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RELATIONAL CONTRACTS OF ADHESION

David A. Hoffman*

ABSTRACT

Not all digital fine print exculpates liability: some exhorts users to perform before the consumer relationship has soured. We promise to choose strong passwords (and hold them private); to behave civilly on social networks; to refrain from streaming shows and sports; and to avoid reverse-engineering code (or, worse, deploying deadly bots). In short: consumers are apparently regulated by digital fine print, though it’s universally assumed we don’t read it, and even if we did, we’ll never be sued for failing to perform.

On reflection, this ordinary phenomenon is perplexing. Why would firms persist in deploying uncommunicative behavioral spurs? The conventional answer is that fine print acts as an option, drafted by uncreative, guild-captured lawyers. Through investigation of several sharing economy firms, and discussions with a variety of lawyers in this space, I show that this account is incomplete. Indeed, I identify and explore examples of innovative fine print that appears to really communicate with and manage users.

These firms have cajoled using contracts by trading on their brands and identities, and by giving up on certain exculpatory defenses common to digital agreements. I argue that the result is a new form of relational contracting, taking on attributes of both mass market adhesion contracts and more long-term deals.

* Professor of Law, University of Pennsylvania Law School. I would like to thank the individuals who agreed to be interviewed for this article: Hissan Bajwa, Michal Cohen, Bonnie Broeren, Rob Chestnut, Eric Goldman, Ari Shahdadi, Curtis Anderson, Ed Ferguson, Michael Cheah, Hansen Tong. Katherine Schloss (Penn ’17), Elyssa Eisenberg (Penn ’18), and Michelle Kao (Penn ’18) provided research assistance. Tom Baker, Shyam Balganesh, Danielle Citron, Zev Eigen, Meirav Furth, Eric Goldman, Sophia Lee, Greg Klass, Florencia Marotta-Wurgler, Lior Strahilevitz, Rick Swedloff, Tess Wilkinson-Ryan, and participants at faculty workshops at the University of Pennsylvania, and the 2nd Empirical Contracts Working Group, provided useful feedback.
INTRODUCTION

Consumer contract theory is myopically focused on the unread fine print.\(^1\) Because consumers don’t read their contracts, firms can make “hidden” terms worse without lowering prices.\(^2\) At best, the platonic consumer contract is read by exactly two people, both lawyers: the drafter curating it from the carcasses of past agreements,\(^3\) and the plaintiff’s counsel, immediately before explaining to an injured client that her case is hopeless.\(^4\) Yet perversely, when judges and juries evaluate terms \textit{ex post}, they blame consumers for failing to exercise care, and hold them to their deals.\(^5\) The result is a legitimacy crisis that has generated an outpouring of contracts scholarship.\(^6\)

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\(^1\) For the modern classic treatment, see Ian Ayres and Alan Schwartz, \textit{The No-Reading Problem in Consumer Contract Law}, 66 STAN. L. REV. 545 (2014).


But even as this account has settled into the new, cynical, conventional wisdom, a new form is arising. The modern consumer experience now includes participation in the creation of goods and services. Firms enlist consumers in building intellectual property. They ask us to review goods and services, and use those reviews in driving future sales. Platforms match users with each other, seeking to disintermediate established transportation and distribution networks. Overall, consumer agency, not passivity, is the rhetoric, if not the reality, of the “sharing economy.”

The evolution of consumers into participants has implications for contract law. Indeed, it is contract that makes the transmutation possible. Our economy is now shaped in part by the success and failure of terms that don’t just exculpate firms from liability, but also express the drafters’ hopes about how users will behave. In part through the fine print, firms may aim to influence consumers’ performance before the parties’ interests become adverse. That is, consumer contracts can’t be described as merely containing unfair and

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\*GILLIAN K. HADFIELD, RULES FOR A FLAT WORLD: WHY HUMANS INVENTED LAW AND HOW TO REINVENT IT FOR A COMPLEX GLOBAL ECONOMY 154 (2017) (discussing complexity of monitoring copying when the “boundary between who is a supplier and who is a consumer dissolves”). The question of labelling of users of sharing economy sites as “consumers” is intensely contested. Ryan Calo and Alex Rosenblat, The Taking Economy: Uber, Innovation, and Power, _ Colum. L. Rev. _ at 32 (forthcoming 2018) (arguing that labelling users as consumers is part of Uber’s strategy of taking from them).

\*In this Article, I’ll generally use “consumer” to refer to users of platform economy sites, though those individuals may be either buyers or sellers. See HADFIELD, ID.

\*The literature on the sharing economy is vast. For a useful recent survey, see Calo and Rosenblat, supra note 7, at 9-19 (describing promise of sharing economy).
defensive hidden terms: they also contain a set of instructions, what I’ll call *precatory fine print*.\(^\text{10}\)

Precatory fine print is distinctive from its aversive and defensive cousin. Unlike a clause defeating class action practice, or one disclaiming consequential damages, precatory terms are not primarily intended to have legal effect. Indeed, in the rare instances that firms seek to enforce clauses in the courts of law, they get into trouble.\(^\text{11}\) Consider the example of streaming media online. Firms often use boilerplate to try to extend their intellectual property rights—for example, by prohibiting consumers from asserting fair use under circumstances where the prevailing law would permit it.\(^\text{12}\) Though controversial among academics, these clauses are never, ever, enforced against consumers.\(^\text{13}\)

As Zev Eigen recently pointed out, a different way to think about these clauses is behavioral: content providers are really attempting to influence the likelihood that a user will keep (or share) content that is streamed onto the user’s device.\(^\text{14}\) Take a single example (which is representative of thousands of contracts that govern media streamed to our various devices): HBO Go. For those who, for whatever reason, are not Game of Thrones fans and consequently don’t subscribe,\(^\text{15}\) HBO Go enables users to stream the channel’s

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\(^{10}\) The use of the phrase “precatory” to describe consumer contracts’ terms of use is novel in published literature, though I did hear Pam Samuelson use it in a conference I attended.

\(^{11}\) Apart from the no-review example I give in this Paper, the widely-mocked, and largely unsuccessful, attempt to use precatory terms of use as the gist for violation of the CFAA provides both a cautionary tale and evidence of the point. As the leading commentator on the statute argued, the prosecution was problematic in part because “Internet users routinely click through such agreements on the assumption that they are legal mumbo jumbo that don’t impact what users are allowed to do.”. Orin S. Kerr, *Vagueness Challenges to the Computer Fraud and Abuse Act*, 94 MINN. L. REV. 1561, 1583 (2010).

\(^{12}\) Guy A. Rub, *Copyright Survives: Rethinking the Copyright-Contracts Conflict*, \_ \_ VA. L. REV. \_\_ at 45-48 (forthcoming 2018)(analyzing 283 cases in which contract claims were asserted and finding no consumer defendants)


\(^{15}\) This is a mistake, even if he’ll never, ever finish it. See Hoffman, *supra* note 6, at 1599 n.15 (explaining the problem of fantasy authors promising too much).
programs to their screen, untethered to their cable connection. Obviously, HBO is concerned lest users expand the scope of the license in various ways. It expresses that concern in a contract term, buried in a 7000-word terms of use. The seventh section is titled “RESTRICTIONS ON USE OF MATERIALS.”

To save space, I’ve reduced its font and cut out some words. Still, the mind reels:

(a) You may not copy, reproduce, distribute, transfer, sell, license, publish, enter into a database, display, perform publicly, modify, create derivative works, upload, edit, post, link to, frame, transmit, rent, lease, lend or sublicense or in any way exploit any part of the Services, or attempt to interfere with the operation of the Services in any way, except that you may access and display material and all other Content displayed on the Services for non-commercial, personal, entertainment use for a limited time only as strictly authorized herein. You may not use any data mining, robots, or similar data gathering and extraction tools on the Services or on any portion of the Service, or frame any portion of the Service. Without limiting the generality of the foregoing, you may not distribute any part of the Services over any network, including a local area network, nor sell or offer it for sale. You may not assign, sublicense, pledge or transfer any of your rights or obligations under this Agreement to any person or entity without HBO’s prior written consent which may be withheld in HBO’s sole discretion (and any such prior written consent shall be void ab initio). In addition, these files may not be used to construct any kind of database . . . Using any material on any other Service or networked computer environment is prohibited. Also prohibited are: decompiling, reverse engineering, disassembling, or otherwise reducing the code used in any software or digital rights management feature on the Services into a readable form in order to examine the construction of such software and/or to copy or create other products based (in whole or in part) on such software or any feature of the Services, or intercepting and/or recording network communications transmitted between the Services and HBO . . . (c) HBO and its partners and affiliates may suspend or terminate your subscription and access to the Services immediately if HBO reasonably determines that you are in violation of this Agreement or receives information that you no longer meet the Eligibility Criteria. In such event, you must cease all use of the Services. The suspension or termination of your subscription is in addition to, and not in lieu of, any rights and remedies available to HBO, its partners and affiliates under this Agreement or under applicable laws.

Let’s stipulate that the only nonlawyer, in the history of the world, who read that entire “paragraph” was the poor 2L student who checked it for accuracy. If you feel shamed by the last sentence and resolve to go back and really read it this time, you would find that HBO’s customers promise to do all sorts of things they will not be sued for failing to do, including watching Cersei Lannister burn her enemies over a local area network. Yet it is impossible to imagine that any ordinary consumer would be tempted to read this exhortation, or, having read it, change their behavior. Though omnipresent, the contract-

\[\text{Terms of Use, HBO Go, Last updated April 3, 2012, on file with author.}\]
\[\text{Sorry not sorry.}\]
\[\text{Admit it, you got bored and stopped reading. And I excised around 100 words from the middle just to make it easier for you.}\]
centered regulatory regime has been stunningly unsuccessful at reducing the copying of movies.  

Why then does this kind of precatory fine print exist? When pressed, most scholars argue that it offers firms a sort of option value. It’s not as if firms want to enforce terms in or out of court. Rather, fine print gives the firm a right to be exercised rarely, when consumers act in highly disruptive ways. This opportunistic account dominates discussions not just of exculpatory consumer contract clauses but also precatory ones. In effect, most scholars think of precatory clauses as little more than exculpatory clauses occasionally enforced through demand letters and algorithmic moderators instead of motions to dismiss. Accordingly, precatory fine print is rarely the subject of distinct law review treatments.

But this perspective misses the mark. Descriptively, in many industries the value for the “option” would be vanishingly low, as the reputational costs for triggering it would be exceptionally high. Moreover, even if firms want to

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19 Jenna Wortham, *The Unrepentant Bootlegger*, N.Y. TIMES, Sept. 28, 2014, at BU1


22 The RIAA, for example, abandoned its campaign to sue users for downloading music after it became a “public-relations disaster.” Sarah McBride and Ethan Smith, *Music Industry to Abandon Mass Suits*, Wal. St. J., Dec. 19, 2008, at B1, available at http://online.wsj.com/article/SB122966038836021137.html. Even threats to sue can be disastrous. The Streisand effect was a term coined by Mike Masnick in 2005 to how attempts to remove
preserve their *ex post* options, why have they done so through a communicative medium that’s famously unread – why haven’t they innovated to find ways to both corral their customers *ex ante* and also preserve their flexibility *ex post*?

Some have argued that the current look and feel of the fine print is evidence of a market failure resulting from a monopoly: the organized Bar. As imperfect, and badly-trained, agents, lawyers simply can’t solve clients’ consumer contracting problems, and repeatedly turn to the tools closest at hand. Thus, we will only have communicative contracts in a world where the gates around the profession are breached, and lawyers can join hands with accountants and engineers to build better forms.

This story is also incomplete. In this Article, I challenge the conventional wisdom by showing that it is possible to write mass market terms that really do influence user behavior outside of court. I do so through a series of interview-generated case studies of the user agreements from prominent new economy firms, including Etsy, Airbnb, Tumblr, and Kickstarter. This is good news: it may suggest a distinct way forward in our understanding of the future of contracting online. Firms can innovate in this space, if they want to, and lawyers can help them do so.

Close inspection of these innovative agreements suggests they might represent a new form of contracting, which I call relational contracts of adhesion. Unlike firms deploying typical, adhesive, mass, consumer contracts, these new firms actively try to motivate readership. In so doing, they hope to govern *ex ante* behavior without recourse to court sanctions, do not inevitably seize every advantage, harmonize the look and feel of the terms with their larger brands as an aspect of trade dress, and have seemingly succeeded in creating mass-market forms that have some of the attributes of “real” contracts. They are thus relational.

