ARTICLE

THE DUTY TO MAKE CONTRACTS UNDERSTANDABLE

Michael A. Blasie*

So what if consumers can't understand contracts? They don't read contracts. They can't negotiate contracts. All their contracts have the same unfair terms. And nowadays businesses use algorithms, artificial intelligence, and social scientists to craft individualized contracts that hack consumer's minds. Choice is an illusion. Consumer understanding is a pipedream.

Even so, contracts should still be understandable.

The opportunity to understand a contract is essential to contract formation's integrity. While much contract literature focuses on how nonnegotiable contracts cause consumers to make bad deals, this Article challenges the concession that a deal has been made. Contract formation requires consumers have an opportunity to read the contract, which in turn requires consumers have an opportunity to understand what they read. Even if consumers do not exercise this opportunity, and even if exercising that opportunity only reveals how unfair the contract is, this opportunity must exist. The Article proposes that the Uniform Law Commission pass a statute requiring consumer contracts to be understandable to the average intended consumer. Such a law benefits sellers and consumers alike, removes the biggest and oldest impediment

* Michael Blasie is Dean of and Professor of Law at KIMEP University School of Law, and an Associate Professor of Law at Seattle University School of Law. Thank you to attendees at the 2023 International Conference on Contracts, the faculty at a Visiting Scholar lecture at the University of Oklahoma College of Law, Jeremy Telman, Dane Thorley, Brook Gotberg, Mohammad Mamnoon, Helena Haapio, Jessica Lee, and the staff of the Columbia Business Law Review for helpful suggestions.

to contract innovation (lawyers), incentivizes using machines and science to improve contracts, and might just save transactional lawyers from having their jobs poached by technology.

INTRODUCTION

Imagine a world where all contract terms are fair and all consumers read every term, understand none of them, yet enter the contract anyway. Should contract law have a problem with this scenario? This Article argues yes.

Typically, lack of understanding is not seen a problem, but rather a cause of a problem.[2] The problem is usually seen as unfair contract terms.[3] To many, lack of understanding partly causes those unfair terms. Even free marketeers who advocate that consumer watchdogs, informed minorities, competition, and reputational consequences will protect consumers against one-sided terms rely on at least some consumers reading and understanding those terms.[4] Those

[2] *See, e.g.,* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022).

[3] *See generally* Jeffrey W. Stempel, *How to Make A Dead Armadillo: Consumer Contracts and the Perils of Compromise*, 32 LOY. CONSUMER L. REV. 605, 620–21 (2020) ("[W]hile acknowledging at length that consumers generally do not read, do not understand, and cannot shape the terms of standard form texts," the Restatement of Consumer Contracts' "primary protection of consumers would be through endorsement of judicial policing of terms").

[4] Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 547 (2014) (arguing that if consumers cannot understand contract terms, then there is no market pressure for sellers to improve terms because consumers cannot comparison shop terms they do not understand); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2259–62, 2283, 2290 (2019) (arguing that it is difficult to understand contracts impede consumer organizations from comparing and ranking products); Louis J. Hallow, III*, Coming to Terms: Re-Restating the Tentative Draft of the Restatement of Consumer Contracts*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 62, 64–65 (2020) (arguing that if consumers do not understand contract terms, then sellers have no disincentives from including prejudicial terms); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism-the Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 3–64 (2012) (explaining that sellers can "impose any number of onerous terms on

who favor regulation tend to rely on disclosures to help consumers make informed decisions, deter seller misconduct, disincentivize one-sided terms, empower consumer watchdogs, and facilitate consumers demanding better terms.[5] But incomprehensible disclosures are useless to consumers.[6]

Whatever the path to fair contract terms, this Article rejects the traditional view that a lack of understanding is the cause of a problem and instead contends that it is a freestanding problem in need of its own solution. Under the longstanding duty to read, if consumers choose to enter contracts without reading and learning the terms they do so

unwary consumers"); Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUDIES 1, 2 (explaining that there are no incentives to provide anything more than the minimally required consumer protections); Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. OF EMP. LEGAL STUDIES 862, 873–79 (2020) (arguing that sellers can offer inferior terms to cut costs while not impacting demand); Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 262 (2002) (arguing that when consumers understand terms, market efficiency improves prices and terms become competitive); James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 199–211 (2013) (discussing the role of consumer understanding in informed minority theory and reputational consequences).

[5] Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 238–39 (2018); Omri Ben-Shahar & Carl E. Schneider, *Coping with the Failure of Mandated Disclosure*, 11 JERUSALEM REV. LEGAL STUD. 83, 88 (2015) (identifying theoretical benefits of disclosures but arguing that they have not come to fruition); Lonegrass, *supra* note 4, at 3–64 (listing proposed benefits of disclosures); Samuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. LAW R. 55, 57–58 (2023).

[6] Benoliel & Zheng, *supra* note 5, at 238–39. *See also* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022) ("In a world of lengthy standard forms, which consumers are unlikely to read, more restrictive assent rules that demand more disclosures, more notifications and alerts, and more structured templates for manifesting assent, while required by courts, are unlikely—even if businesses comply with them—to produce substantial benefit for consumers.")

at their own peril.[7] But this Article contends that implicit in this duty is the assumption that consumers *are capable* of understanding the contract. And now is the time to formalize a duty to make contracts understandable. Just last year, Epic Games, videogame maker of Fortnite and Fallguys, paid $520 million for using "design tricks" to "dupe millions" of players into making "unintentional purchases."[8] When AT&T added a mandatory arbitration clause to its contract, it tested the envelope design, cover letter, and contract to ensure consumers would never read the clause even though they were physically capable of doing so.[9] This Article proposes that the Uniform Law Commission pass a Consumer Contract Plain Language Act that imposes a duty on sellers to make contracts of adhesion understandable to the average intended consumer.

Part I lays the doctrinal foundation by proving why understanding matters to contract law. This new Duty diverges from traditional contract law. It shifts the focus of assent from whether a consumer objectively exercised consent to whether a consumer objectively had the opportunity to exercise consent. Also, the Duty recognizes the inability to understand a contract as a cognizable harm that prevents contract formation.

Part II highlights the need for urgency. Contract formation doctrine has remained stagnant despite seminal evolutions in contracts, specifically the ubiquitous rise of contracts of adhesion, spike in contract volume, and exponential growth of contract complexity. But today we are on the cusp of a fourth evolution: dark patterns. Forget Madison Avenue and fancy lawyers. Nowadays, teams of scientists, algorithms, and artificial intelligence run experiments and analyze private

[7] 17 C.J.S. Contracts § 209; 27 WILLISTON ON CONTRACTS § 70:114 (4th ed.).

[8] Amanda Silberling, *FTC Fines Fortnite Maker Epic Games $520M Over Children's Privacy and Item Shop Charges,* Tech Crunch, Dec. 2022, https://techcrunch.com/2022/12/19/ftc-fines-fortnite-maker-epic-games-520m-over-childrens-privacy-charges/ [https://perma.cc/SQ4S-U6QH].

[9] Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1323 (2015).

data and consumer behavior to develop individualized, irresistible seller advantages.[10]

Part III details the well-intentioned attempts to reign in contract language and their shortcomings. State and federal legislatures and regulators passed over 500 plain language laws that try to make contracts more understandable. But design flaws render most of them toothless. Courts have also tried to import plain language requirements into contract common law. But consumers rarely invoke claims and even more rarely succeed. Branches of government in every state and in the federal government have tried and are trying to fix the problem in different ways. None are succeeding. They have only created a massively confusing patchwork of universally ineffective solutions. Unsurprisingly, making contracts understandable is "one of the most important puzzles facing modern contract law"—and perhaps one of the most difficult.[11]

Part IV proposes a new solution in the form of a statutory duty requiring sellers to make their contracts understandable. After detailing the doctrinal justification for the Duty, it explores its many benefits. While the benefits to consumers may seem obvious, the Duty will also benefit sellers. Indeed, it may be that sellers have always wanted more understandable contracts and the Duty removes the major obstacle—lawyers—by providing a market incentive for innovation. Finally, Part IV fleshes out and responds to the most likely counter arguments by explaining how the Duty is feasible even in mass market contracts despite beliefs about American adult reading levels, will increase the predictability of contracts, and will not backfire against consumers.

I. WHY CONSUMER UNDERSTANDING MATTERS TO CONTRACT LAW

[10] Lauren E. Willis, *Deception by Design*, 34 HARV. J.L. & TECH. 115, 116–31 (2020).

[11] Lonegrass, *supra* note 4, at 3–64.

This section explores the role of consumer understanding in contract law. It explains when and why consumers' ability (or inability) to understand terms matters to contract law.

Contract law protects enforceable bargains.[12] Such enforceable bargains spawn from a "manifestation of mutual assent" between all contracting parties to exchange promises.[13] In the simplest and perhaps most common scenario, one party offers contract terms and another party manifests assent to those terms.[14]

There are many ways to manifest assent.[15] One common way is a signature.[16] Critically, whether a party manifests assent is an objective standard.[17] Thus, when you sign a

[12] Restatement (Second) of Contracts § 1 (1981); Restatement (Second) of Contracts § 3 (1981); 1 WILLISTON ON CONTRACTS § 1:1 (4th ed.)

[13] Restatement (Second) of Contracts § 3 (1981); Restatement (Second) of Contracts §§ 17-18 (1981). *See also* Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1160–62 (2019) ("The premises of freedom of contract--and also freedom from contract--suppose parties with equal capacities to define and enter into only those terms that both agree offer expected gains for each, trusting a well-functioning legal system to focus legal enforcement on their shared agreements.")

[14] Restatement (Second) of Contracts § 22 (1981); 1 WILLISTON ON CONTRACTS § 4:3 (4th ed.)

[15] Restatement (Second) of Contracts § 19 (1981).

[16] *See* 11 Hawkland UCC Series § UCITA 112:1("Thus by signing a standard form contract, a signing party both agrees to the contract and adopts the terms of the form as the terms of that contract."); 17 Am. Jur. 2d Contracts § 30 ("Under this objective theory of contracts, the fact that two parties signed a contract is enough to create legal rights, whatever the signatories might have been thinking when they signed it."); James Acret, CAL. CONSTR. L. MANUAL § 1:5 (2023–2024 ed.) ("This manifestation of mutual assent can occur in many ways. The most common way, so far as a contractor is concerned, is to sign a written contract."); *Siclari v. CBI Acquisitions, LLC*, No. CV 2015-28, 2017 WL 937728, at *2 (D.V.I. Mar. 9, 2017) (" Signing an agreement is commonly understood to be a manifestation of assent."); *Scaife v. Associated Air Ctr. Inc.*, 100 F.3d 406, 411 (5th Cir. 1996) ("Manifestation of assent 'commonly consists of signing and delivery.'[citation omitted]"). The signature may be written or digital. *See* 1 WILLISTON ON CONTRACTS §§ 4:4-4.6 (4th ed.).

[17] 2 WILLISTON ON CONTRACTS § 6:3 (4th ed.). *See also* Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 511 (2002) ("In reality, however, actual

contract, the question is not whether you intended to enter the contract but rather whether the seller could reasonably rely on your signature to mean you intended to enter the contract.[18] But notice how a signature does not alone reveal whether you knew the contract terms before signing.

Under the duty to read, contract law burdens parties to read and learn contract terms before signing.[19] In the absence of foul play, generally courts will enforce contracts against a party who chose to sign without reading.[20] Similarly, under the duty to read, a party's decision not to consult an attorney[21]

intentions and agreements hardly matter in cases that get to court. Instead, courts apply an objective theory of formation and interpretation, under which courts enforce contracts based on apparent, not real intentions. If a promisee reasonably and honestly believed the promisor intended to contract, the promisor may be bound even though the promisor did not intend to contract.")

[18] 2 WILLISTON ON CONTRACTS § 6:3 (4th ed.); Hillman, *supra* note 17, at 511–12 ("The objective approach to contract formation and interpretation is not hard to explain. It protects a promisee's reasonable reliance on the promisor's manifestation of intent. If a promisor jokingly, mistakenly, or insincerely creates the impression that she intends to contract according to particular terms and the conduct induces the promisee to rely on those terms to her detriment, contract law protects the promisee.").

[19] 17 C.J.S. Contracts § 209; 27 WILLISTON ON CONTRACTS § 70:114 (4th ed.).

[20] 17 C.J.S. Contracts § 209; 27 WILLISTON ON CONTRACTS § 70:114 (4th ed.). *See, e.g.*, *Marciano v. DCH Auto Grp.,* 14 F. Supp. 3d 322, 330 (S.D.N.Y. 2014) (collecting cases recognizing New York duty to read and finding party cannot void a contract because he or she did not read it or know its contents); *Proulx v. 1400 Pennsylvania Ave., SE, LLC*, 199 A.3d 667, 672 (D.C. 2019) ("We have . . . consistently adhered to a general rule that one who signs a contract has a duty to read it and is obligated according to its terms. . . . [A]bsent fraud or mistake, one who signs a contract is bound by a contract which [s]he has an opportunity to read whether [s]he does so or not."); *Danner, v. Int'l Freight Sys. of Washington, LLC*, No. CIV.A. ELH-09-3139, 2013 WL 78101, at *19 (D. Md. Jan. 4, 2013) ("one cannot accept a contract and then renege based on one's own failure to read it.") *See also* David A. Hoffman, *Relational Contracts of Adhesion*, 85 85 U. CHI. L. REV. 1395, 1396 (2018) ("Yet perversely, when judges and juries evaluate terms ex post, they blame consumers for failing to exercise care and hold them to their deals.").

[21] 27 WILLISTON ON CONTRACTS § 70:114 (4th ed.) ("Where a contracting party could have taken advantage of legal counsel, but elects not to do so,

or unfamiliarity with the contract's language are not defenses to formation.[22] Pragmatically, the duty to read brings stability and predictability to contract law by allowing parties to rely on manifestations of assent to signal contract formation while removing temptations to lie about whether signatories knew the contract's terms.[23] After all, it would be unfair and impractical if people could escape a contract after signing by later claiming that they did not read the contract. Plus, many contracts contain representations that the parties have read and understood them.[24] Functionally, the duty to read is less like a legal duty (as it cannot be breached) and more like "a statement about how parties should behave during the contract-making process."[25]

Combined, the objective standard of manifesting assent and the duty to read might suggest contract law is indifferent to consumer understanding, but a closer review shows it is not. Although no part of contract doctrine seems to require a contract to be understandable, several doctrines at least consider whether it is. Sometimes, even when a consumer objectively manifests assent to enter a contract, when the seller knows the consumer was unable to understand the contract then there is no manifestation of assent.[26] One such

then that contracting party later cannot clamor about misunderstanding the content of the contract that could have been reviewed by an attorney.").

[22] Charles L. Knapp, *Is There A "Duty to Read"?*, 66 HASTINGS L.J. 1083, 1101 (2015). *See, e.g., Arce v. U-Pull-It Auto Parts, Inc.*, No. 06-5593, 2008 WL 375159, at *8 (E.D. Pa. Feb. 11, 2008) ("Although Plaintiff could not read the release himself, he could have either asked Pedro Rosado, who read both English and Spanish, to translate the writing on the sheet or inquired as to whether a Spanish-speaking employee of the junkyard was available to explain the document.")

[23] 17 C.J.S. Contracts § 209.

[24] Knapp, *supra* note 22, at 1093–94.

[25] Knapp, *supra* note 22, at 1085–86.

[26] *See* Becher & Benoliel, *supra* note 5, at 57 ("Being acquainted with the contract is a prerequisite for informed consent and efficient contracting."); Andrea M. Matwyshyn, *Resilience: Building Better Users and Fair Trade Practices in Information*, 63 FED. COMM. L.J. 391, 405–07 (2011) (asserting that without negotiation and without consumer awareness and understanding of contract terms, there is no meaningful assent); Arbel & Toler, *supra* note 4, at 868 (arguing that courts may be erroneously

scenario is when the seller has unique knowledge about the consumer's capacity to understand the contract. For example, if a seller knows the consumer is unable to understand the contract because the consumer is intoxicated or has a mental illness or defect, there is no assent.[27]

Another scenario (and the one most important to this Article), is when the seller deprives the consumer of an effective opportunity to access the contract's terms. A manifestation of assent requires a reasonable opportunity to access the contract. Sometimes access refers to the physical ability to view the terms or an awareness that the contract exists. For example, in the online context, the validity of browsewrap agreements that bind website users to terms accessed through a hyperlink often depends on whether the user had sufficient notice that such terms exist.[28] But other times, access includes the ability to understand terms.[29] Take the duty to read, which relies on the premise that a consumer could understand the contract. When the contract is unreadable, the major economic and fairness justifications

assuming consent where there was none, depriving consumers of recourse based on illusory consent, or blessing anti-consumer practices); Ayres & Schwartz, *supra* note 4, at 547.

[27] Restatement (Second) of Contracts §§ 15–16 (1981). *Cf.* Restatement (Second) of Contracts § 177(2) (1981) (voiding contracts when one party exercises undue influence over the other).

[28] *James v. Glob. TelLink Corp*, 852 F.3d 262, 267 (3d Cir. 2017). *See also* Federal Trade Commission, *Big Print. Little Print. What's the Deal?*, BUSINESS GUIDANCE RESOURCES, (June 6, 2000) (hiding terms through fine print can form the basis of a deceptive or unfair business practice claim).

[29] Lonegrass, *supra* note 4, at 3–64 ("One cannot meaningfully assent to terms contained in a contract without first having knowledge of the existence of those terms and the capability to understand their meaning and potential consequences."). *Cf.* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022) ("Since advance disclosure of standard terms generally does not render the assent process any more meaningful, the "opportunity to read" technique, which courts have embraced, is quite ineffective in consumer contracts. . . . The requirements focus on the timing, format of presentation, context, process, flow, and substance of the notifications consumers receive regarding the existence of terms applying to the transaction.").

underlying the duty to read disappear.[30] In such cases, consumers do not assume the risk of being unaware by not reading because even if they did read the contract, they would still be unaware of the terms. Plus, unreadable contracts deter consumers from even attempting to read them.[31] The misrepresentation, fraud, and unconscionability defenses also preclude enforcement when a signatory did not have a reasonable opportunity to understand the contract's essential terms.[32] Significant time pressure,[33] assurance that a written contract accurately memorializes an oral agreement,[34] an inability to translate the contract into understandable language,[35] and not providing a copy of the contract terms[36] can all prevent assent. Nowadays, if a seller advertises or negotiates in a language other than English, several states require providing contracts and disclosures in that language.[37]

[30] Benoliel & Becher, *supra* note 4, at 2262. *See also* Benoliel & Zheng, *supra* note 5, at 255–56 (arguing that readable disclosures reduce consumer misunderstanding, help consumers make more informed judgments, save consumers time because they can read and understand more quickly, motivate consumers to read disclosures, and reduce consultation fees).

[31] Benoliel & Becher, *supra* note 4, at 2262–63.

[32] Restatement (Second) of Contracts § 163 (1981); *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 404 (3d Cir. 2020) (holding that a fraud defense is viable when a party executes a contract without reasonable opportunity to know the essential terms); *Nelson v. McGoldrick*, 127 Wash. 2d 124, 131, 896 P.2d 1258, 1262 (1995) (asserting that "a reasonable opportunity to understand" contract terms may contribute to procedural unconscionability).

[33] *Greene v. Gibraltar Mortg. Inv. Corp.*, 488 F. Supp. 177, 180 (D.D.C. 1980).

[34] *MZM Constr. Co., Inc. v. New Jersey Bldg. Laborers Statewide Benefit Funds*, 974 F.3d 386, 404 (3d Cir. 2020).

[35] *Solis v. ZEP LLC*, No. 19CV4230 (JGK), 2020 WL 1439744, at *4 (S.D.N.Y. Mar. 24, 2020).

[36] *Kohlman v. Grane Healthcare Co.*, 2022 PA Super 118, 279 A.3d 42, 48 (2022).

[37] Some states require a contract be written in the language of the oral negotiation. *See, e.g.*, Cal. Civ. Code § 1632(b); Tex. Fin. Code Ann. § 341.502 (a-1) ; Neb. Rev. Stat. Ann. § 69-1604 (3); N.J. Stat. Ann. § 17:16C-100 (d); Wis. Stat. Ann. § 423.203(2).

In short, there is no meaningful difference in assent between not getting a contract and getting a contract written in hieroglyphics. And to many consumers, there is functionally no difference between hieroglyphics and most contract language.

II. THE URGENT NEED FOR CONTRACT LAW TO EVOLVE

The world of consumer contracts has mutated. Yet contract law has remained largely unchanged. This section details the three most significant changes to the form and context of consumer contracts and the way technology will continue to transform contracts. Combined, these changes and transformations require contract law to evolve.

A. The Consumer Contracts Trifecta: Contracts of Adhesion, Volume, and Contract Design

What consumer contracts look like, and when and how consumers enter them, has changed dramatically. This section contends that three changes which have become ubiquitous staples help explain how and why consumer contracts are incomprehensible.

The first change is the rise of contracts of adhesion. Contracts of adhesion are nonnegotiable standardized contracts.[38] Consumer contracts of adhesion emerged in the early 1900s with the rise of mass production,[39] and "nearly every written transaction carried out by Americans today is governed by a standardized form."[40] The inability to negotiate weakens the assent underlying the freedom of

[38] Hallow, *supra* note 4, at 65. *See also* Lonegrass, *supra* note 4, at 59 & n.317 (noting minor disagreements about the precise definition of a contract of adhesion).

[39] White & Mansfield, *supra* note 4, at 243–44.

[40] Lonegrass, *supra* note 4, at 3–64.

contract.[41] Furthermore, contracts of adhesion discourage reading contracts. They are often preprinted, presented when consumers are in a long line, and signed after consumers watch others sign without reading; consumers tend to underestimate risks and see little value in reading terms they cannot negotiate.[42] If consumers do not read contracts, sellers have little incentive or see little value in making the contracts understandable.

The second change is the volume of contracts consumers enter. With billions formed each year, consumer contracts of adhesion are the most common kind of contract formed.[43] This frequency has resulted in most Americans entering more legal agreements in a year than our grandparents did in their

[41] *Id.* at 29 ("The central principle of contract law--freedom of contract--maintains that parties may freely enter into transactions on the terms that they voluntarily choose for themselves through a process of mutual negotiation. However, a powerful set of complex and interwoven forces, both psychological and market-driven, seriously undermine consumer assent to form terms.").

