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Sneak in Contracts

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SNEAK IN CONTRACTS

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Consumer contracts are a pervasive legal tool that govern many of our daily activities. Yet, consumer contracts are routinely modified by businesses after customers accept them. Common modifications include, for example, a change in fees, alteration of a dispute resolution clause, or revision to the firm's privacy policy. In fact, unilateral modifications can affect virtually every aspect of a contract.

While the literature widely discusses the problem of ex ante *consent to consumer contracts, it does not adequately address the problem of* ex post *consent to unilateral modifications. But the practice of unilateral changes to consumer form contracts comes with significant detriments and social costs. Despite these costs, there are no systematic empirical studies exploring this phenomenon. This Article aims to fill this gap by empirically examining the frequency, mechanics, and degree of transparency of unilateral change mechanisms in consumer contracts.*

This Article examines 500 sign-in-wrap contracts of the most popular websites in the United States that use such agreements. We find that the vast majority of consumer contracts in our sample are "sneak in" contracts—that is, they allow firms

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unilateral and broad discretion to covertly change consumers' rights and obligations after consumers accept them. This study's findings raise concerns as to whether sneak in contracts are aligned with prominent core values and principles of contract law, such as consent, promise, reliance, consideration, freedom, choice, empowerment, and community. The study thus calls for greater transparency in the law that governs the modification of consumer contracts.

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I. INTRODUCTION

Consumer contracts are a pervasive legal tool that governs many of our daily activities.[1] Whether we connect with friends on Facebook, post an experience on Instagram, open a bank account with Bank of America, get a mortgage from Wells Fargo, order food via Uber Eats, share a thought on Twitter, insure a car with State Farm, purchase a book on Amazon, join an Anytime Fitness gym, or search for a product on Google, consumer contracts frame our rights and obligations. Indeed, consumer contracts are omnipresent.

Nevertheless, businesses routinely modify consumer contracts after consumers accept them.[2] Take, for instance, some of the most popular firms and online platforms.[3] While we drafted this Article, YouTube, Airbnb, Lyft, PayPal, Quora, Meetup, Yelp, Dropbox, LinkedIn, Spotify, and Microsoft have all changed their consumer agreements after consumers entered into the contracts.[4] Common modifications include changes in fees,[5] modifications of dispute

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[1] This reality is well-acknowledged. *See, e.g.*, Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 76 (2019) (noting that standard form contracts have become "widespread" and "commonplace"); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435 (2002) ("People encounter standard forms in most of their contractual endeavors."); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 594 (1990) ("The standard form contract is the most common type of contract entered into by consumers.").

[2] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 1 (AM. LAW. INST., Tentative Draft 2019) ("Standard contract terms in consumer contracts governing ongoing relationships . . . are often modified."); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 667 (2010) ("[C]orporations unilaterally amend their dispute resolution clauses again and again.").

[3] For the definition of "popularity" in the context of our dataset, see *infra* note 58 and accompanying text.

[4] These changes, which took place from February 2019 to January 2020, were accompanied by personal e-mails that were sent to users. All e-mails are on file with the authors.

[5] *See, e.g.*, Collins Fin. Servs. v. Vigilante, 915 N.Y.S.2d 912, 918 (N.Y. Civ. Ct. 2011) (noting that in "credit card and other consumer credit debt cases[,] . . . items such as the interest rate, late payment charge, and over-the-limit fees may change several times over the course of the consumer credit agreement").

resolution clauses,[6] and revisions to the firm's privacy policy.[7] In fact, unilateral modifications can change any aspect of a contract.

Consumer form contracts raise a myriad of thorny issues, and extensive scholarship exists on the problem of information asymmetry and *ex ante* consent to such contracts.[8] Yet policymakers, courts, and scholars do not adequately recognize the scope of the problem of *ex post* consent to unilateral contract modification. This is particularly troubling since an important difference exists between the *ex ante* and *ex post* stages. When a consumer accepts a form contract *ex ante,* the consumer must deal with a lengthy and complex contract, which the consumer often cannot read or understand.[9] The consumer also must consider other important aspects of the product or service (such as price, delivery, design, etc.), which may distract the consumer from the contract.[10] When facing *ex post* modifications, however, a consumer only needs to consider the specific aspects of the contract that are being changed. That is, a consumer's attention is directed to the relevant clauses that are being modified. This suggests that, at least when a

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[6] *See, e.g.*, Badie v. Bank of Am., 79 Cal. Rptr. 2d 273, 277 (Cal. Ct. App. 1998) (describing a notice sent by a bank to its credit account customers making an ex post change to the dispute resolution clause in each customer's account agreement).

[7] *See, e.g.*, Ian Paul, *Instagram Updates Privacy Policy, Inspiring Backlash*, PCWORLD (Dec. 18, 2012, 8:32 AM), https://www.pcworld.com/article/2021285/instagram-updates-privacy-policy-inspiring-backlash.html (describing revisions to Instagram's privacy policy).

[8] For a succinct explanation of the problem of information asymmetry in consumer contracts, see *infra* Part II. For intriguing discussions about consumers' consent to form contracts and the potential ways fine print can backfire, harm consumers, and impact consumers' perspectives, see Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1747–50 (2014) [hereinafter Wilkinson-Ryan, *Psychological Account*] and Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 164–73 (2017) [hereinafter Wilkinson-Ryan, *Perverse Consequences*].

[9] *See* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2277 (2019) (providing empirical evidence that "consumer sign-in-wrap contracts are generally unreadable" to the average consumer).

[10] This problem is also known as information overload. *See* Melvin Aron Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305, 305–07 (1986) (arguing that information overload can result from many irrelevant and unnecessary terms incorporated in form contracts); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1226 (2003) (arguing that, in the context of consumer contracts, relevant yet excessive information can lead to information overload).

consumer is not locked into a contract,[11] the consumer is more likely to read, review, and evaluate a provision incorporated by *ex post* modification than to read the same provision *ex ante*, so long as the *ex post* modification is properly communicated.

Unfortunately, however, this potential promise of the *ex post* stage has largely been overlooked. Some commentators have examined the phenomenon of *ex post* unilateral change,[12] but the literature primarily relies on common sense, assumptions, and anecdotal evidence. In other words, there is a paucity of systematic empirical studies that explore the contractual mechanisms that support, allow, and facilitate these unilateral modifications.[13] This

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[11] *See infra* notes 130, 207–208 and accompanying text.

[12] These important scholarly efforts offer theoretical analyses of the social, economic, and legal implications of consumer contract modifications. *See, e.g.*, Peter A. Alces & Michael M. Greenfield, *They Can Do What!? Limitations on the Use of Change-of-Terms Clauses*, 26 GA. ST. U. L. REV. 1099, 1100–09 (2010) (surveying unilateral change-of-terms provisions in a range of consumer contracting settings and the laws that govern such provisions); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 588–89 (2014) (exploring the "term optimism" phenomenon and proposing a system of term substantiation and warnings about unexpected terms); Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 8–26 (2010) (exploring the costs of unilateral consumer contract modification); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 119–22 (2007) (presenting behavioral patterns relevant to standard form contracting practices and critiquing various attempts to combat the problems posed by standard form contracts); Curtis Bridgeman & Karen Sandrik, *Bullshit Promises*, 76 TENN. L. REV. 379, 382 (2009) (distinguishing "bullshit promises" from promissory fraud and proposing reforms in contract and tort law to combat these promises); David A. Hoffman & Tess Wilkinson-Ryan, *The Psychology of Contract Precautions*, 80 U. CHI. L. REV. 395, 427–44 (2013) (presenting research on self-protective behavior during and after contract negotiation); Horton, *supra* note 2, at 608–10 (discussing the use of unilateral changes to procedural contract terms and arguing that such revisions should be prohibited); Jake Linford, *Unilateral Reordering in the Reel World*, 88 WASH. L. REV. 1395, 1395–1404 (2013) (discussing the differences between the negotiated contracts portrayed in films and on television and real-world boilerplate contracts); Jeannie Marie Paterson & Rhonda L Smith, *Why Unilateral Variation Clauses in Consumer Contracts Are Unfair*, 2016 CCLJ LEXIS 2, 3–9 (arguing that unilateral variation clauses in consumer contracts are usually unfair and unjustified).

[13] Empirical studies have explored the *frequency* of modifications in consumer contracts. *See* Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 274–75 (2013) ("[F]orty percent of the contracts . . . examined saw at least one standard term change over the period between 2003 and 2010; some changed more than ten terms."); *see also* Jeannie Marie Paterson & Jonathan Gadir, *Looking at the Fine Print: Standard Form Contracts for Telecommunications Products and Consumer Protection Law in Australia*, 37 U. W. AUSTL. L. REV. 45, 45–48

Article aims to fill this gap by empirically examining the nature and frequency of change-of-terms mechanisms in consumer contracts.[14]

Our analysis is based on a sample of the 500 most popular websites in the United States that use sign-in-wrap contracts.[15] Sign-in-wrap contracts are an important and prevalent type of consumer agreement in which the user agrees to the terms and conditions as part of the sign-up process.[16] Such contracts are routinely accepted by billions of users when signing up on popular websites such as Facebook, Amazon, Instagram, and Uber.[17] Unilateral modifications of these contracts have triggered intense public debate and criticism.[18]

As this Article demonstrates, unilateral, broad, and hidden changes to consumer form contracts harm consumers and impose considerable social costs.[19] Among other costs, this practice creates

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(2013) (analyzing consumer protection compliance problems in standard form contracts in the Australian telecommunications industry).

[14] *See infra* Part III.

[15] *See infra* Section III.A.

[16] *See* Benoliel & Becher, *supra* note 9, at 2264 ("A sign-in-wrap contract is commonly defined as an agreement that an online website requires its users to accept before they sign up to use the website's services.").

[17] *See, e.g.*, Andrew Hutchinson, *Facebook Reaches 2.38 Billion Users, Beats Revenue Estimates in Latest Update*, SOCIAL MEDIA TODAY (Apr. 24, 2019), https://www.socialmediatoday.com/news/facebook-reaches-238-billion-users-beats-revenue-estimates-in-latest-upda/553403/ (reporting that Facebook served 2.37 billion monthly active users as of the first quarter of 2019).

[18] *See* Brad Stone & Brian Stelter, *Facebook Withdraws Changes in Data Use*, N.Y. TIMES (Feb. 18, 2009), https://www.nytimes.com/2009/02/19/technology/internet/19facebook.html (describing the backlash following a change in Facebook's user agreement that "appeared to give [Facebook] perpetual ownership of [users'] contributions to the service"); *see also* Charlie Richards, *Users Outraged over PayPal Terms and Conditions That Allow 'Robocalling,'* COINTELEGRAPH (June 4, 2015), https://cointelegraph.com/news/users-outraged-over-paypal-terms-and-conditions-that-allow-robocalling (describing the controversy surrounding an update to PayPal's terms and conditions giving PayPal the right to "'robocall' and text [users] for marketing purposes"); Jonathan Weber & Dan Levine, *Instagram Retreats on Some Service Terms After Backlash*, REUTERS (Dec. 20, 2012, 8:45 PM), https://www.reuters.com/article/us-usa-instagram-changes-idUSBRE8BK03K20121221 ("Instagram . . . has retreated from some but not all of the controversial changes in its terms of service that prompted a fierce backlash from users earlier this week.").

[19] *See infra* Section IV.B. Notably, we use the terms "unilateral modification clause," "change-of-terms clause," "modification term," and the like interchangeably. Likewise, we use the terms "consumer contracts," "consumer form contracts," and "form contracts" interchangeably.

the risk that hidden unilateral changes that harm consumers will fly under consumers' radars and remain unnoticed.[20] It also forces consumer watchdogs—which aim to reduce information asymmetry between consumers and firms—to wastefully invest resources in constantly trying to uncover hidden and harmful contract modifications.[21]

In light of the social costs of unilateral modifications, this Article employs the term "sneak in contracts" to refer to agreements that include three cumulative characteristics. First, sneak in contracts grant firms the right to *unilaterally* modify the agreements without consumers' explicit consent to the change. Second, sneak in contracts use *broad* unilateral change provisions, giving firms wide discretion to modify the contract at any time and for any reason. Third, sneak in contracts facilitate *non-transparent* modifications; they do not require firms to inform consumers personally (e.g., by e-mail), publicly (e.g., via these firms' websites), or in advance about the occurrence and substance of the change.

We studied the nature of sneak in contracts via a content analysis of the contractual modification mechanisms—namely, the change-of-terms provisions—employed by 500 highly popular websites.[22] Specifically, we examined how firms design unilateral modification clauses. Are these mechanisms fair, transparent, and efficient? Do they properly balance the interests of businesses and consumers? Do they provide consumers with clear and effective notice of proposed changes?

This Article makes three contributions. First, the results of our empirical study indicate that the vast majority of consumer

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[20] *See infra* Section IV.B.

[21] *See infra* Section IV.B.

[22] *See infra* Section III.B. Change-of-terms clauses have become increasingly prevalent in consumer contracts. *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 reporters' notes (AM. LAW. INST., Tentative Draft 2019) ("Businesses often specify, in their original standard contract terms, a procedure for contract modification."); *see also* Alces & Greenfield, *supra* note 12, at 1107 (describing change-of-terms clauses as "now-ubiquitous"); Ayres & Schwartz, *supra* note 12, at 588 ("Standard-form relational contracts increasingly include 'change of term' provisions . . . ."); Marotta-Wurgler & Taylor, *supra* note 13, at 254 (explaining that change-of-terms clauses "have become increasingly pervasive over the past decade"); Marco Loos & Joasia Luzak, *Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts With Online Service Providers*, 39 J. CONSUMER POL'Y 63, 67 (2016) ("One of the most commonly drafted contractual terms by online service providers is a clause that allows them to modify the contract's terms and conditions.").

contracts—for the most popular websites, at least—are sneak in contracts.[23] Thus, the Article sheds important light on the need to scrutinize the *ex post* stage of consumer contracts. While focusing on consumers' consent and the need to protect them during the period of contract formation is natural and intuitive, this Article illustrates that such concerns should remain paramount *after* the parties have entered into the contract, too. Accordingly, the results of our study encourage a more nuanced conversation about whether modification terms are aligned with the core values and principles of contract law—such as consent, promise, reliance, consideration, freedom, choice, empowerment, and community.

Second, this Article enriches the discourse regarding the regulation of the content and mechanics of consumer contracts.[24] Commentators generally agree that courts should prevent parties from unfairly using unilateral modification provisions.[25] However, this approach might be too vague and imprecise—one which does not provide enough guidance to courts, legislatures, and contracting parties. This Article calls for the introduction of an underemployed principle—transparency—into the policing of consumer contract modifications.[26] The Article offers a transparency index that is based on concrete, objective, and measurable data. The Article then proposes specific recommendations to improve transparency and reduce social waste. Since transparency is not a silver bullet, the Article further delineates other steps policymakers can take to reduce the problem of sneak in contracts.

Third, this Article blends theory with data. It narrows the gap between legal assumptions, intuitions, and beliefs on the one hand and consumer contracting realities on the other. In this respect, the Article joins recent scholarly efforts to supplement the theoretical

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[23] *See infra* Section III.C.

[24] For a discussion on the contract mechanics that most impact consumers' choices and consumer contracts, see Gregory Klass, *Parol Evidence Rules and the Mechanics of Choice*, 20 THEORETICAL INQUIRES L. 457, 458 (2019).

[25] *See, e.g.*, Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 816 (2016) ("Under the preexisting duty rule, . . . courts will not allow parties to force unilateral modifications in unfair or exploitative ways.").

[26] *See infra* Part IV.

and conceptual literature on consumer contracts with empirical data and examinations.[27]

Part II of this Article provides the conceptual context for the empirical test of this study. It considers the fundamental problem of information asymmetry in consumer contracts, linking it to unilateral change provisions and the notion of sneak in contracts. Part III presents the empirical test of this study. It reviews the data that underlies the test, discusses the test's methodology, and details the test's results. Part IV discusses the normative policy and legal implications of the empirical results. It also provides tentative guidelines for better approaching the thorny problem of sneak in contracts. Part V tackles some possible limitations and critiques of our proposals. Part VI concludes.

II. THE SNEAK IN CONTRACT CONCEPT

A fundamental assumption of contract law is that the contracting parties care about the content of their agreement. Parties presumably exercise their autonomy and maximize their utility by entering into transactions that are aligned with their preferences.[28] Clearly, parties cannot reach a meeting of the minds without having a reasonable opportunity to become familiar with the content of their contracts.[29]

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[27] *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, 1 (2014) (studying the "Internet browsing behavior of 48,154 monthly visitors to the Web sites of 90 online software companies to study the extent to which potential buyers access the [companies'] end-user license agreement[s]"); Benoliel & Becher, *supra* note 9, at 2258 (testing the readability of sign-in-wrap contracts on various websites); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1035 (2019) (examining the role that unenforceable rental agreement terms "play in shaping tenants' postcontract decisions and behavior"); Marotta-Wurgler & Taylor, *supra* note 13, at 243 (studying end user license agreements using a sample of agreements "from 264 mass-market software firms between 2003 and 2010"); Florencia Marotta-Wurgler, *Even* More Than You Wanted to Know *About the Failures of Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 63, 65 (2015) (reviewing changes in disclosure requirements in a large sample of end user license agreements from 2003 to 2010).

[28] *See* Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1229 (2006) ("When buyers receive confusing or contradictory terms . . . people cannot follow them and use them to order their affairs, and that is arguably problematic for their autonomy.").

[29] Many commentators have discussed the challenge that consumer contracts pose for informed consent in the context of contract formation. *See, e.g.*, Ronald J. Mann, *"Contracting"*

Employing economic terminology, the insistence on a contracting party's ability to make informed decisions may conflict with the fundamental problem of asymmetric information between contracting parties.[30] Asymmetric information arises where contracting parties are "differently informed" about the transaction at stake, with one party holding more information than the other.[31] This can lead to uninformed and inefficient decisions.[32] A consumer's lack of familiarity with contractual terms is a specific category of asymmetric information.[33] This is a valid concern, not only *ex ante* (i.e., before a consumer enters into a transaction), but also *ex post* (i.e., after the transaction has been entered into).

Against this background, it should come as no surprise that consumers value information about *ex post* contractual changes that affect their rights and obligations. Undeniably, this is manifested by consumers' reactions to certain modifications introduced by large corporations in recent years. For example, Instagram made a contract amendment that apparently allowed its advertisers to display its users' photos without compensation.[34] Consumers fiercely objected to the change.[35] As another example, PayPal modified a contract to allow it to begin contacting consumers with text messages and autodialed or prerecorded calls.[36] Consumers objected to this change as well.[37] In yet another case, General Mills,

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for Credit, 104 MICH. L. REV. 899, 901–06 (2006) (discussing the problems posed by standardized terms in consumer contracts).

[30] *See* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 733–35 (2008) (discussing contractual asymmetric information in the context of the duty to read doctrine).

[31] *Id.* at 733.

[32] *See id.* at 734 ("The existence of obligational asymmetric information is a serious market failure that can undermine the efficiency of many consumer transactions. . . . Where imperfect information exists, the ability of parties to maximize utility via open market transactions will inevitably decrease.").

[33] *Id.* at 733.

[34] Weber & Levine, *supra* note 18.

[35] *Id.* ("Instagram . . . has retreated from some but not all of the controversial changes in its terms of service that prompted a fierce backlash from users . . . .").

