

Liberalism's Fine Print: Boilerplate's Allusion to Human Nature

Kenneth K. Ching

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LIBERALISM’S FINE PRINT: BOILERPLATE’S ALLUSION TO HUMAN NATURE

KENNETH K. CHING*

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I. INTRODUCTION

The boilerplate debate is but a chapter in the story of liberalism, and both must face the problem of freedom. Given the individualistic nature of the Good, “[t]he problem in liberal society then becomes to insure that each individual will achieve the greatest amount of liberty, the freedom to pursue her own desires, and to establish an order that can restrain conflicts among individuals and that does not favor some at the expense of others.”¹

Alasdair MacIntyre has argued that the problem of freedom cannot be solved by liberal theory. Liberal theory sets individual rights against social utility in an incoherent debate. Because liberalism has no conception of human nature, there is no rational way to choose between rights and utility. Thus, liberalism becomes a disguise for imposing people’s arbitrary preferences by force.

And yet the boilerplate debate resists MacIntyre’s critique. In the boilerplate debate, rights and utility are not set against each other.

* Assistant Professor, Regent University School of Law. B.A., University of Nevada-Reno; J.D., Duke University School of Law. The author thanks Charles Fried, H. Jefferson Powell, C. Scott Pryor, Andrew Verstein, and Jack S. Wroldsen for their comments on drafts of this Article.

1. Drucilla Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 329 (1985) (footnote omitted).

Although there is profound disagreement between libertarians and progressives over boilerplate, they agree about the terms of the debate: the enforcement of boilerplate must vindicate both individual rights and social utility.

This overarching agreement implies that—contrary to the tenets of liberalism—the boilerplate debate is regulated by some concept of human nature. Therefore, boilerplate theorists must direct their attention to human nature if they are to resolve the problem of freedom in boilerplate contracts.

This Article does not attempt to resolve the boilerplate debate, although elsewhere I have tried to do so.² This Article has different purposes. First, this Article demonstrates that the boilerplate debate is part of a much broader debate in liberalism. Second, this Article argues that the boilerplate debate resists Alasdair MacIntyre's critique of liberalism. Third, and most importantly, this Article seeks to reorient the boilerplate debate toward a discussion of human nature.

Part I of this Article describes liberal political theory as a dialectic narrative between libertarianism and progressivism, as well as Alasdair MacIntyre's profound critique of liberalism. Part II of this Article describes the boilerplate debate as it has taken place over the last hundred years. Part III of this Article situates the boilerplate debate within liberalism. Part IV of this Article argues that the boilerplate debate resists MacIntyre's critique of liberalism, indicating that the boilerplate debate is regulated by concepts of human nature and purpose.

II. THE LIBERALISM STORY

A. *Tale of Two Liberties*

Once upon a time, there was Authority, and people were ruled from on high.³ They were ruled politically, spiritually, and intellectually.⁴ They were ruled by kings, priests, and Aristotle.⁵ They had few rights, whether

2. See generally Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price*, 84 UMKC L. REV. 1 (2015).

3. L.T. HOBHOUSE, *LIBERALISM* 10 (1964); J.M. ROBERTS, *THE NEW HISTORY OF THE WORLD* 572 (2003) ("Everywhere . . . the relative strength of rulers *vis-à-vis* their rivals increased greatly from the sixteenth century onwards.").

4. See J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 160, 164, 207 (1992).

5. See *id.*; ROBERTS, *supra* note 3, at 570.

to property or contract, life or liberty.⁶ They were not the masters of their fates or captains of their souls.⁷ They were not autonomous: they obeyed.⁸ They obeyed the rules of their stations, to which they were assigned at birth, and they obeyed the commands of their superiors.⁹

And the people suffered when authority was abused. Kings ruled their subjects arbitrarily, and their subjects' lives and property were insecure.¹⁰ Peasants were compelled to provide labor for their lords, and they had no right to move or seek new employment.¹¹ People were taxed heavily to finance standing armies and vain wars.¹² Yet the nobles were not taxed.¹³ They were given special privileges over the poor.¹⁴ The church was not taxed.¹⁵ In fact, the church added to people's burdens through its collection of tithes.¹⁶ So for some, there were great privileges,

6. See HENRY SUMNER MAINE, *ANCIENT LAW* 183–84 (1861); KEVIN M. TEEVEN, *A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT* 1 (1990) (“During the Middle Ages, property was not ‘owned’ in the modern sense and so could not be freely contracted for. The economy of that time was not influenced to any significant degree by market forces In circumstances where an economy is not directed by market forces and where a society delineates a person’s rights based on the status one was born into, there is little need of, nor opportunity for, either freedom of contract or a flexible contractual device for planning.”).

7. ROBERTS, *supra* note 3, at 562 (“Three hundred years ago, many men and women believed [social forms and institutions] to be virtually God-given . . .”).

8. Cf. KELLY, *supra* note 4, at 209 (“[Social-contract theory] was quite at odds with a theocratic view of government, one which saw kings as divinely appointed, and their subjects as divinely commanded to obey them . . .”).

9. See MAINE, *supra* note 6, at 183.

10. Cf. HOBHOUSE, *supra* note 3, at 16 (“Both logically and historically the first point of attack is arbitrary government, and the first liberty to be secured is the right to be dealt with in accordance with law. A man who has no legal rights against another, but stands entirely at his disposal, to be treated according to his caprice, is a slave to that other. He is ‘rightless,’ devoid of rights.”).

11. JOHN DEWEY, *LIBERALISM AND SOCIAL ACTION* 18 (Prometheus Books 2000) (1991); KELLY, *supra* note 4, at 162; ROBERTS, *supra* note 3, at 563, 567.

12. KELLY, *supra* note 4, at 246–47. French aristocrats

enjoyed and jealously preserved the most odious and abusive privileges, notably freedom from taxation; this, together with the Church’s similar freedom in respect of its own vast wealth, meant . . . an impossibly narrow tax base from which the royal government was left to squeeze the revenue to support world-wide wars.

Id.; see also ROBERTS, *supra* note 3, at 573 (“[F]or three centuries great fertility of imagination was to be shown in inventing new taxes Usually, this bore disproportionately on the poorest . . .”).

13. KELLY, *supra* note 4, at 246–47.

14. ROBERTS, *supra* note 3, at 567.

15. KELLY, *supra* note 4, at 246–47; ROBERTS, *supra* note 3, at 574.

16. Anti-clericalism grew based on the “opposition to tithes and to low standards among

but not for common people.¹⁷ For commoners, there was no hope of improving their condition.¹⁸ They could not own property.¹⁹ They had little ability to arrange their private affairs through contracts.²⁰ There was no market, and so no opportunity to sell their goods and services to the highest bidder.²¹

And who were they to complain? The king was appointed by God, and the church said people had no right to resist their rulers.²² Aristotle explained that it was good for them to be ruled by their betters because they were by nature slaves.²³ “[F]or most of human history most people’s lives have been deeply and cruelly shaped by the fact that they have had little or no choice about the way in which they could provide themselves and their families with shelter and enough to eat.”²⁴

But things changed.²⁵ Galileo debunked Aristotle.²⁶ The Reformation shattered the rule and unity of the Church.²⁷ People

the clergy” Cf. KELLY, *supra* note 4, at 162.

17. *Id.* at 246–47, 270; ROBERTS, *supra* note 3, at 563, 574.

18. ROBERTS, *supra* note 3, at 549.

19. TEEVEN, *supra* note 6, at 1.

20. *Id.*

21. *Id.*

22. KELLY, *supra* note 4, at 174; *see also* ROBERTS, *supra* note 3, at 564–65.

23. Cf. KELLY, *supra* note 4, at 195 (quoting Fernando Vazquez: “Who could endure the impudence—not to say the unforgivable offensiveness—of Aristotle, when he says in the first book of his *Politics* that men of slow intellect should be considered to have been born slaves by nature, or for the service of people of greater wisdom? . . . And surely a much truer and more worthy view is that of those upright and weighty jurists, who have written that slaves have been made so only by the legal systems of men . . . while by the law of nature they have continued to be free.”).

24. ROBERTS, *supra* note 3, at 549.

25. *Id.* at 564–65 (“[A] broad tendency towards social change which strained old forms is observable in many countries by 1700.”). These changes included literacy, social awareness, the rise of a market economy, increased mobility, and increased populations in towns. *See* KELLY, *supra* note 4, at 163 (movable type was invented, allowing lay persons to own Bibles); HOBHOUSE, *supra* note 3, at 14 (“The modern State . . . starts from the basis of an authoritarian order, and the protest against that order, a protest religious, political, economic, social, and ethical, is the historic beginning of Liberalism.”).

