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## UNILATERAL REORDERING IN THE REEL WORLD

Jake Linford\*

### INTRODUCTION

Professor Larry Cunningham's new book, *Contracts in the Real World*,<sup>1</sup> demonstrates that there is much to learn about contract law from a few well-chosen stories. The goal of this Essay is to provide a similar service, relying on stories gleaned from movies and television—contracts in the “reel world,” so to speak—to illustrate and then undermine the traditional stories told about contract formation and modification. We can learn much from the scenes discussed herein about how consumers might be led to think contracts are formed, and perhaps misled about the certainty contracts provide.

Contract law, as it has been classically described, should provide a stable system for the exchange of property between willing parties, a concept often referred to as “private ordering.”<sup>2</sup> When stable rules regarding the enforceability of promises made in arm's length transactions are supported by the state, a framework exists in which parties can have confidence in the deal struck, and plan for the future in accordance with that deal. Unfortunately, this traditional notion of private ordering as a bilateral process is, in many cases, mythological. The reel world—the world of cinema and television—has perpetuated this idea that contracts are negotiated; that there is a give and take that is simply not present in the real world, at least for consumer contracts. Hollywood aside, most contracts are one-sided boilerplate affairs with terms that consumers can take or leave, but not negotiate or change. Furthermore, many of these contracts now include unilateral reordering

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\* Assistant Professor, Florida State University College of Law. Thanks to Larry Cunningham and the editors of the *Washington Law Review* for this opportunity, to Shawn Bayern, Murat Mungan, Karen Sandrik, Mark Spottswood, and Franita Tolson for insightful discussions and incisive comments, and to Evan Liebovitz for excellent research assistance. Remaining mistakes are mine alone.

1. LAWRENCE A. CUNNINGHAM, *CONTRACTS IN THE REAL WORLD: STORIES OF POPULAR CONTRACTS AND WHY THEY MATTER* (2012).

2. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 34 (2013).

clauses that empower the drafter to change the terms as it sees fit.<sup>3</sup>

This boilerplate world is not all bad. Some sellers transact with hundreds of thousands of consumers—if not millions—in a given year. Thus, there are situations when it is most efficient to allow sellers to use fixed terms, which provide for uniform transactions. In addition, fixed terms that limit liability or otherwise reduce costs may result in savings that can be passed on to consumers.<sup>4</sup> Nevertheless, there is something particularly troubling—and I argue inefficient—about a deal that continually changes.

Part I sets the stage by briefly describing how the representations of contracting in the reel world generally perpetuate a classical concept of contract formation. Part II explains some of the differences between perception and reality, particularly when it comes to boilerplate terms festooned with unilateral reordering clauses, and offers different archetypes from the reel world that better reflect modern contract formation and modification. Part III questions the efficiency rationale underlying apologies for boilerplate, explains how that rationale is even weaker when used to justify the enforceability of unilateral reordering clauses, and proposes solutions stemming from that analysis.

## I. THE CLASSICAL NOTION OF CONTRACT NEGOTIATION AND MODIFICATION

*Negotiation: the essence of capitalism!*

—Jack Donaghy, *30 Rock*.<sup>5</sup>

Contract law, in its classic form, is founded on the concept of a *bargained-for exchange*. This classic conception of bargains struck at arm's length by parties wringing concessions from one another also led to a static notion of the contract, one that cannot be modified unless the party seeking the change gives something in exchange. Many representations of negotiation in the reel world dovetail with this classic conception of contract law.

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3. In light of the use of unilateral reordering provisions, Curtis Bridgeman and Karen Sandrik conclude that many promises made by sellers to consumers are “bullshit promises,” allowing the seller to take advantage of promissory language without being subject to sanctions for changing its mind. See generally Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379 (2009).

4. See *infra* Part III.

5. *30 Rock: Hard Ball* (NBC Universal television broadcast Feb. 22, 2007).

A. *Representations of Negotiation in the Reel World*

When consumers think about contract negotiations, they might imagine something like the following scene from *Network*, a satirical film about television networks, in which the titular network is trying to negotiate a deal with a band of radical terrorists (modeled on the Symbionese Liberation Army) to co-host a program called the *Mao-Tse Tung Hour*.<sup>6</sup> Laureen Hobbs is a self-described “bad-ass commie” trying to control how big a cut the terrorists can take of the program, including sublicensing fees and distribution costs. Helen Miggs and Willie Stein represent the network. The Great Ahmed Khan leads the terrorist group, and Mary Ann Gifford is one of his most ardent devotees. As the narrator intones, the parties endeavor to work through “the usual contractual difficulties”:

**Helen Miggs:** [*flipping through her copy of the contract*] Have we settled that sub-licensing thing? We want a clear definition here. Gross proceeds should consist of all funds the sublicensee receives, not merely the net amount remitted after payment to sublicensee or distributor.

**Willie Stein:** We’re not sitting still for overhead charges as a cost prior to distribution.

**Laureen Hobbs:** Don’t fuck with my distribution costs! I’m getting a lousy two-fifteen per segment, and I’m already deficitting twenty-five grand a week with Metro. I’m paying William Morris ten percent off the top! And I’m giving this turkey [*indicates Khan*] ten thou a segment, and another five for this fruitcake [*indicates Gifford*]. And, Helen, don’t start no shit with me about a piece again! I’m paying Metro twenty percent of all foreign and Canadian distribution, and that’s after recoupment! The Communist Party’s not going to see a nickel out of this goddamn show until we go into syndication!

**Miggs:** Come on, Laureen, you’ve got the party in there for seventy-five hundred a week production expenses.

**Hobbs:** I’m not giving this pseudo-insurrectionary sectarian a piece of my show! I’m not giving him script approval! And I sure as shit ain’t cutting him in on my distribution charges.

**Mary Ann Gifford:** [*screaming*] You fuckin’ fascist! Have you

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6. NETWORK (Metro-Goldwyn-Mayer 1976). Those who favor more modern fare might prefer any of a number of scenes from *Entourage* featuring the inimitable Ari Gold. See, e.g., *Entourage: Scared Straight* (HBO television broadcast Sept. 27, 2009); *Entourage: Give a Little Bit* (HBO television broadcast Oct. 4, 2009).

seen the movies we took at the San Marino jail break-out, demonstrating the rising up of a seminal prisoner-class infrastructure?

**Hobbs:** You can blow the seminal prisoner-class infrastructure out your ass! I'm not knocking down my goddamn distribution charges!

[*The Great Ahmed Khan fires a pistol into the air.*]

**Khan:** Man, give her the fucking overhead clause! Let's get back to page twenty-two, number 5, small 'a'. "Subsidiary rights."<sup>7</sup>

In the *Network* excerpt, parties hold hard lines, drive hard bargains, use colorful language, and find dramatic ways to punctuate points. Savvy businessmen and experienced lawyers roll up their sleeves and go to work until the deal is done. One can imagine nights full of give and take, crafting the dickered terms to ensure that the parties get a deal that each side can live with, if not love. But each party can be understood to get something from the other party—and likely give something up as well.

There may have been a point in history when this was the typical manner in which contracts were formed, but those days are long past.<sup>8</sup> Most contracts entered into by consumers are one-sided affairs, often called "contracts of adhesion," due in part to the stickiness, or inescapability, of the terms.<sup>9</sup> The terms within are often referred to as "boilerplate," because they cannot be changed or negotiated.<sup>10</sup> And when a consumer tries to understand a modern contract, laden with boilerplate terms, she might imagine the scene from *A Night at the Opera*,<sup>11</sup> where characters played by Groucho and Chico Marx simply tear from the page those terms they do not understand:

**Driftwood:** All right. It says the, uh, "The first part of the party

7. NETWORK, *supra* note 6.

8. AT&T Mobility LLC v. Concepcion, \_\_U.S. \_\_, 131 S.Ct. 1740, 1750 (2011) ("[T]he times in which consumer contracts were anything other than adhesive are long past.") (citation omitted).

9. See, e.g., Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

10. As Professor Radin has noted:

The term [boilerplate] dates back to the early 1900s and refers to the thick, tough steel sheets used to build steam boilers. From the 1890s onward, printing plates of text for widespread reproduction, such as advertisements or syndicated columns, were cast or stamped in steel . . . Some companies also sent out press releases as boilerplate so that they had to be printed as written.

RADIN, *supra* note 2, at xvi n.\* (quoting Wikipedia).

11. A NIGHT AT THE OPERA (Metro-Goldwyn-Mayer 1935).

of the first part shall be known in this contract as the first part of the party of the first part shall be known in this contract”—look, why should we quarrel about a thing like this? We’ll take it right out, eh?

**Fiorello:** Yeah, it’s too long, anyhow. [*Both tear off the top part of their respective contracts*] Now, what do we got left?

**Driftwood:** Well, I got about a foot and a half. Now, it says, uh, “The party of the second part shall be known in this contract as the party of the second part.”

**Fiorello:** Well, I don’t know about that . . . .

**Driftwood:** Now what’s the matter?

**Fiorello:** I no like the second party, either.

**Driftwood:** Well, you should’ve come to the first party. We didn’t get home ‘til around four in the morning . . . I was blind for three days!

**Fiorello:** Hey, look, why can’t the first part of the second party be the second part of the first party? Then you got something.

**Driftwood:** Well, look, uh, rather than go through all that again, what do you say?

**Fiorello:** Fine. [*They rip out another portion of the contract*]<sup>12</sup>

Of course, there are times when a consumer reads a contract, even in light of some potentially problematic terms, and signs it anyway. For example, in *The Hobbit: An Unexpected Journey*,<sup>13</sup> Bilbo Baggins, the titular hobbit, is presented with a lengthy contract identifying the terms under which he is to provide services as a burglar. Bilbo takes the time to read, and eventually sign the contract, even though it includes some potentially troubling clauses:<sup>14</sup>

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12. *Id.*

13. *THE HOBBIT: AN UNEXPECTED JOURNEY* (New Line Cinema, Metro-Goldwyn-Mayer Pictures & WingNut Films 2012).

