Terms of Injustice

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TERMS OF INJUSTICE

PRZEMYSŁAW PALKA*

ABSTRACT

Terms of Service (ToS) of online platforms often contain Consumer Unfriendly Terms (CUTs). The CUTs encompass clauses limiting consumers’ rights in dispute resolution, limitations on remedies, and corporations’ rights to unilaterally modify the service, delete users’ content, and benefit from their data. The ToS resemble the offline “boilerplate” but, given the context of their functioning—digital capitalism—they also exhibit some critical differences, rendering the context-specific analysis necessary.

This Article argues that the continued toleration of the CUTs is undesirable on economic and democratic grounds. In digital capitalism, online platforms often enjoy a (quasi-)monopolistic position. Further, they can (factually and legally) collect and use consumer data to shape their experience and preferences, as well as to harm their privacy and mental health. Finally, the platforms can control the users’ behavior through the environment’s design and the “digital self-help.” Platforms are powerful market actors who face no significant economic pressure and, at the same time, are like private governors of the online environments who do not face any meaningful political pressure.

In this context, from the economic perspective, the CUTs can neither be presumed to be efficient nor to come with positive price effects. From the democratic perspective, their presence runs against some foundational commitments of liberal democracy. At the same time, CUTs’ continued toleration

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replaces the platforms’ self-regulation with self-dealing by disincentivizing the creation of safe products.

The Article argues that the combined countervailing power of political-economic thought, legal reform, and technologically assisted social mobilization is needed to remove the CUTs from the ToS. The strategies for deploying existing legal tools, creating new ones, and relying on social pressure, are briefly discussed. The primary battleground, however, is the realm of thought. For the CUTs to go, we need to want them to go. This Article’s primary objective is to convince the Reader of that necessity.

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I. INTRODUCTION

This Article investigates the Terms of Service of online platforms and apps. More specifically, it takes a closer look at the Consumer Unfriendly Terms (hereinafter the “CUTs”) that these documents contain. The CUTs encompass various clauses, from limitations of liability and warranty, over mandatory arbitration and class action waivers, to the companies’ rights to unilaterally modify the service or remove the users’ content. This Article argues that we should act to have these clauses removed from the ToS.

Why? Because the CUTs, contrary to the belief widespread in some parts of legal academia, neither come with positive price effects nor can be presumed to be efficient. Moreover, the tolerance of the CUTs gives rise to new centers of unchecked power in society. Platforms’ activities largely escape democratic control, offering little in return. Without the meaningful ability to sue for damages, when the new kinds of harms present in digital capitalism are concerned, given the unregulated markets and nonexistent competition, the CUTs perverse the idea of self-regulation into corporate self-dealing. This Article puts forward a democratic case against the toleration of CUTs while deconstructing the economic counterargument. The CUTs must go.

How? We need to marshal a countervailing power of political-economic thought, law, and technology. “Technology” defines what social actors are capable of doing, whereas the “law” indicates what they are allowed to do. However, it is the “thought” that determines what various social actors want to

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1 These documents come under different names: “Terms of Service,” “Terms of Use,” “Terms and Conditions,” “User Agreement,” etc. When referring to particular documents, the original title is cited. However, for the consistency’s sake, the notions of “ToS” or “Terms of Service” are hereinafter used throughout the Article.

2 See infra Section III.B.2.

3 See infra Section III.B.3.

4 See infra Section II.C.

5 For the most part, I keep the notions of “we” and “to act” undefined on purpose. This is because the central claim of this piece is a normative one: a possible world without the CUTs in the ToS is better than a world with the CUTs. The question of how to achieve that world, i.e., who could act in what way, is briefly addressed in Section III.C.


7 See infra Section III.A.

8 See infra Section III.B.

9 Id.

do. The “thought,” understood as a combination of knowledge, beliefs, and ideals, is as critical as legal reform and technological advancement.11 If policymakers believe that CUTs somehow benefit the people, they will be reluctant to act. On the other hand, if they see why the CUTs empower only those already empowered, a new impetus can emerge when a triggering event occurs.12

To have the CUTs removed from the ToS, we might need legal reform13 and will need social mobilization, ideally assisted by technology.14 However, the primary battleground is the realm of the mind. This Article takes the battle there.

The analysis brings together two scholarly discourses: technology law,15 specifically platform governance, and contract law, specifically consumer and empirical contracts. In doing so, it goes beyond the questions of speech (prevalent in the discussions about platforms)16 and of the CUTs’ enforceability (central to contract law).17 Instead, it focuses on how the CUTs establish and enable relations of power in society and interrogates how just those relations are. Moreover, it draws attention to the fact that the ToS, albeit formally being consumer contracts, in fact, often function as “private statutes” and instances of private government.18 However, the standard “boilerplate” arguments should not be discarded when analyzing the ToS, they cannot be directly relied on either.

The argument proceeds in three steps. Part I provides an account of the anatomy of power in digital capitalism and explains what role the ToS plays in

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11 See John M. Keynes, The General Theory of Employment, Interest and Money (Houghton Mifflin Harcourt 2016) (1936) (famously observing that “the ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood. Indeed, the world is ruled by little else. Practical men, who believe themselves to be quite exempt from any intellectual influences, are usually the slaves of some defunct economist. Madmen in authority, who hear voices in the air, are distilling their frenzy from some academic scribbler of a few years back.”).

12 See Naomi Klein, The Shock Doctrine 7 (2008) (statement of Milton Friedman) (“Only a crisis - actual or perceived - produces real change. When the crisis occurs, the actions that are taken depend on the ideas that are lying around. That, I believe, is our basic function: to develop alternatives to existing policies, to keep them alive and available until the politically impossible becomes politically inevitable.”).

13 See infra Section III.C.

14 Id.


16 See infra Section II.C.

17 See infra Section II.A.

18 See Elizabeth Anderson, Private Government (2017) (discussing the concept of “private government” in employment relations); Przemyslaw Palka, Terms of Service are Not Contracts: Beyond Contract Law in Regulation of Online Platforms, in European Contract Law in the Digital Age 136, 162 (Stefan Grundmann ed., 2018) (introducing the claim that the ToS are not/more than contracts); Nancy S. Kim & D. A. Jeremy Telman, Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent, 80 Mo. L. Rev. 723 (2015) (discussing the idea that online platforms are structurally similar to government entities).
the exercise of that power. Part III surveys the most common kinds of CUTs. It also differentiates between the typical “boilerplate” contracts and the ToS. Part IV scrutinizes the ToS from the economic perspective, demonstrating why the traditional arguments for “boilerplate” toleration do not hold in digital capitalism, and from the democratic perspective, showing not only that the CUTs could be seen as insulting to the very concept of the liberal democracy but also that their continued toleration disincen-
tivizes the platforms from self-regulating. Some suggestions for the potential legal reform follow.

II. THE CONTEXT: DIGITAL CAPITALISM

One could analyze the Terms of Service as merely another kind of “boilerplate” contract. Indeed, some scholars do so and theorize the ToS as “browsewrap” or “clickwrap.”19 Within this optic, the rich “boilerplate” literature would apply directly and serve as a source of arguments for and against the toleration of the CUTs. There are merits in doing so; in many ways, the ToS are like the traditional “boilerplate.” As is often the case with phenomena resulting from socio-technological advancements, the temptation to treat them as entirely new poses a risk of ignoring the past’s wisdom. However, the opposite temptation comes with equally significant risk. Rushing to the conclusion that nothing meaningfully new is at play and simply applying the established doctrines to solve all the societal problems might satisfy the lawyers’ longing for order and cognitive closure,20 but at the same time, blind us to some critical differences.

The last three decades witnessed a series of profound socio-
technological changes that altered the assumptions made by legal doctrines, and arguably, the legal thought has not yet fully caught up. When ordering food on a

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19 See Kaustuv M. Das, Forum-Selection Clauses in Consumer Clickwrap and Browsewrap Agreements and the “Reasonably Communicated” Test, 77 WASH. L. REV. 481 (2002); Paul J. Morrow, Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight, 11 UNIV. PIT. J. TECH. L. & POL’Y 7 (2011); Cheryl B. Preston, “Please Note: You Have Waived Everything”: Can Notice Redeem Online Cons.?., 64 AM. U. L. REV. 535 (2015); Nathan J. Davis, Presumed Assent: The Judicial Acceptance of Clickwrap, 22 BERKELEY TECH. L.J. 577 (2007); cf. Uri Benoliel & Shmuel I. Becher, The Duty to Read the Unreadable, 60 B.C. L. REV. 2255 (2019) (introducing the concept of a “sign-in wrap contract” and arguing that: “the sign-in-wrap contract should be distinguished from its two (older) ‘siblings,’ clickwrap and browsewrap contracts. A sign-in-wrap agreement differs from a clickwrap in that the user can click the sign-up button without being explicitly presented with the entire terms of the agreement, which are available via a hyperlink. In addition, unlike clickwrap agreements that require users to click ‘I agree,’ sign-in-wraps may only state that by signing up to the website the user agrees to the contract. Sign-in-wraps also differ from browsewraps in that they explicitly notify the user that signing up to the website means assenting to contract terms.”).

smartphone or using it to browse the news, look for a date, or fetch a ride, one easily forgets that the World Wide Web went public only in 1995, Google kicked off in 1998, Facebook launched in 2004, and the release of the first iPhone took place in 2007. People born in the same year will be allowed to drink a beer only in 2028. Humans seldom get amazed by the familiar. However, certain social and economic relationships currently have a structure fundamentally different from that in 2006, when one of the most cited symposia on “boilerplate” was published. Arguably, the most significant change comes with the rise of the platforms’ intermediation.

A growing number of social and economic relationships currently occur via online platforms and apps. There’s Amazon for shopping, social media for communication, apps for finding dates, for fetching rides, for booking lodging, for prayer and meditation, for entertainment, and for paying back your friends. We use them so seamlessly that only an exceptional situation – “wait, you don’t have Venmo?” – makes the platforms’ critical role salient. Distinguishing between online and offline activities no longer makes sense. Relations that used to be two-sided, like buying dumbbells, ordering takeout, or asking someone out, now feature the third party: the platform. This development forces the law to reckon with at least three transformations: (i) the unlimited collection of data by the platforms, (ii) their (quasi-)monopolistic position, and (iii) the role they play in the governance of online environments. Let us take a closer look at each of these phenomena, underscoring their relevance for discussing the ToS and the CUTs.

A. Platforms’ Collection and Usage of Data

Platforms gather, analyze, and use large amounts of data about their users. Some scholars say that everything we do “leaves a digital footprint.” This is only partly true. Indeed, there is a record of every search on Google, each purchase on Amazon, and every swipe on Tinder. Importantly, however, these services have been specifically designed in a way that facilitates data collection.

22 Unless they live outside of the U.S. where the drinking age is different. The point being: all this familiar environment is much newer than we tend to remember.
25 See Angelina Fisher & Thomas Streinz, Confronting Data Inequality, 60 COLUM. J. TRANSNAT’L L. 829 (2022) (discussing how platformers can easily gather, analyze, and use large amounts of data about users because they control and build the infrastructures).
26 See, e.g., Carrie Leonetti, Bigfoot: Data Mining, the Digital Footprint, and the Constitutionalization of Inconvenience, 15 J. HIGH TECH. L. 260 (2015).
It did not have to be that way. Nevertheless, as there is money to be made of data, platforms collect it, analyze it, and use it. Data helps companies design more engaging (sometimes even addictive) services; data powers the algorithms profiling users for the purposes of price discrimination, content delivery, and personalization of ads. In short, data “drives” the online business. This phenomenon led some scholars to theorize the current economic system as “surveillance capitalism” or “informational capitalism.” As both views have their merits, and arguably complement one another, I will use the term “digital capitalism” to refer to what is described below.

Shoshana Zuboff, who coined the term “surveillance capitalism,” defines it as “a new economic order that claims human experience as free raw material for hidden commercial practices of extraction, prediction and sales” and “the origin of a new instrumentarian power that asserts dominance over society and presents startling challenges to market democracy.” On her account, companies operating online currently buy and sell “behavioral futures,” i.e., promises to (statistically speaking) modify the behavior of a certain number of users by making them engage with a service more by clicking on ads or other

29 For the discussion of the mechanism, as well as the normative considerations, see Ramsi A. Woodcock, Big Data, Price Discrimination, and Antitrust, 68 HASTINGS L.J. 1371 (2017); Ramsi A. Woodcock, Personalized Pricing as Monopolization, 51 CONN. L. REV. 311 (2019); Oren Bar-Gill, Algorithmic Price Discrimination: When Demand Is a Function of Both Preferences and (Mis)perceptions, 86 U. CHI. L. REV. (2019).
30 See Eliza Mik, The Erosion of Autonomy in Online Consumer Transactions, in 8 LAW, INNOVATION AND TECHNOLOGY 1, 38 (2016); Tim Hwang, Subprime Attention Crisis (2020).
33 ZUBOFF, supra note 31 (providing “The Definition” in an unnumbered page before the table of contents).
34 Id.
types of content.\textsuperscript{35} She notes that the ability to do so stems both from the data collection and from the companies’ unlimited control of the design of the services, and as a result, the users’ experience.\textsuperscript{36} Notably, she underscores that one should see this ability as an exercise of power in a broader sense than merely the economic one. The one who (even partly) controls people’s minds—their preferences, emotions, and behavior—can steer their actions on the market, on the public forum, and inside the ballot booth.\textsuperscript{37} What Zuboff pays less attention to, but others have masterfully described, is that “surveillance capitalism” emerged both as a result of the socio-technological changes (the invention of the smartphone, advancements in data analytics, people’s growing reliance on the platforms, etc.) and skillful application of the law.