26. ARTHUR HERMAN, *THE CAVE AND THE LIGHT: PLATO VERSUS ARISTOTLE, AND THE STRUGGLE FOR THE SOUL OF WESTERN CIVILIZATION* 330–31 (2013); Granger Meador, *Unit 3: Falling Bodies, Reading: Galileo Drops Aristotle*, INQUIRY PHYSICS (2008), <http://www.bps-ok.org/physics/inquiryfiles/03reading.pdf> [<https://perma.cc/XCN5-C7CN>].

27. BRUCE L. SHELLEY, *CHURCH HISTORY IN PLAIN ENGLISH* 237 (3d ed. 2008); cf. KELLY, *supra* note 4, at 159 (“[T]he revival of the Graeco-Roman tradition in art and literature, and . . . the Protestant Reformation . . . brought into life the factors from which, in turn, the modern world was born: the secularization of public life and the emancipation of the lay individual from spiritual authority.”).

revolted against their kings.²⁸ Authority began giving way to autonomy.²⁹ Traditional social hierarchies defined people less,³⁰ and people thought for themselves more.³¹ They believed they had the capacity and the right to make judgments about all things, free from the authority of tradition.³² People did not need to conform to a pre-assigned human nature; they could choose for themselves what they wanted be.³³

Individuals were by nature free and equal.³⁴ They were born with rights such as life, liberty, and property.³⁵ People only gave up these “natural” rights to governments so that those rights could be protected and made effective.³⁶ Governments did not naturally have authority; authority was delegated to government by the consent of the people.³⁷

28. See HERMAN, *supra* note 26, at 401–04; ROBERTS, *supra* note 3, at 574; *cf.* KELLY, *supra* note 4, at 162 (“[A] series of largely peasant revolts These were provoked by taxation and noble oppression, and . . . the system . . . whereby the peasant was compelled to perform labour services for his lord”); *id.* at 244 (“[A]ncient European structures of authority and legitimacy were irreparably fractured by the French and American Revolutions.”).

29. See KELLY, *supra* note 4, at 207 (“But free enquiry implied the repudiation not just of ecclesiastical but of all authority, even that of Aristotle, the most venerable of the ancient pagan philosophers.”).

30. ROBERTS, *supra* note 3, at 563–65.

31. There was a spirit of “independent judgment, of intellectual freedom and self-reliance, which was the very opposite of the old medieval mentality, accustomed to accept the Church’s authority on everything.” *Cf.* KELLY, *supra* note 4, at 166. Erasmus looked to Europe’s emancipation from “spiritual and ultimately from all intellectual authority.” *Id.*

32. See CHARLES FRIED, MODERN LIBERTY AND THE LIMITS OF GOVERNMENT 97 (2007); *cf.* KELLY, *supra* note 4, at 244 (“The [eighteenth] century also contained the high point of the intellectual epoch which prepared the ground for revolution, the so-called ‘Enlightenment’, whose central feature was a rejection of all spiritual and intellectual authority”).

33. *Cf.* JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 119 (1991) (explaining that John Locke held that there was no ultimate end that defined human beings).

34. The French Constitution of 3 September 1791 asserted that “men are born and remain free and equal in rights” See KELLY, *supra* note 4, at 169, 291.

35. See *id.* at 216.

36. DEWEY, *supra* note 11, at 15–16.

37. Richard Hooker said:

Without which consent there were no reason that one man should take upon him to be lord or judge over another; because, although there be, according to the opinion of some very great and judicious men, a kind of natural right in the noble, wise, and virtuous, to govern those which are of servile disposition; nevertheless, for manifestation of this, their right, and men’s more peaceable contentment on both sides, the assent of those who are governed seemeth necessary.

KELLY, *supra* note 4, at 171, 218.

Therefore, political authority was essentially democratic.³⁸ And people wanted rule of law, not arbitrary government.³⁹ Even kings should be subject to the law.⁴⁰ So the old regimes of privilege, injustice, intolerance, and arbitrary government were put down, and the individual was lifted up.⁴¹

The individual became primary, the lens through which government was viewed. “Individuals come first. . . . [S]ocieties, nations, families, team, traditions, religions, languages, and cultures—are the products of individual persons.”⁴² The individual came before the government both chronologically and morally.⁴³ Given that individuals were the basic social and moral unit, coercion of the individual against his will was a great offence.⁴⁴ An individual was not to be used as a means to someone else’s ends.⁴⁵

Thus, the individual and the rights he had delegated both defined and limited the government.⁴⁶ The government’s only purpose was to secure the individual’s natural rights and then do no more.⁴⁷ Any overstepping

38. *Id.* at 207.

39. HOBHOUSE, *supra* note 3, at 17.

40. *Cf.* Kelly, *supra* note 4, at 234. King James was suspending the law, “levying money and keeping a standing army in peacetime” without the consent of Parliament. *Id.* He was imposing excessive bail and fines, all contrary to the law. *Id.* Equality meant that before the law “every person may be bound alike, and that no tenure, estate, charter, degree, birth or place do confer any exemption from the ordinary course of legal proceedings whereunto others are subjected.” *Id.* at 236.

41. *Id.* at 270.

42. FRIED, *supra* note 32, at 19 (footnote omitted).

43. *See* DEWEY, *supra* note 11, at 16.

44. FRIED, *supra* note 32, at 22 (“When others try to force me to do what I judge I do not want to do, or try to trick me into believing what I would not otherwise believe, they attack my person at its deepest level.”).

45. ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 131 (reprt. 1971) (1969) (“I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s, acts of will.”); FRIED, *supra* note 32, at 22.

46. According to John Locke, government cannot be

absolutely arbitrary over the lives and fortunes of the people. For it being but the joint power of every member of the society given up to that person or assembly which is legislator, it can be no more than those persons had in a state of Nature before they entered into society For nobody can transfer to another more power than he has in himself

KELLY, *supra* note 4, at 217; *see also* HOBHOUSE, *supra* note 3, at 33.

47. DEWEY, *supra* note 11, at 16–17 (“It defined the individual in terms of liberties of thought and action already possessed by him . . . and which it was the sole business of the state to safeguard It followed that the great enemy of individual liberty was thought to be government because of its tendency to encroach upon the innate liberties of individuals.”);

of this bound was *ultra vires*, and an individual's civil rights were to mirror his natural rights as closely as possible.⁴⁸ This meant that government owed the individual a negative liberty: an individual should not be prevented from attaining his goals, but no one, including the government, owed him the positive duty of helping him attain his goals.⁴⁹

These individualistic doctrines were not only moral; they were practical.⁵⁰ Progress and civilization were to spring from "the action of individuals."⁵¹ Individuals, not governments, knew what was best for themselves.⁵² Adam Smith taught that the unfettered activity of individuals was the "wellspring of social progress."⁵³ Each person would work to improve his own condition, his own self-interest.⁵⁴ And an unregulated market would make men's self-interest productive, not just for themselves, but for society: "Allowing free trades on open markets . . . increases efficiency and maximizes individual welfare by channeling resources to their highest and best use."⁵⁵ Out of self-interest, men would use their capacities to create the goods and services they could sell at the highest price, and these products would be those things for which society had the greatest need.⁵⁶ This convergence of unplanned individual efforts and desires would generate unprecedented material abundance and benefit society as a whole.⁵⁷ Government interference

HOBHOUSE, *supra* note 3, at 33.

48. See HOBHOUSE, *supra* note 3, at 33 ("Civil rights should agree as nearly as possible with natural rights . . .").

49. BERLIN, *supra* note 45, at 122 ("You lack political liberty or freedom only if you are prevented from attaining a goal by human beings."); FRIED, *supra* note 32, at 51 ("[Liberty] is a relation among people. It is a relation in which each person refrains from interfering with the self-determination of others. It is a relation in which people respect each other—in a limited way, to be sure: they do not necessarily help each other get what they want or need . . .").

50. Cf. KELLY, *supra* note 4, at 305–06 ("[Economic regulation was] resisted not just by inhumanity and greed, but from the conviction that the state had no business to interfere in the relationships of master and workman or landlord and tenant, any more than in any other form of private contract. This position was reinforced by the economic theory of the time . . . which saw the unimpeded operation of free market forces . . . as likely in the long run to best promote economic growth and thus the happiest overall result, whatever the temporary hardship to this or that individual or group . . .").

51. HOBHOUSE, *supra* note 3, at 34.

52. Cf. KELLY, *supra* note 4, at 317 ("[A] core belief of Benthamites was the sacredness of individual freedom, including freedom to contract, on the grounds that the individual must know best for himself what was most conducive to his own welfare . . .").