14. The contract also included a unilateral reordering clause: “I, the undersigned, [referred to hereinafter as Burglar,] agree to travel to the Lonely Mountain, path to be determined by Thorin Oakenshield, who has a right to alter the course of the journey at his so choosing, without prior notification and/or liability for accident or injury incurred.” See James Daily, *Read a Lawyer’s Amazingly Detailed Analysis of Bilbo’s Contract in The Hobbit*, WIRED.COM (Jan. 17, 2013, 4:17 PM), <http://www.wired.com/underwire/2013/01/hobbit-contract-legal-analysis/>. For those unfamiliar with *The Hobbit*, Thorin Oakenshield is the leader of the dwarves that employ Bilbo Baggins.

**Bilbo:** [*reading aloud*] The present company shall not be liable for injuries inflicted by or sustained as a consequence thereof, including, but not limited to . . . lacerations . . . evisceration . . . incineration?<sup>15</sup>

Both Bilbo's decision to read a contract from start to finish, and the hard bargaining in a movie like *Network*, are consistent with a traditional view of contract formation: parties dicker at arm's length, carefully negotiating terms. Under that traditional view, each party gains some ground and makes some concessions, and each party enters the contract fully informed about the obligations they have undertaken.

As the excerpts discussed above also demonstrate, the reel world teaches us that it matters whether things are written down. The parties in *Network* were hard at work amending the same type of densely written contractual language through which Bilbo waded so persistently. But the certainty of a written contract can be deceptive. There is a perception that contract formalities and contract language can trip up the unwary. In *It's the Great Pumpkin, Charlie Brown*,<sup>16</sup> the tripping—or at least the subsequent fall—is portrayed literally.

You may remember the scene where Lucy tries to entice Charlie Brown to kick a football she is holding. He is wise to her, and refuses . . . at first:

**Charlie Brown:** You just want me to come running up to kick that ball so you can pull it away and see me land flat on my back and kill myself.

**Lucy:** This time you can trust me. See? Here's a signed document testifying that I promise not to pull it away.

**Charlie Brown:** It is signed. It's a signed document. I guess if you have a signed document in your possession, you can't go wrong. This year, I'm really going to kick that football. [*Charlie Brown runs toward the football, which Lucy pulls away at the last second*] Aaaaahh! [*The document goes flying as Charlie Brown lands flat on his back*]

**Lucy:** [*catching the document as it flutters to earth*] Peculiar thing about this document. It was never notarized.<sup>17</sup>

The lesson here is two-fold: First, you *can* go wrong, even with a signed document in your possession. Second, even a signed document

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15. THE HOBBIT: AN UNEXPECTED JOURNEY, *supra* note 13.

16. *Charlie Brown: It's the Great Pumpkin, Charlie Brown* (Lee Mendelson Film Productions television broadcast Oct. 27, 1966).

17. *Id.*

may not be as enforceable as it appears. While formalities like notarization are not required to make a contract enforceable (indeed, an oral contract is enforceable in most circumstances),<sup>18</sup> there is something comforting about the formalities. With Lucy's deception of the hapless Charlie Brown as the deviant outlier, these scenes from the reel world portray parties committed to getting contract terms right, or at least understanding them, with the idea that they would be bound to meet the terms or pay the consequences once the deal was finalized.

Those who have survived a first-year course in contract law know that there was a time when a formalized, written document bearing a wax seal was the sine qua non of enforceability.<sup>19</sup> Seals were helpful as a formality because they performed three key functions.<sup>20</sup> The seal was formal *evidence* that the contract exists, or was formed. Heating wax to apply the seal to a document performed a *cautionary* function, requiring the parties to slow down, at least for a moment, and consider whether they truly wanted to make the commitments embodied in the sealed document.<sup>21</sup> Finally, the document under seal *channels* the attention of the courts and parties after the fact.<sup>22</sup> Those commitments made under seal were thus commitments the parties likely intended a court to enforce.<sup>23</sup>

The power of a seal as a formality was diluted over time,<sup>24</sup> and courts replaced it with the formality of *consideration*, also known as a bargained-for exchange. Contracts are thus enforceable, consistent with the doctrine of consideration, when the parties have each agreed to the exchange, with each either giving something up or promising something to the other party.<sup>25</sup> Thinking back to the example from *Network*, one can imagine, if not for lack of time, there would be multiple examples in the film of the terrorist organization receiving concessions as well as making them. In the same vein, the problem with Lucy's promise to Charlie Brown was not that it lacked notarization, but that it lacked

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18. *But see* CUNNINGHAM, *supra* note 1, at 141–47 (describing cases dealing with the statute of frauds and the types of contracts that require a writing).

19. *Id.* at 12–13, 34, 219 n.4.

20. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941).

21. *Id.*

22. *Id.*

23. *Id.* at 801 (“[F]orm offers . . . [are] channels for the legally effective expression of intention.”).

24. *See, e.g.,* Hartford-Connecticut Trust Co. v. Divine, 116 A. 239 (Conn. 1922) (citing 1 SWIFT’S DIG. 174 (1822 ed.)).

25. *See* CUNNINGHAM, *supra* note 1, at 13; Fuller, *supra* note 20, at 814–15.



consideration.<sup>26</sup>

Consideration is primarily at issue when a contract is initially formed, and like the formality of the seal, the formality of consideration ostensibly performs similar *evidentiary*, *cautionary*, and *channeling* functions.<sup>27</sup> In a world where bargained-for exchange is the norm, one expects every contract to be formed in an arm's length negotiation, and parties to stick to the deal negotiated. Thus, unsurprisingly, consideration was seen as an important signal to aid in determining whether a subsequent agreement to modify a contract was also enforceable.

### B. *Classic Contract Modification in the Real World*

As discussed above, contracts are generally enforceable when there is consideration—mutual benefits received or given by each party. Contracts can also be modified when the need presents itself. For that modification to be enforceable, however, courts historically looked for fresh consideration to support the new terms requested by the party seeking the modification.<sup>28</sup> In other words, the party subject to the modified deal should get something in the exchange. Without such consideration, the newly modified terms were held unenforceable.

Some of the earliest attempts to fix the boundaries of contract modification are found in two English cases decided at the turn of the nineteenth century: *Harris v. Watson*,<sup>29</sup> and *Stilk v. Myrick*.<sup>30</sup> *Harris* and *Stilk* both dealt with promises made to sailors that the court found unenforceable. In both cases, the captain of a ship agreed to pay extra wages to sailors in different exigent circumstances. In *Harris*, a sailing ship encountered trouble at sea, and the captain, Watson, promised to

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26. There are some general exceptions to the consideration requirement, like the possibility of a contract formed due to the reasonable reliance of one party on otherwise unenforceable promises by the other. See, e.g., CUNNINGHAM, *supra* note 1, at 7, 16. Perhaps one could find that poor Chuck relied to his detriment on Lucy's promise in a way that makes the promise enforceable. Given their history, however, it is hard to characterize that reliance as reasonable.

27. See Fuller, *supra* note 20, at 800; cf. Duncan Kennedy, *From the Will Theory to the Principle of Private Autonomy: Lon Fuller's "Consideration and Form,"* 100 COLUM. L. REV. 94, 103–04 (2000).

28. See, e.g., Thurston v. Ludwig, 6 Ohio St. 1, 9 (Ohio 1856) (“[A] verbal agreement, to be effectual and binding as an alteration of the express terms of a prior written contract between the parties, must be supported by a new and valid consideration.”).

29. (1791) 170 Eng. Rep. 94 (N.P.); 1 P.N.P. 102.

30. (1809) 170 Eng. Rep. 851 (N.P.); 6 Esp. 129–30. As discussed, below, two different reports provided significantly different takes on the rationale supporting the decision in *Stilk*. See *infra* notes 38–39 and accompanying text.

pay five guineas extra if Harris should take on additional navigating duties.<sup>31</sup> When the ship arrived safely, Harris was not given his extra pay.<sup>32</sup> Lord Kenyon nonsuited Harris, invoking a maritime policy against paying extra wages promised in such exigent circumstances.<sup>33</sup> Lord Kenyon expressed concern that sailors would “in many cases suffer a ship to sink, unless the captain would pay any extravagant demand they might think proper to make.”<sup>34</sup>

Leaving aside the believability of a sailor willing to go down with the ship, rather than do a bit of extra work without extra pay, one can understand the policy intuitions here. Economic growth in Great Britain in the eighteenth century depended in large part on transoceanic commerce.<sup>35</sup> Honoring contracts renegotiated in dangerous circumstances could encourage negotiating in dangerous circumstances, and drive up prices for shipped goods, whether or not more ships were lost at sea as a result of contract disputes gone wrong. There is also some reason to suppose a captain in such difficult situations might literally say anything to save his life and his ship, and that contract modifications entered into in such a circumstance could not be entered into intentionally or consensually.

In *Stilk v. Myrick*,<sup>36</sup> two sailors abandoned their ship at the midpoint in a voyage to Russia. The captain tried and failed to hire two new crewmen, so he promised to divide their wages among the remaining men to limp the ship back to London.<sup>37</sup> *Stilk* was thus distinguishable from *Harris* on policy grounds, although Lord Ellenborough did not so distinguish it.<sup>38</sup> In the more complete of two reports, John Campbell recounts that Lord Ellenborough based the decision to nonsuit the sailors’ claim on a lack of consideration between captain and crew for

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31. *Harris*, 170 Eng. Rep. at 94.

32. *See id.*

33. *Id.* (citing *Hernaman v. Bawden*, (1766) 97 Eng. Rep. 1129 (N.P.), 3 Burr. 1844 (holding that until the ship’s cargo was delivered, wages were not due the sailors, leaving sailors to bear the risk of loss of cargo); *Abernethy v. Landale*, (1780) 99 Eng. Rep. 342 (N.P.), 2 Doug. 539 (same, even though the plaintiff was not on the ship at the time of capture)); *see also* GRANT GILMORE, *THE DEATH OF CONTRACT* 27–28 (1974).

34. *Harris*, 170 Eng. Rep. at 94.

