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Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?

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ONLINE BOILERPLATE: WOULD MANDATORY WEBSITE DISCLOSURE OF E-STANDARD TERMS BACKFIRE?

Robert A. Hillman*

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INTRODUCTION

A law backfires when it produces results opposite from those its drafters intended.¹ Lots of laws may have backfired. For example, people opposed to hate crimes legislation think that the laws “inflame prejudice rather than eradicate it.”² The Endangered Species Act, according to some analysts, has helped destroy rather than preserve the creatures listed by the Act.³ Even

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1. See Robert A. Hillman, *The Rhetoric of Legal Backfire*, 43 B.C. L. REV. 819 (2002) (documenting and critiquing the frequent charge of backfire); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 U. CHI. L. REV. 407, 407 (1990) (“[Some] regulatory strategies . . . achieve an end precisely opposite to the one intended, or to the only public-regarding justification that can be brought forward in their support.”).

2. Jeffery Rosen, *Foreword*, 97 MICH. L. REV. 1323, 1324 (1999) (describing JAMES B. JACOBS & KIMBERLY POTTER, *HATE CRIMES: CRIMINAL LAW & IDENTITY POLITICS* (1998)).

3. Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 424 (1994); John Charles Kunich, *The Fallacy of Deathbed Conservation Under the Endangered Species Act*, 24 ENVTL. L. 501, 561 & n.220 (1994) (citing Robert J. Smith, *The Endangered Species Act: Saving Species or Stopping Growth?*, CATO REV. BUS. & GOV’T REG., Winter 1992, at 83, 85).

consumer protection laws, some believe, increase prices and confuse consumers instead of protecting them.⁴

This Article analyzes whether mandatory website disclosure of e-standard terms, advocated by some as a potential solution to market failures when consumers contract over the Internet, is another potential legal backfire. By mandatory website disclosure, I do not mean a “clickwrap” presentation of terms, in which a consumer must click “I agree” or the like on a screen presenting the terms prior to the completion of a transaction in progress.⁵ Mandatory website disclosure would require a business to maintain an Internet presence and to post its terms prior to any particular transaction so that a consumer could read and compare terms without making a purchase at all.

The problem is not that mandatory website disclosure would increase the cost of doing business, which would be passed on to consumers in the form of higher prices. Businesses have been unable to demonstrate that displaying their terms on their websites would be costly.⁶ Nor should drafting rules that implement the law be too difficult.⁷ Businesses could be required to display their terms on their homepage or on another page reachable di-

4. See Hillman, *supra* note 1, at 819–20. Here are some more examples of possible legal backfires:

The Environmental Protection Agency’s actions to regulate coal-burning power plants is “so inept that some of the nation’s most populous areas will end up with a *worse* environment than would have resulted if the new policy had never been put into effect.” BRUCE A. ACKERMAN & WILLIAM T. HASSLER, *CLEAN COAL/DIRTY AIR* 2 (1981). . . . The Highway Beautification Act “thwarts highway beautification.” Craig J. Albert, *Your Ad Goes Here: How the Highway Beautification Act of 1965 Thwarts Highway Beautification*, 48 U. KAN. L. REV. 463, 467 (2000). . . . Trial judges’ admonitions to juries to disregard tainted evidence causes them to focus on that evidence. Regina Schuller, *Expert Evidence and Hearsay*, 19 LAW & HUM. BEHAV. 345, 349 (1995). . . . Boot camps for juvenile offenders, which mimic aspects of military basic training in lieu of incarceration, result in greater instead of lesser recidivism. Jayson Blair, *Ideals & Trends; Boot Camps: An Idea Whose Time Came and Went*, N.Y. TIMES, Jan. 2, 2000, § 4, at 3. Flexible spending accounts, instead of “hold[ing] down medical costs . . . encourage[] extra medical spending.” David E. Rosenbaum, *When Laws Shoot Themselves in the Foot*, N.Y. TIMES, Aug. 29, 1999, § 4, at 2. . . . Remarkably, even the 55 mile-per-hour speed limit is not sacrosanct. A joint study by the Department of Transportation and the Federal Highway Administration reported that lowering speed limits increased the number of accidents. Effects of Raising and Lowering Speed Limits, Report No. FHWA-RD-92-084 (U.S. Dep’t of Transp., Fed. Highway Admin., 1992), available at <http://www.ibiblio.org/rdu/sl-irrel/index.html>, discussed in Eric Peters, *Demise of ‘Double Nickel’ Speed Limit Sought*, WASH. TIMES, Sept. 15, 1995, at E13. The Federal Communication Commission’s fairness doctrine decreased instead of increased the broadcasting of diverse viewpoints. . . . The fuel economy standards imposed on automobile manufacturers increased rather than decreased our dependence on foreign oil.

Id. at 820–21 n.5.

5. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 464 (2002). In contrast, in a “browsewrap” transaction, a consumer who is downloading software or purchasing goods electronically views a screen that refers to terms that can be found elsewhere. Browsewrap, therefore, permits consumers to bypass the standard form and to “agree” to the terms without ever seeing them. See *id.*

6. See Jean Braucher, *Amended Article 2 and the Decision to Trust the Courts: The Case Against Enforcing Delayed Mass-Market Terms, Especially for Software*, 2004 WIS. L. REV. 753, 768 (“Advance disclosure in the age of computers and the Internet is simple and cheaper than printing copies and getting them into boxes.”).

7. See *infra* notes 64–67 and accompanying text.

rectly through a clearly identified hyperlink. Further, businesses could be required to prove the availability of their terms by furnishing relatively inexpensive archival records of their websites. Mandatory website disclosure may backfire, however, because it may not increase reading or shopping for terms or motivate businesses to draft reasonable ones, but instead, may make heretofore suspect terms more likely enforceable.⁸

Part I reviews why market forces may fail adequately to police standard forms on the Internet. It summarizes previous work in which I report that, despite the relative luxury of time and the lack of sales pressure, consumers generally do not read their e-standard forms presented during a transaction beyond price and the description of the goods and rarely shop for terms.⁹ As a result, market pressure may be insufficient to deter some businesses from overreaching.

Part II shows that mandatory website disclosure as a remedy for market failure is worthy of a focused analysis because its surface attractiveness means that lawmakers are likely to adopt it. Mandatory website disclosure is appealing because, in theory, it would increase the numbers of readers of and shoppers for standard terms, who would have time to contemplate and compare terms, or, at least, it would increase the opportunity to read and shop for terms. Further, mandatory website disclosure would help motivate businesses to write fair terms in order to avoid losing customers to competitors with better terms or to avoid adverse publicity from watchdog groups that can monitor websites and spread the word about unreasonable terms quickly and easily over the Internet. Mandatory website disclosure, therefore, arguably would promote reasonable terms, decrease the instances of market failure, and legitimize the idea that e-purchasers have assented, at least impliedly, to the terms.¹⁰ Further, mandatory website disclosure would not be too expensive or administratively infeasible.¹¹

Part III addresses whether mandatory website disclosure can succeed. Despite its appeal, I worry that it may not achieve its objectives, or worse, may backfire. My preliminary empirical work on e-consumer reading of standard forms, as well as studies of e-shopping behavior, suggests that advance disclosure of terms likely will fail to increase reading or shopping for terms.¹² This should be no surprise. Despite the opportunity to read, most

8. See *infra* notes 93–99 and accompanying text.

9. See generally Hillman & Rachlinski, *supra* note 5; Robert A. Hillman, *On-Line Consumer Standard-Form Contracting Practices: A Survey and Discussion of Legal Implications*, in IS CONSUMER PROTECTION AN ANACHRONISM IN THE INFORMATION ECONOMY? (forthcoming 2006).