But unlike traditional relational contracts between firms, these contracts are not negotiated, the parties are at best loosely bound, and the users are both merchants and consumers at the same time. That is, successful precatory terms are neither fish nor fowl: they take on aspects of both the fabled past of individualized contracting and the cynical present of exploitative standard terms. On the whole, my description of relational contracts of adhesion

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information from the internet cause them to become even more salient. See Mike Masnick, *For 10 Years Everyone’s Been Using ‘The Streisand Effect’ Without Paying; Now I’m Going To Start Issuing Takedowns*, TechDirt January 8, 2015, available at https://perma.cc/4WMX-2VYT

23 See, e.g., Hadfield, supra note 7, at 188-190 (blaming the Bar monopoly for law schools’ and lawyers’ failure to innovate around terms); Eigen, supra note 14, at 2-5 (noting lawyers’ risk aversion as a driver of failure to innovate).
challenges the prevailing account of consumer contracting in the sharing economy, which is relentlessly focused on its dystopian and exploitative aspects.24

This Article thus has several goals. First, I want to carve out precatory terms in adhesion contracts as the objects of study. Though consumer contracts have been discussed at length for decades, the degree to which they contain language which purports to persuade rather than compel has been largely ignored by contract theorists. Part I of this paper provide some examples of precatory terms in their fine-print context, and Part II pieces together the standard account for their continued existence. But the standard account is unconvincing. Part III offers a series of case study examples based on interviews with market players of precatory terms that seem to be functional in motivating user behavior outside of court. Part IV offers a theory that knits together these case studies and suggests that they suggest a distinct form of relational contracting. The conditions giving rise to these contracts might suggest the need for different forms of government intervention in the sharing economy.

I. Precatory Terms Briefly Defined and Illustrated

To start, I confess to using the word precatory in an idiosyncratic sense. Ordinarily, precatory legal language has no legal effect at all25 – e.g., a clause in a will expressing the testator’s desires about her pet’s care.26 But some of the fine print I describe is in theory enforceable in court (though the degree to which that is practically true is a question I explore). For the purposes of this article, I define precatory fine print as language in a mass market contract that is (1) exceedingly unlikely to be enforced in court; (2) purports to govern the user’s conduct outside of the decision to purchase; and (3) introduces terms which the firm would like, all else equal, to see performed.

I have already mentioned that intellectual property contracts are paradigmatic examples of precatory terms. These are both omnipresent and never enforced against consumers.27 There is no evidence that any consumer has been motivated not to avoid copying by a contract, even though we would

24 See Calo and Rosenblat, supra note 7, at 32 (arguing that contracting is a way that firms like Uber exploit their users).
25 Black’s Law Dictionary 1214 (8th ed. 2004): “words of entreaty, request, desire, wish, or recommendation”
27 Rub, supra note 12, at 53-57 (discussing the set of doctrinal and practical hurdles to using contracts to enforce anti-copying rules).
expect that at least someone would have talked about it. It’s a puzzle. Here is a field where the firm-side demand to regulate consumers – to have them behave differently – is high. However, though the underlying firms are innovative and dynamic players in a rapidly changing market, they have settled on a particularly inane strategy. Each imposes boilerplate prohibitions that are as hard to understand as they are to read from beginning to end.

Other precatory terms purport to control consumer speech, creating a “sort of jurisprudence” for all speech-acts on the Internet. Indeed, as Jeffrey Rosen has observed, consumer contracts seem to give the employees of digital companies “more power over who gets heard around the globe than any politician or bureaucrat—more power, in fact, than any president or judge.”

The easiest example to parse is a digital media site that prohibits, using a contract, certain kinds of comments on news stories. Brietbart News, a site that we might not ordinary associate with civility, enjoins its users with a long list of ways that you may not interact with the webpage, all in boilerplate form:

“us[ing] the Services in any way that abuses, defames, stalks, annoys, threatens, harasses or violates the rights of privacy, publicity, intellectual property or other legal rights of a person or entity (now or hereafter recognized) or which encourages conduct which would violate any law or give rise to civil or criminal liability or post, publish, transmit, distribute, disseminate or upload any inappropriate, infringing, defamatory, profane, indecent, obscene, lewd, lascivious, filthy, excessively violent or illegal/unlawful material or matters, including, without limitation, information, topics, names or other material;

and

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28 Rub, supra note 12, at 49.


[Providing user comments that] degrades others on the basis of gender, race, class, ethnicity, national origin, religion, sexual preference, orientation or identity, disability, or other classification”

Civilizing clauses like this are ubiquitous: I found no relevant differences between sites that charge for content and those that build their business models around advertising.

A related attempt to control user behavior occurs when firms that sell goods to the public attempt to control their “community’s” behavior on firm’s own site. That behavior’s locus is typically user reviews. Firms actively monitor and moderate reviews ex post, but they also attempt to shape them ex ante through the terms of use. For example, Lululemon’s 8816-word Terms of Use including the user’s agreement to avoid comments that “defame, abuse, harass, stalk, threaten, or otherwise violate the legal rights (like rights of privacy and publicity) of others”, the use of “racially, ethnically or otherwise offensive language,” or posting anything “that depicts cruelty to animals.” Birchbox, which provides beauty products on a subscription basis, prohibits (in the 10th section of its svelte 5175-word Terms and Conditions) “unduly critical or spiteful comments of other content posted on the page or its authors.”

A common term prohibits impersonation of others. Surely this is the least well enforced contract term on the web. For example, Honeyfund, an online wedding honeymoon registry, exhorts users as a condition of use that not only must they avoid “strong, vulgar or otherwise obscene language”, they must also avoid “impersonating any person, including, but not limited to, other community members or employees of Honeyfund.com, Inc.” (The site also seems concerned about its members violating the securities laws, as it prohibits insider tips and other securities act violations.)

A different problem is posed when parties aggrieved by the service they provide comment on third-party sites. Here, obviously, the firm can’t easily

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31 Brietbart Terms of Service, Last Updated June 3, 2015, at https://perma.cc/5CLE-TY27
As some have pointed out, Universities also try to control speech using contract. See Robert H. Jerry II and Lyrissa Lidsky, Public Forum 2.1: Public Higher Education Institutions and Social Media, 14 FLA COASTAL L. REV. 55 (2012)
32 LuluLemon, at https://perma.cc/8LBL-KRGR
33 BirchBox, at https://perma.cc/BGN5-NY2Y
34 Specifically, users are prohibited from “posting, providing, transmitting, or otherwise making available any information which violates regulations promulgated by the Securities and Exchange Commission, or that of any securities exchange, such as the New York Stock Exchange.” HoneyFund Terms of Use, last updated November 11, 2015, available at https://perma.cc/MRP3-9A3S
resort to self-help by simply removing the offending comments. Single negative reviews may have disproportionately large effects on good will.\textsuperscript{35} In response, starting the mid-Aughts businesses turned to the fine print: clauses in consumer contracts telling users not to negatively review their products, sometimes enforced through penalty damages.\textsuperscript{36} Such clauses (which often backfired against their drafters) are now unenforceable, following the passage of a recent federal statute making all anti-review contract clauses void.\textsuperscript{37} That federal law was passed \textit{after} the election of Donald Trump and signed by Barack Obama in his waning days of office. The Consumer Review Fairness Act, enacted at a moment when political tensions were at a historical apogee, evidences our nearly universal disdain for the fine print.\textsuperscript{38}

A final set of examples comes from the platform economy. Many platform firms attempt to control users’ ability to share a single user account with multiple individuals. LinkedIn’s User Agreement, for instance, requires that adherents “try to choose a strong and secure password; (2) keep your password secure and confidential; (3) not transfer any part of your account (e.g., connections, groups) and (4) follow the law and the Dos and Don’ts below.”\textsuperscript{39} Those Dos and Don’t include an injunction whereby users promise to “provide accurate information to us and keep it updated.”\textsuperscript{40}

A different kind of terms appears to try to control offline customer behavior. ZipCar, for instance, permits its users (who, essentially, rent cars) to drive for services like Lyft and Uber. But, bizarrely, it attempts to use contract to control \textit{who} users transport. As its Membership Contract states:

“2.6 It is prohibited to use a Zipcar vehicle for the transportation of third party goods for payment such as, but not limited to, providing courier or delivery services. In addition, it is prohibited to transport

\textsuperscript{35} Lucille M. Ponte, \textit{Protecting Brand Image or Gaming the System? Consumer ‘Gag’ Contracts in an Age of Crowdsourced Ratings and Review}, 7 WM & MARY BUS. L. REV. 59, 92 (2016) (“the posting of a single negative review online could cause business revenues to plummet about 25 percent or more”)


\textsuperscript{38} Danielle Citron prompts me to wonder whether the rejection of review clauses is instead an illustration of our free speech tradition. Perhaps – though the absence of a similar public outcry against common confidentiality clauses, which are more seriously negotiated but which cause similar deprivation of market-relevant information, seems telling.

\textsuperscript{39} LinkedIn User Agreement, available at https://perma.cc/3Y8S-B28R

\textsuperscript{40} Id. at Section 8.
professional sports persons or professional entertainers in a Zipcar vehicle."\footnote{ZipCar Membership Contract – Floating Model, Last Revised 19 August 2016, available at https://perma.cc/BZL3-WKAH}

The backstory of that provision would be interesting to learn.\footnote{Avis, which owns ZipCar, has a different structure to its terms and conditions around use. First, it conditions assent to its use clause on an exclusion from Avis’s insurance and an immediate termination of the rental. Second, the use clause prohibits using the car to “carry persons or property for hire,” a use permitted by ZipCar. See Avis Rental Terms and Conditions for United States and Canada, available at https://perma.cc/5NCC-FGXR That is, if I were to drive Beyonce to a concert for free, I’d violate Zipcar’s terms of use, but not Avis’s. If I charged her, I’d violate both provisions. If I ferried one of Beyonce’s fans home at a price, I’d violate Avis but not ZipCar’s terms. The unlikelihood that this parsing is apparent to anyone in the world \textit{ex ante} is vanishingly low.} However, it’s not unique – firms routinely enlist contract to try to control user behavior in ways that might mitigate their business risk (but provide few additional legal protections.) Feastly, a site that matches meal preparers with those who want to eat, makes the chefs promise not to “violate any local, state, provincial, national, or other law or regulation, or any order of a court, including, without limitation, zoning restrictions.”\footnote{Feastly Terms and Conditions, available at https://perma.cc/289E-6TZ9 TaskRabbit, which matches the handy with the not, prohibits users from crossing state lines.\footnote{TaskRabbit Terms of Service, available at https://perma.cc/5CW4-94A8} Instacart, which fills your fridge, prohibits users from receiving alcohol from the site.\footnote{Instacart Terms and Conditions, available at https://perma.cc/6EBV-LHAF} Box, which provides storage, requires users to avoid “us[ing] the Service in connection with the operation of nuclear facilities . . . or other situations in which the failure of the Service could lead to death, personal injury, or physical property or environmental damage.”\footnote{Box Terms of Service, available at https://www.box.com/legal/termsofservice. Notably, another product with the similar name of DropBox Inc. does offer services directly to nuclear facilities, by way of a large, metal, toilet. See DropBox Inc. and the Sanitation Station. Portable Restroom Trailers, available at http://www.dropboxinc.com/shipping/container/modification/blog/bid/82601/DropBox-Inc-and-the-Sanitation-Station-Portable-Restroom-Trailers.}

In considering each of these examples, we should ask: if firms really want consumers to do the things they are asking to do, why would they use mass market fine print to communicate their goals? And if they actually don’t care if consumers listen, why bother writing such terms at all?
II. STANDARD ACCOUNTS FOR THE PERSISTENCE OF PRECATORY FINE PRINT

This Section considers the standard explanations for precatory fine print in the modern economy, and finds them, in the end, incomplete. I’ll start with some hopefully uncontroversial propositions about the relationship between terms and behavior.

A. Commercial Terms and Contract Behavior

In some contexts, it is axiomatic that terms govern performance. Why else would they exist? The normal science of the economic analysis of contract focuses on the effect of different terms on different levels of effort: parties take greater precautions against breach when damages are higher; they are more likely to perform when terms are clearly expressed; etc. Between firms, terms matter.

In the consumer sphere, by contrast, most (if not all) of the extant theoretical work on the behavioral effect of terms is explicitly posed as hypothetical at best. True, data from lab experiments does suggest that terms—

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48 Cf. Suchman, id. at 112 (providing account of contract as “significant gesture” that “allow[s] transaction parties to communicate messages to one another or to third-party observers.”)


50 This is not to say that each term is perfectly performed, or that legal sanctions are necessary, as reputational concerns play important roles. See generally Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 American Sociological Rev. 1 (1963); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions*, 99 Michigan Law Review 1724 (2001) (describing the role of trade associations in creating effective reputational constraints).

when read – can influence behavior. But terms (excepting warranties) are never read.

Thus, though although contracting terms are in theory part of the consumer products they regulate, studies have shown that they are not typically amenable to competitive pressures.


56 Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements, 5 J. EMPIRICAL LEGAL STUD. 447, 451 (2008). Field experiment
Perhaps, some argue, precatory terms influence behavior through a more indirect route. There is evidence that individuals experience contracting as a ritual with some latent power, which tends to legitimate terms even when they are not read. As Tess Wilkinson-Ryan puts it, “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.”\textsuperscript{57} The very act of consent “may remind the poster of the legally binding nature of agreement.” Once reminded, users may “reconsider their communications.”\textsuperscript{58}

That is, we all know that some terms apply, and may be behaviorally influenced by what we each imagine to be the rules of the road.\textsuperscript{59} To be concrete, when we agree to a user agreement before commenting online, perhaps we correctly intuit that the agreement tells us not to be a jerk, and behave better as a result. However, even the most cutting edge research has only begun to ask

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\textsuperscript{57} Wilkinson-Ryan, supra note 6, at 47.

