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# The Behavioral Paradox of Boilerplate

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## THE BEHAVIORAL PARADOX OF BOILERPLATE

Tess Wilkinson-Ryan\*

*Abstract:*

Although assent is the doctrinal and theoretical hallmark of contract, its relevance for form contracts has been drastically undermined by the overwhelming evidence that no one reads standard terms. Until now, most political and academic discussions of this phenomenon have acknowledged the truth of universally unread contracts, but have assumed that even unread terms are at best potentially helpful, and at worst harmless. This Article makes the empirical case that unread terms are not a neutral part of American commerce; instead, the mere fact of fine print inhibits reasonable challenges to unfair deals. The experimental study reported here tests the hypothesis that when a policy is disclosed as a boilerplate contract term, it appears more legitimate, both morally and legally, than if it is disclosed elsewhere—even if the term would be plausibly subject to legal challenge in either case. Subjects from an in-person sample recruited by the Wharton Behavioral Laboratory were randomly assigned to read about a consumer policy communicated either as a standard term in a form contract, or as a company policy available on the firm’s website. They were more likely to think that harsh policies were legally enforceable, and morally defensible, when the policies were in the fine print—and more likely to object to a policy that was publicly available but not within the standard terms. Disclosing onerous terms up front does not affect consumer choice *ex ante* but creates a problematic assumption of enforceability when the terms turn out to be troublesome *ex post*. These results were also replicated using a sample of subjects from the general population. If correct, this phenomenon presents a substantial challenge to the traditional economic analysis of private bargaining in contract. The Article concludes with an analysis, in light of these findings, of doctrinal, political, and market mechanisms for policing unfair terms.

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## THE BEHAVIORAL PARADOX OF BOILERPLATE

### INTRODUCTION

Serious observers of modern contracting concede that the current state of the world is disclosure overload.<sup>1</sup> Most people interact with contract law almost exclusively via contracts of adhesion—take-it-or-leave-it deals between firms and individuals. For almost all of our legally binding agreements, we know there are standard terms that govern the peripheral features of our deals, and we do not know what those terms say.<sup>2</sup> Meanwhile, the doctrine of assent, the legal and philosophical core of contract, prevents contract liability when parties had no reason to know that they were bound.<sup>3</sup> This puts modern contract law in an uneasy position: what does it mean to take assent seriously when no one knows what they are assenting to? For now, courts treat each set of standard terms as the proper object of a party’s careful attention, and enforce a term if (and only if) the non-drafting party has explicit, specific notice of its existence.<sup>4</sup> The requirement of disclosure in consumer contracting is utterly uncontroversial.<sup>5</sup> And yet, disclosure requirements lead inexorably to more disclosures. The resulting state of

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<sup>1</sup> See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STANFORD L REV 545 (2014) (responding to the problem of “search costs” engendered by the volume of terms and disclosures available to individual buyers.); see also Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 1, 19 (2014) (customers visited the terms and conditions pages at rates around one-tenth of one percent).

<sup>2</sup> See, e.g., Jeff Sobern, Elayne Greenberg, Paul Kirgis & Yuxiang Liu, *‘Whimsy Little Contracts’ with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 46 (2015) (reporting that a majority of respondents did not know whether a contract included an arbitration clause even when they had just read the contract in question.)

<sup>3</sup> See, e.g., L. L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages (pt. 2)*, 46 YALE L.J. 373, 420 (1937) (“The answer to the question of *Hadley vs. Baxendale* (where shall we stop?) must inevitably be as complex as the answer to the question (where shall we begin?) which is implicit in the law of mutual assent...”); cf Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PENN. L. REV. 1829 (2004) (in contrast to the mutual assent approach, the no-retraction principle developed here suggests that when two parties attach different, but equally plausible, meanings to their agreed-upon contractual obligation, the absence of consensus would not negate any liability.)

<sup>4</sup> See, e.g., Edith Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 515 (reviewing the practice of “hiding” onerous terms, and citing to caselaw on the unenforceability of hidden terms).

<sup>5</sup> For a more comprehensive discussion on the ways that the law has viewed disclosure rules, see generally Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 U. VA. L. REV. 565 (2006).

affairs is a deluge of unreadable terms that courts and policymakers simultaneously require and regret.

This Article has two related goals: first, to show empirically that disclosing terms has perverse effects on parties' behavior in the shadow of the law; and second, to make the case that disclosure requirements undermine the most promising mechanisms for policing unfair terms. This analysis presents a substantial challenge to the traditional economic analysis of private bargaining in contract. Economic theories of contracting are built on the value of information, a value that is typically vindicated via disclosure requirements. By contrast, the arguments presented here are more of a piece with the broad literature on the dubious utility of disclosure for consumer protection—but this Article goes further, and turns the standard inquiry on its head. Empirical scholarship has been uniformly skeptical of the benefits of disclosure, but even those analyses have missed something in their one-sided framing of the problem. We should be asking not just whether there is any *benefit* to disclosure in consumer contracting, but whether there is any *harm*.

The treatment of consumer contracting elaborated here begins with the now-uncontroversial fact of universal non-readership.<sup>6</sup> Starting from the premise that no one reads their form contracts, I argue that we could reasonably conclude that there is no communicative distinction between ten pages of boilerplate and zero pages of boilerplate. The only difference between contracts with and without disclosure is the fact, rather than the function, of the paperwork, fine print, attestations of readership, “I agree” clicks, and hyperlinked privacy policies. If terms and conditions have no practical value to non-drafting parties, we should doubt that they are making contract law better.

The next logical step in the inquiry is to ask, what if the terms are actually making things worse? Let us assume that the presence of extra text does not increase a party's understanding of the deal. Does that mean that the text has no effect on her behavior at all? In an era of unprecedented disclosure overload, we have neglected to ask what most people think of all the unread terms—do they think they are supposed to read them? Do they think they are supposed to ignore them? Do they think the legal system takes them seriously?

In fact, these kinds of questions are very much a part of the contracts literature outside of the consumer context. Scholarship and commentary on consumer contracting has largely overlooked the copious research demonstrating that

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<sup>6</sup> See, e.g., Bakos, Marotta-Wurgler & Trossen, *supra* note 1 at 14 (showing overwhelming non-readership for a sample of online contracts).

contracts have social meaning apart from their content.<sup>7</sup> We have at least fifty years of empirical evidence of strong moral and social norms around contracting,<sup>8</sup> including the special “vener of legality”<sup>9</sup> of policies embodied in contract. That research has largely been about contracts with salient interpersonal or reputational stakes—contracts exchanged between long-term commercial partners, or contracts between individuals for the sale of land or goods, for example. But there is some evidence that contracts have social and moral weight even for one-shot small-scale transactions (i.e. sales) between individuals and corporations.<sup>10</sup>

The normative status of promissory morality is disputed.<sup>11</sup> On the one hand, moral norms may keep contracts on track and out of (costly) court. In the context of consumer contracting, though, the terms may deter complaints, or exit, or even legal challenges, precisely because they appear morally and legally legitimate in a way that non-contractual policies do not.<sup>12</sup> This is the motivating concern, and the empirical focus, of this Article. If individuals think that contract terms have legal and moral force, then the mere fact that unfair terms have been disclosed via contract may make consumers worse off by deterring their legitimate objections.

The experimental study reported here offers a case study for precisely this concern. Participants in a questionnaire study considered the case of a customer taken aback by an unusual fee—in one case, for example, a \$200 “processing fee” charged for renters who received parking tickets. When the fee was described on the company website, separate from the contract transaction between the renter and the agency, readers were skeptical. They thought the fee was unfair, bad business, and maybe even illegal. But for participants who read about the fee in the context of the form contract—as a term embedded in the unread fine print—

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<sup>7</sup> See, e.g., Margaret Radin, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (Princeton University Press 2014).

<sup>8</sup> See Tess Wilkinson-Ryan *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default* 64 VAND. L. REV. 1547 (2011) (discussing moral opposition to strategic default in mortgage contracts); Tess Wilkinson-Ryan, *Breach is for Suckers*, 63 VAND. L. REV. 1003 (2010) (with David Hoffman) (identifying breach as a moral violation that causes affront).

<sup>9</sup> See Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandatory Disclosure*, 159 U. PA. L. REV. 647, 734 (2011) (noting that one downside of over-disclosure is the possible false signal to readers that the disclosure has a presumption of legal force.)

<sup>10</sup> See, e.g., *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 Vand. L. Rev. 1546, 1562-1574 (2011) (reporting results of an experimental survey study of attitudes toward mortgage companies).

<sup>11</sup> See, e.g., Seana Shiffrin, *Divergence of Promise and Contract*, 120 Harv. L. Rev. 708, 740 (2007) (discussing the importance of a culture of moral character for the social and legal order).

<sup>12</sup> See, e.g., Omri Ben-Shahar, *Regulation by Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 885 (2013) (“The social experience of receiving fine print is annoying, alienating, and even degrading.”)

they viewed it more favorably. Their responses suggest that they would be less likely to bring a legal action but also more likely to regard the firm as a reasonable counterparty. Such a response has deep implications for the evolution of caselaw in consumer contracting, and for the plausibility of a functioning market for contract terms.

This Article proceeds in five parts. Part I describes the legal, political, and cultural status quo vis a vis consumer contracting in terms of widespread and undertheorized ambivalence. Courts, legislatures, and individuals all understand the problem of unreadability, but their normative and prescriptive statements are often jarringly dissonant—attending to the impossible demands of boilerplate in some cases and ignoring it in others, with real consequences for consumers. Part II describes the traditional economic analysis of standard terms, an approach that views disclosure as a low-cost means of facilitating deals that benefit both parties. Evidence of non-readership has not been ignored by the law and economics movement, and more recent scholarship has identified more nuanced interventions to rescue the promise of disclosure for consumer contracting. Part III describes a converging body of empirical research on contracts, research that has yet to be brought to bear in a sustained way on contracts of adhesion. Empirical explorations of the psychology of contracts has explored two parallel findings: individuals take contracts very seriously as moral obligations, and individuals believe that the legal and moral implications of contracting instantiate at the formal moment of assent, however thin or one-sided. This research lends itself to a novel understanding of the relationship of consumers to their unread standard terms—it suggests that they may take terms seriously as legal and moral obligations *even when* the contract’s procedural and substantive fairness are clearly in doubt. Part IV presents the results of an experiment testing the differential effects of company policies embedded within form contracts vs. those that are posted and available but not explicitly contractual. When policies—like fees, waivers of liability, dispute resolution processes, etc.—are contracts, they receive greater deference and are judged more favorably than those same policies disclosed outside of contract. Part V considers the implications for political and legal approaches to policing unfair terms.

## I. LAW OF FINE PRINT: TAKING STANDARD TERMS SERIOUSLY

This Part reviews both the straightforward doctrine of consumer contracting, as well as the evidence of what I describe as a growing ambivalence toward standard terms.

I reiterate at the outset of this discussion that I am assuming that meaningfully increasing readership is neither desirable nor practical. There are serious scholars who appear to disagree<sup>13</sup>, but I am setting those arguments aside for the purposes of this Article. Perhaps the most influential paper in support of the no-reading premise is from Omri Ben-Shahar and Carl Schneider, arguing that reading all the terms and disclosures is literally not compatible with a minimally acceptable level of economic and social activity.<sup>14</sup> Reading is costly<sup>15</sup>, and most terms are very, very low-stakes<sup>16</sup>—the documented proliferation of terms over the last fifty years at least suggests the declining marginal relevance of each additional disclosed term.<sup>17</sup> The probability that reading a given term will change any measurable outcome for the consumer is vanishingly low.<sup>18</sup> Most people should not read most terms, because the cost of reading is greater than its expected value. Furthermore, aggregating across consumers, there is no evidence that a small number of diligent readers discipline the market.<sup>19</sup> This is very well-trodden academic ground,<sup>20</sup> and in the remainder of the article, I take non-readership, both descriptive and normative, as an irreversible fact.

#### A. Doctrine: Taking Unread Terms Seriously

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<sup>13</sup> See, e.g., Ayres & Schwartz, *supra* note 1 (suggesting a warning-box method of alerting consumers of unexpected terms).

<sup>14</sup> Ben-Shahar & Schneider, *supra* note 9.

<sup>15</sup> Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181 (2010) (arguing that providing terms after purchase is preferable because reading terms is so onerous.) See also Aleecia McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: A JOURNAL OF LAW & POLICY 540 (estimating that the average reader would require 154 hours of reading time dedicated to privacy policies alone, a cost of over \$2,000).

<sup>16</sup> See, e.g., Zev Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168.1 J. INST. THEORETICAL ECON. 124 (2012) (citing as one of the “typical explanations” of low readership the “low stakes of the exchange.”).

<sup>17</sup> See, e.g., Ben-Shahar & Schneider, *supra* note 9 (arguing that the cost of terms ought to include the overall readership loss as a function of each additional term in a contract).

<sup>18</sup> See, e.g., Omri Ben-Shahar, *The Myth of the Opportunity to Read in Contract Law*, 5.1 EUROPEAN REVIEW OF CONTRACT LAW 1, 15 (2009) (“If we succeeded in reading the text and understanding it, we are often struck by the remoteness of the contingencies it covers – ones that we don’t expect to materialize, such that cost of figuring out and improving the terms that apply to these contingencies is not worth it.”)

<sup>19</sup> This is not to say that consumers have no effect on boilerplate. They almost certainly do, by public complaints, legal actions, online reviews, etc.

<sup>20</sup> See, e.g., Trossen, Marotta-Wurgler & Bakos, *supra* note 1 (offering evidence that the negligible fraction of readers did not reach the threshold for market influence); see also Ben-Shahar, *supra* note 18.



In consumer contracting, the ritual of documentation and provision of terms is essentially vestigial, at least as a form of assent-inducing communication between the parties. And yet, the idea that *some* fine print *could* be readable undergirds the doctrinal focus on assent. Certainly as a matter of black letter law, courts assess assent with respect to whether a party could have read the term in question.<sup>21</sup> Whether or not a company policy that affects consumers is enforceable depends on whether the consumers have adequate notice that the policy exists: would the “reasonably prudent offeree”<sup>22</sup> have had notice and an “opportunity to read”<sup>23</sup>? As such, the status of unread terms is relatively straightforward; for almost any particular term, the non-drafting party is bound to the terms the drafter prefers.<sup>24</sup>

The reasonable notice approach seems unassailable on its face: if firms do not inform consumers that the deal includes other terms, those terms cannot possibly be a part of the deal.<sup>25</sup> You cannot be deemed to have assented to a contract if you do not have reason to expect its existence.<sup>26</sup> Enforcing a contract for terms known only to one party would be truly laughable in the contracts canon—Dr. McGee cannot enforce an agreement for extra medical procedure on George Hawkins’s foot if he fails to mention it before George relents, even if that’s what the doctor had in mind when he was begging George to let him perform the hand surgery.<sup>27</sup> The Carboloc Smoke Ball Company cannot require Mrs. Carlill to keep her failed flu-fighting attempt a secret without including that provision in their advertisement.<sup>28</sup> These would be unthinkable results—whole bodies of contract

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<sup>21</sup> See, e.g., *ProCD vs. Zeidenberg* (deciding that a clickwrap agreement is enforceable because the plaintiff could not purchase without seeing the link to the terms and conditions.) See also Robert Hillman, *Rolling Contracts* 71 *FORDHAM L. REV.* 743, 756 (2002) (arguing that consumers are highly unlikely to read any terms that follow, but that as long as they had an opportunity to do so—perhaps especially in the “comfort of their own home”—the particular terms should be enforced.)

<sup>22</sup> *Specht v. Netscape Comm’ns Corp.*, 306 F.3d 17 (2d Cir. 2002).

<sup>23</sup> *Id.* See also Ben-Shahar *supra* note 18 (describing the legal approach to evaluating whether parties have had an opportunity to read and recommending labels and warnings instead of terms.)

<sup>24</sup> See, generally, Avery Katz, *Your Terms or Mine: The Duty to Read the Fine Print in Contracts*, 21 *RAND J. ECON.* 518 (1990).

<sup>25</sup> See, e.g., Hillman *supra* note 20 at 744 (“Theorists and judges have analyzed this problem by determining *when* the contract is formed. Most reason that the contract is formed either when the consumer orders and pays for the goods and the seller ships them, or when, after delivery, the prescribed “accept or return” time expires. If the former, the new terms that arrive after formation of the contract are proposals for additions to the contract that do not become part of the contract.”)