10. Braucher, *supra* note 6, at 768 (“To force advance disclosure that facilitates shopping and thus market policing, courts should find no agreement to mass-market terms not publicly available before a customer initiates an order.”).

11. See *infra* notes 64–67 and accompanying text.

12. My survey results show that only four percent of purchasers generally read their e-purchase contracts beyond price and product description. See Hillman, *supra* note 9; see also Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 687–88 (2004) (“It is unlikely that the Internet buyer will devote more time to reading text on the website than more traditional buyers devote to reviewing the terms of tangible [standard forms].”).

e-consumers may still have ample rational reasons for not reading and cognitive processes that deter reading and processing terms.¹³ In addition, e-consumers, drawn to the speed and novelty of the Internet, are unlikely to have the patience or discipline to compare terms regardless of when the terms become available. Further, watchdog groups may not positively motivate businesses because they may lack influence and because businesses may conclude that the benefits of particular terms outweigh any potential costs in adverse publicity.

In light of the potential failure of mandatory website disclosure to increase reading and to discipline businesses, the only effects of the proposal may be to insulate businesses from claims of procedural unconscionability and to create a safe harbor for businesses to draft suspect terms. My goal is not to claim that mandatory website disclosure will certainly backfire so that the proposal should be taken off the table. In fact, I conclude that mandatory website disclosure ultimately may be the most viable alternative. I simply want to elaborate on the reasons that the possibility of backfire should be taken seriously before moving in the direction of mandatory website disclosure.

I. THE E-STANDARD-FORM ENVIRONMENT

A. *Do Consumers Read Their E-Standard Forms?*

Professor Rachlinski and I maintained that the e-standard-form environment presented consumers with several advantages:

Several factors suggest that consumers can defend themselves against undesirable terms more easily in the electronic environment. E-consumers can shop in the privacy of their own homes, where they can make careful decisions with fewer time constraints. They can leave their computers and return before completing their transactions, giving them time to think and investigate further. Also, at present, e-consumers tend to be better educated and wealthier than paper-world consumers, suggesting that they can better fend for themselves in the marketplace.

The Internet has also taken comparison shopping to a level that is unimaginable in the real world. The ease with which consumers can compare business practices, including the content of standard forms, suggests that consumers do not need judicial intervention to protect themselves from business abuse.¹⁴

Notwithstanding these benefits, we saw several pitfalls for consumers in the e-world, consisting of either rational, cognitive, or social reasons for failing to read terms or to consider them in their decisions. Some of the rational reasons coincide with paper-world barriers to reading, such as

13. Even consumers who read their terms do not necessarily account for them in their decisionmaking. See generally Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

14. Hillman & Rachlinski, *supra* note 5, at 478 (footnotes omitted).

boilerplate's lack of lucidity, consumers' lack of bargaining power and choices, and the relative likelihood that nothing will go wrong.¹⁵ In addition, the e-environment adds to the futility of reading because of the lack of a live contracting partner and the time and effort necessary to locate terms that e-businesses can easily hide.¹⁶ In short, e-consumers may rationally compare the costs and benefits of reading terms and find a net benefit in spending their time on another activity.

Cognitive reasons for failing to read and process terms also coincide with those in the paper world. These include consumers' propensity to equate "low probability" risks with "zero probability" risks,¹⁷ and their tendencies to digest a limited quantity of information and to rely instead on hunches and processes that simplify decisionmaking.¹⁸ For these reasons, terms that apply when things go wrong, such as dispute resolution and forum selection, especially may not be salient to consumers.¹⁹

On the surface, the e-environment appears to favor e-consumers by eliminating social pressures such as hovering sales agents and impatient people in line.²⁰ However, Rachlinski and I pointed out that the e-environment substitutes other hurdles to reading and processing terms. E-consumers may not attach appropriate significance to a mouse click and therefore may fail to appreciate the seriousness of their actions.²¹ Further, computers and the Internet appear to cast a spell over many consumers, making them impatient, even impetuous.²² We used the term "click-happy" to describe the activity of many consumers contemplating e-standard forms.²³

In light of these factors, Rachlinski and I predicted that e-consumers were just as unlikely to read and shop for standard terms as their paper-world counterparts, who, by and large, ignore their standard forms and fail to shop for favorable terms.²⁴ Preliminary empirical evidence from my forthcoming survey of ninety-two contracts students bears out this

15. *Id.* at 446–47.

16. *Id.* at 479–80.

17. Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw. U. L. REV. 700, 720 (1992).

18. Hillman & Rachlinski, *supra* note 5, at 452–53.

19. Hillman, *supra* note 9, at 12 tbl.5C.

20. *See* Hillman & Rachlinski, *supra* note 5, at 480.

21. *Id.* at 481; *see also* Anonymous Posting to ContractsProf Blog, http://lawprofessors.typepad.com/contractsprof_blog/2005/04/paper_not_plast.html (Apr. 27, 2005) ("The 'cautionary' functions of a contract are easier to achieve through the formalities of a written document" (relying on a report in BNA's Electronic Commerce and Law journal)).

22. *See infra* notes 77–85 and accompanying text.

23. Hillman & Rachlinski, *supra* note 5, at 479–80.

24. *Id.* at 485. Few empirical studies examine consumer reading of standard forms in the paper world. Most commentators merely cite or quote Todd Rakoff's piece on contracts of adhesion for the proposition that consumers do not read standard forms. *See* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983); *see also* Korobkin, *supra* note 13, at 1217 n.45.

prediction.²⁵ Beyond price and product description, only four percent of the sample read their e-purchase contracts “as a general matter.”²⁶ Further, forty-four percent of the respondents reported affirmatively that, other than price and product description, they *do not read* their e-purchase contracts under any circumstances.²⁷ One-third of the respondents may be spurred on to read when the value of the contract is high, and one-third may read when the vendor is unknown.²⁸ About seventeen percent read some selected terms, mainly warranties, product information, disclosures, and warnings.²⁹ Impatience accounts most often for the failure of respondents to read their forms, reinforcing the image of the “click-happy” consumer.³⁰ Finally, only seven percent of respondents shop for advantageous terms (beyond price and description of the goods) despite the advantage of shopping on the Internet.³¹

B. Can Market Pressure Discipline E-Businesses?

Despite the apparent failure of most e-consumers to read their standard forms and to shop for terms, standard-form contracting is good for businesses and consumers alike, provided that market or other forces deter businesses from overreaching. The pros and cons of standard forms are well-known.³² The bottom line is that standard forms reduce the cost of doing business because the drafter, familiar with its products and services, can best determine the risks it can efficiently bear and the risks better allocated to the consumer.³³ Further, businesses that use standard forms do not have to bear the cost of bargaining over terms. Drafters can reduce prices because of these savings.³⁴

25. Hillman, *supra* note 9. The survey inquired, among other things, about the frequency of electronic contracting, the subject matter (purchases or subscriptions), the place and time of making such contracts, the extent to which participants read forms, the particular terms read, the reasons for not reading, and conditions and mechanisms that would promote reading. The survey also compared the practices of men and women and of frequent and occasional users.

