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Hidden Contracts

Shmuel I. Becher* & Uri Benoliel†

Transparency is a promising means for enhancing democratic values, countering corruption, and reducing power abuse. Nonetheless, the potential of transparency in the domain of consumer contracts is untapped. This Article suggests utilizing the power of transparency to increase consumer access to justice, better distribute technological gains between businesses and consumers, and deter sellers from breaching their consumer contracts while exploiting consumers' inferior position.

In doing so, this Article focuses on what we dub "Hidden Contracts." Part I conceptualizes the idea of hidden contracts. It first defines hidden contracts as consumer form contracts that firms unilaterally modify and subsequently remove from the public sphere, despite being binding on consumers. Thereafter, the Article delineates the considerable social costs of hidden contracts.

Given these social costs, Part II discusses our empirical study of hidden contracts. The results of this study indicate that leading firms that supply goods and services to billions of online consumers worldwide routinely employ hidden contracts to the detriment of consumers and society. Against this background, Part III proposes introducing a novel contract transparency duty. It further explains how to design this duty to counter firms' incentive to employ hidden contracts. Next, Part IV tackles key objections to our proposal. Concluding remarks follow.

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INTRODUCTION

Consumer standard form contracts – the most pervasive type of contracts – govern much of our everyday lives.¹ One enters into a standard form contract when using social media, signing up for an

1. See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (“Standard form contracts probably account for more than ninety-nine percent of all of the contracts now made.”); see also Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002) (noting the omnipresence of consumer form contracts, their wide usage in e-commerce, and some of the relationships they govern).

email account or a ridesharing service, booking a flight or a hotel, renting a car, opening a bank account, purchasing insurance, joining a gym, connecting to public Wi-Fi, or buying furniture at a local store. Consumer form contracts are a constant presence, and Terms and Conditions (or Ts & Cs, Terms of Service, Terms of Use (ToU), or simply Terms) govern the behavior, rights, and obligations of billions of individuals worldwide.²

Ubiquity notwithstanding, consumers often think nothing of these contracts until a dispute arises and they discover that the odds are weighed heavily against them.³ Indeed, academics have been sounding the alarm about various problematic aspects of consumer standard form contracts for decades.⁴ Scholars question the validity of consumers' assent to standard form contracts, noting the degradation of consumer rights, lack of choice, and consumers' inferior bargaining power.⁵ Some opine that consumer form contracts grant firms an (absolute or excessive) ability to one-sidedly draft, design, amend, and resolve disputes pertaining to

2. For example, the mega social networks Facebook, YouTube, Instagram, and TikTok have approximately 3, 2.5, 2, and 1.1 billion active users, respectively. See *Most Popular Social Networks Worldwide as of January 2023, Ranked by Number of Monthly Active Users*, STATISTA, <https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Oct. 2, 2023). Likewise, the popular online retailers Amazon, eBay, and Walmart have approximately 3.2 billion, 589 million, and 581 million monthly visits, respectively. See *Most Visited Online Retail Websites Worldwide in 2022, by Average Monthly Traffic*, STATISTA, <https://www.statista.com/statistics/274708/online-retail-and-auction-ranked-by-worldwide-audiences> (last visited Oct. 2, 2023).

3. For one illustrative example, see Katie Benner, *Federal Judge Blocks Racial Discrimination Suit Against Airbnb*, N.Y. TIMES, Nov. 1, 2016, at B5 (“[A] federal judge ruled that the company’s arbitration policy prohibited its users from suing.”).

4. For two seminal early examples, see Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (explaining that standard form contracts are contracts of adhesion, thus deviating from fundamental assumptions of traditional contract law); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 362–71 (1960) (analogizing standard form contracts to laying one’s head into a lion’s mouth).

5. The literature here is extensive. For a few examples, see Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976) (“Most clauses of standard form contracts are candidates for nonenforcement.”); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 143 (1970) (submitting that contracts of adhesion are drafted by one party only and are not a result of a cooperative negotiation); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) (detailing the urgent need to improve oversight of boilerplate contract terms).

consumer contracts.⁶ Others warn that consumers do not, and cannot, read complex and lengthy standard form contracts.⁷ Vast literature wrestles with this long-lasting “no-reading problem” and the asymmetric information it facilitates.⁸

In the domain of Business-to-Consumer (B2C) relationships and elsewhere, one of the principles that can counter and disincentivize exploitative behavior is transparency.⁹ Transparency plays an important role in many legal and nonlegal domains.¹⁰ It enhances

6. See, e.g., David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 667 (2010) (discussing firms’ ability to “unilaterally amend their dispute resolution clauses again and again”); Kessler, *supra* note 4; Slawson, *supra* note 1; Eyal Zamir, *Commonsense Consent and Contract Law*, JOTWELL (Dec. 5, 2022) (reviewing Joanna Demaree-Cotton & Roseanna Sommers, *Autonomy and the Folk Concept of Valid Consent*, 224 COGNITION 105065 (2022)), <https://contracts.jotwell.com/commonsense-consent-and-contract-law> (noting the weak regulation of consumer form contracts in the United States).

7. See, e.g., Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (establishing empirically that virtually no consumers read End User License Agreements); Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (explaining that consumers who typically face one-shot transactions will not accord much attention to standardized terms); Melvin A. Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986) (opining that information overload and language complexity will deter consumers from reading form contracts); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (highlighting the consensus among academics that the adhering party is unlikely to read the standard terms before accepting them). We will return this important issue *infra* Section IV.D.

8. See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (proposing that firms engage in “term substantiation” to learn whether consumers hold accurate beliefs about their agreements); Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 773 (2008) (explaining how the no-reading problem results in contractual information asymmetries that market forces cannot correct); Amy J. Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 863 (2010) (exploring the problem of rolling contracts, where consumers get the terms of their contracts only post purchase).

9. See, e.g., Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. 55 (2023) (proposing a transparency framework to scrutinize and police firms’ contractual behavior).

10. For a detailed discussion, see ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007). See also Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65, 68 (2014) (recognizing various ways to employ transparency); David Weil, Mary Graham & Archon Fung, *Targeting Transparency*, 340 SCI. 1410 (2013) (explaining, among other things, how policymakers can use transparency as a tool to empower third parties to provide market participants with valuable and accessible information).

democratic values, counters corruption, and reduces power abuse.¹¹ Transparency also facilitates equality, fosters trust, and promotes fairness.¹² Few will doubt the positive attributes and the potential of transparency to improve lives, markets, and institutions.

Unsurprisingly, therefore, giant websites – including the most famous and successful social media platforms – often state that they are committed to the principle of transparency. To illustrate, Facebook declares on its website that it is “committed to transparency, control and accountability.”¹³ Similarly, Twitter states that it “was founded on a commitment to transparency.”¹⁴ Along these same lines, TikTok asserts, “We work to earn and maintain trust through ongoing transparency into the actions we take to safeguard our platform”¹⁵

Firms’ commitment to transparency is socially important. It builds trust between these websites and their users.¹⁶ It allows businesses to establish a reputation for openness with the public.¹⁷

11. See *Our Story*, TRANSPARENCY INT’L, <https://www.transparency.org/en/our-story> (last visited Oct. 2, 2023).

12. See, e.g., Perrine Toledano, *Paper on the Business Case for Transparency*, COLUM. CTR. ON SUSTAINABLE INV. STAFF PUBL’NS, June 2012, at 1, 9 (associating transparency with accountability, fairness, and sustainability); Archon Fung, Mary Graham & David Weil, *The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?*, ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION (2002), <https://ash.harvard.edu/publications/political-economy-transparency-what-makes-disclosure-policies-sustainable>.

13. See, e.g., *Facebook’s Commitment to Data Protection and Privacy in Compliance with the GDPR*, META (Jan. 29, 2018), <https://bit.ly/2EGyMvB>.

14. *Twitter Russia Transparency Report*, TWITTER (Feb. 2022), <https://bit.ly/3Cg0wmW>.

15. Vanessa Pappas, *Strengthening Our Commitment to Transparency*, TIKTOK (Jul. 27, 2022), <https://bit.ly/3UODBGL>. For additional examples, see *Discount Transparency Initiative*, MICROSOFT, <https://bit.ly/3CIBhQk> (last visited Oct. 2, 2023) (“Microsoft is dedicated to conducting business responsibly around the world and to meeting the highest legal and ethical standards. Improved transparency is an essential component of these efforts.”); *Transparency Report*, PINTEREST, <https://policy.pinterest.com/en/transparency-report> (last visited Oct. 2, 2023) (“We’re committed to providing greater transparency into how we keep Pinterest safe and positive”).

16. See *TikTok’s New Transparency Reports and Transparency Center*, TIKTOK (DEC. 2, 2021), <https://bit.ly/3dZeRdY> (“To build trust through transparency, we began releasing reports in 2019”); *Transparency Report*, ZOOM (Jul. 7, 2023), <https://explore.zoom.us/docs/en-us/trust/transparency.html> (“At Zoom, transparency is critical to building trust”).

17. See *Transparency Reporting*, TSPA, <https://www.tspa.org/curriculum/ts-fundamentals/transparency-report> (last visited Oct. 2, 2023) (“Transparency reporting can be important for building trust and establishing a reputation for openness with the public.”).

It helps companies to foster accountability in their work.¹⁸ It may also reduce policymakers' vigilance towards firms and shield firms from public and legal scrutiny. If sellers voluntarily adopt transparency as a guiding principle, legal intervention to promote transparency and protect the public becomes less justified.

Given firms' stated commitment to the transparency principle, a fundamental yet imperative question arises: Are websites systematically transparent about the content of their legal rules? Put simply, do consumers have access to the form contracts they accepted when entering into their relationships with the firm? Or do firms opt for non-transparency and hide previous—yet relevant—versions of their contracts from consumers?

Addressing these questions, this Article empirically investigates the contractual practices of 100 highly popular mega sites, such as Google, Facebook, Instagram, TikTok, Twitter, and Amazon. In particular, it examines whether highly popular sites use nontransparent practices that characterize what we dub "hidden contracts." Hidden contracts, as this Article defines them, are mass, standard form contracts whose tracks are blurred to prevent consumers from accessing them. In other words, hidden contracts are agreements consumers cannot find on the online vendor's website once a conflict or dispute arises—typically when they need them most. Consequently, hidden contracts go beyond the concerns that consumer contracts are hard to understand or may have changed; rather, they imply that the terms are gone or inaccessible.

To illustrate the issue, consider the case of the Palmers from Utah. Mr. Palmer ordered a desk ornament and keychain from an online retailer, KlearGear.¹⁹ When the retailer did not deliver, the

18. Chris Sonderby, *Transparency Report, Second Half 2021*, META (May 17, 2022), <https://about.fb.com/news/2022/05/transparency-report-h2-2021> ("That's why we publish biannual transparency reports to provide detail on the numbers and maintain accountability in our work.").

19. Many outlets reported on the Palmers' story and subsequent lawsuit against KlearGear. See, e.g., *Palmer v. KlearGear.com*, PUB. CITIZEN, <https://www.citizen.org/litigation/palmer-v-kleargear-com> (last visited Oct. 2, 2023); Steven Nelson, *Retailer That Fined Couple \$3,500 for Negative Review Hit with Lawsuit*, USNEWS (Dec. 18, 2013, 7:00 am), <https://www.usnews.com/news/articles/2013/12/18/retailer-that-fined-couple-3500-for-negative-review-hit-with-lawsuit>; Olivia Sorrel-Dejerine, *A Case for Reading the Small Print*, BBC (Nov. 18, 2013), <https://www.bbc.com/news/blogs-magazine-monitor-24992518>; Jacob Goldstein & Alexi Horowitz-Ghazi, *Terms of Service*, NPR (Mar. 4, 2020, 7:11 PM),

Palmer's attempted to find out what went wrong.²⁰ Upon realizing she could not reach the business by phone, Mrs. Palmer posted an online review about the business, sharing her negative experience.²¹

More than three years later, the online retailer, KlearGear, contacted the Palmers, demanding the removal of the negative posting. It also threatened the couple with a \$3,500 fine.²² The message from KlearGear cited the firm's terms and conditions, pointing to a non-disparagement clause, which prohibits consumers from publishing negative feedback about the company.²³

One of the key issues in this case was whether this term was part of the original contract between the parties.²⁴ On the one hand, KlearGear stated that the clause had been present in 2008 when the Palmers entered the contract. On the other hand, the Palmers argued that according to Internet Archive, an American digital library, the clause had not been part of the original contract and was added to the site in June 2012.²⁵ In other words, KlearGear inserted this term *after* the Palmers entered into the contract.²⁶

When the Palmers refused to pay the fine or remove the negative review, KlearGear reported them to several credit

<https://www.npr.org/2020/03/04/812264543/episode-976-terms-of-service>. The story evolved to a lawsuit, with its own Wikipedia entry. See *Palmer v. Kleargear.com*, WIKIPEDIA, https://en.wikipedia.org/wiki/Palmer_v._Kleargear.com (last visited Oct. 2, 2023).

20. See PUB. CITIZEN, *supra* note 19 ("The gifts never arrived, and [Mr. Palmer's] attempts to contact KlearGear.com were unsuccessful.").

21. See *id.* (noting that Mrs. Palmer "posted a negative review on RipoffReport.com").

22. See *id.*; Cyrus Farivar, *KlearGear Must Pay \$306,750 to Couple That Left Negative Review*, ARS TECHNICA (June 25, 2014, 8:10 PM), <https://arstechnica.com/tech-policy/2014/06/kleargear-must-pay-306750-to-couple-that-left-negative-review> (describing KlearGear's initial demand to the Palmers to remove their review or pay the large fine).

23. Farivar, *supra* note 22 ("[Mr.] Palmer received an e-mail demanding that the review be deleted within seventy-two hours or that he pay \$3,500, as he was in violation of the company's 'non-disparagement clause' of its terms of service.").

24. Farivar, *supra* note 22 (noting that the clause "did not appear in the Terms of Sale and Use that the Palmers had agreed to when they placed their order in 2008").

25. Complaint at clause 19, *Palmer v. Kleargear.com*, No. 13-cv-00175 (D. Utah Dec. 18, 2013), ("Based on past versions of KlearGear's Terms of Sale and Use available at the Internet Archive, <https://archive.org>, it appears that KlearGear's Terms of Sale and Use did not include a 'non-disparagement clause' until sometime after April 28, 2012."). See also Tim Cushing, *Online Retailer Says if You Give It a Negative Review It Can Fine You \$3,500*, TECHDIRT (Nov. 14, 2013, 8:58 AM), <https://www.techdirt.com/2013/11/14/online-retailer-slaps-unhappy-customers-with-3500-fee-violating-non-disparagement-clause>.

26. Complaint, *supra* note 25.

bureaus.²⁷ As a result, the Palmers were denied credit, had loans delayed, and could not enlist the necessary funds to fix their broken furnace.²⁸ The Palmers sued KlearGear,²⁹ and the court entered a default judgment in favor of the Palmers.³⁰ Later, Congress banned the use of “non-disparagement clauses” (known more generally as “gag clauses”) by statute, introducing the Consumer Review Fairness Act.³¹

Nonetheless, consumers’ attempts to exercise their rights do not often end as fortuitously as in the Palmers’ case. Most consumers find it challenging to confront firms that unilaterally change the contract terms and obfuscate the original terms of the agreement. Firms typically incorporate contractual change-of-terms mechanisms that allow them to unilaterally modify the original contract at will, for any reason, and at any time.³² This practice can exacerbate consumers’ difficulties. As a matter of fact, online forums provide multiple anecdotal examples of customers and users struggling, with no success, to find the relevant terms and conditions.³³

27. See PUB. CITIZEN, *supra* note 19 (“When the Palmers refused to pay . . . KlearGear.com reported the supposed ‘debt’ to the credit reporting agencies. More than a year later . . . this ‘debt’ still mars John Palmer’s credit.”).

28. *Id.* (“[T]he Palmers have been turned down for credit, and had their car loan delayed and paid a higher interest rate on it . . .”); Eugene Volokh, *\$300,000 Damages Award Against KlearGear, the Company that Billed Customers for \$3,500 Because They Posted a Negative Review*, WASH. POST: THE VOLOKH CONSPIRACY (June 26, 2014, 12:48 PM) (stating that the Palmers “spent weeks without heat in their home . . . when their furnace broke and they were unable to obtain a loan to replace it”).

29. Complaint, *supra* note 25.

30. *Palmer v. Kleargear.com*, 13-cv-00175 (D. Utah filed Dec. 18, 2013). See also PUB. CITIZEN, *supra* note 19 (describing the default judgment and damages award).

31. Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355.

32. See, e.g., Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 657 (2021) (finding that the vast majority of popular online website incorporate a non-transparent change-of-terms clause in their consumer form contracts).

33. See, e.g., Live Better, *We Offer A \$900 Reward to Anyone Who Finds a 2017 Version of Epidemic Sound Terms of Service*, LIVEBETTERMEDIA (Mar. 31, 2020), <https://tinyurl.com/38pc5rvh> (“Epidemic Sound is hiding the previous versions of its Terms of Service . . . [A]nd if you ask them to re-release these past versions of the documents that once governed Epidemic Sound’s website, services and copyrights, they ignore your requests, even if the requests are made by a lawyer.”); tjayhawk3231, Comment to *About Skins Being a ‘Rental’*, REDDIT (2022), https://www.reddit.com/r/PlayAvengers/comments/soxr29/about_skins_being_a_rental/?rdt=56272 (“I can’t find the original terms for Marvel Heroes.”); Maxine H, *Recent Comments & Queries from Other Timeshare Owners*, TIMESHARE ADVICE NETWORK (Aug.

As the Palmers' case illustrates and this Article elaborates below,³⁴ it is rather beneficial for consumers—as well as for consumer organizations, watchdog groups, policymakers, enforcement agencies, the media, and adjudicators—to easily know what a consumer contract, including its previous and original versions, says. But despite the fundamental nature of this issue, we are unaware of any studies exploring it. This Article marks the first attempt to systematically examine whether consumers can locate the original contract's terms and conditions that govern their relationships with suppliers.

The key contribution of this Article is threefold. First, it empirically addresses an important question that the literature has neglected: Whether the content of online consumer contracts is available and transparent. Second, this Article joins the call to channel further scholarly and regulatory attention to the hurdles consumers face *ex post*, when attempting to insist on their rights or confront firms.³⁵ Third, this Article connects three premises—access to justice, firms' non-transparent behaviors, and the potential and perils of technology—to make a novel argument regarding the regulation of popular online websites, platforms, and services.³⁶ It argues that big online firms often employ non-transparent tools

18, 2017), <https://www.timeshareadvicenetwork.co.uk/your-stories> (“I can’t find the original contract.”); Doingmybest, Comment to *FirstPlus to Elderbridge*, CONSUMER ACTION GROUP (Apr. 25, 2018), <https://www.consumeractiongroup.co.uk/topic/410000-firstplus-to-elderbridge> (“I can’t find the original contract and terms.”).

34. See discussion *infra* Section I.B.

35. This attention, in turn, highlights the discriminatory means firms employ when dealing with consumers. See, e.g., Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929 (2020) (documenting how assertive and vocal consumers may discipline firms and evaluating those customers' roles); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69 (2019) (discussing the motivations and implications of firms that draft strict form contracts *ex ante* yet display leniency toward consumers *ex post*); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012) (explaining how firms discriminate among consumers, allowing only relatively few vocal and informed consumers to access remedies). See also Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825 (2022) (exploring the magnitude of *ex post* contractual inequality in the context of residential mortgage contracts); Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547 (2016) (highlighting the role of internal corporate mechanisms in responding to, resolving, and mitigating consumer complaints).

36. See, e.g., John M. Newman, *Antitrust in Digital Markets*, 72 VAND. L. REV. 1497 (2019) (arguing that digital markets merit a uniquely interventionist approach); Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203 (2022) (assessing how size and market power create governance problems and how the law can respond).

while eroding consumer access to justice. In doing so, this Article sheds much-needed light on the untapped potential of transparency in the domain of consumer contracts.

The structure of this Article is as follows. Part I provides the theoretical context for the empirical test of this study. It defines hidden contracts and examines their social costs. Part II presents the empirical test of this study. It reviews the data that underlines the empirical examination and discusses its methodology. It then details the results of this study, which indicate that highly popular websites too often apply practices that yield hidden contracts. Part III discusses normative policy and legal implications. It suggests imposing a transparency duty on firms and considers private and public enforcement measures to tackle the challenge of hidden contracts. Part IV discusses potential criticism. Concluding remarks follow.

I. THEORETICAL BACKGROUND

This Part conceptualizes the idea of hidden contracts. Section A defines the two components of such contracts, illustrating them by reference to Amazon. Thereafter, section B delineates the social costs of hidden contracts.

A. The Concept of Hidden Contracts

This Article defines hidden contracts as standard form agreements that oblige consumers despite being concealed from them. More specifically, a supplier that utilizes hidden contracts applies two practices: First, it does not provide a copy of the agreement to consumers after they agree to it. Second, the supplier removes the previous version of the contract from its public sphere after unilaterally amending it.³⁷ We use the term “hidden” to emphasize that whereas firms have records of these previous contract versions in their databases, consumers cannot find or access them.

To illustrate, take the typical consumer experience with Amazon. When consumers sign up for an Amazon account, they

37. Importantly, consumer contracts are often amended by suppliers. For example, Twitter’s contract terms were amended at least fifteen times from the year 2009 to 2022. *See Previous Terms of Service*, TWITTER, <https://twitter.com/en/tos/previous> (last visited Sep. 15, 2023).

are required to provide their contact information, such as their email address.³⁸ Following that, consumers must agree to Amazon's contractual terms of use ("original version").³⁹ However, after consumers agree to the contract, Amazon does not send a copy of the original version to consumers.⁴⁰ Occasionally, Amazon will unilaterally amend its previous contractual terms of use,⁴¹ creating a modified version of its form contract.⁴² However, when it makes such a unilateral amendment, it fails to publish or link to the original version on its terms of use webpage.⁴³ As a result, typical consumers, who accepted the original version, cannot know what it says and are unable to find it.

B. The Social Costs of Hidden Contracts

Hidden agreements are undesirable. In essence, hidden contracts increase the risks that consumers will not know their rights and will avoid action. As a result, businesses will be under-deterred and inefficiently breach their standard form contracts at the expense of consumers.

This section clarifies this argument in three steps: First, it explains why a supplier may breach its contract inefficiently. Second, it discusses a major social mechanism against inefficient breaches by suppliers: consumers' activism and their ability to sue breaching suppliers. Finally, it submits that hidden contracts erode consumer activism; i.e., hidden contracts deter consumers from confronting firms, complaining about their behavior, and filing lawsuits against suppliers who breach their contracts. This reality, in turn, entails that hidden contracts assist firms in breaching their contracts inefficiently. Hidden contracts, therefore, harm consumers

38. *Create Account*, AMAZON, <https://amzn.to/3RJYAZ0> (last visited Oct. 3, 2023).

39. *Id.* (Amazon states following its sign-up button: "By creating an account, you agree to Amazon's Conditions of Use . . .").

40. To confirm this reality, one of the authors signed up with Amazon in September 2022. During the sign-up process the author provided his email address and accepted Amazon's contract terms. However, Amazon did not email (or otherwise send) the author a copy of the contract he agreed to.

41. *Conditions of Use*, AMAZON, <https://amzn.to/3QJ32Gm> (last updated Sep. 14, 2022) (According to Amazon, it last amended its terms on September 14, 2022.).

42. Of course, many companies amend their contracts more than once, hence creating multiple versions of the consumer form contract they offer throughout time.

43. *Supra* note 41.

and undermine the ability of market forces and information flows to discipline sellers and benefit society.

C. Suppliers May Breach Their Contracts Inefficiently

Firms, as profit-maximizers, have a basic incentive to save costs when possible.⁴⁴ Accordingly, when firms predict that the costs of executing their standard form contracts exceed the costs of breaching them, they are likely to breach the agreement.⁴⁵ That is, firms may focus only on their own efficiency curve and ignore consumers' interests.

An example may clarify. Assume that a social network bans a user from the network based on its assumption that the user breached its rules of conduct.⁴⁶ Furthermore, assume that according to the network's contract, the network must provide any banned consumer with a clear and detailed explanation about why they were banned.⁴⁷ In such a scenario, if the social network predicts its costs of explanation are higher than the costs of failing to explain, it is likely to choose the latter. Therefore, the network will ban the user without providing any reasoning whenever the cost of providing an explanation surpasses the expected harm to the network.⁴⁸ By banning the user without giving concrete justifications, the network may save—from its self-interested

44. Jae Sung Lee, *Towards a Development-Oriented Multilateral Framework on Competition Policy*, 7 SAN DIEGO INT'L L.J. 293, 303 (2006) ("Competition among firms sharpens incentives to cut cost."); Wulf A. Kaal, *Blockchain Technology for Good*, 17 U. ST. THOMAS L.J. 878, 883 (2022) ("[C]apitalism suggests that market incentives encourage firms to cut costs.").

45. Thomas S. Ulen, *Happiness, Technology, and the Changing Employment Relationship*, 19 EMP. RTS. & EMP. POL'Y J. 61, 66 (2015) ("[R]ational breachers are very likely to breach only when it is more efficient to breach than to perform."); cf. Jason N.E. Varuhas, *One Person Can Make A Difference: An Individual Petition System for International Environmental Law*, 3 N.Z.J. PUB. & INT'L L. 329, 335 (2005) ("[S]tates are less likely to breach their obligations if the costs of non-compliance are high.").

46. See, e.g., *King v. Facebook, Inc.*, 572 F. Supp. 3d 776, 781 (N.D. Cal. 2021) (Facebook banned a user since it believed that the user "did not follow [Facebook] Community Standards.").

47. Cf. *id.* at 789 (Court rules, based on the contract text, that the implied covenant of good faith obliges Facebook "to provide [to the user] at least some information in addition to the fact that the account has been suspended or terminated—e.g., enough information about why the account was suspended or terminated.").

48. *Id.* at 790 ("Based on the Court's analysis above, Ms. King [a Facebook user] has a claim for breach of contract (or breach of the implied covenant) based on Facebook's disabling of her account, as well as the failure to provide a more specific explanation as to why the account was disabled.").

perspective – the costs of explanation; that is, the costs of articulating the reasons for the ban.

However, while a breach of contract (i.e., not providing the explanation) may be beneficial for the firm, it may be inefficient from a broader social perspective. That is, the total social costs of the breach may outweigh the supplier's costs of providing the explanation. Going back to the example of the social network, when the network breaches the agreement with its banned consumer by failing to explain the reasons for the customer's termination, the overall social costs may be significant.⁴⁹

For starters, the probability of erroneous contract-banning of an innocent consumer who did not breach the network's rules increases.⁵⁰ In other words, lack of reasoning increases the risk that the banning process applied by the supplier will be hasty and not founded on accurate, adequately investigated facts and sound principles of law.⁵¹ Furthermore, a lack of reasoning may also impair the consumer's capacity to easily and fully understand the firm's banning decision and effectively contest it if it is wrong.⁵²

In addition, the firm's erroneous banning of the consumer may generate nontrivial costs to the consumer, which the firm is unlikely to internalize.⁵³ Notably, these costs include the loss of the consumer's prior investment (e.g., time and resources) in trying to create and maintain a relationship with other network users.⁵⁴ Moreover, the banned user may experience embarrassment, mental anguish, and emotional distress due to an unjust banning by the firm.⁵⁵ On top of that, the consumer may incur switching costs when pursuing a similar service or product elsewhere.⁵⁶

Finally, the firm's motivation to ban a consumer may (at times, erroneously) be based on discriminatory and non-transparent

49. Uri Benoliel & Shmuel I. Becher, *Termination Without Explanation Contracts*, 2022 U. ILL. L. REV. 1059, 1070–84 (2022).

50. *Id.* at 1075–78.

51. *Id.* at 1075.

52. *Id.* at 1077. *See also* King v. Facebook, Inc., *supra* note 46, at 789 (“[I]t is plausible that Facebook is obligated to provide at least some information in addition to the fact that the account has been suspended or terminated—e.g., enough information about why the account was suspended or terminated such that an ‘appeal’ could properly be made . . .”).

53. Benoliel & Becher, *supra* note 9, at 1078–84.

54. *Id.* at 1078–79.

55. *Id.* at 1081–83.

56. *Id.* at 1083–84.

factors that undercut societal values such as inclusion, equality, and voice.⁵⁷ Thus, such banning may disproportionately harm vulnerable consumers while eroding imperative societal values.⁵⁸ Nevertheless, since the firm does not fully internalize these costs, it may have a profit incentive to ban consumers without providing an explanation, despite this being a breach of contracts.

Against this background, consumers' ability to discipline firms and sue wrongdoers is of paramount importance. We turn to that next, examining the interplay between hidden contracts and consumers' propensity to complain, air their grievances, and litigate their cases.

1. Consumer Activism as a Mechanism Against Inefficient Breach

While suppliers may have a basic incentive to breach their contracts at the expense of consumers, society has an important mechanism that may reduce the occurrence of such inefficient breaches. Particularly, society allows consumers to file a lawsuit against a supplier that breached its contract. Such lawsuits may deter suppliers, *ex ante*, from breaching the contract.⁵⁹ This deterrence effect is due to the high monetary and reputational costs that consumer lawsuits may cause to a breaching supplier. By and large, a similar analysis applies to consumer activism that takes other shapes: complaining to the mass media and consumer organizations, sharing experiences on social media platforms, or posting online reviews. Though all these tools are not magic bullets,

57. *Id.* at 1070 (“[A] supplier may wrongly terminate a consumer agreement due to the consumer’s race while mistakenly overlooking a statutory rule that prohibits discriminatory contract termination.”); *see also*, *El-Hallani v. Huntington Nat’l Bank*, 623 F. App’x 730, 732–739 (6th Cir. 2015) (explaining that the plaintiffs alleged a bank closed their accounts because of their race, in violation of 42 U.S.C. §§ 1981 and 1982, and the Michigan Elliot-Larsen Civil Rights Act; the court ruled that the plaintiffs pleaded factual content that allowed the court to draw the reasonable inference that the defendant was liable for the misconduct alleged).

58. Benoliel & Becher, *supra* note 49, at 1064.

59. *See, e.g.*, Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Minority*, 69 DEPAUL L. REV. 233, 259 (2020) (consumers’ ability to file lawsuits against sellers “impose direct costs on firms, and the threat of these costs can deter seller misbehavior *ex ante*”).

they can still influence firms' reputations and discipline them to avoid breaching a contract.⁶⁰

To begin with, the mere *filing* of a breach of contract lawsuit may generate reputational costs to the breaching supplier. The willingness of an individual consumer to invest resources and time in filing a lawsuit may signal to other consumers that the probability that the supplier breached the contract is not trivial.⁶¹ The complaint makes the risk of a breach more salient and vivid. As a result, potential consumers, who are informed about the lawsuit filing, may infer from the filing that the supplier might undervalue its clients' legal rights.⁶² Consequently, potential consumers may avoid transacting with this supplier.⁶³ For similar reasons, existing consumers may also reduce their interactions with the supplier due to the lawsuit filing, thereby increasing the supplier's reputational costs.⁶⁴ Existing consumers may also closely examine their own interactions and contracts with the firm, and potentially file a suit of their own or initiate (or join) a class action. Here too, the same rationale pertains to other forms of consumer activism. Consumer complaints, negative online reviews, and

60. See, e.g., Shmuel I. Becher & Tal Z. Zarsky, *Online Consumer Contracts: No One Reads, but Does Anyone Care?*, 12 JERUSALEM REV. LEGAL STUDIES 105, 109-110 (2015) (discussing the importance of press and media interest in consumer form contracts); Arbel & Shapira, *supra* note 35 (discussing the potential role of active and vocal consumers); Jeff Govern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, 11 MICH. BUS. & ENTREPRENEURIAL L. REV. 1 (2021) (examining famous incidents in which companies mistreated consumers and concluding that markets and reputation are not a consumer protection panacea).

61. Cf. David W. Prince & Paul H. Rubin, *The Effect of Product Liability Litigation on the Value of Firms*, 4 AM. L. & ECON. REV. 44, 57 (2002) ("[W]e can expect a negative impact on the value of a firm surrounding the filing of a lawsuit. This is in part because the filing of a lawsuit indicates that plaintiff attorneys believe that a favorable verdict is sufficiently probable to justify what is often a substantial investment.").

62. Cf. Assaf Jacob & Roy Shapira, *An Information-Production Theory of Liability Rules*, 89 U. CHI. L. REV., 1113, 1119 (2022) ("Upon hearing the bad news [about a company], stakeholders may infer that the company's 'type' is worse than they previously thought; for example, they may infer that the company does not invest enough in the quality or safety of its products.").