35. *See generally* Jacob M. Price, *What Did Merchants Do? Reflections on British Overseas Trade, 1660–1790*, 49 J. ECON. HIST. 267 (1989).

36. (1809) 170 Eng. Rep. 851 (N.P.); 6 Esp. 129–30.

37. *Id.*

38. In a report by Isaac Espinasse, *id.* at 128, Lord Ellenborough is portrayed as persuaded that Lord Kenyon’s policy analysis in *Harris* was equally applicable to the case of *Stilk*. This is somewhat hard to follow, as there was not the same state of emergency in *Stilk* as in *Harris*, although the captain of the ship in *Stilk* was admittedly in a tight spot.

the modification to the deal.<sup>39</sup>

In *Stilk*, consideration was used not to cabin the initial formation of a contract, but to determine whether or not a subsequent modification to the contract was enforceable. We also see in *Harris*, expressly, and *Stilk*, less forcefully, stirrings of a general concept of duress.

The more modern case of *Alaska Packers' Association v. Domenico*<sup>40</sup> raises some of the same concerns. In *Alaska Packers*, fishermen hired in San Francisco threatened, on arrival in Alaska, not to fish during the salmon spawning season unless they were paid extra wages. The employer acquiesced, as the hold-out jeopardized its salmon packing venture for the entire year. The Ninth Circuit held that the modification was unenforceable, because the work the fishermen promised to do was within the scope of the initial contract.<sup>41</sup> The same principle has applied in cases where an architect refused to perform until he received a cut of a competitor's deal with the client,<sup>42</sup> and when a supplier refused to provide promised components for radar equipment to a naval contractor unless the contractor paid extra and used the supplier for its next contract with the Navy.<sup>43</sup> While there are exceptions to this relatively broad understanding about the insufficiency of pre-existing duties to provide consideration for modifications,<sup>44</sup> courts continue to invoke the principle,<sup>45</sup> to the dismay of some scholars.<sup>46</sup> This classical notion of contract formation and modification has nevertheless shifted to a considerable extent, as we consider in the next Part.

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39. *Stilk v. Myrick*, (1809) 170 Eng. Rep. 1168–69 (N.P.); 2 Camp. N. P. 317–22.

40. *Alaska Packers' Ass'n v. Domenico*, 117 F. 99, 103 (9th Cir. 1902); CUNNINGHAM, *supra* note 1, at 161–62.

41. *Alaska Packers' Ass'n*, 117 F. at 102 (“Consent to such a demand, under such circumstances, if given, was, in our opinion, without consideration, for the reason that it was based solely upon the [fishermen’s] agreement to render the exact services, and none other, that they were already under contract to render.”).

42. As noted in *Lingenfelder v. Wainwright Brewing Co.*:

[W]hen a party merely does what he has already obligated himself to do, he cannot demand an additional compensation therefor; and although, by taking advantage of the necessities of his adversary, he obtains a promise for more, the law will regard it as *nudum pactum* [a bare, unenforceable promise], and will not lend its process to aid in the wrong.

15 S.W. 844, 848 (Mo. 1890).

43. See *Austin Instrument, Inc. v. Loral Corp.*, 272 N.E.2d 533, 534, 537 (N.Y. 1971).

44. For example, courts have held that the discovery of unforeseen conditions can justify an enforceable modification, so long as neither party could have anticipated the condition and the payor agreed to provide extra compensation for the payee’s “extra” work. See, e.g., *Brian Constr. & Dev. Co. v. Brighetti*, 176 Conn. 162, 405 A.2d 72 (1978); CUNNINGHAM, *supra* note 1, at 160.

45. See, e.g., *Laidman v. Clark*, No. 2:11-CV-00704-LRH-PAL, 2013 WL 508169, at \*4 (D. Nev. Feb. 8, 2013).

46. See, e.g., Shawn Bayern, *Against Certainty*, 41 HOFSTRA L. REV. 53, 65, 70 (2012).

## II. UNILATERAL REORDERING IN THE 21ST CENTURY

The classical notion of contract law, and representations thereof from the reel world, suggest that deals are negotiated, as are modifications. This notion that parties are empowered to negotiate contracts fits with other traditional concepts of the common law, such as the notion that failure to read a contract one has signed is no defense against the enforceability of the contract.<sup>47</sup> That particular notion—about the importance of reading contracts—opened the door to a new concept of contract formation: contracts that could be enforceable without negotiation, even if consumers fail to read the terms at the time of formation. Sellers (and sophisticated buyers) began to ply contracting partners with boilerplate agreements, the terms of which are often unalterable, acontextual, and infrequently read.

As an end result, most consumer contracts are non-negotiable. Terms may be accepted or rejected, but not shaped by the buyer. There may be consideration, but it is not bargained for. Consumer contracts governed by boilerplate terms have become the norm. More recently, this brave new world of boilerplate terms features a particularly pernicious specimen: the unilateral reordering clause, which purports to empower the seller to change the terms at any time, for any reason.<sup>48</sup>

The movie excerpts described in Part I are thus more fiction than fact for a majority of American consumers. In this Part, we consider two other archetypes. The first comes from the fifth installment of George Lucas's *Star Wars* space opera, *The Empire Strikes Back*.<sup>49</sup>

In *The Empire Strikes Back*, a handful of heroes—the smuggler Han Solo; his sidekick, the Wookie Chewbacca; Princess Leia Organa; and the droid C-3PO—have sought aid from Lando Calrissian, one of Han's old acquaintances. Lando is the administrator of a quasi-legal mining operation.<sup>50</sup> What Han and the others realize too late is that Lando has

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47. As one court noted:

To permit a party when sued on a written contract, to admit that he signed it but to deny that it expresses the agreement he made or to allow him to admit that he signed it but did not read it or know its stipulations would absolutely destroy the value of all contracts.

Busching v. Griffin, 542 So. 2d 860, 865 (Miss. 1989).

48. See *infra* notes 54–57 and accompanying text.

49. STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK (Lucasfilm 1980).

50. In one scene, Lando describes his tenuous position:

**Lando:** So you see, since we're a small operation, we don't fall into the, uh, jurisdiction of the Empire.

**Leia:** So you're part of the Mining Guild, then?

**Lando:** No, not actually. Our operation is small enough not to be noticed. Which is advantageous for everybody since our customers are anxious to avoid attracting attention to

already struck a deal, betraying them to Darth Vader, heavy for the Galactic Empire and the ostensible villain of the piece. As Lando characterizes it just before the big reveal, the deal with Vader is designed to “keep the Empire out of here forever.”<sup>51</sup> The initial negotiation is not fleshed out on screen, but viewers might reasonably imagine that Vader, as the number two man in the galactic Empire, used considerable bargaining power to secure certain concessions from Lando. Nevertheless, one could also imagine a dickered, if somewhat lopsided, bargain, upon which Lando might reasonably expect to rely.

The viewer learns the rough outline of the deal as it changes over the last act of the film. First, Lando watches as Vader grants the bounty hunter, Boba Fett, permission to cart Han off to intergalactic mobster, Jabba the Hutt. Vader then informs Lando that Leia and Chewbacca “must never again leave this city.”

**Lando:** That was never a condition of our agreement, nor was giving Han to this bounty hunter!

**Vader:** Perhaps you think you’re being treated unfairly?

**Lando:** [*pauses, then nervously*] No.

**Vader:** Good. It would be unfortunate if I had to leave a garrison here. [*Vader exits*]

**Lando:** [*to himself*] This deal is getting worse all the time!<sup>52</sup>

Unfortunately for Lando, Vader is not yet finished reordering the deal. After Vader tests a carbon freezing unit on Han, and transfers the ensnared smuggler to Boba Fett, he turns to Lando:

**Vader:** Calrissian, take the princess and the Wookie to my ship.

**Lando:** You said they’d be left in this city under my supervision!

**Vader:** I am altering the deal. Pray I don’t alter it any further.<sup>53</sup>

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themselves.

**Han:** Aren’t you afraid the Empire’s going to find out about this little operation, shut you down?

**Lando:** It’s always been a danger that looms like a shadow over everything we’ve built here . . .

*Id.*

51. *Id.*

52. *Id.*

53. *Id.* The comedy program *Robot Chicken* spliced the two scenes to create the following running gag:

**Darth Vader:** Leia and the Wookiee must never again leave this city.

**Lando Calrissian:** That was never a condition of our arrangement, nor was giving Han to this bounty hunter.

**Vader:** I have altered the deal. Pray I don’t alter it any further. [*Vader exits*]

While one is left to imagine exact details, it is clear enough that Lando thought he had a better deal when it was first formed.<sup>54</sup> Lando's indignation—assuming it is not feigned—suggests that he understood the concessions Vader secured from him in the initial negotiation were the only concessions required to keep his mining colony free of Imperial entanglements.

These scenes from *The Empire Strikes Back*, while not directly about contract negotiation, match modern reality far better than those scenes presented in Part I. Take for instance the typical credit card agreement. The card provider typically claims authority pursuant to a unilateral reordering clause to change the deal as it sees fit after the fact. For example, in one dispute between Sears and customers who used a Sears credit card, the court upheld a change in a credit card policy for which the provider did not directly negotiate.<sup>55</sup> The initial terms agreed to by consumers included a “Change of Terms” provision which claimed that Sears “has the right to change any term or part of this agreement, including the rate of Finance Charge, applicable to current and future balances.”<sup>56</sup> When the customers signed on, there was no arbitration

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**Lando:** [to self] This deal's getting worse all the time. [Vader enters]

**Vader:** Furthermore, I wish you to wear this dress and bonnet. [Presents dress and bonnet to Lando]

**Lando:** This was never a condition of our arrangement.

**Vader:** [interrupts] I have altered the deal. Pray I don't alter it any further. [Vader exits]

**Lando:** [to self] This deal's getting worse all the time. [Vader enters]

**Vader:** Here is a unicycle. You will ride it wherever you go. [Presents unicycle to Lando]

**Lando:** What? I'm not riding no [bleep]-ing unicycle. [Throws unicycle to the floor]

**Vader:** I have altered the deal. Pray I don't alter it any further. [Vader exits]

**Lando:** [to self, aggravated] This deal is getting worse all the time. [Vader enters]

**Vader:** Also, you are to wear these clown shoes, and refer to yourself as “Mary.” [Presents clown shoes to Lando]

**Lando:** [throws clown shoe] Oh, [shoe squeaks] you, man! I'm not doing it!

**Vader:** I have altered the deal. Pray I don't alter it any further. [Vader exits]

**Lando:** [to self] This deal . . . [pauses and looks around] is very fair and I'm happy to be a part of it. [Listens for Vader's entrance. When Vader does not enter, Lando scoops up the dress, unicycle, and shoes, and exits screen left.]