Respondents could select more than one response to many of the questions discussed *infra* in text accompanying footnotes 26–31.

26. *Id.* at 7.

27. *Id.* at 8.

28. *Id.*

29. *Id.*

30. Sixty-five percent of the respondents failed to read for this reason. *Id.* at 10.

31. *Id.* at 13. PC Pitstop’s licensing agreement promised a “consideration” to anyone who read their terms and sent an email to an address listed in the agreement. It took four months and more than 3000 downloads before anyone wrote the email. Larry Magid, *It Pays to Read License Agreements*, PC PITSTOP, <http://www.pcpitstop.com/spycheck/eula.asp> (last visited Oct. 14, 2005). My colleague Doug Kysar points out that PC Pitstop is a free site and people are therefore unlikely to read the terms of use.

32. See, e.g., Rakoff, *supra* note 24.

33. Hillman & Rachlinski, *supra* note 5, at 437–39.

34. See Robert A. Hillman, *Rolling Contracts*, 71 *FORDHAM L. REV.* 743, 747 (2002).

Many scholars, Rachlinski and I included, have discussed whether market forces discipline the drafters of standard forms.³⁵ Notwithstanding the common failure of most consumers to read standard forms, analysts have suggested that in competitive markets a small number of readers, whom businesses cannot afford to lose, may be sufficient to deter overreaching.³⁶ Competition for market share in the e-environment may therefore deter businesses from drafting onerous terms or even motivate them to write terms favorable to consumers.³⁷ Because e-consumers can easily spread the word about the nature of the terms, the Internet should increase this incentive.³⁸

However, market pressure may be insufficient to discipline businesses.³⁹ In insufficiently competitive industries, businesses can afford to lose the small cadre of readers and dictate onerous terms to the nonreaders.⁴⁰ Further, in more competitive climates, businesses may be able to identify readers and offer them more favorable terms. E-technology facilitates such segregation by enabling businesses to gather data on consumer behavior on the Internet.⁴¹

In addition, e-commerce offers businesses new and inexpensive strategies for manipulating consumers to minimize standard-term shopping. As Rachlinski and I pointed out, businesses can experiment with modes of presentation, including methods of accessing the standard terms, graphics,

35. Hillman & Rachlinski, *supra* note 5; *see also* Korobkin, *supra* note 13.

36. *See, e.g.*, Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1409 (1983).

37. *See* Hillman & Rachlinski, *supra* note 5, at 469–70. Akerlof’s “lemons model” explains that businesses will write only average quality terms if their customers are not aware of better terms and therefore will not pay more for them. *See* Avery Wiener Katz, *Standard Form Contracts*, 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 502, 504 (Peter Newman ed., Stockton Press 1998) (“The lemons model applies quite straightforwardly to the case of form contracts, since such contracts vary substantially in their terms and the drafting party . . . knows much more about those terms than the nondrafting party.” (discussing George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970))).

38. Hillman & Rachlinski, *supra* note 5, at 470; Katz, *supra* note 37, at 505 (“If reputational concerns lead drafters of forms to moderate their opportunism, regulation may be largely unnecessary.”).

39. There is ample evidence that some businesses seek to take advantage of consumers. *See, e.g.*, Jeff Sovern, *Towards a New Model of Consumer Protection: The Problem of Inflated Transactions Costs*, 47 WM. & MARY L. REV. (forthcoming Mar. 2006) (marshaling evidence of businesses’ strategies to increase consumer transaction costs, such as by utilizing rebates). Businesses that seek to defraud customers are beyond the scope of this Article.

40. Gillette, *supra* note 12, at 695.

41. Hillman & Rachlinski, *supra* note 5, at 471–72; *see also* Donnavieve N. Smith & K. Sivakumar, *Flow and Internet Shopping Behavior: A Conceptual Model and Research Propositions*, 57 J. BUS. RES. 1199, 1207 (2004) (“To ensure the desired shopping behavior, e-tailers should attempt to manage the shoppers’ flow states on an individual basis. They should invest in tools that enable them to develop personal profiles of their customers, while garnering information regarding the consumers’ skills and their perceptions of the challenges presented by shopping the site.”). Segregation of readers will work, of course, only if watchdog groups are ineffectual. *See infra* notes 48–50, 91–92 and accompanying text.

and font sizes, to determine which presentations most effectively deter reading, and can use those strategies when the consumer decides to contract.⁴²

In the article reporting my survey, I evaluated various proposals for intervention in the e-market on the assumption that market failures exist and that the benefits of regulation exceed its costs.⁴³ The proposals include enforcing clickwrap but not browsewrap contracts, adopting more specific rules about presentation and agreement to terms, requiring a cooling-off period, and adopting substantive mandatory terms.⁴⁴ Suffice it to say here that enforcing only clickwrap terms may not be enough because, for the reasons already mentioned, consumers are unlikely to read and digest the terms presented on a screen during a transaction. Further, other methods of attracting attention to the terms, such as requiring bold text or clicking after each term on the screen (or both), might increase reading, but analogous strategies in the paper world have had mixed results, probably in part because consumers, worn down by the contracting process, are unlikely to be riveted to attention by such formalities.⁴⁵ In addition, contracting could become prohibitively expensive for e-businesses if consumers could retract their consent during a cooling-off period, and for little gain because consumers are as unlikely to read terms after a transaction as during one.⁴⁶

42. Hillman & Rachlinski, *supra* note 5, at 479. Rachlinski and I also noted:

Studies of e-commerce confirm the suspicion that the Internet is not yet a consumer's paradise. In theory, the easy access to information that the Internet provides should reduce prices and reduce price dispersion between businesses that supply similar goods. Although e-commerce has had this effect on some commodities, wide dispersions in prices can be found. In some cases, the disparities are no lower on the Internet than in the real world. These results indicate that e-consumers have yet to exploit the full benefits of the electronic environment. Despite the Internet's apparent benefits for consumers, these findings reveal that businesses still have many opportunities to exploit consumers' lack of information about goods and services.

Id. at 473–74 (footnotes omitted).

43. Hillman, *supra* note 9.

44. See *id.* For the definitions of clickwrap and browsewrap, see *supra* note 5 and accompanying text.

45. See Korobkin, *supra* note 13, at 1234 (“‘Notice’ is a prerequisite of salience, but notice is not a sufficient condition of salience.”); see also David Frisch & John D. Wladis, *General Provisions, Sales, Bulk Transfers, and Documents of Title*, 46 BUS. LAW. 1455, 1495–96 (1991) (discussing courts’ varying requirements regarding “conspicuousness” in disclaimers of implied warranties under the UCC). My survey of contracts students’ e-standard-form practices revealed that the respondents were more likely to read if they were required to click “I agree” at the end of each term (49% or 45/92). Forty-two percent (39/92) of respondents also thought that they would read bold or otherwise highlighted text. Only 24% (22/92) thought they would read terms presented in a pop-up window and 23% (21/92) thought they would read when the terms appear on the screen as a series of individual windows that must be clicked. Clicking “I agree” at the end of all of the terms would induce reading among only 17% of the respondents (16/92). Perhaps the most significant finding is that only 5% (5/92) of the respondents are more likely to read when they “must click” on a link to another page to read the terms. This “browsewrap” strategy, however, is heavily utilized by online merchants.

