see generally* Robert M. Lloyd, *The "Circle of Assent" Doctrine: An Important Innovation in Contract Law*, 7 TRANSACTIONS: TENN. J. BUS. L. 237, 270 (2006) (explaining in-depth the rationale for the rule).

368. *Sw. Petroleum Corp.*, 757 S.W.2d at 674 (quoting Parton v. Mark Pirtle Oldsmobile–Cadillac–Isuzu, Inc., 730 S.W.2d 634, 637 (Tenn. Ct. App. 1987).

369. *See, e.g.*, Lloyd, *supra* note 367 (explaining generally the rationale for the rule).

370. *Id.* at 240.

371. *Id.*

372. *Sw. Petroleum Corp.*, 757 S.W.2d at 674.

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

Still, other decisions hold that adhesion contracts are not agreements under the traditional bargain model. Regarding adhesion contracts, the prerequisites for "[a]ssent and volition . . . are absent."[374] Another case observed that standard form adhesion contracts "are not, under any reasonable test, the agreement of the consumer or business recipient to whom they are delivered."[375] Yet another decision concluded, "The contracting still imagined by courts and law teachers as typical, in which both parties participate in choosing the language of their entire agreement, is no longer of much more than historical importance."[376] A fourth case even implicitly rejected the plain meaning rule, observing that "[a] court should disregard [the parties'] stated intent when it is contained in an adhesion contract."[377] These courts would seem to agree that "[t]he process of entering into a contract of adhesion . . . is not one of haggle or cooperative process but rather of a fly and flypaper."[378]

This other line of cases echoes Kar and Radin's refrain that contract law has lost sight of the moral premise that contracts are enforceable only when each side has voluntarily exchanged one item of value for another.[379] Indeed, an Arizona case observed in language very close to Kar and Radin's critique: "To apply the old rule and interpret such contracts according to the imagined intent of the parties is to perpetuate a fiction which can do no more than bring the law into ridicule."[380] These cases indicate that an adhesion contract is not a sufficiently pure form of private ordering.

Kar and Radin failed to mention that an influential tribunal has seemingly narrowed the ambit of the objective theory regarding the existence of manifested intent.[381] The U.S. Court of Appeals for the District of Columbia Circuit said in *Williams v. First Government Mortgage and Investors Corp*.:

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374. Germantown Mfg. Co. v. Rawlinson, 491 A.2d 138, 147 (Pa. Super. 1985); *see also* Brokers Title Co., Inc. v. St. Paul Fire & Marine Ins. Co., 610 F.2d 1174, 1180 (3d Cir. 1979) ("essence of assent is absent [in a contract of adhesion]").

375. Rudbart v. N. Jersey Dist. Water Supply Comm'n, 605 A.2d 681, 686 (N.J. 1992) (quoting W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971)).

376. C & J Fertilizer, Inc. v. Allied Mut. Ins. Co., 227 N.W.2d 169, 173 (Iowa 1975) (quoting W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971)).

377. Taylor v. E. Connection Operating, Inc., 988 N.E.2d 408, 411 n.8 (Mass. 2013) (quoting L.L. MCDOUGAL, III & R.U. WHITTEN, AMERICAN CONFLICTS LAW § 137 (5th ed. 2001)).

378. Woodruff v. Bretz, Inc., 218 P.3d 486, 490 (Mont. 2009) (quoting ARTHUR CORBIN, CORBIN ON CONTRACTS § 1.4, 13–14 (rev. ed. 1998)).

379. Kar and Radin, *supra* note 4, at 1161 (stating each party has an obligation to ensure that the other party is making a sound bargain).

380. Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 399 (Ariz. 1984).

381. *See* Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 748 (D.C. Cir. 2000) (quoting Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965)).

> [w]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms.[382]

Put another way, the court indicated that a reasonable party in the position of the seller, knowing that consumers rarely if ever read and understand the particular mass market contract of adhesion, would not necessarily construe the consumer's acceptance of the contract as manifesting concurrence.[383] The traditional run of cases rarely, if ever, attempted to rebut this argument.