63. Prince & Rubin, *supra* note 61, at 51 ("[L]awsuits that are damaging to a firm's brand name are likely to be associated with reputation costs due to lower quasi-rents from future sales [to consumers]."); Jacob & Shapira, *supra* note 62, at 1119 ("[B]ad news about the company may lead to diminished future business opportunities.").

64. For a similar argument in a different context, see Uri Benoliel, *Reputation Life Cycle: The Case of Franchising*, 13 CHAP. L. REV. 1, 6 (2009) ("[A] franchisor who terminates the contract without good cause will encounter difficulties in retaining its other franchisees.").

critical mass media coverage create information flows that reach other prospective consumers.⁶⁵ These information flows make it more likely that other consumers will exercise vigilance and reduce their willingness to engage with the firm that breached its contract.

Information flows are not limited to consumers, of course. Investors, too, may be deterred by negative information flows and suits against a company.⁶⁶ Investors may be concerned about the potential negative economic implications of the breach of contract lawsuit (e.g., fewer future sales) or the negative publicity.⁶⁷ Investors may also infer from the lawsuit or the negative publicity that the supplier disrespects consumer rights.⁶⁸ Such disrespect may expose the supplier to additional breach of contract lawsuits by consumers and further consumer complaints, ultimately harming its investors.

Empirical evidence, albeit in a different context, indicates that the mere filing of a consumer lawsuit against a supplier can cause reputational harm to the supplier. For example, Professors David Prince and Paul Rubin examined whether firms in the automobile and pharmaceutical industries suffer reputational costs due to product liability lawsuits.⁶⁹ They found that firms facing lawsuits for their products suffer significant capital market losses.⁷⁰ The

65. See generally Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008) (explaining the potential power of online information flows to discipline firms). These information flows have their own limits, of course. See, e.g., Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1253 (2019) (explaining that reputational information can be costly to obtain, noisy, distorted, or ineffectual).

66. Cf. James M. Rice, *The Defensive Patent Playbook*, 30 BERKELEY TECH. L.J. 725, 750 (2015) (“A litigation risk . . . deters some investors . . .”); Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 885 (2019) (“Investors hearing about a corporate governance scandal will start demanding higher returns for their investment.”).

67. Rice, *supra* note 66, at 750 (“A litigation risk . . . deters some investors who see the exposure as a limit to potential revenue.”).

68. Cf. Jacob & Shapira, *supra* note 62, at 1119 (“Upon hearing the bad news [about a company], stakeholders may infer that the company’s type is worse than they previously thought; for example, they may infer that the company does not invest enough in the quality or safety of its products.”).

69. Prince & Rubin, *supra* note 61, at 45 (2002) (one of the study’s goals was “to determine whether firms suffer reputation costs as a result of lawsuits.”).

70. *Id.* at 71 (indicating that firms facing lawsuits for their products suffer capital market losses approximately equal to a worst-case scenario associated with the litigation).

study found that the values of automobile firms facing lawsuits fall anywhere from \$276.45 million to \$499.22 million.⁷¹

The reputational costs caused to the supplier by the mere filing of a breach of contract lawsuit may be increased by the legal process that follows such filing. The process may reveal negative information about the supplier's practices that the firm had previously concealed from the public.⁷² Particularly, documents exposed by the supplier during the discovery stage, which can be made public or published, or behaviors and norms exposed during testimony in open court, may reveal illegal internal practices the supplier exercises.⁷³

The reputational costs to the supplier, caused by information flows or a breach of contract lawsuit and the legal process that follows, may be intensified by the ultimate legal *outcome* of the lawsuit. The final decision by the court may highlight patterns of contractual misbehavior by breaching suppliers.⁷⁴ In addition, the public is likely to treat a court decision, provided by a neutral judge, as trustworthy.⁷⁵ The same is often true about media coverage. Accordingly, the firm risks further reputational costs once these negative information flows and judicial decisions reach the public. Thus, reputational costs can pressure firms into changing policies or avoiding breaching contracts with consumers.

2. Hidden Contracts Hinder Consumer Activism

We have seen that firms may be motivated to breach contracts inefficiently, harming consumers. We have also seen how

71. *Id.* at 61 (“[T]he firms facing the lawsuits fall in value anywhere from \$276.45 million . . . to \$499.22 million.”).

72. Shapira, *supra* note 66, at 887 (“[L]itigation helps market players by uncovering new pieces of information on the corporate misconduct in question.”).

73. *Id.* at 888 (“[L]egal documents that come out during pleading, discovery, or trial help not just by drawing outside observers’ attention to a misbehavior they were not aware of, but also by adding detail and analysis on how things happened.”); Roy Shapira, *Reputation through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1214 (2016) (“[I]ntra-company emails being revealed only during discovery [may expose] exactly what top managers knew and when they knew it.”).

74. Shapira, *supra* note 66, at 888 (“Judicial opinions are good at flashing out patterns of misbehavior . . .”).

75. *Id.* (“Judicial opinions are normally considered disinterested and fair . . .”); Shapira, *Reputation through Litigation*, *supra* note 73, at 1232 (“When well-respected judges put their name on a certain version of the events, stakeholders are more likely to update their beliefs based on it.”).

consumer activism, and especially the possibility of a lawsuit, mitigates firms' appetites to breach their contracts. However, while lawsuits may serve as a deterrence mechanism against breaches, hidden contracts erode the potential of this mechanism. Slightly restated, hidden contracts can discourage consumers from complaining and filing a breach of contract lawsuit against breaching firms.

Consumer contracts contain many provisions that interact with consumers' willingness to complain, share grievances, and litigate. To begin with, consumers are likely to feel more comfortable and motivated to confront the firm, complain against it, and file a breach of contract lawsuit where they are confident that the firm violated their rights. But it is hard for consumers to know whether firms breach their contractual obligations if they do not know what the relevant contracts that govern the parties' relationships says.

Moreover, to assess the expected benefits of potential litigation, consumers (or their lawyers) must evaluate, among other things, the probability of winning a lawsuit.⁷⁶ This evaluation requires reviewing the content of the contracts they entered.⁷⁷ For example, consumers may wish to know the states whose laws govern their cases. Some states have stronger consumer protection laws than others,⁷⁸ affecting consumers' probability of winning at trial.⁷⁹

76. Cf. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 390 (2004) (“[S]uit is more likely . . . the greater the likelihood of winning at trial.”).

77. *Breach of Contract Lawyers in Washington D.C.*, HKM, <https://hkm.com/washingtondc/breach-of-contract> (last visited Sept. 2, 2023) (“The first thing your lawyer will do [before filing a breach of contract lawsuit] is review the contract so that they can understand each party’s terms and obligations.”); Jaclyn Wishnia, LEGALMATCH, *Breach of Contract Lawsuit: Suing for Breach of Contract*, <https://www.legalmatch.com/law-library/article/breach-of-contract.html> (last visited Oct. 3, 2023) (“Before filing a breach of contract claim, it is important to review the contract . . .”).

78. A prime example is California, which is known to have relatively strong consumer protection laws. See, e.g., *Wershaba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145, 160 (Cal. Ct. App. 2001) (“California’s consumer protection laws are among the strongest in the country . . .”). At the same time, Alabama has a history of relatively weak consumer protection regulation. See, e.g., Melissa Briggs Hutchens, *At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama*, 53 ALA. L. REV. 599, 601 (2002) (Alabama has a “history of weak consumer protection laws . . .”).

79. *Bach Talk: In Praise of Contingency Fees*, UNITED POLICYHOLDERS, <https://uphelp.org/bach-talk-in-praise-of-contingency-fees> (last visited Sept. 2, 2023) (“In [states with weak consumer protection laws], attorneys can’t or won’t work on a contingency fee because it will reduce the policy benefits the consumer has been deprived of to the point where it doesn’t make economic sense to sue.”).

Furthermore, consumers (or their advocates) may wish to access their contracts to check whether they include any time bars for filing a lawsuit, which may impact their chances of winning.⁸⁰

The same analysis applies to consumers who wish to criticize a firm's behavior online, arbitrate cases, or complain to consumer organizations, enforcement agencies, or the media. People perceive legal rights as worth protecting; after all, this is why the law grants such rights. Thus, a consumer complaint based on a breach of contract is more likely to gain prominence, attract attention, prompt empathy, and stimulate action.⁸¹

On top of that, to assess the expected *benefits* of a lawsuit, consumers must also evaluate the magnitude of their gains, assuming they win a case.⁸² And, once again, in order to estimate the expected gains, consumers must evaluate the contracts they signed. For example, consumers may wish to know whether their contracts include a limitation-of-damages clause, and if so, the scope of that clause (i.e., how much consumers could recover if they prevail).⁸³ Consumers may also want to examine whether the contract requires the supplier to reimburse them for their legal fees if the consumers win at trial.⁸⁴

80. For instance, according to Tripadvisor's sign-up contract, a consumer is obliged to file a lawsuit against Tripadvisor within two years from the date on which the cause of action arose. See *Tripadvisor Terms, Conditions and Notices*, TRIPADVISOR, https://tripadvisor.mediaroom.com/us-terms-of-use#OLE_LINK23 (last visited Sept. 2, 2023) (“[Y]ou agree that you will bring any claim or cause of action arising from or relating to your access or use of the Services within two (2) years from the date on which such claim or action arose . . .”).

81. People generally overvalue formal aspects of contract law. See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015) (elucidating how laypeople attribute excessive significance to formal facets of contract law).

82. STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 390 (2004) (“The plaintiff's expected benefits from suit involve possible . . . gains from trial.”).

83. A limitation-of-damages clause may cap the scope of damages that a plaintiff is entitled to receive. See, e.g., Gabrielle Nater-Bass & Stefanie Pfisterer, *Contractual Limitations on Damages*, GLOB. ARB. REV., (Dec. 19, 2022), <https://globalarbitrationreview.com/guide/the-guide-damages-in-international-arbitration/5th-edition/article/contractual-limitations-damages> (“Contractual limitations on damages are agreements whereby the parties limit or exclude the availability of damages that would otherwise be available under statutory law.”).

84. For example, according to the sign-up contract of Alamy.com, “[t]he prevailing party will be entitled to recover its reasonable legal costs relating to that aspect of its claim or defense on which it prevails . . .” See *Terms and Conditions*, art. 18.10, ALAMY, <https://www.alamy.com/terms/us.aspx#Miscellaneous-terms> (last visited Sept. 2, 2023).

Similarly, when it comes to initiating litigation, consumers may be interested in examining the potential *costs* of the lawsuit.⁸⁵ The lower the expected costs, the higher the chances that consumers will file suit.⁸⁶ To assess the expected costs, consumers must, once again, analyze the contract they entered into with the supplier. Here, consumers may examine whether the contract requires them to file a lawsuit in a specific jurisdiction, which may be a distant state or country, thereby exposing consumers to significant travelling and lodging costs during the lawsuit.⁸⁷ Consumers may also seek to check whether the contract requires them to file a lawsuit only with an arbitration organization, which can impact the costs of the legal procedure.⁸⁸ Moreover, consumers may examine whether the contract requires them to reimburse the supplier, if they lose at trial, for its attorney's fees, which are often significant.⁸⁹

Hidden contracts hamper the ability of consumers to become familiar with the relevant contract provisions, which can be paramount to a decision about whether to complain or initiate litigation. Hidden contracts, by their nature, are not accessible to consumers after they are signed.⁹⁰ Hence, hidden contracts entail legal uncertainty. Under such contractual ambiguity, consumers may find it difficult, if not impossible, to make an informed decision on how to handle their grievances or disputes. Put simply, we hypothesize that hidden contracts make consumers less likely

85. SHAVELL, *supra* note 82.

86. SHAVELL, *supra* note 82 (“[S]uit is more likely the lower the cost of suit . . .”).

87. Tanya J. Monestier, *Forum Selection Clauses and Consumer Contracts in Canada*, 36 B.U. INT’L L.J. 177, 210 & n.190 (2018) (The consumer’s costs of litigation outside her home jurisdiction may include “travel and lodging, and costs associated with being temporarily out of work.”).

88. Some contracts provide that only the firm pays for arbitration processes, while others do not. At the same time, arbitration can also entail greater costs to consumers. *See, e.g.,* Joe Valenti, *The Case Against Mandatory Consumer Arbitration Clauses*, CAP, (Aug. 2, 2016), <https://www.americanprogress.org/article/the-case-against-mandatory-consumer-arbitration-clauses> (“[A]rbitration can be a more expensive and time-consuming resolution that makes it harder for victims to pursue their claims.”).

89. Westlaw Classic, *General Contract Clauses: Litigation Costs and Expenses*, Practical Law Standard Clauses 3-540-2608 (“Attorneys’ fees are typically the largest component of the cost of pursuing or defending litigation.”); *see also* Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 288 (2003) (noting the exorbitant cost of litigation).

90. *See* discussion *supra* Section I.A.

to file a lawsuit or otherwise be vocal and assertive and enforce their rights.⁹¹

Empirical studies implicitly indicate that legal uncertainty about consumers' rights may reduce consumers' willingness to initiate litigation against suppliers. In this context, Professor Ronald Tipper analyzed interviews of a nationally representative sample of more than 950 consumers.⁹² Among other things, the respondents were asked which, if any, third-party actions, including legal actions, they had taken against a supplier.⁹³ The results of the study show that consumers with less knowledge of their legal rights tended to seek third-party redress less frequently than consumers with more knowledge about these rights.⁹⁴

Moreover, hidden contracts also present practical challenges to consumers who consider bringing a breach of contract lawsuit against suppliers. Under the law of several states, a plaintiff suing for violation of a written contract must attach that contract to the complaint⁹⁵ or state its substance.⁹⁶ Naturally, hidden contracts can prevent consumers from attaching a contract to a lawsuit or effectively stating the contract's substance, as required by law.

91. Cf. Michael L. Ursic, *A Model of the Consumer Decision to Seek Legal Redress*, 19 J. CONSUMER AFFS. 20, 26 (1985) ("If a person feels that success in court is probable, he or she is more likely to take action than a person who does not feel that winning in court is probable."); Roger Van den Bergh & Louis Visscher, *The Preventive Function of Collective Actions for Damages in Consumer Law*, 1 ERASMUS L. REV. 5, 14 (2008) ("It is also very difficult for consumers to assess whether manufacturers have obeyed safety regulations. Due to this information asymmetry, consumers may not start a lawsuit . . .").

92. Ronald H. Tipper, *Characteristics of Consumers Who Seek Third Party Redress*, 43 CONSUMER INTS. ANN. 222, 223 (1997) ("The data set was based on telephone interviews among a nationally representative sample of 957 adults . . .").

93. *Id.* ("The respondents were asked which (if any) third party action was taken.").

94. *Id.* at 225 ("Consumers with more knowledge of consumer rights . . . tended to seek some type of third-party redress more than their counterparts.").

95. See, e.g., *Ramirez v. Palisades Collection LLC*, No. CIV.A.07-C-3840, 2008 WL 2512679, at *3 (N.D. Ill. June 23, 2008) ("Illinois law requires that a plaintiff suing for violation of a written contract must attach that contract to its complaint . . ."); *Strategic Mktg., Inc. v. Great Blue Heron Software*, No. 15-CIV-80032, 2015 WL 11438209, at *6 (S.D. Fla. May 12, 2015) (Florida law "expressly require[s] the attachment of a contract to a pleading where the contract is material to the pleadings . . ."); *Harleysville Lakes States Ins. Co. v. Mason Ins. Agency, Inc.*, No. 255195, 2005 WL 2323814, at *2 (Mich. Ct. App. Sept. 22, 2005) ("With certain exceptions, a party suing on a contract must attach that contract to its complaint.").

96. See, e.g., *Target Nat'l Bank v. Kilbride*, No. 2009-4291, 2010 WL 1435304 (Pa. C.P. Feb. 5, 2010) ("If the writing is not available to the pleader, the pleader may . . . state the substance of the writing in the pleading.").

In sum, firms that employ hidden contracts blur the tracks of the contracts after the consumers agree to them.⁹⁷ As a result, hidden contracts create legal uncertainty for consumers, precluding them from properly assessing their situation, their ability to complain, the legitimacy of the complaint, and the potential costs and benefits of suing the supplier.⁹⁸ Hidden contracts can prevent consumers from actively confronting the firm and informing the public about firms' misbehavior and inefficient breach of contracts.⁹⁹ Consequently, hidden contracts shield suppliers from the reputational and legal costs of their illegal behavior. Therefore, hidden contracts increase the risk that suppliers will breach their contracts inefficiently, harming consumers and society more generally.

