

Fall 2019

## Boilerplate Indignity

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### Recommended Citation

Encarnacion, Erik (2019) "Boilerplate Indignity," *Indiana Law Journal*: Vol. 94 : Iss. 4 , Article 2.

Available at: <https://www.repository.law.indiana.edu/ilj/vol94/iss4/2>

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# BOILERPLATE INDIGNITY

ERIK ENCARNACION\*

*Commentators have long tried to sound the alarm about boilerplate contracts, pointing out threats ranging from the loss of privacy rights to the erosion of public law and democratic self-governance. This Article argues that this list of concerns misses something important: that imposing certain boilerplate terms on individuals is incompatible with their dignity. After explaining and defending the conception of dignity presupposed here, this Article shows how boilerplate accountability waivers—like arbitration clauses—prevent people from accessing the distinctive dignity-vindicating role of courts and degrade their status as legal persons. And because governments may legitimately protect dignity interests, proposed reforms like the Arbitration Fairness Act have an even stronger justification than previously recognized. Boilerplate indignity should, in any event, force us to take a hard look at the dignity interests jeopardized by fine print, interests routinely sacrificed at the altar of commercial expediency.*

INTRODUCTION.....	1306
I. BOILERPLATE ACCOUNTABILITY WAIVERS AND THEIR CRITICS.....	1309
A. BOILERPLATE ACCOUNTABILITY WAIVERS.....	1309
1. ARBITRATION CLAUSES .....	1309
2. OTHER ACCOUNTABILITY WAIVERS .....	1312
B. EXISTING CRITICISMS OF BOILERPLATE ACCOUNTABILITY WAIVERS	1316
1. IMPOVERISHED CONSENT.....	1316
2. SYSTEMIC HARMS .....	1321
II. THE INDIGNITY OF ACCOUNTABILITY WAIVERS .....	1323
A. THE CONCEPT AND VALUE OF DIGNITY .....	1325
1. THE CONCEPT OF DIGNITY .....	1325
2. THE VALUE OF DIGNITY.....	1329
B. HOW ACCOUNTABILITY WAIVERS JEOPARDIZE DIGNITY .....	1332
1. THE INSTRUMENTAL ARGUMENT: HOW COURTS VINDICATE DIGNITY .....	1333
2. THE ARGUMENT FROM FORM: AGAINST LEVELING DOWN .....	1336
C. OBJECTIONS.....	1339
1. CONSENT REVISITED.....	1339
2. TRADEOFF ARGUMENTS.....	1342
3. PROVING TOO MUCH .....	1346
III. APPLICATIONS: <i>EX ANTE</i> AND <i>EX POST</i> .....	1347

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A. EX ANTE REGULATION .....	1347
B. EX POST ADJUDICATION OR INVESTIGATION .....	1349
CONCLUSION .....	1350

#### INTRODUCTION

In *AT&T Mobility LLC v. Concepcion*, consumers tried to form a class to sue AT&T for fraudulently charging taxes on cell phones advertised as “free.”<sup>1</sup> But there was a problem. An arbitration clause was buried in the fine print of their service agreements.<sup>2</sup> The clause purported to prevent the consumers from forming a class, requiring them instead to march single file to arbitration rather than litigate in court.<sup>3</sup> The U.S. Supreme Court ultimately held that the clause was enforceable despite lower court decisions finding it unconscionable under California law.<sup>4</sup> The Supreme Court reasoned that the Federal Arbitration Act (FAA) both required enforcing the arbitration clause and preempted California doctrine.<sup>5</sup> Later Supreme Court decisions have made challenging arbitration clauses even harder.<sup>6</sup>

Arbitration clauses are just one of a number of ways that firms use boilerplate to prevent individuals from holding them accountable in courts of law.<sup>7</sup> A growing chorus has criticized this development. Some critics focus on the legal merits, arguing (for example) that the Supreme Court’s FAA jurisprudence unjustifiably departs from the text, history, and purpose of the FAA itself.<sup>8</sup> Others show how

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1. 563 U.S. 333 (2011).

2. *Id.* at 336.

3. *Id.*

4. *Id.*

5. *Id.* at 346–47, 352.

6. See *Epic Sys. v. Lewis*, 138 S. Ct. 1612 (2018); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

7. See *infra* Section I.B.

8. See, e.g., Brian T. Fitzpatrick, *Justice Scalia and Class Actions: A Loving Critique*, 92 NOTRE DAME L. REV. 1977, 1984–89 (2017) (criticizing Justice Scalia’s majority opinions in *Concepcion* and *Italian Colors* as difficult to reconcile with the text, history, or purpose of the FAA); Margaret L. Moses, *How the Supreme Court’s Misconstruction of the FAA Has Affected Consumers*, 30 LOY. CONSUMER L. REV. 1, 1 (2017) (“Neither the drafters of the Federal Arbitration Act nor the Congress that adopted it intended it to cover consumers or workers, or to displace state jurisdiction or state substantive law.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 114–22 (2006).

boilerplate threatens worker rights and consumer protections,<sup>9</sup> contract law,<sup>10</sup> democratic self-governance and participation,<sup>11</sup> and even the rule of law itself.<sup>12</sup>

This Article takes aim at a different, overlooked, and deeply troubling aspect of boilerplate: to the extent that boilerplate clauses attempt to strip individuals of their rights to hold firms accountable in courts of law, they thereby threaten dignity. This Article refers to these clauses as “accountability waivers.”

Because my arguments target certain boilerplate practices and their enforcement by the state, Part I begins by identifying those practices more precisely. Part I describes accountability waivers and identifies common examples, including: arbitration clauses (which waive the right to public trial), waivers of rights to litigate in class actions, choice-of-forum clauses, and certain wholesale liability disclaimers. In order to situate my claims about dignity within broader debates about these boilerplate terms, Part I also catalogues some of the existing objections to boilerplate waivers of important rights, grouping them roughly into two camps: complaints about individual consent and objections rooted in systemic concerns or “negative externalities.” Although objections from both camps have some merit, they each miss something important about the morally problematic nature of accountability waivers. Focusing on systemic harms obscures the mistreatment of individuals. And although focusing on the problematic nature of consent in the context of boilerplate rightly

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9. J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3057 (2015) (claiming that *Italian Colors* in effect “authorized private parties to use mandatory private arbitration clauses to construct procedural rules that have the foreseeable, indeed possibly intended, consequence of preventing certain claims from being asserted at all, rendering those claims mere nullities”); Kathryn A. Sabeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009) (“Privatizing the enforcement of statutory rights erodes those rights, as rights that are not enforced publicly vanish from the public’s eye, making the public less educated about the laws governing society and probably less likely to recognize and correct the laws’ violations.”); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, (Econ. Pol’y Inst. Briefing Paper No. 414, 2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/3WEY-VYGS>].

10. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) [hereinafter RADIN, *BOILERPLATE*]; see also Margaret Jane Radin, *Of Priors and Disconnects*, 127 HARV. L. REV. F. 259, 260 (2014) [hereinafter, Radin, *Of Priors and Disconnects*] (arguing that her Boilerplate book is in part about a “disconnect . . . between theory and practice when we attempt to apply contract theory to the phenomenon of mass-market boilerplate”).

11. ALEXANDRA LAHAV, *IN PRAISE OF LITIGATION* 84–111 (2017); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971); see also Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (worrying that powerful enterprises make contracts of adhesion “effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals”).

12. Margaret Jane Radin, *Boilerplate: A Threat to the Rule of Law?*, in PRIVATE LAW AND THE RULE OF LAW 292 (Lisa M. Austin & Dennis Klimchuk eds., 2014) [hereinafter Radin, *Boilerplate: A Threat*] (arguing that “the rule of law at its most basic level requires that some rights not be privatized such that they can be curtailed and sometimes eradicated by firms”).

focuses on how firms interact with individuals, consent is far from the only concern about the way that firms treat individuals at the transactional level.

Part II introduces the missing objection, which is that boilerplate accountability waivers are incompatible with individual dignity. This claim presupposes a conception of “dignity” that Part II makes explicit. The core argument singles out two ways in which these waivers undermine dignity, where “dignity” is understood as a high-ranking status held by each adult within a political community.<sup>13</sup> First, courts play a unique role in vindicating a person’s status, given that courts can publicly lend their prestige and power to individuals when that status is threatened. Second, dignity involves a *high-ranking* status, one that is determined partly by reference to the rights and responsibilities traditionally reserved for the highest-ranking members of society. Modern dignity “levels up” this aristocratic notion of dignity, allocating where possible this set of rights and responsibilities to each person in a political community. The right to sue in court is one of these rights. But firms that use boilerplate accountability waivers attempt to “level down” in a way incompatible with modern dignity. For these reasons, boilerplate accountability waivers threaten dignity.

Part II concludes by responding to the objections that (1) individuals *consent* to this “mistreatment”; (2) individuals actually benefit by trading off their access to courts in exchange for cheaper goods or services; and (3) the argument “proves too much” by construing perfectly innocent commercial behavior as nefarious. To preview my replies, first, consent does not justify all conduct that harms dignity. Nor does consent to an item off a menu justify imposing the menu itself; the dignity-based argument here criticizes the options presented to those subjected to offending boilerplate provisions. Second, tradeoff arguments prove too much by implying that we should be permitted to wholly waive our rights to hold others accountable in any forum whatsoever provided that we might obtain lower prices for goods and services as a result. There is also reason to believe that tradeoff arguments are paternalistic. Nor does this Article’s argument, third, “prove too much” since not all boilerplate terms jeopardize dignity in the way that accountability waivers do.

Part III turns to the practical implications of the analysis, arguing that taking dignity seriously justifies robust attempts to regulate arbitration clauses *ex ante* and should motivate greater efforts to conduct *ex post* investigation of other accountability waivers besides arbitration clauses.

In the end, not all boilerplate terms threaten dignity. But accountability waivers differ. They reflect attempts to wrest control from individuals’ legal power to stand up for themselves and vindicate their standing by holding others legally accountable. These powers are partially constitutive of one’s status as a full adult person with dignity. Firms that arrogate these powers diminish that status. And because governments have legitimate interests in protecting dignity, proposed reforms like the Arbitration Fairness Act have an even stronger justification than previously recognized.<sup>14</sup>

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13. This influential conception is articulated and defended in Jeremy Waldron’s recent work. *See infra* Section II.A.

14. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3 (2015).

## I. BOILERPLATE ACCOUNTABILITY WAIVERS AND THEIR CRITICS

## A. Boilerplate Accountability Waivers

Boilerplate contracts are ubiquitous.<sup>15</sup> Firms draft them, they contain non-negotiable language purporting to express legally binding terms, they govern the relationship between the firm and the signer, and most signers are consumers or employees who lack the bargaining power to change the terms.<sup>16</sup> Examples include leases,<sup>17</sup> warranties,<sup>18</sup> gym membership agreements,<sup>19</sup> cellular phone terms of service,<sup>20</sup> and employment contracts.<sup>21</sup>

Boilerplate contains terms that often systematically favor the drafting party by deleting or undermining important legal rights.<sup>22</sup> And it is no accident that the rights that disappear tend to favor the firm's bottom line often at the expense of the consumer or employee. Even defenders of boilerplate admit, "boilerplates are far more firm-friendly than the background default rules that they replace."<sup>23</sup>

The particular boilerplate terms that this Article focuses on, "accountability waivers," are inserted into boilerplate agreements by firms with the aim of preventing individuals from retaining or exercising their legal powers to hold those same firms legally accountable in courts of law. The main type of accountability waiver is an arbitration clause, but there are other types as well.

## 1. Arbitration Clauses

Consumers and employees routinely find themselves subject to boilerplate clauses that commit them to private, binding arbitration for any disputes arising in connection with their relationship with the firms producing that boilerplate.<sup>24</sup> One

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15. See, e.g., Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1751 (2014) ("Disclosures, fine print, standard terms—these are unavoidable facts of modern life.").

16. For a similar definition of a "contract of adhesion," see Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1177 (1983). Other salient features of boilerplate include the fact that the drafter of the agreement engages in many more transactions of the particular kind of transaction than the typical signatory. *Id.*

17. See Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. L. ANALYSIS 1 (2017).

18. See, e.g., Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 116 (2010).

19. See *id.*

20. See Oren Bar-Gill & Rebecca Stone, *Mobile Misperceptions*, 23 HARV. J.L. & TECH. 49 (2009).

21. See, e.g., Schmitz, *supra* note 18.

22. See generally RADIN, BOILERPLATE, *supra* note 10.

23. Omri Ben-Shahar, Book Note, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 893 (2014) (reviewing MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013)).

24. See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. DISP. RESOL. 669, 669 (2001); Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y.

concern is that arbitrators favor repeat purchasers of arbitration services—i.e., the very firms who impose boilerplate on consumers and employees.<sup>25</sup> The National Arbitration Forum, for example, a firm hired by credit card issuer First USA to handle its arbitrations, decided 99.6% of consumer arbitrations in favor of First USA.<sup>26</sup> Now, courts are not perfect. But to the extent that they lack the same incentives to systematically favor firms that repeatedly purchase arbitration services, courts of law appear impartial compared to arbitration.<sup>27</sup> Whether individuals fare better in arbitration than in court remains hotly contested,<sup>28</sup> largely because evidence about the impartiality of arbitration is limited given that proceedings are often not publicly available.<sup>29</sup>

Making matters worse, arbitration clauses usually limit the right to form classes, even in arbitration.<sup>30</sup> Because consumers or employees are forced to pursue their

TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/8P9J-ZYDW>].

25. See, e.g., Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 215 (1997). For a state-of-the-art discussion of the empirical literature on repeat players, accompanied by more nuanced empirical support for the claim that extreme repeat players hold advantages in arbitration, though declining to attribute this advantage to bias, see David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 83–87, 120–24 (2017) (“*Concepcion* might have created a structural bias that favors extreme repeat players over one-shotters.”).

26. See BRIAN H. BIX, *CONTRACT LAW: RULES, THEORY, AND CONTEXT* 130–31 (2012) (collecting sources and commentary on the National Arbitration Forum).

27. The comparative claim is admittedly speculative, but many have voiced serious worries about partiality and bias in arbitration, as well as the function of arbitration clauses in silencing legal claims rather than diverting them to arbitration. See, e.g., Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2014) [hereinafter Resnik, *Diffusing Disputes*]; Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119, 2120 (2017) (presenting evidence that “that the more the public learns about predispute binding arbitration clauses, the more they believe this dispute-resolution procedure is unjust and illegitimate”); see also *id.* at 2138 (“[I]t is highly unlikely that those who zealously draft and design adhesion contracts will consider the public’s perspective or enact dispute resolution procedures that truly lead to neutral, unbiased, and just outcomes.”).

28. See Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 1 (2011); Horton & Chandrasekhar, *supra* note 25, at 83–87, 120–24; Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, “*Whimsy Little Contracts*” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1 (2015). But see Alan Kaplinsky, Mark Levin & Daniel McKenna, *Consumers Fare Better with Arbitration*, AM. BANKER (Dec. 23, 2014), <https://www.americanbanker.com/opinion/consumers-fare-better-with-arbitration> [<https://perma.cc/CN45-9GTH>].