Julie Cohen argues that “law’s facilitative role in these processes of economic and ideological transformation is foundational and generally unremarked.”\textsuperscript{38} She proposed a different term, “informational capitalism,” in which, on her account, “market actors use knowledge, culture, and networked information technologies as means of extracting and appropriating surplus value, including consumer surplus.”\textsuperscript{39} Within that system, the “law and legal institutions have facilitated the emergence of informational capitalism by defining patterns of entitlement and disentitlement in new informational resources.”\textsuperscript{40} Indeed, the law does not specify any entitlements to information or data about one’s behavior. As long as this data is not made public or otherwise disclosed without consent, companies who can gather it have a right to utilize it.\textsuperscript{41} Consequently, the factual ability to collect data translates into the legal right to make use of it. Cohen deems this phenomenon the “biopolitical public

\begin{flushleft}
35 See id. at 63–97.
36 See id. at 293–328.
38 See COHEN, supra note 32, at 8 (emphasis in original).
39 Id. at 6.
40 Id. at 11.
41 American private law (understood here as property, contract, and tort) provides only limited recourse to the people whose information is gathered and further used. Developed by the common law courts, following the publication of Brandeis and Warren’s influential article, the so-called “privacy torts” deal mostly with disclosure, or physical interference with someone’s private space. See Samuel D. Warren & Louis D. Brandeis, Right to Privacy, 4 HARV. L. REV. 193, 220 (1890). For the restatement of the common law’s approach to privacy, see William L. Prosser, Privacy, 48 CAL. L. REV. 383, 389 (1960) (enumerating four types of privacy torts: “1. Intrusion upon the plaintiff’s seclusion or solitude, or into his private affairs; 2. Public disclosure of embarrassing private facts about the plaintiff; 3. Publicity which places the plaintiff in a false light in the public eye; 4. Appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”).
\end{flushleft}
domain. Hence, the first dimension of the law’s role in the emergence of surveillance/informational/digital capitalism is the silence regarding the people’s entitlements. However, the law and the legal institutions also play an active role in this process. The most important one, from this Article’s perspective, is the contract.

Katharina Pistor demonstrates how the fundamental legal institutions—contract, tort, property, collateral, and trust—enable corporations to “code” certain assets into capital. Using these instruments, lawyers help corporations transform certain assets (including data) into quasi-proprietory commodities. With resourceful law firms’ assistance, companies managed to turn an instrument intended as a pro-consumer mandated disclosure—a privacy policy—into a contract serving as a source of their rights to collect and use information. Privacy policies specify what data companies gather, with whom they share it, and how they use it. Notably, they do so within the broader legal relationship constituted by the ToS—a relationship where the user waives all the liability claims, her right to a class action or jury trial, agrees to travel to a distanced forum, or even undergo mandatory arbitration.

Consequently, a user’s relationship with the platform (constituted by the ToS) differs from that of a consumer buying, for example, a laptop or a package vacation tour (together with a boilerplate) in two important regards. First, platforms themselves shape users’ behavior and preferences (including habits, value assignments, and utility sources). They do so based on data about the particular user, seen against data about millions of others, understanding users’ cognitive and behavioral patterns better than users themselves. Further, platforms running advertisements can help other businesses maximize the chance of purchase or engagement by displaying ads fine-tuned to a particular user’s habits, time of day, and preferred form and content. Second, unlike the markets

42 See COHEN, supra note 32, at 48–74.
43 To be fully comprehensive, one should note that the law is silent only regarding the users’ entitlements. When it comes to the platforms’ entitlements, the law protects them, albeit through criminal, not common, law. It is currently, in principle, illegal to scrap data from a website without its owner’s permission. See Thomas E. Kadri, Digital Gatekeepers, 99 Tex. L. Rev. 951 (2021) for a detailed discussion of this situation, as well as proposals on how to amend.
46 See infra Part III.
47 See Dayna Tortorici, Infinite Scroll: Life Under Instagram, THE GUARDIAN (Jan. 31, 2020), http://www.theguardian.com/technology/2020/jan/31/infinite-scroll-life-under-instagram (a story of the inventor of the “infinite scroll,” who came to realize that “increasing users’ engagement” actually translated into re-shaping their preferences, sources of dopamine boosts, and ultimately addicted many of them to the platform, further leading to psychological problems).
48 See Mik, supra note 30.
in laptops, package vacations, cigarettes, and alcohol, data usage to deliver ads or design services has not been regulated.

Congress did not pass a comprehensive data privacy law back in the 1990s because the policymakers believed that the market would deliver outcomes closer to the people’s preferences than any top-down government regulation. Whether that belief was justified back then, or whether it is justified now, is a question beyond the scope of this Article. However, without a doubt, relying on market mechanisms presupposes two fundamental features of the legally grounded political economy. First, that there is recourse to courts who can either enforce or refuse to enforce (for example, on the grounds of unconscionability) the market agreements. The prevalence of CUTs, limiting remedies, and access to justice in the ToS renders this assumption invalid. Second, that there is competition in the market, users have meaningful choices, and companies face competitive pressure not to extract the consumers’ surplus. In the current stage of digital capitalism, the latter is often questionable. This leads me to the next section.

B. The (Un-)natural Monopolies

The dominant (or monopolist) position of a few online platforms makes up the second crucial feature of digital capitalism. Only a handful of very large

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50 See Daniel J. Solove, Introduction: Privacy Self-Management and the Consent Dilemma, 126 Harv. L. Rev. 1879, 1894 (2013) (discussing the pros and cons of replacing the market mechanisms) (“The most obvious alternative would be for the law to regulate and compel certain privacy choices. Privacy regulation, however, risks becoming too paternalistic. Regulation that side steps consent denies people the freedom to make choices. The end result is that either people have choices that are not meaningful or people are denied choices altogether. Ironically, paternalistic regulation might limit people’s freedom to choose in the name of enhancing their autonomy. I term this problem the ‘consent dilemma.’ Privacy scholars must identify a conception of consent that both protects privacy and avoids paternalism.”); Kevin E. Davis & Florencia Marotta-Wurgler, Contracting for Personal Data, 94 N.Y.U. L. Rev. 662, 667 (2019) (arguing in favor of the market over top-down regulations) (“These differences [between platforms operating in various sectors of the economy - PP] offer evidence of the potential advantages of the flexibility associated with a traditional contractual approach in that they may reflect differences in preferences across markets. Subjects might want more protection in highly sensitive or potentially embarrassing situations, but require less for other uses of data, such as sharing on message boards. Permitting subjects to contract freely gives them the flexibility to enter into transactions that fit their varying needs.”).

51 See infra Section III.A.

52 See Florencia Marotta-Wurgler, Self-Regulation and Competition in Privacy Policies, 45 J. Legal Stud. 13–16 (2016) for an instant-classic account using competition to explain the contents of privacy policies.
players control the critical spheres of socioeconomic life.\textsuperscript{53} Importantly, it is not just Amazon, Google, Facebook, or X (previously Twitter) that one should bear in mind. In many markets, from transport and lodging to dating, entertainment, app stores, food delivery, or payments, one can observe a tendency toward market capture by one or a couple of massive firms. Several interrelated reasons have caused this trend, with two major ones standing out. Those are (i) the law’s refusal to step in and regulate the design of platforms’ code and (ii) the Chicago School’s triumph in the doctrine of antitrust law.\textsuperscript{54}

People tend to stick to the most prominent player due to the so-called “network effects.”\textsuperscript{55} Nominally, competition is there (you’re free to search the web using Bing!), but the reality is often different. The appeal of platforms like X, Facebook, Venmo, Bumble, or Uber Eats comes not only from the features of the product (what the website/app enables the consumer to do) but also, if not primarily, from the network effects, i.e., the access to the network of people (or companies) that these platforms facilitate. You might be unhappy about Facebook’s or X’s practices regarding privacy,\textsuperscript{56} exploitation of workers,\textsuperscript{57} or their impact on the political process. However, if all your friends and people you want to follow use these platforms, you will think twice before moving to Mastodon.\textsuperscript{58}

The same logic holds regarding the contents of the Terms of Service (and Privacy Policies, as incorporated into these documents). If a consumer receives an email about an update in a platform’s ToS and decides to stay with it, her decision often does not signify that she likes the terms or that switching costs exceed the benefits, because sometimes there is no one to switch to. Of course, from the traditional antitrust perspective, proving that a platform is a monopolist might be difficult due to the need to specify the relevant product market.

\begin{footnotesize}
\begin{itemize}
  \item For the account of how this process occurred, from the ideological, political, and judicial perspective, see Tim Wu, \textit{The Curse of Bigness} 102–126 (2018); Lina Khan, \textit{Amazon’s Antitrust Paradox}, 126 Yale L.J. 710, 718–36 (2017).
  \item See Guggenberger, supra note 53, at 243.
\end{itemize}
\end{footnotesize}
Facebook might be very popular, but there are many other social networks. Amazon might have become very large, but no one stops consumers from shopping in brick-and-mortar shops or ordering directly from the producers. This logic, however, misses the point. If a consumer wants to be able to see and send tweets, she must be on X. If she wants to send money back to her friends using her smartphone, she must use Venmo. Due to the network effects, Facebook, X, and Venmo are currently monopolists in the market for participating in Facebook Groups, tweeting, or venmoing.\textsuperscript{59} What does this have to do with the law’s refusal to regulate the code or the nitty-gritty details of the antitrust law’s doctrine?

Somehow counterintuitively, there is nothing “natural” to the network effects caused by the platforms.\textsuperscript{60} These platforms could have been designed differently if their owners decided to make them interoperable with other substitutive or complimentary services (as Mastodon was).\textsuperscript{61} We could live in a world in which there are several interoperable providers of “Twitters/Xs” or “Facebooks,” just like we live in the world where users of Samsung with a contract with Verizon can call and text users of iPhones with a contract with AT&T, or just like different websites can be accessed using different browsers, like Safari, Chrome or Firefox.\textsuperscript{62} Lawrence Lessing made that point back in the 1990s, arguing that “the code” is a modality of governance, which, however, could (and, on his account, should) be regulated by the law.\textsuperscript{63} A decade later, the same point was made by Jonathan Zittrain, who already then had observed the trend toward the winner-takes-all approach in online platforms.\textsuperscript{64} Companies have no business reason to adopt such an approach; they are happy to reap all the

\textsuperscript{59} For an argument advocating this perspective, see Przemyslaw Palka, The World of Fifty (Interoperable) Facebooks, 51 SETON HALL L. REV. 1193 (2021).

\textsuperscript{60} See Dipayan Ghosh, Don’t Break Up Facebook—Treat It Like a Utility, HARV. BUS. REV. (May 30, 2019), https://hbr.org/2019/05/dont-break-up-facebook-treat-it-like-a-utility (“I contend that Facebook and firms like it have become natural monopolies that necessitate a novel, stringent set of regulations to obstruct their capitalistic overreaches and protect the public against ingrained economic exploitation.”).

\textsuperscript{61} See generally Ian Brown, Interoperability as a Tool for Competition Regulation, OPENFORUM ACAD. (Nov. 2020), https://openforumeurope.org/publications/oferes-research-paper-interoperability-as-a-tool-for-competition-regulation/. See also Kadri, supra note 43; Palka, supra note 59.

\textsuperscript{62} For an in-depth analysis of the concept of interoperability in the IT sector, as well as a survey of technical/legal/political difficulties in achieving it, see JOHN PALFREY & URS GASSER, INTEROP (2012); see also Cory Doctorow, Adversarial Interoperability, ELEC. FRONTIER FOUND. (Oct. 2, 2019), https://www.eff.org/deeplinks/2019/10/adversarial-interoperability; Bennett Cyphers & Cory Doctorow, A Legislative Path to an Interoperable Internet, ELEC. FRONTIER FOUND. (July 28, 2020), https://www.eff.org/deeplinks/2020/07/legislative-path-interoperable-internet.

\textsuperscript{63} See Lessig, supra note 27.

\textsuperscript{64} See Jonathan Zittrain, The Future of the Internet (Penguin Adult 2009).
benefits and extract the consumer surplus. Why, then, did the policymakers not intervene?

The rise of the platforms coincided with the period in American legal thought in which the antitrust law has profoundly transformed. Unlike in the previous decades (and, arguably, contrary to Congress’s intention), lawyers came to view monopolies as acceptable if they only increased the “consumer welfare.”