II. THE EMPIRICAL TEST

Given the social costs of hidden contracts,¹⁰⁰ an important empirical question arises: Do mega websites, used by billions of consumers worldwide, utilize practices that facilitate the emergence of undesirable hidden contracts? This Part tackles that question. Section A describes our sample of 100 popular websites. Thereafter, section B explains our methodology in analyzing those websites and their contracts. Finally, section C details our findings: that hidden contracts are a prevalent problem.

A. Data

This Article's sample contains 100 of the most popularly used websites in the United States that meet three conditions: first, the website allows consumers to sign up to their services, normally via a button titled "sign up"; second, during the sign-up process, the website informs consumers that by signing up to the site, consumers agree to its standard form contract, normally titled "terms of use," "terms of service" or "terms and conditions;" third,

97. *Supra* Section I.A.

98. *See supra* text accompanying note 88.

99. *See supra* text accompanying notes 89-93. This is not to argue, of course, that hidden contracts negate *any* kind of consumer complaints. Even without access to their contracts, consumers can still criticize, for example, defective products or bad customer service.

100. *See* discussion *supra* Section I.B.

during the sign-up process, consumers are required to provide their contact information, such as their email address.¹⁰¹

To identify the most popular U.S. websites, we used DataForSEO's list of top 1,000 websites.¹⁰² Since not all the popular websites met the study's three conditions, the 100th website in our sample is ranked 159 in popularity according to DataForSEO. Appendix A lists these 100 highly popular sites, which include, inter alia, Google, Spotify, YouTube, Etsy, Facebook, Instagram, eBay, LinkedIn and Amazon. Overall, the websites that constitute this Article's sample belong to highly heterogeneous categories. These include hotels and accommodations; computers, electronics, and technology; e-commerce and shopping; news and media; social media; search engines; streaming and online TV; dictionaries and encyclopedias; jobs and career; music; video games; science and education; visual arts and design; and real estate.¹⁰³

B. Methodology

To test the frequency with which firms apply practices that facilitate the creation of hidden contracts, we took the following independent steps. First, for each sample website, we examined whether it provides consumers a copy of the contract they agreed to while signing up for the website. For that purpose, we provided an email address to the website during the sign-up process. Seven days later, we examined whether the email inbox or spam folders contained an email from the website with a copy of the sign-up agreement.

Second, for each sample website, we tested whether the site removed any contract terms it had amended from its public sphere. To that end, we initially had to identify those websites that amended their terms. We identified these websites by employing two indicators.

101. These conditions were set, since this empirical study aims to examine whether mega sites transparently send to consumers a copy of their standard form agreements, after consumers agree to said contracts.

102. See *Top 1000 Websites by Ranking Keywords*, DATAFORSEO (Aug. 20, 2022), <https://dataforseo.com/top-1000-websites>.

103. The website categories were identified using the SimilarWeb search engine. See <https://www.similarweb.com> (last visited Sept. 4, 2023).

1. *The First Indicator of Amendments to the Contract*

For each sample website, we first examined whether its terms of use webpage included a statement that implies that previous terms were amended. For example, Facebook's current terms of service page includes the following statement: "Date of Last Revision: Sept. 19, 2022."¹⁰⁴ Likewise, Amazon's current terms include the statement "Last updated: September 14, 2022."¹⁰⁵ These statements imply that Facebook and Amazon amended a previous version of their contract terms.

2. *The Second Indicator of Amendments*

For websites that did not include such a statement, we tested whether the website contained a statement about the effective date of the current terms. When we found such a statement in the terms, we checked—via the Wayback Machine online tool—whether the terms webpage existed before the effective date of the current terms.¹⁰⁶ If the result of this test was positive, we concluded that the current contract terms of the website modified a previous version. For instance, LinkedIn's current terms include a statement that their effective date is February 1, 2022.¹⁰⁷ However, according to Wayback Machine, the terms webpage already existed on April 29, 2013.¹⁰⁸ Therefore, in this and similar cases, we concluded that LinkedIn's current terms modify a previous version of the terms. By employing these two indicators, we established a list of websites that amended their terms. Diagram 1 below visually illustrates the major steps of the inquiry described above.

104. *Terms of Service*, FACEBOOK (Sept. 19, 2022), <https://www.facebook.com/terms.php>.

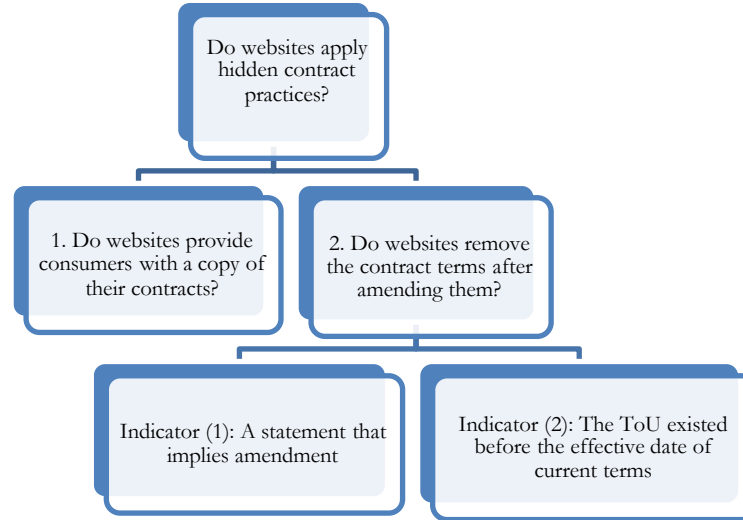
105. *Conditions of Use*, AMAZON (Sept. 14, 2022), <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM>.

106. The Wayback Machine tool is available at <https://archive.org/web> (last visited Sept. 2, 2023).

107. *User Agreement*, LINKEDIN (Feb. 1, 2022), <https://www.linkedin.com/legal/user-agreement>.

108. See LinkedIn User Agreement, INTERNET ARCHIVE WAYBACK MACHINE, https://web.archive.org/web/20220000000000*/https://www.linkedin.com/legal/user-agreement (last visited Sept. 2, 2023).

Diagram 1. Analysis Inquiries



At this point, we moved to the next stage and examined whether the identified websites that amended their terms maintained a copy of pre-amendment versions of the terms on their website. For that purpose, we checked whether the terms webpage includes a link to either pre-amendment versions or an archive that includes these versions. For example, Yelp amended its contractual terms of use on December 13, 2019. Helpfully, Yelp’s terms webpage includes a link to a digital archive of pre-amendment versions of these terms.¹⁰⁹ Conversely, Walmart.com amended its terms on June 19, 2023, but Walmart’s terms webpage does not include a link to pre-amendment versions of the terms or an archive of previous versions.¹¹⁰

C. Results

The results of this study indicate that firms routinely apply practices that facilitate the emergence of hidden contracts. First, out

109. See *Terms of Service*, YELP, (DEC. 19, 2019), https://terms.yelp.com/tos/en_us/20200101_en_us (noting “to review the previous terms, please click”).

110. See *Terms of Use*, WALMART, (June 19, 2023), <https://www.walmart.com/help/article/walmart-com-terms-of-use/3b75080af40340d6bbd596f116fae5a0> (“The ‘Last Updated’ legend above indicates when these Terms of Use were last changed.”).

of 100 sample websites, none sent consumers a copy of the standard form agreement to which the consumers agreed. Specifically, none of the websites email consumers either a PDF file with their sign-up agreement or the text of the contract.

Next, our findings indicate that most sample websites (82%; n=82) amended their original contract terms. As to the first indicator, the terms of 65 websites included a statement that implies that previous terms were amended (e.g., an announcement about the date of the last revision). Regarding the second indicator, among the remaining 35 websites, 20 included a statement about the effective date of terms. Of these 20 websites, the terms of use of 17 webpages existed earlier than the effective date presented in the current terms.¹¹¹ This implies that an older version of the terms was amended (by the current terms). Table 1 below summarizes these findings.

Table 1. Amendment indicators (out of 100 sample websites)

| Indicator | Frequency |
|--------------------|-----------|
| Implicit Statement | 65 |
| Effective Date | 17 |
| Total | 82 |

Conspicuously, out of the 82 websites that amended their original contracts, the majority (80.5%; n=66) removed the pre-amended version of their contracts from their public spheres. Particularly, these websites failed to include on their terms webpages a link to the pre-amendment version of the terms or to an archive of previous versions.

Notably, our finding that 80.5% of the websites that amended their contracts removed the pre-amended versions from their site is conservative. To begin with, our two indicators of contract

111. The authors used the Wayback Machine online tool to examine whether the terms of use webpage existed earlier than the effective date of the terms. *See also supra* Section II.B.

amendment rely on what websites report and what we can find via the Wayback Machine. However, it is possible that firms amended their contracts non-transparently and did not indicate this fact on their websites. It is reasonable to suspect that some firms may not announce they modified the terms (indicator 1) or the terms' effective dates (indicator 2)—especially when such modifications harm consumers.¹¹² Secondly, and as we explain below, the Wayback Machine is an incomplete tool: it does not encompass all previous web pages, and firms can opt out of being included in it.¹¹³

Importantly, our empirical examination also revealed that—even among the minority of 16 websites that amended their contracts and published a purported archive with pre-amendment versions—the archive is typically incomplete. Particularly, 13 of these 16 websites (i.e., 81.25%) do not have full archives. In other words, only 3 of the 82 sampled websites that changed their contract terms included apparently adequate archives.¹¹⁴

The archives that do exist lack in various ways. In 5 websites, the oldest version of the contract in the archive does not seem to be the actual oldest version. To illustrate, according to the language of the oldest contract version published in Quora.com's archive, that version was last updated on "December 18, 2017."¹¹⁵ However, Quora.com's archive does not include the version that was in effect before that update.¹¹⁶

Likewise, in 3 additional websites, the oldest version of the terms in the archive does not seem to be the actual oldest version of the terms, as reflected by the internet archive tool, the Wayback Machine. For instance, Houzz.com's terms of use webpage includes

112. See discussion *supra* Section II.B (explaining this study's methodology and elaborating on these two indicators). Theoretically, one may argue that perhaps the firms that changed their terms without using these two indicators did include an archive. To negate this possibility, we checked these websites and found that none of them included archives of previous contract versions.

113. See discussion *infra* Section III.C (explaining that not all previous versions of consumer form contracts are available in internet archives).

114. For example, Twitter's archive apparently includes all the versions of their terms (from version number one to seventeen). See *Previous Terms of Service*, TWITTER, <https://twitter.com/en/tos/previous> (last visited Sept. 2, 2023).

115. *Terms of Service - Prior Versions*, QUORA https://www.quora.com/about/tos_archive (last visited Sept. 2, 2023).

116. *Id.*

a link to a prior version of the terms,¹¹⁷ which was effective on January 1, 2020.¹¹⁸ However, Houzz.com's terms of use webpage does not include a link to any version of the terms that was effective before that date. This is so despite Houzz.com's terms of use webpage having existed much earlier than January 1, 2020, according to the Wayback Machine.¹¹⁹ Similarly, another site, AliExpress, included the full text of only one older version of its terms, stating that it was "effective as of April 30, 2021."¹²⁰ Nevertheless, according to information provided by the site itself, it was founded much earlier, in 2010,¹²¹ and ostensibly had terms of use soon thereafter.

Two other websites only mentioned historical changes made in their contract terms instead of a well-organized and systematic archive that includes the full text of all previous contracts. To illustrate, Tumblr.com includes a link to previous versions of its terms.¹²² This link contains the following promising statement: "You will find prior versions of our Terms of Service on GitHub, which will allow you to compare historical versions and see which terms have been updated."¹²³ However, the link leads to a non-consumer-friendly list of sub-links, each connecting to a presentation of historical changes made in the terms.¹²⁴ The screenshots below illustrate.

117. *Houzz Terms of Use*, HOZZ, <https://www.houzz.com/termsOfUse> (last visited Sept. 2, 2023) ("Click here for the prior revision").

118. *Id.* ("Effective January 1, 2020").

119. *Houzz's Terms of Use*, INTERNET ARCHIVE WAYBACK MACHINE, https://web.archive.org/web/20220000000000*/https://www.houzz.com/termsOfUse (last visited Sept. 2, 2023) (Houzz's terms of use webpage existed at least from July 10, 2009.).

120. *AliExpress.com Terms of Use*, ALIEXPRESS (June 13, 2022), https://terms.alicdn.com/legal-agreement/terms/suit_bu1_alieexpress/suit_bu1_alieexpress_202204182115_66077.html?spm=a2g0o.home.0.0.650c2145ZCwgp.

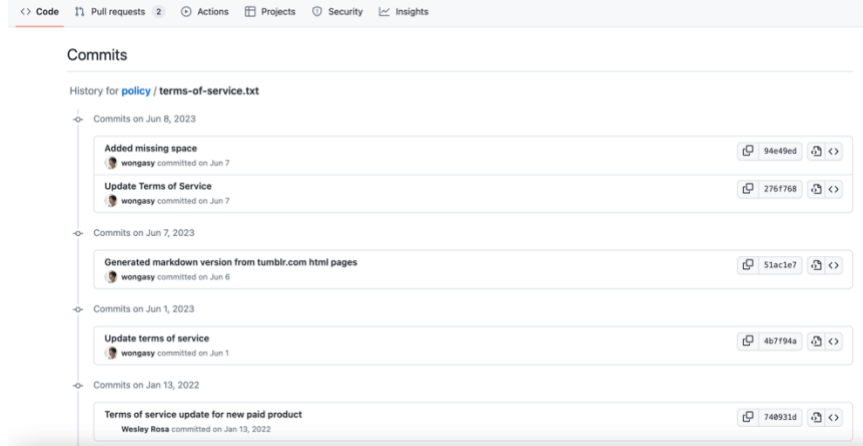
121. *Aliexpress.com, Website Biography, Domain Age, Reviews, Logo*, ONLINE BIOGRAPHY, <https://onlinebiography.in/aliexpress> (last visited Sept. 2, 2023) ("aliexpress.com was founded in the year 2010.").

122. *Terms of Service*, TUMBLR (June 7, 2023), <https://www.tumblr.com/policy/en/terms-of-service>.

123. *Id.*

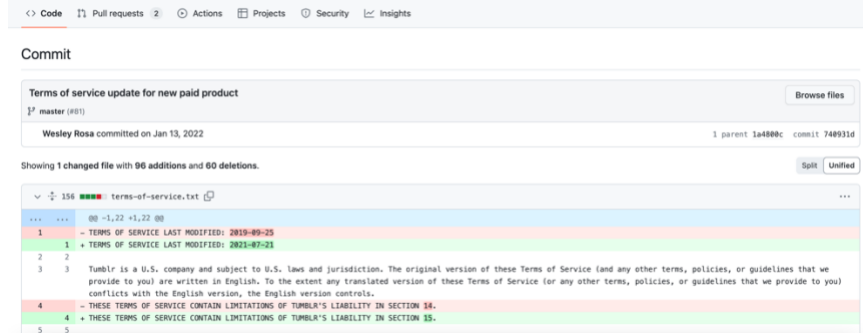
124. *Tumblr/Policy*, GITHUB, <https://github.com/tumblr/policy/commits/master/terms-of-service.txt> (last visited Sept. 2, 2023).

Image 1. Tumblr.com link to previous versions of its terms



Clicking on the last link above (titled “Terms of service update for new paid product”) brings the user to the following awkward webpage.

Image 2. Tumblr.com’s presentation of historical changes

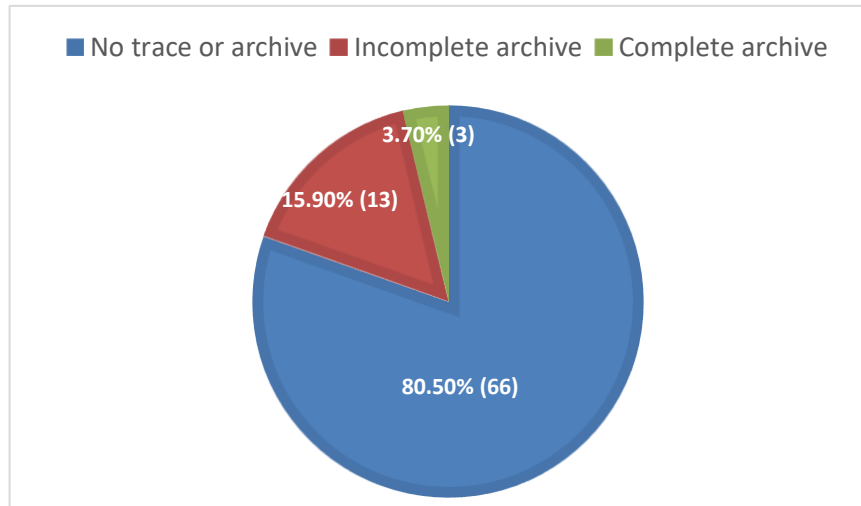


Another website, Github.com, did not present any older versions of the site’s terms, although the site includes a link stating: “You can view all changes to these Terms in our Site Policy repository.”¹²⁵ Lastly, on one website, Alibaba.com, the terms’

125. *GitHub Terms of Service*, GITHUB, <https://docs.github.com/en/site-policy/github-terms/github-terms-of-service> (last visited Sept. 2, 2023).

historical archive is only available in Chinese.¹²⁶ The graph below summarizes our findings regarding the 82 websites that amended their contractual terms.