Respondents could select more than one response to the questions discussed here.

46. Cf. Jean Braucher, *The Failed Promise of the UCITA Mass-Market Concept and Its Lessons for Policing of Standard Form Contracts*, 7 J. SMALL & EMERGING BUS. L. 393, 404 (2003); Korobkin, *supra* note 13, at 1265. For example, consumers might not remove already-downloaded software from their computers.

Finally, prescribing mandatory terms that extend regulation beyond the tested limits of unconscionability and related litmus tests of reasonable contracting, such as the doctrines of duress and misrepresentation, runs into serious autonomy objections and a legitimate concern over whether third-party regulators can effectively identify the class of terms that are the product of market failures.

Perhaps the most practical and promising suggestion is to require pre-contract mandatory website disclosure of terms. The next two Parts of this Article analyze this proposal in depth.

II. THE POTENTIAL BENEFITS OF MANDATORY WEBSITE DISCLOSURE

To assess whether the law should require businesses to make their standard forms available on their websites so that consumers can peruse them even before deciding to make a purchase, lawmakers should assess the costs and benefits of doing so. This Part shows that a very promising theoretical case for mandatory website disclosure can be made. Nonetheless, in Part III, I confess to serious reservations about whether mandatory website disclosure can be successful.

In theory, mandatory website disclosure would increase the number of readers of standard forms and shoppers for terms to a level that businesses could not ignore. Further, mandatory website disclosure would allow consumers to educate themselves by perusing and comparing terms far removed from the excitement and anticipation of an imminent purchase. Businesses in competitive markets would vie for a larger market share by writing terms attractive to consumers. Market segregation of readers would be unsuccessful because of the volume of readers. Businesses in less competitive industries would seek to draft attractive terms to appeal to the high volume

Liberal return policies among retailers in analogous shrinkwrap transactions constitute an extralegal cooling-off period that seems to work, but return policies vary. *See, e.g.*, Deborah Tussey, *UCITA, Copyright, and Capture*, 21 *CARDOZO ARTS & ENT. L.J.* 319, 329 n.51 (2003) ("Any consumer could have [reported] that software retailers refuse to accept returns of opened software packages."); Glen O. Robinson, *Personal Property Servitudes*, 71 *U. CHI. L. REV.* 1449, 1475 n.92 (2004) ("A class action suit has been filed against Microsoft and various retailers claiming a conspiracy to defraud the public on the grounds that the retailers have refused to accept return of opened software packages by customers who refuse to accept the license terms." (citing *Complaint for Consumer Damages, Rescission and Unlawful and Unfair Business Practices, Baker v. Microsoft, Inc.*, Civil Action No. 030612 (Cal. Super. Ct. filed Feb. 7, 2003))). The amended complaint in *Baker* claims that if a consumer does not accept Microsoft's end user license agreement ("EULA"), the retailer typically will not give the consumer a refund. *See First Amended Complaint for Consumer Damages, Rescission and Relief from Unlawful, Unfair and Fraudulent Business Practices, Baker v. Microsoft Corp.*, Civil Action No. 030612 (Cal. Super. Ct. filed May 1, 2003), available at <http://www.techfirm.com/AmendedComplaint-Filed.pdf>. Microsoft's website offers, with some exceptions, a thirty-day return policy for all retail software products. The consumer is informed that "[r]etail products can most easily be returned through the retailer where the product was purchased, subject to that retailer's return policy, or directly to Microsoft, subject to the policy below." Microsoft North American Retail Product Returns, <http://www.microsoft.com/info/nareturns.htm> (last visited June 21, 2005).

of readers as well. Consumers could shop in these markets with some confidence that prices adequately reflect the quality of the terms.⁴⁷

Even if mandatory website disclosure did not increase consumer reading very much, in theory it still might motivate businesses to write fair terms. Businesses would worry, for example, that disclosure would facilitate watchdog-group exposure of unsavory terms. Such exposure could ruin a business's reputation, which is especially critical on the web where consumer trust is the key to success,⁴⁸ and thereby diminish the business's market share.⁴⁹ For example, the Electronic Frontier Foundation lists "dangerous terms" on its website, such as those that bar criticism of products, permit monitoring of a transferee's computer, or allow modification of agreements without notice or consent.⁵⁰

By increasing the opportunity to read e-standard forms, contract law would also reinforce autonomy reasons for enforcing contracts.⁵¹ Consumers who have an opportunity to read and compare terms can better choose for themselves whether and with whom to contract. Mandatory website disclosure would therefore reinforce Llewellyn's conception of consumers' blanket *assent* to reasonable standard terms.⁵² Llewellyn wrote that, so long as a consumer has access to standard terms, her signature constitutes an implied delegation to the drafter of the duty to draft fair and efficient boilerplate terms, even if the consumer does not read them.⁵³ The delegation is not unlike a consumer's delegation to a seller of the duty to select the component parts of goods.⁵⁴ Under Llewellyn's theory, consumers who agree to a standard-form transaction after mandatory website disclosure would have a more difficult time complaining of hollow assent.⁵⁵ The end

47. See generally Christian J. Meier-Schatz, *A Fresh Look at Business Disclosure*, 51 AM. J. COMP. L. 691 (2003) (book review).

48. See, e.g., Efthymios Constantinides, *Influencing the Online Consumer's Behavior: The Web Experience*, 14 INTERNET RES. 111, 118 (2004) ("The physical distance, lack of personal contact and the anonymity of the Internet . . . increas[e] the consumers' anxiety and risk perceptions.").

49. For a more sobering discussion of watchdog groups and their effect, see *infra* notes 91–92 and accompanying text.

50. See Annalee Newitz, *Dangerous Terms: A User's Guide to EULAs*, ELEC. FRONTIER FOUND., <http://www.eff.org/wp/eula.php> (last visited Oct. 28, 2005).

51. See John Dalzell, *Duress by Economic Pressure I*, 20 N.C. L. REV. 237, 237 (1942) ("We have been proud of our 'freedom of contract,' confident that the maximum of social progress will result from encouragement of each man's initiative and ambition by giving him the right to use his economic powers to the full.").

52. See Hillman & Rachlinski, *supra* note 5, at 492 ("If e-consumers have some opportunity to read the standard terms before deciding whether to enter into the contract, then courts should apply Llewellyn's presumption of enforceability of such terms. Just as in the paper world, consumers understand the existence of standard terms and agree to be bound by them, even though they rarely choose to read them." (footnote omitted)).

53. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370–71 (1960).

54. Hillman & Rachlinski, *supra* note 5, at 461–62; Jeffrey E. Thomas, *An Interdisciplinary Critique of the Reasonable Expectations Doctrine*, 5 CONN. INS. L.J. 295, 308 & n.63 (1998–99).