*Robot Chicken: Star Wars Episode II* (Stoopid Monkey television broadcast Nov. 16, 2008).

54. One could instead read these scenes as highlighting the high cost of dealing with a corrupt government, or the lengths to which a businessman will go to circumvent government regulation. Ilya Somin, for example, has argued that this dialogue highlights the importance of the Contracts Clause of the Constitution. Ilya Somin, *Darth Vader and the Contracts Clause*, THE VOLOKH CONSPIRACY (Oct. 14, 2012, 11:50 AM), <http://www.volokh.com/2012/10/14/darth-vader-and-the-contracts-clause/>.

55. *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 887–88 (Ill. App. Ct. 2003).

56. *Id.* at 888. This Essay uses the term “unilateral reordering clause” instead of “change of terms clause” because there are cases where parties negotiate a change in the terms of a contract at arm's length, and those changes can be recorded in a “Change of Terms Agreement.” See, e.g., Cranberry

clause. That soon changed. Sears sent out a letter to inform consumers of the new terms. While the cover letter did not flag particular changes, a copy of the new terms included an arbitration clause, requiring “[a]ny and all claims . . . be resolved . . . by final and binding arbitration before a single arbitrator.”<sup>57</sup> The court enforced the new agreement, even though the consumers had not expressly agreed to it, and even though the services delivered by the credit card provider had not changed.<sup>58</sup> In other words, the changes were enforced even though there was no bargaining and no consideration for the modification.

There are cases in which new terms added to a credit card agreement have been held unenforceable because the agreement is “unconscionable”—grossly one-sided both procedurally and substantively.<sup>59</sup> In many other cases, courts have upheld unilateral amendments made pursuant to unilateral reordering provisions in the original agreements against a claim of unconscionability because consumers have a right to opt out of the deal<sup>60</sup>—*i.e.*, to immediately stop using the credit card rather than accept the change.<sup>61</sup> The decision to keep using the card,<sup>62</sup> or even the failure to cancel the credit card,<sup>63</sup> has been taken as evidence of the consumer’s consent to the new terms. In *The Empire Strikes Back*, Lord Vader provided an opt-out of a sort to

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Fin., L.L.C. v. S & V P’ship, 927 N.E.2d 623, 625 (Ohio Ct. App. 2010); First Citizens Bank v. Sullivan, 200 P.3d 39, 41 (Mont. 2008).

57. *Hutcherson*, 793 N.E.2d at 889.

58. *Id.* at 900.

59. *See, e.g.*, *Davis v. Chase Bank USA, N.A.*, 299 F. App’x 662, 663 (9th Cir. 2008).

60. *See, e.g.*, *Joseph v. M.B.N.A. Am. Bank, N.A.*, 775 N.E.2d 550, 553 (Ohio Ct. App. 2002) (holding that an amendment to a credit card agreement adding an arbitration provision was not unconscionable because plaintiff was given the right to opt out by terminating the agreement and the arbitration provision was not so one-sided as to be per se unconscionable); *Herrington v. Union Planters Bank, N.A.*, 113 F. Supp. 2d 1026, 1032 (S.D. Miss. 2000) *aff’d sub nom. Herrington v. Union Planters Bank*, 265 F.3d 1059 (5th Cir. 2001) (noting that consumers dissatisfied with a new arbitration clause “could have simply declined to accept the arbitration provision by terminating their account before the effective date of the amendment.”).

61. *Hutcherson*, 793 N.E.2d at 888. Some card providers do not require such an immediate decision. *See, e.g.*, *Citibank (South Dakota), N.A. v. Walker*, No. A117770, 2008 WL 4175125, at \*5–6 (Cal. Ct. App. September 11, 2008) (holding an arbitration waiver was not unconscionable where consumers could refuse the new arbitration clause and continue using the card until its expiration).

62. *Perry v. FleetBoston Fin. Corp.*, No. Civ.A.04–507, 2004 WL 1508518, at \*5 (E.D. Pa. July 6, 2004) (denying enforcement of a new arbitration term on the ground that it was not contemplated in the original agreement, but noting that, “[i]f Plaintiffs had used their credit cards, they would have manifested their assent to the new term, and the change would no longer be unilateral.”).

63. *Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002) (“Boomer accepted this offer by continuing to use AT&T’s services, and therefore the CSA constitutes a contract.”).

Lando Calrissian, inviting him to modify the contract if he thought he was “being treated unfairly” and suggesting as part of the price of “opting out,” that Vader might have to leave a garrison of troops at the mining colony.<sup>64</sup>

Unilateral reordering clauses are not upheld in every case. For example, one recent case was decided in favor of the consumer on appeal, but also poses a puzzle. In *Douglas v. United States District Court*,<sup>65</sup> Talk America, a cellphone provider, attempted to enforce an arbitration clause that it unilaterally added to its terms of service. Talk America had not directly notified customers about the change, but posted the modified terms on its website. The Ninth Circuit granted a writ of mandamus, vacating the district court’s decision compelling arbitration.<sup>66</sup> While the district court apparently assumed that Douglas must have visited Talk America’s website because he paid his bill online, the Ninth Circuit recognized that Douglas “would have had no reason to look at the contract posted there.”<sup>67</sup> Furthermore, the court reasoned that Douglas was under no obligation to check for new terms, and had no way of knowing when to check for them.<sup>68</sup> While the court recognized that assent can be implied in certain cases,<sup>69</sup> it concluded that “such assent can only be inferred after [the consumer] received proper notice of the proposed changes.”<sup>70</sup> Thus, the new terms were not enforceable.<sup>71</sup>

*Douglas* is a puzzle not for its holding, but for seller behavior in its

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64. For reasons discussed below, courts likely overvalue the protection that an opt-out provides consumers. See *infra* notes 118–19 and accompanying text.

65. *Douglas v. U.S. Dist. Court for Cent. Dist. of Cal.*, 495 F.3d 1062, 1062–63 (9th Cir. 2007).

66. A writ of mandamus was necessary because the Federal Arbitration Act, 9 U.S.C. § 16 (2012), does not allow interlocutory appeals of a district court order compelling arbitration.

67. *Douglas*, 495 F.3d at 1066.

68. *Id.*

69. See, e.g., *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886 (Ill. App. Ct. 2003); *First Citizens Bank v. Sullivan*, 200 P.3d 39 (Mont. 2008); *Cranberry Fin., L.L.C. v. S & V P’ship*, 927 N.E.2d 623 (Ohio Ct. App. 2010).

70. *Douglas*, 495 F.3d at 1066.

71. The court in *Douglas* also noted the stringent unconscionability standards applied in California to arbitration clauses. Those standards may no longer be good law. To the extent that cases like *Douglas* are tied to the notable resistance of California state courts to unilateral shifts to arbitration, it is unclear whether those standards would survive direct scrutiny from the Supreme Court, particularly in light of its recent opinions broadening the reach of the Federal Arbitration Act. See *Am. Express Co. v. Italian Colors Rest.*, \_\_\_U.S. \_\_\_, 133 S. Ct. 594 (2013); *AT&T Mobility LLC v. Concepcion*, \_\_\_U.S. \_\_\_, 131 S. Ct. 1740, 1753 (2011) (holding that the Federal Arbitration Act preempted a state law barring enforcement of a class-arbitration waiver); see also Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129 (2012).



aftermath. To date, no court has held that changes posted only to a website provide sufficient notice to consumers.<sup>72</sup> Nevertheless, post-*Douglas*, firms still include unilateral reordering clauses that promise nothing more than posting the new terms to a website. For example, the terms of service for cloud computing service Box.com claim the right to change the terms at any point, promising only to notify consumers “via the [Box.com] Service and/or by email,” and only if the company decides that the modification is “material.”<sup>73</sup> As non-material changes could be posted to the [www.box.com](http://www.box.com) website or “related Box blogs,” customers are “encourage[d]” to “check the date of these Terms whenever [they] visit the Site to see if these Terms have been updated.”<sup>74</sup>

Box.com is not the only company that persists in claiming that it can enforce new terms without providing direct notice to consumers.<sup>75</sup> It is unclear why. Perhaps companies like Box.com have not processed the Ninth Circuit’s decision in *Douglas*, or think that it will not be followed in other circuits or state courts.<sup>76</sup> Perhaps they have decided to provide notice of any terms they hope to enforce, and are merely reserving a right that they will not attempt to exercise. Perhaps firms are becoming savvier about how to draft unilateral reordering clauses and how to frame consumer obligations. Firms might instead hope that encouraging

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72. Courts have upheld forum selection clauses in contracts between Google and users of its email services, because “Google requires all users, after seeing a screen listing the terms or a link to the terms, to agree to the terms of use before creating an email account.” *Rudgayzer v. Google Inc.*, No. 13 CV 120(ILG)(RER), 2013 WL 6057988, \*5 (E.D.N.Y. Nov. 15, 2013). The court in *Rudgayzer* suggested that a unilateral reordering clause in the contract was enforceable, without discussing how consumers were put on notice of the change. *Id.* at \*2 n.1.

73. *Box Terms of Service*, BOX.COM, [https://app.box.com/legal\\_text/tos](https://app.box.com/legal_text/tos) (last updated Feb. 28, 2013).