Robert Bork initially presented this view in his influential book, titled *The Antitrust Paradox,* and it quickly became a commonly accepted doctrine. Hence, a handful of online platforms’ rapid growth and market capture did not strike lawmakers as suspicious, even if, back in the 1960s, it arguably would have. Moreover, for quite some time, lawyers did not have the tools to measure the harms stemming from the lack of competition. The services seemed to be “free,” and users’ engagement (a proxy metric for users’ preference satisfaction) grew. This state of affairs slowly changed, with insightful scholarly articles published on the subject or the FTC’s lawsuit against Facebook, but the struggle has only started. Finally, not only the antitrust doctrine but the overall political-economic thought has seen the government’s intervention as, in principle, undesirable. The perceived success of Reagan’s *laissez-faire* approach to the economy, strengthened by the West’s victory over the centrally planned Soviet Bloc, provided arguments for preferring the markets over the regulation in the 1990s and early 2000s when policymakers were making decisions about the current legal landscape of platforms’ operation.

Again, one sees the underappreciated role of thought in shaping the law and politics.

These transformations undercut two fundamental assumptions in the legal arguments against outlawing the CUTs. One is free to believe that the market will deliver better outcomes than the government’s top-down regulation;

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65 See *Wu,* supra note 54, at 102–18; see also *Khan,* supra note 54.
68 See Rosenquist, Morton & Weinstein, supra note 28.
71 This has been a long and complex process. For an excellent overview, see BINYAMIN APPELBAUM, *THE ECONOMISTS’ HOUR* 1–33 (Illustrated ed. 2019); see also KLEIN, supra note 12, at 3–24; THOMAS PHILIPPON, *THE GREAT REVERSAL* (First Printing ed. 2019).
and that regulation should not constrain individuals’ freedom to choose products (and associated contracts, including Terms of Service) following their preferences. However, for these forces to operate, individuals must indeed have choices. The markets must indeed be free. “Free markets” presuppose not only less regulation but also a vibrant antitrust law preventing monopolies from arising and dismantling them when they have arisen. Even F.A. Hayek, seen nowadays as the prophet of market freedom, argued that the government must “plan for competition.”\footnote{See Friedrich A. Hayek, The Inevitability of Planning, in The Road to Serfdom (1944).} However, if a person wants to communicate with her peers who all happen to use Facebook or Snapchat, what choice does she have? If the market is supposed to self-regulate, how can we expect companies to refrain from extracting consumer surplus if they have no competition? As of today, the markets controlled by the platforms are not free.\footnote{For a detailed argument defending this proposition, see Philippson, supra note 71.} In this case, toleration of the CUTs does not favor “the market” over regulation; it amounts to conceding power to the monopolists who deal as they please.

Moreover, online platforms are much more than economic actors. In the very literal sense of the word, they have become private governments.\footnote{See Anderson, supra note 18.} Understanding this point is critical to grasping the role that ToS play in the current stage of digital capitalism. Let us look at the accounts supporting this point of view.

\textbf{C. Platforms as Governors}

Online platforms’ position as “governors” of our social and economic relationships makes up the third critical feature of (the current stage) of digital capitalism. On its face, it could seem that DoorDash, Venmo, or Bumble are just products allowing one to order food, share the bill, or find a date by connecting the user to the network through a useful interface. As we have discussed, these platforms are economically powerful, given their size and the amount of user data they amass. However, economic power is not the only kind of power they exercise.\footnote{For the arguments that the distinction is not that clear cut, see Britton-Purdy et al., supra note 10.}

Platforms also structure the very environments in which individuals and societies relate to one another. Whether you can tip an Uber driver, whom you will see in your newsfeed, and whether you’ll be allowed to sell a particular item, depends on the platforms’ regulatory decisions. They make them through their code’s design (what is possible, what the users are factually capable of doing),\footnote{See Roger Brownsword, Law, Technology and Society (2019).} through their algorithms (determining what users see, what posts/offers pop up on top), and through their ToS (including “rules,” indicating how users must
The efficacy of the last tool stems not only from the fact that platforms draft their ToS unilaterally but also from the platforms’ ability to engage in “digital self-help.” Removing a post or a listing, or even blocking someone’s account—unlike kicking a shop off one’s property—does not require a court’s decision, nor does it involve using physical force. A click of a button suffices.

The American public has, in the last years, witnessed several examples of the platforms exercising such power. The most widely discussed has been the de-platforming of Donald Trump. However, less politically loaded and equally indicative has been the controversy surrounding the GameStop stocks’ mass-buying by Reddit and Robinhood users. When the price of GameStop shares skyrocketed, Robinhood (a retail investment platform) blocked the possibility of buying these shares further to the detriment of several hedge funds. The company had a right to do it, according to their “ToS,” but they also had the ability to do it, given their unilateral control of the platform’s code. Further, when users started giving the Robinhood app negative reviews in the app stores, Google deleted more than one hundred thousand reviews. Again, they had the right and ability to do it, a perfect example of “digital self-help.”

Scholars have begun to theorize the position of platforms as the sources of power. The works that usually capture the public’s imagination the most deal with speech and content moderation; however, one should remember that the

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78 For an early account of this phenomenon, as well as its statutory basis in copyright law enforcement, see Julie E. Cohen, Copyright and the Jurisprudence of Self-Help, 13 BERKELEY TECH. L.J. 1089 (1998).


82 Id.


84 See Restrictions on Trading, in ROBINHOOD FINANCIAL LLC & ROBINHOOD SECURITIES, LLC CUSTOMER AGREEMENT, section 16, (Revised June 22, 2020) [hereinafter, Robinhood ToS], https://cdn.robinhood.com/assets/robinhood/legal/Custom%20Agreement.pdf. (“I understand that Robinhood may, in its discretion, prohibit or restrict the trading of securities, or the substitution of securities, in any of My Accounts.”).

phenomenon scales to other socioeconomic life spheres. Jack Balkin suggested that one sees online platforms’ activities as an instance of “private governance.” Tarleton Gillespie, who labels platforms the “custodians” of the internet, argues that “[h]ow platforms are designed and governed not only makes possible social activity, it calls it into being, gives it shape, and affirms its basic legitimacy as a public contribution.”

Kate Klonick prefers the term “governors,” claiming that “[a]nalyzing online platforms from the perspective of governance is both more descriptively accurate and more normatively useful in addressing the infrastructure of this ever-evolving private space.” In her influential HLR article, she provides empirical, conceptual, and normative arguments to support the conclusion that:

[P]latforms have a centralized body, an established set of laws or rules, ex ante and ex post procedures for adjudication of content against rules, and democratic values and culture; policies and rules are modified and updated through external input; platforms are economically subject to normative influence of citizen-users and are also collaborative with external networks like government and third-party groups.

One can dispute the extent to which platforms have developed “democratic values and culture,” as well as whether platforms treat their users anywhere close to how one would treat a “citizen.” Nevertheless, Klonick’s choice of the “public” register (“democratic,” “a citizen”) as opposed to a “market” vocabulary of “a consumer” or “preference satisfaction” is indicative. It suggests that the kinds of decisions platforms regularly take (what content stays and what goes? what rules should apply across the platform? whether and how to deal with the users’ complaints?) are not only economic but very much political.

Julie Cohen goes a step further and explicitly draws a comparison between online platforms and sovereign states. She observes that, “[a]s to governance authority, the sovereignty of platforms is emergent and performative.” According to her research, platforms not only “govern their domains with a quiet tenacity, imposing their own regulatory structures on

86 See Jack M. Balkin, Free Speech is a Triangle, 118 Colum. L. Rev. 2011, 2021 (2018) (“Technology companies’ ever-expanding capacities for private surveillance and control lead naturally to viewing them as a new form of private governance. By this I mean that we should think of private-infrastructure owners—and especially social media companies—as governing online speakers, communities, and populations, rather than thinking of them as merely facilitating or hindering digital communication.”).


88 See Klonick, supra note 77, at 1662.

89 Id. at 1663.

permitted conduct—e.g., sponsored search results, Facebook ‘likes’ and ‘tags,’ X reposts—and their own internal sanctions on disfavored conduct.”91 They also “increasingly practice diplomacy in the manner of sovereign actors.”92 Hence, on top of political-like decisions they have to make and political-like powers at their disposal, online platforms start behaving increasingly like governments.

Rory Van Loo refers to online platforms (and other corporations) as the “new gatekeepers,” pointing out that federal agencies (like the FTC, the CFPB, the EPA, and the FDA) “have enlisted a large array of private actors in their quest for optimal regulatory design.”93 His empirical observation boils down to noticing that public policy is currently administered largely by private actors, who must police their customers’/employees’ actions to further the government’s goals. Regarding the platforms, Van Loo describes how the FTC conscripted Amazon and Facebook to engage in oversight through its enforcement actions against the tech giants.94 From the point of view of this Article, what matters is that the platforms have the ability to engage in oversight (given the amount of data they have access to) and rules-enforcement (given their control of the code). They can pursue the public, democratically established goals and values; however, they can use the same powers to their benefit without any control.

Thomas Kadri demonstrates how this power arises not only from the law’s refusal to limit the platforms’ freedom in design and usage of “digital self-help,” but also from affirmatively created protections. Labeling the platforms as “digital gatekeepers,” Kadri shows how the early adoption of the “cyberspace” metaphor when referring to online websites led to the adoption of federal cyber-trespass laws in the United States.95 These laws, most prominently the Computer Fraud and Abuse Act,96 prohibit illegally accessing a website without authorization and obtaining information.97 Such an action—vaguely defined—not only poses a risk of prosecution to the user but is a source of the platforms’ right to defend itself from the “trespassers.” Hence, one sees how the platforms’ factual ability to shape and control the users’ relationship receives legal sanction and legitimation.

Without a doubt, these activities strongly affect economic relations as well. Nikolas Guggenberger compares the platforms to “toll bridges” or “the railroads” of the internet.98 In his view:

91 Id. at 201–02.
92 Id. at 200.
94 Id. at 482–85.
95 See Kadri, supra note 43, at 988–93.
98 See generally Guggenberger, supra note 53.
[T]he platform picks the winners and losers. They do everything in their power to give their own services a leg up. Markets on the platform do not resemble level playing fields, in which the quality and the price of the products and services determines their success in the marketplace. That does not need to be the case. Rather, enabling platforms to exercise gatekeeper power over significant parts of the industry is a policy choice . . .

[D]igital platforms have become the defining bottlenecks for digital commerce.99

Guggenberger, despite writing about other spheres of socioeconomic life than the scholars mentioned before (market exchange, as opposed to free speech and policymaking and oversight), points to the same structural phenomenon. Online platforms have the factual ability and legal right to freely design the architecture of online environments, promulgate the rules of conduct, oversee the users’ behavior, and ultimately enforce them without going to court.

We must look at the Terms of Service and the Consumer Unfriendly Terms they contain within this context. ToS is not just a “boilerplate” contract, akin to the one attached to an insurance policy, parking ticket, or package travel. It is also a source of the platform’s right to amass and deploy large amounts of data; an essential document outlying how the platform plans to exercise its power, and ultimately, the source of legitimation for that power. In this sense, choosing between Tinder and Bumble, or between DoorDash and Uber Eats, is a little bit like choosing between buying Shoes A in Store Y and Shoes B in Store Z. But it’s also a bit like choosing between going for spring break to Spain or to Germany, with all the different attractions awaiting and laws applying. In the same way, being stuck with Google or Facebook is a little bit like being stuck with the only cable company in town, but also a little bit like being stuck in communist Poland without a passport.

### III. THE TYPES OF CUTS

Having discussed the context of the ToS functioning, I’d like now to take a closer look at the various kinds of CUTs that they feature. I begin this section by recounting the scholarly contributions made about boilerplate contracts in general (both offline and online) in order to ground the analysis in it its broader intellectual background. I then categorize the CUTs by subject matter100 and divide them into two larger groups. First, I analyze the “familiar boilerplate” clauses, which include: (i) dispute resolution clauses (choice of law, choice of forum, mandatory arbitration, waivers of rights to a jury trial or class action); (ii)

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99 Id. at 10.
100 Other criteria are also possible. See Yehuda Adar & Shmuel Becher, Ending the License to Exploit: Administrative Oversight of Consumer Contracts, 62 B.C. L. Rev. 2405, 2415–24 (2021) (distinguishing between legally invalid, unconscionable, and unfair terms).
limitation of remedy clauses (exclusion/limitation of the provider’s liability, exclusion of warranty); and (iii) alteration clauses (provider’s right to unilaterally modify or terminate the contract or the service). The law already speaks to the legality or enforceability of these categories of CUTs in consumer contracts, and scholars have made arguments endorsing or criticizing the most consequential cases. This Article’s analysis of the CUTs needs to account for this normative legacy, bearing in mind, however, that the current context of ToS functioning is different. Then, I shift my focus to more ToS-specific CUTs: (i) content deletion/modification clauses; (ii) lack of features’ specification (“no promises”); (iii) data management/privacy clauses; and (iv) excessive intellectual property licenses.

A. The Old Problem’s New Clothes

The phenomenon of “boilerplate”—or standard-form “adhesion contracts”—as well as scholarly discussions surrounding it, long predates the emergence of the internet and the digitalization of socioeconomic life. Arguably, the “boilerplate’s” widespread adoption coincided with the emergence of mass consumer markets. The usage of standardized contracts in connection with sales of consumer goods and providing services lowered the transaction costs for both the firms and the consumers. If one concludes just a handful of contracts a year and has time and resources to invest in the process, one might just as well negotiate. However, if one had to individually draft a contract every time one buys breakfast, enters a bus, or visits a dentist, the amount of time necessary to do so would be immense. Hence, in principle, there is nothing wrong with “boilerplate” as such.