[36] Alex Johnson, *PayPal Backs Down on Controversial New Robocall Policy*, NBC NEWS (June 29, 2015, 8:08 PM), https://www.nbcnews.com/news/us-news/paypal-backs-down-controversial-new-robocall-policy-n384116.

[37] *See id.* (reporting that the new PayPal policy "angered users, lawmakers and federal regulators").

a major manufacturer and marketer of consumer foods, introduced a mandatory arbitration clause in its online contract.[38] Once again, consumers fiercely resented the change.[39] All of these unilateral changes resulted in corporate scandals covered by prime mass media.

While consumers value information about changes to their contracts, self-interested firms may employ sneak in contracts that give the firms wide discretion and maximum flexibility with minimal transparency requirements. In this way, sneak in contracts might allow a business to modify a contract at its sole discretion and at any time. Under sneak in contracts, contractual changes might come into effect automatically, or even retroactively, without obtaining the consumers' active, direct, or explicit assent.

Furthermore, under sneak in contracts, the purpose of the contractual change might be unconstrained. Firms might not have to present a legitimate business interest or a reasonable cause to justify modifications. Simply put, firms might draft contracts that allow them to change terms at will. Accordingly, a major concern in the context of consumer contracts is firms' broad and self-serving right to change the terms of their agreements.[40] Modification terms may be a concern even if such mechanisms would be regarded as unacceptable under current case law because the mere inclusion of these terms may have a chilling effect on many consumers.[41]

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[38] *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 (reporting that General Mills had "quietly put up the new terms requiring consumers . . . interacting with General Mills . . . to agree to arbitration").

[39] *See id.* (explaining that General Mill's new arbitration clause was "widely excoriated by consumers").

[40] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 1 (AM. LAW. INST., Tentative Draft 2019) ("There is a concern . . . that businesses will make self-serving, opportunistic modifications in standard contract terms once consumers are already locked into the service.").

[41] *See, e.g.*, Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83, 91 (1997) ("[C]onsistent with the concerns of many legal scholars, the presence of exculpatory language did have a deterrent effect on participants' propensity to seek compensation."); Wilkinson-Ryan, *Psychological Account*, *supra* note 8, at 1782 (finding that the existence of fine-print disclosures in contracts tended to cause experimental subjects to understand transactional harms as products of consumer consent, rather than firm wrongdoing); *see also* Meirav Furth-Matzkin, *On the Unexpected*

Moreover, sneak in contracts might not require firms to effectively and adequately inform consumers about contractual changes. Specifically, firms may not have to provide consumers with advanced notice of upcoming contractual modifications, let alone the specific content of the changes, thus creating nontransparent contractual mechanisms. To employ the economic terminology discussed above, sneak in contracts situate consumers in an inferior position, where they suffer from information asymmetry.

Sneak in contracts may differ in their degrees of stealth. For example, a sneak in contract may not require the firm to take *any* action to inform consumers about a contractual change that affects consumers' rights and obligations. To illustrate, such a contract may broadly state: "We reserve the right to make changes to this contract at any time."[42] Alternatively, a sneak in contract may require firms to take limited actions to inform consumers about a contract amendment, while excluding other important actions. For example, the agreement may obligate the business to *personally* notify consumers about any contract alteration and allow consumers time to review the change but fail to explicitly obligate the firm to *publicly* inform consumers about the modification.[43] The contract also may not require the firm to explain to consumers, both personally and publicly, the nature of the change. To illustrate, such agreements may generally state: "We may, from time to time, change the contract. We will notify you at least thirty days before such changes apply to you."[44] While sneak in contracts may differ in their degree of guile, they usually have one common characteristic:

Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market, 9 J. LEGAL ANALYSIS 1, 2–3 (2017) (arguing that unenforceable terms in consumer contracts cause consumers to (1) "unquestioningly behave in accordance with their contract terms, ignorant of their unenforceability," (2) back down from attempting to have sellers resolve problems "once the seller brings the relevant contractual terms to their attention," and (3) compromise with sellers "on the basis of the false assumption that their entire contract is enforceable").

[42] *See, e.g.*, *Conditions of Use*, AMAZON, https://www.amazon.com/gp/help/customer/display.html/ref=ap_register_notification_condition_of_use?ie=UTF8&nodeId=508088 (last updated May 21, 2018) ("We reserve the right to make changes to our site, policies, Service Terms, and these Conditions of Use at any time.").

[43] *See infra* Section IV.C.

[44] *See, e.g.*, *Netflix Terms of Use*, NETFLIX, https://help.netflix.com/en/legal/termsofuse (last updated Jan. 1, 2021) ("Netflix may, from time to time, change these Terms of Use. . . . [F]or existing members, such revisions shall, unless otherwise stated, be effective 30 days after posting.").

they do not obligate the firm to adequately inform consumers—personally, publicly, or in advance—about the occurrence and content of a unilateral contract modification.

Sneak in contracts—both online and offline—present key challenges to contract law in general and to the law of consumer contracts in particular. Such contracts give firms wide discretion to alter the terms of their form contracts, without being adequately transparent about these changes. But how self-serving and sneaky are consumer contracts in practice? Are the concerns surrounding them justified from an empirical perspective? The next Part tackles these questions.

III. THE EMPIRICAL TEST

This Part transitions from presenting general assumptions and intuitions about unilateral change terms to examining these terms empirically. In doing so, it examines a sample of consumer contracts used by highly popular websites in the United States. In particular, this examination seeks to answer three major questions: (1) How widespread are sneak in contracts? (2) How transparent are such contracts? (3) Is there is a relationship between the degree of transparency, or lack thereof, and the website's traffic?

At this point, a quick clarification about our third question is due. It is possible that websites with lower traffic are less likely to have transparent modification mechanisms than sites with higher traffic. First, the probability that consumers will detect hidden contract changes—and fiercely resent them—likely is lower when fewer consumers visit and monitor a website's activities.[45] Second, and closely related, websites with less traffic may be less popular and thus less closely monitored and discussed by online and mass media. We return to this hypothesis below.

A. DATA

In order to investigate the sneak in contract phenomenon, we focus on an important and prevalent type of consumer agreement: the sign-in-wrap contract. Sign-in-wrap contracts on websites

[45] *Cf.* Linda Dawson, *Preventing Abuse and Neglect in Health Care Settings: The Regulatory Agency's Responsibility*, WIS. LAW., Aug. 2004, at 13, 65 ("Perpetrators are less likely to act when they know that all eyes are watching all the time.").

usually state explicitly that by signing up for the website's services, the user agrees to the contract.[46] The user can normally view the contract terms by clicking a hyperlink located next to a sign-up button displayed on the screen.[47] This hyperlink is often labeled as "Conditions of Use," "Terms of Service," "Terms and Conditions," or simply "Terms."

Importantly, a sign-in-wrap contract often includes a change-of-terms clause, the focus of this Article's empirical study.[48] A change-of-terms clause gives a firm the right to unilaterally change the terms of the parties' agreement.[49] In addition to unilateral change terms, sign-in-wrap contracts often include clauses that define consumers' rights and obligations. Typical clauses include:

> (1) an intellectual property clause, which informs consumers about how they may use the website's content;[50]
> (2) a prohibited use clause, which outlines what actions users are prohibited from doing, such as database scraping;[51]

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[46] *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 75–76 (2d Cir. 2017) (stating that sign-in-wrap agreements on websites inform the consumer that she assents to the website's terms of use by signing up to use the website); TopstepTrader, LLC v. OneUp Trader, LLC, No. 17 C 4412, 2018 WL 1859040, at *3 (N.D. Ill. Apr. 18, 2018) (noting that, during the registration process on a website, sign-in-wrap agreements often display language to the effect of: "By signing up for an account with [website provider], you are accepting the [website]'s terms of service" (alterations in original)).

[47] *See TopstepTrader*, 2018 WL 1859040, at *3 (explaining that sign-in-wrap agreements usually provide a hyperlink to the terms of service); Robert V. Hale II, *Recent Developments in Online Consumer Contracts*, 71 BUS. LAW. 353, 357 (2015) (noting that websites' sign-in-wrap agreements typically make their terms accessible via a hyperlink).

[48] *See infra* Section III.B.

[49] *See* Bar-Gill & Davis, *supra* note 12, at 6–7 (describing "change-of-terms clauses" as "provisions that allow unilateral changes in terms"); Albert H. Choi & Geeyoung Min, *Contractarian Theory and Unilateral Bylaw Amendments*, 104 IOWA L. REV. 1, 23 (2018) (characterizing a change-of-terms clause as a provision that allows "one party to a contract the right to unilaterally amend (or modify) the contract").

[50] *See, e.g.*, *Terms of Service*, YOUTUBE (Dec. 10, 2019), https://www.youtube.com/static?template=terms&gl=US ("You retain ownership rights in your Content. However, we do require you to grant certain rights to YouTube and other users of the Service . . . .").

[51] *See, e.g.*, *Terms of Use*, ZILLOW GROUP, https://www.zillow.com/corp/Terms.htm (last updated Nov. 4, 2020) (listing prohibited uses, including "database scraping").

> (3) a termination clause, which specifies the circumstances under which the website can deactivate user accounts;[52]
> (4) a limitation of liability clause, which stipulates the degree of legal exposure for the website in actions arising from website usage;[53]
> (5) a dispute resolution clause, which outlines the way the parties will resolve legal disagreements related to the contract (e.g., arbitration);[54]
> (6) a forum selection clause, which establishes the geographic location for litigation between the parties;[55]
> (7) a governing law clause, which specifies what law will govern a dispute between the parties;[56] and
> (8) a time bar clause, which sets a time period within which the user is entitled to sue the website.[57]

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[52] *See, e.g.*, *Terms of Service*, TWITCH, https://www.twitch.tv/p/legal/terms-of-service/ (last modified Jan. 1, 2021) ("To the fullest extent permitted by applicable law, Twitch reserves the right, without notice and in our sole discretion, to terminate your license to use the Twitch Services (including to post User Content) and to block or prevent your future access to and use of the Twitch Services . . . .").

[53] *See, e.g.*, *Terms of Service*, QUORA, https://www.quora.com/about/tos# (last updated Dec. 11, 2020) (containing a "Disclaimers and Limitation of Liability" section which lists matters for which Quora disclaims liability).

[54] *See, e.g.*, *Walmart.com Terms of Use*, WALMART, https://www.walmart.com/help/article/walmart-com-terms-of-use/f25b207926d84d79b57e6ae2327bbf12 (last updated Dec. 4, 2020) (containing a "Disputes & Arbitration; Applicable Law" section providing that users and Walmart "will waive any right to file a lawsuit in court or participate in a class action for matters within the terms of the Arbitration provision").

[55] *See, e.g.*, *Terms of Service*, YELP, https://www.yelp.com/static?p=tos (last updated Dec. 13, 2019) (providing that certain classes of claims "are subject to the exclusive jurisdiction in, and the exclusive venue of, the state and federal courts located within San Francisco County, California").

[56] *See, e.g.*, *User Agreement*, EBAY (Aug. 20, 2020) https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259 ("You agree that, except to the extent inconsistent with or preempted by federal law, the laws of the State of Utah, without regard to principles of conflict of laws, will govern this User Agreement and any claim or dispute that has arisen or may arise between you and eBay, except as otherwise stated in this User Agreement.").

[57] *See, e.g.*, *Terms of Service*, TUMBLR, https://www.tumblr.com/policy/en/terms-of-service (last modified Sept. 25, 2019) ("You agree that any claim you may have arising out of or related to this Agreement or your relationship with Tumblr must be filed within one year after such claim arose; otherwise, your claim is permanently barred.").

This Article's sample contains the 500 most popular websites in the United States that use sign-in-wrap agreements. The initial data source was the Alexa Top Sites web service, which provides a ranked list of the most popular websites in the United States.[58] The Alexa Top Sites service is a leading website traffic measurement tool[59] based on millions of internet users.[60] Since Alexa Top Sites is built on a significant sample of internet users,[61] it is widely used as a source of data for empirical research.[62] Of the most popular websites in the United States identified by Alexa Top Sites, we selected the 500 most popular sites that use sign-in-wrap contracts, including Google, Facebook, and Amazon. Thus, the 500 websites making up the sample rank among the 1000 most popular websites in the United States.[63]

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[58] *See Alexa Top Sites*, AMAZON WEB SERVS., https://aws.amazon.com/alexa-top-sites/ (last visited Jan. 24, 2021) [hereinafter *Alexa Top Sites*] ("The Alexa Top Sites web service provides ranked lists of the top sites on the Internet."). According to Alexa Top Sites, a website's ranking is determined by a combination of unique visitors and page views. *See id.*

[59] *See* Estela Marine-Roig, *A Webometric Analysis of Travel Blogs and Review Hosting: The Case of Catalonia*, 31 J. TRAVEL & TOURISM MARKETING 381, 386 (2014) ("Alexa Traffic Rank is the most popular Web site traffic measurement unit . . . ."); Adela-Laura Popa, Naiana Nicoleta Tarca & Teodora-Mihaela Tarcza, *The Online Strategy of Romanian Higher Education Institutions: Present and Future* ("Alexa traffic rank is one of the most used instrument in analyzing a site performance."), *in* 1 ENTREPRENEURSHIP, BUSINESS AND ECONOMICS 413, 420 (Mehmet Huseyin Bilgin & Hakan Danis eds., 2016).

[60] *See* Greg Orelind, *Top 6 Myths About the Alexa Traffic Rank*, ALEXA BLOG, https://blog.alexa.com/top-6-myths-about-the-alexa-traffic-rank/ (last visited Jan. 24, 2021) ("Alexa's traffic panel is based on millions of people using over 25,000 different browser extensions that appeal to a wide audience.").

[61] *See Alexa Top Sites*, *supra* note 58 ("Alexa's site popularity traffic rankings are based on the anonymous usage patterns of one of the largest . . . samples of internet users available in the world.").

[62] *See* Liwen Vaughan & Rongbin Yang, *Web Traffic and Organization Performance Measures: Relationships and Data Sources Examined*, 7 J. INFORMETRICS 699, 701 (2013) (noting that numerous studies have used data from Alexa Top Sites). For examples of studies using Alexa, see Stephen K. Callaway, *Internet Banking and Performance*, 26 AM. J. BUS. 12, 16 (2011); Chun-Yao Huang & Shin-Shin Chang, *Commonality of Web Site Visiting Among Countries*, 60 J. AM. SOC'Y FOR INFO. SCI. & TECH. 1168, 1172 (2009); Agnieszka Wolk & Sven Theysohn, *Factors Influencing Website Traffic in the Paid Content Market*, 23 J. MARKETING MGMT. 769, 779 (2007).

[63] To be precise, and as noted above, the 500th website in our sample is ranked 886 in popularity according to Alexa.com. *See Alexa Top Sites*, *supra* note 58.

B. METHODOLOGY

This Section presents the method we used to examine the frequency of sneak in contracts in the 500-website sample and, more particularly, the frequency of the three major elements of change-in-terms clauses: unilaterality, breadth, and non-transparency.[64] It then explains the methodology applied to test the statistical relationship between a website's traffic ranking and the degree of transparency that the site explicitly promises to provide consumers regarding contractual changes.

1. Frequency of Sneak in Contracts. To examine the frequency of sneak in contracts, we first determined whether each sample contract included a change-of-terms clause. To that end, we searched for terms associated with these clauses within each contract. We specifically searched for any combination of each of the following words: "change," "modify," "alter," and "amend." We then read the clauses that included these words to ascertain whether the clauses were, in fact, change-of-terms clauses. Next, for each contract that included a modification clause, we examined the following three elements that typify sneak in contracts:

> 1. Unilaterality: Does the change-of-terms clause allow the firm to *unilaterally* modify the contract without first obtaining the consent of consumers?[65]
> 2. Breadth: How *broad* is the change-of-term clause? Namely, how wide is the discretion that it gives the firm to modify the contract? With regard to breadth, we examined the following two questions for each clause:
>
> > 2.1. Does the contract indicate any time frame during which the contract may be changed? Or can the firm alter the terms at any time?
> >
> > 2.2. Does the contract limit the circumstances under which the firm can change its terms? For

[64] For these a discussion of these dimensions, see Part I.

[65] If a change-of-terms clause did not allow the firm to unilaterally modify the contract without obtaining the consent of consumers, the answer was negative. For instance, this was the case if a term stated "you understand and agree that your express consent to the amended Terms is a precondition to your access of, or to your activity within, the Website" or the like. *See, e.g.*, *Terms and Conditions*, ABS-CBN, https://careers.abs-cbn.com/terms (last visited Jan. 24, 2021).

example, are changes allowed only in response to a "good" or "reasonable" cause, such as technological development or legislative change? Does the change need to be justified by a legitimate business interest? Alternatively, can the business change the contract at will, regardless of the circumstances, motivation, or causes at hand?

3. Transparency: How *transparent* is the change-of-terms clause? With respect to transparency, we specifically examined the following five questions for each clause:

3.1. Does the clause require the firm to notify consumers individually about the *occurrence* of any contractual change that alters the firm's or consumers' rights or duties? For example, this requirement could be satisfied where the clause states, "[Y]ou will be notified by e-mail of any amendment to this agreement."[66] If a contract did not state that changes would be individually communicated to consumers, the answer was negative.

3.2. Does the clause require the firm to inform consumers on a *public platform* about the occurrence of any contract modification that amends the firm's or consumers' rights or obligations? For example, if the public webpage on which the contract was published contained wording such as, "we'll post notice of modifications to this contract on this page," this requirement was

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[66] *See, e.g.*, *Steam Subscriber Agreement*, STEAM, https://store.steampowered.com/subscriber_agreement/ (last updated Aug. 28, 2020) ("[Y]ou will be notified by e-mail of any amendment to this Agreement made by Valve at least 30 (30) days before the effective date of the amendment."). Notably, 2.92% of the clauses included a general statement such as, "we will notify you," without specifying how the firm would make the notice. For the sake of caution, we assumed, for the benefit of the company, that its intention is to notify the consumer personally of the change, and the contract was coded as a 1. For example, if a contract stated, "we may change these Terms at any time, and we will tell you when we do," we coded that contract as a 1. For an explanation of our coding system, see *infra* Section III.B.*2*.

> satisfied.[67] Conversely, if a contract stated that the firm would only post the updated terms on its website, without stating that the firm would explicitly notify consumers about the incidence of a contract alteration, this requirement was not met.[68]

These two questions focus on whether the firm must inform consumers about the mere *occurrence* of a change of terms. Another important aspect of a change-of-terms clause is whether the firm must inform the consumer not only about the occurrence of the change, but also the *nature* of the change. We therefore also examined the following two questions:

> 3.3. Does the contract require the firm to personally inform consumers about the *content* of the change? This could be done, for example, by stating, "we will provide notices regarding any modifications by sending you an e-mail, and these notices will also inform you of the changes to the contract."[69] If the contract did not require the firm to inform consumers about the nature of the change, this requirement was not satisfied.
> 3.4. Does the clause require the business to publicly disclose to consumers the *content* of the change? This could be fulfilled, for example, by terms that state that the firm will post an online notice on their website explaining how the contract

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[67] *See, e.g.*, *Google Terms of Service*, GOOGLE (Oct. 25, 2017), https://policies.google.com/terms/archive/20171025?hl=en ("We'll post notice of modifications to these terms on this page."). Note that Google's Terms of Service have been modified and no longer include such a term. *Google Terms of Service*, GOOGLE, https://policies.google.com/terms?hl=en (last modified Mar. 31, 2020) ("If we materially change these terms . . . we'll provide you with reasonable advance notice and the opportunity to review the changes . . . .").