Although generally a pro-merchant policy, one iteration of the duty to read doctrine[384] comports with Kar and Radin's position. In contesting the use of the objective theory of assent for boilerplate, the authors could have profitably cited those decisions that lessen the duty to read either when the party signs an adhesion contract[385] or when enforcing the duty to read would be "unfair under the circumstance" or cause "great hardship."[386] These courts further reason in an exception to the duty to read that "[w]here a contractual provision would defeat the 'strong' expectation of the weaker party, it may also be necessary [for the merchant] to call [the consumer's] attention to the language of the provision."[387] Indeed, under New Jersey case law, an insurer must disclose to the insured those policy terms that might vary from the insured's reasonable expectations.[388] Thus, Kar and Radin overlooked that some jurisdictions would lessen the importance of the duty to read as a barrier for consumers seeking to overturn their standardized adhesion contracts.

Apart from these qualifications to the duty to read, even when the contract terms are unambiguous, Kar and Radin could have argued that a strict approach

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

383. *Williams*, 225 F.3d at 748.

384. *See* Merit Music Serv., Inc. v. Sonneborn, 225 A.2d 470, 474 (Md. 1967) ("the law presumes that a person knows the contents of a document that he executes and understands at least the literal meaning of its terms").

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

386. Heller Fin., Inc. v. Hidwhey Powder Co., Inc., 883 F.2d 1286, 1292 (7th Cir. 1989) (internal citations omitted).

387. *Wheeler*, 133 Cal. Rptr. at 785.

388. Bowler v. Fid. & Cas. Co. of N.Y., 250 A.2d 580, 588 (N.J. 1969).

marginalizes the importance of the circumstances surrounding contract formation and performance.[389] The last-cited decisions indicated that they will not apply the rules of contract construction in an "unreal" – or even "fictitious" – manner.[390] This broader view of contract-as-transaction could support the position that, irrespective of dry words on inert paper, the particular parties in the full context of their living relationship never intended anything other than a free and open transaction. Authority also exists for the proposition that the duty to read merely states a rebuttable presumption that cannot stand where dispelled by direct evidence that the person never read the document in question.[391]

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

> The [problem is that the] written term asserted by one party is contained in a form contract, in circumstances where the party asserting the term has no reasonable basis to believe that the other party had knowingly or would knowingly assent to the term. In such circumstances, enforcement of the written term does not further the policies underlying contract law, [which are] to "promot[e] and facilitat[e] reliance on business agreements."[392]

C. Explaining Mutual Assent when Actual Agreement is Missing

If various courts under the second line of authority accept that full-fledged agreement is missing for adhesion contracts, how do these decisions rationalize the absence of traditional mutual assent? The possible obstacle here is that if there is no evidence of mutual assent, then there is no contract and no agreement to enforce by either side.[393] While Kar and Radin cited no case law either way on this issue, several decisions address this problem.

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389. A number of courts give these extrinsic considerations important weight. *See, e.g.*, Muchesko v. Muchesko, 955 P.2d 21, 24 (Ariz. Ct. App. 1997) (in determining mutual assent, courts may consider the language of the agreement, the parties' conduct and other circumstances); Adler v. Fred Lind Manor, 103 P.3d 773, 784 (Wash. 2004) (en banc).

390. Perma Research & Dev. v. Singer Co., 542 F.2d 111, 118 (2d Cir. 1976) (internal citations omitted); *but see* Rory v. Cont'l Ins. Co., 703 N.W.2d 23, 35 (Mich. 2005) (applying plain meaning rule to adhesion contracts).

391. *Wheeler*, 133 Cal. Rptr. at 791.

392. Sutton v. Banner Life Ins. Co., 686 A.2d 1045, 1052 (D.C. App. 1996) (emphasis added).

393. *See Rory*, 703 N.W.2d at 42 n.84; *see also Muchesko*, 955 P.2d at 24 (mutual assent is an essential element of any enforceable contract).