29. See generally Bingham, *supra* note 25, at 218; Resnik, *Diffusing Disputes*, *supra* note 27.

30. For example, the arbitration clause at issue in *AT&T Mobility LLC v. Concepcion* not only mandated arbitration for any dispute arising between contracting parties, it also required

claims in arbitration on a case-by-case basis, this terminates in effect their rights to form classes.<sup>31</sup> Small-dollar claims cannot be aggregated to create incentives for plaintiff-side attorneys to represent them, even in arbitration.<sup>32</sup> Forcing individuals to pursue their small-dollar claims individually therefore defeats one of the purposes of class actions. So in effect many arbitration clauses not only divest individuals of their right to hold others accountable in public jury trials, they also operate in effect to divest individuals of their right to hold others accountable in *any* ostensibly neutral adjudicative setting.<sup>33</sup>

At one point, state law doctrines like unconscionability provided a bulwark against aggressive arbitration clauses and class-action waivers. Although section 2 of the Federal Arbitration Act (FAA) mandates that arbitration agreements shall be enforceable, the statute's text contains language that presumably preserves a state's prerogative—grounded in “law” or “equity”—to refuse to enforce some arbitration agreements.<sup>34</sup> California courts, for example, have held that many arbitration clauses are unconscionable and hence unenforceable.<sup>35</sup> But the United States Supreme Court has chipped away at this prerogative in recent years. In 2008, the Supreme Court held that the FAA preempts state laws that prevent arbitration of particular “types” of claims.<sup>36</sup> The Court went further in *AT&T Mobility LLC v. Concepcion*, holding that clauses prohibiting class actions *even in the context of arbitration* were enforceable because the FAA preempted California's so-called *Discover Bank* rule, under which most of those clauses were unconscionable.<sup>37</sup>

Formally at least, the Supreme Court has tried to articulate limiting principles on the enforcement of arbitration clauses, insisting that they will be enforced only so long as they are consistent with the “effective vindication” of federal statutory

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that parties seeking to pursue claims do so in their “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336 (2011) (internal quotation marks omitted).

31. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2318 (2013) (Kagan, J., dissenting) (observing that boilerplate provisions that operate to “rais[e] a plaintiff's costs could foreclose consideration of federal claims,” and opining that doing so “run[s] afoul of the effective-vindication rule” that is supposed to make sure that arbitration remains a viable alternative to litigation).

32. See Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 U. KAN. L. REV. 767, 780 (2012).

33. See *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting); Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 703 (2018) (“If the imposition of mandatory arbitration means that the employer faces only a miniscule chance of ever confronting a formal legal claim in any forum regarding future legal misconduct against its employees, then such a provision virtually amounts to an ex ante exculpatory clause, and an ex ante waiver of substantive rights that the law declares non-waivable.”).

34. 9 U.S.C. § 2 (2012).

35. See, e.g., *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005). California courts applying the *Discover Bank* analysis include *Cohen v. DirecTV, Inc.*, 142 Cal. App. 4th 1442, 1451–53 (2006); *Klussman v. Cross Country Bank*, 134 Cal. App. 4th 1283, 1297 (2005); *Aral v. EarthLink, Inc.*, 134 Cal. App. 4th 544, 556–57 (2005).

36. *Preston v. Ferrer*, 552 U.S. 346, 353 (2008).

37. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); see also *Discover Bank v. Super. Ct.*, 113 P.3d 1100 (Cal. 2005).

rights.<sup>38</sup> But the Court has chipped away at this exception as well, most notably in its recent decision in *American Express Company v. Italian Colors Restaurant*, which holds that arbitration clauses that require class-action waivers must be enforced, even when doing so would make it prohibitively expensive to arbitrate federal antitrust claims.<sup>39</sup> *Italian Colors* has prompted some scholars to portend the end of class action litigation.<sup>40</sup> So federal protections against the erosion of individuals' rights to litigate in public courts are slim indeed.

Critics have argued that the Supreme Court has misapplied the FAA.<sup>41</sup> Whatever the merits of these criticisms, *Concepcion* and *Italian Colors* have undermined further the ability of consumers and employees to hold firms accountable in courts of law, and have hampered their ability to hold firms accountable in even *private* arbitration.<sup>42</sup> Indeed, as a result of these criticisms and its own independent investigation into arbitration clauses, the Consumer Financial Protection Bureau had issued a rule barring arbitration clauses across a range of consumer contracts unless they permitted consumers to form classes—that is, until Congress used the Congressional Review Act to overturn the rule.<sup>43</sup> So as it stands, arbitration clauses and class waivers still undermine the power that consumers and employees have to hold firms legally accountable for claims arising between them and firms.

## 2. Other Accountability Waivers

On their face, arbitration clauses aim to prevent potential plaintiffs from accessing courts. But they are not the only form of accountability waiver, since firms sometimes use other common boilerplate terms to achieve the same aim. Some examples include: hold-harmless clauses, forum-selection clauses, and unilateral modification clauses.

“Hold-harmless” clauses purport to waive rights to sue the drafting firm in connection with the underlying contractual exchange.<sup>44</sup> Whether courts will enforce

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38. See *Italian Colors*, 133 S. Ct. at 2318 (Kagan, J., dissenting).

39. *Id.* at 2304.

40. See, e.g., Fitzpatrick, *supra* note 8, at 1984–89. Others started sounding the alarm much earlier. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near- Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

41. See, e.g., Fitzpatrick, *supra* note 8, at 1984–89.

42. Resnik, *Diffusing Disputes*, *supra* note 27, at 2808 (concluding that “few who are cut off from using the courts and required (rather than choosing) to arbitrate do so, thereby erasing as well as diffusing disputes”); see also *id.* at 2809 n.15 (observing that “Justice Scalia has authored two opinions requiring single-file arbitrations despite evidence that absent the capacity to use collective action, claims will not be brought”).

43. Renae Merle & Tory Newmyer, *Congressional Republicans Use Special Maneuver to Kill ‘Arbitration Rule’*, WASH. POST (Oct. 25, 2017), [https://www.washingtonpost.com/business/economy/once-again-congressional-republicans-find-it-easier-to-kill-policy-than-write-it/2017/10/25/06eb764e-b997-11e7-be94-fabb0f1e9ffb\\_story.html](https://www.washingtonpost.com/business/economy/once-again-congressional-republicans-find-it-easier-to-kill-policy-than-write-it/2017/10/25/06eb764e-b997-11e7-be94-fabb0f1e9ffb_story.html) [https://perma.cc/FGM6-VTFN].

44. See Scott J. Burnham, *Are You Free to Contract Away Your Right to Bring a Negligence Claim?*, 89 CHI.-KENT L. REV. 379, 379 (2014). For more on exculpatory clauses, see Anita Cava & Don Wiesner, *Rationalizing a Decade of Judicial Responses to Exculpatory Clauses*, 28 SANTA CLARA L. REV. 611, 640 (1988).

these clauses depends in part on how broad they are.<sup>45</sup> Courts decline to enforce exculpatory clauses that purport to waive rights to sue for intentional harms or harms arising from reckless or grossly negligent conduct, sometimes holding that these blanket liability waivers violate public policy.<sup>46</sup> But some courts enforce negligence waivers.<sup>47</sup>

Some evidence suggests, however, that firms insert overbroad exculpatory clauses into boilerplate despite knowing that they probably would not be enforced.<sup>48</sup> There is little cost to the firm to draft overbroad provisions, after all, and much to be gained in terms of deterring would-be plaintiffs.<sup>49</sup> Indeed, other evidence suggests that consumers subject to these overbroad clauses are unwilling or unable to test them in court.<sup>50</sup> Functionally, then, some boilerplate clauses have the same effect of “waiving” rights to sue even when those waivers would not survive a challenge in court. To the extent that firms draft exculpatory clauses intending to prevent individuals from pursuing claims against them in court, these clauses count as accountability waivers.

Firms also sometimes use forum-selection clauses to keep plaintiffs out of court. Unlike arbitration clauses, which on their face attempt to redirect potential plaintiffs away from court, forum-selection clauses formally preserve litigants’ access to courts.<sup>51</sup> Facebook’s Terms of Service, for example, require disputes to be resolved in the U.S. District Court for the Northern District of California or state courts in San

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45. RADIN, BOILERPLATE, *supra* note 10, at 138.

46. *Id.*; *see also* 15-85 Corbin on Contracts § 85.18 (2008) (“Courts do not enforce agreements to exempt parties from tort liability if the liability results from that party’s own gross negligence, recklessness, or intentional conduct.”).

47. RADIN, BOILERPLATE, *supra* note 10, at 139 (citing *Newton’s Crest Homeowners’ Ass’n v. Camp*, 702 S.E. 2d 41, 47 (Ga. Ct. App. 2010) and *N. Sunrooms & Additions, LLC v. Dorstad*, No. A10-1217, 2011 WL 292160, at \*2 (Minn. Ct. App. Feb. 1, 2011)).

48. *See* Furth-Matzkin, *supra* note 17.

49. RADIN, BOILERPLATE, *supra* note 10, at 13 (remarking that even if firms were not confident about whether a given term were enforceable, “it might reason that the attempt was worth trying” given that it might deter lawsuits). For empirical findings consistent with this assessment, *see generally* Furth-Matzkin, *supra* note 17.

50. *See e.g.*, Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997).

51. *See, e.g.*, *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 596 (1991) (holding that the forum-selection clause expressly preserves rather than nullifies the respondent’s “right to ‘a trial by [a] court of competent jurisdiction’” and thus did not violate a federal statute prohibiting such nullifications).

Mateo County, California.<sup>52</sup> And these clauses are often enforceable.<sup>53</sup> Facebook's forum-selection clause in particular has been enforced by some courts.<sup>54</sup>

But not all.<sup>55</sup> This is at least partly because of the long-recognized "deterrent effects" of forum-selection clauses on would-be plaintiffs, "rang[ing] from added costs, logistical impediments and delays, to deterrent psychological effects."<sup>56</sup> These clauses therefore often make it difficult to sue firms that insert them into boilerplate.<sup>57</sup> To the extent that forum-selection clauses aim to divest would-be consumers and employees of their power to hold firms legally accountable by making their claims extremely costly to pursue, these clauses count as a form of accountability waiver.<sup>58</sup> But to the extent that these clauses are imposed without aiming to prevent litigants from having their day in court, they do not count as accountability waivers.

Unilateral modification clauses also enable firms to sidestep legal accountability.<sup>59</sup> These clauses represent the paradigm of a one-sided term,

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52. *Terms of Service* § 4.4, FACEBOOK, <https://www.facebook.com/terms.php> [<https://perma.cc/3CXU-EE7S>] (last updated Apr. 19, 2018) ("For any claim, cause of action, or dispute you have against us that arises out of or relates to these Terms or the Facebook Products ("claim"), you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim, and that the laws of the State of California will govern these Terms and any claim, without regard to conflict of law provisions.").

53. *See, e.g.,* Bense v. Interstate Battery Sys. of Am., Inc., 683 F.2d 718, 721–22 (2d Cir. 1982) (observing that "contractual forum-selection clauses will be enforced unless it clearly can be shown that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching"). On the Supreme Court's long-standing willingness to enforce forum-selection clauses, see Patrick J. Borchers, *Forum Selection Agreements in the Federal Courts after Carnival Cruise: A Proposal for Congressional Reform*, 67 WASH. L. REV. 55, 57 (1992).

54. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829 (S.D.N.Y. 2012) (granting a motion to transfer venue to the Northern District of California on the grounds that plaintiffs assented to a forum-selection clause in Facebook's Terms of Service).

55. *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751 (Can.) (declining to enforce Facebook's forum-selection clause).

56. *Id.* (Abella, J., concurring) (citing Edward A. Purcell, Jr., *Geography as a Litigation Weapon: Consumers, Forum-Selection Clauses, and the Rehnquist Court*, 40 UCLA L. REV. 423, 514 (1992)); *see also* *Yoder v. Heinold Commodities, Inc.*, 630 F. Supp. 756, 759 (E.D. Va. 1986) (holding that "a forum selection clause should not be enforced where a consumer is told by a corporate agent to ignore boilerplate contract language containing a forum selection clause, where there is a material difference in bargaining power, and where the forum designated by the contract has little to do with the transaction and *is gravely inconvenient for the parties and witnesses*") (emphasis added).

57. *See Yoder*, 630 F. Supp. at 759.

58. *See, e.g.,* Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 401 ("[F]orum selection clauses in contracts of adhesion are sometimes a method for stripping people of their rights.") (emphasis omitted).

59. Judith Resnik provides the following example from an AT&T consumer contract: "We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time." Resnik, *Diffusing Disputes*, *supra* note 27, at 2806 (quoting *Wireless*

permitting the drafter to change other terms of the agreement but denying the same privilege to the consumer or employee subject to those agreements. It is not clear the extent to which unilateral modification clauses are enforced.<sup>60</sup> But they are common. They appear in credit card agreements,<sup>61</sup> consumer loyalty programs,<sup>62</sup> subscription services,<sup>63</sup> and so on.<sup>64</sup> Modification clauses allow firms to evade liability by changing terms on the fly, allowing firms to change the terms of the relationship that holds between them and consumers, and hindering legal accountability (given that firms' accountability for breach of contract is a function of the terms of the underlying contract itself).<sup>65</sup> By claiming the sole power to change terms, firms make it more difficult to hold them accountable. So to the extent that unilateral modification clauses aim to evade legal accountability, they qualify as accountability waivers.

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The accountability waivers listed above do not exhaust the field.<sup>66</sup> But the arguments that follow will often focus on arbitration clauses, primarily because they unambiguously count as accountability waivers. After all, by inserting arbitration clauses into their boilerplate, firms make no secret of their aims: to prevent individuals from exercising their legal powers to hold those firms accountable in courts of law. That is, after all, precisely what arbitration clauses are designed to do: eliminate the need for courts. By contrast, it is less obvious (for example) that a forum-selection clause aims to deprive individuals of their day in court, given that these clauses formally and ostensibly *preserve* access to courts. This makes it more difficult to distinguish forum-section clauses that count as genuine accountability waivers (i.e., those that aim to prevent individuals from having or exercising rights

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*Customer Agreement*, AT&T § 1.3 (2015), <http://www.att.com/legal/terms.wirelessCustomerAgreement-list.html> [<http://perma.cc/9XA6-E956>]; NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 65 (2013) (“Modification at will, or unilateral modification clauses, typically state that the website can modify the agreement at any time, and the consumer assents by using the site after such modification.”). For further examples, see KIM, *supra*, at 66.

60. See KIM, *supra* note 59, at 67 (observing a court “split”); Michael L. DeMichele & Richard A. Bales, *Unilateral-Modification Provisions in Employment Arbitration Agreements*, 24 HOFSTRA LAB. & EMP. L.J. 63, 64–65 (2006).

61. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 649 (2010).

62. See Carmen Labbozzetta, *A Principled Approach to Reward Loyalty: An Argument for Code of Conduct Principles to Remedy the Contractual Unfairness and Legislative Confusion in Loyalty Programs*, 4 MACQUARIE J. BUS. L. 123, 125 (2007).

63. See Horton, *supra* note 61, at 628.

64. See *id.*

65. See *id.*

66. Another potential form of accountability waiver, for example, includes limitations on remedies that aim to prevent access to courts. See RADIN, BOILERPLATE, *supra* note 10, at 140–42; see also Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407 (2016) (arguing against the growing enforceability of contract clauses that stipulate the remedy for breaching other clauses in the same contract).

to sue those firms), as opposed to those forum-selection clauses that genuinely seek to preserve court access. In any event, although much of the following discussion focuses primarily on arbitration clauses, they represent just one of broad family of accountability waivers.

### *B. Existing Criticisms of Boilerplate Accountability Waivers*

Criticisms of boilerplate accountability waivers can be roughly characterized in terms of whether they focus on how individuals are wronged or the systemic harms associated with the waivers of rights. In what follows, I use the term “harm” broadly to refer to a setback to an important interest.<sup>67</sup>

#### 1. Impoverished Consent

The orthodox view is that contracts are enforceable only if parties validly consent to their terms.<sup>68</sup> Indeed, consent has been described by one scholar as “the master concept that defines the law of contracts in the United States.”<sup>69</sup> In describing the normative underpinnings of this legal requirement, another scholar describes an ideology according to which obtaining consent “almost always insulates the fairness of the terms of that contract from both public scrutiny and legal attack, regardless of how harmful or injurious that contract turns out to be to any of the parties that consented to it.”<sup>70</sup> So beyond being a legal requirement of contract formation, consent also serves a widely accepted “legitimation” function.<sup>71</sup> Valid consent constitutes a process that validates the terms of the agreement that parties have reached.<sup>72</sup>

But scholars have long noticed a tension between consent’s role in contract formation and normative legitimation, on the one hand, and the realities of boilerplate contracting practices on the other.<sup>73</sup> One of the chief complaints about boilerplate contracts holds that individuals surrender important rights under circumstances that

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67. JOEL FEINBERG, *HARM TO OTHERS: THE MORAL LIMITS OF THE CRIMINAL LAW* 33 (1984).