<sup>26</sup> See, e.g., *Specht vs. Netscape* 306 F.2d 17 (2<sup>nd</sup> Cir. 2002)(distinguishing between agreement to terms and pressing “download” without more warning about the existence of terms).

<sup>27</sup> *Hawkins vs McGee*, 146 A. at 643. (1926).

<sup>28</sup> *Carlill v. Carboloc Smoke Ball* EWCA Civ. 1 (1892).

law (foreseeability<sup>29</sup>, misunderstanding<sup>30</sup>, and the Mirror Image rule<sup>31</sup>, to name a few) are premised on the notion that parties should not be subject to liability they could not see coming. To do so would be to undermine our confidence in the benefit of the bargain. All told, the insistence on notice and disclosure flows neatly from the economic analysis.

In fact, though, it ought to be somewhat surprising that the doctrine of assent remains truly robust in the common law of consumer contract. Does it really make sense to ask whether particular parties have “sufficient notice”<sup>32</sup> that terms exist, or a reasonable opportunity to read them “to his heart’s content”<sup>33</sup>? In their written opinions, judges seriously explore the question, for example, of whether the casual user of a website should have known that there were terms of use and whether that user could have learned those terms without too much hassle.<sup>34</sup> This is surely all but theoretical in a world in which terms are always expected<sup>35</sup> and never read; in fact, most people recognize that changing the placement of the link or the size of the font or the leisure with which consumers may peruse the fine print has no practical effect on either the likelihood or the benefit of reading.<sup>36</sup>

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<sup>29</sup> See, e.g., Melvin Aron Eisenberg, *The Principle of Hadley vs. Baxendale*, 80 CAL. L. REV. 563 (1992) (describing the longstanding focus of the foreseeability doctrine on the core understanding of the parties’ assent).

<sup>30</sup> See, e.g., George E. Palmer, *The Effect of Contract Misunderstanding on Formation and Reformation under the Restatement of Contracts Second*, 65 MICH. L. REV. 33 (1966).

<sup>31</sup> See, e.g., Douglas Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of Section 2-207*, 68 VA. L. REV. 1217, 1235 (1981) (describing the historical application of the mirror image rule to refuse enforcement when courts were not clear that parties would have come to terms).

<sup>32</sup> See *Specht*, *supra* note 26 (asking whether a link to terms positioned to require scrolling down the webpage was sufficiently available to put the user on notice).

<sup>33</sup> See e.g., *In Re Realnetworks* 2000 WL 631341 (N.D. Ill. 2000) (finding an arbitration clause enforceable in part because “The pop-up window containing the License agreement does not disappear after a certain time period; so, the user can scroll through it and examine it to his heart’s content.”).

<sup>34</sup> See, e.g., *Discover Bank vs. Superior Court* (striking down an arbitration clause in part because the term was included as part of a “bill stuffer.”)

<sup>35</sup> See, e.g., *Hill v. Gateway*, 105 F.3d 1147 (11th Cir. 1997) (Easterbrook opinion arguing that failure to warn customers over the phone of additional terms arriving by mail is harmless, because purchasers of such good always expect terms).

<sup>36</sup> See, e.g., Hillman, *supra* note (arguing that “methods of attracting attention to the terms, such as requiring bold text or clicking after each term on the screen (or both), might increase reading, but analogous strategies in the paper world have had mixed results, probably in part because consumers, worn down by the contracting process, are unlikely to be riveted to attention by such formalities.); cf Ayres & Schwartz, *supra* note 1 at 561 (noting the “blinding reality” that consumers do not read standard form contracts but nonetheless proposing a warning label system with high-salience terms in a standardized warning box).

## B. Case Study of Assent Gone Awry: Click-Wrap and Browsewrap

When courts analyze assent for the purposes of determining enforceability, they drill down into the particular facts of each website's hyperlinked terms of service, or each vendor's modification by bill stuffer. Take, for example, the growing doctrine of browsewrap terms.<sup>37</sup> In a browsewrap contract, users encounter a link on a website called "Terms and Conditions" or "Terms of Service."<sup>38</sup> They can continue using the site or making a purchase without looking at the terms and without indicating that they agree to the terms.<sup>39</sup> The enforceability of browsewrap turns on notice—whether the link is conspicuous enough.<sup>40</sup> Thus, the analysis of an unenforceable term often looks like this (in this case, an action to refuse enforcement of a browsewrap term on Zappos.com):

The Terms of Use is inconspicuous, buried in the middle to bottom of every Zappos.com webpage among many other links, and the website never directs a user to the Terms of Use. No reasonable user would have reason to click on the Terms of Use.<sup>41</sup>

In a suit against the genetic testing service 23andme, plaintiffs argued that they had not consented to arbitration.<sup>42</sup> The court agreed that the Terms of Service link was not prominent enough to make assent binding at purchase, but decided that when plaintiffs registered for their accounts and had to click "Yes, I have read and agree to the Terms of Service and Privacy Statement", they had enough notice to make the term binding.<sup>43</sup>

These analyses do not just assume that terms are everywhere, or that reading is futile, or that consumers do not choose on terms even if they know them. They treat assent to contracts of adhesion the same way they treat assent when

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<sup>37</sup> Browsewrap agreements are distinguished from clickwrap agreements, in which the terms are again offered via a link to another page, but users cannot proceed without clicking "I agree." Clickwrap agreements are almost always enforceable, on the grounds that the consumer received notice of the terms when she had to click 'I Agree' to move forward with the transaction.

<sup>38</sup> See, e.g., Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today's Economy?* 78 WASH. L. REV. 265 (2003) ("A browse-wrap agreement is an online contract that governs the use of a Web site but does not require users of the site to affirmatively agree to the terms and conditions of the contract.")

<sup>39</sup> *Id.*

<sup>40</sup> See, e.g., See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. Rev. 429 (2002).

<sup>41</sup> *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058 (2012).

<sup>42</sup> *Tompkins v. 23andMe, Inc.*, No. 13-CV-05682-LHK, 2014 WL 2903752, at \*5 (N.D. Cal. 2014).

<sup>43</sup> *Id.*

individual parties are negotiating a deal from scratch, investigating the details of each manifestation.<sup>44</sup> In consumer contracting, the duty to read is a legal fiction; the hoped-for readership neither physically possible nor desirable, but this is not the tack that courts take in their opinions. Courts can and do acknowledge the widespread failure to read, but an individual's failure to read in any specific case is read against the particulars of the context and the contract, not the cultural background of disclosure overload. The law of consumer contracting as it is interpreted by courts is just the law of contract, taking assent as seriously for boilerplate as for negotiated deals.

All told, the law of assent in consumer contracting leaves us in an uneasy place: anyone reading a judicial opinion in contract law would have no reason to think that assent to standard terms is dead.<sup>45</sup> But surely analyzing assent to consumer contracts in any kind of granular way is disingenuous, when we all know that consumer contracts are unreadable all the time, no matter how close or how far the link to the "Privacy Policy" is to the "Checkout" button. The descriptive norm (no reading) and the prescriptive norm (reading) may set up individuals, and possibly courts, for a confused analytic stance with respect to contractual fairness. In any given case, it is easy to imagine how a party could and should have read the fine print<sup>46</sup>, and easy to create a story about the party's failure of reasonable prudence.<sup>47</sup> The implications of the should-have-read narrative are less coherent and more troubling, however, in an economic landscape overloaded with terms and with a functional readership rate of zero.<sup>48</sup>

Even as courts pay little heed to the unrealistic demands of reading, scholars and commentators alternately and simultaneously declare that we cannot read<sup>49</sup>, but

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<sup>44</sup> See, e.g., *ProCD vs. Zeidenberg*, *supra* note 21 (opening with broad affirmation that traditional rules of assent apply equally to online commerce).

<sup>45</sup> See, e.g. *Specht v. Netscape*, 306 F.3d 17 (2d Cir. 2002).

<sup>46</sup> For a more comprehensive discussion see Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA. L. REV. 1745, 1770 (2014). In particular, the psychological phenomenon of interest is "norm theory," which posits that some counterfactuals are easier to imagine than others—and that when a counterfactual in which a person avoids a harm via his or her own actions is particularly available, cognitively speaking, there is more blame and regret associated with the harm. Norm theory was originally described in Daniel Kahneman and Dale Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCH. REV. 136 (1986).

<sup>47</sup> See, e.g., Robert Agans & Leigh Shaffer, *The Hindsight Bias: The Role of the Availability Bias and Perceived Risk*, 15 BASIC & APPLIED SOC. PSYCH. 439 (1994) (explaining the bias in evaluating risky outcomes in hindsight based on the salience of the bad outcome).

<sup>48</sup> See Trossen, Marotta-Wurgler & Bakos, *supra* note 1.

<sup>49</sup> See, e.g., Debra Pogrud Stark & Jessica Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, NYU J. LAW & BUS. (2009) (identifying social norms of non-readership); see also, Noah Feldman, *When You Can't Find the Fine Print (Or Read*

sometimes we can read the important parts<sup>50</sup>, but we should have read in this case<sup>51</sup>, but readership is a necessary legal fiction<sup>52</sup>, and so forth. Given the legal backdrop reviewed above, it should perhaps not be surprising, that until very recently, the policy responses to widespread non-readership were about how to get terms to be more readable and how to get consumers to read them.<sup>53</sup> This policy response is a direct result of the structure of modern assent doctrine. The common law frames the problem of assent to unread terms as either a failure of notice (term is not enforceable) or as a failure to read (term is enforceable). Consumer contracts do a bad job of communicating terms, and consumers do a bad job of reading terms. The natural response to this problem is to try to help consumers understand the important things in their contracts. The focus has therefore been on the cognitive barriers to reading: limited foresight<sup>54</sup>; limited attention<sup>55</sup>; limited literacy<sup>56</sup>; limited numeracy<sup>57</sup>; and most of all, limited time.<sup>58</sup> The cognitive approach is described in more detail in the next section; the point here is to flag the relationship between the evolution of the common law in this area and the nature of the response from academic and policy commentators.

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*It*), Bloomberg News, March 28, 2016, available at <https://www.bloomberg.com/view/articles/2016-03-28/when-you-can-t-find-the-fine-print-or-read-it> (“When was the last time you actually read the terms of service before clicking “I agree” on a website? Unless your answer is “never,” I don’t believe you -- and I don’t think it’s your fault, either.”)

<sup>50</sup> See, e.g., Wilkinson-Ryan (2014) *supra* note **Error! Bookmark not defined.** (evaluating the possibility that individuals might “triage” their contract readership, and select to read the most important terms).

<sup>51</sup> See Feldman, *supra* note 49 (explaining that Judge Diane Wood’s decision in a recent contracts case reaffirmed that “the inquiry into whether a contract had been formed was case-specific).

<sup>52</sup> See, e.g., See, e.g., Robert Hillman, *Online Boilerplate: Would Mandatory Online Disclosure of E-Standard Terms Backfire?* 104 MICH. L. REV. 837, 847 (2011) (“Disclosure laws in the context of e-standard-form contracts would mean that lawmakers were making an effort to turn into something more meaningful the ‘apologetic’ legal fiction that consumers understand and assent to the terms of their e-standard-form contracts.”).

<sup>53</sup> See, e.g., Oren Bar-Gill & Ryan Bubb, *Credit Card Pricing: The CARD Act and Beyond*, 97 CORNELL L. REV. 967, 1003 (2011) (advocating for new and better disclosure regimes including aggregated fee information).

<sup>54</sup> Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STANFORD L. REV. 211 (1995).

<sup>55</sup> Russell Korobkin, *Behavioral Economics, Contract Formation, and Contract Law* in BEHAVIORAL LAW AND ECONOMICS 116 (Cass R. Sunstein, ed. 2000).

<sup>56</sup> Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STANFORD L. & POLICY REV. \_\_ (2000).

<sup>57</sup> See generally, Sam Allgood & William Walstad, *Financial Literacy and Credit Card Behaviors” A Cross-Sectional Analysis by Age*, 6 NUMERACY 3 (2013) (finding that deficits in financial literacy predicted costly credit card practices).

<sup>58</sup> Ben-Shahar & Schneider, *supra* note 9 (describing the absurd time commitment required to read all the standard terms faced by a single consumer in a single day).

## II. TRADITIONAL ECONOMIC APPROACHES TO DISCLOSURE

Disclosure is at the core of any economic account of contracting. For at least 150 years, the implicit consensus of common law legal systems reflects a vision of contracts as financial instruments—tools of commerce.<sup>59</sup> A central justification for state intervention in contractual agreements is that efficient exchange requires enforcement in order to permit parties to rely on their deals when performance is sequential rather than simultaneous.<sup>60</sup> Contracts are tools of wealth creation, and the guarantor of mutual benefit is mutual assent to the terms of the deal. On this theory, we can be confident that contracts are wealth-enhancing, because people do not agree to deals that make them worse off, and without agreement there is no contract. These efficient exchanges, secured and reliable because of contract law, are at the heart of a robust market economy.

### A. *Information: Imperfections and Asymmetries*

For an economic analysis of modern contract law and theory, disclosure is *the* bulwark against bad deals. Economic theory has long focused on the deep problem of imperfect information for efficient bargains; choices based on imperfect or asymmetric information disrupt markets.<sup>61</sup> The solution, or at least the goal of proposed solutions, is more information—sharing information, making information easy to assimilate, and facilitating information gathering. Boilerplate *is* information, and in consumer contracts, it is all that there is to know about the terms. If the deal is the product, with terms as features of the product, then a party who does not know the content of the drafter's terms has imperfect information

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<sup>59</sup> See, e.g., Ian Macneil, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 856 (1978) (describing the evolution of contract law and situating it within the classical formulation of contract as discrete transaction).

<sup>60</sup> See generally Charles Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L. J. 1261 (recounting the history and scholarship of legal and economic justification for a state role in contract enforcement).

<sup>61</sup> See Joseph E. Stiglitz, *Information and the Change in the Paradigm in Economics*, 92 AM. ECON. REV. 460, 461 (2002) (reviewing “some of the dramatic impacts that information economics has had on how economics is approached today, how it has provided explanations for phenomena that were previously unexplained, how it has altered our views about how the economy functions, and, perhaps most importantly, how it has led to a rethinking of the appropriate role for government in our society.”)

about the product.<sup>62</sup> The non-drafter has limited information, the drafter has full information, and thus the parties transact under conditions of asymmetric information.<sup>63</sup> Information asymmetries lead, in theory, to a host of distributional and efficiency maladies, which include, inter alia, exploitation<sup>64</sup>, adverse selection<sup>65</sup>, excessive risk aversion<sup>66</sup>, and thin or “missing” markets.<sup>67</sup>

In contracts, most of the theoretical and behavioral work on information asymmetries has been about the effects of imperfect information on the distribution of the surplus—who captures how much of the benefit of the bargain.<sup>68</sup> Each party has information about her own preferences and capacities, and some additional information about the state of the world. A borrower who knows herself to be on the brink of unemployment might exploit that information asymmetry by borrowing at a low interest rate; this is adverse selection. On the flip side, lenders who fear this type of adverse selection may opt to dramatically constrain their participation in a market that could, with better information, be quite robust.<sup>69</sup> To simplify egregiously in the interest of space, the solution to the imperfect information problem is more information. As a policy matter, the prescription comes in a number of forms: incentivizing information sharing (i.e., both search and disclosure), creating opportunities for learning via direct observation, and drawing inferences from the way that markets function.

It should seem natural to take this set of logic from the economic theory of information asymmetries and turn to the particular problem of form contracting—

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<sup>62</sup> See generally, Arthur Alan Leff, *Contract as Thing*, 19 Am U. L. Rev. 131 (1970)(introducing the highly influential conception of contracts not as an iterative list of rights and obligations, but as the constitutive content of the product).

<sup>63</sup> *Id.* at 469-470 (identifying the problem of information asymmetry as a straightforward fact that “different people know different things”).

<sup>64</sup> See generally, Aaron Edlin & Joseph Stiglitz, *Discouraging Rivals: Managerial Rent-Seeking and Economic Inefficiencies*, 85 AM. ECON. REV. 1301 (1995) (arguing that entrenched managers exploit their market power by actively increasing information asymmetry).