[42] Eric A. Zacks, *Contracting Blame*, 15 U. PA. J. BUS. L. 169, 176–77 (2012) (identifying contextual factors that cause consumers not to read contract); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 656–65 (2009) (describing how word choice, clause design, organization, and overall form of contracts as well as presentation of contracts discourage reading and how consumers assume they can be negotiated); Lonegrass, *supra* note 4, at 3–64 (describing why consumers are discouraged from reading); Franklin G. Snyder & Ann M. Mirabito, *Boilerplate: What Consumers Actually Think About It*, 52 IND. L. REV. 431, 433 (2019) ("No one except the lawyers who write them and litigate over them ever read them. We know, in fact, that of those who buy online, only some 0.1 percent of consumers ever click on the 'terms and conditions' link, and that and ninety percent of those who do spend less than two minutes looking at the dense and legalistic verbiage."); Ayres & Schwartz, *supra* note 4, at 546–47 (consumers do not read when time pressed or when confronted with repeat standardized terms, even for major one-time purchases like mortgages.); Justin (Gus) Hurwitz, *Designing A Pattern, Darkly*, 22 N.C. J. L. & TECH. 57, 68 (2020) (suggesting that consumers may be unwilling to devote the cognitive effort to reading every contract because of the perceived low value of doing so).

[43] Bakos, et al, *supra* note 4, at 1.

lifetime.[44] Consumers enter them for luxuries and necessities alike: concert tickets, social media accounts, health insurance, music, food, cell phones, mortgages, employment, etc.[45] "Everywhere we look, adhesive terms stare back: they control our lives at the market, at school, at work, on vacation, and online; they constrain our public law rights, and our private law duties; and they determine procedure we use to vindicate what's left of both."[46] A staggering 97% of Americans have been asked to agree to a privacy policy.[47] When polled, "[o]ne-quarter of adults say they are asked to agree to the terms and conditions of a company's privacy policy on an almost daily basis, while 32% say this happens about once a week; another 24% say they are asked for this roughly once a month."[48]

In addition to the overall volume of contracts, the size of individual contracts and the number of contracts associated with a single purchase has increased. For example, buying a computer may involve a novel's worth of pages spread across twenty-five contracts.[49] The average length of terms of service for popular websites is 3,851.7 words, but can go much higher (e.g., iTunes's is over 20,000 words and Facebook's is over 15,000 words).[50] Even the length of specific contract

[44] Hallow, *supra* note 4, at 64. *See also* Snyder & Mirabito, *supra* note 42 at 432 ("The average American consumer is likely a party to dozens or hundreds of standard-form contracts at any given time.").

[45] Hallow, *supra* note 4, at 64; Lonegrass, *supra* note 4, at 3.

[46] David A. Hoffman, *Defeating the Empire of Forms*, 109 VIR. L. REV. 1367, 1368–69 (2023).

[47] Brooke Auxier, et al., *Americans' attitudes and experiences with privacy policies and laws*, Pew Research Center (Nov. 15, 2019), https://www.pewresearch.org/internet/2019/11/15/americans-attitudes-and-experiences-with-privacy-policies-and-laws/ [https://perma.cc/WSN8-ZLJP].

[48] *Id.*

[49] Gibson, *supra* note 4, at 190.

[50] Johnathan Yerby & Ian Vaughn, *Deliberately Confusing Language in Terms of Service and Privacy Policy Agreements*, 23 ISSUES IN INFORMATION SYSTEMS 138, 140–41 (2022). *See also* Matthew Jennejohn, *The Architecture of Contract Innovation*, 59 B.C. L. REV. 71, 73–74, 85 (2018) (describing how even negotiated contracts are longer; a 1930s template merger agreement between two railroad companies was three and one-half pages while nowadays a typical public company merger agreement is twenty times longer and over one-hundred pages).

provisions is untenable. The average length of a credit card arbitration clause is 1,098 words.[51] Volume both discourages reading and prevents those who attempt to read from understanding terms.[52]

Third, contract design is complex. While there is no discernable moment in history when contracts were widely

[51] Consumer Protection Financial Bureau, ARBITRATION STUDY PRELIMINARY RESULTS 28–29 (Dec. 12, 2013), https://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [https://perma.cc/YVQ4-5HY2] (preliminary results of a study examining 66 credit card arbitration clauses showed clauses ranged from 78 to 2,410 words, with the average being 1,098 words).

[52] Ben-Shahar & Schneider, *supra* note 5, at 89–90 (providing a comprehensive attack on mandatory disclosures and arguing disclosures are flawed for several reasons including the volume of information); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 665, 686–701 (2011) (arguing consumers do not receive, read, or understand disclosures, and are often overloaded by volume of disclosures); Jeremy R. McClane, *Regulating Substance Through Form: Lessons from the Sec's Plain English Initiative*, 55 HARV. J. ON LEGIS. 265, 274–76 (2018) ("The SEC reasoned that, the more information an investor received, the less likely he or she would be to absorb it, and the presence of boilerplate risk language would cause investors to ignore the language altogether."); Gibson, *supra* note 4, at 171–79, 190º93 (referencing empirical studies that show people can only process a few terms at a time); Matwyshyn, *supra* note 25, at 405–07 ("Fatalistic default acceptance of terms presented to consumers is the norm in digital contracting. Even consumers who wish to invest the time to understand the contract before them are unlikely to be able to do so."); Stark & Chopin, *supra* note 42, at 681–85 (detailing results of study showing college students do not read consent forms in part because the form was long and boring); Lonegrass, *supra* note 4, at 3–4 (noting difficulties reading contracts, low literacy skills of consumers, and cognitive burden of processing terms); RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022) ("The proliferation of lengthy standard-term contracts, mostly in digital form, makes it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent. . . . As the length and incidence of standard-form contracts have grown, it has become all the less plausible to expect consumers to read and take informed account of the contracts' provisions."); 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, 215–17 (2010) (survey shows most consumers do not intend to read standard form contracts, but some may intend to skim terms).

understood,[53] modern consumer contracts are incomprehensible to most consumers.[54] For example, the Government Accountability Office concluded credit card agreements from the four largest issuers were too complicated for many consumers,[55] and pension disclosures "would not be readily understandable to many average plan participants."[56] One study concluded social media contract clauses "are indecipherable to most users."[57] Others found licensing

[53] Carol M. Bast, *Lawyers Should Use Plain Language*, 69 FLA. B.J. 30, 32 (1995) (describing Legal Writing Institute resolution that acknowledged over four centuries of complaints).

[54] Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute's Impossible Dream*, 32 LOY. CONSUMER L. REV. 369, 376 (2020) ("Most consumers do not read the agreements. Even if they try to, they are unlikely to understand them because they contain legalistic terms."). *See, e.g.*, Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263, 1327 (2011) (describing difficulties consumers face when trying to understand insurance policies); John Aloysius Cogan Jr., *Readability, Contracts of Recurring Use, and the Problem of Ex Post Judicial Governance of Health Insurance Policies*, 15 ROGER WILLIAMS U. L. REV. 93, 95 (2010) ("While the problem is especially acute for the elderly and low-income populations, the complexity of health insurance information challenges even those who read at the college level."); White & Mansfield, *supra* note 4, at 261–62 ("[O]ne can see that many consumers cannot understand the contracts they sign or the disclosures they receive.").

[55] U.S. Gov't Accountability Office, Gao-06-929, Credit Cards: Increased Complexity In Rates And Fees Heightens Need For More Effective Disclosures To Consumers 3, 6 (2006), https://www.gao.gov/assets/260/251427.pdf [https://perma.cc/LGJ2-WHZY].

[56] U.S. Gov't Accountability Office, Gao-14-92, Private Pensions: Clarity Of Required Reports And Disclosures Could Be Improved 2–3, 36 (2013), https://www.gao.gov/assets/660/659211.pdf [https://perma.cc/JPY5-R7QQ].

[57] Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 628 (2015) (noting that the readability of the mean liability limitation clauses was 9.2 grade levels above terms of use as a whole, and the median was 7 grade levels higher). *See also* Jenny Goldsberry, *Facebook's Terms of Service Require Collegiate Reading Comprehension: Study*, WASH. EXAM'R (August 9, 2022) https://www.washingtonexaminer.com/news/2295183/facebooks-terms-of-service-require-collegiate-reading-comprehension-study/ [https://perma.cc/LJ58-KEYD] (measuring Facebook's terms of service to have

agreements, franchise agreements, and credit card agreements too difficult for most consumers.[58] According to a 2019 Pew Research Center study, of the Americans who read privacy policies, only 13% report understanding a "great deal" of them, while 55% report understanding some of them, 29% understand very little, and 3% understand none. [59] A study of 329 social networking site terms of use concluded that they were nearly all difficult to understand on a variety of metrics and difficult to process for anyone with a reading level below the eleventh grade, "not to speak of the poorly educated, children, or non-native English speakers."[60]

In perhaps the largest study to date, a 2022 survey of contracts of adhesion of the 100 largest retailers, 100 largest digital companies, 100 largest software companies, 50 largest banks, and 33 largest credit card companies concluded

16th grade reading level and comparing other social media terms of service that require a 14th grade reading level).

[58] Benoliel & Becher, *supra* note 4, at 2268 (using readability tests to conclude online license and website agreements are too difficult to read for average consumer); White & Mansfield, *supra* note 4, at 233, 262 (". . . complex consumer-credit transactions are not understood by most consumers, despite, or in part, because of the barrage of contract and disclosure documents."); Becher & Benoliel, *supra* note 5, at 62–63; Benoliel & Zheng, *supra* note 5, at 238 (analysis of 523 franchise disclosures revealed "prospective franchisees need, on average, more than twenty years of education to comprehend" a franchise disclosure document even though the "highest level of education that most franchisees have completed is community college which normally requires fourteen years of education.").

[59] Auxier, *supra* note 47.

[60] Michael L. Rustad & Thomas H. Koenig, *Wolves of the World Wide Web: Reforming Social Networks' Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1461–63 (2014). *See also* Tim R Samples, Katherine Ireland & Caroline Kraczon, *TL;DR: The Law And Linguistics Of Social Platform Terms-Of-Use*, 39 BERKELY TECH. & LAW J. 47, 84 (2023) (analyzing 196 terms of use from 75 digital platforms on a variety of linguistic metrics and concluding they are "incomprehensible to a broad audience" and generally require at least some college-level coursework to understand); Kyle D. Logue, Daniel B. Schwarcz & Brenda J. Cude, *The Value and Reality of Transparent Consumer Insurance Contracts* 15–20 (October 27, 2022). Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4260410 [https://perma.cc/HEG9-KAKB] (surveying research measuring consumer understanding of insurance policies).

"consumer contracts are drafted at a college level—six grade levels (or greater) higher than the average American adult's reading level."[61] For example, the average retailer contract required a collegiate level of reading and most contained arbitration clauses requiring "nearly three years of college" to read, warranty disclaimers requiring a master's degree level of reading, and damage cap clauses that only people with a Ph.D. reading level could understand.[62] The contracts from the top 100 digital companies,100 largest retailers, and 50 largest banks all required a collegiate reading level between six and eight grades higher than the average U.S. adult reading level.[63] Most arbitration and warranty disclaimer clauses were harder to read than the contract itself.[64] In fact, certain liability limitations clauses were as high as a grade 20, 21, 28, and even 29 reading levels.[65] Such results make one wonder if the lawyers who drafted them could even understand them. Almost no American has even a remote chance at understanding rights-foreclosure clauses; "while consumer contracts are unreadable, rights-foreclosure clauses are *indecipherable*."[66]

The precise writing features that make contracts incomprehensible needs more study. But among the most common are obtuse language and jargon, center-embedded clauses, unclear or counterintuitive organization, passive voice, nonstandard capitalization, and even poor font style and size.[67]

[61] Michael L. Rustad, *Why A New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521, 524–25 (2022).

[62] *Id.* at 547.

[63] *Id.* at 549–51.

[64] *Id.* at 563–65.

[65] *Id.* at 558–59.

[66] *Id.* at 559, 565 (emphasis in original).

[67] Eric Martinez, Francis Mollic, & Edward Gibson, *Poor Writing, Not Specialized Concepts, Drives Processing Difficulty in Legal Language*, 224 COGNITION 1–8 (2022); Becher & Benoliel, *supra* note 5, at 61–62.

In addition to discouraging consumers from reading contracts, complex contract design ensures consumers cannot fully understand the contracts they attempt to read.[68]

B. Leveraging Technology and Data Against Consumers

Even more concerning, sellers now leverage technology to actively learn about, target, and exploit "consumers' cognitive vulnerabilities."[69] Known as dark patterns or dark contracts, some sellers design electronic interfaces to subvert or impair consumers.[70] Dark patterns "knowingly confuse users, make

[68] Mary Beth Beazley, *Hiding in Plain Sight: "Conspicuous Type" Standards in Mandated Communication Statutes*, 40 J. LEGIS. 1, 28 (2014); Kenneth B. Firtel, *Plain English: A Reappraisal of the Intended Audience of Disclosure Under the Securities Act of 1933*, 72 S. CAL. L. REV. 851, 869–71 (1999) ("The issue of whether disclosure is intended for average investors decreases in importance if the investors are not reading the prospectus because they do not have faith in its ability to clearly present the information."); Cogan, *supra* note 54, at 102–03 ("Law professors, treatises, commentators and the Restatement (Second) of Contracts all concede that people do not read their insurance contracts, due in large part to the complexity of the contracts.").

[69] Lonegrass, *supra* note 4, at 3–64.

[70] Jennifer King & Adriana Stephan, *Regulating Privacy Dark Patterns in Practice-Drawing Inspiration from California Privacy Rights Act*, 5 GEO. L. TECH. REV. 251, 253 (2021); Budnitz, *supra* note 54, at 422–23 (dark patterns use interface design to coerce, steer, or deceive user into unintended and potentially harmful disclosures and include tactics like fact discounts and fudged inventory numbers); Hurwitz, *supra* note 42, at 58–60 (dark pattern is "using design to prompt desired (not necessarily desirable) behavior."); Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 1, 3–4 (2020) ("With attention drawn, some platforms then exploit cognitive vulnerabilities to guide users towards targeted choices, known as 'dark patterns.' For instance, an interface can present two options ("cancel" or "stay enrolled") where the placement, color, and size of clickable boxes confuse users into selecting the platform's preferred choice--i.e., the design navigates unwitting users towards remaining enrolled. Additional examples of dark patterns include the roach motel, confirm shaming, and privacy Zuckering.").

it difficult for users to express their actual preferences, or manipulate users into taking certain actions."[71]

These patterns stem from enormous efforts to collect and analyze consumer data. Companies can and do collect data on how consumers use their products, including biometric data, and hire experts like psychologists and data analysts.[72] For example, video games use biometric data like weight and facial features and financial information like available funds and spending habits to present offers that maximize the chance players spend.[73] Video games cleverly collect personal data through techniques like personality tests, psychometric evaluations, and dialogue choices.[74] They can even tell if the player listens to a conversation between two video game characters.[75] Stores can track cellphone locations to know what department the consumer is in and use facial analytics software to assess their mood, while online games can alter advertising content depending on whether a player is winning

[71] Jamie Luguri & Lior Jacob Strahilevitz, *Shining A Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 44 (2021). *See generally* Gregory Day & Abbey Stemler, *supra* note 70, at 6 ("Consumer welfare erodes when a platform excludes competition and coerces users into paying attention, spending money, generating data, or revealing personal information against their best interests . . . online manipulation is shown to impair decision-making by not only exploiting cognitive vulnerabilities but also causing physical alterations of the brain. . . . The manner in which big tech builds market power by manipulating free will is not, as we argue, a legitimate form of competition.")

[72] Scott A. Goodstein, *When the Cat's Away: Techlash, Loot Boxes, and Regulating "Dark Patterns" in the Video Game Industry's Monetization Strategies*, 92 U. COLO. L. REV. 285, 294–95, 304–06 (2021) (noting "all dark patterns are intentionally manipulative, 'carefully crafted with a solid understanding of human psychology, and they do not have the user's interest in mind,' and describing how video game companies use psychologists and behavioral psychology to design game mechanics").

[73] *Id*. at 285, 305.

[74] Patrick Stafford, *The Dangers of In-Game Data Collection*, POLYGON (May 9, 2019, 12:00 PM), https://www.polygon.com/features/2019/5/9/18522937/videogame-privacy-player-data-collection [https://perma.cc/VPV2-7LHT].

[75] Stafford, *supra note 74*.

or losing, and a video game might cause players to win or lose to influence their mood and make them more likely to buy.[76]

To some, the patterns trick consumers into doing something they do not mean to do, like buying something they do not want or disclosing personal information.[77] For example, Scott Goodstein argues the way video games convince players to spend real money to win random in-game items is a dark pattern because they are "carefully crafted to trick users into doing things they might not otherwise do, such as buying insurance with their purchase or signing up for recurring bills."[78] Other dark patterns might require players to invest more time to have the same advantages as other players; encourage players to spend money to achieve status or increase the odds of success; or cause confusion as gamers try to convert real money into in-game currency to make a purchase.[79] Scholars have found dark patterns on websites for prominent companies including Microsoft, Google, Skype, Facebook, Amazon, Uber, Office Depot, and LinkedIn.[80]

The scale of consumer data collection and dark pattern design is gargantuan. As Lauren Willis explains, "data driven marketing" is now obtained through "rapid, iterative, online tests" that allow businesses to customize approaches for target consumers.[81] Facebook hosts thousands of experiments every day.[82] As Capital One's CEO explained, the credit card industry has the "ability to turn a business into a scientific laboratory where every decision about product design, marketing, channels of communication, credit lines, customer

[76] Lauren E. Willis, *Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud*, 80 LAW & CONTEMP. PROBS. 7, 15 (2017).

[77] King & Stephan, *supra* note 70, at 254–59; Goodstein, *supra* note 72, at 294; Luguri & Strahilevitz, *supra* note 71, at 64–71 (reporting empirical results that show dark patterns influence consumer decisions and can be more influential with some consumers).

[78] Goodstein, *supra* note 72, at 288–93.

[79] *Id.* at 295–99.

[80] *Id. See also* Luguri & Strahilevitz, *supra* note 71, at 44–45, 64–71 (discussing surveys of dark patterns' prevalence in Android apps and popular shopping websites).

[81] Willis, *supra* note 76, at 7, 11–12.

[82] *Id.*

selection, collection policies and cross-selling decisions could be subjected to systematic testing using thousands of experiments."[83] Businesses can custom-advertise "at the individual or near-individual level, hyper-segmented by precisely-estimated demographics, psychological and behavioral profiles, and known needs. . . . twenty-first century marketing is moving toward targeting right down to the individual consumer in real time. Big data and algorithmic analytics allow firms to target the individual by channel, time of day, week, or year, geolocation, and activity."[84] A 2022 Federal Trade Commission report sounded the alarm, describing how companies can use online design features to hide disclaimers and experiment with different designs to find which most effectively influence consumer behavior.[85]

All that testing, data, and analysis leads to shocking levels of customization. Indeed, we may be approaching the day when an electronic contract morphs to target you based on the data a website collected on you.[86] Now, businesses use technology to personalize what they market, when they market, and how they market and sell to each individual customer. [87] A data analytics company that works with video games helps adjust in-game pricing depending on the players' gameplay and spending habits so that "two different players playing the same game can be sold the same in-game item at different prices." [88] Developers use an individual's data to determine when and how to sell virtual goods. [89] According to one artificial intelligence expert and game developer, sellers

[83] Thomas H. Davenport, *How to Design Smart Business Experiments*, HARV. BUS. REV. (Feb. 2009).

[84] Willis, *supra* note 76, at 7, 15.

[85] FED. TRADE COMM'N, STAFF REPORT: BRINGING DARK PATTERNS TO LIGHT 2 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P214800%20Dark%20Patterns%20Report%209.14.2022%20-%20FINAL.pdf [https://perma.cc/FTJ9-TYT4].

[86] Willis, *supra* note 76, at 17.

[87] *Id.* at 122.

[88] Goodstein, *supra* note 72, at 305.

[89] *Id.*

can create "a perfect storm . . . . Imagine micro-targeted cigarettes that could deliver the cigarette right in your fingers the minute you're feeling the most vulnerable."[90]

While many kinds of dark patterns do not involve contract terms, some do. Consider the Currency Confusion dark pattern, which "forces users to convert real money into an 'arbitrary secondary currency'" to mislead consumers into how much money they are spending. Microsoft did just this by charging 480 Microsoft Points to rent a movie when $5.00 bought 400 Microsoft Points.[91] Dark pattern data and learning is not just for electronic contract documents. "A more sophisticated example comes from AT&T's addition of a mandatory arbitration clause to its contract with its customers: it designed the envelope, cover letter, and amended contract through extensive market testing to ensure that most consumers would not open the envelope, or that if they did open it, they would not read beyond the cover letter."[92]

The number and kinds of dark patterns are myriad and growing because electronic contracts do not have the limitations of physical contracts.[93] Entering a contract on a cellphone—which has a small screen—may be different than entering a contract on paper.[94] With innovative technology,

[90] Stafford, *supra note 74*. *See also* Willis, *supra* note 10, at 117–19 (warning of a "deluge of increasingly algorithmically-designed, micro-targeted, and ever-changing digital communications and conduct").

[91] Goodstein, *supra* note 72, at 298–300. *See also* Willis, *supra* note 76, at 7, 13 (describing how PayPal's website confused consumers into signing up for a new product and then "automatically enrolled these customers in electronic billing, and the emails containing the bills were treated as junk by common email filters, such that many customers never saw the bills").

[92] Willis, *supra* note 9, at 1323 (citing *Ting v. AT&T*, 319 F.3d 1126, 1133–34 (9th Cir. 2003)).

[93] Hurwitz, *supra* note 42, at 68. *See* Luguri & Strahilevitz, *supra* note 71, at 52–53 (2021) (identifying examples and taxonomy of kinds of dark patterns).

