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CONTRACTS, PERSONS AND PROPERTY: A TRIBUTE TO MARGARET JANE RADIN

*Ruth L. Okediji**

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In 2011, the United States was only just beginning to emerge from what some claimed to be the most significant economic crisis since the Great Depression.[1] The devastation wrought by unregulated subprime mortgages unfolded as a political, legal, financial and social tragedy.[2] Millions of homeowners had purchased homes for amounts they most certainly could not afford, with terms and conditions written on documents they even more certainly had never read. Many of those most severely affected were, as one might expect, racial minorities and underrepresented groups,[3] but plenty of

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1. *See* Miguel Almunia et. al, *From Great Depression to Great Credit Crisis: Similarities, Differences and Lessons* 8, (Nat'l Bureau of Econ. Research, Working Paper No. 15524, 2009), http://www.nber.org/papers/w15524 ("[w]hen viewed as a global phenomenon, the current economic crisis was a Depression-sized event").

2. FIN. CRISIS INQUIRY COMM., FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, xv (2013) ("This was a fundamental disruption—a financial upheaval, if you will—that wreaked havoc in communities and neighborhoods across this country.")(hereinafter FINAL REPORT). According to the FINAL REPORT, almost $11 trillion dollars in household debt vanished. *See id.*; *see also* Simon Johnson, *Three Unlearned Lessons From the Financial Crisis*, BLOOMBERG VIEW (Sept. 26, 2013, 1:06 PM), http://www.bloombergview.com/articles/2013-09-26/three-unlearned-lessons-from-the-financial-crisis (estimating that the U.S. lost at least 40% of 2007 gross domestic product).

3. *See* GREGORY D. SQUIRES, DEREK S. HYRA & ROBERT N. RENNER, SEGREGATION AND THE SUBPRIME LENDING CRISIS 3 (Apr. 16, 2009) (presented at 2009 Federal Reserve System Community Affairs Research Conference, D.C.) http://www.kansascityfed.org/publicat/events/community/2009carc/Hyra.pdf (reporting that approximately 53.7% of African American and 46.6% of Latino mortgagors received subprime mortgages compared to 17.7% of White mortgagors.); *see also* DEBBIE GRUENSTEIN BOCIAN, WEN LI, CAROLINA REID & ROBERTO G. QUERCIA, CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 3 (Nov. 5, 2011), http://www.responsiblelending.org/mortgage-lending/research-analysis/Lost-Ground-2011.pdf; DEBBIE GRUENSTEIN BOCIAN, WEN LI & KEITH S. ERNST, CTR. FOR RESPONSIBLE LENDING *Foreclosures by Race and Ethnicity: The Demographics of a Crisis* 1-2 (June 18, 2010), http://www.responsiblelending.org/mortgage-lending/research-analysis/foreclosures-by-race-and-ethnicity.pdf. For analysis of the historical and regulatory context for this disparity, *see e.g.*, Aleatra P. Williams, *Lending Discrimination, The Foreclosure Crisis and the Perpetuation of Racial and Ethnic Disparities in Homeownership in the U.S.*, 6 WM. & MARY BUS. L. REV. 601 (2015).

other members of society were also caught in the intricately woven fine print of the "contracts" that compelled the crisis.[4]

These well-known points in recent history are connected to another: In 2011, Professor Margaret Jane (Peggy) Radin completed the manuscript for her book *Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law*.[5] It was published in 2013 when the cause, consequences and implications of the subprime mortgage crisis were still being debated.[6] Certainly, the consequences of the crisis are still unfolding today.[7] *Boilerplate* compels us to more fully appreciate and understand the structural antecedents of the crises. In it, Professor Radin offers an unreserved analysis of the institutional, economic and welfare loss occasioned by boilerplate contracts now