101 See supra Part I.


103 See James Gibson, Boilerplate’s False Dichotomy, 106 GEO. L.J. 249, 257 (2018) (“Boilerplate originated in the early 1900s, when mass-market transactions became increasingly common and complex. Standardized sales began to replace one-on-one bartering, which meant the end of individual negotiation and the rise of adhesive terms.”).

104 See Marcel Kahan & Michael Klausner, Standardization and Innovation in Corporate Contracting (or the “Economics of Boilerplate”), 83 VA. L. REV. 713 (1997).

105 This is a perfect example of “transaction costs,” a term coined by Ronald Coase. See the reprint of the original article in Ronald H. Coase, The Problem of Social Cost, in CLASSIC PAPERS IN NATURAL RESOURCE ECONOMICS 87–137 (Chennat Gopalakrishnan ed., 2000), https://doi.org/10.1057/9780230523210_6.
The fundamental problem lies in the distinction between efficiency and justice of the general phenomenon of corporations using “boilerplate” in the market (where efficiency gains are evident, and justice as such is not necessarily endangered), and the efficiency and justice of the particular terms included in the real-world instances of “boilerplate.” The latter might be lowered/infringed if the companies choose to include inefficient or unjust clauses, and consumers, for whatever reason, are compelled to accept them. As such a move comes with financial gains for companies, one should have only expected them to do so. Still, the legal system could have intervened by outright outlawing certain kinds of clauses or making abundantly clear that they would not be enforced. This however did not happen in the United States. Nevertheless, thanks to extensive empirical and behavioral studies, our understanding of the actual contractual practice regarding boilerplate is substantial.

Indeed, scholars have devoted a significant amount of work to the questions of whether consumers actually read boilerplate contracts and what normative consequences their no-reading should entail. Yannis Bakos, Florencia Marotta-Wurgler, and David Trossen demonstrated that essentially no one reads the boilerplate contracts, and the study by Jonathan Obar & Anne Oeldorf-Hirsch shows that the same is the case regarding the privacy policies. This has to do with features of consumers (who have no time or no ability to understand boilerplate contracts) and of the contracts themselves (which tend


107 See, e.g., Ian Ayres & Alan Schwartz, The No-Reading Problem in Consumer Contract Law, 66 STAN. L. REV. 545 (2014) (arguing that firms should periodically take stock of what their clients expect to be in the boilerplate and enforce the less-favorable ones only if they warned the consumers about them); see also Stephen J. Choi & G. Mitu Gulati, Contract as Statute, 104 MICH. L. REV. 1129 (2006) (arguing that boilerplate should be interpreted not using the contractual standards but the statutory ones).


to be long, complicated, and written in legalese).\footnote{See Aleecia M. McDonald & Lorrie Faith Cranor, The Cost of Reading Privacy Policies 2008 Privacy Year in Review, 4 I/S: J. L. & POL’Y FOR INFO. SOC’Y 543 (2008).} The latter point has been empirically demonstrated in a series of studies by Benoliel & Becher, who tested the readability of ToS and privacy policies.\footnote{See Benoliel & Becher, supra note 19; see also SAMUEL BECHER & URI BENOLIEL, Law in Books and Law in Action, in CONSUMER L. & ECON. 179, 204 (Klaus Mathis & Avishalom Tor eds., 2021).}

Even if the consumers do, for whatever reason, read the boilerplate, they tend to misunderstand its meaning and/or legal consequences.\footnote{See Joel R. Reidenberg et al., Disagreeable Privacy Policies: Mismatches Between Meaning and Users’ Understanding, 30 BERKELEY TECH. L.J. 39 (2015).} This might result from the fact that, as a general matter, consumers sometimes misunderstand the law, as shown by Oren Bar-Gill and Kevin Davies.\footnote{See Oren Bar-Gill & Kevin E. Davis, (Mis)perceptions of Law in Consumer Markets, 19 AM. L. & ECON. REV. 245, 286 (2017).} Or, more worryingly, consumers’ misunderstandings might stem from straightforward fraud committed by companies, a possibility that has been proven by Meirav Furth-Matzkin and Roseanna Sommers.\footnote{See Meirav Furth-Matzkin & Roseanna Sommers, Consumer Psychology and the Problem of Fine-Print Fraud, 72 STAN. L. REV. 503 (2020).} Moreover, as shown by Stephen Choi, Mitu Gulati and Robert Scott (albeit in the case study of commercial contracts), standard-term contracts could themselves, over time, erode in meaning.\footnote{See Stephen J. Choi, Mitu Gulati & Robert E. Scott, The Black Hole Problem in Commercial Boilerplate, 67 DUKE L.J. 1 (2017).}

A growing body of work suggests that publicly accessible boilerplate contracts might be actively harmful to consumers. Tess Wilkinson-Ryan has shown that, despite the widespread knowledge about the no-reading phenomenon, the mere fact that an unfair term is disclosed in a contract makes it seem more legitimate, both legally and psychologically.\footnote{See Tess Wilkinson-Ryan, The Perverse Consequences of Disclosing Standard Terms, 103 CORNELL L. REV. 117 (2017); see also Tess Wilkinson-Ryan, Justifying Bad Deals, 169 U. PA. L. REV. 193 (2020).} Meirav Furth-Matzkin demonstrated that even unenforceable terms, when written as a part of a contract, influence the behavior of consumers (in the example of tenants).\footnote{See Meirav Furth-Matzkin, Harmful Effects of Unenforceable Contract Terms: Experimental Evidence, 70 ALA. L. REV. 1031 (2019).}

All these accounts complicate the assumption about the purely contractual nature of the ToS. In the end, as put by James Gibson, “particular contract terms are simply presumed to represent the informed, private ordering of a universe of disparate individuals.”\footnote{See Gibson, supra note 103, at 253.} However, the fact that the costs of acquiring and processing the information included in the “boilerplate” are...
prohibitively high renders this presumption simply false. An explicit argument for the claim that “boilerplate” is not a contract has been provided by Margaret Jane Radin. She further advances a normative argument for combatting the CUTs (or, in her language, “boilerplate rights deletion schemes”) from their widespread use in the market. She devoted her work to “boilerplate” as such, not just the ToS of online platforms; nevertheless, many of her arguments are directly applicable to the discussion at hand. On her account, the CUTs contribute to the normative degradation (the meaninglessness of “consent” and “freedom of choice”) and democratic degradation (replacement of the Rule of Law with the rule of the corporations) in our society and political economy. She engages the arguments of the “boilerplate” proponents and provides a roadmap for having the CUTs eliminated. Other accounts supporting her arguments have since been given, e.g., by Eric Encarnacion, who argues that stripping individuals of rights via “boilerplate” cannot be reconciled with their dignity as persons.

Counterarguments quickly followed, usually either focusing on the purported efficiency or price effects of CUTs toleration in “boilerplate” or downplaying the democratic losses stemming from the lack of consent or free

120 See id. at 256 (“Reduced to its essence, then, the problem is the limited resources that consumers possess. The failure to find and read boilerplate is not proof of laziness or moral failing. It is a reflection of individuals’ bounded rationality. Consumers simply do not have the time or expertise to absorb all of the boilerplate they encounter and factor it into their purchasing decisions. (That’s why more disclosure is not the answer; more information doesn’t help when consumers are already short on time.) This all adds up to a failure of consumers—a justifiable, rational failure—to read and understand boilerplate. And if they don’t read it, they aren’t comparison shopping. And if they aren’t shopping or negotiating, the longstanding market-based rationale for enforcement disappears.”).

121 See generally MARGARET JANE RADIN, BOILERPLATE (2013).

122 Id. at 19–32 (“Our legal system adheres to an ideal of private ordering and its importance to individual freedom. Within this system, freedom of contract is a core value, and ‘involuntary’ or ‘unfree’ contract is a contradiction in terms. […] A system in which rights could be taken from people without their consent if they were paid the alleged market price for those rights would be a major departure from our own. If our system is tending in that direction because millions of people are without their consent being made subject to boilerplate that erases important legal rights, then surely our system of contract law, in which consent is essential, is being degraded.”).

123 Id. at 33 (“When a firm’s mass-market boilerplate withdraws a number of important recipients’ rights—such as rights of redress granted by the state, or user rights that are free of owner control under intellectual property regimes—it is displacing the legal regime enacted by the state with a governance scheme that is more favorable to the firm. It is transporting recipients to a firm’s own preferred legal universe. I am not referring here to all ‘contracts of adhesion.’ Rather I mean to focus on mass-market boilerplate rights deletion schemes: the deployment of boilerplate to rework a system of recipients’ rights that are guaranteed by the polity in order to divest recipients of those rights, or of some substantial portion of them, for the benefit of a firm.”).

124 See infra Part V.

125 See generally Erik Encarnacion, Boilerplate Indignity, 94 IND. L.J. 1305 (2019).
choice in consumers giving up their statutory rights. I study and scrutinize these arguments in Sections III.A. and III.B. For now, however, it suffices to note that some categories of the CUTs have been known to the law and legal scholarship for a while, and any plan for reform needs to take a position towards the existing rules, practices, and opinions. Now, let us take a look at these categories.

B. The Familiar “Boilerplate” Clauses

1. Dispute Resolution Clauses

The first category of the CUTs widespread in the online platforms’ ToS concerns dispute resolution. The ToS often contain choice-of-forum and choice-of-law clauses, mandatory arbitration clauses, and class action waivers and trial-by-jury waivers. The purpose of these clauses is to make it more difficult for consumers to sue the company for damages, individually or collectively. Consider the clause in X’s (formerly Twitter’s) Terms of Service:

The laws of the State of California, excluding its choice of law provisions, will govern these Terms and any dispute that arises between you and Twitter. All disputes related to these Terms or the Services will be brought solely in the federal or state courts located in San Francisco County, California, United States, and you consent to personal jurisdiction and waive any objection as to inconvenient forum.

\[126\] See Ben-Shahar, supra note 6; Nathan B. Oman, Reconsidering Contractual Consent: Why We Shouldn’t Worry Too Much about Boilerplate and Other Puzzles, 83 BROOK. L. REV. 215 (2017).


\[129\] X Terms of Service, X (Sept. 29, 2023), https://twitter.com/en/tos/ (referring to Section 6, General).
Suppose a consumer bound by this clause—every X user (residing in the United States)—suffers harm or something they perceive to be harm. For example, an error in X’s code makes their private photos publicly available for a while, and someone downloads them to misuse them, or they get addicted to the website and suffer associated mental health problems requiring expensive treatment. In these cases, they can only sue X in the jurisdiction specified in the ToS. If they reside in San Francisco, CA, they’re lucky. But what about consumers in Cody, WY, or New Haven, CT, or anywhere else? They will either have to travel there or, if the cost of the trip and hiring a local lawyer (as the laws of California govern the contract) exceed the suffered damages, they will have to accept and internalize the cost of the tort or breach of contract committed by X.

Following the Supreme Court’s decision in *Carnival Cruise Lines, Inc. v. Shute*, federal courts generally enforce choice-of-forum and choice-of-law clauses in consumer contracts. In that case, the Shutes, residents of Arlington, WA, purchased a ticket for a cruise vacation from a Florida-based company. On the back of the ticket (sent to them after the purchase), a choice-of-forum clause was included, indicating that all the disputes must be resolved in Florida. Unfortunately, when in Mexico, Mrs. Shute suffered an injury and, upon returning home, sued the company for damages in Washington State. The case made it to the Supreme Court of the United States, which decided that the choice-of-law clause must be enforced and so the plaintiff can only seek a remedy in (the specified) Florida courts. Writing for the majority, Justice Blackmun noted that “there is no indication that petitioner set Florida as the forum in which disputes were to be resolved as a means of discouraging cruise passengers from pursuing legitimate claims.” Arguably, the fact that—even if the Florida-based company chose the forum primarily for its own convenience, and Florida state law afforded consumers comparable levels of protection—having to travel across the entire country while recovering from injury will have the effect of “discouragement,” did not strike Justice Blackmun as relevant. As of today, choice-of-forum and choice-of-law clauses in ToS are enforceable.