[94] Budnitz, *supra* note 54, at 389 (mentioning the "Federal Trade Commission's guidance that repeatedly points out that disclosures on a small screen make a legally significant difference in assessing the consumer's ability to perceive and understand the disclosures on a website").

consumers now and in the future might "enter" contracts electronically by touching a screen, speaking a command, giving hand gestures, directing personal assistants, programming artificial intelligence, or even using microchips.[95] The evolution of dark patterns far outpaces any kind of regulation or common law response.[96] Dark patterns are difficult to legislate because as soon as lawmakers ban one kind of dark pattern, developers can create new ones or design patterns that operate in legal grey areas.[97]

C. Hope for the Future

The result is clear: "a wealth of legal and interdisciplinary scholarship has definitively established that meaningful, voluntary assent to standardized terms is an impossibility, as consumers are largely unable to understand the contracts that they sign and are virtually powerless to find better terms elsewhere in the market."[98]

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[95] Budnitz, *supra* note 54, at 415–17, 432–35.

[96] Willis, *supra* note 9 at 1311 ("Moreover, the speed with which firms foil disclosure and design regulation will only increase in the device-mediated world of big data."); Budnitz, *supra* note 54, at 370 (advocating abandoning restatement of consumer contracts because marketplace outpaces restatement); Babette E. Boliek, *Upgrading Unconscionability: A Common Law Ally for a Digital World*, 81 MD. L. REV. 46, 64 (2021) ("[I]t is clear that the technological realities of today have exceeded current privacy protections, leaving us scrambling to catch up.").

[97] King & Stephan, *supra* note 70, at 261–62. *But see* S. 3330, 117th Cong. (2022) (proposed federal law restricting the manipulation of user interfaces to obtain consent or user data and the running of behavioral or psychological experimentation on consumers), https://www.congress.gov/bill/117th-congress/senate-bill/3330/actions [https://perma.cc/MV9R-P92J]; Marie Potel-Saville & Mathilde Da Rocha, *From Dark Patterns to Fair Patterns? Usable Taxonomy to Contribute Solving the Issue with Countermeasures*, EU Annual Privacy Forum, at 8–19 (June 2023) (proposing taxonomy of dark patterns and fair patterns).

[98] Lonegrass, *supra* note 4, at 3–64. *See also* RESTATEMENT OF CONSUMER CONTRACTS Intro. (AM. L. INST., Tentative Draft No. 2, 2022) ("In these environments, strengthening the disclosure requirements emanating from contract law's general rules of mutual assent would not prompt consumers

Yet, none of the causes mentioned above inevitably render contracts incomprehensible. Nothing prevents contracts of adhesion from being standardized, nonnegotiable, and understandable. Likewise, consumers could enter large volumes of understandable contracts. While length may affect the ability to understand, there may be ways to reduce length or to make long contracts more understandable. Further, the data, technology, and experts behind dark patterns could be used to aid, clarify, and focus consumers. They can highlight disclosures, help consumer transactions, help meet consumer needs and preferences, and alert consumers to helpful opportunities.[99] But such conversion requires change: "American consumers have a duty to read the contracts they sign, but the largest U.S. companies have no equivalent duty to make their [terms of use] understandable."[100]

III. ATTEMPTS TO IMPROVE THE UNDERSTANDABILITY OF CONSUMER CONTRACTS

This Section details the approaches governments and scholars have taken to improve consumers' ability to understand contracts of adhesion, and why these approaches have fallen short.

A. Statutory and Regulatory Solutions

Although it takes various forms, the primary solution adopted by legislatures and regulators has been laws that require drafters to use plain language in contracts.

to read the terms, to carefully weigh them, and to ultimately make more prudent contracting decisions.").

[99] Willis, *supra* note 76, at 7, 16–17.

[100] Rustad, *supra* note 61, at 524–25.

1. Plain Language Laws

Plain language—sometimes referred to as "plain English"— is the concept that drafters should make their documents easily understood by the intended reader.[101] Doing so involves knowing the intended reader, making judgment calls about what content to include or exclude, organizing content to maximize understanding, using paragraph and sentence structures that help readers, and even using visual aids like illustrations, bullet points, and charts.[102]

Over the last seventy years, plain language laws targeting consumer contracts have become increasingly popular. Starting in the 1970s, several states and the federal government passed plain language laws requiring either an entire contract or specific disclosures to use plain language, with the goal of giving consumers enough information to make informed decisions.[103] Consider the legislative findings in Pennsylvania's Plain Language Consumer Act: "many consumer contracts are written, arranged and designed in a way that makes them hard for consumers to understand. Competition would be aided if these contracts were easier to understand" and "will protect consumers from making contracts that they do not understand. It will help consumers to know better their rights and duties under those contracts."[104] Likewise, New Jersey's insurance plain language laws make policies "more readable and

[101] Firtel, *supra* note 68, at 877–81; Benoliel & Zheng, *supra* note 5, at 241–45 (explaining that the plain language movement tries to make legal texts readable and easily understood by the normal consumer).

[102] Firtel, *supra* note 68, at 877–81; Olga V. Mack, *Legal Tech: How Using Images in Contracts Makes Law More Accessible*, ACC Docket (Oct. 5. 2021), https://docket.acc.com/node/2950 [https://perma.cc/27H2-AY3T]; International Plain Language Federation, https://www.iplfederation.org/plain-language/ [https://perma.cc/QN4Q-RCMP] (defining "plain language").

[103] Michael Blasie, *Rise of Plain Language Laws*, 76 U. MIAMI L. REV. 447, 465–66 (2022).

[104] 73 PA. STAT. ANN. § 2202. *See also* Grimm v. First Nat. Bank of Pa., 578 F. Supp. 2d 785, 793 n.15 (W.D. Pa. 2008) (holding that the Act's purpose is to improve consumer understanding); *In re* Derienzo, 254 B.R. 334, 345 (Bankr. M.D. Pa. 2000).

understandable to the purchaser," and "protect the consumer from an insurance company improperly refusing to pay policy claims."[105] Currently, about 600 laws require plain language in consumer documents.[106] Lawmakers propose more every year. For example, President Biden's *Blueprint for an AI [Artificial Intelligence] Bill of Rights* stresses using plain language when requesting private data.[107] International lawmakers have also passed plain language consumer contract laws. For instance, the European Union's General Data Protection Regulation requires company requests for consumer data to use plain language.[108] Multiple scholars support consumer contract plain language laws too.[109]

[105] Daly v. Paul Revere Variable Annuity Ins. Co., 489 A.2d 1279, 1282 (N.J. Super. Ct. Law Div. 1984), *aff'd*, 502 A.2d 48 (N.J. Super. Ct. 1985). *See also* Shea v. United Servs. Auto. Ass'n, 411 A.2d 1118, 1119 (N.H. 1980) ("In response to increased litigation spawned by the almost incomprehensible language found in many insurance policies, some states have reacted by enacting plain language laws requiring clear, simple policy language.")

[106] MICHAEL BLASIE, UNITED STATES PLAIN LANGUAGE LAWS 4:2 (Wolters Kluwer 2023).

[107] The White House, *Blueprint for an AI Bill of Rights*, https://www.whitehouse.gov/ostp/ai-bill-of-rights/ [https://perma.cc/DZE9-ZXJL].

[108] Justin H. Dion & Nicholas M. Smith, *Consumer Protection-Exploring Private Causes of Action for Victims of Data Breaches*, 41 W. NEW ENG. L. REV. 253, 273–74 (2019).

[109] Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination, and Tagging of Personally Identifying Information*, 10 VAND. J. ENT. & TECH. L. 553, 588–91, 598, 632–33 (2008) (proposing a plain language law on ecommerce privacy policies); Benoliel & Zheng, *supra* note 5, at 257 (supporting plain language laws with clear standards for readability); Carl Felsenfeld, *The Plain English Movement*, 6 CAN. BUS. L. J. 408, 414–15 (1981) (highlighting the argument for statutory codification of plain language laws because businesses have not deployed plain language quickly enough). *See also* Hoffman, *supra* note 20, at 1402–03, 1416–21 ("Whether because of social pressures that reward conformity, the bar's monopoly, a desire to please the client, the fear of legal liability, or network effects, lawyers generally are cast as reluctant contract innovators.") But there are a small minority of adhesion contracts where drafters do want consumer to read. *See id.*

Coverage varies among these laws. 240 laws cover insurance contracts and their associated disclosures.[110] Others cover classic contracts of adhesion like loans, leases, credit contracts, and car rental agreements.[111] Some are surprisingly focused, covering contingency fee, funeral, or cemetery contracts.[112] Meanwhile, a handful are sweepingly broad. Connecticut's consumer contract plain language statute covers contracts for property, services, or credit for up to $25,000,[113] while Maine's version covers consumer leases of goods and loans for up to $100,000.[114]

Another design variation is which of four standards the laws apply. About 76% of consumer contract plain language laws use Descriptive Standards, which describe a compliant document without describing the process to achieve compliance.[115] A Descriptive Standard might require a contract to be "understandable by a person of average intelligence and education."[116] About 11% of consumer contract plain language laws use a Readability Standard, which requires documents to achieve a certain score based on formulas that measure objective features like the number of syllables in words and the number of words in a sentence.[117] For example, a Readability Standard might require a contract to have "a minimum score of 40 on the Flesch reading ease test or an equivalent score on any other comparable test."[118] Meanwhile, 3% of consumer protection plain language laws use Features Standards, which list writing features drafters must use or avoid. [119] Such a standard might require avoiding confusing cross-references, unnecessarily lengthy sentences, double negatives, exceptions to exceptions, illogical order,

[110] BLASIE, *supra* note 106, at 5:1–5:11

[111] *Id.*

[112] *Id.*

[113] CONN. GEN. STAT. ANN. §§ 42-151 to 158 (West 1979).

[114] ME. REV. STAT. ANN. tit. 10, §§ 1121–26 (1986).

[115] BLASIE, *supra* note 106, at 2:3.

[116] MINN. STAT. ANN. § 80D.04, subd. 4.

[117] BLASIE, *supra* note 106, at 2:3.

[118] *See, e.g.*, ARIZ. ADMIN. CODE § R20-6-213(C)(1) (2019).

[119] BLASIE, *supra* note 106 at 2 :3.

jargon, or uncommon words.[120] Alternatively, laws could require using clear vocabulary, present tense, active voice, simple sentences, and headers.[121] About 7% of consumer protection plain language laws use a Hybrid Standard, which combines a Readability Standard with a Features Standard, or offers a choice between the two.[122]

Yet another design variation is penalties. Some plain language laws are silent about whether they are enforceable.[123] Others state they do not create new causes of action or penalties, or do not create, expand, or limit other causes of action.[124] Still others affirmatively authorize regulatory enforcement.[125] A fourth approach allows enforcement under a pre-existing cause of action, like unfair

[120] N.J. STAT. ANN. § 56:12-10(1)–(6).

[121] OR. REV. STAT. ANN. § 180.545(1).

[122] BLASIE, *supra* note 106, at 2:3.

[123] For example, a Kentucky law says car rental insurance agreements "shall not be transacted" unless certain disclosures meet readability requirements. KY. REV. STAT. ANN. § 304.9-509. But without any explicit penalties or caselaw interpreting the statute, who and how to enforce it is unclear.

[124] *See e.g.*, ARK. CODE ANN. § 23-61-115(c); LA. STAT. ANN. § 22:41.

[125] *See, e.g.*, ARIZ. ADMIN. CODE R20-6-213(C)(4); COLO. REV. STAT. ANN. § 10-16-107.3(1)(b); COLO. REV. STAT. ANN. § 10-4-633.5(1)(b); HAW. REV. STAT. ANN. § 431:10-107(a); ME. REV. STAT. tit. 24-A, § 2441(4); *See, e.g.*, CONN. GEN. STAT. ANN. § 38a-299(a)(1) (insurance commissioner must approve policies as meeting readability requirements); IOWA ADMIN. CODE r. 191-28.14(509); N.J. Stat. Ann. § 17B:25-18(h) (insurance commissioner may disapprove policies that are unjust, unfair, misleading, contrary to law, or contrary to public policy); N.C. GEN. STAT. ANN. § 58-38-30 (commissioner must deny noncompliant policies); N.J. STAT. ANN. § 17:46C-6(a)(3)(b)(ii)–(iii) (insurance commissioner must reject legal services insurance policies that fail "to attain a reasonable degree of readability, simplicity and conciseness" or are "misleading, deceptive or obscure because of its physical aspects such as format, typography, style, color, material or organization"); 230 R.I. CODE R. 20-60-1.14(A) (insurance commissioner cannot approve certain consumer credit insurance forms "unless the policy or certificate is written in non-technical, readily understandable language, using words of common everyday usage" and meets a minimum readability score on the Flesch scale).

competition or deceptive practice claims.[126] A fifth approach simply authorizes a claim.[127] Penalties also vary. A regulator might be able to issue monetary fines[128] or deny market access.[129] Some laws permit equitable remedies: Minnesota patients can prevent hospitals from collecting noncompliant bills,[130] New York courts can require landlords to rewrite leases,[131] and New Jersey courts can rewrite contracts.[132] Some laws go even further and render noncompliant contracts

[126] ALASKA STAT. ANN. § 45.50.471(b)(13); COLO. REV. STAT. ANN. § 6-1-105(m); COLO. REV. STAT. ANN. § 6-1-203(1)(b); 16 C.F.R. § 436.6(a)–(b). A close variation creates functional barriers to enforcing a noncompliant contract. One of the few codified New York rules of evidence prevents fine print consumer contracts or leases that use fine print or illegible print from being admitted into evidence at any trial, hearing, or proceeding by the party who prepared the contract. N.Y. C.P.L.R. 4544 (McKinney).

[127] *See, e.g.*, MINN. STAT. ANN. § 604.175(a); MONT. CODE ANN. § 30-14-1111 (West).

[128] VT. STAT. ANN. tit. 33, § 7303 (West)(describing notice); VT. STAT. ANN. tit. 33, § 7304 (West) (authorizing a $1000 penalty); COLO. REV. STAT. ANN. § 6-1-112(1)(a) (West) (authorizing a $20,000 penalty); 42 U.S.C. § 4013a(b) (authorizing a $50,000 penalty).

[129] *See, e.g.*, S.C. CODE ANN. § 38-61-40 (empowering insurance director to withdraw approval or certification of insurance policy); N.J. STAT. ANN. § 52:14B-4.1a(b) (the Office of Administrative Law cannot accept a notice of rule change "which lacks a standard of clarity").

[130] MINN. STAT. ANN. § 604.175(a).

[131] Newport Apartments Co. v. Collins, 103 Misc. 2d 994, 995, 431 N.Y.S.2d 231, 232 (App. Term 1980) (holding that a landlord must rewrite renewal lease to satisfy plain language law); Francis Apts. v. McKittrick, 104 Misc. 2d 693, 697, 429 N.Y.S.2d 516, 519 (Civ. Ct. 1979).

[132] N.J. STAT. ANN. § 56:12-4.1. *See also* MINN. STAT. ANN. § 325G.33.

unenforceable,[133] while others permit enforcement.[134] Many of the broadest laws have complex schemes that mix and match actual monetary damages, attorney costs and fees, class actions, punitive damages, and damages caps.[135] For example, Pennsylvania's consumer contract plain language law permits recovery of actual loss, statutory damages of the larger of $100 or the total value of the contract, court costs, and reasonable attorney fees, but prohibits class actions.[136] Connecticut's law sets damages at $100 and potential attorney fees, and permits class actions.[137] Meanwhile, New Jersey's law permits punitive damages on top of attorney's fees and costs.[138] Complicating matters, some plain language laws have defenses like government agency preapproval of a contract[139] or a good faith defense.[140]

[133] *See, e.g.,* W. VA. CODE R. 77-6-3 (a waiver is not knowing and voluntary if not written in plain language); 18-1 VT. CODE R. § 30-000-4.702(B)(1), (B)(5) (a letter changing long distance telecommunication provider is invalid if not in plain language); DEL. CODE ANN. TIT. 6, § 2807(a), (g) (giving purchaser option to void camping ground contract that does not use plain language); GA. CODE ANN. § 10-4-107.1(b)(2) (contract to purchase tobacco is invalid and not binding unless written in plain language); N.D. CENT. CODE ANN. § 14-03.2-08(1) (noncompliant premarital agreement is unenforceable); OR. REV. STAT. ANN. § 20.340 (voiding noncompliant lawyer contingency fee agreements).

[134] *See, e.g.*, WIS. STAT. ANN. § 631.22(6) (violative insurance policies are neither void nor rendered voidable).

[135] *See, e.g.*, MONT. CODE ANN. § 30-14-1111 (setting remedy at $50 plus actual damages and costs); MONT. CODE ANN. § 30-14-1112 (capping class action damages at $10,000 plus actual damages and stating that a violation does not void a contract); MINN. STAT. ANN. § 325G.33; MINN. STAT. ANN. § 8.31(3) (permitting judgments in the form of reformation, injunctions, monetary penalties up to $25,000, attorneys fees, and costs); Minn. Stat. Ann. § 325G.34 (permitting class actions).

[136] 73 PA. STAT. ANN. §§ 2207–2208.

[137] CONN. GEN. STAT. ANN. § 42-154; Lessard v. Rent-A-Ctr. E., Inc., 250 F.R.D. 103, 105 (D. Conn. 2008).

[138] N.J. STAT. ANN. §§ 56:12-3–:12-4.

[139] *See, e.g.*, N.J. STAT. ANN. § 56:12-8; 37 PA.CODE § 307.10(a).

[140] MINN. STAT. ANN. § 325G.34; 73 PA. STAT. ANN. § 2208.

2. The Limitation of Plain Language Laws

Despite enormous popularity, plain language statutes and regulations have not significantly affected consumer understanding or consumer contracts. Widespread agreement that consumer contracts are incomprehensible remains;[141] indeed, lawmakers would not continue passing these laws if contracts were already understandable. Several reasons likely impede plain language laws from having a significant impact.

First, both nationally and regionally, plain language laws cover a limited number of consumer contracts. The nearly six hundred plain language laws cover fewer consumer contracts than you might think. Entire jurisdictions have nearly non-existent coverage. For example, Mississippi, Nebraska, and Kansas have four or fewer consumer plain language laws, each with very narrow coverage like a particular uniform commercial code notice or a delayed bank deposit notice.[142] Even jurisdictions with many plain language laws do not necessarily require plain language in a large percentage of consumer contracts. While Texas has the most consumer protection plain language laws, the majority cover insurance documents.[143] Nationwide, only a handful of consumer contract plain language laws are incredibly broad; most are hyper-specific, like a Missouri law covering the explanation of endowed care cemetery burial spaces.[144] Admittedly, massive change could occur without a plain language law covering all consumer contracts. At a certain inflection point, enough drafters need to craft enough of their contracts in an understandable way that their skill in drafting understandable contracts would bleed over into even uncovered contracts. But we have not yet reached that point.

Second, plain language law standards rarely emphasize a consumer's understanding. Descriptive Standards are vague, requiring for example "clear and plain language" or

[141] *See supra* note 54.

[142] BLASIE, *supra* note 106, at App'x P.

[143] *Id.*

[144] MO. ANN. STAT. § 214.345(1).

writing in "clear and coherent manner using words with common and everyday meanings."[145] Such vague language grants drafters flexibility at the expense of predictability and consistency. Parties cannot accurately predict what the standard requires or how a court or regulator would apply the standard. Regulators and courts might apply these standards strictly or weakly. This lack of clarity on what the standard actually requires culminates in lack of clarity on whether compliance actually improves consumer understanding. A small subset of Descriptive Standards mention the document being understandable to the average person or the intended reader,[146] but how courts would interpret such language is unclear. Readability Standards only focus on improving reader understanding to a point. These standards only test *some* of the criteria that affect understanding.[147] Indeed, because they do not account for other important criteria like content, organization, coherence, or design, researchers "have long taken pains to recommend that, because of their limitations, formulas are best used in conjunction with other methods."[148] Readability Standards also permit

[145] BLASIE, *supra* note 106, at 4:1.

[146] *Id.*

[147] William H. DuBay, THE PRINCIPLES OF READABILITY 19 (2004). *See* Cogan, *supra* note 54, at 125 (acknowledging limitations of adopting readability standards in insurance laws because they have not been tested or designed for technical documents, ignore important features like content and organization, and have not been adequately validated, but concluding "This does not mean that readability formulas are not without their flaws, but until a viable, objective alternate tool is developed to predict text difficulty, readability formulas like the Flesch-Kinkaid formula and FRE remain the best tools used to objectively assess the reading level of documents.").

[148] DuBay, *supra* note 147, at 19; Daniel Schwarcz, *Transparently Opaque: Understanding the Lack of Transparency in Insurance Consumer Protection*, 61 UCLA L. REV. 394, 420-22 (2014) (criticizing readability formulas and noting the importance organization can play in understanding); Schwarcz, *supra* note 54, at 1326–27 (noting that combining information from different provisions and "verbose and confusing grammatical structures and word choices" harm comprehension). *See also* Louis J. Sirico, Jr., *Readability Studies: How Technocentrism Can Compromise Research and Legal Determinations*, 26 QUINNIPIAC L. REV.

gamesmanship, as drafters can use hyphens and punctuation to change a formula's score without having any meaningful impact on reader understanding. They offer no incentive to improve understanding, only to satisfy the formula. Another compounding factor is the threshold lawmakers set under these standards. On a 1 to 100 scale, 59% of plain language law Readability Standards require a minimum score of 40, and over 72% a minimum score of between 40 and 50, which translate to scores of "difficult" or "fairly difficult" on par with college or eleventh and twelfth grade reading levels,[149] which are well above the average consumer's reading level. The most specific kind of standards, Features Standards, risk being overinclusive or underinclusive by drawing draw bright-lines about what can or cannot go in a contract.[150] Like Readability Standards, they incentivize compliance, not designing the most understandable contract.

Third, many plain language laws fail to incentivize enforcement. Some are explicitly unenforceable or have unclear enforceability.[151] Others are enforceable by only regulators, which relies on regulators devoting staff to enforcement, training the staff to spot noncompliant

147, 149–66 (2007) (discussing limitations of readability formulas); Karen Schriver, *Readability Formulas in the New Millennium: What's the Use?*, 24 ACM J. OF COMPLIT. DOCUMENTATION 138, 138–140 (questioning the validity and reliability of readability formulas).

[149] BLASIE, *supra* note 106, at 4:1; Scott Taylor, et al, *Can Patients and Families Read the Questionnaires for Patient-Related Outcome Measures?*, 39 J. OF PEDIATRIC ORTHOPEDICS 397, 398.

