Minding the Gap

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ABSTRACT

Online and offline, relations between consumers and businesses are most frequently governed by consumer standard form contracts. For decades such contracts have been assumed to be one-sidedly biased against consumers. Consumer law seeks to alleviate this bias and empower consumers. Legislatures, consumer organizations, scholars and judges constantly look for ways to protect consumers from unscrupulous firms and unfair behaviors.

While consumers–businesses relations are assumedly administered by standardized contracts, firms do not always follow these contracts in practice. Sometimes there is significant disparity between what the written contract stipulates and what consumers experience de facto. Interestingly, firms often deviate from the written contract in favor of consumers, thus creating a gap ("the Gap"). In other words, firms often take a lenient approach despite the stringent written contracts they draft. This article examines whether, counter-intuitively, policy makers should add firms' leniency to the growing list of firms' suspicious behaviors.

The article proposes that firms' lenient approach, coupled with online tools and human psychology, may occasionally have surprising and harmful qualities. It illustrates how technological changes can turn the Gap into a key component in consumers' understanding, or perhaps misunderstanding, of consumer contracts. It examines when firms' leniency should be considered manipulative or exercised in bad faith. It then explores whether firms should be allowed to enforce the written contract even if they deliberately and consistently deviate from it.

The main contribution of this article is threefold: First, it points to the Gap and examines its foundations and origins. Second, it illustrates how the Gap complicates the interplay between reputation, conduct, trust and the need to protect consumers. By doing so, it demonstrates that the prevailing view concerning the Gap is seriously incomplete. While it is generally believed that the Gap is harmless or even desirable, we show that it might have serious adverse effects. The article asserts that, at the end of the day, the Gap may blend into a toxic mix that distorts consumers' perception and undermine rational decision-making. Third, it identifies key questions policy makers and courts should consider in respect of this said Gap.

INTRODUCTION

Often firms draft one-sided or stringent consumer standard form contracts ("SFCs") yet display a flexible and lenient approach to their consumers ("the Gap"). For instance, a vendor may stipulate a "no refund and no returns" policy, yet exhibit–at least in some circumstances–accommodating, lenient behavior. Alternatively, a firm may, in practice, accept consumers' behaviors as lawful even though such behaviors are, according to the SFC, a breach of contract. Should consumer law be wary of such a practice? Are there valid reasons for prohibiting firms from exercising this form of leniency?

The gap between contractual language and corporate conduct is frequently manifested as a deviation from the written SFC in favor of consumers. At first glance, firms should be allowed, if not encouraged, to exercise leniency. For decades, many have complained about firms that exploit unequal bargaining power and information asymmetries. Intuitively, therefore, contract law should not be concerned about firms' lenient practices that seem to benefit consumers.

But as this Article shows, the gap between the SFC and the firm's lenient behavior mandates close scrutiny. Such a Gap may stem from a range of motivations and can have nuanced implications. The Gap may distort consumers' perception and undermine rational decision-making. It can undermine the correct allocation of risks and diminish overall efficiency. It might be unfair, as well as counter other liberal values. Accordingly, we suggest regulating – or at least considering – not only firms' "bad" behavior (*e.g*., breach) but "good" behavior (*i.e*., leniency) as well.

To understand why, one should consider the changes the internet has brought to the way we seek information. In the digital realm, we overvalue, and over-rely on, some types of information. Given this reality, we show below that technological tools contribute towards turning the Gap into a key component in consumers' misunderstanding of consumer contracts.

A few academics have already noted and discussed the existence of the Gap.[1] Nonetheless, the literature on this issue is sparse, under-developed and under-theorized. Often it does not address the Gap explicitly or misses its meaning in the online era. It further neglects to examine consistently the Gap's relation to the key issue of firms' reputations. This article makes a modest yet innovative step to address these issues consistently and enrich contract law and consumer protection literature.

Indeed, when it comes to the formation of business-to-consumers contracts, the law and legal academia has traditionally focused on two main components. One is the consumer's behavior. Here, well known questions have been addressed: when does clicking "I agree" on web

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[1] *See, e.g.,* Stewart Macaulay, *Relational Contracts Floating in a Sea of Customs? Thoughts about the Ideas of Ian Macneil and Lisa Bernstein,* 94 NW. L. REV. 775, 791-92 (2000) (commenting on Bernstein's approach to commercial trade usage and the Gap). *See also* Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of how Standard Form Contracts Enable Cooperative Negotiation between Businesses and Consumers,* 104 MICH. L. REV. 857 (2006); Lisa Bernstein & Hagay Volvosky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts – Comment on the Work of Florencia Marotta-Wurgler,* 12 JRSLM. REV. LEGAL STUD. 128 (2015). Some authors have even started examining, sometimes implicitly, some limited facets of the relation between the Gap and the notion of reputation or opportunistic behavior. *See, e.g.*, Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce,* 42 HOUSTON L. REV. 975 (2005); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets,* 104 MICH. L. REV. 827 (2006); Ariel Porat & David Gilo, *Viewing Unconscionability through a Market Lens* 52 WM. & MARY L. REV. 133 (2010).

browsers signal consent? Do consumers even read SFCs to begin with? And if not, can an informed minority of consumers discipline sellers?[2] How should the law respond to the fact that consumers do not read–and are unable to understand–SFCs? The other main component that has received much scholarly and doctrinal attention is the language and form of SFCs. The central analytical questions here were: how should courts address terms buried in boilerplate? When should a term be invalidated due to unconscionability? Should sellers be allowed to enforce unexpected SFCs' terms (only) if such terms are disclosed in a specific way, such as inclusion in a warning box? Should SFCs and disclosures be simplified?[3]

This Article seeks to go beyond these two sets of queries. It suggests shifting some attention from consumers to firms and from contractual language to actual behavior. The Article further opines that firms' behavior and contractual language may be intertwined. The two can impact one another, and therefore should be scrutinized jointly or side-by-side. Following this logic, the Article examines whether, counter-intuitively, policy makers should add firms' lenient conduct to the growing list of firms' suspicious behaviors.

The Article is organized as follows: Part I provides the general background. The first Section explains what the Gap is. The second Section places the Gap in a broader social, commercial and technological context, demonstrating how it complicates the interplay between technology, reputation, conduct and law. It further explains how the Gap defies and changes the classic paradigm of consumer contract law. By doing so, we demonstrate that the prevailing view concerning the Gap is seriously incomplete. Slightly restated, while it is generally believed that the Gap is harmless or even desirable, we show that it may have serious adverse effects.

In Part II we provide a deeper view of the Gap, examining seven possible incentives firms may have to create one. We further discuss the degree to which such incentives should be considered legitimate. Part III contains five Sections which examine five central test-cases which further illustrate how the gap may be manifested. Following this, Part

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[2] *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 (1983); Shmuel I. Becher, *A 'Fair Contracts' Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 MICHIGAN J. L. REFORM 747 (2009); Amy Schimtz, *Pizza-Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV. 862 (2010); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts*, 43 J. LEG. STUD. 1 (2014).

[3] *See, e.g.*, Arthur Leff, *Unconscionability and the Code – The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014); Omri Ben-Shahar & Adam S. Chilton, *Simplification of Privacy Disclosures: An Experimental Test* (working paper, 2016).

IV discusses policy recommendations. It proposes various possible *ex post* and *ex ante* tools to minimize the unwarranted outcomes of the Gap as well as the implications of the Gap for empirical research of standard form contracting. A brief conclusion follows.

I. THE GAP IN CONTEXT

This Part provides the necessary background for understanding the Gap and the relevance and importance of this phenomenon. Section A explains what the Gap is, presenting a concrete example. Section B connects the four cornerstones of our thesis: contract language, firms' behavior, online information flow and the law.

A. What (is) the Gap?

Online and offline, relations between consumers and businesses are governed by consumer SFCs. Despite being so commonplace, or maybe partly because of being so widespread, consumers do not read SFCs. For decades, therefore, SFCs have been assumed one-sidedly biased against consumers.

In this context, one of the main objectives of consumer law is to empower consumers and level the consumer–firm playing field. Legislatures, consumer organizations, scholars and judges constantly seek ways to protect consumers from unscrupulous firms and unfair behaviors. Recently, an old-new notion – information flow – has raised hopes of its being a means to protect consumers.[4] Information flow as a restraining mechanism is of course not a new idea, but modern developments have brought a new twist to the tale.

The internet equips consumers with a variety of new platforms, which facilitates unprecedented information sharing among consumers. Such information sharing, which affects firms' reputations, is now experienced at an unimaginable volume. Online information flows allow consumers to learn about businesses and their contracts efficiently and quickly. Consumers are now informed by the impressions that other, experienced, consumers share and spread online. Consumers learn about firms' behavior before establishing a relationship with them, through the experiences that other consumers communicate.

Let us now return to the basic notions of consumer law. As has been observed by many, consumers do not read SFCs as part of the "offer and acceptance" process.[5] But given the online reality, we might argue that they become familiar with its content through the experiences that others

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[4] *See* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008). For a recent critical analysis and discussion *see* Sofia Ranchordas, *Online Reputation and the Regulation of Information Asymmetries in the Platform Economy*, CRITICAL ANALY. L. (forthcoming, 2018).