<sup>65</sup> See, e.g., George Akerlof, *The Market for Lemons*, 84 Q. J. ECON. 488 (1970) (famously observing that the mere decision to sell a used car conveys information about the car’s quality; sellers who select into the used car market are more likely to be selling “lemons”).

<sup>66</sup> Stiglitz, *supra* note 61 at 477 (suggesting that contract in particular offers a mechanism for risk-sharing, a response to risk aversion, that can “help explain the perpetuation of seemingly inefficient contracts.”).

<sup>67</sup> Akerlof, *supra* note **Error! Bookmark not defined.** (showing that under conditions of imperfect information, markets may be thick or absent).

<sup>68</sup> See, e.g., Ronen Avraham & Zhiyong Liu, *Incomplete Contracts with Asymmetric Information: Exclusive Versus Optimal Remedies*, 8 AM. LAW ECON. REV. 523 (2006) (describing the hydraulic relationship between information, bargaining power, and contract surplus).

<sup>69</sup> See, Stiglitz, *supra* note 61 at 470 (identifying adverse selection in employment contracts as a particularly relevant example).

form contracting is specifically about one party, the drafter, having information about the terms of the deal that the other party does not. On closer inspection, though, consumer contracting via boilerplate does not really implicate the kind of intractable private information problems from traditional contracting and negotiations analyses. The information problem in contracts of adhesion is perhaps better described as an attentional asymmetry.<sup>70</sup> Both parties have access to information but only one of them attends to it.

On this view, the information asymmetry in consumer contracting might actually seem to be the *most* susceptible to information solutions. Parties must communicate terms if they want them enforced, and all of the relevant information is captured in text made available to the less informed party.<sup>71</sup> Indeed the concept of “private information”<sup>72</sup> here is barely legible—what does it mean to have private information about liability waivers or fees? It’s not “information” in the sense of declarative facts *unless* it is disclosed—it only becomes a legal fact upon disclosure to the counterparty. In short, this doesn’t even look like a serious information asymmetry problem. Both parties have access to information; at worst, it looks like one party affirmatively rejects the opportunity to learn, at which point we might be more sanguine about the distributional consequences of the asymmetry.

Courts and legislators have identified a number of practices that undermine the ideal of disclosure. Presentation of fees and interest rates must in some cases be disclosed in particular forms—aggregating costs, for example, or calculating the total cost of borrowing over the life of the loan. Contracts must normally be comprehensible for a moderately-educated consumer.<sup>73</sup> The type must be

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<sup>70</sup> There is a separate and also interesting information issue with disclosure of peripheral terms that I will not address here. That is the issue of what kinds of inferences the parties might draw about the core transaction (e.g., the quality of the product for sale) given the terms. Disclaimer of warranty is a term that, if known, conveys information about the quality of the good. In this analysis, I am dealing only with terms qua terms—what implications do they have for the parties’ legal obligations.

<sup>71</sup> See, e.g., Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 VA. L. REV. 566, 593 (2006) (situating nondisclosure with misrepresentation within a model of firm liability).

<sup>72</sup> See, e.g., Lars A. Stole, *The Economics of Liquidated Damage Clauses in Contractual Environments with Private Information*, 8 J. L. ECON. & ORG. 582 (1992) (offering a standard analysis of negotiation and contracting when the parties have ‘private information’, a model in which information is private because the party without it cannot ascertain or discover it).

<sup>73</sup> See, e.g., Ronald Mann, *Contracting for Credit*, 104 Mich. L. Rev. 899, 903-904 (2006) (discussing the readability problem in contracts between lenders and borrowers).



legible.<sup>74</sup> These interventions reduce the search costs<sup>75</sup> for the non-drafting party—a consumer can read the terms without consulting a dictionary or a calculator or a magnifying glass. Indeed, some of the core doctrines of contract law are best explained as rules that encourage parties to share information. Limiting damages to those that are foreseeable, for example, encourages a party who anticipates serious but non-obvious harms from breach to speak up at the time of drafting.<sup>76</sup> Refusing to enforce one party’s earnest but idiosyncratic or narrow interpretation of a term incentivizes parties with specific meanings to announce themselves early.<sup>77</sup>

Addressing market failures by providing information is an enormously appealing solution, because it takes no position on the parties’ preferences; it is not paternalistic. All the more so in the boilerplate context, because forcing disclosure does not divest the disclosing party of any legal or moral claim she has to surplus. The problem, of course, is that the expected value of the information in boilerplate is so low, and the cost of reading it so high, that disclosing information is unrelated to receiving or processing that information, which eradicates the most straightforward path from information to market behavior.

#### *B. The Law & Economics Approach to Non-Readership*

The law and economics movement in legal academia, and in contracts in particular, has been mindful of the effects of non-readership on an economic model predicated on the ability of informed consumers to effectuate their own preferences with respect to their deals. Perhaps the most influential response from law and economics theory on this point is the model from Alan Schwartz and Louis Wilde’s 1979 paper, “Intervening in Markets on the Basis of Imperfect

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<sup>74</sup> See, e.g., Friedrich Kessler, *The Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 fn. 3 (explaining that unread contracts are enforceable “provided the document is legible however small the print”).

<sup>75</sup> See, e.g., David Grether, Alan Schwartz & Louis Wilde, *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277 (1985) (“Consumers...would then be helped by disclosure that reduced the costs to them of searching over product attributes.”)

<sup>76</sup> See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L. J. 87 at 103-105 (1989) (arguing that the limitation on consequential damages is a penalty default intended to incentivize parties to contract around the default when they have private knowledge about their own risk of loss).

<sup>77</sup> See, e.g., David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1819 (1991) (offering a normative account of interpretive rules).

Information.”<sup>78</sup> In that paper, Schwartz and Wilde argue that the information problem of boilerplate can be solved, at least in the sense of avoiding unfair or one-sided terms, when a fraction of consumers do read and select on favorable terms.<sup>79</sup> As Eric Posner says, “If sellers cannot easily distinguish informed and uninformed consumers, they cannot exploit the latter by charging them a higher price.”<sup>80</sup> This is a theory that suggests that information *does* matter in the face of non-readership, because the vigilant minority will protect the free-riding majority by compelling firms to compete on terms.

Much as the problem with an assumption of perfect information is that the theory has limited utility when there is imperfect information (e.g., always), the Schwartz & Wilde model is only useful if there is in fact a fraction of reading consumers with enough market power to shape firm behavior. All evidence suggests that there is not. The groundbreaking paper on this work by Florencia Marotta-Wurgler and Yannis Bakos assesses consumer access to a software license and finds that about one in one thousand users click through—and those who do click through stay on the page for a median of 30 seconds.<sup>81</sup> They ask whether these results could be interpreted as “an informed-minority equilibrium” (of the Schwartz & Wilde variety), and answer pretty unequivocally no.<sup>82</sup>

As to any particular product feature or company policy, the prospect of making disclosure work is very appealing.<sup>83</sup> Indeed, disclosure continues to have real

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<sup>78</sup> See Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) (showing that even if most non-drafting parties do not know the terms of their agreements, as long as a fraction of consumers do read and select on favorable terms, terms will not be unfairly one-sided.)

<sup>79</sup> *Id.* at 632.

<sup>80</sup> Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?* 112 Yale L.J. 829, 844 (2003).

<sup>81</sup> See Yannis Bakos, Florencia Marotta-Wurgler, and David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 1 (2014).

<sup>82</sup> *Id.* at 19.

<sup>83</sup> There is currently very little reason to think that disclosure interventions in contracts have had any meaningful protective/warning effect on consumer behavior, and yet there is continued optimism in the face of dismal results. For example, financial regulation has been a prime target for disclosure rules: “Information-based intervention has been proven feasible and effective in other contexts...Perhaps the modern tendency to finance consumption with debt, without a complete understanding of the future repercussions of such a tendency, can be (at least partially) overcome through provision of information.” Oren Bar-Gill, *Seduction by Plastic*, 98 NW. L. REV. 1373, 1417 (2004). In the medical world, informed consent, conflict of interest disclosures, and risk framing have been a subject of debate for some time. Kathryn Zeiler argued against caps on medical malpractice damages with a disclosure solution: “By observing disclosed contract terms, patients are able to update their beliefs about the likelihood that they received compliant treatment.” Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure*, 5 YALE J. HEALTH POLICY, LAW, AND ETHICS 385, 395-396 (2005). A prominent physician promoted

appeal as a regulatory solution.<sup>84</sup> The rationale is intuitive: people who are making choices make better decisions when they have information about the content of their choices.<sup>85</sup> When people know the prices of similar goods, they can choose the cheaper options; when they know the flavor of ice cream in the carton, they can choose the flavor they like better; when they know the size of the shirt, they can choose the shirt that will fit.<sup>86</sup> These are not the examples that worry us in the form contract or disclosure context, though. Some attributes of a product are highly salient no matter what—consumers do not need reminders to shop on price or to buy foods they like to eat.<sup>87</sup> On the other hand, there are many

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disclosure as a means of managing conflicts of interest in the *New England Journal of Medicine*: “An advantage of disclosure is that it gives those who would be affected...information they need to make their own decisions.”<sup>83</sup> Dennis Thompson, *Understanding Financial Conflicts of Interest*, 329 NEW ENGLAND J. MED. 573 (1993). These examples are admittedly cherry-picked, chosen not to prove that everyone believes in disclosure but that at least some people advocating disclosure-based solutions do so on the basis that putting people on formal notice of non-salient terms of a deal will actually affect their choices or the nature of their consent.

<sup>84</sup> There is currently very little reason to think that disclosure interventions in contracts have had any meaningful protective/warning effect on consumer behavior, and yet there is continued optimism in the face of dismal results. For example, financial regulation has been a prime target for disclosure rules: “Information-based intervention has been proven feasible and effective in other contexts...Perhaps the modern tendency to finance consumption with debt, without a complete understanding of the future repercussions of such a tendency, can be (at least partially) overcome through provision of information.” Oren Bar-Gill, *Seduction by Plastic*, 98 NW. L. REV. 1373, 1417 (2004). In the medical world, informed consent, conflict of interest disclosures, and risk framing have been a subject of debate for some time. Kathryn Zeiler argued against caps on medical malpractice damages with a disclosure solution: “By observing disclosed contract terms, patients are able to update their beliefs about the likelihood that they received compliant treatment.” Kathryn Zeiler, *Turning from Damage Caps to Information Disclosure*, 5 YALE J. HEALTH POLICY, LAW, AND ETHICS 385, 395-396 (2005). A prominent physician promoted disclosure as a means of managing conflicts of interest in the *New England Journal of Medicine*: “An advantage of disclosure is that it gives those who would be affected...information they need to make their own decisions.”<sup>84</sup> Dennis Thompson, *Understanding Financial Conflicts of Interest*, 329 NEW ENGLAND J. MED. 573 (1993). These examples are admittedly cherry-picked, chosen not to prove that everyone believes in disclosure but that at least some people advocating disclosure-based solutions do so on the basis that putting people on formal notice of non-salient terms of a deal will actually affect their choices or the nature of their consent.

<sup>85</sup> See, e.g. Dan Ariely, *Controlling the Information Flow: Effects on Consumers’ Decision Making and Preferences*, 27 J. CONSUMER RESEARCH 233, 245 (showing experiments linking the ability to select relevant information to high-quality decision-making.)

<sup>86</sup> Of course, even these common sense examples are subject to challenge from behavioral economics studies. Many people choose expensive financial products over identical cheap financial products; choice overload studies suggest that knowing about a lot of jam choices leads to a decreased ability to choose the jam that makes you happy.

<sup>87</sup> See, e.g., William Dodds, Kent Monroe & Dhruv Grewal, *Effects of Price, Brand, and Store Information on Buyers’ Product Evaluations*, 28 J. MARKETING RESEARCH 307 (1991) (finding an expected relationship between price and quality on willingness to purchase consumer goods), cf

terms that do not affect choice but still affect *ex post* outcomes.<sup>88</sup> These are standard terms—arbitration clauses, privacy policies, license agreements, and so on.<sup>89</sup> These terms are arguably not susceptible to salience solutions.

As such, most contracts are comprised almost entirely of terms that will never attract enough attention to change consumer behavior. The surprising omission from the existing literature is any curiosity about the practical effects of these irredeemably low-salience terms. Even vocal opponents of disclosure overload “support the unexceptional notion that consumers have an opportunity to read the terms of their agreements.”<sup>90</sup> Or, from other commentators citing the irrelevance of standard terms: “The notice provision can perhaps serve some socially valuable purpose, even if the vast majority of consumers would ignore any notice....Notice can also be useful to a consumer who seeks to learn about his or her legal rights after something has gone wrong with the transaction.”<sup>91</sup> These comments suggest that the existence of the standard terms is a fact of life not to be taken seriously—probably not beneficial, but harmless. The next section looks to another literature, the research from psychology and behavioral economics, for the outlines of a plausible but distinct account.

The most recent set of information solutions for unread contracts comes from behavioral economists. One way to think about their approach is that the goal is not to rely on a few fully informed consumers, but on many partially informed consumers. The trick is to bring parties’ attention to the terms that matter. The insight is that if the parties only really need to know a few important things, perhaps it *is* possible to meaningfully inform the non-drafting party. There are a host of proposals from behavioral economics along the lines of how to make terms more “salient,” or attention-getting.<sup>92</sup> The responses hew closely to the problems: Terms can be put into a warning box.<sup>93</sup> Terms can be simplified.<sup>94</sup> The

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<sup>88</sup> See, e.g., Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?* 168 J. INST. THEOR. ECON. 94 (2012) (finding that exposure to a one-sided term in a software license agreement has no effect on likelihood to purchase the product in question).

<sup>89</sup> Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1225 (“[P]roduct attributes that are evaluated, compared, and implicitly priced as part of the purchase decision [are] “salient” attributes and product attributes that are not evaluated, compared, and priced as part of the purchase decision [are] non-salient attributes.”)

<sup>90</sup> Ayres & Schwartz, *supra* note 1 at 561.

<sup>91</sup> RESTATEMENT OF THE LAW CONSUMER CONTRACTS, Preliminary Draft No. 2 (October 20, 2015)

<sup>92</sup> See, e.g., Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, STAN. L. REV. 211, 240 (1995) (describing multiple ways in which terms are overlooked or underweighted at the time of drafting).

<sup>93</sup> See, e.g., Ayres & Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 *Stanford L Rev* 545 (2014).

total price of a loan over the life of the 30-year mortgage can be provided on the Good Faith Estimate form.<sup>95</sup> The costs of credit can be aggregated.<sup>96</sup> In the most carefully calibrated of these approaches to the “no-reading problem” to date, Ian Ayres and Alan Schwartz argue for disclosure triage: don’t worry about disclosing everything, but rather worry about terms that are surprising and one-sided.<sup>97</sup> On their view, the question of surprise is meant to be empirical: are consumers actually surprised by this unfavorable term?<sup>98</sup> If so, the authors would require that firms to put the terms into a pull-out box titled “Warning” or are otherwise designed to draw attention.<sup>99</sup>

In sum, we can think of these economic analyses as offering two justifications for incentivizing, and ultimately enforcing, boilerplate: either the standard terms affect consumer choice directly, or the communication of *some* terms to *some* people is enough to prevent exploitation.

From a law and economics perspective, the assessment of disclosure solutions is appealing on both sides of the ledger—information benefits the parties, of course, but also it is very low-cost. Requiring disclosure puts only a very minimal burden on firms<sup>100</sup>, requires almost no judicial or regulatory oversight<sup>101</sup>, and does not otherwise interfere with parties’ private ordering.<sup>102</sup> The vanishingly low cost of

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<sup>94</sup> See, e.g., Ryan Singel, “Facebook Debuts Simplified Privacy Settings,” *Wired Magazine* May 26, 2010 available at <http://www.wired.com/2010/05/facebook-debuts-simplified-privacy-settings/>.

<sup>95</sup> See, e.g., Vanessa Perry, *Understanding the Fine Print: The Need for Effective Testing of Mandatory Mortgage Loan Disclosures*, 31 J. PUBLIC POLICY & MARKETING 305, 306 (“[The law requiring a good faith estimate], initially interpreted as allowing lenders or brokers to provide the cost information in any format they chose, was interpreted by the regulators in 2008 to require a three-page standard form that included information about the interest rate, payments, and other loan terms, as well as settlement service costs.”)