53. DEWEY, *supra* note 11, at 18; HOBHOUSE, *supra* note 3, at 44.

54. See DEWEY, *supra* note 11, at 19.

55. FRIED, *supra* note 32, at 72–73; see also HOBHOUSE, *supra* note 3, at 44–45.

56. DEWEY, *supra* note 11, at 19; HOBHOUSE, *supra* note 3, at 34.

57. DEWEY, *supra* note 11, at 19.

with such economic liberty would not only trample on people's rights but hinder society's progress.⁵⁸ The best government could do was *laissez-faire*.⁵⁹

But under *laissez-faire*, it became clear that people could not have freedom if they did not also have equality.⁶⁰ Using their economic freedom, business interests concentrated their power until they occupied greatly superior bargaining power over those with whom they contracted.⁶¹ Individuals had little choice but to consent to whatever corporations offered them in the "free market," as there was no one else to contract with.⁶² Such agreements were not based on true consent but on implicit coercion.⁶³ When legislatures tried to come to the aid of workers, courts used "freedom of contract" as a tool to enforce the unequal positions of the parties.⁶⁴ Private control now operated as oppressively as had public control.⁶⁵ Corporations were like legislatures now, and they could dictate harsh terms to their inferiors. It was like a return to feudalism or arbitrary government.⁶⁶ What good was freedom

58. *Id.* at 20.

59. *Id.* at 22.

60. *Cf.* DEWEY, *supra* note 11, at 35 ("Thus from various sources and under various influences there developed an inner split in liberalism."); KELLY, *supra* note 4, at 306 ("Critics of the 'freedom of contract' religion arose, who pointed out that there was no real freedom in a relationship where the starting positions of the two sides were grossly unequal.").

61. *Cf.* TEEVEN, *supra* note 6, at 291 ("[In the nineteenth century], [t]he consolidation of business power in a few hands was the most important factor in the destruction of both market balance and equal economic opportunity. The imbalance in distribution of wealth was aggravated by instrumental governmental policies protecting the strong through governmental franchises, public utilities and trusts. . . . The concentration of power in a few brought on a drift toward monopoly and a diminution of individual freedom to contract. Liberalism's former presumption that most contractors negotiated on an equal bargaining level was no longer applicable." (footnote omitted)).

62. *Id.* ("Consent was gone when a person's whole livelihood was in the market but he had no choice about the terms and often didn't even have the right to contract with a person with an individual identity.").

63. HOBHOUSE, *supra* note 3, at 50.

64. TEEVEN, *supra* note 6, at 299.

65. Private control of the "forces of production . . . operate in the same way as private unchecked control of political power." DEWEY, *supra* note 11, at 44.

66. TEEVEN, *supra* note 6, at 291 ("A former system of market exchanges based on freedom of equal contracting parties was replaced by a neo-feudal corporate system of relations based on superiors and inferiors. Courts of the last quarter of the nineteenth century . . . refused to interfere with one-sided exercise of power since all contracts made in proper form were seen as enforceable. . . . Freedom of contract protected the unequal distribution of property but didn't protect weaker parties from coercion by these owners of the means of production." (footnote omitted)); *cf. id.* at 295 ("Some saw the weapon of 'freedom of contract' facilitating the imposition of a new feudal order by industrial and commercial

when there were no real choices?⁶⁷ Freedom of contract had become a means for undermining freedom. *Laissez-faire* had become the *Ancien Régime*.⁶⁸

Thus if individuals were to develop their capacities, government needed to exert more control over individuals.⁶⁹ The state could not simply let freedom and nature take their “natural” course: many people were unable to benefit from such unregulated freedom.⁷⁰ Under *laissez-faire*, lack of government control had increased coercion of the weak by the strong.⁷¹ People needed actual, not merely legal, liberty.⁷² Thus, the state needed to adopt its own agenda to further human progress.⁷³ This progressivism was not intended to repudiate liberty, but to effectuate it.⁷⁴ It was understood that liberty was relative to particular social conditions.⁷⁵ Medieval conditions may have required individualism, but

overlords through the private legislation of standardized contracts . . .” (footnote omitted)).

67. *See id.* (“It became an illusion that the law protected the public interest against the abuses of freedom of contract when freedom depended on one’s position on the economic ladder.”).

68. *Cf.* DEWEY, *supra* note 11, at 41 (“The economic and political changes for which they strove were so largely accomplished that they had become in turn the vested interest . . .”); HOBHOUSE, *supra* note 3, at 47.

69. DEWEY, *supra* note 11, at 44 (“[S]ocial control of economic forces is equally necessary if anything approaching economic equality and liberty is to be realized.”); HOBHOUSE, *supra* note 3, at 54; KELLY, *supra* note 4, at 306 (“T.H. Green . . . restated the liberal faith in a form which made it include respect for the dignity of the individual, recognition that he should have the chance of fully unfolding his capacities, and an acknowledgment that the state had a role, which might take the form of legislative interference and regulation, in affording him the basic conditions in which this ideal might be achieved. The force of this reconstructed liberalism was joined, in the 1880s, by beginnings of organized socialism . . .”).

70. HOBHOUSE, *supra* note 3, at 80 (“We all admit a collective responsibility for children. Are there not grown-up people who stand just as much in need of care? What of the idiot, the imbecile, the feeble-minded or the drunkard? What does rational self-determination mean for these classes.”).

71. *See* TEEVEN, *supra* note 6, at 295.

72. DEWEY, *supra* note 11, at 37–40.

73. *Id.* at 34 (“[I]t is the business of the state to protect all forms and to promote all modes of human association in which the moral claims of the members of society are embodied and which serve as the means of voluntary self-realization. Its business is negatively to remove the obstacles that stand in the way of individuals coming to consciousness of themselves for what they are, and positively to promote the cause of public education.”).

74. HOBHOUSE, *supra* note 3, at 47.

75. *Cf.* DEWEY, *supra* note 11, at 54 (“[T]he conception of liberty is always relative to forces that at a given time and place are increasingly felt to be oppressive. Liberty in the concrete signifies release from the impact of particular oppressive forces . . .”); TEEVEN, *supra* note 6, at 296 (“Thus Adam Smith could be seen as correct in protesting against eighteenth century paternalistic mercantile restrictions, but it was now argued that state intervention was necessary to provide positive assistance for the furtherance of human progress.”).

laissez-faire now required government intervention.⁷⁶ By the nineteenth and twentieth centuries, government control over individual freedom had spread to many areas of public life.⁷⁷

We now turn from the narrative of liberalism to an analysis of that narrative. Because of the tension between individual rights and social welfare, liberalism presents us with “the problem of freedom.”⁷⁸ Given the individualistic nature of the Good, “[t]he problem in liberal society then becomes to insure that each individual will achieve the greatest amount of liberty, the freedom to pursue her own desires, and to establish an order that can restrain conflicts among individuals and that does not favor some at the expense of others.”⁷⁹

We have seen that there are two streams of liberalism, one libertarian and one progressive. Libertarians believe people have natural rights such as life, liberty, property, and freedom of thought and contract.⁸⁰ These rights are not conferred by the state; people possessed them before there were states.⁸¹ They are “prepolitical.”⁸² Such natural rights must be secure against government interference.⁸³

But progressives believe that rights are created and defined by society; rights are to be limited or extended based on the benefit provided to society as a whole.⁸⁴ “[The community] may do with the individual what it pleases provided that it has the good of the whole in view.”⁸⁵ Even the innermost aspects of a person, his thoughts, are considered “social.”⁸⁶ Though progressives are solicitous of individual rights (they believe the interest of individuals and their society ultimately coincide),⁸⁷ they admit

76. See TEEVEN, *supra* note 6, at 296–97 (“The Progressives’ positive program was not meant to overthrow private enterprise but instead was a middle ground between socialism and individualism.”).

77. *Id.* at 296, 301; see also KELLY, *supra* note 4, at 352–53.

78. Cornell, *supra* note 1, at 328–29.

79. *Id.* at 329.

80. FRIED, *supra* note 32, at 80; HOBHOUSE, *supra* note 3, at 32.

81. DEWEY, *supra* note 11, at 15 (“The outstanding points of Locke’s version of liberalism are that governments are instituted to protect the rights that belong to individuals prior to political organization of social relations.”).

82. FRIED, *supra* note 32, at 80; HOBHOUSE, *supra* note 3, at 32.

83. FRIED, *supra* note 32, at 94; HOBHOUSE, *supra* note 3, at 52.

84. HOBHOUSE, *supra* note 3, at 36–38, 68.

85. *Id.* at 38.

86. *Id.* at 19.

87. See *id.* at 42.

that in the final analysis there is no aspect of an individual's life that is not a social issue.⁸⁸

This difference over the nature of rights leads to a difference over the role of government. Libertarians believe in limited government.⁸⁹ The government's role is to secure people's natural rights, and to do more is to transgress its limits.⁹⁰ Because man's essence is his autonomy, "[p]aternalism is the greatest despotism imaginable."⁹¹ Coercing men in the name of some social goal is a road to hell paved with good intentions.⁹² But progressives believe government is not so limited and that it should be used as an instrument of good to advance people's welfare, especially the economically disadvantaged.⁹³

Libertarians believe that individuals are entitled to plan their lives according to their own judgment, to choose their own vision of the Good.⁹⁴ "It is the capacity to choose and judge for ourselves that is the essence of our individuality and so of our liberty."⁹⁵ Progressives deny, if only implicitly, that individuals may choose their own Good, at least in an

88. *Id.* at 65 ("We should frankly recognize that there is no side of a man's life which is unimportant to society, for whatever he is, does, or thinks may affect his own well-being, which is and ought to be matter of common concern, and may also directly or indirectly affect the thought, action, and character of those with whom he comes in contact.").