68. *See, e.g.,* *Netbula, LLC v. BindView Dev. Corp.*, 516 F. Supp. 2d 1137, 1155 (N.D. Cal. 2007) (“Under California law, in order to form a valid and enforceable contract, it is essential that there be: (1) parties capable of contracting; (2) their consent; (3) a lawful object; and, (4) a sufficient consideration.”); *Ehlen v. Melvin*, 823 N.W.2d 780, 783 (N.D. 2012) (“A contract requires parties capable of contracting, consent of the parties, a lawful object, and sufficient consideration.”) (citation and quotation marks omitted).

69. Peter H. Schuck, *Rethinking Informed Consent*, 103 *YALE L.J.* 899, 900 (1994).

70. Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 *YALE L.J.* 1394, 1407 (2009).

71. *Id.*

72. For a more detailed discussion of the senses in which contract formation counts as a form of procedural justice, see Aditi Baghi, *Contract as Procedural Justice*, 7 *JURIS.* 47, 52–53 (2016) (arguing that, under certain consent-based views, valid consent suffices to render contracts legally valid as well, and describing such views as examples of theories of pure procedural justice).

73. *See* Kessler, *supra* note 11, at 640 (warning, in 1943, about the excessive powers exercised by firms through their contracts of adhesion).

render their consent dubious at best.<sup>74</sup> As applied to boilerplate accountability waivers, specifically, the objection assumes that the right to hold firms accountable in court (or in at least some forum) is important, yet individuals are divested of that right under conditions that render “consent” illusory.<sup>75</sup>

Several features of boilerplate contracting practices drive this inadequate-consent argument. First, individuals are often ignorant about the content or meaning of accountability waivers contained in boilerplate agreements. Knowing whether we have given up rights pursuant to an accountability waiver would require individuals, at a minimum, to read all boilerplate that crosses our paths. But not only do consumers and employees fail to read boilerplate beyond a few key terms (especially, price conditions or what has been called “dickered” or “visible” terms),<sup>76</sup> it is unreasonable—some have even called it “sadistic”—to expect consumers to read beyond a few key terms.<sup>77</sup>

A few reasons people typically do not read the waivers stand out.<sup>78</sup> First, even if people did read boilerplate, they would not necessarily appreciate its legal or

74. See, e.g., RADIN, *BOILERPLATE*, *supra* note 10, at 30 (“The gerrymandering of the word ‘agreement,’ along with various other strategies for fitting [‘assent’ to boilerplate] into the . . . paradigm of voluntary transfer by agreement can be viewed as a process of the devolution or decay of the concept of voluntariness. In this process, consent is degraded to assent, then to fictional or constructive or hypothetical assent, then further to mere notice (i.e., something that tells recipients that terms are there), until finally we are left with only a fictional or constructive notice of the terms.”); James Gibson, *Boilerplate’s False Dichotomy*, 106 GEO. L.J. 249, 255 (2018) (“Those who study contract law have accordingly formed a near-universal consensus that consumers simply do not voluntarily agree to late-arriving boilerplate (even if they click ‘I agree’ once its terms are presented) and that the necessary market discipline is therefore lacking.”); Kessler, *supra* note 11, at 640 (warning that contracts of adhesion may “become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals”); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 465 (2006) (“[I]n today’s electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms.”); Andrew Robertson, *The Limits of Voluntariness in Contract*, 29 MELB. U. L. REV. 179, 202 (2005) (concluding that the legal obligations that “commonly arise” in the context of standard form contracts occur in circumstances that “are clearly not best understood as voluntary obligations”); Sovern et al., *supra* note 28, at 82 (observing that empirical results “raise[] serious questions about whether the consent consumers provide when they enter into a contract containing an arbitration clause is a knowing consent, and therefore whether it should be considered consent at all”); see also DEP’T OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS (Aug. 9, 2006), [http://archive.defense.gov/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf) [<https://perma.cc/8ALP-Q69Q>].

75. See Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251, 267 (Franklin G. Miller & Alan Wertheimer eds., 2010) (observing that contracting practices falls short of “full consent”).

76. See, e.g., Rakoff, *supra* note 16, at 1251.

77. KIM, *supra* note 59, at 65.

78. For a list similar to the one that follows, see RADIN, *BOILERPLATE*, *supra* note 10, at 12; see also OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW:*

practical import.<sup>79</sup> Second, boilerplate terms are presented as non-negotiable,<sup>80</sup> so there is nothing short of foregoing the individual transaction that they could do about it (often an illusory option, as discussed below). Third, as noted earlier in the context of exculpation clauses, some firms have a strong incentive to misrepresent legal rights and responsibilities in favor of those firms.<sup>81</sup> Boilerplate often contains unenforceable terms, and there is very little incentive for drafters to avoid including them.<sup>82</sup> But even a diligent reader would not know this absent further legal research.

All of these explanations for why we typically do not read boilerplate assume that the consumer at least knows that that they are about to enter into some kind of legally enforceable arrangement. But in many cases involving so-called “wrap contracts” parties become legally bound without even realizing it.<sup>83</sup> The same T-Mobile terms and conditions provide that one “accepts” those terms, among other ways, *by opening the box* containing the cell phone that comes bundled with the T-Mobile cellular service.<sup>84</sup>

Beyond ignorance, boilerplate agreements have long been criticized to the extent that they offer individuals no meaningful choice about whether to waive certain important rights.<sup>85</sup> This “no choice” worry also relates to consent, to the extent that the validity of consent depends on the chooser’s having a reasonable menu of options from which to choose. To illustrate the concern, consider the Department of Defense’s 2006 congressional report on the effects of predatory lending on service members. The Department observed that arbitration clauses prevented military personnel from seeking legal recourse in court, adding that “[w]aiver is not a matter of ‘choice’ in take-it-or-leave-it contracts of adhesion.”<sup>86</sup> The Federal Trade Commission similarly opined in 2010 that “consumers should, but generally do not, have a meaningful choice regarding mandatory pre-dispute arbitration provisions in consumer credit contracts.”<sup>87</sup>

THE FAILURE OF MANDATED DISCLOSURE 10, 61 (2014).

79. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1648 (2005) (“Empirical studies have shown that only a minute percentage of consumers read form agreements, and of these, only a smaller number understand what they read.”); *see also* Sovern et al., *supra* note 28, at 4, 15 (finding that “consumers lack awareness of arbitration agreements and do not understand those agreements when they are aware of them”).

80. Rakoff, *supra* note 16, at 1177.

81. *See* RADIN, *BOILERPLATE*, *supra* note 10.

82. *See* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1127 (2009). For empirical support, *see generally* Furth-Matzkin, *supra* note 48.

83. KIM, *supra* note 59, at 3; *see also* Lemley, *supra* note 74, at 466.

84. *T-Mobile Terms & Conditions*, T-MOBILE, [https://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr\\_Ftr\\_TermsAndConditions](https://www.t-mobile.com/templates/popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions) [<https://perma.cc/2XFQ-EBSF>] (last updated Aug. 22, 2018) (“You accept these terms by . . . opening the Device box.”).

85. *See, e.g.*, sources cited *infra* notes 86–87.

86. DEP’T OF DEFENSE, REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 51 (Aug. 9, 2006), [http://archive.defense.gov/pubs/pdfs/Report\\_to\\_Congress\\_final.pdf](http://archive.defense.gov/pubs/pdfs/Report_to_Congress_final.pdf) [<https://perma.cc/2XFQ-EBSF>].

87. FED. TRADE COMM’N, REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 45 (2010).

There are several reasons to think that boilerplate accountability waivers involve impoverished choice. Even if we somehow knew that a take-it-or-leave-it waiver of an important right appeared in the fine print, it is often unreasonable to expect us to “shop” for better terms given the high cost of doing so or low likelihood of finding materially different terms.<sup>88</sup> What’s more, even if individuals could in theory shop around for better terms, in many markets we are unlikely to find a substitute good or service without a similar waiver. This is because competition frequently fails to weed out problematic terms.<sup>89</sup> And this should come as little surprise. Problematic boilerplate terms including accountability waivers quickly become industry norms, at least when they are perceived by firms as cost-saving devices.<sup>90</sup> Even Chief Justice Roberts commented during oral argument in *Carpenter v. United States* that “you really don’t have a choice these days if you want to have a cell phone.”<sup>91</sup> He might just as well have added that you “don’t really have a choice” about whether your interactions with cell phone companies will be governed by boilerplate containing arbitration clauses. So not only does competition fail to weed out accountability waivers and other problematic terms, competition may in fact serve to entrench their use.<sup>92</sup>

Our dependence on online commerce has made boilerplate even more unavoidable. Indeed, “[p]ractically every website professes to be governed by a browsewrap and/or clickwrap, and customers typically encounter several wrap agreements each time they go online.”<sup>93</sup> The Canadian Supreme Court has even suggested that a particular firm’s services—Facebook, Inc.—are so enmeshed in our

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88. *Douez v. Facebook*, [2017] 1 S.C.R. 751 (Can.) (“Having the choice to remain ‘offline’ may not be a real choice in the Internet era.”); KIM, *supra* note 59, at 205 (“Even where a consumer is aware that she is ‘manifesting consent’ by clicking ‘I agree,’ her behavior is not so much an expression of intent to contract as it is a ceding to the reality of her situation—she clicks without reading because she knows that it does not matter what the contract says. If she wants to enter into any transaction online using a computer or mobile phone, she will accept all of the terms of each provider because she has no other choice.”); Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U.L. REV. 700, 717 (1992) (“[P]urchasers would be acting irrationally if they incurred the costs required to fully comprehend all contract terms.”); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990) (arguing that it is “rational for even a conscientious consumer to pay little, if any, attention to subordinate contract terms”).

89. OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS* 16–17 (2012); Rakoff, *supra* note 16, at 1227.

90. *See generally* GEORGE A. AKERLOF & ROBERT J. SHILLER, *PHISHING FOR PHOOLS: THE ECONOMICS OF MANIPULATION AND DECEPTION* 1–11 (2015) (introducing the concept of a “phishing equilibrium” according to which competitive market pressures create incentives to manipulate and deceive consumers); Mark A. Lemley & David McGowan, *Legal Implications of Network Economic Effects*, 86 CALIF. L. REV. 479, 589 (1998); Rakoff, *supra* note 16, at 1227.

91. Transcript of Oral Argument at 80–81, *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (No. 16-402).

92. AKERLOF & SHILLER, *supra* note 90, at 1–11; BAR-GILL, *supra* note 89, at 16–17; Rakoff, *supra* note 16, at 1227.

93. KIM, *supra* note 59, at 59.

social lives that construing that firm's services as avoidable seems unconvincing given the social costs of foregoing them.<sup>94</sup> We must engage in at least some of these activities—online or offline—just to participate in a modern society and its commercial economy. And doing so almost always involves losing some important legal powers to hold those firms legally accountable for the harms they may inflict.<sup>95</sup>

Despite these concerns about the validity of consent, courts and commentators continue to argue that enforcing accountability waivers is justified because individuals genuinely consent to them. The Supreme Court robustly enforces arbitration clauses under the Federal Arbitration Act in part because doing so “is a matter of consent.”<sup>96</sup> Karl Llewellyn famously argued that “blanket assent” to unknown terms might be quite broad yet no less legitimate as a form of consent.<sup>97</sup> Roughly, the argument is that an individual genuinely consents to specific terms—price, quantity, for example—while also giving “blanket assent . . . to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”<sup>98</sup> Llewellyn's view continues to have adherents.<sup>99</sup>

And there is at least a grain of truth in what Llewellyn argues. Rarely do individuals know all the facts that pertain to their commitments. So long as ignorance does not go to the heart of the underlying transaction—e.g., price terms or other core conditions of performance—ignorance may not undermine consent after all. In turn, determining whether *accountability waivers* count as “core conditions” will likely reproduce disagreements among partisans: boilerplate skeptics will argue that accountability waivers are core conditions, such that a contracting party's ignorance

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94. *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751 (Can.) (“As the intervener the Canadian Civil Liberties Association emphasizes, access to Facebook and social media platforms, including the online communities they make possible, has become increasingly important for the exercise of free speech, freedom of association and for full participation in democracy.”) (citation and internal quotation marks omitted).

95. One might think that the law helps to rein in abuse of accountability waivers, including unconscionability doctrine. For doubts about whether this is the case, see, e.g., KIM, *supra* note 59, at 87–92; RADIN, *BOILERPLATE*, *supra* note 10, at 124–27; Meredith R. Miller, *Contracting Out of Process, Contracting Out of Corporate Accountability: An Argument Against Enforcement of Pre-dispute Limits on Process*, 75 TENN. L. REV. 365, 368–69 (2008); see also Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 486–87. For an argument in favor of reforming the doctrine, see KIM, *supra* note 59, at 208–10.

96. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

97. See, e.g., KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 (1960).

98. *Id.* at 370.

99. See, e.g., Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967, 1978 (2014) (reviewing MARGARET JANE RADIN, *BOILERPLATE: FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013)) (citing Llewellyn). For a more recent version of the view, see Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002). The blanket-assent position shares with prominent contract-as-product views common features and motivations. See Erik Encarnacion, *Contract as Commodified Promise*, 71 VAND. L. REV. 61, 113–15 (2018).

of them undermines the validity of her consent, while boilerplate defenders will probably deny that accountability waivers count as core conditions.

Setting ignorance aside, what about lack of meaningful choice? Here too consent-based objections face difficulties. Consider one possible response: meaningful choice is not required for consent to be valid. Individuals may lack a meaningful choice about whether to consent to a life-saving surgery, for example, yet quite extensive liability waivers may be valid nonetheless.<sup>100</sup> So long as consent is not secured through fraud, coercion, or duress—the response continues—lack of meaningful choice does not necessarily invalidate consent. If this response is correct, the fact that individuals lack a meaningful choice about whether to lose their rights under the terms of accountability waivers does not necessarily undermine the validity of those waivers.<sup>101</sup> So objecting to accountability waivers on the grounds that individuals lack meaningful choice does not by itself show that those waivers are invalid.

The preceding discussion has not traced all the contours of the debates about consent in the boilerplate context. But so far no decisive consent-based arguments for or against boilerplate terms generally or accountability waivers in particular have emerged. This stalemate has motivated boilerplate skeptics to focus on systemic harms or negative externalities beyond the immediate confines of individual boilerplate transactions.

## 2. Systemic Harms

There are other important criticisms of accountability waivers that focus, broadly speaking, on negative externalities—i.e., potential harms to third parties or institutions that are not party to a given boilerplate agreement. The particular criticisms that I will focus on are grounded in claims about the systemic effects of accountability waivers. Although commentators have identified multiple potential systemic harms at various levels of specificity, three will illustrate the point: harms to democratic self-governance, harms to courts, and harms to rule-of-law norms. All of these harms are complaints about the ways that accountability waivers degrade public institutions, norms, and values.

Turning first to democratic self-governance, accountability waivers often undermine substantive and procedural rights and responsibilities codified in law by legal institutions like legislatures.<sup>102</sup> But the overarching concern is that, given that

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100. ALAN WERTHEIMER, *EXPLOITATION* 135 n.36 (1996) (observing that “although we understand the sense in which a patient has ‘no choice’ but to undergo surgery, given that death is an intolerable alternative, we do not think that this fact . . . invalidates the patient’s ‘informed consent’”).

101. Other theorists, rather than trying to argue that individuals meaningfully consent to boilerplate, opt instead to downplay the importance of consent. *See, e.g.*, NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 156 (2016) (arguing that contract theorists should stop trying to argue that boilerplate involves “meaningful” consent, and instead acknowledge that attenuated consent suffices for the purposes of facilitating functioning markets); *see also* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 *CASE W. RES. L. REV.* 57, 57 (2012) (arguing that “contract law abandon its consent-centric focus”).