\textsuperscript{58} Nancy S. Kim, Web Site Proprietorship and Online Harassment, 2009 Utah L. Rev. 993, 1014 (2009); but see David A. Hoffman and Zev Eigen, Contract Consideration and Behavior, 85 Geo. Wash. L. Rev. 351, 385-387 (2017) (noting lack of evidence and arguing for new forms of formation formality); Monika Leszczyńska, Think Twice Before You Sign: An Experiment on the Cautiousy Effect of Contract Formalities, available at http://www.law.nyu.edu/sites/default/files/upload_documents/Leszczyńska_Think	%20twice%20before%20you%20sign_09262016.pdf (individual were more impulsive when clicking a box than when signing their name)

\textsuperscript{59} Wilkinson-Ryan provides some evidence in support of this hypothesis. Wilkinson-Ryan, supra note 6, at 49. See also Eigen, supra note 4, at 135 (showing that as individuals learned more about the contract ex ante they were less likely to read terms ex post); Ayres and Schwartz, supra note 1, at 600 (discussing consumer views as to what privacy policies say). This sort of intuition gives rise to the famously unsuccessful Restatement (2nd) of Contracts § 211, otherwise known as the reasonable expectations doctrine. As the Restatement puts it, “Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, they are not bound to unknown terms which are beyond the range of reasonable expectation.”
about individuals’ naïve views of consumer contract terms. It seems unlikely that firms know more.

In fact, if consumer contracts are really just adding an extra feeling of heft behind *implicit* performance terms, why should firms insert any explicit behavioral terms at all, especially since term drafting is costly and may result in blowback? Some might respond that firms hope to influence the collective understanding of what terms are normal by pushing out particular language—that is, to create collective reasonable expectations one term at a time. The idea isn’t actually so outlandish over a long enough time horizon. But it is hard to imagine that any firms follow this kind of generational strategy.

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60 There are a number of papers that discuss the terms that consumers expect, but which do not focus on performance obligations. For example, consumers do not seem to accurately assess the likelihood of certain clauses in some consumer contracts. Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis and Yuxiang Liu, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MARYLAND L. REV. 1, 41 (2015) (few consumers recalled seeing arbitration agreement in a contract that contained one); cf. Ayres and Schwartz, supra note 1, at 600 (finding that many social media site terms are unsurprising to consumers); Zev J. Eigen, The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts, 41 CONN. L. REV. 383, 409 (2008) (only 3 of 37 employees recalled that an employment agreement they signed contained an arbitration clause); Debra Pogrund Stark, Jessica M. Choplin, and Eileen Linnabery, Dysfunctional Contracts and the Laws and Practices That Enable Them: An Empirical Analysis, 46 IND L REV 797, 813–20 (2013) (consumers do not understand waivers of remedies). There is a more robust literature about naïve views of law in various fields. See, e.g., Gregory Mandel, Anne A. Fast and Kristina Olson, Intellectual Property Law’s Plagiarism Fallacy, 2015 Brigham Young U. L. REV. 915, 947 (reporting experimental results about individuals view about the content of intellectual property law); see also Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, What’s a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property, 93 B.U. L. REV. 1389, 1390 (2013) (“creators are willing to sacrifice significant economic payments in favor of receiving attribution for their work”);


62 See Leib and Eigen, id. at 79 (“The more we fail to resist zombie contracts, the easier it is for drafting entities to assert that they hold a reasonable belief that individuals manifesting assent to terms would still do so, even in the face of more and more rights-encroaching terms.”)

63 It is hard to find data that supports or refutes the idea that individuals’ subjective expectations of contract terms have changed. And yet, for example, in the 1980s forum selection clauses were seem as controversial and seemingly limited to negotiated deals, but over time (helped by the Supreme Court in Carnival Cruise Lines v. Shute) they have become anodyne.

64 For one, it might not work! There is evidence from the privacy context that changes in subjective views about fourth amendment privacy may be relatively fixed. See Matthew B. Kugler and Lior Strahilevitz, The Myth of Fourth Amendment Circularity, 84 U. CHI. L. REV. ___ (2017 forthcoming) (finding that while Supreme Court decisions had short term effects on views of lawful surveillance, such effects disappeared over time). Danielle Citron, however, suggests that
Thus, the best extant empirical evidence about how ordinary precatory fine print functions concludes that it doesn’t, at least with respect to *ex ante* behavioral regulation and deterrence.

**B. The Standard Account: The Option Value of the Fine Print**

Why, then, might firms waste the time drafting terms that won’t influence behavior? Most argue, in one form or another, that even if terms don’t affect behavior *ex ante*, they certainly can *ex post*. That claim is common with respect to terms that limit consumer rights: explicit terms make legal defenses stronger. However, the defense doesn’t require all terms to be litigated, and it acknowledges that in fact firms rarely insist on the actual language in their consumer contracts. Rather, the terms are used opportunistically, policing consumers on the margin. The fine print functions as an option.

This view is most closely associated with a short essay by Lucian Bebchuk and Richard Posner. Bebchuk and Posner claimed that aversive terms in consumer contracts are intended to give firms the flexibility to police “egregious” conduct that is not easily reducible to semantic contract terms. By giving firms “discretion” in dealing with consumers, terms which look one-sided turn out in practice to harm few consumers. The firm can choose to exercise its rights when it is in its interest to do so. These options—even if implicit—have value for their holders.

This option-centered account sheds light on some puzzling features of current practice outside of the conventional context of defenses to obligation. Precatory terms are, sometimes, “exercised,” though not in court. Reference

Facebook’s real name policy might be an example of a firm with just such a long-term commitment in mind, based on Mark Zuckerberg’s personal commitments.

65 Eigen, *supra* note 14, at 4 (implied rights are more expensive to enforce);
69 Ammori, *supra* note 29, at 2276-2279 (describing implementation of speech codes at various digital companies)
to them makes it easier for sites to ban abusive commentators without recourse to legal process, and to serve as a defense in actions by commentators, and the third parties they might have harmed. Generally, firms will prefer to point out explicit reasons for self-help to consumers so as to avoid reputational blowback. This works because consumers generally think contracts are legitimate—even adhesive contracts on the web. Thus precatory consumer contract terms permit firms to cheaply weed out particular bad consumers from communities that would otherwise be contaminated by their presence.

Options can also be exercised against non-parties. Firms might use terms in contracts, not to defend against consumer suits, but to affirmatively police competitors who would leverage gaps in public law to seize work product. Or contracts might be used as evidence in suits that firms tried (but failed) to prevent bad conduct, like harassing speech or copyright infringement. The terms, in short, are a defensive shield behind which the firm has room to maneuver.

But the option explanation is incomplete. Buried terms may result in blowback if enforced and self-help will often be imperfect. Both problems

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70 Kim, *supra* note 58, at 1029 n.144 (2009) (noting a firm sued for failing to enforce its own terms and conditions against abuse). The fact that most such actions fail on Section 230 grounds makes the marginal legal utility of TOS particularly puzzling.

71 Ponte, *supra* note 35, at 78-79; Becher and Zarsky, *supra* note 53, at 322-328 (discussing ways that consumer learn of terms ex post).

72 Wilkinson-Ryan, *supra* note 6, at 50 (arguing that firms will use boilerplate because it will chill complaints); Stolle and Slaine, *supra* note 5; at 88-91 (boilerplate clauses reduced complaints); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Leg. Analysis 1 (2017) (consumers rationally may believe that terms are enforceable and binding when they are not).

73 Citron and Norton, *supra* note 21, at 1468.

74 Register v. Verio, 356 F.3d 393 (2d Cir. 2004).

75 *Citron, supra* NOTE 80, at 229 (discussing MySpace).

76 As Ed Ferguson, Vice President and Associate General Counsel at IAC, and Michael Cheah, General Counsel at Vimeo, explained to me, the terms of service provide protection for the firm – the freedom of action to enable to exclude users or manage disputes. Telephone Interview with Ed Ferguson and Michael Cheah, April 28, 2017.

77 Feldman & Teichman, *supra* note 52, at 31 (discounting option explanation after experimental study about individual motivations).

78 For example, consumers often try to switch cellphone carriers notwithstanding cancellation fees. The result is large consumer debts. See Consumer Financial Protection Bureau, Consumer Credit Reports: A study of medical and non-medical collections 19 (December 2014) available at [http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf](http://files.consumerfinance.gov/f/201412_cfpb_reports_consumer-credit-medical-and-non-medical-collections.pdf) (telecom fees represent the second largest form of debt referred to collection agencies that shows up on consumer credit reports, after medical care). But firms rarely are made whole through debt collection and typically they are thus left without real
would be ameliorated were the firm to find a way to present behaviorally relevant terms in ways that are salient to consumers. That is, no *ex post* benefits would be eliminated if firms could offer *ex ante* behavioral spurs. Also, *ex post* effects in some industries are all but impossible to observe: Guy Rub, in a survey of the universe of 283 reported decisions analyzing the copyright/contract nexus, found no examples of a consumer charged with breach of an intellectual property standard form contract.\(^{79}\)

Relatedly, though terms and conditions exhorting various forms of good behavior are omnipresent, so are trolls and stalker.\(^{80}\) To the extent that standard precatory terms assist firms in regulating behavior, they are *only doing so ex post*. This seems like a wasted opportunity – as if the criminal law were so obscure that it only functioned to punish, not to deter. It is odd that, though media firms obviously spend a great deal of time thinking about to place material on sites to ensure readership and grab clicks,\(^{81}\) they spend no time on the question of how to maximize the readership of their terms and conditions.\(^{82}\)

recourse for breach. *Id.* at 34. The move to “no contract clauses” is in this sense a reaction to the failure of termination clauses in fixed-duration agreements. There is an interesting dynamic here, whereby no contract clauses may be in part an attempt by the firm to make salient the alternative (termination fees) and thus affect the behavior of the small percent of consumers who stuck with a contract deal. That is, by advertising “no contract” the firm makes the remaining part of its consumer base realize that they are buying shackles, and become constrained accordingly. Evidence for this proposition is suggestive: the churn rate during the period from 2013 – the year when T-Mobile was the first major carrier to introduce a no contract plan – to 2016 shows a significant drop, from 2.11% to 1.73%. *Average Monthly Churn Rate for Wireless Carriers in the United States from 1st Quarter 2013 to 3rd Quarter 2016,* Statistica (Marc 10, 2017), [https://www.statista.com/statistics/283511/average-monthly-churn-rate-top-wireless-carriers-us/](https://www.statista.com/statistics/283511/average-monthly-churn-rate-top-wireless-carriers-us/). Additionally, as “no contract” plans became more common, the media was particularly quick to argue that two-year agreements were akin to being in jail. See, e.g., Joanna Stern, *Kill the Wireless Contract! Buy Your Own Phone,* WALL ST. J (Feb. 25, 2015), [https://www.wsj.com/articles/kill-the-wireless-contract-buy-your-own-phone-1424807865](https://www.wsj.com/articles/kill-the-wireless-contract-buy-your-own-phone-1424807865) (depicting signing on to a two-year contract as literally being in jail cell of the mayor carriers); Alison Griswold, *So Long, Cellphone Contracts. You Won’t Be Missed,* SLATE (Aug. 18, 2015, pm), [http://www.slate.com/blogs/moneybox/2015/08/18/so_long_cell_phone_contracts_wireless_carriers_are_phasing_two_year_plans.html](http://www.slate.com/blogs/moneybox/2015/08/18/so_long_cell_phone_contracts_wireless_carriers_are_phasing_two_year_plans.html) (arguing that while most consumers will be happy to see the end of two-year contracts, some who do not mind the commitment and do not worry about having the newest phones be better off staying on two-year plans).

\(^{79}\) Rub, supra note 12, at 48.

\(^{80}\) DANIELLE KEATS CITRON, HATE CRIMES IN CYBERSPACE (Harvard 2016).

\(^{81}\) See Hoffman, supra note 6, at 1639, n.189 (discussing firm innovation around dynamic webpages).

Who can we blame for the seeming failure of the market the produce terms written by and for humans?

Lawyers.

C. Legal Market Failure

Whether because of social pressures which reward conformity, the bar’s monopoly, a desire to please the client, the fear of legal liability, or network effects, lawyers generally are reluctant innovators around contract terms. Terms and conditions, as “convenient and known instruments” in the legal toolset, come easily to hand for lawyers who are tasked by their clients with solving consumers’ behavioral problems. More exotic forms of regulation, like visceral notice, are both unproven and potentially could backfirm against the firm. The result is an allegedly inefficient equilibrium. Eigen makes this argument most bluntly:

“Lawyers at a firm do not like to be sued for malpractice any less than in-house counsel enjoy being fired. So generally speaking, it is a wise and rational self-preserving strategy to avoid reinventing the wheel or doing something differently from every other lawyer working for other similarly situated companies or firms. If every lawyer before you relied

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83 Joshua Fairfield, The Cost of Consent: Optimal Standardization in the Law of Contract, 58 Emory L.J. 1401, 1409 (2009) (lawyers reuse language to “save themselves drafting costs, economize on learning costs, reuse ‘safe’ language that has been vetted by courts, and signal to prospective counterparties that the contract drafter does not seek an unfair advantage”).
84 Hadfield, supra note 7, at 189.
87 Eigen, supra note 21, at 4.
88 Calo, supra note 21, at [___].
89 Though lawyers are traditionally seen as risk averse with respect to new technologies, they are often also criticized for taking risks by drafting to the edge of what’s enforceable. Sometimes, we can’t win. See 9 Report of the N.Y. State Law Rev. Comm’n, Study of the Uniform Commercial Code. Legislative Doc. No. 65, at 177 (1954) (statement of Professor Karl Llewellyn) (“Business lawyers tend to draft to the edge of the possible. Any engineer makes his construction within a margin of safety, and a wide margin of safety, so that he knows for sure that he is getting what he is gunning for. The practice of business lawyers has been, however...to draft...to the edge of the possible.”)
on terms and conditions to solve a problem, you should too. How could a client fault you for using the same tactics as every other lawyer?"  