4. *See* FINAL REPORT, at xviii-xx (2013)(providing a description of the business practices that led to the crisis and the failure of different regulatory bodies to catch and address problems along the way). There is, of course, also the way in which the fragmented ownership of mortgages made it impossible for mortgagees to engage directly with their contractual partners to adjust terms as necessary. While not the same problem raised by boilerplate contracts, the resulting alienation between contracting parties, the inability to renegotiate provisions, and the presumption of assent despite ignorance of the terms, are similarly shared. As noted by Judge Hand, to make consent serve the economic thinking of the time, "judges had gone to great lengths to discover in contracts an initial acceptance of consequences they felt bound to impose on the promisor. It assuaged harsh results, if one could say that the sufferer had agreed to them in advance, and sophistry, as ever, was a facile handmaiden to authority." Learned Hand, Foreword to Samuel Williston, Life and Law: An Autobiography, viii (1940), http://www.harvardsquarelibrary.org/biographies/samuel-williston/.

5. MARGARET RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (Princeton University Press, 2013).

6. There certainly has been plenty of finger-pointing. In concluding that the crisis was avoidable, the Financial Inquiry Commission Final Report noted "The captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks within a system essential to the well-being of the American public. Theirs was a big miss, not a stumble." The Report also concluded, inter alia, that there were "widespread failures in financial regulation and supervision. . . . The sentries were not at their post." *See* FINAL REPORT at xviii.

7. *See The Origins of the Financial Crisis: Crash Course*, THE ECONOMIST, Sept. 7, 2013 (noting that "GDP is still below its pre-crisis peak in many rich countries. . . . The effects of the crash are still rippling through the world economy . . ."); *see also* Aleatra P. Williams, *Beneath the Stains of Time: The Banality of Race, the Housing and Foreclosure Crisis, and the Financial Genocide of Minorities*, 24 B.U. PUB. INT. L.J. 247 (2015) (arguing that despite suggestions that the U.S. has emerged from the crisis, the effects on minorities remain persistent and may worsen); Sarah Ludwig, *Credit Scores in America Perpetuate Racial Injustice. Here's How*, THE GUARDIAN, (October 13, 2015, 6:45 AM), http://www.theguardian.com/commentisfree/2015/oct/13/your-credit-score-is-racist-heres-why ("Starting in the 1990's, financial institutions began flooding historically-redlined neighborhoods of color. . . . Although Wall Street is no longer pumping toxic mortgages into black and Latino neighborhoods, people and neighborhoods of color continue to reel from the foreclosure crisis, which many predict is far from over."). A worrisome contributor to the crisis in the U.S. is the unbelievably large ratio of debt to disposable personal income for U.S. households. It rose from 77% in 1990 to 127% at the end of 2007, much of this increase mortgage-related. The debt burden of U.S. society has fast become one of the leading causes of structural and persistent inequality. *See generally* Williams, *id.*

endemic in private economic relations. The overarching claim—that boilerplate terms have systematically eroded fundamental aspects of the rule of law[8]—reflects Professor Radin's well-known capacity to take complex challenges and define them pointedly in terms that expose the real stakes and values at issue.

In virtually every sphere, the institution of fine print governs both the big and small aspects of the daily lives of consumers. In its analysis of the legal rules that facilitate boilerplate terms, the book provides a stark picture of the culture from which the subprime mortgage crisis emerged. To be clear, *Boilerplate* is not about the sub-prime crises, but its subject matter illuminates why we remain vulnerable to the debilitating manipulation of consumers that has become part of the fabric of the digital economy. *Boilerplate* addresses the assault on contract law wrought by boilerplate terms - terms that are usually unilaterally introduced by a powerful party in a position to leverage that power to achieve a set of preferred ends on a "take it or leave it" basis. I have chosen to use *Boilerplate* as a centerpiece in my tribute to Professor Radin because it reveals much about the values that define who she is. *Boilerplate* reflects the distinctive rigor of her analytical approach to big problems and her commitment to identify meaningful and feasible solutions to whatever concerns she addresses. But it is her trenchant defense of the rule of law and her career-long focus on clarifying, strengthening and defending the values that underlie legal rules that stand out forcefully to me as a vital aspect of her legacy.