[5] *See* the discussion infra notes 10-11 and accompanying text. For a recent interesting discussion and suggestion *see* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014).

articulate, share and post online. In short, peer-to-peer information flows provide the necessary information consumers need, thereby substituting contract reading.[6]

Following this logic, firms that employ harsh, one-sided contract terms will undermine their reputation as the contractual language would be reflected in the noted information flow. They will thus lose consumers to fair competitors that do not employ biased SFCs. If this is indeed the case, the law should refrain from intervening in markets where good information flow exists. In such markets, consumers will know about their SFCs even without reading them. Firms, in return, are held in check due to reputational concerns and are likely to refine their policies accordingly. For instance, a few hours after a disgruntled consumer complained on tweeter about paying JetBlue a fee for a folding bike that fitted into his suitcase, the company decided to change its (unjust) policy.[7] When this dynamic successfully unfolds, legal intervention may become superfluous.

But while consumers–businesses relations are legally administered by standardized contracts, firms do not always follow these contracts in practice. At times there is significant disparity between what the written contract stipulates and what consumers experience *de facto*. That is, there is a crucial gap between how firms draft their contracts on the one hand, and how firms treat consumers on the other. Interestingly, the Gap is frequently manifested by deviation from the written contract *in favor* of consumers. In other words, firms often exercise a lenient approach in spite of the stringent written contracts employed.[8]

When and where the Gap exists, consumers may discover, after the fact, that it was the firm's behavior – rather than the contract – they were learning about through said information flows. Slightly restated, firms may attempt to preserve and enhance their reputation by demonstrating lenient behavior, while employing one-sided contracts. This may have multiple challenging results.

Perhaps an example will clarify. David considers registering with a renowned dating site, hoping to find his soulmate. Before registering, David surfs the internet. He reads feedback posted by some other users.

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[6] In a different context it has already been empirically proven that "information about the exchange beyond the contract substitutes for information in the contract." *See* Zev J. Eigen, *Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. INST. & THEORETICAL ECON. 124 (2012).

[7] *See A Day in the Life: Social Media, JetBlue Blue Tales Blog*, JETBLUE (Jan. 19, 2012), available at http://blog.jetblue.com/a-day-in-the-life-social-media/.

[8] Our article is concerned with one type of Gap: where the SFC is one-sided while actual behavior is lenient. Yet it is worth bearing other interesting Gaps in mind. One example is where the SFCs confer benefits on consumers who become aware of them. The firm will not provide consumers these benefits unless they ask for them. For a detailed discussion *see* Porat & Gilo, *supra* note 1. Still another type of gap is providing consumers rights and entitlements they cannot actually use. *See* Amy Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 ARIZONA L. REV. 213 (2016).

He looks at the websites testimonials. Feeling optimistic and excited about the bright and loving future ahead of him, he decides to "give it a shot".

As part of the enrollment process, David is required to provide personal information and build a personal profile. In his profile David notes that he is six feet tall, 26 years old, and earns 100,000 dollars a year. Yet in fact, David's height is one inch shorter, and his annual salary is merely 95,000 dollars. He is well aware of all these facts, yet believes these small inaccuracies are a legitimate part of the dating game.

On its homepage, the dating site David chose has a link (among many other links) that directs the user to lengthy terms of service (ToS). These note that the user (David, in this case) is prohibited from posting any incorrect information. The terms explicitly state: "the user shall not provide inaccurate, misleading or false information." Yet David does not open the link; hence, he is not aware of this term.

After dating a few mates, David receives an email from the dating site operator. The operator notifies David that he is in breach of the contract he accepted when joining the site. The operator further informs David that his account is therefore immediately terminated, and his access to the website denied. The email directs David to the terms discussed above. Simultaneously, the operator cites another term: "the operator reserves the right to immediately suspend or terminate the user's access to any of the services, without notice, for any reason or no reason." Lastly, the operator reports on a complaint it received from one of the women David had dated. This woman has complained about the "false and misleading information" David posted on his profile.

David is baffled by this outcome which leaves him quite helpless. Not only didn't he read the TOS, he also had no idea that the inaccurate information was of crucial importance to the women he dated. He was also unaware of the fact that it can lead to the termination of his account, and possible related expenses (both monetary and emotional). As noted, before entering the contract with the online dating site, David read some reviews posted by other, experienced users. None of these users mentioned a similar complaint or issue. David also knows, as other users of dating sites know, that many people do not provide accurate information about their age, salary, weight or income in their online profiles.[9] In fact, some of his acquaintances even told him that everyone posts little white lies on their online profiles and no one really checks or cares.

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[9] *See, e.g.*, DAN ARIELY, THE UPSIDE OF IRRATIONALITY, chapter 8 (2010). *See also* Greg Hodge, *The Ugly Truth of Online Dating: Top 10 Lies Told by Internet Daters*, HUFFINGTON POST (October 10, 2012), available at http://www.huffingtonpost.com/greg-hodge/online-dating-lies_b_1930053.html; Peter Holmes *et al.*, *Can You Get away with the Ten Most Common Online Dating Lies?* THE TELEGRAPH (October 13, 2015), available at http://www.telegraph.co.uk/men/the-filter/11922786/Can-you-get-away-with-the-ten-most-common-online-dating-lies.html.

In this scenario we are confronted with the legal question as to whether the site could lawfully terminate David's membership. As we illustrate below, in order to answer this question, one should explore the gap between the firm's contractual language and actual conduct. We turn to that next.

B. The Gap, Consumer Contracts and the Online Reality

Parties are generally expected to comply with the contract they enter. The law assumes that both parties believe that the agreed contract delineates and dictates their risks allocation, obligations and rights. Traditionally, it is assumed that the contracting parties are closely familiar with the contract's content. This however is not the case with respect to consumer SFCs. It is widely agreed that consumers tend not to read form contracts,[10] and for several good reasons linked to both rational and irrational behavior.[11]

From an economic perceptive, the "no reading" problem of consumer contracts facilitates a classic market failure of asymmetric (or imperfect) information.[12] Drafters may take advantage of consumers' inferiority or ignorance and draft biased contracts of the lowest quality possible.[13] As a result, courts, legislatures, academics and the general public frequently regard SFCs with distrust. Thus, courts and legislatures are called on to protect consumers from egregious one-sided contractual terms.[14]

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[10] *See, e.g.,* Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, WIS. L. REV., 679, 680 (2004) (noting that "[c]ommentators agree that buyers, or the vast majority of them, do not read the terms presented to them by sellers."); Lewis A. Kornhauser, Comment: *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151, 1163 (1976) (opining that "[i]n general the consumer will not have read any of the clauses, and most will be written in obscure legal terms."); RICHARD A. EPSTEIN, *Contract not Regulation: UCITA and High-Tech Consumers Meet Their Consumer Protection Critics*, in CONSUMER PROTECTION IN THE AGE OF THE 'INFORMATION ECONOMY', (JANE K. WINN, Ed. 2006) 227 ("It seems clear that most consumers – of whom I am proudly one – never bother to read these terms anyhow: we know what they say on the issue of firm liability, and adopt a strategy of 'rational ignorance' to economize on the use of our time.").

[11] *See, e.g.,* Robert A. Hillman & Jeffery J. Rachlinski, *Standard-form Contracting in the Electronic Age*, 77 N.Y.U.L. REV. 429 (2002) (providing economic, behavioral and social reasons); Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts,* 68 LOUISIANA L. REV. 118 (2007); 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 (2009).

[12] *See, e.g.,* Shmuel I. Becher, *Asymmetric Information in the Market for Contract Terms: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L. J**.** 723 (2008).

[13] *See, e.g.,* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

[14] Since SFCs are adhesion contracts frequently offered on a take-it-or-leave-it basis we focus on and analyze these contracts as an example. For a seminal article that calls to protect offerees who enter adhesion contracts *see* Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction,* 96 HARV. L. REV. 1174 (1983).

So far, contract and consumer law has focused on situations where the firm drafts unfair contract terms. The natural assumption here, of course, is that the parties are expected to follow the contractual language. If the firm drafts a fair contract and adheres to it, there is no need for legal intervention. Furthermore, if the firm drafts a fair contract but does not adhere to it, the consumer will have the right to sue the firm for breaching the contract. But what if the firm drafts an unfair contract yet, *at times*, deviates from it in favor of consumers, thus exhibiting fair conduct towards them? In the following matrix, one rubric has somewhat escaped the scrutiny of mainstream legal analysis.

Table 1- SFCs and firms' actual behavior

Firm's behavior / *Firm's SFC*	**Harsh**	**Lenient**
Harsh	Legal intervention may be justified	???
Lenient	Breach of contract	No intervention required

Should the law be concerned with firms' lenient behavior? Even with respect to unfair or harsh contracts, courts' willingness to intervene is context-dependent. One of the main factors that deter courts from intervening is the problem of *ex post* fair and efficient allocation of rights. Courts (or other legal entities) may find it difficult, sometimes even impossible, to re-write SFCs' terms instead of those that are struck down.[15] For that reason, it is important to seek out possible substitutes for blunt ex post legal interventions whenever possible.

An important factor that may diminish courts' tendency to intervene in SFCs is reputation. Following this line of reasoning, before yielding to legal intervention, the role of reputation ought to be considered.[16] In essence, the idea here is that reputational constraints may discipline sellers and incentivize them to behave fairly with consumers. If sellers are concerned about their positive reputation they may fear that executing biased SFCs will undermine it.

