

DARK CONTRACTS

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Abstract: Millions of consumers are routinely subject to non-transparent consumer contracts that undermine fundamental contract law notions. Such contracts leave consumers uninformed and disempowered, encourage unethical behavior, and undercut the ability of legal and extralegal forces to discipline firms. This Article develops a new holistic framework for understanding these opaque consumer contracts. To conceptualize the various non-transparent ways in which firms use consumer contracts, the Article develops the notion of “Dark Contracts.”

Part I of this Article explains what Dark Contracts are. It delineates how firms design and employ non-transparent tools at almost every possible contractual juncture. Part II places the problem of Dark Contracts in a wider context, arguing that the sum of these non-transparent components is greater than its parts. Dark Contracts not only create pockets of non-transparency, but also produce an *in terrorem* effect. Dark Contracts harm consumers and emasculate the ability of institutional actors to scrutinize firms’ use of power. Such Contracts also interfere with the market’s ability to offer effective reputational systems that discipline firms and facilitate unethical behavior. Part III calls for introducing transparency-related concepts to the law of consumer contracts. It explains the potential and limitations of utilizing transparency principles in policing consumer contracts. It further argues that policymakers should design such principles to (1) better scrutinize firms’ practices; (2) empower consumers to make better-informed decisions; and (3) ensure that firms’ unethical contractual behavior is not the norm.

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INTRODUCTION

Consumers are frequently unaware of important contractual aspects and realities pertaining to their agreements with businesses. A significant part of this ignorance stems from firms' tendency to utilize harmful, non-transparent contractual tools and practices. This Article argues that these non-transparent tools and practices create "Dark Contracts,"¹ which harm consumers, courts, regulators, and other disciplining and monitoring forces.² In light of the multiple harms stemming from Dark Contracts, this Article calls for the introduction of transparency-related principles into the law of consumer contracts.

Contract law assumes that contracting parties are familiar with their contracts. Being acquainted with the contract is a prerequisite for informed consent and efficient contracting. If one wishes to rely on contracts and advance core goals—autonomy, trust, ability to plan, utility maximization, collaboration, self-expression, justice in exchange, or empowerment³—awareness of the contractual arrangements, scope, and meaning is vital.

In the domain of business-to-consumer (B2C) markets, the law attempts to enhance informed contracting by imposing various disclosure duties. At times, disclosures pertain to a product's attributes, such as nutritional information.⁴ At other times, disclosure duties address specific contractual aspects, such as disclaimers.⁵ Contract law scholars follow suit and suggest ways to

¹ Cf. Arunesh Mathur, Gunes Acar, Michael J. Friedman, Elena Lucherini et al., *Dark Patterns at Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2019, at 1, 1 (using the term "[d]ark patterns" to refer to online interface design choices that manipulate users).

² See *infra* Parts I–II and accompanying text.

³ See, e.g., Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 761 (2016) (viewing contract law as an empowerment mechanism); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1446–74 (2004) (advancing a collaboration framework in contract law); Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003) (discussing pluralist theories that address values such as efficiency, fairness, good faith, and autonomy).

⁴ See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301–399i (granting the Food and Drug Administration (FDA) authority to oversee the safety of certain products); 21 C.F.R. § 101.9 (2022) (providing regulations regarding disclosures on the nutritional labeling of food).

⁵ For instance, U.C.C. § 2-316(2) (AM. L. INST. & NAT'L CONF. COMM'RS ON UNIF. STATE L. 2022) requires warranty disclaimers to be "conspicuous." As another example, the Federal Trade Commission's Used Motor Vehicle Trade Regulation Rule requires used car dealers to alert customers to the risks of relying on oral promises. See 16 C.F.R. § 455.4 (2022).

shape disclosures adequately.⁶ Contract law also features a “duty to read,” which holds parties accountable for the contracts they accept.⁷

Despite these efforts, consumer standard form contracts repeatedly surprise consumers. To begin with, consumers are unaware of the contract’s content. Consumers do not read form contracts,⁸ which employ language beyond their literacy levels.⁹ Stealthy contractual changes, which consumer contracts facilitate, frequently surprise consumers.¹⁰ Additionally, consumers regularly rely on sellers’ oral representations, which firms recurrently negate in the fine print.¹¹

Consumers are similarly unaware of how firms discriminate among consumers. For instance, firms may insist on strict contractual language with some consumers but not others.¹² Furthermore, consumers are sometimes surprised by unforeseen and abrupt termination mechanisms.¹³ Moreover, consumers are largely unaware of the multiple tools that firms use to dissuade consumers from insisting on their rights or airing their grievances.¹⁴ This ignorance is a barrier to justice when a dispute arises *ex post*. It also results in an inability to properly evaluate firms’ reputations and the risks their contracts imply *ex ante*.

This Article argues that these unpleasant surprises have an astute and nuanced common denominator: contractual non-transparency and unwarranted obfuscation.¹⁵ As this Article demonstrates, firms employ numerous non-transparent contractual tools, mechanisms, and practices. This non-transparency significantly contributes to consumer exploitation, and it casts serious doubt on the efficacy and fairness of consumer contracts.

⁶ See, e.g., Melvin A. Eisenberg, *Disclosure in Contract Law*, 91 CALIF. L. REV. 1645, 1649–56 (2003) (developing a so-called “Disclosure Principle” while striking a balance between multiple considerations in favor of and against disclosures).

⁷ See, e.g., *Rosenfeld v. JPMorgan Chase Bank, N.A.*, 732 F. Supp. 2d 952, 965 (N.D. Cal. 2010) (“Plaintiff has a duty to read the terms of a contract before signing.” (first citing *Fields v. Blue Shield of Cal.*, 163 Cal. App. 3d 570, 578 (1985); and then citing *Emp. Painters’ Tr. v. J&B Finishes*, 77 F.3d 1188, 1192 (9th Cir. 1996)); *Liggatt v. Emps. Mut. Cas. Co.*, 46 P.3d 1120, 1125 (Kan. 2002) (“A party to a contract has a duty to read the contract before signing it . . .”); *Priore v. State Farm Fire & Cas. Co.*, No. 99692, 2014 WL 811776, at *3 (Ohio Ct. App. Feb. 27, 2014) (“A court presumes that the parties’ intent is reflected in the language that is found in the policy.”).

⁸ 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, 3 (2014) (finding that only one or two of every one thousand online consumers access End User License Agreements (EULAs)).

⁹ See *infra* Section I.A and accompanying text.

¹⁰ See *infra* Section I.C and accompanying text.

¹¹ See *infra* Section I.F and accompanying text.

¹² See *infra* Section I.B and accompanying text.

¹³ See *infra* Section I.E and accompanying text.

¹⁴ See *infra* Section I.D and accompanying text.

¹⁵ For an analysis of the various dimensions of non-transparency see *infra* Subsection II.A.1 and accompanying text.

To be sure, commentators have long complained about consumer contracts and the degradation of consumer rights.¹⁶ Some have also observed that firms “enact” laws without being subject to the checks and balances of law-making when using standard form contracts.¹⁷ It is hard to conceptualize, however, the actual magnitude of this problem, its various facets, its extensive yet nuanced ramifications, and how to tackle them. Using a transparency lens, this Article tackles these challenges. In doing so, it offers a typology of contractual non-transparency along five dimensions: form, substance, behavior, inconsistency, and outcomes.¹⁸

By exploring the phenomenon of non-transparency in consumer contracts, this Article makes three main contributions. The first is conceptual. This Article constitutes the first attempt to offer an express intellectual foundation that brings contractual non-transparency to the forefront. In doing so, the Article collates recent empirical findings regarding firms’ non-transparent practices and places them in a broad framework. Although it is important to focus on specific issues in consumer contracts, such an approach is inherently limited. By connecting the seemingly unconnected dots, the Article sheds light on the aggregated phenomenon of firms’ contractual non-transparency. This synthesis distills the findings of several isolated studies, producing new insights.

The second contribution of this Article is normative-analytical. Here, the Article delineates the far-reaching harms of Dark Contracts. Notably, the Article demonstrates that Dark Contracts do not just hurt consumers—they also injure regulators, courts, enforcement agencies, market watchdogs, market forces, and society overall.

The Article’s third contribution is prescriptive. It explains why and how transparency principles could improve the law of consumer contracts. In essence, transparency systems can create economic, social, and political incentives or environments that advance imperative policy objectives. Accordingly, the Article offers novel instruments and policy guidelines beyond the traditional call for disclosures. It further emphasizes the importance of implementing transparency systems that work in tandem with other legal and extralegal instruments.

¹⁶ For a comprehensive account, see generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013). For a few notable earlier writings, see generally Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151 (1976); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983).

¹⁷ See, e.g., W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 532–33 (1971) (suggesting the creation of an “administrative law” of contracts to control the power of firms in drafting standard form contracts).

¹⁸ See *infra* Section II.A and accompanying text.

The remainder of this Article proceeds as follows. Part I discusses various means and strategies that firms employ to make their contracts and contractual behavior non-transparent. It addresses contract formation, performance, change, disputes, and termination. It also discusses the more general practice of non-transparent representation of consumer contracts and B2C contractual relationships. In light of the practices surveyed in Part I and the insights it offers, Part II moves to conceptualize the problem of transparency.¹⁹ It examines the aggregate effect of firms' non-transparent practices, which is larger than the sum of its parts. It further illustrates how Dark Contracts damage consumers, policymakers, regulatory agencies, courts, consumer organizations, reputation systems, and society at large. Part III then assesses the advantages and disadvantages of applying transparency concepts to consumer contracts, while sketching out policy guidelines and recommendations. Concluding remarks follow.

I. DARK CONTRACTS IN ACTION

Examining detailed empirical findings, this Part surveys diverse areas of contractual non-transparency practices. Specifically, it demonstrates how firms consistently utilize powerful non-transparent practices to the detriment of consumers. Although the domains of non-transparency that this Part studies are not all-encompassing, the discussion provides multiple focal facets of Dark Contracts.

Section A of this Part addresses contractual language. It illustrates how firms draft consumer contracts that are far past the literacy level of the average consumer. It also discusses the potentially counterproductive practice of highlighting terms by using all caps. Thereafter, Section B discusses contractual performance. It focuses on various non-transparent ways in which firms discriminate among consumers and treat them selectively. Consequently, Section C addresses contractual change. It shows how firms employ non-transparent unilateral change-of-terms clauses, allowing firms to make sneaky changes to existing contracts.

Next, Section D explores the non-transparent practices that firms use once a dispute arises. It first addresses formal dispute mechanism terms, such as mandatory arbitration and class action waivers. It then discusses less structured mechanisms, namely firms' internal complaints processes. Subsequently, Section E considers the non-transparency of termination practices. It reviews the

¹⁹ We choose to first look at some trees before attending to the forest. Indeed, our endeavor is inductive in nature. We aim to clarify and define the concept and scope of transparency through the observation of firm practices. As we discuss below, transparency is an elusive concept, and we use the term Dark Contracts metaphorically.

evidence suggesting that firms terminate consumers without providing adequate explanations or allowing consumers a voice in the process.

Finally, Section F considers how firms are often non-transparent in the promises and representations they make. First, firms make oral promises that greatly influence consumers, yet negate them in the fine print. Second, firms often misrepresent the nature of the B2C relationships, presenting them as potentially deep, caring, and meaningful. Such relationships, however, are based on market exchange and should not be framed as social or communal. Third, firms lure consumers by heightening benefits and underplaying legal risks. Typically, the benefits are conspicuous and vivid, whereas risks and liability limitations are in the fine print.

A. Contractual Language & Design

Many view the development of language as the most outstanding achievement of humanity.²⁰ It is hard to imagine effective communication without the use of language. The mere use of language, however, does not guarantee efficacious communication.

In the context of consumer contracts, scholars have warned that the language firms employ in their standard form contracts is incomprehensible and abstruse.²¹ If firms employ obscure language loaded with legalese, consumers may be unable, or legitimately unwilling, to read these contracts.²² The same is true if firms employ overly lengthy contracts;²³ hide valuable or surprising terms in an onslaught of words;²⁴ or present contractual information in awk-

²⁰ For a book-length discussion, see generally DANIEL EVERETT, *HOW LANGUAGE BEGAN: THE STORY OF HUMANITY'S GREATEST INVENTION* (2017).

²¹ For two examples, see generally Jeffrey Davis, *Protecting Consumers from Overdisclosure and Gobbledygook: An Empirical Look at the Simplification of Consumer-Credit Contracts*, 63 VA. L. REV. 841 (1977) (studying and advocating for the creation of simplified consumer-credit contracts to aid consumers); Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309 (1986) (“The average consumer knows that he probably will be unable to fully understand the dense text of a form contract, either term-by-term or as an integrated whole. Even experts often can’t understand such text.”).

²² Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 243 (1995) (“Faced with preprinted terms whose effect the form taker knows he will find difficult or impossible to fully understand, . . . a rational form taker will typically decide to remain ignorant of the preprinted terms.” (citing Michael L. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 600 (1990))).

²³ Cf. Claire A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words?*, 79 CHI.-KENT L. REV. 889, 894 (2004) (characterizing American business contracts as “very long” with “a great deal of ‘legalese’”).

²⁴ See, e.g., David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 WM. & MARY L. REV. 133, 154–55 (2010) (explaining how and why fine print may benefit consumers who bother to read form contracts). For one attention-grabbing media story see Josh Hafner, *Woman Wins \$10,000 for Reading Fine Print on Her Insurance Policy*, USA TODAY, <https://www.usa>

ward and non-user-friendly forms.²⁵ Such practices prevent consumers from reading and understanding their contracts and, thus, undermine contractual transparency.

A string of studies confirms that consumer contracts are generally unreadable for the average consumer. These studies use established linguistic tools to measure a text's readability in their analysis. Simply put, these tools determine text complexity by measuring two factors: the average sentence length and the average number of syllables per word. The underlying premise of these (and other) linguistic tests is that, on average, unreadable texts contain long sentences and multi-syllable words.

One study measured the readability levels of online EULAs.²⁶ The study found that EULAs were challenging to read. In the authors' words, "EULAs are comparable to articles in scientific journals."²⁷ Another study examined social media Terms of Use (TOUs).²⁸ Here again, the findings indicated the language level of these TOUs to be considerably beyond the understanding of the typical consumer.²⁹

More recently, we examined the readability of a relatively large and heterogeneous sample of 500 popular online contracts.³⁰ We found most of them unreadable for the average consumer. Alarming, 498 (99.6%) of our sample's 500 contracts received a lower readability score than the recommended score.³¹ Likewise, the average sentence length in 70.4% of the sampled contracts was

today.com/story/news/nation/2019/03/07/woman-reads-fine-print-wins-10-000-insurance-company-contest/3091831002/ [https://perma.cc/UW4T-584N] (Mar. 7, 2019) (reporting about a \$10,000 award given to an insured woman who read her policy, purely for reading the policy). Interestingly, drafters of insurance contracts cannot surprise insureds and include terms that contradict their reasonable expectations. *See, e.g.*, *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 172 (Cal. 1966) (discussing the doctrine of reasonable expectations); *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 394–95 (Ariz. 1984) (en banc) (same); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 120–24 (Cal. Ct. App. 1982) (discussing the doctrine of unfair surprise).

²⁵ *Cf.* Rob Waller, *Contract Design for Humans: Preventing Cognitive Accidents* 24–25 & tbl.4 (Simplification Centre, Technical Paper No. 16, 2020), https://uploads-ssl.webflow.com/5c06fb475dbf1265069aba1e/603186a620ef72043752d779_SC16HumanContracts.pdf [https://perma.cc/7GN9-JP9L] (explaining how drafters can better design their contracts to ensure that people understand them properly).

²⁶ *See generally* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240 (2013) (studying the readability of software license agreements).

²⁷ *Id.* at 253.

²⁸ *See generally* Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431 (2014) (evaluating the readability of social media TOUs).

²⁹ *Id.* at 1456.

³⁰ Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2256 (2019).

³¹ *Id.* at 2277–79. The recommended score was sixty. *Id.* at 2277.

longer than the recommended *limit* of twenty-five words per sentence.³² Another recent study concerning the readability of privacy policies in the European Union observed somewhat similar results.³³ Here, too, almost all the privacy policies tested—that is, 209 out of 216 (96.76%)—received a lower readability score than the recommended one.³⁴ These findings might be of particular interest given key European legislation—the General Data Protection Regulation (GDPR)—that requires privacy policies to use plain language.³⁵

Another facet of non-transparency in consumer contracts relates to their design. Consumer contracts are not user-friendly, and their design is not user-centered.³⁶ Consider, for instance, the use of all caps clauses. A recent empirical study found that all caps terms are prevalent, with all caps paragraphs appearing in approximately seventy-seven percent of consumer contracts.³⁷ The study found, however, that such clauses do not improve consumers' understanding and awareness.³⁸ Worryingly, the study also found that all caps clauses may even harm older consumers by reducing their level of comprehension.³⁹ Employing this Article's terminology, although the all caps practice has the allure of enhancing transparency, it actually undermines transparency.

Long, complex sentences and all caps clauses are not the only means of reducing the transparency of contractual language and design. Firms can augment non-transparency by using fine and illegible print, making it harder for the consumer to read. Similarly, firms repeatedly use misleading or uninformative subheadings, making it harder for consumers to decipher the terms' meaning.⁴⁰ Furthermore, firms often make the original contract inaccessible after unilaterally modifying it, so consumers cannot view the original version they accepted.⁴¹ Outside of these technical means, firms sometimes utilize “wolf in

³² *Id.* at 2279–80.

³³ Shmuel I. Becher & Uri Benoliel, *Law in Books and Law in Action: The Readability of Privacy Policies and the GDPR*, in CONSUMER LAW AND ECONOMICS 179, 179 (Klaus Mathis & Avishalom Tor eds., 2021).

³⁴ *Id.* at 194–95. Again, the recommended score was sixty. *Id.* at 194.

³⁵ *Id.* at 183.

³⁶ For an interesting analysis, see generally Waller, *supra* note 25.

³⁷ Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862, 874 (2020).

³⁸ *Id.* at 893.

³⁹ *Id.*

⁴⁰ *Cf.* Waller, *supra* note 25, at 24–25 (discussing how contract drafters can optimize design to enhance comprehension and readability). See generally Uri Benoliel & Shmuel I. Becher, *Messy Contracts* (forthcoming) (on file with authors) (finding that many consumer form contracts contain inadequate headings and lack tables of contents).

⁴¹ For instance, at the time of writing, Amazon states that it changed its Conditions of Use on September 14, 2022, without presenting or providing a link to the previous version(s). See *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> [<https://perma.cc/7BX5-VRNX>] (Sept. 14, 2022) (presenting Amazon's latest Conditions

sheep's clothing" contracts, using humoristic language that may cover up unfair contract clauses.⁴² All of these techniques can make it harder for consumers to exercise adequate vigilance, become aware of the contract and understand its content.

B. Contractual Performance

This Section deals with the performance stage. In essence, it argues that firms are non-transparent in how they treat consumers and perform their contracts. Particularly, it addresses the concern that firms non-transparently discriminate among consumers in deciding whether to follow the contractual language.⁴³ That is, firms may keep to the letter of the contract with some (vulnerable) consumers. They will reveal leniency, however, toward more assertive or influential consumers without making such practices public and transparent.