Some cases indicated that consent is merely assumed because the consumer trusts to the good faith of the party using the form agreement and to the tacit representation that like terms are being accepted regularly by other parties similarly situated."[394] Citing the example of insurance policies, courts in another line of cases have conceded that mutual consent is missing for adhesion contracts and that it is necessary to substitute the role of public expectations and commercially-accepted standards for ordinary standards for assent.[395] Still other courts have asserted the merchant creates consent through de facto legislation. The argument here centers on the point that one predominant unilateral will – the merchant's – in substance, legislates terms to an undetermined number of persons rather than to just one individual; accordingly, these adhesive instruments are more akin to "[a] law rather than a meeting of the minds."[396]

What can we make of the cases conceding the consumer does not give sufficient assent but is bound nonetheless under consent-substitutes, such as public expectations, commercially reasonable standards, or de facto legislation? Along these same lines another question may be asked: If a court rejects the plain meaning rule and rejects consent substitutes such as de facto legislation, is there a theory that accurately reflects the realities of adhesion contracts consistent with the traditional objective doctrine of assent?

D. Resolution of the Conflicting Decisions

As compared with the majority view supporting bona fide mutual assent for adhesion contracts, the minority position challenging the existence of consent for these contracts is not persuasive. A Missouri Court of Appeals decision in the minority camp, *Spychalski v. MFA Life Insurance Co.*,[397] erred by stating that "quite apart" from the existence of any ambiguity, or the written words of the contract, "[t]he printed words are not enough to disclose the expectations of the parties."[398] The more logical position is that when the boilerplate is sufficiently comprehensive, which is almost always the case, the printed words and their plain meaning are generally adequate under the objective doctrine to establish mutual assent. In effect, the minority line of decisions incorrectly requires proof of the consumer's subjective knowing assent.[399] Accordingly, the minority position directly contradicts the established test, which

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

395. Vargas v. Calabrese, 714 F. Supp. 714, 720 (D.N.J. 1989); *see also* Vasquez v. Glassboro Serv. Ass'n, Inc., 415 A.2d 1156, 1165 (N.J. 1980).

396. Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960) (citing Siegelman v. Cunard White Star, 221 F.2d 189, 206 (2d Cir. 1955) (Frank, J., dissenting)); *Dunlap*, 567 S.E.2d at 273 n.4.

397. 620 S.W.2d 388, 393 (Mo. Ct. App. 1981).

398. *Id*. at 393–94.

399. For a specific example of this inappropriate subjectivist approach, *see* NAACP of Camden Cty. E. v. Foulke Mgmt. Corp., 24 A.3d 777 (N.J. Super. Ct. App. Div.

looks to "objective" manifestations of "voluntary mutual assent" through the medium of the contract document in the context of "an offer and reciprocal acceptance."[400]

Furthermore, the minority position overlooks the prevailing rule: "The only intent of the parties to a contract which is essential is an intent to say the words and do the acts which constitute their manifestation of assent"; agreement does not "consist of harmonious intentions or states of mind . . . ."[401] When the parties affix voluntary signatures on a document that is unambiguously presented to them and known to be a contract with no recognized defense that upsets the legal existence of joint assent, no real question exists as to mutual assent.

This last argument draws support from the theory that adhesion contracts with a knowing exchange of money for goods or services are contractual "bargains" under the *Restatement (Second) of Contracts*.[402] The Restatement defines a "bargain" as an "[a]greement to exchange promises or to exchange a promise for a performance or to exchange performances."[403] In this respect, a bargain is also commonly a contract where it provides "[a] remedy for its breach or recognize performance as a legal duty."[404] Therefore, when a consumer pays for a service or product after signing what he understands to be a contract, even if there is some form of economic pressure or if the consumer is not fully conversant with all terms, it is difficult to contend under a flexible but realistic view of the law that there is no "bargain" – and therefore no "contract" – under the *Restatement (Second) of Contracts*.[405]

2011) ("Because arbitration provisions are often embedded in contracts of adhesion, courts take particular care in assuring *the knowing assent of both parties to arbitrate, and a clear mutual understanding of the ramifications of that assent*." (emphasis added)); *see also* Peoples Mortg. Co. v. Fed. Nat'l Mortg. Ass'n, 856 F. Supp. 910, 927 (E.D. Pa. 1994).