I. We Are All Mrs. Williams

Contract law is defined as private law that governs relations between legal persons—be they firms or individuals. Many contracts have boilerplate terms. In most cases, citizens have become acculturated to their existence, pervasiveness and incomprehensibility. But if the legal weight attached to a contract is firmly anchored in the idea that its provisions are self-imposed through the exercise of a person's free choice,[9] then standard-

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8. As this Tribute was going to press, the New York Times ran a three-part series on fine print in consumer contracts and loss of access to courts. *See* Jessica Silver-Greenberg and Robert Gebeloff, *Beware the Fineprint – Part I: Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, Oct. 31, 2015, at 1 (describing boilerplate arbitration terms as "disabling" of consumer challenges to practices such as predatory lending, wage theft and discrimination); Michael Corkery and Jessica Silver-Greenberg, *Beware the Fine Print – Part II: A Privatization of the Justice System*, Nov. 1, 2015, N.Y. Times, at 1; Michael Corkery and Jessica Silver-Greenberg, *Beware the Fine Print – Part III: In Religious Arbitration, Scripture Is the Rule of Law,* Nov. 2, 2015, N.Y. Times, at 1.

9. Debates about the *soul* of contract law, whether contract is a promise which the law neutrally enforces versus contract as an imposition of societal goals and standards remain a vibrant part of contracts theory. *See generally* Charles Fried, Contract as Promise: A Theory of Contractual Obligation (1981) (a leading proponent of contract as promise); Patrick Atiyah, The Rise and Fall of Freedom of Contract (1979).

ized contracts that consist principally of non-dickered terms raise difficult moral and conceptual questions regarding what we consider an "agreement." This is a major thrust of *Boilerplate*. Professor Radin makes the unequivocal claim that boilerplate terms should not be so easily or casually enforced because they violate the moral premise of contract law. Rather than reflect movement away from status as the basis of economic organization, boilerplate contracts once again instantiate status-based relations in the name of liberal autonomy.[10] She argues that the conditions of the digital age—like those of the industrial age—urge concern about the extent to which something we call a contract is, in fact, a true representative of the promises, covenants or intentions of the parties. As contracts scholars and teachers know well, courts engage in interpretative maneuvers and adjust explicit terms in order to accommodate issues neither party thought about. They fill in gaps in the contract, effectuate what appears to be the will of the parties, or adjust theories to meet the demands of justice.[11] Courts, of course, rarely indicate that these moves—masked as they are in various doctrines such as "implied promises" or rules of interpretation—are tools to address those instances where markets are unlikely to self-correct, and our moral intuition refuses to be calmed by simply saying "you are bound by the law of contract because you promised."[12] *Boilerplate* demonstrates the gross insufficiency of the rules that justify boilerplate terms on moral, legal and utilitarian grounds.

Consider the famous case of *Williams v. Walker Thomas Furniture*.[13] One of the plaintiffs, a single mother of seven on welfare,[14] purchased an expensive stereo set pursuant to an "add-on" scheme. Under this scheme, each item purchased became security for all the items, which meant her failure to make payments on one item resulted in the loss of all the goods she had previously purchased. The facts indicate that Mrs. Williams had limited

10. *See generally* Nathan Isaacs, *The Standardizing of Contracts*, 27 Yale L.J. 34 (1917).

11. *See* Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 Yale L.J. 169, 204-06 (1917).

12. As Corbin noted, decisions about the legal relations to be imposed on parties due to some manifestation of assent "depend upon the notions of the court as to policy, welfare, justice, right and wrong, such notions often being inarticulate and subconscious." *Id.* at 206. Even proponents of 'contracts as promise' would not necessarily argue against a morally just outcome such as ensuring consumers are not taken advantage of; only that adjusting contracts to achieve such ends unfairly places the burden of redistribution on individual persons rather than making it a collective responsibility. *See* Fried, *supra* note 10, at Chapter 3. There is also the argument that such pervasive behavior using contract theory really belong in the realm of tort law. Moreover, promises procured by fraud or duress lack the moral force that mandates the laws deference and, as such, should not be enforced.