Consider the following illustrative example. A hotel with a 10:30 A.M. check-out policy stipulates in its terms and conditions that guests will be charged an extra amount in case of lateness. The discrimination argument is that the hotel may penalize some late guests while waiving the penalty for others. The concern here is that the firm may exercise its penalizing power against weak or marginalized consumers while refraining from harshly treating privileged or assertive consumers.⁴⁴ Consumers are unlikely to know about this practice and its basis.

Another illustration may be an egregious extra cost that communication firms charge for internet roaming services. Here, too, assertive consumers might argue their way out of these charges, whereas introverted, hesitant, or naïve consumers may end up complying with the firms' unforgiving tariffs. As another example, social media platforms can also often discriminate among

of Use without a link to prior version(s)); see also Shmuel I. Becher & Uri Benoliel, *Hidden Contracts* (forthcoming) (manuscript at 19–23) (on file with authors) (finding that the majority of popular online websites change their terms without making previous contractual versions available to consumers).

⁴² For further information about the use of these drafting techniques and some of their underlying motivations, see David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1421–41 (2018).

⁴³ Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 73–74, 76–79 (2019). There is also the concern that firms discriminate among consumers ex ante, offering different terms to different consumers. Due to the paucity of systematic empirical data, however, we do not tackle this concern.

⁴⁴ A possible counterargument here is that if consumers know that there is discretion in enforcement, it might attract bad-faith consumers. Those consumers may behave opportunistically and take advantage of this flexibility. See Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28 (2006) (discussing the use of one-sided terms as a means to weed out opportunistic parties). We believe that firms can design discretion mechanisms to circumvent this concern, and we do not agree that this concern legitimizes opaque discriminatory practices.

consumers at the performance stage. Here, a platform may turn a blind eye toward violations of its policies by attractive users while strictly imposing its policies on less popular users. Along these lines, the media recently alleged that Facebook employed a program known as XCheck, which gave millions of more influential users greater leeway to post with less moderation.⁴⁵

In these and other instances, such non-transparency can reduce consumers' ability to evaluate the contract and underlying firm. It also weakens consumers' ability (as a class) to insist upon their rights, while aggravating social inequalities.⁴⁶ Yet, firms have an incentive to be non-transparent about their discriminatory practices. Non-transparency helps firms extract benefits from weak consumers who do not realize that firms discriminate against them. Simultaneously, it allows firms to appear generous and understanding by treating preferred consumers tolerantly. By doing so non-transparently, firms avoid sparking a public scandal that can threaten their reputation.⁴⁷

Recent empirical work demonstrates, once again, that these are not purely academic concerns. One study examined the realm of return policies, documenting firms' responses to testers who returned non-defective goods to stores.⁴⁸ The study focused on stores with formal return policies that did not obligate sellers to accept said returns. Nonetheless, a significant proportion of sellers were willing to forgo their formal return policies and accept returns.⁴⁹

The pro-consumer departures from the official return policies in this study followed a consumer request or a formal complaint. The literature suggests that assertive and vocal consumers who make such requests and complaints are also likely to be wealthy and well educated.⁵⁰ Hence, empowered consumers are likely to benefit from such selective enforcement while being cross-subsidized by marginalized consumers, who tend not to insist on their rights. Indeed, the study's findings indicated that retailers enforced their return policies differentially against different customers: sellers were more lenient toward white consumers than African-American consumers.⁵¹

⁴⁵ See Jeff Horwitz, *Facebook Says Its Rules Apply to All. Company Documents Reveal a Secret Elite That's Exempt*, WALL ST. J. (Sept. 13, 2021), <https://www.wsj.com/articles/facebook-files-xcheck-zuckerberg-elite-rules-11631541353> [<https://perma.cc/G7EL-SWU6>].

⁴⁶ For an argument that rising social inequities may legitimize the use of contract law to tackle inequality, see generally Kevin E. Davis & Mariana Pargendler, *Contract Law and Inequality*, 107 IOWA L. REV. 1485 (2022).

⁴⁷ For a general discussion, see Becher & Zarsky, *supra* note 43, at 85–87.

⁴⁸ Meirav Furth-Matzkin, *Discriminatory Enforcement of Consumer Contracts: Evidence from the Retail Market 23–24* (Oct. 2022) (unpublished manuscript), https://www.law.nyu.edu/sites/default/files/Furth_Discriminatory_Enforcement.pdf [<https://perma.cc/67JF-UUM7>].

⁴⁹ *Id.* at 12 & fig.1.

⁵⁰ Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012).

⁵¹ Furth-Matzkin, *supra* note 48 (manuscript at 27).

Yet another study found evidence of selective treatment in the execution of residential mortgage contracts.⁵² The study, which tracked data from a large nationwide sample, found that mortgage servicers chose not to exercise their right to foreclose on more than forty percent of defaulting borrowers.⁵³ Notably, the study documented a disturbing selective enforcement pattern, with a disproportionate rate of foreclosures on borrowers in poor neighborhoods.⁵⁴ Firms offered some defaulting borrowers, predominantly wealthier ones, alternative paths to foreclosure. At the same time, other borrowers, primarily those from more impoverished neighborhoods, were far more likely to face foreclosures following a default.⁵⁵

Once again, we submit that many consumers are probably unaware of these non-transparent practices, which might breach the duty to perform in good faith.⁵⁶ This non-transparency makes it harder for consumers to grasp critical aspects of the contractual exchange. It also reduces consumers' capacity and willingness to insist on their rights. If firms successfully employ discriminatory practices to silence (assertive) consumers, third parties are less likely to inspect firms' behavior.⁵⁷ After all, those assertive and wealthy consumers are more likely to perceive firms' harmful behavior and related problems.⁵⁸ They are also more likely to complain to consumer organizations, protest in the media, initiate litigation against injurious firms, or pressure policymakers to scrutinize firms.⁵⁹

⁵² Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 825 (2022).

⁵³ *Id.* at 857 (noting that "42% of defaulted loans never end in foreclosure").

⁵⁴ *Id.* at 857–61.

⁵⁵ *Id.* at 860.

⁵⁶ *Cf.* Carma Devs. (Cal.), Inc. v. Marathon Dev. Cal., Inc., 826 P.2d 710, 726 (Cal. 1992) (en banc) ("The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another."); *Ernie Haire Ford, Inc. v. Ford Motor Co.*, 260 F.3d 1285, 1291 (11th Cir. 2001) (noting that contracting parties operating in good faith "cannot capriciously exercise discretion accorded it under a contract so as to thwart the contracting parties' reasonable expectations").

⁵⁷ *See infra* Sections II.B–II.C.

⁵⁸ *See, e.g.,* Arthur Best & Alan R. Andreasen, *Consumer Response to Unsatisfactory Purchases: A Survey of Perceiving Defects, Voicing Complaints, and Obtaining Redress*, 11 LAW & SOC'Y REV. 701, 728–29 (1977) ("At the problem perception stage, individuals of low socioeconomic status notice fewer problems.").

⁵⁹ *Id.* at 729 ("[V]oiced complaints overrepresent problems . . . that are experienced by high socioeconomic status households."); *cf.* 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, 929 (2020) (discussing consumers deemed "nudniks," who disproportionately pursue redressive action in situations where most consumers do not).

C. Contractual Change

Another critical occurrence that often takes place during the B2C relationship is contractual modification. Firms frequently change terms in their consumer contracts, even after consumers accept them.⁶⁰ This Section focuses on the non-transparent contractual change-of-terms mechanisms that firms utilize.

The behavioral literature demonstrates that people are disproportionately sensitive to change. The psychological literature uses the term “status quo bias” to illustrate that people largely prefer the current state of things and are generally averse to change.⁶¹ Negative change, generally comparable to a loss, exacerbates this sensitivity. In behavioral economics literature, this is known as loss aversion. Loss aversion explains why individuals perceive a loss as more considerable than an equivalent gain.⁶²

Theoretically, contractual changes are likely to disrupt the contractual status quo. When the change harms consumers’ interests, consumers may view it as a loss. Given people’s sensitivity to change in general, and loss in particular, firms have a clear incentive to be non-transparent about the contractual changes they introduce to their contracts.

In a recent study, we found exactly that.⁶³ Of five hundred popular online consumer contracts, the vast majority adopted non-transparent change-of-terms clauses.⁶⁴ For starters, 479 contracts included a change-of-terms clause that authorized the firm to change its contract.⁶⁵ Of these 479 change-of-terms clauses, 472 (98.54%) did not require consumers’ active assent.⁶⁶ Moreover, 478 of these 479 (99.79%) clauses did not require the firm to solicit feedback from consumers before making the change.⁶⁷ Additionally, none of the clauses we studied limited the time during which firms could modify their contracts.⁶⁸

⁶⁰ For a few interesting examples, see generally *Pisarrri v. Town Sports Int’l, LLC*, No. 18 Civ. 1737, 2019 WL 1245485 (S.D.N.Y. Mar. 4, 2019) (regarding unilateral, no-notice changes to a gym membership program); Complaint, *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (D. Utah Dec. 18, 2013) (regarding a firm’s addition of a non-disparagement clause to its Terms of Sale and Use more than three years after the customer did business with the company); *Collins Fin. Servs. v. Vigilante*, 915 N.Y.S.2d 912, 918 (Civ. Ct. 2011) (regarding changes to a consumer credit agreement). See also David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608–09 (2010) (discussing unilateral amendments of procedural contract terms).

⁶¹ William Samuelson & Richard Zeckhauser, *Status Quo Bias in Decision Making*, 1 J. RISK & UNCERTAINTY 7, 8 (1988).

⁶² Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSPS. 193, 194 (1991).

⁶³ Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA. L. REV. 657, 657 (2021).

⁶⁴ *Id.* at 657–58.

⁶⁵ *Id.* at 681–82.

⁶⁶ *Id.*

⁶⁷ *Id.* at 682.

⁶⁸ *Id.*

Furthermore, 476 (99.37%) of these clauses allowed the firm to do so at will, without limiting the legitimate causes that may lead to change.⁶⁹

Most alarmingly, these prevalent change-of-terms clauses facilitated hidden changes, lacking features that can guarantee reasonable levels of transparency.⁷⁰ For instance, 450 of 479 (93.95%) clauses did not require firms to inform their consumers individually about the change.⁷¹ Moreover, 454 of these clauses (94.78%) did not require that firms communicate the change to consumers via a publicly accessible platform.⁷² Disturbingly, all of these unilateral change clauses did not explicitly require firms to adequately notify consumers, personally or publicly, about the substance (rather than the mere occurrence) of any modification.⁷³

In conclusion, in many markets, firms employ vastly non-transparent contractual mechanisms.⁷⁴ These mechanisms allow unilateral changes of terms without sufficiently informing consumers.⁷⁵ Firms can virtually make any change they wish to their contracts, for whatever reason and at any time, without properly communicating this change. This reduces consumers' ability to detect unfavorable changes, be informed about their contracts, and make decisions accordingly. It also imposes high costs on consumer organizations and market watchdogs that monitor consumer contracts. Similarly, stealthy non-transparent contractual changes are also less likely to be monitored by legislators, regulators, and the judiciary.

D. Dispute Management

A hallmark of Dark Contracts is their non-transparent approach to dispute resolution and conflict management. The importance and impact of non-transparent dispute-management clauses stem from two key points. First, dispute resolution and conflict management terms impact numerous consumers. Firms' internal processes for handling consumer complaints, which this Section also tackles, similarly pertain to innumerable consumers. Consumers rarely complain to official governmental bodies, but many do engage with sellers

⁶⁹ *Id.*

⁷⁰ *Id.* at 682–83.

⁷¹ *Id.*

⁷² *Id.* at 683.

⁷³ *Id.* Adding insult to injury, most of these terms (444 out of 479, 92.69%) did not grant consumers a cooling-off period following notification about the change in terms. *Id.* at 684–85 & tbl.1.

⁷⁴ In some markets, such as the insurance market, firms cannot easily change their contracts. Limited discretion in firms' contractual changes, however, is the exception, not the norm.

⁷⁵ At times, firms even engage in market research, examining the effect that different presentation forms may have on consumers' propensity to notice the contractual change and pay attention to its details. See generally *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (regarding changes AT&T unilaterally imposed on its customers).

and producers when a problem arises.⁷⁶ Second, as elucidated below, the impact of such terms goes beyond the numerous individuals subject to those terms. Such terms affect consumers as a class, disempowering them and impacting their ability to join forces or learn from others' experiences.⁷⁷ By destabilizing information flows about consumers' dissatisfaction and complaints, firms can weaken the disciplining power of vital reputational mechanisms.

The remainder of this Section proceeds in three steps. The first subsection focuses on the popularity of non-transparent mandatory arbitration and class action waivers in consumer contracts. The second subsection addresses other conflict management aspects that are less prominent in legal and public discourse. Finally, the third subsection explains why all of these conflict management practices are non-transparent and harmful.

1. Mandatory Arbitration and Class Action Waivers

Much ink has been spilled in the debate over mandatory arbitration clauses, jury waivers, class action waivers, and forum selection clauses.⁷⁸ In light of the U.S. Supreme Court's favorable approach to arbitration and class action waiver terms,⁷⁹ some academics and consumer advocates have sounded the alarm concerning consumers' diminishing access to justice.⁸⁰

⁷⁶ See Keith B. Anderson, *To Whom Do Victims of Mass-Market Consumer Fraud Complain?* 3 (May 24, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3852323 [https://perma.cc/WF8Z-S433] (noting that although an extremely small number of consumers complained to government or local authorities, most lodged complaints with parties to the transaction).

⁷⁷ See, e.g., Hila Keren, *Divided and Conquered: The Neoliberal and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 582 (2020) (discussing how arbitration agreements isolate consumers and bring about a sense of powerlessness).

⁷⁸ For a few examples, see generally Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700 (1992) (discussing the potential unfairness and inefficiencies of forum selection clauses); David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57 (2015) (exploring how the abolition of class actions and the shift to arbitration undermines consumers' interests and leads to "extreme repeat players" in the arbitration arena); Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. 1727 (2015) (advocating for the adoption of transparency-related tools in the arbitration realm); Ryan Miller, *Next-Gen Arbitration: An Empirical Study of How Arbitration Agreements in Consumer Form Contracts Have Changed After Concepcion and American Express*, 32 GEO. J. LEGAL ETHICS 793 (2019) (exploring how firms design their arbitration clauses to disadvantage consumers and yet avoid judicial aversion); Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1 (2015) (establishing empirically that consumers do not properly understand the meaning and importance of arbitration agreements).

⁷⁹ For examples of leading cases, see, for example, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343, 352 (2011) (holding that the Federal Arbitration Act preempts California law relating to arbitration agreements and that enforcing arbitrations on a class-action basis is contrary to Congress's legislative intent); *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238–39 (2013) (holding that

The courts' supportive jurisprudence concerning mandatory arbitration and class action waiver clauses in consumer contracts is relatively unique to the United States. For example, in the European Union, the Directive on Unfair Terms in Consumer Contracts regards terms "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration . . ." as unfair.⁸¹ Likewise, in Israel, the law stipulates that a contract term that refers customer disputes to arbitration is presumably unfair.⁸²

The European Union and Israel are not alone in exercising vigilance toward consumer arbitration. In Canada, for instance, the Supreme Court of Canada shows suspicion, if not a degree of hostility, toward mandatory consumer arbitration clauses, significantly limiting their enforceability.⁸³ In New Zealand, arbitration clauses in consumer contracts are enforceable only if the consumer agrees to the term in a "separate written agreement" after certifying that they comprehend the agreement and agree to follow it.⁸⁴

The sympathetic U.S. legal landscape surrounding pro-business arbitration and class action waiver clauses may explain the exceptional prevalence of such terms in consumer contracts. As one study plainly puts it, "[f]orced consumer arbitration clauses are principally a U.S. phenomenon."⁸⁵ By examining the TOUs of social media providers, the study found that U.S.-based social media providers were about three times more likely to employ a mandatory arbitration clause than non-U.S.-based companies.⁸⁶

Other empirical examinations further confirm the pervasiveness of mandated arbitration clauses in consumer contracts. One study estimated that "at

the Federal Arbitration Act does not permit courts to invalidate a contractual waiver of class arbitration even if it would result in costly arbitration); *DIRECTV Inc. v. Imburgia*, 136 S. Ct. 463, 468, 471 (2015) (holding that the Federal Arbitration Act preempts state law and, thus, that reference to state law in an arbitration clause does not require the application of that state law); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1412, 1419 (2019) (holding that courts may not assume consent to class arbitration absent an affirmative contractual basis that points to the party's explicit agreement).

⁸⁰ See *supra* note 78 and accompanying text.

⁸¹ Council Directive 93/13, annex 1(q), 1993 O.J. (L 95) 29, 33 (EC).

⁸² § 4(8), Standard Contracts Law, 5743–1982, LSI 37 6 (1982–83) (Isr.).

⁸³ See, e.g., *TELUS Commc'ns Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, 150–52 (Can.) (finding a mandatory arbitration clause generally unenforceable against consumers under Ontario's Consumer Protection Act, 2002); *Uber Techs. Inc. v. Heller*, 2020 SCC 16, 447 D.L.R. 4th 179 ¶¶ 93–98 (Can.) (finding that Uber's mandatory arbitration clause was subject to Ontario's Arbitration Act, 1991, and invalidating the arbitration clause under the doctrine of unconscionability).

⁸⁴ Arbitration Act 1996, s 11(1)(c)–(d) (N.Z.).

⁸⁵ Thomas H. Koenig & Michael L. Rustad, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341, 341 (2014). Whether this is a result of pro-plaintiff class action litigation outcomes is beyond the scope of this Article.

⁸⁶ *Id.* at 351 ("Only eighteen of the 141 foreign [social networking websites] selected mandatory arbitration—13 percent versus 42 percent of the U.S. providers.").

least 826,537,000 consumer arbitration agreements were in force” in 2018.⁸⁷ This study examined the use of consumer arbitration agreements by the top one hundred largest domestic U.S. companies, as ranked by *Fortune* magazine.⁸⁸ It found that eighty-one of these one hundred companies employed “arbitration agreements in connection with consumer transactions,” and that of these eighty-one firms, seventy-eight also had class action waivers.⁸⁹ Similarly, the Consumer Financial Protection Bureau (CFPB) found that 87.5 percent of the major wireless providers have arbitration obligations in their contracts.⁹⁰ Another empirical study examined one hundred contracts from prominent firms in six different industries.⁹¹ This study found that the frequency of binding arbitration agreements with class actions waivers in the sampled contracts tripled in seven years.⁹²

2. Additional Non-transparent Conflict Management Tools

Firms use various additional conflict-related techniques to reduce their risk exposure, disincentivize consumer action, and keep consumers in the dark. One example is sunset clauses that limit the timeframe during which a consumer can sue the firm.⁹³ Another example is terms that severely limit consumers’ remedies, such as those waiving consumers’ right to recover expectation, consequential, or reliance damages.⁹⁴ Yet another strategy is to require

⁸⁷ 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> [<https://perma.cc/EF86-L6XU>]. The actual number may in fact be significantly higher because this estimate is based on available information pertaining to just a few firms. *Id.*

⁸⁸ *Id.* at 233–34.

⁸⁹ *Id.* at 234.

⁹⁰ See 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). There are, however, considerable variations in the use and frequency of arbitration clauses across sectors. See generally *id.* at 3–79 (discussing the use of arbitration clauses across credit cards, checking accounts, loans, and mobile wireless companies).

⁹¹ Miller, *supra* note 78, at 803.

⁹² *Id.* at 824 (“Over the course of only seven years, the proportion of businesses surveyed that use[d] . . . arbitration agreements almost tripled from 22.3% to 66.7% . . .” (footnote omitted)).