89. See LIBERTARIAN PARTY, LIBERTARIAN PARTY PLATFORM (2014), https://www.lp.org/files/2014_LP_Platform.pdf [<https://perma.cc/5UAX-49QW>].

90. See DEWEY, *supra* note 11, at 15–16.

91. BERLIN, *supra* note 45, at 137.

92. *Id.* at 132–33 ("[W]e recognize that it is possible, and at times justifiable, to coerce men in the name of some goal (let us say, justice or public health) which they would, if they were more enlightened, themselves pursue I am then claiming that I know what they truly need better than they know it themselves Once I take this view, I am in a position to ignore the actual wishes of men or societies, to bully, oppress, torture them in the name, and on behalf, of their 'real' selves"); cf. HOBHOUSE, *supra* note 3, at 26–28. Hobhouse, an early leader of progressivism, opines that it is "doubtful" that the American "Negro . . . [is] mentally and morally capable of self-government" HOBHOUSE, *supra* note 3, at 26–27. He also argues against universal suffrage on the grounds that "people as a whole might be careless of their rights and incapable of managing them. . . . It is perfectly possible that from the point of view of general liberty and social progress a limited franchise might give better results than one that is more extended." *Id.* at 28.

93. DEWEY, *supra* note 11, at 30 ("Gradually a change came over the spirit and meaning of liberalism. It came surely, if gradually, to be disassociated from the *laissez faire* creed and to be associated with the use of governmental action for aid to those at economic disadvantage and for alleviation of their conditions.").

94. FRIED, *supra* note 32, at 94.

95. *Id.*

absolute sense.⁹⁶ Progressives believe that at times certain social goods must trump the freedom of an individual.⁹⁷

Despite these profound differences, there is a family resemblance between libertarianism and progressivism. Both emphasize the right of individuals to develop their own capacities.⁹⁸ Both claim to promote the welfare of both individuals and society.⁹⁹ Both believe that people's freedom must be limited to some extent if their freedom is to be effective, and yet both believe there are limits to those limits: there must be *some* degree of individual freedom that government does not invade.¹⁰⁰ Both are protests against abuse of power.¹⁰¹

B. MacIntyre's Critique of Liberalism

Alasdair MacIntyre has argued that the liberal dialectic between libertarianism and progressivism is incoherent and can never be rationally resolved.¹⁰² One side of the debate argues in terms of rights and limited government.¹⁰³ The other side argues in terms of utility, emphasizing that individual rights are subordinate to social welfare.¹⁰⁴ But this debate suffers from "conceptual incommensurability."¹⁰⁵ There is no rational way to decide which should have priority between rights and utility.¹⁰⁶ Many efforts have been made to demonstrate a rational, secular basis for

96. *Id.* at 89; HOBHOUSE, *supra* note 3, at 68.

97. HOBHOUSE, *supra* note 3, at 38, 68.

98. *Cf.* DEWEY, *supra* note 11, at 33 (Progressives "remained faithful . . . to the ideals of liberalism; the conceptions of a common good as the measure of political organization and policy, of liberty as the most precious trait and very seal of individuality, of the claim of every individual to the full development of his capacities."); FRIED, *supra* note 32, at 94 ("[O]nly in a regime of secure entitlements can there be liberty. Only in such a regime are individuals able to plan and develop their lives according to their plans, secure against the imposition of others."); HOBHOUSE, *supra* note 3, at 60.

99. FRIED, *supra* note 32, at 72-74; HOBHOUSE, *supra* note 3, at 60.

100. BERLIN, *supra* note 45, at 124 ("[T]he area of men's free action must be limited by law. . . . [But] there ought to exist a certain minimum area of personal freedom which must on no account be violated; for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred. It follows that a frontier must be drawn between the area of private life and that of public authority."); FRIED, *supra* note 32, at 89-90; HOBHOUSE, *supra* note 3, at 17.

101. HOBHOUSE, *supra* note 3, at 75; KELLY, *supra* note 4, at 270-71.

102. *See* ALASDAIR MACINTYRE, *AFTER VIRTUE* 6-8 (2d ed. 1984).

103. *See generally id.*

104. *Id.*

105. *Id.* at 8.

106. *Id.*

one framework or the other, but MacIntyre argues that all such efforts have failed.¹⁰⁷ It is in reference to these issues of “conceptual incommensurability” and irrationality that I will later show that the boilerplate debate resists MacIntyre’s critique.

However, according to MacIntyre, given liberalism’s failure to give rational grounds for its moral judgments, such judgments must be expressions “of attitude or feeling” and “neither true nor false.”¹⁰⁸ So all that can be done is to presuppose the priority of one or the other; there is no rational justification for any claims that an objective moral standard exists.¹⁰⁹ Given that there is no rational basis for choosing between rights and utility as a basis for morality and ethics, such a decision can only be made by an act of will.¹¹⁰ This means that the choice between moral frameworks is arbitrary.¹¹¹ Because morality is arbitrary, Nietzsche held to a principled irrationalism for “if there is nothing to morality but expression of will, my morality can only be what my will creates.”¹¹² Ultimately, we can only try to force our wills upon each other.¹¹³

According to MacIntyre, we have arrived at this philosophy of “Emotivism” by way of our escape from the authoritarianism of the middle ages as “the individual” was freed from “constraining hierarchies” and the “superstitions of teleology,” including the notion that human beings have a human nature.¹¹⁴ So although the individual gained “sovereignty in its own realm” by casting off Medievalism in favor of Modernism, it left behind “its traditional boundaries provided by a social identity and a view of human life as ordered to a given end.”¹¹⁵ Ethics requires an account of human nature and human purpose.¹¹⁶ For example, Aristotle said human beings were rational animals made for the purpose of *eudemonia*, or happiness.¹¹⁷ But modern thought rejected “any teleological view of human nature, any view of man as having an essence which defines his true end.”¹¹⁸

107. *Id.* at 54–61.

108. *Id.* at 12.

109. *Id.* at 19.

110. *Id.* at 20–21.

111. *See id.* at 8.

112. *Id.* at 26, 113–14.

113. *Id.* at 26.

114. *Id.* at 14, 34.

115. *Id.* at 34.

116. *Id.* at 52.

117. *Id.* at 148.

118. *Id.* at 54.

What is left after *telos* is rejected as an incoherent moral scheme in which human nature is conceived of as needing moral education and “moral injunctions” (i.e., promises should be kept) but without any agreed upon purpose for why.¹¹⁹ In such a situation, any appeal to moral rules must “appear as a mere instrument of individual desire and will.”¹²⁰ Modern philosophy tries to substitute utility for teleology and underwrite “rights” with reason.¹²¹ But utility proves an unworkable criteria for ethics,¹²² and a secular account of human rights has failed.¹²³ Utility and rights are marshalled to make arguments seem objective, but in fact, they are only vehicles for modern individuals’ will to power.¹²⁴

II. THE BOILERPLATE DEBATE

For nearly one hundred years, one venue for the liberalism dialectic has been the boilerplate debate. By “boilerplate,” this Article refers to contracts of adhesion in which there is a significant disparity in bargaining power between the parties, the offeror offers terms on a “take it or leave it” basis, and the contract is formed after little or no negotiation. We will see that the boilerplate debate parallels the liberalism dialectic, and then we will consider what liberalism tells us about boilerplate and what boilerplate tells us about liberalism.

In the late nineteenth century, the mass production and distribution of goods and services led business firms to use form contracts to standardize their relationships with their customers.¹²⁵ Form contracts decrease a firm’s transaction costs and increase its efficiency.¹²⁶ The use of form contracts eliminated the costly process of bargaining with

119. *Id.* at 55, 65.

120. *Id.* at 62.

121. *Id.* at 62–64.

122. When it is recommended that

we should guide our own choice by the prospects of our own future pleasure or happiness, the appropriate retort is to enquire: ‘But which pleasure, which happiness ought to guide me?’ . . . [A]ppeal to the criteria of pleasure will not tell me whether to drink or swim and appeal to those of happiness cannot decide for me between the life of a monk and that of a soldier.

Id. at 63–64.

123. *Id.* at 69; see also Nicholas Wolterstorff, *Can Human Rights Survive Secularization?*, 54 VILL. L. REV. 411 (2009).