74. *Id.*

75. *Google Terms of Service*, GOOGLE.COM, <http://www.google.com/intl/en/policies/terms/> (last modified Mar. 1, 2012) (“We may modify these terms or any additional terms that apply to a Service to, for example, reflect changes to the law or changes to our Services. You should look at the terms regularly. We’ll post notice of modifications to these terms on this page.”). Instagram’s terms of use instead:

Reserve the right, in our sole discretion, to change these Terms of Use (“Updated Terms”) from time to time. Unless we make a change for legal or administrative reasons, we will provide reasonable advance notice before the Updated Terms become effective. You agree that we may notify you of the Updated Terms by posting them on the Service, and that your use of the Service after the effective date of the Updated Terms (or engaging in such other conduct as we may reasonably specify) constitutes your agreement to the Updated Terms. Therefore, you should review these Terms of Use and any Updated Terms before using the Service.

*Terms of Use*, INSTAGRAM.COM, <http://instagram.com/about/legal/terms/#> (last modified Jan. 19, 2013).

76. To date, none of the other circuits have cited the case in a reported opinion.

consumers to regularly check the website will convince courts that indirect notice is nevertheless sufficient notice.<sup>77</sup> And perhaps companies take comfort in the fact that many courts and state legislatures seem more interested in policing the behavior of consumers than the behavior of credit card companies.<sup>78</sup>

Considering the behavior of firms like Box.com, the contract-driven reel world interaction most representative of real world reordering played out in a recent episode of *South Park*.<sup>79</sup> The conceit of the episode is that one of the characters, an elementary student named Kyle, never reads the updated terms governing his Apple products. In the process of clicking “yes” to an update, Kyle inadvertently agreed to undergo a medical experiment.<sup>80</sup> He discovers his error when three “business casual G-Men” from Apple show up at a local restaurant to collect him:

**Apple Man 1:** There he is! [*The men approach him*] Hello Kyle, we’re from Apple. We’re all ready for you now. [*A second man sets a scale on the floor*]

**Kyle:** What? Ready for what?

**Apple Man 1:** To fulfill the agreement. Can we get a weight please? [*The third man puts Kyle on the scale*]

**Apple Man 2:** 83 pounds, sir.

**Kyle:** What “agreement”?!

**Apple Man 1:** 83 pounds, good. Let’s get the blood work.

**Kyle:** Hey! You can’t do that! [*The second man pulls out a tape measure to measure the circumference of Kyle’s head, while the third man produces a syringe and prepares to take Kyle’s blood*]

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77. See *supra* note 74 and accompanying text.

78. See David Horton, *The Shadow Terms*, 57 UCLA L. REV. 605, 637–38 (2010) (describing how some states are engaged in a race to the bottom regarding consumer protections in order to attract the business of credit card providers); Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1098, 1128–30 (2010) (same); see also *Edelist v. MBNA Am. Bank*, 790 A.2d 1249, 1259 (Del. Super. Ct. 2001) (“Delaware’s statutory scheme permitting unilateral amendment with an opt-out is an acceptable means of amending a credit card agreement.”).

79. *South Park: HUMANCENTiPAD* (Parker-Stone Studios television broadcast April 27, 2011). It will come as no surprise to the occasional viewer that the *New York Times* referred to the *Comedy Central* animated series as “willfully crude satire.” David Itzkoff, ‘*South Park*’ at 200: Trey Parker and Matt Stone Apologize to No One, ARTSBEAT.BLOGS.NYTIMES.COM, (Mar. 10, 2010, 11:30 AM), [http://artsbeat.blogs.nytimes.com/2010/03/10/south-park-at-200-trey-parker-and-matt-stone-apologize-to-no-one/?\\_r=0](http://artsbeat.blogs.nytimes.com/2010/03/10/south-park-at-200-trey-parker-and-matt-stone-apologize-to-no-one/?_r=0).

80. *South Park: HUMANCENTiPAD*, *supra* note 79. Decency requires sparing the reader further details about the procedure to which Kyle unwittingly subjected himself.

**Apple Man 1:** You agreed we could take all the blood we needed.

**Kyle:** What are you talking about?!

**Apple Man 1:** When you downloaded the last iTunes update, a window on your screen popped up and asked you if you agreed to our terms and conditions. You clicked “Agree.” Alright, let’s get him to the water tank.

**Kyle:** The water tank? [*Steps off the scale and away from the men*] Hey, I’m not going with you!

**Apple Man 1:** You’ve agreed to all of this! [*Kyle runs out of the restaurant*] Hey!<sup>81</sup>

Moments later, Kyle seeks help from his friends, who are incredulous that he never reads the terms and conditions:

**Kyle:** You gotta help me. These business casual G-men are trying to kidnap me!

**Stan:** What?

**Kyle:** It’s crazy, dude! They’re saying it’s because I agreed to the latest terms and conditions on iTunes!

**Stan:** Why? What did the terms and conditions for the last update say?

**Kyle:** I don’t know, I didn’t read them!

**Butters:** You didn’t read them?

**Kyle:** Who the hell reads that entire thing every time it pops up?

**Stan:** [*earnestly*] I do.

**Clyde:** Me too.

**Kyle:** You’re telling me that every time you guys download an update for iTunes, you read the entire terms and conditions?

**Jimmy:** Of course.

**Butters:** Well, how do you know if you agree to something if you don’t read it?<sup>82</sup>

There is a level at which the satirists behind *South Park* are taking a dig at those who suggest consumers are overburdened and should not be required to read every online agreement to which they ostensibly agree.<sup>83</sup> As one of the boys asks, “[h]ow *do* you know if you agree to

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81. *Id.*

82. *Id.*

83. See, e.g., Alessandro Acquisti & Jens Grossklags, *Privacy and Rationality in Individual Decision Making*, IEEE SECURITY & PRIVACY, Jan.–Feb. 2005, 26, at 26.

something if you don't read it?"<sup>84</sup> But even if we assume the average consumer has the capacity to understand the terms of every boilerplate contract, she would be hard-pressed to actually read them. Consider a recent study measuring the privacy policies posted on websites visited by the public (which are ostensibly enforceable from the moment the visitor logs on to the website).<sup>85</sup> The study determined that the typical privacy policy on the typical site would take ten minutes to read,<sup>86</sup> and the average American visits approximately 1,462 sites a year.<sup>87</sup> Thus, the average consumer would need to spend thirty eight-hour days a year—a full month—reading privacy policies.<sup>88</sup> The authors estimated the national opportunity costs of reading online privacy policies could reach \$781 billion.<sup>89</sup> That time estimate does not take into account changes to website terms. If every website changed policies once a year, that could double the time required.<sup>90</sup>

It seems rather unlikely that a court would enforce a term in an iTunes update that allowed Apple to conduct a medical experiment on its customers.<sup>91</sup> Reason might suggest that unilateral modification of iTunes contracts should be limited to things one might expect from iTunes, like data mining consumers' music preferences, advertising new MP3s based on music they have purchased, or making prospective changes to pricing structures. For example, in *Badie v. Bank of America*,<sup>92</sup> the court concluded that a bank could not add an arbitration clause to contracts with current customers, despite the inclusion of a unilateral reordering clause in the initial contract, because the initial contract had nothing to say about arbitration or a right to a jury trial.<sup>93</sup> The court in *Badie* noted that "permitting the Bank to exercise its unilateral rights under the

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84. *South Park: HUMANCENTiPAD*, *supra* note 79 (emphasis added).

85. Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. L. & POL'Y FOR INFO. SOC'Y 543 (2008).

86. *Id.* at 554.

87. *Id.* at 561.

88. *See id.* at 563.

89. *Id.* at 564.

90. The study did not account for any terms of service or disclaimers for goods purchased.

91. This is so in part because there is a higher bar to establish informed consent to medical procedures than in other contexts. *See, e.g.*, Omri Ben-Shahar, *Regulation through Boilerplate: An Apologia* 5 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 640, 2013), available at <http://ssrn.com/abstract=2255161>.

92. 79 Cal. Rptr. 2d 273 (Cal. Ct. App. 1998).

93. The court in *Badie* was also persuaded that "the notice contained in the bill stuffer" announcing the new arbitration clause "was 'not designed to achieve knowing consent' to the ADR provision." *Id.* at 290 (quoting the trial court's conclusion).

change of terms provision, without any limitation on the substantive nature of the change permitted, would open the door to a claim that the agreements are illusory.”<sup>94</sup> Courts in other jurisdictions, however, reject the *Badie* rule. For example, in *Hutcherson v. Sears Roebuck & Co.*,<sup>95</sup> an Illinois Appellate Court held that a unilateral reordering clause means what it says, and if the contract says anything can change, consumers should expect—and be bound by—changed language.<sup>96</sup> The reality highlighted by *The Empire Strikes Back* and *South Park* is that most consumers are at the mercy of the seller, so long as they use the seller’s products or services, whether or not they realize that the deal has changed.

### III. THE INEFFICIENCY OF UNILATERAL REORDERING

Unilateral reordering clauses would be impossible without a general acceptance of boilerplate in consumer and business-to-business transactions. It is hard to imagine, as the Darth Vader excerpt highlights, one party agreeing in an arm’s length transaction not only to whatever terms the other party articulates during negotiation, but also to whatever terms may suit that other party’s needs over the life of the contract,<sup>97</sup> at least without significant concessions on other terms by the party that wants the unilateral reordering clause.<sup>98</sup>

One of the common defenses of boilerplate on efficiency grounds is that it leads to lower prices.<sup>99</sup> For example, in his opinion in *IFC Credit*

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94. *Id.* at 284–85, 297. For more on illusory agreements, which are generally held unenforceable, see CUNNINGHAM, *supra* note 1, at 150.

95. 793 N.E.2d 886 (Ill. App. Ct. 2003).

96. *Id.* at 900 (“[W]e do not read the ‘change of terms’ provision so narrowly as to preclude an amendment containing an arbitration provision.”).

97. Based on a conversation with corporate counsel for a Fortune 500 company, when negotiating deals, boilerplate from the other side often includes a unilateral reordering clause, which the attorney instructs staff attorneys to strike out if they find it.

98. *But see* Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 636 (2002) (proposing that in exchange for valuable consideration, one could choose to be bound to do any one thing the other party wrote and sealed in an envelope). In Barnett’s envelope hypothetical, one could imagine that the writing might require “Do any one thing I specify later.” The reader could intend to be bound to whatever the writer could later imagine, but the language might just as likely come as an unpleasant or even unfair surprise.