[150] *See generally* U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-92, PRIVATE PENSIONS: CLARITY OF REQUIRED REPORTS AND DISCLOSURES COULD BE IMPROVED 36 (2013) ("Thus, it seems likely that the information in these disclosures would not be readily understandable to many average plan participants and that readability might present a challenge for participants, even when plan sponsors adopt the model notice developed by the agency."); Beazley, *supra* note 68, at 16-17 ("Readers need more than just better sentence structure . . . myriad features of the written word can encourage or discourage reader engagement with the text."); Michael S. Friman, *Plain English Statutes Long Overdue or Underdone?*, 7 LOY. CONSUMER L. REP. 103, 104 (1995) ("[N]ot all short sentences are coherent, and the passive voice is perfectly acceptable when used properly.").

[151] *Supra* note 133.

contracts, and deciding to enforce the law.[152] Further, noncompliant contracts have affirmatively escaped regulator review.[153] Equitable remedies like contract reformation provide little incentive for a consumer to bear litigation costs. When noncompliance does not render a contract unenforceable, consumers cannot raise it as a defense, which means there must be independent incentives to bring suit. Monetary damages are a strong incentive if they outweigh litigation costs. Whether they do is unclear, especially because litigants would likely need to hire experts to opine on whether a consumer contract satisfied the standards mentioned above. Recovery may be unlikely if courts require proof the unclear language caused quantifiable damages.[154] After all, apart from a party's self-interested testimony, what common objective evidence could a party use to link their behavior to a contract's unclear language? Defenses like the good faith defense shift the law's focus from the consumer to the drafter and risk rendering claims unwinnable.

[152] *See, e.g.*, Campbell *ex rel.* Equity Units Holders v. Am. Int'l Grp., Inc., 86 F.Supp.3d 464, 471–72 (E.D. Va. 2015) ("That the SEC has the power to enforce its rules and regulations creates a strong presumption that Congress did not intend for private individuals to have that power."), *aff'd sub nom.* Campbell v. Am. Int'l Grp., Inc., 616 Fed.Appx. 74 (4th Cir. 2015).

[153] *See, e.g.*, Gross v. Lloyds of London Ins. Co., 347 N.W.2d 899, 904 (Wis. Ct. App. 1984).

[154] Plain language laws enforceable as claims for unfair competition or deceptive trade practices might require proving a significant impact on the public, injury to a legally protected interest, causation, unfairness, or deception. *See, e.g.*, COLO. REV. STAT. ANN. § 6-1-105(m); Wainscott v. Centura Health Corp., 351 P.3d 513, 526–27; ALASKA STAT. ANN. § 45.50.471(b)(13); Merdes & Merdes, P.C. v. Leisnoi, Inc., 410 P.3d 398, 412 (Alaska 2017). *See also* 15 U.S.C.A. § 45(a)(1), (a)(n) (prohibiting "unfair methods of competition" if "the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence."); Luguri & Strahilevitz, *supra* note 71, at 89–90 (identifying potential difficulties proving unavoidable entry into a contract when companies use mild dark patterns).

In sum, plain language laws cover only a subset of consumer contracts; little evidence suggests drafters comply with plain language laws; and even if they did, compliance might not yield contracts that consumers find understandable.

B. Common Law Solutions

Courts too have tried to make consumer understanding relevant to contract law. The most common method is the same employed by legislators and regulators: plain language. But how courts deploy this method varies.

1. Court-Infused Plain Language Requirements

Some courts import plain language as a prerequisite to or factor in manifestation of assent. For example, in *Atalese* the New Jersey Supreme Court declared an arbitration agreement unenforceable in part because it did not use plain language and therefore lacked mutual assent.[155] "Arbitration clauses—and other contractual clauses—will pass muster when phrased in plain language that is understandable to the reasonable consumer."[156] Five years later, the Court again struck down an arbitration agreement for not using plain language because "it cannot fairly be ascertained from the

[155] Atalese v. U.S. Legal Servs. Grp., L.P., 219 N.J. 430, 448, 99 A.3d 306, 316 (2014).

[156] *Id.* at 314. *See also* Sanchez v. Brown Auto., Inc., No. B306713, 2021 WL 1608575, at *7 (Cal. Ct. App. Apr. 26, 2021) (arbitration clauses did not use plain language); OTO, L.L.C. v. Kho, 447 P.3d 680, 691–92 (Cal. 2019) (arbitration agreement was a "paragon of prolixity . . . . The single dense paragraph covering arbitration requires 51 lines. . . . . The sentences are complex, filled with statutory references and legal jargon. The second sentence alone is 12 lines long" and the paragraph cross-referenced multiple federal and state laws); Woods v. JFK Mem'l Hosp., Inc., No. G050286, 2014 WL 5475231, at *7–8 (Cal. Ct. App. Oct. 30, 2014) ("We are, frankly, perplexed that we continue to see arbitration agreements such as this one. . . . Employers should be well aware by now that to insulate their agreements from unconscionability claims, particularly when they are adhesive contracts, there is a simple list of do's and don'ts.").

contract's language that she knowingly assented to the provision's terms or knew that arbitration was the exclusive forum for dispute resolution."[157] Other courts have found mutual assent present when a contract uses plain language.[158]

Other courts consider plain language when determining if contractual waivers were made voluntarily and knowingly.[159] For example, when considering a multi-factor test to determine if a waiver of ERISA pension benefits was made voluntarily and knowingly, a federal trial court found the waiver was clear in part because it used plain language.[160] Another federal court upheld a jury trial waiver in part because its use of plain language made it understandable to a high school graduate.[161] When describing what kind of "unmistakable language" is needed to enforce a clause that exempts a party from negligent acts, the New York Court of

[157] Kernahan v. Home Warranty Adm'r of Fla., Inc., 199 A.3d 766, 778–80 (2019). Whether the holding would survive a challenge under the Supremacy Clause and the Federal Arbitration Act is beyond the scope of this Article but a question of worthy scholarly inquiry.

[158] *See, e.g.*, Gabriel v. Island Pac. Acad., Inc., 400 P.3d 526, 536 (Haw. 2017) (" the plain language of the arbitration agreement demonstrates the parties' mutual assent to arbitrate"); Hill v. Wackenhut Servs. Int'l, 865 F.Supp.2d 84, 97 (D.D.C. 2012) (finding meeting of minds on the arbitration clause in part because clause used plain English); Yakima Cnty. (W. Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 858 P.2d 245, 255 (Wash. 1993) ("Where a party has signed a contract without reading it, that party cannot successfully argue that mutual assent was lacking as long as . . . the contract was "plain and unambiguous").

[159] *See also* Mark Cooney, *Style Is Substance: Collected Cases Showing Why It Matters*, 14 SCRIBES J. LEGAL WRITING 1, 3, 15 (2012) ("For legalese can doom exculpatory releases designed to avoid personal-injury suits. On the flip side, courts have cited the absence of legalese as a reason to enforce a release. . . . a court may be reluctant to enforce a potentially harsh contractual provision, such as an indemnity clause in a consumer document, if that provision is 'buried at the end of a run-on sentence.'") *But see* People v. Czemerynski, 786 P.2d 1100, 1105–06 (Colo. 1990) (plain language is preferred but not required in waiver of conflict-free representation).

[160] Yablon v. Stroock & Stroock & Lavan Ret. Plan & Tr., No. 01 CIV.452, 2002 WL 1300256, at *6 (S.D.N.Y. June 11, 2002).

[161] Dennis v. G4S Secure Sols. (USA), Inc., No. 1:20-CV-46, 2021 WL 6275630, at *5 (E.D. Tenn. Jan. 28, 2021)

Appeals held "clear and coherent language" was needed and cited a plain language statute.[162]

Still other courts consider plain language when assessing whether a contract or clause is ambiguous. Indeed, under the doctrine of *contra proferentem*, ambiguities in insurance contracts are usually interpreted against the insurer.[163] Plain language is also often a data point courts use to determine whether such ambiguity exists in insurance contracts.[164]

Finally, many courts consider plain language in an unconscionability analysis. The unconscionability doctrine renders otherwise valid contracts unenforceable.[165] While substantive unconscionability examines whether the contract's terms were unfair, procedural unconscionability

[162] Gross v. Sweet, 400 N.E.2d 306, 309 (N.Y. 1979).

[163] RICHARD A. LORD, WILLISTON ON CONTRACTS § 32:12 (4th ed. 2009).

[164] *See, e.g.,* Badger Mut. Ins. Co. v. Schmitz, 647 N.W.2d 223, 236–38 (Wis. 2002) (finding that an insurance policy was "a maze that is organizationally complex and plainly contradictory," "sends several false signals to the insured," and "is not user-friendly," which created enough "confusion, ambiguity, and illusory coverage in the context of the entire policy" to "render[] an otherwise unambiguous, although poorly labeled" clause unenforceable."); Aetna Ins. Co. v. Stevens, 229 So. 2d 601, 602 (Fla. Dist. Ct. App. 1969) ("If this insurance company had no intention of defending an electrical contractor accused of negligent Installation (not Manufacture) after completion of his work it should have said so in plain English."); Comm'rs of State Ins. Fund v. Ins. Co. of N. Am., 607 N.E.2d 795, 797 (N.Y. 1992) (use of plain language favored against finding ambiguity); Steinhauer v. Liberty Mut. Ins. Co., No. 3:18-CV-1416-JR, 2019 WL 3559474, at *7 (D. Or. May 21, 2019) (insurance policy was not ambiguous because "the contract clearly spells out that requirement in plain English"); Harris v. St. Vincent Healthcare, 305 P.3d 852, 857 (Mont. 2013) (rejecting a claim of ambiguity when the contract clauses used plain language); Auto-Owners Ins. Co. v. Benko, 964 N.E.2d 886, 887 (Ind. Ct. App. 2012) ("[I]f the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy"); *Cf.* McLean v. Cont'l Cas. Co., No. 95 CIV. 10415 HB, 1997 WL 566117, at *3 (S.D.N.Y. Sept. 11, 1997)(awarding attorney's fees for ERISA violation in part to incentivize insurance companies to "draft plain policy language in plain [E]nglish and expressly delineate policy exclusions.").

[165] RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:1 (4th ed. 2009); CAL. CIV. CODE § 1670.5 (authorizing courts to void unconscionable contracts).

examines whether the formation of the contract was unfair due to lack of meaningful choice.[166] The procedural unconscionability analysis focuses on "objective indicia demonstrating that a consumer was unable to read and understand the terms of the agreement."[167] Court analyses reference (a) plain language,[168] (b) "hidden or unduly complex contract terms,"[169] (c) "complex legalistic language,"[170] hiding clauses in fine print or "inconspicuous places . . . [and] phrasing clauses in language incomprehensible to an average person without legal training, or phrasing clauses in such a way so as to divert from the problems they raise or the rights relinquished under them,"[171] (d) whether each party had "a reasonable opportunity to understand the terms of the

[166] RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:10 (4th ed. 2009) (procedural unconscionability focuses on whether the contracting party "had meaningful choice about whether and how to enter into the transaction").

[167] Lonegrass, *supra* note 4, at 3–64.

[168] *See, e.g.*, Stormont-Vail Hosp. v. Spurling, 331 P.3d 834 (Kan. Ct. App. 2014); Pietroske, Inc. v. Globalcom, Inc., 2004 WI App 142, ¶ 9, 275 Wis. 2d 444, 452–53, 685 N.W.2d 884, 888; In re Park W. Galleries, Inc., Mktg. & Sales Pracs. Litig., No. 09-2076RSL, 2010 WL 2640262, at *3 (W.D. Wash. June 25, 2010); Sierra v. Isdell, No. 609CV124-ORL-19KRS, 2009 WL 2179127, at *5 (M.D. Fla. July 21, 2009); Sanchez v. Brown Auto., Inc., No. B306713, 2021 WL 1608575, at *7–8 (Cal. Ct. App. Apr. 26, 2021).

[169] Laibow v. Menashe, No. CV194549KMSCM, 2019 WL 6243368, at *8 (D.N.J. Nov. 21, 2019). *See also* Hampden Coal, LLC v. Varney, 810 S.E.2d 286, 297–98 (W. Va. 2018) (considering "inadequacies that results in the lack of a real and voluntary meeting of the minds of the parties" that include "whether each party had a reasonable opportunity to understand the terms of the contract."); Sierra v. Isdell, 2009 WL 2179127, at *4 (M.D. Fla. 2009) (procedural unconscionability "turns on the bargaining power of the parties and their ability to understand the relevant terms," which includes "whether each party had a reasonable opportunity to understand the terms.").

[170] Bell v. Koch Foods of Mississippi, LLC, 358 F. App'x 498, 503 (5th Cir. 2009).

[171] Stormont-Vail Hosp. v. Spurling, No. 110, 2014 Kan. App. Unpub. LEXIS 659, at *11. *See also* Boliek, *supra* note 96, at 55 ("The small font, the burying of the term with unrelated provisions, the lack of highlighting such a material employment condition are likely examples of procedural unconscionability.")

contract," and (e) whether important terms were "hidden in a maze of fine print and minimized by deceptive sales practices."[172] Some courts even consider plain language as part of a substantive unconscionability analysis.[173] Apart from a contract's text, many courts consider other factors related to understanding like a consumer's age, literacy, and sophistication.[174]

2. Limitations of Common Law Solutions

Court infusions of plain language into contract law has had little effect. At least three reasons explain why.

First, the infusions are not widespread. So far, they have arisen on a case-by-case basis scattered across jurisdictions, mostly in trial courts. Until appellate courts across the country begin recognizing the role of plain language in contract law, drafters have little incentive to change long-standing language and templates. Moreover, even when appellate courts like the New Jersey Supreme Court have recognized the importance of plain language, they do so only in very focused areas of contract law. Many of the above-referenced cases focus on waivers of statutory or constitutional rights, especially arbitration clauses and

[172] Williams v. Walker-Thomas Furniture Company, 350 F. 2d 445, 447–48 (D.C. Cir. 1965).

[173] *See, e.g.*, Copello v. Boehringer Ingelheim Pharms. Inc., 812 F. Supp. 2d 886, 896 (N.D. Ill. 2011); H.H. Franchising Sys., Inc. v. Pawson, No. 1:17-CV-368, 2018 WL 1456131, at *15 (S.D. Ohio Mar. 23, 2018); Hampden Coal, LLC v. Varney, 240 W. Va. 284, 293, 810 S.E.2d 286, 295 (2018). *See also* 8 WILLISTON ON CONTRACTS § 18:10 (4th ed.) ("[T]he terms contained in the resulting contract—whether in fine print or legal 'gobbledygook'—would hardly be of concern unless they were substantively harmful to the nondrafting party as well.").

[174] *See, e.g.*, Laibow v. Menashe, No. CV194549KMSCM, 2019 WL 6243368, at *20–21 (D.N.J. Nov. 21, 2019); Hampden Coal, LLC v. Varney, 810 S.E.2d 286, 297–98 (2018). *See also* Sierra v. Isdell, No. 609CV124-ORL-19KRS, 2009 WL 2179127, at *4 (M.D. Fla. July 21, 2009) (analysis "turns on the bargaining power of the parties and their ability to understand the relevant terms," which includes "whether each party had a reasonable opportunity to understand the terms").

agreements. Relatively few cases extend plain language to all contract terms or consider how all the provisions affect the understanding of one another. Thus, both jurisdictionally and substantively, the scope of common law infusions has been limited.

Second, plain language is rarely dispositive. Unconscionability provides a good example. Plain language is usually one of several factors considered as part of a procedural unconscionability analysis.[175] Even if a court finds procedural unconscionability, most jurisdictions require some degree of substantive unconscionability to void a contract.[176] The high burden to and rare success of proving unconscionability discourages parties from incurring the risks and expenses of pursuing it.[177] Limited case law and highly

[175] *See, e.g.*, Wisconsin Auto Title Loans, Inc. v. Jones, 2006 WI 53, ¶ 58, 290 Wis. 2d 514, 546, 714 N.W.2d 155, 171 ("[T]he fact that a contract is written in plain English does not alone defeat a showing of a quantum of procedural unconscionability . . . no single factor is required to establish procedural unconscionability.").

[176] Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1256 (2003); Maxwell v. Fid. Fin. Servs., Inc., 184 Ariz. 82, 89, 907 P.2d 51, 58 (1995); Boliek, *supra* note 96, at 56; Lonegrass, *supra* note 4, at 11.

[177] Boliek, *supra* note 96, at 89 (acknowledging an increase in unconscionability claims but pegging the success rate of such claims at around 28%, varying by jurisdiction and kind of clauses challenged); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability As A Signaling Device*, 46 SAN DIEGO L. REV. 609, 622–23 (2009) (showing an increase in unconscionability cases and an increase in success for challenged arbitration clauses but rare success to other kinds of clauses); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) (calculating success rate at about 42% of cases); Budnitz, *supra* note 54, at 397 ("In most situations, the costs of refusing to pay in order to be sued and raise unconscionability as a defense usually would not be worth any potential and highly speculative benefits."). *Cf.* Nicolás Rojas Covarrubias, *Limits of Assent in Consumer Contracts: A (Regulatory) View from the South*, 32 LOY. CONSUMER L. REV. 589–90 (2020) (suggesting that consumers sometimes feel responsible for not reading a contract or for lacking the necessary legal knowledge to know that they may have an unconscionability claim).

fact-specific rulings render the unconscionability doctrine difficult to predict.[178]

Third, plain language tends to get lip service without much rigor. Consider *Romero v. Allstate Ins. Co.*, where a federal trial court had to determine if an insurer's contractual waiver of claims signed by its employees was valid.[179] A federal regulation required this waiver to be "drafted in plain language geared to the level of understanding of the individual party to the agreement or individuals eligible to participate."[180] The waiver was a solitary 203-word run-on sentence filled with legal jargon.[181] In addition to the plaintiffs claiming they did not understand the waiver, the insurance company's designee admitted not knowing what several of the terms in the waiver meant during the company's deposition.[182] Although the court acknowledged the waiver was "hardly the model of clarity," the court upheld the waiver because it was highlighted and not buried at the contract's bottom, "sa[id] what it means," and was clarified by a supplemental notice.[183] The court deemed the deposition testimony irrelevant to the objective understandability requirement, reasoning that "almost every release, waiver, disclaimer, etc. contains some legal jargon that the average reader cannot parse or individually define." Instead, it found controlling that plaintiffs "were all businesspeople" who were

[178] Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis As A Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 803 (2004) (arguing that unconscionability remains "something less than coherent and fully developed," because of inconsistencies with "what constitutes unconscionability and under what circumstances the presence of unconscionability invalidates" a clause); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 194 (2004) ("Unconscionability is an open-ended, undefined concept subject to judicial definition case-by-case.").

[179] Romero v. Allstate Ins. Co., 1 F. Supp. 3d 319, 375, 387 (E.D. Pa. 2014).

[180] *Id.* at 387.

[181] *Id.* at 388.

[182] *Id.* at 389–90.

[183] *Id.* at 388.

insurance agents who handled insurance contracts for between nine and thirty-one years and "[m]any had attended at least some college and some had business or professional degrees."[184] Although the plaintiffs submitted the results of readability tests showing the release language was impossible or extremely difficult to read, the court rejected the evidence because it lacked expert testimony.[185]

Other times, courts override plaintiffs' claims of lack of understanding and conclude without explanation that a contract is understandable. They also base their conclusions on objective features without any data showing these features aid understanding. For instance, in a Mississippi federal court decision, although the signatories argued the agreement contained "complex legalistic language that they did not understand," the court countered that the signatories did "not argue that they lack a basic education or that they are unable to read," the arbitration agreement's font style and size were normal, and the agreement was "written in simple and plain English."[186] Likewise, when a party alleged procedural unconscionability because the arbitration provision was "far too difficult for a layperson to understand," a California federal court countered there was "nothing apparently unclear, hidden, or deceptive about the language of the arbitration provision." [187] The Court highlighted the section title was "Arbitration Agreement," and the provision was "prominently displayed, much of it is in all capital letters and bold, and it is worded in very plain English."[188] The court concluded there was "no reason to believe that a contracting customer would not notice the provision or would fail to understand its meaning."[189] When analyzing a hospital surgical contract, a Kansas court found no unconscionability

[184] *Id.* at 390.

[185] *Id.* at 390–91.

[186] Steed v. Sanderson Farms, Inc., No. CIVA205CV02146KSMTP, 2006 WL 2844546, at *24 (S.D. Miss. Sept. 29, 2006).

[187] Lee v. Goldline Int'l, Inc., No. CV 11-1495 DSF RZX, 2011 WL 1739989, at *2 (C.D. Cal. Apr. 27, 2011).

[188] *Id.* at 2–3.

[189] *Id.* at 3.

in part because the contract's language was comprehensible to the average person and was "not so obscure."[190] When rejecting a claim of procedural unconscionability, a New Jersey federal court reasoned the "language of the agreement is clear, [the plaintiff] is an educated and sophisticated party."[191]

Even though data suggests nearly all consumer contracts are incomprehensible to consumers, courts consistently conclude such contracts are comprehensible. Perhaps courts are reluctant to void contracts or take a more stringent approach for fear of criticism that they are intervening in the market in an unrestrained or unguided manner.[192] Whatever the reason, although courts have created doctrinal requirements that contracts be more understandable, courts have not rigorously enforced those requirements.

C. Scholarly Solutions

Legal scholars have proposed solutions to the problems caused by contracts of adhesion, but very few address understandability. Notably, this section focuses on doctrinal solutions: solutions that propose requirements rather than those that propose suggestions.

Many solutions focus on related issues without impacting consumer understanding. For example, some scholars advocate only enforcing terms consumers reasonably expect to be in a particular contract of adhesion.[193] While such solutions

[190] Stormont-Vail Hosp. v. Spurling, No. 110,979, slip op. at *13–14 (Kan. Ct. App. Aug. 15, 2014)

[191] Laibow v. Menashe, No. CV194549KMSCM, 2019 WL 6243368, at *25 (D.N.J. Nov. 21, 2019).

[192] *Cf.* Stempel, *supra* note 178, at 763–64, 840–41, 852 (noting objections to unconscionability doctrine because it grants judges too much unguided discretion which can produce inefficiencies or exceed judicial discretion, while also flagging support for expanding common law doctrine and the influence of industry over legislatures, regulators, and even model code drafters).