⁹³ *Id.* at 812 (finding that more than 15% of arbitration agreements in the study’s sample also employed sunset clauses).

⁹⁴ See Debra Pogrud Stark, Jessica M. Choplin & Eileen Linnabery, *Dysfunctional Contracts and the Laws and Practices That Enable Them: An Empirical Analysis*, 46 IND. L. REV. 797, 797–98 (2013) (discussing the high prevalence of one-sided remedies provisions in condominium contracts).

that consumers first lodge a complaint with the firm or otherwise follow a “formal complaint process” prior to initiating litigation.⁹⁵

Relatedly, scholars highlight the importance of firms’ internal processes for addressing consumers’ complaints, although there is limited data available on this extensive system of private order.⁹⁶ A recent paper confirms the significance of such internal dispute and complaint processes,⁹⁷ observing that less than three percent of victims of mass-market consumer fraud complained to a government entity.⁹⁸ Nonetheless, no less than thirty percent reported complaining to sellers or manufacturers.⁹⁹

3. A Transparency Outlook

Openness is a fundamental component of fair procedures. Nonetheless, non-transparency is a recurring theme in firms’ dispute and conflict practices. First, many clauses that limit consumers’ access to justice or disincentivize them to sue are buried in dense text or incorporated as part of a (sneaky) contractual change, reducing the likelihood that consumers (or the media and the public) become aware of them.¹⁰⁰ Second, empirical evidence suggests that some of these clauses have exceptionally poor readability scores, making them particularly hard to read and understand. Some scholars have found that arbitration clauses receive substantially poorer readability scores than overall TOUs in contracts, which have low readability scores to begin with.¹⁰¹ Third, empirical evidence suggests that consumers are likely to misunderstand such contractual terms. For example, consumers wrongly assume that mandated

⁹⁵ For one anecdote, see Nancy Kim, *Coinbase’s TOS*, CONTRACTSPROF BLOG (Apr. 14, 2021), https://lawprofessors.typepad.com/contractspof_blog/2021/04/coinbases-tos.html [<https://perma.cc/7HUY-GF2C>] (discussing Coinbase’s dispute resolution process).

⁹⁶ Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 547, 601 (2016).

⁹⁷ Anderson, *supra* note 76, at i.

⁹⁸ *Id.* at 11 tbl.2.

⁹⁹ *Id.*

¹⁰⁰ For one story of a hidden arbitration clause, see Kim, *supra* note 95 (discussing Coinbase’s TOUs and noting that one needs to click twenty-nine times on the “page down” key to view the dispute resolution clause). For examples where firms introduced mandatory arbitration via unilateral contractual changes, see generally *Wainblat v. Comcast Cable Commc’ns, LLC*, No. 19-10976, 2019 WL 5698446 (D. Mass. Nov. 4, 2019) (granting a cable company’s motion to compel arbitration); *Cayanan v. Citi Holdings, Inc.*, 928 F. Supp. 2d 1182, 1208 (S.D. Cal. 2013) (granting a motion to compel separate arbitration against a class of litigants). For an attempt to introduce, unilaterally, mandatory arbitration that led to public backlash, see Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES (Apr. 20, 2014), <http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html> [<https://perma.cc/3MSB-7FF2>].

¹⁰¹ Rustad & Koenig, *supra* note 28, at 1471 (“[T]he social media TOUs’ arbitration clauses are written at a much higher grade level than the overall TOU.”).

arbitration clauses do not preclude them from bringing their case to court.¹⁰² Likewise, laypeople do not seem to comprehend the meaning of limitation-of-remedy clauses.¹⁰³

These realities make the whole dispute resolution mechanism non-transparent for consumers. They also ensure that consumers do not know how firms treat others when disputes arise. Furthermore, they prevent consumers from learning of other disputes, which consumers may find relevant both *ex ante* (when deciding whether to interact with the firm) and *ex post* (when deciding whether to insist on their rights).

There are also deeper, substantive concerns regarding these limitations on consumer access to courts.¹⁰⁴ Arbitration proceedings, for example, are often confidential, inaccessible, and unpublished. As such, they mostly do not reach the public's attention. Likewise, the public is unlikely to know about related settlements between firms and consumers.

Class action waivers are also problematic from a transparency perspective. A class action is generally considered to be among the most transparent forms of consumer litigation.¹⁰⁵ Significantly, “judge[s] must review and approve a proposed class settlements following public notice and a public hearing.”¹⁰⁶ Class action waivers erode this open litigation process.

By channeling consumers' complaints and grievances past the judicial system, firms undermine information flows about their behavior and consumers' dissatisfaction.¹⁰⁷ Consumers, for example, cannot know how many other consumers are disgruntled and for what reasons. Slightly restated: closed and secretive processes prevent consumers from observing valuable quantitative and qualitative data.

Once again, these non-transparent practices do not only harm consumers. Such practices shield courts from systematic exposure to consumers' complaints, which precludes the judiciary from policing firms' misbehavior. Similarly, legislatures are not privy to arbitral proceedings and, thus, only get partial exposure to firms' misdeeds. This diminishes their ability to develop adequate legislation.

¹⁰² Sovern et al., *supra* note 78, at 46–47 & fig.9 (noting that “only 14% of the respondents realized that the contract [with the mandated arbitration clause] banned litigation in court”).

¹⁰³ Stark et al., *supra* note 94, at 799 (reporting on an experiment that indicated “a widespread failure of the participants to understand the impact of this type of clause on their rights after a breach”).

¹⁰⁴ See, e.g., Lampley, *supra* note 78, at 1732.

¹⁰⁵ See Nicholas M. Pace & William B. Rubenstein, *How Transparent Are Class Action Outcomes?*, at v (Rand Inst. for Civ. Just., Working Paper No. WR-599-ICJ, 2008), https://www.rand.org/content/dam/rand/pubs/working_papers/2008/RAND_WR599.pdf [<https://perma.cc/DJG6-QSRK>].

¹⁰⁶ *Id.*

¹⁰⁷ See Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 875 (2019).

Likewise, scholars and the media cannot scrutinize firms' misconduct, or the ways courts and policymakers respond to them. This private ordering system weakens the ability to effectively inspect firms' behavior and generate adequate reputational checks. We return to this issue in more detail in Part II below.¹⁰⁸

E. Contract Termination

Another weighty aspect of the B2C relationship is the way such relationships end. Although the previous Section surveyed non-transparent dispute and conflict resolution strategies that firms adopt, not all bad endings necessarily emanate from conflicts. Another common practice that firms use is consumer termination, which is not a marginal phenomenon.¹⁰⁹ Indeed, firms routinely ban and terminate consumers' use of the firm's services.¹¹⁰

Consumer termination is essential to study for various reasons. Many consumers invest considerably in the products and services that firms offer. Consider, for instance, users of online social media platforms, such as Facebook or Instagram, dating apps, or gaming services. These users are likely to invest significant effort into developing their profiles, sharing information, connecting with others, building reputations, and accumulating benefits. Relatedly, consumers often use online accounts to store valuable information and materials. Furthermore, some consumers may define themselves and form their identities through their use of these accounts.¹¹¹ Consumer investment, which firms often encourage, can therefore take the form of money, time, attention, energy, and emotional involvement.

¹⁰⁸ See *infra* notes 157–216 and accompanying text.

¹⁰⁹ For some illustrative termination cases, see *Doe v. Bank of Am. Corp.*, 273 F. Supp. 3d 203, 213 (D.D.C. 2017); *Ruales v. Spencer Sav. Bank*, No. 18-9192, 2019 WL 140794, at *2–3 (D.N.J. Jan. 9, 2019); *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, No. 09-4567, 2011 WL 900096, at *8–9 (D.N.J. Mar. 15, 2011); *Young v. Facebook, Inc.*, No. 5:10-cv-03579, 2010 WL 4269304, at *3–4 (N.D. Cal. Oct. 25, 2010).

¹¹⁰ For examples of media reports, see Samuel Okike, *Your Twitter Account May Have Been Suspended by Accident*, TECHPOINT.AFRICA (Aug. 8, 2019), <https://techpoint.africa/2019/08/08/your-twitter-account-may-have-been-suspended-by-accident/> [<https://perma.cc/KAL4-CVMS>] (discussing inadvertent Twitter suspensions); Mary Margaret Olohan, *TikTok Reinstates Live Action Account, Apologizes, Says 'Human Error' Caused Ban*, TENN. STAR (Feb. 2, 2020), <https://tennesseestar.com/2020/02/02/tiktok-reinstates-live-action-account-apologizes-says-human-error-caused-ban/> [<https://perma.cc/PCG2-22TW>] (discussing the accidental termination of a pro-life account).

¹¹¹ See, e.g., Uğur Gündüz, *The Effect of Social Media on Identity Construction*, MEDITERRANEAN J. SOC. SCI., Sept. 2017, at 85, 85 (“[Social media] enable[s] individuals [to] present themselves to others and determine the way they would like to be perceive[d] . . .”).

Correspondingly, users who find themselves banned from their favorite platform or service can experience considerable pain and anguish.¹¹² Of course, the potential harm is not limited to the online realm. For example, termination of financial services, memberships, or club associations can also damage consumers.¹¹³

Firms' use of unfair, non-transparent, and discriminatory termination practices likely exacerbates the psychological aggravation that terminated consumers experience. In reality, firms sometimes terminate consumers based on gender, race, ethnicity, appearance, (lack of) sophistication, or other questionable grounds—without sharing the reason for the termination.¹¹⁴ Additionally, many firms err in making termination decisions.¹¹⁵ Alas, non-transparent contractual mechanisms conceal these unfortunate realities. This further accentuates the importance of considering the means that firms use to end their relationships with consumers.¹¹⁶

In another study, we examined the contractual clauses that accord firms the discretion to terminate consumers.¹¹⁷ The results confirmed the high degree of non-transparency in contractual termination mechanisms. A sweeping majority of the contracts in our samples, 482 out of 500 (that is, 96.4 percent), failed to require firms to explain to consumers the reason for contract termination ("termination without explanation contracts").¹¹⁸

¹¹² See, e.g., *Wheat v. Chase Bank*, No. 3:11-cv-309, 2014 WL 457588, at *28 (S.D. Ohio Feb. 3, 2014) (noting that "[e]mbarrassment, mental anguish, and emotional distress might be the inevitable and unfortunate effects" of the termination of the plaintiff's bank account).

¹¹³ See, e.g., *Gao v. JPMorgan Chase & Co.*, No. 14 Civ. 4281, 2015 WL 3606308, at *1 (S.D.N.Y. June 9, 2015) (noting that "Chase revoked the unredeemed rewards points when terminating [the customer's] accounts").

¹¹⁴ See, e.g., *El-Hallani v. Huntington Nat'l Bank*, 623 F. App'x 730, 732, 739 (6th Cir. 2015) (discussing a complaint about a bank closing accounts based on the clients' race in violation of 42 U.S.C. §§ 1981 and 1982 and the Michigan Elliot-Larsen Civil Rights Act); *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012) (noting a plaintiff's argument that Facebook terminated his account because of his ethnicity); Jamie Frevele, *Transgender Tinder Users Are Being Banned Without Explanation*, MEDIAITE (June 4, 2015), <https://www.mediaite.com/online/transgender-tinder-users-are-being-banned-without-explanation/> [<https://perma.cc/5UG8-D7MY>] (discussing the removal of transgender Tinder users from the app); Khadeeja Safdar & Laura Stevens, *Banned from Amazon: The Shoppers Who Make Too Many Returns*, WALL ST. J. (May 22, 2018), <https://www.wsj.com/articles/banned-from-amazon-the-shoppers-who-make-too-many-returns-1526981401> [<https://perma.cc/RAM3-RAVE>] (regarding the ban of Amazon users without explanation for returning a large number of orders).

¹¹⁵ See, e.g., Okike, *supra* note 110 (regarding erroneous Twitter bans); Olohan, *supra* note 110 (regarding faulty TikTok account removals).

¹¹⁶ Cf. *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978) (stating that a reasoned explanation "inform[s] the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review)").

¹¹⁷ Uri Benoliel & Shmuel I. Becher, *Termination without Explanation Contracts*, 2022 U. ILL. L. REV. 1059, 1059–60.

¹¹⁸ *Id.* at 1087–89.

Moreover, 330 out of 482 (68.5 percent) of these termination without explanation contracts did not contain exhaustive reasons explaining when termination might occur.¹¹⁹ That is, the contracts did not explicitly specify all the potential reasons for which termination can be executed. This obscurity means that consumers are not informed of the exact reasons that may ultimately lead to their termination. Thus, at best, consumers have only partial ability to minimize termination by ensuring compliant behavior.

Additionally, most of the sampled contracts (289 out of 482, or 60 percent) included an explicit notice waiver, exempting the firm from informing consumers of the termination.¹²⁰ Moreover, almost all the contracts in our sample (473 out of 482, or 98 percent) were unclear about whether terminated consumers have a right to appeal or voice their perspectives.¹²¹ All of these tactics ensure that consumers remain in the dark about their termination and their ability to challenge it.

These are not hypothetical concerns about the non-transparent facets of the contract's text. Indeed, firms use their contractual power, in reality, to terminate consumers while repeatedly failing to provide any explanation. Consider, for instance, the CFPB report stating that consumers who complained about their bank's decision to close their account often noted that their bank provided no reason for the termination.¹²² Similarly, users have complained that Amazon, Uber, Tinder, and Facebook closed their accounts without explanation.¹²³ This demonstrates that firms do, in fact, use non-transparent contractual mechanisms when terminating consumers.

F. Contractual-Related Representations

Thus far, this Part has delineated various aspects of contractual non-transparency while largely following a chronological timeline. It first addressed the point of formation (Section A), then performance and change (Sections B and C), followed by conflict resolution and termination (Sections D and E).

¹¹⁹ *Id.* at 1087.

¹²⁰ *Id.* at 1087–88.

¹²¹ *Id.* at 1088.

¹²² *Monthly Complaint Report*, CONSUMER FIN. PROT. BUREAU, Nov. 2015, at 1, 12, https://files.consumerfinance.gov/f/201511_cfpb_monthly-complaint-report-vol-5.pdf [<https://perma.cc/HK9F-JK8D>].

¹²³ See, e.g., Tony Merevick, *Uber Will Ban You if You Break These New Rules*, THRILLIST (Dec. 8, 2016), <https://www.thrillist.com/news/nation/uber-will-ban-you-if-you-break-these-new-rules> [<https://perma.cc/UKQ3-WTZZ>] (discussing changes to Uber's Community Guidelines regarding incidents that will result in bans); Frevele, *supra* note 114 (regarding Tinder bans potentially based on gender identification); Safdar & Stevens, *supra* note 114 (regarding Amazon bans for overutilization of its return-order feature).

This Section moves to address non-transparency in the context of overall contractual presentation. It explores how firms present their promises and their relationships with consumers. In discussing this feature of non-transparency, this Section cannot be chronologically assigned to a specific stage in the B2C relationship. In this context, the non-transparent tools that firms employ encompass ex ante and ex post stages and include various behaviors and modes.

For clarity, this Section is organized around three arguments.¹²⁴ The first, which is the focus of Subsection 1, is that firms make non-transparent oral promises to consumers while negating those promises in the fine print. Firms are thus non-transparent during the contract negotiation stage about the (in)validity of their oral promises. The second argument, which is discussed in Subsection 2, is that firms pretend to form deep and meaningful relationships with consumers, suggesting illusionary intimacy and care, while trying to conceal the pure transactional nature of these relationships. Finally, the third, which Subsection 3 outlines, is that firms hide undesirable aspects of the transaction at stake in the fine print, presenting their products and services in imbalanced ways.

1. Promises, Promises

Facing a complex world, consumers must often turn to the oral representations that sellers make to understand the transaction they are considering. Naturally, consumers expect salespeople to be familiar with the product or service at stake. Consumers also assume that salespeople are knowledgeable about the firm's policies and practices. Therefore, consumers will likely inquire with salespeople about their rights and obligations, including what may happen if things go wrong.

Trusting others can have considerable advantages. Trust among individuals can smooth transactions and reduce the need to remain vigilant and suspicious.¹²⁵ Humans are trusting creatures, and trust sustains flourishing econo-

¹²⁴ To be sure, there are additional non-transparent aspects that relate to overall presentation. One example is browsewrap agreements, where links to the TOUs are often hidden at the bottom of the webpage, at times in small font and obscure shades. Another example is rolling contracts, or "pay now terms later" agreements, where the buyer receives the Terms and Conditions only at a later stage. The problematic aspects of such contracts have been discussed at length. See generally Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679.

¹²⁵ See, e.g., Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 COMPUTS. HUM. BEHAV. 1020, 1025 (2016) ("[T]rust continues to reduce perceived risk over time The end result is that buyers trust to the point that their intention to engage in transactions is decisively enhanced, and perceived risk begins to encourage purchase behavior rather than discouraging buyers from engaging in transactions.").

mies and societies by enhancing commerce and reducing transaction costs.¹²⁶ Trust promotes well-being and health, and it is linked to community, growth, and thriving societies.¹²⁷

Salespeople's representations, even puffery ones, are likely to be persuasive.¹²⁸ After all, salespeople are trained to sell. Precisely because firms incentivize and encourage salespeople to sell, their oral representations are often not objective. Such representations can frequently be inaccurate, exaggerated, and overly optimistic, if not manipulative. These oral statements are a worrisome non-transparent practice in and of themselves. Such representations become even more worrying because consumer form contracts will regularly disclaim or qualify them in the fine print.¹²⁹

Manipulative oral promises generate considerable social costs.¹³⁰ Consumers are influenced by inaccurate information and may make erroneous decisions based on them. The unfortunate and harmful effects of this manipulation disproportionately affect vulnerable consumers, who often lack the resources or knowledge to defend their rights.¹³¹ Worryingly, consumers, as laypeople, often feel bound by the written contract, even if it contains void, unconscionable, or otherwise unfair terms.¹³²

Empirical evidence and insights from behavioral ethics suggest that non-transparent oral promises are ubiquitous. Studies demonstrate that "ordinary unethical[ity]"—unethical behavior that members of society perceive as only slightly improper—is far more pervasive than typically assumed.¹³³ To be sure,

¹²⁶ For a comprehensive discussion, see generally MAREK KOHN, *TRUST: SELF-INTEREST AND THE COMMON GOOD* (2008).

¹²⁷ For a detailed account on trust and community in the United States, see generally ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2020).

¹²⁸ See, e.g., Archishman Chakraborty & Rick Harbaugh, *Persuasive Puffery*, 33 MKTG. SCI. 382, 382 (2014) (discussing the persuasiveness of puffery); David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395, 1434–39 (2006) (surveying marketing literature showing that consumers believe puffery).

¹²⁹ For example, firms routinely use entire agreement or merger clauses that typically state that the written agreement constitutes the entire agreement and supersedes any prior understandings, agreements, or representations. See Kevin Davis, *Licensing Lies: Merger Clauses, the Parol Evidence Rule and Pre-contractual Misrepresentations*, 33 VAL. U. L. REV. 485, 489 (1999).

¹³⁰ Shmuel I. Becher, Yuval Feldman & Meirav Furth-Matzkin, *Toxic Promises*, 63 B.C. L. REV. 753, 756–57, 786–90 (2022).

¹³¹ Schmitz, *supra* note 50, at 280.

¹³² See, e.g., Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1760–61 (2014) (discussing the strong commitment that laypeople have vis-à-vis the fine print).