Another kind of dispute-resolution-related CUTs is a mandatory arbitration clause, usually combined with a class-action and trial-by-jury

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130 X uses a different contract for users located in the EU and the UK, which can be found under the same link.
133 See RADIN, supra note 121, at 6.
134 *Shute*, 499 U.S. at 587.
135 *Id.* at 587–88.
136 Note that the dispute in case involved a tort-based, not a breach-of-contract, cause of action.
137 *Shute*, 499 U.S. at 595.
HEADSPACE, a popular meditation app, ironically promising to help users with achieving peace of mind and releasing stress, includes one in the ToS:

PLEASE NOTE THAT THESE TERMS CONTAIN AN ARBITRATION CLAUSE. EXCEPT FOR CERTAIN TYPES OF DISPUTES MENTIONED IN THE ARBITRATION CLAUSE, YOU AND HEADSPACE AGREE THAT DISPUTES RELATING TO THESE TERMS OR YOUR USE OF THE PRODUCTS WILL BE RESOLVED BY MANDATORY BINDING ARBITRATION, AND YOU WAIVE ANY RIGHT TO PARTICIPATE IN A CLASS-ACTION LAWSUIT OR CLASS-WIDE ARBITRATION.139

Such clauses existed long before digitization but have become widespread in online platforms’ ToS.140 Following the two relevant United States Supreme Court cases of AT&T Mobility LLC v. Concepcion141 and American Express v. Italian Colors,142 platforms have been gradually including them in their terms of service.143 In the former, the Concepcions wanted to bring a class action against AT&T (with numerous other consumers), but their contract included a mandatory arbitration clause paired with a class action waiver.144 Justice Scalia, writing for the majority, held that the clause must be enforced. The ruling was reinforced in Italian Colors, where the Supreme Court

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138 See RADIN, supra note 121, at 17 (“By deploying an arbitration clause, a firm also deletes recipients’ right to bring a class action suit”).
139 Headspace Terms and Conditions, HEADSPACE (Sept. 8, 2021), https://www.headspace.com/terms-and-conditions (referring to Section 1.2., “Arbitration Notice and Class Action Waiver”).
142 570 U.S. 228 (2013).
143 See Elizabeth C. Tippett & Bridget Schaaff, How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy, 70 RUTGERS L. REV. 459, 461 (2017) (“Results suggest that only a minority of gig companies included arbitration provisions in their Terms of Service contracts before AT&T v. Concepcion. Of those that did, only one included a class action waiver. By 2016, company practices had changed substantially, with nearly two thirds of gig companies including an arbitration agreement in their Terms of Service contracts. Additionally, by 2016, almost all contracts with an arbitration provision also included a class action waiver.”).
144 AT&T, 563 U.S. at 336.
affirmatively answered whether a class action waiver binds the consumers even if the cost of arbitration is much higher than the sought damage, thereby essentially making it clear that the plaintiffs would not sue.\textsuperscript{145}

Hence, today, the ToS of online platforms almost always contain choice-of-law and choice-of-forum clauses, and often—on top of that—a mandatory arbitration clause, together with a class action and right to jury trial waivers. These clauses, given the binding precedents, are enforceable. This state of affairs puts users in a difficult position regarding the platforms, especially given that, in many market sectors, there is no choice. Arguably, it also undercuts the basic premise of the “regulation by the market” approach to platform governance. If companies face neither competitive pressure nor fear of litigation, the effect is not “self-regulation” but simply self-dealing.

However, assume that a consumer manages to bring her case in front of the court specified in ToS. What happens then?

2. Limitation of Remedy Clauses

The second category of “familiar” boilerplate CUTs are clauses limiting the remedies available to the consumer. These include exculpatory clauses (limitation of liability) and warranty waivers. Consider the following provision in the ToS of Bumble, a popular dating app:

NEITHER US NOR ANY OWNER WILL BE LIABLE FOR ANY DAMAGES, DIRECT, INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, OR PUNITIVE, INCLUDING, WITHOUT LIMITATION, LOSS OF DATA, INCOME, PROFIT OR GOODWILL, LOSS OF OR DAMAGE TO PROPERTY AND CLAIMS OF THIRD PARTIES ARISING OUT OF YOUR ACCESS TO OR USE OF THE APP, SITE, OUR CONTENT, OR ANY MEMBER CONTENT, HOWEVER CAUSED, WHETHER BASED ON BREACH OF CONTRACT, TORT (INCLUDING NEGLIGENCE), PROPRIETARY RIGHTS INFRINGEMENT, PRODUCT LIABILITY OR OTHERWISE.

\ldots IF ANY PORTION OF THIS LIMITATION ON LIABILITY IS FOUND TO BE INVALID OR UNENFORCEABLE FOR ANY REASON, THEN OUR AGGREGATE LIABILITY SHALL NOT EXCEED ONE HUNDRED DOLLARS ($100).

THE LIMITATION OF LIABILITY HEREIN IS A FUNDAMENTAL ELEMENT OF THE BASIS OF THE BARGAIN AND REFLECTS A FAIR ALLOCATION OF

\textsuperscript{145} \textit{Italian Colors}, 570 U.S. at 233.
RISK. THE APP AND SITE WOULD NOT BE PROVIDED WITHOUT SUCH LIMITATIONS . . . 146

The lawyerly skill invested in drafting this provision justifies the lengthy quotation. First, the consumers waive the liability for “any damages,” followed by the specification of their types, causes, and sources of law.147 Both the company’s breach of contract and any possible tort would not give rise to any consumer claims. Second, as the company foresees the possibility that some jurisdictions would not enforce such a clause, a dollar “cap” on the liability ($100) is introduced.148 Third, anticipating the arguments that the plaintiff might make in court, the company clarifies that “the allocation of risk is fair” and that these waivers essentially constitute an element of the price.149 “The app and site would not be provided without such limitations,” we read.150 The last provision is more than misleading. Many jurisdictions outside of the United States, including the European Union, have stringent limits on exculpatory clauses’ enforceability.151 Bumble offers its services there as well.

Empirical research shows that including exculpatory clauses in the ToS deters consumers from suing.152 On the level of society and the political economy, these clauses have a double effect. Yes, they make it more difficult for each consumer to seek damages. However, they also minimize the chances of proper “self-regulation” in the spheres where Congress, or state legislatures, decided not to act. Not only privacy problems but also non-personal data management, behavioral and mental harms, and countless others might never be tried in court.153

Warranty disclaimer has a similar effect. Venmo’s ToS include the following clause:

The Venmo services are provided “as-is” and without any representation or warranty, whether express, implied or statutory. We specifically disclaim any implied warranties of

147 Id.
148 Id.
149 Id.
150 Id.
153 See infra section IV.B.2.
title, merchantability, fitness for a particular purpose and non-infringement.  

In this case, even if a user makes it to court and somehow manages to invalidate the liability waiver, she will have a hard time proving a breach of contract/lack of conformity of the service with the contract, as the contract makes clear that no specific warranties are made. I will have more to say on this particular issue in the next section. As I will show, warranty disclaimers have a particularly damaging effect in digital capitalism; however, one should remember that they have been around for a while now.

3. Unilateral Alteration Clauses

The final category of the CUTs familiar to the law is the unilateral alteration clause. The firm reserves the right to modify or terminate the contract or the service itself through such a clause. In banking contracts, utility, and phone contracts, the federal courts have generally considered these clauses as enforceable. Not surprisingly, the ToS of online platforms often contain such clauses as well. For example, X’s ToS states:

Our Services evolve constantly. As such, the Services may change from time to time, at our discretion. We may stop (permanently or temporarily) providing the Services or any features within the Services to you or to users generally. We also retain the right to create limits on use and storage at our sole discretion at any time.

And:

We may revise these Terms from time to time. The changes will not be retroactive, and the most current version of the Terms, which will always be at twitter.com/tos, will govern our


155 See infra section III.C.2.


158 For an overview of unilateral alteration clauses across various sectors of the economy, as well as a discussion of their legal status, see Peter A. Alces & Michael M. Greenfield, They Can Do What?! Limitations on the Use of Change-of-Terms Clauses, 26 Ga. State Univ. L. Rev. 1099 (2009).

159 X Terms of Service, supra note 129 (Section 4, “Using the Services”).
relationship with you. We will try to notify you of material revisions, for example via a service notification or an email to the email associated with your account. By continuing to access or use the Services after those revisions become effective, you agree to be bound by the revised Terms.\textsuperscript{160}

The conditions under which a consumer decides to start using the platform, and the service features, might change overnight, at the company’s discretion. Formally speaking, the user reserves the right to walk away from the service once this happens. Unlike with some phone providers’ contracts, there’s no penalty for the user or an obligation to keep paying a subscription fee. However, to find consolation in this “equal” position of the user and the provider would be to miss the point entirely. As discussed in Part I, and as the Reader might know from experience, one’s presence is valuable only in the context of all these relationships developed on the platform. If someone habitually uses a particular platform to speak to a chosen audience, “quitting” that platform comes at a high cost. This cost could be lower if we lived in a world where platforms are interoperable (as the phone carriers are), but this is not the case today.\textsuperscript{161}

An example of unilateral alteration of the service came in the loud GameStop/Robinhood controversy.\textsuperscript{162} In their ToS at the time, which users had to accept, Robinhood stated, “I understand that Robinhood may, in its discretion, prohibit or restrict the trading of securities, or the substitution of securities, in any of My Accounts.”\textsuperscript{163} And they did so, overnight, without notifying the users in advance. Hence, even though the alteration clauses have been present in “boilerplate” contracts long before the full-fledged digitization of socioeconomic life occurred, their significance has vastly increased lately. To fully appreciate that, let us now consider a few other categories of CUTs present in ToS of online platforms, specific to digital capitalism.

\textbf{C. CUTs Specific to Digital Capitalism}

As noted above, in several ways, ToS resemble other types of “boilerplate” contracts. However, these similarities should not overshadow the differences. ToS differ from other kinds of boilerplate due to the context in which they function\textsuperscript{164} and their contents. Certain types of clauses (including certain types of CUTs) are very much ToS-specific. In this section, I take a close look at the examples of such CUTs and discuss their relevance.

\textsuperscript{160} Id. (Section 6, “General”).
\textsuperscript{161} See Brown, supra note 61; Palka, supra note 59.
\textsuperscript{162} See Yun Li, supra note 81.
\textsuperscript{163} Robinhood ToS, supra note 84 (Section 16, “Restrictions on trading”).
\textsuperscript{164} See supra Part II.
1. Content Modification/Deletion

Online platforms serve as repositories of users’ “content.” This category is very broad, encompassing not only typical instances of “speech” but also files stored online or the so-called “virtual items.” As already discussed, platforms have the factual ability to modify or remove this content (through “digital self-help”). In their ToS, they also state that they have a right to do so, usually with little or no limitations.

The case that most profoundly captured the American public’s minds has been then-Twitter’s flagging of the (then-president) Donald Trump’s tweets, followed by his de-platforming. The relevance of the platforms’ power toward freedom of speech has been broadly explored in the literature and, arguably, comes with its own political and constitutional considerations. Hence, in this Article, I will refrain from discussing free expression explicitly, referring the Reader to this vast literature on the subject. Instead, I want to focus on the more horizontal phenomenon—often overlooked—namely the platforms’ right and ability to modify/remove any type of user content.

Consider the following passage from the ToS of Pokémon Go, a mobile app that made headlines through its enormous profits and novel approach to gameplay, forcing the users to go outside and walk instead of merely sitting at home.

Certain Apps permit the purchase of virtual currency (“Virtual Money”), specific to each App, and use of that Virtual Money

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167 The developer, Niantic, Inc., uses the same Terms of Service for all of its apps.

to purchase virtual items or services expressly available for use in the respective Apps (“Virtual Goods”). You acknowledge that you do not acquire any ownership rights in or to the Virtual Money or Virtual Goods. Generally, we have the right to offer, modify, eliminate, and/or terminate Virtual Money, Virtual Goods, the Content, and/or the Services, or any portion thereof, at any time, without notice or liability to you.169

*Pokémon Go* makes money by selling “virtual currency” to its users, who in turn can exchange it for “virtual items.”170 However, the game’s developer, Niantic Inc., states in its ToS that when such a transaction occurs, users do not acquire any rights to this content, so it is free to modify/delete them. As neither the common law nor any statutory law grants the users rights in digital/virtual content, the ToS is the only source of their rights or lack thereof.171

This problem scales to other spheres of socioeconomic life. Every platform, regardless of the context of its operation, has the factual ability to engage in “digital self-help.” As the law is silent about users’ entitlements to digital content within the platform, the company claims the right to do so through the ToS. Amazon can remove listings, Google search results or ratings, Facebook and X posts, Bumble photos, YouTube videos, etc. All of them can also block/delete the entire accounts of their users. The conditions under which platforms intend to use this power are specified in the ToS and various kinds of “house rules,” usually collected in a different document, though incorporated into the contract.

Notice how such an ability has no counterpart in the familiar, offline context. To imagine one, consider a manufacturer of Moleskin notebooks reserving a right to unilaterally “delete” drawings or notes that a consumer has made in her notebooks. One day, a consumer wakes up and realizes that the drawing she made last night, with a pencil, has vanished. This is physically impossible; hence, there are no laws regulating such conduct. Yet, in the digital context, such a unilateral content deletion can occur easily.

Arguably, platforms would (as of today) have a right to modify/remove users’ content and accounts even if they did not explicitly reserve it or if they did

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170 This is the so-called “freemium” business model. For a detailed description of its features, see Hao-Chen Huang, *Freemium Business Model: Construct Development and Measurement Validation*, 26 Internet Rsch. 604 (2016).

not specify the conditions for such an action in their ToS. This is because, as noted above, no *prima facie* right in the content/accounts exists.\(^{172}\) However, from the corporations’ point of view, including such a right in the ToS serves as a kind of insurance policy should litigation take place. This might, by the way, be an alternative explanation for the existence of the so-called “precatory clauses” in the ToS.

David Hoffman brought renewed attention to the phenomenon of the ToS, including terms creating obligations for consumers, which, however, are almost never enforced in court (like creating a strong password). He writes:

> In short, consumers are apparently regulated by digital fine print, though it’s universally assumed that we don’t read it and, even if we did, that we’ll never be sued for failing to perform.\(^{173}\)

Hoffman’s explanation for the presence of such terms has to do with long-term relationships developed via such contracts and the shaping of consumer behavior in the context of such relationships.\(^{174}\) Quite possibly, the firms might be simultaneously realizing several objectives at the same time. From the company’s point of view, having consumers behave in a particular way (and so having no need to police them) is optimal. Nevertheless, once the need to police their behavior (through content/account deletion) occurs, such terms can serve as a legal basis.