[193] Restatement (Second) of Contracts § 211(c) (1981) (permitting enforcement of standard terms that consumers reasonably expect to be in contract); White & Mansfield, *supra* note 4, at 264 (suggesting widespread

address whether terms are substantively fair, they do not address whether the consumer could understand those terms. Other solutions focus on access and attention. For example, under the recently adopted Restatement of Consumer Contracts, a standard contract term is adopted into a consumer contract when the consumer has reasonable notice of the term and a reasonably opportunity to review the term, which is important to electronic contracts like clickwrap and browsewrap contracts.[194] Likewise, proposals like visceral notice of certain terms,[195] forced salience,[196] or warning boxes disclosing unexpected terms have similar goals.[197] Here again, these are solutions to a different problem. Such solutions might encourage consumers to read provisions, but they do not help the reader understand those provisions.

Perhaps the most commonly advanced solutions that touch on consumer understanding are proposals to bolster the unconscionability doctrine.[198] Often these proposals do

adoption of Restatement (Second) of Contracts § 211 in several different types of contracts); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 637 (2002) (arguing that consent to form contracts applies to all terms except the "radically unexpected"); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265–66 (1993) (focusing proposed inquiry on consumers' expectations and reasonableness of unexpected terms).

[194] RESTATEMENT OF THE LAW: CONSUMER CONTRACTS § 2(a) (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022).

[195] M. Ryan Calo, *Against Notice Skepticism in Privacy (and Elsewhere)*, 87 NOTRE DAME L. REV. 1027, 1033–35, 1037, 1039, 1041–44 (2012)

[196] Gibson, *supra* note 4, at 228.

[197] Ayres & Schwartz, *supra* note 4, at 553.

[198] *See, e.g.*, Lonegrass, *supra* note 4, at 57 (advocating for a more rigorous sliding-scale approach that requires both procedural and substantive unconscionability); Gibson, *supra* note 4, at 219, 223–24 (advocating that courts should consider entire transaction in assessing procedural unconscionability and if procedural unconscionability is found, seller bears the burden of proving that the contract was not substantively unconscionable); Boliek, *supra* note 96, at 99–100 (arguing for codification of a stronger unconscionability doctrine); White & Mansfield, *supra* note 4, at 263 (arguing that courts should assume procedural unconscionability for a contract of adhesion but still examine substantive unconscionability). *Cf.* Stark & Chopin, *supra* note 42, at 701 (arguing for expansion of the fraud

reference a consumer's ability to understand a contract. For example, the Restatement of Consumer Contracts states a term is procedurally unconscionable when the reasonable consumer "does not understand or appreciate the implications of the term," and lists factors like the "legal and financial sophistication of a consumer," and the term and contract's complexity.[199] Similarly, an Ohio statute lists several considerations for unconscionability, including a supplier taking advantage of the consumer's "inability to understand the language of an agreement."[200] While admirably drawing attention to the importance of consumer understanding, these solutions suffer from the unconscionability limitations mentioned above; namely, that a lack of understanding is one data point and never dispositive, substantive unconscionability is still required, and they would be highly fact-intensive, rarely raised, and rarely resolved arguments.

A handful of scholars have focused more squarely on the idea of consumer understanding. Michael Meyerson asserted, "consumers should only be bound by those contract terms that they know and comprehend."[201] Edith Warkentine proposed that courts require "knowing assent" of unbargained-for terms by requiring such terms to be conspicuous, explained to the consumer, and that the consumers manifest assent to each of those terms separately from assenting to the general contract.[202] To address concerns with dark patterns, Paul Ohm proposed a "forthrightness obligation" that would require companies that process personal information to

doctrine but not addressing consumer understanding); Willis, *supra* note 10, at 171(advocating for a legal presumption of causation in a deceptive practice claim when the customer has a false material belief that favors the seller).

[199] RESTATEMENT OF THE LAW: CONSUMER CONTRACTS § 5 (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022).

[200] OHIO REV. CODE ANN. § 1345.03(B)(1).

[201] Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1299 (1993).

[202] Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" As the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 473 (2008).

ensure consumers are aware of what matters to them, and examines a communication's content, omissions, and design.[203] In the same context, Samuel Becher and Uri Benoliel proposed lawmakers create transparency standards that use tools like readability test scores and incentivize "user-centered" designs like smart disclosures that account for a reader's "capacity and cognitive bandwidth" and present information in an "easy and accessible" way.[204] Lauren Willis proposed replacing disclosure requirements with performance-based comprehension standards to require companies to educate consumers about their products.[205] Robin Bradley Karr and Margaret Jane Radin proposed courts only enforce contract terms that "contribute[] shared meaning to a contract."[206] Michael Rustad proposed imposing a readability standard set at around an eighth-grade reading level and rendering noncompliant contracts unenforceable.[207]

This Article both builds upon and diverges from these proposals. While some earlier articles concluded with recommendations or general goals worthy of pursuing, this Article fleshes out a proposed solution, complete with proposed statutory language and justifications. Moreover, the Article provides a doctrinal framework explaining how and why the proposed statute fits within current contract law. In doing so, the Article cabins its solution; it does not apply to all contracts, nor does it require every consumer to understand. While some scholarship proposed a broad one-size-fits-all standard, this Article proposes a legislative solution with flexible implementation. This standard incentivizes empirical and data-based research on consumer contracts that allows

[203] Paul Ohm, *Forthright Code*, 56 HOUS. L. REV. 471, 485–87 (2018).

[204] Becher & Benoliel, *supra* note 5, at 109.

[205] Willis, *supra* note 9, at 1336.

[206] Kar & Radin, *supra* note 13, at 1167 (limiting contract terms to those that could "have plausibly contributed to an oral conversation that contributes terms to a contract consistent with the presupposition that both parties were observing the cooperative norms that govern language use to form a contract")

[207] Michael L. Rustad, *Why A New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521, 569–70 (2022).

contract drafters to choose the method that works best under the circumstances. It also provides for innovation in contract design and flexibility depending on the consumer.[208]

IV. PROPOSAL: A DUTY TO MAKE CONTRACTS UNDERSTANDABLE

The Uniform Law Commission should propose a Consumer Contract Plain Language Act that imposes a duty on sellers to make contracts of adhesion understandable (the "Duty").[209] Such contracts are understandable if the average intended consumer can understand them.[210] A breach of the Duty means there was no manifestation of assent to enter the contract or to enter a particular provision. The rest of this section details the reasoning behind the Duty's components, the Duty's advantages, and the responses to likely counterarguments.

A. The Duty's Components and Their Justification

The first component is scope. The Duty applies to sellers who use contracts of adhesion. Since contracts of adhesion are

[208] George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 193 (2013) (In addition to regulation prompting innovation, "Judicial opinions that interpret or strike down an existing contractual provision invite an innovative approach to clarify or restate the parties' contractual intent."); Willis, *supra* note 76, at 7, 30–32 ("The order did not specify how the defendant was to reach this benchmark. Instead, the State of California was given the freedom and the responsibility for determining the best way, given its particular circumstances, to do so. . . . The benefit of performance-based remedies for environmental cases is that they give defendants flexibility to determine how best to meet the goal of the law and to adapt their activities over time as new technology develops to reduce emissions.").

[209] Proposals for such a law go back at least to a 1984 edition of the United Kingdom's Clarity organization newsletters. *See Plain Words for Consumers Plain English for Lawyers*, Clarity no. 3, July 1984.

[210] The phrasing is a variation of the International Plain Language Federation's definition of plain language. *See* International Plain Language Federation, https://www.iplfederation.org/plain-language/ [https://perma.cc/T8BQ-5LFQ] (last visited Sept. 20, 2024)

non-negotiable contracts drafted in advance by sellers, the sellers have ample opportunity to read, understand, and assent to such contracts. By contrast, the consumer has no opportunity to alter the terms, propose alternative terms that are understandable, or even engage in a conversation with the seller about what the terms are. In such circumstances, the objective standard of manifestation of assent and the duty to read advantage the seller. Conversely, the duty to read becomes unfair and pointless because even if consumers read the contract, the consumers could not understand it and have no opportunity to gain an understanding. Therefore, because sellers unilaterally control the contracts of adhesion drafting process, in exchange for the advantages contracts of adhesion give sellers,[211] and to avoid the unfairness of imposing a duty to read the incomprehensible, the Duty burdens sellers with making the contracts understandable. The Duty only applies to contracts of adhesion because sellers do not have the same advantages, and consumers do not experience the same unfairness, when there is no contract of adhesion. Nonetheless, the lessons learned from making contracts of adhesion more understandable would likely be welcome additions to all contracts.[212] As the Duty only applies to sellers, sellers cannot invoke the Duty as a defense.

The second component is audience. For two reasons, the Duty only requires the contract be understandable to the average intended consumer, not to all consumers. First, the "average" consumer requirement is consistent with the objective standard for manifestation of assent.[213] Under

[211] RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022) ("The efficiencies of mass production and mass distribution of products and services would be hindered if the terms of each transaction with each consumer had to be individually negotiated.").

[212] *See* Shawn Burton, *The Case for Plain-Language Contracts*, 8 HARV. BUS. REV. 134 (Feb. 2018) (". . . fewer pages and words do not necessarily make a contract more comprehensible"); *see also* Kate Vitasek, *Plain Language Contracts on the Rise*, FORBES (Mar 19, 2018, 7:00 AM), https://www.forbes.com/sites/katevitasek/2018/03/19/plain-language-contracts-on-the-rise/?sh=595b9e1efc66 [https://perma.cc/DWM5-BDQW].

[213] *See* 2 WILLISTON ON CONTRACTS § 6:3 (4th ed.)

longstanding contract law, sellers need not learn about or account for unique proclivities of individual consumers. The "average" requirement ensures the Duty (1) does not impose too large of a burden on sellers to customize contracts to every individual consumer, (2) prevents the temptation for perjury, and (3) protects stability and predictability. Essentially, if the average intended consumer cannot understand the contract, the seller is on constructive notice that none of the intended consumers can manifest assent. Second, the "intended consumer" requirement focuses sellers on finding the approach most effective for their market, rather than forcing them to use a one-size-fits all approach.[214] One of the drawbacks of certain standards in plain language laws—Readability, Features, and Hybrid—is that they treat all readers and contracts the same, essentially proposing a single silver-bullet solution. By contrast, the Duty matches the form with the consumer. The Duty accounts for differences from the way teenagers read terms of service on a cell phone to how retirees read homeowners association agreements on paper. For example, technical welding terms may be perfectly fine in a contract of adhesion between a welding company and contractors it hires if the contractors are welders who understand those terms. And a seller need not translate a contract into Spanish when the consumers do not speak Spanish. However, a seller likely would need to offer a contract in Spanish if selling a product that targets consumers who only speak Spanish. This component requires sellers to learn about their consumers, which they already do as part of marketing.[215] The audience component resembles that of

[214] *See, e.g.*, 220 ILL. COMP. STAT. ANN. 5/16-115A(e)(ii) (2023) ("[T]his written information shall be provided in a language in which the customer subject to the marketing or solicitation is able to understand and communicate . . . .").

[215] Willis, *supra* note 9, at 1356 ("Comprehension standards hold firms responsible for reaching consumers where they find them, which is where firms sell to them."); U.S. SECURITIES AND EXCHANGE COMMISSION, A PLAIN ENGLISH HANDBOOK 9-10, https://www.sec.gov/pdf/handbook.pdf [https://perma.cc/85W7-8XP4] (encouraging companies to tailor communication to their investors).

certain Descriptive Standards in current United States plain language laws[216] as well as standards implemented abroad.[217]

What consumer characteristics are relevant under the average intended consumer standard? This Article intentionally leaves that question open. To be sure, courts already undergo this kind of inquiry. For example, in unconscionability analyses courts often consider a consumer's age, literacy, business sophistication, education, and socioeconomic status.[218] But whether courts are considering the right traits in the right circumstances is unknown.[219] The Duty empowers parties to present arguments using data and evidence, and to respond to opposing parties' data and evidence, likely producing a battle of experts.[220] Over time those battles will yield consensus on what characteristics matters.

The third component is standard. The Duty requires the contract or contract clause to be understandable. The standard marks a partial shift in longstanding contract law by drawing a distinction between the exercise of consent and the capacity to consent. Traditionally, courts only looked for

[216] *See, e.g.*, MINN. STAT. ANN. § 17.943 (agricultural contracts must be "understandable by a person of average intelligence, education, and experience within the industry").

[217] For example, the National Credit Act of South Africa requires credit agreements and notices to use plain language, which is defined as when "an ordinary consumer of the class of persons for whom the document is intended, with average literacy skills and minimal credit experience, could be expected to understand the content, significance, and import of the document without undue effort." National Credit Act of South Africa, No. 35 of 2005, §64, https://www.gov.za/sites/default/files/gcis_document/201409/a34-050_0.pdf. [https://perma.cc/J2GQ-3TSQ].

[218] Lonegrass, *supra* note 4, at 9.

[219] Lonegrass, *supra* note 4, at 45–46 ("However, interdisciplinary research studying consumer cognition and market forces demonstrate that the traditional objective indicia of assent seized upon by most courts are not useful indicators of meaningful choice with respect to standard form contracts.")

[220] *Cf.* Garcia v. Omaha Prop. & Cas. Ins. Co., 933 F. Supp. 1064, 1069 (S.D. Fla. 1995), *aff'd*, 95 F.3d 58 (11th Cir. 1996) (rejecting claims of ambiguity in insurance policy despite testimony from readability expert because other courts found the same policy unambiguous).

the exercise of consent, in the form of an objective manifestation like a signature,[221] occasionally conjoined with laws that required noticeability.[222] By contrast, the Duty's understanding component requires courts to pry into whether a consumer had the capacity to consent given every aspect of the contract's architecture. Consumers cannot exercise consent when they lack capacity to do so.[223] If the seller knows or should know that something about the contract would cause the average intended consumer to not understand the contract then the seller knows the average intended consumers do not have the capacity to enter that contract.[224] Such a performance-based metric is similar to ones used in desegregation, prison reform, environmental law, civil and constitutional rights, and consumer fraud cases.[225] In doing so, the standard allows courts to consider what actually affects human understanding. For example, parties can argue writing features that intuitively seem to aid understanding actually obfuscate understanding, like attempts at humor in

[221] *See also* Lonegrass, *supra* note 4, at 50 ("The objective theory of contract formation and the accompanying duty to read prevent courts from looking beyond objective manifestations of assent to determine if the consumers understand contract terms.").

[222] "By focusing on noticeability, legislatures may ignore the burden of comprehension that their text can impose on readers. . . . If mandated communication statutes are written to speed comprehension, they will by definition reduce the time and cognitive costs that readers must invest and increase the chance that readers will read and understand the information." Beazley, *supra* note 68, at 27, 30.

[223] *See* Joanna Demaree-Cotton & Roseanna Sommers, *Autonomy and the Folk Concept of Valid Consent*, 224 COGNITION 1, 2 (Feb. 2022) (contrasting the Exercises Capacity Hypothesis that proposes consent is valid when the decision to consent is made in an autonomous way with the Mere Capacity Hypothesis that proposes consent is valid when the consenter possesses the capacity to make autonomous decisions).

[224] *See also* Lynn B. Squires, *Autopsy of a Plain English Insurance Contract: Can Plain English Survive Proximate Cause?–Graham v. Public Employees Mut. Ins. Co.*, *98 Wn.2d 533, 656 P.2d 1077 (1983)*, 59 WASH. L. REV. 565, 580–81(1984) ("The policy terms should be irrelevant to a coverage dispute if an insured cannot in fairness be held to a duty to read or if an insured would not have understood the policy if read.").

[225] Willis, *supra* note 76, at 7, 30–32.

a contract.[226] At the same time, unlike many plain language laws, a performance-based standard grants sellers the flexibility and inventiveness to comply in the most efficient and effective way.[227]

The fourth component is penalty. This Article contends the opportunity to understand is essential to assent and assent is essential to contract formation. Therefore, a breach of the Duty prevents contract formation.[228] Apart from doctrinal cohesion, such a stiff penalty provides a strong incentive to comply. Moreover, because the Duty applies to the threshold inquiry of formation, it is more likely to be raised and decided in courts, unlike unconscionability or many plain language laws. To be sure, remedies like promissory estoppel and other doctrines that enforce otherwise unenforceable contracts will help avoid windfalls to consumers when sellers fulfill their promise so that, for example, a tenant cannot stop paying rent just because the lease is incomprehensible.[229] Plus, the Duty

[226] Becher & Benoliel, *supra* note 5, at 63–64 ("[F]irms sometimes utilize 'wolf in sheep's clothing' contracts, using humoristic language that may cover up unfair contract clauses."). *See also* Matthew S. Schwartz, *When Not Reading The Fine Print Can Cost Your Soul*, NAT'L PUB. RADIO (Mar. 8, 2019), https://www.npr.org/2019/03/08/701417140/when-not-reading-the-fine-print-can-cost-your-soul [https://perma.cc/7PC7-K7XS] (providing examples of humorous and presumably exaggerated provisions that companies have added to standard form contracts, like ones agreeing to collect the consumer's soul or first-born child); Karen A. Schriver, *Plain Language in the U.S. Gains Momentum: 1940-2015,* 60 IEEE TRANS. PROF. COMMUN. 343, 345 ("Indeed, organizations may intentionally deceive, lie and manipulate people's thinking using plain language.").

[227] Willis, *supra* note 9, at 1356 (concluding performance-based standards do not require maximum depth of understanding and consumers only need the information most relevant to their own usage)]

[228] Procedurally, the Duty could come up in a variety of ways. For example, a defendant might invoke it as a defense to a breach of contract claims. Alternatively, a plaintiff might invoke it to refute a defendant's contractual waiver defense. For example, if a plaintiff sued a company under a claim permitting recovery for acquiring personal consumer data, the company might respond by asserting the consumer contractually agreed to the data's collection, while the plaintiff responds by trying to invalidate the contract by way of the Duty.

[229] 4 WILLISTON ON CONTRACTS § 8:4 (4th ed.) (promissory estoppel remedy available when a promisee justifiably relies on promisor's promise

might only void the formation of a particular provision, rather than the entire contract, unless the provision was material.

B. The Duty's Benefits

Recognizing the Duty brings six major benefits.

First, the Duty helps consumers by protecting the contracting process's integrity. For example, it protects consumer privacy and helps consumers learn about the kind of seller they are contracting with by exposing a seller's use of technology or consumer data in ways consumers oppose. Under the Duty, whether the average intended consumer can understand the contract is a relevant issue to determining contract formation. Therefore, in a lawsuit the Duty would permit discovery on understandability.[230] If a seller had run experiments, collected data, received feedback, or hired consultants to opine on whether the contract was understandable, all the non-privileged information would be

and incurs hardship if the promise is unenforced); *id.* at § 8:5 (promissory estoppel applied "when there was a promise which the promisor should reasonably have been able to foresee would induce action or forbearance, as long as the action or forbearance was of a definite and substantial character and as long as hardship, in the view of the court, could be avoided only by enforcement of the promise"); RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981) (permitting enforcement of promises that reasonably induce action); RESTATEMENT (SECOND) OF CONTRACTS § 139 (1981) (enforcement of promises that reasonably induce action despite violation of Statute of Frauds); RESTATEMENT (SECOND) OF CONTRACTS § 86 (1981) (permitting enforcement of promises based on previous benefits received).

[230] FED. R. CIV. P. 26 advisory committee's note to 1970 amendment. ("Materials assembled in the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for other nonlitigation purposes are not" work product.); United States v. Adlman, 134 F.3d 1194, 1197–98 (2d Cir. 1998) (work product protection only applies to documents primarily or exclusively prepared to assist with litigation); United States v. El Paso Co., 682 F.2d 530, 543 (5th Cir. 1982) (holding that a document containing legal analysis but prepared for a business end was not protected by attorney-client privilege); Hercules, Inc. v. Exxon Corp., 434 F. Supp. 136, 147 (D. Del. 1977) (attorney-client privilege does not apply when the primary purpose of communication is to solicit or render advice on non-legal matters).

discoverable.[231] If sellers were intentionally designing contracts to be incomprehensible or had replaced one version of a contract with another less-comprehensible version, the seller could suffer reputational harm. Indeed, litigation may be one of the few ways the public can learn about the likely extensive knowledge companies already have on consumer behavior.[232] Also, if consumers read the contract before entering it or buying the product or service again, the Duty enables them to make more informed decisions about whether to enter the contract and to better compare competing products or services.[233] Even if consumers read the contract after entering it, the Duty can help them comply with contract terms (if they have any duties) and understand whether there has been a breach by them or the seller.

Notably, the Duty helps all consumers. Often the term "consumers" is synonymous with individuals. Here, this Article intentionally avoids that alignment. Businesses are

[231] *See* FED. R. CIV. P. 26(b); FED. R. CIV. P. 34(a). *See also* Budnitz, *supra* note 54, at 421–22 (describing how companies perform research to determine where consumers look on websites, how they process information, their preference for default settings, and the use of reference numbers); Willis, *supra* note 76, at 11–17 (describing how records of AT&T testing of mailings and contract terms were discovered in litigation).

[232] Luguri & Strahilevitz, *supra* note 71, at 45 (noting lack of published research on dark pattern and hypothesizing many studies have been done by "social scientists working in-house for technology and e-commerce companies. . . . But those social scientists have had strong incentives to suppress the results of their A-B testing of dark patterns, so as to preserve data about the successes and failures of the techniques as trade secrets and (perhaps) to stem the emergence of public outrage and legislative or regulatory responses.")

[233] *See, e.g.*, Donnelly v. Bauer, 453 Pa. Super. 396, 412–15, 683 A.2d 1242, 1250–51 (1996) (Del Sole, J., dissenting) (arguing that the plain language law covering car insurance notices protects "consumers by completely informing them of their choices and the costs associated with each" without imposing a "costly burden on insurers"); Longobardi v. Chubb Ins. Co. of New Jersey, 121 N.J. 530, 538, 582 A.2d 1257, 1261 (1990) (holding that the insurance plain language statute reflects "legislative judgment that the average insured can better understand his or her policy if it avoids confusing cross-references, excessively lengthy sentences, exceptions to exceptions, and words that are either obsolete or have a legal meaning different from their common meaning").

consumers too and they also enter contracts of adhesion. An individual might enter a contract of adhesion for a loan with a bank, who in turn has a contract of adhesion lease with a landlord, who has a contract of adhesion for water with the utility company, who has a contract of adhesion for internet service with the internet provider, who entered a contract of adhesion for furniture with the office furniture supplier. Business-consumers often struggle to comply with contracts as much as individual-consumers. According to Cerebro Capital, "38% of middle market companies violated a loan agreement and didn't know it."[234] As every seller is also a consumer, every seller receives the burden and benefit of the Duty depending on the contract.