124. MACINTYRE, *supra* note 102, at 71.

125. TEEVEN, *supra* note 6, at 294.

126. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1221–22 (1983).

individuals, replacing labor intensive and potentially idiosyncratic negotiations with efficient take-it-or-leave-it forms, all while preserving and enhancing a firm's ability to negotiate later in the event of a dispute.¹²⁷ Forms also gave firms control over their agents by limiting negotiation to a small number of terms and preventing the agent from departing from the "script," thus facilitating the management of the firm.¹²⁸ Forms facilitated the firm's planning and security by making the terms of a contract more certain, both because they were specified in great detail and because they were drafted by the firm, and thereby firms gained some control over potential disputes, made risks easier to predict, and made business more efficient.¹²⁹

It has been estimated that 99% of contracts are form contracts, and form contracts are acknowledged as a modern necessity.¹³⁰ However, for at least one hundred years, commentators have expressed concerns over adhesion contracts.¹³¹ The absence of consumer consent to adhesion contracts is one primary problem as the consumer does not read or understand boilerplate before signing it, and even if he did, he would have minimal alternatives unless he were willing to forgo most goods and services.¹³² "[T]his fact tends to suggest two polar positions: all terms are valid, because signing is binding, or all form terms are potentially invalid, because they are neither bargained for nor agreed upon."¹³³ The widespread invalidation of form terms is assumed to be impracticable given "[t]he economics of the mass distribution of goods" though it has been argued that "nothing inherent in the concept of mass distribution requires that the drafting party's terms must prevail."¹³⁴ The question of

127. Cf. TEEVEN, *supra* note 6, at 294 ("Business favored standardized contracts because of the cost of individualized handling of mass transactions and because of the control it gave over its agents and the factors of production. Standardization facilitated better planning and security by encouraging certainty and making risks more calculable under agreements drafted with the needs of commercial interests in mind."); Jason Scott Johnston, *Cooperative Negotiations in the Shadow of Boilerplate*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 20–21 (Omri Ben-Shahar ed., 2007); Rakoff, *supra* note 126, at 1221, 1228.

128. Cf. Johnston, *supra* note 127, at 20–21; Rakoff, *supra* note 126, at 1222–24.

129. Cf. Johnston, *supra* note 127, at 19–21; Rakoff, *supra* note 126, at 1221–22.

130. W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529–30 (1971).

131. Rakoff, *supra* note 126, at 1178–79 (noting that many standard form contracts do not raise the same issues as adhesion contract); see also Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34, 34–35 (1917).

132. Rakoff, *supra* note 126, at 1179, 1228–29; see also Arthur Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970).

133. Rakoff, *supra* note 126, at 1207; see also Leff, *supra* note 132, at 349.

134. Rakoff, *supra* note 126, at 1208.

which party, the drafter of the adhesive terms or the draftee, deserves greater deference seems to depend on intuitions about whether the government will distribute risks prudently.¹³⁵

However, the most important criticism of adhesion contracts is that they result in unfair bargains for consumers. Adhesion contracts tend to maximize the rights of the firm and shift unfavorable terms onto consumers.¹³⁶ Nevertheless, courts have generally enforced form contracts.¹³⁷ There has been a wide range of calls for procedural and substantive reforms of contracts of adhesion, as well as defenses of the current regime.¹³⁸

Karl Llewellyn states that in adhesion contracts the consumer's assent to the terms of the writing is relatively limited.¹³⁹ A consumer specifically assented to the few negotiated terms, and then gave blanket assent to the remaining terms in the adhesion contract.¹⁴⁰ However, because consumers did not specifically assent to the unread terms, such "fine print" should not be enforced if unreasonable.¹⁴¹ Llewellyn's approach to adhesion contracts bases the justification for enforcing contractual terms on the parties' consent.¹⁴² But this raises a question: what can one be consenting to when one consents to unread terms? It cannot be said that a person specifically agrees to those terms because the person does not know what they are. Llewellyn's solution is to describe a fictional "blanket assent" to reasonable terms.¹⁴³ It is fictional because, of course, the parties to the contract have not discussed this blanket assent any more than they have discussed the unread terms specifically.¹⁴⁴

Llewellyn's approach attempts to both vindicate and give content to the parties' decision to enter into a contractual relationship, including those aspects of the deal that are "sound particularizations of the deal to

135. Cf. Rakoff, *supra* note 126, at 1208 n.125. Rakoff notes that Arthur Leff seemed to fear that the government would socialize too many risks; Rakoff believes that fear is unsubstantiated. *Id.*

136. *See id.* at 1222, 1227.

137. *Id.* at 1184–85.

138. *See infra* pp. 646–55.

139. *See* KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362–63 (1960).

140. *See id.* at 371.

141. *See id.* at 362–63.

142. *See* Rakoff, *supra* note 126, at 1199–1200.

143. *See id.* at 1200.

144. *See id.* ("Some adherents may have formed such an intent, but it is unlikely that the majority of adherents do, or on reflection would, conceive of the relation in this manner.").

the business,” while fixing a boundary of fairness around that relationship.¹⁴⁵ Llewellyn expresses some concern that judges were not well suited to draw the line between reasonable and unreasonable terms.¹⁴⁶ He believes that trade practices are good evidence of what should be deemed reasonable in an adhesion contact (though he notes that unreasonable trade practices need to be rejected) and suggests that judges be deferential to an expert’s knowledge of what was fair in a given trade.¹⁴⁷

But Todd Rakoff responds that it is “not at all clear that the businessman’s expertise, as applied, will yield a better result than the judge’s impartiality.”¹⁴⁸ An adhesion contract tends to reflect the art of the *lawyer*, not the business person, and the lawyer will “draft up to the limit allowed by law”¹⁴⁹

There is no basis for presuming that the form incorporates any relevant social wisdom. There may be a very good argument for allowing parties to educate judges to practical realities, and a very good argument against judges’ jumping to apply “general rules”; but that is a far cry from adopting a presumption that the form document should be enforced.¹⁵⁰

Rakoff characterizes Llewellyn’s approach as an attempt to understand adhesion contracts within a framework of private law, which emphasizes the interaction of the contract parties.¹⁵¹ Another approach is to “acknowledge frankly that the question whether to enforce form terms presents a series of policy choices. If the question is to be considered in this light, Llewellyn’s private law stance must be abandoned in favor of an investigation of public law approaches.”¹⁵² Arthur Leff, for example, suggests “a broad program of legislation coupled with administrative enforcement, directed in part to requiring greater disclosure of terms but aimed primarily at the outright prohibition of particular clauses and devices in adhesion contracts.”¹⁵³ For Leff,

145. See *id.* at 1202–03. Llewellyn believed in enforcing terms unless they were “too unfair.” *Id.*

146. *Id.* at 1202–04.

147. *Id.* at 1204.

148. *Id.*

149. *Id.* at 1205.

150. *Id.* at 1206.

151. *Id.* at 1198.

152. *Id.* at 1206–07.

153. *Id.* at 1207 (citing Leff, *supra* note 132, at 357).

adhesion contracts are used by firms to maximize profits by avoiding risks, and the administration of these risks is a matter of public policy because adhesion contracts “are mass produced and treat a large number of persons in the same way.”¹⁵⁴ Thus, form contracts should be regulated like products liability.¹⁵⁵

This argument would justify public control of form contracts, but it also seems to prove too much by implying that the government should determine all the terms of form contracts.¹⁵⁶ If the government should regulate non-negotiated terms, why shouldn't it regulate the negotiated terms as well? “[O]nce full enforceability is denied, the premises supporting any degree of enforcement are called into question. . . . [F]rom the public law standpoint, one perceives no reason not to employ rules created by the legal system instead of by the draftsman.”¹⁵⁷

Fredrich Kessler writes that adhesion contracts are the result of the “trend of competitive capitalism towards monopoly.”¹⁵⁸ Kessler identifies the dynamic of bargaining power as allowing firms to dictate terms to consumers.¹⁵⁹ The consumer comes to the firm in need of goods and services, but the consumer is denied the opportunity to negotiate terms because the firm has a monopoly or because all of the firm's competitors use similar terms.¹⁶⁰ Thus, the consumer must accept what the firm offers.¹⁶¹ The enforcement of form contracts grants authoritarian power to business firms.¹⁶²

Rakoff argues that the usual assumption that form contracts generate economic utility cannot be accepted at face value.¹⁶³ In fact, the opposite should be assumed. Because consumers do not read form contracts, profit-seeking firms are incentivized to shift costs to consumers without

154. Rakoff, *supra* note 126, at 1209; *see also* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 140–42 (1970).

155. Rakoff, *supra* note 126, at 1209.

156. *Id.*

157. *Id.* at 1215.

158. Fredrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

159. *Id.* at 632.

160. *Id.*

161. *Id.*

162. *Id.* at 640.