99. *See, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1455 (7th Cir. 1996) (“Terms and conditions offered by contract reflect private ordering, essential to the efficient functioning of markets.”); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 *YALE L.J.* 1297, 1318–19 (1981) (“Warranty exclusions are a form of product standardization . . . . [I]f the incidence or magnitude of an element of loss differs greatly between consumers of a product, the market for insurance may not be sufficiently large to justify offering insurance . . . . [Warranty exclusion thus

*Corp. v. United Business & Industrial Federal Credit Union*,<sup>100</sup> Judge Easterbrook opined that terms in boilerplate contracts that overwhelmingly favor the seller invariably lead to savings for the buyer:

If buyers prefer juries, then an agreement waiving a jury comes with a lower price to compensate buyers for the loss—though if bench trials reduce the cost of litigation, then sellers may be better off even at the lower price, for they may save more in legal expenses than they forego in receipts from customers.<sup>101</sup>

Nevertheless, there are reasons to be skeptical that savings from boilerplate clauses are passed on to consumers.<sup>102</sup> Professor Margaret Radin suggests there is insufficient evidence for the traditional argument that consumers likely benefit to the tune of reduced prices when companies are allowed to restrict their duties and obligations using boilerplate.<sup>103</sup> Professor David Horton goes farther, suggesting the presumption of consumer savings is at its core not falsifiable.<sup>104</sup> In addition, the cost-saving argument ignores the cost of switching services, which is often the only opt-out available. When switching costs are high, firms can retain a greater proportion of a dissatisfied customer base without passing on significant savings.<sup>105</sup>

As noted above, courts sometimes find unilateral reordering clauses unconscionable, and thus unenforceable.<sup>106</sup> But this presumption about pricing can have some problematic effects on standard unconscionability

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may reduce] the costs of production and distribution. In this respect, consumers of the product may be said to have demanded the exclusions.”).

100. 512 F.3d 989 (7th Cir. 2008) (Easterbrook, J.). *See also id.* at 993 (“As long as the market is competitive, sellers must adopt terms that buyers find acceptable; onerous terms just lead to lower prices.”).

101. *Id.* at 993. In this way, Judge Easterbrook was simply following in the tracks of the assumptions articulated by Karl Llewellyn nearly a century ago, regarding the savings that come from standardized contract language:

[Standardized forms] save trouble in bargaining. They save time in bargaining. They infinitely simplify the task of internal administration of a business unit, of keeping tabs on transactions, of knowing where one is at, of arranging orderly expectation, orderly fulfillment, orderly planning. They ease administration by concentrating the need for discretion and decision in such personnel as can be trusted to be discreet. This reduces human wear and tear, it cheapens administration, it serves the ultimate consumer.

K. N. Llewellyn, *Book Review*, 52 HARV. L. REV. 700, 701 (1939).

102. *See* RADIN, *supra* note 2, at 100–09.

103. *Id.* *But see* Ben-Shahar, *supra* note 91, at 15–16.

104. Horton, *supra* note 78, at 647 n.274. (“[W]hether a market contains pro-drafter or pro-adherent terms, the economic model concludes that it reflects adherents’ preferences.”).

105. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1407 (2004).

106. *See supra* note 59 and accompanying text.

tests. For example, in *United States v. Bedford Associates*,<sup>107</sup> the Second Circuit articulated three factors to consider when determining whether a given clause is unconscionable: (1) the benefit of the bargain to the parties at the time of formation; (2) how the contract was negotiated; and (3) the relative bargaining power of the parties.<sup>108</sup> If one assumes that terms unfavorable to consumers lead to a reduction in the price of goods and services, the first factor will always benefit the seller, because the benefit to consumers is assumed. Likewise, if one assumes that one-sided “negotiations” always save consumers money, then concerns about actual negotiations are mitigated by the price reduction. Finally, a court willing to assume that unfavorable terms lead inexorably to favorable prices will see no need to concern itself with unequal bargaining power.

Whatever its limitations, boilerplate is a fact of life in modern commercial culture, and it is unlikely to go away.<sup>109</sup> Assuming *arguendo* that some of the economic justifications of boilerplate are nonetheless defensible, unilateral reordering clauses are much less defensible because they severely exacerbate the inefficiencies of boilerplate. The problems identified by behavioral economists regarding the challenges facing consumers who hope to comprehend or comparison shop when dealing with boilerplate are aggravated by unilateral reordering provisions. Even worse, there is some indication that the savings realized by sellers exercising a unilateral reordering provision are rarely, if ever, passed on to consumers post-formation.

#### A. *Unilateral Reordering Clauses Worsen Problems with Consent*

Boilerplate provisions have been challenged on the ground that consumers do not actually consent to them in any meaningful way. Unilateral reordering provisions exacerbate this problem. First, as described above, consumers could waste an inordinate amount of time simply trying to read all the boilerplate that suffuses their lives, and thus often do not bother.<sup>110</sup> Unilateral reordering clauses compound the workload and further disincentivize reading. Second, unilateral reordering clauses reduce the effectiveness of consumer notice and even provide openings for sellers to attempt to evade consumer notice and

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107. 657 F.2d 1300 (2d Cir. 1981), *cert. denied*, 456 U.S. 914 (1982).

108. *Id.* at 1312–13.

109. *See* IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union, 512 F.3d 989, 992–93 (7th Cir. 2008) (Easterbrook, J.) (noting that courts almost always find boilerplate provisions enforceable).

110. *See supra* notes 87–90 and accompanying text.

hide potentially objectionable terms.

As a matter of classic contract law doctrine, the party is bound to the terms of the contract, even if she did not read it.<sup>111</sup> There is some sense in this. If we want to encourage consumers to read the contracts they sign (even boilerplate contracts),<sup>112</sup> we would be ill-served to allow consumers to avoid clauses they did not read. But if a unilateral reordering clause is construed broadly, as it was in *Hutcherson*,<sup>113</sup> there is no aspect of the contract immune to change from day to day. In such circumstances, it would be fruitless for the consumer to attempt to educate herself about the nuances of the contract. Thus, the unilateral reordering clause compounds the difficulty of comprehending the contract by requiring consumers to invest additional—and potentially futile—effort to understand every change. Some courts have thus limited change-of-terms clauses to ideas contemplated or at issue but unresolved in the original contract. Recall that in *Badie v. Bank of America*, the court concluded that a unilateral reordering clause did not empower a bank to add an arbitration clause to a credit card contract because the initial contract entered into by consumers did not discuss dispute resolution at all.<sup>114</sup> Even with such a limiting construction, there is little benefit in trying to divine which changes a court might consider fair game and which changes are off-limits as not contemplated in the original contract.

Some courts assume that a consumer who uses a product or service after contract terms are updated must be treated as though she consented to the new terms.<sup>115</sup> Such an assumption seems defensible when the consumer is sufficiently notified of the change; but as the *Douglas* case demonstrates,<sup>116</sup> notice is often insufficient.<sup>117</sup> Even worse, change-of-terms clauses are often held not to be unconscionable because consumers can opt out of the deal with the seller. In reaching that conclusion, courts often overlook the costs of consumer lock-in. For example, Oren Bar-

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111. See *supra* note 47.

112. There is some question whether it ever makes sense to read boilerplate, in light of the volume of information the typical consumer would need to digest. I leave that question for another day. *But see* Ben-Shahar, *supra* note 91, at 9–11.

113. *Hutcherson v. Sears Roebuck & Co.*, 793 N.E.2d 886, 900 (Ill. Ct. App. 2003).

114. 79 Cal. Rptr. 2d 273, 284–85 (Cal. Ct. App. 1998); *see also supra* notes 92–94 and accompanying text.

115. *See, e.g.,* *Boomer v. AT&T Corp.*, 309 F.3d 404, 424 (7th Cir. 2002) (“Boomer accepted this offer by continuing to use AT&T’s services, and therefore the CSA constitutes a contract.”).

116. *See supra* notes 65–71 and accompanying text.

117. Alces & Greenfield, *supra* note 78, at 1136–37; Oren Bar-Gill & Kevin Davis, *Empty Promises*, 83 S. CAL. L. REV. 985, 989 (2010); Horton, *supra* note 78, at 649–51, 662.



Gill has described how difficult it is for the typical consumer to correctly estimate the cost of switching to a new credit card once a six-month teaser rate on a credit card gives way to a higher rate.<sup>118</sup> Other scholars have argued that credit card rates in general are set with one eye to the risk of providing credit to a particular consumer, and with the other to the opportunity presented by the “lock-in” effect.<sup>119</sup>

There is a second fallacy underlying the assumption that consumer opt-out cures any distortions created by unilateral reordering. A unilateral reordering clause is only valuable in contracts where the seller and buyer will have a business relationship of more than a transitory duration.<sup>120</sup> Presenting the consumer with an opt-out as the only corrective for a distorted deal strips away the consumer’s ability to plan long term in those situations where it is most essential.<sup>121</sup> Shifting risk to the consumer post-negotiation hampers the ability of the consumer to plan for and account for risk. Enforcing unilateral reordering clauses empowers the company claiming the right to change terms and pass risk on to consumers without negotiating for that right up front, or even calculating that risk in the initial term. Here, the reel world can help us understand the disconnect between assumed ease of opt out and the unfortunate reality of unilateral reordering. Reflect back on the scenes from *The Empire Strikes Back*. Lando had an opt-out of a sort, which he finally exercised when the situation with Vader became intolerable: he shut down the mining operation, told his clientele to scatter, and shot his way out of the city with Princess Leia.<sup>122</sup> It is not an outcome Lando might have embraced when the deal was first negotiated.

### B. *Do Unilateral Reordering Clauses Save Consumers Money?*

As noted above, lock-in effects generally allow sellers to remain

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118. Bar-Gill, *supra* note 105, at 1407.