55. Other factors, such as a lack of alternative terms, still may make a consumer's assent rather artificial, of course.

result would be that freedom of contract would have some meaning within the realm of e-standard-form transactions.⁵⁶

Relatedly, even if disclosure fails to increase reading, it still may have symbolic value by demonstrating lawmakers' efforts to make business-consumer transactions fairer.⁵⁷ Disclosure would show that lawmakers are not content treating consumer assent to standard forms as what Lon Fuller called an "apologetic or merciful [legal] fiction[]." ⁵⁸ Fuller thought that the presumption that "everyone knows the law," for example, is a useful fiction to "apologize" for the troubling reality that people who are punished often do not even realize that they are breaking the law.⁵⁹ Disclosure laws in the context of e-standard-form contracts would mean that lawmakers were making an effort to turn into something more meaningful the "apologetic" legal fiction that consumers understand and assent to the terms of their e-standard-form contracts.

Finally, mandatory website disclosure would eliminate painful decisions, like drawing lines between those consumer nonreaders who are entitled to relief from standard terms and those who should be subject to the duty to read.⁶⁰ After all, consumers bring a whole range of emotions, attitudes, and resources to their shopping experience.⁶¹ The law cannot easily sort out those Internet shoppers who should fend for themselves from those who, because of emotional or cognitive processes, may have failed to internalize adverse terms.⁶²

56. See James J. White, *Contracting Under Amended 2-207*, 2004 WIS. L. REV. 723, 750. Of course, consumers may have limited choices because of the commonality of terms within an industry. Common terms do not necessarily indicate collusion among businesses, however. Instead it may mean that the terms are efficient. See Hillman & Rachlinski, *supra* note 5, at 439 ("Because the best allocation of risks is not likely to vary between businesses within an industry, most businesses will offer terms similar to those offered by their competitors. Less experienced businesses simply copy their senior counterparts. Uniformity of terms within an industry, in fact, might indicate that the industry is highly competitive." (footnote omitted)).

57. See William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 WIS. L. REV. 400, 404 ("Perhaps we would have a more just society if relations between consumer and merchant appeared more honest, even if there is no change in consumer behavior or the content of transactions."); see also L.B. Edelman & M. Galanter, *Law: Overview*, 12 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES, 8537, 8539 (Neil J. Smelser & Paul B. Baltes eds., 2001) ("Law operates not simply as a body of regulatory controls and public edicts, but also as a set of symbols, with different meanings for different social groups").

58. LON L. FULLER, LEGAL FICTIONS 84 (1967).

59. *Id.* (quoting PIERRE DE TOURTOULON, PHILOSOPHY IN THE DEVELOPMENT OF LAW 386 (Martha M. Read trans., 1922) (omission in original)):

It is an essentially human tendency to refuse to believe sad events and to invent happy ones. What the lawmaker sometimes tries to do is precisely this—to efface unfortunate realities as far as possible and to evoke the shades of fortunate realities which have not been achieved . . . While the fiction is a subtle instrument of juridical technique, it is also clearly the expression of a desire inherent in human nature, the desire to efface unpleasant realities and evoke imaginary good fortune.

60. MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 163 (1993).

61. See *infra* notes 62, 77–81 and accompanying text for a discussion.

62. According to one study, e-shoppers may be confident or apprehensive, and highly involved or apathetic. Letecia N. McKinney, *Internet Shopping Orientation Segments: An Exploration*

The obvious costs of mandatory website disclosure should not be too high because displaying standard forms on a website should be inexpensive. In fact, to date, businesses have failed to mount an effective argument against the requirement.⁶³ Nor should lawmakers have insurmountable problems drafting rules that successfully implement disclosure. The rules of mandatory website disclosure must be clear and detailed if e-businesses are to be discouraged from devising methods of deterring reading.⁶⁴ Easily accessible terms written in plain English on a website's homepage or on a clearly identified hyperlink may add to the phalanx of readers, but legalese that can be reached only after several mouse clicks likely would not.⁶⁵ Mandatory website disclosure rules must therefore account for such strategies by requiring businesses to display terms on their homepages or on another page only a few clicks away. Further, the rules should bar scroll-down windows that disappear or are too small.⁶⁶

Enforcement costs would include the cost of proving that a business failed to display its terms prior to the transaction in a manner prescribed by the law or at all. Mandatory website disclosure rules could allocate the burden of proof to businesses to prove the content of their websites, which would motivate them to keep accurate evidence of the content. Many e-businesses currently keep archival records of their website content, including when it was introduced, modified, and removed. They also maintain server logs, which indicate when and if a web page was modified. Under a regime of mandatory website disclosure, all e-businesses would have to follow suit. Of course, businesses willing to engage in fraud may be able to alter their records, but this problem should not be too different from the challenge of weeding out fraud in the paper contracting world. Evidence to corroborate a business's proof could include, for example, the testimony of other visitors to the website during the contested period. E-businesses can find these visitors by consulting their web logs. In the e-world, we can also

of Differences in Consumer Behavior, 32 FAM. & CONSUMER SCI. RES. J. 408, 418-421 (2004). Such attitudes may have a significant effect on reading habits, as well as purchasing frequency. Requiring courts to sort out which attitudes should lead them to discount the duty to read seems unmanageable.

63. Braucher, *supra* note 6, at 768. Few software vendors currently display their terms on their website. See Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1806-07 (2000) [hereinafter Braucher, *Delayed Disclosure*] (reporting the author's finding that 87.5% of software companies did not make precontract disclosures of their terms).

64. See Braucher, *Delayed Disclosure*, *supra* note 63, at 1807-08.

65. "There are design prescriptions gleaned from empirical studies of web-searching behavior that claim that if in three clicks users do not find information that at least suggests they are on the right track, they will leave the site." Gary M. Olson & Judith S. Olson, *Human-Computer Interaction: Psychological Aspects of the Human Use of Computing*, 54 ANN. REV. PSYCHOL. 491, 500 (2003). The Federal Trade Commission has promulgated rules of website disclosure. Federal Trade Commission, *Dot Com Disclosures*, <http://www.ftc.gov/bcp/online/pubs/buspubs/dotcom/index.html> (last visited Dec. 21, 2005). For a discussion, see Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 302 (2003).

66. See Kunz et al., *supra* note 65, at 302.

expect rapid technological advances combined with entrepreneurial activity to produce new methods of establishing credible evidence of website content over time. For example, if contract law adopts mandatory website disclosure, do not be surprised to see new web businesses spring up to archive the standard forms of e-businesses.⁶⁷

III. WILL MANDATORY WEBSITE DISCLOSURE BACKFIRE?

A. *Will Mandatory Website Disclosure Alleviate Market Failures?*

Mandatory website disclosure targets businesses by enforcing only those terms that appear on a business's website prior to a transaction. Such a rule, of course, does not mandate the content of terms. Disclosure is intended to influence businesses to write reasonable terms on the theory that more consumers will read and shop for terms or that watchdog groups will publicize adverse terms.