102. *See* sources cited *supra* notes 9–12.

the chief aim of an accountability waiver is to keep disputes out of courts, these waivers make vindicating substantive legal rights much harder. This is especially so when the accountability waiver comes in the form of an arbitration clause that requires individual rather than class arbitration. Vindicating small-dollar claims in arbitration—let alone in court—becomes prohibitively expensive.<sup>103</sup> Individual consumer claims, ranging from breach of contract to deceptive trade practices claims or other consumer protections—simply go unenforced. Violations of employee rights also become shielded from private actions to the extent they involve relatively small dollar amounts.<sup>104</sup> And procedural devices that aim to facilitate justice—like the class action vehicle itself—also fall by the wayside.<sup>105</sup> This entire dynamic effectively allows firms to opt out of large swaths of substantive and procedural law that depends heavily on private causes of action for enforcement, law with a robust democratic pedigree including antitrust and consumer and employee protections.

Accountability waivers also potentially undermine courts.<sup>106</sup> Focus again on arbitration clauses. To the extent that we view the court's sole function as being one of efficient dispute resolution, taking cases away from the courts may not seem like a bad thing. But as many scholars have shown, dispute resolution is hardly the sole function of courts, and perhaps not even its more important one.<sup>107</sup> One of the chief differences between public courts and private arbitration, for example, is that the former provides a relatively transparent process while the latter is typically secret.<sup>108</sup> The information-forcing function of courts comes in many forms. The discovery process unearths valuable public information about firms that plaintiffs value,<sup>109</sup> and that have public benefits that extend beyond individual causes of action. Pre-discovery filings also contain a wealth of information.<sup>110</sup> Litigation that produces merits determinations often helps to clarify the law for those subject to it.<sup>111</sup> Secret, private arbitration offers no such public benefit.

There are, relatedly, serious rule-of-law concerns with boilerplate accountability waivers.<sup>112</sup> Although the "rule of law" is a contested concept, certain values are closely associated with the ideal of living under a system of law rather than under arbitrary and capricious rule by individuals. And many of these values are undermined when individuals lack private power to hold firms legally accountable

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103. See sources cited *supra* note 33.

104. See sources cited *supra* note 33.

105. See, e.g., Horton, *supra* note 61.

106. See, e.g., Resnik, *Diffusing Disputes*, *supra* note 27.

107. See, e.g., Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

108. Resnik, *Diffusing Disputes*, *supra* note 27, at 2893–2915.

109. Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 73 (2010).

110. Resnik, *Diffusing Disputes*, *supra* note 27, at 2827 ("The mix of public adjudication, rulemaking, litigant filings, task forces, accounting for funds, and the need to obtain more resources has turned courts into 'a huge information system—an entity that receives, processes, stores, creates, monitors, and disseminates large quantities of documents and information.'") (quoting RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 201 (2008)).

111. See *id.*

112. See generally Radin, *Boilerplate: A Threat*, *supra* note 12.

in court. One such value is that the law on the books, as it were, should at least roughly reflect that law in practice (the value of “congruence”).<sup>113</sup> But if large swaths of law go unenforced because individuals lack recourse, so much the worse for that rule-of-law value. Another value requires governments to make public what the law requires of them.<sup>114</sup> Legal compliance requires to a large extent knowing and voluntary self-application of the law.<sup>115</sup> But, as already noted, cutting off the production of case law hampers a key source of this public knowledge: binding precedent. And because voluntary compliance requires public knowledge of the law’s content, cutting off a source of legal knowledge potentially makes voluntary compliance more difficult as well. Formal equality under law is also associated with the rule of law.<sup>116</sup> But when disputes are resolved in private rather than in public forums, the public is not in a position to evaluate whether arbitrators are complying with this norm. To the extent states stand by and willingly enforce accountability waivers, they seem to indirectly endorse or remain complicit with this kind of treatment.

These and other potential systemic harms have been catalogued in greater detail elsewhere.<sup>117</sup> For our purposes what unites these criticisms is that they focus squarely on the negative effects of accountability waivers *beyond* the alleged injustice to individual parties to the transaction.

Because criticisms of boilerplate that focus on systemic harms are varied, global responses to these criticisms are not readily available. But one type of response comes in the form of tradeoff arguments. These arguments will be discussed at greater length in Part II below. To preview, tradeoff arguments promise that benefits flow from boilerplate waivers of important rights, and that these benefits outweigh costs or harms articulated by commentators worried about systemic harms.<sup>118</sup> But for present purposes the important point is to recognize the distinction between consent-based objections to boilerplate and objections grounded in concerns about systemic harms.

## II. THE INDIGNITY OF ACCOUNTABILITY WAIVERS

Existing criticisms of boilerplate may have merit. But they also miss something important. Yes, systemic harms are worrisome. But focusing exclusively on these harms sidelines the ways firms mistreat *individuals* at the transactional level. Put differently, even if the negative externalities of boilerplate accountability waivers were minimal, the way that firms use boilerplate accountability waivers to establish relationships with individuals would remain problematic. Critics who emphasize

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113. LON L. FULLER, *THE MORALITY OF LAW* 81–83 (rev. ed. 1969).

114. *See id.* at 39.

115. Jeremy Waldron, *How Law Protects Dignity*, 71 *CAMBRIDGE L.J.* 205–08 (2012).

116. Radin, *Boilerplate: A Threat*, *supra* note 12, at 304 (“Equality before the law cannot exist in practice when one portion of the public has redress of grievances available and another portion (maybe the larger portion) does not.”); LAHAV, *supra* note 11, at 123–32 (discussing challenges to the ideal of equality before the law).

117. *See, e.g.*, RADIN, *BOILERPLATE*, *supra* note 10; Radin, *Boilerplate: A Threat*, *supra* note 12.

118. *See infra* Section II.C.2.

consent or the lack thereof, by contrast, do not ignore the possibility of transactional injustice between contracting parties. But they too miss something important. Yes, ignorance or lacking viable alternatives may very well undermine the validity of consent. But even if firms obtained knowing and valid consent, individuals would have good reason to resent being subjected to non-negotiable accountability waivers as a precondition of forming contractual relationships. And they would have good reason to resent this treatment before any consent is given. Consent does not launder all shameful treatment of individuals by firms.

What the preceding objections overlook is that boilerplate accountability waivers threaten individuals' dignity interests. In a moment I will substantiate this claim, but I first want to highlight the stakes up front. After all, the fact that private actors subject each other to indignity may initially seem unimportant or simply a regrettable fact of life, surely not the kind of fact that jeopardizes any interest that the law does or should protect.<sup>119</sup> But as a broad proposition this claim is simply false. Governments protect individuals against reputational harms often couched in terms of protecting dignity.<sup>120</sup> Courts justify anti-discrimination law in terms of dignity.<sup>121</sup> Executive Order 13,563 authorized federal agencies to consider "human dignity" in its cost-benefit analyses, despite acknowledging that dignity may be "difficult or impossible to quantify."<sup>122</sup> And the U.S. Supreme Court has repeatedly relied on and recognized "dignity" as an interest worthy of protection by law.<sup>123</sup> Even setting aside

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119. For an articulation (though not necessarily an endorsement) of this objection, see MICHAEL ROSEN, *DIGNITY: ITS HISTORY AND MEANING* 69 (2012) ("If it is the person who behaves in an undignified way, then, if he or she does so willingly and in full awareness of the consequences . . . what business is it of the state to stop them?").

120. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."); Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964) (defending legal rights to privacy as crucial for protecting individual dignity); Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986).

121. See, e.g., *King v. Hillen*, 21 F.3d 1572, 1582 (Fed. Cir. 1994) ("The purpose of Title VII is not to import into the workplace the prejudices of the community, but through law to liberate the workplace from the demeaning influence of discrimination, and thereby to implement the goals of human dignity and economic equality in employment.").

122. Exec. Order No. 13,563, 3 C.F.R. § 1(c) (2011).

123. E.g., *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1698 (2017) (Ginsburg, J.). Justice Kennedy had a well-known fondness for the phrase "equal dignity." See, e.g., *Schuette v. Coal. to Defend Affirmative Action*, 134 S. Ct. 1623, 1637 (2014) (Kennedy, J.); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595, 2603, 2608 (2015) (Kennedy, J.). For a scholarly discussion of older Supreme Court references to "dignity," see, e.g., Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921, 1934–38 (2003); see also Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PENN. L. REV. 169, 172 (2011) (arguing that "few concepts dominate modern constitutional jurisprudence more than dignity does without appearing in the Constitution"); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2013).

the law's contingent recognition that dignity is a freestanding and important interest, political theorists have argued that dignity holds an independent value that plays a crucial role for supporting or instantiating other democratic values like liberty and equality.<sup>124</sup> So when private commercial practices like the imposition of accountability waivers represent a direct frontal attack on dignity, officials must take notice.

Ultimately, my claim is that accountability waivers threaten our dignity interests by attempting to deny individuals the legal power to sue in court. I advance two arguments to support this conclusion. The first is couched in instrumental terms: that individuals have an interest in having access to institutions capable of vindicating their dignity, and courts play an irreplaceable role doing precisely this, given certain institutional features and legal powers that they have. The second argument is more formal: by putting individuals in the position of either giving up their rights to access court as a transactional precondition or walking away, firms treat individuals in a way incompatible with their dignity, where dignity is understood as an equal, high-ranking status. The widespread practice of imposing accountability waivers on individuals effectuates a widespread "leveling down" incompatible with that high rank, while each person subjected to these conditions is placed in the humiliating condition of either degrading her rank or foregoing valuable opportunities. But before reaching these conclusions, more must be said about the conception of dignity presupposed here.

#### A. *The Concept and Value of Dignity*

##### 1. The Concept of Dignity

Dignity is a contested concept. But this Article nevertheless assumes, following Jeremy Waldron's influential work,<sup>125</sup> that dignity is a high rank or status held by each adult member of a political community.

Let me explain. Broadly speaking there are two conceptions of dignity.<sup>126</sup> The first interprets dignity as an inalienable attribute of every human person, "from the highest to the lowest . . . no matter what they do or what happens to them."<sup>127</sup> This view is usually attributed to Immanuel Kant, who famously described dignity as value without price that inheres in humanity, to the extent that humanity is capable of morality.<sup>128</sup> The second has been described as rooted in the "old idea of dignity in the sense of the Roman *dignitas*—the status attached to a specific role or rank in a system of nobility and hierarchical office."<sup>129</sup> On this Roman view, dignity is a scarce

124. See, e.g., Josiah Ober, *Democracy's Dignity*, 106 AM. POL. SCI. REV. 827, 827–28 (2012).

125. See, e.g., JEREMY WALDRON, DIGNITY, RANK, AND RIGHTS (Meir Dan-Cohen ed., 2012); see also Ober, *supra* note 124.

126. Jeremy Waldron, *Citizenship and Dignity*, in UNDERSTANDING HUMAN DIGNITY 327 (Christopher McCrudden ed., 2013) [hereinafter Waldron, *Citizenship and Dignity*].

127. *Id.*

128. Immanuel Kant, *Groundwork of the Metaphysics of Morals*, in IMMANUEL KANT, PRACTICAL PHILOSOPHY 41, 84 (Mary J. Gregor ed., 1996).

129. Waldron, *Citizenship and Dignity*, *supra* note 126, at 327; see also WALDRON, *supra*

resource in the economy of esteem, certainly not the kind of thing capable of being distributed equally to each adult.

The recent work of Jeremy Waldron has sparked a revival and revision of this second conception of dignity,<sup>130</sup> one that attempts to reinterpret dignity in a way that in effect partially reconciles it with the Kantian conception's egalitarian dimension.<sup>131</sup> Waldron's reinterpretation embraces the aristocratic connotations of the term "dignity."<sup>132</sup> Having dignity in this sense entails having a high social rank or status, as well as all the rights and responsibilities that come with that status.<sup>133</sup> Someone with dignity can also demand to be treated in certain ways by others, including to be treated with certain deference, solicitude, and respect.<sup>134</sup> Modern liberal political communities that have attempted to abolish caste systems or systems of heritable nobility do not and should not aim to eliminate all of these aristocratic understandings of dignity. To the contrary, the project of liberation from royal hierarchies or other caste systems involves "leveling up," by allocating aristocratic privileges once reserved for nobility to every person. Or as Waldron puts the point, "the modern notion of human dignity involves an upwards equalization of rank, so that we now try to accord to every human being something of the dignity, rank, and expectation of respect that was formerly accorded to nobility."<sup>135</sup> In a slogan, dignity is a high-ranking status held by each person in a community.

Implicit in this conception are three constituents: status, high rank, and equality. Focus first on status. "Status," in the relevant sense, refers to a social position that is constituted in part—but only in part—by rights and responsibilities. One's marital status, for example, is constituted in part by a set of legal rights and responsibilities. But status cannot be explained completely by them.<sup>136</sup> To illustrate, recall that defenders of gay marriage are not concerned merely with having a certain cluster of rights and responsibilities associated with legal marriage. Marital status has social meaning and intangible benefits beyond them.<sup>137</sup> This is why recognizing "civil

note 125, at 30.

130. For the most important recent expression of this view, see WALDRON, *supra* note 125.

131. *Id.* at 31 ("I don't want to underestimate the breach between Roman-Greek and Judeo-Christian ideas, but I believe that as far as dignity is concerned the connotation of ranking status remained, and that what happened was that it was transvalued rather than superseded."). Elsewhere, Waldron discusses ways in which Kant himself may have employed the aristocratic conception of dignity in his work in political philosophy. See Waldron, *Citizenship and Dignity*, *supra* note 126, at 327–32; WALDRON, *supra* note 125, at 25 ("But Kant's use of dignity (or *Würde*) is complicated. He does also use the term in ways that line up much more closely to the traditional connotations of nobility that we have been talking about.").

132. See generally WALDRON, *supra* note 125, at 30; Waldron, *Citizenship and Dignity*, *supra* note 126, at 327.

133. See WALDRON, *supra* note 125, at 34–36.

134. *Id.* at 24 ("The thing to do with a ranking status is to respect and defer to the person who bears it.").

135. *Id.* at 33.

136. *Id.* at 139 ("[A] status term is never just reducible to a list of rights and duties; it also conveys the point of clustering those particular rights and duties together in a certain way."); see also *id.* (explaining that a status "is a matter of fleshing out and responding to a certain sort of standing or considerability that an entity or agent is supposed to have among us").

137. For a more complete discussion of the tangible and intangible benefits of marriage,

unions” could not be a satisfactory substitute for full recognition of marriage between gay spouses, even if the formal legal attributes attending civil unions were identical to marital status.<sup>138</sup> The “civil union” label signaled a less-than-full public recognition of the commitments that gay spouses had towards each other.<sup>139</sup> That is, the label “civil union” expressed or communicated that certain legally recognized monogamous relationships were inferior to others, even if the same rights and responsibilities attached to both statuses. This shows that having a certain status implies having a certain standing in a community that is more than the sum of its constituent rights and responsibilities.

But dignity is more than just any status. Having a low-ranking status may entail being an object of contempt, oppression, or humiliation across a range of social settings. But “dignity” has aristocratic connotations suggestive of a high-ranking status wholly inconsistent with this treatment.<sup>140</sup> Historically, legal systems that recognized hereditary castes or royalty treat dignity as a scarce resource—an “elite peerage”—protected and exclusive in nature.<sup>141</sup> The rights and responsibilities that partially constitute an elite status may themselves be quite desirable. And, as already noted, a person with dignity is also entitled by default to expect certain deferential, solicitous, and respectful treatment by others. Some entitlements more directly implicate high ranking than others. And not every rights infringement necessarily threatens one’s high ranking. Someone who accidentally and harmlessly trespasses on my property does not necessarily threaten my dignity. Indeed, not every “indignity” or insult—taken in isolation—will fundamentally threaten a person’s equal high rank. But, as I argue below, the right to hale others into court is tightly bound up with high-ranking status, both historically and normatively.<sup>142</sup>

Finally, dignity entails more than a high-ranking status. The *equal*-high-ranking conception of dignity is partially aspirational, involving a norm of equality. According to this conception, liberal political communities that recognize the dignity of individuals aspire to “level up” by recognizing that *all adults* within those communities ought to be treated as if they were members of a high-ranking class.<sup>143</sup> Modern dignity in liberal political communities is—or should be—deeply opposed to conceptions of dignity according to which respectful treatment is bestowed

see *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death.”); see also *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). For a discussion of the social meaning of marriage, see, e.g., Ralph Wedgwood, *The Meaning of Same-Sex Marriage*, N.Y. TIMES (May 24, 2012), <https://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality> [<https://perma.cc/7N7N-B2PE>].