[68] *See, e.g.*, *Reddit User Agreement*, REDDIT, https://www.redditinc.com/policies/user-agreement (last updated Sept. 15, 2020) ("If we make changes, we will post the revised Terms and update the Effective Date above.").

[69] *See, e.g.*, *Terms of Service*, RESEARCHGATE, https://www.researchgate.net/terms-of-service (last updated July 7, 2020) ("In our notices, we will inform you of the new terms and the main changes to these Terms . . . .").

> was modified. If the firm did not make such a commitment, the requirement was not met.

Finally, with respect to transparency, we also inquired into whether the change-of-terms clause requires the firm to inform consumers in *advance* about the change and its substance. Accordingly, we asked:

> 3.5. Does the change-of-terms clause provide consumers with a "cooling-off period"[70] following a contractually assured notification, either personal or public, about the change in terms? That is, does the clause require the firm to provide consumers with a period of time to review and consider the amendment before it becomes effective?[71] If so, we also recorded the length of the cooling-off period (e.g., fourteen days, thirty days, etc.). Notably, we considered the cooling-off period a transparency variable because transparency requires not only the disclosure of information, but also that the disclosure be timed in a way that enables consumers to consider and respond to the information.[72]

To conclude, Diagram 1 summarizes the elements of sneak in contracts.

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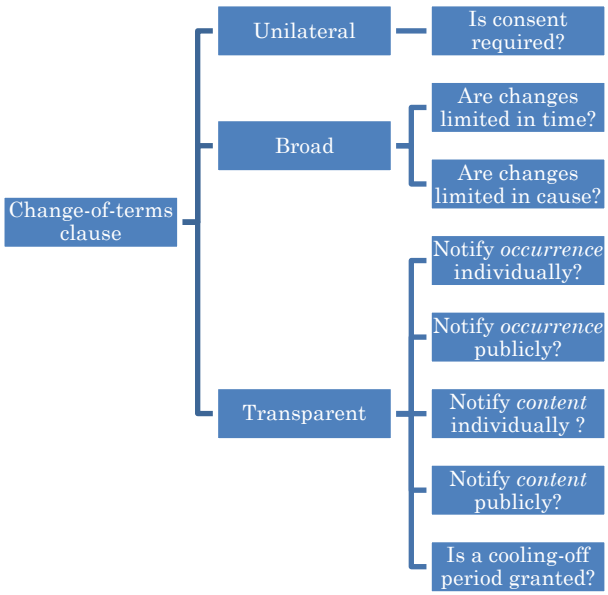
[70] The term "cooling-off period" is more frequently used in the *ex ante* stage when a consumer is deciding to enter a contract. However, we use the term here to refer to a proper notice prior to making an *ex post* change to the contract.

[71] *See, e.g.*, TUMBLR, *supra* note 57 ("[T]he modified version of this Agreement will become effective fourteen days after we have posted the modified Agreement and provided you notification of the modifications.").

[72] *See* Brad Rawlins, *Give the Emperor a Mirror: Toward Developing a Stakeholder Measurement of Organizational Transparency*, 21 J. PUB. REL. RES. 71, 75 (2009) ("Transparency is the deliberate attempt to make available all legally releasable information . . . in a manner that is . . . timely . . . for the purpose of enhancing the reasoning ability of publics . . . ."); Terry Collins-Williams & Robert Wolfe, *Transparency as a Trade Policy Tool: The WTO's Cloudy Windows*, 9 WORLD TRADE REV. 551, 557 (2010) (explaining that transparency means, *inter alia*, the publication of legal rules "in sufficient time for anyone affected by the rules to know about them before they come into force, both to allow time to comment and time to prepare to take advantage of the new opportunities created").

Diagram 1. The Elements of Sneak In Contracts



Before delving into the results, one clarification is due. At times, a change-of-terms clause employed non-binding language in relation to one of the questions above. In such cases, the contract was not coded as including an explicit requirement related to that question. For example, if the contract stated, in non-binding language, that the firm "*may*" provide consumers personal notice regarding a contractual change, it was not coded as including an explicit duty to provide such notice.[73]

Similarly, some clauses merely *allowed* firms to inform consumers by employing one of several alternatives. We did not perceive these clauses as imposing an explicit duty to take specific action. For example, if the clause stated that any amendment would be effective following "either" a dispatch of a personal notice to the consumer "or" a posting of the amended terms, the contract was not

[73] *See, e.g.*, *Verizon Media Terms of Service*, VERIZON MEDIA, https://www.verizonmedia.com/policies/us/en/verizonmedia/terms/otos/index.html (last updated Aug. 2020) ("Verizon Media *may* provide you with notices, including service announcements and notices regarding changes to these Terms . . . ." (emphasis added)).

coded as including an explicit duty to send a personal or public notice to consumers.[74]

2. Statistical Relationship. We tested the statistical relationship between a website's traffic ranking and the degree of the explicit transparency of change-of-terms provisions. To do that, we took a number of steps. First, we determined the website's traffic rank via Alexa's traffic ranking database.[75] According to Alexa, a site's ranking is based on two measures: "reach" and "page views."[76] Alexa defines "reach" as "the number of unique Alexa users who visit a site on a given day,"[77] and "page views" as "the total number of Alexa user page requests for a site."[78] Accordingly, the site with the "highest combination of users and page views" is ranked first.[79] The site popularity ranks in our sample ranged from 1 (most popular) to 886 (least popular).[80]

Second, in order to measure the level of each website's explicit transparency, we developed an initial transparency index. The index was based on six variables, and a contract's total score depended on the number of variables present in the contract. In line with our analysis above, the variables in our index included the following:

> (1) a duty to notify consumers personally about the occurrence of any contractual change that alters their rights or duties;
> (2) a duty to notify consumers publicly about the occurrence of the change;
> (3) a duty to notify consumers personally about the substance of the change;

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[74] *See, e.g.*, *English – Disney Terms of Use – United States*, THE WALT DISNEY COMPANY, https://disneytermsofuse.com/english/ (last updated June 9, 2020) ("If we make a material change to this Agreement, it will be effective thirty (30) days following *either* our dispatch of a notice to you *or* our posting of the amended terms . . . ." (emphasis added)).

[75] *See Alexa Top Sites*, *supra* note 58.

[76] *Id.* A website's reach and page views are computed over a trailing three-month period. *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] The average site in our sample ranked 399.3, with a standard deviation of 258.0.

> (4) a duty to notify consumers publicly about the substance of the change;
> (5) a duty to notify consumers only about "material" changes, either personally or publicly; and
> (6) a duty to give consumers a cooling-off period following notification of a change.

As a general rule, for variables 1, 2, 3, 4, and 6, we awarded the contract a "1" for each of the variables that appeared in the contract's modification clause. Conversely, we assigned the contract a "0" for any of those variables that were not present. With respect to variable 5, when a contract included a partial duty to disclose only "material" contract changes, either personally or publicly, we awarded the contract a "0.5" (and not a "1").

To illustrate, if a modification clause included only a duty to personally notify consumers about the occurrence of a contractual change, its total score was 1. Alternatively, if a modification clause included a duty to personally inform consumers about material changes and a duty to allow consumers a cooling-off period, its weighted sum was 1.5.

Based on this data, the next step was to define a three-level transparency index. We labeled the index "high" if the sum of the six transparency dimensions was equal to or greater than 1.5, "moderate" if the sum was equal to 0.5 or 1, and "low" if the sum was equal to 0. Of course, there are different ways one might develop an index from the factors identified above. For reasons detailed throughout the Article, we believe that the examined variables are, by and large, equally important, so as a starting point, we generally regarded the factors as equal. That said, one might develop other indexes once scholars and regulatory agencies give additional attention to this matter.

Finally, to test whether a statistical association exists between a website's popularity rank and its transparency index, we used the Wilcoxon-Mann-Whitney test (also known as the Mann-Whitney test).[81] We chose this test for two reasons. First, as our study

[81] *See, e.g.*, Anna Hart, *Mann-Whitney Test Is Not Just a Test of Medians: Differences in Spread Can Be Important*, 323 BMJ 391, 391 (2001) ("The Mann-Whitney test is a test of both location and shape. Given two independent samples, it tests whether one variable tends to have values higher than the other."). Notably, prior to using the Wilcoxon-Mann-Whitney test, we used the Kruskal-Wallis (K-W) test in order to assure that there is an overall

required, the test is based on the order of data values, namely their ranking, rather than their actual value.[82] Second, the test is robust to deviations from normal distribution,[83] as we identified in our data.

C. RESULTS

This Section reports the main results of our study. We first focus on the frequency and nature of sneak in contracts. We then discuss the statistical relationship between website traffic and levels of transparency.

1. Frequency of Sneak in Contracts. The results of this study show that sneak in contracts are widespread. Of the 500 contracts in our dataset, the vast majority (81.6%; *n=408*) included the three cumulative characteristics of sneak in contracts.

To begin with, of the 500 contracts, the clear majority (95.8%; *n=479*) included a change-of-terms clause that enables the firm to change the consumer agreement. The results also indicate that consumer contracts normally include a combination of the three elements of sneak in agreements, as follows:

> 1. Do most change-of-terms clauses allow firms to *unilaterally* change the contract?

The unequivocal answer to this question is "yes." Out of 479 change-of-terms clauses examined, 98.54% (*n=472*) did not require consumers' active assent as a prerequisite for the change to come

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difference between the website popularity ranks among the three different transparency levels. *See* Yvonne Chan & Roy P Walmsley, *Learning and Understanding the Kruskal-Wallis One-Way Analysis-of-Variance-by-Ranks Test for Differences Among Three or More Independent Groups*, 77 PHYSICAL THERAPY 1755, 1755 (1997) ("The Kruskal-Wallis one-way analysis-of-variance-by-ranks test . . . is used to determine whether three or more independent groups are the same or different on some variable of interest when an ordinal level of data or an interval or ratio level of data is available."). The results of the K-W test were positive (*P=0.0004*).

[82] *See* Francis Sahngun Nahm, *Nonparametric Statistical Tests for the Continuous Data: The Basic Concept and the Practical Use*, 69 KOREAN J. ANESTHESIOLOGY 8, 12 (2016) ("[T]he Mann-Whitney test . . . ranks the original data values. That is, it collects all data instances from the samples and ranks them in increasing order.").

[83] *See* Hart, *supra* note 81, at 391 ("The Mann-Whitney test is used as an alternative to a t test when the data are not normally distributed.").

into force.[84] This entails that the change can come into effect automatically. Relatedly, of the 479 clauses examined, 99.79% (*n=478*)—that is, all but one contract—did not require the business to solicit comments or reservations from consumers before changing the agreement.[85]

2. Are change-of-terms clauses *broad* in scope?

The answer to this question is, once again, a clear "yes." The change-of-terms clauses in the vast majority of contracts in our sample were broad. That is, the clauses allowed the firms wide discretion to modify the contract. The following findings are illustrative:

a. No time constraints. None of the clauses in our sample limited the time during which the contract could be modified over the contract period. Put simply, this allows these businesses to alter these consumer contracts at any time.

b. Change at will. Furthermore, of the 479 clauses examined, 99.37% (*n=476*)—that is, all but three contracts—did not limit the purpose of the change. The contracts did not stipulate, for example, a requirement that the change will only be for a good or reasonable cause. Essentially, this allows these businesses to change these consumer contracts at will.

3. Do change-of-terms provisions ensure *transparency*?

The empirical results indicate that the vast majority of modification clauses allow firms to make hidden modifications.[86] That is, they lack features that guarantee reasonable levels of transparency. The following findings are illustrative:

a. No obligation to inform consumers individually. Most clauses in our sample failed to require firms to effectively notify consumers about the occurrence of any contract alteration that affects their right or duties. More specifically, 93.95% (*n=450*) of the clauses

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[84] *See infra* Table 1. *Cf.* Marotta-Wurgler, *supra* note 13, at 35 (showing that out of 261 privacy policies studied in 2016, 10% stated that users must explicitly assent to material changes to the policies).

[85] For the one exception, see *Terms of Service*, ARCHIVE OF OUR OWN (May 23, 2018), https://archiveofourown.org/tos ("Proposed changes will be prominently disclosed on the Service, and we will offer at least a two-week comment period for proposed changes.").

[86] *See supra* Section III.B.*1*.

examined did not obligate the firms to inform consumers individually about the change.

Notably, a significant minority of clauses (29.44%; *n=141*) shifted the burden from businesses to consumers. These terms impose a burdensome duty on consumers to inspect contract terms regularly in order to detect contractual changes.[87]

b. No obligation to inform consumers as a class. Out of the 479 contracts studied, 94.78% (*n=454*) did not impose a general requirement to notify consumers via a publicly accessible platform about the change.

A minority of clauses (17.95%; *n=86*) required firms to notify consumers only about "material" modifications, either publicly or personally.[88] Normally, however, these clauses did not define what makes a change "material." Typically, they gave the firm the sole discretion to decide which changes are material.[89] Given the partial nature of these clauses, we did not regard them as including an explicit duty to inform consumers about contractual changes.

c. No obligation to detail the substance of contractual modifications. The change-of-terms clauses studied largely failed to require firms to adequately notify consumers about the *substance* (rather than the *occurrence*) of any modification that alters the firm's or consumers' rights or duties. More specifically, 100% of the clauses examined did not impose an explicit duty on firms to inform consumers personally about the substance of a change. Similarly, none of the clauses explicitly required firms to publicly disclose the contents of a change.

Only one clause (0.21%) partially required the firm to disclose to consumers the substance of the change.[90] However, this non-

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[87] Clauses that merely recommended or suggested that consumers regularly inspect contract terms were not regarded as imposing a duty to inspect on consumers.

[88] *Cf.* Marotta-Wurgler, *supra* note 13, at 35 (showing that out of 261 privacy policies studied in 2016, 34% stated that the company will alert consumers to "material" changes of the policy).

[89] *See, e.g.*, *Terms of Service*, PINTEREST (May 1, 2018), https://policy.pinterest.com/en/terms-of-service ("If a revision, in our discretion, is material, we'll notify you."). Moreover, clauses that oblige firms to notify consumers about only "material" changes usually fail to ensure that the notification will be both personal and public. *See, e.g.*, *id.*

[90] *See* RESEARCHGATE, *supra* note 69 ("We will provide . . . notice [regarding any modifications to the Terms of Service] by sending you an email and/or notifying you on the

representative clause suffered from a central deficiency: it promised to notify consumers only about the substance of "main" changes, without defining the term "main."[91] Given the partial nature of this clause, we did not regard it as including an explicit duty to inform consumers about the substance of contractual modifications that alter the consumers' rights or duties.

d. No cooling-off periods. One way to balance the effects of *ex post* unilateral changes, at least to some extent, is to provide consumers with an effective cooling-off period and "right to exit."[92] Under some circumstances, notifying a consumer in advance about a change and allowing the consumer to exit the contract in light of that change decreases the potential unfairness to the consumer. When a consumer is not de facto locked into a contract, an effective cooling-off period can provide the consumer with some degree of choice—a way to exercise autonomy and freedom.

Only a small minority of clauses (7.31%; *n=35*) provided consumers with a cooling-off period following *either* a personal *or* public notification about the change in terms. Among these cooling-off clauses, 45.71% (*n=16*) provided a thirty-day cooling-off period. Another 40% (*n=14*) provided a fourteen-day period. The remaining 14.29% (*n=5*) provided cooling-off periods of other lengths.[93]

Table 1 below summarizes the findings discussed in this Section. It details the distribution, among the 479 change-of-terms provisions in our sample, of the contractual sneakiness variables within each sneakiness category. A value of "1" in the table means that the relevant variable appears in the clause. A value of "0" indicates that the relevant variable did not appear in the contract.

Service. . . . In our notices, we will inform you of the new terms and the main changes to these Terms . . . .").

[91] *Id.*

[92] *See* Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 TUL. L. REV. 105, 125–27 (2018) (discussing the benefits of providing consumers a cooling-off period and the right to exit).

[93] Specifically, one contract provided a seven-day cooling-off period, another provided a ten-day period, and one other provided a twenty-eight-day period. One clause included a "reasonable" cooling-off period. Finally, one contract stated that notice will be provided "prior" to the effective date of any amendment or change.

*Table 1. Distribution of Sneakiness Variables (*n=479*)*

Sneakiness Category	Variable	Value	n	%
Unilaterality	Changes are subject to consumers' explicit consent	0	472	98.54
		1	7	1.46
Breadth	Changes are constrained in time	0	479	100
		1	0	0
	Changes are constrained in purpose	0	476	99.37
		1	3	0.63
Transparency	Promise to notify consumers personally about occurrence of change	0	450	93.95
		1	29	6.05
	Promise to notify consumers publicly about occurrence of change	0	454	94.78
		1	25	5.22
	Promise to notify consumers personally about substance of change	0	479	100
		1	0	0
	Promise to notify consumers publicly about substance of change	0	479	100
		1	0	0
	Promise to give consumers a cooling-off period	0	444	92.69
		1	35	7.31

2. Statistical Relationship. The results of the study also indicate that there is an association between a website's traffic and its transparency level. Put simply, less popular sites tend to have less transparent modification mechanisms. The initial results, to be followed by more nuanced investigation, show that the mean website rankings within the moderate- and low-transparency levels

were substantially lower than the mean website ranking within the high-transparency level.[94]

While the mean website ranking within the moderate-transparency level was 390.9, the mean website ranking within the high-transparency level was 208.8—substantially higher. Similarly, the mean website ranking within the high-transparency level was substantially higher than the mean website ranking within the low-transparency level, at 416.4. Similar results were observed regarding the median website ranking within the three transparency levels. These results are summarized in Table 2.

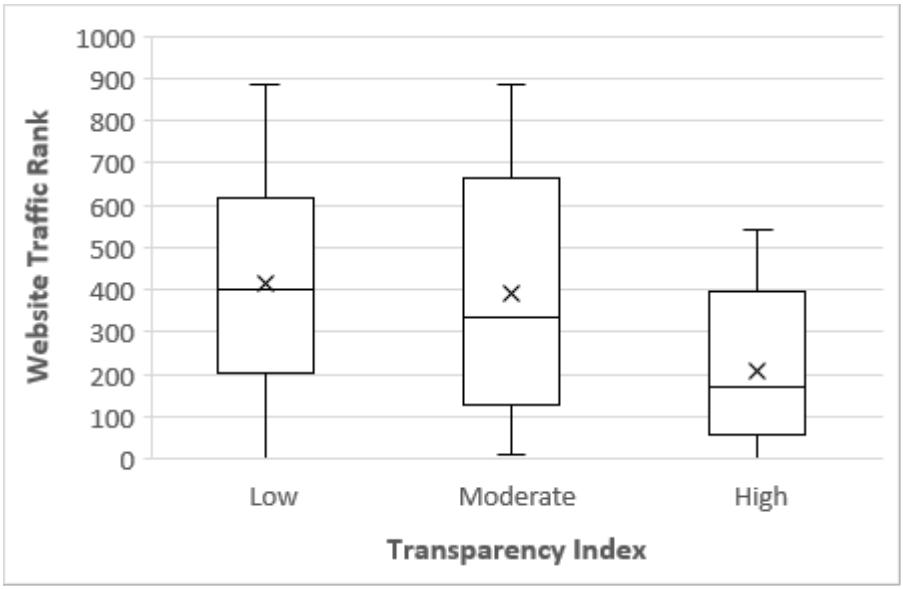
*Table 2. Mean and Median Website Traffic Ranks Within Levels of the Transparency Index (*n=479*)*

Level of Transparency Index	**Website Traffic Rank**	
	Mean	**Median**
High	208.8	168.5
Moderate	390.9	337
Low	416.4	401
All	399.3	378

Similarly, casual observation shows that sites with a high transparency level had significantly higher rankings than those within the moderate and low transparency levels. Since a picture is often worth a thousand words, Figure 1 below shows a graphical box plot representation of website traffic ranks within levels of the transparency index.