¹³³ See Francesca Gino, *Understanding Ordinary Unethical Behavior: Why People Who Value Morality Act Immorally*, 3 CURRENT OP. BEHAV. SCIS. 107, 107 (2015). See generally DAN ARIELY, *THE (HONEST) TRUTH ABOUT DISHONESTY: HOW WE LIE TO EVERYONE—ESPECIALLY OURSELVES* (2012) (analyzing why cheating persists in society).

such “ordinary unethical[ity]” is frequently exercised by otherwise law-abiding people.¹³⁴

In all, salespeople may excuse their dishonest and non-transparent oral claims by convincing themselves that such promises are a legitimate marketing technique.¹³⁵ Salespeople may also believe that such techniques are commonplace and acceptable. They may further justify themselves by arguing that “everyone does it” and “this is the only way to survive in this business.”¹³⁶ Regardless of these self-serving justifications, however, manipulative oral promises made in the shadow of qualifying fine print keep consumers in the dark.

2. Selling Relationships

Subsection 1 illustrated that firms adopt non-transparent practices at the micro-level by making non-transparent promises to individual consumers at the pre-contract stage. This Subsection demonstrates that firms are also non-transparent in more subtle ways at the macro-level. It argues that firms often try to hide the purely transactional and formal nature of their relationship with consumers, while misrepresenting the relationship as friendly and intimate. The image below, taken at the N.Y.C. subway,¹³⁷ may serve as a humoristic starting point for this discussion.

Image 1. Photo from N.Y.C. Subway (July 2021)



¹³⁴ Gino, *supra* note 133, at 107; Max H. Bazerman, George Lowenstein & Don A. Moore, *Why Good Accountants Do Bad Audits*, HARV. BUS. REV., Nov. 2002, at 96, 96. *See generally* YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES' ABILITY TO REGULATE HUMAN BEHAVIOR* (2018) (discussing how and why otherwise good people commit dishonest acts).

¹³⁵ Cf. Shaul Shalvi, Ori Eldar & Yoella Bereby-Meyer, *Honesty Requires Time (and Lack of Justifications)*, 23 PSYCH. SCI. 1264, 1264 (2012) (researching how individuals rationalize dishonest practices based on their time constraints and self-interests).

¹³⁶ *See, e.g.*, Albert Bandura, Claudio Barbaranelli, Gian Vittorio Caprara & Concetta Pastorelli, *Mechanisms of Moral Disengagement in the Exercise of Moral Agency*, 71 J. PERSONALITY & SOC. PSYCH. 364, 364, 371 (1996) (discussing how moral disconnection impacts human behavior).

¹³⁷ The authors thank Sarah Dadush for sharing this photo.

Humans use different norms when they interact in the social (communal) sphere than when they operate in the market (exchange) sphere. For instance, consider having dinner. When one is invited over by a friend, social norms govern. In these circumstances, one will probably express their gratitude by thanking the hosts and giving them a bottle of wine, flowers, or a hug. One would not, however, offer the host payment in exchange for dinner. At the same time, if one is dining at a restaurant, market norms preside. In these situations, one is expected to pay for the meal. Hugging the waitress or the chef would be inappropriate. There are business spheres and social spheres, and society should strive to keep them distinct, if not separate.¹³⁸

When businesses transact with consumers, they operate in the market sphere. The businesses offer their products and services to consumers. In exchange, consumers provide some form of payment, such as money, data, time, involvement, or attention. Although this may seem straightforward, businesses frequently and deliberately make non-transparent statements, blurring this reality. Indeed, many businesses market their products and services emotionally, making illusory promises of fake closeness and intimacy, while hiding the purely transactional nature of the relationship.¹³⁹

Firms repeatedly address consumers as one would approach a friend or caring community member. Firms explicitly use emotional and communal language. They greet customers using personalized texts and employing communal notions of reciprocity and care. Firms further utilize warm tones and emotionally manipulate customers not to end their relationship with the firm.

Although some consumers may brush off such communications as harmless, these are not just cute and innocent gestures that make life more pleasant. Firms often design these messages to confuse (more susceptible) consumers about the nature of the B2C relationship. As social creatures, humans need relationships, which are crucial to our well-being and health. By making empty gestures of closeness, firms sell relationships as if they were a product. In other words, they bewilder consumers into believing that individuals can form deep and emotionally satisfying relationships with firms.¹⁴⁰

Firms use such tactics in both mundane and more serious contexts. Consider, for instance, online payday lenders that frequently frame their messages around the concept of “help.” “‘We Help’ is our simple mantra,” “[c]all us on 1300 WE HELP,” and “know that you’ll be welcomed at [payday lender] and

¹³⁸ DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* 75–103 (2008).

¹³⁹ See Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 U. ILL. L. REV. 1547, 1547–48, 1602–03. The following paragraphs and examples rely on this article.

¹⁴⁰ *Id.* at 1556–62.

treated with the same respect and care that we would a dear friend in need” are just a few illustrations.¹⁴¹ Lenders further use social media platforms to post content depicting their firm as fun and helpful—the virtues of a human friend. Bafflingly, individuals will find this content intermingled on their feeds with posts from family and friends.¹⁴²

As another example, consider the real estate market, which involves complex and stressful transactions. This challenging and high-stakes environment provides the perfect setting for a real estate company to claim to be the client’s “protector.”¹⁴³ In one such ad, a (male) realtor was embracing a (female) client while another (female) realtor was watching over the client. The ad instills the impression that the firm will protect and lead the (female) client throughout the real estate transaction.¹⁴⁴

By enticing consumers to believe they can establish intimate and meaningful relationships with firms, firms prompt consumers to lower their guards. Consumers, in turn, become more forgiving of firms that misstep. They end up behaving in a less self-interested, more firm-regarding way. They keep engaging with the firms even when they should not.¹⁴⁵

B2C contracts reflect market norms and exchange relationships. Strategies that market and sell B2C relationships as social and intimate are dishonest and can mislead consumers. Circling back to the image above, the bank’s (communal) promise, “We’re here for you,” is ridiculed by its (market-based) second quote, “You owe us money for running out of money.”¹⁴⁶ Firms, however, often employ non-transparent means that conceal and blur this mockery.

3. Accentuating Benefits, Underplaying Risks

Firms often use means to ensure that consumers focus on the positive attributes of products and services and ignore their negative and risky aspects.¹⁴⁷ Thus, firms non-transparently include essential information and legal risks in

¹⁴¹ See *id.* at 1558 (alteration in original).

¹⁴² See Vivien Chen, *Online Payday Lenders: Trusted Friends or Debt Traps?*, 43 UNSW L.J. 674, 699 (2020).

¹⁴³ Becher & Dadush, *supra* note 139, at 1559.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 1552.

¹⁴⁶ See *supra* Image 1.

¹⁴⁷ To some extent, firms are expected to emphasize the positive traits of their products and services while underplaying risks and weaknesses. There is a fine line, however, between legitimate promotion on the one hand and making rosy promises that illegitimately exploit consumers’ weaknesses on the other. We return to that point in more detail below.

dull and complex documents that consumers often ignore.¹⁴⁸ At the same time, firms use vivid and colorful materials, which capture consumers' attention, to entice consumers with the benefits of their offerings and overshadow the tedious legal documents.

Consider, in this context, an empirical study in the emerging field of tele-genetics and telegenomics, which are services that apply telemedicine in the context of genetic and genomic tests.¹⁴⁹ One of the developments in this field is direct-to-consumer (DTC) marketing to promote genetic and genomic consultant services. A 2018 study took a close look at these service providers' websites.¹⁵⁰ Among other things, the study sought to examine how service providers portray their service.

Foreseeably, the study found that all the providers' websites detailed various benefits accompanying telegenetics.¹⁵¹ DTC telegenetics providers advertised their services as progressive and innovative.¹⁵² The providers' websites employed highly positive language, using terms such as "timely," "flexible," and "money saving."¹⁵³ Alas, however, some of the advertised advantages lacked "clinical validity."¹⁵⁴

At the same time, all service providers but one did not mention the associated risks,¹⁵⁵ which the fine print typically addresses in detail. The handling of sensitive and personalized health information entails significant risks that consumers should be aware of. The study concluded that providing an "unrealistic rosy perspective" can exploit consumers' psychological weaknesses.¹⁵⁶ This is likely to be the situation in many other markets too.

II. THE SOCIAL COSTS OF DARK CONTRACTS

The previous Part described various forms of contractual non-transparency. It demonstrated how firms use non-transparent contractual tools to disadvantage consumers in every nook and cranny. To develop our understanding of the challenges that Dark Contracts present, this Part adopts a holistic

¹⁴⁸ See, e.g., Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1676 (2006) (considering consumers' tendency to focus on "interesting and exciting information, rather than dull information").

¹⁴⁹ Service providers in this field take advantage of technological advancements, such as interactive video and fast internet connections, to connect in real time with patients in distant locations.

¹⁵⁰ Li Du & Shmuel I. Becher, *Genetic and Genomic Consultation: Are We Ready for Direct-to-Consumer Telegenetics?*, FRONT. GENETICS, Dec. 2018, at 1, 2.

¹⁵¹ *Id.* at 3.

¹⁵² *Id.* at 4.

¹⁵³ *Id.* at 5.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 3.

¹⁵⁶ *Id.* at 6.

perspective. Section A highlights the cumulative impact of Dark Contracts. Next, Section B delineates the negative impact of Dark Contracts on various legal forces. Thereafter, Section C illustrates how Dark Contracts also disrupt a vital extralegal disciplining force: reputation. Finally, Section D explains why Dark Contracts are objectionable from an ethical perspective and why firms are unlikely to appreciate the ethical harm that Dark Contracts inflict.

A. Contextualizing Transparency

In isolation, each of the practices discussed in the previous Part is troublesome and merits attention. This Section, however, argues that the compound power of non-transparent practices is greater than the sum of its parts.

1. Dimensions of Contractual Non-transparency

Thus far, we have employed “non-transparency” as an umbrella term. Part I, however, illustrated that non-transparent contractual mechanisms and practices have different flavors and shades. We next suggest distinguishing between the different dimensions of non-transparency. As we argue below, these various dimensions may necessitate different responses.

The first type of non-transparency relates to *form* (rather than substance). Non-transparency in form addresses aspects not directly related to the contract’s content, but to other formal or technical aspects. Examples include the use of hidden links to terms and conditions on websites, small font, confusing sub-headings, all caps paragraphs, complex language, or contracts (including past versions) that are not readily available.

Even if the contract term is transparent in form, it can still be non-transparent in its content. That is, a term may be accessible, legible, and readable, yet adopt a non-transparent mechanism. Accordingly, the second type of non-transparency pertains to contractual *substance*: contractual mechanisms that are non-transparent in nature. One example is a unilateral change-of-terms mechanism that does not require proper notice or consumer consent. Another is a termination mechanism that allows firms to terminate a contract without informing consumers or specifying the cause of termination.

The fact that a term is transparent in both form and substance still does not guarantee transparency. Firms may be non-transparent in performing the contract. Hence, the third type of non-transparency concerns contractual *behavior*. A conspicuous example is non-transparent discrimination among different types of consumers.

Notably, non-transparent contractual practices may exist even if firms impartially employ a transparent term in form and substance. This is due to the fourth dimension of non-transparency, which we dub non-transparent *inconsistency*. The inconsistency dimension implies that firms may create a non-

transparent discrepancy between what they promise or otherwise represent to the consumer and what the contract actually says. For example, a firm's salesperson can make oral promises about a product that the fine print negates. The same is true regarding firms that manipulate consumers to focus on the product's benefits and ignore its risks.

Finally, the fifth dimension of non-transparency pertains to non-transparent *outcomes*. This dimension focuses on the non-transparency of the legal and reputational outcomes of contractual disputes or breaches by the firm. An illustrative example is dispute management mechanisms that firms typically incorporate into their contracts. Firms often undermine effective information flows by limiting access to justice and channeling consumer disputes outside the judicial system. Contractual mechanisms that silence consumers and contribute to biased reputation or distorted information flows are non-transparent in and of themselves. This is true even if the relevant contract terms are transparent in form and substance, implemented impartially, and not misaligned with other promises and representations. Accordingly, Figure 1 below depicts the five dimensions of contractual non-transparency.

Figure 1. Five Dimensions of Contractual Non-transparency



Although this typology is helpful, it is neither exhaustive nor set in stone. At times, different dimensions of non-transparency converge in one practice. Take, for instance, contract terms that address dispute resolution, such as mandated arbitration and internal dispute processes. Firms may draft these terms using complex language, bury them in fine print, and write them in all caps, making them non-transparent in *form*. At the same time, the terms might allow the firm to act non-transparently during the dispute resolution process, meaning that they are non-transparent in *substance*. Firms may also implement these

terms non-transparently by favoring assertive consumers while adopting a strict approach toward vulnerable ones, rendering the terms non-transparent in *behavior*. Furthermore, such mechanisms can considerably contribute to non-transparent information flows and thus lead to non-transparent *outcomes*.

2. The Aggregation Problem

The typology of contractual non-transparency advances another insight: Dark Contracts create a comprehensive regime of non-transparency. Dark Contracts do not merely utilize specific facets or dimensions of non-transparency. Rather, they can more broadly result in an *in terrorem* effect, dissuading consumers, disempowering them, and instilling helplessness in them.

The dominating Western scientific approach breaks up complex issues into smaller components.¹⁵⁷ By isolating these components, humans can study them carefully, discover their laws, solve problems, and expand human knowledge. Sometimes, however, this isolation process misses essential virtues of the big picture. Along these lines, Eastern and Indigenous approaches are more holistic, looking at “the whole.”¹⁵⁸

At times, the whole is not a mere reflection of its elements. A narrow focus on specific contractual terms or practices may miss insights that can only be found in the big picture. Borrowing from the Gestalt theory,¹⁵⁹ the nature of the whole, in our case, suggests that non-transparency profoundly influences the B2C arena. In essence, the argument here is that one can only understand the whole by looking beyond what the separate issues tell. That is, if we want to appreciate the puzzle better, we must look further than its pieces.

Indeed, the big picture of non-transparency can offer a few possible imperative insights. First, it suggests that non-transparency is not an anecdotal slip or problem. It is more likely to be a general approach, or even a strategy, which firms adopt. Therefore, when interacting with a firm, the individual consumer is unlikely to escape this non-transparency and its resultant harm.

Second, non-transparency is likely to yield inefficient, one-sided, and pro-firm contracts. If a buyer is unaware of a product’s characteristic (such as contract terms) and cannot evaluate its quality, firms have no incentive to offer a

¹⁵⁷ See, e.g., Richard E. Nisbett, Kaiping Peng, Incheol Choi & Ara Norenzayan, *Culture and Systems of Thought: Holistic Versus Analytic Cognition*, 108 PSYCH. REV. 291, 291 (2001).

¹⁵⁸ See, e.g., Vanessa W. Simonds & Suzanne Christopher, *Adapting Western Research Methods to Indigenous Ways of Knowing*, 103 AM. J. PUB. HEALTH 2185, 2185, 2187–88, 2190–91 (2013).

¹⁵⁹ See generally Max Wertheimer & Kurt Riezler, *Gestalt Theory*, 11 SOC. RSCH. 78 (1944) (regarding a speech in which Max Wertheimer explored gestalt theory).

high-quality characteristic.¹⁶⁰ Thus, overall non-transparency is likely to yield multiple low-quality contract terms and practices.

Third, Dark Contracts increase transaction costs.¹⁶¹ Because the relevant information is hidden or not fully available, consumers who wish to object or challenge firms' non-transparent practices face high costs. At this point, consumers have two main options. One is to invest these resources and bear the loss. The other is to avoid these investments but risk making uninformed decisions.¹⁶² Either option entails harm to consumers.

Another related lesson is that the consumer cannot evade non-transparency by dealing with one firm rather than another. Non-transparency makes comparison-shopping prohibitive, which might create a barrier to entry for new firms. In fact, economic analysis suggests that firms in competitive markets are likely to engage in a race to the bottom vis-à-vis any non-salient aspect, offsetting the costs of competing over salient attributes.¹⁶³ As we have seen, empirical evidence confirms this concern.¹⁶⁴

All in all, these insights also suggest that non-transparency practices pollute the entire B2C domain. These practices disempower consumers as individuals and as a class. They weaken potential solidarity ties and subvert consumers' bargaining power.

Take, for instance, the potential life cycle of consumer complaints.¹⁶⁵ A consumer first needs to perceive the problem. Next, the consumer should voice a complaint. Thereafter, the consumer can engage in a resolution process. Dark Contracts fail all three stages. In the first stage, Dark Contracts make it less likely that consumers will be aware of their rights and the ways firms may harm them. At the second stage, Dark Contracts adopt strategies that can silence or neutralize informed and active consumers. Finally, at the third stage, Dark Contracts limit consumers' access to justice.

¹⁶⁰ Cf. George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970) (discussing how information asymmetry may result in markets for low-quality, low-priced products).

¹⁶¹ For a general discussion of the harm that inflated transaction costs imposed on consumers, see Sovorn, *supra* note 148, at 1683–86.

¹⁶² Cf. *id.* at 1686 ("[T]ransaction costs have a disproportionate capacity to deter consumers from protecting their interests.").

¹⁶³ See, e.g., Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 743 (2008) (explaining how "firms have a strong incentive to compete over several salient transactional terms while racing to the bottom on others"); see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

¹⁶⁴ Part I provided various examples, including the wide adoption of unreadable contracts (Section I.A), selective enforcement of contractual terms (Section I.B), unilateral change-of-term clauses (Section I.D), and contractual abrupt terminations (Section I.E).

¹⁶⁵ Best & Andreasen, *supra* note 58, at 701–02 (breaking the life cycle of consumer complaints into three stages).

Because Dark Contracts weaken consumers and diminish their power, other forces should scrutinize firms' behavior and balance the B2C playing field. Courts, legislators, regulators, consumer organizations, market watchdogs, and the media all have an essential role to play. The following Section will evaluate how non-transparency practices interfere with the ability of these forces to perform this task.

B. Harming Legal Forces

Dark Contracts make it harder for consumers to reach informed decisions and know their rights. Nonetheless, one might argue that legislatures, courts, regulators, consumer organizations, and market watchdogs sufficiently protect consumers. This Section examines how non-transparency practices may impact these actors.

Legislatures play an essential role in protecting consumers and ensuring that markets function properly. Legislatures, along with regulators, mandate disclosures,¹⁶⁶ introduce compulsory standards,¹⁶⁷ provide consumers with minimum guarantees,¹⁶⁸ or afford non-waivable rights.¹⁶⁹ These types of ex ante interventions are (and should be) based on the way that legislatures view consumer markets.

To regulate consumer markets, legislatures should be familiar with the relevant sector, the (often dynamic) market conditions, and the prevailing contractual norms and their potential harms and benefits.¹⁷⁰ The problem with Dark Contracts, however, is that they hide important contractual aspects and, thus, obscure the big picture. Without properly grasping this big picture, legislatures are unlikely to identify the acute failures and gaps they should address.

Consider, for instance, the lenient treatment that firms provide to some consumers but not others.¹⁷¹ These non-transparent practices reduce the accuracy and reliability of information flows regarding the firms' contractual prac-

¹⁶⁶ For instance, the famous so-called Schumer Box requires card issuers to disclose the rates, fees, terms, and conditions of a credit card agreement. *See* 12 C.F.R. § 226.5a(a)(1)–(b)(15) (2021).