13. 350 F. 2d 445 (D.C. Cir. 1965).

14. One of the interesting features of the case is the courts abstemious engagement with the plaintiff's racial or economic background. The dissent does mention that Mrs. Williams was receiving "relief funds." *Id.* at 450.

education and the other plaintiffs in the case had only a third-grade education.[15] According to Mrs. Williams, the goods she purchased were the result of door-to-door sales by the company, so most of the contracts were signed in her home; the contracts were signed in blank; she did not receive copies of the contracts she signed.[16] The lower court ruled that the contract should be enforced,[17] but the Appellate Court remanded for application of the test of unconscionability.[18]

The facts in *Williams* always horrify my students who encounter the "duty to read" rule within the first week of law school. In their early introduction to the rule, students' initial reaction is that the rule is responsible, defensible and central to the notion of consent. In an ideal world, this may be an appropriate view. But of course, the duty to read rule goes much deeper. Through a fiction of sorts, the rule assumes something elemental—that a person has the capacity to understand what she is agreeing to and, implicitly, that a person has the bargaining power to negotiate for terms that protect her interests.[19] These are large assumptions in a society that is deeply stained by structural inequities—not just the inequities that arise because of the concentrated economic power of the firm and our related deference to markets, but also, those inequities that stem from the failure of the state to evaluate, establish and enforce the basic interests of its citizens. The *Williams* case always marks a sharp turn in my contracts class. Students become more critically aware of the veil that formalism imposes on socioeconomic conditions, and that contract law may exacerbate those challenges in systemic ways. As they reconsider the utility of the duty to read rules in light of *Williams*, I observe their consternation about the ideal of assent and the unspoken tradeoffs that the classic construction of assent often requires. Those tradeoffs go well beyond issues of "right" or "fairness."

Professor Radin argues that such "assent" costs us much more than the goods or services being bargained for. It costs us our best democratic values. It numbs us to the long-term danger of losing access to courts and giving up rights that are fundamental to ensuring that power does not hold a trump card in socio-economic relations.

What difference should it have made if Mrs. Williams *had* understood the terms? Does assent to something wrong or unfair make it "right" or

15. Transcript of Record at 44–45, Williams v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. 1964) (No. 3389); Transcript of Record at 37, Thorne v. Walker-Thomas Furniture Co., 198 A.2d 914 (D.C. 1964) (No. 3412) (Settled Statement of Proceedings and Evidence).

16. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the* "*Law of the Poor*," 102 Geo. L.J. 1383, 1395-1396 (2014).

17. 350 F. 2d at 447.

18. *Id.* at 450.

19. *See* Fried, *supra* note 10, at 2 ("[T]he law of contracts facilitates our disposing of . . . rights on terms that seem best to us. The regime of contract law, which respects the disposition individuals make of their rights, carries to its natural conclusion the liberal premise that individuals have rights.").

"fair"? Does assent make add-on clauses more appropriate or legally defensible? Even if we agree that Mrs. Williams did not "need" an expensive stereo, did she need the sheets, toys, beds, furniture, washing machine, children's items, etc. that preceded the stereo purchase? Did the store "need" to keep partial ownership of everything she ever purchased from the store in order to make a profit on the stereo?

Boilerplate terms pervasively make us all equal in our powerlessness to effectuate change in the terms that define the circumstances under which we may use and enjoy goods or services. As Professor Radin observes in *Boilerplate*, even the most sophisticated consumers have difficulty comprehending the many words, paragraphs and pages that constitute boilerplate contracts. Who really understands the terms of their Facebook "agreement," car rental "agreement," airline ticket "contract," or software installation "click-wrap"? More critically, what would such understanding change? Consumers may ask for changes that more closely align with reasonable expectations about rights and avenues for redress, but what's the recourse if the answer is no? Perversely, failed attempts to negotiate boilerplates may actually count against a consumer who later executes an agreement and then argues that the terms are invalid for lack of assent. The reality is that consumers have no meaningful options to the pernicious click-wraps, shrink-wraps or other "wraps" deployed to regulate our relationship to the goods or services that enable meaningful cultural, political and economic participation in society. A court (and most contracts students) may be less sympathetic to an eminent legal scholar who executed a document filled with standardized terms. But surely clicking "yes" to boilerplate terms, no matter who does so, can't be defended as some form of assent.