The problem is that people do not always act the way lawmakers predict, and therefore, laws designed to achieve purposes by influencing people's conduct can go astray, or even backfire.⁶⁸ For example, the Endangered Species Act, mentioned in the Introduction to this Article, may threaten the creatures it was designed to protect because lawmakers failed to predict that landowners would lawfully destroy potential habitats so that listed species would not occupy them.⁶⁹ Hate crimes laws may decrease social harmony by focusing people's attention on "conflict between races, genders, and nationality groups,"⁷⁰ and by creating the perception that such crimes occur more frequently than they do in reality.⁷¹ Will mandatory website disclosure also backfire?

1. *Disclosure as a Method of Increasing Reading*

To make a long story short, mandatory website disclosure may fail to increase reading and shopping for terms. This is not a revelation, of course. Many commentators seem to have lost faith in disclosure as a remedy for market failures in standard-form contracting partly because they have seen

67. For a discussion of current web archiving activity in the context of a recent lawsuit, see Tom Zeller, Jr., *Keeper of Expired Web Pages Is Sued Because Archive Was Used in Another Suit*, N.Y. TIMES, July 13, 2005, at C9 ("The Internet Archive was created in 1996 as the institutional memory of the online world, storing snapshots of ever-changing Web sites and collecting other multimedia artifacts. . . . The Internet Archive uses Web-crawling 'bot' programs to make copies of publicly accessible sites on a periodic, automated basis. Those copies are then stored on the archive's servers for later recall using the Wayback machine.").

68. Hillman, *supra* note 1, at 846-47.

69. Gidari, *supra* note 3, at 424 ("Because of the habitat modification restrictions . . . landowners are taking pains to manage their lands so that protected, or potentially protectable, species do not occupy the site.").

70. JACOBS & POTTER, *supra* note 2, at 5.

71. *Id.* at 132.

the relative failure of laws such as Truth in Lending,⁷² and partly because they now better understand the reasons people sometimes fail to respond to information.⁷³ Considerable evidence points to the failure of mandatory website disclosure too.⁷⁴

Mandatory website disclosure may not increase reading and shopping because most of the rational, cognitive, and emotional reasons consumers do not read terms still apply regardless of when businesses display the terms. Businesses can still hide behind legalese and consumers, who do not have bargaining power, will continue to process information selectively and to believe that nothing will go wrong.⁷⁵ In fact, by increasing the information available to consumers, the early display of terms may add to the problem of information overload.⁷⁶ Further, without the immediacy of an actual transaction, consumers may find plowing through legalese more tedious and worthless than ever.

Perhaps most important, if consumers are truly “click happy,” they are unlikely to settle down simply because of advance disclosure of terms.

72. 15 U.S.C. §§ 1601–1667f (2000); see Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 261 (2002) (“Consumer disclosures retain their appeal for lawmakers despite the growing realization that they do not work. Existing disclosure forms, meant to remedy the incomprehensibility of consumer transactions, are viewed widely as inadequate to the task.”); Whitford, *supra* note 57, at 420 (“[T]he evidence presently available suggests that any success truth-in-lending will have inducing credit shopping for lower interest rates will be modest and concentrated among higher income groups.”); *id.* at 403 (“The continued reliance on disclosure as an important technique for regulating consumer transactions is contrary to the advice of many commentators, who have argued that although not positively harmful, such regulation is typically almost useless.”).

Some commentators see a value in disclosure laws such as Truth in Lending. See, e.g., Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for “Asymmetric Paternalism”*, 151 U. PA. L. REV. 1211, 1233 (2003) (“The Act provides potentially substantial benefits to those who are less than rational”); Christopher L. Peterson, *Truth, Understanding, and High-Cost Consumer Credit: The Historical Context of the Truth in Lending Act*, 55 FLA. L. REV. 807, 815 (2003) (“With aggressive and practical reform, Truth in Lending may blossom into a much more effective strategy”).

73. See, e.g., Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305, 309–10 (1986) (discussing information overload); Korobkin, *supra* note 13. Disclosure may be ineffective, of course, in many different contexts. See, e.g., Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005) (arguing that disclosure may have a perverse effect in the context of conflict of interests).

74. Some analysts are not optimistic that mandatory website disclosure of terms will increase reading of standard forms. See, e.g., Gillette, *supra* note 12, at 687–88 (“It is unlikely that the Internet buyer will devote more time to reading text on the website than more traditional buyers devote to reviewing the terms of tangible [standard forms].”).

75. Hillman, *supra* note 34, at 757 & n.79.

76. See William N. Eskridge, Jr., *One Hundred Years of Ineptitude: The Need for Mortgage Rules Consonant with the Economic and Psychological Dynamics of the Home Sale and Loan Transaction*, 70 VA. L. REV. 1083, 1133 (1984) (“Consumers have a limited ability to absorb and process information during any given period. If they receive too much, they either will be unable to make accurate comparisons or will be discouraged from even trying to evaluate the data.”); Jeff Sovern, *Toward a Theory of Warranties in Sales of New Homes: Housing the Implied Warranty Advocates, Law and Economics Mavens, and Consumer Psychologists Under One Roof*, 1993 WIS. L. REV. 13, 28–29 (“Though some research indicates the contrary, a number of studies show that people make less effective decisions when overloaded with information; that is, they select a less than optimal choice.” (footnote omitted)); Eduardo Porter, *Choice is Good. Yes, No or Maybe?*, N.Y. TIMES, Mar. 27, 2005, § 4, at 12 (“Too many options may drive consumers away.”).

Understanding people's Internet shopping processes adds to the pessimism. Analysis of such shopping is still relatively novel, but early reports are not promising. One study identifies two major types of shoppers on the Internet.⁷⁷ One type, the "convenience" shopper, has a particular purchase in mind and rationally uses the Internet to reduce search costs, such as by using a search engine to gather information on a product and compare prices and by reading product reviews online.⁷⁸ The "recreational" shopper, on the other hand, shops for the sheer enjoyment of the experience and, stimulated by the interactive nature of the Internet, often purchases impulsively.⁷⁹ Recreational shoppers "may be driven by *need to purchase* rather than *need for a product*."⁸⁰ Analysts report that recreation may be "more important than convenience for online shoppers."⁸¹ Even shoppers who begin their shopping experience rationally to reduce the costs of their transaction may ultimately engage in impulse buying.⁸² The Internet environment apparently contributes to impulse purchasing because of its anonymity (people purchasing impulsively prefer privacy), availability twenty-four hours a day, and other "recreational shopping features," such as "e-mail alerts of new products . . . [and] special offers."⁸³

In short, the online environment may contribute to impulsivity and even addictive purchasing among consumers. For consumers who succumb, Internet shopping may consist in large part of "consumers who utilize interactive features [to] enter a seamless sequence of responses, a 'flow' state in which their sense of time and reality becomes distorted and their self-control is diminished."⁸⁴ These findings "challenge [the] explanations of the online shopping experience that emphasize economic convenience and the operation of an efficient electronic marketplace. . . . [O]nline buying could be out of control and . . . not . . . judged against rational standards of consumer efficiency."⁸⁵

77. Junghyun Kim & Robert LaRose, *Interactive E-Commerce: Promoting Consumer Efficiency or Impulsivity?* 10 J. COMPUTER-MEDIATED COMM., Nov. 2004, http://jcmc.indiana.edu/vol10/issue1/kim_larose.html.