Eigen is far from the only commentator to suggest that lawyers have failed to offer creative and value-maximizing solutions to clients in the new economy.  

As Gillian Hadfield has recently argued, many entrepreneurial businesses have come to conclude that large law firms cannot solve their business problems “at any price.” She points to the complaints of the general counsel of CBS who finds that lawyers create terms and conditions that either “lock down” content or which entirely give it away. CBS—and other companies navigating today’s economy—sought a Goldilocks solution. But it was “very hard to locate the lawyers who know how to think like that.”

The former general counsel of Tumblr, describing Tumblr’s TOS revision process (about which I’ll say more later), noted that “law firm feedback was beyond useless, as their assessment of risks is way off and they can’t really balance the interests of users”: “[n]o law firms are good at this . . .”. When asked what institutional barriers exist to widespread use of precatory consumer contracts, he squarely laid the blame at the feet of the bar.

“[D]ecaying and venal legal institutions … surround US companies and don’t highlight the benefits (and low risks) of user-friendly contracts – [and] a federal judiciary that routinely kowtows to concentrated financial power (ergo allowing class action waivers and mandatory arb clauses), a corrupt and self-interested bar that invests in inefficiency and hooks for meritless plaintiffs’ suits, that same bar being insanely overly conservative on the defense/advice side to protect their inefficient and exorbitant fee structures, etc.”

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90 Eigen, supra note 14, at 4.
92 Hadfield, supra note 7, at 188.
93 Hadfield, supra note 7, at 190.
95 Email from Ari Shahdadi, VP Business Development, Buzzfeed, to David A. Hoffman, Professor of Law, University of Pennsylvania Law School (Mar. 22, 2017, 5:45 P.M. EST) (on file with author).
Similarly, the general counsel of Kickstarter, suggested that outside law firms have difficulty in a “very lawyerly risk averse approach” and that, as a consequence, they are likely to avoid changes to consumer-facing terms. This is true both in traditional biglaw and in firms that serve entrepreneurs: general counsel, by virtue of being embedded in the business, develop a more healthy appetite for risk-taking and a sense of the relative unimportance of small bore legal problems.96

Etsy’s representatives, when prompted to reflect on barriers to change, also mentioned risk aversion as a driver, though not standing alone:

“It’s hard to know for sure why other companies haven’t taken a similar approach, but there are certainly costs associated with making significant changes to user policies. Some of those costs – in-house counsel’s time, translation, and outside counsel review – are relatively concrete and easy to quantify. Others, such as the risks of attracting unwanted attention from users or plaintiff’s counsel or omitting some crucial piece of legal language, are harder to evaluate. But we suspect that some combination of cost sensitivity and risk aversion is responsible for many companies’ continued use of more old-fashioned policies.”97

As a lawyer who worked at Etsy on their Terms of Use project lamented, outside counsel “will never give you exactly what you want: you have to hold the pen . . . [Because] they focus on magic words.”98

It is undeniable that lawyers are imperfect agents.99 With respect to precatory contracts, it may seem unlikely that lawyers as traditionally educated will have the skills not just to write terms that can persuade their readers to perform, but also design them to make readership is likely.100 But critics of

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96 Telephone Interview with Michal Rosenn, General Counsel KickStarter, March 24, 2017.
97 Email from Bonnie Broeren, Head of Policy, Etsy, to David Hoffman, Professor of Law, University of Pennsylvania Law School (March 28, 2017 2:17 PM EST) (quoting Matthew Glick, Senior Product and Commercial Counsel at Etsy).
98 Telephone Interview with Hissan Bajwa, General Counsel Breather.com (April 4, 2017).
100 HADFIELD, SUPRA note 7, at 234-35 (arguing that lawyers’ traditional training produces a monoculture).
lawyers go too far when they say that traditional lawyering provides no value to entrepreneurs in this space.  

Even if it is true that terms in contracts are badly designed to influence primary behavior, they still can provide important legal and reputational value for the firms. Lawyers do innovate, even in consumer contract fine print. For example, in a mid-1990s, Alan Kaplinsky, a Philadelphia-based big firm lawyer, invented the class action waiver in a consumer contract. That technology created enormous value for his clients. Other lawyers built on Kaplinsky’s invention, eventually (through a deliberate strategy of creation and refinement) creating a clause for AT&T that applied waivers to arbitration in a way that survived Supreme Court review.

Indeed, many firms have even innovated with respect to behavior shaping clauses in this very space. They’ve done so by moving from “contract” to “policy.” As Goldman argued (in 2008):

“[B]ehavioral restrictions that do not need to be specifically barred in the user agreement can be moved into a separate statement of community norms/standards. This way, users are told what they can do and not do, but the statement does not have the force of law. Ideally, other users can be given tools to help them enforce the community norms. Even better, the norms can be posted on a wiki so that the site’s users can help update them as the site’s community evolves.

[A] separate non-legal document may be a more effective tool to communicate site expectations than embedding those rules in a user agreement that no one will read . . . .”

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101 Notably, though lawyers abroad face fewer barriers to competition, the have not produced (to my knowledge) distinctively communicative legal terms. That’s true although “new types of business models for legal work” are flourishing, including “joint venture[s] between lawyers, software engineers, and business experts . . .” Hadfield, supra note 7, at 241-43 (offering a description of UK’s deregulatory system).


There are indeed some examples of firms with communicatively moribund terms of use that have nevertheless found ways to regulate users with guidelines.106 The relationship between nonbinding guidelines and terms of use is an interesting one, because it seems that as firms grow larger and more complex, it becomes ever more difficult to maintain the separation. However, it remains that case that most firms do appear to stick with the traditional approach of writing uncommunicative precatory terms.

But not all firms. In the next section I identify firms that have innovated in their contracts and ask their lawyers how they did it.

III. Functional Precatory Terms

So far, I have described fine print that was traditional in both form and placement. That is, it wasn’t frontloaded in the contract but rather placed somewhere in its guts, and it looked and sounded like it was written by and for lawyers. However, not all fine print fits the stereotype. Sometimes, firms create fine print that least sounds like it was written by a human. Consider Bumble, a dating app, which functions somewhat like the better-known Tinder except that women initiate matches. Bumble’s Terms and Conditions, like those of many other modern firms, control IP rights and regulate user behavior. But Bumble’s approach sounds different:

It begins with a jaunty paragraph:

Hey guys! Welcome to Bumble’s Terms and Conditions of Use (these "Terms"). Our lawyers insist that we impose rules on users to protect all of our hard work. This is a contract between you and Bumble Trading Inc and we want you to know yours and our rights before you use the Bumble application ("App"). Please take a few moments to read these Terms before enjoying the App, because once you access, view or use

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106 An example is a firm that Goldman once worked with: Nextdoor. The site’s “community guidelines” effectively contain a series of norms that don’t read as simple re-hashed terms of use. [https://help.nextdoor.com/customer/en/portal/articles/2446947#guidelines](https://help.nextdoor.com/customer/en/portal/articles/2446947#guidelines). Another example is the intellectual property guidelines at Vimeo, which were developed by the community team at that firm, with oversight from legal, to create a communicatively rich way to explain to users the intellectual property rules that the site wants to enforce. As the firm’s general counsel pointed out to me, the firm in those guidelines uses phrases and a tone (“Don’t be a creep.”) which it would never do in a terms of use. Interview with Michael Cheah, supra note 76, discussing Help Center/Vimeo Guidelines, available at [https://vimeo.com/help/guidelines](https://vimeo.com/help/guidelines)
the App, you are going to be legally bound by these Terms (so probably best to read them first!).\footnote{Bumble Terms and Conditions, available at \url{https://perma.cc/ZGJ3-YCXQ}}

And the rest of the terms, though substantively identical to a thousand other sites, are interspersed with exclamation points and snark. Some of the wording explicitly attempts to remind users of offline norms of courtesy and reciprocity:

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RESTRICTIONS ON THE APP

Also, we don’t appreciate users doing bad things to Bumble - we’ve worked hard on our creation, so scraping or replicating any part of the App without our prior consent is expressly prohibited.

The eleventh section of the terms, headed miscellaneous, is introduced as follows: “\textit{Firstly, those standard clauses at the end of most contracts (boring, we know)}”\footnote{HBO Terms of Use, at \url{https://perma.cc/GS9N-J5WA}} After users have agreed that the terms may be unilaterally modified, the terms then flag that “\textit{Some more legal mumbo jumbo}” is on its way, including a waiver of class action relief and choice of forum clauses, all presented in their original legal language.

Consider how different such terms sound from the ordinary drone of EULAs that you haven’t read (to remind yourself what that drone sounds like, take a look at iTunes’ EULA, since it’s likely at hand). To the extent that you found Bumble’s terms refreshing, consider the incentive structures that produced them. Doesn’t everyone now agree that no one reads consumer contracts and they are, at best, a series of weak option clauses? If that’s true, what could drive Bumble (and other firms like it)\footnote{Jet (\url{https://perma.cc/CK9J-RXZH}): “We apologize for the all-caps shouting we’re about to do, but these parts are important. (\textquote{takes deep breath})”; Netflix Terms of Use (\url{https://help.netflix.com/legal/termsofuse?locale=en&docType=termsofuse}) (beginning its terms of use with the possibly disarming, or at least chipper, exhortation: \textquote{Welcome to Netflix!)}.\footnote{There are, of course, other firms with excellent, communicative terms. Pinterest, Twitter and Youtube repeatedly came up in my conversations. The examples here are not} to create terms that are funny and easier to parse?

To answer that question, I talked with numerous participants in the consumer contracts industry and was led to focus on a few platform economy firms who have written terms that appear to actually seek to communicate with, and influence, their users.\footnote{Though a series of semi-structured interviews, I}
asked general counsel at Tumblr, Kickstarter, Etsy, as well as AirBnb, how they came to write the terms they did and what they sought to gain. All are businesses which rely on participation by users, and all have cultivated relationships with their “community” that revolve, to one degree or another, around trust. So, let us examine the mass contracts they created.

A. Tumblr: Because They Cared

Consider first the case of Tumblr. Tumblr’s Terms of Service are notable for their translations of legal terms. For example, the service, as it typical, mandates: “No individual under the age of thirteen (13) may use the Services, provide any personal information to Tumblr, or otherwise submit personal information through the Services…” Under that prohibition, in a shaded box, Tumblr helpfully glosses:

You have to be at least 13 years old to use Tumblr. We’re serious: it’s a hard rule, based on U.S. federal and state legislation. “But I’m, like, 12.9 years old!” you plead. Nope, sorry. If you’re younger than 13, don’t use Tumblr. Ask your parents for a Playstation 4, or try books.

intended to be exclusive, but rather the result of the limits of my contacts. On Pininterest, see Elizabeth Townsend Gard and Bri Whetstone, Copyright and Social Media: A Preliminary Case Study of Pinterest, 31 Miss. C. L. REV. 249, 255-58 (2012) (describing Pinterest’s evolution of its terms, and summarizing that “Essentially the Terms of Service are the same, with one notable difference: the new Terms can actually be understood by the average user.) A famous example of communicative terms in the privacy context is Zynga, Inc, the gaming firm that turned its privacy policy into, literally a game called Privacyville. Julie Beck, Zynga Inc: Game-ification, INSIDE COUNSEL 58 (Sept. 2012). For other examples, see 500px’s Terms, available at https://perma.cc/WWW8-GYHA (translating in-line).

111 Semi-structured interviews follow a “general framework or outline of the topics to be covered during the interview but is free to follow the flow of the interview in deciding when and how to pursue each thread.” They can be particularly helpful in interviewing attorneys. See ROBERT LAWLESS ET AL., EMPirical METHODS IN LAW 81 (Aspen 2010). I interviewed the policy team at Etsy and Tumblr’s former general counsel by email, and conducted all other conversations by phone. I sent a preliminary draft of this paper to each source and offered them an opportunity to correct any direct quotes, as well as suggest changes to my interpretation. (I took all edits to direct quotes from interviews, and some of the suggested changes to interpretation.) Each interview/email exchange focused on four basic topics: why did the firm come to create the terms it did, what was the process of their drafting, what barriers did they face, and how did they measure or evaluate success.

112 Sharing economy firms are typically built on trust between strangers. Calo and Rosenblat, supra note 7, at 13.

113 Tumblr Terms of Service, available at https://perma.cc/D666-4U8G.
Similarly, Tumblr provides a precisely worded obligation with multiple different examples of how users can behave maliciously with respect to the service, coupled with a shaded explanation.