<sup>96</sup> Oren Bar-Gill, *Seduction by Plastic*, 98 NW. L. REV. 1373 (2004).

<sup>97</sup> Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STANFORD L. REV. 545 (2014).

<sup>98</sup> *Id.* at 595 (introducing an empirical approach to expectability vs. surprise in standard terms).

<sup>99</sup> *Id.* at 576 (describing the warning box mechanism for disclosure).

<sup>100</sup> See, e.g., Robert Hillman and Maureen O’Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 75, 106-108 (2011) (defending standard terms).

<sup>101</sup> For a discussion of the ways that boilerplate might achieve a balance between speaking to courts and speaking to consumers via the theory of modularity, see Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1178 (2006) (“[L]aw and economics, even behavioral law and economics, does not emphasize the benefits of modularity for human comprehension and innovation, even though pioneering behavioral economist Herbert Simon considered the very notion of bounded rationality to imply a strong trend towards modularity in human problem solving”).

<sup>102</sup> Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627, 630-31 (2002) (discussing a market-based justification for form contracts)

boilerplate is essentially dispositive for any cost-benefit analysis—even low-probability or low-impact benefits are acceptable when they come very cheap.<sup>103</sup> In sum, the traditional economic analysis of contract sees disclosure requirements as a cheap intervention that supports robust private ordering and prevents exploitation on the market.

In the following section, I am going to argue that the economic model gets it wrong on disclosure. Not because economists are overly bullish about the potential for boilerplate to be helpful—I think at this point most concede that the benefits are slim. The problem is that the economic picture of consumer contracting does not adequately capture the economic and distributive costs of unread standard terms.

### III. PARADOXICAL MORAL PSYCHOLOGY OF CONTRACT

In order to make the case that the economic analysis of terms is ignoring the real costs of disclosures, I am going to turn to a complementary literature in the social sciences. A growing body of experimental evidence speaks directly to the intuitive normativity of contracts. That literature makes three main moves of importance here: it suggests that people take promises very seriously; that contract is understood as a category of promise; and that the contract-as-promise schema is instantiated even outside of meaningful relationships.

At its best, scholarship from law and psychology asks what the humans participating in the legal system believe, feel, or understand about their legal rights and obligations—and then how those cognitions affect their legal decision-making. In this context ‘legal decision-making’ should be understood to encompass any decisions in which the legal rule is a non-trivial factor motivating a particular choice—choosing to commit a crime or nullify on a jury, of course, but also choosing to cancel a cable subscription or argue with a customer service representative over a late fee.

So what does the psychology of legal decision-making have to say about the costs of boilerplate? In the paragraphs that follow, I am going to walk systematically through a series of research findings that do not obviously cohere, and make the pitch that, taken together, they yield a surprising picture of disclosure. The short version is as follows: 1) Psychological research suggests that individuals have strong underlying preferences for honoring contracts.<sup>104</sup> They take contracts

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<sup>103</sup> Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. Chi. L. Rev. 1181 (2010).

<sup>104</sup> *Id.*

seriously, and they believe the legal system does so, too.<sup>105</sup> 2) Even though they are certainly unable to read their own consumer contracts, the unreasonable demands of readership are not cognitively salient.<sup>106</sup> 3) As such, when consumers are subject to onerous terms in their unread contracts, many (if not most) individuals identify the non-reading consumer, not the drafter, as the norm-violator, because the consumer has failed to take her contract seriously.<sup>107</sup> 4) Formal contracts receive moral and behavioral deference from consumers.<sup>108</sup> 5) Rules promulgated via boilerplate go unexamined and unchallenged.<sup>109</sup> 6) The cost to consumers is the price of adhering to unenforceable unfavorable terms.<sup>110</sup> I am going to lay out the existing evidence that 1-4 are true, offer a new set of experiments to demonstrate 5, and discuss 6 as the logical and problematic implication of all of the above.

#### A. *Contract as Moral Commitment*

This Article is largely focused on how non-expert parties navigate their contractual relationships in the shadow of contract law.<sup>111</sup> Without a court directly telling them what to do, how do they decide whether to perform, whether to breach, or whether to sue? In contract, private legal decision-making is heavily influenced by the moral and social norms of promissory exchange.<sup>112</sup> I claim, and try to demonstrate empirically, that the perplexing consequences of standard terms are rooted in the moral psychology of contract, that the reason that standard terms are afforded so much deference is because they are contracts, and contracts are promises.

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<sup>105</sup> Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, J. EMPIRICAL LEG. STUDY 405 (2009) (showing experimental evidence suggesting an intuitive connection between informal norms of promise and informal norms of contract).

<sup>106</sup> Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1762-68 (2014) (describing a study of readability and fault for not reading).

<sup>107</sup> *Id.*

<sup>108</sup> See, e.g., Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2123-29 (2015) (reporting the effects of moral norms on unenforceable contracts of adhesion when the party has assented via formality, e.g., by signing).

<sup>109</sup> See *infra* Part IV for experimental evidence of this phenomenon.

<sup>110</sup> See *infra* Part V for discussion of the implications of this framework for consumers and policymakers.

<sup>111</sup> For an introduction to the idea of the ‘shadow of the law’—the relationship of legal rules and private behavior Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950 (1979) (positing that private negotiating behavior will be constrained by the expected value of a court-imposed resolution of a dispute).

<sup>112</sup> See, e.g., Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 652 (2010) (reporting experimental evidence that individuals resist breach of contract even when it is profitable, because they believe it is morally wrong).

For the last 50 years, sociology and psychology have offered to legal scholarship evidence that contracts are, for the parties involved, more than neutral financial instruments. On the contrary, contracts have social, cultural, and moral meaning. This meaning is partly derived from its legal status, and partly from its close association with the norm of promise-keeping.<sup>113</sup> As to the latter, cultural anthropology has identified promise-keeping as one of only a very few truly universal social norms.<sup>114</sup> It has a meaning separate from other norms around gift-giving or reciprocity, meaning specifically about giving one's word and then keeping it.

At this point in time, there is substantial, converging evidence, from methodologically diverse research, in support of the hypothesis that shared informal norms motivate parties to avoid breach even when the math says they would be better off breaching. This is a large and multidisciplinary literature, which I will try to trace temporally.

In the 1950s and 60s, Stewart Macaulay and other colleagues working in law and sociology interviewed businessmen in Wisconsin, to ask them about how they interact with one another. The results of that work opened up the scholarly field of relational contracting—a recognition that for a swath of contracting parties, repeated interactions over time and within close-knit communities meant that the parties developed norms of negotiation and dispute resolution outside of the courtroom.<sup>115</sup> Particular attention was paid to the strong norm of the handshake—the sense that one's “word” was a bond, and that it was its own reason not to break an obligation with a counterparty.<sup>116</sup> This research yielded a new perspective on the reputation costs of breach of contracts in long term relationships—costs that were both financial insofar as breach might lead to a breakdown of the business relationship, but also costs that were more purely personal or social. This research is, of course, small *n*, and perhaps of a particular time and place. But other researchers have documented similar phenomena. Lisa Bernstein, for example, found merchants in the small diamond-trading world

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<sup>113</sup> See, e.g., Gary Charness & Martin Dufwenberg, *Promises and Partnership*, 74 *ECONOMETRICA* 1579 (2006); see also T. Ellingsen & M. Johannesson, *Promises, Threats, and Fairness* 114 *THE ECON. J.* 397 (2004) (demonstrating a ‘taste’ for keeping one's word). Christoph Vanberg *Why Do People Keep Their Promises? An Experimental Test of Two Explanations*, 76 *ECONOMETRICA* 1467 (2008).

<sup>114</sup> See, e.g., Paul Robinson, Robert Kurzban & Owen Jones, *The Origins of Shared Intuitions of Justice* 60 *VAND. L. REV.* 1633 (2007) (reporting cross-cultural norms of promise and exchange).

<sup>115</sup> Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 *AM. SOC. REV.* 55 (1963) (describing interviews with businessmen in Wisconsin in the 1960s who largely viewed their contracts as relational rather than formal).

<sup>116</sup> *Id.*



relied heavily on informal norms and handshakes in order to enforce promises. In effect, the evidence from these sociological studies is about participants in real world commerce reporting on their own experiences—they report that their contractual commitments are moral commitments.<sup>117</sup>

The next wave of research came from experimental and behavioral economics focusing on intuitions about fairness. Amos Tversky and Daniel Kahneman began to document systematic preferences for fairness, across a range of transactions. One underappreciated feature of their pathbreaking 1986 article “Fairness as a Constraint on Profit Seeking” is that it explicitly addresses contract fairness.<sup>118</sup> The authors considered the importance of the contractual entitlements (referred to in their terms as “reference transaction”) in determining fair outcomes. For example, they asked participants in a survey study whether it would be fair to reduce wages of a current employee when unemployment goes up (and thus cheaper employees are available). Subjects thought this breach of contract was unfair even if it was legally permissible.<sup>119</sup> New employees, though, could fairly be brought on at the lower wage.<sup>120</sup> Tversky and Kahneman found not only that fairness matters, but that a deal—a contract—changes the way that people think of their obligations to one another, even without legal enforcement.

Experimental economics has picked up this thread, testing the role of fairness within real-stakes laboratory games played in real time by in-person participants. In experimental economics terms, their research question is how much financial reward people will give up in order to avoid breach. For example, in one experiment, participants were permitted to chat with one another about whether they planned to cooperate or defect on a task, where cooperation was better overall but defection was better for the individual.<sup>121</sup> When players exchanged statements of intention to cooperate, they were no more likely than anyone else to do so.<sup>122</sup> But players who decided to mutually *promise* were noticeably more likely to actually cooperate.<sup>123</sup> In another experiment, players played a “Dictator Game.” In a Dictator Game, two players are paired. One of them, the Dictator, is given some amount of money, and allowed to share it. The dependent variable in

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<sup>117</sup> Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relationships in the Diamond Industry*, 21 J. Leg. Stud. 115, 138 (1992) (identifying both ethical and reputational constraints on transactors in the diamond industry).

<sup>118</sup> Daniel Kahneman, Jack L. Knetsch & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 729 (1986).

<sup>119</sup> *Id.* at 730 (describing vignette study and results).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 4.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

this setup is measured by how much the Dictator shares.<sup>124</sup> Christoph Vanberg used a game in which the Dictator could choose either a more equitable or a more selfish outcome. Players could chat with one another before the choice.<sup>125</sup> Chatting players who promised to choose the equitable outcome were significantly more likely to do so than those who had not promised. Furthermore, in some conditions, after talking but before the allocation decision, the players were switched, separating partners. Interestingly, once the pair was broken up, the promising Dictators behaved just like the non-promising Dictators—what mattered was whether the Dictator had made a promise to this *particular* counterparty.<sup>126</sup> This scholarship took the logic of contractual commitments to the laboratory to effectively demonstrate the plausibility of moral preferences in contract even in the face of incompatible financial incentives.

Finally, the most recent line of social science research to pick up on the connection between contract and promise has come specifically from the law and psychology literature. In this literature, the moral implications of contracting have received more systematic experimental attention, especially in the context of breach.<sup>127</sup> Scholars including, inter alia, Steven Shavell, Zev Eigen, Yuval Feldman, David Hoffman, and myself have asked non-experts to explicitly or implicitly reason through dilemmas in contract law. For example, Shavell asked a group of law students whether it would be immoral to breach a contract, varying the available information about the parties' preferences for risk allocation; when they lacked information to the contrary, his participants viewed breach as immoral.<sup>128</sup> Other vignette-study research concludes, in tension with some descriptions of efficient breach theory<sup>129</sup>, that many people view breach of contract as a moral harm whose social and psychological costs are not worth the

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<sup>124</sup> See, e.g. Colin Camerer & Richard Thaler, *Anomalies: Ultimatums, Dictators, and Manners*, 9 J. ECON. PERSP. 209, 210 (1995) (describing the Dictator Game in experimental economics).

<sup>125</sup> Vanberg, *supra* note 89 at 1470 (explaining methodological choices).

<sup>126</sup> *Id.* at 1480 (showing results of the experimental manipulation).

<sup>127</sup> See, e.g. Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843 (2012); Yuval Feldman & Doron Teichman, *Are all Contractual Obligations Created Equal*, 100 GEO. L. J. 5 (2011), Tess Wilkinson-Ryan, *Transferring Trust: Reciprocity Norms and Assignment of Contract*, 9 J. EMP. LEG. STUD. 511 (2012).

<sup>128</sup> See generally Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569 (2009) (acknowledging the widely held belief that breach of contract is immoral, but arguing that may not always be the case given that contracts are incomplete and cannot cover every contingency).

<sup>129</sup> See Steven Shavell, *Damage Measures for Breach of Contract* 11 BELL J. ECON. 466 (1980) (showing that expectation damages set incentives for breach at a level that encourages Pareto-superior transfers).

financial rewards.<sup>130</sup> Zev Eigen made the stakes of compliance very high for his subjects, foisting an extraordinarily long and onerous survey on those who agreed to take it in return for a DVD. Subjects could stop anytime, but many persisted well beyond the point of frustration; strikingly, this was especially true when they were prodded with rhetoric about the moral stakes of breaching.<sup>131</sup> In other studies, subjects drawn from representative samples report that they would be unwilling to breach a contract for a small profit, and indicate that only a large premium on breach would sway them from their promissory commitment.<sup>132</sup> Experimental studies show that willingness to breach is tied explicitly to the strength of the interpersonal commitment; the further along a deal gets on the offer-acceptance-performance continuum, the more reluctant parties are to breach, even when the costs of breach do not concomitantly increase.<sup>133</sup> The upshot of recent experimental research on moral norms of contract is that there is a non-trivial tendency to treat contracts as promissory obligations and not just currency. People place intrinsic value on contract performance, as a moral and social good.<sup>134</sup>

#### *B. Salience: The Cognitive Roots of the Moral Psychology of Contracts*

This Article is largely focused on the moral psychology of breach and performance, but there is also an important piece of the puzzle from cognitive psychology. In this context, cognitive psychology asks: how salient, legible, and evaluable are the attributes the breach/perform decision.

Two pieces of evidence from the behavioral decision literature clearly bear on the issues here. The first is that people appear rather insensitive to the real-life

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<sup>130</sup> See, e.g., Wilkinson-Ryan & Baron *supra* note 105 at 410 (using a series of experimental questionnaire studies to show that many people view efficient breach as an affirmative wrong worthy of supracompensatory damages); see also Wilkinson-Ryan *supra* note 112 at 659 (reporting willingness to breach a contract required more than trivial financial gains).

<sup>131</sup> Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67 (2012)(showing that participants in an onerous online survey were more likely to continue with the survey when they were reminded that they had agreed to finish it and were morally obligated to do so.)

<sup>132</sup> See Wilkinson-Ryan *supra* note 101; see also *Id.*

<sup>133</sup> Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1292 (2015) (finding that some subjects in an online study reported preferences to perform at the offer stage, and even more at the acceptance stage, even when it was not binding at acceptance).

<sup>134</sup> See, e.g., Tess Wilkinson-Ryan, *Incentives to Breach* 17 AM. L. ECON. REV. 290, 299 (2015) (showing, for example, that more than half of the players in a contracts game were unwilling to break their deal for a \$12 premium).

demands of readership. This first came to light by way of an overconfidence<sup>135</sup> study. Overconfidence studies typically ask people to indicate their own level of skill or diligence in a particular domain (how good a driver, how successful a teacher, etc.). In this case, subjects in a brief survey study were randomly assigned to predict the fraction of boilerplate readership either of themselves or of other people.<sup>136</sup> They guessed their own readership would be at levels greater than 50% for a credit card contract, a computer term sheet, and a car warranty—but that others would read less.<sup>137</sup> A belief that others do not read but that *I* read suggests a dissonance between the descriptive norm and the prescriptive norm—sure, people fail to read their contracts, but they could read them, like I do. However, in a subsequent study, participants were randomly assigned to either a) simply estimate their own level of readership, or b) first estimate the quantity of fine print they saw in a day and *then* estimate their own level of readership. Those who had been prompted to focus on the demands of readership downgraded their estimates of their own readership substantially.<sup>138</sup> Subjects overall appeared to ignore the context of form contracting—the impossibility of thorough readership—unless prompted to do otherwise.