In this respect, reputation complements and possibly even replaces ex ante reading. Rather than being deterred by the (non-existent) reading consumers, firms are deterred by the "gossiping" ones. The latter will be quick to share with fellow consumers any disappointments or misfortunes. For instance, a New York hotel has tried to preserve its reputation by fining guests $500 for negative reviews posted online. However, after applying this policy consumers complained, the story

[15] *See, e.g.,* Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 592 (2003).

[16] *See, e.g.,* DORON TEICHMAN & EYAL ZAMIR, BEHAVIORAL LAW AND ECONOMICS (forthcoming, 2018), CH. 8 – CONSUMER CONTRACTS, Section F (discussing market solutions and reviewing the role of reputation).

went viral, the hotel's rating plummeted and the hotel ended that policy.[17]

Thus, firms that wish to maintain a solid reputation have strong incentives to conduct themselves fairly: they will be unwilling to use or capitalize on one-sided contractual provisions buried in an SFC that no one reads. This, in short, may ensure that sellers have sufficient profit-incentive to interact fairly with consumers. Therefore, online platforms that facilitate robust peer-to-peer information sharing have an important potential from consumers' perspective. They can significantly reduce the risks involved in contracting and the need for legal precaution-taking.

For reputation to be an effective means, it is imperative that sellers' reputations might potentially compromised by biased contracts and actions. This might indeed occur thanks to the noted digital and online information flows. Until the emergence of the digital age, the traditional information flow that consumers generated was rather partial in scope, limited to relatively few close friends and relatives.[18] Nowadays, individuals generate an enormous amount of content, frequently designed to be used by peers. Online information flow disperses information with amazing efficiency and accessibility.

Peer-to-peer information flow may have promising strength and quality for a variety of reasons. First and foremost, peer-to-peer information sharing may seem an innocent and objective way of communication. Individuals, therefore, tend to openly rely upon such information. On its face and unlike firms, most consumers post their feedback and reviews with no hidden agenda. Consumers share their experiences with no financial incentive, at least vis-à-vis other consumers. Consumers who communicate their perspectives online are not trying to manipulate or exploit other consumers. Moreover, sharing information online is part of a larger feature of increased trust among individuals. On top of that, humans exhibit a conformity bias (or herd behavior). We tend to follow others' behavioral patterns and social norms, which are frequently conveyed via these online information flows.[19] Last but not least, the aggregation of numerous consumer

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[17] *See, e.g.*, Jackie Huba, *Lessons from the Hotel that Fines Customers $500 for Negative Online Reviews*, FORBS (Aug. 4, 2014), available at https://www.forbes.com/sites/jackiehuba/2014/08/04/lessons-from-the-hotel-that-fines-customers-500-for-negative-online-reviews/#5e618cc179c5.

[18] The basic idea was perhaps most famously studied by Robin Dunbar, lately becoming known as "Dunbar's number" and cited by popular books and the media. *See, e.g.*, Robin Dunbar, *Neocortex Size as a Constraint on Group Size in Primates*, 22 J. HUM. EVOLUTION 469 (1992). The issue was discussed in MALCOLM GLADWELL'S best-seller, THE TIPPING POINT - HOW LITTLE THINGS MAKE A BIG DIFFERENCE, pp. 177–181, 185–186. For an interesting and accessible media review *see* Maria Konnikova, *The Limits of Friendships*, THE NEW YORKER (October 7, 2014).

[19] *See, e.g.*, Solomon E. Asch, *Opinions and Social Pressure*, in: READINGS ABOUT THE SOCIAL ANIMAL (9th Ed., edited by Joshua Aronson & Elliot Aronson) pp. 17-26 (2004).

reviews into one overall score provides consumers intuitive and handy information. In a way, it exempts them from the tedious task of reading, analyzing and acting on the abundant information. Thus, it economizes on consumers' scarce attention. Given this background, peer-to-peer information flow becomes very noteworthy for retailers, as it is a central information source for potential consumers.

Indeed, online consumers share their experiences all over the net, using various technologies and methods of online information distribution. Blogs, social networks and Apps, online forums, Twitter, as well as other tools – all allow consumers to share their experiences, thoughts and impressions with numerous potentially interested people. By posting and sharing their experiences, knowledgeable and educated users (*ex post* consumer) can inform other, inexperienced users (*ex ante* consumers). For instance, a consumer who contemplates dining at a given restaurant or lodging at a hotel can often find abundant reviews posted (on sites like TripAdvisor and Yelp) by others who have experienced the place. Likewise, a consumer who considers purchasing running shoes on Amazon is likely to find plenty reviews and ratings provided by other, experienced, shoppers.

This dynamic of information flow is enhanced not only by technology, but also by a social shift to a culture of information gathering and sharing. Technology enables consumers to share their experiences in a very friendly and inviting way and the public has been sure to follow. At the same time, technology enables consumers to seek and find information easily and inexpensively through the use of search engines and social networks. This trio – technology, sharing and gathering – creates a new reality in consumer marks, with important policy and legal implications.

In the context of consumer contract law and theory, information flows may have significant value with respect to reputation. As part of this general feature, users generate, among other things, information flows pertaining to *contractual aspects*. Information flows may therefore allow prospective consumers to become informed about the transaction they are considering and the contracts that govern them. They can learn a great deal about them merely by conducting a simple search and short read. This greatly empowers consumers, providing them with information and market power they have never held.[20] Such a reality in turn may level the consumer–firm playing field and thus imply less need for intervention in SFCs by regulators and courts.

Nevertheless, consumers' empowerment in this specific context is not yet to be celebrated: information flows do not necessarily promote information about the contract *per se*. To be precise, there are two kinds of information flow. The first concerns information regarding the written contract. This flow is generated by people who discover and share, *ex post*, problematic contract terms. It can also be generated by peer ventures which set out to educate the public about the contractual

[20] For a detailed account *see* Becher & Zarsky, *supra* note 4.

language.[21] These flows turn out to be weak and unimpressive. Studies continuously show that the general public is not interested in reading contract terms, reviewing and commenting on them, or reading about them.[22]

Yet the second type of flow deals with information about the firm's behavior, which might pertain to contractual aspects. Apparently, this latter kind of information flow is more impressive, interesting and noteworthy. It is this type of information flow that we focus our attention on.

In a nutshell, firms are often concerned about their overall reputation. However, online reputation apparently reflects firms' conduct, which is not necessarily similar or identical to its contract. In other words, if firms conduct themselves strictly according to the contracts they draft, information flows may indeed ensure that the contractual language is balanced. That is, online information flow is most powerful regarding governing the balance of contractual language where the firm's conduct and the contract's language are aligned. But if the two are misaligned, information flow and reputation concerns cannot potentially guarantee fair SFCs.

Firms have powerful incentives to deviate from the contract's four corners, thereby generating a gap between contract and conduct. They may deliberately stipulate one thing in their contracts, while choosing to do something else. Frequently, firms do not use and enforce their contractual rights in specific, yet recurring, instances. In such cases, the firm's reputation or information flow pertaining to its actions does not represent what the contract states. Instead, it addresses the firm's conduct, hence cannot contribute to the equilibrium of fair and efficient SFCs.

Reputation and online flow are weighty concepts that may re-shape the law of SFCs. Acknowledging firms' motivation to create a Gap is a necessary step in understanding the force and limits of these concepts. We turn to this now.

II. CONCEPTUALIZING THE GAP

The Gap can be manifested when firms allow divergence from the written SFCs in a way that benefits consumers.[23] Sometimes firm's

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[21] See, for instance, Forced Arbitration Rogues Gallery, PUBLICCITIZEN, http://www.citizen.org/forced-arbitration-rogues-gallery (last visited March 13, 2015). Some of the information is collected by the NGO itself. Yet much of it is reported by "active whistleblowers" who the firm actively solicits. See also TERMS OF SERVICE – DIDN'T READ, https://tosdr.org/.

[22] *See, e.g.*, Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard Form Contracts,* 43 J. LEG. STUD. 1 (2014).

[23] Occasionally firms do not exercise the rights and powers that the SFC confers. For instance, firms may refrain from enforcing contractual rights or terminating the contract, despite their contractual entitlement. We analyze specific examples *infra* Part III.

divergence from the contract's language is part of a systematic routine course of business. In other instances such deviation is sporadic and genuinely rare. Here we focus on the former.[24]

At this point a preliminary fundamental question emerges: if firms have the right to enforce or follow strict terms that benefit them, why don't they do so? Put simply, why do firms give up beneficial contract terms and generate a Gap instead? And if the firm intends to exercise leniency and not follow the one-sided legalese, why not incorporate lenient contract language *ex ante*? After all, some consumers might read the contract at some point and thus the firm will benefit from such lenient language.[25]

As the analysis in this Part demonstrates, firms have various incentives to create and use a Gap. Sections A-G below provide seven main motivations, indicating both benign and malign reasons for generating the Gap. This discussion also shows how possible behavioral, reputational, economic and public relation incentives interplay. Placing the Gap in a broader context will subsequently help us to craft proper policy responses.