That is a critical message in *Boilerplate.*

II. We, The People

In Professor Radin's analysis, boilerplate agreements are not just the instantiation of standardized contracts, which have long been a pervasive feature of market transactions. Boilerplate agreements are also a species of *non*-contract (or a type of non-consent)—a law of coercion justified by the form of agreement, but lacking any intrinsic moral power or legitimacy.[20] These terms are not an imposition of another's will and preferences; boilerplate agreements are not wrong merely because they are contrary to the liberal conception of autonomous individuals. Rather, it is the profound disruption of the settled role of the state and its institutions of justice and liberty that is deeply troubling about the casual acceptance of the legality of boilerplate agreements. Even if we reasonably conclude that Facebook has a right to say "no" to suggestions by its consumers, it is a disservice to equate boilerplate terms with assent in contract formation—a disservice to the peo-

20. This is a paraphrase of a verse of scripture. *See* 2 *Timothy* 3:5.

ple bound by contracts, to the judges who are called on to enforce boilerplate terms, and to society as a whole.

Professor Radin powerfully argues that boilerplate agreements create a new reality—an "alternative legal universe" far removed from the classical world of mutual assent and from the processes that offer an opportunity for redress familiar to most consumers.[21] In short, contemporary boilerplate agreements not only regulate relations over the specific object a consumer wants, these instruments leverage that want—they leverage our "needs," whether real or imagined—to alter the processes, institutions and options that serve the critical role of preserving the normative foundations of contractual assent. For example, boilerplate agreements may eviscerate the right to a jury trial, eliminate responsibility for fault and deny us the right to claim certain defenses. They ignore the possibility for individualistic conditions that may demand different (better or worse) bargains.

Placing one's signature to boilerplate terms is *not* equivalent to agreement—it is submission to a social order that enjoys the privilege of deference by legislatures because of our preoccupation with, and faith in, markets. After all, in some instances a piece of paper signed by two parties is not a contract when it violates public policy.[22] We have no exact definition of "public policy" except that, in the world of contracts, it serves as a heuristic for those outcomes (or processes) we think are destabilizing to established order, or that violate a well-recognized moral standard. In such cases, we say there is no enforceable contract.[23] Assent in such cases is insufficient to overcome the fact that the transaction arguably is inconsistent with the tenets of a just society. Not all boilerplate terms have this character; but those that do, especially those that deny access to the institutions designed to defend the rule of law, make a mockery of the notion of contractual assent largely because they also make a mockery of liberty. Not only should such terms be stricken from a contract, Professor Radin argues that the high social cost imposed by boilerplate terms should occasion liability for those who use them.

Professor Radin's proposed imposition of liability isn't as unreasonable as some might imagine at first blush. Consider that there is nothing boilerplate agreements *cannot* do and very little contracts law offers to address the tax they impose on our legal and political values. In addition to imposing liability, *Boilerplate* advances a framework designed to improve the traditional public policy/unconscionability/good faith levers in contract law. These levers are largely dissatisfying doctrinally and they are applied too

21. *See* Radin, *supra* note 6, Chapter 1.

22. *See* Restatement (Second) of Contracts § 179 (1981).