Graph 1. Traces of previous versions (N=82)



III. POLICY RECOMMENDATIONS

Firms often apply practices that underlie hidden contracts.¹²⁷ Online contracting realities change the contracting ecosystem, allowing firms to constantly write over their terms and modify their contracts at virtually no cost. However, businesses consistently fail to send a copy of their standard form contracts to consumers,¹²⁸ and

126. The link “history rules” in Alibaba’s terms of use webpage leads to an archive in Chinese. See ALIBABA.COM, <https://rulechannel.alibaba.com/icbu#/rules?cId=-1> (last visited Sept. 4, 2023). In addition, Alibaba’s terms of use webpage includes an English version of the full text of only one older version of the terms, “effective as of April 30, 2021,” although the site was founded in 1999. See *Terms of Use*, ALIBABA.COM (July 6, 2021), <https://rulechannel.alibaba.com/icbu?type=detail&ruleId=2041&cId=1307#/rule/detail?cId=1307&ruleId=2041>. See also *Alibaba.com vs AliExpress: What are the Differences*, ALIBABA (Dec. 10, 2020), <https://seller.alibaba.com/businessblogs/px53308i-alibabacom-vs-aliexpress-what-are-the-differences> (“Alibaba.com was founded in 1999 . . .”).

127. See discussion *supra* Section II.C.

128. See discussion *supra* Section II.C.

when they amend their contracts, they frequently do not maintain the original contract versions on their websites.¹²⁹

The implications of this practice are alarming. Hidden agreements hinder the ability of consumers (or their lawyers and consumer organizations) to analyze the contracts they agreed to.¹³⁰ As a result, consumers may be unable to accurately assess the potential costs and benefits of a breach of contract lawsuit against a breaching supplier.¹³¹ Consequently, consumers may be deterred from complaining against the supplier or filing a breach of contract lawsuit against inefficient breaches of their standard form contracts.¹³² This reality is undesirable because consumers' ability to air their complaints and initiate litigation is an important mechanism that empowers consumers and disciplines sellers.¹³³

This Part concisely points to a few possible law and policy responses. Section A proposes introducing a contract transparency duty that will oblige firms to provide consumers with a copy of their contracts and maintain the versions of their contracts on their websites. Next, section B details ways to enforce this duty and enhance its effectiveness. It mainly suggests administrative enforcement and using injunctions, penalties, and fines. Thereafter, section C examines whether employing hidden contracts amounts to an unfair and deceptive practice under existing consumer law, highlighting the potential and obstacles of such a claim.

A. Transparency Duty

In many domains, the best way to solve a problem is to prevent it. The case of hidden contracts is no different. Given the social costs of hidden contracts, policymakers should consider imposing a *contract transparency duty* on firms. Such a duty, which should encompass a few operational aspects, will operate ex ante to discipline sellers.

First, under this duty, firms would be primarily required to provide consumers with their contracts following the formation of the agreement. However, we acknowledge that this is far from a

129. See discussion *supra* Section II.C.

130. See discussion *supra* Section I.B.

131. See discussion *supra* Section I.B.

132. See discussion *supra* Section I.B.

133. See discussion *supra* Section I.B.

magic bullet. Consumers accept a plethora of contracts during their lives, and one cannot reasonably expect all consumers to keep all of their contracts accessible all of the time.¹³⁴ For various legitimate reasons, consumers may lose the original copies of contracts provided by suppliers.

Accordingly, the second component of the proposed transparency duty would oblige suppliers to publish in their public spheres (e.g., their websites) all the versions of their standard form contracts, including all original and amended versions and the dates they were in force. This duty would allow consumers to easily review, at any stage, any previous versions of suppliers' contracts. Importantly, requiring firms to publish earlier versions of their agreements is not too burdensome. Businesses are likely to maintain previous versions of their contracts for internal uses, and if they do not currently retain such versions, they can easily adopt the practice.

One may argue that these two mechanisms may not suffice, since consumers may not know which of the previous versions applies in their individual cases. Moreover, some consumers—especially vulnerable consumers, such as the elderly, non-native English speakers, those who experience learning difficulties, and less-educated populations—may find it difficult to access and navigate online links containing legal documents. Accordingly, policymakers could add a third component to the proposed duty of transparency. Under this third component, firms would have to reproduce the original contract at any stage of the contractual relationship upon a consumer's request.

To be sure, a duty to reproduce a copy of the agreement upon the consumer's request may impose administrative costs on the supplier (e.g., time spent by employees). However, these costs are likely to be relatively low. Technological tools can make it quite easy for businesses to locate and provide the relevant contracts to those consumers who request them. Presumably, firms can easily track when a consumer joined their services and effortlessly link these points in time to the applicable contracts. That said, if policymakers conclude that the costs involved are considerable,

134. Paraphrasing Bob Marley, we opine that you might expect consumers to keep some contracts sometimes, but you can't assume they will keep all the contracts all the time. We intuit that many consumers would (often mindlessly) delete emails that contain their form contracts.

they can determine that the requesting consumer shall reimburse the supplier for reasonable administrative expenses. Charging an administrative/copy fee exists in other domains, such as requesting copies of medical records and account statements from a lender or creditor.

The contract transparency duty proposed in this Article is socially desirable. Importantly, this duty would help tackle the long-lasting challenge of consumer access to justice.¹³⁵ A transparency duty would assist consumers in better understanding their contractual legal rights once a supplier harms them. In doing so, the contract transparency duty may assist consumers in making informed decisions about complaining to third parties, sharing their experiences online, or filing breach of contract lawsuits against suppliers. Such consumer activism can expose suppliers to considerable reputational costs.¹³⁶ This exposure, in turn, may desirably deter suppliers, *ex ante*, from inefficiently breaching their contracts.

Furthermore, a duty of transparency would facilitate more accountability and, ideally, encourage a fairer and more balanced B2C environment. Online realities enhance firms' capability to manipulate consumers in many subtle ways, including utilizing nuanced design features (also known as dark patterns).¹³⁷ Technological developments produce winners and losers. Transparency laws have the untapped potential to compel firms to use technology (cheap means of communication and webpages) and data (regarding dates of consumers' sign-ups and the contracts they accepted) to benefit consumers at a very low cost.

Remarkably, the Consumer Financial Protection Bureau (CFPB) requires credit card companies to make their agreements available

135. See, e.g., Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405, 2439–41 (2021) (reviewing the typical hurdles consumers face in enforcing their rights and litigating their cases).

136. See discussion *supra* Section I.B.2.

137. See, e.g., Kerstin Bongard-Blanchy, Arianna Rossi, Salvador Rivas, Sophie Doublet, Vincent Koenig & Gabriele Lenzini, "I am Definitely Manipulated, Even When I am Aware of It. It's Ridiculous!" – Dark Patterns from the End-User Perspective, DESIGNING INTERACTIVE SYS. CONF. 2021 (June 28–July 2) (finding that dark patterns can manipulate and influence consumers even if consumers are aware of them).

on the CFPB's website, which contains prior agreement versions.¹³⁸ Recently, the CFPB also proposed creating a public registry of problematic standardized terms in nonbank customer agreements, citing concerns about lengthy one-sided contracts and the need to better monitor contracting practices.¹³⁹ According to this proposal, the CFPB would publish the information it collects in an accessible and centralized database online.¹⁴⁰ Notably, the CFPB's director highlighted the regulatory need to easily spot the use of harmful boilerplate, alongside the benefits of providing consumers with accessible information regarding form contracts.¹⁴¹

Moreover, a few states have already adopted a contract transparency duty similar, to some extent, to the duty proposed in this Article. To illustrate, some states require suppliers to provide consumers with a copy of the contract following its formation.¹⁴² However, this duty often focuses only on a few limited types of transactions, including the sale of vacation time-sharing plans,¹⁴³ motor vehicles,¹⁴⁴ home improvement services,¹⁴⁵ insurance,¹⁴⁶

138. See *Credit Card Agreement Database*, CFPB, https://www.consumerfinance.gov/credit-cards/agreements/?_gl=1*y96w9v*_ga*NTI0Mzc1OTAxLjE2NjExODMyMTg.*_ga_DBYJL30CHS*MTY3MzMwOTg4Mi4xMS4xLjE2NzZmMDk5MDguMC4wLjA (last visited Sept. 2, 2023) ("The CFPB maintains a database of credit card agreements from hundreds of card issuers.").

139. See *CFPB Proposes Rule to Establish Public Registry of Terms and Conditions in Form Contracts that Claim to Waive or Limit Consumer Rights and Protections*, CFPB (Jan. 11, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-rule-to-establish-public-registry-of-terms-and-conditions-in-form-contracts-that-claim-to-waive-or-limit-consumer-rights-and-protections>.

140. See *id.*

141. See *id.*

142. See, e.g., DEL. CODE ANN. tit. 6, § 2825 (West) ("The seller shall deliver to the purchaser a fully executed copy of the contract . . ."); OHIO REV. CODE ANN. § 4517.26 (West 2002) ("The seller, upon execution of the agreement or contract and before the delivery of the motor vehicle, shall deliver to the buyer a copy of the agreement or contract . . .").

143. See, e.g., tit. 6, § 2825 ("The seller shall deliver to the purchaser a fully executed copy of the contract . . .").

144. See, e.g., § 4517.26 ("The seller, upon execution of the agreement or contract and before the delivery of the motor vehicle, shall deliver to the buyer a copy of the agreement or contract . . .").

145. See, e.g., 73 PA. STAT. & CONS. ANN. § 517.7(c) (West 2014) ("A contractor or salesperson shall provide and deliver to the owner, without charge, a completed copy of the home improvement contract at the time the contract is executed . . .").

146. See, e.g., S.C. CODE ANN. § 38-63-210 (1976) ("Every insurer doing a life insurance business in the State shall deliver with each policy of insurance issued by it a copy of the application made by the insured so that the whole contract appears in the application and policy of insurance.").

health care plans,¹⁴⁷ manufactured or mobile homes,¹⁴⁸ and goods or services paid for in installments.¹⁴⁹ Similarly, in the banking industry, suppliers are required in some types of transactions to “(i) [p]ost and maintain the consumer’s agreement on [their] Web site[s]; or (ii) Promptly provide a copy of the consumer’s agreement to the consumer upon the consumer’s request”¹⁵⁰ However, since the social costs of hidden contracts are not confined to a limited set of relatively high-value or high stakes transactions, policymakers should consider expanding this obligation and imposing a *general* contract transparency duty that governs all mass consumer contracts.

Interestingly, a few jurisdictions have adopted a general consumer contract transparency duty, not limited to a particular category of transactions. For example, under the California Consumer Contract Awareness Act of 1990, a supplier is generally required to deliver a copy of its contract to the consumer.¹⁵¹ Although we welcome this approach, the Californian model can be improved. First, providing the contract to the consumer after entering it is merely one (admittedly, the first) component of transparency. As explained above, suppliers should be obliged to maintain all the versions of their consumer contracts in their public spheres (for instance, their websites).¹⁵² In addition, policymakers

147. See, e.g., W. VA. CODE ANN. § 33-25-13(a) (West 1971) (“Every such corporation shall deliver to each subscriber to its health care plan a copy of the contract.”).

148. See, e.g., OHIO REV. CODE ANN. § 4781.24(a) (West 2010) (“The seller, upon execution of the contract and before the delivery of the manufactured or mobile home, shall deliver to the buyer a copy of the contract”).

149. See, e.g., FLA. STAT. ANN. § 520.34(c) (West 2003) (“The seller shall deliver to the buyer, or mail to the buyer at his or her address shown on the contract, a copy of the contract signed by the seller.”).

150. 12 C.F.R. § 1005.19 (2019)

151. CAL. CIV. CODE § 1799.202(a) (West 1991) (“[A] seller shall deliver a copy of a consumer contract to the consumer at the time it is signed by the consumer”). See also TEX. BUS. & COM. CODE ANN. § 601.052(a) (West 2009) (“A merchant must provide a consumer with a complete receipt or copy of a contract pertaining to the consumer transaction at the time of its execution.”); ME. REV. STAT. ANN. tit. 32, § 4662(1) (2004) (in consumer solicitation sales, “[t]he seller shall furnish a completely executed copy of the contract or agreement to the consumer immediately after the consumer signs the agreement or contract.”).

152. See discussion *supra* Section III.A (proposing a contract transparency duty that obliges online firms to have previous versions of the consumer contracts available and accessible online).

could direct firms to send to the consumer, upon the latter's request, a copy of the contract.

B. A Duty that Bites: Adjudication and Administrative Enforcement

Introducing a transparency duty is the first positive step in tackling hidden contracts. Alongside this step, it is crucial to implement enforcement mechanisms and principles that incentivize firms to comply. In other words, policymakers should ensure that the conceptual idea of a transparency duty enjoys an operational and effective framework that deters firms from employing hidden contracts.

Indeed, an explicit and concrete remedy is another aspect lacking in the California Consumer Contract Awareness Act. According to the existing model's remedial scheme, a supplier that fails to comply with the duty to provide a copy of the agreement is liable to the consumer for any resultant actual damages suffered by the consumer.¹⁵³ However, as has been argued in this Article, a major problem created by hidden contracts is that they keep consumers in the dark about their contractual rights.¹⁵⁴ This legal obscurity may hinder consumers from being able to sue suppliers for the damages consumers suffer due to suppliers' failures to provide agreement copies. Thus, the legal process that would determine such damages may never begin.

Hence, regulators should back the proposed transparency duty with an explicit remedy that directly tackles the non-transparency that hidden contracts create. In this context, there are a few options to consider. First is the possibility of private enforcement. If a consumer successfully sues a seller who fails to comply with the contract transparency duty, the consumer should be entitled to an injunction that compels the seller to comply. Additionally, if the request for an injunction is deemed justified, the supplier should reimburse the consumer for all the reasonable costs involved (including, for example, loss of time and legal fees). To further incentivize consumers, lawmakers could also allow statutory

153. CAL. CIV. CODE § 1799.205 (West 1991) ("A seller who fails to comply with section 1799.202 is liable to the consumer for any actual damages suffered by the consumer as the result of that failure.").

154. See discussion *supra* Section I.B.

multiple and minimum damage awards that courts can grant successful plaintiffs.¹⁵⁵

Such a scheme notwithstanding, relying only on consumers to enforce the law and discipline firms may be unwise, if not unfair. Even under a transparency duty, some consumers may not be aware of their rights, prefer not to spend their limited time reading consumer contracts, fear confronting firms, or lack the motivation or necessary resources to litigate their cases.¹⁵⁶ Furthermore, mandated arbitration clauses, which are part of many standard form contracts, considerably limit consumers' ability to bring their claims before the courts.¹⁵⁷ Therefore, another imperative path to consider is administrative enforcement.

In view of that, we suggest that administrative agencies be vested with the authority to impose a fine for violating the transparency duty. Certainly, there is a growing recognition of the potential of administrative enforcement tools to contribute to a more balanced B2C environment and increase firms' compliance. For example, the recent Directive (EU) 2019/2161 empowers European Union Member States "to decide on the administrative or judicial procedure for the application of penalties for infringements" of Council Directive 93/13/EEC on unfair terms in consumer contracts.¹⁵⁸ Directive 2019/2161 further acknowledges that

155. Cf. N.Y. GEN. OBLIG. LAW § 5-702 (2020) (requiring that consumer contracts employ plain language and providing for a penalty of actual damages plus \$50).

156. See, e.g., U.S. FED. TRADE COMM'N, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY 80-81, 80 tbl.5-1 (2004) (finding that only less than one tenth of defrauded consumers complained to official sources).