Second, the Duty benefits sellers. Just as consumers have difficulties understanding contracts, so too do sellers. Those same contract features that cause consumers to not read or understand documents inhibit sellers too. Sellers who are running a business likely do not have the time or mental bandwidth to review the volume of contracts now associated with their products or services.[235] Sellers do not necessarily possess the collegiate or PhD level of training to understand the language used. [236] Indeed, it seems likely that neither landlords nor tenants understand most leases, but perhaps the landlords' lawyers do. Even a large seller with its own in-house counsel department faces challenges. For example, the dozens of employees in a large company's procurement division who receive a palette of office supplies likely have no way of knowing if the delivery complies with the contract without consulting the in-house counsel's office, leading to vast inefficiencies. And remember, in-house counsel are extraordinarily rare. Most sellers do not have lawyers they can consult for every contract. 99.9% of U.S. businesses are

[234] Loan Compliance Navigator Features, CEREBRO CAPITAL, https://www.cerebrocapital.com/loan-compliance-navigator-features/ [https://perma.cc/4XZ7-HEPB] (last visited Sept. 29, 2024).

[235] *See supra*, p. 8.

[236] *See supra*, pp. 9–10.

small businesses with fewer than 500 employees.[237] The median number of lawyers for companies with less than $1 billion is two lawyers.[238] Indeed, Congress has repeatedly considered laws requiring the federal government to use plain language in the government contracting process to help small businesses.[239] Of the few companies that have in-house counsel, those lawyers are often extremely busy and under-resourced.[240] Being able to understand contracts can help sellers avoid breaches and fully comply with their obligations, which decreases the likelihood of disputes and costs. Similarly, sellers might have lower legal fees thanks to understandable contracts because they either do not have to consult lawyers as often or their lawyers can provide advice more quickly. Larger sellers might derive internal efficiencies when more employees can understand their contracts, or even when more members of the seller's in-house department can understand a contract.[241] Promising data suggests consumers buy more while complaining and suing less when the contract

[237] U.S. SMALL BUSINESS ADMINISTRATION, *Frequently Asked Questions* (Mar. 2023), https://advocacy.sba.gov/wp-content/uploads/2023/03/Frequently-Asked-Questions-About-Small-Business-March-2023-508c.pdf [https://perma.cc/PPM6-6P4K**].**

[238] ASS'N OF CORP. COUNSEL, *ACC Law Department Management Benchmarking Report* 8 (2023), https://www.acc.com/sites/default/files/2023-06/ACC_2023_LDMB_Report_Executive_Summary.pdf

[239] Melisa Angell, *Government Contracts Are So Confusing That Congress Just Wrote a Bill to Simplify Them*, INC. MAGAZINE (Apr. 18, 2024), https://www.inc.com/melissa-angell/government-contracts-are-so-confusing-that-congress-just-wrote-a-bill-to-try-simplify-them.html [https://perma.cc/7FFV-7ZFT].

[240] Lyle Moran, *Nearly 90% of In-House Lawyers are Dissatisfied with Their Jobs, Survey Finds*, LEGALDIVE (Dec. 20, 2023), https://www.legaldive.com/news/in-house-lawyer-job-satisfaction-axiom-survey-legal-talent-provider/703140/ [https://perma.cc/9T2W-EQYL]; Greg Andrews, *'You Get Asked to Do Everything': How COVID Heightened In-House Lawyers' Burnout Risks*, NEW JERSEY LAW JOURNAL (June 20, 2022).

[241] Shawn Burton, *The Case for Plain-Language Contracts*, 8 HARV. BUS. REV. 134 (Feb. 2018) (describing a 60% decrease in the time taken to negotiate contracts after adopting plain language).

is understandable.[242] Moreover, by forcing sellers to examine and review contracts, the Duty may help sellers become aware of opportunities to improve (or revisit overlooked flaws in) longstanding templates.[243]

Third, the Duty creates a market for drafters who can write and design understandable contracts. Currently, there is a little incentive for sellers to make their contracts of adhesion understandable.[244] David Hoffman describes a minority of contracts of adhesion involving technology companies driven by market needs who have found value in using unusually conversational contract language.[245] The general counsels of these companies described values like reflecting a "basic moral imperative" to make terms of use friendly, building trust with users, delivering marketing benefits, decreasing legal risks, reflecting company values, advancing the company's mission, supporting the company's trade dress, reflecting certain virtues, bringing reputation capital, building consumer goodwill, and aligning with larger social campaigns.[246] Finnish scholars Helena Haapio and Anne Ketola see clear contract language as a form of corporate responsibility and sustainability.[247] The Duty creates a market for contract-drafting lawyers who can write understandable contracts[248] and perhaps even a market for

[242] Michael Blasie, *Regulating Plain Language*, 2023 WIS. L.REV. 687, 697 (2023).

[243] *See also* BRYAN A. GARNER, DRAFTING & EDITING CONTRACTS 16 (West 2020) (discussing malpractice claim against law firm that made a mistake drafting a mortgage in the 1980s that went unnoticed for twenty years).

[244] Hoffman, *supra* note 46, at 24–31 (suggesting economics and the lost cost of forms explains why so many companies use them and why they contain particular terms).

[245] Hoffman, *supra* note 20, at 1402–03.

[246] *Id.* at 1427–45.

[247] Helena Haapio & Anne Ketola, *Yritysvastuu ja Sopimukset – Kieliteoista Käytäntöön ,* KIELIKEOLLO, https://kielikello.fi/yritysvastuu-ja-sopimukset-kieliteoista-kaytantoon/ [https://perma.cc/H56J-L5XU].

[248] *See* Mark Duckworth & Christopher Balmford, *Convincing Business That Clarity Pays*, 12 MICH. BAR J., 1314, 1314–15 (1994) (describing an Australian law firm that embraced plain language); *see, e.g.*, Christine Smith, *Leaving Legalese Behind*, 61 CLARITY 29, 29–32 (2009) (describing

experts who specialize in designing legal documents.[249] Such a market may be the missing key to dramatic change in contract drafting. Indeed, sellers may not be the ones resisting change. Sellers likely have strong interests in the substance and enforceability of contracts. But apart from the temptation to conceal very particular and sensitive clauses, few sellers have an interest in incomprehensible contracts. To the extent lawyers have impeded change in contract drafting,[250] the Duty removes that impediment. Moreover, creating a market for lawyers with a particular skillset will decrease the cost to sellers of revising and creating understandable contracts. The Duty is the much-needed incentive to change longstanding boilerplate, change how transactional lawyers train, and encourage experimentation in contract design. Indeed, it may prompt innovations like greater reliance on oral contracts,[251] reimagining contract layout and organization,[252] or a move to supplement or even replace text with visual aids like icons,[253]

business benefits after an intellectual property law firm embraced plain language writing).

[249] *See, e.g.*, *Helena Haapio*, LEGAL DESIGN ALLIANCE, https://www.legaldesignalliance.org/community/helenahaapio/ [https://perma.cc/8FHF-MXLS]; *More About Helena Haapio*, LEXPERT, https://www.lexpert.com/our_team/more-about-helena_haapio/ [https://perma.cc/3V4Q-GW52]; STEFANIA PASSERA, https://stefaniapassera.com/ [https://perma.cc/93G8-VPXZ].

[250] *See* MITU GULATI & ROBERT E SCOTT, THE THREE AND A HALF MINUTE TRANSACTION: BOILERPLATE AND THE LIMITS OF CONTRACT DESIGN 160–65 (Chicago Press 2013).

[251] *Cf.* Hoffman, *supra* note 36, at 1409–27 (making the case for banishing written contracts for low-cost transactions and requiring oral contracts).

[252] *Layout*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/library/layout [https://perma.cc/Y67E-JSYG]; *Organizing*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/library/organizing [https://perma.cc/Z3KQ-D6CT].

[253] *Accordion*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/accordion. [https://perma.cc/YE6L-GLKZ].

comic book-style frames,[254] diagrams,[255] and flowcharts.[256] Thanks to contracting innovators like Robert De Rooy, one large company, ClemenGold, uses a fruit picking contract that has pictures, graphics, a comic-book-like layout, and even audio components that pickers can access through a phone application.[257]

Fourth, the Duty creates an adaptable standard focused on reader understanding. While many plain language laws focus on features present in static hard copy contracts, the Duty allows contract law to adapt to the new realm of electronic contracts. Courts must be able to assess everything that affects a consumer's interaction with a contract, which is more than just the words on the "page" and font size. Now, color, sound, iconography, images, page organization, hyperlinks, and a host of other options are part of a contract. These new tools can help or hinder consumer understanding. The Duty empowers sellers to use nontraditional tools that might dramatically increase understanding like charts or images, while giving parties and courts the flexibility to investigate dark patterns.

Fifth, the Duty's malleable standard encourages reliance on scientific evidence rather than our intuitions about human comprehension.[258] There may be no silver bullet

[254] *Comic Contracts*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/comic-contracts [https://perma.cc/YE6L-GLKZ].

[255] *Delivery Diagram*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/delivery-dia [https://perma.cc/HN6H-K2KS].

[256] *Flowchart*, WORLDCC FOUNDATION, https://contract-design.worldcc.com/flowchart [https://perma.cc/QA4V-VYPH].

[257] Videotape: ShowSmart ClemenGold Demo (Claire Harcourt-Cooke 2023), https://www.youtube.com/watch?v=I4l-fR_V97U [https://perma.cc/2TZR-5B9F]; Kate Vitaseck, *Comic Contracts: A Novel Approach To Contract Clarity And Accessibility*, FORBES (Feb. 14, 2017), https://www.forbes.com/sites/katevitasek/2017/02/14/comic-contracts-a-novel-approach-to-contract-clarity-and-accessibility/?sh=a5ac03976353 [https://perma.cc/DH5A-BC25].

[258] Lonegrass, *supra* note 4, at 38 ("As social scientists make new discoveries about the limitations on consumers' abilities to access, understand, and make rational choices concerning standardized terms, the legal norms that govern standard contracts should evolve accordingly. However, legal theory has not kept pace with advancements in

to creating a universally understandable contract. One of the chief critiques of plain language laws is that they are too mechanical and inflexible.[259] Yonathan Arbel and Andrew Toler's study on misguided mandates that require certain documents to use all-caps suggests that mechanical, bright-line rules are inappropriate to maximize human communication, which is a subtle, complex, and context-dependent practice.[260] The consumer and the contract's form may impact understandability. Perhaps the most understandable form for the same document varies as the consumer changes.[261] The Duty can account for differences in the intended consumer like education literacy, language proficiency, and familiarity with terminology. Likewise, even when comparing contracts with the same consumers, perhaps the form of the contract affects understandability. The Duty can account for differences between the way humans process information on paper and on a laptop screen, cell phone screen, pop-up window, or video game. Plus, as our understanding of how humans process information develops, or as the way humans process information changes over time, the Duty can adjust.

the understanding of consumer cognition and behavior."); Budnitz, *supra* note 54, at 406 (calling for the Restatement of Consumer Contracts to account for social science "on deficiencies in consumer cognition that hamper consumers' ability to bargain freely, social factors affecting consumer behavior when entering into contracts, and literacy problems"); Gibson, *supra* note 4, at 218–28 (proposing that courts evaluate evidence of unconscionability "in light of the emerging empirical findings on consumers' cognitive limitations when dealing with boilerplate"); Luguri & Strahilevitz, *supra* note 71, at 98–99 (noting that companies already perform A/B testing to determine how to change consumer behavior and encouraging government agencies to do the same).

[259] Carl Felsenfeld, *The Plain English Movement*, 6 CAN. BUS. L. J. 408, 415 (1981) (noting criticisms of plain language laws include being too mechanical and unyielding, preventing experimentation, and not yet knowing the best form of language).

[260] Yonathan Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862, 912 (2020).

[261] Jonathan M. Barnes, *Tailored Jury Instructions: Writing Instructions that Match a Specific Jury's Reading Level*, 87 MISS. L.J. 193, 225 (2018).

Incorporating social science into contract formation law both corrects mistaken assumptions about human behavior and ensures full consideration of all the relevant factors that affect understanding. Often, how the human mind works is counterintuitive. As a result, relying on intuition can backfire.[262] Courts assume certain factors affect consumer understanding when they do not or when other unconsidered factors play a much more significant role.[263] Many well-intentioned legislatures required important disclosures to use all-caps, even though all-caps does not improve understanding and may impede it.[264] Some contracts might use humor and come off as playful to the delight of consumers, while not actually effectively communicating.[265] In other cases, a seller might do something that seems to impede understanding but perhaps improves it. For example, if a seller used hard-to-read font a court might assume the font impedes understanding, but one study shows students learned better when reading information presented in a hard-to-read font rather than an

[262] For example, one empirical study suggests mild use of dark patterns are harder for consumers to avoid than extreme use of dark patterns because they are subtle and persuasive. Luguri & Strahilevitz, *supra* note 71, at 89–90.

[263] Lonegrass, *supra* note 4 at 45–46 ("[I]nterdisciplinary research studying consumer cognition and market forces demonstrate that the traditional objective indicia of assent seized upon by most courts are not useful indicators of meaningful choice with respect to standard form contracts. . . . [T]he conventional approach [to an unconscionability analysis] is not merely unhelpful, but also harmful in its adherence to faulty and obsolete assumptions about consumer decision making."). *Cf.* Romero v. Allstate Ins. Co., 1 F. Supp. 3d 319, 375, 389–90 (E.D. Pa. 2014) (relying on assumptions about years of job experience and years of education to conclude that parties were able to understand contract terms).

[264] Arbel & Toler, *supra* note 4 at 895–96 (concluding that there is no psychological basis for using all-caps and reporting results of a study showing that all-caps does not aid—and may hinder—comprehension)

[265] David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1459–60 (2018) (identifying company contracts that were "in some ways much friendlier to users than is the norm," but being unable to determine if they "merely perpetuated a narrative of trust that enables the firms to profit from customers who have mistakenly concluded that they are merchants rather than the products being sold").

easy-to-read font.[266] This Article is not opining one way or the other; rather, the larger point is that our assumptions are often incorrect. Likewise, the Duty would allow courts to hear from experts on how to navigate and interpret social science data. For example, while lawmakers have occasionally deployed Readability Standards that use particular linguistic tests and scores, a court could hear expert testimony on the different kinds of readability tests available and learn which, if any, to apply.[267] Companies are collecting consumer data and hiring experts so courts should consider that data and hear about what those experts do.

Finally, the Duty streamlines the law and empowers drafters and designers. Widespread adoption of the Duty should accompany the repeal of many plain language laws and other laws that control contract design. The requirements of these laws would hold drafters and courts back from creating the most understandable contracts.[268] The current landscape is a hodgepodge of state and federal lawmakers, from all three branches of government, passing different laws with different standards and coverage.[269] Reducing the number and variation in sources of governing law would streamline the process of crafting contracts for use in multiple jurisdictions; there would now be only one standard to worry about. Likewise, drafters would become designers; they could remain creative in how they design consumer contracts, taking advantage of the growing amounts of data collected and even consulting their marketing and advertising departments to assist. The Duty also focuses on the goal of understanding. By contrast, plain language laws might balance that goal against

[266] David M. Oppenheimer, Connor Diemand Yauman & Erikka B. Vaughan, *Fortune Favors the Bold and the Italicized: Effects of Disfluency on Educational Outcomes*, 118 COGNITION 111, 112–14 (2011).

[267] Beazley, *supra* note 68, at 30–31. *See also* Snyder & Mirabito, *supra* note 42, at 440–53 (illustrating an example of methodology to test one's understanding of contract language).

[268] Beazley, *supra* note 68, at 11–12 (describing how many state and federal laws require specific wording and grant no discretion to drafters)

[269] Budnitz, *supra* note 54, at 450 (suggesting that plain language best practices are hard to develop because state laws take so many different approaches).

other considerations like creating a standard that is predictable, is easy to apply, or imposes minimal costs.

C. Likely Opposition and Responses

Readers may doubt or outright oppose the proposed Duty. This section identifies and responds to what are likely to be the most forceful objections and concerns.

1. The Pragmatic Objection: Not All Contracts Can be Made Understandable to Every Consumer

The Objection: Perhaps the most common objection is the Pragmatic Objection. Simply put, the Pragmatic Objection contends that at least a subset of contracts can never be understandable to their average intended consumer. Sobering data shows that Americans struggle to read. Among American adults, the average adult has an eighth- or ninth-grade reading level, twenty-one percent have below a fifth-grade reading level, about thirty-two million cannot read, and a quarter are illiterate.[270] At the same time, they lack basic background knowledge about a contract's complex contents and even basic terminology.[271] Masterfully clear writing about

[270] Jonathan M. Barnes, *Tailored Jury Instructions: Writing Instructions That Match a Specific Jury's Reading Level*, 87 MISS. L.J. 193, 195–96 (2018); Cogan, *supra* note 54, at 97–98; Omri Ben-Shahar, Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 709–29 (2011) (describing different forms of illiteracy).

[271] Lonegrass, *supra* note 4, at 3–4 (". . . [C]onsumers who actually read consumer contracts do not understand them, either because they lack the requisite legal training, or worse, basic literacy skills. Literate, savvy consumers suffer from cognitive limitations that render them unlikely to apprehend the meaning of and risks inherent in standard terms."); Cogan, *supra* note 54, at 97–98. *Cf.* Firtel, *supra* note 68, at 865–66 (opposing the SEC's plain language regulations, describing "The Myth of the Informed Layman," and pointing out that the goods, services, and accounting principles in securities filings have become so complex that a nonprofessional lacks the skill and expertise to understand them).

concepts the consumer knows nothing about are pointless.[272] For example, when determining whether certain car lease disclosures were in a legally required "reasonably understandable form," the Second Circuit found that they did not comply as they were "beyond the understanding of the average consumer."[273] That said, Third Circuit disagreed, holding that the standard does "not necessarily demand disclosure in a form that the average consumer can understand" because some provisions "involve math that is well beyond the understanding of the average consumer."[274] However, invalidating contracts solely because the average consumer may not understand them would disrupt the majority of contracts.[275] Indeed, attempts to make complex areas of law understandable sometimes oversimplifies legal information.[276]

Just picture some of the most common contracts in the country like car insurance contracts. They are long and complex. Their average intended consumer is every American adult. Explaining all the fundamentals of insurance could convert the contract into an encyclopedia on insurance, producing a catch-22: all the explanations need to be there to help the consumer understand but when they are all there the

[272] Firtel, *supra* note 68, at 887–92 ("[A] greater understanding of the words will still neither allow investors to understand the complex legal/financial concepts underlying the words nor will it enable investors to make intelligent investment decisions because 'the general public, without the benefit of a professional legal education, has difficulty understanding the law because they do not understand legal concepts . . . .'").

[273] Lundquist v. Sec. Pac. Auto. Fin. Servs. Corp., 993 F.2d 11, 15 (2d Cir. 1993).

[274] Applebaum v. Nissan Motor Acceptance Corp., 226 F.3d 214, 220 (3d Cir. 2000).

[275] Lonegrass, *supra* note 4, at 58.

[276] *See, e.g.*, Joshua D. Blank & Leigh Osofsky, *Automated Agencies*, 107 MINN. L. REV. 2115, 2162 (2023); Joshua D. Blank & Leigh Osofsky, *Simplexity: Plain Language and the Tax Law*, 66 EMORY L.J. 189, 205–07 (2017).

contract is far too long for the consumer to understand.[277] Worse, you could imagine an insurance company assembling an all-star team of linguists, plain language experts, legal document designers, insurers, educators, user experience specialists, and artificial intelligence gurus; giving them maximum discretion to rewrite the contract; and having the team come back and say "we can only make it understandable at a tenth grade reading level." What is the insurance company to do then?

The Response: Despite the Pragmatic Objection's compelling points, the Duty remains viable for three reasons.

First, for decades, lawmakers have been imposing understanding-focused standards to complex legal documents. For example, Minnesota requires continuing care facility disclosures to be "understandable by a person of average intelligence and education."[278] Federal Age Discrimination Act waivers are invalid unless they are part of an employment agreement "written in a manner calculated to be understood by" the employee.[279] In Oregon, the "intended audience" must be able to understand a voter pamphlet the first time they read it.[280] Federal agency environmental impact statements must be "readily understandable by governmental decisionmakers and by interested non-professional laypersons likely to be affected by actions taken under the [statement]."[281] Similar standards apply even when the intended readers have barriers to comprehension. Due

[277] *See* Firtel, *supra* note 68, at 866–67 (opposing the SEC's plain language regulations and claiming full disclosure would yield such a high volume that no one could decipher the disclosures).

[278] MINN. STAT. ANN. § 80D.04.

[279] 29 U.S.C. § 626(f)(1)(A).

[280] OR. ADMIN. R. 165-024-0005.

[281] Oregon Envtl. Council v. Kunzman, 817 F.2d 484, 494 (9th Cir. 1987). *Accord* 40 C.F.R. § 1502.8 ("Agencies shall write environmental impact statements in plain language and may use appropriate graphics so that decision makers and the public can readily understand such statements. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which shall be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.")

Process requires immigration notices and orders about administrative hearings to be "reasonably calculated, under all the circumstances" to inform recipients.[282] Disclosures for health plans on the federal health exchange must use "language that the intended audience, including individuals with limited English proficiency, can readily understand and use."[283] Under the Colorado Privacy Act, all required consumer disclosures and notices must be "[d]esigned to be understandable and accessible to a [seller's] target audiences, considering the vulnerabilities or unique characteristics of the audience and paying particular attention to the vulnerabilities of children" and must be "[r]easonably accessible to Consumers with Disabilities."[284] To avoid violating the Fair Debt Collection Practice Act, a debt collector's representations cannot be misleading to the "least sophisticated consumer."[285] Consider the Consumer Financial Protection Act of 2010, which bans material interference with consumers' ability to understand contract terms, including through acts or omissions that have "the natural consequence of impeding consumers' ability to understand."[286] In short, while objectors may think the Duty is impractical despite never having tried to make the documents understandable, lawmakers do not. In fact, some lawmakers suggest making legal documents understandable is not as difficult as drafters suggest. For instance, one federal court held that requiring the federal government to make Medicare claim notices more understandable was not a substantial burden.[287]

[282] Walters v. Reno, No. C94-1204C, 1996 WL 897662, at *4–10 (W.D. Wash. Mar. 13, 1996) (citing Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 13 (1978)).