Platforms have no need to sue their users to enforce the ToS. Often, they’re able to enforce the ToS unilaterally. The “precatory” terms are there in case the user sues the platform requesting to have the content returned. If ToS are generally enforced, this kind of CUT would be valid as well. Moreover, legislative proposals limiting the deployment of “digital self-help” to conditions specified in the ToS gain popularity. One such proposal has recently been adopted in the European Union.\(^{175}\) Nevertheless, suppose the ToS contain a clause stating that the provider has a right to remove any content for any reason. In that case, such a procedural guarantee does little to help the consumers.

The difficulty of achieving just outcomes only through procedural guarantees becomes even clearer when one considers another type of CUTs, the “provisions as is” clauses.


\(^{174}\) *Id.*

2. No Promises

The “as-is” clause emerged together with corporations’ attempts to disclaim warranties in “boilerplate” contracts. It has become widespread in the ToS of online platforms. However, the exact role it plays in the latter differs significantly from its function in the former. As a general rule, ToS do not contain any descriptions of the services they govern or promises directly made to the user.

Consider the following passages from Instagram’s ToS:

We agree to provide you with the Instagram Service. The Service includes all of the Instagram products, features, applications, services, technologies, and software that we provide to advance Instagram’s mission: To bring you closer to the people and things you love. The Service is made up of the following aspects:

- Offering personalized opportunities to create, connect, communicate, discover, and share . . .
- Fostering a positive, inclusive, and safe environment . . .
- Developing and using technologies that help us consistently serve our growing community . . .
- Providing consistent and seamless experiences across other Facebook Company Products . . .
- Ensuring access to our Service . . .
- Connecting you with brands, products, and services in ways you care about.
- Research and innovation . . .

And further:

Our Service is provided “as is,” and we can’t guarantee it will be safe and secure or will work perfectly all the time. TO THE EXTENT PERMITTED BY LAW, WE ALSO DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.

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178 See Pałka, supra note 18.
179 Instagram Terms of Use, INSTAGRAM (Jan. 4, 2022) [hereinafter Instagram ToS], https://help.instagram.com/581066165581870 (referring to section titled “The Instagram Service”).
180 Id. (Subsection titled “Who Is Responsible if Something Happens”).
The ToS says nothing about any particular features of the platform. Upon reading the ToS, the user will not know what exactly she will find there—will she be able to upload videos or comment on the content of others? She might expect that knowing the platform’s practice, but the description of the product’s features cannot be read anywhere. Instead, we find a general and vague wish list of goals and intentions (“fostering an inclusive environment,” “ensuring access,” etc.) How exactly will these goals be achieved? This is not clear.

The lack of the platforms’ features specifications, paired with the “as-is” clause, disclaiming any warranty (including “implied . . . fitness for a particular purpose”), puts the user in a very precarious position. A contract binds her without making any promise on the provider’s side, in an environment where the provider can re-design the service as they see fit. Hence, even assuming that a user manages to go to court and have the exculpatory clause invalidated, she will have a tough time proving any breach of contract, as the contract does not contain any promises in the first place. One cannot breach a promise if one never made one.181

Consequently, the Consumer Unfriendly Term in this context is not the “as-is” clause itself but rather the “as-is” clause inserted into the ToS which contains no description of the service. Should the “as-is” clause be absent, the consumer could argue that she developed reliance about their further existence based on the service features. However, platforms specifically write that no such expectation might be formed. They can not only modify the service at will; they are also not constrained by any of the users’ expectations when doing so.

3. Privacy and Data Management

Corporations use vagueness in their ToS not only as a means of limiting the users’ rights but also as a tool for expanding their own entitlements. Such a strategy is best visible in privacy policies, most often incorporated into the ToS. As noted above, privacy policies emerged as mandated disclosures, as Congress favored market self-regulation over substantive regulation by the law.182 However, since no privacy-policy-specific enforcement mechanism was put in place, consumers and common law courts began treating privacy policies as contracts183 while the FTC approached them as (potentially unfair) practices in

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(Un)expectedly, a legal device designed to serve as means for consumers’ empowerment was turned into a source of corporations’ rights to collect and use personal data. The limits of what the companies are allowed to do with users’ data stem from the privacy policies drafted by the same companies. And they make sure that these limits are not only minimal but also unclear. Consider the following statement from the ASICS privacy policy, offering a popular jogging app:

We may share your personal data with the following parties . . . Service Providers and Processor. We engage third party vendors, agents, service providers, and affiliated entities to provide services to us on our behalf, such as support for the internal operations of our websites, online stores (including payment processors and third parties we use of sending your orders to your home address), Services (e.g., technical support processing), as well as related offline product support services, data storage and other services.

First, this paragraph is full of abstract terms like “service providers” or “other services.” Who are these providers? What exactly do they do with the data? Second, the whole paragraph begins with a modal verb “may,” indicating uncertainty regarding whether the foreseen sharing will indeed take place or not. “May” can also be understood in a contractual sense, meaning “we are allowed,” but the document’s informational character indicates otherwise. A lawyer will be able to argue one way or another, but from the consumers’ point of view, the meaning is unclear. Third, a lot of used phrases are open-ended. When enumerating uses or third parties, the privacy policies will insert phrases like “such as,” “e.g.,” “including,” etc. Hence the reader never knows whether the provided list is exhaustive or not. She has all the reasons to assume the latter. However, she does not know.

As discussed in Part I, this information can be used by the company (and its “partners”) in a myriad of ways, including for addicting users to certain apps and monetization through advertising and other means. Possibly, leaving such choices to users’ individual decisions is a smart regulatory move – this is a question beyond this Article’s argument. However, the form in which privacy policies’ clauses are drafted – vague and general sentences meaning everything and nothing – is double-unfair to the consumers. First, it leaves them in the dark regarding the knowledge of how their data will be used. Second, it looks like a promise while, in fact, it practically does not constrain the company’s behavior at all.

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184 See Hartzog & Solove, supra note 182.


186 See Zakon, supra note 28.
4. Intellectual Property

Finally, the CUTs included in many platforms’ ToS encompass free licenses to monetize the users’ content. Consider how Facebook does it. As some of the content people upload is copyright-protected, Facebook needs a license to display it legally. Specifically, the provider will need a license to copy, display, and make the content available to other users, corresponding with the types of activities that the content can be an object of. However, the business conditions of this license are not in any way predetermined. Specifically, the fact that the license is royalty-free—users do not get paid, even if millions see their posts—is Facebook’s business decision, easy to force upon users because Facebook Inc. is a monopolist. Nevertheless, these conditions constitute a cost. In Facebook’s ToS we read:

The permissions you give us:

. . . Nothing in these Terms takes away the rights you have to your own content. You are free to share your content with anyone else, wherever you want.

However, to provide our services we need you to give us some legal permissions (known as a ‘license’) to use this content. This is solely for the purposes of providing and improving our Products and services as described in Section 1 above.

Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connection with our Products, you grant us a non-exclusive, transferable, sublicensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). As you might notice by looking at the text’s emphasized portions, Facebook’s wording is misleading, and this contractual condition is by no means the only possible one. Facebook claims that they need a license to display your IP-protected content, which is true. However, to do so, Facebook does not need a royalty-free license. It could agree to pay you a share of the profits it makes.

Such sharing needs not to be automatic. There could be a minimum number of engagements necessary for the provider to pay you, but the fact that you never participate in the profits is free-riding.

\[187\] In this case, the most important test being “originality.” For an overview of the ways various jurisdictions define this concept, see Elizabeth F. Judge & Daniel Gervais, Of Silos and Constellations: Comparing Notions of Originality in Copyright Law, 27 Cardozo Arts & Ent. L.J. 375 (2009).

\[188\] Facebook Terms of Service, FACEBOOK (Jan. 4, 2022), https://m.facebook.com/legal/terms (quoting Section 3: “Your Commitments to Facebook and Our Community”) (emphasis added).
IV. THE CASE AGAINST THE CUTS IN DIGITAL CAPITALISM

Until now, I have shown that the widespread use and the law’s acceptance of the CUTs in the online platforms’ ToS are detrimental to consumers’ interests alongside many dimensions. The CUTs make it harder for consumers to go to court and to seek remedy while in court, they decrease the consumers’ ability to foresee what the corporations will actually provide and enable the companies to extract value out of consumer’s data and user-generated content. Yet, the law still tolerates them, for the reasons of economic and democratic nature, though articulated long before the emergence of the current state of digital capitalism.

In this last Part, I reconstruct the scholarly arguments for the CUTs’ toleration in boilerplate in general, demonstrate why they do not hold in the context of digital capitalism, and argue why we should act to have them removed. In the first two sections, I keep the general terms “we” and “act” undefined, as the purpose is to defend the normative claim that CUTs are intolerable to the extent that requires action against their toleration. In the last section, I discuss the institutional (who is “we”?) and political (what does “to act” mean?) possibilities.

A. The Economic Perspective

The first case for the CUTs’ continued toleration and enforcement is economic: these terms are said or presumed (i) to be efficient or (ii) to come with positive price effects for consumers, or both. Are they?

1. Are CUTs in the ToS Efficient?

Economic efficiency is a fundamental concept in American law in general, and in contract law in particular. It has been used both as an explanatory tool (for arguing that the common law rules are the way they are because the courts tacitly gravitate towards efficiency) and as a normative threshold for assessing whether the rules are acceptable or how they should be modified. Though there are many ways to understand the concept, two are

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189 See Markovits & Schwartz, supra note 181, at 22 (“Formally speaking, efficiency is a property of allocations of resources. Such allocations are efficient if, in the relevant respect, they cannot be improved. Often, claims are made for the efficiency not of allocations of resources but rather of legal rules. Such claims should be understood to say that the adoption of the efficient legal rules will usher in efficient allocations of resources.”).


discussed most often: Pareto efficiency and Kaldor-Hicks Efficiency. Let us take a look at the CUTs (in “boilerplate” in general) from the efficiency standpoint.

A standard argument for tolerating and enforcing the CUTs in boilerplate would focus on the possibility of firms’ valuing the presence of such clauses more than (some) consumers would value their absence. For example, imagine you’re buying a widget for which the price, with CUTs in the contract, is $100. The firm, reluctant to get involved in long and costly litigation, values the CUTs quite highly; if unable to insert them in the boilerplate, it would choose to charge you $120 for the same product (to offset the expected costs of legal proceedings). Assume further that you are not really risk-averse in this particular transaction, and even though you would not mind having the ability to sue in your place in domicile and not being subject to limitations of liability, you also don’t really expect to have to go to court (how often do you sue the sellers of widgets anyway?). Consequently, let us assume the absence of the CUTs is worth $10 for you.

If the CUTs were outlawed, the firm would charge you $120 for a widget that is worth $110 for you (the original product $100 plus the $10 in value for the absence of the CUTs). Would such a result be efficient? By no means. There is an alternative world where, if the law allowed the presence and the enforcement of the CUTs, the firm would charge you $100 (its position would not change), but you could be made better off by $10 without making the firm worse off. Hence, in this example, the world without the CUTs is not efficient.

“But these numbers are just taken from thin air!” — you might think — “what if the firm values the presence of the CUTs at $15, whereas I value them at $20?” A reasonable objection, which, however, does not defeat the argument. In such a case, the firm would charge you $120 for a product with no CUTs in the boilerplate. Your preferences would be fully satisfied, and the firm would cash the $5 difference. Notice that if we assume that consumers’ preferences are known to the traders, society does not need any laws telling the firms what clauses to include (or not) in their boilerplate; they will do it on their own motion, responding to business incentives (as long as there is competition).

192 See Markovits & Schwartz, supra note 181, at 22 (“An allocation of resources is said to be Pareto efficient if it is such that no person could be made better off without also making someone else worse off.”).


194 This assumption has been made due to the information-conferring function of the price mechanism. See F. A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 519 (1945); Przemyslaw Palka, Algorithmic Central Planning: Between Efficiency and Freedom, 83 L. & CONTEMP. PROBS. 125 (2020).
The appeal of refraining from regulating the boilerplate and the CUTs in a top-down, horizontal manner is that different persons and firms value their presence or absence differently.\textsuperscript{195} There might be a group of consumers who really do not want to have the CUTs in their contracts, and thereby value their absence more than corporations value their presence. For such consumers, there would always be a corporation that offers a deal without the CUTs and makes money by doing so. At the same time, there might be a group of consumers who prefer a cheaper product and do not mind having the CUTs in the contract. In such a case, the market will also respond to their demand. Inserting mandatory contract rules,\textsuperscript{196} forbidding the parties from modifying the defaults—either by outlawing the CUTs or by enshrining them in the law—would always render some transactions inefficient.

Whether this argument holds in general, regarding all boilerplate contracts, is beyond the scope of this Article. There are voices to the contrary. James Gibson, for example, has claimed that the cost of processing the information about the clauses in the boilerplate — first, learning that the CUTs are there and, second, estimating their real value — are prohibitive for consumers.\textsuperscript{197} Put differently, the standard argument from efficiency assumes zero transaction costs on the side of the consumers, whereas, in the real world, these costs are so high that even knowing how much one values the absence of CUTs, and shopping for alternatives, never occurs. It is a neat model that, however, almost never describes reality.