78. *Id.*

79. *Id.*

80. *Id.* (citing Dennis W. Rook & Robert J. Fisher, *Normative Influences in Impulsive Buying Behavior*, 22 J. CONSUMER RES., Dec. 1995, at 305-13).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* Reluctance to purchase because of fear of disclosing information diminishes when firms have good reputations, when the consumer is familiar with a site, and even when sites have "visually pleasing" layouts, including easy navigation and "professionalism." See Miriam J. Metzger, *Privacy, Trust, and Disclosure: Exploring Barriers to Electronic Commerce*, 9 J. COMPUTER-MEDIATED COMM., July 2004, <http://jcmc.indiana.edu/vol9/issue4/metzger.html> ("Web sites of respected organizations that were visually pleasing were rated high in trustworthiness and expertise.")

85. Kim & LaRose, *supra* note 77; see also Robert LaRose & Matthew S. Eastin, *Is Online Buying Out of Control? Electronic Commerce and Consumer Self-Regulation*, 46 J. BROADCASTING & ELECTRONIC MEDIA 549, 559 (2002) ("[D]efficient self-regulation . . . may be a more important

On the other hand, some characteristics of online shopping may contribute to shopping rationality. Convenient access to prices, search engines that easily take consumers to competitors' sites, shopping carts, product reviews, and the absence of a hands-on bonding experience with a product moderate consumer impulsivity.⁸⁶ In fact, business publications paint a rosy picture of the Internet's empowerment of consumers who are "taking control of the way [they] learn[] and hear[] about products."⁸⁷

More study is necessary before we can reach any conclusions about the ultimate influence of the Internet on shopping behavior, but if the Internet marketplace is comprised in large part of impulse purchasers or people who turn into impulse purchasers, it is obviously not the kind of environment that is conducive to reading and shopping for terms prior to a transaction. If consumers throw caution to the wind in the very decision to partake in a transaction, this suggests only a small possibility that such consumers would studiously read and shop for terms prior to the transaction. Ironically, the very lack of time pressure that might be thought to increase reading may do the opposite. Theorists of the Internet shopping process surmise that the lack of time pressure ironically may increase impulse purchasing as consumers get caught up in the enjoyment of surfing for unnecessary items.⁸⁸ At the least, additional time allows consumers more interaction with a site, which, in turn, may enhance a consumer's favorable attitude toward and confidence in the site.⁸⁹ Such beliefs may reduce the perceived need to read terms.

To this point, I have said nothing about the reality that people review their standard forms on their screens instead of by reading hard copy. Will this increase or decrease reading? Reading from the screen can be difficult on the eyes, not to mention can create orthopedic emergencies.⁹⁰ In short, reading is probably not enhanced by the absence of hard copy. People can print out terms, but from what has been said already about impatience and the like, the likelihood seems small that people will take the time to do so. In short, the lack of a hard copy probably contributes to consumers' lack of reading of their standard forms.

determinant of online buying activity than either rational or economic expectations about the cost and convenience of Internet shopping or the personal and economic characteristics of e-commerce consumers.").

86. LaRose & Eastin, *supra* note 85, at 552; see also Robert LaRose, *On the Negative Effects of E-Commerce: A Sociocognitive Exploration of Unregulated On-Line Buying*, 6 J. COMPUTER-MEDIATED COMM., Apr. 2001, <http://www.ascusc.org/jcmc/vol6/issue3/larose.html>.

87. Paul Markillie, *Crowned at Last*, *ECONOMIST*, Apr. 2, 2005, at 3, 4; see also Alan Mitchell, *Marketers Must Face Up to the Buyer's Side of the Coin*, *MKTG. WEEK*, Apr. 14, 2005, at 32 (discussing how the Internet "turns the tables" on businesses). *But see* Victoria Murphy, *The Revolution That Wasn't*, *FORBES*, Oct. 27, 2003, at 210 (asserting that the anticipated benefits of online shopping have failed to materialize).

88. Kim & LaRose, *supra* note 77 (citing Sharon E. Beatty & M. Elizabeth Ferrell, *Impulse Buying: Modeling Its Precursors*, 74 J. RETAILING 169-91 (1998)).

89. Metzger, *supra* note 84.

90. For example, at the moment that I am typing this, I am experiencing pain in my shoulder and neck from looking at this manuscript on the screen. This is likely bad for my tennis.

2. Watchdog Groups

As discussed, mandatory website disclosure might create incentives for businesses to write reasonable terms because watchdog groups can spread the word about unreasonable terms. The problem is that although the fear of watchdog groups may create incentives to avoid drafting *outrageous* terms (that would be stricken today under unconscionability or related law anyway), this concern may be insufficient to deter businesses from drafting *marginal* terms that may not create significant reputational concerns but would harm consumers just the same. For example, a business that is wary of watchdog groups may shy away from a term that requires a consumer to reimburse the business's attorneys' fees and costs regardless of the outcome of a dispute or to arbitrate in a non-neutral setting,⁹¹ but such terms may be unenforceable on unconscionability grounds anyway. On the other hand, a firm may decide that the benefits of a forum-selection clause that is inconvenient for the consumer or a term allowing an Internet site to "collect[] certain non-personally identifiable information about a consumer's web surfing and computer usage,"⁹² outweighs the costs of whatever bad press they may produce. And, as I will discuss more fully below, such terms may be enforceable if disclosed on a business's website because of the absence of procedural unconscionability.

The efficacy of watchdog groups also depends on whether consumers and news services access the groups' websites and whether visitors to these sites publicize the information. This will depend in turn on the reputations of the watchdogs, as well as the reliability and timeliness of their information. Currently, apparently because of insufficient resources and questionable consumer interest, many watchdog groups monitor only large software developers. The success of watchdog groups has yet to be proven.

B. Legal Ramifications of Mandatory Website Disclosure When Consumers Do Not Read and Shop

An ominous possibility is that mandatory website disclosure will backfire and create a safe haven for businesses that are seeking to write marginal, but not outrageous terms. Terms once potentially stricken on unconscionability or related grounds might be enforceable because of their reasonable disclosure.

Most cases entertaining an unconscionability or related claim, including those involving e-commerce, look for both procedural and substantive

91. See Kunz et al., *supra* note 65, at 280-81 ("[T]he terms most commonly providing the impetus to challenge the validity of electronic standard-form agreements are dispute resolution clauses, forum selection clauses, disclaimers of warranty, limitations of liability, and prohibitions on the commercial use of the data or software available on the site." (footnotes omitted)).