You may not, without express prior written permission, do any of the following while accessing or using the Services: (a) tamper with, or use non-public areas of the Services, or the computer or delivery systems of Tumblr and/or its service providers; (b) probe, scan, or test any system or network (particularly for vulnerabilities), or otherwise attempt to breach or circumvent any security or authentication measures; (c) access or search or attempt to access or search the Services by any means (automated or otherwise) other than through our currently available, published interfaces that are provided by Tumblr (and only pursuant to those terms and conditions) or unless permitted by Tumblr's robots.txt file or other robot exclusion mechanisms; (d) scrape the Services, and particularly scrape Content (as defined below) from the Services; (e) use the Services to send altered, deceptive, or false source-identifying information, including without limitation by forging TCP-IP packet headers or email headers; or (f) interfere with, or disrupt, (or attempt to do so), the access of any Subscriber, host or network, including, without limitation, by sending a virus to, spamming, or overloading the Services, or by scripted use of the Services in such a manner as to interfere with or create an undue burden on the Services.

Don't do bad things to Tumblr or to other users. Some particularly egregious examples of "bad things" are listed in this section.

Tumblr, like the other platform sites I described above, insists that “[y]ou agree to provide Tumblr with accurate, complete, and updated registration information, particularly your email address.” But unlike those sites, Tumblr then justifies the injunction in another shaded paragraph:

It's really important that the email address associated with your Tumblr account is accurate and up-to-date. If you ever forget your password - or worse, fall victim to a malicious phishing attack - a working email address is often the only way for us to recover your account.

Ari Shahdadi, describing his work as the general counsel at Tumblr, listed this translation-centered revision of the TOS as one of his great successes. When he arrived on the job, he “thought this thing needs to get rewritten. It was not in keeping with the Trust relationship that David [Karp, Tumblr’s founder] had built with the user base. So that was on my list day one.” He and his team saw the consumers of Tumblr’s EULA as “creators”: the mission of the general counsel office was to “advocate for and defend our

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115 See Notes on Doing Podcast 029 with Ari Shahdadi, available at http://notesandoing.com/029-ari-shahdadi/ at @32:00 minutes
Indeed, both Shahdadi and Karp report that changing the Terms to make them user-friendly was a “basic moral imperative,” in part because the site was “very focused on creators.” They generated terms through an iterative process:

“[W]e expected them [the users] to read the TOS (and interrogate us on any changes that were suspect). Part of that process was previewing TOS and policy changes and asking for feedback before launching them - which I personally responded to (and it was good feedback). In general we had established a relationship of trust between company and user in a number of ways and the TOS & policies were the written instantiation of that trust. I’d liken it to basic institution-building, something companies are usually awful at. This is why I didn’t, e.g., include one of those stupid class-action waivers or a mandatory arb clause even though they were considered “legal innovations” by the second update I did to the documents.

It’s the difference between ‘corporate social responsibility’ as BS marketing and actually caring about your users/customers.”

Tumblr’s process was curated at the highest levels of the firm. Shahdadi drafted the terms (with the help of law professor Eric Goldman) and Karp annotated them. After the new terms rolled, Shahdadi celebrated the response to them:

“[I don’t have quantitative] data but I know they were read - people were turning them into memes when we launched them. We had a bunch of "fake news" misinterpretations of the terms as well, but our own users fought those off because they knew we had their backs. We also forced a click-through in a pop-up or lightbox when we did the

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117 Email from Ari Shahdadi to David Hoffman, supra note 95.
118 Email from Ari Shahdadi to David Hoffman, supra note 94; see also Ammori, supra note 29, at 2273 (describing Shahdadi’s willingness to send an email to every user to commented on the proposed changes to the TOS
119 Shahdadi noted: “we went in fully knowing the risk that a court would integrate them [the annotations] with the document.” Email from Ari Shahdadi to David Hoffman, supra note 94.
update to make sure people at least knew the terms were being updated . . .”120

Shahdadi claims that the site made the updated terms conspicuous “to genuinely make sure people saw them – but it also ended up being great marketing.”121 He believes that user-friendly terms on the margins produce few real legal risks (“I took the indemnification provision out – who the heck ever seeks indemnity from a user? It would tank the business.”) At the same time, “it built real trust in the company and company management.” But these cost-benefit calculations were, in Shahdadi’s view, secondary to the firm’s motivation, which was intrinsic: “because we care(d).”122

Shahdadi also suggested that the business case for friendly and precatory contracts is not obvious for all firms. Though being user-friendly “is still surely a net positive,” the advantages to being able to exploit consumers’ data through contract terms are also undeniable: they make the “marginal consideration worthless as it is incredibly hard to build and maintain . . . one of these platform businesses at this point [outside of Google/Apple/Facebook’s orbit.]”123

B. Kickstarter: Reflecting Its Values

Kickstarter is a well-known crowdfunding platform that allows backers to support creators’ creative projects by pledging to their campaigns in exchange for rewards.124 Kickstarter reincorporated as a Public Benefit Corporation under Delaware Law in 2016.125 Its terms were last revised in 2014, as a part of a project to make the entire site more transparent and easy to access.126 Indeed, Kickstarter’s Public Benefit Corporation charter now explicitly requires the firm to operate in a way that “reflect[s] its values” and, further, mandates that its “terms of use and privacy policies will be clear, fair, and transparent. Kickstarter will not cover every possible future contingency,
or claim rights and powers just because it can or because doing so is industry standard.”

As a part of the term revision process, Kickstarter’s general counsel, Michal Rosenn, asked an intern to distinguish in the firm’s existing (and standard) terms and conditions for the content that was necessary and core to the company’s needs from the additional detritus. According to Rosenn, she decided deliberately to pare down the terms to exclude protections that added little business value – forced arbitration and class action waivers, for instance – in part because they seemed like an overreach of power.

Rosenn and a nonlawyer then worked to redraft the existing terms to make them clear and jargon free. They had seen Tumblr’s terms of use (and indeed are a part of the same small community of NY based startups, originally funded by the same venture firm, and using the same outside counsel). Like Tumblr, Kickstarter created simple, easy-to-read summaries of each section of their Terms of Use and framed them in bright blue boxes at the beginning of each section. It begins:

This page explains our terms of use. When you use Kickstarter, you’re agreeing to all the rules on this page. Some of them need to be expressed in legal language, but we’ve done our best to offer you clear and simple explanations of what everything means — hence the brief summaries in these blue boxes. The summaries, for the record, are not part of the official legal terms.

Like many sites, for example, Kickstarter requires users to avoid bad behavior. But their Dos and Don’ts section begins, again, with a blue box that contains the following text.

This section is a list of things you probably already know you shouldn’t do — lie, break laws, abuse people, steal data, hack other people’s computers, and so on. Please behave yourself. Don’t do this stuff.

This approach seems to have at least the potential of resulting in more readers – and more users whose behavior would be affected by the terms. Rosenn reports that the translation provided both reputational benefits for Kickstarter

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127 https://www.kickstarter.com/charter. Rosenn, noting that the charter post-dated the revision, suggested that the former’s language reflected the firm’s motivation and attitude during the reform process. Interview with Rosenn, supra.

128 From Kickstarter, Terms of Use, https://www.kickstarter.com/terms-of-use?ref=footer
as well as an improved relationship with users. The major substantive change in the terms was to clarify the responsibilities and expectations of creators and backers when it comes to funding projects: the old (buried) language had inaccurately overpromised refunds, and Kickstarter wanted to better reflect the site’s practices and expectations around funding on the site. According to Rosenn, users sent positive feedback about the change, and they have seen fewer questions (from users) as well. Moreover, backers, who communicate with creators, rely on and cite the terms of use frequently, suggesting that they have real uptake.

C. Etsy: Handcrafted Terms

A third site is Etsy, also a community where user buy-in is crucial to the business model. Etsy, like Kickstarter, decided to translate existing terms of use that were “just as generic and ugly as every other terms of service out there.” The change was initiated by a lawyer at the firm, Hissan Bajwa (who is now general counsel at another startup). Bajwa noted that the existing terms were dissonant with the mission and look of the rest of Etsy’s trade dress: “we use the word handcrafted a lot . . . all these other teams are spending all this time making their pieces of the company – their turf – look and feel an reflect who we believe we are as a company, [while] we the legal team are looking like robot lawyers drafting legalistic documents that were a nightmare for our community members to draft off of. That’s where it came from.”

Bajwa, with the permission of the firm’s then-general counsel, began by working on the “key document,” the terms of use. He “tore it up and started over.” But, because of the relationship of that document to other contracts, the project quickly expanded. He joined with Bonnie Broeren, who heads Etsy’s policy team. Their first goal was to create a unique style guide on how to write its terms and conditions. The objective of that guide was (according to the people who worked on it) to “write policies that are enforceable from a legal

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130 Interview with Rosenn, supra note 126.
131 Telephone Interview with Hissan Bajwa, General Counsel, Breather (April 4, 2017). Mr. Bajwa was previously Senior Counsel at Etsy and the Founder and CEO of SpotlessCity.
132 Bajwa interview, supra note 132
perspective, but still human and accessible from a member perspective.”\textsuperscript{133} An entire section of that guide was dedicated to voice, with create instructions on how to write legal terms. To create the guide, Etsy’s lawyers worked with “product, engineering and design teams to see what would be possible.” The resulting product is a balance of text on the page, and headings that had an “impactful presence on the page.”\textsuperscript{134}

As Bajwa pointed out, it’s rare for lawyers to have access to engineering resources. In Etsy’s case, the resources were fortuitously available:

“The internal tools team was working [at that very time] on improving our blog and educational content. We thought: hold on a second, you are making the seller handbook look and feel better. Why don’t we piggyback on that work and give us a little bit of custom design and graphics . . . Once [we] frame[d] it as this is very important to our customer service team to reduce their workload, it is hard to argue against it.”\textsuperscript{135}

The joint team unified the various policies into a single integrated system – Etsy’s “house rules”.\textsuperscript{136} Today, those house rules have a distinctive look and feel. Section and paragraph headers are in plain and clear English: “Be honest with us”, “Let’s be clear about our relationship,” “Rights you Grant Etsy,” “Don’t steal our stuff.” And with respect to particular provisions, Etsy explains why it needs the rights it does, particularly the IP rights it takes. Thus, it explains its non-exclusive license with a conventional clause and then justifies it immediately afterwards:

That sounds like a lot, but it’s necessary for us to keep Etsy going. Consider these examples: if you upload a photo of a listing on your Etsy shop, first, we have permission to display it to buyers, and second, we can resize it so it looks good to a buyer using our mobile app; if you post a description in English, we can translate it into French so a buyer in Paris can learn the story behind your item; and if you post a beautiful photo of your latest handmade necklace, we can feature it on our

\textsuperscript{133} See Email from Bonnie Broeren, Head of Policy at Etsy, to David A. Hoffman, Professor of Law, University of Pennsylvania (Mar. 27, 2017 11:09 PM). Interview with Bajwa, supra note 132. (“We came up with this style guide or lexicon so that it will be treated as a unit, the house rules, in the same voice.”)

\textsuperscript{134} Broeren email, supra note 133.

\textsuperscript{135} Bajwa Interview, supra note 132.

\textsuperscript{136} Etsy Terms of Use, at https://perma.cc/A6BF-D3D9
homepage, in one of our blogs or even on a billboard to help promote your business and Etsy’s.\textsuperscript{137}

Illustrations of the terms are intended to clarify them for users. For example, Etsy illustrates “maker” and “designer” as follows.

Etsy tested these changes in two ways. It created different versions of the policies with a tool called “Etsy Impressions,” which showed sellers particular policies and asked them to highlight sections and give the firm feedback. It also ran focus groups with sellers and invited feedback on the changed policies. In so doing, the team proposed to “make sure the people who will be bound by our policies actually understand our terms.”\textsuperscript{138}

After the terms rolled, the policy team measured their success by talking to support teams and seeing if particular provisions were creating friction or resolving it, by monitoring user communication with each other, and by looking at how Etsy’s terms were described in the press.\textsuperscript{139} Broeren, cautioning that Etsy’s support teams still field complaints and concerns from users, noted:

“We did . . . see our members positively discussing our policies in our forums, mentioning that they trusted us more than some of our competitors as a result of our easy-to-read policies. We also saw some positive press coverage. Regarding our customer support teams, I would say that incorporating their perspectives is critical to our success.

\textsuperscript{137} Etsy Terms of Use, at https://perma.cc/A6BF-D3D9
\textsuperscript{138} Id.
\textsuperscript{139} Broeren Email, supra note 133.
as we continue to tweak our policies. They are usually on the front lines of any member dissatisfaction.”

And, according to Bajwa, though it is hard to articulate a monetary return for the revision, the site’s users appeared less confused, more likely to rely on their own reading of the terms to guide conduct, and the internal customer support workers were less frustrated with the legal department as a result.

D. Airbnb: Solving a P.R. Crisis

Airbnb, the short-term rental site, had a problem. Three researchers had shown that guest applications with distinctively African-American names were less likely to be accepted by hosts, and they argued that the platform’s design facilitated that outcome. Rob Chestnut, in his second week as general counsel of the firm, was quickly put on his back foot: having not anticipated the issue, “we were forced to take it on reactively, [which is] not the ideal way to do it.” Chestnut reports that the firm was a bit surprised by the issue because “our founders and company are in San Francisco, [which is] culturally very tolerant and diverse environment.” But once the issue “blew up,” the firm had to decide what to do.