However, in this Article, I would like to focus solely on whether this argument holds in the context of the online platforms’ ToS in digital capitalism.\textsuperscript{198} Let us, for that purpose, assume that the analysis from above is, in general, acceptable and correct. What makes the ToS different?

First, using many online apps or platforms is “free.” Of course, there are good scholarly accounts claiming that consumers “pay” for them with their

\textsuperscript{195} See Markovits & Schwartz, supra note 181, at 20 (“It is one thing for law to be used as a tool for promoting a single, dominant, religious or ethical creed, as in a totalitarian legal system. It is quite another for law to be used to promote the aggregate of the many competing values and ideals of the several citizens of a cosmopolitan state. [...] This problem naturally led those interested in social engineering in pluralist societies to try to develop a metric for aggregating the flourishing of the subjects in such societies without having to resolve their ideological disputes about in what such flourishing consists. One prominent approach to this task has been to take a subjective attitude towards flourishing—replacing the question what ends persons ought to pursue in order to live well with the question how successfully persons are pursuing the ends that they have set themselves, whatever these are.”).

\textsuperscript{196} For an overview of the concept and a classification, see Eyal Zamir & Ian Ayres, A Theory of Mandatory Rules: Typology, Policy, and Design, 99 Tex. L. Rev. 283 (2020).

\textsuperscript{197} See Gibson, supra note 103.

\textsuperscript{198} See supra Part II.
personal data—\textsuperscript{199} or “attention”—\textsuperscript{200}—we’ll come back to them soon—\textsuperscript{201}—but let us begin by noticing that a user of Instagram, X, or Google does not pay money for using them. In this world, it is hard to imagine how exactly the corporations would shift the costs of removing the CUTs from the ToS onto the consumers. One option would be to start charging them fees on top of the monetization of their data and attention. The other would be to try to “make up” the loss by showing even more ads or extracting even more value from data or consumers’ IP than the firms are currently doing. However, there are two major problems with these options.

Regarding value extraction: notice that the markets in digital advertising, and more generally data governance, are largely unregulated.\textsuperscript{202} In the U.S., companies are free to do whatever they specified in their privacy policies,\textsuperscript{203} and in the EU, despite regulations like the GDPR in place, they are much less constrained than one would assume.\textsuperscript{204} There is no “cap” on the number of ads they can show or on the amount of data they can gather.\textsuperscript{205} In this context, as long as there is a business case for value extraction (the expected profits surpass the costs), one should expect that the corporations are extracting it already. This is the beautiful and tricky thing about playing with simple economic models: if we want to simply assume that corporations shift costs onto consumers, we must also assume that they are already earning the money they could be earning.

Regarding the fees: platforms are global actors, operating in many other markets than the U.S., for example in the United Kingdom or the European


\textsuperscript{201} See infra section IV.B.2.

\textsuperscript{202} Ads cannot be misleading or deceptive, i.e., cannot insert untrue information into the market. See Luke Herrine, The Folklore of Unfairness, 96 N.Y.U. L. REV. 431 (2021); Lauren E. Willis, Deception by Design, 34 HARV. J. L. & TECH. 116 (2020).

\textsuperscript{203} See Hartzog & Solove, supra note 182.

\textsuperscript{204} See Palka, supra note 49.

\textsuperscript{205} Though some scholars have argued there should be, see Omri Ben-Shahar, Data Pollution, 11 J. LEGAL ANALYSIS 104 (2019).
Union (including Germany, Italy, France, etc.), where the CUTs are unlawful.206 As those are large markets—for example, Facebook had almost 44 million active users in Germany in September 2022207 and more than 53 million users in the UK the same month208—with robust legal systems, one would assume that the fear of litigation was substantial. Yet, users in these countries—not bound by the CUTs—receive exactly the same service, without having to pay a dime for the better boilerplate. Of course, there is a possibility that Meta Inc. and other platforms subsidize its European operations with CUTs-related savings from the U.S. However, this is just a guess, weakened by the second objection.

Second, many of the online platforms are (quasi-)monopolists. Google, Facebook, or X might not (yet) be considered to be possessing monopoly power under the existing American antitrust laws,209 but they are de facto monopolists in the market for googling, accessing Facebook content, or tweeting.210 Hence, the simple microeconomic analysis would have us assume that they are already extracting the consumer surplus and that the terms under which they offer their services (the ToS including the CUTs) are already inefficient.211 Put simply: these platforms probably already make much more money than they would have in a competitive market. Meaning, if they are expected to incur new costs (like the estimated cost of future litigation with no CUTs in their contracts), they cannot simply shift these costs onto the consumers (as they do not want to impose fees and cannot extract any more value from data) they will simply internalize the costs and make less money. Eliminating the CUTs in monetarily-free and non-competitive markets (it is important that both conditions are met subsequently) would not lead to shifting the costs onto the consumers but to lowering the consumer surplus extraction.

Consequently, we cannot conclude that the presence of the CUTs in online platforms’ ToS is efficient, unlike with the regular boilerplate (assuming zero transaction costs). The first objection to eliminating them does not hold.

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206   See Loos & Luzak, supra note 151; Micklitz & Reich, supra note 106; Peter Rott, Unfair contract terms, in RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW (2016).
210   See Palka, supra note 59.
2. What are the distributive price effects of the CUTs?

There is another economic argument for tolerating the CUTs: the price effects. It has recently been put most forcefully by Omri Ben-Shahar, in his review of Margaret Jane Radin’s book. In his words:

[T]he “price effect” means that one cannot evaluate whether boilerplate deletion of legal rights is good or bad for consumers without also looking at the price people are asked to pay for the “product + boilerplate” package. This is not an “efficiency” perspective. It focuses solely on the consumers’ well-being, not on the firms’ profits. It identifies inevitable trade-offs by asking what consumers would have to give up to secure the added protections that autonomists want to mandate.212

The starting assumption of this argument is the same as in the previous one: as eliminating the CUTs from boilerplate contracts increases the firms’ expected future costs of litigation, corporations will increase the prices of their products. However, rather than focusing on the inefficient outcomes of this move, Ben-Shahar points out the unfairness of its distributive consequences. When prices go up, some consumers will no longer be able to afford the product. Why would one do that to them? Ben-Shahar continues:

There may be a minority of citizens – I would guess part of a sophisticated elite – for whom the boilerplate rights-deletion bargain is undesirable and even offensive. For them, the degradation of consent and of legal entitlements cannot be priced . . . . Unfortunately, meeting the preferences of such groups would require the entire pool of consumers, including the vast majority indifferent to such privileges, to pay more as well. And so everyone would pay for benefits that some are disproportionately likely to enjoy.213

This is a strong objection. If people really do not care about the ability to sue or join a class action to recover damages, why should we price them out of the market? Notice, however, all the assumptions made here: (i) that prices necessarily will rise because of the CUTs removal, (ii) that it will be the least well-off to suffer from this, and (iii) that the vast majority of consumers are indifferent to the CUTs. Regarding the first two assumptions, I have recently put them to question by showing that comparative analysis (the price of products in jurisdictions that allow and don’t allow the CUTs) does not support them and that it is, in fact, the least-well off (consumers who cannot internalize the future

212 Ben-Shahar, supra note 6, at 895.
213 Id. at 900.
damage) who actually subsidize the better-off middle class.\textsuperscript{214} Regarding the last one, James Gibson—having pointed out that, due to the high cost of processing the contents of boilerplate and their consequences, consumers actually do not price them properly—demonstrates that the move Ben-Shahar makes is simply a guess.\textsuperscript{215} These are, however, arguments regarding the CUTs in boilerplate in general. One can argue one way or another.

In the context of digital capitalism, however, the same counterargument that was made in the subsection above applies. Many of the platforms are (quasi-) monopolists who do not charge monetary prices for their products. It is hard to imagine what “prices rising” even means in the context of Google, Facebook, or X. And there are good arguments to assume that, since these corporations already extract consumer surplus, no such thing will happen. Of course, this is just an educated guess, bound to be imperfect. However, within the internal logic of the economic argument, it is at least as valid as the objection itself. Hence, one cannot conclude that the objection holds in the context of the CUTs’ removal from the online platforms’ ToS.

To sum this section up: the economic case for tolerating the CUTs, focusing on efficiency and price effects, assumes rational consumers, acting on competitive markets (with real choices) for products that already have a monetary price. As none of these assumptions hold, and there is a good argument to be made that the platforms already extract consumer surplus, this case is pretty weak. Note that—even though there are arguments for doing so—I do not conclude that the objections do not hold in all boilerplate contexts, e.g., when the assumptions are correct. However, in the context of digital capitalism, they simply do not apply.

\textbf{B. The Democratic Perspective}

The second case for the CUTs’ continued toleration in the platforms’ ToS would downplay the intrinsic value of the rights lost by consumers or emphasize the democratic function of the “market’s” operation. The former concerns the questions of deontological nature, i.e., the question of whether human dignity\textsuperscript{216} or some other inalienable value simply demands that


\textsuperscript{215} See Gibson, supra note 103, at 262 (“[T]his last defense of boilerplate engages in the top-down regulatory judgments that contract law is supposed to render irrelevant. It is one thing when courts and legislatures issue judgments about contract terms; the results might be imperfect, but at least they are constrained by the rule of law and the political process. But why would we ever defer to such judgments when made by self-interested companies, unconstrained by market forces or the political process? Why would we assume that terms unilaterally imposed by sellers would happen to accord with customer preferences?”).

\textsuperscript{216} See Encarnacion, supra note 125.
individuals have a right to seek remedy for damages, unconstrained by the CUTs or not. This is a profound debate that far exceeds the scope of this Article, and so I only briefly signal it in the following subsection. The latter, however, focusing on consequentialist analysis, is where I believe the objection is the weakest and the case for the CUTs elimination the strongest. Put simply: in unregulated markets, absent meaningful competition, the CUTs structurally disincentivize the platforms from self-regulating for the safety of their products.

1. The Deontological View

One way to reconstruct the debate between the proponents and the opponents of the CUTs’ toleration is to posit that it concerns the following question: is there something inherently wrong with stripping individuals of their rights to effectively seek remedy in court; something so wrong that, in a liberal democracy, other considerations, like the economic effects, should not be considered, or at least significantly weakened? If the answer to this question is affirmative, there is a good chance that the argument is deontological in nature. In the words of Eyal Zamir and Barak Medina:

All deontological theories view the goodness of outcomes as a morally relevant factor, but, unlike consequentialism, they do not consider it the only intrinsically important factor. Deontological theories prioritize such values as autonomy, human dignity, basic liberties, truth telling, fidelity, fair play, and keeping one’s promises over the promotion of good outcomes. Whereas consequentialism judges the morality of an action (or anything else) according to its outcomes, deontology focuses on the morality of the action itself and on relations between people.217

Hence, a deontologist would object to the considerations from the previous section by stating that, even before we begin talking about the monetary value that consumers ascribe to their rights to effectively seek remedy, or their price effects, we should first ponder whether such rights should be seen as having a monetary value in the first place. Maybe they are priceless? And even if no one would advance such a strong claim—“priceless” would indicate that nothing can be more important than a right to join a class action, which does not seem convincing—a deontologist would caution before too easily treating rights, and the correlated corporate duties, as matters-to-be-priced in the same way as other products.

For example, John Goldberg and Benjamin Zipursky argue that the right to sue for damages is not only the foundation of American tort law but should be

seen as a principle of constitutional gravity. One simply does not price the values protected by the Constitution of the United States the same way one puts a price on a car or on an insurance contract. Eric Encarnacion maintains that the CUTs, or, in his words, “accountability waivers,” cannot be reconciled with consumers’ dignity as humans. There is something so fundamental about the fact that each and every adult American can get their day in court, unconstrained by the contract, that tolerating the CUTs is insulting the very essence of the Republic’s sociopolitical foundation.

There are two ways to answer such objections to CUTs’ toleration. On the one hand, one could attack them from within the deontological normative theories and try to show that the conclusions are questionable. Despite my best efforts, I was unable to find such an account. On the other hand, one could question the very premise of the argument, i.e., answer the question posed at the beginning of this subsection negatively. This is the approach that Omri Ben-Shahar adopts, writing:

Let us begin by assuming that the rights that boilerplates delete are important. They are important because they affect, in an economically meaningful way, consumers’ surplus . . . . How should we think about this trade-off of rights versus discounts?

218 See JOHN C. P. GOLDBERG & BENJAMIN C. ZIPIRUSKY, RECOGNIZING WRONGS 31 (2020) (“The idea behind the principle of civil recourse is straightforward. Our legal system recognizes in various ways that each of us is entitled to be free of certain kinds of interferences [or to have certain things done for us]. The more serious government is about enjoining these interferences, and the more serious each of us is about complying with the relevant norms of conduct, the more powerful is the argument that rights are at stake. When a right of this sort is violated, the victim should be able to demand certain things from the wrongdoer. Yet a demand of this kind would be hollow if the wrongdoer were simply free to ignore it. Thus, the state renders the victim’s demand legally enforceable, so long as it is authenticated through the judicial process. In opening courthouse doors, government gives victims an avenue of civil recourse.”).