[283] 42 U.S.C. § 18031(e)(3)(B).

[284] 4 COLO. CODE REGS. § 904-3:3.02.

[285] Easterling v. Collecto, Inc., 692 F.3d 229, 233 (2d Cir. 2012) (quoting *Clomon v. Jackson*, 988 F.2d 1314, 1318 (2d Cir. 1993)).

[286] Consumer Financial Protection Bureau, *Supervisory Guidance,* POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES (Apr. 3, 2023), https://www.consumerfinance.gov/compliance/supervisory-guidance/policy-statement-on-abusiveness/ [https://perma.cc/BS3Z-77NL].

[287] David v. Heckler, 591 F. Supp. 1033, 1035–48 (E.D.N.Y. 1984).

Second, although data on whether plain language laws are followed and enforced is sparse, anecdotes suggest complex legal documents can be much more understandable. Consider the Social Security Statement, which is an annual explanation available to every working American between the ages of 25 and 65 that explains what their Social Security benefit will be when they retire.[288] Because the Social Security Administration uses the statement to make information available to a massive swath of the general public, everyone from the college educated to the barely literate, a total of about 125 million readers each year, must understand the statement.[289] A 2022 redesign of 22 states' food stamp forms led in part to 664,681 more people signing up for food stamps over the course of one year.[290] Revisions to complex quintessential legal documents have occurred too. In 1993 Australia began a process of revising its Corporations Law into plain language,[291] while in 1996 the United Kingdom began a project to rewrite all 6,000 pages of its tax code into plain language,[292] and in 2004 New Zealand rewrote one-third of its income tax act into plain language.[293] The SEC's plain language initiative reformed many public disclosures.[294] The Federal Judicial Council made plain language revisions to

[288] *See* Carolyn Boccella Bagin, *Plain Language Pays Off for the Social Security Administration*, 45 Clarity 2, 2–4 (2000); *see also* Barbara A. Smith & Kenneth A. Couch, *Social Security Administration, The Social Security Statement: Background, Implementation, and Recent Developments*, 74 SOCIAL SECURITY BULLETIN 1, 1 (2014).

[289] *See* Bagin, *supra* note 289, at 2–4.

[290] Kristin Kleimann, Ilana Bain & Lara Whitman, *Removing Barriers to Food Stamp Assistance—One Complex Form at a Time*, 55 CLARITY 32, 35 (2006).

[291] Dr. Robert Eagleson, *Bringing the Audience to the Fore: Radical Approaches to Preparing Legislation*, 72 CLARITY 35, 35–39 (2014).

[292] Christopher Williams, *"And Yet it Moves": Recent Developments in Plain Legal English in the UK*, 60 CLARITY 11, 11–12 (2008).

[293] Margaret Nixon, *Rewriting the Income Tax Act*, 52 CLARITY 22, 22–25 (2004).

[294] McClane, *supra* note 52, at 274–76, 291 (noting that compliance was initially strong but faded over time).

every federal rule of procedure.[295] Labs at Stanford, Harvard, and Suffolk law schools redesign court documents.[296] Turning to contracts, when lawyers have innovated, the results have been positive. General Electric's aviation division redesigned contracts to be understandable at a tenth-grade reading level.[297] Companies like Bumble and Etsy revised terms of service to use more understandable language.[298] Designers like Stefania Passera have reworked university student housing contracts.[299] The World Commerce and Contracting design pattern library contains examples of contract design innovation from complex contracts with large companies like Airbus Defence and Space,[300] Shell Marine Lubricants,[301] Australian telecommunications giant Telstra Corporation Limited,[302] and the largest UK trade association known as the

[295] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE: JURISDICTION AND RELATED MATTERS 7–10 (5th ed. 2019).

[296] Justice Innovation, STANFORD LEGAL DESIGN LAB, https://justiceinnovation.law.stanford.edu/ [https://perma.cc/4854-2FCY]; A2J Lab, CURRENT PROJECTS, https://a2jlab.org/current-projects/ [https://perma.cc/7WVV-CJAY]; Legal Innovation & Technology Lab Suffolk University Law School, SELECT PROJECTS, https://suffolklitlab.org/portfolio/ [https://perma.cc/N5NQ-R8B].

[297] Shawn Burton, *The Case for Plain-Language Contracts*, 96 HARV. BUS. REV. 134, 136 (Feb. 2018).

[298] David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1421–23, 1432–37 (2018).

[299] Stefania Passera, *Why Do We Need Visualization in Contracts?*, STEFANIA PASSERA (Feb. 16, 2018), https://stefaniapassera.com/portfolio/tenancy/ [https://perma.cc/EX6K-54F3]; *See also* Stefania Passera*, Beyond the Wall of Text: How Information Design Can Make Contracts User-Friendly, in* 9187 DESIGN, USER EXPERIENCE, AND USABILITY: USERS AND INTERACTIONS 341, 341–52 (Aaron Marcus ed., 2015) (measuring the effect of contract redesign on study participants).

[300] WorldCC Foundation, *Icon System*, CONTRACT DESIGN PATTERN LIBRARY (2019), https://contract-design.worldcc.com/icon-system?category%5B0%5D=emphasis [https://perma.cc/R9YU-64FY].

[301] WorldCC Foundation, *Prominent Section Start*, CONTRACT DESIGN PATTERN LIBRARY (2019), https://contract-design.worldcc.com/prominent-section-start?category%5B0%5D=emphasis [https://perma.cc/SZS3-KLDA].

[302] WorldCC Foundation, *Table*, CONTRACT DESIGN PATTERN LIBRARY (2019), https://contract-design.worldcc.com/table?category%5B0%5D=explainers [https://perma.cc/7JL9-MWZ4].

Federation of Master Builders.[303] Further, a host of technologies now promise plain language contracting.[304] For a variety of reasons many lawyers have been reluctant to innovate contracts,[305] even though studies suggest some of the most common causes of incomprehension in legal documents are fixable, like word choice and sentence structure.[306] Considering businesses already effectively communicate to their consumers in their advertisements[307] and already collect data and conduct experiments on how their consumers process information,[308] stronger incentives may make such changes even more likely.

Third, even if a subset of contracts cannot be made understandable to the average intended consumer (and we do not yet know if such a subset exists), other tools can supplement the contract to achieve understanding. One supplement is technology. Smart Readers learn someone's language down to "cultural expectations, linguistic abilities, and cognitive needs" and then translate text to match that individual's needs; they are so effective that Yonathan Arbel and Shmuel Becher opine the "problem of complexity can be mitigated, if not defeated, by the simplification of text."[309] They even allow consumers to ask follow-up questions about specific legal language like whether an international trip violates a clause requiring you to permanently reside in the

[303] WorldCC Foundation, *Guidance Notes*, CONTRACT DESIGN PATTERN LIBRARY (2022), https://contract-design.worldcc.com/guidance-notes?category%5B0%5D=explainers [https://perma.cc/J3J5-DV9F].

[304] *See infra* note 334.

[305] Hoffman, *supra* note 299, at 1.

[306] Martínez et al., *supra* note 67, at 1–8; Michael L. Rustad, *Why A New Deal Must Address the Readability of U.S. Consumer Contracts*, 44 CARDOZO L. REV. 521, 527 (2022) ("The chief factors that go into readability are 'sentence length, sentence structure, and the average syllables per word'—all of which, when combined, determine the reader's likelihood of understanding the text.")

[307] Arbel & Toler, *supra* note 4, at 893.

[308] Hurwitz, *supra* note 42, at 62, 70–71.

[309] Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 G.W. L. REV. 83, 96, 100–04 (2022).

United States.[310] A healthcare company is already providing patients with artificial intelligence-driven software to help explain radiology reports.[311] Another supplement is publicly-available industry-run or government-run civic education about contracts.[312] For instance, an insurance agency might have free videos or pamphlets about the fundamentals of car insurance or common insurance terms.[313]

2. The Principled Objection: The Average Intended Consumer's Understanding is Irrelevant to Contract Law and is Not the Seller's Responsibility

The Objection: The Principled Objection strikes at the Duty's heart on three fronts. First, the Duty is a solution in need of a problem because consumer understanding is irrelevant to contract law. Pragmatically, there is no need to make contracts understandable because consumers do not read contracts. The real audience is lawyers and judges, and they seem able to understand contracts just fine. Widespread

[310] *Id.* at 104–06. *See also* Anne Ketola, Helena Haapio, & Robert De Rooy*, Chattable Contracts:*

AI Driven Access to Justice, STANFORD LEGAL DESIGN LAB, https://justiceinnovation.law.stanford.edu/jurix-workshop/ [https://perma.cc/TZD2-AME7].

[311] *Royal Health and SCANSLATED Announce Partnership to Deliver Interactive Patient Friendly Radiology Reports*, PR NEWSWIRE (Jan 31, 2023), https://www.prnewswire.com/news-releases/royal-health-and-scanslated-announce-partnership-to-deliver-interactive-patient-friendly-radiology-reports-301733756.html [https://perma.cc/B6X4-FF6P].

[312] Stark & Chopin, *supra* note 42, at 661 (arguing that consumers need background information called "schemas" to understand different kinds of contracts of adhesion).

[313] James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. 105, 166 (1998) (advocating for education initiatives to work in tandem with SEC plain language rules). If technology and better education is enough to bridge the gap between the consumers and the most understandable version of contracts, that revelation will reverberate well beyond contract law to *Miranda* warnings, jury instructions, court notices, and more.

consumer understanding brings no benefit because consumers will still not be able to negotiate, and thus will still have the same unfair contract terms. In short, the Duty will have no effect on consumer behavior so there is no value in imposing a cost on sellers.

Second, to the extent consumer understanding is important to contract law, consumers bear responsibility to obtain that understanding; the Duty functionally requires sellers to give consumers both a contract and an education. Consumers are not being coerced into the contracts and might choose to not care about having understandable language. If they want to understand contract language they can consult lawyers or access free online resources like legal dictionaries, lawyer blogs, and consumer websites.

Third, the Duty's objective standard means at least some parties can invoke the Duty unfairly. Specifically, consumers who subjectively did or could understand the contract would unfairly receive the Duty's benefits. The chief contract drafter for the industry could retire, become a consumer, understand every contract provision, and successfully defeat the contract because none of the other consumers could understand the provisions.

The Response: While fair, all three of the Objection's points have compelling responses.

Even if the Duty has no effect on the fairness of terms or ability to negotiate,[314] the Duty legitimizes declaring a bargain enforceable. Unfair terms and consumers not reading contracts are problems, but they are separate problems in need of separate solutions. The Duty ensures an *opportunity* to understand a contract. Even if never exercised, that

[314] Staunch plain language supporters argue plain language helps consumers make informed decisions, increases the chance all consumers have equal information, educates consumers about product, and promotes more purchases because less risky for consumers to buy products. *See* Susumu Miyazaki, *Should Japan Adopt A Plain Language Rule?*, 13 MINN. J. GLOBAL TRADE 1, 8–11 (2004). This Article leaves open the question of what effect plain language contracts would have on consumers and contends, even if it had no effect on consumer behavior, understandable contracts is still an important doctrinal requirement.

opportunity provides a fair foundation for concluding a contract exists.[315] Remember, the manifestation of assent requirement rests on whether an offeror can interpret an act, like a signature or a mouse click, as assent. When the offeror knows the consumer likely could not understand the contract, then no act could manifest assent.[316] Without the opportunity to understand a contract, consumers are not consenting to enter *the* contract, rather they are just consenting to entering *a* contract.[317] But when a contract forms, the Duty to Read treats consumers as if they assented to every provision in the contract. If contract law is going to treat consumers that way, then consumers should at least have the opportunity to understand the contract's terms.[318] The Duty to Read is meaningless if consumers are incapable of understanding contracts.[319] There is no meaningful difference between hiding

[315] "The more confidence we have that a contractual arrangement is misunderstood by one of the parties and does not serve the expressed interests of that party, the less reason there is to let the terms of a relationship be set by contract law." Luguri & Strahilevitz, *supra* note 71, at 92. *See also* AUSTRALIAN COMPETITION AND CONSUMER COMM'N, *Unfair Contract Terms—A Guide for Businesses and Legal Practitioners* (May 2016) (under the Australian Consumer Law, courts consider a term's transparency to determine if the term is unfair).

[316] Rustad, *supra* note 207, at 545 (If contracts "are not drafted in easy-to-read language, consumers will have no meaningful opportunity to understand the rights they are waiving.").

[317] *See generally* RESTATEMENT OF THE LAW: CONSUMER CONTRACTS INTRO (AM. L. INST., TENTATIVE DRAFT NO. 2, 2022) ("A signature at the bottom of the form, a click of 'I Accept,' or some other form of manifestation of willingness to enter the transaction is, at best, a declaration [that] I know I am agreeing to something, but I don't know to what. I trust that if something really bad is buried in the fine print, the law will protect me from its bite.'")

[318] *See* Knapp, *supra* note 22, at 1108–12.

[319] *See also* Logue, et al, *supra* note 60, at 8–9 ("But the blanket assent principle is strongest when the terms of the contract are not only unambiguous but also comprehensible; otherwise, consumers never had a meaningful initial opportunity to read those terms in the first place, meaning that their decision not to do so was, in fact, not a choice at all."); Kar & Radin, *supra* note 13, at 1155–56 (arguing that portions of contracts of adhesion that do not reflect an exchange the parties could have had to

the terms of a contract from consumers and giving consumers incomprehensible terms. Indeed, some plain language laws speak of consumers having a "right" to understand a standard form contract.[320]

In terms of scope, the Duty does not require sellers to give consumers anything more than a contract but does require sellers to rethink how they design contracts. Although a buyer is not coerced into entering any specific contract, currently buyers are functionally coerced into a life of entering incomprehensible form contracts. Nowadays, the most committed of hermits channeling the spirit of Henry David Thoreau and looking for their own Walden Pond would probably still have to enter at least a few contracts. For the rest of us, contracts are ubiquitous in modern life and necessary to obtain essential parts of everyday life like housing, healthcare, banking and credit, communication, and transportation.[321] Yet, even when there are multiple competitors offering different contracts, all of those contracts are incomprehensible form contracts.[322] It is difficult to imagine why a buyer would want to waive the ability to have an understandable contract at no additional cost. But even when imagining a buyer who both trusts the seller and wants to avoid placing such a burden on the seller, contract law should still not permit the buyer to do so. Understandable language is not a "right" the buyer can waive. The Duty at issue in this Article focuses on when a buyer objectively manifests assent to a form contract. Assent requires at least actual or constructive notice of the contract terms.[323] This Article goes one step further, arguing that even with notice

create common meaning are not part of the contract, but rather are a pseudo-contract).

[320] *See, e.g.*, LA. STAT. ANN. § 22:41 (2018) (creating "the right to a readable [insurance] policy," but not creating a cause of action or new damages).

[321] *See supra* Part II. A.

[322] *See supra* Part II. A.

[323] *See, e.g.,* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016) ("In determining the validity of browsewrap agreements, courts often consider whether a website user has actual or constructive notice of the conditions.")

(i.e. presenting the contract), sellers cannot interpret any act—no matter how explicit—as assent when the buyer lacks capacity to issue such assent. Just as a minor[324] or mentally incapacitated person[325] cannot assent to a contract (or can later void the contract), when contract terms are incomprehensible to the average intended buyer, then the seller has constructive knowledge that no buyer has the capacity to manifest assent.

The Duty does not require contracts to include anything more or less than current contract law. Rather, it only requires sellers make the information they already convey understandable. And of course that information is in a non-negotiable contract the seller has created and vetted before any use. Sellers' advertising and marketing departments already make much of this information understandable to consumers. Functionally, rather than starting with a template, the Duty requires drafters to approach a contract with a blank slate and choose language and designs that aid consumer understanding. To the extent consumers already have readily available free means to aid their contract understanding, the Duty can account for those in the definition of the average intended consumer. For instance, for many contracts it may be true that the average intended consumer has a smart phone with free applications that can translate a contract into different languages. In other cases, the average intended consumer may not be aware of those resources or may access different tools that provide different translations. Some predict a future where every human has an artificial intelligence personal assistant.[326] In this future where humans walk through life with an AI spirit animal, the Duty exists but the average intended consumer would be a consumer who has AI. In this world, contracts might no longer

[324] RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981); Doe v. Roblox Corp., 602 F. Supp. 3d 1243, 1257 (N.D. Cal. 2022).

[325] RESTATEMENT (SECOND) OF CONTRACTS § 12 (1981); Hernandez v. Banks, 65 A.3d 59, 65 (D.C. 2013).

[326] *See* Jacob Marques, *Eric Schmidt talks about AI Assistants*, MEDIUM, https://medium.com/21-900-musings/213-eric-schmidt-talks-about-ai-assistants-bce26ef1383f [https://perma.cc/G3KM-RAHC].

be human-readable. But the Duty would prevent drafters from deceiving the AI or causing the AI to miscommunicate the contract to the consumer.[327]

Finally, although the Duty could result in a scenario where someone subjectively understood a provision but is not bound by it, any unfairness is limited or non-existent. Consumers have little incentive to sue when the seller performs and doctrines like promissory estoppel guard against windfalls when the seller relies on a promise and no contract exists.[328] It is more likely the consumer will invoke the Duty to challenge specific provisions, like one permitting the collection of private data. In such a case, the consumer benefits by escaping an obligation or eliminating a benefit to the seller. Conversely, the seller receives the benefit of learning the provision as currently drafted is unenforceable against most of its consumers and requires redrafting. Moreover, improving the understandability of the contract decreases the chance of future breaches by either party, including the seller. Importantly, the Duty does not allow a consumer to collect other kinds of civil remedies like some plain language laws do.

[327] In some ways, the proposed Duty may be more adaptable to this potential future than plain language laws. *See* McClane, *supra* note 52, at 265, 310 ("In an era when machine-based analysis of documents is becoming more common, style matters less. Indeed, assumedly uninformative boilerplate may actually provide more easily digestible means of assimilating information, and picking out noteworthy differences among deals, than more standard disclosure can. A number of tools that are now widely used for information retrieval and machine learning can help regulators and investors to understand boilerplate in a new way, and separate that which might be informative from that which is not.")

[328] 4 WILLISTON ON CONTRACTS §§ 8.4–8.5 (4th ed.); RESTATEMENT (SECOND) OF CONTRACTS §§ 89–90, 139 (1981).

3. The Disruption Objection: The Duty Will Disrupt Commerce Because It Makes Contract Law Unpredictable

The Objection: Practitioners are sure to invoke the Disruption Objection. Predictability is essential in contracts of adhesion. A flaw in one contract of adhesion is a flaw in all of them. Currently, sellers have predictability because boilerplate language has been tested and vetted. The Duty overrides all of that precedent, which strips these contracts of any predictability and encourages lawsuits. Moreover, drafters cannot be sure they satisfy the Duty before issuing a contract because the standard is unpredictable. Without any contours, courts could expand the Duty unforeseeably to impose immense costs on sellers. In fact, one reason why jurisdictions require substantive unconscionability is to prevent such judicial overreach and avoid "the needless invalidation of standard form contracts on the basis of lack of meaningful assent alone."[329] Worse, the costs of compliance are immense. Sellers will need to teach new drafting and design skills, invest in focus group testing, research the science of human understanding, and jettison all templates.

The Response: While there will be some disruption from unpredictability and costs, the disruption will likely be short-lived, the Duty offers greater predictability than the status quo, and the costs are mostly absorbed by lawyers rather than sellers.

Turning first to predictability, traditional boilerplate is not predictable. The widespread belief that most contract language is precedent-vetted gives a false sense of security in the status quo.[330] In fact, it is hard to imagine any contract

[329] Lonegrass, *supra* note 4 at 57–58 ("However, recognizing that the bulk of consumer contracts today are not freely negotiated, most courts and scholars maintain that invalidating contracts on procedural foundations alone would produce so much instability in the marketplace as to be counterproductive.")

[330] Joseph Kimble, *Flimsy Claims for Legalese and False Criticisms of Plain Language: A 30-Year Collection*, 19 SCRIBES J. LEGAL WRITING 1, 3 (2020); BRYAN A. GARNER, DRAFTING & EDITING CONTRACTS 13 (West 2020)

could be written exclusively through language vetted by courts. After all, such language would require that: (1) a pre-existing contract used the same language, (2) every provision capable of being breached was allegedly breached, (3) parties discovered every alleged breach and decided to pursue litigation because the parties could not resolve the dispute, and (4) the cases did not settle or go to arbitration before a court reached judgment on the issue. To truly be predictable you would need appellate authority. Further, drafters would need a system to learn about these court decisions. If such a contract did exist, we would expect to see no variation in that contract amongst different sellers as it would be an unnecessary risk to use different language. Thus, there would be no market for transactional lawyers; sellers could simply choose from a menu of litigation-approved provisions. Such a world elevates ancient contract language into sacred text, effectively freezing it in place for eternity.[331] While perhaps widely believed, none of this rings true with the real world of contract drafting.

Consider Professors Mitu Gulati's and Robert E. Scott's delightful book on a centuries-old contract provision with byzantine language in sovereign debt contracts that remained unchanged even though no one knew what it meant and even

(suggesting that most terms of art are not as precise and fixed in meaning as lawyers think).