[94] Out of the 479 change-of-terms clauses, 68.7% (*n=329*) were categorized as "low" with a transparency index value of zero; 26.3% (*n=126*) were categorized as "moderate," having a transparency index value of 0.5 (17.5%; *n=84*) or 1 (8.8%; *n=42*); and 5% (*n=24*) were categorized as "high," having values ranging from 1.5 to 3 (two clauses had a transparency value of 1.5, twenty-one clauses had the value of 2, and one clause had a value of 3).

Figure 1. Box Plot of Website Traffic Ranks Within Levels of the Transparency Index[95]



While the picture may seem clear, appearances can be misleading. To verify the results indicating a relationship between a website's traffic and its transparency level, we employed the Wilcoxon-Mann-Whitney statistical test.[96] Similar to our earlier observations, the sites within the moderate- and low-transparency levels had a significantly lower ranking than those within the high level of transparency (*P=0.004* and *P<0.0001*, respectively). The test shows, however, that although there was a difference between the website rankings within the moderate and low levels of transparency, it was not statistically significant (*P=0.24*).

IV. DISCUSSION AND NORMATIVE IMPLICATIONS

The results of this study indicate that sneak in contracts are extremely prevalent. However, legislatures, policymakers, and

[95] The horizontal lines of each box show the 25th, 50th (median) and 75th percentiles; each "x" shows the mean; and the whiskers extend to the minimum and maximum data values.

[96] *See supra* notes 81–83 and accompanying text.

courts show a lenient attitude towards change-of-terms clauses.[97] This Part introduces the legal status of sneak in contracts. It then discusses the normative implications of our findings and recommends policy solutions.

A. THE LEGAL STATUS OF SNEAK IN CONTRACTS

Despite the obvious concerns surrounding unilateral contractual changes, sneak in contracts are not explicitly prohibited under U.S. consumer or contract law. Accordingly, courts often enforce contracts that allow firms to unilaterally amend their agreements.[98] While these cases are often common law contract decisions, some decisions rely, expressly or implicitly, on statutory provisions that allow unilateral term changes.[99]

Different courts apply different rules to unilateral changes, and some are less accepting than others.[100] In general, existing case law seemingly requires firms that modify their contracts to provide consumers with "reasonable" (or "proper") notice.[101] However, courts

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[97] *See infra* Section IV.A.

[98] *See* Horton, *supra* note 2, at 649 ("Most courts hold that companies can unilaterally amend any procedural term if the underlying contract includes a change-of-terms clause."); *see also* Ekin v. Amazon Servs., LLC, 84 F. Supp. 3d 1172, 1176 (W.D. Wash. 2014) ("Washington and Ninth Circuit courts have a history of enforcing contracts containing change-in-terms provisions."); Alces & Greenfield, *supra* note 12, at 1128 ("Federal law thus tolerates change-of-terms clauses in most open-end credit contracts.").

[99] Most conspicuously, some state statutes allow credit card issuers to unilaterally modify their agreements. *See, e.g.*, DEL. CODE ANN. tit. 5, § 952(a) (West, Westlaw through ch. 292 of the 150th Gen. Assemb. (2019–2020)) ("Unless the agreement . . . otherwise provides, a bank may at any time and from time to time amend such agreement in any respect . . . ."); O.C.G.A. § 7-5-4(c) (West, Westlaw through 2020 Legis. Sess.) ("A domestic lender or credit card bank may, as specified in the written agreement governing a credit card account, modify in any respect any terms or conditions of such credit card account . . . ."); *see also* Adam J. Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet M. Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. ON REG. 447, 456, 459 (2019) (noting that "many states have statutes that specifically authorize unilateral changes in terms for credit cards with no additional consideration from the issuer" and that courts frequently apply those statutes).

[100] *See* Nancy S. Kim, *Ideology, Coercion, and the Proposed Restatement of the Law of Consumer Contracts*, LOY. CONSUMER L. REV. (forthcoming) (manuscript at 20–25), https://ssrn.com/abstract=3577250 (arguing that the draft Restatement of Consumer Contracts reveals an unjustified lenient approach to unilateral modification and citing cases that limit unilateral changes).

[101] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 reporters' notes (AM. LAW. INST., Tentative Draft 2019) ("[M]odified standard terms are adopted prospectively to govern the

often implicitly permit firms to make modifications that are not fully transparent. For example, in *Cayanan v. Citi Holdings, Inc.*, Citibank changed one of its credit card agreements by adding an arbitration clause.[102] The bank personally informed its customers about the change via a bill stuffer that contained the complete terms of the modified agreement.[103] The court approved the notice, holding, *inter alia*, that a contract change is not inherently invalid if done via a bill stuffer.[104] Importantly, the implicit conclusion from this holding is that a business is not required to notify consumers personally or publicly about the substance of a contractual change, so long as the business sends consumers a bill stuffer notice of the change that contains the entire lengthy and complex modified agreement. Similarly, *Briceño v. Sprint Spectrum, L.P.* involved a contract modification, which included the addition of a mandatory arbitration clause.[105] The court held that there was no evidence that

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contractual relationship, as long as the consumer is provided with reasonable notice . . . ."); Mark E. Budnitz, *The Legal Framework of Mobile Payments: Gaps, Ambiguities and Overlap* 27 (Ga. State Univ. Coll. of Law., Legal Studies Research Paper. No. 2016-22, 2016), https://ssrn.com/abstract=2841701 ("Courts permit companies to modify their contracts as long as the company provides consumers with proper notice . . . ."); *Online Contracts: We May Modify These Terms at Any Time, Right?*, ABA (May 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/05/07_moringiello/ ("[T]he offeree must have proper notice of the proposed modification."); *see also* Douglas v. U.S. Dist. Court for the Cent. Dist. of Cal., 495 F.3d 1062, 1066 (9th Cir. 2007) ("Even if Douglas's continued use of Talk America's service could be considered assent, such assent can only be inferred after he received proper notice of the proposed changes."); Rodman v. Safeway, Inc., 694 F. App'x 612, 613 (9th Cir. 2017) (mem.) ("California would not enforce a modification without notice.").

[102] 928 F. Supp. 2d 1182, 1188 (S.D. Cal. 2013) ("In the years after Citibank began servicing the Thank You Card, Citibank periodically mailed Baker several change-of-terms notices . . . . The cardmember agreement that accompanied the [first] notice contained . . . [an] arbitration clause . . . .").

[103] *See id.* at 1188, 1202 n.13 (explaining that "[t]he notice informed Baker that Citibank intended to change the terms of her cardmember agreement and indicated that the enclosed cardmember agreement would replace any existing agreement" and that "[a]s for Baker, only the terms of the Thank You Card account were modified with bill stuffer notices").

[104] *Id.* at 1199 ("As a general matter, a 'bill stuffer' notice of change of terms is not an inherently invalid method of assenting to changes in credit card contracts, including the modification, addition, or deletion of terms.").

[105] 911 So. 2d 176, 178 (Fla. Dist. Ct. App. 2005) ("Relevant to this appeal is the 2003 amendment to the Terms and Conditions concerning Sprint's mandatory arbitration clause.").

the change was sneakily added into the contract.[106] This holding was based, *inter alia*, on the assertion that the business informed its consumers about the change via mail.[107] Furthermore, the court noted that consumers could view the modified contract on the business's website.[108] This decision, therefore, seems to allow firms to change a contract without notifying consumers personally and publicly about the exact contents of the change. Instead, change is permissible as long as the firm personally informs consumers that a change is being implemented and consumers have access to the amended contract.

Likewise, in *Rodman v. Safeway Inc.*, the court held that an e-mail informing consumers about a change in the price of an online contract can, in principle, constitute sufficient notice.[109] The implicit conclusion from this holding is that a business is not required to notify consumers publicly (e.g., on its website) about the occurrence and contents of a contractual change, so long as the business sends a personal e-mail to its customers. Personal e-mails may not provide sufficient notice of a change, however, because they may not reach all consumers; they can be classified as spam, automatically blocked, not reach their destination due to technical problems, be lost among a multitude of other e-mails, or be sent to an old e-mail account that is no longer in use.[110]

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[106] *Id.* at 180 ("[T]here is no evidence that Sprint concealed or attempted to conceal the aforementioned original or amended Terms and Conditions.").

[107] *Id.* at 178 ("Sprint printed a '*Notice of Changes*' on the front of the . . . invoice that it mailed to Briceño. This notice informed her that amendments to the original Terms and Conditions were posted on Sprint's website.").

[108] The e-mail that the business sent, and which the court's decision relied upon, stated: "The Terms and Conditions of PCS Service from Sprint have changed. To view the current version, please visit www.sprintpcs.com . . . ." *Id.* at 180.

[109] No. 11-cv-03003-JST, 2015 WL 604985, at *9 (N.D. Cal. Feb. 12, 2015) ("Safeway amended the Special Terms in November 2011 to specifically provide that Safeway.com was not offering the same prices offered in the physical stores."), *aff'd*, 694 F. App'x 612 (9th Cir. 2017) (mem.); *id.* at *11 ("After making a change, Safeway can take any number of actions to alert users that the Special Terms they agreed to at registration have been altered. For instance, Safeway could . . . send all existing Safeway.com customers an email in order to ensure that every consumer is aware of a change in the Special Terms prior to making a purchase."). Notably, the court found that Safeway did not send all its customers such an e-mail. *Id.* ("Safeway admits the email was not sent to all [Safeway users] . . . .").

[110] *See* Horton, *supra* note 2, at 649 ("Sometimes the change-of-terms notice is indistinguishable from the cacophony of daily junk mail . . . ."); Eric Goldman, *Ninth Circuit Strikes Down Contract Amendment Without Notice*—Douglas v. Talk America, TECH. & MARKETING L. BLOG (July 23, 2007), https://blog.ericgoldman.org/archives/2007/07/ninth_

Finally, in the recent case of *Wainblat v. Comcast Cable Communications, LLC*, Comcast's Subscriber Agreement allowed Comcast to unilaterally modify the agreement's terms.[111] The modification mechanism required Comcast to provide subscribers with notice of a change and give subscribers thirty days to reject the change.[112] Yet, the Subscriber Agreement did not require Comcast to provide the subscriber notice in an effective way. The relevant contract term stated:

> We [Comcast] may deliver any notice concerning our relationship with you, including notice of any change to this Agreement, in any one or more of the following ways, as determined in our discretion: (1) by posting on www.xfinity.com or any other website about which you have been notified; (2) by mail or hand delivery to your Premises; (3) by e-mail to the address for your account in our records; or (4) by including it on or with your bill for Service(s)[.] You agree that any one of the foregoing will constitute sufficient and effective notice under this Agreement. . . . If you find any change to this Agreement to be unacceptable, you have the right to cancel your Service(s). Your continued receipt of the Service(s) for more than 30 days after we deliver notice of the change, however, will constitute your acceptance of the change.[113]

The Subscriber Agreement also contained an arbitration clause, which covered the claim at issue in the case.[114] The plaintiff argued that the arbitration clause was unenforceable, since Comcast had wide discretion to modify the contractual terms *ex post*.[115] The court rejected the plaintiff's claim and upheld the arbitration provision

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circuit_s_1.htm ("[I]n practice, giving users notice isn't all that easy. A mass-email to the userbase is likely to get flagged as spam by many IAPs . . . .").

[111] No. 19-10976-FDS, 2019 WL 5698446, at *2 (D. Mass. Nov. 4, 2019).

[112] *Id.* at *4 ("[T]he notice-of-changes provision empowers subscribers to reject 'any' change . . . and gives them 30 days to make that decision.").

[113] *Id.* at *2 (first alteration in original).

[114] *Id.*

[115] *Id.* at *4.

without criticizing the unilateral modification clause.[116] In doing so, the court emphasized that Comcast's notices of contractual changes "empower[ed] subscribers to reject 'any' change to the Subscriber Agreement and [gave] them 30 days to make that decision."[117]

We believe that courts in these and other cases exhibit an underdeveloped, undertheorized, and imbalanced approach to unilateral change-of-terms provisions. The courts do not thoroughly discuss the transparency of these provisions, nor do they place the provisions in a broader context, examining their degrees of unilaterality, bias, breadth, and, thus, (un)fairness. We return to these issues and make concrete recommendations in Sections IV.C and IV.D below.

B. THE SOCIAL COSTS OF SNEAK IN CONTRACTS

Sneak in contracts are socially costly. As we have demonstrated, they provide firms with a *broad* and *unilateral* right to change the contract at any time, for any reason, and without the express consent of consumers.[118] This may create five major costs that legal scholars have already identified.[119] Our empirical findings, which show that sneak in contracts are prevalent, support these concerns.

First, sneak in contracts increase the already high reading costs that consumers must bear if they wish to become familiar with their contracts.[120] Contract alterations require these consumers to read not only the initial consumer contract *ex ante,* but also the modified agreement *ex post*.[121]

Second, the one-sided and broad right to alter the contract can render the initial contractual promises quite meaningless.[122] Firms

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[116] *Id.* at *5 ("[B]ecause Comcast's obligations under the Arbitration Provision were not 'illusory,' the Arbitration Provision is valid and enforceable.").

[117] *Id.* at *4.

[118] *See supra* Section III.C.*1*.

[119] *See infra* notes 120–134 and accompanying text.

[120] Linford, *supra* note 12, at 1417 ("[T]he unilateral reordering clause compounds the difficulty of comprehending the contract by requiring consumers to invest additional—and potentially futile—effort to understand every change.").

[121] *Id.* at 1413 (explaining that "[i]f every website changed [privacy] policies once a year, that could double the time required" to read the policies).

[122] *See* Bridgeman & Sandrik, *supra* note 12, at 381 (describing a firm's ability to make a meaningless promise "by making an offer on certain specific terms while elsewhere reserving for itself the right to change those terms unilaterally at any time it wishes").

can evade their duties—at any time, for any reason—by unilaterally changing the initial contract.[123] In addition to the unfairness that such a move entails, it also introduces a considerable degree of uncertainty,[124] further reducing the incentive consumers have to read and comprehend the initial form contract before accepting it.[125]

Third, the unilateral and broad amendments permitted under sneak in contracts can harm competition among firms.[126] If consumers know that their contracts could be unilaterally and widely modified *ex post*, they are unlikely to comparison shop for the best initial contract terms.[127] Consequently, firms will have limited incentive to improve the quality of their contract terms.[128]

Fourth, unilateral and broad change clauses may lead to inefficient investments, resulting in economic waste. When consumers undertake sunk investments based on the original agreement,[129] firms may unilaterally change the contract

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[123] *Id.* ("[P]romisors can make all the promises they want without committing themselves to any course of action by simply reserving the right to change their minds later.").

[124] *See, e.g.*, Paterson & Smith, *supra* note 12, at *6 ("[C]onsumers may find themselves left to bear the burden of unexpected changes affecting the supplier's performance, and vulnerable to opportunistic advantage taking by the supplier who may reduce the contractual benefits available to consumers at whim.").

[125] *See* Linford, *supra* note 12, at 1416 ("Unilateral reordering clauses compound the workload and further disincentivize reading."); *see also* Bar-Gill & Davis, *supra* note 12, at 25 ("The problem is that when terms are subject to unilateral modification, the initial contract provides relatively little information about the terms on which sellers will ultimately provide their products.").

[126] *See* Bar-Gill & Davis, *supra* note 12, at 6 (arguing that businesses' ability to unilaterally modify their contracts "undermines competition"). Theoretically, consumers can go comparison shopping by focusing on unilateral modification clauses and by avoiding contracts with sneaky mechanisms. This assumes, however, that change-of-terms clauses are salient and attributes unrealistic levels of sophistication and rationality to consumers. *Cf. id.* at 43 (noting that unilateral contract modifications can disadvantage "unsophisticated" employees).

[127] *See* Horton, *supra* note 2, at 609 ("[N]o rational adherent would spend the time and energy necessary to shop for terms that the drafter can freely change."); *see also* Bar-Gill & Davis, *supra* note 12, at 6 ("Comparison shopping becomes meaningless when the product or contract can be changed easily soon after the purchase is complete.").

[128] Bar-Gill & Davis, *supra* note 12, at 26 ("[I]f consumers cannot shop around, then sellers have limited incentives to reduce prices or to improve the quality of their products and services.").

[129] The vigilant reader may wonder how consumers can rely on contracts that include unilateral change-of-terms provisions, which they do not read. The answer is that due to information flows and word-of-mouth, consumers may have some perception of what their

opportunistically.[130] For example, firms may specifically make inefficient and harmful contract modifications that benefit themselves at the expense of consumers. These consumers may find themselves locked into the agreement by their prior investments.[131]

Fifth, social and behavioral factors may cause consumers to underplay the probability and potential harm of contractual modifications when initially entering the transaction.[132] Due to information overload, the present bias, or the optimism bias, consumers may underestimate the risk that firms will opportunistically modify their contracts *ex post*.[133] As a result of underestimating risk, consumers are less likely to be motivated to insist, *ex ante*, on entering into contracts that incorporate protection against future opportunistic modifications.[134]

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contracts say. *See, e.g.*, Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 313–14 (2008).

[130] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 1 (AM. LAW. INST., Tentative Draft 2019) ("There is a concern, however, that businesses will make self-serving, opportunistic modifications in standard contract terms once consumers are already locked into the service."); *see also* Bridgeman & Sandrik, *supra* note 12, at 391 ("The company could have a plan in place to induce as many consumers as possible to open new credit-card accounts, and then to change the terms on those accounts as soon as the consumers have accrued a balance."); Robert A. Hillman, *Contract Law in Context: The Case of Software Contracts*, 45 WAKE FOREST L. REV. 669, 684 (2010) (noting that unilateral modifications may be used to extract "unbargained-for gains"); Hoffman & Wilkinson-Ryan, *supra* note 12, at 432 ("Because . . . contracts encourage relational investments, consumers may be caught flat-footed by their counterparties' attempts to change the terms of the deal." (footnote omitted)).

[131] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 1 (AM. LAW. INST., Tentative Draft 2019) ("Consumers may manifest [assent to modified terms] reluctantly, if termination of the contract would squander some acquired value, would unreasonably undermine their reliance investments, or would be practically infeasible.").

[132] *See, e.g.*, Becher, *supra* note 12, at 151 (arguing that "consumption culture" makes it more likely that "laypeople will not fully acknowledge the risks they face by accepting [standard form contract] terms").