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

401. Tsintolas Realty Co. v. Mendez, 984 A.2d 181, 190 (D.C. Cir. 2009); *see also* Moody Realty Co. v. Huestis, 237 S.W.3d 666, 674 n.8 (Tenn. Ct. App. 2007) ("The legal mechanism by which parties show their assent to be bound is through offer and acceptance.").

402. RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981) (AM. LAW INST. 1981).

403. *Id.*

404. *See* Daniel P. O'Gorman, *Redefining Offer in Contract Law*, 82 MISS. L.J. 1049, 1054 (2013).

405. Sherman v. Lunsford, 723 P.2d 1176, 1178 (Wash. Ct. App. 1986) ("Although the parties may not have fully understood the legal significance of each and every term, they knew they were signing a binding contract."); Nw. Nat'l Ins. Co. v. Donovan, 916 F.2d 372, 377 (7th Cir. 1990) ("Form contracts, and standard clauses in individually

Besides reflecting the legal tenets of the objective doctrine – including the plain meaning rule and the duty to read and understand a contract – and meeting the criteria of an enforceable bargain per the *Restatement (Second) of Contracts*, the majority doctrine draws support from the strong policies of the sanctity of contract and the need for preserving commercial stability.[406] It also implements the rule that, wherever possible, courts should strive to uphold, rather than to defeat, an otherwise binding contract.[407] As the decisions recognize,

> In the overwhelming majority of circumstances, contractual promises are to be performed, not avoided: pacta sunt servanda, or, as the Seventh Circuit loosely translated it, "a deal's a deal." This is an eminently sound doctrine, because typically. . . [A] court cannot improve matters by intervention after the fact. It can only destabilize the institution of contract, increase risk, and make parties worse off. . . .[408]

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

CONCLUSION

Because *Pseudo-Contract and Shared Meaning Analysis* is largely a doctrinal challenge to the courts and some analysts, a response is also appropriate based largely on doctrinal grounds. Most prominently, the authors' reliance on linguistics has little value for contract interpretation, and the shared meaning

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negotiated contracts, enable enormous savings in transaction costs, and the abuses to which they occasionally give rise can be controlled without altering traditional doctrines, provided those doctrines are interpreted flexibly, realistically."). If one were to take literally Kar and Radin's argument that pseudo-contracts are not contracts, then they would need to concede that the law should not recognize a remedy for a seller's breach. I doubt Kar and Radin would subscribe to leaving consumers in such a lurch.

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

407. *See* 11 SAMUEL WILLISTON & RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:11 (4th ed. 2019) (whenever possible courts strive to uphold a contract as to its validity); *cf.* Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. of Texas, 571 U.S. 49, 66 (2013) ("Because courts should not unnecessarily disrupt the parties' [contractual agreement] . . . [i]n all but the most unusual cases . . . the interest of justice is served by holding the parties to their bargain.") (internal quotations omitted).

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

analysis proposal simply masks Kar and Radin's dissatisfaction with the balance of market power as between merchants and consumers.

The authors' proposal, if adopted, would likely detract from established contractual theories of obligation, undermine some key evidentiary principles, impair freedom of contract and the duty to read, and create the likelihood that the American commercial system would experience widespread unpredictability and uncertainty. Unlike the authors, courts have regularly rejected the notion that boilerplate terms are per se unfair or contrary to public policy.[409] Given that almost all courts regularly uphold standard form contracts absent a recognized bargaining defect, "[r]ational personal and economic behavior in the modern post-industrial world is only possible if agreements between parties are respected."[410] Kar and Radin's article did not appropriately consider these significant policies. Because the accurate recitation of legal principles must support valid doctrinal and normative criticism of the contracting system and especially considering that courts already follow numerous pro-consumer doctrines, Kar and Radin have failed to establish that current law undermines mutual assent.

409. *See supra* note 250 and accompanying text.

410. Dearnley v. Mountain Creek, No. L–540–09, 2012 WL 762150, at *3 (N.J. Super. Ct. A.D. Mar. 12, 2012) (per curiam).