23. Examples include contracts involving illegal behavior such as a contract for the purchase of illegal drugs or a contract to kill another person. Other examples are covenants not to compete that violate the reasonableness standard. *See* Restatement (2nd) § 188. *See generally*, Harlan M. Blake, *Employee Covenants Not to Compete*, 73 Harv. L. Rev. 625 (1960).

inconsistently to be effective in addressing the ill-effects of boilerplate agreements.[24] I am favorably inclined to Professor Radin's framework because it asks judges to evaluate the nature of the rights taken away in the boilerplate terms, the quality of the consent, and the prevalence of the scheme at issue. This approach recognizes the liberty strand that the formalistic "assent" box largely eliminated; it reintroduces the notion of participatory citizenship and accountability in shaping societal norms.

Ultimately, Professor Radin's framework requires political institutions to do more. It requires protecting the ability of individuals to influence the terms of contractual relationships that erode our fundamental values and diminish our role as citizens entitled to certain basic rights and processes. To expect people to be responsible for what they "agree" to, we must also empower them with a certain quality of freedom so highly prized by our theories of political governance. At the same time, we must strengthen the role of public institutions and courts to intervene when that freedom is reduced to mere formalism. In short, Professor Radin's framework treats consumers like *real* people whose quality of life matters.

III. We Are the World

The subprime mortgage crisis and its aftermath are not just an American problem. The entire global economy was affected by the collective failures of the state, market, consumers and policy institutions.[25] What U.S. courts and institutions allow is not just watched worldwide, but also mimicked. This is a function of economic hegemony[26] and also because we have demanded (and historically earned) the trust and reliance of our trading partners. The vigilance required to secure this trust and maintain it for global citizens is perhaps greater than ever before, given the specter of rapid contagion facilitated by a highly networked digital environment. In this inevitable global economy, there must be a renewed sense of being our "brother's keeper." Empowering citizens and consumers to read, resist, and demand reform of imposed "contractual relations" is essential for preserving the core liberty necessary to the institution of contracts. Such empowerment is also indispensable for strong institutions and resilient, efficient markets.[27]

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24. *See* Radin, *supra* note 6, Chapter 9.

25. *See* Almunia et. al, *supra* note 2, at 2 (noting that "world trade fell even faster in the first year of this crisis than in the [peak year of the Great Depression].").

26. *See* G. Cordero Moss, *Harmonized Contract Clauses in Different Business Cultures*, *in* Private Law and the Main Cultures of Europe 221-22 (T. Wihelmsson, E. Paunio, A. Pohjolainen eds., 2007, Kluwer International) (noting the leading role of Anglo-American law in the development of business leading to the rise of terminology and legal concepts from common law systems in international contracts).

27. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003).

Boilerplate presents a carefully sustained analysis about why certain *kinds* of terms should categorically fall beyond the reach of the strong arm of boilerplate agreements. In the world of boilerplate terms, standardization is, arguably, about a different kind of moral order—one punctuated by efficiency and the creation of incentives to encourage opportunities for people, who otherwise lack good credit or have fallen upon hard times, to purchase and enjoy the items that make for their conception of the good life.[28] Most people will agree that boilerplate terms can be useful, and used for good. But as Professor Radin notes, it is not just the substance of boilerplate agreements about which we should be concerned—it is the fact that they eliminate the opportunities for discourse and critical engagement regarding the repeated transactions we engage in daily. Certainly in the U.S. more so than elsewhere, standardized contracts have become the essential tool of social organization—very few economic transactions are immune from the reach of standardized terms.

IV. Radin on Contracts

Professor Radin's thesis is much deeper than arguing over whether boilerplate terms can be improved. As noted earlier, she makes important proposals for how we might address the key challenges they pose to our values. Her critique and her proposals are not premised on any supposition of neutrality in the choice of whether to use boilerplate provisions. There is an undeniable allure to treating similar transactions similarly. For this reason, boilerplate terms are also on the rise internationally.[29] Boilerplate terms are resilient because they offer some predictability and consistency; they impose an order that society does benefit from and we could all benefit in some ways as a result. But only if—and the caveat is a strong one—the particular boilerplate terms are not directed at eroding rights that are fundamental to democratic society, that might undermine the functioning of democratic institutions, or that contravene the fundamental purpose of a specific legal regime. Examples of such rights that should not be subject to boilerplate agreements might include: the right to assert violations of constitutional rights in court (rather than arbitration); the right to criticize a product, such as by exercising copyright's fair use doctrine; the right to engage in competition by reverse engineering; the right to alienate one's property by re-sale; and the right to raise certain defenses, such as lack of mental capacity, coercion or duress.