A. Enhancing Reputation

One incentive for employing a Gap is enhancing firms' reputations.[26] Here we refer to situations in which the firm has a given contractual right but does not insist on it in practice. When aggrieved consumers turn to vendors for relief, the vendor will first refer them to the contractual provision. Then the vendor will inform customers that its consumer-friendly policy is to forgo the contractual rights. This might allow vendors to manipulate consumers into believing that they have received accommodating, perhaps even personal, treatment. For instance, a seller may waive his right to sue a consumer or terminate the contract because of a certain behavior. Or an airline may allow a costumer to make minor changes to her flight ticket (such as slight correction to one's name so to insure it is aligned with the passenger's formal name), even though she is not allowed to make any changes under the SFC. Since people are highly sensitive to losses,[27] saving

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[24] Drawing the lines between the two is certainly not easy. For now suffice it to say that further empirical and analytical work is required. We return to this point *infra*.

[25] If not *ex ante*, some consumers may read the contract *ex post*, once a dispute arises. *See, e.g.,* 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 (2010).

[26] Becher & Zarsky, *supra* note 4, at 342.

[27] Loss aversion is perhaps the most fundamental insight suggested and studied in Behavioral Economics. It stands at the heart of Prospect Theory, which was originally developed by Amos Tversky and Daniel Kahneman. *See, e.g.* Daniel Kahneman and Amos Tversky, *Prospect Theory: An Analysis of Decision under Risk*, 47 ECONOMITRICA 263 (1979). For various interesting legal implications *see* Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829 (2012).

consumers from facing potential losses will be highly appreciated by said consumers.

Interestingly, strong online information flow among consumers may temper this motivation.[28] Theoretically, with *ex post* information flow consumers may easily find out how vendors treat other customers. They can learn that the vendors consistently forgo their contractual rights. They can thus conclude that they are not receiving any preferable or generous treatment.

Yet from the vendor's perspective some reputational benefit may nevertheless be derived from such a strategy. First, there is no guarantee that online information flow indeed features the seller's lenient treatment. Many consumers may experience the lenient treatment yet refrain from posting it online due to insufficient motivation.[29] Second, even if there is online information that reveals the seller's true (lenient) attitude, it is not always likely to reach other affected consumers. Faced with a firm's generous response to an alleged problem, some consumers will naively accept such kindness without second-guessing it online. Others might be too stressed or focused on direct communication with the vendor, hoping to find an optimal solution. These consumers are not likely to attend to online reviews. If consumers do not comment on sellers' positive behavior, or if they are unlikely to read such comments even if posted, the Gap strategy may indeed enhance a seller's reputation. However, if this strategy is widespread, consumer will be unimpressed by the firm's lenient behavior, as they will view it as a common and even expected practice. Therefore, in some instances and perhaps over time, this motivation will be of limited force.

B. The Ex Post Chilling Effect

The mere inclusion of one-sided provisions may have an *ex post* "chilling effect" on a significant segment of consumer complainers.[30] According to this reasoning, faced with such provisions some aggrieved consumers will refrain from taking legal or reputational action against the vendor. These consumers will display a passive and sometimes naïve approach due to their limited entitlements according to the SFC.[31] At the same time, other aggrieved consumers will not be deterred by the contractual language. To these consumers the firm will show leniency and not insist on following the written terms. Importantly, for the chilling effect to materialize it is not necessary that consumers actually

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[28] Becher & Zarsky, *supra* note 4, at 343.

[29] This may be because such instances are not likely to be part of the main, central consumer experience for which consumers are likely to post a feedback.

[30] Becher & Zarsky, *supra* note 4, at 342

[31] *Cf.* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contracts Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue,* 15 BEHAV. SCI. & L. 83 (1997); Merav Furth-Matzkin, *On the Surprising Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2782987 (2016).

read, *ex post*, the SFC.[32] Rather, it is sufficient that the seller points to the relevant contract terms.[33]

As with the foregoing motivation, online information flow among *ex post* consumers may render this incentive less compelling.[34] When suitable information flow exists, consumers may learn that vendors ultimately waive their contractual rights. Hence, consumers who learn about the actual reality need not be so intimidated by the language of the SFC. With this kind of information in hand, consumers will feel more confident to demand more consumer-friendly treatment from the vendor.

Nonetheless, online information flow may weaken the incentive, but it does not eliminate it altogether. The threatened consumer does not always know to what degree the online information flow is representative. She may not know how exactly the firms' policy works. Therefore, some consumers – especially vulnerable ones – might still be intimidated by the SFC's language. Thus, this chilling effect might indeed play a part in a vendor's decision to create and employ a Gap.

C. Sorting out Bad Consumers Ex Ante

Some consumers do read SFCs or parts of them, especially when the stakes are high.[35] In some instances consumers may consult a lawyer, who will convey the meaning of the fine print. Yet other consumers may become familiar with SFCs terms after the seller's representative or marketing materials point to key provisions. On the assumption that (some) consumers become aware of (at least some) SFCs' terms, the Gap might serve as a signal and screening mechanism. This can be the case when firms stick to the strict contractual language exclusively when dealing with opportunistic consumers. If the relevant information flows reflect this behavior, opportunistic consumers will be less likely to engage with the firm.

In such a case the Gap may be helpful not only for the firm, but also to good faith and non-opportunistic consumers. It can serve as a positive signal, indicating that the firm upholds the contract only against opportunistic consumers.[36] Therefore, good-faith consumers will not be deterred by the harsh SFC at stake.[37] At the same time, the contractual

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[32] It is worth noting that *ex post* reading may occur significantly more frequently than *ex ante* reading. *See, e.g.*, Becher & Unger-Aviram, *supra* note 25.

[33] Along these lines, a recent study of leasing agreements has found a substantial presence of non-enforceable provisions, the inclusion of which could be explained under this theory. *See* Meirav Furth-Matzkin; *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEG. ANALYSIS 1, 40 (2017).

[34] Becher & Zarsky, *supra* note 4, at 343.

[35] Becher and Unger-Aviram, *supra* note 25; Bebchuk & Posner, *supra* note 1.

[36] *See* Bebchuk & Posner, *supra* note 1.

[37] Sophisticated consumers may even infer that the SFC at stake does not attract (some) bad-faith consumers, who are deterred by the SFC. So good-faith consumers may also conclude that there are no cross-subsidies. That is, that the SFC is not over-priced due to bad-faith or opportunistic customers.

language functions as a (deterring) signal for problematic players who become aware of the SFC's content.[38] As a result, the Gap can attract good customers and deter bad ones.

Richard Posner and Lucian Bebchuk offer – albeit in a somewhat different context – an illustration of such screening,[39] while referring to the SFC between a publication and an author. Assume the SFC stipulates that the publication can pull the plug on a project that is going wrong. A sophisticated author who believes in his manuscript and knows he has no intention to engage in problematic behavior should be happy to accept this SFC. At the same time, it might scare inadequate authors away.

Here, one might wonder whether good-faith authors too might be deterred by the harsh language of the SFC. That is, some authors might opt not to enter the contract after reading it (or learning about it via information flows) because of its harshness. Authors may fear that even a mild disagreement with their editors will be harshly viewed and lead to unilateral termination. True, an author might be aware of the Gap (through the noted information flows) and thus conclude that the publication's behavior is not so rigid in practice. Nevertheless, she might fear that the policy will change, and that the Gap she relies on *ex ante* will no longer exist *ex post*.[40] Therefore, applying this strategic move might not seem to be the best idea.

However, from the firm's perspective this problem seems minor. While few "good authors" may read the lopsided contract, they can nevertheless be persuaded to enter the SFC at stake. Online information flows, firm's agents or friends and colleagues are likely to allay their fears. They may explain to the author that these harsh terms are seldom imposed. They may equally provide convincing anecdotes to relax the good author's concerns.[41]

Of course, screening and signaling can occur only where consumers are aware of the SFC's content. If consumers are unfamiliar with the contract's scheme, they will not be able to factor it into their decisions. Another presumption here is that the vendor will indeed enforce the contract solely on bad-faith customers. This brings us to the next possible motivation.

Opportunistic consumers may become aware of the SFC by reading it, but also by asking the seller about it or by the seller's representation, which may highlight some contractual aspects.

[39] Bebchuk & Posner, *supra* note 1.

[40] Similarly, a consumer might fear that she will be considered as a problematic or an opportunistic customer. This also seems a moot problem from the firm's perspective. Individuals are generally over-optimistic and over-confident, and believe that not much will go wrong in their future lives.

[41] For a discussion of the strong influence of personal stories and narratives *see, e.g.,* Paul Slovic, *The More Who Die, the Less We Care*, *in* THE IRRATIONAL ECONOMIST – MAKING DECISIONS IN A DANGEROUS WORLD 30 (Erwann Michel-Kerjan & Paul Slovic, eds., 2010).

D. "Trouble-makers" & an "Opportunistic Retreat" Ex Post

Section C notes the way firms may use the Gap to deter opportunistic consumers *ex ante.* However, the Gap may be a consequence of – or serve as – an *ex post* screening tool as well (that is, after the contract was signed and during the course of carrying out the relevant service).[42] At times, firms might be able to distinguish different types of consumers. This ability allows firms to treat different consumers differently, while generating and benefiting from the Gap. This Section explains the two facets of this idea.