157. See, e.g., Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 234 (2019), <https://lawreview.law.ucdavis.edu/online/vol52/52-online-Szalai.pdf> ("[A]t least 826,537,000 consumer arbitration agreements were in force" in 2018.); Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RESV. L. REV. 341, 341, 351 (2014) (defining forced arbitration clauses in consumer contracts as a U.S. phenomenon and finding that U.S.-based social media providers were about three times more likely to incorporate a mandatory arbitration clause in their terms of use than non-U.S.-based providers); U.S. CONSUMER FIN. PROT. BUREAU, *Section 2: How Prevalent Are Pre-dispute Arbitration Clauses and What Are Their Main Features?*, in ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET AND CONSUMER PROTECTION ACT § 1028(A), 25-27, § 2.3.6 & fig.6 (2015) (finding that 87.5% of the major wireless providers have arbitration obligations in their contracts).

158. See Directive (EU) 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernization of Union consumer protection rules, art. 14.

administrative authorities could impose penalties against firms (in this case, firms that employ unfair contract terms).¹⁵⁹ A similar logic should apply to hidden contracts.

Administrative enforcement has multiple advantages, and administrative agencies can be more effective than courts at protecting consumers from harmful practices and exploitation.¹⁶⁰ First, administrative agencies can be proactive rather than passive and reactive. Unlike courts, administrative bodies do not depend on the initiative of private consumers. Second, whereas courts respond to individual cases with no ability to prioritize them, administrative enforcement authorities can channel public resources more efficiently. That is, they can adopt a macro perspective and focus on the most pressing, prescient, or harmful practices and firms.

Furthermore, unlike the judiciary, administrative bodies can engage in a dialogue with various stakeholders, such as consumers, consumer organizations, firms, and other agencies. Agencies are also less bounded in the remedies and solutions they may seek. For example, administrative authorities can reach a consensual agreement with the firm and accompany and monitor its implementation.

Furthermore, agencies operating at the federal level, such as the Federal Trade Commission (FTC) and the CFPB, have access to complex information and can consult with academics and experts. These agencies, and their counterparts on the state level, can develop industry-specific expertise, which elected judges may not possess. Additionally, administrative bodies address market-wide issues rather than responding on a case-by-case basis. This entails that administrative enforcement can be more coherent and much faster than judicial review. Overall, administrative bodies have greater institutional competence, better capability in responding to market dynamics, and higher capability to avoid political pressure. They can therefore supplement important private enforcement initiatives in valuable ways.

Particularly, administrative agencies should be able to make two key remedial responses when tackling hidden contracts. First,

159. *Id.*

160. The discussion regarding the advantages of administrative enforcement relies on Adar & Becher, *supra* note 135, at 2443–46.

they should be empowered to issue orders—such as mandatory injunctions and cease and desist notices—to ensure that firms comply with the transparency duty. Specifically, this authorization warrants that firms (1) provide consumers with their original contracts and (2) maintain an adequate online archive. Second, administrative agencies should be authorized to issue penalties, sanctioning noncompliance. These penalties should be sufficiently steep to deter firms from utilizing hidden contracts, and they should not be arbitrarily capped.¹⁶¹ Of course, any administrative decision should be subject to judicial review or an appeal before an administrative tribunal.

Finally, the content and imposition of any such remedies should be publicly transparent and visible. For example, they could be posted on the agency’s website. Such publicity would maximize the impact of these orders and sanctions. At the same time, enforcement agencies could also include examples of “best practice” archives on their websites. These positive examples will serve as role models and enhance the reputation that compliance entails.

A. *Hidden Contracts as an Unfair Practice*

Whereas a contract transparency duty does not currently exist, all states have enacted a consumer protection statute (also known as a UDAP law).¹⁶² Though these statutes vary in scope and effect, they generally prohibit deceptive, unfair, unconscionable, or abusive practices.¹⁶³ Notably, State Attorneys General can bring enforcement actions under their states’ UDAP laws.¹⁶⁴ Furthermore, some of these laws empower consumers to pursue

161. See generally CAROLYN CARTER, NAT’L CONSUMER L. CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE PRACTICES LAW 1, 44, 55–56, 58–60, 62–63 (2018) (referring to ceilings such as \$1,000 on civil penalties as obstacles in the path of consumer protection enforcement).

162. See NAT’L CONSUMER L. CTR., *Unfair, Deceptive and Abusive Practices (UDAP)*, <https://www.nclc.org/topic/unfair-deceptive-and-abusive-practices-udap> (last visited Sept. 29, 2023) (“Every state has a consumer protection statute . . .”).

163. See *id.*

164. See, e.g., CROWELL, *State UDAP Laws are a Treasure Trove of Civil Penalties for Price Gouging*, (Apr. 15, 2020), <https://www.crowell.com/NewsEvents/AlertsNewsletters/all/State-UDAP-Laws-are-a-Treasure-Trove-of-Civil-Penalties-for-Price-Gouging> (“State Attorneys General have statutory authority and power to enforce consumer protection laws, and many have warned that they will do so.”).

private action against non-compliant businesses,¹⁶⁵ and many delegate rulemaking authority to the state consumer protection agencies.¹⁶⁶ The FTC and CFPB also have a broad statutory authority to prohibit unfair and deceptive practices.¹⁶⁷

Overall, these statutes should play a central role in protecting consumers against dishonest businesses.¹⁶⁸ Thus, it is important to consider whether employing hidden contracts amounts to an unfair practice. Below we focus on what is an unfair practice under the FTC Act, which inspired much of state UDAP laws.¹⁶⁹ In fact, UDAP laws are frequently regarded as “little FTC Acts,” despite occasionally deviating from that Act.¹⁷⁰ We narrow our attention to unfair practices because hidden contracts are less likely to satisfy the criteria for a deceptive practice according to the FTC Act.¹⁷¹

165. This is the case, for example, in Nebraska, Alaska, Maryland and New Mexico. *See id.* For analyzing the interplay between federal, state, and private enforcement of consumer protection laws, see Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTI-TRUST L.J. 911 (2017).

166. *See* David Berman, Note, *A Critique of Consumer Advocacy Against the Restatement of the Law of Consumer Contracts*, 54 COLUM. J.L. & SOC. PROBS. 49, 52, 85–89 (2020) (suggesting using UDAP laws to tackle unfair contract terms).

167. *See* Federal Trade Commission Act, 15 U.S.C. § 45(a)(1)–(2) (FTC’s mandate to prevent “deceptive acts or practices in or affecting commerce”); Dodd-Frank Act, § 1031, 12 U.S.C. § 5531(a)–(b); Dodd-Frank Act, Pub. L. No. 111-203, 124 Stat. 1376, § 1012(a)(10) (July 21, 2010) (CFPB’s mandate).

168. *See* CARTER, *supra* note 161, at 1 (“Unfair and Deceptive Acts and Practices (UDAP) laws should be the backbone of consumer protection in every state.”). *See also* Pridgen, *supra* note 165, at 912 (“State consumer protection statutes, known as state UDAP laws or state ‘little FTC acts,’ provide a stronghold of effective consumer protection in the United States.”).

169. *See, e.g.,* Pridgen, *supra* note 165, at 917 (“Thus, the state UDAP laws, by providing for private enforcement of state laws that mimic the language of the federal law, have the effect of enlisting private consumer plaintiffs in the FTC’s efforts to stem unfair and deceptive trade practices. Indeed, further solidifying the tie between the FTC Act and the state consumer protection laws, most of the state UDAP laws contain a provision declaring that the state legislature intended that the state courts and government enforcers be guided by relevant interpretations of the FTC Act in applying their own state law.” (footnotes omitted)).

170. *See, e.g., id.* at 912 (“State consumer protection statutes [are] known as state UDAP laws or state ‘little FTC acts’”); Henry N. Butler & Joshua D. Wright, *Are State Consumer Protection Acts Really Little-FTC Acts?*, 63 FLA. L. REV. 163, 163 (2011).

171. For a practice to be deceptive, it should be likely to mislead a consumer acting reasonably under the circumstances and be material. *See* FED. TRADE COMM’N, POLICY STATEMENT ON DECEPTION 2, 5 (Oct. 14, 1983). Examples of deceptive acts or practices include misleading price claims, bait-and-switch techniques—where sellers make an alluring yet insincere offer to sell a product or service while intending to switch the consumer from the advertised merchandise to a different product or service that better benefits the sellers (*see*

Fairness is a vague legal norm, and the law does not precisely define what constitutes an unfair trade practice.¹⁷² Rather, case law gradually defines the boundaries of unfair (and deceptive) practices and illustrates their scope¹⁷³—at times, pushing their limits.¹⁷⁴ Though a trade practice can be both deceptive and unfair, it need not be deceptive to be unfair. Under current law, an unfair practice should (a) “cause[] or [be] likely to cause substantial injury which is [(b)] not reasonably avoidable by consumers . . . , and [(c)] not outweighed by countervailing benefits to consumers or to competition.”¹⁷⁵

First, the injury should be substantial and not trivial or speculative.¹⁷⁶ Typically, substantial injury comes in the form of monetary harm.¹⁷⁷ Importantly, a practice that causes a small amount of harm to many consumers may meet the substantial injury threshold.¹⁷⁸ Notably, actual injury is not always required, and a considerable risk of concrete harm may suffice.¹⁷⁹ In our context, the financial injury to consumers stems from the fact that firms blur the traces of their previous contracts. Slightly restated, hidden contracts prevent consumers from knowing their rights and obligations. This, in turn, undermines consumers’ ability to complain about the firm’s behavior, air their dissatisfaction, and bring their cases before the courts.¹⁸⁰ Additionally, determining the presence of substantial injury may

FTC, Guides Against Bait Advertising, 16 C.F.R. § 238.0), or omitting material limitations or conditions. See FTC Guides for the Advertising of Warranties and Guarantees, 16 C.F.R. §§ 239.1, 239.3.

172. See *FTC v. R.F. Keppel & Bro.*, 291 U.S. 304, 310–12 (1934) (The Federal Trade Commission Act’s ban on unfair competition tactics “does not ‘admit of precise definition’” (quoting *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931))).

173. See *id.* at 312 (“the meaning and application of [the Federal Trade Commission Act’s unfairness ban] must be arrived at by what this court elsewhere has called ‘the gradual process of judicial inclusion and exclusion.’”) (quoting *Raladam*, *supra* note 172, at 648).

174. Cf. *Pridgen*, *supra* note 165, at 921–22 (“Some states . . . were leaders in aggressively enforcing their state consumer protection laws and also in pushing the boundaries of the meaning of ‘unfair’ or ‘deceptive’ trade practices.”).

175. 15 U.S.C. § 45(n).

176. FED. TRADE COMM’N, POLICY STATEMENT ON UNFAIRNESS (Dec. 7, 1980).

177. *Id.*

178. *Id.* n.12.

179. *Id.*

180. See discussion *supra* Section I.B.

include public policy considerations, such as greater transparency and a fairer market environment.¹⁸¹

Assuming the “substantial injury” requirement is satisfied, one should examine whether consumers can reasonably avoid the injury. We opine in section IV.A below that it is unrealistic to expect consumers to always keep track of their consumer form contracts.¹⁸² Firms are the least-cost avoiders, as they opt to employ hidden contracts, and they can easily solve the problems they create by posting previous versions of their contracts online (at a negligible cost). Conversely, and as we will explain in more detail in section IV.A, consumers, who are often time-constrained and boundedly rational, cannot be realistically expected to combat hidden contract practices by diligently saving all the consumer contracts they ever agree to.¹⁸³

We further note, in this context, that the unfairness analysis adopts a “reasonable consumer” standard, not the “perfect consumer” who exercises “perfectly rational behavior.”¹⁸⁴ Essentially, “the question ‘is not whether a consumer could have made a better choice’”¹⁸⁵ (theoretically, build a personal archive of form contracts). In short, the law merely expects consumers to take reasonable actions to avoid injury.¹⁸⁶ Whereas a cost-benefit analysis may lead even a perfectly rational consumer to avoid maintaining a personal archive of consumer contracts, the reasonable consumer should definitely not be expected to do so.

Interestingly, one path the FTC uses to assess whether consumers could have reasonably avoided the injury is to examine whether the practice interferes with consumer decision-making.¹⁸⁷

181. The FTC policy narrowed the scope for making public policy arguments to substantiate unfairness, but it did not entirely close it. Hence, public policy interest can be used to substantiate the injury and meet the substantial injury test.

182. See discussion *infra* Section IV.A. (refuting the argument that consumers should have the responsibility to maintain a personal archive with all their form contracts).

183. See *infra* Section IV.A.

184. CAROLYN CARTER, NAT’L CONSUMER L. CTR., UNFAIR AND DECEPTIVE ACTS AND PRACTICES § 4.3.2.3.2 (2021) (citing CONSUMER FIN. PROT. BUREAU [CFPB], CFPB SUPERVISION AND EXAMINATION MANUAL, UDAAP, UDAAP 2, 6 (2020)).

185. *Id.* (quoting CFPB, *supra* note 184, at 2).

186. See *id.*

187. See Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311, 1374–75 (2015) (“Most of the Commission’s unfairness matters are brought . . . to halt some form of seller behavior that unreasonably creates or takes advantage

Consumers cannot reasonably avoid injury if the practice at stake inhibits their ability to make decisions or to act to avoid injury. In the case of hidden contracts, firms that blur the traces of their previous contracts—without warning consumers or making this practice explicit—aggravate information asymmetries. Such information asymmetries undercut consumers' ability to make rationally informed decisions. In essence, we submit that there should be little question as to whether consumers can reasonably avoid the injury hidden contracts pose.

After establishing that consumers cannot reasonably avoid the harm of hidden contracts, the next step is to attend to the third and final prong of the unfairness analysis: whether the benefits to consumers or competition outweigh the injury. This component necessitates a cost-benefit analysis demonstrating that the practice at stake "is injurious in its net effects."¹⁸⁸

When it comes to hidden contracts, it is hard to argue that such contracts benefit consumers or competition. Admittedly, firms might reduce operational costs by not maintaining an archive of previous contractual versions. However, these savings are unlikely to translate into lower prices for consumers, given the low cost of keeping such an archive. Firms already have these versions in an electronic format, and they all maintain websites with multiple pages. Thus, the costs of taking measures to prevent the injury—providing consumers with their original contracts and posting contractual versions online—should be minimal. In contrast, the harms hidden contracts inflict on consumers and society are considerable.¹⁸⁹

Things are trickier, however, in terms of remedies. At the outset, it would be challenging for consumers and their advocates to quantify the damage and show how and to what extent hidden contracts prevented them from action and eroded their ability to seek remedies. At the same time, disgorgement would require evaluating the additional profits that hidden contracts generate. Things get even further complicated given that consumers did

of an obstacle to the free exercise of consumer decision making.' This definition was later adopted by courts and has become part of the accepted definition of the FTC's test for unfairness.") (quoting FED. TRADE COMM'N, *supra* note 175, ¶ 12).

188. See FED. TRADE COMM'N, *supra* note 175, ¶ 11.

189. See discussion *supra* Section I.B. (detailing the social costs of hidden contracts).

receive a product or a service from the firm that later hid its contract.

Therefore, one interesting path to consider is the idea of performance-based remedies.¹⁹⁰ According to this framework, a court could order a firm to comply with a “confusion injunction.”¹⁹¹ In essence, confusion injunctions ban “firms that have unfairly, deceptively, or abusively exploited customer confusion from continuing to do so.”¹⁹² In our context, a confusion injunction would require the firm to stop confusing consumers about their contractual rights and obligations by hiding the contract governing their business relationship. Likewise, a “consequences injunction” would “prohibit firms from continuing to unfairly, deceptively, or abusively inflict ill consequences on their customers.”¹⁹³ Such an injunction would require the firm to not use hidden contracts to manipulate consumer decision-making.¹⁹⁴

In summary, quantifying the injury that hidden contracts inflict on consumers and society and establishing causal links between hidden contracts and specific quantified harms may pose considerable challenges. These challenges are coupled with the weakness and gaps of UDAP laws and the political environment that may impact federal agencies and their appetite to act. In all, this analysis reinforces the need to propose a holistic approach. Such an approach should introduce a contract transparency duty, combining private, public, and administrative enforcement measures.¹⁹⁵

IV. RESPONDING TO CRITIQUES

This Article proposes to impose a duty on firms to act transparently and provide a copy of their contracts to consumers. It also suggests that online firms should maintain a public archive with their historical agreements and that consumers should be

190. See Lauren E. Willis, *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud*, 80 LAW & CONTEMP. PROBS. 7, 8 (2017).

191. *Id.* at 8, 30.

192. *Id.* at 30.