163. Rakoff, *supra* note 126, at 1231.

lowering their prices.¹⁶⁴ Thus, so-called “freedom of contract” in adhesion contracts works to exploit consumers.¹⁶⁵

Although in the past, freedom of contract served to promote the growth of the market economy and empower people previously unable to freely organize their private lives, it has become the contemporary embodiment of *laissez-faire*, which causes courts to overlook “the elements of liberty that are actually at stake.”¹⁶⁶ Freedom of contract in the adhesion contract context does not protect the liberty of a real person, but a “drafting organization.”¹⁶⁷ But enforcing form contracts does not enhance the development of a human being’s capacities through the exercise of individual choice; the form contract is simply the business technology of a non-human organization.¹⁶⁸ What is really at stake is the domination of individual human beings by business firms via contract law.¹⁶⁹ “[R]ecognizing that elimination of such domination, where it exists, is . . . a fulfillment of liberty”¹⁷⁰

Therefore, public officials should choose the terms to be enforced in an adhesive contract and choose those terms to promote the common good.¹⁷¹ Rakoff finds that adhesive contracts should not be presumed to be enforceable.¹⁷² Terms that are consciously bargained-for or shopped-for will be analyzed and enforced according to normal contract law.¹⁷³ But

164. Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 118, 172 (2007); Jonathan Klick, *The Microfoundations of Standard Form Contracts: Price Discrimination vs. Behavioral Bias*, 32 FLA. ST. U. L. REV. 555, 556 (2005) (“This efficiency view implies that in competitive markets, standardized terms will benefit buyers. A corollary to this is that if we observe ‘abusive’ standardized terms, the market is presumptively monopolistic. Casual observation suggests that standardized contracts are nearly ubiquitous, and a great many of the standardized terms appear to benefit the seller to the potential detriment of the buyer.” (footnote omitted)); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1235 (2003) (“When buyers cannot verify quality, the market will produce lower-quality goods. Ironically, far from guaranteeing a market equilibrium of efficient terms, competition can guarantee an equilibrium of inefficient terms.” (footnote omitted)); cf. Rakoff, *supra* note 126, at 1204 (“[T]he businessman who absorbs risks may find it difficult to compete with others who can lower prices because they disown risks.”).

165. See Rakoff, *supra* note 126, at 1235.

166. See *id.* at 1235–36.

167. *Id.* at 1236.

168. *Id.*

169. *Id.* at 1236–37.

170. *Id.* at 1237.

171. *Id.* at 1238.

172. *Id.* at 1243.

173. *Id.* at 1251.

because of the inevitable infringement on individual's freedom, adhesive terms should be presumptively *unenforceable*.¹⁷⁴

Randy Barnett questions Rakoff's proposal on many grounds. He doubts public officials are capable of writing appropriate terms to replace adhesive terms.¹⁷⁵ Such a process will increase transaction costs and ultimately harm consumers.¹⁷⁶ This process will also increase uncertainty of transactions because both drafters and adherents will require legal counsel to learn what terms a court is likely to impose upon their contractual relationship.¹⁷⁷

Barnett acknowledges that parties do not read form contracts or give specific agreement to terms.¹⁷⁸ But this is part of "rational ignorance."¹⁷⁹ Rational ignorance means that given the low probability that a dispute will arise over one of the unread terms, and given the low stakes involved in most form contracts, it would be "irrational for form-receiving parties to spend time reading, much less understanding, the terms in the forms they sign."¹⁸⁰ This puts the drafter in the position of knowing that an adherent will consent to the form without reading it or understanding it.¹⁸¹ This is a problem for the traditional approach to contractual assent, as it suggests that the parties to a form contract have not actually reached any agreement, and therefore, the form is not binding.¹⁸² Yet, despite these problems, form contracts offer economic benefits to both drafters and adherents.¹⁸³ Thus, Barnett offers a justification for the enforcement of

174. *Id.* at 1238.

175. Randy E. Barnett, *Consenting to Form Contract*, 71 *FORDHAM L. REV.* 627, 633–34 (2002).

176. *Id.*

177. *Id.* at 634.

178. *Id.* at 629.

179. *Id.* at 631; Daniel E. Wenner, Note, *Renting in Collegetown*, 84 *CORNELL L. REV.* 543, 572–73 (1999) ("The utilization of form contracts creates an environment in which 'rational ignorance plays a particularly powerful role.' The resource costs of making an informed decision with respect to a form contract are extremely high. Form contracts often contain many legal terms, the language of which confuses laypeople. To execute a form contract safely, a layperson would have to pay an attorney to review it, further increasing the transaction costs and limiting the form contract's efficiency. Indeed, even an attorney would not parse every inch of a form contract when he endeavors to 'rent a car, purchase an airline ticket, enter a parking garage, or sign a car loan agreement or apartment lease.'" (footnotes omitted)).

180. Barnett, *supra* note 175, at 631; *cf.* Klick, *supra* note 164, at 562 ("That is, perhaps the reason that certain terms are systematically non-salient is because their ultimate importance is trivial.").

181. Barnett, *supra* note 175, at 629–30.

182. *Id.*

183. *Id.* at 630–31 (citing Rakoff, *supra* note 126, at 1220); Michelle A. Sargent, Note,

form contracts. According to Barnett, consenting to form contracts is not about making a promise that a party would need to have actually understood. Instead it is “about manifesting consent to be legally bound.”¹⁸⁴

Now think of click license agreements on web sites. 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.¹⁸⁵

Barnett’s main point is that “in principle, one can consent to terms one does not read. . . . [O]ne can consent to terms one is not even shown in advance.”¹⁸⁶ The only limit is that the drafter may not “exceed some bound of reasonableness.”¹⁸⁷

Barnett’s approach has the advantage of being in accord with the U.S. Supreme Court’s.¹⁸⁸ In *Carnival Cruise Lines, Inc. v. Shute*, Eulala Shute attempted to sue Carnival Cruise Lines in her home state of Washington after being injured during a cruise.¹⁸⁹ However, the tickets that Eulala had purchased indicated that she could only sue in Florida, and ultimately the U.S. Supreme Court enforced the forum selection clause. The fact that the forum selection clause was adhesive and would make it difficult for the Shutes to bring suit did not make the term unenforceable.¹⁹⁰ The Court did say that such terms were to be scrutinized for “fundamental fairness.”¹⁹¹ However, the term in question was found to be reasonable because it served a rational business purpose, enhanced clarity about the

Misplaced Misrepresentations: Why Misrepresentation-of-Age Statutes Must Be Reinterpreted as They Apply to Children’s Online Contracts, 112 MICH. L. REV. 301, 307 (2013) (“[C]ourts’ opinions have emphasized the economic benefits of form contracts and boilerplate language . . .”).

184. Barnett, *supra* note 175, at 634.

185. *Id.* at 635.

186. *Id.* at 641 (emphasis omitted).

187. *Id.* at 638.

188. Barnett offers *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), as an example of his consensual approach to form contracts. See Barnett, *supra* note 175, at 638–39.

189. 499 U.S. at 585.

190. Barnett, *supra* note 175, at 639.

191. *Id.*

parties' rights, conserved judicial resources, and was economically beneficial for all involved.¹⁹²

All of these pragmatic justifications have been questioned. Of course a term in a form contract serves a business purpose, but shouldn't this purpose be weighed against the detriment it imposes on the consumer?¹⁹³ Also, it is doubtful that form terms actually make parties' rights and obligations clear, at least for consumers, because people do not read form contracts.¹⁹⁴ Apparently, judicial resources are not actually conserved by form contracts, as forum selection clauses are frequently litigated.¹⁹⁵ And perhaps most importantly, form contracts may not in fact reduce prices for consumers. Competition cannot cause firms to improve contract quality when consumers are not reading form contracts because there will be no comparison-shopping for terms of which they are unaware.¹⁹⁶ In other words, competition will actually cause firms to draft worse terms in their form contracts.

However, even if the pragmatic justifications for adhesion contracts are in question, there remains the autonomy argument. Barnett writes that "[r]efusing to enforce all of these terms would violate their freedom

192. See Linda S. Mullenix, *Another Easy Case, Some More Bad Law: Carnival Cruise Lines and Contractual Personal Jurisdiction*, 27 TEX. INT'L L.J. 323, 340–41 (1992).

193. *Id.* at 342.

194. *Id.*

195. *Id.* at 342–43.

196. Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546 (2014); cf. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 4 (2014) ("We find that the fraction of consumers who read such contracts is so small that it is unlikely that an informed minority alone is shaping software license terms."); Becher, *supra* note 164, at 172 ("This reality, in turn, creates a market failure that results from sellers' race-to-the-bottom since it provides contract drafters with a profit incentive to include low quality (non-salient) terms in their pre-drafted forms."); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243–44 (1995); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716–21 (1992) (rejecting economists' assertions that contracts of adhesion are efficient); Klick, *supra* note 164, at 556 ("This efficiency view implies that in competitive markets, standardized terms will benefit buyers. A corollary to this is that if we observe 'abusive' standardized terms, the market is presumptively monopolistic. Casual observation suggests that standardized contracts are nearly ubiquitous, and a great many of the standardized terms appear to benefit the seller to the potential detriment of the buyer."); Korobkin, *supra* note 164, at 1235 ("When buyers cannot verify quality, the market will produce lower-quality goods. Ironically, far from guaranteeing a market equilibrium of efficient terms, competition can guarantee an equilibrium of inefficient terms." (footnote omitted)); Rakoff, *supra* note 126, at 1204 ("[T]he businessman who absorbs risks may find it difficult to compete with others who can lower prices because they disown risks.").

to contract.”¹⁹⁷ Although consumers sign form contracts without reading them, “[t]hey would rather run the risk of agreeing to unread terms than either (a) decline to agree or (b) read the terms.”¹⁹⁸

Behavioral economics calls into question this autonomy-based argument. People cannot rationally assess or reject terms that they do not know exist.¹⁹⁹ Moreover, this ignorance-based consent is unlikely to be economically efficient. “[P]eople deviate, in systematic ways, from what is supposed (by standards of efficiency) to be rational behavior.”²⁰⁰ Consumers are overly optimistic, poor at estimating risk, prone to ignoring unfavorable terms in form contracts, throwing good money after bad, and accepting unfavorable price changes during contract formation.²⁰¹

These arguments cast doubt on the premise of autonomous choice. People do not always make good choices, so perhaps we should not look favorably on their choice to “consent” to boilerplate. But some go further and simply deny that consent to form contracts is an act of autonomy. “[T]he enforcement of form terms is objectionable because it undermines individual autonomy, as the buyer finds herself obligated to terms to which she did not voluntarily agree.”²⁰²

Margaret Radin argues that adhesion contracts are in fact an assault on our politics of individual rights and that enforcement of certain adhesive terms results in “democratic degradation.”²⁰³ “[O]ur system is

197. Barnett, *supra* note 175, at 639 (emphasis omitted).

198. *Id.* at 639.

199. Cf. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 523 (2008) (“The Court ignored the unlikelihood that average cruise-goers would read material received after they paid for their tickets and once they confirmed that their tickets were enclosed in the envelope.”).

200. Becher, *supra* note 164, at 123; cf. Eisenberg, *supra* note 196, at 213 (“Rationality requires, among other things, that when consequences are uncertain, their likelihood is evaluated without violating the basic rules of probability theory. . . . [E]mpirical evidence shows that actors characteristically violate the standard rational-choice or expected-utility model, due to the limits of cognition.”).

201. Ching, *supra* note 2, at 13; Avery Weiner Katz, *Standard Form Contracts*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 502, 504 (Peter Newman ed., 1998) (noting that asymmetric information can result in inefficient terms in form contracts); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 585 (1990) (“[I]mperfect consumer information causes a tendency toward inefficiency in transactions involving consumer form contracts.”).

202. Korobkin, *supra* note 164, at 1205; Rakoff, *supra* note 126, at 1238.

203. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33 (2013).

committed to the moral premise . . . that people who enter contracts are *voluntarily* giving up something in exchange for something they value more.”²⁰⁴ But consumers are not voluntarily giving up these rights, and through adhesive contracts, firms become lawmaking bodies which are deleting people’s basic political rights, such as jury trials and rights of redress.²⁰⁵ Adhesive contracts thereby jeopardize the distinction between the public–private sphere, the idea of private ordering, and rule of law.²⁰⁶ Radin’s proposed solution is to make a number of legal rights inalienable via adhesion contracts.²⁰⁷

Omri Ben-Shahar has resisted Radin’s proposal.²⁰⁸ He insists that when firms use adhesion contracts, even—or especially—those that delete important consumer rights, consumers benefit by paying lower prices for goods and services.²⁰⁹ If firms were prevented from deleting consumers’ rights through adhesion contracts, prices would go up, which would disproportionately affect the poor.²¹⁰

Ben-Shahar argues that it is likely that a majority of consumers are *delighted* to get a product at a lower price, even if it is at the cost of certain legal rights.²¹¹ Although there may be a minority who do not share this preference, it would be anti-democratic to impose this minority’s preferences on the majority by prohibiting firms from offering rights-deleting form contracts.²¹² If consumers wanted to preserve their legal rights, the market would supply such an option.²¹³ To Ben-Shahar, a program of inalienable legal rights looks like a threat to individual autonomy, not protection of it.²¹⁴ People should be allowed *not* to care about their legal rights, he argues.²¹⁵ In short, regulating boilerplate

204. *Id.* at 15.

205. *Id.* at 16–17, 33.

206. *Id.* at 33, 35, 38.

207. Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 892 (2014) (“In Radin’s autonomist regime, the right to a jury trial, to participate in a class action, to a substantial warranty, to expectation damages, to fair-use rights in digital content, and to various other ends, should be elevated to a quasi-mandatory status. No more boilerplate opting out.”).

208. *Id.* at 892, 895.

209. *Id.* at 895.

210. *Id.* at 900–01.

211. *Id.* at 896–98.

212. *Id.* at 896.

213. *Id.* at 898.

214. *Id.* at 899.

215. *Cf. id.* at 899 (“Because the issues governed by boilerplate are complex and largely unfamiliar, being occupied by them can detract from one’s sense of control. And having to pay

would both violate individuals' autonomy and cause them to pay higher prices.

III. THE BOILERPLATE CHAPTER OF THE LIBERALISM STORY

The boilerplate debate seems to be an inevitable outcome of liberalism.²¹⁶ Libertarian impulses drive one side of the debate. Boilerplate arises from liberalism's granting to individuals both private property and the freedom to exercise their subjective judgment about what to do with it, so as to develop their individual capacities and life plans.²¹⁷ Boilerplate expands the private sphere, allowing people to engage in private ordering with only minimal oversight by public officials.²¹⁸ As Rakoff notes, when we consider boilerplate, we tend to assume that government is limited and that it must justify itself before it interferes with people's freedom of contract.²¹⁹ Boilerplate could be thought of as an instrument of natural right, as people, by the authority of their own autonomous wills, bind themselves to their promises.

Boilerplate enacts a formal equality between contracting parties, largely disregarding the parties' circumstances, including wealth, necessity, and sophistication.²²⁰ By enforcing boilerplate contracts, courts grant people negative liberty, in which absent something like fraud or unconscionability, the contract will be enforced.²²¹ And boilerplate is recognized as a virtual necessity in the individualistic market economy and is deemed to benefit both consumers and business firms.²²²

Yet boilerplate raises all the same concerns progressivism has about individualism. Though there may be legal equality between a business firm and a consumer, there is enormous substantive inequality between them. Formally, a boilerplate contract may look like an agreement between autonomous parties, but substantively it is more like private legislation imposed on consumers by business firms.²²³ And the likely consequence is substantively unfair contracts.

higher prices unless people are smart and sophisticated enough to thoughtfully waive these rights would make most people feel less autonomous. For many, the choice not to bother is the ultimate liberator." (emphasis omitted)).

216. Rakoff, *supra* note 126, at 1217–18.

217. RADIN, *supra* note 203, at 35.

218. *Id.* at 34–35.

219. Rakoff, *supra* note 126, at 1236.

220. *See id.* at 1188.

221. *See id.* at 1190–93, 1236–38.

222. *Id.* at 1230.

223. Ben-Shahar, *supra* note 207, at 884.

Even if substantively unfair contracts were acceptable, progressives doubt that when consumers accept boilerplate terms, they are acting autonomously. There is no real choice because the market only offers boilerplate terms. Further, behavioral economics undermines the notion that consumers' acceptance of boilerplate terms is rational or economically efficient.²²⁴ In order to effectuate freedom of contract and economic efficiency, progressives argue that government must intervene in boilerplate contracts, not in derogation of individual liberty, but for its effectuation.²²⁵

Because the boilerplate debate evokes the themes of liberalism, perhaps it is susceptible to Alasdair MacIntyre's critique of liberalism. As in the liberal dialectic, the boilerplate debate is conducted in terms of rights and utility.²²⁶ Critics of boilerplate argue that accepting boilerplate is not a real act of autonomy, while apologists argue adherents receive lower prices because of boilerplate.²²⁷ Critics argue that boilerplate is not actually efficient, while apologists argue that it would violate a person's freedom of contract *not* to enforce boilerplate terms.²²⁸ But rights and utility are incommensurable, according to MacIntyre, and this setting of rights against utility is, thus, irrational.²²⁹

And the reason we cannot rationally choose between rights and utility in the boilerplate debate is because liberalism lacks concepts of human nature and purpose. Liberalism specifically leaves those issues to individuals' subjective judgment.²³⁰ So, Radin sees people degrading themselves by giving up their legal rights via boilerplate, but Ben-Shahar sees the same people as satisfied customers.²³¹ Neither can be objectively "correct" if *telos* is in the eye of the beholder. What would it even mean to degrade a person who does not have a particular human nature? And how can you decide whether "satisfied customer" is a desirable outcome without a particular conception of human purpose?