¹⁶⁷ A prominent example is health and safety standards, which are in place for, among other things, cars and toys intended for use by children. *See, e.g.,* Safety Standard Mandating ASTM F963 for Toys, 16 C.F.R. pt. 1250 (2021) (providing a wide-ranging standard addressing many hazards related to toys).

¹⁶⁸ For instance, European consumers have a minimum of a two-year guarantee during which the seller is liable for any fault found in new products. *See* Directive 2019/771, art. 10, ¶¶ 1–2, 2019 O.J. (L 136) 28, 43 (EU).

¹⁶⁹ For example, consumers have a right to cancel a door-to-door sale or home equity loans for a designated period of time. *See, e.g.,* Home Equity Loan Consumer Protection Act of 1988, Pub. L. No. 100-709, 102 Stat. 4725 (codified at 15 U.S.C. §§ 1637a, 1665b, 1647).

¹⁷⁰ *See, e.g.,* Yehuda Adar & Shmuel I. Becher, *Ending the License to Exploit: Administrative Oversight of Consumer Contracts*, 62 B.C. L. REV. 2405, 2446 (2021) (making a similar claim).

¹⁷¹ *See supra* Section I.B and accompanying text.

tices and behavior. If firms can silence the more active and cognizant consumers, legislatures cannot learn about the scope of the relevant issues and their magnitude. The same is true concerning the many internal disputes and complaints processes that firms endorse. Mandated arbitration clauses, which ensure that disputes are heard confidentially, have the same effect.

Additionally, other non-transparent practices can harm legislatures' aptitude to address more specific practices and issues. Consider, for instance, the omnipresent contractual mechanisms that allow firms to introduce sneaky unilateral changes.¹⁷² Because these changes are typically stealthy or surreptitious, legislatures are less likely to learn of them and their frequency, scope, and harm. At the end of the day, Dark Contracts keep not only consumers but also legislatures in the dark.

Whereas legislatures strive to design fair and efficient rules *ex ante*, courts can supplement these efforts with *ex post* review and policing. To be sure, the judiciary has a considerable role in scrutinizing firms' behavior and protecting consumers from exploitation and abuse. Common law courts do so by gradually developing the law. Of course, this incremental development of the law results from cases brought before the courts.

Dark Contracts, however, undermine the courts' ability to develop the law. First, Dark Contracts prevent numerous cases from being heard by the judiciary. Most fundamentally, Dark Contracts make it difficult for consumers to know their rights. Further, Dark Contracts channel disputes away from the judicial system by using internal processes and mandating arbitration. Dark Contracts also limit consumers' ability and motivation to sue in various ways, such as through sunset clauses and liability limitations.¹⁷³ Moreover, misleading consumers to believe that the B2C relationships are thick and deep can encourage consumers to forgive firms' missteps.¹⁷⁴

These unheard cases in and of themselves could be imperative for developing the law. But they are also essential in providing courts with the opportunity to realize the ubiquity and prominence of some consumer issues. Mere partial exposure to consumer issues impedes courts from effectively responding to the relevant challenges in this domain.¹⁷⁵

¹⁷² See *supra* Section I.C and accompanying text.

¹⁷³ See *supra* notes 93–99 and accompanying text.

¹⁷⁴ See *supra* notes 137–146 and accompanying text.

¹⁷⁵ For example, if courts identify under-enforcement—in our context, frequent violations of consumer rights accompanied by low enforcement rates—they may adjust the remedies they award accordingly. Under-enforcement may justify, for instance, aggravated or punitive damages. See, e.g., Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 780 (2009) (noting that "punitive damages might be acceptable in under-enforcement cases"); cf. Bert I. Huang, Essay, *Surprisingly Punitive*

Second, Dark Contracts generate not only “a quantitative problem” (precluding many cases from being heard), but also “a qualitative problem.” Plaintiffs are the engine of litigation. In the context of consumer litigation, plaintiffs should be able to identify the harm, name the wrongdoer, have motivation to sue, trust courts, and have sufficient resources to adjudicate their case.¹⁷⁶ Consumers, however, usually do not insist on their rights, and the few who do are typically relatively informed, educated, and wealthy.¹⁷⁷

Alas, Dark Contracts help firms to distinguish between consumers who have the ability and willingness to insist on their rights and challenge the firm and those who do not.¹⁷⁸ Non-transparent contractual performance, for instance, allows firms to discriminate among different types of consumers. Firms can be lenient toward insistent or decided consumers, soothing their concerns and complaints. By neutralizing assertive consumers, Dark Contracts not only dramatically reduce consumer litigation. Rather, they also prevent litigation from materializing in those cases that are likely to be successful and make a difference.¹⁷⁹

Third, Dark Contracts weaken the capacity of judicial decisions to serve as a signaling device. Resolving disputes is important not only for their inherent value to the conflicting parties. Third parties can also hear about courts’ rulings and learn from them. Firstly, judicial decisions can signal to firms what is acceptable and unacceptable in B2C relationships. Court decisions can thus influence or correct the market for players who are not directly involved in the specific litigation. Indeed, firms learn about courts’ decisions and change their contracts and behaviors accordingly.¹⁸⁰ Fewer judicial decisions due to Dark Contracts, however, mean fewer effective signals to market participants.¹⁸¹ Secondly, consumers can hear about judicial decisions via various channels, including mass and social media. Again, with only a limited number of such decisions, consumers have fewer opportunities to become informed about con-

Damages, 100 VA. L. REV. 1027, 1030 (2014) (discussing super-compensatory statutory damages that are designed to offset imperfect enforcement).

¹⁷⁶ Cf. William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . . , 15 LAW & SOC’Y REV. 631, 631, 633–37 (1980) (providing an overview of the transformation of injuries into disputes).

¹⁷⁷ See, e.g., Schmitz, *supra* note 50, at 280.

¹⁷⁸ See *supra* Section I.B and notes 93–99 and accompanying text.

¹⁷⁹ Cf. Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95, 95–97 (1974) (discussing how aspects of the American legal system can stymie change).

¹⁸⁰ Marotta-Wurgler & Taylor, *supra* note 26, at 266–74 (finding that firms respond to litigation outcomes and change their EULAs accordingly).

¹⁸¹ See Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 632–35 (2020) (discussing the paucity of consumer contract cases, possible reasons for it, and possible negative implications).

tractual risks or their rights. Thirdly, the paucity of cases also weakens the dialogue between the judiciary and the legislative branches. It inhibits courts' opportunities to converse with or signal to legislatures via judicial decisions. Moreover, it reduces the legislators' capability of improving and learning from judicial decisions.

Dark Contracts also undermine the ability of other legal forces to check firms. Dark Contracts impose hardship and unnecessary costs on scrutinizing bodies, such as the Federal Trade Commission, the CFPB, state attorneys general, pro-consumer organizations, and market watchdogs. The mere need to sift through non-transparent practices (and prove them, in case of adjudication) makes the monitoring process less straightforward and more expensive, which results in social waste. Furthermore, non-transparent contractual performance and internal dispute processes ensure that regulatory agencies and watchdogs receive fewer consumer complaints. As with legislatures, this may impair the rulemaking ability of regulatory agencies. Non-transparency may also lessen the capability of regulatory bodies to engage in a robust dialogue with industry players.¹⁸²

For example, consider stealthy unilateral changes. Such changes make it more challenging for consumer organizations and watchdogs to detect them and monitor their content. The problem of unreadable contracts¹⁸³ serves as another illustration of how Dark Contracts harm regulatory and monitoring bodies. First, unreadable contracts make it harder for consumers to know their rights. Second, firms may use complex contractual text to misrepresent such rights. This may lead, anew, to fewer consumer complaints.

Other non-transparent practices exacerbate the negative impact of Dark Contracts on regulatory and monitoring agencies. For instance, fine print negating or qualifying sellers' prior oral promises further limits consumers' appetite to complain to regulatory agencies. Moreover, and as noted above, consumers that erroneously believe in forming deep B2C relationships may also refrain from complaining about firms' behaviors and tactics.

By definition, Dark Contracts allow non-transparent behavior. This, in turn, imposes additional hardship on regulatory agencies that wish to police firms' behavior. Regulatory agencies might often prefer to avoid gray areas and nuanced cases. Such cases can be hard to monitor and prove, and are less likely to attract the public's attention. Regulators might often favor tackling incidences that are likely to lead to a relatively straightforward win or to receive considerable public attention and support. Cherry-picking battles in this way

¹⁸² For instance, monitoring agencies may wish to make "regulatory threats" under some circumstances. See Tim Wu, Essay, *Agency Threats*, 60 DUKE L.J. 1841, 1841–43 (2011). Non-transparency diminishes the ability of such agencies to make adequate threats.

¹⁸³ See *supra* Section I.A.

may buttress an agency's reputation and legitimacy and better suit its limited budgets and resources.¹⁸⁴

To summarize, non-transparent practices undercut the ability of legislatures, courts, regulators, and consumer organizations to contribute to a leveled B2C playing field. Yet, such practices are considered proprietary, and the law does not monitor them satisfactorily. Firms, therefore, can keep engaging in those non-transparent practices without the need to report on them or fear external intervention. In all, Dark Contracts shield firms from legal accountability.

C. Undermining Reputational Mechanisms

Legal forces are not the only players capable of empowering consumers and monitoring firms. Extralegal forces can also advance a transparent, fair, and efficient contracting equilibrium. Accordingly, this Section shifts the focus from the role of legal actors to the role of market-based mechanisms, namely reputation. In a nutshell, it illustrates how Dark Contracts diminish the valuable function of reputation as a disciplining power.

That reputation can discipline contracting parties and deter them from misbehaving is not a novel observation.¹⁸⁵ Applied to consumer contracts, the argument here is that if a seller offers or executes unfair contract terms, consumers will learn about these terms and avoid the contract. Thus, firms that behave opportunistically will suffer from a bad reputation.¹⁸⁶

Potentially, this disciplining force has become exponentially more potent given online information flows.¹⁸⁷ Online information flows allow experienced consumers to post their feedback, grievances, and complaints using various online platforms. By sharing their experiences ex post, consumers diffuse the

¹⁸⁴ Cf. Maarten Pieter Schinkel, Lukáš Tóth & Jan Tuinstra, *Discretionary Authority and Prioritizing in Government Agencies*, 30 J. PUB. ADMIN. RSCH. & THEORY 240, 240 (2020) (discussing the various considerations that government agencies utilize in deciding how to approach to action).

¹⁸⁵ See, e.g., Chrysanthos Dellarocas, *Reputation Mechanisms* ("Before the establishment of formal law and centralized systems of contract enforcement backed by the sovereign power of a state, most ancient and medieval communities relied on reputation as the primary enabler of economic and social activity." (citation omitted) (first citing Bruce L. Benson, *The Spontaneous Evolution of Commercial Law*, 55 S. ECON. J. 644 (1989); then citing Paul R. Milgrom, Douglass C. North & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990); and then citing Avner Greif, *Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders' Coalition*, 83 AM. ECON. REV. 525 (1993))), in *ECONOMICS AND INFORMATION SYSTEMS* 629, 630 (T. Hendershott ed., 2006).

¹⁸⁶ Bebchuk & Posner, *supra* note 44, at 830.

¹⁸⁷ See Shmuel I. Becher & Tal Z. Zarsky, *E-contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMMS. & TECH. L. REV. 303, 303–04 (2008) (discussing increased online information flows and their impact on standard form contracting).

information widely and inform others. Many of these other consumers are at the *ex ante* stage, merely considering interacting with a seller.¹⁸⁸

An illustrative example is consumer reviews on platforms such as Amazon, eBay, TripAdvisor, Yelp, or Booking.com. Using these and other platforms, experienced consumers can share their evaluations of the business, its products and services, and its practices. Many other consumers may then read these reviews before making their own decisions. By sharing their experiences, *ex post* consumers create potent information flows that impact firms' reputations.

Consumers indeed engage in such behavior. Recent evidence indicates, for example, that "[seventy-two percent] of [U.S.] consumers have written a review for a local business" in 2020.¹⁸⁹ Evidence also suggests that most consumers consult online reviews about businesses.¹⁹⁰ A large majority of consumers trust online reviews "as much as personal recommendations from friends or family."¹⁹¹ It is thus predictable that reviews frequently influence most consumers.¹⁹²

Information flows from experienced consumers to non-experienced ones can thus substantially impact businesses.¹⁹³ Firms, therefore, have a profit incentive to ensure positive information flows about their practices, behaviors, and goods and services.¹⁹⁴ The same is generally true concerning conventional mass media.¹⁹⁵ The media can pick up on firms' contractual behavior or misconduct and publicize it.¹⁹⁶ Such public discussions can harm firms' reputations while informing and warning (an unlimited number of) consumers.

¹⁸⁸ *Id.* at 340–41.

¹⁸⁹ *Local Consumer Review Survey 2020*, BRIGHTLOCAL (Dec. 9, 2020), <https://www.brightlocal.com/research/local-consumer-review-survey-2020/> [<https://perma.cc/W74Y-HREM>].

¹⁹⁰ *Id.* (reporting that "87% of consumers read online reviews for local businesses in 2020").

¹⁹¹ *Id.*

¹⁹² Dan Hinckley, *New Study: Data Reveals 67% of Consumers Are Influenced by Online Reviews*, MOZ (Sept. 2, 2015), <https://moz.com/blog/new-data-reveals-67-of-consumers-are-influenced-by-online-reviews> [<https://perma.cc/P5WT-U3KF>].

¹⁹³ See, e.g., Yelp Inc., *Nielsen: 4 Out of 5 Yelp Users Visit the Site When Preparing to Spend Money*, YELP BLOG (June 25, 2013), <https://blog.yelp.com/2013/06/nielsen-4-out-of-5-yelp-users-visit-the-site-when-preparing-to-spend-money-at-a-local-business> [<https://perma.cc/J9MA-VU2B>] (discussing how Yelp users overwhelming look at reviews before making purchase).

¹⁹⁴ See Hinckley, *supra* note 192 ("[W]hat is included in Google search results for a company or product name will inevitably have an impact on the profitability of that company or product.").

¹⁹⁵ Cf. A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1449 (2010) (arguing that consumers should be relatively well informed about "the risks of many widely sold products" because "the media and regulators have naturally strong incentives to identify and publicize the risks of such products").

¹⁹⁶ For a few examples, see generally Michael Corkery, *Amazon Ends Use of Arbitration for Customer Disputes*, N.Y. TIMES, <https://www.nytimes.com/2021/07/22/business/amazon-arbitration-customer-disputes.html> [<https://perma.cc/NX3F-E6C3>] (Sept. 22, 2021) (discussing Amazon's switch from using arbitration clauses to utilizing the federal court system for consumer disputes); Jacob Goldstein & Alexi Horowitz-Ghazi, *Planet Money, Terms of Service*, NPR (Mar. 4, 2020), <https://>

On its face, the analysis of online information flows pertains to consumer contracts too. A firm that offers bad contracts risks losing business due to a damaged reputation. Experienced consumers can share their critiques about unfair terms, damaging the firm's reputation and warning other consumers who will likely avoid the firm. This dynamic, the argument goes, will deter firms from using unfair terms in the first place.¹⁹⁷

For this potential to materialize, information flows should meet several conditions. First and foremost, there should be a sufficient number of consumers who discuss the firm's contractual practices and behaviors online. In our context, it is not enough that consumers share their views about the products (for example, "these are comfortable shoes!" or "this bed is hard to assemble") or about general aspects of the transaction (for example, "I had to wait two weeks to get this product delivered"). To deter firms from using unfair contract terms, consumers should directly and explicitly discuss contractual aspects, expressly attributing and linking the faults they experienced to contractual terms and schemes.

Dark Contracts thwart the potential ability of consumers to discuss contractual aspects in various ways. For instance, non-transparent language makes it harder for consumers to understand and discuss their contracts online. Hidden selective enforcement practices can silence the most vocal consumers, who play a central role in complaining to the media or generating online reputation flows.¹⁹⁸ Sneaky unilateral changes make it less likely that consumers will realize the contractual change and complain about it or review it online. Mandated arbitration and internal dispute processes also silence consumers and make it less likely that the media will learn about firms' practices.¹⁹⁹ In other words, Dark Contracts exacerbate the non-saliency of many aspects of B2C contracting realities.

Furthermore, recall that firms often make promises, but negate them in the fine print.²⁰⁰ Because consumers feel morally and legally obligated to follow the fine print, they become less likely to complain about manipulative oral

www.npr.org/2020/03/04/812264543/episode-976-terms-of-service [<https://perma.cc/R69M-6LPD>] (discussing an incident relating to a bad review and terms of service); Strom, *supra* note 100 (describing General Mills' reversal of plans to update its terms of service to exclusively include binding arbitration).

¹⁹⁷ Becher & Zarsky, *supra* note 187, at 340.

¹⁹⁸ Cf. Arbel & Shapira, *supra* note 59, at 931 (discussing how firms are active in silencing and avoiding vocal consumers who bring forward complaints or disputes).

¹⁹⁹ See Roy Shapira, *Law as Source: How the Legal System Facilitates Investigative Journalism*, 37 YALE L. & POL'Y REV. 153, 206–09 (2018) (discussing the undermining effect of arbitration on the media's ability to rely on public dispute resolution to cover firms' misconduct and product defects).

²⁰⁰ See *supra* notes 125–136 and accompanying text.

promises. Firms' practice of luring consumers into believing that they can form deep and meaningful relationships with businesses aggravates this problem. As noted, consumers who fall for these promises are likely to be more forgiving toward firms.²⁰¹ This reality, once more, diminishes the likelihood that consumers will complain, let alone to third parties, about the firm's behavior.

In summary, Dark Contracts can considerably reduce consumers' ability to realize when firms abuse their power or mistreat them. Dark Contracts also substantially reduce consumers' motivation and willingness to air their complaints. Combined, this reduces the potential of market-based reputation systems to police firms and advance a balanced B2C contracting environment.

D. Facilitating Unethicity

Section C shifted the focus from legal to extralegal forces, namely reputation. Extralegal forces, however, include not only market-based mechanisms, but also ethical standards that regulate firms' behavior. Such ethical standards may consist of trust, fairness, respect, and kindness. Therefore, the fear of legal sanctions or unwanted reputational consequences is not the only vector that may lead firms to treat consumers justly. Some firms may prefer to treat consumers fairly and transparently because of accepted ethical principles.

Yet, Dark Contracts have two unethical dimensions. First, the mere adoption of non-transparent practices can be unethical. Transparency can often serve as the foundation of an ethical corporate culture.²⁰² Non-transparency depicts the potential abuse of power by the superiorly informed party. Paraphrasing Kant's famous terminology, non-transparency treats consumers merely as a means (to making profits) rather than as an end in themselves.²⁰³ Second, Part I outlined how Dark Contracts facilitate some specific unethical behaviors. As we have seen, these may include surreptitiously discriminating among consumers, limiting consumers' access to justice, introducing stealthy contractual changes, or terminating consumers without providing an explanation or mode of recourse.

This Section develops the contention that Dark Contracts, as a phenomenon, decrease firms' moral and ethical incentives to treat consumers fairly. The

²⁰¹ See *supra* notes 137–146 and accompanying text.

²⁰² See, e.g., Jolene Lampton, *Transparency Is the Bedrock of Ethics*, STRATEGIC FIN. (Sept. 1, 2019), <https://sfmagazine.com/post-entry/september-2019-transparency-is-the-bedrock-of-ethics/> [<https://perma.cc/FKV5-P74L>] (discussing how transparency can be a cornerstone in promoting an ethical corporate culture).