When the firm's deviation from the contract's language is tailored to a specific individual, it constitutes *ex post* discrimination.[43] Such dynamics unfold where assertive consumers will obtain relief or preferable treatment after a dispute or when a problem arises. At the same time, ordinary consumers will not.[44] Here, the firm *employs* the Gap to award assertive consumers.

For example, a seller's return policy states that an item cannot be returned once its original box or wrap has been opened. Two consumers buy from that seller a fan, to be used for their bedroom. They open the box, plug in the fan, and discover it makes too much noise. Note, however, that the fan is not faulty, and no misrepresentation regarding noise has been made.

The two attempt to return the product. The seller denies the first consumer's request, based on its return policy. Faced with such a response, the consumer realizes there is not much he can do. As for the second consumer, she is clearly not happy with the seller's attitude. She is more vocal and assertive. She threatens to post a negative review online, complain to consumer organizations and even protest outside the premises holding up a store-bashing sign. She demands to talk with the firm's CEO.[45] Neither consumer has any legal right to return the item under the contract. Nevertheless, the store realizes that the second consumer poses a reputational threat. She is therefore granted relief.

As this example shows, consumers who do not pose a threat to the firms' revenues and reputation will not receive lenient treatment. Firms may be motivated to treat a passive, weak, unprofitable or uninformed consumer in accordance with the stringent SFC. Conversely, assertive

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[42] See R. Ted Cruz & Jeffery J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L. J. 635 (1996).

[43] Cruz & Hinck, *id*. For a discussion of how big data allows firms to further distinguish different consumers *see, e.g.,* Amy Schmitz, *Secret Consumer Scores and Segmentation: Separating Consumer "Haves" from "Have-nots,"* 2014 MICH. ST. L. REV. 1411 (2014).

[44] For anecdotal evidence that almost everything can be negotiated or re-negotiated when consumers display an assertive approach *see* Johnston, *supra* note 1, at 876.

[45] *See, e.g.,* Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. REG. 547, 574 (2016) (noting that "[c]onsumers denied redress by a customer service representative can appeal to higher authorities within the organization, even sometimes obtaining redress by writing directly to the CEO") (footnote omitted).

and informed consumers will receive mild treatment, to mollify their complaints and dissatisfaction. This facilitates – and is facilitated by – the Gap.

Again, information flow may undermine the firms' ability to discriminate *ex post*. The flow undercuts the firm's ability to employ the Gap to benefit sophisticated consumers. With the information flow in place, consumers can educate themselves as to the circumstances in which the firm's reveal leniency. From the firm's perspective, it may often be hard to envisage which consumers will voice their disappointment online and how damaging any single interaction will prove to be. Returning to the example above, it may be difficult for sellers to predict which (if either) of the two consumers will post his grievance regarding the store's return policy online. While firms may sometimes be able to profile and categorize consumers, in many other instances firms would prefer to avoid this speculation. Consequently, online information flow induces firms to be more cautious in their treatment of seemingly uninformed consumers. Moreover, the risk becomes even greater once we consider the potential public distaste for the practice of *ex post* discrimination. In other words, the risk of generating a negative information flow and criticism regarding the employment of discriminating practices should have a restraining role.

However, firms may be able to effectively profile consumers and single out the most "damaging" ones by engaging in big data analysis and employing computer algorithms and other strategies. This has proved successful in predicting consumer traits and preferences in various contexts.[46] For instance, firms can consider consumers' social network in deciding how to treat requests and handle complaints. As Van Loo notes, firms "are also integrating into their business decisions means of assessing a consumer's online social influence over peers, such as the number of Twitter followers or Facebook friends."[47]

Where firms can indeed successfully exercise tailored *ex post* discrimination, a negative distributive problem arises. Here, uninformed and weak groups of consumers are subject to the strict SFC. At the same time, sophisticated and informed groups are treated more forgivingly or generously. Thus, the firm's behavior may cause wealth transfer from weak to strong consumers. Alternatively, it may cause wealth transfer from consumers to firms and decrease overall welfare. In addition, such dynamics counter basic intuitions of positive fairness (which is often a proxy for normative fairness).[48]

There is yet another facet for using the Gap *ex post.* Firms can also use SFC's one-sided terms as a way to *cope* – somewhat punitively –

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[46] *See, e.g.,* Ariel Porat and Lior J. Strachilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417 (2014).

[47] Van Loo, *supra* note 45, at 565 (also noting that "Bank of America recently developed big data software that considers the wealth of family members in deciding how to handle a customer's request for a fee waiver"; *id.*, at 547).

[48] *See* discussion in Ronen Perry & Tal Zarsky, *Queues in Law*, 99 IOWA L. REV. 1595 (2014).

with opportunistic consumers.[49] For example, let us return to David and the online dating site. Firms may turn a blind eye to all users who write "acceptable" fibs or slight exaggerations in their online profile. However, some consumers may over-stretch this flexibility, telling blunt lies. Such behavior would be unfair and may well upset other consumers. Therefore, firms might tend to apply its strict policy to the latter, while displaying a forgiving attitude to the former. Whether or not information flow regarding this strategy exists, firms are likely to exercise this Gap without fearing reputational damage.

The normative aspects of this form of discrimination are somewhat more complex. Though this practice seems fair and efficient, it might have problematic aspects. Such a practice enables firms to exercise its power without providing the affected party with due process and without adequate transparency as to the differential treatment.[50] In addition, at times, actions which seem opportunistic to the firm need not be viewed as such by all consumers or society in general.

E. The Gap & the Anchoring Effect: Forming a Behavioral Starting Point

The Gap can provide another advantage for firms: setting a desired starting point. This may be best explained by referring to the anchoring effect. In short, the anchoring effect suggests that when making decisions and forming judgments people rely too heavily – and irrationally – on the first piece of information or data provided.[51] For instance, the original price proposed for a used item will significantly influence and shape the rest of the negotiation. This sort of anchoring occurs regardless of the legitimacy of the initial price.

Assume a hotel with an 11:00 am check-out policy. Further assume that the hotel states in its terms of service (i.e., SFC) that it will charge the client for an additional day should she check out late. The hotel knows that some clients might check out late for fairly reasonable reasons or genuinely by mistake. It does not wish to over-apply this rigid check-out policy; in fact, the hotel is fine with late check-outs as long as they are done by midday. By stating its 11:00 am check-out policy, the hotel anchors customers. This may minimize check-out lateness, especially problematic cases that occur after midday. If a customer does need to check out late, she is more likely to endeavor to do so as close as possible to 11:00 am.

This example shows how contract terms can shape consumers' behavior *ex ante*. Yet the anchoring technique may serve companies *ex*

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[49] For a similar analysis, *see* Jason Scott Johnston, Cooperative Negotiations in the Shadow of Boilerplate, in: BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 12 (Omri Ben-Shahar ed., 2007).

[50] On the problematic aspects of such conduct with respect to large online intermediaries *see* Niva Elkin-Koren & Eldar Haber, *Governance by Proxy: Cyber Challenges to Civil Liberties*, 82 BROOK. L. REV. 105, 149 (2016).

[51] *See, e.g.*, Amos Tversky & Daniel Kahneman, *Judgment under Uncertainty: Heuristics and Biases*, 185 SCIENCE 1124 (1974).

post as well. For example, assume a telecom company that sets the price for extra (beyond the customer's plan) roaming data usage at $100 per 1GB. The consumer is unaware of this pricing, which is offensively expensive. When an aggrieve consumer complains about it, the company might be willing to charge him just $50. Since the $100 serves as an anchor, the consumer will be more likely to accept – and perhaps be happy with – the $50 charge. In both these cases, firms write their SFCs in a language that affects consumers' behavior, perception and judgment even though the firm itself does not strictly follow the SFC. While shaping consumers' perspective, the Gap allows firms to appear tolerant and cooperative.

However, the anchoring effect requires consumers to be familiar with the relevant contractual terms. Otherwise, of course, no anchoring can occur. Therefore, the anchoring strategy may be effective only with respect to salient terms, which consumers are aware of. These can be important terms which consumers care about *ex ante*. Alternatively, they may be terms that the firm highlights in the contracting process. Yet another alternative refers to terms that interest a consumer once an issue arises *ex post*.

F. The Doomsday Scenario

The next incentive for firms to generate a gap relates to the "doomsday scenario."[52] Here we address firms that generally aim to treat their consumer leniently, yet face an urgent, novel or unpredicted need to change their policy and apply strict SFCs. There are numerous circumstances that may lead firms to cease their deviating conduct and adhere to the strict SFC and thus generate the Gap. Examples may include tight times or unexpected catastrophes,[53] changes in corporate objectives and policy,[54] or "endgame" situations such as bankruptcy or a hostile takeover,[55] etc.

As noted, in view of the prospect of this scenario firms would strive to retain the option to stiffen their practices and conduct at their discretion without risking breach of contract. By the same token, firms prefer to have wide discretion to stop revealing leniency to consumers due to a substantial policy or market change.

Confronted with the prospect of a possible doomsday scenario, firms will employ a cost/benefit analysis before resorting to the contractual language. That is, they will balance the costs of reputational damage against the short term benefits of generating additional surplus. In the doomsday scenarios, long term and reputational damages might be of secondary importance. This may explain why resorting to the contractual language might prove to be a sustainable option under such circumstances.