119. See, e.g., Adam J. Levitin, *Rate-Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339, 363–64.

120. Alces & Greenfield, *supra* note 78 at 1125:

The power of the unilateral change-of-terms clause in continuing contractual relationships is in the dominant party’s ability to exercise the clause when the subordinate party is impotent to avoid the consequences of its operation. So it is in fact somewhat tautological to acknowledge the prejudice that operation of the clause entails: prejudice is the point. . . . As long as the dominant party maintains leverage, it does so precisely because that limited “remedy” is of no practical use to the subordinate party.

121. See, e.g., Jones v. Citigroup, Inc., St. Unfair Trade Prac. L. (CCH) ¶ 31,169, 2006 WL 6471430 (Cal. Ct. App. Jan. 26, 2006) (Moore, J., dissenting) (“Ultimately, whether in a few months or several years, the cardholder is left in the same position—either accept the arbitration clause or forfeit the ability to use a credit card.”).

122. STAR WARS: EPISODE V—THE EMPIRE STRIKES BACK, *supra* note 49.

competitive, even if they pass on significantly less than the total savings generated by pro-seller contract provisions to consumers.<sup>123</sup> Consumers have a difficult time properly pricing lock-in effects when change is flagged up front.<sup>124</sup> It is more difficult when the terms can change with little advance notice and no limit on scope.<sup>125</sup> Thinking back to the reel world examples from Part II, Darth Vader's imperious approach differs stylistically from Apple's automatic updates, but they lead to the same result—unexpected surprises for consumers for which it is difficult to plan.

There is other evidence that the market for contract terms is typically not sensitive to reordering by consumers. First, there is some indication that even sophisticated attorneys tend to incorporate new clauses into boilerplate without fully understanding their import.<sup>126</sup> Second, companies may not actually compete on boilerplate terms at all. To the extent that a clause provides an advantage to a seller (including managing risk), the rational competitor will incorporate that clause if they suspect that consumers do not shop based on contract terms.<sup>127</sup> These problems are exacerbated by unilateral reordering. In addition, boilerplate is often defended against claims regarding consumer consent and unfair pricing on the ground that sophisticated consumers will reject terms that are too objectionable, and there are enough sophisticated consumers to shape business practices.<sup>128</sup> But adding a unilateral reordering clause to the mix disincentivizes sophisticated consumers and allows a seller to mitigate the impact of sophisticated consumers on its business practices.

Even consumers who understand the general import of a unilateral reordering clause might misapprehend what they give up, especially when it is difficult to predict how a seller might reorder the contract, and what that might cost the consumer in the future.<sup>129</sup> The flexibility provided by a unilateral reordering provision makes it likely that a firm will include one when drafting boilerplate. Finally, in some jurisdictions,

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123. See *supra* note 105 and accompanying text.

124. See *supra* notes 118–19.

125. See *supra* notes 82–96 and accompanying text.

126. See MITU GULATI & ROBERT E. SCOTT, *THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN* 73–78 (2012).

127. See Ronald J. Mann, “Contracting” for Credit, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 106, 110 (Omri Ben-Shahar ed., 2007) [hereinafter *BOILERPLATE: MARKET CONTRACTS*].

128. See *infra* notes 133–35.

129. Horton, *supra* note 78, at 652.

some businesses (most often credit card providers) can unilaterally reorder the contract even without reserving the right to do so in contractual language.<sup>130</sup> In those jurisdictions, there will be no competition based on the presence or absence of a unilateral reordering clause because no clause is necessary.

In addition, a seller exercising a unilateral reordering clause is less likely to pass savings on to consumers than in the general case, because the point of a change of terms clause is to shift risk and costs onto the contracting party once it is detected.<sup>131</sup> Once consumers are locked in, the seller has a buffer against the need to make future concessions. As David Horton notes, businesses almost never offer a price reduction to consumers when the terms change.<sup>132</sup> Even if one assumes that the product or service consumers purchase was properly priced to reflect the savings that consumers ostensibly secure through accepting or tolerating onerous boilerplate terms, the contract is almost never re-priced to reflect the saving that the seller supposedly passes on to consumers when it reorders the contract.

Professor Douglas Baird has suggested that despite these typical concerns, we may not need to worry about contracts of adhesion and boilerplate, at least so long as there are some sophisticated consumers that will understand the terms and shop with their feet.<sup>133</sup> The sophisticated consumer is a false hope for several reasons, and the problem is once again exacerbated by unilateral reordering clauses. First, firms have become more adept at dealing with the sophisticated consumer differently than the general populace. Professor Lucian Bebchuk and Judge Richard Posner have argued that businesses are less likely to behave opportunistically than consumers, so the ability to set up

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130. *Id.* at 625 n.132.

131. As noted by Horton:

[T]he absurdity of the “opt out” period comes into sharp relief when one considers that the adherent would be leaving a company over the existence or non-existence of a procedural term for another company that enjoys the unfettered power to add, delete, or modify its own procedural terms. With no way to be sure that the new firm will continue to use the same procedural provisions in the future, a rational adherent would stay put.

*Id.* at 650–51.

132. *Id.* at 651 (noting one exception, *Stiles v. Home Cable Concepts, Inc.*, 994 F. Supp. 1410, 1413 (M.D. Ala. 1998), where consumers were given the option to accept a unilaterally added arbitration clause in exchange for a reduction of two percent to the interest rate charged).

133. Douglas Baird, *The Boilerplate Puzzle*, in *BOILERPLATE: MARKET CONTRACTS*, *supra* note 127, at 131, 134. Baird thus acknowledges that in markets which typically lack sophisticated consumers—like the market for rent-to-own furniture at issue in *Williams v. Walker-Thomas Furniture, Co.*, 350 F.2d 445 (D.C. Cir. 1965)—courts should take a more serious look at the enforceability of the substantive terms of the contract, rather than assume the contract is shaped in part by the ability of sophisticated consumers to opt out. *Id.* at 138.

rigid, business-protective rules in boilerplate language is the most efficient option because the firm is likely to relax those rules for consumers who do not behave opportunistically.<sup>134</sup> What Professor Bebchuk and Judge Posner describe as a benefit becomes a detriment when one realizes that sellers can use the same bright line to forestall the claims of the unsophisticated consumer while preserving the flexibility to treat sophisticated consumers better. A happy sophisticated consumer is less likely to warn her unsophisticated fellows. Thus, the corporation can avoid the need to change the terms of the contract by buying off the sophisticated consumer whose departure might otherwise provide a warning like the proverbial canary in the coal mine.<sup>135</sup>

Another problem posed by relying on the sophisticated consumer is that even when sophisticated consumers bring problems to the attention of the public, the public's collective attention span is unfortunately short.<sup>136</sup> A seller can play a long game, making substantive shifts in its favor over time while creating the impression that the company is conceding on major points. One need only look at the history of privacy disputes by Facebook users to see this process play out.<sup>137</sup> As early as 2006, Facebook began changing its privacy policy in ways that triggered strong objections from consumers.<sup>138</sup> Facebook responded with occasional retrenchments and invitations to consumers to adjust privacy settings, but the combination of Facebook's nudges towards full disclosure and its incremental changes in its default settings continually ratchets down baseline privacy expectations regarding access to user information.<sup>139</sup> This occurs despite frequent updates by well-informed

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134. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: MARKET CONTRACTS*, *supra* note 127, at 3, 9–10.

135. Sometimes, the company gets rid of difficult consumers instead. *See, e.g., Sprint disconnects customers who complain too much*, USA TODAY (July 10, 2007, 7:59 AM), [http://usatoday30.usatoday.com/tech/news/2007-07-09-sprint-disconnects-customers\\_n.htm](http://usatoday30.usatoday.com/tech/news/2007-07-09-sprint-disconnects-customers_n.htm) (describing how Sprint Nextel cut service for 1,000 consumers who averaged forty to fifty calls per month to customer service).

136. *See, e.g., Jake Linford, Speech and Progress Institutions*, 16 VAND. J. ENT. & TECH. L. (forthcoming 2014) (manuscript at 56–57) (describing the public outcry against recent copyright reform bills).

137. *See generally* Robert E. Lemons, *Protecting Our Digital Walls: Regulating the Privacy Policy Changes Made by Social Networking Websites*, 6 V.S. J.L. & POL'Y FOR INFO. SOC'Y 603 (2011); *Facebook Privacy: A Bewildering Tangle of Options*, N.Y. TIMES (May 12, 2010), [http://www.nytimes.com/interactive/2010/05/12/business/facebook-privacy.html?\\_r=0](http://www.nytimes.com/interactive/2010/05/12/business/facebook-privacy.html?_r=0); Matt McKeon, *The Evolution of Privacy on Facebook*, <http://mattmckeon.com/facebook-privacy/> (last visited Oct. 18, 2013).

138. *See e.g.,* Jessica E. Vascellaro, *Facebook Grapples with Privacy Issues*, WALL ST. J., May 19, 2010, <http://online.wsj.com/article/SB10001424052748704912004575252723109845>.

139. *See* McKeon, *supra* note 137.

users who successfully ferret out every shift in Facebook's terms of service.<sup>140</sup>

### C. *The End of Unilateral Reordering?*

What then should be done? The ship has sailed regarding the enforceability of boilerplate,<sup>141</sup> but in light of the manner in which unilateral reordering clauses exacerbate problems with consumer consent and the illusion that products with onerous terms always have pro-consumer pricing, the correct policy response may be a prophylactic rule barring any changes enacted pursuant to a unilateral reordering clause offered in boilerplate language.<sup>142</sup> Such a prophylactic rule is bound to be over-inclusive.<sup>143</sup> For example, in some cases, well-informed consumers might legitimately prefer to accept a unilateral reordering clause. It is also possible that some consumers who fail to consider, or are incapable of fully processing the import of a unilateral reordering clause, might nonetheless prefer it to other alternatives because the lowest price is the only salient factor in the decision regarding which among competing products to purchase or services to use.<sup>144</sup> But the harms stemming from allowing unilateral reordering clauses are sufficiently severe for the majority of consumers specifically, to markets generally, and to any reasonable theory of contract law, that the losses from applying a prophylactic rule are far outweighed by the benefits that will stem from such a rule.