[133] *See, e.g.*, Korobkin, *supra* note 10, at 1226 (arguing that information overload reduces the amount of information that consumers choose to process); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 21 (2012) (explaining that present bias can lead consumers to "care more about the present and not enough about the future"); Bar-Gill & Davis, *supra* note 12, at 22 ("Optimistic consumers might underestimate the likelihood of a unilateral modification or the magnitude of the harm from a unilateral modification.").

[134] *See* Bar-Gill & Davis, *supra* note 12, at 20 ("[A] consumer who fails to appreciate the risk of an inefficient modification might not insist on a mutual assent requirement for modifications . . . ."). This problem is aggravated where firms are able to sneak in contractual

Beyond these costs, our study points to two additional and more specific costs that sneak in contracts may create. These costs derive from nontransparent modifications that sneak in contracts allow. Slightly restated, the *lack of transparency* that characterizes sneak in contracts may create two additional social costs that the existing literature does not adequately discuss.

First, sneak in contracts create the risk that hidden contract changes that harm consumers will fly under a consumer's radar and remain unnoticed.[135] In such cases, consumers who have read their original contracts, or parts of them, may have a false impression of their contracts' terms. Firms may have a profit incentive to opportunistically modify their contracts, even if the modifications entail large costs to consumers.[136] Firms may also blur or hide from consumers the occurrence and contents of harmful changes to avoid consumer backlash. As a result, consumers may become bound by suboptimal contract alterations that were secretly made under a sneak in agreement.[137]

To illustrate, a firm may wish to prevent consumers from filing a class action against the firm. To achieve this end, the firm may modify its initial contract—after it has been accepted by many consumers—to add a class action waiver clause that forces consumers to arbitrate. The inclusion of class action waivers in contracts seems to have become a standard business practice,[138] and such a waiver may prevent consumers from filing class actions.

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changes and blur the importance and frequency of the changes. By doing so, firms further reduce consumers' ability to realize the risks posed by sneak in contracts. As a result, consumers are less likely to take appropriate precautions against these risks.

[135] *See* Loos & Luzak, *supra* note 22, at 69–70 ("Consumers are not notified of changes . . . . As a result, consumers may not even be aware that the standard terms and conditions of their contracts have changed."); Russell Brandom, *After Instagram Controversy, a Watchdog Site Tracks Shifting Terms of Service*, VERGE (Feb. 6, 2013, 10:47 AM), https://www.theverge.com/2013/2/6/3951050/tracking-terms-of-service-changes-to-catch-the-next-instagram (suggesting that Skype changed its terms of service and "[n]o one noticed").

[136] *See* Bar-Gill & Davis, *supra* note 12, at 19 ("[S]ellers will have a strong incentive to make modifications that increase their profits, regardless of the adverse consequences to consumers.").

[137] *See id.* at 19, 45 (arguing that, by not requiring consumers' assent to contractual changes, firms are more likely to make inefficient modifications).

[138] *See* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 579 (2020) ("The arbitration revolution is far-reaching."); *see also* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v.

This kind of modification may significantly harm consumers. The right of consumers to file a class action may deter firms' opportunistic behavior.[139] It is also an important reputational tool, allowing consumers to publicly air their disputes with firms.[140] Yet, under a sneak in contract, a firm may deliberately hide a modification. In other words, a firm may fail to inform consumers, personally and publicly, about the existence and essence of a change. Under these circumstances, a class action waiver covertly added to an agreement may fly under consumers' radars. Consumers, in turn, will be unknowingly bound by a class action waiver that significantly and adversely affects their interests.[141]

So far, we have discussed the first social cost that non-transparent modifications inflict—namely, unnoticed harmful contractual terms. The second social cost that hidden modifications impose pertains not to individual consumers, but to pro-consumer organizations. Here, the focus is on the burden of unnecessary costs on consumer watchdogs and consumer organizations.

Consumer watchdogs, as organizations that aim to protect the interests of consumers,[142] play an important role in reducing the information asymmetry between consumers and firms. Specifically, consumer watchdogs can disseminate information about harmful contract modifications among consumers. In doing so, consumer watchdogs may sometimes cause a firm to reverse an inefficient or unfair contract modification.

Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 708–09 (2012) ("In case after case, courts are now refusing to void arbitral class action waivers in consumer and employment cases.").

[139] *See* Bar-Gill & Davis, *supra* note 12, at 14–15 ("[C]lass-barring arbitration clauses, by substantially reducing deterrence and accountability, enable, and even encourage, issuers to engage in profit-maximizing but welfare-reducing practices . . . .").

[140] *See, e.g.*, Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 875 (2019) ("[Litigation] can facilitate reputational penalties: the risk of having damning information about how [a firm] behaved become public, thereby reducing the willingness of outside observers to trust and do business with [the firm] going forward").

[141] As we have noted, when consumers and the media learn about such changes, they tend to protest against them. *See supra* notes 34–39 and accompanying text.

[142] *See Consumer Watchdog*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/dictionary/english/consumer-watchdog (last visited Jan. 24, 2021) (defining "consumer watchdog" as "an official organization that works to protect the rights and interests of people who buy things or use services"); *see also* Hayagreeva Rao, *Caveat Emptor: The Construction of Nonprofit Consumer Watchdog Organizations*, 103 AM. J. SOC. 912, 914 (1998) (explaining that nonprofit consumer watchdog organizations "educate consumers about their rights").

In particular, the dissemination of information about a harmful contractual change provides consumers and the media with an opportunity to voice their resentment—it creates a reputational concern.[143] Dispersing such information among consumers may allow consumers to communicate their dissatisfaction to the relevant firm. The firm, in turn, may revoke the distrusted modification. In essence, the firm may be deterred by the possibility that consumers, being dissatisfied by the harmful change, will take collective retaliatory action against the firm.

The potential role of consumer watchdogs in this context is illustrated by a past contract modification that Facebook made to its user agreement, which caught significant media attention.[144] Facebook altered its previous contract by adding a new clause that allowed it to use consumers' information even after the consumers deleted their accounts.[145] At first, given the typical asymmetry of information between consumers and firms, the new clause went unnoticed by consumers.[146] However, Consumerist, a consumer watchdog organization,[147] reviewed the modified contract, detected the change, and spread information about the change through its public blog.[148] The spread of information, initiated by Consumerist,

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[143] *See supra* note 34–39 and accompanying text.

[144] *See* Stone & Stelter, *supra* note 18 (discussing Facebook's modification of its terms of service and the firm's decision to reverse course in response to consumer backlash); *see also* Daniel Ionescu, *Facebook's Zuckerberg Calms Privacy Fears over TOS Change*, PCWORLD (Feb. 17, 2009, 5:25 AM), https://www.pcworld.com/article/159636/facebook_tos_privacy_zuckerberg.html (describing the update to Facebook's terms of service).

[145] *See* Florencia Marotta-Wurgler, *What We've Learned from Software License Agreements: A Response to Comments*, 12 JERUSALEM REV. LEGAL STUD. 171, 175 n.20 (2015) ("Facebook amended its Terms of Use and included a clause that allowed the firm to do whatever it wished with subscribers' information even after subscribers deleted their accounts."); *see also* Stone & Stelter, *supra* note 18 (explaining that the change to Facebook's terms gave Facebook "perpetual ownership of [users'] contributions to the service").

[146] Ionescu, *supra* note 144 ("The changes went under the radar . . . until a consumer-oriented blog attacked them . . . .").

[147] Consumerist was founded in 2005 to serve as "an independent source of consumer news and information published by Consumer Reports." *Welcome to the Consumerist Archives*, CONSUMERIST, https://consumerist.com/ (last visited Jan. 24, 2021). In 2017, Consumerist ceased its operations. *See An Important Message from Consumer Reports*, CONSUMERIST (Oct. 30, 2017), https://consumerist.com/2017/10/30/please-pardon-the-interruption/.

[148] *See Facebook's New Terms of Service: "We Can Do Anything We Want with Your Content. Forever."*, CONSUMERIST (Feb. 15, 2009, 11:14 PM), https://consumerist.com/2009/02/15/facebooks-new-terms-of-service-we-can-do-anything-we-

caused consumers to jointly protest the new clause.[149] In response, Facebook reversed its contract modifications.[150]

Sneak in contracts may impede the important role consumer watchdogs play in informing consumers about contractual changes. Under sneak in contracts, a firm can modify its contract without personally and publicly disclosing the information about the occurrence and substance of the modification. This forces consumer watchdogs to invest more time and resources into tracking consumer contracts.

This involves two major tasks. First, consumer watchdogs must constantly compare an original contract with the latest available version of the contract to detect differences.[151] For example, the consumer watchdog TOSBack regularly checks the terms of service of selected websites, such as Google and Amazon, to see if any of the terms have changed.[152] Another example is ParanoidPaul.com, which provides consumers a service that tracks changes made to selected online user agreements or privacy policies.[153] Yet, many

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want-with-your-content-forever/ (announcing the implications of Facebook's contractual change to readers); *see also* Stone & Stelter, *supra* note 18 (explaining that the change to Facebook's terms "were highlighted . . . by a blog called The Consumerist, which reviewed the contract").

[149] *See Facebook Backs Down, Reverses on User Information Policy*, CNN (Feb. 18, 2009), https://edition.cnn.com/2009/TECH/02/18/facebook.reversal/index.html ("Member backlash against Facebook began over the weekend after a consumer advocate Web site, The Consumerist, flagged a change made to Facebook's policy earlier in the month."); Stone & Stelter, *supra* note 18 ("The Consumerist blog entry set off an explosion of activity . . . .").

[150] *See* Stone & Stelter, *supra* note 18 ("After three days of pressure from angry users and the threat of a formal legal complaint by a coalition of consumer advocacy groups, the company reversed changes to its contract with users . . . .").

[151] *Cf.* Bar-Gill & Davis, *supra* note 12, at 26 ("The ease of product change would require *Consumer Reports* . . . to exert constant vigilance in order to keep up. Such vigilance is costly, perhaps prohibitively so." (footnote omitted)).

[152] *See* TOSBACK, https://tosback.org/ [https://webcache.googleusercontent.com/search?q=cache:oPnlgJ5s5nIJ:https://tosback.org/%3Fpage%3D3+&cd=1&hl=en&ct=clnk&gl=us] (last visited Nov. 10, 2020) ("Every day, we check the Terms and Policies of many online services to see if any of them have changed."); *see also* Tim Jones & Fred von Lohmann, *EFF Launches TOSBack—A 'Terms of Service' Tracker for Facebook, Google, eBay, and More*, ELECTRONIC FRONTIER FOUND. (June 3, 2009), https://www.eff.org/press/archives/2009/06/03-0 ("We created TOSBack to help consumers monitor terms of service for the websites they use [every day], and show how the terms change over time.").

[153] PARANOIDPAUL, https://www.paranoidpaul.com/ (last visited Jan. 24, 2021). ("ParanoidPaul is a FREE service that allows you to track changes made to online documents that affect your privacy or your personal information, like Privacy Policies, Terms and Conditions or User Agreements."); *see also About Paranoid Paul*, PARANOIDPAUL,

consumers are probably unaware of consumer watchdog services, which do not cover all consumer contracts. Other consumers may not trust the accuracy of these services or may find the watchdogs' notices and alerts unintelligible or hard to comprehend.

Second, after detecting contract changes, consumer watchdogs must analyze the nature of each change. This helps the consumer watchdog decide which changes are important to communicate and explain to consumers. Alas, as of today, we are yet unaware of any technological advancements that make these tasks effortless and costless. In any event, imposing on watchdogs the need to develop or purchase the software required to complete these tasks seems unfair and inefficient.

Of course, consumer watchdogs' investment in obtaining information about contract changes may create a social benefit. Yet, sneak in contracts create social waste because firms that make these changes already possess information about the existence and content of the change. To employ Professor Kronman's famous terminology,[154] the firm has acquired the information casually, as part of the process of contract alteration. The firm can disclose the information relatively easily and cheaply, rather than imposing unnecessary burdens and costs on consumer watchdogs.[155] Consumers should not be suspicious with respect to their contracts. Like in many other contexts, contracting parties that are vested with power should exercise it reasonably.[156]

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https://paranoidpaul.com/about.php (last visited Jan. 24, 2021) ("Currently [ParanoidPaul is] tracking 123 sites . . . .").

[154] *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 2 (1978) (arguing that a party that acquires information as the result of a deliberate search, as opposed to acquiring the information "casually," should enjoy a right to nondisclosure).

[155] *Cf.* Rodman v. Safeway Inc., No. 11-cv-03003-JST, 2015 WL 604985, at *11 (N.D. Cal. Feb. 12, 2015) ("Safeway is best positioned to make sure customers are aware of changes that Safeway has made to its contract with Class Members."), *aff'd*, 694 F. App'x 612 (9th Cir. 2017) (mem.).

[156] *See* Stephen Kós, *Constraints on the Exercise of Contractual Powers*, 42 VICTORIA U. WELLINGTON. L. REV. 17, 20 (2011) ("[C]ontractual discretion must not be exercised arbitrarily, capriciously or in bad faith, or unreasonably . . . ."); Jeannie Marie Paterson, *Implied Fetters on the Exercise of Discretionary Contractual Powers*, 35 MONASH U. L. REV. 45, 49 (2009) ("Courts have sometimes . . . stated that the duty of good faith incorporates a standard of reasonableness in the exercise of discretionary contractual powers . . . .").

That firms will behave in ways that prevent this social waste is not a utopian cry. In 2018, LinkedIn made several changes to its consumer agreement.[157] To help consumers better understand the changes and how they may impact consumers, LinkedIn publicly disclosed a summary of the changes on its website.[158] For example, LinkedIn specifically stated that it changed the law governing the contract for its consumers outside the United States and the European Union so that the new governing law would be California law.[159] By openly disclosing the content of the change, LinkedIn may have saved wasteful investment of resources by consumer watchdogs in obtaining data about the contents of the change. While this kind of behavior is currently the exception rather than the rule, we believe that a better regulatory framework may change this reality. We turn to that now.

C. POLICY RECOMMENDATIONS: SCRUTINIZING SNEAK IN CONTRACTS

This Section provides a general framework for regulating sneak in contracts. It succinctly details a spectrum of possible policy and regulatory responses to the problems sneak in contracts present. In the next Section, we propose a more detailed response that attends to some important practical aspects.

Fundamental notions of contract and consumer law require scrutiny of sneak in contracts. Sneak in contracts reflect unequal bargaining power between firms and consumers, and they undercut consumers' ability to exercise freedom, autonomy, and choice. Additionally, sneak in contracts erode community, trust, and empowerment, which contract law ought to guard and advance.[160]

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[157] *See Summary of Changes to the LinkedIn User Agreement*, LINKEDIN (May 8, 2018), https://www.linkedin.com/legal/preview/user-agreement-summary.

[158] *Id.*

[159] *Id.* Clearly, firms have an incentive to publicize positive (or maybe neutral) modifications, while concealing negative modifications. This further supports regulatory interventions, which we discuss in Section IV.C.

[160] *See* Kar, *supra* note 25, at 761 ("[C]ontract law aims to empower people to use promises as tools to influence one another's actions and thereby to meet a broad range of human needs and interests."); Keren, *supra* note 138, at 623–25 (explaining that the power of consumers to participate in a class action against a firm provides a "sense of empowerment"); *see also* Shmuel I. Becher & Jessica C. Lai, *In Consumer Protection We Trust? Re-thinking the Legal Framework for Country of Origin Cases*, 55 SAN DIEGO L. REV. 539, 556 (2018) ("Consumer

Contract and consumer law seek to protect the vulnerable contracting party from exploitation by the other contracting party,[161] but sneak in contracts make exploitation of the weaker party (i.e., consumers) more likely. Accordingly, the starting point of this Section is that the law ought to prevent or minimize firms' ability to exploit consumers with sneak in contracts. In this sense, regulating sneak in contracts is a piece of a big and complex puzzle, namely, leveling the playing field of consumer form contracts.

A continuum of regulatory responses is at the disposal of policymakers.[162] At one end of this continuum is an *ex ante* regulatory prohibition.[163] A regulator that chooses this approach would ban sneak in contracts. This is the most intrusive—and some may say paternalistic—measure that regulators can use.[164]

The fierce criticism of unilateral contract changes has led some scholars to propose banning unilateral modifications altogether.[165] This Article takes a subtler approach. As a starting point, we assume that firms should not be conclusively barred from changing their agreements unilaterally and broadly.

Two major reasons support this proposition. First, the economic, technological, and legal environment that surrounds long-term

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trust in the marketplace is everywhere and is essential for the proper functioning of markets. Hence, trust benefits consumers, traders, and markets more generally." (footnote omitted)); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1420 (2004) ("[P]romises generally, and contracts in particular, establish a relation of recognition and respect—and indeed a kind of community—among those who participate in them . . . .").

[161] *See, e.g.*, RESTATEMENT OF CONSUMER CONTRACTS § 5 reporters' notes (AM. LAW. INST., Tentative Draft 2019) (explaining that the Consumer Financial Protection Bureau seeks to protect consumers "against exploitation of consumers' imperfect understanding and limited sophistication").

[162] The discussion in the following paragraphs and the idea of employing a regulatory continuum is based on one of the co-author's previous works. *See* Shmuel I. Becher & Yuval Feldman, *Manipulating, Fast and Slow: The Law of Non-Verbal Market Manipulations*, 38 CARDOZO L. REV. 101, 129–33 (2016) (describing "a continuum of regulatory reactions").

[163] *Id.* at 130.

[164] *Id.*

[165] *See* Linford, *supra* note 12, at 1422 ("[T]he correct policy response may be a prophylactic rule barring any changes enacted pursuant to a unilateral reordering clause offered in boilerplate language."); Horton, *supra* note 2, at 665 ("I thus propose that policymakers simply ban unilateral revisions to procedural terms."). Notably, other scholars have shown less resistance to unilateral modifications. *See, e.g.*, Bar-Gill & Davis, *supra* note 12, at 37 (proposing that a specialized body should be "charged with approving" contract modifications).

consumer contracts is dynamic.[166] This vibrant environment may require firms to change and update their agreements.[167] Therefore, contract adaptation can potentially benefit both consumers and firms.[168] Such modifications should be upheld by the courts.[169]

Second, allowing firms to unilaterally change the contract, instead of requiring each consumer's explicit approval, is sometimes justifiable. The transaction costs associated with collecting an explicit opt-in assent from each individual consumer can outweigh its benefits.[170] This may be the case, for example, when the firm has many consumers and the proposed change does not substantially alter consumers' rights and obligations.[171]

At the other end of the regulatory continuum, sneak in contracts are left unregulated.[172] Under this option, firms will keep using sneak in contracts, and courts will keep showing leniency toward them. This is the most anti-paternalistic approach, which largely places the burden and responsibility of regulation on individual consumers.[173]

The very nature of sneak in contracts indicates that consumers should not be expected to take the necessary precautions against harmful unilateral modifications. But given their pervasiveness and the negative consequences they generate, sneak in contracts should

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[166] Bar-Gill & Davis, *supra* note 12, at 17 ("The benefits of modifications arise from the dynamic environment in which long-term consumer contracts operate.").

[167] *See* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 1 (AM. LAW. INST., Tentative Draft 2019) ("Many modifications may be justified by changes in the economic or legal environment, by revisions in the service itself, or by the realization of other unexpected contingencies."); Becher, *supra* note 12, at 140 n.64 ("[F]irms incorporate such modification terms in their pre-drafted agreements in order to maintain maximum flexibility and to allow better responsiveness to changing circumstances.").