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[52] Becher & Zarsky, *supra* note 4, at 342.
[53] A possible example is a massive recall or a colossal product malfunction.
[54] A potential instance might be moving from one market to another.
[55] Here the firm is likely to care less about its reputation.

G. Reducing Transaction Costs

Another possible incentive for creating a Gap is reducing transaction costs. In the regular course of action, the SFC is very detailed, perhaps delineating when exactly the firm will exercise its rights. However, it would be extremely expensive to address all possible circumstances.[56] Consequently, the firm might simply draft its contract in a protective and somewhat harsh fashion, while strategically relying on the Gap.[57] That is, a firm may state broadly and one-sidedly its rights, such as terminating a contract or making unilateral changes. At the same time, their interests in maintaining their reputation may still keep the firms in check, incentivizing fair conduct in practice and allowing the firms to exercise maximal flexibility. When faced with unanticipated circumstances the firm might consider a change in its policy–resorting to the contractual language.[58]

This function of the Gap allows firms to reduce transaction costs while maintaining its discretion regarding unforeseen circumstances. As before, the Gap serves as a type of insurance against unforeseen negative circumstances. Other options to deal with unique and unpredicted circumstances, such as employing broad standards in SFCs are problematic. They entail litigation risks, as consumers may strive broadly interpret these standards. And reverting to the option of providing detailed SFCs to try and cover all possible instances seems unattractive. This entails high drafting costs to the firms, which might be able to roll some of these costs onto consumers.[59] Consumers will also suffer, since reading these documents will result in information overload.[60] Thus, the Gap allows firms to avoid these problematic outcomes, while offering several layers of benefits to consumers.

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[56] *See* Bernstein & Volvosky, *supra* note 1 (employing a similar analysis and noting practices carried out in the shoe manufacturing market).

[57] For anecdotal and interesting writing discussing somewhat similar cases *see* Macaulay, *supra* note 1, at 796 ("Some firms attempt to arm themselves with end-game strategies by placing 'heads I win, tails you lose' clauses in form contracts unlikely to be read until trouble arises. Professor Fuller's 1947 casebook defended such drafting. He noted: '*The practice actually followed in the settlement of claims by companies which employ a standard form for transacting business is often much more liberal than might be inferred from the terms of the contract they ask their customers to sign*.' Fuller continues: 'The companies ... seek a contractual margin of safety within which they can exercise their own discretion free from the threat of litigation ....' Firms hide loopholes in the fine print, knowing that these terms will not be the subject of negotiations. These terms are used to ward off legal liability by providing bright-line rules. *Rather than having to prove such things as fraud, material failure of performance, or substantial breach, the firm's lawyers give themselves an easy-to-establish standard*" (emphasis added)).

[58] *Cf.* Johnston, *supra* note 1.

[59] It seems that SFCs in the US are long and complicated. *See, e.g.,* Clair A. Hill & Christopher King, *How Do German Contracts Do as Much with Fewer Words*, 79 CHI-.KENT L. REV. 889 (2004) (opining that American contracts are long and detailing the possible reasons for this feature).

[60] For more on this issue *see, e.g.,* David M. Grether, Alan Schwartz & Louis Wilde, *The Irrelevance of Information Overload: An Analysis of Search and*

III. THE GAP IN ACTION

The previous Part pointed out various incentives firms may have to create and utilize a Gap. From the firms' perspective and for the noted reasons, there are substantial incentives to set a lower reference point by drafting one-sided terms.[61]

Building on these incentives, this Part analyzes five different scenarios that enrich our understanding as to when the Gap merits legal vigilance – every one of which requiring a nuanced discussion. The first test-case, addressed in Section A, pertains to instances in which firms generally choose to change their policy and revisit the SFC. The other four instances, delineated in Sections B-E, deal with a firm's decision to adhere to the SFC selectively. Recognizing and addressing these test cases, which include the various incentives noticed, is a crucial step in framing the legal and policy discussion. It may as well serve as a basis for future empirical research.

Generally speaking, the way firms use the Gap can be categorized into two types of cases. First are instances where the existence of the Gap is continuous and firms may routinely reap its benefits. This can be the case when the Gap is used during ex post negotiation; employed as a signaling function to enhance reputation; utilized as an anchoring mechanism or applied as a measure to deter bad actors ex ante. These instances raise specific issues relating to unfair marketing and manipulation and require legal responses with these and related doctrines. The second type of cases encompasses dynamic instances where the Gap is created and thereafter closed. These dynamic cases, on which we now elaborate, are more challenging and interesting.

A. Change of Policy: Resorting to the Contractual Language

The first scenario in which the Gap is present addresses an overall change in the firm's policy, across the board. Here we refer to cases where the firm switches from a lenient approach towards almost all consumers to a strict approach. In doing so, it opts to literally follow the terms of the SFC, which are much less liberal than its previous behavior was.

Disclosure, 59 S. CAL. L. REV. 277 (1986); Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CAL. L. REV. 305 (1986); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 177–173 (2007).

[61] By contrast, providing consumers better terms *ex ante* will create a very different starting point. In such a case, consumers will view these better terms as part of their entitlement. Making a change and degrading the contract is more likely to be realized by consumers as a loss, which may well generate a public backlash. For integrating the status quo bias, the endowment effect and loss aversion into legal analysis *see, e.g.*, Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608 (1998); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1232 (2003).

Most probably, consumers did not anticipate this change, and did not consider it *ex ante*, because no information regarding this type of event (or the firm's actual contractual language) existed. However, from the moment the firm makes the change and acts in accordance to its rigid SFC, information regarding this shift may quickly become public and apparent. Since the change is applied across the board as a general business practice, consumers are likely to discuss it and generate information flows. Nonetheless, firms are sure to predict this future flow of information and strive to pre-empt or counter it by producing a relevant public relation response.

Firms have various motivations for changing their policy and resorting to the contractual language. The central relevant motivations might be a change in the firms' outlook; what we referred to as the "doomsday scenario" in the case of a drastic change. Yet it also might be possible that the firm acted in this way to reduce transaction costs; i.e., it adopted an initial broad scope contractually and later amended its actual policies based on various needs and market changes.

The noted changes might focus on various forms of broad contractual provisions that enable conduct modification. Some could pertain to termination clauses. Such changes will take place when the contracts stipulate that the firm may terminate the contract unilaterally. In this given scenario, the firm never applied this term to its full extent until a shift occurred and the firm opted to follow its strict contract. Yet this dynamic can also unfold regarding other contractual rights, such as those pertaining to data collection and usage policy. To demonstrate, consider the following case in point: Sharon opens an account with a technology company that provides social media services. She chooses a company that is known for taking users privacy seriously. For many years the company has refrained from using any technology that can track users or gather their information. However, Sharon has never read the media firm's Terms of Service, which stated: "we may use cookies and other technologies to track our customers, gather their personal or private information, discover how they use our services, etc." Sharon, who has been using her account for five years now, learns that the firm has recently changed its practices and decided to extensively collect and use personal data. Upon protesting to the firm, she is referred to the SFC's language. A similar scenario might unfold regarding the firm's ability to censor and remove content posted by its users.[62]

At this point, we must establish whether resorting to the contractual language is legitimate, or perhaps the contract is to be understood as being amended during the years, so to not allow this policy change. As

[62] The firm might only selectively remove content yet have broad authority to do so in accordance to it terms of use. This indeed is the situation with regard to Twitter. *See* discussion on ContractsProfBlog, *Twitter's Discretion in Its Terms of Service and the Way We Define Words*, (Oct. 13, 2017) available at http://lawprofessors.typepad.com/contractsprof_blog/2017/10/twitters-discretion-in-its-terms-of-service-and-the-way-we-define-words.html?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+typepad%2FjEFi+%28ContractsProf+Blog%29

noted, while engaging in these actions, firms might have both legitimate and illegitimate incentives, which are often confused. If the firm is deterred by negative reputation, its usage of general language to limit costs and enable flexibility can lead to fair and efficient outcomes. Yet if only insufficient information flows exist, or if the firm is faced with an "endgame" setting in which it need not care for its reputation, legal intervention might be required. Here, given consumers' lack or paucity of information regarding these new requirements and practices, the outcomes of unilaterally shifting to enforce the actual contractual language might be deemed inefficient and unfair.

To complicate matters further, consider an additional example which involves salient provisions and the Gap. For instance, a firm is contractually obliged to deliver a good within 30 business days yet is famous for doing so within a week. At one point the firm shifts to deliver within 30 days to all customers, as indicated in its contract. Legal intuition leads to concluding that this situation differs from the one previously noted in its severity. Indeed, when consumer contracts are involved, it should be assumed that contracting parties are familiar with the salient contractual terms at issue – such as price, quality, and often shipment options and details. Therefore, in this latter case, the noted Gap and the possible change that followed should be within the parties' expectations and the risk assumed by the purchaser. Consumers should be responsible for understanding that their shipment might eventually arrive only after 30 days even if others have received it quicker, given the clear contractual stipulation reserving the right to do so.