One option, according to Chestnut, would be the “standard legal approach” as a platform, involving disclaiming responsibility for renters’ behavior. Instead, the company decided the right option was to declare “we own this, we want to be better than this . . . We’re not going to be driven by legal issues here. We’re going to be driven by what’s important to our mission and our community.” Chestnut wrote a first draft of an entirely new nondiscrimination policy, carved out of the existing terms of service to “call it out.” That draft’s goal was to “sound authentic and human” rather than lawyerly.

Chestnut sent the draft to two well-known lawyers, Eric Holder (the former Attorney General) and John Relman, a crusading civil rights and

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140 See Email from Bonnie Broeren, Head of Policy at Etsy, to David A. Hoffman, Professor of Law, University of Pennsylvania (May 26, 2017 2:22 PM).
141 Bajwa interview, supra note 132.
143 All direct quotes in this section are to a telephone interview that I conducted with Rob Chestnut, General Counsel, Airbnb, on April 14, 2017.
housing lawyer, both of whom played a key role in its drafting process.\textsuperscript{144} As Chestnut noted, the two lawyers and their respective teams “each worked on different elements [of the policy, . . . [and] in the end, we came up with something that is very Airbnb. It’s not crafted by lawyers for legal protection.”

The policy itself is, indeed, straightforward and written in a clear and accessible style. Unlike the earlier examples we’ve discussed, there are no visual cues or call-outs: Chestnut specifically described “an effort to be authentic, not legalese, but not cute. There was an intentional effort to keep it simple.” Thus, the terms permit and prohibit behavior, often in the same section:

- Airbnb hosts \textit{may not}
  - Decline to rent to a guest based on gender \textit{unless} the host shares living spaces (for example, bathroom, kitchen, or common areas) with the guest.
  - Impose any different terms or conditions based on gender unless the host shares living spaces with the guest.
  - Post any listing or make any statement that discourages or indicates a preference for or against any guest on account of gender, unless the host shares living spaces with the guest.

- Airbnb hosts \textit{may}
  - Make a unit available to guests of the host’s gender and not the other, where the host shares living spaces with the guest.

\textbf{Figure 1: AirBnb’s Gender Identity Rules}

The policy describes the prohibition on discrimination as an aspect of Airbnb’s mission of “bringing the world closer together by fostering meaningful, shared experiences among people from all parts of the world.”\textsuperscript{145} That is, like the examples preceding it, Airbnb deliberately tried to align its brand with the terms to make them more persuasive. Generally speaking, Airbnb’s policy rollout resulted in positive press,\textsuperscript{146} though questions remain about whether in fact it makes implicit bias worse.\textsuperscript{147}

\begin{footnotesize}
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\textsuperscript{144} \url{http://thehill.com/policy/technology/295265-airbnb-enlists-civil-rights-leaders-in-discrimination-fight}; \url{http://blog.airbnb.com/an-update-on-the-airbnb-anti-discrimination-review/?c=tw_us_gen_brand&af=14383374}


\textsuperscript{147} Ruomeng Cui, Jun Li and Dennis J. Zhang, \textit{Discrimination with Incomplete Information in the Sharing Economy: Field Evidence From AirBnb}, available at
\end{footnotesize}
Chestnut stated that Airbnb did not test out different versions of the policy language, though it has been conducting experiments on different placement of pictures and reviews to encourage user behavior that the firm desires. Though Airbnb required every user to click to agree to the policy, Chestnut confirmed that there have been no internal efforts to monitor how much time users spend reading the policy. Chestnut acknowledged that the document itself would require continuous monitoring and tweaking, through an internal compliance team that surfaces difficult cases and sends them to a committee tasked with refining the rules over time.

Thus, though Airbnb rolled out its new, clear, rules in clean English and appeared motivated to reduce discriminatory behavior, its took a different path than previous sites to determine if they (in fact) done so. There has been a small (under 5%) loss in users which Chestnut attributes to the policy. But Chestnut admitted that Airbnb has chosen not to conduct its own testing on users to see if they are discriminating in ways prohibited by the rules.\footnote{After I talked with Chestnut, the firm announced that it had reached a settlement with a California regulator to allow the state to conduct such tests on its behalf. https://www.theguardian.com/technology/2017/apr/27/airbnb-government-housing-test-black-discrimination} Though the nondiscrimination policy “is particularly important,” looks different from most terms and conditions, and comes “from the heart of the firm,” Airbnb’s legal response to discrimination appears in some ways to still be reactive.

IV. FROM OPTIONS TO RELATIONAL CONTRACTS OF ADHESION

The previous sections highlighted two observations about the current state of mass market contracts’ precatory terms: most such terms are weakly justified by the existing literature, and some firms write terms that look and function distinctly. Though the evidence is impressionistic, it seems like they have succeeded, on the margins, in using contract as a way of encouraging particular behaviors, building the firm’s brand, and enhancing the bottom line outside of the sterile reduction of litigation costs.

Stepping back from the detail allows us to consider whether these distinctive contracting moments come together to illustrate a new way that some contracts might work in the sharing economy. I believe they do: mass market contracts governing behavior by making adhesive contracts an extension of the firm’s brand. These contracts take on relational and discrete

attributes.\textsuperscript{149} They are a new phenomenon, what I will call \textit{relational contracts of adhesion}.

This section considers the motivation for producing these contracts and then attempts to construct an account that situates them against and within existing contract theory.

\section{A. Solving Problems With Branded Terms}

Most of the case studies started with a problem: a firm with hundreds of thousands or millions of counterparties wanted to affect those individuals’ behavior without spending excessive time policing them. In each case, for various reasons, that behavioral problem fell into the lap of a lawyer, who decided to adapt a traditionally inert form to a new use. To review:

- Kickstarter needed a way to better channel investor-users when their projects failed, and thus reduce reputational blowback from the firm.\textsuperscript{151}
- Etsy sought to increase the likelihood of users avoiding behaviors that reflected badly on the firm – for example, unlawful copying – because it was leading to friction with Etsy and a loss of the site’s ability to be a trusted platform.\textsuperscript{152}
- Tumblr needed to find a way to embed its terms in the firm’s mission of motivating creative production by users.
- Airbnb needed to reduce user discrimination (or at least be plausibly seen to do so).


\textsuperscript{150} Others, notably Ethan Leib, have suggested that courts should treat consumer contracts using relational doctrines. \textit{See generally} Ethan J. Leib, \textit{What is the Relational Theory of Consumer Form Contract?}, in \textit{REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL} 259 (Jean Braucher, John Kidwell & William C. Whitford eds., 2013). Leib claims that such contracts function as bureaucratic plans that stand not on particular assent to terms but rather “consensual entry into already legitimate relations.” \textit{Id.} at 269. He would police terms using the reasonable expectations doctrine. \textit{Id.} at 276. There is much in this claim that I agree with, but of course my focus is different: adhesive contracts that are intended to be read and to influence \textit{ex ante} behavior.

\textsuperscript{151} Interview with Rosenn, \textit{supra} note 126.

\textsuperscript{152} Broeren Email, \textit{supra} note 133.
Each of these firms changed the substance of their terms. For the first three firms, the changes involved abandoning remedial limitations and defenses to actions by users; for Airbnb, the changes increased the firm’s explicit responsibility for preventing discrimination. All four firms thus *increased their formal legal exposure*. At the same time, each explicitly worked to avoid legalese and focus on simple, declarative, sentences. All except for Airbnb also presented the terms with some playful humor and informality, as well as some visual cues and displays. Those cues seem to have been designed to enhance, or at least fit, within the firm’s existing public persona.

Thus, a key lesson is that firms are trying to enhance their brands using mass market contracts. 153 Indeed, by combining terms, tone and look, firms can make their legal rules part of the firm’s trade dress. 154 As Shahdadi pointed out, Tumblr’s playful approach to Terms succeeded in grabbing attention on the web and branding the firm as a humane and trustworthy firm. 155 At Etsy, it was the incongruence of ordinary terms with the site’s brand that motivated the project, 156 and the team, justifying the new terms, claimed that they “can even provide a competitive advantage over other companies whose terms are more difficult to understand.” 157 Airbnb’s general counsel noted that their revised policy was “very Airbnb” – aesthetically and in terms of congruence with its mission.

This trade dress centered understanding of functional terms is not entirely novel. As others, notably Danielle Citron, have suggested, firms can use terms of service to signal their allegiance to larger social campaigns. 158

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154 I mean this in the colloquial sense – I’m not sure that the T&Cs would meet the Lanham Act definition of trade dress, in part because they are functional. Fair Wind Sailing, Inc. v. Dempster, 764 F.3d 303, 309 (3rd Cir. 2014) (identifying elements of trade dress infringement).

155 See e.g., [http://www.businessinsider.com/tumbrs-new-terms-of-service-is-inspiring-and-funny-2014-1](http://www.businessinsider.com/tumbrs-new-terms-of-service-is-inspiring-and-funny-2014-1). I am not arguing that the motivation for change by Shahdadi was primarily instrumental. I think he held a sincere belief that it was, in fact, the right thing to do. Rather, he was able to justify his motivation in terms that spoke across constituencies.

156 Bajwa interview, supra note 132.

157 Bajwa interview, supra note 132.

highlighting virtues and thus gaining reputational capital. For example, MySpace changed its TOS to ban certain kinds of speech and enforced those bands with aggressive moderation. These efforts helped the firm “by creating market niches and contributing to consumer goodwill.” Others, including Robert Gomulkiewicz, have argued that firms should draft EULAs to “build goodwill with consumers . . . [through] tone”. But the idea that harmonizing the look and feel of terms can help make them functional has yet to be explored.

Understanding how these terms work as extensions of the firm’s brand is jarring. There is something odd about the idea that hyper-modern sharing economy firms try to advance their hipster credentials with that most antiquated behavioral tool of all: a contract. Thus there is an element of false consciousness here: terms might be in fact gaining user trust through a revision that in fact does little of substance.

This dystopian vision of the sharing economy has been forcefully advanced by Ryan Calo in a series of papers culminating in his co-authored Taking Economy expose of Uber’s predatory behavior. Calo argues that because firms have the opportunity to learn about users en masse, and the motive to exploit their vulnerabilities, we ought to be concerned lest actions that they take couched in the new economy’s language of free and choice confuse us to the reality of exploitation on the ground. Thus, one way to see the case studies I’ve presented is wolfish firms successfully branding themselves as sheep.

While this story is plausible for some firms, it doesn’t really capture the phenomenon at work here. Each of our case study firms really did give up legal rights in ways that clearly made outside counsel worried. They did so in part to encourage user buy-in, but also because the change fit with a larger public brand that the firm was eager to extend. And, in each case, the lawyers pushing the change stressed their internal motivation to do the right thing as an

159 CITRON, supra NOTE 80, at 231.
160 CITRON, supra NOTE 80, at 229.
161 Gomulkiewicz, supra note 82, at 696.
162 See Calo and Rosenblat, supra note 7, at 32 (forthcoming 2018) (arguing that contracting is a way that firms like Uber exploit their users); Ryan Calo, Digital Market Manipulation, 82 GEO. WASH. L. REV. 995 (2014)
163 Professor Curtis Anderson, formerly the general counsel of the Match Group (of Match.Com and Tinder) told me that Match decided not to follow the Tumblr model for terms because of a judgment that a two-track model for terms (and additional illustrations) added legal risk that courts would render important legal protections for the firm unenforceable. Telephone Interview of Curtis Anderson, Associate Teaching Professor, Brigham Young University Law School (April 20, 2017).
important or motivating factor in the particular sorts of choices that were made. We need to dig deeper.

**B. Producing Branded Terms**

The firms provide different models to produce terms, from one that was determined by lawyers (Kickstarter and Airbnb) to a collaboration between the GC and CEO with informal user feedback (Tumblr) to an interdisciplinary team with regularized user feedback (Etsy).164

These different processes reveal how the task of redrafting the fine print can have organizational consequences inside the firm. Revision of terms reveals something about firm culture: as Shahdadi says, “I would never farm this task out - it’s core to every company … [N]ext time I would be more aggressive and do most of the work myself.”165 That is, when firms think about how to make precatory fine print functional, they might come to learn things about themselves. This organizing function of disclosure is an important, but understudied, phenomenon. As Peter Swire, explaining the beneficent effects of required financial privacy disclosures, puts it:

> “I contend that a principal effect of the notices has been to require financial institutions to inspect their own practices . . . In order to draft the notice, many financial institutions undertook an extensive process, often for the first time, to learn just how data is and is not shared between different parts of the organization and with third parties. Based on my extensive discussions with people in the industry, I believe that many institutions discovered practices that they decided, upon deliberation, to change.”166

Arguably, this kind of focusing effect can be socially useful even if it isn’t terribly effective at directly changing behavior. The mere fact that the firm has thought about how to write terms that tell users not to be obnoxious may

164 Bajwa interview, supra note 132 (“The caveat is that unlike most or many consumer sites we have an active community and our sellers are an active community who read every word of this.”); Gomulkiewicz, supra note 82, at 700-701 (arguing that lack of participation by non-lawyers makes innovation difficult).