Professor Radin is uncompromising in *Boilerplate*. Even innocent boilerplate terms should be cautiously embraced, she argues. I find compelling

28. *See* Williams v. Walker Thomas Furniture, 350 F.2d 445 (D.C. Cir. 1965); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & Econ. 293 (1975).

29. *See* Boilerplate Clauses, International Commercial Contracts and the Applicable Law (Giudita Cordero Moss, ed. Cambridge University Press 2011).

her claim that a boilerplate society is fundamentally anti-democratic (not just undemocratic). Not only are consumers unable to comprehend the terms of many such documents, this state of incomprehensibility actually grows. As society becomes more complex and social relations more intricate, boilerplate terms only increase in scope and obscurity. In fact, it seems the more necessary a service or a good for human welfare, the more likely it is that a boilerplate term will govern the relations between the provider of the service or good and those who need it. From brick and mortar industries to digital platform services, there is a pervasive reliance on these ubiquitous instruments.

By calling them "contracts," boilerplate terms rest in a position of normative virtue to which they are not entitled. Boilerplate terms may have some redeeming features, but Professor Radin exposes just how few there really are, and how their threat to the very values that make democratic societies robust, accountable and resilient is much greater. An uninformed citizenry cannot resist, challenge or transform what it does not know. More critically, when consumers are actively disempowered by the rationalization that boilerplate terms are inevitable and economically justifiable, democratic discourse about the structural conditions of life for citizens in a digital economy is dangerously weakened. Moreover, the use and defense of boilerplate terms by institutions whose economic activities impose upon the social welfare seems to affirm our political focus on competition as the sole arbiter of our nation's well-being. However it is construed, "consent" to signing away our precious rights of citizenship cannot justify such a fundamental deconstruction of some of our most important institutions, especially courts. Nor can boilerplate agreements replace the human experience of participating in the development of the values that facilitate the exercise of our liberty. Professor Radin points to the various ways (especially ignorance) in which nonconsent occurs—a boilerplate culture entrenches ignorance, dulls our sense of right and wrong, and eradicates the important, if unstable, line between the obligation of the state and the privileges of market actors. Normative degradation (the systematic undermining and eroding of our core democratic values or institutions) and democratic degradation (the marginalization of state responsibility in safeguarding our core democratic values or institutions) are the real and substantial costs of uncritically embracing a boilerplate society. *Boilerplate* does not let us do so ignorantly.

Conclusion

Professor Radin's indomitable perspicacity throughout her formal career produced distinctive contributions in at least three fields that concern me: contracts, intellectual property and international law.[30] Our judgments, as-

30. I don't believe for one minute Peggy is in retirement. I consider this "emerita" period merely the informal phase of her academic career.

sumptions and responses to dominant theories of sovereignty in each of these fields—assent, authorship and the authority of the state—are most critical to the welfare of human society today. In Professor Radin's exemplary career, she has hewn down trees of intellectual theories that, despite their own utility, threatened to obscure the light of the principles and values that sustain the best expressions of human welfare—security of life and liberty. She can never be accused, like the "captains of finance" or "the public stewards of our financial system," of failing to question, criticize or urge change in the subjects of her mastery—subjects that are "essential to the well-being of the American public." Like many other scholars, I have learned much from the way she has explored philosophical issues by connecting abstract points to specific doctrines, and she has given us great examples to shore our appreciation of these points. We owe her a debt of gratitude for her years of unequivocal thinking, writing and teaching about what is wrong—and what could be better—about the laws around which our transactions are structured and to which our lives and well-being are inescapably tethered.