193. *Id.*

194. See *id.*

195. Cf. Pridgen, *supra* note 165, at 933 (“Indeed, the use of private enforcement mechanisms as an extension of administrative agency regulation is a hallmark of the American regulatory system”); *Id.* at 935 (“The private right of action and the state powers of enforcement are truly complementary, not exclusive.”).

entitled to receive a copy of their (original) contracts for a nominal fee. One may criticize this proposition from five major directions. The following sections present these criticisms and respond to them.

A Consumers' Personal Responsibility

First, one can argue that even if suppliers try to blur the tracks of their hidden contracts, consumers can (and perhaps should) save a copy of the agreement immediately after they accept it. Consumers should be responsible for their decisions and actions. A responsible consumer, the argument goes, should exercise vigilance and keep track of the contract she accepts. By keeping a copy of their contracts available, consumers actively care for their interests instead of relying on others, whether the firm or a government agency. When the need arises, consumers who save their original contract for future reference can retrieve it, learn about their rights and obligations, and make informed decisions.

As noted above,¹⁹⁶ we do not find this argument persuasive. Consumers typically agree to numerous standard form contracts.¹⁹⁷ Standard form contracts, especially online ones, govern multiple aspects of our everyday lives.¹⁹⁸ One accepts a standard form contract when engaging with others on social media, partaking in e-commerce, using dating apps, booking flights and hotels, purchasing insurance, opening a bank account, joining a gym, playing games online, or simply using public Wi-Fi—to name just a few. Moreover, consumer contracts are merely one type of legal document that people encounter. Other documents include, among other things, privacy policies, employment agreements, financial disclaimers, consent forms, and numerous disclosures. Can we reasonably expect consumers to track, sort, store, and be able to retrieve all these documents?

196. See discussion *supra* Section III.C (arguing that consumers cannot reasonably avoid the harm of hidden contracts by maintaining a personal inventory of form contracts).

197. See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 372 n.36 (1988) (“[C]onsumers make many transactions.”); Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 L. & CONTEMP. PROBS. 63, 66 n.13 (2011) (“[C]onsumers engage in many transactions . . .”).

198. See *supra* note 1; see also Woodrow Hartzog, *Website Design as Contract*, 60 AM. U. L. REV. 1635, 1641 (2011) (“As websites became ubiquitous, so did terms of use. As a result, an overwhelming amount of online activity is not governed by default law but rather through agreement between the parties.”) (footnote omitted).

There are many other reasons to doubt the personal responsibility proposition. For instance, consumers are typically time constrained,¹⁹⁹ and they often encounter form contracts when in a hurry or while being engaged with everything else life throws at us. Additionally, many consumers accept form contracts on their phones, where saving these documents can be less convenient and is not always intuitive or easy.

Cost-benefit analysis, cognitive biases, and limited mental bandwidth may further reduce consumers' tendency to diligently save consumer contracts. For example, each individual consumer may rationally believe that the probability that he or she will be a victim of an inefficient contract breach is low.²⁰⁰ Hence, each individual consumer may rationally decide not to produce a digital or hard copy of each of the many contracts he or she accepts. Consumers may also believe that disagreements with sellers will be resolved in a friendly manner (or at least through simple correspondence, if not friendly), without the need to follow the strict arrangements of form contracts. Consumers may further assume that if worse comes to worst, they will be able to find the contracts they accepted online. At the time of contracting, consumers – as laypeople – may not envisage hidden contracts that follow unilateral amendments. People naturally tend to focus on the present,²⁰¹ discount future risks,²⁰² and be optimistic about the future.²⁰³ There is no reason to penalize the average consumer and

199. Laura R. Bradford, *Emotion, Dilution, and the Trademark Consumer*, 23 BERKELEY TECH. L.J. 1227, 1283 (2008) (“Constraints on consumer’s time . . . will always favor familiar brands because they will always seem less risky.”) (footnote omitted). Cf. David Adam Friedman, “*Dishonest Search Disruption: Taking Deceptive-Pricing Tactics Seriously*,” 51 U.C. DAVIS L. REV. ONLINE 121, 123 (2018) (“Consumers have time constraints . . .”).

200. See Kenneth K. Ching, *What We Consent to When We Consent to Form Contracts: Market Price*, 84 UMKC L. REV. 1, 3 (2015) (“Given the low probability that a dispute will arise over one of the unread terms . . . it would be ‘irrational for form-receiving parties to spend time reading . . . the terms in the forms they sign.’”) (quoting Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 672, 631 (2002)).

201. See generally, e.g., Ted O’Donoghue & Matthew Rabin, *Doing it Now or Later*, 89 AM. ECON. REV. 103 (1999) (discussing the present bias); David Laibson, *Golden Eggs and Hyperbolic Discounting*, 112 Q. J. ECON. 443 (1997) (explaining how myopia can lead people to disproportionately care more about the present and not care enough about the future).

202. See, e.g., Neil Weinstein, *Optimistic Biases About Personal Risks*, 246 SCIENCE 1232, 1232 (1989).

203. See, e.g., Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L. & HUM. BEHAV.

force them to be suspicious and litigious in every interaction with well-known online firms.

Finally, it is important to note how hidden contracts also undercut the potential of advanced technological tools (“smart readers”) to assist consumers who wish to understand their standard form contracts.²⁰⁴ Indeed, smart readers may be able to simplify contracts for consumers, personalize the content of these contracts, construct, and potentially benchmark them.²⁰⁵ However, such smart readers need input (a contract text) to analyze. Hidden contracts entail no text at the outset, making even the most powerful and advanced technological language processing models useless.

B. Social Norms are Superior to Legal Rules

A second critical argument against our suggestion to introduce a transparency duty on suppliers may be that the duty is superfluous. According to this critique, consumers who need a copy of the original pre-amended contract can request it from the supplier. Once the consumer requires a copy of the agreement, the argument goes, the supplier will voluntarily agree to this request as an act of goodwill and to maintain its reputation. This will ease the burden on the supplier and ensure it will reproduce a copy of the original contract only for those consumers who actually want it. It will also eliminate regulatory and enforcement costs.

This line of reasoning is speculative and unsounded. First, it contradicts the impression one gets from online customers’ complaints, which frequently protest that firms do not provide previous contractual versions.²⁰⁶ Second, a consumer’s email with an informal request may get lost in the firm’s administrative maze, land in a spam or junk folder, or be inadvertently blocked or filtered. Such misfortune is less likely to occur when businesses are

439 (1993); Neil D. Weinstein & William M. Klein, *Unrealistic Optimism: Present and Future*, 15 J. SOC. & CLINICAL PSYCH. 1 (1996).

204. See Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83 (2022) (explaining how “Smart Readers” that employ language processing models such as GPT-3 can assist consumers and facilitate market competition over consumer form contract terms).

205. *Id.* at 94–109 (detailing the capabilities of smart readers).

206. See, e.g., Live Better, *supra* note 33 (“We emailed seven different Epidemic Sound employees asking them for these older versions of their legal documents [including the terms of service], but none of them replied.”).

formally obliged to provide consumers with a copy of their original contracts, because firms will establish filters or frameworks to address such inquiries. Third, and perhaps most importantly, as rational profit maximizers, companies often have weak incentives to voluntarily fulfill a consumer's request to receive a copy of the original contract.²⁰⁷ Firms may be concerned that fulfilling the consumer's request may increase the probability that the consumer will raise demands, file third-party complaints, or take legal actions against the firm, based on the contractual legal terms. After all, why else would consumers ask for their original contracts? Hence, businesses may often prefer to keep consumers under the legal uncertainty that hidden contracts facilitate unless governed by a transparency duty. Without a clear rule mandating transparency, one should assume that firms would employ transparency strategically: opting for transparency only when it serves their interests (e.g., when the original form does not support the consumer's claim).

Furthermore, placing the burden on consumers to request the contract and subjecting them to the firm's will is problematic in and of itself.²⁰⁸ As noted, most consumers lack legal knowledge, are generally unaware of their rights, are undermotivated to insist on those rights, and may fear confronting or suing the firm.²⁰⁹ To increase access to justice, we should make it as easy and simple as

207. Cf. Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281, 1340 (1994) (“[B]anks are profit-oriented enterprises and will not voluntarily give up an advantageous position . . .”); Sarah L. Stafford, *Outsourcing Enforcement: Principles to Guide Self-Policing Regimes*, 32 CARDOZO L. REV. 2293, 2298 (2011) (“[P]rofit-maximizing facilities will not voluntarily undertake costly self-audits and turn themselves in for discovered violations unless there is some type of inducement for doing so.”).

208. For a recent accessible account illustrating the hurdles that private enforcement of consumer protections law can entail see Jeff Guo, Alexi Horowitz-Ghazi, Willa Rubin & Keith Romer, *Spam Call Bounty Hunter*, NPR (Dec. 14, 2022, 6:43 PM), <https://www.npr.org/2022/12/07/1141358550/spam-call-bounty-hunter-telemarketing> (detailing the story of an individual who sought to file suits against firms that did not comply with the Do Not Call register) (last visited Oct. 3, 2023).

209. Cf. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* 15 L. & SOC'Y REV. 631, 651–52 (1980–1981). Consumers may remain passive and not partake in legal proceedings even as defendants. See Emily S. Taylor Poppe, *Why Consumer Defendants Lump It*, 14 NW. J. L. & SOC. POL'Y 149, 151 (2019) (“In the majority of actions to collect on consumer debts, default judgments are entered against consumer borrowers who fail to appear, even when there are flaws in the creditors' claims.”).

possible for laypeople to access their legal documents and become acquainted with their rights.

If anything, providing firms with discretion about who receives a copy of the original agreement and under what circumstances may aggravate the undesirable distributional effects of hidden contracts. Consumers are heterogeneous. Consumers who vocally demand a contract and threaten a firm's reputation are likely to be privileged consumers (e.g., white, educated, male). At the same time, disadvantaged consumers are not likely to be assertive and insist on their rights.²¹⁰ This aggravates the negative impact of hidden contracts on marginalized consumers, further disempowering them and limiting their access to justice.

C. Original Contracts are Already Available Online

The third critique against our proposal is that consumers may locate their original contracts themselves via third-party online archives. If the original contracts are already available online, imposing a transparency duty on firms is superfluous. In fact, according to this line of reasoning, a transparency duty can backfire and harm consumers by increasing the costs of doing business. Firms would likely pass onto consumers the additional administrative costs that this duty generates.

We find this argument normatively inappropriate, factually inaccurate, and partially misleading. Normatively, much of the preceding analysis regarding access to justice and distribution effects is relevant here too. There is no basis to believe the average consumer has the knowledge and initiative to search for old form contracts via third-party archives. Moreover, placing this burden on individuals ignores the digital divide and harms the most vulnerable consumers.²¹¹ Many consumers, including the elderly,

210. See *supra* note 35.

211. See, e.g., Mark Lloyd, *The Digital Divide and Equal Access to Justice*, 24 HASTINGS COMM'NS & ENT. L.J. 505, 527-30 (2002) (arguing that unequal access to technology could exacerbate inequalities). See also Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, PEW RSCH. CTR., (June 22, 2021), <https://www.pewresearch.org/fact-tank/2019/05/07/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption> (last visited Oct. 3, 2023); Anique Scheerder, Alexander van Deursen & Jan van Dijk, *Determinants of Internet Skills, Uses and Outcomes. A Systematic Review of the Second- and Third-Level Digital Divide*, 34 TELEMATICS & INFORMATICS 1607 (2017).

poor, and disadvantaged, may not be technologically savvy.²¹² These consumers may be unaware of the advanced online tools that provide access to old versions of a website's contract terms.

But beyond that, the mere assumption that online archives provide a satisfactory source for previous versions of consumer contracts is factually incorrect. To be sure, some third-party online archives, such as "Wayback Machine,"²¹³ allow consumers to locate *some* old web pages that may include the original pre-amendment versions of contracts. However, these websites are an incomplete solution.

To begin with, online archives do not track the history of every webpage.²¹⁴ This incompleteness stems from two major reasons. First, the online contracting environment and the ways in which businesses and consumers interact online are constantly and rapidly evolving.²¹⁵ Second, website owners are allowed to exclude their sites from online archives.²¹⁶ Moreover, even when these archives include previous versions of a webpage, their historical tracking of a webpage is sometimes partial. To illustrate, while

212. Cf. Jennifer Lynch, *Identity Theft in Cyberspace: Crime Control Methods and Their Effectiveness in Combating Phishing Attacks*, 20 BERKELEY TECH. L.J. 259, 284 (2005) ("[B]ehavioral studies have shown that consumers are not instituting practices recommended by the FTC to protect themselves from online fraud, possibly because they are not technically savvy.") (citing George R. Milne, Andrew Rohm & Shalini Bahl, *Consumers' Protection of Online Privacy and Identity*, 38 J. CONSUMER AFFS. 217, 223-24 (2004)); (Jerry) Jie Hua, *Toward A More Balanced Model: The Revision of Anti-Circumvention Rules*, 60 J. COPYRIGHT SOC'Y U.S.A. 327, 348 (2013) ("Technologically-unsavvy consumers often are not conscious" of monitoring and data collection techniques used by firms.); John Shaeffer & Charlie Nelson Keever, *Privacy as a Collective Norm*, 41 LOY. L.A. ENT. L. REV. 253, 293 (2021) ("Big [D]ata is likely to affect the welfare of unsophisticated, vulnerable, and technologically unsavvy consumers more negatively.") (quoting Nir Kshetri, *Big Data's Impact on Privacy, Security and Consumer Welfare*, 38 TELECOMMS. POL'Y 1134, 1152 (2014) (alteration in original)).

213. WAYBACK MACHINE, <https://archive.org/web> (last visited Oct. 3, 2023).

214. TODD G. SHIPLEY & ART BOWKER, *INVESTIGATING INTERNET CRIMES: AN INTRODUCTION TO SOLVING CRIMES IN CYBERSPACE* 301 (2014) (Wayback Machine "does not crawl and record everything found on a website or webpage."); Ludovica Price, *Internet Archiving – The Wayback Machine*, HUMANITIES COMMONS 3 (2011) ("[T]he Archive cannot be considered to be 'complete.'"). As an example, Wayback Machine has not stored the URL of the contract terms of AliExpress.com, available at https://terms.alicdn.com/legal-agreement/terms/suit_bu1_alieexpress/suit_bu1_alieexpress202204182115_66077.html?spm=a2g0o.home.0.0.1ea66b05vMwOJG.

215. Price, *supra* note 214, at 3 ("But the size of the internet, its constant growth and mutability has since made net-wide crawls virtually impossible.").

216. *Wayback Machine General Information*, INTERNET ARCHIVE, <https://help.archive.org/help/wayback-machine-general-information> (last visited Oct. 3, 2023) ("Pages may not be archived due to robot's exclusions and some sites are excluded by direct site owner request.").

Yahoo.com was founded in 1994,²¹⁷ the tracking of its terms of use webpage only goes back to September 2021.²¹⁸ Beyond this, the archives do not store traditional offline consumer contracts, such as agreements between consumers and brick-and-mortar retailers (which may still employ digital means to form a contract; for example, a rental company that asks the consumer to sign digitally a contract presented on a screen).

Finally, it is also somewhat misleading to suggest that contracts found via online archives, such as “Wayback Machine,” are fully evidentiarily acceptable. Courts are still grappling with the legal status of old versions of webpages found via online archives.²¹⁹ Though some courts find these sources acceptable, others do not. Given this issue is still in flux, consumers should not bear the risk that courts will reject the contract they present as evidentiarily deficient or inadequate.

D. Hidden or Not, Consumers Will Not Read

Another possible critique against our proposed recommendations is that whether form contracts are accessible or not, consumers do

217. *Yahoo!*, BRITANNICA, <https://www.britannica.com/topic/Yahoo-Inc> (last visited Oct. 3, 2023).

218. See the URL of Yahoo’s terms of use, <https://legal.yahoo.com/us/en/yahoo/terms/otos/index.html> (last visited Oct. 3, 2023). According to Wayback Machine, it started saving this URL on September 1, 2021. See https://web.archive.org/web/20220000000000*/https://legal.yahoo.com/us/en/yahoo/terms/otos/index.html (last visited Oct. 3, 2023).