[168] *See* Bar-Gill & Davis, *supra* note 12, at 17–18 ("Modification allows the contract to keep up with changing circumstances without incurring the costs of drafting an initial contract that provides for all future contingencies. Consequently, it is often mutually beneficial to permit modification." (footnote omitted)).

[169] *Cf.* Kar, *supra* note 25, at 816 ("[C]ourts will allow some unilateral modifications when circumstances change in ways that alter the fundamental nature of a transaction, so long as the modifications are 'fair.'").

[170] For a discussion of similar issues in getting consumers' consent in the privacy context, see Jeff Sovern, *Opting in, Opting out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1074–81 (1999).

[171] *Cf.* Bar-Gill & Davis, *supra* note 12, at 18 ("Securing the express assent of thousands, or millions, of consumers to every modification can be very expensive.").

[172] Becher & Feldman, *supra* note 162, at 130.

[173] *Id.*

be scrutinized and constrained. A natural tendency might be to focus on scrutinizing large and popular firms, which may impact numerous consumers. However, our findings suggest that enforcement agencies should not underestimate the harm that less popular firms may cause consumers, because those firms with less traffic are more likely to employ non-transparent change-of-terms provisions.[174]

Conceptually, several ways exist to scrutinize and regulate sneak in contracts (aside from banning them altogether). One option is to condition significant unilateral changes on consumers' explicit and active consent. To make this option even more effective, regulators can impose further steps to increase the likelihood that consumers' consent is meaningful and informed. For instance, unilateral changes can be conditioned on a consumer's "actual knowledge."[175] While this may seem well-aligned with some core principles of contract law, this option also imposes high transaction costs on firms, who may roll at least some of the costs onto consumers.[176] Nonetheless, and as we discuss in the next Section, this is a viable option that merits consideration.

Another tool in the legislators' arsenal is to provide consumers with mandated cooling-off periods, available for a designated period of time after a firm makes its unilateral contractual changes. This measure would give consumers the right to exit a contract at no cost. Cooling-off periods are a well-established regulatory tool in the context of consumer law.[177] The assumption here is that during a cooling-off period, consumers can learn about the contractual change, consider competing options, and make a decision that best

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[174] *See supra* Section III.C.*2*.

[175] *Cf.* 29 U.S.C. § 1113(2) (2018) (creating an "actual knowledge" requirement to trigger a three-year statute of limitations for claims); Intel Corp. Inv. Policy Comm. v. Sulyma, 140 S. Ct. 768, 773 (2020) (holding that a retirement policyholder could not file suit for his employer's alleged fiduciary breach because he did not read, or could not recall reading, information contained in disclosures, such that he would have "actual knowledge" of the fiduciary breach).

[176] *See* Bar-Gill & Davis, *supra* note 12, at 25 ("Meaningful assent, of thousands or millions of consumers, is costly to obtain.").

[177] For a detailed discussion of cooling-off periods and their potential perils, see Shmuel I. Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 LAW & CONTEMP. PROBS. 63, 70–71 (2011).

fits their interests.[178] As we detail in the next Section, we support this tool. Having said that, we also note that cooling-off periods have some shortcomings.[179] We therefore propose supplementing such periods with additional regulations.

One imperative way to supplement a cooling-off period and to strengthen the protection afforded to consumers is to require greater transparency. That is, firms that wish to modify their contracts *ex post* should be required to adequately notify consumers of the proposed change. Such requirements should be tailored so as to counter the problems that sneak in contracts pose.

Of course, mandating notice of a contractual modification is far from a simple solution. A significant debate in the literature exists as to when and to what extent notices and disclosures can be effective. Critics argue, among other things, that disclosures are not adequately noticed by consumers: they are not read, are not tailored to the way consumers process information, are not in line with how people make decisions, and are too numerous for consumers to read and assimilate.[180] For notices to work, they must be specially designed to maximize their efficacy.[181] We return to this point in more detail in the next Section.

As a minimum prerequisite, for any contractual change that alters consumers' rights or obligations to be valid, we submit that the change should be fully *transparent*.[182] In light of this

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[178] *See, e.g.*, *id.* at 67 ("This time allows for examination of additional, competing options. And as time passes, new options may emerge or be discovered.").

[179] *See* Jeff Sovern, *Written Notice of Cooling-Off Periods: A Forty-Year Natural Experiment in Illusory Consumer Protection and the Relative Effectiveness of Oral and Written Disclosures*, 75 U. PITT. L. REV. 333, 379–80 (2014) (explaining that cooling-off periods "may create the illusion of consumer protection without the reality"); *see also* Becher & Zarsky, *supra* note 177, at 74 (discussing the potential negative consequences of providing consumers a cooling-off period and an "open door" to withdraw from an *ex ante* commitment).

[180] For a comprehensive discussion of the problems posed by mandated disclosures, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[181] *See* Oren Bar-Gill, *Smart Disclosure: Promise and Perils*, BEHAV. PUB. POL'Y (forthcoming) (manuscript at 13), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/ABBD374581DA9F05473E2F639CFE9548/S2398063X19000241a.pdf/smart_disclosure_promise_and_perils.pdf ("[S]mart disclosure is a powerful tool that needs to be harnessed. Unlike 'old-school' disclosure, it can meaningfully affect consumer behavior and market outcomes. But there is no *a priori* guarantee that these effects will be beneficial.").

[182] For a discussion of how transparency can be measured and imposed, see *infra* Section IV.D.

recommendation, transparency should be a leading criterion when examining the legitimacy of contractual clauses that incorporate unilateral change of terms. Accordingly, firms should be prohibited from drafting sneak in contracts that fail to ensure the transparency of unilateral contract changes.[183]

Contract law assumes, for good reasons, that parties need to be sufficiently informed to make contractual decisions. A contract legally allocates risk, provides certainty, enhances clarity, and allows parties to rely on each other's promises and plan for the future. Undeniably, consumers value information about contractual modifications that affect their rights and obligations.[184] Thus, firms should effectively inform consumers about unilateral alterations. Here, one should keep in mind that a unilateral change to a consumer contract may impose onerous and biased terms on consumers. Accordingly, a fully transparent form of notice—which cannot be excluded by the contract[185]—should be required.

Following our empirical examination, firms should take four major steps. First, they should notify consumers personally (e.g., via e-mail) about the occurrence of the change. Otherwise, consumers may find it burdensome to continuously monitor the firms' dynamic contracts in an attempt to identify amendments that impact consumers' rights and obligations.[186] Placing such a burden on consumers, as some of the contracts in our sample do,[187] seems inefficient and unfair.

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[183] For a discussion of our proposed transparency index that examines levels of transparency in modification clauses, see *supra* Section III.B.*2*.

[184] *See supra* notes 34–39 and accompanying text.

[185] According to the Tentative Draft of the Restatement of the Law, Consumer Contracts, a consumer agreement may not, to the detriment of consumers, exclude consumers' rights to receive a reasonable notice of proposed modified terms. *See* RESTATEMENT OF CONSUMER CONTRACTS §§ 3(a)(1), 3(b) (AM. LAW. INST., Tentative Draft 2019).

[186] *See* Douglas v. U.S. Dist. Court for the Cent. Dist. of Cal., 495 F.3d 1062, 1066 n.1 (9th Cir. 2007) ("Without notice, an examination would be fairly cumbersome, as [the consumer] would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed."); Rodman v. Safeway Inc., No. 11-cv-03003-JST, 2015 WL 604985, at *11 (N.D. Cal. Feb. 12, 2015) (explaining that imposing an obligation on consumers to periodically check contract terms to learn whether the terms have been changed "would seriously compromise the convenience that makes online shopping a desirable alternative to the in-store experience"), *aff'd*, 694 F. App'x 612 (9th Cir. 2017) (mem.).

[187] In our sample, 141 contracts (29.44%) impose on consumers a duty to inspect their contracts for possible changes. *See supra* Section III.C.

That said, personal notifications may not suffice, as they may not reach all consumers. For instance, notifications may be blocked, be categorized as spam, get lost among other e-mails, be sent to an outdated account that the consumer does not frequently use, or be missed due to a technical problem.[188] Accordingly, the second step businesses should take is to inform consumers about the change via a publicly accessible platform. This might be done on the firm's website or on a third-party's website that policymakers have selected.[189] This will increase the likelihood that consumers—at least those who visit the website before the change comes into effect—will become familiar with the upcoming change.[190]

Third, firms should not only inform consumers personally and publicly about the *occurrence* of a contract amendment, but they should also personally and publicly disclose to consumers the *substance* of the change, detailing the proposed modifications. Consumers, who are normally time-constrained and rationally bound, cannot meaningfully compare and analyze the original and modified contracts, both of which are often long and technical.[191] In short, firms should make it easier for consumers to identify the exact changes and their substantive importance. Here, too, we make some further concrete recommendations in the next Section.

Finally, businesses should effectively inform consumers about the occurrence and contents of the change in advance by giving them sufficient notice.[192] This will enable consumers to review and

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[188] *See supra* note 110 and accompanying text.

[189] Policymakers could nominate websites of consumer organizations, governmental agencies, and the like. Prime examples include the Federal Trade Commission, the Better Business Bureau, and Consumer Reports.

[190] Disclosing the occurrence of the change only on a public platform, without sending an additional personal notice to each consumer, may be insufficient, because some consumers may not visit public platforms during the period in which the contract change is not yet effective. *Cf.* Goldman, *supra* note 110 ("[N]otice can be given when the user comes back to the website and logs in, but obviously only a limited number of legacy users come back to the website to log in.").

[191] *Cf.* Becher, *supra* note 12, at 122 ("Generally speaking, individuals' limited ability to process information undermines optimal contracting."); Eisenberg, *supra* note 10, at 307 ("Consumers may respond to too much information not by overloading, but by refusing to load any information at all.").

[192] The exact timeframe that makes a cooling-off period "sufficient" may differ among various contracts, markets, and modifications. As a general rule, consumers should have enough time to review and consider the change. For instance, the Credit Card Accountability Responsibility and Disclosure Act of 2009 requires credit card issuers to give consumers at

consider the change before it comes into effect.[193] Otherwise, consumers may be precluded from terminating a harmful modified agreement before it becomes binding.

The analysis in this Section addressed policy responses to sneak in contracts from a somewhat general, macro perspective. Clearly, a more precise and workable framework might assist policymakers and regulators. We thus propose more detailed recommendations next.

D. THE DEVIL IS IN THE DETAILS: A TENTATIVE GUIDELINE FOR REGULATORS

An individual's decision to enter into a contract reflects one's autonomy, choice, and freedom.[194] Thus, when firms alter their consumer contracts, they should provide consumers with personal notice of the changes. Indeed, personal notifications seem to be one of the most cost-effective means to inform consumers about changes to their contracts.[195] At a practical level, given consumers' bounded rationality and limited attention span, we suggest that for personal messages to be effective, they must meet the following criteria:

> (1) The title of the message should clearly inform consumers that the message concerns a contractual change.
> (2) The body of the message should explicitly state that the contract is going to be modified.

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least a forty-five days' notice before rates can go up. *See* 15 U.S.C. § 1637(i)(1)–(2) (2018). The Act also allows consumers to cancel their accounts before the change takes effect. *See id.* § 1637(i)(3).

[193] *Cf.* RESTATEMENT OF CONSUMER CONTRACTS § 3 cmt. 3, illus. 5 (AM. LAW. INST., Tentative Draft 2019) ("[I]n the absence of an affirmative, reasonable alert, the consumer does not have a reasonable opportunity to review the proposed modification . . . .").

[194] *See* Radin, *supra* note 29, at 1231 ("The traditional picture of contract is the time-honored meeting of the minds. The traditional picture imagines two autonomous wills coming together to express their autonomy by binding themselves reciprocally to a bargain of exchange.").

[195] *See, e.g.*, Laura Acevedo, *The Advantages of Email in Business Communication*, CHRON (Feb. 14, 2019), https://smallbusiness.chron.com/advantages-email-business-communication-122.html (explaining that communicating with customers via e-mail is significantly less expensive than communicating by physical mail and other methods).

> (3) The message should clearly disclose when the change will come into effect.
> (4) The body of the message should explain the nature of the change in concise and clear language. Specifically, it should explain, in plain English,[196] how the changes will affect the rights and duties of consumers. It should also provide a clear comparison table that allows consumers to easily contrast, side-by-side, the modified terms with the original terms.
> (5) The personal message should solely concern the contractual change. Unlike bill stuffers, it should not include other messages that might distract consumers' attention from the contractual change.
> (6) The message should not include any other material information or promotional content.
> (7) The message should include a link that consumers can click to reject the proposed change, exit the contract, and end the relationship with the firm.
> (8) If the proposed change is substantial, consumers should be given the opportunity to reject the modification, and the contract should retain the original contract terms.
> (9) The message should include contact information that consumers can use to further inquire.[197]

Ideally, the notices should also direct consumers and watchdogs to interactive platforms that allow consumers to comment on the changes. Furthermore, policymakers should consider requiring the use of social media platforms to further communicate changes to consumers and to solicit their responses.[198] The notifications could help effectively spread important information about harmful

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[196] For an explanation of how policymakers can enact clear and specific, "plain English" rules to better serve consumers, see Benoliel & Becher, *supra* note 9, at 2282–88.

[197] *See, e.g.*, *Update Notice for Changes in Legal Agreements*, TERMSFEED (Feb. 19, 2020), https://www.termsfeed.com/blog/update-notice-legal-agreements/ (explaining when and how to provide notice of updates to legal agreements via personal messages and providing examples of effective notices).

[198] *Cf. id.* (recommending that firms use social media to announce updates to their contracts).

contract modifications among consumers and could help assess the public's response to the modifications.

As noted, personal notifications by firms may not reach all consumers. Thus, policymakers should also require firms to give public notice of contractual changes. For public notifications to be effective, we suggest they must meet the following criteria:[199]

> (1) Firms should add to their public web pages a prominent top bar that clearly informs consumers that the contract was modified. At a minimum, the top bar should remain on the website from the time the firm proposes the change through the subsequent cooling-off period.
> (2) The top bar should mention the date on which the modification will become effective.
> (3) The bar should include a prominent link to a public webpage that clarifies, legibly and in plain English, how the changes will affect consumers' rights and duties.
> (4) The public explanatory page should include a simple table that allows consumers to easily compare, side-by-side, the modified terms with the original terms.
> (5) The public webpage should include contact information and a means for consumers to discuss the changes with an authorized representative, presumably a trained person from the firm's customer service department (assuming the firm has such a department).[200]

Policymakers can implement additional means to further enhance the likelihood that consumers will channel their attention to, and understand, such notices. For example, the visual design of a notice is extremely important and should thus be carefully considered.[201] Use of proper colors, fonts (type and size), frames,

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[199] *Id*.

[200] *Id*.

[201] In recent years, scholars have discussed visualization and legal design as means to improve the communication of legal information. *See* Gerlinde Berger-Walliser, Thomas D. Barton & Helena Haapio, *From Visualization to Legal Design: A Collaborative and Creative Process*, 54 AM. BUS. L.J. 347, 348 (2017) ("[L]egal visualization will be increasingly explored

images, and graphs can all assist consumers in absorbing the communicated information.[202] Likewise, the use of videos, tutorials, and infographics can also improve consumers' engagement and understanding. These visual tools can help firms present "dry" information in a more intuitive, memorable, and entertaining way.[203] The tools can be produced by government entities or consumer organizations. Ideally, they can also be created by the firms that make the unilateral changes.[204]

On top of the private and public notice requirements, policymakers should require firms to provide consumers with a specific cooling-off period.[205] For instance, any material change could require a thirty-day cooling-off period. As explained above, a cooling-off period would allow consumers to review, consider, and exercise the right to exit the contract before any changes become binding.[206]

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in research and legal practice in coming years."); Stefania Passera & Helena Haapio, *Transforming Contracts from Legal Rules to User-Centered Communication Tools: A Human-Information Interaction Challenge*, COMM. DESIGN Q., Apr. 2013, at 38, 38 (discussing how visualization can transform peoples' perceptions of contracts).

[202] *See* Oren Bar-Gill, *supra* note 181, at 2 (discussing the benefits and downsides of "smart disclosure" which "represents a new disclosure paradigm, one that takes seriously the intended audience of the disclosure mandate and pays close attention to questions of disclosure design"); *cf.* 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, 1319 (2019) (proposing the use of images and colors to assist consumers in making better food purchasing decisions).

[203] *Cf.* Shmuel I. Becher, Yuval Feldman & Orly Lobel, *Poor Consumer(s) Law: The Case of High-Cost Credit and Payday Loans* 25 (Univ. of San Diego Sch. of Law, Research Paper No. 18-357, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3235810 (arguing that visual cues like font, color, and frames can enhance the effectiveness of informational presentations about payday loans), *in* LEGAL APPLICATIONS OF MARKETING THEORIES (Jacob Gersen & Joel Steckel eds., forthcoming 2021).

[204] Of course, this presents a risk that firms will present information in a self-serving way, diverting consumers' attention from harmful changes. One way to minimize this concern is to require firms to demonstrate that consumers understand the changes. *Cf.* Lauren E. Willis, *The Consumer Financial Protection Bureau and the Quest for Consumer Comprehension*, RSF, Jan. 2017, at 74, 74–75 (discussing the idea that lenders will have to periodically demonstrate that borrowers understand "the key pertinent costs, benefits, and risks of the financial products they have been sold").

[205] Similarly, the tentative draft of the Restatement of the Law, Consumer Contracts requires firms to give consumers a "reasonable opportunity to review" the notice of a modified term. *See* RESTATEMENT OF CONSUMER CONTRACTS § 3(a)(1) (AM. LAW. INST., Tentative Draft 2019).

[206] *See supra* note 72, 92 & 192–193 and accompanying text.

That said, cooling-off periods are not a cure-all. Consumers may not have viable options to choose from once faced with a unilateral change.[207] Also, consumers may be deterred from exiting a contract due to prior investments or switching costs.[208] Moreover, long cooling-off periods may backfire, leading consumers to procrastinate, forget about the issue, or otherwise fail to take advantage of their rights.[209] Therefore, many consumers will follow the status quo and will be unlikely to exercise the right to opt out of the agreement.

When firms make substantial changes, allowing consumers a right to exit might not be a sufficient measure, even if consumers were to use such a right. Allowing consumers only to end the contract frustrates the consumers' legitimate expectations that the firm will perform under the contract as originally written. In other words, an exit option does not protect consumers' reliance interests and does not secure the consumers' contractual right to have their share of the deal.

A more forceful step would be for firms to allow consumers to reject the change and keep the previous contract terms in effect. Under this proposal, consumers who face a substantial contract change could choose between two options. One option is to accept the terms and amend the contract per the firm's proposal. The other option is to reject the change and keep the original terms in force.[210]

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[207] *See, e.g.*, Paterson & Smith, *supra* note 12, at *8 ("[C]onsumers may have few alternatives available to them at the time [they are faced with a unilateral contract modification] . . . .").

[208] *Cf. id.* (explaining that consumers may refrain from taking advantage of a cooling-off period due to a belief "that the costs associated with termination outweigh the benefits").