138. *Ops. of the Justices to the Senate*, 802 N.E.2d 565, 568 (Mass. 2004) (holding that a proposed bill providing for “civil unions” that contained identical rights and responsibilities as marriage nonetheless violated the state’s due process and equal protection clauses because they functioned to stigmatize gay couples as having second-class relationships).

139. See generally WALDRON, *supra* note 125.

140. Ober, *supra* note 124, at 829.

141. *Id.* at 830.

142. See *infra* Section II.B.1 & B.2.

143. See WALDRON, *supra* note 125, at 133–36; see also Ober, *supra* note 124, at 835 (“Civic dignity scales up elite peerage . . . once reserved to a small and socially homogenous elite to a larger and more socially diverse body of citizens.”).

exclusively upon, say, a blue-blooded elite.<sup>144</sup> Putting the pieces together, dignity is a high-ranking status held by each adult member of a political community in equal measure. This entails having the same basic set of legal rights and responsibilities, at a minimum, but also having an entitlement to demand (from others and institutions) solicitous, deferential, and respectful treatment befitting someone of high rank.

Before turning to the question of dignity's value, let me respond to some objections to avoid misunderstandings. One objection resists the very idea of an equal high-ranking status, which seems oxymoronic. Having a high rank presupposes that others have a lower rank. But if dignity requires that each person have the same high rank, then no one has a lower rank. So no high rank is possible, and in turn, it is impossible for anyone to have dignity.

This objection misses its mark. One response is to point out that it is not obvious that children have dignity in the equal-high-rank conception of dignity. But setting aside the question of whether children have dignity in this sense, making sense of the idea of equal high rank simply requires understanding what low-ranking treatment involves. That is, having a basic understanding of caste systems or royal hierarchies, as they have existed either historically or persist today, is all that one needs by way of comparison to have a basic grip on what having a high rank might entail. And this is true even if (some day) nobody within a particular community occupies that low rank any more. So even though the idea of dignity as an equal, high-ranking status may sound oxymoronic, it is totally coherent. We do not need actually existing social stratification to understand or make use of this conception of dignity.<sup>145</sup>

But there are more sophisticated versions of this objection. The first focuses on the fact that, historically at least, certain legal rights and social privileges were intelligible only assuming that there were low-ranking statuses. Certain privileges were "positional."<sup>146</sup> And we do not need to go very far back in time to see them. During the Jim Crow era, black Americans were expected to surrender their seats in the front of buses to white Americans. But how does the government universalize this practice, which essentially depends on racial hierarchies? Universalization, after all, is compatible with a range of practices, some of which remain morally abhorrent. A related problem with universalizing aristocratic rank is that aristocratic privileges often included a disturbing lack of accountability—something that would be

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144. See James Q. Whitman, "Human Dignity" in *Europe and the United States: The Social Foundations*, in *EUROPE AND US CONSTITUTIONALISM: SCIENCE AND TECHNIQUE OF DEMOCRACY* 95, 97 (G. Nolte ed., 2005) (asserting that "[t]he core idea of 'human dignity' in continental Europe is . . . that old forms of low-status treatment are no longer acceptable . . . 'Human dignity,' as we find it on the Continent today, has been formed by a pattern of levelling up, by an extension of formerly high-status treatment to all sectors of the population.").

145. Scott Hershovitz makes a similar point en route to endorsing aspects of Waldron's conception of dignity. See Scott Hershovitz, *Treating Wrongs as Wrongs: An Expressive Argument for Tort Law*, 10 J. TORT L. 1, 13 n.43 (2017) ("We can all be equals in our dignity because we can all occupy the same rank simultaneously . . . What makes the rank high is that we are familiar with lower ranks, even if we no longer think they are filled.").

146. Don Herzog, *Aristocratic Dignity?*, in JEREMY WALDRON, *DIGNITY, RANK, AND RIGHTS* 99, 108 (Meir Dan-Cohen ed., 2012).

undesirable even if it were possible.<sup>147</sup> Aristocrats did not have to answer to commoners.<sup>148</sup> As Don Herzog summarizes the point, “at the heart of the dignity enjoyed by aristocrats was the claim, ‘I don’t have to answer to the likes of you.’”<sup>149</sup>

These are important points that require a fuller discussion than can be undertaken here. Yes, sometimes universalizing the privileges of high rank is indeterminate or impossible. This seems a good thing to the extent that the positional entitlements involve lack of accountability to the “lower” orders. But the fact that universalizing eradicates “bad” positional entitlements looks more like a feature than a bug of Waldron’s conception. And yes, sometimes universalizing might be possible, but requires further reconstruction to avoid undesirable implications. A regime that permits white bus riders to demand black bus patrons to surrender their seats is not desirable even if black bus riders could respond in kind. But another answer to these more sophisticated objections is that dignity is not the only normative ideal available for determining how our legal and social institutions ought to be designed. Dignity still is capable of playing a powerful normative role, demanding that powerful institutions critically evaluate how they treat the highest-ranked within a political community, while further generalizing that treatment to all persons to the extent possible. But even though dignity cannot do all the normative work expected of a full moral and political theory, this does not mean it is incapable of doing any independent work at all. Indeed, dignity performs quite valuable work, as explained below.

## 2. The Value of Dignity

We should turn to dignity’s value. Understood as an equal high rank, individuals may value dignity for a number of reasons. This Article focuses mostly on the way that dignity instantiates an empowering form of relational equality. But to motivate that focus, first notice how political theorists have tried to locate dignity’s value in its relation to other values like democracy. Josiah Ober has argued, for example, that widespread dignity is a “necessary condition for democracy,” and claims that dignity and democracy exist in a “reciprocal relationship,” in which “[d]emocratic institutions defend dignity,” while “the habits of dignified citizens provide behavioral foundations for defending democracy.”<sup>150</sup> This is because, according to Ober, dignity plays a necessary role in shoring up democracy’s two major values, liberty and equality.<sup>151</sup> Living with indignity—understood as being systematically subjected to humiliating or infantilizing treatment—makes it impossible to effectively exercise our political liberties and is incompatible with equality.<sup>152</sup> After all, individuals who lack secure dignity risk humiliation and infantilization.<sup>153</sup> This

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147. *Id.* at 114 (“[T]oo much of what aristocrats had, in law and society, is stuff we want to abolish, not extend to everyone.”).

148. *See id.* at 100–02.

149. *Id.* at 101–02.

150. Ober, *supra* note 124, at 827–28.

151. *Id.* at 827.

152. *Id.* at 831.

153. *Id.*

treatment, in turn, causes individuals to shrink from public roles and democratic participation, thereby weakening democracy in the process.<sup>154</sup>

Surely Ober is correct that dignity matters for democracy. But his claim that dignity is a *necessary* precondition to democracy seems incorrect, at least when it is strictly construed. To see why, notice that the relationship between democracy and dignity, on Ober's description, is an instrumental one and therefore contingent. Political communities that are treated with dignity may (per Ober) have robust democratic participation and vice versa. But not necessarily. The current occupant of the White House is not well known for treating his political opponents with dignity, yet his attempts to humiliate and bully them may very well *motivate* democratic participation.<sup>155</sup> What's more, unless we have a more concrete understanding of what equal high rank entails, having this rank may just as well breed complacency and indifference towards the underlying political institution that sustains it. Dignity may matter for democracy instrumentally and vice versa. But their relationship is more complicated than Ober lets on.

A better understanding of dignity's value will not be so contingent. Instead, I want to elaborate on the value that bears a constitutive rather than instrumental relation to dignity wherever it is manifested. Dignity is an equal-high-ranking status partially constituted by a set of rights and responsibilities. But once again this set of rights and responsibilities partly—and only partly—explains the value of dignity.<sup>156</sup> The distinctive value of dignity inheres in the way that equal high ranking allows individuals to stand in a relationship as equals with one another in a political community, while being empowered to vindicate that membership status.

The equality here is a form of relational equality.<sup>157</sup> At minimum, dignity rejects caste systems that stigmatize, marginalize, or otherwise oppress individuals throughout a range of social settings that they may encounter or participate in. Dignity does not require having the *same* high rank in every institution one participates in. Not everyone will be CEO. But dignity demands that one will not be systematically and predictably treated as less worthy of consideration across a wide range of social settings. More positively, the idea is that all institutions within a community treat individuals as though they have a high rank. We are all members of an “elite peerage” and are entitled to, in addition to certain basic rights and responsibilities, a basic level of solicitude, deference, and respect from one another and from institutions—and, moreover, we are empowered (befitting our high rank) to demand those things from others if they are not forthcoming.<sup>158</sup> True, having an equal high rank and all of its accouterments may be instrumentally useful to us in a variety of ways. But it is also intrinsically valuable.

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154. *Id.*

155. We shall see.

156. This “partly” proviso is why dignity is not, as some critics have argued, empty or useless. Ruth Macklin, *Dignity Is a Useless Concept*, 327 BRIT. MED. J. 1419 (2003); Steven Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 28, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity> [<https://perma.cc/B8ZE-YAJ4>].

157. For a classic articulation of relational equality, as opposed to distributive equality, see Elizabeth S. Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999).

158. WALDRON, *supra* note 125, at 24 (“The thing to do with a ranking status is to respect and defer to the person who bears it.”).

This is all quite abstract. But sometimes we see dignity's distinctive value most clearly when it is threatened. Return again to marital status, which usefully illustrates how dignity may be jeopardized in ways that extend beyond the mere violation of the rights that underpin it.<sup>159</sup> In its pre-*Obergefell* decision, *Opinion of the Justices to the Senate*, the Supreme Judicial Court of Massachusetts considered whether a proposed bill—providing that same-sex “‘spouses’ in a civil union shall be ‘joined in it with a legal status equivalent to marriage’” in all but name—would pass muster under the state’s constitution.<sup>160</sup> The court held that the proposed bill would violate the due process and equal protection clauses of the Massachusetts constitution,<sup>161</sup> reasoning that the legislature’s labeling was not “innocuous”; rather, “it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”<sup>162</sup> In other words, by “relegat[ing] same-sex couples to a different status,”<sup>163</sup> the civil union bill would have harmed the dignity interests of gay spouses despite formally having the same benefits and burdens as opposite-sex “married” couples.

The *Opinion of the Justices* usefully illustrates a few lessons. The first reinforces a conceptual point about status: that status is something over and above a constellation of legal rights and responsibilities, even though those same rights and responsibilities partially constitute a status. The second lesson follows from the first. The *value* of marital status is not exhausted by the value of the underlying set of rights and responsibilities. To the extent that calling committed relationships “civil unions” rather than “marriages” signaled, in context, a subordinate status that was flatly inconsistent with treating individuals as having an equal high rank. The labeling difference was not merely semantic; it represented a mark of inferiority inconsistent with possessing a high rank. What was valuable to gay couples, and what was being threatened by the bill, was their standing to demand the same solicitude, deference, and respect afforded straight couples across a broad range of social settings, over and above the set of legal rights and responsibilities that come with marriage.

One final point is worth emphasizing. The notion of high rank plays an important role, if unstated, over and above equality. Suppose that the Massachusetts legislature, rather than recognize gay marriage, simply eliminated marriage or started to label all marriages “civil unions.” These two reactions would have secured some measure of formal equality, in principle accessible to each person. But in context, this maneuver would clearly signal that the legislature was attempting to “level down” rather than afford gay couples the same status previously afforded exclusively to straight ones. This maneuver would be no more legitimate than attempts by Southern states to shut down public schools rather than integrate them.<sup>164</sup> So the notion of *high rank* is

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159. That is, rights other than the basic right to be treated with dignity.

160. 802 N.E.2d 565, 568 (Mass. 2004).

161. *Id.* at 572.

162. *Id.* at 570.

163. *Id.* at at 569.

164. For a narrative account discussing Prince Edward County’s role in massive resistance, see Kristen Green, *Prince Edward County’s Long Shadow of Segregation*, ATLANTIC (Aug. 1, 2015), <https://www.theatlantic.com/national/archive/2015/08/segregation-prince-edward-county/400256> [<https://perma.cc/G3JG-SBA6>].

capable of performing independent normative work, and captures some value independent of formal equality of treatment or abstract notions of relational equality by themselves.

As with marital status, so too with dignity conceived of as an equal high rank. One's dignity, like marital status, cuts across a variety of legal, institutional, and social settings and has normative force that goes beyond a cluster of rights and responsibilities. When a person's dignity is jeopardized, this does not merely or even necessarily mean that a particular right has been violated—though curtailing some rights may threaten a person's high-ranking status depending on context.<sup>165</sup> Jeopardizing a person's dignity interests means threatening an individual's high standing in a political community of equals, something that is of intrinsic rather than merely instrumental value.<sup>166</sup>

And this understanding of dignity helps to answer a common objection to it, which is that dignity is too vague to be normatively useful. Understanding dignity as a high rank is useful because it forces us to ask questions that a purely rights-based inquiry does not comfortably ask.<sup>167</sup> Taking dignity seriously involves asking whether certain patterns of contemptuous behavior jeopardize our standing in a way that may negatively affect our relationships with others over a range of social settings. Taking dignity seriously invites us, in other words, to identify harms that extend beyond discrete “transactional” harms to our interests in our bodily integrity, property, or free choice.

But identifying genuine threats to individual dignity is not always easy. Still, the threats discussed below raise particular concerns because they do not merely involve discrete expressions of contempt inconsistent with our dignity. Rather, boilerplate accountability waivers pose a threat to individual dignity by trying to deprive us of an important vehicle for vindicating our high ranking: public courts.

#### *B. How Accountability Waivers Jeopardize Dignity*

As previewed above, I offer two arguments for why boilerplate accountability waivers threaten dignity. First, accountability waivers attempt to deny individuals a vehicle—the legal power to sue in court—crucial for vindicating a person's high rank or standing as an equal in a liberal political community. This first argument leans heavily on the aspect of dignity that interprets it as a *status*, and focuses in turn on the status-vindicating powers of courts. The second argument claims that having access to courts comes along with having a high rank. This argument thus leans more heavily on the *high rank* aspect of dignity. Although independent, the arguments are mutually reinforcing.

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165. For further discussion of this point, see *infra* Section II.B.1.

166. See *infra* Section II.B.1.

167. Cf. WALDRON, *supra* note 125, at 141 (explaining how dignity differs from and is not reducible to autonomy).

### 1. The Instrumental Argument: How Courts Vindicate Dignity

Courts play a special instrumental role in vindicating individual dignity.<sup>168</sup> This is because courts are capable of lending their prestige and power to litigants. Because vindicating one's dignity involves defeating or mitigating challenges to it, understanding how courts are uniquely situated to vindicate status first requires understanding how a person's status can be challenged. Sometimes certain substantive legal rights directly protect a person's status, such that violating these rights *per se* challenge a person's status. For example, defamation claims protect against reputational harms and allow individuals to protect their "good names."<sup>169</sup>

Claims of wrongful discrimination also provide a compelling example. When one person wrongfully discriminates against another, that discriminator's conduct frequently expresses the judgment that the victim is somehow of lesser importance on the basis of a protected aspect of that person's identity. To generalize, rights violations can intrinsically threaten a person's status when those rights themselves aim to protect a person's standing in a community.