The second finding of interest along these lines comes from the psychological phenomenon of “norm theory.”<sup>139</sup> Norm theory describes a set of results from psychology that deal with counterfactual thinking. Counterfactual narratives about an experience shape judgments and reactions to that experience. An example might go like this: all else being equal, I am sad if I do not win a contest that I entered, but probably not as sad if I didn’t enter the contest at all. The counterfactual (I might have won!) is more salient in the former case than in the latter. In a previous study, I speculated that this analysis might have some bite context of a party to a contract who failed to read and later discovered a burdensome term. The hypothesis was that the natural counterfactual when a consumer is the victim of an unread bad term is that same consumer reading and avoiding the bad term. This need not be the case—the counterfactual could be that in the alternate world, the term, and not the consumer, was different. This bears

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<sup>135</sup> See, e.g., William Howell, *Uncertainty from Internal and External Sources: A Clear Case of Overconfidence*, 89 J. EXP. PSYCHOLOGY 240 (1971) (reporting a study showing increased overconfidence particularly over outcomes determined by the performance of the individual rather than external factors).

<sup>136</sup> Wilkinson-Ryan *supra* note 146 at 1774 (showing table reporting high estimates of readership, and greater for self than the average consumer).

<sup>137</sup> *Id.* at 1774 (explaining study stimuli for each condition).

<sup>138</sup> *Id.* at 1781 (reporting effect of a prompt about difficulty of reading on estimates of own likelihood to read).

<sup>139</sup> Dale Miller & Daniel Kahneman, *Norm Theory: Comparing Reality to Its Alternative*, 93 Psych. Rev. 136 (1986).

directly on how we assign blame—the more salient actor in the case is typically assigned blame for choosing the wrong path.<sup>140</sup>

One of the consistent findings of norm theory is that as between a set of background conditions and an agent in a narrative, the agent's alternative choices are more salient than the alternative background facts. In order to leverage this observation in the consumer contract context, a previous experiment randomly assigned subjects to read about a longstanding onerous policy in a credit card contract or a new policy recently implemented by the company.<sup>141</sup> In this manipulation, the term is either a background fact with no salient agent, or the result of an active decision by the firm. Subjects who read about the new term rated the unhappy non-reading consumer as less to blame for his predicament than the consumer who had failed to read the longtime default policy.

Together, these results suggest an availability or a salience story of non-readership—the possibility or narrative of reading contracts comes very readily to mind. It is very easy to imagine how someone might have avoided a bad term by reading; less so to imagine how a consumer might have avoided a bad term by not having an exploitative counterparty. These studies form an impression that the reflexive, and perhaps unreflective, lay view of consumer contracts is that they are readable<sup>142</sup>—and perhaps that a manifestation of assent to participate in the economy is justifiably viewed as an assumption of risk of bad terms.<sup>143</sup>

### *C. Moral Commitment Under Conditions of Dubious Assent*

I have thus far reviewed the empirical evidence that promises are serious moral obligations for legal actors, and that contracts, as a species of promise, are also taken seriously. I have also offered some suggestive evidence that the unreasonable demands of readership are not especially salient in the context of making judgments about non-readers. These two lines of inquiry converge in a very recent body of research about how individuals reason about their moral obligations under conditions of very thin assent.<sup>144</sup> The challenge is this: It is one

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<sup>140</sup> See, e.g., Dale Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation*, 12 *Personality & Social Psych. Bull.* 513, 517 (1986) (showing in an experiment that subjects had greater sympathy in situations in which the positive alternative was highly salient).

<sup>141</sup> Wilkinson-Ryan, *supra* note 106 (explaining methods and results of norm theory experiment).

<sup>142</sup> See, e.g., Wilkinson-Ryan *supra* note 133 (experimentally surveying non-experts who systematically report that they believe people can and should read their contracts).

<sup>143</sup> See, e.g., Robert Bartlett III & Victoria Plaut, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 31 *LAW & HUM. BEHAV.* (2012) (reporting subjects' own accounts of why they sign form contracts).

<sup>144</sup> See, e.g., Wilkinson-Ryan, *supra* note 108.

thing to think that my contract with my cabinetmaker is regulated by informal interpersonal or moral norms—but with Comcast? Or Visa? Indeed, though, recent research strongly suggests that the perceived moral obligation of contract is instantiated with formal agreement (e.g., clicking “I agree” to unread hyperlinked terms”) rather than meaningful assent.<sup>145</sup>

Three findings along these lines set the stage for the new experiments reported below. First, readability does not appear to affect perceived obligation. In a recent study, I asked subjects to consider the plight a consumer who found himself subject to a fee he did not expect.<sup>146</sup> Subjects were randomly assigned to read that the fee was explained in either a two-page or a fifteen-page contract.<sup>147</sup> They clearly differentiated between the two conditions when asked whether readership was a reasonable expectation—they thought it reasonable in the short contract case and unreasonable in the long contract case.<sup>148</sup> They *did not differ*, however, in attributions of responsibility; subjects in both conditions viewed the consumer as “to blame” for his own misfortune.<sup>149</sup> That is, even when it was clear that reading would be much harder in one case than in the other, the subjects thought that the non-reading consumer had himself to blame for his problems.

Second, there is evidence that the promissory norms of contract are “switched on,” so to speak, but formal assent rather than a more robust meeting of the minds. In recent experimental research, subjects were simply asked to assess the moment of assent.<sup>150</sup> When formal assent—something in writing and signed—was uncoupled from substantive assent—a meeting of the minds—subjects overwhelmingly chose the moment of formal assent as the legally relevant moment.<sup>151</sup> Even when subjects were informed that the legal consequences of written and oral assent were identical, they reported that they would be less

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<sup>145</sup> See Wilkinson-Ryan & Hoffman, *supra* note 133 (describing the importance of signing paperwork); see also Wilkinson-Ryan *supra* note 104 (showing a higher moral commitment to signed agreements).

<sup>146</sup> Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA. L. REV. 1745, 1762-68 (2014) (describing a study of readability and fault for not reading).

<sup>147</sup> *Id.* at 763.

<sup>148</sup> *Id.* at 764 (showing that 34% of subjects thought reading was a reasonable expectation when a contract was 15 pages long, but 76% thought it was reasonable when the contract was two pages long).

<sup>149</sup> *Id.* at 1765 (“Even though subjects reported that it is unreasonable to expect a consumer to read a 15-page contract, they nonetheless felt that the non-reading consumer was as responsible for his non-readership as the consumer who had only two pages of terms to wade through.”)

<sup>150</sup> Wilkinson-Ryan & Hoffman, *supra* note 133 at 1283.

<sup>151</sup> *Id.* at 1284-1288 (showing survey results in which participants chose the moment of signing over the moment of in-person verbal assent as the moment of contract formation).

willing to breach a contract that has been formalized in writing.<sup>152</sup> These findings suggest that form contracts have bite, precisely because of their highly formal structure.

Finally, we have some evidence that terms encapsulated in formal contract may receive deference even when they are indisputably unfair. In a 1997 experiment by then-graduate students Dennis Stolle and Andrew Slain, subjects read vignettes describing a harm suffered in connection with a contract (e.g., a slip-and-fall at a gym).<sup>153</sup> Subjects were randomly assigned to see the contract with or without an exculpatory clause.<sup>154</sup> The rather egregious exculpatory clauses included would not be legally enforceable in most jurisdictions, whether because they would be void for unconscionability or because they were barred by statute.<sup>155</sup> The authors asked subjects to report their own reactions—in particular, would they seek compensation in such a situation, and was the contract unfair<sup>156</sup>—as well as their beliefs—namely, what would be the likely outcome of a suit<sup>157</sup>? Although the reported results are somewhat scanty, they are very provocative. The two most important findings are as follows:

[C]onsistent with the concerns of many legal scholars, the presence of exculpatory language did have a deterrent effect on participants' propensity to seek compensation. This main effect for presence of an exculpatory clause is also consistent with previous research suggesting that consumers' contract schema includes a general belief that written contract terms are enforceable... Surprisingly, the presence of an exculpatory clause did not impact participants' perceptions of the fairness of the contracts.<sup>158</sup>

Thus the Stolle and Slain study offered evidence of one commonsense proposition and one puzzling twist. The commonsense proposition is that people think they're bound to whatever they sign. The authors suggested that the reason for this is a misperception of the law—that people believe the law is more accommodating of burdensome terms than it is. The puzzle is that there were no reported differences in judgments of fairness. Contracts that were objectively more burdensome for

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<sup>152</sup> Wilkinson-Ryan, *supra* note 108 at 2126 (describing empirical results from a survey experiment).

<sup>153</sup> Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses of Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997).

<sup>154</sup> *Id.* at 87.

<sup>155</sup> *Id.* at 88.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 91.

consumers were not viewed as less fair. This is arguably difficult to explain based on perceptions of law alone; individuals can and do distinguish between legality and fairness.

In sum, there is a growing body of evidence that people not only believe that contracts *are* enforceable, they often believe that contractual obligations are also moral obligations. Further, the perceptions of legal and moral bindingness are surprisingly insensitive to the form and possibly even the content of the contract. There is evidence for a sort of on-off switch.<sup>159</sup> On an intuitive account of contracts of adhesion, any documented manifestation of assent triggers all (or many, or most) of the moral and legal implications of contract and promise.<sup>160</sup>

This commitment to contractual sanctity puts people in a bind, because they cannot possibly treat each form with attention and deliberation. The remainder of this Article explores the natural logical extension of the existing literature: that the moral commitment to contracting might redound to the disadvantage of the non-drafting parties because there is a mismatch when contracts cannot be taken seriously *ex ante* but courts and parties purport to find meaningful assent *ex post*. The study below explores the consequences of that mismatch systematically.

#### IV. EXPERIMENTAL VIGNETTE STUDY

The overarching goal of this Article is to connect the practice of disclosure to the moral psychology of contract—to ask how the provision of notice and the exchange of forms affects individual parties, irrespective of the legal status of the terms.

In order to assess the effect of terms on perceptions of contractual obligations, I used an experimental vignette study.<sup>161</sup> I showed participants brief descriptions of contracts, randomly assigning subjects to three assent conditions. Specifically, the independent variable was the accessibility of a particular burdensome term—was it provided up front, or offered after purchase, or only available by affirmative search? Subjects were asked in each case to evaluate the term’s legal and moral effect, respectively, including their inclination to challenge the policy. The prediction was that a policy embodied in contractual terms that were made available before assent would be taken more seriously than terms only available

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<sup>159</sup> See Wilkinson-Ryan, *supra* note 108 (arguing empirically for a connection between formal agreement and moral commitment).

<sup>160</sup> *Id.*

<sup>161</sup> See generally, Christiane Atzmüller & Peter Steiner, *Experimental Vignette Studies in Survey Research*, 6 *METHODOLOGY* 128 (2015) (describing and evaluating methods for drawing inferences to responses from random assignment to different scenarios).



after purchase, and that in turn those “rolling contract” terms would be taken more seriously than policies made available outside of contract.

### A. Study Design

Subjects were recruited to participate in experimental studies at the University of Pennsylvania’s Wharton School of Business. A separate pool of subjects was also recruited to participate via Amazon Mechanical Turk<sup>162</sup>. The two samples behaved very similarly, and only the Wharton results are reported in full in the body of this paper. Results from the Mechanical Turk replication are provided in the Appendix.

All subjects read two short vignettes describing surprising and unfavorable contract terms, with each study experimentally manipulating different features of the vignette. Subjects were asked to answer a series of follow-up questions after each scenario.

The vignettes were designed to cover some of the most important ground by invoking both a defensive and an offensive consumer stance. They are not designed to be compared to one another, only to be compared within-scenario, across conditions. In the Fee scenario, the customer is surprised to find himself being charged a fee by a car rental agency. In the Waiver scenario, the individual is surprised to find himself unable to get money from the hotel for damage to personal property. In familiar behavioral decision-making paradigms, one cost is framed in loss terms (the fee) and the other in gain terms (foregone

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<sup>162</sup> Amazon Mechanical Turk is an online platform from which individual workers/participants can be recruited to do small tasks for small sums of money; it is an increasingly common online forum for soliciting participants to research studies. It has been studied extensively at this point. Its advantages are that populations recruited via Turk are more representative of the national population than convenience samples (e.g., undergraduates) and that a variety of experimental findings have been replicated using MTurk. See, e.g., Adam Berinsky, Gregory Huber, and Gabriel Lenz, *Evaluating Online LaborMarkets for Experimental Research: Amazon.com’s Mechanical Turk*, 20 *POLITICAL ANALYSIS* 351 (2012). There is also evidence, both systematic and anecdotal, that Turk subjects are particularly attentive, perhaps due to the formal mechanisms available for giving them feedback that affects reputation ratings. The disadvantage of MTurk as compared to the sample procured by a commercial survey firm is the young and leftward skew of the population. Turk respondents are “wealthier, younger, more educated, less racially diverse, and more Democratic” than national samples. See Neil Stewart et al., *The Average Laboratory Samples a Population of 7,300 Amazon Mechanical Turk Workers*, \_\_\_ *JUDGMENT AND DECISION MAKING* \_\_\_ (forthcoming), available at [http://www.stewart.warwick.ac.uk/publications/papers/Stewart\\_Ungemach\\_Harris\\_Bartels\\_Newel\\_Paolacci\\_Chander\\_in\\_press.pdf](http://www.stewart.warwick.ac.uk/publications/papers/Stewart_Ungemach_Harris_Bartels_Newel_Paolacci_Chander_in_press.pdf).

compensation).<sup>163</sup> Although the two scenarios obviously do not exhaust the possible ways in which a consumer might be affronted by a company policy, there are reasons to think that most people distinguish between these two kinds of costly terms. Therefore I use both to assess the possibility that the distinction between contract and not-contract exists across terms that burden the consumer as well as terms that relieve the burden of the drafter.

Each case was designed to invoke the idea of a company policy with reasonably salient stakes. This is distinguished, at this point at least, from arbitration clauses and class action waivers, which may be problematic on other normative grounds, but are too remote from everyday experience to get traction in a scenario study.<sup>164</sup> The company policies in question are meant to push the boundaries of reasonable business practices. The goal is that readers view the policies as burdensome and problematic, such that they would be inclined, all else being equal, to object. The stakes are mid-range—not enormous transactions like home-buying where readership arguably has a clearer normative status, but not the EULA for a movie download, either. The goal was to invoke run-of-the-mill in-person consumer contracting scenarios, where the manifestation of assent is evinced by signature, in the presence of the drafter’s agent, in a situation in which careful readership is possible but would be unusual.

Subjects were randomly assigned to one of three conditions for each vignette. The independent variable was, roughly, the quality of the notice of terms: standard form, rolling contract, and online policy. The three conditions were drafted to be as similar as possible on all dimensions except the consumer’s access to the company policy. Thus the term in all three conditions was described as having been available and documented prior to the customer complaint. In each condition, subjects were meant to have the sense that the company had a real, long-standing policy. In this way, each policy was intended feel like a true company practice rather than an *ad hoc* penalty, in each case verifiable with documentation in a way that parallels the standard contract condition.

The dependent variables homed in on a few main constructs. The rationale for the response variables of central interest are described briefly here; the exact wording is given in the Methods subsection below.

- **Enforceability:** The study asked subjects to give their best guess about the legal effect of the contract. This is the first question after they read the

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<sup>163</sup> See, e.g., See Chris Guthrie, *Prospect Theory, Risk Preference, and the Law*, 97 NW U L REV 1115, 1118 (2003) (explaining different behavior under “gain frames” than under “loss frames”).

<sup>164</sup> See, e.g., Marotta-Wurgler *supra* note 88 (showing that reading an arbitration clause does not deter purchase).

vignette and arguably the most important, insofar as the perceived legal status of a term affects its moral weight as well as the likelihood of challenge.