²⁰³ For an accessible explanation, see Samuel Kerstein, *Treating Persons as Means* (analyzing the Kantian philosophies relating to treating people as means), in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2019), <https://plato.stanford.edu/entries/persons-means/> [<https://perma.cc/XBB8-7HE5>].

strategy of non-transparent contracts augments the erosion of values and principles that could otherwise hold firms in check. Essentially, Dark Contracts facilitate a moral wiggle room in which firms can behave self-interestedly while exploiting consumers.

Several factors and vectors explain sellers' preparedness to employ Dark Contracts despite their unethicity. First, consider ubiquity. As the preceding discussion illuminated, the strategy of non-transparency is not limited to just a few wrongdoers. Because non-transparency is the prevailing norm, it becomes easier for firms to justify it. The pervasiveness of non-transparency entails that individuals within firms can more easily self-justify their non-transparent behavior and rationalize it. When doing so, sellers may use arguments such as "this is how people expect me to behave," "this is part of the game," "consumers don't really anticipate anything else," and "everyone else does it."

Furthermore, competitive settings accentuate people's willingness to behave unethically.²⁰⁴ The competitive context might cause sellers to believe that their competitors probably utilize any possible trick to maximize their gains. Sellers may thus believe they are in the midst of an "arms race" that necessitates the use of non-transparent tools.²⁰⁵

Moreover, recall that people are exceptionally sensitive to losses. Salespeople may frame the situation at hand as a potential loss ("If I don't engage in non-transparency, I will lose ground to my competitors who adopt this kind of behavior"). The (factually correct) belief that competitors employ Dark Contracts, coupled with the concern of being left behind if one opts not to use them, can form a remarkably compelling motivation to engage in non-transparency. Advancing one's interests is a natural and instinctive tendency, and avoiding it requires a high degree of self-control.²⁰⁶

An individual's belief that "everyone else does it and this is the only way to survive in consumer markets" can be a forceful self-justification. The literature suggests that "good people" are willing to behave unethically as long as they can maintain a positive self-image as moral individuals. When "good people" can interpret what they do as a legitimate practice, they are more likely to engage in unethical behavior.²⁰⁷

²⁰⁴ See, e.g., Scott Rick & George Loewenstein, *Commentaries and Rejoinder to "The Dishonesty of Honest People": Hypermotivation*, 45 J. MKTG. RSCH. 645, 645–47 (2008) (discussing hypermotivation to engage unethically due to competitive pressures).

²⁰⁵ Cf. *id.* (noting that academics feel the need to "produce more to achieve the same career gains").

²⁰⁶ See, e.g., Don A. Moore & George Loewenstein, *Self-Interest, Automaticity, and the Psychology of Conflict of Interest*, 17 SOC. JUST. RSCH. 189, 189 (2004) (explaining that self-interest is automatic whereas following ethical norms requires deliberate thought).

²⁰⁷ For two examples in other domains, see Celia Moore, James R. Detert, Linda Klebe Treviño, Vicki L. Baker et al., *Why Employees Do Bad Things: Moral Disengagement and Unethical Organi-*

The omnipresence of Dark Contracts normalizes this kind of behavior. The universality of Dark Contracts also amplifies their cumulative ethical harm by blurring the gravity of non-transparency. That is, the fact that otherwise moral and law-abiding people adopt non-transparency as a norm often overshadows its severity. In the long term, however, the pervasive use of Dark Contracts can fuel a suspecting and distrusting B2C environment.

In addition, the nature of modern B2C relationships often entails a lack of familiarity between the contracting parties. Typically, firms have many consumers, and most firms are not acquainted with them. Consumer form contracts align with this reality. Sellers offer such form contracts to numerous (faceless) consumers on a take-it-or-leave-it basis. At the same time, individuals are more willing to hurt strangers than people they know. Therefore, sellers' willingness to use Dark Contracts that damage consumers may be explained, in part, by the lack of familiarity between the parties.

More specifically, Dark Contracts can facilitate bias and unethically in a few ways. Consider, for example, ambiguity. Ambiguity enhances bias and makes it easier for people to overlook the nature of their behavior.²⁰⁸ Dark Contracts create gray areas of legal and moral uncertainty. These gray areas can enable sellers to convince themselves that Dark Contracts are merely legal technicalities that often do not matter much. Along these lines, the mundane nature of consumer transactions further allows sellers to justify their mischief.

Other realities of Dark Contracts also explain sellers' decisions to behave unethically. For example, people's tendency to act dishonestly increases when they believe they are not the only ones benefiting from the wrongdoing. Thus, individual salespeople who trap consumers using Dark Contracts may soothe their conscience by arguing that it is "the firm" that reaps the full benefit of their wrongdoing.²⁰⁹ They may view Dark Contracts as integral parts of their jobs. They may argue that such contracts are a necessary component of B2C relationships, as dictated by their management. The vague nature of Dark Contracts means that sellers will find it easier to engage in such justifications.

Another potential situational factor contributing to sellers' willingness to employ Dark Contracts unethically is teamwork or division of labor. Where different people are responsible for various aspects of the behavior, their disposition

zational Behavior, 65 PERS. PSYCH. 1, 1 (2012) (examining employees' moral disengagement in various contexts); Bazerman et al., *supra* note 134, at 3–4 (discussing accounting scandals and the biases that may lead to them).

²⁰⁸ See generally Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INSTITUTIONAL & THEORETICAL ECON. 137 (2014) (describing and challenging assumptions about compliance with the law when faced with ambiguity).

²⁰⁹ See, e.g., Scott S. Wiltermuth, *Cheating More When the Spoils Are Split*, 115 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 157, 157, 166 (2011) (showing that "people are more likely to cheat when the benefits of doing so are split with another person").

to behave unethically grows. Under these circumstances, each individual can reduce their own responsibility and derive legitimacy from the group.²¹⁰

Dark Contracts can inflict multiple, yet seemingly distinct, harms. By separating these diverse harms, Dark Contracts can reduce the likelihood that any individual will feel responsible for the whole. A manager may stipulate the firm's general expectations; a lawyer may draft the contract; a salesperson will offer the contract to a consumer (or the consumer may simply accept it online by ticking a box); a customer service representative will perform the contract; and other employees may deal with consumer complaints or termination. If each individual does not realize the full impact of non-transparency and does not feel fully accountable, the likelihood of unethical behavior rises.²¹¹

Along similar lines, sellers may perceive their behavior as passive, shifting the blame to consumers.²¹² At the end of the day, salespeople may argue, consumers freely decide to accept these deals. Moreover, the argument goes, consumers have abundant alternative sources of information.²¹³ After all, according to this narrative, if consumers are unhappy with Dark Contracts, they are not forced to accept them. This line of reasoning is concerning and should be rejected.

In summary, people generally believe that they are more honest and moral than others.²¹⁴ Individuals may be unconsciously motivated, or find excuses, to justify their unethical behavior. Alas, such beliefs and excuses can lead firms to justify their non-transparent contracts as an inherent part of the game. It is thus unsurprising that unethical Dark Contracts are the prevailing norm. Ubiquitous unethical behaviors, in turn, can have a destructive effect on interpersonal relations and social trust.²¹⁵ They may even pave the way to more radical forms of anti-social behavior.²¹⁶

²¹⁰ See Ori Weisel & Shaul Shalvi, *The Collaborative Roots of Corruption*, 112 PROC. NAT'L ACAD. SCI. 10651, 10651 (2015) (suggesting that human cooperation can advance corruption).

²¹¹ See generally Melvin J. Dubnick, *Accountability and Ethics: Reconsidering the Relationships*, 6 INT'L J. ORG. THEORY & BEHAV. 405 (2003) (studying how accountability and ethics interact).

²¹² This could be linked to the omission bias, which reflects "the preference for harm caused by omissions over equal or lesser harm caused by acts." See, e.g., Jonathan Baron & Ilana Ritov, *Omission Bias, Individual Differences, and Normality*, 94 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 74, 74 (2004).

²¹³ Typically, consumers can use online platforms or reviews, the firm's published contracts and policies, and the firm's reputation to make decisions.

²¹⁴ See, e.g., Constantine Sedikides & Aiden P. Gregg, *Self-Enhancement: Food for Thought*, 3 PERSPS. ON PSYCH. SCI. 102, 102 (2008) (discussing people's tendency toward positive self-evaluation).

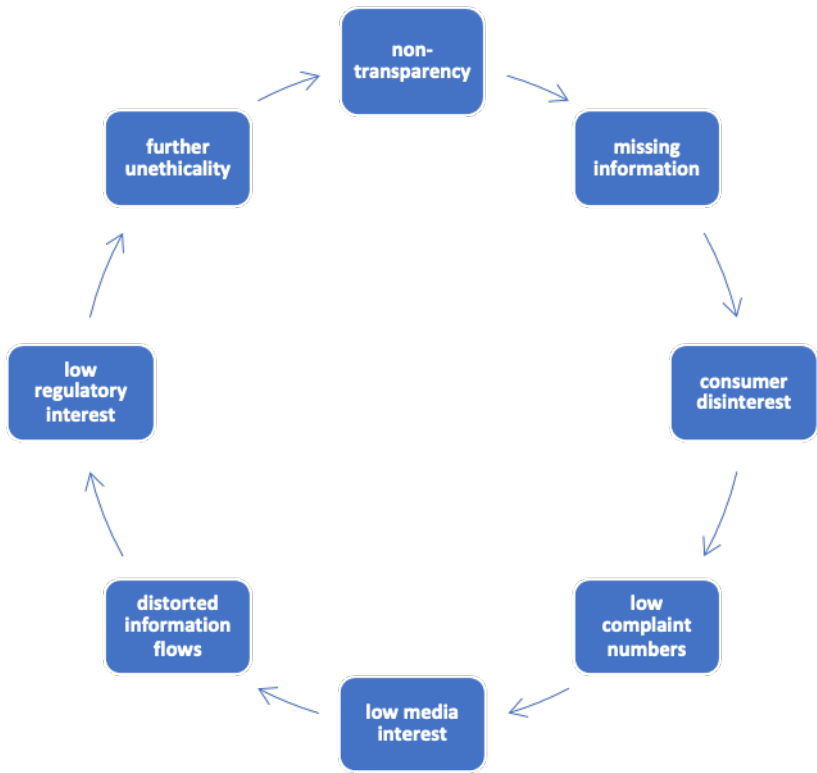
²¹⁵ Cf. Blake E. Ashforth & Vikas Anand, *The Normalization of Corruption in Organizations*, 25 RSCH. ORGANIZATIONAL BEHAV. 1, 1–2 (2003) (arguing that the cost of organizational corruption dwarfs that of street crime "because [it] corrode[s] trust in authorities and institutions").

²¹⁶ See generally GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* (1996) (positing that social disorder-

* * * *

Part I surveyed non-transparency practices in action, focusing on the discrete injuries that Dark Contracts inflict on consumers. Part II placed Dark Contracts in a broader context, explaining why they are further objectionable from legal, market-based, and ethical perspectives. Figure 2 below combines these harms to illustrate the vicious cycle that Dark Contracts generate.

Figure 2. The Vicious Cycle of Dark Contracts



III. THE PERILS AND PROMISE OF TRANSPARENCY RESPONSES

Dark Contracts result in a vicious cycle, which we call on policymakers to break. But transparency can be an elusive concept. Accordingly, this Part conceptualizes and develops a suite of transparency-related policy recommendations.

der creates fear among citizens, which leads to weakened social control, which then allows crime to flourish).

Section A conceptualizes transparency by delineating four paths that policymakers can take. Section B places transparency on the rules-versus-standards spectrum, explaining why transparency is superior to many other frequently employed concepts regulating consumer contracts. Section C puts the transparency idea to work. It demonstrates how transparency-related principles can alleviate the problems that Dark Contracts create. Finally, Section D addresses some limitations of and objections to the proposed transparency principles.

A. Conceptualizing Transparency

Roughly speaking, one can identify two traditional camps in the scholarly discourse about consumer contracts. The first comprises academics who generally support legal intervention and consumer protection measures. Proponents of this approach believe that unfairness and injustice characterize many consumer markets, which therefore merit public scrutiny. Accordingly, advocates of this approach call for relatively strong regulatory control over consumer contracts.²¹⁷

The second camp encompasses academics who generally believe in market forces.²¹⁸ They question the efficacy of regulation and governments' capacity to intervene in consumer markets efficiently. Many in this camp regard standard form contracts as a byproduct of modern markets. They view consumer contracts as a reasonable risk that consumers are happy to assume when transacting with firms. Accordingly, they opine, legal intervention should be reserved for cost-effective measures that can cure market failures.²¹⁹ In between these two camps, scholars propose numerous middle-ground approaches.²²⁰

²¹⁷ See, e.g., 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."); Slawson, *supra* note 17, at 529 (discussing consumer form contract terms that are "almost universally unfair"). See generally RADIN, *supra* note 16 (discussing the pressing need and means to improve oversight of boilerplate terms). The appetite for this approach is prominent in many other jurisdictions, with Europe being a notable example.

²¹⁸ For Articles that follow this line of reasoning, see Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 111–14 (2006) (discussing market remedies to consumers' mistakes); Bebbchuk & Posner, *supra* note 44, at 827–28 (discussing the role of reputation in disciplining sellers).

²¹⁹ See, e.g., George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1298–99 (1981) (developing a theory of standardized warranty based on investment); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 630–32 (1979) (raising questions about the regulatory capacity to influence market imperfections, given incomplete information).

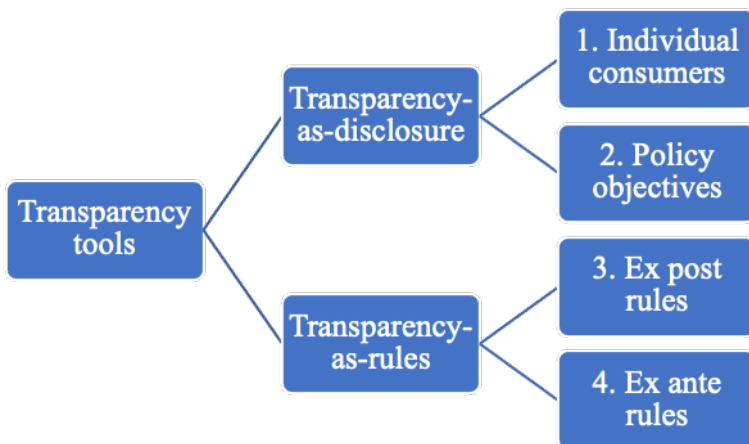
²²⁰ For example, some scholars support the idea of improving disclosures, some believe that ex ante regulation is preferable, and others believe that courts should have a central role in policing unfair terms.

This Article employs the notion of transparency to refer to various types of regulatory and scrutinizing instruments.²²¹ It suggests distinguishing between two fundamental uses of transparency, which it dubs transparency-as-information-disclosures (“transparency-as-disclosure”) and transparency-as-rules-of-behavior (“transparency-as-rules”). As Figure 3 below exemplifies, each of these two approaches toward transparency can be further divided into two sub-categories. Overall, this typology yields four types of transparency tools.

For transparency-as-disclosure, one should differentiate between two objectives, which correlate with two types of transparency tools. The first objective (type 1) is relatively narrow and involves empowering consumers in their B2C interactions by providing them with information. This type of disclosure provides information that consumers can use in their dealings with firms. The second objective (type 2) is more ambitious. This type of disclosure can target intermediaries and parties that do not trade with firms. These may include consumer organizations, market watchdogs, the media, researchers, or monitoring bodies and regulators. Type 2 disclosures can assist in both disciplining markets and advancing more general policy objectives.

As noted, transparency-as-rules should also be separated into two types. The first use of transparency-as-rules pertains to ex post measures that courts and regulators can use to encourage transparent behavior (type 3). The second type of transparency-as-rules pertains to ex ante rules that dictate concrete transparent contractual behaviors (type 4). Accordingly, Figure 3 proposes a typology of transparency-related tools.

Figure 3. Typology of Transparency Tools



²²¹ Cf. Stephen Kosack & Archon Fung, *Does Transparency Improve Governance?*, 17 ANN. REV. POL. SCI. 65, 68 (2014) (identifying four different ways to utilize transparency).

This Article now moves to discuss each of these four types. First, policymakers can mandate that information disclosures align with individual consumers' interests (type 1). Here, policymakers can use transparency as a tool to provide market participants with valuable information.²²² For example, consider a disclosure requirement that compels firms to report on the level of transparency of their unilateral contractual change-of-terms mechanism. To that end, policymakers can utilize a traffic light signal system, where green denotes transparent mechanisms, red indicates non-transparent mechanisms, and orange represents a mediocre transparency level. This, in turn, would presumably empower consumers to use the disclosed information in their decision-making or dealings with firms.²²³

This type of transparency tool may appeal to both academic camps: fairness-motivated proponents and efficiency-concerned advocates. For the former, transparency can be viewed as a social right. Transparency enhances fairness, as it better respects people's autonomy and mastery. Such transparency also advances the ability of third parties—such as legislatures, regulators, and consumer agencies—to identify challenges and respond to consumer harm. For efficiency-oriented scholars, this type of transparency tool is a light-handed regulatory measure, which can reduce information asymmetries. It increases the likelihood that consumers make informed decisions aligned with their preferences. Revealing valuable information of this type reduces transaction costs, which scholars regard as “dead weight losses” and “the root of all evil.”²²⁴

The second usage of transparency we envisage is also based on disclosure, yet with a different purpose. This second category of transparency requirements moves past the interests of individual consumers.²²⁵ Disclosure type 1 aims to provide valuable information that consumers can directly use in their decisions. Disclosure type 2, however, seeks to advance more general policy goals.

In this respect, transparency can support various players who fight for corporate social responsibility, including non-governmental organizations

²²² The role of third parties in ensuring that consumers can benefit from the disclosed information can be essential. See, e.g., David Weil, Mary Graham & Archon Fung, *Targeting Transparency*, 340 SCIENCE 1410, 1410 (2013) (“Third parties may play critical roles, translating complex information into a form more readily used by individuals in market settings . . .”).

²²³ We use “presumably” because when the information is complex, multidimensional, or myriad, consumer organizations or other intermediaries may translate the disclosed information into accessible terms that consumers can use.

²²⁴ Sovern, *supra* note 148, at 1683 (first quoting Carl J. Dahlman, *The Problem of Externality*, 22 J.L. & ECON. 141, 142 (1979); and then quoting STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 26–27 (2002)).

²²⁵ Cf. Kosack & Fung, *supra* note 221, at 69 (noting that transparency can shape “views on what are essentially policy questions . . . rather than individual consumer interests”).

(NGOs), activists, and the media. Examples may consist of disclosures regarding investment policies of financial institutions or the environmental impact of firms' activities. Likewise, this second type of disclosure can assist in addressing policy issues, such as contractual discrimination or dispute resolution processes. In all, the underlying rationale of transparency-as-disclosure is the adage that "knowledge is power." Hence, transparency tools are part of global efforts to control firms' power and ensure they do not abuse it.²²⁶

When people know that others can observe, monitor, and criticize their behavior, they perform at higher standards.²²⁷ Transparency can thus bring with it accountability and fairness.²²⁸ Among other things, an open and transparent environment makes it harder to engage in unethical or anti-social behavior.²²⁹ In short, transparency type 2 also has the advantage of tapping into ethical and moral values.