92. Magid, *supra* note 31 (discussing the licensing agreement that accompanies Gain Publishing's eWallet software, which authorizes the collection of data about a consumer's reading behavior, TV interests, and communication partners, effectively allowing the company to "follow [the transferee] around").

unconscionability.⁹³ Procedural unconscionability involves the manner in which the contract was made and regulates situations resembling, among other things, duress, misrepresentation, or, most important here, an unfair presentation of the terms.⁹⁴ Although contract law generally does not evaluate the adequacy of an exchange,⁹⁵ substantive unconscionability focuses on whether the exchange is grossly imbalanced.⁹⁶ Many courts apply a sliding scale to the unconscionability inquiry whereby “the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”⁹⁷

If courts rarely strike a contract or term based solely on one or the other kind of unconscionability, but use a sliding scale of procedural and substantive unconscionability, what will be the outcome of mandatory website disclosure? Perhaps marginal terms, insufficiently outlandish to motivate a court to strike them on substantive unconscionability grounds alone, will be enforceable because of their early disclosure on the website. For example, consider the term mentioned earlier allowing a software vendor to “collect[] certain non-personally identifiable information about [a consumer’s] Web surfing and computer usage.”⁹⁸ If such authorization to “follow around” the consumer⁹⁹ is fully disclosed on the vendor’s webpage, I doubt that a court would strike it on substantive unconscionability grounds alone.

The result of mandatory website disclosure would constitute a legal backfire. Mandatory website disclosure would narrow consumer rights rather than expand them. Although the Critical Legal Studies movement once claimed that laws seemingly designed to even the playing field are part of a conspiracy of the elite to “justify the prevailing conditions of social life and erect . . . barriers to social change,”¹⁰⁰ the motive for adopting manda-

93. See, e.g., *Comb v. PayPal, Inc.*, 218 F. Supp. 2d 1165, 1172–76 (N.D. Cal. 2002); *In re RealNetworks, Inc., Privacy Litigation*, No. 00 C 1366, 2000 WL 631341 (N.D. Ill. May 8, 2000); *Strand v. U.S. Bank Nat’l Ass’n* ND, 693 N.W.2d 918, 924 (N.D. 2005); Korobkin, *supra* note 13, at 1254 (“Courts usually search for ‘substantive unconscionability’ only when there is evidence of a procedural defect in the bargaining process. Without evidence of ‘procedural unconscionability,’ courts generally defer completely to seller-drafted terms.”); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 487–88 (1967). But see Hillman & Rachlinski, *supra* note 5, at 457 & n.158 (citing some cases where procedural or substantive unconscionability alone was enough).

94. See Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 42 (1981).

95. Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 506 n.6 (2002).

96. Leff, *supra* note 93, at 485–86.

97. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

98. Magid, *supra* note 31 (quoting the licensing agreement that accompanies Gain Publishing’s eWallet software).

99. *Id.*

100. Allan C. Hutchinson & Patrick J. Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 209 (1984), quoted in ROBERT A. HILLMAN, *THE RICHNESS OF CONTRACT LAW* 201 (1997). For example, according to Donald Kennedy (I know his name is Duncan, but he once called me Richard Hillman in print), “the doctrine of unequal bargaining power represents a partial acceptance of distributive motives into the

tory website disclosure would be benign. Still, lawmakers must understand that their predictions about how people will respond to a law can miss the mark and must realize that a disclosure strategy may inadvertently place consumers in a worse position than the status quo and even forestall other attempts at reform.¹⁰¹

CONCLUSION

Despite all that has been said, mandatory website disclosure may still be the best strategy for dealing with the problem of e-standard forms. As mentioned, other solutions present significant problems of their own.¹⁰² Further, mandatory website disclosure is cheap, substantiates the claim of consumer assent, and constitutes a symbolic victory for those advocating greater fairness in e-standard-form contracting.

Of course, mandatory website disclosure is attractive for these reasons only if my fear of a legal backfire proves exaggerated because the benefits of disclosure outweigh the costs of the enforcement of some questionable terms. And perhaps I am being unduly pessimistic about the possibility that disclosure will backfire. After all, if disclosure were a good strategy for businesses to avoid unconscionability claims and of little concern because consumers do not read their standard forms, one would expect to see lots of precontract disclosure of e-standard forms already. Businesses tempted to draft unfair terms must therefore believe that disclosure benefits consumers. But I am not convinced by this argument. Business decisionmakers may themselves fail to make rational decisions for much the same reasons as consumers.¹⁰³ For example, businesses may be unduly risk averse concerning

domain of contract law, but an acceptance that is rhetorical rather than real—intended to disarm.” Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 622 (1982), quoted in HILLMAN, *supra*, at 204.

101. See Florencia Marotta-Wurgler, Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements (Aug. 22, 2005) (unpublished manuscript, on file with author) (noting that evidence suggests that “sellers whose boilerplate is more one-sided tend to make their contract harder to challenge by requiring buyers to unequivocally accept it”).

102. See *supra* notes 43–46 and accompanying text.

103. Although subject to debate, managers probably make cognitive errors, just like everyone else. See, e.g., MAX BAZERMAN, *JUDGMENT IN MANAGERIAL DECISION MAKING* 5 (4th ed. 1998) (“Since managers make hundreds of decisions daily, the systematic and time-consuming demands of rational decision making are simply not viable.”); Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1911 n.7 (2002) (“[T]he uncertainty and pressure from business competitors and rapid technological change has led executives to enter into mega-mergers on the basis of the kind of decision-making biases that, according to behavioral and psychological research, are typical of human beings reacting in the face of complexity and uncertainty. People often make decisions from little data, or from data that is exemplary, in the foreground or available, but that is not statistically representative.” (quoting James A. Fanto, *Braking the Merger Momentum: Reforming Corporate Law Governing Mega-Mergers*, 49 BUFF. L. REV. 249, 288–89 (2001))); Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy*, 101 MICH. L. REV. 482, 561–62 (2002) (“[T]raditional economists argue that because in markets decisionmakers pay a price for their mistakes they learn and correct their errors. The learning argument assumes, however, that decisionmakers are able to identify their mistakes, associate them with the costs they incur [sic] and

the outcome of disclosure and therefore prefer to hide their marginal terms, even though disclosing them actually would work to their advantage.

Ultimately, optimism about disclosure may depend on one's time frame for measuring the law's effects. Even if disclosure backfires in the short term, perhaps eventually the word will get out about a business's unsavory terms. Consider the experience of cigarette manufacturers who, in response to legislation, put warning labels on their packages. For a considerable period of time, these labels helped manufacturers "fend[] off smokers' suits" based on smokers' assumption of the risk.¹⁰⁴ As a result, "[w]hat was intended as a burden on tobacco became a shield instead."¹⁰⁵ In the long run, however, the package warnings, along with the many revelations about cigarette manufacturers' attempts to hide other adverse facts about their products, led to a massive change in public opinion and, ultimately, to serious legal sanctions against the cigarette companies.¹⁰⁶ Perhaps mandatory website disclosure will also have a long-term beneficial effect.

proceed to correct them. These assumptions are rarely met either in the case of entry or in other legally significant real-world settings." (footnote omitted)). For a general discussion of the fallibility of corporate cultures, see Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417 (2003).

104. Cain et al., *supra* note 73, at 3 n.2 (quoting Action on Smoking and Health, Warning: History of Tobacco Manipulation of Congress (Sept. 11, 1997), <http://www.no-smoking.org/sept97/9-11-97-1.html>).

105. *Id.*

106. For a discussion of public opinion's influence on lawmaking, see Robert A. Hillman, *The "New Conservatism" in Contract Law and the Process of Legal Change*, 40 B.C. L. REV. 879 (1999).