219 However, for an argument why maintaining the distinction is much harder in practice than in theory, see Guido Calabresi, The Decision for Accidents: An Approach to Non-Fault Allocation of Costs, 78 HARV. L. REV. 713 (1965).

220 See Encarnacion, supra note 125, at 1332 (“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.”).

Unfortunately, there is no formula for an optimal balance. People may vary in their preferences for legal rights.\footnote{Ben-Shahar, supra note 6, at 895–96.}

Such a statement does not engage the deontological argument on its merits; it simply denies its relevance. In market relations, Ben-Shahar implies, what matters is preference satisfaction, efficiency, price effects, and surplus allocation, end of story. The disagreement is located not on a normative but on the meta-normative level: what kinds of arguments should we even consider? As noted above, taking sides on this issue goes beyond the scope of the paper. However, its very existence should give one pause when trying to discuss the law’s toleration of the CUTs solely from the economic perspective. Maybe there is something about the very essence of the society we want to live in that requires a consumer wronged by a platform to seek remedy in court, unconstrained by the CUTs? Though we can, legitimately, disagree on this question, we cannot simply assume it away. Hence, even if the deontological arguments—given the presence of the meta-normative disagreements—cannot single-handedly require the end of the CUTs toleration, the opposite view cannot be said to prevail either.

However, there is a much stronger (because it is a less controversial) democratic reason—a consequentialist, this time—to have the CUTs eliminated. Let us now consider it in detail.

2. The Consequentialist View: Self-Regulation or Self-Dealing?

The online markets are largely unregulated by the law. There is no federal statute (and a very limited amount of state laws) regulating privacy,\footnote{See Hartzog & Solove, supra note 182.} data governance,\footnote{See Salomé Viljoen, A Relational Theory of Data Governance, 131 YALE L.J. 573 (2021); Cohen, supra note 32.} mental health safety,\footnote{See Zakon, supra note 28.} or the attention economy online.\footnote{See Wu, supra note 69.} This is neither an “accident” nor an example of the law “lagging behind” technology. On the contrary, Congress had repeatedly demonstrated its ability to regulate the digital sphere when the prevailing ideologies demanded it, e.g., by shielding the emerging platforms from the liability for the users’ conduct through Section 230,\footnote{See Candeub, supra note 166.} protecting intellectual property online through the Digital Millennium Copyright Act\footnote{See Jeffrey Cobia, The Digital Millennium Copyright Act Takedown Notice Procedure: Misuses, Abuses, and Shortcomings of the Process, 10 MINN. J.L. SCI. & TECH. 387 (2009).} or “digital property” through the Computer Fraud...
and Abuse Act. These statutes, just as much as technological advances, have shaped the internet as we know it. In other spheres, however, Congress proactively decided not to act and instead to rely on the markets’ self-regulation.

In many ways, this seemed like a laudable decision. As it was impossible to predict the potential innovations that the technology could bring about, the lawmakers opted for the hands-off approach, allowing the corporations to experiment and the consumers to vote with their dollars. And, as long as the “innovation” was the goal, the plan seems to have worked. After all, corporations like Google, Facebook, Uber, or Airbnb all emerged in the United States, not Europe, where regulations were much more stringent. Yet, concerning harm prevention, the model was much less successful.

We are now only coming to grasp the potential harms to consumers that “free” online services bring about. “Privacy” has been on the scholars’ radar for a while now, but problems like online discrimination, manipulation, depletion of attention, addiction, or other mental health problems are the consequences we are only beginning to understand. If one recalls the public uproar following the revelations of the whistleblower Frances Haugen, who reported how Facebook Inc. (now Meta Inc.) knew and did nothing about the

229 See Kadri, supra note 43.
231 For an exposition of this argument, see Solove, supra note 50.
235 See Wu, supra note 69; Trzaskowski, supra note 200.
236 See Zakon, supra note 28; Rosenquist, supra note 28.
negative effects its product had on the users’ mental health,\textsuperscript{238} one thing is surprising, if one thinks about it. No litigation followed. If social media are indeed so harmful to our mental health—and a growing number of peer-reviewed psychological studies seem to confirm that\textsuperscript{239}—why did no class action emerge? And why has the corporation not done anything about this?

Even though there are many ways to understand “self-regulation,”\textsuperscript{240} the concept essentially boils down to an industry self-policing its own behavior without the external pressure from the law. There are many reasons why the firms would do so. The First has to do with competitive pressure. If company A offers software that keeps malfunctioning, and company B markets a similar product that works perfectly, A has an incentive to apply the higher standards without the law demanding it. Second, firms might fear government regulation. This, arguably, is what happened in the areas of privacy and data governance, where companies started voluntarily publishing privacy policies to deter Congress from enacting the laws over-curtailing their freedoms.\textsuperscript{241} If the lawmakers see that there is no “market failure,” they might be reluctant to act. Third, as corporations know that marketing unsafe products might lead to litigation and enormous damages to be paid out to consumers, they will preemptively apply safety standards that will stand scrutiny in court.\textsuperscript{242} In short, self-regulation can be expected to function well if:

Corporations face significant market pressure, or
Corporations fear government regulation, or
Corporations fear litigation and damages following an accident.
That the first assumption does not hold has been demonstrated already.\textsuperscript{243} The second seems absent due to Congress’s current inability to pass


\textsuperscript{240} See Price, supra note 230, at 1–22.

\textsuperscript{241} See Marotta-Wurgler, supra note 52, at 13–14.

\textsuperscript{242} See Richard J. Pierce, Jr., Encouraging Safety: The Limits of Tort Law and Government Regulation, 33 VAND. L. REV. 1281 (1980); Keith N. Hylton, When Should We Prefer Tort Law to Environmental Regulation?, 41 WASHBURN L.J. 515 (2001).

\textsuperscript{243} See supra Section II.A.
legislation resulting both from the divided chambers and a lack of a convincing narrative that could create political pressure (a part of which this Article hopes to provide). The third, however, is where the CUTs are to blame.

As American law stands now, it is prohibitively hard to seek damages for mental health harms. Contract law explicitly excludes damages for “emotional distress,” with two minor and specific exceptions, i.e., preparation of the wedding dresses and preservation of bodies for burial. Similarly, even though the American common law knows the torts of infliction of emotional distress, the threshold for claiming the damages is prohibitively high. Of course, these laws were adopted long before the emergence of digital capitalism and, arguably, when society’s understanding of how mental health operates was less robust than now. Yet, the path to change them is blocked by the CUTs.

Courts have in the past “regulated” harms resulting from technological advances in the past, most famously by developing the doctrine of privacy torts, following an article published in Harvard Law Review by Louis Brandeis and Samuel Warren. However, for this to happen again, a real prospect of litigation needs to exist. Notice how, in the time of sociotechnological flux, it is not just seeking damages but recognizing that some wrong should be treated by the law as an injury is at play. However, when a consumer is unable to bring a lawsuit to court, given jurisdictional clauses, class-action waivers, mandatory arbitration, and a whole range of liability and warranty waivers, the courts will never have a chance to speak on the issue.

Importantly, such court cases—leading to the “regulation” by the courts—do not really need to materialize for self-regulation to emerge. What is sufficient is that corporations see such cases as a real prospect and take preventive measures by proactively limiting the negative effects their products might have on consumers. By inserting the CUTs in their ToS, companies not only limit the chance that an individual consumer will be able to seek relief but—more strikingly from the democratic point of view—prevent the courts from ever recognizing harm as legally relevant damage. They insure themselves not only from having to pay but also from having to care.

245 See Markovits & Schwartz, supra note 181, at 89.
247 For an overview of the evolution and coming to grasp with online services’ negative impact, see JUDSON BREWER, UNWINDING ANXIETY: NEW SCIENCE SHOWS HOW TO BREAK THE CYCLES OF WORRY AND FEAR TO HEAL YOUR MIND (2021).
248 See Prosser, supra note 41.
249 See Warren & Brandeis, supra note 41.
250 See supra Part III.
Consequently, the “self-regulation” objection to removing the CUTs from the online platforms’ ToS does not hold. Moreover, upon closer scrutiny, a much more powerful reason for having the CUTs removed becomes apparent. Without the meaningful ability to sue for damages, when the new kinds of harms present in digital capitalism are concerned, given the unregulated markets and nonexistent competition, the CUTs perverse the idea of self-regulation into corporate self-dealing.

C. The Possible Path(s) Forward

Until now, I have laid down the arguments for why we should act to have the CUTs removed from the online platforms’ ToS. This account constitutes the primary contribution of this Article, as my goal is to shift the mindset around the “boilerplate” discussions in the context of digital capitalism. As long as the legal scholars, the policymakers, and the public believe that the CUTs somehow benefit them, they will be reluctant to act. For political pressure to emerge, people must want the CUTs to go. Convincing the readers that this is a worthy endeavor has been my goal.

In this last subsection, I survey the possible plans for action: who could do what to actually have the CUTs removed? As each plan comes with a myriad of complexities begging for a separate article, I do not discuss them in detail. Rather, my aim is to give a high-level overview of the options, to be further elaborated upon in a different piece or by anyone else.

The first option, and the most straightforward one, would be to pass legislation directly outlawing the use of CUTs or making them null and void. Such laws exist in other jurisdictions, like the UK or the EU, and so there is a lot to learn from their experience, for good and for bad. Importantly, such legislation does not need to be enacted, from the very beginning, at the federal level. Even if some states legislate that, as long as their residents are concerned, choice-of-law or choice-of-forum clauses are not binding in consumer transactions, this could have a significant effect.

The second option would be for the courts to act. Nancy Kim provided arguments on how the common law doctrine of unconscionability could be used to remove the CUTs from the online boilerplate. Alternatively, she suggests,

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251 For an argument on how this could fit within the American law, see RADIN, supra note 121, at 233–39; see also Adar & Becher, supra note 100, at 2431–32.

252 See Loos & Luzak, supra note 151; Micklitz & Reich, supra note 106; Micklitz, Palca & Panagis, supra note 106.

253 See Kim, supra note 18, at 208 (“I propose that the doctrine of unconscionability be looked at more holistically. Although consistent with the sliding-scale approach, it would not require an express finding of both procedural and substantive unconscionability. Unconscionability in many cases cannot be so easily divided. Courts are generally reluctant to assess the substance of terms. Furthermore, substantive unconscionability relies on norms which may be inappropriate in wrap
common law courts could recognize a “duty to draft reasonably” as a counterpart for the consumers’ duty to read.\textsuperscript{254} Margaret Jane Radin proposed an even more radical solution, relying on tort rather than contract. In her view, inserting the CUTs in one’s ToS could, in itself, be considered a tortious act.\textsuperscript{255} This approach has a clear advantage of being easy to operationalize even in situations when, due to political polarization, legislative action is difficult. However, there is also a good argument to be made that such a substantive change in law should result from democratic and not technocratic interventions.

The third option, and the most indirect one, would be to increase the public pressure on corporations to have the CUTs removed from their ToS. An increasing number of technological solutions enable consumers, journalists, and researchers to automatically detect such clauses.\textsuperscript{256} Exposing the scale of the phenomenon in media, paired with the growing understanding of why the CUTs are harmful to consumers and society, could assist either in creating the political pressure to regulate or the consumer boycotts, possibly sufficient for the corporations to self-regulate not only their products but also their terms of service.

V. CONCLUSION

My aim in this Article has been to advocate for a policy goal, namely, to have the Consumer Unfriendly Terms removed from online platforms’ Terms of Service. Having sketched the context of their operation—digital capitalism—and given an overview of the types of the CUTs’ widespread in the ToS, I have scrutinized the typical reasons for the CUTs’ continued toleration, including the economic and democratic arguments. I have shown that the CUTs cannot be presumed to be efficient or to come with positive price effects in digital capitalism, that there are strong arguments to consider other-than-economic values when analyzing them, and, most importantly, that their toleration by the law disincentivizes the platforms from self-regulating the safety of their products. How exactly the CUTs should be eliminated is a different problem, and

\noindent contracting scenarios. Norms reflected in online terms may not evidence fairness or efficient business practices; rather they may be the product of anticompetitiveness. Standard terms that are adopted by all companies in a market segment result in de facto term fixing that, like price fixing, is suboptimal and eliminates consumer choice.”).\textsuperscript{254} Id. at 186–89.

\noindent \textsuperscript{255} See \textsc{Radin}, supra note 121, at 197 (“Receipt of boilerplate is often more like an accident than a bargain. What follows from this fact for legal oversight of boilerplate? Bargains come under contract law; accidents come under tort law.”).

I have given a brief overview of the possibilities, including regulation, courts’ intervention, and public pressure.

The CUTs in the ToS are distinct from traditional “boilerplate.” Standard arguments for their toleration should be reconsidered. Otherwise, we will continue to live not in a self-regulated market, but a digital sphere constructed by self-dealing online giants, not only extracting the consumer surplus but getting away with harming the consumers in both old and new ways. One might be tempted to find comfort in the old arguments for why the CUTs are tolerable; in such a word, there is no need to take action. However, in the new context, these arguments no longer hold. Hence, it is time for the civil society and policymakers to take action aimed at getting rid of the CUTs.