- Assent: In order to assess subjective views of assent, each condition was evaluated for subjects' own understandings of the level of meaningful agreement.
- Individual and Company Responsibility for Unread Terms: In two questions, subjects indicated the extent to which the consumer and the company, respectively, were at "fault" for the consumer's ignorance of the term. One speculation is that the apportionment of blame affects how and when people seek redress.
- Fairness: This inquiry builds on the moral psychology literature showing strong commitments to contracts. As in the breach literature, we would expect to find that increased perceptions of fairness are associated with increased compliance to the terms of the contract, irrespective of legal mechanisms for challenge or exit.
- Reasonableness of Means of Communicating Terms: Subjects were asked to indicate the extent to which it is reasonable to expect knowledge of a particular policy. This acts in part as a manipulation check when the experimental manipulation is precisely aimed at ease of reading, but also helps give a baseline sense of how consumers view the norms of consumer readership.
- Legal Status Uncertain: The last two questions, posed on a separate second page, asked subjects to assume that the legal status of the policy is unclear, and then to consider the probability of suit and the normative status of the policy. This was meant to separate the assumptions or beliefs about enforceability from willingness to challenge—so, does the standard contract elicit weaker preferences to challenge, even if it is clear that a challenge may be successful? These last two questions were raised after the rest, on a separate page, so that the introduction of legal uncertainty would not affect how subjects answered the question about legal enforceability.

### *B. Method*

A contract term may be problematic because it is excessively burdensome to consumers, or because it is difficult for consumers to discover, understand, or evaluate before the deal becomes binding. This study tested the basic hypothesis that more transparent contracting practices predict perceptions of increased legal and moral obligation, decreased likelihood to challenge, and more positive views of the drafter.

208 participants were recruited via the Wharton Behavioral Lab (WBL) at the University of Pennsylvania.<sup>165</sup> 72.1% of subjects were female. Subject ages ranged from 18 to 41 with a median age of 20. Subjects were 13.4% first-year students, 28.3% second-year students, 21.6% third-year students, and 36.5% fourth-year students. They came from the College (61.1%), the School of Engineering (8.7%), the school of Nursing (3.4%) and the Wharton School (26.4%). They were paid an average of \$11 for participation in a total of three consecutive unrelated studies taken during a one-hour time slot, of which this was the second.

The questionnaire was programmed in Qualtrics and took under ten minutes to complete. Subjects were assigned to individual carrels with desktop computers. They could not see the screens of other participants, and no identifying information was collected; responses were confidential and anonymous.

In total each subject saw two vignettes, in random order, and with each vignette randomly appearing in one of the three conditions. The two scenarios are detailed below.

The **Waiver** scenario read as follows:

Jamie recently rented a hotel room with Home Again Suites for a night, so he could go to his cousin's out of town wedding. The hotel room cost about \$100 for a night. Just as Jamie was getting ready for bed, the fire alarm went off. He grabbed his wallet and overnight bag and went outside to wait with the other guests. The manager came out and apologized, explaining that a small kitchen fire had started and been extinguished, and everyone could return to their rooms within a half hour. The manager warned everyone that the bathroom sprinklers had been briefly activated on the ground floor, and to be careful of slippery floors. He announced that all guests would have their room charges refunded.

Jamie was immediately concerned, because he had left his laptop charging next to the bathroom sink where there was an easily accessible outlet. When he returned to his room, he found his laptop in a shallow puddle,

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<sup>165</sup> The Wharton Behavioral Laboratory is a fully staffed, full-time research facility at the University of Pennsylvania's Wharton School of Business. The WBL recruits subjects on and off campus for experimental research. Subjects sign up for one-hour slots for which they are paid \$10-\$15 in total. Subjects who participated in this study also participated in two other, unrelated studies during the course of the hour.

and it would not turn on. His laptop was relatively new and had cost over \$1000.

He went to see the hotel’s manager at the front desk, who apologized but said, “I am really sorry, but our policy is not to cover any unintentional damage to guests’ personal property.”

Subjects then read the condition-specific text as follows:

<b>Standard Contract</b>	The manager pulled out the agreement Jamie signed when he checked in and showed him a clause on the second page. Jamie’s signature was at the bottom of the page.
<b>Rolling Contract</b>	The manager pulled out the agreement Jamie signed when he checked in and showed him a clause on the second page. It read, “This agreement includes and incorporates the policies listed in the Guest Binder available with the manager.” Jamie’s signature was at the bottom of the page. The manager showed Jamie the part of the Guest Binder with Guest Policies.
<b>Online Policy</b>	The manager pulled out a three-ring binder with the cover label, “Guest Binder” and turned to the tab for “Home Again Suites Guest Policies.” A copy of the Guest Binder is in every room.

[The clause read], “Home Again Suites shall not be liable for any damage to personal property including damage caused by the negligence or recklessness of Home Again Suites employees, affiliates, or guests.”

Subjects rated their agreement with 7 statements, each on a scale of 1 to 7, where 1 was “totally disagree” and 7 was “totally agree.” Each question is listed here with a variable name for ease of reporting results below; subjects did not see variable labels.

<b>Legal</b>	Jamie is not legally entitled to compensation for the laptop damage.
<b>Fair</b>	This is a fair contract.
<b>Customer Fault</b>	It is Jamie’s fault that he didn’t know about the liability

	waiver.
<b>Hotel Fault</b>	It is the hotel's fault that Jamie didn't know about the liability waiver.
<b>Assent</b>	Jamie agreed to the policy.
<b>Moral</b>	Jamie is morally obligated to follow the hotel's policy in this case.
<b>Communication</b>	Home Again Suites uses a reasonable way to communicate its policies to its customers.

Subjects then clicked through to a second set of two follow-up questions, preceded by the new assumption that the law's legal status is uncertain:

Assume that when a lawyer friend of Jamie's looks at the state's contract laws, she finds that the law is not clear on whether or not this kind of term in this situation is enforceable. In the event that the state law is unclear:

<b>Sue</b>	If I were Jamie, I would sue the hotel for the value of the laptop (\$1,000) in small claims court.
<b>Legitimate</b>	Home Again Suites's policy is a legitimate business practice in this context, and the law should permit it.

The **Fee** scenario described a customer faced with a fee (a loss rather than a foregone gain as in the hotel scenario). In this scenario the Rolling Contract condition does not include an affirmative agreement to be bound by additional terms to follow:

Jake recently made a phone reservation for a rental car from Autoday, a national car rental agency. He picked up the car on a Tuesday at a local branch of Autoday, where there was a long line of customers waiting to get their cars. When he got to the rental desk, an Autoday agent gave him a short rental agreement, which he was asked to sign. He signed, paid, and received the car keys and a "Welcome to Autoday" folder.

Jake drove the car for almost a week. During the week, he had a number of meetings, and as a result received two parking tickets when he was late to fill his meter. His tickets were \$32 each, and he sent a check for \$64 to the city's parking authority right away. He returned his rental car at the end of the week.

One week later, he looked at his credit card bill and saw a new charge for \$200 from the car rental agency. Confused, he called the company. They

told him that they charged a \$100 processing fee for each parking ticket issued against one of their vehicles.

<b>Standard Contract</b>	The customer service agent told him that the fee was spelled out in the rental agreement Jake signed at the reservation desk, and the agent emailed him a scan of the relevant page, showing the clause and Jake’s signature at the bottom.
<b>Rolling Contract</b>	The customer service agent told him that the fee was spelled out in a terms and conditions document in his “Welcome to Autoday” folder. The agent emailed him a scan of the relevant page.
<b>Posted Policy</b>	The customer service agent told him that the fee was spelled out on the company’s website. The agent emailed him a link to the relevant page.

It read, “Parking tickets issued to this vehicle result in a \$100 processing fee per ticket, to be charged automatically to the customer.” Jake did not expect this policy and did not want to pay the fee.

*C. Results*

Tables 1 and 2 show the mean response on a 1-7 scale for each response variable. These tables show every mean for every condition in both vignettes. Of the 16 response variables (8 for each scenario), only one variable differed significantly between the Standard and the Rolling contract, namely the Enforceable item in the Fee scenario.

The tables show three separate comparisons, with statistical significance, per variable. For each item, I compared the Standard Contract to the Online Policy, and I compared the Rolling Contract to the Online Policy—that is, each Contract condition was separately compared to the Policy condition. The statistical tests of difference are reported by asterisk on the Contract variable.

Because the Standard and Rolling conditions behaved so similarly, I also joined them together for the purposes of a less granular analysis, comparing an overall Contract condition with a Policy condition. The table shows the means for each

variable by condition. This is reported in the fourth column with a yes/no value. All reported significance tests reported in tables below compare conditions with a Wilcoxon rank-sum test.<sup>166</sup> Narrative analysis of these results is reported below the tables.

**Table 1. Hotel Liability Waiver Scenario: Mean responses for each response variable, by condition.**

<b>WAIVER</b>	<b>Standard Contract</b>	<b>Rolling Contract</b>	<b>Policy</b>	<b>Contract vs. Policy: Significant Difference</b>
Enforceable	4.8	4.9	4.7	No
Fair	3.4	3.4	3.1	No
Customer Fault	3.9**	3.8*	3.1	<b>Yes</b>
Company Fault	4.1**	4.4*	4.8	<b>Yes</b>
Consent	5.4***	5.3**	4.4	<b>Yes</b>
Moral	3.7	4	3.7	No
Communication	3***	2.8**	2.2	<b>Yes</b>
Sue	5	5	5.3	No
Policy Legitimate	3.5+	3.7*	3.1	<b>Yes</b>

**Table 2. Car Rental Fee Scenario: Mean responses for each response variable, by condition.**

<b>FEE</b>	<b>Standard Contract</b>	<b>Rolling Contract</b>	<b>Policy</b>	<b>Contract vs. Policy: Significant Difference</b>
Enforceable	5.9**	5.5	5.2	<b>Yes</b>
Fair	4.2*	3.8	3.6	No
Customer Fault	5**	4.6+	4.1	<b>Yes</b>
Company Fault	4.2	4.3	4.8	<b>Yes</b>
Consent	5.6	5.3	4.6	<b>Yes</b>
Moral	4.6**	4.3*	4.3	No
Communication	3.3*	3	2.7	<b>Yes</b>
Sue	3.6*	3.7+	4.2	<b>Yes</b>

<sup>166</sup> A Wilcoxon rank-sum test is a test of significance used for comparisons of two samples, as with the more familiar t-test. Rather than a comparison of means, it is a comparison of medians. The Wilcoxon test rank-sum test essentially asks whether the observations in one condition tend to be greater than the observations in the other. This is generally a conservative measure of statistical significance.



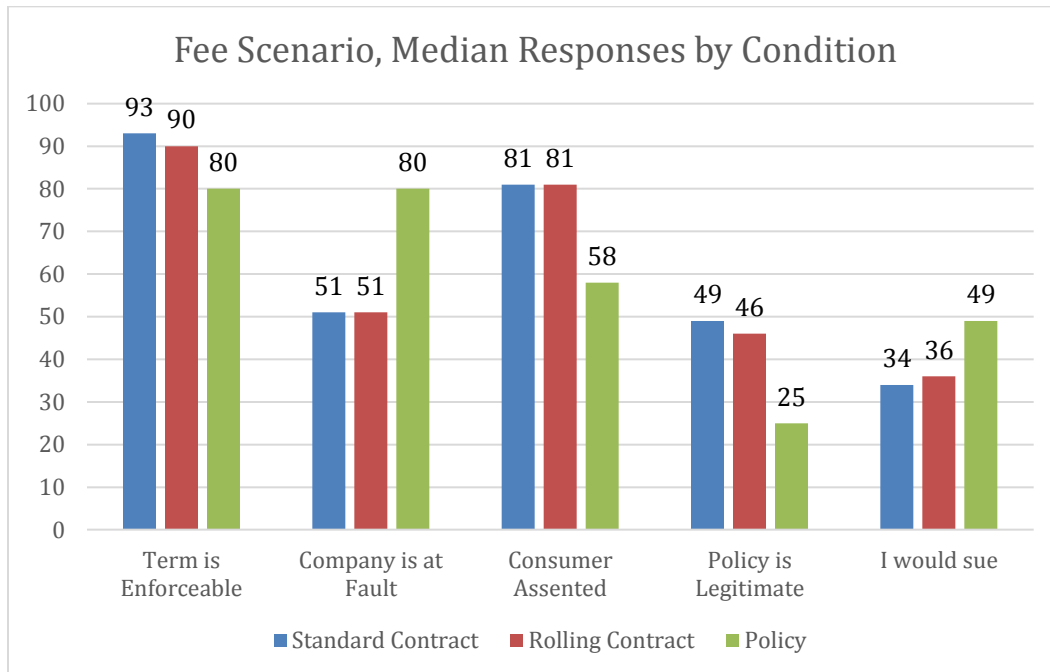
Policy Legitimate	4.2**	3.8	3.4	<b>Yes</b>
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p < .10; \* p < .05; \*\*p < .01; \*\*\* p <.001. Significance tests show p-values for Wilcoxon rank-sum comparisons of each variable in the Standard Contract and Rolling Contract conditions, respectively, with the Policy Condition.

### 1. Short Contract vs. Rolling Contract

As Tables 1 and 2 show, there were few statistically significant differences between the Short Contract and the Rolling Contract. Some trends suggest a slightly more skeptical attitude toward the Rolling Contract, and some of these differences would likely come to light in a study with more power. Nonetheless, the most striking result here was how similarly subjects treated terms that would clearly be enforceable on traditional assent analyses and those that would be suspect for lack of notice. Figure 1 shows the percentage of subjects who agreed with each statement (i.e., chose 5-7 on the 7-point scale of agreement), by condition.

**Figure 1. Percent of Subjects Agreeing with each statement, by condition, Fee Scenario**





**Figure 2. Percent of Subjects Agreeing with each statement, by condition, Waiver Scenario**

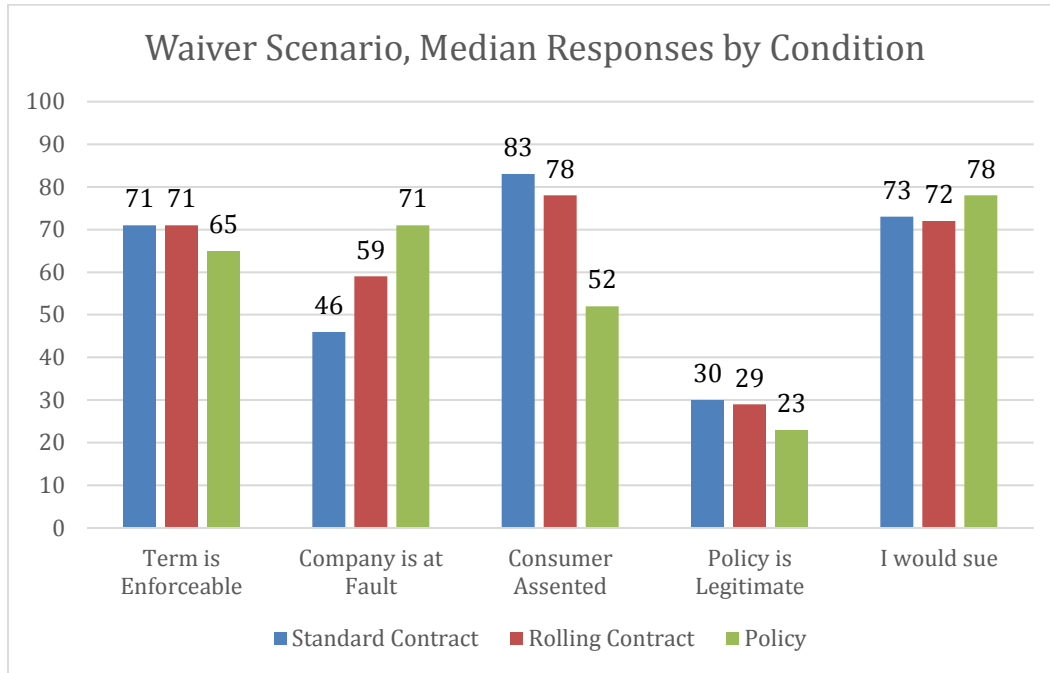


Figure 1 shows that subjects appeared to believe that the terms available in a non-contractual document, presented only after the contract had been signed, were viewed as similar to a standard form contract in terms of enforceability, assent, legitimacy, and subject to challenge. One is always hesitant to report a null result as real evidence, especially in a scenario study, so I offer my conclusions cautiously. Although subjects may distinguish the Simple and Rolling contracts along dimensions other than those prompted, they did not do so, or at least not consistently, in response to these questions—even the questions about communicative efficacy that were meant more or less as manipulation checks.<sup>167</sup> The statement about the contract being a “reasonable way to communicate” was intended to draw out the intuition that a single dose of standard boilerplate is easier to skim than multiple iterations of standard boilerplate. It did not. One

<sup>167</sup> A manipulation check in a psychology experiment is a direct question about the subject’s experience of the independent variable of interest, to make sure that the experimental manipulation itself succeeded qua independent variable. So if the study were on the effect of emotion on test performance, with subjects being randomly induced to feel happiness or sadness, a manipulation check would just ask, usually at the end of the experiment session, “How do you feel?” If subjects did not differ on this dimension, it might give the experimenters pause about the effectiveness of their emotion-inducement mechanism. In this case, the finding that subjects did not view the standard and rolling contract as dissimilar in communicative efficacy essentially becomes its own result insofar as there is no evidence that subjects failed to comprehend the scenarios.

reasonable inference would be that subjects truly, explicitly find both kinds of contracting to be equally reasonable ways of communicating information to consumers. My own intuition is actually in accord with this view, though I would go further and argue that the three contract procedures under consideration are equally ineffective as communication. In this case, though, I think that most subjects saw the standard and rolling contracts as just more or less within the boundaries of contract. A short separate study is in line with this interpretation.<sup>168</sup> Nonetheless, the null result was surprising, and I offer some further thoughts in the Discussion.