For those skeptical of the prophylactic rule, consider two alternatives: a "two-price" solution designed to help consumers properly price the

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140. See e.g., Steve Henn, *Facebook's Latest Privacy Changes: Tag, You're You*, NPR, (August 30, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/08/30/217281470/facebooks-latest-privacy-changes-tag-youre-you>.

141. See *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 992–93 (7th Cir. 2008) (Easterbrook, J.).

142. As noted by Professors Bar-Gill and Davis, Regulation Z, promulgated by the Federal Reserve Board under the Truth in Lending Act, bans creditors from changing terms in a home equity plan. See 12 C.F.R. § 226.5b(f)(3) (2013); Bar-Gill & Davis, *supra* note 117, at 31. Other authors have taken more limited stances against unilateral reordering clauses. Professors Peter Alces and Michael Greenfield have argued that under traditional contract doctrines, the Uniform Commercial Code, and certain statutes, some unilateral reordering clauses would be unenforceable. See generally Alces & Greenfield, *supra* note 78. Professor Horton supports his call for a bar on the ability of drafters to unilaterally reorder procedural terms like arbitration clauses by noting that consumers are unlikely to benefit from the change, or even recognize the importance of new procedural clauses as changes occur. See Horton, *supra* note 78, at 652.

143. Cf. Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 397 (1985) (describing the over- and under-inclusiveness of the rule-like definition of commercial speech).

144. Ben-Shahar, *supra* note 91, at 11.

unilateral reordering option at the time of purchase,<sup>145</sup> and a “perceived value” proposal designed to ensure that sellers are passing some savings on to consumers when exercising a unilateral reordering clause.<sup>146</sup> As for the first, Professors Oren Bar-Gill and Kevin Davis argue that the unilateral reordering problem can be corrected by inserting a third party into the contract, one that will determine whether any given attempted reordering is enforceable.<sup>147</sup> These third-party “Change Approval Boards” could market themselves based on how strictly they construe unilateral reordering clauses.

In a way, Professors Bar-Gill and Davis have suggested a complicated means of ensuring a level of transparent pricing. Thus, a simpler solution presents itself: require the seller who offers its goods or services subject to a unilateral reordering clause to also offer the same goods or services without such a clause. The goods or services sold subject to seller reordering are likely to be cheaper than those sold under less alterable deals. This two-price solution would be similar to other circumstances where consumers can purchase what are ostensibly the same goods or services, but with different contract terms and therefore different price points. For example, Professor Omri Ben-Shahar has recently reminded us that more people buy nonrefundable, economy-priced airline tickets than more flexible first-class or business-class tickets, trading flexibility for price.<sup>148</sup> The difference in price is transparent, at least on some websites, where the economy class ticket is often steeply discounted compared to first-class or flexible tickets.<sup>149</sup> Like the difference between economy and business class airline tickets, a two-price solution to the unilateral reordering problem would be a minor improvement compared to the status quo because it would require purveyors of unilateral reordering terms to transparently price the difference.

The downside of the two-price solution is readily apparent. The requirement would likely increase costs for sellers, because it would lead to non-uniform treatment of consumers purchasing the same products and services. Those costs will almost certainly be passed on to

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145. *See infra* notes 147–51 and accompanying text.

146. *See infra* notes 152–60 and accompanying text.

147. Bar-Gill & Davis, *supra* note 117, at 991.

148. Some have argued that first and business-class tickets were historically *over*-priced, due to a lack of sensitivity to price on the part of business travelers in the 1980s. *See, e.g.*, Jon Bonné, *Inside the Mysteries of Airline Fares*, NBC NEWS.COM (May 8, 2003), [http://www.nbcnews.com/id/3073548/ns/business-us\\_business/t/inside-mysteries-airline-fares/#.UfvYjdK1FCg](http://www.nbcnews.com/id/3073548/ns/business-us_business/t/inside-mysteries-airline-fares/#.UfvYjdK1FCg).

149. This has been the author’s experience purchasing tickets on the Delta.com website.

consumers who prefer the certainty of a deal to one that can be subsequently reordered. There is also a chance that sellers will try to take unfair advantage of consumers who favor predictability over surprises, and price the “plain vanilla” contract like retailers price insurance for electronics—offering too little coverage for too much money,<sup>150</sup> while hoping to take advantage of consumers’ cognitive limitations.<sup>151</sup> Nonetheless, if consumers were offered two options, (1) a cheaper “Darth Vader” deal, where the seller reserves the right to change the terms, and (2) a more expensive contract that could not be changed without something resembling a bargained-for exchange, the seller would at least send a clear signal about the level of contractual predictability offered to the purchaser of its product or service.

If one is concerned that forcing sellers to offer two deals takes away too much necessary discretion, and is still persuaded that cost savings realized through unilateral reordering could be passed down to consumers, a second option—the “perceptible value” proposal—offers the seller the opportunity to put its money where its clause is. In one reported case, *Stiles v. Home Cable Concepts, Inc.*,<sup>152</sup> a credit card provider attempted to keep consumers from exercising the ability to opt out of a new arbitration clause by promising a 2% cut in the interest rate for those who agreed to binding arbitration.<sup>153</sup> The court reasonably found the modification enforceable because consumers accepting the modification were given an actual, perceptible benefit for doing so, and consumers who did not accept the modification were allowed to keep using the card in accordance with the old deal.<sup>154</sup> It is not unreasonable to think that the card provider valued its savings under the arbitration clause at something above the 2% cut. Neither is it irrational to think that even consumers who valued the ability to sue a credit card company for breach of contract might have been willing to trade it away in exchange for a 2% rate cut.

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150. Ben-Shahar, *supra* note 91, draft at 18.

151. See generally Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995).

152. 994 F. Supp. 1410 (M.D. Ala. 1998).

153. The terms of the credit card agreement stated that:

You may elect to reject these changes in terms by completing the attached postage paid postcard and returning it to American General Financial Center postmarked no later than March 1, 1997. If you reject these changes your Annual Percentage Rate(s) will be reinstated to the current rate(s) disclosed on your enclosed billing statement, and there will be no arbitration agreement in effect.

*Id.* at 1413.

154. *Id.* at 1417–18.

Following the example in *Stiles*, a change made pursuant to a unilateral reordering clause might be enforceable if the party making the change—almost always the seller<sup>155</sup>—gives something of value to the party subject to the change. Unlike the two-price solution,<sup>156</sup> which provides clarity ex ante to consumers regarding the value to the seller of the right to unilaterally reorder the contract, the perceptible value proposal would maintain some seller flexibility up front, but require sellers to reify the assumption underlying standard economic defenses of boilerplate that contracting efficiencies will trickle down to consumers. Thus, for example, a unilateral change to Facebook’s privacy policy might be enforceable under the perceptible value proposal if Facebook users subject to the change were provided with free promotion of a post or two.<sup>157</sup>

The perceptible value proposal would not require sellers to pass all savings on to consumers. In line with old notions of sufficient consideration, something just north of a negligible benefit could suffice.<sup>158</sup> But like the benefit offered in *Stiles*, the benefit conveyed should be some form of cash or savings that lasts for the remainder of the existing term of the contract. For example, it would not meet the goal of the perceptible value proposal to conclude that consumers received something of value from a seller who adds an arbitration clause to a contract simply because the seller is bound to arbitration like consumers.<sup>159</sup> In addition, the perceptible value proposal would not necessarily require sellers to provide an opt-out to consumers, which is

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155. *But see* Andrew Trotman, *Man Who Created Own Credit Card Sues Bank for Not Sticking to Terms*, THE TELEGRAPH (Aug. 8, 2013, 4:41 PM), <http://www.telegraph.co.uk/finance/personal-finance/borrowing/creditcards/10231556/Man-who-created-own-credit-card-sues-bank-for-not-sticking-to-terms.html> (reporting that a Russian court upheld new terms inserted by a consumer in a credit card agreement when the bank signed the modified agreement, apparently without reading it).

156. *See supra* notes 147–50 and accompanying text.

157. The going rate to promote one of the author’s Facebook posts on September 13, 2013 was \$6.99, a price that is, for now, too rich for the author to pay. Facebook claims that promoting a post “simply increases the likelihood that your audience will see your message in their News Feed.” *Promoted Posts*, FACEBOOK, <https://www.facebook.com/help/promote> (last visited Oct. 20, 2013). How much promotion increases said likelihood has not been disclosed.

158. In fact, courts are unlikely to wade into the question of whether value conveyed by the seller is commensurate with the change made. *See, e.g.*, *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982) (“Far from consideration needing to be coextensive or even proportionate, the value or measurability of the thing forborne or promised is not crucial so long as it is acceptable to the promisee.”).

159. *But see In re Halliburton Co.*, 80 S.W.3d 566, 569 (Tex. 2002) (holding a new arbitration clause in an employment contract enforceable because “the promise to arbitrate would have been binding and enforceable on both parties”).



of questionable value in any case.<sup>160</sup>

## CONCLUSION

The proposed prophylactic rule barring the enforceability of unilateral reordering clauses in boilerplate contracts,<sup>161</sup> and the more limited two-price and perceived value proposals,<sup>162</sup> would lead in the same direction—toward something reminiscent of old requirements for bargained-for exchange to support an enforceable contract modification.<sup>163</sup> Some might find the proposals too strong, but at a minimum, there is good reason to question whether standard economic defenses of boilerplate are applicable to unilateral reordering clauses. The public may be required to live with boilerplate, but perhaps they should not be subject to the endless reordering of that boilerplate, like some game of musical chairs that only the seller can win. As the real world catches up to modern reality, may there seldom be cause to say about our contractual obligations, “this deal is getting worse all the time.”

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160. While the contract in *Stiles* also included an opt-out provision, the ability to opt out is hardly the sine qua non of an enforceable modification in a contract of adhesion, particularly in light of the difficulties presented by calculating lock-in effects. *See supra* notes 104–05, 121 and accompanying text.

161. *See supra* notes 141–44 and accompanying text.

162. *See supra* notes 147–60 and accompanying text.

163. *See supra* Part I.B.