However, unlike this specific example, we cannot simply assume that consumers indeed took *all* the relevant risks into consideration *ex ante*, including those indicated in the SFC which conflict with the firm's ongoing practices. At the same time, information flows indicating specific actual behaviors are rather powerful and enjoy high levels of trust. Accordingly, we suggest below that strategic policy changes in conduct which lead to the firm's mere following of its contractual undertakings ought to be scrutinized. Accordingly, courts should consider a variety of doctrinal tools for that purpose.[63]

B. An "Opportunism Retreat": Selectively Resorting to the Contractual Language

A firm may selectively and strategically treat *a specific customer* (or set of consumers sharing attributes or traits) in a rigid way, as detailed in its SFC.[64] In this scenario, firms initially insert various relatively one-sided terms in their SFC. Yet, they generally do not insist on their rights according to the written language. At some points they might choose to revert to the contractual language, such as when the customer behaves opportunistically.

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[63] *Infra* Section IV.B.

[64] Scholars point to this potential occurrence. *See* Bebchuk & Posner, *supra* note 1.

One example discussed above is the firm's utilization of its broad remedies in the situations where "small" inaccuracies users employ in their online dating site profiles are encountered. As mentioned, these inaccuracies are often met with a lenient response.[65] Yet the Gap and the existing contractual framework allow the dating website to "throw the book" at users they suspect have crossed the line. Another common example pertains to return policies.[66] Assume such policy states that clothing items may be returned only if the consumer returns the item (1) within 48 hours, (2) with the original tag and (3) with proof of purchase. Further, assume that the store does not insist on all these terms most of the time. Usually, the store allows consumers to return the items even if three or four days have elapsed since the purchase, hence generating goodwill with their customers. Alan, a regular consumer, notices the firm's overall leniency. In response, he routinely buys luxurious items every Friday morning, returning them the following Tuesday, at times without the tags. The store observes this pattern of behavior and denies Alan's returns based on its formal return policy. In other words, it flags Alan as an opportunistic consumer and treats him accordingly.

These examples show that oftentimes the firm's selective reliance on the contractual language is both fair and efficient. It prevents unjustified cross-subsidies (between honest and dishonest consumers) and tackles opportunistic behavior. Therefore, the law should enable such actions and outcomes. Yet as we will soon demonstrate, there is a thin line between firms' legitimate practices and those that would be deemed unacceptable.

C. Ex Post Discrimination: Selectively Departing from Contractual Language

When the firm's deviation from its contractual language is tailored and examined on a case-by-case basis, it could be considered to constitute an unacceptable manner of *ex post* discrimination.[67] One form of such discrimination may occur in response to a dispute or a problem between the consumer and the firm. In such instances, the firm may provide relief for sophisticated or assertive consumers, as opposed to lay consumers.[68] Note that in the previously discussed scenarios (such as that addressing return policies) firms *withdraw* from the Gap and present an inflexible attitude to some consumers, as noted in the contract. In this example, however, the firm *employs* the Gap to award informed or

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[65] *Supra* Section II.D.

[66] For an economics and behavioral analysis of cooling-off periods *see* Shmuel Becher & Tal Z. Zarsky, *Open Doors, Trap Doors and the Law*, 74 LAW & CONTEMP. PROBS. 63 (2011).

[67] *Supra* Section II.B. For a detailed discussion *see, e.g.*, Cruz & Hinck, *supra* note 42.

[68] For anecdotal evidence that almost everything relating to SFCs can be re-negotiated when consumers display an assertive approach *see* Johnston, *supra* note 1, at 876.

otherwise preferred consumers rights and remedies the contract does not feature.

For another example, consider a firm that will forgo a disproportionate charge for roaming data when dealing with assertive and sophisticated consumers.[69] In such cases, firms treat weak consumers stringently (according to the SFC) while evincing lenient treatment for strong consumers that will assuage their complaints and dissatisfaction.[70] Whether withdrawing from the Gap or employing it, the questions raised and the balances entailed are almost identical; the forms of ex post discrimination here discussed generate a specter of unfairness. One normative shortcoming of such actions is that it generates a negative distributive problem. That is, such discriminatory practices transfer wealth from weak consumers (which are not familiar with the ability to contest) to sophisticated and informed ones. Therefore, the Gap is more likely to harm consumers with lower-income, less knowledge and less sophistication.

Here again, consider the implications of enhanced data flows regarding these practices. In many instances, enhancing information flows regarding the existence of such ex post discrimination would undermine their success.[71] Such flows may heighten the public's and policymakers' awareness and thus restrain firms. The stronger the information flow regarding this matter, the greater the reputational risk that firms may face.

Encouraging information flow as a means to restraint sellers' behavior is an *ex ante* tool. When ex ante tools prove insufficient, courts may have to consider *ex post* measures. Below we suggest that courts should be vigilant and suspicious when scrutinizing the Gap in situations featuring these forms of discrimination, especially where there is no information flow to discipline sellers.

In this context as well, sometimes the firm may not be too wary about information flow that documents *ex post* discrimination. This can be the case in instances where the firm would want to incentivize consumers to actively shift towards the group receiving preferable treatment. Consider an airline that makes use of latent contractual provisions which allow it to overbook flights and remove passengers from them at its own discretion. It is often suspected that airlines choose to invoke the contractual language towards "regular" consumers, when needed, while retaining its loyal customers on the plane (thus treating them leniently).[72] In such cases, the airlines (or other relevant firms) might encourage the

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[69] An example discussed *supra* Section II.B.

[70] For example, firms may devise a statistical model to find out precisely who consumers with the weakest voices are – and target them.

[71] *See* Becher & Zarsky, *supra* note 4, at 360-365 (detailing various measures to achieve this).

[72] See Benjamin Zhang, *How Airlines Like United Choose Who to Kick Off a Flight*, Business Insider, April, 10, 2017, at http://www.businessinsider.com/how-airline-choose-who-kick-off-flight-united-american-delta-2017-4

For simplicity reasons we assume that no laws, regulations or treaties govern this case.

flow information about such practices and alleged preferences. Such a flow can motivate many other consumers to join the airline loyalty program – a move which would generate additional income for the airlines.[73] While these cases seem upsetting, they might not be considered as unfair if these ground rules are known to all parties when purchasing the airline ticket.

D. Gaming Information Flow: Selectively & Randomly Using the Contractual Language

Relatedly, the fourth state in which firms can utilize the Gap is by exploiting only a segment of random consumers. Firms will selectively adhere to the written SFC (or conversely choose to diverge from it) in a certain number of cases, regardless of the consumers' nature. Here, the selection would be carried out at random, as opposed to previously discussed schemes which strive to identify a specific profile of consumers. With other customers, firms will use the Gap, display leniency and ease their business and legal interaction. The incentives for doing so could be varied, mostly related to the greater surplus which could be derived from adhering to the SFC (as opposed to exhibiting a lenient behavior).

From the firm's perspective, the idea would be to exploit a limited number of consumers. The exact number depends on the extent and nature of the information flow that the firm's behavior generates. That is, firms will aim to exploit consumers as long as their complaints and voices are unheard or insignificant. If the number of aggrieved consumers is below a certain threshold, their opinions will be dissolved in the general information flow.

While this practice intuitively seems unfair and unacceptable, explaining why requires some additional work. The practice leads to unfair outcomes, as random yet equal consumers are treated differently.[74] Yet the law rarely intervenes in the arbitrary actions of private parties. It indeed does so when the firms discriminate on the basis of unacceptable criteria, such as race or gender. But this is not the case here. While the doctrine of "bad faith" may be applied, [75] it should also be noted that consumers subjected to this random form of discrimination were unaware of that risk when entering the contractual relationship. Thus, they suffered from a type of information asymmetry – which market forces cannot overcome – when entering the transaction; an asymmetry which leads to their harm and an inefficient outcome

[73] Of course, the company has to balance this with the risk of alienating consumers who are not – and will not become – loyalty club members.

[74] For a discussion of the fairness aspects of random selection processes, *see* Ronen Perry & Tal Z. Zarsky, "*May the Odds Be Ever in Your Favor": Lotteries in Law*, 66 ALA. L. REV. 1035, 1044 (2015).

[75] On detailing the obligation to perform a contract in good faith *see, e.g.,* §§1-203, 2-305(2), 2-306(1), 2-311(1), 2-615(a) of the Uniform Commercial Code.

given the materialization of unaccounted risks.[76] In addition, they might be eligible for a remedy given the harm to their liberty.[77]

E. Politics and Citizenship: Selectively Enforcing Contractual Language

The final scenario relates to a situation in which a firm selectively withdraws from the Gap (rather than utilizing it). Firms sometimes prefer to end the "Gap practices" and revisit the contractual language with respect to specific customers in a process which is not random yet for reasons which go beyond the motivations discussed thus far. These can include external causes, political pressure and public demand. Interestingly, this may be the case when a firm chooses to apply its "gap discretion" to another firm – rather than consumers.

One interesting example pertains to Amazon.com's famous 2010 decision to terminate its cloud-server contract to host WikiLeaks. This unilateral measure, which received a good deal of media attention,[78] was made possible given the very broad language in the various provisions of the SFC that Amazon used. Such provisions prohibited the usage of the hosting services for materials the client did not have rights to or might be harmful to third parties. Of course, Amazon rarely exercised such rights vis-à-vis other clients, nor even checked the legality of their actions.