Harnessing the power of transparency to nudge firms toward policy goals, such as responsible and ethical behavior, is not a utopian aspiration. For example,²³⁰ the Home Mortgage Disclosure Act requires banks to disclose mortgage lending information.²³¹ The Act compels banks and other financial institutions to report data pertaining to the race, gender, and annual income of borrowers and applicants.²³² Interestingly, data from these reports suggested discriminatory racial practices.²³³ In response, Congress approved the Community Rein-

²²⁶ See generally Roy Shapira, *The Challenge of Holding Big Business Accountable*, 44 CARDOZO L. REV. 203 (2022) (discussing ways in which size and market power create governance problems and how to tackle these problems).

²²⁷ Cf. Paul R. Kleindorfer, *What if You Know You Will Have to Explain Your Choices to Others Afterwards?: Legitimation in Decision Making* (explaining that the expectation of having to explain a decision ex post can affect the decision made ex ante), in *THE IRRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD* 72, 72–78 (Erwann Michel-Kerjan & Paul Slovic eds., 2010).

²²⁸ See, e.g., Kosack & Fung, *supra* note 221, at 66 (discussing the possible link between transparency and other desirable outcomes, such as accountability); PERRINE TOLEDANO, COLUM. CTR. ON SUSTAINABLE INV., *PAPER ON THE BUSINESS CASE FOR TRANSPARENCY* 9 (2012), https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1027&context=sustainable_investment_staffpubs [<https://perma.cc/QR38-6RUW>] (associating transparency with "accountability," "fairness," and "sustainability").

²²⁹ Rick & Loewenstein, *supra* note 204, at 647.

²³⁰ The example is drawn from Archon Fung, Mary Graham, David Weil & Elena Fagotto, *From Food to Finance: What Makes Disclosure Policies Effective?* 3 (Harvard. Univ. Taubman Ctr., Policy Brief No. PB-2005-3, 2005), https://ash.harvard.edu/files/ash/files/food_to_finance.pdf [<https://perma.cc/PPD2-WM34>].

²³¹ See Home Mortgage Disclosure Act of 1975, Pub. L. No. 94-200, 89 Stat. 1125 (codified at 12 U.S.C. §§ 2801–2810); Compilation of Reportable Data, 12 C.F.R. § 1003.4 (2021).

²³² 12 C.F.R. § 1003.4(b), (f).

²³³ See Archon Fung, Mary Graham & David Weil, *The Political Economy of Transparency: What Makes Disclosure Policies Sustainable?* 21 (John F. Kennedy Sch. of Gov't, Harvard Univ., Faculty Research Working Paper No. RWP03-039, 2003) ("In 1992, the Boston Federal Reserve conducted a rigorous study that concluded that race had a strong influence in lending decisions . . ."), available at <https://ideas.repec.org/p/ecl/harjfk/rwp03-039.html> [<https://perma.cc/JT9Z-S62B>].

vestment Act of 1977.²³⁴ This Act incentivizes banks to avoid discriminatory practices by allowing regulators to use disclosed information as a factor in deciding whether to approve banks' requests for mergers and acquisitions.²³⁵

Returning to Dark Contracts, there are good reasons to believe that firms routinely discriminate against vulnerable groups of consumers at the performance stage.²³⁶ Transparency measures may shed light on these practices. Such measures can inform consumers about the firms they consider *ex ante* and about consumers' rights *ex post*. These measures can also guide education campaigns, signal what areas require further monitoring and vigilance, and encourage firms to fix the course and avoid discriminatory practices. That said, supporters of the anti-intervention approach may require a more nuanced analysis of type 2 transparency tools. Transparency disclosures may generate costs, and efficiency considerations may require weighing these expected costs against the expected utility.

Where the two types of disclosure are inappropriate or likely to fail,²³⁷ policymakers may wish to employ additional tools. This possibility shifts our focus to a different set of transparency-related tools. Here, we envisage moving past mere disclosures to specific rules that tackle contractual non-transparent behaviors or mechanisms. These rules can be divided into *ex post* monitoring rules (type 3) and *ex ante* preventative ones (type 4).

Rules regarding the readability levels of consumer contracts illustrate. *Ex post* (type 3), courts could ignore the duty to read and assume the consumer did not assent to unreadable contracts.²³⁸ *Ex ante* (type 4), regulatory rules can require firms to draft their contracts to meet specific linguistic metrics. For instance, a rule may stipulate a readability test score that ensures readability by average users. Along these lines, consider the use of all caps. *Ex post* (type 3), courts could treat all caps with suspicion, rather than relying on all caps to inform consumers.²³⁹ *Ex ante* (type 4), regulators could ban the use of all caps paragraphs in consumer contracts. Such rules target non-transparent behavior, directly seeking to prevent it from materializing.

²³⁴ Community Reinvestment Act of 1977, Pub. L. No. 95-128, 91 Stat. 1111 (codified at 12 U.S.C. §§ 2901–2908).

²³⁵ For a review, see Fung et al., *supra* note 233, at 20–22.

²³⁶ See Becher & Zarsky, *supra* note 43, at 77–88 (indicating that one-sided language can be an obstacle to certain consumers); Padi, *supra* note 52, at 825 (discussing the inequality that results from contractual discriminatory practices); Furth-Matzkin, *supra* note 48 (manuscript at 1) (discussing a study that tests whether sellers treat customers differently based on discriminatory factors).

²³⁷ For a comprehensive attack on disclosures, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE* (2014).

²³⁸ See, e.g., *Kernahan v. Home Warranty Adm'r of Fla., Inc.*, 199 A.3d 766, 778–79 (N.J. 2019) (noting that contractual ambiguity may prevent a consumer from knowingly assenting to it).

²³⁹ Arbel & Toler, *supra* note 37, at 894.

Unilateral change-of-term mechanisms can serve as another illustration. Ex post (type 3), courts can view sneaky unilateral contractual changes as invalid and contrary to the duty to contract in good faith and fair dealing. Ex ante (type 4), legislatures may require firms to file amendments to their agreements with regulatory agencies, making these modifications searchable. Additionally, legislatures can require firms to be more transparent about their contractual mechanisms.²⁴⁰ For example, firms could be obligated to inform consumers individually about contractual changes. The relevant rules can further mandate plain language notifications and condition change on consumers' explicit consent. Such rules attempt to ensure specific standards of transparency.

As a final example, consider the issue of non-transparent termination. Ex post (type 3), courts can invalidate contractual terminations without explanation.²⁴¹ At the same time, legislatures can design ex ante (type 4) rules that compel firms to inform consumers prior to termination. Such rules can require the termination notice to include the reason for the termination. It can further allow terminated consumers a voice in the process if they wish to discuss their termination with the firm. Such rules, again, would be designed to reduce firms' ability to behave non-transparently when terminating consumers.²⁴²

Overall, transparency-as-rules can dictate specific norms of transparent behavior. As such, transparency-as-rules is more forceful than transparency-as-disclosures. Transparency-as-disclosures merely seeks to *expose* information and let the market internalize and respond to it. Transparency-as-rules, however, strives directly to *dictate* specific behaviors or *strongly incentivize* them. Therefore, efficiency camp proponents may be more skeptical toward transparency-as-rules.

Within the transparency-as-rules approach, ex ante rules could be more potent than ex post ones. The nature of ex ante rules allows them to prescribe specific behaviors or norms vis-à-vis all market participants. For instance, a rule that compels firms to inform consumers individually about unilateral contract changes and seek their consent can be a general rule that applies to all firms in all circumstances. Ex post rules, however, are likely to be somewhat weaker and more erratic. They depend on enforcement, a crucial challenge for

²⁴⁰ Becher & Benoliel, *supra* note 63, at 664–66.

²⁴¹ For instance, a German court recently ruled that Facebook's account suspensions were illegal because they did not include an explanation. For related media coverage, see Douglas Busvine, *Top German Court Strikes Down Facebook Rules on Hate Speech*, REUTERS (July 29, 2021), [https://www.reuters.com/technology/top-german-court-strikes-down-facebook-rules-hate-speech-2021-07-29/\[https://perma.cc/7PF8-VDF7\]](https://www.reuters.com/technology/top-german-court-strikes-down-facebook-rules-hate-speech-2021-07-29/[https://perma.cc/7PF8-VDF7]) (describing a German court's holding that Facebook's account terminations were illegal because terminated users were not given a reason for termination).

²⁴² Benoliel & Becher, *supra* note 117, at 1059–60.

consumer law. Furthermore, ex post rules depend on a judicial application, which can be slow and often pertain only to the disputing parties.

In summary, Figure 4 ranks the four types of transparency tools according to their forcefulness. One can predict that the proponents of the market-based approach would be more suspicious of the more intrusive measures. We return to some major critiques of transparency tools below.²⁴³

Figure 4. A Continuum of Transparency Tools



As a final exercise, let us consider specific proposals to increase transparency in the arbitration realm. Professor Lampley makes three such proposals, aiming to provide empirical data that will assist in evaluating the fairness and efficiency of arbitral mechanisms.²⁴⁴ First, she proposes that legislators impose on providers of arbitration services data reporting requirements regarding arbitration proceedings.²⁴⁵ Second, she suggests that arbitration law should compel arbitrators to issue short statements of their decisions, which would then be available online.²⁴⁶ Third, she proposes that firms employing arbitration agreements should provide data on the “extent and nature of such arbitrations.”²⁴⁷

This Article’s framework can characterize these three proposals. The first can be categorized as transparency-as-disclosure because it strives to provide interested parties with valuable information. Depending on the target recipients, this can be a type 1 or 2 disclosure. If the information attempts to empower consumers—for example, by providing them information regarding their chances of winning a case—this would be disclosure type 1. If the disclosure aims to contribute to the policy discourse of whether arbitration erodes the protection of individual rights, it would be disclosure type 2.

The same is true concerning the third recommendation, which could again be viewed as transparency-as-disclosure. It is disclosure type 2 if it sheds light on possible discrimination or problematic trade practices, with an eye on pressuring the firm to correct the course. It is disclosure type 1 if it informs inter-

²⁴³ See *infra* notes 273–291 and accompanying text.

²⁴⁴ See Lampley, *supra* note 78, at 1727 (suggesting a “three-part solution for promoting transparency”).

²⁴⁵ See *id.* at 1763–73. Some state statutes require disclosure of arbitration-related information. See, e.g., CAL. CIV. PROC. CODE § 1281.96(a) (West 2022); MD. CODE ANN., COM. LAW §§ 14-3901–3905 (West 2022). Ideally, legislatures could improve these requirements and more broadly adopt them.

²⁴⁶ Lampley, *supra* note 78, at 1773–75.

²⁴⁷ *Id.* at 1775–78.

ested consumers about relevant risks concerning specific products, manufacturers, or firms. The second suggestion, however, can be categorized as transparency-as-rules (type 4). It seeks to dictate, *ex ante*, a specific rule of behavior designed to increase transparency.

B. Improving on Current Vague Standards

A fundamental legal truism is that legal norms are not created equal. This Section aims to explain how transparency measures against the classic distinction between legal norms that are “rules” and those that are “standards.”²⁴⁸

Rules are rigid and relatively easy to implement and enforce. As such, they provide predictability and certainty. Examples may include a minimum age for drinking, driving, or voting; speed limits; and due dates or deadlines (for example, in the case of filing a tax return or appealing a judicial decision). All of these legal rules are relatively straightforward and precise. As such, they provide good behavioral guidance.²⁴⁹

Standards are vague, less constraining, and more flexible. An example may be the use of the terms “reasonable” and “good faith.” Standards provide more space for nuanced development. They allow for *ex post*, context-dependent fairness. Yet, standards do not provide clear means to guide behavior because they enable choice or discretion.²⁵⁰

The literature currently employs a host of vague standards to describe the problem with consumer contracts. Scholars use terms such as “abusive,” “biased,” “exploitive,” “harsh,” “imbalanced,” “onerous,” “one-sided,” “oppressive,” “unfair,” “unfavorable,” “unreasonable,” and “egregious” to convey why consumer contracts merit scrutiny.²⁵¹ But such terms are notoriously hard to define and quantify. What makes a contract term “unfair” or “abusive”? The line is blurry, and one may find it difficult to circumvent intuitive judgments.

Nonetheless, not all standards are equally ambiguous. Despite being a standard, transparency offers an improved framework compared to the above-mentioned terms. Although transparency is not a well-defined rule, the transparency lens allows for more constructive and clear discourse. The following straightforward observation illustrates: the answer to why a term or contractual practice is egregious, unfair, unreasonable, abusive, exploitive, and sometimes

²⁴⁸ See Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381–83 (1985) (providing definitions for rules and standards).

²⁴⁹ *Id.*; see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685, 1688–89 (1976).

²⁵⁰ Kennedy, *supra* note 249, at 1688–89; Schlag, *supra* note 248, at 406.

²⁵¹ See Adar & Becher, *supra* note 170, at 2406, 2409, 2415, 2426; Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 743, 750, 755 (2002); Eric A. Zacks, *Unstacking the Deck? Contract Manipulation and Credit Card Accountability*, 78 U. CIN. L. REV. 1471, 1472, 1500 (2010).

even inefficient is often its non-transparency. This does not work the other way around, however. One cannot plausibly argue that a contract is non-transparent because it is unfair, abusive, or one-sided.

Consider, for instance, the practice of unilateral stealthy contractual change. The transparency prism explains why such changes are problematic or unfair. Because they are non-transparent, consumers may not become aware of them. This may lead to information asymmetry or high transaction costs, injuring legislatures, courts, and consumer agencies. The non-transparency aspect also explains why such changes are unfair: they undermine consumers' autonomy and do not respect their interests.

Discriminatory contractual practices can serve as another illustration. On its face, one may argue that firms should be allowed to differentiate among consumers and treat different groups of consumers differently. Nonetheless, the fact that firms are non-transparent about these practices begs a further inquiry. Utilizing the transparency agenda helps explain the resulting damages of such practices and how they may harm fundamental societal values. It can then propose more tailored transparency-as-disclosure responses.

Another demonstration is the practice of termination without explanation. As noted, firms will typically not provide consumers with an opportunity to challenge or dispute the termination. One may have a solid intuition that this termination is unfair and one-sided. But the transparency framework goes beyond intuition. Lack of transparency about the reasons that led to the termination explains why such terminations may be unfair. Furthermore, lack of due process once a firm makes such a decision may explain why these terminations can offend our sense of justice.

But transparency is more than explaining why a practice or a term is unfair or inefficient. The transparency framework can offer well-designed interventions. Recall that there are four types of transparency tools under the transparency approach that this Article develops. Disclosures (types 1 and 2) can target specific aspects, markets, or firms. In addition, transparency-as-rules (types 3 and 4) can propose concrete responses to (sometimes elusive) grievances over consumer contracts. Such tools can be precise and effective in guiding behavior.

Moreover, the transparency approach we propose includes detailed criteria that guide policymakers in evaluating whether a transparency tool may work in any given context. When transparency-as-disclosure fails (or is inappropriate to begin with), policymakers can opt for the more potent tools of transparency-as-rules. The following Section further illustrates.

C. Breaking the Vicious Circle: Putting Transparency to Work

Policymakers can use transparency as a general framework or value. The aspiration to increase transparency, diffuse information, empower individuals, prevent corruption, and reduce unethical behavior is legitimate in and of itself. Transparency, however, can also be a framework to measure change and progress. Legislatures and regulatory agencies can use transparency-related metrics to measure how firms contract with and treat consumers. Thus, empiricists can measure and compare the efficacy of various regulatory tools. Furthermore, transparency can be a tool for developing detailed and nuanced regulation where appropriate (types 3 and 4).

Transparency policies have been implemented in various domains, such as restaurant hygiene, food safety, and financial reporting. The literature provides some practical lessons on when and how to use transparency.²⁵² Many of these lessons are applicable to the domain of consumer contracts.

Let us consider the circumstances in which transparency principles are likely to succeed.²⁵³ One key element is measurability. Transparency-related policies are more likely to be effective if their impact can be measured.²⁵⁴ Take, for instance, the unreadability of Dark Contracts or the use of all caps.²⁵⁵ One can measure these aspects, and the metrics for doing so are robust. Scholars measure readability by using agreeable linguistic formulas, and they can monitor or quantify the extent of all caps paragraphs.

As discussed above, scholars are now empirically quantifying other aspects of non-transparency, such as firms' selective approach toward consumers.²⁵⁶ The fact that studies can empirically examine the progress (or lack thereof) in these dimensions can help assess the worthiness of any implemented transparency principle.²⁵⁷ Policymakers, therefore, need to clarify how to measure transparency levels in consumer contracts. This will guide firms' behavior and align it with enforcement efforts and empirical studies that examine firms' conduct or compliance.

²⁵² For a detailed discussion, see generally ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (2007).

²⁵³ See generally Archon Fung, Mary Graham, David Weil & Elena Fagotto, *Transparency Policies: Two Possible Futures* (Harv. Univ. Taubman Ctr., Policy Brief No. PB-2007-1, 2007), https://www.hks.harvard.edu/sites/default/files/centers/taubman/files/transparency_new.pdf [<https://perma.cc/4QR4-7U3S>] (describing scenarios in which transparency may be implemented).

²⁵⁴ See *id.* at 4 (proposing accuracy and comparability metrics to enhance the impact of transparency policies).

²⁵⁵ See *supra* notes 20–42 and accompanying text.

²⁵⁶ See *supra* notes 43–59 and accompanying text.

²⁵⁷ At the same time, if policymakers wish to *eliminate* immoral or corrupt practices, they should opt for a ban rather than transparency principles.

Interestingly, the measurability criterion can explain why some underdeveloped transparency tools do not achieve their goals. For instance, the famous European Union GDPR requires firms to use plain language—an important transparency tool—in their privacy policies. The GDPR, however, does not detail or define what “plain language” is. Viewing the GDPR through the transparency framework developed here, one can hypothesize that it will have little effect. If the regulation does not stipulate an accepted way for measuring plain language, one should not expect significant progress. Empirical findings confirmed precisely that.²⁵⁸

Policymakers that are cognizant of the measurability criteria can thus better tailor the transparency tool to the problem at issue. Consider the problem of non-transparent overall representations, such as making unfounded oral promises, tempting consumers to believe they can establish deep relationships with firms, or misleadingly emphasizing benefits while hiding risks.²⁵⁹ Confronting such manipulative behavior by advancing disclosures seems unlikely to work. Currently, there is no agreed-upon standard for quantifying such behaviors and measuring progress on these dimensions. Because metrics are unlikely, policymakers should design rules that ban some behaviors and disincentivize others.

For transparency-as-disclosure, policymakers should consider the accessibility, quantity, and quality of information. That is, firms can readily disclose complex information that consumers cannot understand. Accordingly, the information that transparency tools intend to disseminate should be communicated in a practical way.²⁶⁰ Importantly, it should align with recipients’ capacity and cognitive bandwidth. The literature on “smart disclosure” can assist in designing disclosures and communication campaigns that target people’s intuitive reasoning system.²⁶¹ Smart disclosures can spare people the need to confront and dissect dense information. For instance, a traffic-light label on food packaging or a star rating denoting car safety is substantially more effective than detailed verbal information.²⁶²

²⁵⁸ See *supra* notes 33–35 and accompanying text (discussing a study finding low privacy policy readability scores in a majority of policies studied).

²⁵⁹ For a detailed discussion, see *supra* notes 124–156 and accompanying text.

²⁶⁰ Fung et al., *supra* note 253, at 3 (highlighting the importance of practical communication in the context of transparency).