## 2. Contracts vs. Policies

The main result of this study is the difference between the contracts on the one hand (standard or rolling) and the policy on the other. Though some comparative differences are less robust, overall, subjects differentiated significantly between the Contract conditions and the Policy condition. They viewed a policy embedded in an unread contract as more likely to be enforceable in court and were favorable toward the company. When asked to assume that the policy was on uncertain legal grounds, they nonetheless reported less willingness to pursue a claim in court when the policy was included in the contract, and more support for the policy as a legitimate business practice. Tables 1 and 2 showed these the means for each question in each condition. Figures 1 and 2 describe the data in different terms, showing the distribution of responses rather than the means. This may provide some more meaningful way of thinking about what these results mean.

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<sup>168</sup> From a separate study, I have some evidence that when prompted to consider contracts procedures with salient reference points, people do distinguish between standard and rolling contracts. 286 Turk subjects answered the following short questionnaire:

Acme Gym gives its members a three-page membership contract when they sign up. It includes all of the company's policies and procedures.

Fitness Works gives its members a three-page membership contract when they sign up. It includes most of the company's policies and procedures. During the first month of membership, they also send their members a Welcome Packet, which includes additional terms and conditions of membership.

Please rate each company's Contracting Policies below, where the worst policies for customers are rated 0 and the best are rated 100.

When asked to compare the two contracting methods side-by-side, subjects graded the pre-acceptance contract as an 80.6 and the post-acceptance document as a 52.7. This mean difference of 27.9 points on a hundred-point scale is highly significant on a within-subjects t-test ( $t=12.50$ ,  $df=285$ ,  $p=.000$ ).

To take the results reported in Figure 1: Moving a policy out of the rolling contract and onto the website led 10% fewer subjects to believe that the term was enforceable; 23% fewer subjects to believe that the consumer had assented; and 19% fewer subjects to view the policy as a legitimate business practice. The results reported in Figure 2 are visibly messier but all told convey a similar story—distinct and robust shifts in assignment of blame and inferences of assent.

### 3. Replication in a Non-Student Sample

As noted in the introduction to the Methods section, this study replicated fully on Amazon Turk. Those results, included in the Appendix, yield one main impression, namely that the results look even more dramatic than in the student population. This subject pool included more male subjects, more subjects of different socioeconomic backgrounds, and a much greater age range. Subjects consistently viewed the non-contractual policies as less fair, less enforceable, and less legitimate than the contractual policies, even when the contract in question was dubious at best. This is a finding to keep in mind going forward, as there are reasons to think that general sample both has more experience in diverse contracts contacts and that it is a sample less likely to have in-depth knowledge of the legal system and the law of contracts.

Overall, across samples, these results show some substantial shifts in subjects' intuitions and judgments across the term-policy divide. Terms in contract form were taken more seriously as legal and moral obligations than terms in more clearly non-contractual form.

#### *D. Follow-up Study: Testing Assumptions About Contract Law*

In a short follow-up study, I tested the hypothesis that individuals make assumptions about the legal approach to contract enforcement, and that those assumptions affect their approach to fine print, either by providing a convincing normative argument or just by raising the previously-unconsidered possibility that there is something legally objectionable about assent to consumer contracts.

140 subjects recruited via Amazon Turk were paid \$.50 each to complete a three-minute questionnaire.

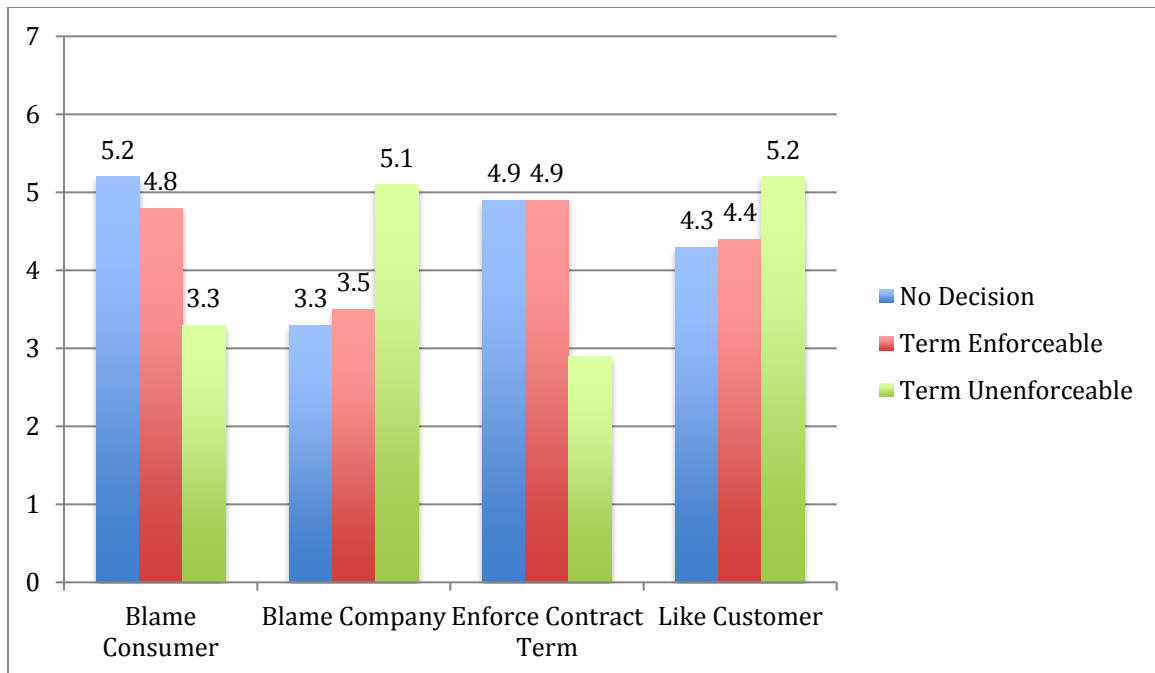
All subjects read the Fee scenario in the Rolling Contract condition described above. They were then told that the protagonist, Jeremy, decided to sue the car rental company in small claims court. They then read something about the outcome of the case, randomly assigned among the three following conditions.

<b>Control</b>	The judge heard the case and made his ruling.
<b>Enforceable</b>	“In this case, the fee is permissible,” said the judge. “The fee is upheld on the basis of the customer’s consent. The customer agreed to the terms and conditions of rental including the Additional Policies document.” Jeremy lost the case and paid the fee.
<b>Unenforceable</b>	“In this case, the fee is impermissible,” said the judge. “The fee is void for lack of consent. The customer did not agree to the terms and conditions of rental included in the Additional Policies document.” Jeremy won the case and did not pay the fee.

Subjects were asked to indicate their agreement, on a scale from 1 to 7, with the following statements.

1. Jeremy sounds like someone I would like.
2. The car rental company is in the wrong here.
3. Jeremy is to blame for this situation.
4. The right decision for the judge to make is to enforce the fee and require Jeremy to pay.

**Figure 4. Means for each response item, by condition.**



Subjects who were not told what the judge would find believed the contract would be enforceable, with almost precisely the same confidence as subjects who read that the judge would enforce the term. Subjects given the information that a judge refused to enforce appeared to update their beliefs and judgments such that they believed that the term should not be enforceable and that the company was to blame. Overall, the Enforceable condition was statistically indistinguishable from the Control condition. The Unenforceable condition, on the other hand, was dramatically different from the Control. Subjects who read that the contract was void for lack of consent reported that the consumer was less to blame (mean difference=1.9,  $W=934.5$ ,  $p=.000$ ), the company was more to blame (mean difference=1.8,  $W=1621$ ,  $p=.000$ ), the decision to enforce was more robust (mean difference=2.0,  $W=465.4$ ,  $p=.000$ ), and the customer was more likeable (mean difference =.9,  $W=723.5$ ,  $p=.007$ ).

These results suggest that subjects essentially intuited the Enforceable scenario. Their own view was that the term was probably enforceable. When informed that a judge ruled the contract term void for lack of consent, however, their views shifted markedly. They switched the burden of blame from the consumer to the company, and moved judgments of enforceability across the midline.

This study raises some important questions about the role of law in contract intuitions. They suggest that people have a particular view of the legal norms in

this area—namely, if it’s in a contract, it’s enforceable—and that the possibility of a legal norm that requires more meaningful assent acts as an update.

## V. DISCUSSION AND IMPLICATIONS

To summarize the results: subjects believed policies embedded in contract were more likely to be legally enforceable, judged those policies as more fair, and imagined that they would be less likely to challenge those policies in court. The possibility that the legal rule might take fairness or meaningful assent into account appeared to be new information.

Until now, the mismatch between consumer contracting and contract doctrine has been couched in terms of disclosure overload<sup>169</sup>, an apt characterization of the current consumer landscape, but a red herring. The problem is not that people are failing their duty to read their contracts because of bounded rationality. The problem is that the terms, afforded so little attention *ex ante*, have too much weight *ex post*. The duty to read doctrine has formal legal consequences for parties, of course, but research on informal norms might suggest that the doctrine also has consequences for the colloquial understanding of contracting as a social practice.<sup>170</sup> When terms are memorialized and documents shared, they assume the mantle of contract-capital-C, with all of its moral and social baggage.<sup>171</sup> Policies or rules promulgated in the form of contract, whether or not that contract is read or is intended to be read, look and feel legitimate. People feel more bound, legally and morally, by policies that they agreed to, in the thinnest sense, even if the policies are clearly burdensome or problematic or otherwise unfair.<sup>172</sup> In turn, a policy’s inclusion in a form contract may reduce the likelihood that consumers will challenge a practice using market power, informal dispute mechanisms, the court system, or the political process.

### A. *Incentives to Produce Boilerplate*

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<sup>169</sup> See, e.g., Ben-Shahar & Schneider, *supra* note 9 (titling their analysis “Disclosure Overload”).

<sup>170</sup> See, e.g., Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VANDERBILT L. REV. 1051, 1058 (1965) (“The duty to read in a fairly strict form carries out the substantive goal...On the basis of common sense but not much evidence, some have assumed that this tack will promote self-reliance. If one knows he will be legally bound to what he signs, he will take care to protect himself (or so it is said). And this would be a good thing.”)

<sup>171</sup> See Wilkinson-Ryan *supra* note 152 (arguing that formalization is viewed as an important trigger for moral obligation in contract.)

<sup>172</sup> Stolle & Slain, *supra* note 153, *infra* Part III.



The final section of this paper argues that if the experimental results described here are correctly identifying a cultural phenomenon, they should disrupt existing analyses of contract, because they reshape our sense of the relationship between disclosure and fairness. On most existing accounts, disclosure makes contracts *more* fair. These studies raise the question of whether the opposite might be true. This is a deeply disruptive intervention, because current legal and policy approaches to contract try to get to fairness via disclosure. The focus on disclosure is obfuscating, though; it clouds both the legal and the cultural discourse around fairness in consumer contracting. The focus on procedural fairness via disclosure, to the exclusion of substantive fairness, creates affirmative incentives for firms to keep disclosing. If disclosure is bad for consumers, we are incentivizing the wrong thing. The next two subsections address these incentives—the positive incentives to drafters to keep producing boilerplate, and the absence of disincentives for including borderline or unenforceable terms.

### 1. Substantial Benefits to Drafters of Unread Terms

Firms understand that their terms will be policed via the assent doctrine, not as a matter of the balance of equities between the parties. Mostly for the better, courts do not actually look into an exchange and evaluate the equities. People are free to agree to inequitable exchanges most of the time, so long as they have assented. Fairness via assent is the background explanation for the rule of expectation damages<sup>173</sup>, as well as the limitation on damages to only those losses that were reasonably foreseen<sup>174</sup>: parties can be held liable for the liability to which they have manifested assent, and only that liability.<sup>175</sup> In fact, even contract doctrines that purport to treat fairness on its own terms revert to an assent inquiry. The test of good faith and fair dealing, for example, is a constraint how the parties may interpret their obligations to one another, and it requires that they deal “fairly.”<sup>176</sup> The test of good faith and fair dealing prohibits parties from taking advantage or exploiting—but how do we know when one party’s behavior is reasonable and when it is exploitation? Courts look to the parties’ own understandings at the time of assent; the question of whether or not it would be *fair* to fire an at-will

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<sup>173</sup> See, e.g., Richard Craswell, *How We Got This Way: Further Thoughts on Fuller and Perdue*, 1 ISSUES IN LEG. SCHOL. 1 (2001).

<sup>174</sup> See Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV.

<sup>175</sup> See generally FARNSWORTH ON CONTRACTS, section 12.8

<sup>176</sup> See generally RESTATEMENT (SECOND) 205 (“Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”); cmt. d. (providing examples of bad faith performance); see also Robert Summers, *The General Duty of Good Faith*, 67 CORNELL L REV 810, 818-821 (1982).

employee just after she lands a big account is a question of the nature of the deal the court thinks the parties understood themselves to have assented to *ex ante*.<sup>177</sup> The upshot of this stance is that firms that wish to promulgate one-sided or burdensome terms have every incentive to disclose those terms—in bold print, in all-caps, etc.—within their standard contract.

It is very, very difficult to escape this incentive structure, even when there is widespread agreement that courts should police unfair terms on substance. I will briefly describe a case in point—a sort of exception that proves the rule, the ALI project on a proposed Restatement on Consumer Contract.<sup>178</sup> Its core approach is a loosening of assent doctrine coupled with heightened policing of unfairness:

[T]he “grand bargain” within consumer-contract law entails fairly unrestricted freedom for businesses to draft and affix their terms to the transaction, balanced by a set of substantive boundary restrictions, prohibiting businesses from going too far...as assent rules shift to the more permissive end of the continuum, there is more need and justification for mandatory restrictions and ex post scrutiny of abusive terms.<sup>179</sup>

This proposal is of particular interest for this Article because it is dealing with the problem of non-readership head-on, and taking seriously the possibility of scrutinizing terms for unfairness. The reason that I call this proposal an exception that proves the rule is that even as it recommends a shift in focus from assent to substantive fairness, it nonetheless retains enough traditional assent doctrine that it locks in the one-way ratchet for the production of standard terms.

Take, for example, the following illustration. The proposed rule for notice, made considerably more lenient than the usual rules of assent in contract, includes the following model case:

Illustration 18. A consumer visits a store to purchase a good. Upon payment at the cash register, the consumer is handed a sales receipt referencing additional terms and noting that these additional terms can be obtained at the customer-service desk. The additional terms are adopted as part of the contract.

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<sup>177</sup> *Fortune vs. National Cash Register*, 373 Mass. 96, 364 N.E.2d 1251 (1977) (“in every contract there is an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract.”)

<sup>178</sup> PRELIMINARY DRAFT RESTATEMENT OF LAW CONSUMER CONTRACTS, *supra* note 91.

<sup>179</sup> PRELIMINARY DRAFT RESTATEMENT OF LAW CONSUMER CONTRACTS, *supra* note 91, Section 2, Adoption of Standard Contract Terms (draft page 12).