165 Email from Ari Shahdadi to David Hoffman, supra note 95.

influence it to invest more effort in how to prevent corrosive user conduct, leading to innovations in page design.\footnote{Citron, supra note 80, at 232 (describing InterParliamentary Task Force on Internet Hate’s Anti-Cyberhate Working Group’s discussions on how to better create TOS).}

For example, at Etsy the revision process required the legal and policy team to talk with a variety of stakeholders within the firm. While the older terms had a “Frankensteinian” aspect, the new ones were designed to be coherent. Some of the conversations required translation of technical concepts (like the payment and direct checkout system). Though they got a “gut check” from outside counsel, the inside legal team spent a considerable amount of time trying to coordinate the views of diverse internal audiences and making sure they were on (literally) one page.\footnote{Bajwa interview, supra note 132. In some ways, Etsy’s process followed the model laid out by Gomulkiewicz for how one might design a use-friendly contract, though there is no evidence that they knew of his work. Gomulkiewicz, supra note 82, at 703-705 (laying out model process)}

One question is whether it is possible to entirely outsource the project of producing functional precatory contracts. As it turns out, a firm called SnapTerms tried, between 2011 and 2014, to sell terms with a “sense of humor” to small businesses with relatively simple consumer sales interfaces. It was marketed extensively, with features on popular websites, as a place where you could get semi-customizable terms for a fixed price.\footnote{See Sarah Perez, SnapTerms: Terms of Service as a Service, Techcrunch April 13, 2012, available at https://perma.cc/3XXC-KVPT} Over three years the firm sold 2200 contracts, and around 10% of customers paid extra for humorous inserts.\footnote{Interview with Hansen Tong, Attorney at Kelly/Warner PLC, April 27, 2017. Mr. Tong was a co-owner of SnapTerms and one of the individuals involved with its business operations until it closed for a “pivot” in late 2014.} As an example, consider the site’s own description of its services:

“Snapterms is a legal service for people who don’t want to mortgage their house to hire a traditional law firm. Snapterms, in turn, consists of an elite team of lawyers who have made the career decision to whore ourselves out at bargain basement prices. How do we keep prices so low? Well, we can’t really discuss trade secrets, but it involves a giant mill contraption like in Conan the Barbarian, but with a bunch of lawyers chained to it.”\footnote{See Snapterms Terms and Conditions, available at https://perma.cc/AHA9-REQN}
Unlike the in-house examples we’ve discussed, SnapTerms did not attempt to actually ensure that its terms were more readable (or read) than the alternative. Though it hired advertising copywriters to create humorous inserts, it did not test its product’s readability in a scientific way, nor actual reader comprehension.\textsuperscript{172} SnapTerms borrowed some of its ideas for humor and explanatory phrases from other websites, and did not attempt to tie its explanations into its clients’ brands or identity.\textsuperscript{173} Thus it is unclear whether outsourcing is a viable solution to the no reading problem.

These stories show how weak, in the end, are explanations that blame lawyers for failures to innovate around terms. It was lawyers at Kickstarter, Etsy and Tumblr (among others) who innovated around contracts in their respective firms and solved pressing business problems. They were not uniquely risk-seeking, even though they did come from the same New York based entrepreneurial law community.\textsuperscript{174} That is, innovation and legal training are not incompatible.

Then why did these firms innovate when others did not? I think the reasons are many, but start with a compelling business logic.\textsuperscript{175} For firms like Bumble (and SnapTerm’s consumers) funny and hip terms of use may be a cheap branding play: the suggest “youth” and “informality” without giving up much of substance. But for platform firms, the brand can’t be entirely superficial. Because their customers are often also merchants, who often build businesses and brands on the platform, the studied firms have users with a vested interest in the content of the terms and who care greatly about the performance-shaping rules that they contain.\textsuperscript{176} Someone who buys on Etsy

\textsuperscript{172} Obviously, the SnapTerms team did monitor client feedback (which was positive) and followed reviews online at places like Reddit to be sure that the market regarded its terms as clear. My point is that it did not design processes to learn about the terms in a more rigorous way. See Tong Interview, supra note 170 (noting that they particularly spent time improving the readability of the indemnification, representations and warranties and limitations on liability terms).

\textsuperscript{173} Tong Interview, supra note 170 (noting that SnapTerms has pivoted in part because of concerns about its scalability given the legal regulatory environment).

\textsuperscript{174} Indeed, Etsy, Tumblr and Kickstarter arose from the same Union Square Venture capital fund and share an outside counsel, the Gunderson firm. Bajwa interview, supra note 132.

\textsuperscript{175} One driver of innovation might be that the firms I studied had relatively simple business models and relatively low risk exposures. Match.com, by contrast, was exposed to a high likelihood of user-generated lawsuits, including for tortious conduct by other users that might be attributed to the firm. Anderson interview, supra note 163. The audience for Match’s terms and conditions was courts and regulators, not primarily consumers.

\textsuperscript{176} This is in accord with Vic Fleisher’s insight about “branding moments” in a corporation’s life, where otherwise sterile forms (like a charter) can further its brand. Fleischer,
might also become someone who sells on the site: the “House Rules” are addressed to an intensely attentive audience. As Etsy’s representative explained to me: “We want our members to trust us, and writing policies that are easy to understand is a big part of earning that trust.” Similarly, Kickstarter derives its revenue by being seen as a trusted intermediary between a mass of internet “investors” and a smaller number of firms: the terms of use are the constitutive document, meant to be understood and read by all, as opposed to only those for whom deals go bad. And Tumblr users will often bemoan their exclusion from the community, as hard-built personal brands disappear overnight.

In other words, even old-fashioned, monopolistic lawyers write readable mass contracts (which might also be read) when both firms and their “customers” demand them. But where users (or reporters) aren’t motivated to pay attention, firms’ incentive to innovate are reduced, and it starts to make more sense to stick with the status quo. That is, just as in other fields, outsiders innovate, while the established players stick with what they know. That’s true because writing terms in English is hard work – as Etsy’s lawyers noted, “cost sensitivity” matters here. Indeed, as Bajwa lamented, the revision process took six months, much of it on nights and weekends carved out from the day-to-day work of being a lawyer for a busy and growing firm.

For most general counsel at most firms, renovating the terms and conditions to make sure that terms which command obedience are understandable simply isn’t high on the priority list. Bajwa continued:

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177 See Broeren email, supra note 133.
180 Broeren email, supra note 97.
“Now that I’m a GC at a new and much younger startup, when I look at my priorities right now and with much fewer resources and a company that is in a much different position I can’t justify devoting time to focusing on the terms of service here... Our user base is not interested [in the same way at Etsy’s]. If they are legally sound, that is fine for now.”

This suggests that the market for terms like those I’ve described might be constrained. Similarly, Kickstarter’s Cohen pointed out that existing terms “get the job done” by mitigating risk. In the hurly burly of the day, with competing demands on a general counsel’s time, marginally improving the terms is usually cost prohibitive: it’s a “challenging” task to “force yourself outside of the lawyer lens and think about language and policies in a more human way.”

More generally, general counsel argue that the time spent on terms is difficult to justify in a world where much of what must be contained in terms of use is mandated by law, or compelled by solving transnational compliance problems. According to lawyers at the IAC Group (which owns or owned Ask.com, Match.com, Vimeo and other new economy firms), terms of use are hard to read and complex because they must be: lawyers are trying to solve worldwide compliance issues, responding to evolving business goals and technical modalities, while permitting firms maximum flexibility to maneuver in fields like privacy. Given that “the working assumption is that no one reads terms,” it would a Sisyphean task to spend significant efforts to encourage readership of documents that must, by their nature, be hideously complex. Vimeo’s GC lamented: “You can do as much education as you want on terms: people aren’t going to sit down and read them.”

This account, then, suggests that the barrier to innovation isn’t lawyers training or risk-aversion – or at least not primarily those factors. Rather, firms innovate when it is in their interest to do so.

C. Relational Contracts of Adhesion

With this account of why and when precatory terms work in hand, we can turn our attention to considering how our case studies fit in the existing

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181 Bajwa interview, supra note 132; see also Gomulkiewicz, supra note 82, at 701 (barrier to innovation includes lack of priority given).
182 Rosenn Interview, supra note 126.
183 Interview with Ferguson and Cheah, supra note 76.
184 Id.
taxonomy of contract law and practice. To wildly oversimplify, that taxonomy can be thought of as starting with the 19th century’s classical contract: a fully-negotiated contract between equally-situated individuals. From that root came two great branches. The first is the modern commercial contract, marked by negotiation ex ante (at least some of the time), and reputationally-determined performance goals and norms.\textsuperscript{185} Such contracts are intended to be read and to govern behavior while the parties relationship remains intact.

The second branch is the classic consumer contract of adhesion.\textsuperscript{186} Consumer contracts are never negotiated ex ante, are offered on a take-it-or-leave-it basis, and (as I’ve described) function as discretionary options.\textsuperscript{187} The drafters of such contracts are aware that their terms will be unread by their mass adherents: the audience is \textit{ex post} – largely for courts, and secondarily for aggrieved consumers.

One way to think about the case studies in this paper is that they have taken on attributes of both traditional consumer and commercial contracts. This can be seen along a number of dimensions, as the following Table illustrates.

<table>
<thead>
<tr>
<th></th>
<th>Consumer Contracts</th>
<th>Commercial Contracts</th>
<th>Platform Case Studies</th>
</tr>
</thead>
<tbody>
<tr>
<td>\textit{Individually negotiated or adhesive}</td>
<td>Adhesive</td>
<td>Negotiated</td>
<td>Some informal drafting but then deployed adhesively</td>
</tr>
<tr>
<td>\textit{Number of counterparties}</td>
<td>Millions</td>
<td>A handful</td>
<td>Millions</td>
</tr>
<tr>
<td>\textit{Duration}</td>
<td>Largely one-off purchases</td>
<td>Relationship</td>
<td>Relationship</td>
</tr>
<tr>
<td>\textit{Reading expected?}</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>\textit{Merchants or Consumers}</td>
<td>Buyers</td>
<td>Both</td>
<td>Both</td>
</tr>
</tbody>
</table>

\textsuperscript{185} See supra at text accompanying notes 47 through 51.


\textsuperscript{187} See supra at text accompanying notes 52 through 56.
These categories are largely self-explanatory with a few exceptions:

- **Merchants or consumers:** Categorizing platform counterparties as consumers or merchants may be one of the key legal and political questions of the digital age. I would resist the easy temptation to argue that Etsy’s craftspeople are all “merchants” in the same way that firms in traditional consumer contracts are – for one, they might be buyers and sellers of items simultaneously, and for another, they may be hobbyists or individuals earning their livelihood. This is even more true for Tumblr, which attracts both professionals and those who simply seek to express themselves. Now, obviously, heavy users on each site are probably more like traditional merchants than they are like one-off consumers, but it’s not at all clear that such users were the exclusive audience for the revised tone and feeling of terms that I’ve discussed.

- **How are terms enforced:** Like ordinary consumer contracts, platform terms work in part through exclusion: users are thrown off sites for bad behavior, and terms (filtered through moderators and complaint systems) enable those sanctions to proceed smoothly. But unlike consumer contracts, the evidence I’ve adduced suggests that platform contracts also succeed because at least some of their adherents read them, talk about them, and use them in dealing with one another. That is, the terms become a part of the reputational market on the platform.

- **Sharing of benefit and burdens:** This is a shorthand way of asking how one-sided the contracts are – do they grasp each advantage for the drafting party, or do the mass counterparties retain sufficient negotiating power to make the resulting exchanges moderately “fair.” Here, it is difficult to know with precision. I’ve shown that firms have foregone some opportunities to exculpate liability and control litigation risk. At the same time, the firms do share some of the benefits of the platform with
their users, in that they permit them to monetize their property and do not take ownership in it. Whether platform firms generally are largely benign is outside the scope of this article, but I will return later to the question of just how “fair” their contracts in fact are.

What to make of this mix? A word that came up repeatedly in conversations with the lawyers who drafted these contracts was relationship. The contracts were intended to embody trust between the firm and its users, to demonstrate that the terms were aligned with the firms’ long-term mission, and to encourage users to continue to participate in the platform. The firms had no desire to sue any of their users for violations of the terms. At most, they wished to weed out from their sites users who were disruptive to the platform’s functioning, but otherwise they hoped to create a set of rules which would be self-policing. This reads, in many ways, like an attempt to create a classic relational contract, counterpoised to the ordinary discrete consumer contract.

As with traditional description of relational contracting, the governing contracts here are “not designed to create incentives for performance and breach primarily through the prospect of court-imposed monetary damage.” Performance is rather governed largely by users internalizing a set of rules created through brand alignment, informality, and calling on interpersonal norms of reciprocity and fairness. As Oliver Hart has explained, reciprocity is a strong norm when the participants clearly understand what they are getting and giving; Etsy’s need to clarify the intellectual property rights that its platform takes (or doesn’t) thus was a crucial part of its reform process.