[209] *See, e.g.*, Meng Zhu, Rajesh Bagchi & Stefan J. Hock, *The Mere Deadline Effect: Why More Time Might Sabotage Goal Pursuit*, 45 J. CONSUMER RES. 1068, 1069 (2019) ("[W]e propose a mere deadline effect; that is, longer versus shorter incidental deadlines, once imposed, will lead to the inference that the goal is more difficult.").

[210] The draft Restatement of the Law, Consumer Contracts endorses this solution. It states that a modification is subject to "the consumer receiv[ing] a reasonable opportunity to reject the proposed modified term and continue the contractual relationship under the existing term . . . ." *See* RESTATEMENT OF CONSUMER CONTRACTS § 3(a)(2) (AM. LAW. INST., Tentative Draft 2019). However, this endorsement seems to be weakened in a subsequent section that allows a firm to "replace the reasonable opportunity to reject the proposed modified term with a reasonable opportunity to terminate the transaction without unreasonable cost, loss of value, or personal burden." *Id.* § 3(b).

Overall, these recommendations are all tentative in nature. Ideally, regulators should progress incrementally and empirically examine the effectiveness of the implemented protective measures. If the suggested measures prove ineffective, policymakers may consider regulating the substantive nature of change-of-terms clauses.

Regulating the substance of change-of-terms mechanisms is, of course, a more challenging and complex regulatory tool. However, given the nature of sneak in contracts, more forceful protective mechanisms may be required. Many other countries have found justifiable grounds for regulating the content of consumer contracts in general, and unilateral change-of-terms provisions in particular. For instance, under European, Australian, New Zealand, and Israeli laws, a unilateral change is considered a gray (suspicious) term.[211] That is, the inclusion of such a term in a consumer contract is prima facie unfair. Under these laws, a unilateral change can be struck down by a court.

Additional constraints on firms' power to unilaterally change contracts may take other forms. One option is to limit firms' discretion to objective circumstances or specific timeframes. Another is to condition unilateral changes on consumers' assent.[212] Yet another would be to require firms to demonstrate that consumers were aware of and properly understood the contractual

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[211] *See* Council Directive 93/13/EEC, art. 3, annex, 1993 O.J. (L 95/29) 29, 33 (EC) (providing that "terms which may be regarded as unfair" include terms which "enabl[e] the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract"); *Competition and Consumer Act 2010* (Cth) sch 2 ch 2 pt 2–3 s 25(a) (Austl.) (providing that "a term that permits . . . one party (but not another party) to avoid or limit performance of the contract" may be an unfair term); Fair Trading Act 1986, pt 5, s 46M(d) (N.Z.) (providing that "a term that permits . . . one party (but not another party) to vary the terms of the contract" may be an unfair term); Standard Contracts Law, 5743–1982, § 4(4), 37 LSI 6, (1982–83) (Isr.) (providing that "a condition conferring on the supplier the right to alter unilaterally, after the contract has been made, a price or any other material obligation imposed on the customer" is "presumed to be unduly disadvantageous").

[212] *See* Bar-Gill & Davis, *supra* note 12, at 29 (arguing that requiring consumers' meaningful assent to every contractual change "is perhaps the most obvious response to the unilateral modification problem"); Hila Keren, *I Am Altering the Deal. Pray I Don't Alter It Any Further.*, JOTWELL (May 4, 2020), https://contracts.jotwell.com/i-am-altering-the-deal-pray-i-dont-alter-it-any-further/ (arguing that contract law should require consumers to provide meaningful assent to unilateral contract changes).

changes.[213] Another possible path to explore is to require major changes to be graded or approved by an administrative, judicial, or even pro-consumer body.[214] All in all, such steps will reduce the risk that consumers will find themselves facing onerous changes they neither considered nor accepted.

The results of our study may support these and similar weighty steps, and it is tempting to suggest taking this path. Given the current legal and political climate in the United States, however, it is difficult to imagine sweeping adoption of such reforms in the near future. Therefore, we suggest, as a starting point, the adoption of smart notices to enhance transparency, accompanied by a mandated cooling-off period. However, transparency and a right to exit, even when smartly designed and implemented, are not panaceas. After experimenting with these measures, their degree of success should be examined, and their impact and costs evaluated.[215] If these steps do not yield satisfying results, policymakers can consider using more intrusive options as discussed in this Part. These are summarized in Diagram 2.

In Diagram 2, we categorize regulatory tools into three groups. First is the green group with the letter "L" (low), denoting three light intervention measures. Second is the orange group with the letter "M" (moderate), representing three medium intervention

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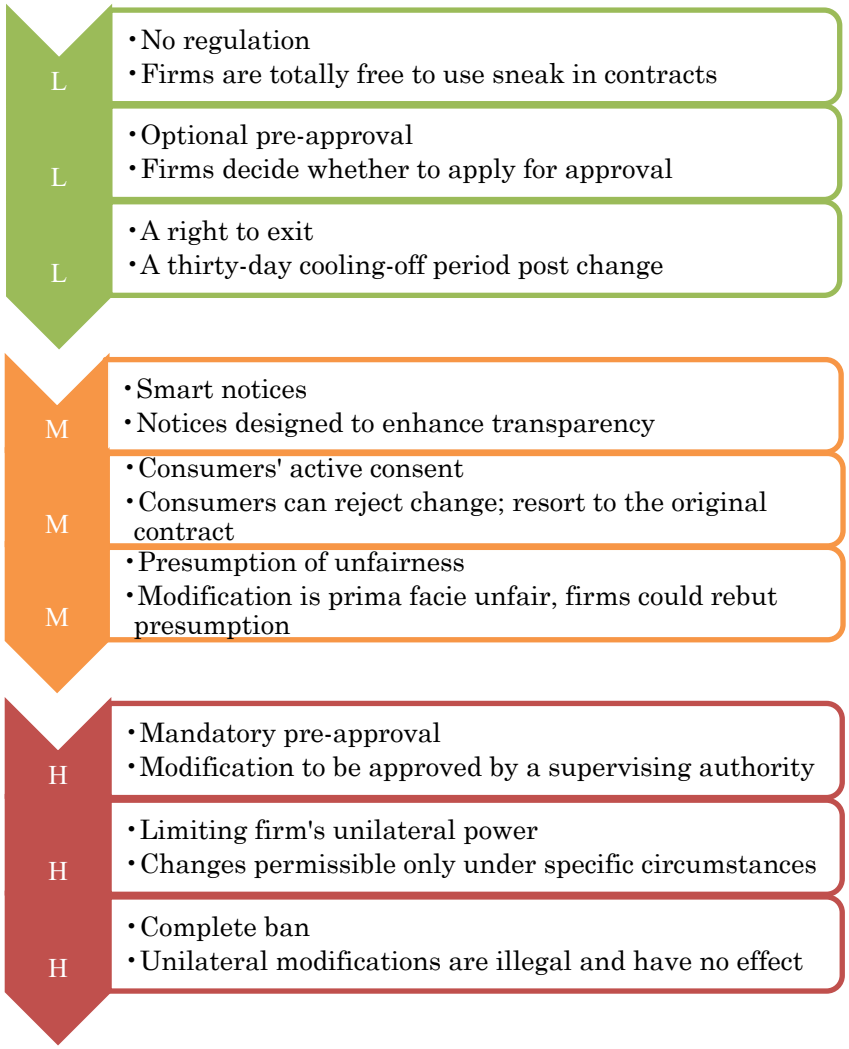
[213] *Cf.* Willis, *supra* note 204, at 75 ("[T]he [Consumer Financial Protection Bureau] should require firms to prove that their customers are aware of all costs at the moment when the customers are deciding whether to take an action that will trigger those costs . . . ."). According to this line of argument, firms have generally proven their ability to draw consumers' attention in a variety of creative and effective ways. *Cf. id.* at 80 ("[F]irms have information and expertise that could allow them to design disclosures better than regulators can do.").

[214] *See* Bar-Gill & Davis, *supra* note 12, at 37 (proposing that a "Change Approval Board" be created to approve consumer contract modifications). If a grading system is implemented, public notices to the customers should include the grade that a modification receives. For a general discussion of the complex issues that pre-approval and grading by third parties raise, see Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 750–51 (2009).

[215] *See* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1400–09 (2015) (proposing that regulation of consumer markets should be based on actual consumer behavior and should be enriched by a monitoring system that provides regular feedback); *see also* Becher, *supra* note 92, at 128–31 (suggesting a gradual and cautious approach to consumer protection legislation).

measures. Third is the red group with the letter "H" (high), indicating three forcible measures.

Diagram 2. Regulatory Continuum



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So far, we have discussed *ex ante* regulatory measures, without addressing possible *ex post* scrutiny by courts. Our focus on *ex ante*

tools is deliberate. As a general rule, we believe that preventing a problem is more effective than trying to resolve it once it emerges.

This is especially true in the case of consumer contracts, for at least two key reasons. First, many consumer contracts include mandatory arbitration clauses.[216] These clauses prevent consumers from bringing their disputes before courts, making courts less likely to scrutinize these issues to begin with.[217] Second, placing the emotional and financial burdens on consumers to initiate litigation against unfair modifications ignores the complex realities that consumers face.[218] Among other problems, many consumers often do not identify harms or cannot point to the perpetrator,[219] typical consumer contracts often address relatively small monetary values,[220] initiating litigation is costly,[221] and many consumers may be deterred by the adversarial nature of legal disputes—especially

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[216] *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 871 ("Arbitration clauses are common features of American consumer agreements.").

[217] *See* Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 266 (2015) ("Arbitration clauses require consumers and employees to waive their rights to bring litigation in court, leaving private arbitration as their only avenue to seek redress for violations of any law . . . ."). It follows that a lack of litigation over a particular issue will result in a lack of judicial scrutiny of that issue.

[218] *See* Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012) ("[R]elatively few consumers are aware of available remedies, and even fewer seek assistance.").

[219] *See, e.g.*, *id.* at 282 ("[T]here is no evidence that a sufficient number of 'informed' consumers read or shop for purchase terms beyond price . . . . Furthermore, even if some level of informed minority exists, only a handful of the consumers in this group pursue contract complaints." (footnotes omitted)); *see also* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming* . . ., 15 LAW & SOC'Y REV. 631, 632 (1980) (analyzing "the conditions under which injuries are [perceived] or go unnoticed and how [consumers] respond to the experience of injustice and conflict").

[220] *See* Meyerson, *supra* note 1, at 599 (stating that "[f]or most consumer purchases . . . the cost of legal advice will far exceed the expected value of the gain to be derived").

[221] *See* Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 288 (2003) ("Litigation ranges from being rather expensive, to extremely expensive, to ferociously expensive, to make-your-hair-stand-up-on-end-knock-your-teeth-out-one-by-one expensive.").

given the power and experience that firms hold.[222] Thus, we should not rely heavily on courts to police sneak in contracts.

That said, courts can still develop and employ doctrinal tools to examine sneak in contracts in relevant cases that are brought before them. Such tools may include, for instance, unfair surprise,[223] reasonable expectations,[224] reasonable communication,[225] good faith,[226] and unconscionability.[227] All of these doctrines involve standards; that is, vague and open legal norms that provide *ex post* flexibility for courts (but not much *ex ante* guidance for the parties).[228]

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[222] *See* Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 97–100 (1974) (explaining that firms are advantaged by being "repeat players" in litigation).

[223] According to the doctrine of unfair surprise, courts will not enforce contract terms that violate the reasonable expectations of a contracting party. *See, e.g.*, A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 120–24 (Cal. Dist. Ct. App. 1982) (discussing the doctrine of unfair surprise).

[224] According to the "reasonable expectation" test, "[i]n dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling', and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." Gray v. Zurich Ins. Co., 419 P.2d 168, 172 (Cal. 1966) (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943)). This doctrine is primarily used in the context of insurance contracts. For an argument that the "reasonable expectation" test is underutilized and that its application should not be limited to insurance contracts, see Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 231 (2007).

[225] Courts developed the "reasonably communicated" test in the context of forum selection clauses. The test is intended to assure that the consumer has a reasonable chance to observe a clause and absorb its effects on the consumer's legal rights. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (AM. LAW INST. 1981) ("Where the other party has reason to believe that the party manifesting . . . assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.").

[226] *See* U.C.C. § 1-201(20) (AM. LAW INST. & NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2017) (defining "Good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); *see also id.* §§ 2-305(2), 2-306(1), 2-311(1), 2-615(a) (detailing the obligation to perform a contract in good faith).

[227] *See id.* § 2-302(1) ("If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . ."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW INST. 1981) ("If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract . . . .").

[228] *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1685 (1976) (analyzing the "nature and interconnection of the different

Perhaps the most important and relevant tool is the doctrine of unconscionability, which plays a key role in judicial analysis of consumer contracts.[229] The doctrine of unconscionability has procedural and substantive components.[230] While procedural unconscionability addresses unfairness in the bargaining process,[231] substantive unconscionability focuses on unfairness in the bargaining outcome.[232] The prevailing opinion is that courts can (and should) use the doctrine to review both substantive and procedural aspects of consumer contracts.[233]

Courts acknowledge that the typical unequal bargaining power between consumers and firms allows courts to relax consumers' duty to read and "to avoid enforcement of unconscionable provisions in long printed standardized contracts."[234] More generally, many courts apply the doctrine of unconscionability using a "sliding scale."[235] In essence, courts that use the sliding scale approach view the procedural and substantive components in tandem. That means that "a relatively large quantum of one type of unconscionability can offset a relatively small quantum of the other."[236] The sneaky nature of unilateral modification clauses arguably suggests a significant procedural flaw, which entails that courts could find that these clauses are substantively unconscionable.

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rhetorical modes found in American private law opinions, articles and treatises")*;* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 381 (1985) (examining the difference between legal rules and legal standards).

[229] For a famous case applying the doctrine of unconscionability to a consumer contract, see Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 450 (D.C. Cir. 1965).

[230] *See* Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6 (2012) (outlining the traditional "two-prong" approach to the unconscionability doctrine where "both procedural and substantive unconscionability are required to justify judicial interference with a contract").

[231] *Id.* at 9.

[232] *See* Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 752 (1982) (noting that substantive unconscionability has been described "as fault or unfairness in the bargaining *outcome*—that is, unfairness of terms").

[233] *See id.* at 754 (suggesting that both procedural and substantive unconscionability should be applied when analyzing contracts); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 21 (1981) (criticizing the procedural/substantive distinction of unconscionability).

[234] Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 86 (N.J. 1960) (citing 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 128, at 188 (1950)).

[235] *See* Lonegrass, *supra* note 230, at 5.

[236] *Id.* at 12.

V. LIMITATIONS AND CRITICISMS

This Part tackles four key counterarguments: (1) the futility argument; (2) the anti-intervention argument; (3) the "real deal" argument; and (4) the partial data argument. By addressing these arguments, this Part also connects the dots to provide a bird's eye view of our thesis.

A. THE FUTILITY ARGUMENT

One possible argument against our analysis is that the attempt to improve the mechanism of unilateral change terms is futile. According to this critique, consumer contracts are complex, long, boring, unreadable, and, thus, non-salient.[237] Improving the ways firms inform consumers of contractual changes is irrelevant if consumers regard their contracts as unimportant legal technicalities that address remote risks.[238] In short, communicating legal information to consumers is difficult.[239] Regardless of our suggestions, the argument goes, consumers will continue to not pay heed to contractual terms and modifications.

While intuitively appealing, the futility argument ignores important realities of consumer and contract law and policy. Taken to an extreme, the argument should also recommend not presenting consumers with form contracts—which they generally do not read—in the first place. We find this criticism troublesome for the following six reasons.

First, non-transparent, unilateral changes aggravate the problem of information asymmetry. In fact, sneak in contracts may dissuade consumers from attempting to become familiar with their

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[237] *Cf.* BEN-SHAHAR & SCHNEIDER, *supra* note 180, at 8–9 (opining that people should not be expected to read long disclosures, contracts, and other legal texts).

[238] Some scholars argue that cognitive biases may lead consumers to discount contractual risks. *See* Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1375–76 (2004) (discussing various behavioural biases that "result[] in the underestimation of [the risks of] future borrowing"); Becher, *supra* note 12, at 142–51 (exploring biases said to cause consumers to underestimate contractual risks).

[239] *See, e.g.*, Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862, 866–67 (2020) ("A recalcitrant problem in consumer contracts, however, is that a minority of consumers actually read much of the written contract, and even fewer read the fine print. Consumer inattentiveness to contract terms fosters an information gap, enabling firms to cut costs by offering inferior terms without a demand loss." (footnote omitted)).

contracts before they even accept the contracts.[240] If a contracting party knows (or suspects) that the other party has the power to unilaterally change the contract for any reason at any time, the value of reading the contract *ex ante* diminishes.

True, consumer contracts are hard to read and unilateral change-of-terms provisions are not the only reason that consumers do not read their contracts. However, consumers may be more likely to read *ex post* modifications if firms properly communicate the modifications. Such modifications are typically specific and address a limited number of contractual aspects, and firms can potentially channel consumers' limited attention to the relevant clauses. Indeed, the scandals around some unilateral changes illustrate that, to some extent, consumers and the public do care about contractual terms and are willing to engage in public debate about them.[241] Therefore, sneak in contracts impose further costs on those consumers who wish to become familiar with (at least part of) their contracts. This merits a response.

Second, while consumers tend to ignore the fine print in form contracts, the same cannot be categorically argued for consumer organizations and watchdogs. As previously noted, sneak in contracts impose extra and unjustified costs not only on consumers, but also on pro-consumer organizations.[242] Seemingly no legitimate reason exists for making it harder and costlier for those entities to examine consumer contracts.

Third, though most consumers generally do not read most of their contracts, some consumers do occasionally read some of their contracts.[243] These consumers accept the terms of sneak in contracts

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[240] *See supra* note 125 and accompanying text.

[241] *See, e.g.*, *supra* notes 34–39 and accompanying text.

[242] *See supra* Section IV.B.

[243] *Cf.* DELOITTE, 2017 GLOBAL MOBILE CONSUMER SURVEY: US EDITION 12 (2017), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/technology-media-telecommunications/us-tmt-2017-global-mobile-consumer-survey-executive-summary.pdf ("[C]onsumers have been more open to signing agreements with mobile app and service providers—91 percent willingly accept legal terms and conditions without reading them before installing apps, registering Wi-Fi hotspots, accepting updates, and signing on to online services such as video streaming."); Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 212–17 (2010) (finding that a minority of consumers report a tendency to read some contracts, both *ex ante* and *ex post*).

with uncertainty as to possible future covert changes. This uncertainty is socially undesirable. In addition, consumers' optimism and trust may lead them to downplay the risks of sneaky changes.[244] Importantly, for those consumers that read a contract *ex ante*, a non-transparent unilateral change may cause cumulatively significant harm. The extremely high volume of consumers who accept these form contracts suggests that even if only a small portion of them read their contracts, in absolute terms the numbers are still significant.[245]

Fourth, where disputes arise, aggravated consumers might want to become familiar with the changes that firms made to their contracts. An aggrieved consumer might be surprised by a current contractual term and seek to compare it with the original version of the contract the consumer accepted.[246] Sneak in contracts undermine consumers' ability to make these comparisons. Making it easy for aggrieved consumers to identify and compare their contract terms is a prerequisite for the effective enforcement of consumer rights.

Fifth, the effectiveness of our proposals should be assessed not only against consumers' behavior, but also in light of their potential impact on firms. In fact, notices and disclosures often impact firms more than consumers.[247] One potential reason is the "spotlight effect," which can cause firms to focus on the information

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[244] *See supra* note 133–134 and accompanying text.