Apart from individual rights violations, lacking the ability to stand up for one's self against legal transgressions, and lacking the ability to do so in court, represents a potential threat to one's high-ranking status.<sup>170</sup> To see why, recall that a person's status accompanies her through a wide range of social settings. As Don Herzog puts the point, having an "[a]ristocratic status," entails that "your status follows you across the whole social landscape . . . [y]ou're a duke 24/7."<sup>171</sup> But this suggests that a threat to a person's dignity anywhere might be a threat to that status everywhere. Having the power to sue in court is not just a matter of seeking compensation from a particular defendant. The power enables a person to stand up and publicly affirm to the broader community that treating her a certain way is simply not acceptable—that one is not to be trifled with.<sup>172</sup>

Courts play an important role in vindicating status in the face of these potential challenges. Several features prove helpful in vindicating status. Courts have prestige. This prestige is manifested aesthetically through architecture,<sup>173</sup> rituals, and through

168. Judith Resnik, *Courts: In and Out of Sight, Site, and Cite—The Norman Shachoy Lecture*, 53 VILL. L. REV. 771, 808 (2008).

169. ARTHUR RIPSTEIN, *PRIVATE WRONGS* 185 (2016).

170. Jason Solomon and Scott Hershovitz, respectively, emphasize that lawsuits empower individuals to stand up for themselves in public. See Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 NW. L. REV. 1765, 1797, 1814 (2009); Scott Hershovitz, *Tort as a Substitute for Revenge*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 86, 96 (John Oberdiek ed., 2014). Hershovitz in particular emphasizes how lawsuits force defendants to publicly confront accusations of wrongdoing in a way that aims in part to reaffirm the social standing of plaintiffs. Every wrongdoing, according to Hershovitz, poses a threat to a person's standing; responding to that threat, especially through the public mechanism of lawsuits, involves fighting back against those threats. See Hershovitz, *supra*, at 97; see also Hershovitz, *supra* note 145. Not every legal wrongdoing jeopardizes a person's social standing. Systematically denying individuals access to full trial proceedings, however, does.

171. Herzog, *supra* note 146, at 108.

172. Scott Hershovitz has explored similar themes in recent work. See, e.g., Hershovitz, *supra* note 145, at 32.

173. Architects try to emphasize this "prestige and dignity" when designing courthouses.

the clothing judges wear, whether wigs or robes or both. Beyond aesthetics, courts have authority: they have the power to make decisions binding on parties. Everyone within a jurisdiction is expected to comply with these rulings when they are parties to a dispute. To back up these expectations, courts have the power to hold non-complying parties in contempt. And even third parties not party to a particular dispute must respect or accommodate court decisions, given that courts set precedent. In other words, all institutions within a jurisdiction must defer to courts. Last but not least, courts are *public* authorities: their proceedings are by and large public, and their findings of fact and conclusions of law are public.

These commonplaces about courts show why they can play an especially valuable role in vindicating not only an individual's rights, but also her dignity. Precisely because courts have prestige and actual legal power to command deference from other institutions within a jurisdiction, and precisely because this prestige and power is exercised *in public* for all to see, courts are uniquely situated to publicly vindicate a person's high ranking across a wide range of institutions. Because status "follows you across the whole social landscape,"<sup>174</sup> institutions capable of demanding deference and respect from other institutions—and doing so publicly—make courts especially valuable for vindicating one's dignity across that landscape. In short, courts vindicate dignity by lending their prestige and power to individuals, as if to say, "I, sitting up on high, am with you—and everyone else should be, too."

This is not to say courts are perfect. They make mistakes. And in many cases individuals might prefer not to air their dirty laundry in public. Plaintiffs are not always perfectly well behaved and may be subjected to ridicule (warranted or not). So sometimes it might very well be in a plaintiff's interests to make sure that certain facts do not become well known. As Scott Hershovitz observes, "public trials can be a public spectacle, which puts some plaintiffs to the choice of compromising their dignity in one way, so that they can vindicate it in another."<sup>175</sup> Arbitration may, in many contexts, actually provide a method of dispute resolution capable of better protecting individual dignity. Accordingly, this Article seeks to avoid disparaging all forms of alternative dispute resolution in all contexts.

But boilerplate accountability waivers still raise a special problem. They attach to a person and preclude her access to courts before any dispute arises. Nominally, these waivers preserve some method of dispute resolution. But when they work as they are designed to, they keep disputes out of courts entirely, often without regard to the nature of the dispute, and regardless of whether a person has suffered from a wrongdoing that jeopardizes her dignity. Plaintiffs not only lose a forum for protecting their legal rights, they lose a potentially powerful ally (courts) in the attempt to protect their standing as full adults within a broader community. They cannot use courts to give that standing a "signal boost" and, in turn, to vindicate their status. This is how boilerplate accountability waivers instrumentally harm an individual's dignity interests: individuals have an interest in using courts to vindicate their standing *once they become aware of a particular wrongdoing*.

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See, e.g., *Architecture of the Supreme Court Building*, FLA. SUP. CT., <http://www.floridasupremecourt.org/about/architecture/index.shtml> [<https://perma.cc/9KUM-7S6T>].

174. Herzog, *supra* note 146, at 108.

175. Hershovitz, *supra* note 145, at 46.

Of course the court's ability to publicly vindicate a person's dignity means more to some people than others. Bill Gates may face mandatory arbitration just like we all do when we click "I agree." But in many other legal and social contexts he will be treated with the solicitude, deference, and respect of someone with dignity. Many of us are not so lucky. Indeed, the right to sue in court represents one of the few ways the weakest may, in principle, uphold their dignity by holding the strongest accountable—as equals—for their transgressions. In a vivid expression of this idea, one attorney representing his client's claims against BP oil company insisted that "[t]here is only one place where a waitress or a shrimper can be on equal footing with a company the size of BP, and that's a courtroom."<sup>176</sup>

Beyond the indignity that lacking access to courts would involve—the inability of an individual to even *try* to force a more powerful party to take her seriously—distributional harms may follow as well. The inequality between a shrimper and BP is an economic one. But without access to courts this kind of economic disparity is potentially compounded, insofar as it gives more powerful firms a tool for a one-way extraction of wealth from the pockets of certain potential future litigants to the firm's bottom line.<sup>177</sup>

But something more is at stake than the unilateral extraction of wealth. Quite apart from compounding economic inequalities, accountability waivers—although facially neutral—disparately impact members of social groups who face ongoing struggles for dignity. Women and racial, sexual, and religious minorities have long fought for social recognition as equals—as equally worthy of respect as possessors of dignity.<sup>178</sup> Dignity, as presupposed in this Article, is a high rank that attaches to a person throughout the various institutional roles or social relationships she occupies or engages in. But dignity, in this sense, is also one that historically and contemporaneously has not been afforded to everyone. And although courts have not always consistently helped in securing equal dignity for members of historically marginalized groups, the ability of courts to set public precedent has been instrumental to securing whatever advances that have come.<sup>179</sup> Members of social groups who have struggled to gain recognition as possessors of this equal-high-rank lose an important battleground when they lose access to courts. In this context, where courts have played such an important public role in shoring up dignity interests—not just against state but also against private attempts to exclude and degrade—the facial neutrality of accountability waivers masks a disparately felt impact of those waivers

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176. LAHAV, *supra* note 11, at 113; *see also* Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 *FORDHAM L. REV.* 3193, 3200 (2013) (arguing that by aggregating claims class actions help to rectify wrongdoings and hold the powerful accountable).

177. For an argument for this conclusion, see Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 *YALE L. & POL'Y REV.* 499, 500 (2017).

178. *See generally* Anderson, *supra* note 157.

179. And I do not simply mean advances couched exclusively in terms of constitutional law, either. Even when plaintiffs initially lose Title VII claims, Congress has proven willing and able to "overrule" Supreme Court decisions. *See, e.g.,* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.

on individuals still engaged in that struggle for social recognition as possessors of full social status.

In sum, accountability waivers harm our dignity interests. Legal wrongdoings do not just violate our rights, they sometimes threaten our standing in a political community. Courts play an important and unique role in vindicating that status in ways that cannot be fully replicated by other institutions. But by preventing us from accessing courts before legal wrongdoing arises, accountability waivers make it the case that we are not in a position to determine whether courts are needed to vindicate our status. This sets back our interests in protecting our dignity, and thus harms it.

## 2. The Argument from Form: Against Leveling Down

The previous argument focused on the *status* aspect of dignity, and in particular, the status-protecting function of courts. The present argument will emphasize the *high rank* aspect of dignity. That is, the argument here is that dignity rejects leveling down important rights traditionally constitutive of high-ranking status. The right to sue in court partially constitutes one's high-ranking status as an adult person. Boilerplate accountability waivers degrade this status directly by effectively depriving people of their legal right to sue in court, and indirectly, by simply putting them in a degrading position of having to effectively trade away rights to court as a condition of commercial exchange. In short, accountability waivers ask us to level down.

This argument begins, like the last one, by briefly rehearsing the high-rank conception of dignity. This conception suggests a certain normative methodology to test which privileges, at a minimum, should be afforded to everyone—or at least every adult within a political community. The methodology begins by identifying the rights and responsibilities that have traditionally attached to persons with high-ranking social statuses and urges the state to universalize that treatment where possible.<sup>180</sup> Notice that this line of inquiry does not wholly eschew historical practices; the fact that this conception of dignity is partly rooted in existing legal and historical practices explains how the conception is capable of rendering relatively concrete judgments about the dignity or indignity of present-day acts and practices. Protecting dignity requires a political community to ensure that each person has the rights and responsibilities, in some form, traditionally afforded to members of elite classes. If so, theorists must be in a position to identify these rights and responsibilities.

The right to stand up for oneself in court has traditionally been held by high-ranking members of societies. The claim that the legal power to sue in court is an important marker of high-ranking status is hardly novel. Sometimes the idea is expressed in terms of citizenship. In his highly influential essay, *Citizenship and Social Class*, T.H. Marshall emphasizes “the right to defend and assert all one's rights on terms of equality with others and by due process of law[]” as vitally important to citizenship, adding that “the institutions most directly associated with civil rights are *the courts of justice*.”<sup>181</sup> The connection between full adult citizenship

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180. See *supra* Section II.A.

181. T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* 10–11 (1950) (emphasis added); see

and the right to sue also has deep historical roots. Avishai Margalit observes, “[i]n ancient Rome, citizens enjoyed special public privileges, such as voting at assemblies, army service, the right to hold public office, and *the legal right to sue and to defend themselves against suits*.”<sup>182</sup> And John Goldberg’s extended meditation on the constitutional status of private law in the United States describes the deep roots of the power to bring an action for redress, both as a matter of intellectual history and in the common law tradition.<sup>183</sup>

Elite peerage, however, carries with it many privileges and perhaps some of them do not implicate dignity interests. But the legal power to hale others into court bears an especially close relationship to the dignity of adulthood. Counted among the privileges of this dignified-high-ranking, according to Waldron, are legal rights that empower individuals to “stand up for themselves,” “make unapologetic claims on their own behalf,” and “*control the pursuit and prosecution of their own grievances*.”<sup>184</sup> These privileges—no longer allocated exclusively to nobility—ought to extend *to include everyone*. So too must the same right to stand up for oneself by choosing whether and how to hale others into court.<sup>185</sup>

And it is little wonder why. Part of what it means to have a high rank—a full adult in a liberal community—means having legal rights. And not just the veneer of rights. Having rights requires being in a position to make legal demands on others and expect that others defer to those demands when valid. Making these demands credible, in turn, requires access to actual remedies for when those rights are violated. As Margaret Radin correctly emphasizes, “if legal rights cannot be empty vessels, and if the principle of equality before the law is honoured in practice, all rights holders must have reasonable access to remedies.”<sup>186</sup> Radin’s primary concern in context is systemic, insofar as she emphasizes the way that boilerplate promotes democratic degradation and undermines the rule of law.<sup>187</sup> But others have observed that part of what it means to have dignity is to be a rights holder, which in turn means that one will be in a position to “stand” on those rights.<sup>188</sup> So close is the connection between having legal rights and human dignity that it has been suggested that human dignity might be nothing over and above “the recognizable capacity to assert claims.”<sup>189</sup> Although for reasons already given this is not quite correct,<sup>190</sup> the recognizable capacity to assert legal claims does partially constitute one’s high rank.

Accountability waivers degrade this capacity and in turn degrade one’s standing as a full adult with dignity. After all, *depriving* individuals of their right to stand up

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*also* WALDRON, *supra* note 125, at 60–61 (drawing the connection between Marshall’s conception of citizenship and dignity).

182. AVISHAI MARGALIT, *THE DECENT SOCIETY* 151 (1996) (emphasis added).

183. *See generally* John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 *YALE L.J.* 524 (2005).

184. WALDRON, *supra* note 125, at 49–50 (emphasis added).

185. *See id.*

186. Radin, *Boilerplate: A Threat*, *supra* note 12, at 290.

187. *See generally id.*

188. *See generally* Joel Feinberg, *The Nature and Value of Rights*, 4 *J. VALUE INQUIRY* 243, 252 (1970).

189. *Id.*

190. *See supra* Section II.A.2.

for themselves in court is notoriously linked to placing them in a low-ranking status. Unlike “[h]igh-ranking persons” whose “word and testimony would be taken seriously,” and who “would be entitled to the benefit of elaborate processes,” such low-ranking persons “*would not have the privilege of bringing suit in the courts, or if they were it would have to be under someone else’s protection; they were not, as we sometimes say, sui iuris.*”<sup>191</sup> Indeed, we do not even need to *imagine* caste societies in which one’s inability to bring others into court serves as a marker of inferiority. Systematically depriving individuals of the right to sue others in court is notoriously linked with disrespectful treatment and institutionalized humiliation of historically disfavored groups.<sup>192</sup>

And lacking the capacity to stand up for oneself can be deeply humiliating, indeed. Nathan Oman recounts a vignette from *A Tale of Two Cities* in which “Marquis Evremonde, driving his carriage recklessly through the streets of Paris, kills the young son of a humble sans culotte named Gaspard.”<sup>193</sup> The Marquis—described as “selfish, thoughtless of others, and cruel”<sup>194</sup>—flings a coin at the man as compensation and drives away.<sup>195</sup> Importantly, Gaspard lacked “all avenues of action against the Marquis” as a consequence of the French ancien régime, which in turn, “deprive[d] Gaspard of any means of vindicating his honor against this humiliation.”<sup>196</sup> Because Gaspard lacked any legal means of standing up for himself and his son, Gaspard was, in Oman’s apt phrase, “made complicit in his own humiliation.”<sup>197</sup> The fact that Gaspard and others like him lacked avenues for redress against higher-ranking members of society was a part of France’s formal social

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191. Waldron, *supra* note 115, at 213 (emphasis added); *see also* WALDRON, *supra* note 125, at 57.

192. Goldberg, *supra* note 183, at 565 (observing that historically one of the chief vehicles of oppression is by depriving people of their rights to sue, adding that “[t]he inability of African-Americans to avail themselves of the law, whether by entering into contracts *or by obtaining redress for wrongs*, was among the hallmarks of slavery and the Black Codes”) (emphasis added). The social subordination of women in the United States has also walked hand in hand with their deprivation of the wholly independent right to sue others in court. Women gained suffrage only in the Twentieth Century, and so too did they only relatively recently obtain the independent right to sue and be sued as citizens apart from their husbands. *See* Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman’s Separate Estate*, 26 YALE J.L. & FEMINISM 165, 167 (2014). Part of the (ongoing) process by which women fought to become recognized as equal citizens and peers involved not only obtaining the right to vote but also the independent right to hold others legally accountable by suing them, while having that power without first seeking the permission of men. The *status quo ante* placed women in a disrespectful, inferior caste that required members of the higher-ranking caste—men—to sign off on any claim they might wish to make against others. Denise Réaume, *Dignity, Choice, and Circumstances*, in UNDERSTANDING HUMAN DIGNITY 539, 541–42 (Christopher McCrudden ed., 2013).

193. Nathan B. Oman, *The Honor of Private Law*, 80 FORDHAM L. REV. 31, 60 (2011) (citing CHARLES DICKENS, *A TALE OF TWO CITIES* (Modern Library ed. 1996) (1859)).