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189 An analogy is to online dispute resolution systems like that of Wikipedia, which seeks to weed out problematic users but otherwise motivate productive editors to continue to dispute (and generate content for the platform.) See David A. Hoffman and Salil K. Mehra, *Wikitruth Through Wikiorder*, 59 EMORY L. J. 151 (2009) (exploring the wiki-arbitration system).


When soft norms fail, even in relational contracting systems firms retain the ability to use a heavier hand. Here, our case study firms start their sanctions with rating-based complaint systems, escalate to suasion by site moderators, and finally exclude bad users from the marketplace entirely. But those systems can be overstrained – as the case studies show, firms innovated here in part because their customer service reps needed a break from noncompliant users, who needed to be better convinced that they were in a relationship of trust and reciprocity. In this way, we can see the relational contracts here as solving for a business problem: they needed to keep users engaged, on task, and willing to contribute to a larger platform economy.

But platform users aren’t ordinary relational contracting counterparties. Because the users of Etsy et al. are heterogeneous and myriad, ordinary norms and reputational alone must be weak forces in policing behavior. From the case studies, it seems clear that one important way that these contracting systems work is through consumer service teams, who use the terms themselves to remind users of the rules. This is not the traditional relational contracting setting, where the rules are (at best) the beginning of the conversation. Etsy (and others) really isn’t in a repeated, socially-rich relationship with each of its users: it is in a virtual one.

Moreover, the contracts here, though focus-grouped ex ante, are formally adhesive: individual Etsy or Kickstarter users simply can not negotiate their own deals with each other with the site. That’s true in part because terms of use are mass agreements, binding not hundreds on a local or regional bourse


195 For more on the role of enforceability (however defined) in holding up the sharing economy, see Andrew A. Schwartz, Consumer Contract Exchanges and the Problem of Adhesion, 28 Yale J. on Reg. 313 (2011).

196 See also Ronald J. Mann and Travis Siebeneicher, Just One Click: The Reality of Internet Retail Contracting, 108 Colum. L. Rev. 984, 1011 (2008) (“Although many of the customers are repeat customers, there is by definition almost no opportunity online for the kind of personal interaction that characterizes relational contracting as it is commonly understood.”); F. Scott Kieff, Coordination, Property, and Intellectual Property: An Unconventional Approach to Anticompetitive Effects and Downstream Access, 56 Emory L.J. 327, 356 (2006) (relational contracting is effective “within homogeneous communities”).
but millions, worldwide, on the Internet. It would be inconceivable for platform firms to come to separate deals with each of their users, or even talk about the deals in detail with a fraction of them. Conventionally, “contracts of adheision and relational contracts are in some ways opposite to one another,” making even the term “relational contracts of adhesion” a difficult one.

Thus, Etsy, Tumblr and Kickstarter (and to a lesser extent, Airbnb) illustrate a genuinely novel contracting form. Their end-user contracting framework is designed to build on an existing relationship and generate trust by the users toward the firm and toward each other. But it does so on a massive scale through terms of use which are embedded into the firm’s existing trade dress. Users can participate in the terms’ creation, or at least are invited to do so in a way that makes them feel included. But the terms themselves are nonnegotiable, and are enforced against the users not by the threat of suit but by exclusion from the market. The case study contracts aren’t just accomplishing the ordinary goals of conveying information and setting up rules. They are doing that. But they are also marketing materials, demonstrating values the firms think useful – i.e., we’re progressive, nonconformist, funny, hip, young, and above all, not evil.

They have created a contractual form that is both relational and adhesive at the same time.

D. The Future of Contract Regulation (and Regulation By Contract)

An implicit premise of this paper is that contract theorists should treat precatory terms and exculpatory terms as distinct objects of study. To date, they have not, all but ignoring precatory terms. But to the extent that contract (particularly consumer contract) theory is to become realistic, we ought to revisit our accounts of contracting to deal with the fact that many terms in adhesive mass market contracts purport to extend the performance obligation beyond the point of purchase, and yet are obviously not intended to have legal force.

I have suggested that the persistence of precatory terms in ordinary consumer contracts is a underexplored puzzle. Most would solve the puzzle by assuming all such terms are options, badly drafted by a monopolistic bar. The account I have provided is inconsistent with that easy answer. Lawyer-driven

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197 Aditi Bagchi, Parallel Contract, 75 U. Pitt. L. Rev. 139, 143 (2013)
198 Selection plays a role here – only exculpatory terms are typically tested in court, leading to decisions that are the grist for law review treatments
innovation has created persuasive precatory terms. Notably, such innovation didn’t rely on the cognitive solutions which are the stuff of modern consumer contract theory.

When trying to solve the problem of aversive, unread, exculpatory terms scholars have pushed a solution designed to remedy cognitive problems of information overload. For example, some advocate for smart disclosure mandates, like shaded boxes with unexpected terms, or graphical warning labels for terms that are particularly unfair. The consumer contract problem is conceived as a problem of mandating the precisely right disclosures because it is assumed that firms always lack incentives to encourage readership.

The examples of success that I have provided here suggest the possible futility of even sophisticated disclosure regimes. Each of the case studies suggests that terms exhort when they are trusted, are built from the ground up with buy-in from the firm’s users, and they fit with the brand. Thus, instead of imposing mandates for particular sorts of disclosures, perhaps we ought to work to find ways to reduce the costs of innovation and make it more likely that firms can create their own communicatively rich contracts. That is, if we see the failure of terms as one of entrepreneurial costs, we might reconsider how to solve the no reading problem.

For example, if we come to believe that firms can create terms that communicate, maybe we would mandate that they achieve particular self-directed comprehension goals. This suggestion is aligned with what Lauren Willis has recently written in defense of a performance-based, standards for consumer law. In the consumer contract context, she suggests that comprehension-based standards could supplement, and sometimes replace, disclosure based ones. As she vividly illustrates, performance-standards may lead us in very odd places:

Some consumers may be more likely to comprehend the cost of credit if it is relayed to them by online video explanations from bikini-clad models rather than by government-designed disclosure documents. One study found that a photograph of even a fully clothed, attractive woman, when added to a postcard advertising short-term loans,

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199 Ayres and Schwartz, supra note 1.
200 For a skeptical discussion, see Omri Ben-Shahar and Carl E. Schneider, More than You Wanted to Know: The Failure of Mandated Disclosure 135-36 (2014) (discussing failure of food labeling).
201 Cf. id. at 125 (“Simplicity, then, is usually in tension with full disclosure.”)
increased demand for the loans among South African males to the same extent as a 2 percent reduction in the monthly interest rate. Certainly firms could experiment to determine whether the bikini method would be effective in educating consumers . . . Comprehension standards allow firms to bring the full force of Madison Avenue to consumer education in a way that is not possible for the government.203

Willis’s performance standards are one way to motivate innovation. Another would be to focus on the costs of changing terms. Perhaps the reason is that for most firms the costs and benefits are out of whack based on an implicit set of subsidies and taxes that don’t align with today’ economy. For example, firms may pay a penalty for experimenting with terms the are more likely to be litigated, and finding ways to provide interpretative meaning to standard terms-of-art can create complications for their drafters.204

In response, regulators might consider subsidizing focus group testing of terms, or hosting particularly good examples on public sites to increase the branding returns to legal investment. Perhaps the FTC could convene working groups of engineers, lawyers and designers to set standards and organize discussions in ways that might produce firm innovation. Or Congress could pass a law providing a safe-harbor for certain sorts of contract “translations” into English to encourage their use. Even disclosure based solutions could be useful if better-targeted. The SEC’s non-binding say on pay proposal had has weight: might a regulation requiring firms to disclose what they’ve done to make terms more functional do the similar work?

This sort of policy take-away accompanies one about research directions. Many questions remain, but could usefully focus on the functioning and possible limits of relational contracts of adhesion.

There is much we do not know. Are Etsy’s house rules better than ebay’s? Are Airbnb better than the Hyatt’s? Tumblr’s than Instagram’s? In what way? These are questions difficult to get a handle on.205 As Ryan Calo has pointed out, we should be cautious before taking the sharing economy firms at their mission statements.206 These firms are motivated to extract value from

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203 Id. at 1337.
205 Similarly difficult to determine is how courts ought to fold the design features of such contracts into their explicit terms. Hartzog, *supra* note 21, at 1653-1661 (arguing for design centered policing of contract terms online).
206 Calo and Rosenblat, *supra* note 7, at [ ].
users in whatever ways are at hand: contracts that give with one hand may take away with another in ways invisible to external observers. I can’t conclusively determine whether contracts I’ve identified, which are in some ways much friendly to users than is the norm, are being undermined through conduct behind the scenes. Have they created a real relationship of cooperation and trust (the firms’ story) or merely perpetuated a narrative of trust that enables the firms to profit from customers who have mistakenly concluded they are merchants, and not the products being sold? This is a question worth further detailed study.207

Relatedly, the theory I’ve laid out is highly reliant on stories told by particular firms’ lawyers, who wrote the contracts in question, spent time justifying them to other stakeholders, and clearly have an interest in being portrayed as both progressive and innovative. Indeed, I gave the lawyers permission to read and edit their quoted comments before this paper’s circulation – any direct quotes which they believed reflected badly on them would not have survived such an inquiry. It is interesting, and perhaps telling, that none of the general counsel I spoke to provided hard data about readership rates, or designed systems to rigorously evaluate their modified Term’s behavioral effects. That is not to say that the lawyers I spoke to were deceiving (me or themselves). Rather, to the extent that part of the story I’ve told is one of contract-as-marketing, we ought to be wary of taking more grand claims of behavioral influence at face value.

If we were become convinced that relational contracts of adhesion were functional, further qualitative and quantitative study might suggest the limits of users’ acquiescence to the regulatory regime – is buy-in stronger with those who make more money on the site? Who have been there longer? Who commented on the terms in their drafting? The apparent reticence of firms like Airbnb to ask probing questions of its users suggests that not all regimes will be equally able to affect behavior, or want to learn about it.

Obviously, only a few firms have user terms that look anything like the ones I’ve studied. Why is that? Are relational contracts of adhesion limited to circumstances where users are also merchants? To firms pressed on the problem when they were small enough to care but big enough to invest? To firms born in New York City? Near Union Square? A research project that

207 See Mark Fenster, Coolhunting the Law, 12 HARV. NEGOT. L. REV. 157 , 173 (2007) (“When it works effectively in the consumer context, branding operates by instilling affective meaning into consumer goods in order to persuade people to purchase products they may not need at prices higher than they need to or even should spend.”
looked at those firms which did not innovate, though they had the opportunity to do so, might help to provide clarity on these issues.

V. CONCLUSION

Channeling user behavior is one of the mission-critical tasks in the sharing economy. Firms have spent enormous energy on that project, mostly in the form of behavioral nudges,\textsuperscript{208} and software like Digital Rights Management.\textsuperscript{209} Technological evangelists are even starting to promise that “smart contracts” based on decentralized ledger technology – a set of tools and protocols that exchange and verify data without centralized intermediaries – can solve certain problems in the consumer space.\textsuperscript{210}

Notwithstanding these sophisticated techniques, firms continue to deploy benumbing terms of use to users who do not read them. Those terms continue to purport to govern user behavior. Their regulations can be bizarre – e.g., the fine print “tells” you not to drive Beyonce home from a concert in your ZipCar, or trade on insider tips when registering for your honeymoon.\textsuperscript{211} Indeed, so odd does the project of governing the public with contract terms seem that no one has written carefully about it. Precatory and executory terms are seen as part of the same story of uncreative exploitation.

It’s dangerous to generalize from case studies, let alone ones that valorize their subjects. All I can say is this: this Article has suggested that not all mass market contracts are the same. Some might be changing user behavior by drawing on norms that we might have thought limited to individualized, negotiated, off-line deals. Consider, in this light, the case of comedian Louis C.K. In 2011, he distributed his comedy album online, where it cleared over $1,000,000 in two weeks, despite the absence of either anti-piracy technology or terms of use prohibiting copying. Rather, he posted the following notice:

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\textsuperscript{208} Calo and Rosenblat, \textit{supra} note 9, at \[ \] (summarizing literature).

\textsuperscript{209} In Europe, the pirate party system was built on opposition to DRM technologies. Rebecca Wexler, \textit{The Private Life of DRM: Lessons on Information Privacy from the Copyright Enforcement Debate}, 17 \textit{YALE JOURNAL ON LAW AND TECHNOLOGY} 368, 378-381 (2015); Rub, \textit{supra} note 12, at 54-56 (exploring DRM as an alternative to contractual control).


\textsuperscript{211} See text accompanying notes 34 through 42.
“You can watch it from any country on earth. It’s an unprotected video that you can download and burn on a DVD or stream. Please don’t torrent this video. I paid for the whole thing with my own stupid money.”

For some, this is a story about the foolishness of using contracts when other tools are at hand. I wonder whether it is instead a lesson about the power of a brand. The comedian, like Etsy and Tumblr and Kickstarter, leveraged authenticity to create a norm of reciprocity (my “own stupid money” for yours.) There is only one Louis C.K. But there are potentially many sharing economy firms that might, by surrendering certain forms of ex post protections and taking small risks with tone and design, achieve what he did at scale. The challenge going forward is to understand better what role the law and legal institutions plays in creating innovation around these relational contracts of adhesion.

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213 Eigen, supra note 14, at 4.