[245] For instance, Facebook has 2.38 billion users. *See* Hutchinson, *supra* note 17. As Deloitte suggests, assume that approximately 9% of users attempt to read Facebook's online agreement. *See* DELOITTE, *supra* note 243. This means that more than 200 million users read their contracts. Of course, readership is not limited to Facebook contracts, so it is possible that billions of consumers overall attempt to read sneak in consumer contracts.

[246] Some research suggests that consumers are willing to read, and are influenced by, form contracts *ex post*. *See* Becher & Zarsky, *supra* note 129, at 315 ("Most of the reasons for the lack of effective reading and comprehension of 'non-salient' terms ex ante do not apply to the ex post context."); Furth-Matzkin, *supra* note 41, at 6 ("[E]ven if consumers . . . do not read or pay attention to the contract terms *ex ante*, they are still likely to read their contracts (or substantial portions of them) *ex post*, when a problem occurs or when a question arises concerning their rights and obligations as buyers.").

[247] *See* George Loewenstein, Cass R. Sunstein & Russell Golman, *Disclosure: Psychology Changes Everything*, 6 ANN. REV. ECON. 391, 398 (2014) ("[D]isclosure may have little effect on recipients but large effects on providers.").

disclosed.[248] This increases the perceived salience of the information at stake,[249] causing firms to overestimate consumers' attention to the information.[250] This effect may deter firms from unscrupulous behavior, disciplining them further.

Finally, that firms exploit their superior bargaining power and introduce biased and unfair mechanisms may negatively impact society. Consumers should be able to trust that firms will use their power and discretion to modify contracts in a reasonable way.[251] Firms' ability to make unilateral, broad, and non-transparent contract modifications can undermine the public's trust in the market, as well as in the law's capacity to protect consumers from abusive modifications.

At the same time, policymakers have an incentive to facilitate and protect trust, which is an important virtue in healthy and thriving societies.[252] Along somewhat similar lines, consumers have

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[248] *See id.* at 404 ("[S]ellers may well have an inflated sense of the public salience of disclosures, in a phenomenon related to the spotlight effect . . . by which people exaggerate how much other people are looking at them." (citation omitted)).

[249] *See id.*

[250] *Cf.* 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. PSYCHOL. 211, 214 (2000) (finding that the spotlight effect "distort[ed] [participants'] estimates of how much [a potentially embarrassing t-shirt] would command the attention of others" and "led them to substantially overestimate the number of others present who" paid attention to their shirts).

[251] Thus, courts can interpret change-of-terms provisions in a way that permits a limited range of changes while requiring reasonable decisionmaking by firms. *See* Braganza v. BP Shipping Ltd. [2015] UKSC 17 [18] (Eng.) ("[T]he party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. . . . The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised . . . ."); Kós, *supra* note 156, at 27 ("[C]ourts appear to be . . . applying the rule that contractual powers must not be exercised arbitrarily or capriciously or in bad faith with ever greater frequency."); Paterson, *supra* note 156, at 46 ("Courts in both Australia and England have responded to the risk of abuse of discretionary contractual powers by being prepared to imply duties fettering the exercise of such powers.").

[252] *See generally* ROBERT D. PUTNAM, BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY (2000) (discussing the macro impact that trust has on societies); *see also* Gimun Kim & Hoonyoung Koo, *The Causal Relationship Between Risk and Trust in the Online Marketplace: A Bidirectional Perspective*, 55 COMPUTERS 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

the right to be properly informed about modifications to their contracts. This holds true even if consumers cannot do much, or choose not to do much, with the information at hand.[253] Promoting the perception of a just legal system is worthwhile in and of itself.

B. THE ANTI-INTERVENTION ARGUMENT

Another important criticism submits that legal intervention is likely to yield an inefficient equilibrium. According to this argument, allowing market forces, such as reputational constraints, to discipline firms would be best.[254] In essence, the argument is that firms that draft one-sided modification clauses that can be invoked opaquely will suffer reputational harm. Some consumers, or consumer organizations, are likely to identify such terms and post their findings online, relying on unprecedented information flows to disseminate the information and warn other consumers.[255]

This argument is flawed. First, the empirical findings presented above negate the theory that firms compete over terms in a way that yields fair and balanced contracts. To the contrary, our examination demonstrates that firms employ biased mechanisms, characterized by a lack of transparency. As others have noted, reputational constraints are likely to be distorted and biased and suffer from other severe limitations.[256]

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engaging in transactions."); Paul J. Zak & Stephen Knack, *Trust and Growth*, 111 ECON. J. 295, 296 (2001) ("Because trust reduces the cost of transactions ([i.e.] less time is spent investigating one's broker), high trust societies produce more output than low trust societies."). For an argument that the social notion of trust can and should be integrated into consumer protection analyses, see generally Becher & Lai, *supra* note 160.

[253] *Cf.* Benoliel & Becher, *supra* note 9, at 2291 (arguing that consumers have a right to receive readable contracts even if they choose to not read them).

[254] *See, e.g.*, Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827 (2006) (explaining that reputational concerns can prevent sellers "from behaving opportunistically").

[255] For a comprehensive discussion of the potential of consumer-generated online information flows to discipline firms, see Becher & Zarsky, *supra* note 129, at 342.

[256] *See* Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1253 (2019) ("[R]eputational information may be costly to obtain, noisy, distorted by the incentives of intermediaries, or ineffectual . . . ." (footnotes omitted)); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1200–10 (2016) (explaining how reputational sanctions work and why they are inherently noisy).

Second, while reputational concerns and online flows can deter sellers under some circumstances, no good reason exists to believe that these tools are sufficiently strong to deter sellers from drafting one-sided contract terms generally. *Ex ante*, most contract terms are non-salient from consumers' perspectives, and firms have no incentive to compete over such terms. Typically, online information flows pertain to some aspects of a firm's behavior (e.g., speed of delivery, customer service, returns policy, etc.), rather than the form contract terms per se. In other words, while consumer contracts address important aspects of the transactions at stake, at the time of contracting, consumers typically undervalue these aspects and find them hard to comprehend.[257]

Third, firms with lower numbers of consumers or volume of traffic might try to modify their contracts while hoping that the changes will go unnoticed.[258] If the firm is successful, it will benefit from making the change. If the attempt fails and the public becomes aware of the change, the firm can retreat and reverse the change. In other words, the option to withdraw from the change makes the reputational risks and the costs involved less prohibitive.

Fourth, even assuming that reputational concerns and online information flows can (sometimes) deter sellers from drafting unfair contract terms, there is no legitimate reason to increase the costs for those who wish to create these flows. Note, again, that those who are likely to generate such beneficial information flows are consumer groups, or exceptional individual consumers, who serve the public by disseminating valuable information. Essentially, greater transparency translates to cheaper information flows. This is not only more efficient, but also fairer.

C. THE "CONTRACT DEAL" VS. THE "REAL DEAL" ARGUMENT

Another possible counterargument to our analysis pertains to the potential gap between what the contract says and what firms do.

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[257] This should not be confused with consumer responses to contractual modification at the *ex post* stage. At this later stage, consumers are less likely to suffer from information overload, since they typically need to consider only the changes made, not the transaction or contract as a whole.

[258] Our results indicate that sites that are less popular tend to have less transparent modification mechanisms. *See supra* Section III.C.

According to this argument, firms may draft one-sided and non-transparent modification mechanism provisions, but not because they anticipate *ex post* opportunistic modifications. Rather, incorporating unilateral change-of-terms provisions decreases the chances that consumers will sue the firm for not complying with the firm's own modification mechanism.[259] Yet, for a variety of reasons, the argument goes, firms will rarely use these mechanisms in ways that actively harm consumers. Thus, the argument concludes, we should be more concerned with what firms *actually* do with their contracts, rather than what firms say they *can* do.[260]

The response to this important reservation is twofold. First, unilateral modification provisions are not dormant clauses that firms rarely use. As outlined above, firms repeatedly modify their consumer agreements,[261] relying on these contractual change mechanisms. While not all changes harm consumers, many non-transparent changes do undermine important rights for which consumers have contracted. Overall, even if firms do not intend to use sneak in mechanisms in practice, including the mechanisms in the contract *ex ante* still seems inherently dubious.

An illustration may further clarify. In August 2019, Lyft.com, a major ridesharing company, personally informed consumers via e-mail that it had changed its terms of service.[262] According to Lyft's notification, the changes related to several terms, including the

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[259] Stated in the alternative, detailed and transparent procedures provide an additional ground for disgruntled consumers to challenge the change a firm makes.

[260] A growing body of contract law literature addresses this phenomenon, examining the gap between what contracts say and how parties actually behave from various perspectives. *See, e.g.*, Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts—Comment on the Work of Florencia Marotta-Wurgler*, 12 JERUSALEM REV. LEGAL STUD. 128, 129 (2015) ("[This comment] suggests that studies of consumer contracts in particular contexts should move from looking almost exclusively at the terms of the *paper deal* to looking at the terms of the *real deal*—that is, the way sellers actually behave in the shadow of both written contracts and the wide variety of other forces that may constrain or influence their behavior."); Catherine Mitchell, *Contracts and Contract Law: Challenging the Distinction Between the 'Real' and 'Paper' Deal*, 29 OXFORD J.L. STUD. 675, 676 (2009) (examining the claim that "contracting parties inhabit two different worlds, a real one created by [the parties] and an artificial one created by the law"); Becher & Zarsky, *supra* note 1, at 73 ("Often, firms draft one-sided or stringent consumer standard form contracts . . . yet display a flexible and lenient approach to their consumers . . . .").

[261] *See supra* notes 2–7 and accompanying text.

[262] This notification is on file with the authors.

website referral program, dispute resolution mechanism, intellectual property licenses, and confidentiality policy.[263] However, the notification was not fully transparent. It failed to inform consumers about the concrete details of the changes; instead, the notification merely informed users that they could read the full, updated terms of service by following a link provided within the notification.[264] These full terms, though, are lengthy and complex.[265]

Lyft's non-transparent notification may have created wasteful social costs, forcing interested consumers and consumer watchdogs to invest efforts in comparing the old and updated terms in order to detect and analyze the contractual changes. This undesirable outcome is arguably backed by Lyft's change-of-terms clause. While the clause allows the website to change its contract without limiting the time and purpose of the change, it fails to require the site to inform consumers personally (or publicly) about the specific contents of the change.[266]

The argument that firms will not use sneak in contracts in ways that harm consumers is questionable for another reason. It seems that the real deal is sometimes worse than the paper deal, rather than vice versa. For instance, in the recent case of *Pisarri v. Town Sports International*, a business made unilateral changes to its membership agreement without notifying its consumers.[267] This modification put the business in breach of its change-of-terms mechanism, which required the firm to provide notice.[268]

These and other observations suggest that firms use sneak in contracts. Nonetheless, it would be beneficial to gain a more complete picture as to the ways in which firms use change-of-terms

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[263] The notification stated, *inter alia*, that "terms regarding the Lyft referral program, dispute resolution, intellectual property licenses, and confidentiality have also been updated." *Id.*

[264] *Id.* (the notification stated, *inter alia*, "The updated Terms will go into effect for all users on August 26, 2019. You can review these Terms in full here.").

[265] *See, e.g.*, *Lyft Terms of Service*, LYFT, https://www.lyft.com/terms/preview (last updated Dec. 9, 2020).

[266] *See id.*

[267] Pisarri v. Town Sports Int'l, LLC, No. 18 Civ. 1737 (LLS), 2019 WL 1245485, at *4 (S.D.N.Y. Mar. 4, 2019) ("Although TSI can change the rules at any time, the agreement also states that 'TSI will notify members of any changes.' . . . TSI did not give Plaintiffs any notice that it was changing their membership terms." (citation omitted)).

[268] *See id.*

mechanisms in practice (i.e., the "real deal"). Although this Article provides some insights into this issue, we hope that future studies will tackle the topic in a systematic and empirical manner.

D. THE PARTIAL DATA ARGUMENT

Finally, an important caveat to our analysis concerns our study's sample. The sample encompasses 500 sign-in-wrap contracts from popular websites, which we use as a case study. Theoretically, these online contracts may employ different terms and mechanisms than offline consumer contracts or less popular online contracts. For instance, one may hypothesize that the online contracts in our sample are more likely to involve products and services that are offered free of charge. In such a context, the argument goes, consumers may be more likely to tolerate unilateral change terms. Alternatively, one may theorize that firms employing sign-in-wrap contracts are more innovative and dynamic. They might be, according to this argument, more attune to contract law doctrine and more likely to appreciate the flexibility that change-of-terms clauses provide.

Although no empirical evidence supports such arguments, it might indeed be that online contracts of popular websites have unique characteristics. We therefore welcome future studies that examine unilateral change-of-terms clauses in other types of consumer contracts. Importantly, however, even if the sign-in-wrap contracts in this study's sample have unique characteristics, our analysis still holds, for two main reasons.

First, the results of our study indicate that sites that are less popular tend to have modification mechanisms that are even *less* transparent than more popular websites.[269] These results might imply that websites and firms that are less popular than the ones tested in this study are likely to have even poorer transparency modification mechanisms. Second, the popularity of the websites in our sample—and the large volume of consumers they attract—make these contracts sufficiently important in and of themselves. The number of consumers involved, combined with the findings we present, merit legal vigilance.

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[269] *See supra* Section III.C.

VI. CONCLUSION

In 2008, Mr. Palmer ordered a present for his wife from an online retailer.[270] When the order did not arrive, the Palmers tried to find out what went wrong.[271] After she realized she could not reach the online retailer by phone, Mrs. Palmer posted an online review about the business, sharing her negative experience.[272] More than three years later, the online retailer, KlearGear, contacted the Palmers, demanding that they remove the negative posting and threatening that the couple would be fined $3500.[273] The message from KlearGear cited the firm's terms and conditions, pointing to a non-disparagement clause.[274] This term was not even part of the original contract between the parties.[275] It was inserted after the Palmers entered the contract, and it allegedly applied to them retroactively.[276]

When the Palmers refused to pay the fine, the company reported them to several credit bureaus, damaging the Palmers'

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[270] Many outlets reported on the Palmers' story and subsequent lawsuit against KlearGear. *See, e.g.*, *Palmer v. KlearGear.com*, PUB. CITIZEN, https://www.citizen.org/litigation/palmer-v-kleargear-com/ (last visited Jan. 24, 2021); Eugene Volokh, *$300,000 Damages Award Against KlearGear, the Company that Billed Customers for $3,500 Because They Posted a Negative Review*, WASH. POST: THE VOLOKH CONSPIRACY (June 26, 2014, 12:48 PM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/26/300000-damages-award-against-kleargear-the-company-that-billed-customers-for-3500-because-they-posted-a-negative-review/; Jacob Goldstein & Alexi Horowitz-Ghazi, *Terms of Service*, NPR (Mar. 4, 2020, 7:11 PM), https://www.npr.org/2020/03/04/812264543/episode-976-terms-of-service.

[271] *See* PUB. CITIZEN, *supra* note 270 ("The gifts never arrived, and [Mr. Palmer's] attempts to contact KlearGear.com were unsuccessful.").

[272] *See id.* (noting that she "posted a negative review on RipoffReport.com").

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

[274] Farivar, *supra* note 273 ("[Mr.] Palmer received an e-mail demanding that the review be deleted within 72 hours or that he pay $3,500, as he was in violation of the company's 'non-disparagement clause' of its terms of service.").

[275] *Id.* (noting that the clause "did not appear in the Terms of Sale and Use that the Palmers had agreed to when they placed their order in 2008").

[276] *Id.*

creditworthiness.[277] As a result, the Palmers were denied credit, had loans delayed, and were unable to enlist the necessary funds to fix their broken furnace.[278] The Palmers sued KlearGear.[279] In 2014, a court entered a default judgment for the Palmers.[280] The case inspired legislatures to adopt laws banning the use of non-disparagement clauses in consumer contracts.[281]

Most consumers do not fight back, and happy endings of this type are rare. Billions of users routinely sign up on highly popular websites that use sign-in-wrap consumer contracts. As our study illustrates, these contracts normally grant firms a broad right to unilaterally change the agreement. Alas, the findings of this study indicate that the clear majority of these contracts fall under the definition of a sneak in contract.

Specifically, these contracts provide firms with wide and imbalanced discretion to alter contracts *ex post*. They fail to obligate firms to inform consumers personally, publicly, and in advance about the mere occurrence of any contractual change that alters their rights or duties. These contracts further fail to impose a duty on firms to inform consumers personally, publicly, and in advance about the specific substance of the change.

Given the broad right of firms to modify their agreements, consumers are constantly exposed to unilateral contract modifications that may alter their rights and obligations. This alteration mechanism is likely to be unfair and inefficient. Additionally, these sneak in contracts, instead of requiring firms to

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[277] *See* PUB. CITIZEN, *supra* note 270 ("When the Palmers refused to pay . . . KlearGear.com reported the supposed 'debt' to the credit reporting agencies. . . . More than a year later . . . this 'debt' still mars John Palmer's credit.").

[278] *Id.* (nothing that "the Palmers have been turned down for credit, and had their car loan delayed and paid a higher interest rate on it"); Volokh, *supra* note 270 (stating that the Palmers "spent weeks without heat in their home . . . when their furnace broke and they were unable to obtain a loan to replace it").

[279] Complaint, Palmer v. Kleargear.com, No. 13-cv-00175 (D. Utah Dec. 18, 2013).

[280] PUB. CITIZEN, *supra* note 270 (describing the default judgment and damages award).

[281] *See, e.g.*, Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 130 Stat. 1355, 1355 (2016) (creating federal law "[t]o prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services . . . that were the subject of the contract"); *see also* Niraj Chokshi, *California Protects the Right to Yelp Without Penalty*, WASH. POST (Sept. 10, 2014, 10:12 AM), https://www.washingtonpost.com/blogs/govbeat/wp/2014/09/10/california-protects-the-right-to-yelp-without-penalty/ (describing a new California law prohibiting waivers of the right to comment on products and services received in consumer contracts).

disclose information they already have at their disposal, increase transaction and reading costs on the part of consumers and watchdog organizations.

Furthermore, sneak in contracts discourage consumers from reading form contracts and shopping among them, exploit consumers' over-optimism and prior investment, increase the risk of empty promises, and can reduce competition among firms. Sneak in contracts also expose consumers to the risk that harmful contract alterations will fly under their radar. Finally, consumer watchdogs may be forced to devote unnecessary resources, time, and money toward uncovering hidden and harmful contract modifications.

Our findings illustrate that sneak in contracts are rampant, relentless, and opaque. Such contracts are not aligned with the core values and principles that guide contract law. Sneak in contracts undermine public trust, entail social waste, and lead to unfair outcomes.

But sneak in contracts are not inevitable. In response, policymakers should implement various protective measures. As delineated in this Article, these may include smart and well-designed public and private notices; mandated cooling-off periods and a right to exit; requirements for consumers' explicit consent to, or "actual knowledge" of, unilateral changes; allowances for consumers to reject the unilateral change and continue with the original contract terms; pre-approval of contractual modifications; substantive control over such mechanisms; and limitations on firms' ability to unilaterally change contracts *ex post*. We hope that by adopting the measures outlined in this Article, policymakers and courts will be better equipped to tackle the issues surrounding, and improve the legal treatment of, sneak in contracts.