194. *Id.*

195. *Id.*

196. *Id.* at 61.

197. *Id.*

hierarchy at the time.<sup>198</sup> Lower class members of society were formally less than full adult citizens.

But these lofty abstractions about the connection between the right to sue and our full status as citizens, as well as comparisons with formal caste societies, might invite skepticism. Most obviously, the situation of consumers and employees subject to boilerplate accountability waivers is not yet as dire as Gaspard's situation. For one thing, Bill Gates is just as much bound to arbitrate certain consumer transactions as anyone else. There is no special class of citizens wholly exempted from arbitration clauses as there was a special class of nobility exempted from suits by commoners. For another thing, some consumers and employees still retain some avenues for recourse against firms that wrong them, depending on the nature of the wrongdoing. Even if individuals systematically lacked access to courts, they at least have (in principle) access to arbitration. We should not fetishize courts, critics might argue. And even if individuals lacked access to courts, one might object, individuals could still (in principle) appeal to the legislatures and state attorneys general to vindicate their rights. Finally, many consumers and employees might happily give up their right to sue in court in exchange for the promise of lower prices, higher quality goods and services, higher wages, or more employment opportunities. The idea that the right to sue in court is central to our status as adult citizens is untethered from reality, one might argue, a reality in which individuals rarely if ever think about suing others, let alone desire to do so.

Still, we must be careful not to underestimate the importance of having access to courts, and more specifically the value of having the right to sue others who wrong us. Each of the preceding responses endorse, in effect, the claim that "leveling down" is permissible and compatible with individual dignity provided that we get some tangible benefits. Bill Gates cannot access courts for his consumer disputes; accordingly, the thought continues, it is permissible that we too lack such access. In the same vein, most of us won't sue or won't want to sue, so we can all "level down" even though some of us may not wish to; arbitration is good enough to the extent that it allows us to speak up.

All of these responses may be compatible with some formal conception of equality and even status. But all of these responses fail to come to grips with the notion that dignity counts as a *high-ranking* status, where rank is compared by reference to baselines of treatment afforded the highest-ranking members of society. High-ranking members historically have had the option to go to court, we may plausibly insist, yet boilerplate accountability waivers—when they succeed—prevent us from doing so. Backsliding is not defensible simply on the grounds that it is widespread.

### *C. Objections*

#### 1. Consent Revisited

At first glance, perhaps the weightiest response to the problem of boilerplate indignity is to insist that individuals consent to or voluntarily choose this treatment,

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198. *Id.*

regardless of whether it infringes on their dignity. The “moral magic” of consent is that it is supposed to transform otherwise serious misconduct into morally permissible behavior, while respecting the interests of those subject to that treatment by respecting their authority to decide what happens to them.<sup>199</sup> In the context of boilerplate accountability waivers in particular, the claim is simple: consumers and employees genuinely consent to accountability waivers.<sup>200</sup> When we sign on the dotted line, or click “I accept,” the argument goes, we consent to being legally bound to the terms contained in the boilerplate, even those terms about which we are ignorant. Knowing little about what we consent to does not negate the consent. In fact, the argument goes, *most* consent involves some ignorance on the part of the consenting party. We do not know precisely what goes on under the knife when surgeons operate on us. Nor do we know everything about the hardware and software that helps our computers run. Still, we somehow manage to successfully consent to surgery and voluntarily purchase computers.<sup>201</sup> Indeed, the Supreme Court occasionally intones that robustly enforcing arbitration clauses under the Federal Arbitration Act “is a matter of consent.”<sup>202</sup> Accordingly, even if accountability waivers damage a person’s dignity, so what? Individuals validly consent to that treatment. Consent is the only thing that matters here.

Criticisms of consent-based justifications favoring enforcement of boilerplate have been articulated at length elsewhere, as well as above,<sup>203</sup> so I will not rehearse all of them here.<sup>204</sup> Suffice it to say that even proponents of consent-based arguments admit that consent or assent will not validate *every* item contained in fine print.<sup>205</sup> If so, consent does not make much progress in determining which boilerplate terms should be enforced because it leads back to “basic questions,”<sup>206</sup> including which principles should determine the limits of contractual consent.

This dialectic has been discussed above already.<sup>207</sup> But consider some other responses that have received less attention. First, consent does not provide the right kind of reason to justify the *social practices* of imposing and enforcing accountability

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199. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

200. The genesis of the idea has been attributed to Karl Llewellyn. Boardman, *supra* note 99, at 1978 (citing KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960)). For a more recent version of the view, see Barnett, *supra* note 99.

201. For a critical discussion of similar analogies in the context of the so-called contract-as-product model of boilerplate, see Encarnacion, *supra* note 99, at 113–16.

202. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

203. *See supra* Section I.C.1.

204. *See, e.g.*, KIM, *supra* note 59; RADIN, *BOILERPLATE*, *supra* note 10, at 30; Gibson, *supra* note 74, at 255; Kessler, *supra* note 11, at 640 (warning that contracts of adhesion may “become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals”); Sovern et al., *supra* note 28, at 82 (observing that empirical results “raise[] serious questions about whether the consent consumers provide when they enter into a contract containing an arbitration clause is a knowing consent, and therefore whether it should be considered consent at all”).

205. Barnett, *supra* note 99, at 637.

206. *See* BIX, *supra* note 26, at 138.

207. *See supra* Section I.B.1.

waivers on individuals. That is, even if a proposed transaction is consensual or fully voluntary, that does not necessarily justify social practices that make those proposals available or place them beyond legitimate criticism.<sup>208</sup> Critics of boilerplate that focus on systemic harms implicitly adopt this criticism.

But the dignity-based objection presented here is not simply a complaint against certain social practices (though that it is). A motivation for the arguments above is that there remains an individual threat to dignity interests *of the individual* regardless of whether a person ultimately “consents.” This suggests another answer to the consent objection: certain offers are *themselves* affronts to dignity interests regardless of whether the offeree ultimately accepts those offers. Elizabeth Anderson puts a similar point as follows: “Consent to an option within a set cannot justify the option set itself.”<sup>209</sup> In its original context, Anderson aims to rebut a common idea about consent in relation to employment: that because we consent to employment, this effectively legitimizes a broad range of mistreatment by the employer against us so long as we have a robust power to exit.<sup>210</sup> But we can generalize the point: when one evaluates the moral permissibility of a menu of options, an individual’s choosing an option off that menu will not suffice to validate the menu as a whole.

Examples might help to illustrate. Suppose that someone credibly offers you a choice between taking a \$1000 gift or a bullet to the foot.<sup>211</sup> The fact that you choose the money voluntarily does not thereby legitimize the offeror’s decision to present you with those options, even if your life is overall much better off as a result of deal. The menu you are offered still warrants moral criticism, even though you have the option to exit, because sometimes practices of making particular offers are themselves morally wrong even if individuals remain free to walk away.<sup>212</sup> Consider another example. During the Jim Crow era, some African Americans used racially segregated water fountains in the United States. But this obviously does not serve to justify the *practice* of racially segregating water fountains or racial segregation more broadly, even if one could voluntarily decline to use them.<sup>213</sup> When the very social

208. See, e.g., *In re Baby M*, 537 A.2d 1227, 1249 (N.J. 1988) (“In America, we decided long ago that merely because conduct purchased by money was ‘voluntary’ did not mean that it was good or beyond regulation and prohibition.”).

209. ELIZABETH ANDERSON, *PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON’T TALK ABOUT IT)* 60–61 (2017). This observation also wreaks havoc on conceptions of distributive justice that depend on sharply distinguishing outcomes that result from individual choice from those that are the upshot of external circumstances or luck. See Matthew Seligman, *Luck, Leverage, and Equality: A Bargaining Problem for Luck Egalitarians*, 35 PHIL. & PUB. AFF. 266, 279–86 (2007).

210. ANDERSON, *supra* note 209, at 61.

211. The Spanish expression “plata o plomo”—“silver or lead”—captures this choice set, though in context the option is understood as a clear threat: accept a bribe or die.

212. See generally *INDECENT PROPOSAL* (Paramount Pictures 1993).

213. For a discussion of more recent examples of option-enhancing but demeaning offers, see generally Mollie Gerver, *Paying Minorities to Leave*, 17 POL., PHIL. & ECON. 3 (2018). See also Martha Nussbaum, *Human Dignity and Political Entitlements*, in *HUMAN DIGNITY AND BIOETHICS* 351, 370 (2008) (arguing that offers of payment in exchange for humiliation by public institutions should not be permitted under her capabilities approach, adding that public institutions should not act as “an accomplice to the private humiliation”); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 26 (2011).

practices that establish our options are called into question, individual, case-by-case selections of one of those options cannot justify the entire set. But even if exactly *one* establishment offered racially segregated water fountains—rather than widespread social practice—this too would be impermissible even if some individuals chose to use those fountains.<sup>214</sup>

Dignity-depriving offers are especially suspect. Even the most fervent proponents of the freedom of contract recognize that certain things cannot be bargained away. John Stuart Mill denied that governments should enforce contracts purporting to sell oneself into slavery.<sup>215</sup> We might add to the list of inalienable rights the right to vote, bankruptcy protection, or the right to file a claim grounded in Title VII. Similarly, even if we accept that labor, certain rights, and promises are frequently market alienable,<sup>216</sup> interests that implicate a person's dignity—such as our interests against being humiliated or treated with contempt—are different.<sup>217</sup> Making a waiver of a person's dignity interests a condition of exchange is not a trade that the state must necessarily stand willing to enforce. When dignity is jeopardized, unhindered freedom of contract no longer holds.

Notice that these objections to the consent-based rationale do not deny that individuals consent to boilerplate<sup>218</sup> or that blanket assent reflects the kind of robust consent presupposed by contract law.<sup>219</sup> The objection is independent of these concerns; it denies that individual consent provides the right kind of rationale for *offering*, imposing, and enforcing accountability waivers even if there is a sense in which individuals may opt to invoke them “voluntarily.” The important point to remember is that even if individuals voluntarily adopt boilerplate that they know contains liability waivers, this does not suffice to justify the offers.

## 2. Tradeoff Arguments

One of the most prominent defenses of accountability waivers comes in the form of *tradeoff arguments*. The key idea is this: allowing consumers or employees to retain rather than waive their accountability rights—e.g., rights to sue in conveniently located courts of law rather than requiring private arbitration at the firm's convenience—makes those who “commit” to boilerplate, including its accountability waivers, better off than the alternatives. As we will see in a moment, different tradeoff arguments tell different stories about what being “better off” entails.

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214. See generally Gerver, *supra* note 213; see also Jeremy Snyder, *Exploitation and Demeaning Choices*, 12 POL., PHIL. & ECON. 345 (2013).

215. JOHN STUART MILL, ON LIBERTY 163–64 (David Bromwich & George Kateb eds., 2003).

216. For the concept of market alienability, see Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

217. NUSSBAUM, *supra* note 213, at 26; David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 751 (2012) (arguing that “dignity” is not fungible with cash “[b]ecause these two things cannot be reduced to a common metric and compared”); Nussbaum, *supra* note 213, at 370.

218. See generally KIM, *supra* note 59.

219. See generally RADIN, BOILERPLATE, *supra* note 10.

This Section makes two points. First, tradeoff arguments prove too much and provide no room for inalienable rights, and second, tradeoff arguments are themselves incompatible with dignity to the extent that they express a contemptuous form of paternalism when voiced by firms seeking to prevent public adjudication.

Before reaching these conclusions, consider how tradeoff arguments are used to defend accountability waivers. Omri Ben-Shahar usefully presents a wholly generalized version of the argument in defense of boilerplate waivers of “important” rights:

Let us begin by assuming that the rights that boilerplates delete are important. . . . The immediate implication of this assumption is that a product + boilerplate bundle that deletes these rights eliminates important fragments of value and thus saves the firms some of the costs of doing business. This cost saving allows firms that offer the depleted bundle to charge a lower price. Standard economics analysis shows that this implication holds regardless of the market power that firms have. It is possible that not all cost savings would accrue to consumers through lower prices. But it is hard to imagine that the savings due to, say, stingy warranties or restricted use of information products, would have no price effect.<sup>220</sup>

Ben-Shahar worries that protecting too many rights against waiver may have the effect of raising prices and excluding too many people from the market. But he also goes further, speculating that “[t]here is plenty of reason to think that for most people, getting a lower price is the overriding goal.”<sup>221</sup>

Although Ben-Shahar’s tradeoff argument is wholly general insofar as it purports to justify the practice of allowing firms to impose accountability waivers and does so on the basis of lower prices, tradeoff arguments have been offered to defend arbitration specifically. Consider, for example, AT&T’s arguments in the Ninth Circuit in *Laster v. AT&T Mobility LLC* (later captioned *AT&T Mobility LLC v. Concepcion* when AT&T petitioned to the Supreme Court).<sup>222</sup> The litigation involved a class action against AT&T, which complained about the company’s practice of charging customers taxes for “free phones” offered in exchange for agreeing to cellular service contracts.<sup>223</sup> As noted in the introduction, the case raised the question of whether arbitration clauses were enforceable despite lower court findings that they were unconscionable under state law.<sup>224</sup> Important for present purposes, AT&T explicitly argued on appeal in the Ninth Circuit that the *Concepcions*—the class representatives—were “better off in individual arbitration than as class

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220. Ben-Shahar, *supra* note 23, at 895–96.

221. *See id.* at 896. Notice, again, that some version of the tradeoff argument could go through even if lower prices were not the result. Suppose that the surplus were reinvested in making higher quality goods at the same price that the firm could charge, for lower-quality goods, without the accountability waivers. This too would benefit consumers.

222. Opening Brief of AT&T Mobility LLC, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009) (No. 08-56394), 2009 WL 2494186 [hereinafter Opening Brief].

223. *See generally* *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

224. *Id.*

representatives.”<sup>225</sup> Specifically, AT&T claimed that “revised arbitration provision substantially exceed the typical incentive payments awarded to class representatives as part of court-approved settlement agreements;”<sup>226</sup> that arbitration was quicker and easier;<sup>227</sup> and that the Concepcions were particularly likely to achieve a satisfactory result.<sup>228</sup>

Initially, tradeoff arguments may seem compelling, insofar as they present accountability waivers as ultimately *good for consumers and employees*. Now, it should be noted that the empirical case for these claims is not rock solid, to say the least.<sup>229</sup> But put aside the empirical questions. Instead, notice two problems with the tradeoff argument that exist regardless of how the empirical question is resolved. First, tradeoff arguments contain no limiting principle; they prove too much. By their reasoning, there is simply no reason to think that we should have *any* legal power to hold firms accountable in courts *or* some other form of alternative dispute resolution. After all, the chances that we’ll need to invoke some adjudication or arbitration may be quite small. And the promised “benefits”—lower prices or higher quality goods or services—seem worth the risk. But if the total abrogation of accountability seems a bridge too far—and it is—then tradeoff arguments do not in principle rule them out. A major problem with these arguments, as Margaret Radin rightly points out, is that certain rights are and should be “in the care of the polity”<sup>230</sup> and are subject to restraints on alienation. One’s right to vote or obligation to serve on juries or register for selective service are among those inalienable rights. One’s *status* as a person with dignity, I submit, also falls within this category: one’s dignity demands respect from others that “typically overrides other kinds of considerations and typically prohibits sacrificing the dignity of a single person for the greater well-being or even the dignity of others.”<sup>231</sup> The point that dignity is not readily fungible with lower prices is a point widely accepted.<sup>232</sup>

This is not to say that it is easy to determine the moral limits of tradeoff arguments like Ben-Shahar’s. But if there is *some* principled limit on tradeoff arguments, the debate simply becomes where to place that limit. The position of this Article has been that boilerplate accountability waivers that aim to prevent access to courts cross the line, wherever it is ultimately located.