²⁶¹ Oren Bar-Gill, *Smart Disclosure: Promise and Perils*, 5 BEHAV. PUB. POL’Y 238, 238–39 (2021).

²⁶² See, e.g., Shmuel I. Becher, Hongzhi Gao, Alana Harrison & Jessica C. Lai, *Hungry for Change: The Law and Policy of Food Health Labeling*, 54 WAKE FOREST L. REV. 1305, 1323–51 (2019) (discussing visual front-of-package food health labeling and its efficacy); Weil et al., *supra* note 222, at 1410 (explaining the value of accessible rating measures, such as star ratings for vehicle safety and hygiene grades for restaurants).

Relatedly, transparency-as-disclosure should be user-centered and attentive to who the recipients of the information are.²⁶³ If the information targets individuals, the disclosures should address information people value in easy and accessible (at times, standardized) ways. Complex information that requires deliberate processing is less likely to grab people's attention. At the same time, if the recipients are regulators or consumer organizations, the disclosures may be more nuanced, technical, or convoluted.

From a broader perspective, transparency policies are more effective where user groups utilize, sustain, and improve transparency systems.²⁶⁴ Here, consumer organizations and market watchdogs can play essential roles. Policymakers should thus encourage such parties to partake. Therefore, among other things, transparency systems should be accessible and easy to use and allow information sharing.

Additionally, policymakers should consider and incorporate feedback from stakeholders—firms, consumers, consumer groups, academics, and enforcement agencies. This dialogue may promote a balanced and inclusive perspective and a collaborative environment. Furthermore, policymakers should periodically revisit the implemented principles to prevent the system from becoming obsolete, inefficient, or too rigid.²⁶⁵

Rules, penalties, and incentives are essential components to keep in mind.²⁶⁶ Any regulatory and enforcement schemes should include rules and penalties for breaking them. If firms are adequately fined for not complying with transparency principles, they would be more likely to comply with them. Rigorous enforcement efforts should accompany rules and penalties to amplify the system's effectiveness. Transparency tools that require disclosures especially warrant this.

Simultaneously, incentives for compliance or improvement can further improve the system's sustainability.²⁶⁷ If policymakers convert compliance to positive reputational signals and non-compliance to negative ones, firms will have more to gain by adhering to transparency principles or integrating them

²⁶³ Fung et al., *supra* note 253, at 4 (discussing the importance of considering disclosure recipients' "levels of attention and comprehension").

²⁶⁴ *Id.* at 3 ("Transparency systems are likely to be more sustainable when advocacy groups, analysts, entrepreneurial politicians, or other representatives of user interests have incentives to maintain and improve them.").

²⁶⁵ See, e.g., Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 TUL. L. REV. 105, 137–40 (2018) (proposing more frequent use of temporary laws in the domain of consumer protection).

²⁶⁶ Fung et al., *supra* note 253, at 5 (opining that sanctions and enforcement are important principles in the design of transparency policies).

²⁶⁷ *Id.* at 4 ("When some disclosers perceive benefits from improved transparency, systems are more likely to prove sustainable.").

into their operations. Slightly restated, firms would more likely comply with transparency principles when they can reap reputational benefits or fear retribution for non-compliance. These negative and positive incentives can work together to enhance cooperation and obedience.

In addition to these practical guidelines, transparency can shine a light on the partial success, or the shortcomings, of some pro-consumer initiatives and tools. Consider new technologies, like “smart readers,” that simplify, personalize, and construct consumer form contracts.²⁶⁸ Consumers may use such technologies with ease and at a low price, making lengthy and complex contracts accessible. Such technologies have a great potential to bridge critical information gaps.

Although policymakers can leverage technological developments to improve transparency, the transparency framework can also highlight possible limitations of these technologies. In the case of smart readers that process consumer contracts, firms may draft contracts employing adversarial attacks that manipulate the way smart readers dissect the relevant text.²⁶⁹ Additionally, firms may provide machine-readable contracts, but be non-transparent in other ways. These may include non-transparent contractual performance, dispute and conflict management, and contractual termination. Where transparency-as-disclosure is ineffective, or if policymakers conclude that a certain standard of behavior must be achieved, switching to transparency-as-rules (types 3 and 4) is advisable.

Finally, policymakers should realize that the fight for transparency is a multi-layered effort. The transparency approach should respect legal and non-legal instruments.²⁷⁰ The framework can thus work in concert with other policies and initiatives.²⁷¹ Hence, academics, policymakers, and regulators should regard transparency tools as a supplement to, rather than a substitute for, other policing efforts.²⁷²

²⁶⁸ See Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. 83, 83, 133–34 (2022) (analyzing both the potential and limitations of smart reader technologies as means to overcome the “no-reading problem” in consumer contracts).

²⁶⁹ *Id.* at 121–23 (addressing the concern that firms may attempt to manipulate smart readers, demonstrating that smart reader devices may misinterpret text or images).

²⁷⁰ For example, transparency principles can complement or be part of the efforts to educate sellers about ethics principles.

²⁷¹ For a similar general recommendation, see Fung et al., *supra* note 253, at 5 (noting that “transparency can be designed to work in tandem with other government policies”).

²⁷² Cf. Daniel Schwarcz, *Transparency Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 398 (2014) (emphasizing the need to approach transparency as “a vital complement to effective substantive regulation” in insurance markets).

D. Limitations and Hurdles

Uprooting bias, unethicity, and non-transparency from the B2C relationship is an ambitious, ongoing battle. Adopting a transparency framework to combat Dark Contracts, though practical and realistic, is not a magic bullet. Transparency principles can be limited in scope and effectiveness and encounter resistance. This Section succinctly discusses some potential hurdles and weaknesses.

First, transparency is a restricted concept that does not guarantee fairness or efficiency. Firms can be transparent yet adopt inefficient, biased, or harsh contractual practices and mechanisms. They can be transparent yet overload consumers with a myriad of information they cannot dissect. Furthermore, some disclosures that endeavor to promote ethical behavior can boomerang and make people feel more comfortable exhibiting biases or behaving manipulatively.²⁷³ Likewise, terms can be non-transparent, yet simultaneously fair and efficient and, thus, beneficial overall for consumers.

Our response is that although transparency principles do not guarantee fairness, they can significantly reduce firms' appetite to exploit consumers and abuse their power. Transparency tools may have a positive spotlight effect: people often overestimate the importance that others attribute to their flaws and blunders.²⁷⁴ Firms may attribute much significance to the mere fact that policymakers and the public are demanding transparency and paying attention to their behavior.²⁷⁵ Furthermore, policymakers can move from transparency-as-disclosure to transparency-as-rules where a specific standard of behavior is warranted. Stronger tools can go a long way.

Another criticism of transparency is that although transparency is more concrete than "fairness" or "reasonableness," it is still not well-defined. There is no unified understanding of the transparency concept.²⁷⁶ Thus, what transparency entails in consumer contracts is context dependent.

Our response is threefold. First, the move from vague standards (such as fairness) to a more concrete standard reflects progress. As noted, transparency can explain why specific terms or practices are problematic. Second, the trans-

²⁷³ For instance, by being transparent about a practice, one may believe it is more legitimate to engage in it. See, e.g., Bazerman et al., *supra* note 134, at 7 (describing how disclosing conflicts of interest can exacerbate self-serving behavior).

²⁷⁴ See, e.g., Thomas Gilovich, Victoria Husted Medvec & Kenneth Savitsky, *The Spotlight Effect in Social Judgment: An Egocentric Bias in Estimates of the Salience of One's Own Actions and Appearance*, 78 J. PERSONALITY & SOC. PSYCH. 211, 211 (2000).

²⁷⁵ See, e.g., George Loewenstein, Cass R. Sunstein & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 398 (2014) (explaining that mandated disclosures sometimes influence firms more than consumers).

²⁷⁶ See Kosack & Fung, *supra* note 221, at 67 (noting that "there is no single conception of transparency").

parency framework can often offer metrics to track improvement. Third, transparency, as we employ it, can also utilize specific rules (types 3 and 4) that are clear and that can, as a result, eliminate ambiguity and guide firms' behavior.

That said, the gains of adopting transparency principles are not certain.²⁷⁷ Policymakers need to develop the transparency framework prudently and introduce more detailed rules and measurements to be operational and practical. Transparency systems should be carefully designed and regularly revisited. An incremental and open approach, which includes a dialogue with relevant stakeholders, can help develop effective transparency systems.

A more general concern is that transparency systems must adapt to dynamic markets and practices. Transparency tools should respond to new science and technology, and account for changing political or ideological preferences.²⁷⁸ Designing a workable and effective transparency framework, the argument goes, is a complex challenge that governments and policymakers should not undertake lightly.²⁷⁹

Although this is an important caveat, it applies to virtually every attempt to regulate consumer markets. Taken to an extreme, it implies that policymakers should sit on their hands and avoid any effort to correct failures or advance consumers' wellbeing. This despair is unwarranted. Instead, this reservation should further prompt policymakers to be thorough and vigilant in designing transparency systems. For instance, policymakers should keep in mind the regulatory continuum of four types of transparency tools. Specifically, they should be vigilant in moving from transparency-as-disclosure (types 1 and 2) to transparency-as-rules (types 3 and 4). As part of adopting a humble approach, policymakers should acknowledge that even successful transparency tools entail implementation costs.²⁸⁰ These costs need to be carefully weighed against the expected benefits.

Another practical concern stems from the fact that transparency principles aim to reduce the unequal bargaining power between firms and consumers. They seek to empower consumers and instigate more effective checks on firms. Firms—especially those that perform worse on transparency metrics—are likely to resist these attempts to reduce power asymmetries. *Ex ante*, firms can collabo-

²⁷⁷ See *id.* at 83 (concluding that the success of transparency in improving concrete outcomes is a complex question that depends on various conditions).

²⁷⁸ Cf. Weil et al., *supra* note 222, at 1410 (noting that “politics plays a role in framing targeted transparency” and that “[d]isclosure systems erode over time if not designed to evolve as markets and scientific findings change”).

²⁷⁹ Cf. Nicholas Gruen, Book Review, 24 *POL’Y MAG.*, no. 1, 2008, at 62, 63 (reviewing FUNGET AL., *supra* note 252) (suggesting that, rather than relying solely on regulation, industry leaders should also play a role in introducing transparency norms).

²⁸⁰ *Id.* at 62–63.

rate and influence policymakers not to implement forceful measures.²⁸¹ Regulatory capture can undermine the efficacy of transparency systems.²⁸² Ex post, firms may have a profit incentive to identify loopholes in the system and avoid, exploit, or game it to their advantage.²⁸³

This is a valid concern. Policymakers should be prepared to face firms' attempts to weaken or bypass transparency initiatives. At the ex ante stage, policymakers should discount firms' pressure, minimize interest groups and lobbyists' activities, and invite consumers and other groups to the table. Regulators should preclude firms from dominating the discussion and instead engage in a lively discussion with experts and consumer organizations. At the ex post stage, policymakers and regulators should revisit transparency systems regularly, progress gradually, consult experts, budget for and prioritize enforcement, and seek feedback from participants. All of these measures can reduce the risk that firms will run circles around the proposed system.

Relatedly, another worry that generally accompanies pro-consumer initiatives is the fear of rising costs.²⁸⁴ Putting transparency systems into action can increase firms' expenses of doing business. Firms may incur costs in the process of gathering, processing, and revealing the relevant information.²⁸⁵ Firms may also sustain costs (or losses) in changing their contractual behavior in response to, or in anticipation of, the unveiled information or new regulatory rules.²⁸⁶ Thus, transparency principles can influence market equilibrium and raise marginal costs. The argument also maintains that firms are likely to roll these costs onto consumers. Consumers will then end up paying more for products and services.

²⁸¹ See, e.g., Shmuel I. Becher, *Key Lessons for the Design of Consumer Protection Legislation* (explaining that consumer protection initiatives are often curtailed due to the influence that firms have on regulators and legislators), in *LAW AND ECONOMICS OF REGULATION* 73, 75–77 (Klaus Mathis & Avishalom Tor eds., 2021).

²⁸² See, e.g., Weil et al., *supra* note 222, at 1411 (“Policies lose value when dynamics like gaming and regulatory capture undermine their purposes.”).

²⁸³ See *id.* (“Companies or agencies may also try to avoid detection, appear as if they have complied or improved their performance, or raise some measures without altering underlying outcomes As with any high-stakes policies, transparency may lead to attempts to undermine the system politically or to bribe officials.” (footnote omitted) (citing Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 *YALE L.J.* 574 (2012)). See generally Lauren E. Willis, *Performance-Based Consumer Law*, 82 *U. CHI. L. REV.* 1309 (2015) (suggesting that firms can run circles around consumer law disclosure mandates).

²⁸⁴ For a sophisticated analysis, see generally Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 *STAN. L. REV.* 361 (1991).

²⁸⁵ Weil et al., *supra* note 222, at 1410 (“Forcing companies to collect and disclose information can require substantial resources.”).

²⁸⁶ At times, firms take preemptive steps in response to new disclosure requirements to avoid potential public backlash. See, e.g., *id.* at 1411 (noting the examples of toxic pollution and drinking water contaminants).

We do not find this contention persuasive. First, firms' ability to roll the costs onto consumers in competitive markets is not unlimited.²⁸⁷ Second, such an equilibrium price disruption, if it indeed materializes, is justified. Dark Contracts create markets that are not strong enough to allocate resources efficiently due to acute information asymmetries. Overall, transparency measures should address this failure, inform consumers, and increase their overall welfare. In all, prices that genuinely reflect transparent mechanisms and practices are superior to lower prices that result from non-transparency, manipulation, and unknown risks. Third, the focus on the marginal costs of transparency ignores various potential gains. Transparency correlates with positive outcomes, including productivity, improved work culture, and better financial results.²⁸⁸ Fourth, the potential price impact should not be viewed in isolation nor detached from the overall framework. Transparency systems can contribute to just and equitable B2C relationships while advancing a more ethical market environment. These (sometimes) intangible benefits are an essential part of the transparency mosaic.

As a final critique, one may argue that transparency principles clash with the legitimate use of proprietary information and firms' datasets. American society highly values individual freedom.²⁸⁹ It features a loose culture, an appreciation of entrepreneurship and innovation, and a willingness to trade certainty for a relaxed, informal attitude that allows vagueness.²⁹⁰ Transparency, this argument contends, interferes with firms' ability to shape the B2C relationship.

These arguments are worthy, but their narrative is narrow and biased. The American culture also views law as an art of balancing among competing considerations. The negative consequences of Dark Contracts are far reaching. They lead to inefficient transactions, inflate transaction costs, disrupt society's ability to keep firms in check, undercut consumers' autonomy and mastery,

²⁸⁷ See, e.g., Craswell, *supra* note 284, at 361–62.

²⁸⁸ See, e.g., TOLEDANO, *supra* note 228, at 4–5 (examining the association between transparency regarding tax payments in the extractive industry and better financial results, as well as the correlation between transparency and fewer cases of human and environmental rights violations); see also Kate Russell, *The Business Case for Transparency*, HR DAILY ADVISOR, <https://hrdailyadvisor.blr.com/2020/06/22/the-business-case-for-transparency/> [<https://perma.cc/AKC6-XGM7>] (June 22, 2020) (surveying the links between salary transparency and cohesion in the workplace, human diversity, equity, and productivity).

²⁸⁹ One illustration of that is Hofstede's influential six-dimension cultural study, in which the United States scores very high on individualism (and low on power distance). See *What About the USA?*, HOFSTED INSIGHTS, <https://www.hofstede-insights.com/country/the-usa/> [<https://perma.cc/BMM5-PJR6>].

²⁹⁰ See, e.g., *id.* See generally MICHELE GELFAND, RULE MAKERS, RULE BREAKERS: HOW TIGHT AND LOOSE CULTURES WIRE OUR WORLD (2018) (suggesting that U.S. culture is loose and more open to new people and ideas).

exacerbate inequality, and contribute to an unethical business culture. Transparency can be an essential component in combatting these ills. With time, firms might equate transparency mandates with corporate social responsibility and, thus, equate transparency with the opportunity to buttress their reputation.²⁹¹

CONCLUSION

To improve our understanding of contractual B2C relationships, this Article developed the notion of Dark Contracts. Relying on empirical evidence and findings, the Article first demonstrated how firms utilize non-transparent contractual practices and mechanisms in dealing with consumers. It then explicated the multiple, yet frequently subtle, harms of Dark Contracts. Notably, it illustrated how these harms negatively bear upon consumers, legislatures, courts, regulators, market watchdogs, consumer organizations, reputation systems, and society at large.

Moreover, the various harms associated with Dark Contracts should not be studied distinctly. The transparency approach helps connect the dots between specific contract terms and practices to firms' global approach to B2C contracts. Instead of merely focusing on specific unfair or abusive terms and behaviors, the transparency framework encourages scholars, courts, consumer organizations, and policymakers to capture the big picture.

Transparency enjoys high popularity among academics, NGOs, policymakers, watchdogs, and citizens.²⁹² The power of information can be remarkable, and transparency systems have a promising allure. With time, growing awareness of the potential of transparency measurements could feed dynamics that favor robust transparency. Firms may opt to disclose valuable information or improve non-transparent practices even in domains that are not regulated.

Furthermore, transparency principles could also guide disciplining forces in their monitoring and policing endeavors. It may remind those forces to remain vigilant, think holistically about the B2C landscape, prioritize scrutinizing efforts, and advance educational initiatives. This can generate a positive reinforcing loop that increases the salience of non-transparency in consumer contracts.

²⁹¹ Cf. *Our Commitment*, BUS. ROUNDTABLE, <https://opportunity.businessroundtable.org/ourcommitment/> [<https://perma.cc/2E37-AW67>] (highlighting the Business Roundtable's statement on the purpose of a corporation, which includes transparency). For a critical view, see Brett Ryder, *The Political CEO*, THE ECONOMIST (Apr. 15, 2021), <https://www.economist.com/leaders/2021/04/15/the-political-ceo> [<https://perma.cc/HHZ7-YCBC>].

²⁹² Cf. Kosack & Fung, *supra* note 221, at 67 ("As a basic notion, transparency is attractive to many people.").

Importantly, transparency can provide a common ground for scholars from various camps. Furthermore, transparency moves beyond vague concepts, such as unfairness and one-sidedness, that the literature currently employs vis-à-vis consumer contracts. Transparency can offer concrete types of rules, as well as promote a generally more ethical environment.

Implementing transparency principles is not a panacea, however. The development of transparency systems faces serious challenges. Transparency policies require clever design, rigorous execution, and courageous conversations. Still, taking the transparency path can be rewarding and worthwhile despite the challenges ahead. Transparency can alleviate persistent failures and promote a culture of trust, openness, and respect. The need for more transparent B2C contractual relationships is crucial.

All in all, transparency systems join the call to rethink the social role of corporations in accomplishing sustainable, equitable, and inclusive economic growth.²⁹³ Applying a transparency framework to consumer contracts can play an imperative role in informing and fundamentally altering the legal perspective of the B2C landscape. Like in many other domains, however, progress may require experimentation and will likely be slow and gradual.

²⁹³ For recent illuminating discussions about redefining the roles of corporations, see generally REBECCA HENDERSON, *REIMAGINING CAPITALISM: HOW BUSINESS CAN SAVE THE WORLD* (2020); COLIN MAYER, *PROSPERITY: BETTER BUSINESS MAKES THE GREATER GOOD* (2018).