Illustration 18 is arguably expanding the current understanding of assent to include a term that a reasonably prudent offeree would not discover. Although we might be justified in thinking that most people would not think a receipt has contract terms on the back of it, there are persuasive policy arguments for loosening assent in this way in the consumer context. But here is its counterexample:

Illustration 19. Same as [above] but now the sales receipt does not include a reference to the additional terms. The additional terms are not adopted as part of the contract...

The result in Illustration 19 essentially doubles down on the legal fiction, in the sense that the reasoning suggests not only that the courts take readership seriously, but that they take it so seriously that they think that there is a meaningful difference between notice of terms on the back of a receipt and no explicit notice of terms.

The important thing to notice here is that the new Restatement approach intends to deal explicitly with non-readership, and to do so via strengthened doctrines of fraud and unconscionability. But its relaxation of the assent standard has the perverse effect of encouraging firms to produce even more fine print. If company policies must be flagged on the back of the receipt in order to receive deference from courts, then firms should use every opportunity to indicate to consumers that they are committed to unread terms—even though it will not change anything about consumer choice *ex ante*.

Current models encourage production of useless terms, and policies that continue in this vein are misguided and even harmful. Courts and policymakers might start to think about what regulation would look like if one goal was to disincentivize boilerplate. If contracts without terms are actually *more* fair than contracts with full disclosure, then we ought to at least entertain the idea that we should be discouraging rather than incentivizing disclosures. We might indulge in the following thought experiment: What would it look like to have contracts but no disclosure of standard terms? In a world without terms, people buy products and click “Buy” rather than “I agree.”<sup>180</sup> There are no hyperlinks to terms and

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<sup>180</sup> See, e.g., Ryan Casamiquela, *Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L. J. 475, 475 fn. 3 (2002) (reviewing a series of cases in which courts upheld assent to terms via an “I Agree” button but refused in some cases where the assent manifestation was less explicit.)

conditions. No EULAs pop up when users download software.<sup>181</sup> A rental car company gives its customer a receipt and the keys to the car, but no paperwork.<sup>182</sup> Readers subscribe to magazines not knowing if renewal is automatic<sup>183</sup>; exercisers join gyms not knowing if they can recover damages for personal injuries<sup>184</sup>; car buyers purchase warranties without knowing whether they are covered for losses from vandalism<sup>185</sup>; online shoppers buy shoes or prescription drugs or electronics without knowing whether vendors plan to share their purchasing patterns with other sellers.<sup>186</sup>

Termlessness is not quite as disruptive a notion as it looks at first glance. Notice is deeply material to assent to a negotiated deal, but none of the convincing justifications for assent to standard terms actually requires that terms be provided to the parties as part of the transaction.<sup>187</sup> Whether parties are deemed to be consenting to reasonable terms only<sup>188</sup> or consenting to be surprised<sup>189</sup>, or letting

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<sup>181</sup> See, e.g., Robert Gomulkiewicz, *Getting Serious About User-Friendly Mass Market Licensing for Software*, 12 GEO. MASON. L. REV. 687, 688 (2004) (“Despite all the scholarly debate, one important reality remains: EULAs are here to stay for the foreseeable future. Courts, by and large, have enforced EULAs...”).

<sup>182</sup> See e.g., Andreas Fink & Torsten Reiners, *Modeling and Solving the Short-Term Car Rental Logistics Problem*, 42 TRANSPORTATION RESEARCH PART E: LOGISTICS AND TRANSPORTATION REV. 272, 275 (2006) (A rental starts with a check-out at some station where the customer signs the contract and ends with a check-in at the same or a different station).

<sup>183</sup> See, e.g., Mark Stiving, *Sleazy Pricing by WSJ*, Pragmatic Pricing blog, available at <http://pragmaticpricing.com/2012/12/23/sleazy-pricing-by-wsj/> (“Wow, I didn’t even notice. That was my fault. It was my responsibility to read whatever fine print there was when I originally signed up saying the rate would go up 3 fold after the first year.”)

<sup>184</sup> See, e.g., *Keitel v. PFPA LLC* (permitting release of liability for major injuries enforceable under Illinois law).

<sup>185</sup> See, e.g., Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011) (explaining the “surprising absence of any mechanisms by which informed and vigilant consumers could comparison shop among carriers”).

<sup>186</sup> See, e.g., Florencia Marotta-Wurgler, *Understanding Privacy Policies: Content, Self-Regulation, and Markets*, available at: [http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2736513](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2736513) (describing the variety of privacy policies and their uneven responses to FTC regulation).

<sup>187</sup> See, e.g., Eric Posner, *ProCd v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1183 (2010) (arguing that “If contracts rest on consent, then parties should be able to consent to be bound by hidden terms”).

<sup>188</sup> KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) (suggesting that in standard form contracts, non-reading parties may be deemed to have assented to “any not unreasonable or indecent terms, which do not alter or eviscerate the reasonable meaning of the dickered terms.”)

<sup>189</sup> See Randy Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 640 (2002) (“Suppose I say to my dearest friend, ‘Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.’ Is it categorically impossible to make such a

the most discerning consumers shape the market<sup>190</sup>, there is no obvious reason that the terms must exist as contract; as long as they are available to a consumer who is affirmatively searching for information about a company policy, those analyses are easily applied. In fact, nothing in standard accounts clearly requires the policies be available at all. If I can consent to be surprised by what is in my unread contract<sup>191</sup>, why can I not consent to be surprised by the whims of my cable company<sup>192</sup> or by the mysterious algorithms of my credit card lender's APR fluctuations?<sup>193</sup>

Hiding terms on purpose is clearly a fanciful idea, but there are intermediate steps with more practical appeal. As a first step, courts could start by letting go of assent analysis for peripheral terms in contracts of adhesion. Courts could take a uniform approach to consumer contracts, stepping back from the granular, fact-specific inquiries that have characterized the doctrinal parsing of browsewrap, clickwrap, and terms that follow. A term may be enforceable or unenforceable, but the justification for either would no longer rest on the text on the back of a receipt or the failure to make customers click "I Agree" before purchase. At this point, I take no strong position of what theory of standard terms would undergird this move. Courts could, roughly, take one of two approaches to assent. In *Hill vs. Gateway*, Judge Easterbrook implies that everyone is always on notice of terms, because all agreements are understood to be subject to terms.<sup>194</sup> As such, individual notice should be irrelevant. The other approach would look more like *DiscoverBank v. Superior Court* opinion from the California Supreme Court, which declares that a contract of adhesion is itself enough evidence of procedural defects to trigger scrutiny into the substantive unconscionability of a term.<sup>195</sup>

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promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later?")

<sup>190</sup> See Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) (showing that even if most non-drafting parties do not know the terms of their agreements, as long as a fraction of consumers do read and select on favorable terms, terms will not be unfairly one-sided.)

<sup>191</sup> See Barnett, *supra* note 189 at 625 (arguing that assenting to be surprised, clearly permissible under standard assent doctrine, is the equivalent of assenting to unread terms).

<sup>192</sup> See, e.g., Eric Andrew Horwitz, *An Analysis of Change-of-Terms Provisions as Used in Consumer Service Contracts of Adhesion*, 15 U. MIAMI BUS. L. REV. 75, 75-76 (2006) ("Imagine entering into a year-long contract for cable service...According to the cable company, the subscriber agreement contains a provision stating: 'We reserve the right to change the terms of the contract at any time...'"

<sup>193</sup> See, e.g., Ellen Cannon, *How To Avoid the Credit Card Nightmare of Universal Default*, FORBES, May 27, 2011 (explaining a particularly vicious version of the APR algorithm in which default on a separate and independent loan obligation can trigger a higher interest rate in a credit card agreement).

<sup>194</sup> *Id.*

<sup>195</sup> *Discover Bank v. Superior Court*, 30 Cal. Rptr. 3d 76 (Cal. 2005).

Again, if all form contracts are suspect, courts could stop inquiring into the particulars of a specific form contract.<sup>196</sup> If the courts were to jettison assent on either theory, the unconscionability review would then focus entirely on the substantive fairness of the disputed term. Defects in the bargaining process would be irrelevant to the determination of fairness, whether on a background understanding that consumers are always on notice that terms exist or that they are never on notice of their terms. The goal is that assent to consumer contracts is treated across the board such that it requires no analytic space—and thus offers no incentives to firms to produce it. If courts do not pay attention to notice of standard terms, companies risk less by leaving them out; changing the assent analysis changes the incentives.

It is worth noting here, though this Article cannot do the topic justice, that the discourse of assent affects the political conversation around unfair terms. The assent question is distracting; it obfuscates what ought to be a robust debate about what firms can and cannot do. If the question is whether or not firms ought to be able to require customers to bring their claims in arbitration, that determination could be made on its own terms. Either that is something firms ought to be able to do or it is not; there is no intervening fantasy about the consumer agreeing to arbitration. We might think that consumers could use the political process to register their opposition to unfair terms. If the cultural status of consumer contracting is framed mainly as a debate over procedural fairness, those objections may be less likely to crystallize into something politically actionable.

## 2. Low Costs of Overreach

There are two sides to the boilerplate-incentives coin. The first is that when courts and legislatures inquire carefully into assent/disclosure but only facially into substantive fairness, rational drafters who know that their counterparties are not reading should include any term that has a positive value to them. This is the argument of the last subsection, that focus on assent leads to overproduction of terms. The other side of the coin is that our current enforcement regime imposes no real costs to firms that overreach. When DiscoverBank includes an unenforceable restriction on class actions, a disapproving court invalidates the term—but not the contract.<sup>197</sup> The defendant in that case pays no real costs—if the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best. This is a real problem on two levels. The

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<sup>196</sup> I hasten to add that this is not the approach of the *Discover Bank* court, which identifies a low threshold for procedural defects, any contract of adhesion, but still endorses a sliding scale approach.

<sup>197</sup> *DiscoverBank supra* note 195.

first is that firms may be deterring legitimate, serious actions this way. Recall the Stolle & Slain finding about the personal injury disclaimer at the gym. If a company knows that some parties with high-stakes claims will forbear from bringing suit just on the basis of the contract language alone, the firm stands to benefit from the inclusion of the unenforceable term. The second problem is the more general observation that it does nothing to stem the tide of boilerplate.

The right goal in this area ought to be to find ways of policing contracts of adhesion via legal mechanisms that *deter* firms from trying to informally legitimize unfair terms. The policy prescriptions deserve full and separate treatment outside of this Article, but I can sketch out some of the most promising practices. One route is to subject firms to civil fines when they include unenforceable terms in their contracts. In California, for example, the ban on anti-disparagement clauses comes with a monetary penalty for any firm that attempts to enforce such a term.<sup>198</sup> Legislation introduced in both the Senate and the House, called the Consumer Review Freedom Act, has also received support, and it imposes \$10,000 fines per violation.<sup>199</sup> When terms are not explicitly forbidden by statute, courts may nonetheless be persuaded to address them in terms of fraud. A firm that knowingly includes an unenforceable term in a contract with the intention of deterring legal or extralegal challenge might be properly understood to be engaging in a form of fraud, which subjects the firm to liability in tort. The Federal Trade Commission has shown willingness to adopt this kind of reasoning in other consumer protection contexts, particularly false advertising (a very close relative).<sup>200</sup> Finally, even without legislative authorization to impose penalties, courts may nonetheless take the more forceful measure of invalidating not only unenforceable terms but the broader deals that contain them. A firm that risks a voided term risks very little; a firm that risks a voided contract because of the one bad term has a more serious calculation to make. Interventions that target unfair terms may be most effective if they make clear that firms that get it wrong—firms that include terms that a court deems unenforceable—will suffer real costs.

## VI. CONCLUSION

Consumer contracting has an uneasy status in modern American culture and contemporary legal doctrine. Given the sheer number of standard term texts, and

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<sup>198</sup> See California Civil Code section 1670.8, also referred to as the “Yelp” bill.

<sup>199</sup> See S.2044, 114th Congress (2015-2016), available at: <https://www.congress.gov/bill/114th-congress/senate-bill/2044>.

<sup>200</sup> See, e.g., Maureen Ohlhausen, *Weigh the Label, Not the Tractor: What Goes on the Scale in an FTC Unfairness Cost-Benefit Analysis*, 83 GEO. WASH. L. REV. 1999, 2005 (2015) (describing a fraud approach to an analysis of false advertising).

their unprecedented length, it should not be surprising that readership is almost nil. Even so, in the case law and in the popular culture, the notion that reading fine print is a reasonable and laudable goal persists. Thus far, interventions have been focused largely on increasing the salience of important terms, even as these efforts have repeatedly failed to increase consumer understanding. This paper offered some experimental evidence that efforts to increase consumer access to terms may paradoxically inhibit substantive objections to those terms. The intuitive moral norms of contracting appear to apply even when assent is very thin and formalistic. As such, even terms clearly vulnerable to challenge may receive an unwarranted level of deference in the shadow of the law.

Under the current doctrine, an analysis of procedural fairness in consumer contracting attends to the particulars of the contracting situation in ways that elide the larger reality of unreadness and unreadability, and that elision has doctrinal and cultural consequences. By contrast, if contracts have no standard terms, consumer-firm transactions can be analyzed earnestly and transparently. When terms are absent, it is arguably clear to all parties that they are not meant to be discovered *ex ante*. In such a regime, the difference between insiders and outsiders diminishes. And, in turn, when the terms or policies appear problematic or unfair, there are no social or moral obstacles to raising a challenge—the terms have no special promissory status.

Assent to unread fine print is a live legal debate, one that is currently receiving real political and analytic attention. The proposals to sharpen the back-end scrutiny of terms for unfairness are particularly apt for this context, where consumers are unlikely to evaluate terms before assent. But if consumer contracts of adhesion are going to be explicitly and systematically cleaved from the larger body of contract law, there is an opportunity to face the assent fiction head-on, taking into account the effect of contract law on non-expert or outsider participants in our legal system. The current regime requires firms to disclose every term they hope to later enforce, and consumers to attest that they agree to those terms if they want to purchase the good or browse the site. Courts and scholars understand that this simulacrum of meaningful assent is in tension with the underlying principles of contract enforcement, but one would never know as much by reading the case law or the contracts themselves. The fresh attention to consumer contracting is a moment to ask not only whether people are reading their contracts but also what they make of these unread contracts—and, finally, how those judgments and choices affect the normative appeal of our contract law.



## APPENDIX

### Study Replication with Amazon Turk Subject Pool

300 subjects were recruited from Amazon Turk. Subjects were paid \$1 to complete a 5-7 minute questionnaire. 3 subjects were omitted from the sample because they took the survey twice; 294 observations are reported here. 50.3% of subjects were men, with ages ranging from 19 to 72 with a median age of 32.

**Table 1. Means, Fee Scenario, Standard Contract vs. Rolling and Online Policy**

	Standard Contract	Rolling Contract	Online Policy
Legal	5.7	5.7	4.7***
Fair	4.1	3.6	3.2**
Blame Customer	5.3	5.2	4.1***
Blame Agency	3.8	3.7	4.5*
Consent	5.9	5.5	4.7***
Moral	5.2	5.1	4.1***
Communication	3.7	3.7	2.9*
Sue	3.3	3.7	4.0+
Legitimate	4.2	4.3	3.4**

+  $p < .10$ ; \*  $p < .05$ ; \*\* $p < .01$ ; \*\*\*  $p < .001$

Significance tests show p-values for Wilcoxon rank-sum comparisons of each variable in the Rolling Contract and Online Policy conditions with the same variable in the Standard Contract condition.

**Table 2. Means, Waiver Scenario, Standard Contract vs. Rolling, Posted Policy, and Hidden Policy**

	Standard Contract	Rolling Contract	Online Policy
Legal	5.1	4.7	3.9***
Fair	3.4	3.4	2.5**
Blame Customer	4.7	4.2+	3.2***
Blame Hotel	3.9	4.2	4.7***
Consent	5.8	5.4	4.0***
Moral	4.5	4.3	3.2***
Communication	3.6	3.2	2.4***
Sue	5.1	5.1	5.4
Legitimate	3.6	3.4	2.8**

+  $p < .10$ ; \*  $p < .05$ ; \*\* $p < .01$ ; \*\*\*  $p < .001$

Significance tests show p-values for Wilcoxon rank-sum comparisons of each variable in the Rolling Contract and Online Policy conditions with the same variable in the Standard Contract condition.