This is not to say that people cannot choose between the frameworks of rights and utility. It is simply to say that absent concepts of human nature and purpose, such choices must be arbitrary acts of will. And if

224. Becher, *supra* note 164, at 120, 178–79.

225. See TEEVEN, *supra* note 6, at 296–97.

226. See MACINTYRE, *supra* note 102, at 70–72.

227. Ben-Shahar, *supra* note 207, at 886.

228. *Id.* at 885.

229. MACINTYRE, *supra* note 102, at 71.

230. See *id.* at 70–72.

231. See RADIN, *supra* note 203, at 15, 33; Ben-Shahar, *supra* note 207, at 897.

our selection of moral frameworks is arbitrary, the imposition of that framework must be by force, not reason. In such a situation the logical outcome is for those in power to impose their preferences on their subjects.²³² Perhaps such will to power is evidenced by business firms like Carnival Cruise Lines using boilerplate to impose forum selection clauses on unwitting consumers like the Shutes.²³³

So does the boilerplate debate confirm MacIntyre's thesis about the incoherence of liberalism? The final part of this Article argues that the boilerplate debate, in fact, resists MacIntyre's critique and demonstrates the rationality of liberalism, at least in the context of the boilerplate debate.

IV. CONCLUSION: BOILERPLATE, THE RATIONALITY OF LIBERALISM, AND HUMAN NATURE

In this part, I will offer three pieces of evidence that the boilerplate debate resists MacIntyre's critique of liberalism: (1) courts are not engaged in paternalistic overreach; (2) business firms are not imposing harsh terms on consumers; and (3) in the boilerplate debate, rights and utility are not set against each other, as advocates argue that both rights *and* utility justify their positions.

The liberal narrative suggests that what should concern us about boilerplate is the potential for abuse of power. Freedom is not an abstraction to be analytically unpacked so we can learn what it means. Nothing in the definition of "freedom" will tell us whether we should enforce or invalidate a boilerplate contract. Instead, it is the relevant circumstances that tell us what freedom means. And whether it was the *Ancien Régime* or *laissez-faire*, liberalism's use of the concept of freedom has been oriented by abuse of power. Likewise, if MacIntyre's diagnosis of liberalism were correct, we should expect to find abuse of power via boilerplate.

When it comes to boilerplate, where should we look for abuse of power? Libertarianism looks first to the government as a likely culprit, and we should not ignore the possibility of paternalistic infringement upon individual freedom.²³⁴ Yet, when it comes to boilerplate contracts,

232. C.S. LEWIS, *THE ABOLITION OF MAN* 75 (Simon & Schuster 1996) (1944).

233. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 585 (1991).

234. Cf. HOBHOUSE, *supra* note 3, at 26–28. Hobhouse, an early leader of progressivism, opines that it is "doubtful" that the American "Negro . . . [is] mentally and morally capable of self-government . . ." *Id.* at 26–27. He also argues against universal suffrage on the grounds that "people as a whole might be careless of their rights and incapable of managing them. . . . It

the law favors the enforcement of boilerplate, and courts tend to refrain from interfering with boilerplate relationships.²³⁵ Currently, there is little danger that courts will abuse their power in the boilerplate context, at least through paternalistic overreaching.

The more likely source of abuse of power is business firms. Many scholars have noted the likelihood that business firms will use boilerplate to impose one-sided terms on consumers.²³⁶ The logic of the market seems to require it. And yet, surprisingly, the empirical evidence confounds this expectation.

Florencia Marotta-Wurgler has been engaged in empirical research that essentially studies whether standard form contracts are “an instrument of market power” allowing “dominant corporations” to impose one-sided terms on consumers or if instead competition forces such contracts to be efficient.²³⁷ Marotta-Wurgler analyzed 647 software license agreements from 598 different software companies.²³⁸ She constructed an index to measure these agreements’ “buyer friendliness.”²³⁹ The index was based on twenty-five common terms that allocate rights and risks between contract parties, and she then measured the buyer or seller friendliness of each term relative to the default rules of Article 2 of the Uniform Commercial Code.²⁴⁰ Marotta-Wurgler also investigated the role competition plays in determining these agreements’ terms.²⁴¹

Marotta-Wurgler’s research revealed that these agreements did tend to be seller friendly. However, she also determined that sellers offer the same terms to consumers and large businesses via boilerplate, indicating that sellers are not taking advantage of their bargaining power over

is perfectly possible that from the point of view of general liberty and social progress a limited franchise might give better results than one that is more extended.” *Id.* at 28.

235. *Cf.* Florencia Marotta-Wurgler, “Unfair” *Dispute Resolution Clauses: Much Ado About Nothing?*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS*, *supra* note 127, at 45, 51 (noting that forum selection and arbitration clauses in form contracts have generally been enforced). *See generally Carnival Cruise Lines*, 499 U.S. 585.

236. *See, e.g.,* RADIN, *supra* note 203; Ben-Shahar, *supra* note 207; Rakoff, *supra* note 126.

237. Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: An Empirical Analysis of Software License Agreements 2* (Law and Economics Research Paper Series, Working Paper No. 05-11, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=799274 [<https://perma.cc/Q7DV-6CY2>].

238. *Id.* at 3.

239. *Id.* at 4.

240. *Id.*

241. *Id.* at 25–33.

consumers in order to impose one-sided terms.²⁴² Further, she has found that contract terms do not become more biased depending on whether sellers have greater market power.²⁴³ Counterintuitively, one measurement of sellers' market power actually indicated that increased market power was associated with "slightly more *pro-buyer* terms."²⁴⁴ "[W]e can conclude that market power, however defined, does not lead to meaningfully worse standard terms overall"²⁴⁵

Marotta-Wurgler's research suggests that business firms are not using their superior bargaining power to impose one-sided terms on less powerful consumers. If they were, we should see worse terms being offered to the general public than to the large businesses, but that is not the case, at least according to Marotta-Wurgler's research.²⁴⁶

Thus, boilerplate tells us something surprising: both the public and private sectors are more or less behaving themselves. Courts are not engaged in paternalistic overreach, and business firms are not imposing harsh terms on consumers. Contrary to MacIntyre's argument, the powerful are not arbitrarily imposing their will on the people. Why?

According to MacIntyre, will to power is preceded by incoherence in liberal moral dialogue, when rights are set against utility.²⁴⁷ But when we turn to the boilerplate debate, we find something interesting about the roles played by rights and utility. They are not set against each other. They are not adversaries, but allies. Both sides of the boilerplate debate argue that their programs vindicate both rights and utility.²⁴⁸ Boilerplate apologists argue that consumers consent to boilerplate *and* that the enforcement of boilerplate benefits consumers and business firms.²⁴⁹ Boilerplate critics argue that consumers have not really consented *and* that enforcement of boilerplate is inefficient.²⁵⁰ Neither side asserts that rights trump utility or vice versa. The framework is agreed upon: boilerplate enforcement requires both individual consent and social utility.

242. *Id.* at 4, 25, 34.

243. *Id.* at 5.

244. *Id.* at 31.

245. *Id.* at 32.

246. *Id.* at 4.

247. See MACINTYRE, *supra* note 102, at 70–71.

248. See Ben-Shahar, *supra* note 207.

249. *Id.* at 885.

250. *Id.*

Of course, there is disagreement about what counts as consent and what counts as utility, but there is agreement about the terms of the debate. Disagreement is not always because of incommensurability. In fact, MacIntyre notes that “when a tradition is in good order it is always partially constituted by an argument about the goods the pursuit of which gives to that tradition its particular point and purpose.”²⁵¹ At least in the boilerplate debate, liberalism, whether libertarian or progressive, insists on promoting both individual rights and social welfare. There is often disagreement about how to promote these goods, or even what these goods actually consist of, but there is agreement about the framework of the debate. Thus, the disagreement is *rational*.

And if the boilerplate debate is rational, something greater is implied. Moral debate becomes irrational, according to MacIntyre, when it is conducted without reference to human nature and purpose.²⁵² Thus, if the boilerplate debate is rational, we can infer that, somehow, it is being regulated by concepts of human nature and purpose, those concepts ostensibly disclaimed by liberalism long ago.

What is human nature? What is human purpose? These are the questions theorists must address if they are to answer the practical questions posed by both liberalism and boilerplate. The overarching rationality of the boilerplate debate resists MacIntyre’s charge that liberalism is incoherent. But this rational framework does not answer the specific questions of the boilerplate debate. What is better for a person, to retain their legal rights or to get a good price on an iPhone? To answer such questions, theorists must turn their attention to human nature and purpose.

251. MACINTYRE, *supra* note 102, at 222.

252. *Id.* at 70–71.