[331] GARNER, *supra* note 331, at xv (West 2020) ("Too many transactional drafters work from earlier forms without giving them sufficient critical thought. It's all too easy to assume that a document that 'worked' before will work again and, as a result, to suppose any 'tinkering' could be exceedingly dangerous. The inclination is to consider forms or precedents to be more or less frozen as stated: any revisions, it is feared, could bring potential liabilities for the slightest unintended change in meaning. This complacent, perfunctory approach militates against rising above predecessors' mediocrity."); George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 193–97 (2013) (identifying impediments to contract innovation, including lack of market incentives). Triantis argues that "deal partners are generally suspicious of and expend additional resources to understand novel terms" and that "[deal partners] discount the value of a contract that includes unfamiliar contract terms or language." *Id.*

after an unanticipated court interpretation.[332] Notably, Gulati and Scott coupled thorough historical research on the clause with review of 1500 contracts and extensive interviews with 200 of the very lawyers who draft these contracts. [333] They confirmed contracts of adhesion are the products of automation and not thoughtful, intentional wordsmithing. Contracts of adhesion go generations without change.[334] Even in the world of high stakes contracts like those where a country takes on debt, lawyers in the most well-resourced biggest law firms draft the contracts in three and a half minutes and without discussion or collaboration.[335] Many of the transactional lawyers interviewed were not responding to or even accounting for court decisions.[336]

A growing body of scholarship shows contract language is not the result of intentional wordsmithing by transactional lawyers. An analysis of 1,050 contracts coupled with 85 interviews with transactional lawyers revealed consequential damages clauses were often "poorly drafted" and the result of lawyers "kind of mindlessly including exclusions" with "minimal care to whether the [] provision being used was tailored to the circumstances of the deal at hand."[337] Interviewees conceded "[i]f you want to understand these

[332] GULATI & SCOTT, *supra* note 251, at 3 (Chicago Press 2013).

[333] *Id.* at 3–6.

[334] *Id.* at 3. ("This is also a story about the organic life form known as a standard commercial contract and about how such documents pass relatively untouched through the hands of generations of lawyers much like a seed can pass unharmed through the intestinal tract of a bird.")

[335] *Id.* at 9–10.

[336] "But only a miniscule faction of contracts are ever litigated, and transactional lawyers are almost never involved in the litigation. . . . Yet neither one of us had seen much evidence of transactional lawyers engaged in a dynamic process of regularly reading cases and incorporating that learning into novel innovations in subsequent contracts. Some of the transactional lawyers we knew did not appear to have looked at a case in years. . . . However, we had seen little evidence of interaction among transactional lawyers and litigators, let alone a process by which they collaborate in R&D on contract design." *Id.* at 4.

[337] Tara Chowdhury et al., *Consequential Damages Clauses: Alien Vomit Or Intelligent Design?*, WASH. U. L. R. (forthcoming 2024) (manuscript at 13) (on file with the Columbia Business Law Review).

clauses, talk to the litigators—they know the case law; for the corporate lawyers, these are boilerplate . . . . 'No transactional lawyer is reading the case law. The last time most of them saw a case was in law school.'"[338] In this study's view, "[r]ather than contract nirvana where everyone designs the perfect term for themselves, the world we study is one where parties with limited time and resources focus on the key financial terms and maybe a couple of other key deal terms. There is relatively little attention to the set of legal terms the parties see as 'boilerplate.' This results in the frequent use and reproduction of sub-optimal terms." [339] Oftentimes, even the drafting lawyers may not understand the language in contracts.[340] Gulati and Scott predicted it may not be long before transactional lawyers are not the primary drafters, explaining "[i]f eminent law firms are doing little more than reproducing contract documents from prior deals, without doing much to correct errors in prior drafts, let alone innovating and improving contracts, then it will not be long before boilerplate contract drafting gets outsourced. One does not, after all, need to pay Wall Street lawyer fees to have some junior associate cut and paste a document from a prior deal. That process can occur at a lower cost in Bangalore or Manila, with what will probably be a higher rate of error correction. Perhaps the future of the elite U.S. or U.K. law firm is less leverage, higher quality, and greater outsourcing of routine tasks."[341]

Although precedent does back some current contract provisions, the Duty increases the overall predictability of every provision for two reasons. First, being made more

[338] *Id.* at 26–27.

[339] *Id.* at 31–32.

[340] *See, e.g.,* Pharm. Prod. Dev., Inc. v. TVM Life Sci. Ventures VI, L.P., No. C.A. 5688-VCS, 2011 WL 549163, at *7 (Del. Ch. Feb. 16, 2011) ("As discussed at oral argument, § 7.4(c)'s laundry list of precluded damages might have been put in the Merger Agreement by lawyers who themselves were unclear on what those terms actually mean.")

[341] Mitu Gulati & Robert E. Scott, *Foreword: The Three and a Half Minute Transaction: Boilerplate and the Limits of Contract Design*, 40 HOFSTRA L. REV. 1, 7–8 (2011)

understandable to the consumer, the provisions will also be more understandable to any reader, including the judge, which makes them less susceptible to alternative interpretations. Indeed, plenty of litigated cases end with traditional wording in a contract for adhesion working against the drafter.[342] Plus, using precedent-approved language is not

[342] *See, e.g.*, Sanders v. Ashland Oil, Inc., 696 So. 2d 1031, 1038 (La. App. 1 Cir. 1997) (holding that an indemnity clause is ambiguous because "[the] agreement is poorly drafted and . . . the use of legalese, such as "aforesaid," makes the meaning of the contract terms unclear"); Gochenour v. Gochenour, No. 22-ICA-22, 2023 WL 152171, at *3 (W. Va. Ct. App. Jan. 10, 2023) (holding a prenuptial agreement unenforceable because "[b]oth parties testified that they did not understand the legalese within the agreement"); Eyster v. Pechenik, 887 N.E.2d 272, 283 (2008) (holding a prenuptial agreement unenforceable in part because there was no "plain language or other evidence demonstrating that the parties sufficiently understood their marital rights and how they were altering them"); Stone v. Life Time Fitness, Inc., 411 P.3d 230-31 (Colo. Ct. App. 2017) (holding that exculpatory clauses releasing negligence claims unenforceable in part because "two clauses are replete with legal jargon," that "[t]he use of such technical legal language militates against the conclusion that the release of liability was clear and simple to a lay person," and that repeated use of certain "phrases makes the clauses more confusing, and the reader is left to guess whether the phrases have different meanings"); Twarowski v. Heart's Desire DCL, LLC, No. CV SAG-20-00815, 2021 WL 5359668, at *3 (D. Md. Nov. 17, 2021) (holding that an indemnification clause covering negligent conduct was unenforceable because it used "convoluted legalese"); Kalmowitz v. Fed. Home Mortg. Corp., No. CV619MC00010JCBJDL, 2019 WL 6249298, at *3 (E.D. Tex. Oct. 22, 2019) (holding an arbitration clause unenforceable because "[t]he whole of the 22-page document, drafted with repetitive, nonsense legalese, contains no factual or legal conclusions from which this Court could deduce the existence of a valid contract, let alone a valid agreement to arbitrate"); Dunn v. Glob. Tr. Mgmt., LLC, 506 F. Supp. 3d 1214, 1235 (M.D. Fla. 2020) (finding that "the arbitration provision is on page twelve of the account terms and itself consists of two pages of dense legalese—a lot for unsophisticated consumers to digest, particularly on their own. Presenting the arbitration provision in this way—especially given the take-or-leave-it context of the whole application process—ensures borrowers have little choice but to accept it, just as Plaintiffs did here"); Cintron v. Universal Underwriters Grp., 601 A.2d 1051, 1056 (Del. Super. Ct. 1990), *aff'd*, 586 A.2d 1203 (Del. 1990) (holding an insurance policy ambiguous because "the terms as used differ from the term as ordinarily understood and is so convoluted as to cause confusion to the reader"); Auto-Owners Ins. Co. v. Benko, 964 N.E.2d 886, 887 (Ind. Ct. App. 2012) (holding

risk free. Any assessment of longstanding language must account for the costs of the traditional language and the opportunity costs of not changing. Consider this telling anecdote. During a meeting of lawyers, a speaker recommended using the word "shall" in a contract because a recent high court interpreted the term to mean "may;" Bryan Garner posed the obvious suggestion: instead of using "shall" to mean "may," just use the word "may;" but the presenter disagreed because "he had no idea what that might be held to mean. After all, it hadn't been adjudicated."[343] Blind allegiance to precedent has downsides. Also, the Duty allows drafters to gain predictability before an appellate court decides a case. Rather than wait for a future case, with unknown facts, decided by an unknown judge who may choose any number of interpretations, the Duty allows drafters to obtain predictability upfront by testing language on consumers. Even when experts on contract drafting agree on replacing certain traditional contract language, sometimes courts have disagreed, like on the meaning of the term "will."[344] Unlike the status quo which pivots on how a judge would interpret terms, under the Duty, the inquiry focuses on how the average consumer would understand them. A seller can answer that question even before the seller issues the contract. That predictive value is not absolute as an opponent may later bring forth evidence challenging it. However, sellers have far more data points than guessing how a judge will rule when there is no precedent. As more court decisions issue on

that "if the insurance company intended a different interpretation, it should have stated so in plain English so that their policyholders understand what is necessary to protect their interests and collect their benefits under the policy"); Gross v. Sweet, 400 N.E.2d 306, 307-09 (N.Y. 1979) (citing a plain language statute and concluding that release from negligent conduct was unenforceable); Morgan v. Sanford Brown Inst., 137 A.3d 1168, 1181 (N.J. 2016) (holding an arbitration clause unenforceable because it was not written in plain language); Kernahan v. Home Warranty Adm'r of Fla., Inc., 199 A.3d 766, 781 (N.J. 2019).

[343] BRYAN A. GARNER, GARNER'S GUIDELINES FOR DRAFTING & EDITING CONTRACTS 1 (West Academic 2019).

[344] Lori D. Johnson, *The Ethics of Non-Traditional Contract Drafting*, 84 U. CIN. L. REV. 595, 618–20 (2016).

the kinds of evidence courts examine, drafters will receive more predictability. Since a statute imposes the duty, lawmakers could pass it with a delayed effective date, allowing drafters time to revise their contracts.

A focus on consumer understanding also constrains courts more than current contract law. Currently, judges have no guidance on what to consider and may consider evidence that is irrelevant or inaccurate.[345] By contrast, the Duty encourages parties and courts to rely on evidence, data, experts, and science to determine what does and does not affect understanding. Over time, both research and case law may reach consensus.

Finally, the Disruption Objection is correct that there are significant costs to implementing the Duty, but those costs will be borne by transactional lawyers, not sellers. The Duty will void most templates and databases of contracts of adhesion. Yes, lawyers will need to learn a new skillset and learn how to test consumer understanding. But the tools are readily available. In-house lawyers who have successfully experimented with converting contracts to plain language did so without the aid of outside counsel.[346] Artificial intelligence and software already promises to write contracts in plain language.[347] A 2024 study showed how artificial intelligence-powered writing assistants could improve the readability of

[345] *See supra* note 184.

[346] David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. CHI. L. REV. 1395, 1427–45 (2018).

[347] *See, e.g.*, *Robin AI Launches Free AI-Generated Legal Dictionary*, SOLICITORS JOURNAL, https://www.solicitorsjournal.com/sjarticle/robin-ai-launches-free-aigenerated-legal-dictionary [https://perma.cc/F4GC-9CZP]; *The Contract Network Seeds $8M for Collaborative Contracting*, AXIOS, https://www.axios.com/pro/health-tech-deals/2023/08/17/contract-network-raises-8m-seed-collaborative-contracting; *ChatGPT: The Next Frontier of Construction Contracts*, FORCONSTRUCTIONPROS.COM, https://www.forconstructionpros.com/construction-technology/article/22861600/blackboiler-chatgpt-the-next-frontier-of-construction-contracts [https://perma.cc/WJ7N-R7AF]; LEGALESE DECODER, https://legalesedecoder.com/.

franchise disclosure documents.[348] Information and examples about incorporating legal design into contracts are publicly available.[349] In 2016, Margaret Hagan and Helena Haapio proposed a pattern design library showcasing real example of contracts that effectively incorporate legal design,[350] which led to the World Commerce and Contracting Contract Design pattern library.[351] A 2024 European Union-funded open-source book authored by over a dozen experts from around the world detailed how and why drafters are incorporating legal design into of legal documents.[352]

You could view the Duty as a form of consumer protection, ensuring sellers (clients) receive quality products (contracts) from drafters (lawyers). While the disruption will be abrupt and significant, the costs and disruption decrease as lawyers learn a new skillset and replace their templates. Moreover, this change may save the legal industry. The change will be dramatic, is necessary, and is overdue.

4. The Free Market Objection: The Free Market Will Incentivize Lawyers to Change Without the Duty

The Objection: The Free Market Objection argues that if more understandable contracts benefit sellers and sellers are the clients of transactional lawyers, then the market provides a natural incentive for understandable contracts. Therefore, the Duty is unnecessary and will result in court intervention

[348] Uri Benoleil, *Have Plain Language Laws Kept Up With The AI Revolution? An Empirical Test*, BERKELEY BUS. L. J. (forthcoming 2024) (manuscript at 9) (on file with the Columbia Business Law Review).

[349] *Contract Design Pattern Library*, WORLDCC FOUNDATION (Stefania Passera & Helena Haapio eds.), https://contract-design.worldcc.com.

[350] Helena Haapio & Margaret Hagan, *Design Patterns for Contracts*, *in NETWORKS. PROCEEDINGS OF THE 19TH INTERNATIONAL LEGAL INFORMATICS SYMPOSIUM IRIS 2016* 381–88 (Erich Schweighofer et al. eds., Österreichische Computergesellschaft 2016).

[351] *Contract Design Pattern Library*, *supra* note 349.

[352] *Design(s) for Law*, ZENODO (Rossana Ducato, Alain Strowel & Enguerrand Marique eds.), https://zenodo.org/record/10829515.

and litigation costs that impede the natural market for understandable contracts.

The Response: The free market is not incentivizing more understandable contracts or even innovation in contract design.[353] The proof is the enormous prevalence of incomprehensible contracts[354] and the extensive literature on "sticky" boilerplate terms that lawyers reuse even though those terms may be "unenforceable, incomprehensible, or illogical."[355]

Several reasons likely confront any market incentives to innovate contracts. First and most importantly, the predominant reason lawyers use traditional language is not predictability; it is cost. They crib from one template to another through the generations because doing so is cheaper than inventing new language.[356] No one knows who the original author was or why that author chose that language.[357] According to one recent study, the only thing holding back lawyers from making contracts more understandable is time and money. When researchers presented lawyers with traditional and plain-language versions of contracts, they were better at comprehending and recalling the plain language version.[358] Even more interesting, lawyers rated the

[353] George G. Triantis, *Improving Contract Quality: Modularity, Technology, and Innovation in Contract Design*, 18 STAN. J.L. BUS. & FIN. 177, 193–97 (2013) (identifying impediments to contract innovation, including lack of market incentives).

[354] *See supra* Part II.A.

[355] Erik F. Gerding, *Contract as Pattern Language*, 88 WASH. L. REV. 1323, 1354 (2013).

[356] Triantis, *supra* note 354, at 186-90.

[357] Joseph Kimble, *Another Example from the Proposed New Federal Rules of Evidence*, Mich. B.J., 46, 46 (2009) (explaining why lawyers are poor drafters); Joseph Kimble, *You Think Lawyers Are Good Drafters?*, Mich. B.J., 54, 54 (2015) ("No, I'm sorry, but most lawyers are not skilled drafters. It doesn't matter how smart or experienced they are or how many legal documents they have drafted. Most--a supermajority, probably--are lacking. And yet, oddly enough, while they tend to be blind to their own shortcomings, the poor quality of others' drafting is plain for them to see.")

[358] Eric Martinez, Francis Mollica & Edward Gibson, *Even Lawyers Do Not Like Legalese*, 120 PROCS. NAT'L ACAD. SCIS. 1, 1 (2023).

plain-language version significantly higher in quality and no less enforceable, rated the authors as significantly more hirable, were significantly more likely to agree to use the contract, and predicted clients would be significantly more likely to sign the contract.[359] The results suggest lawyers use traditional language primarily because of the habit and incentives to rely on templates.[360] The cost of changing templates are difficult to quantify. Transactional lawyers would need to acquire a new skill that is not adequately addressed in law school or in continuing legal education classes.[361] Second, the benefits of change are difficult to quantify. The current system works well for transactional lawyers who can rely on templates. While change could bring the benefits of new business, those benefits are difficult to calculate in the long run because contract drafters cannot hold intellectual property rights in their contracts or prevent others from copying them.[362] Third, there are pervasive myths among lawyers that can prevent them from replacing legalese with understandable language, like assumptions that clients value complexity over simplicity, or that more understandable language inevitably oversimplifies the content.[363]

[359] *Id.* at 3.

[360] *Id.* at 2, 5.

[361] Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study*, 53 J. LEGAL EDUC. 80, 86–87 (2003); James E. Viator, *Legal Education's Perfect Storm: Law Students' Poor Writing and Legal Analysis Skills Collide with Dismal Employment Prospects, Creating the Urgent Need to Reconfigure the First-Year Curriculum*, 61 CATH. U. L. REV. 735, 741–42 (2012); Heidi K. Brown, *Breaking Bad Briefs*, 41 J. LEGAL PROF. 259, 296 (2017).

[362] Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution*, 88 N.Y.U. L. REV. 1, 7 (2013). *Cf.* John F. Coyle & Joseph M. Green, *Contract as Swag*, 124 PENN ST. L. REV. 353, 378 (2020) (noting the absence of intellectual property rights, but suggesting contract innovation can build a valuable reputation). This article leaves open the question of whether there are intellectual property rights for contract designs that involve the kinds of visuals that in a non-contract context might receive protection.

[363] Wayne Schiess, *What Transactional Drafters Should Know About Plain English*, 39 TEX. J. BUS. L. 515, 524 (2004); Joseph Kimble, *The Great*

No single reason accounts for contract stickiness. Here again, Professors Gulati and Scott systematically examined economic and psychological justifications for a particularly sticky contract provision including learning externalities, network externalities, negative signaling, hindsight bias, the costs of innovating new contract terms, the law firm business model, herd behavior, risk aversion, free riders, and cognitive biases.[364] No one explanation accounted for the failure to change.[365] What's more, none of the people interviewed could adequately explain why they did not change the clause: "the explanations we were given for why a troublesome clause was allowed to remain in subsequent contracts were both diverse and conflicting. Moreover, we determined from our research that these explanations often rested on myths that were based on unsupportable factual premises. . . . The myths that we were told are best understood as ways in which the lawyers were able to deflect what would otherwise be obvious failures to correct errors in the formulation of historic boilerplate."[366] Ultimately, Gulati and Scott concluded the best law firms will "evolve governance mechanisms that facilitate and support innovations."[367] In short, innovation is possible; it is lawyers not language that stands in the way.

5. The Unintended Consequences Objection: The Duty Will Actually Harm Consumers

The Objection: The Unintended Consequences Objection contends that the Duty will backfire by harming consumers. Perhaps the Duty will discourage sellers from providing products and services focused on people with major barriers to comprehension. Or the Duty might gut the unconscionability defense, one of the few doctrines consumers

Myth That Plain Language Is Not Precise, 7 SCRIBES J. LEGAL WRITING 109, 111 (2000).

[364] GULATI & SCOTT, *supra* note 251, at 34–43, 73–108.

[365] *Id.* at 164–65.

[366] *Id.* at 7.

[367] *Id.* at 164–65.

can draw on. The Duty weakens the defense because if a court is considering unconscionability, it has already found a contract is formed and therefore the consumer could not argue confusing language supports a finding of unconscionability. Plus, large businesses could overwhelm individual consumers with questionable industry-backed research showing incomprehensible contracts are understandable.

The Response: The Objection raises fair points, but each kind of unintended consequence is highly unlikely.

For the small subset of contracts for products or services intended predominantly for people with barriers to comprehension who themselves (as opposed to a guardian) enter a written contract, the Duty imposes a manageable burden. Such scenarios exist. Just imagine an online course for recent immigrants who struggle with English or in-game purchases in video games for children.[368] In such cases, sellers know how to communicate effectively with these consumers. Their marketing, advertising, package design, and customer service departments all have experience communicating with such consumers. The lawyers drafting the contracts might not. But they will acquire that skill, perhaps with the client's help. Doing so is possible. After all, lawyers represent children, immigrants, and others with communication barriers and nonetheless have an ethical obligation to effectively communicate complex information.[369] Indeed, these lawyers might even develop a valuable expertise in drafting contracts understandable to these particular consumers. Noted above, technology may help too.[370]

As for the unconscionability defense, the Duty will weaken it but that weakening is worth the cost. The Duty transfers the plain language analysis from procedural

[368] Goodstein, *supra* note 72, at 296–97 (noting that children's games hide advertisements for microtransactions within in-game items such as presents and cake).

[369] *See* Model Rules of Pro. Conduct r. 1.4, 1.14 (Am. Bar Ass'n, 1983); ABA Ethics Op. 500 (Oct. 6, 2021), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba-formal-opinion-500.pdf.

[370] *See supra* note 347.

unconscionability to contract formation. This transfer strengthens the plain language analysis. Under current doctrine, plain language is one of many factors considered, is never dispositive, is often an amorphous and toothless standard, is rarely raised and decided, and rarely succeeds.[371] By contrast, the Duty makes understandability a question of contract formation, a requirement always decided by a court even when there is an arbitration clause[372] and a topic parties can present scientific evidence on which will give it rigor. True, the potential grounds for procedural unconscionability shrink, but consumers relying on unconscionability are facing a longshot anyway and usually require some degree of substantive unconscionability to win. In short, the Duty allows parties to make the same argument with considerably lower hurdles.

Finally, there usually will be no market incentive for businesses to fund research defending their contracts. Tobacco companies have a strong market incentive to fund research supporting tobacco use because tobacco is essential to their product. However, contract language usually is not essential to a seller's product. Typically, contract language serves as a means to an end. In fact, noted above, the sellers will likely benefit from clearer contracts and appreciate the Duty removing the impediment (lawyers) to contract revisions.[373] If any seller does have a market incentive to create research defending incomprehensible contracts, their competitors will likely have an incentive to challenge that research, as will companies developing contract drafting tools that promise understandable contracts.[374]

[371] *See supra* note 175.

[372] *See* Fedor v. United Healthcare, Inc., 976 F.3d 1100, 1105 (10th Cir. 2020) ("The issue of whether an arbitration agreement was formed between the parties must always be decided by a court, regardless of whether the alleged agreement contained a delegation clause or whether one of the parties specifically challenged such a clause.")

[373] *See supra* note 235.

[374] *See supra* pp. 38–39.

CONCLUSION

Substance does not trump form. While substantive terms make a contract a "bad deal," the form of the contract determines whether a deal has been made in the first place. The opportunity to understand a contract is essential to contract formation. Currently, the form of most contract offers deprives buyers of that opportunity, thereby undermining the integrity of the contract. Both sellers and buyers suffer from incomprehensible contracts and benefit from those that are understandable.