But consider another response to this tradeoff argument, which is that defenders of boilerplate accountability waivers also risk expressing contempt at odds with dignity by defending them in paternalistic terms.<sup>233</sup> Remarkably, James Gibson objects directly to Ben-Shahar’s argument, calling it an example of “private

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225. Opening Brief, *supra* note 222, at \*31.

226. *Id.* at \*31.

227. *Id.* at \*31–32.

228. *Id.*

229. See RADIN: BOILERPLATE, *supra* note 10, at 136–37.

230. Radin, *Boilerplate: A Threat*, *supra* note 12, at 301.

231. Ariel Zylberman, *Human Dignity*, 11 PHIL. COMPASS 201, 202 (2016) (citations omitted).

232. See, e.g., sources cited *supra* note 217.

233. For an argument that infantilization and paternalism are incompatible with dignity, see Ober, *supra* note 124, at 831. For an argument that tradeoff arguments can be paternalistic, see Gibson, *supra* note 74, at 262.

paternalism,” while exclaiming, “[t]he world has gone topsy-turvy when those who favor enforcement of contracts paternalistically purport to know what is best for individuals without consulting them, whereas those who oppose enforcement are labeled ‘autonomists’ and make arguments based on individual agency.”<sup>234</sup>

There is a grain of truth to Gibson’s argument, and the rest of this subsection will defend a version of it. But as the argument stands, it moves too quickly. To see why, notice that leading conceptions of paternalism hold that paternalism refers to a *motive for behavior*.<sup>235</sup> But motive-based conceptions initially seem to undermine the claim that accountability waivers are paternalistic. After all, firms and their agents (arguably) aim to maximize profits and nothing else (except to the extent that something else indirectly serves that goal). As a result, it might seem unlikely that firms do *anything* for consumers or employees—let alone impose accountability waivers—because they are *motivated* to serve the interests of those consumers or employees. So if motive-based views are correct, then the idea that accountability waivers count as paternalistic seems like a nonstarter.

This is not the place to evaluate the merits of motive-based conceptions of paternalism.<sup>236</sup> But the objection grounded in motive-based conceptions is far from decisive. First, uncontroversial theories of paternalism remain elusive,<sup>237</sup> and motive-based paternalism is not the only game in town. And although canvassing all existing theories is not feasible here, suffice it to say that I reject the view that paternalistic motivations are necessary for paternalism, even though they may sometimes suffice. Views about paternalism exist that emphasize what rationales are publicly proffered in favor of behavior or policies.<sup>238</sup> Other views focus on whether paternalistic judgments are *expressed*.<sup>239</sup> The idea here is that, just like an actor can express sorrow without subjectively feeling sad, agents can express paternalistic judgments even if the relevant agents lack paternalistic motivations. To make this claim *prima facie*

234. Gibson, *supra* note 74, at 262.

235. See, e.g., JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 80 (2011); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFFAIRS 205, 215 (2000).

236. Even if motive-based views were correct, accountability waivers still may be paternalistic to some extent. First, it is a mistake to assume that a firm’s agents—even if motivated by profit—cannot also be motivated by paternalistic attitudes. One can hold the thoughts, without contradiction, that (i) my profit-maximizing practices that prevent you from retaining effective rights to sue in court better serve your interests than allowing you to retain those rights and (ii) I have superior judgment to you about the matter, or you lack the capacity to effectively make the appropriate judgments for yourself about the matter. Of course it is an empirical question about whether a particular firm’s agents are motivated by this complex judgment. But it is a mistake to think that being motivated primarily by profit necessarily precludes paternalism. For other support for the claim that arbitration may be paternalistically motivated, see generally Amalia D. Kessler, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940 (2015).

237. Jessica Begon, *Paternalism*, 76 ANALYSIS REVS. 355, 356 (2016) (observing “the proliferation of (sometimes contradictory) terminology in this field”).

238. Douglas Husak, *Paternalism*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 467, 471 (Andrei Marmor ed., 2012).

239. See generally Nicolas Cornell, *A Third Theory of Paternalism*, 113 MICH. L. REV. 1295 (2015).

plausible, notice that we recognize many laws and policies as *paradigmatically* paternalistic—including seatbelt laws and motorcycle helmet laws—even though we lack knowledge about whether the individual authors of the those policies were motivated by paternalistic judgments.<sup>240</sup> This is, I submit, because it is possible for agents to express paternalistic judgments, through their behavior and arguments, without having any paternalistic mental states or motivations at all.

Tradeoff arguments appear to do precisely this—at least when firms use tradeoff arguments to defend boilerplate accountability waivers. Indeed, it is very difficult to take tradeoff arguments seriously *without* presupposing a paternalistic premise. To see why, suppose that firms *lacked* superior judgment to consumers or employees about whether mandatory pre-dispute arbitration clauses better protected their interests. This would seriously compound any doubts we would have about tradeoff arguments and their empirical foundations. After all, if firms that imposed the waivers were in epistemically no better position than individuals subject to the waivers (to determine whether those waivers were good for them), individually or in aggregate, then we have strong reason to doubt the truth of the underlying tradeoff argument that *asserts* that individuals are better off. So to the extent that the practices of imposing and enforcing accountability waivers are actually defended in terms of tradeoff arguments—or normatively depend on them<sup>241</sup>—there is reason to believe that those practices count as paternalistic.<sup>242</sup>

So tradeoff arguments, though initially appealing and intuitive, fail to respond to the problem of boilerplate indignity in two ways. First, they prove too much by suggesting that wholesale waivers of the right to sue should be permissible, and second, they appear to presuppose or express paternalism.

### 3. Proving Too Much

Another worry is that the indignity argument simply proves too much; that too many perfectly valid waivers will end up, in the present analysis, incompatible with dignity. To take a concrete example, consider a local business—a gym, perhaps—that includes a fairly broad boilerplate liability waiver. There is a disparity of bargaining power here, the term is nonnegotiable, and it entails that for quite a lot of claims individuals will not be able to sue in court for perceived transgressions. Would this waiver be incompatible with one’s dignity?

It depends. Dignity itself requires autonomy,<sup>243</sup> though they are not identical.<sup>244</sup> Some valuable activities—medical procedures and other especially injury-prone yet

240. See, e.g., Begon, *supra* note 237, at 355; Gerald Dworkin, *Paternalism*, 56 *MONIST* 64, 65, 83 (1972); Peter de Marnette, *Avoiding Paternalism*, 34 *PHIL. & PUB. AFF.* 68, 68 (2006); Susanna Kim Ripken, *Paternalism and Securities Regulation*, 21 *STAN. J.L., BUS. & FIN.* 1, 9 (2015) (“Paternalism also occurs on a broader public level between the state and its citizens, e.g., a law that mandates all automobile drivers and passengers wear seatbelts.”).

241. See *supra* Section II.A & II.B.

242. There is more to the story here of course, including the question of when paternalism is wrong. But that story cannot be undertaken here.

243. See, e.g., Ober, *supra* note 124.

244. For a useful discussion of some differences, see WALDRON, *supra* note 125, at 140 (“There are aspects here that distinguish dignity from autonomy,” including the fact that,

valuable activities—might very well become inaccessible if they were too vulnerable to litigation. Waivers should be narrowly tailored to make the activity in question feasible. Other things being equal, the broader a particular waiver is, the more likely it is that the waiver compromises an individual’s dignity. Yet even then certain activities may themselves be incompatible with dignity and thus should not be worthy of protection.<sup>245</sup> Neither small businesses nor medical practices should jeopardize the dignity of their consumers and employees. “Business necessity” is not a cure-all. Firms that cannot operate without due regard for the dignity of the consumers and employees have no business being in business.

### III. APPLICATIONS: *EX ANTE* AND *EX POST*

So boilerplate accountability waivers threaten our dignity interests. But recognizing this overlooked reason in favor of robustly regulating boilerplate—and boilerplate accountability waivers in particular—does not tell us the form that regulation will take. This Part nevertheless considers—in very broad strokes—two modes of intervention: *ex ante* regulation and *ex post* adjudication or investigation. Specifically, arbitration clauses are probably best constrained using *ex ante* regulations or statutory interventions, while other forms of potentially dignity-degrading accountability waivers are probably better rooted out through *ex post* modes of adjudication or investigation.

#### A. *Ex Ante Regulation*

If boilerplate accountability waivers threaten the dignity of consumers or employees, this would provide a compelling new reason to robustly regulate boilerplate. Enacting some version of the Arbitration Fairness Act would curtail the enforcement of arbitration clauses in many boilerplate contracts.<sup>246</sup> But many other regulations of accountability waivers—whether codified in statutes or promulgated by administrative agencies—are possible. Regulations range from wholesale “bans” of all accountability waivers as a group, bans on particular waivers like arbitration clauses,<sup>247</sup> partial prohibitions—like the one attempted by the Consumer Financial Protection Bureau, which prohibited arbitration clauses that precluded mass arbitration<sup>248</sup>—and so on. Senator Kirsten Gillibrand has introduced a bill that would prevent the enforcement of arbitration clauses that purport to require arbitration of

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unlike dignity, “our modern understanding of autonomy sees it almost entirely as a matter of right untinged by any sense of responsibility.”).

245. Discriminatory practices are obvious examples here. Another infamous example discussed in the literature on dignity involves a French municipality’s choice to ban the practice of “dwarf tossing.” See, e.g., WALDRON, *supra* note 125, at 141.

246. For one version of the bill, see Arbitration Fairness Act of 2015, S. 1133, 114th Cong. § 3 (2015).

247. For precedent in U.S. law despite the FAA, see 10 U.S.C. §§ 987(e)(3), (f)(4) (2012) (banning mandatory arbitration clauses in loan agreements with military personnel).

248. See Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017), *superseded by statute*, Public Law No. 115–74, 131 Stat. 1243 (2017).

sexual harassment claims under Title VII.<sup>249</sup> And there are a litany of regulatory techniques beyond outright bans.

No model statute or rule aiming to mitigate disrespectful accountability waivers will be offered in this exploratory sketch. But two broad observations about ex ante intervention should nevertheless frame further thinking on the matter. First, among the various accountability waivers described earlier, arbitration clauses appear most amenable to ex ante regulation in consumer and employee contracts. Mandatory pre-dispute arbitration clauses, unlike other accountability waivers, transparently aim to prevent individuals from holding firms accountable in courts of law.

But other accountability waivers—such as choice-of-forum clauses—appear to formally *preserve* rights to sue in court, at least in principle.<sup>250</sup> In such cases, establishing that these clauses count as accountability waivers becomes more difficult since the aims of these clauses do not straightforwardly include attempts to deprive citizens of their day in court. This makes ex ante regulation that targets *all* accountability waivers as a class especially prone to sweeping too broadly by unnecessarily penalizing the use of clauses that do not actually harm individual dignity. So, ex ante regulations will less likely risk sweeping too broadly if they focus primarily on mandatory pre-dispute arbitration clauses.

Does this mean that all mandatory, pre-dispute arbitration clauses should be banned? One need not be an absolutist to think that the various problems with arbitration clauses justify wholesale bans on pre-dispute arbitration clauses found in boilerplate consumer and employee contracts. Although this initially might sound radical, there already exists a ban on these arbitration clauses in consumer financial contracts involving active military personnel and their families.<sup>251</sup> And it is difficult to argue that they face wholly unique vulnerabilities to financial predation as compared to civilians.<sup>252</sup> Nor can we plausibly argue that military personnel or their families are worthier of protection from boilerplate indignity.<sup>253</sup> Finally, banning pre-dispute arbitration clauses would not mean the end of arbitration, given the option of arbitration after a dispute arises.

An alternative to the outright ban would be to attempt to perform some type of cost-benefit analysis before imposing any ex ante regulation,<sup>254</sup> while affording special weight to the dignity interests jeopardized by disrespectful arbitration

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249. Ending Forced Arbitration of Sexual Harassment Act of 2017, S. 2203, 115th Cong. (introduced Dec. 6, 2017).

250. Indeed, even some arbitration clauses in principle preserve the right to sue in courts because they formally permit individuals to opt out of binding arbitration within a certain time frame.

251. 10 U.S.C. §§ 987(e)(3), (f)(4) (2012).

252. See especially Creola Johnson, *Congress Protected the Troops: Can the New CFPB Protect Civilians from Payday Lending?*, 69 WASH. & LEE L. REV. 649, 666, 679 (2012) (observing that the same arguments that legislators used to regulate consumer credit agreements governing active-duty military personnel apply with equal force to other non-military consumers).

253. See generally *id.*

254. Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis* (Coase-Sandor Inst. for Law & Econ., Working Paper No. 802, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2930450](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2930450) [<https://perma.cc/3DYX-E5AL>].

clauses. Some versions of this approach attempt to monetize dignity interests, while others eschew such attempts.<sup>255</sup> And difficulties remain in figuring out how to “balance” monetized costs against non-monetized values like dignity. But we need not resolve these controversies here. For present purposes, notice that the dominant form of reasoning used to justify regulatory intervention—cost-benefit analysis—makes room for considering precisely the kind of dignity interests jeopardized by accountability waivers generally and arbitration clauses specifically. So dignity retains normative purchase in modern regulatory practice—and is still consistent with outright bans on certain kinds of arbitration clauses depending on how one conducts the cost-benefit analysis.

### *B. Ex Post Adjudication or Investigation*

Accountability waivers besides arbitration clauses are more difficult to identify. As already discussed, some choice-of-forum clauses might not qualify as accountability waivers to the extent that firms do not use them with the goal of preventing litigants from accessing courts.<sup>256</sup> Sometimes, determining whether individual boilerplate clauses count as accountability waivers requires case-specific evidence; ex post approaches appear to fit most naturally with attempts to mitigate accountability waivers including choice-of-forum clauses, exculpation clauses, and unilateral modification clauses.

Two ex post approaches come to mind. First, individual litigants can seek to challenge these clauses under pre-existing doctrines like unconscionability. Plaintiffs seeking to avoid or challenge these clauses can use the discovery process to identify evidence as to whether they are being used to avoid litigation or genuinely serve some other legitimate purpose. The difficulty with this litigation-based approach, of course, is obvious: litigants will not likely reach court, let alone obtain discovery, if these clauses succeed as accountability waivers. After all, individuals may be effectively prevented from suing in court, so they will not be in a position to challenge the very clauses preventing them from doing so.

The second ex post approach comes through the civil enforcement divisions of consumer protection agencies or offices of attorneys general. To the extent certain firms systematically avoid litigation simply because they have used accountability waivers, these firms look like natural targets for civil investigative demands. These demands may ripen into settlements for consumers or lawsuits under, say, state unfair trade practices acts. This is not the place to evaluate the merits of such claims. But this approach does show an alternative avenue for rooting out dignitary harms otherwise hiding in plain sight.

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255. See Exec. Order No. 13,563, 3 C.F.R. § 1(c) (2011). For a detailed discussion of how agencies may take into account dignity, including the indignity of “lowering” the “status of adults to the status of children,” see Rachel Bayefsky, Note, *Dignity as a Value in Cost-Benefit Analysis*, 123 YALE L.J. 1732, 1775 (2014).

256. See *supra* Section I.A.2.

## CONCLUSION

Consumers and employees—basically, everyone in the United States—frequently face boilerplate contracts that impose onerous terms that make it difficult—indeed, often practically impossible—to hold firms accountable in court. This is well known, as is the fact that these terms are very difficult to systematically avoid, provided that one wishes to participate in modern commercial society at all.

This Article has argued that standard criticisms of boilerplate largely overlook how it threatens dignity. Focusing on terms imposed by firms that aim to keep individuals out of court, this Article has argued that these terms undermine individual dignity in at least two interrelated ways. The instrumental argument showed how firms harm individuals' dignity interests by preventing them from using the power and prestige of courts to publicly vindicate their dignity, not just their legal rights. The second claim argued that attempting to deprive individuals of these rights, and succeeding, puts individuals in a degraded position, such that they no longer have the high-ranking status that constitutes dignity itself.

Governments have compelling interests in protecting individuals against harms to dignity. My hope is that shining a light on how boilerplate manages to damage our dignity will motivate reform or at least provide a new reason to justify it.