219. See, e.g., *Ward v. Am. Airlines, Inc.*, No. 4:20-CV-00371-O, 2020 WL 8300505, at *1–2 (N.D. Tex. Oct. 16, 2020) (“[T]he Court declines to take judicial notice of Hotwire’s and Expedia’s Terms of Use by way of the Internet Archive Wayback Machine.”); *Lloyd v. The Retail Equation, Inc.*, No. CV 21-17057, 2022 WL 18024204, at *9 (D.N.J. Dec. 29, 2022) (“[I]t is unclear whether screenshots from the Wayback Machine are admissible in the Third Circuit absent authentication by an Internet Archive employee.”); *Weinhoffer v. Davie Shoring, Inc.*, 23 F.4th 579, 584 (5th Cir. 2022) (“[O]ther district courts have held that evidence from the Wayback Machine ‘is not so reliable and self-explanatory that it may be an appropriate candidate for judicial notice’” (quoting *My Health Inc. v. Gen. Elec. Co.*, No. 15-CV-80-JDP, 2015 WL 9474293 at *4 (W.D. Wis. Dec. 28, 2015). *But see* *Thorne v. Square, Inc.*, No. 20-CV-5119(NGG)(TAM), 2022 WL 542383, at *1 (E.D.N.Y. Feb. 23, 2022), appeal withdrawn, No. 22-542, 2022 WL 2068771 (2d Cir. Apr. 14, 2022) (“The court therefore joins the chorus of others and takes judicial notice of these archived webpages from the Wayback Machine as the relevant terms of service that Plaintiffs would have respectively viewed when registering for Cash App and requesting a Cash Card.”); *Gardiner v. Walmart Inc.*, No. 20-CV-04618-JSW, 2021 WL 2520103, at *9 (N.D. Cal. Mar. 5, 2021) (“Courts have routinely taken judicial notice of contents of web pages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot be questioned.”).

not, and will not, read them. Undeniably, evidence suggests that ordinary consumers, law professors, and judges all do not read consumer contracts.²²⁰ If no one reads form contracts, the argument goes, there is little wisdom in endeavoring to make them available and accessible. If anything, these efforts are doomed to fail and are thus wasteful.

With respect, this argument misses the mark. First and foremost, as the case of the Palmers illustrates, our analysis focuses on the ex-post stage—once consumers experience a problem with the product, service, or firm and need to access their (hidden) contracts. While consumers may not read their contracts ex ante, they reveal a stronger tendency to read and act upon their contracts once a dispute or a problem arises.²²¹ Indeed, consumers often share their inability to find their form contracts.²²² Hence, making contracts available (i.e., un hiding contracts) can serve consumers ex post, regardless of their tendency to ignore form contracts ex ante.

Second, we noted in section IV.A the potential of new technologies (“smart readers”) to assist consumers with their form contracts.²²³ The possibility of using such smart readers entails freeing consumers from the need to read long and complex arrangements. Instead, consumers can delegate such tasks to machines. However, if a contract is hidden, smart readers do not

220. See, e.g., Bakos et al., *supra* note 7 (finding that virtually all online users do not read EULAs); Schmitz, *supra* note 8, at 873–78 (reviewing empirical research suggesting consumers do not read form contracts); Jeff Sovern, *The Content of Consumer Law Classes III*, 22 J. CONSUMER & COM. L. 2, 4 (presenting survey results indicating that 57% of consumer law professors “rarely or never” read consumer contracts); Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn’t Read the Computer Fine Print*, A.B.A. J. (Oct. 20, 2010), <https://perma.cc/964P-EGVW> (last visited Oct. 3, 2023).

221. See, e.g., Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 315 (2008) (“Most of the reasons for the lack of effective reading and comprehension of ‘non-salient’ terms ex ante do not apply to the ex post context.”); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 214–15 (2010) (Many more consumers indicated “they would read the contract ex post (rather than ex ante)”); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEG. ANALYSIS 1, 7 (2017) (finding that tenants are likely to be deterred by the terms of their lease agreements once a dispute arises even if those terms are unenforceable).

222. See, e.g., examples noted *supra* note 33 (detailing examples of users who cannot find their contracts); see also cases cited *supra* note 215 (illustrating the need to sometimes use the Wayback Machine to present the governing contract to the court).

223. See discussion *supra* text accompanying notes 200–201.

have the necessary input to analyze it and thus cannot help consumers.²²⁴ Therefore, hidden contracts subvert consumers' ability to use new technologies to effectively cope with standard form contracts.

Third, throughout this Article we explained how hidden contracts harm not only consumers but also consumer organizations, intermediaries, and other legal and extralegal forces. Therefore, focusing only on consumer readership (or lack thereof) neglects other important pieces of the puzzle. Overall, lowering the search costs for those consumers and third parties who wish to access consumer form contracts is a legitimate goal in and of itself.

E. The Original Contract Is Irrelevant

Finally, a seemingly potent yet factually inaccurate criticism opines that we should not care too much about the original contract the consumer accepted. As the argument goes, once suppliers modify the contract, the original contract becomes legally irrelevant. According to this logic, the new modified contract invalidates and replaces the original one. It is thus futile to invest resources to allow consumers access to the original contract.

This critique has some merit, but it is not entirely persuasive. To be sure, U.S. law allows firms significant discretion to amend their contracts.²²⁵ However, as the case of the Palmers suggests,²²⁶ unilateral modification of the contract does not automatically nullify and substitute the original one. Typically, contractual amendments should satisfy various legal requirements in order to replace the original agreement.

Notably, the recipient of the proposed contractual changes must receive a reasonable (1) notice of the proposed modified terms, (2) opportunity to review these terms, and (3) opportunity to reject the proposed modified terms (or terminate the agreement

224. See Arbel & Becher, *supra* note 200 (explaining the power and promise of GPT-3 smart readers).

225. See RESTATEMENT (SECOND) OF CONTRACTS § 89 (AM. L. INST. 1981) (detailing the circumstances and allowed scope of contractual modifications); U.C.C. § 2-209 (AM. L. INST. & NAT'L CONF. COMM'RS ON UNIF. STATE L. 2020) (stating that modification needs no consideration and noting basic requirements and limitations).

226. See discussion *supra* text accompanying notes 19-30.

with no penalty).²²⁷ In addition, for a modification to replace the original contract, a consumer must either manifest assent to the modified terms or not reject them.²²⁸ Moreover, the modifying party must propose the contractual amendment in good faith, limiting firms to modifications within the parties' original reasonable expectations.²²⁹ Likewise, modifications shall not undermine an affirmation or promise made by the business that was a central part of the original bargain between the contracting parties.²³⁰ Courts apply these criteria quite consistently and often reject contractual modifications.²³¹

To be sure, courts and commentators vary in the importance they attribute to notice and the degree to which notice should affect enforceability. Judicial decisions regarding modifications also depend on the concrete circumstances of the individual case, which courts examine on a case-by-case basis. That said, courts tend to ensure that firms properly communicate the changes to consumers and that consumers have a reasonable opportunity to reject the modifications.²³² For example, merely posting modified terms online does not constitute reasonable notice.²³³ Likewise, a message buried in fine print and hidden at the bottom of dense text does not

227. RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS 66 (AM. L. INST., Tentative Draft No. 2, 2022).

228. *Id.*

229. *See e.g.,* *Badie v. Bank of America*, 79 Cal. Rptr. 2d 273, 284 (Cal. Ct. App. 1998) (“[I]t is the Bank’s exercise of its discretionary right to change the agreement . . . which must first be analyzed in terms of the implied covenant [of good faith and fair dealing.]”); *Cycle City, Ltd. v. Harley-Davidson Motor Co.*, 81 F. Supp. 3d 993, 1014 (D. Haw. 2014) (“Harley-Davidson reserved the right to change prices, but, in doing so, it was obligated to act in good faith. When an express contract provision allows a party to exercise some discretion, that party is obligated to exercise its discretion in good faith.”) (citing *Damabeh v. 7-Eleven, Inc.*, No. 12-CV-1739-LHK, 2013 WL 1915867, at *6 n.4 (N.D. Cal. 2013)).

230. RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS *supra* note 227.

231. In the sample of cases surveyed by the Restatement of the Law of Consumer Contracts, courts rejected modifications in almost 40 percent (38 of 97) of the cases.

232. RESTATEMENT OF THE LAW OF CONSUMER CONTRACTS *supra* note 227.

233. *See e.g.,* *Rodman v. Safeway Inc.*, No. 11-cv-03003-JST, 2015 U.S. Dist. LEXIS 17523, at *10 (N.D. Cal. Feb. 12, 2015) (“Even if a customer’s continued use of a service could be considered assent to revised terms, ‘such assent can only be inferred after [that customer] received proper notice of the proposed changes.’”) (quoting *Douglas v. U.S. Dist. Court for Cent. Dist. Of Cal.*, 495 F.3d 1062, 1065 (9th Cir. 2007) (alteration in original); *Douglas*, 495 F.3d at 1066 (“Even if Douglas’s continued use of Talk America’s service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes.”)).

suffice.²³⁴ Similarly, posting the changes on a remote webpage or including them in an inconspicuous hyperlink obscured with many other links would not satisfy the requirement for proper notice.²³⁵

Furthermore, even if the modification satisfies these requirements and replaces the original contract, there is still considerable value in accessing the original contract and tracking the changes the firm made. Watchdogs, consumer organizations, the media, policymakers, regulators, and academics may all wish to access and investigate previous versions of consumer form contracts. Contractual archives would contribute valuable intelligence for monitoring and supervision agencies, which may indicate which practices or industries merit vigilance and prioritizing.²³⁶ All in all, exploring contractual modifications can highlight or expose important trends and trajectories, which studying specific (current) contracts in isolation cannot reveal. Such trends can pertain, for example, to how firms structure their dispute resolution processes (mandated arbitration, jury waivers, class action limitations, forum selection clauses); the changes in length and complexity of contracts throughout the year; the ways firms respond to case law, and much more.

To sum up, there are legitimate justifications to ensure access to previous consumer form contract versions. First and foremost, earlier versions may be legally binding and relevant where a contract modification does not fulfill all the legal requirements. Moreover, consumers may wish to compare revised terms with old ones in deciding whether to continue their relationships with the

234. See e.g., *Murray v. Grocery Delivery E-Services USA Inc.*, 460 F. Supp. 3d 93, 98 (D. Mass. 2020) (“[T]he supposed notice was not notice at all [It] was given by a one-line statement at the bottom of the email”). See also *Martin v. Comcast*, 146 P.3d 380, 389 (Or. Ct. App. 2006) (rejecting a modification included in bill stuffers since consumers were not provided with sufficient notice); *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 575 (Fla. Dist. Ct. App. 1999) (rejecting a modification sent as an insert with the customer’s bill, finding it unconscionable).

235. See e.g., *Grosvenor v. Qwest Corp.*, 854 F. Supp. 2d 36 1021, 1034 (D. Colo. 2012) (“[T]he Court is not convinced that a simple requirement that Qwest post any changes it makes to its agreement to a remote webpage is material.”); *In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1066 (D. Nev. 2012) (“A party cannot assent to terms of which it has no knowledge or constructive notice, and a highly inconspicuous hyperlink buried among a sea of links does not provide such notice.”).

236. See also *supra* note 139 (noting the CFPB’s ability to use data from a registry of contract terms to identify risks that terms and conditions pose to consumers and prioritize and scope regulatory measures).

firm or comprehend new risks, rights, and obligations. Finally, previous contractual versions have value beyond the particular case, serving diverse stakeholders that monitor, scrutinize, and report on possible trajectories and trends, and discipline firms' behavior.

CONCLUSION

Giant websites often declare that they are committed to the principle of transparency.²³⁷ This Article, however, reveals that such websites too often utilize the benefits of online contracting yet apply nontransparent contractual practices. These practices obfuscate the contents of their standard form agreements and facilitate what this Article dubs "hidden contracts."²³⁸

Hidden contracts undermine access to justice while harming the most vulnerable consumers. Such contracts reduce consumers' ability to assess the contracting parties' rights and obligations and make informed decisions about potential disputes and grievances.²³⁹ Hidden contracts prevent consumers from making informed decisions about insisting on their rights, complaining about firms, sharing their experiences online, and bringing their cases to court. This uncertainty may increase the suppliers' incentive to breach their contracts at the expense of consumers.²⁴⁰ Furthermore, hidden contracts also impede the ability of other interested parties to study consumer contracts, identify concerning trends, monitor firms, and address possible regulatory loopholes.²⁴¹

This Article focused on the contractual practices of 100 of the most popular websites. These websites are rather heterogenous and govern practical aspects in the everyday lives of billions of consumers.²⁴² Given the importance of these websites and how the online sphere rules much of our lives, future research could examine upscaling and broadening our analysis. We believe that much of our examination may apply to additional documents, including precontractual promises, risk disclosures, consent forms,

237. See discussion *supra* notes 12-14 and accompanying text.

238. See discussion *supra* Section II.C.

239. See discussion *supra* Section I.B.

240. See *id.*

241. See discussion *supra* Section IV.D (noting the potential interest of multiple stakeholders in previous version of consumer stand form contracts).

242. See discussion *supra* Section II.A.

privacy agreements, behavioral policies, and codes of conduct. At the same time, we also acknowledge the limitations of our sample. There are many types of consumer form contracts, including offline contracts, and our sample may not capture them all. We thus hope that future research will shed further light on the prevalence, danger, implications, mechanics, and regulation of hidden contracts.

As a first step, and bearing in mind the ways technology eases and facilitates information sharing and retention, we suggest introducing a contract transparency duty.²⁴³ According to this proposal, firms would (1) supply copies of contracts to consumers shortly after consumers accept them; (2) maintain previous versions of their consumer form contracts on their websites; and (3) provide consumers with copies of the original contracts they accepted whenever consumers request them, charging merely nominal fees.

Admittedly, a transparency duty cannot guarantee a fair overall market equilibrium. Nonetheless, it would mark a considerable step toward empowering consumers, improving access to justice, materializing the untapped potential of transparency, and more justly distributing the benefits of the online environment.

243. See discussion *supra* Section III.

APPENDIX A: SAMPLE WEBSITES
(ALPHABETICALLY LISTED BY COLUMN)

| | | |
|---------------------------|--------------------------|---------------------------|
| 1. adobe.com | 35. genius.com | 69. sears.com |
| 2. alamy.com | 36. github.com | 70. shutterstock.com |
| 3. alibaba.com | 37. glassdoor.com | 71. simplyhired.com |
| 4. aliexpress.com | 38. goodhousekeeping.com | 72. soundcloud.com |
| 5. amazon.com | 39. goodreads.com | 73. spotify.com |
| 6. bbc.com | 40. google.com | 74. springer.com |
| 7. bestbuy.com | 41. homedepot.com | 75. stackexchange.com |
| 8. bloomberg.com | 42. houzz.com | 76. stackoverflow.com |
| 9. britannica.com | 43. imdb.com | 77. tandfonline.com |
| 10. businessinsider.com | 44. indeed.com | 78. target.com |
| 11. buzzfeed.com | 45. insider.com | 79. thefreedictionary.com |
| 12. buzzfile.com | 46. instagram.com | 80. theguardian.com |
| 13. cambridge.org | 47. issuu.com | 81. tiktok.com |
| 14. cbsnews.com | 48. istockphoto.com | 82. time.com |
| 15. chamberofcommerce.com | 49. jstor.org | 83. trip.com |
| 16. chron.com | 50. latimes.com | 84. tripadvisor.com |
| 17. cnbc.com | 51. linkedin.com | 85. tumblr.com |
| 18. cnn.com | 52. manta.com | 86. twitter.com |
| 19. costco.com | 53. merriam-webster.com | 87. usnews.com |
| 20. cylex.us.com | 54. microsoft.com | 88. walmart.com |
| 21. dailymail.co.uk | 55. npr.org | 89. washingtonpost.com |
| 22. dailymotion.com | 56. nypost.com | 90. wayfair.com |
| 23. deviantart.com | 57. nytimes.com | 91. webmd.com |
| 24. dreamstime.com | 58. oup.com | 92. weebly.com |
| 25. ebay.com | 59. pinterest.com | 93. wikihow.com |
| 26. espn.com | 60. popsugar.com | 94. wordpress.com |

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|--------------------|-----------------------|-----------------------|
| 27. etsy.com | 61. quizlet.com | 95. yahoo.com |
| 28. expedia.com | 62. quora.com | 96. yellowpages.com |
| 29. facebook.com | 63. redbubble.com | 97. yelp.com |
| 30. fandom.com | 64. reddit.com | 98. youtube.com |
| 31. flickr.com | 65. redfin.com | 99. zillow.com |
| 32. forbes.com | 66. researchgate.net | 100. ziprecruiter.com |
| 33. foursquare.com | 67. reuters.com | |
| 34. gamespot.com | 68. sciencedirect.com | |