In this case, however, Amazon chose to terminate its contract while yielding to public and political pressure; most notably after senior U.S. Senators intervened.[79] Arguably, it did so to protect its brand, or out of fear of future governmental retaliation. In a way, this scenario can be viewed as a form of the "opportunism retreat" (*i.e.*, the second scenario). In both contexts, the firm seeks to use the SFC's language to deal with a problematic contracting party *ex post*. Moreover, in both cases the firm often has the incentive to encourage the information flow on the matter. Information flow will enhance the firm's reputation and protect its public image.

Nonetheless, this is a unique case of a change in the firm's contractual policy which justifies a separate analysis. The previously discussed scenario involved a customer who causes *direct* financial burdens or losses to the firm's profitability. In the fifth scenario

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[76] The analysis changes, however, if individuals clearly understand and accept the chance to being subjected to random mistreatment *ex ante*. In such cases it becomes imperative to inquire whether individuals are nevertheless likely to miscalculate the risks involved; for instance – due to cognitive biases such as over-optimism.

[77] See Teichman & Zamir, *supra* note 16, at 31.

[78] *See, e.g.*, Ewen MacAskill, *WikiLeaks Website Pulled by Amazon after US Political Pressure* (THE GUARDIAN, December 1, 2010); Charlie Savage, *Amazon Cites Terms of Use in Expulsion of WikiLeaks* (THE NEW YORK TIMES, December 2, 2010).

[79] *Cf.* Rachel Slada, *How Lieberman Got Amazon to Drop WikiLeaks*, BUSINESS INSIDER AUSTRALIA (December 2, 2010).

currently discussed, the burden or loss is indirect and results from a negative externality. Indeed, WikiLeaks' behavior in and of itself does not affect Amazon. However, it allegedly caused harm to others, and these others, in turn, may see Amazon as the source of their harms. As a result, these third parties (which could be quite powerful) might contemplate measures against Amazon. Amazon, therefore will strive to limit their exposure by retreating to the actual contractual language.

The scenarios also differ in terms of their normative outcomes. In the previously discussed second scenario (involving opportunistic consumers), the firm's policy to follow the contractual terms is enhancing overall efficiency and fairness. In the current case, however, the firm's decision is often controversial and possibly unfair. It might even lead to substantial negative externalities. For instance, it can reasonably be argued that Amazon's conduct in the WikiLeaks case is harmful to public discourse, free speech and democracy in general – although the firm's actions seem to be well grounded within the four corners of the contract. In other words, the steps taken silenced an important voice. This was done without providing due process or opportunity to justify its steps and prove its point.

This final example may indicate interests that go beyond those of consumer protection and considerations that go beyond efficiency and fairness. It illustrates from another perspective why the firm's ability to employ a Gap is problematic. This further supports the need to provide a framework for better tailoring the legal responses, which will be the focus of the next Part.

IV. THE GAP IN LAW AND POLICY

The previous parts pointed to the Gap and demonstrated that relying on a system solely premised on information flows and reputation can be fickle. The less severe the reputational risks and related ramifications the firm faces, the more likely it is to use the Gap at its discretion. With that in mind, this Part explores the Gap's empirical and doctrinal implications. Empirically, the Gap may explain some findings in the literature relating to consumer contracting behavior and create difficulties for future inquires striving to analyze the true nature of SFC dynamics. Doctrinally, recognizing the Gap is essential for crafting a more sensitive and up-to-date judicial approach towards key issues in consumer and standard contract law.[80]

A. Empirical Findings & the Gap

Acknowledging the Gap is a vital component in answering some of the most crucial questions related to the laws that governs SFCs; i.e., how much consumers know about their contracts and whether regulatory intervention is warranted. It is clear that almost no one reads SFCs. However, it is far less clear how much information is available to

[80] For a similar assertion *see* Bernstein & Volvosky, *supra* note 1.

consumers through other means – such as online information flows. It is also very challenging to determine the quality of information flowing to consumers, and whether it is indeed partial or being manipulated. Thus, it is difficult to establish whether such flows provide a mitigating force that may discipline sellers.

A possible approach here is to compare the bias of SFCs to the amount of information available online about the correlating products and services. In fact, a study attempted to do just that,[81] using empirical tools to critically examine and question the existence of an online information flow.[82] Interestingly, it concluded that there is no meaningful correlation between a contract's biases and the product's ranking on leading websites.[83] On the basis of these findings, the author of this study pointed to several potential weaknesses in online information-flow theory. Indeed, based on these findings one can easily deduce that the existence of such a flow most likely cannot serve to substitute regulatory intervention.

However, such a conclusion does not seem to account for the Gap. Once we bear in mind the existence of the Gap it is easy to see why these findings do not necessarily indicate the lack of an online information flow, the paucity of effective consumption of such information by consumers, or even the need for regulation. This is so, since said study examined contract biases and product ranking. However, the Gap teaches us that online rankings and data flows would most likely reflect the firm's behavior, rather the language of the contracts and the biases it might include. Thus, measuring properly the accuracy and effectiveness of online flows requires measuring and comparing firm's conduct and practice – and accounting for the Gap at all times.

B. The Gap Analysis: Policy Framework and Recommendations

In this Section we detail our recommendations for minimizing the problems association with the Gap. In the first sub-section we consider ex ante tools, aimed to encourage information flows generally, which will also assist in mitigating the Gap-related concerns we articulate above. In the second sub-section we sketch a judicial framework for Gap cases.

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[81] Nishanth V. Chari, *Disciplining Standard Form Contract Terms through Online Information Flows: An Empirical Study*, 85 NYU L. R. (2010).

[82] The methods of inquiry and statistical datasets are closely related to the work of Bakos et al., *supra* note 22.

[83] In some contexts a negative correlation between biases and ranking was shown. Chari, *supra* note 81.

1. Ex Ante Tools: Encouraging Information Flows and Strengthening Reputational Information

The existence of the Gap can, in some cases, undermine the accuracy of the information flowing to individuals regarding the contents of the SFCs. In others, the Gap is structured in a way that sidesteps relevant information flows. In any event, full and accurate information about both market practices and contractual language would prove extremely helpful and important in the hands (and heads) of consumers. Effective and accurate flows can enhance market dynamics and reduce the role of regulators and courts. Therefore, regulatory measures should be taken to enhance such flows.

In some of the instances noted above, the Gap is applied to distort information flows. This would be the case when firms provide beneficial treatment to opinion leaders. In others, firms apply the Gap and benefit from insufficient feedback loops regarding the fact they are doing so. This occurred in scenarios "C" and "D", where the firm applied the Gap generally, yet fell back to the contractual language selectively or randomly. Greater knowledge regarding these dynamics via information flows would prove rather beneficial in countering the Gap's shortcomings. It would either deter firms from doing so or educate consumers about their existence. Therefore, regulatory steps to promote information flows might be helpful to mitigate both sets of problems.[84]

As in other contexts, promoting high-quality information flow faces three main challenges. The first is over-production of some forms of information. This occurs when relatively few consumers generate a large amount of information, disproportionate to the group's size and representativeness. Assume, for instance, that a firm treats only 20% of its customers in a preferable, lenient way. Over-production of information means that these 20% of satisfied consumers produces significantly more than 20% of the reviews relating to this firm.[85] Therefore, some measures must be applied to adjust the information flow to properly reflect the broader population.

The second challenge in the advent of high-quality information flows is under-production of information. This challenge mirrors the foregoing one, as it is concerned with consumers who do not post reviews and feedback, and therefore are under-represented. In our context, it might

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[84] It is worth noting here that such knowledge may not always suffice. In this context, one possible concern to consider is that consumers will over-optimistically assume that they will be treated leniently. Thus, consumers may under-estimate the risk that they will be subject to the harsh SFC. *See generally* Neil Weinstein, *Optimistic Biases about Personal Risks*, 246 SCI. 1232 (1989).

[85] Employing the famous Pareto principle (20/80 rule) we might assume that these 20% of consumers will produce 80% of the reviews. Of course, it may well be that the 20% most aggrieved consumers will generate disproportionately negative reviews. However, this does not pose a problem since if these consumers voice their complaints they do not create a Gap but rather eliminate it. Moreover, in light of firms' ability to engage in effective *ex post* discrimination, this is less likely to be the case.

refer to consumers who do not benefit from easy access to the internet (*e.g.*, elderly or poor consumers). Alternatively, it might relate to consumers without the time or availability to express and share their experiences. Then again, it may mean consumers who simply lack the sufficient incentives to post their impressions and thoughts. This may be the case when consumers have had an average experience,[86] or if the consumer believes that she – or others – will not gain from her review.[87] Interestingly, another group of consumers who might not share their feedback are those who wish to post negative reviews. Some of these consumers might fear personal liability lawsuits, whether or not such reviews are protected under the Consumer Review Fairness Act of 2016. Yet many other consumers may receive redress by using firms' complaints and settlements departments,[88] making online complaints less desirable.

Notably, the response to all these problems and concerns might be aligned with general policies striving to promote digital literacy and overcome the digital divide in society. Yet another set of responses will be policies and measures set out to hamper the progression of lawsuits against individuals opining on firm's conduct.[89] A subset of this issue, for instance, pertains to the move by some firms to block negative reviews by including provisions forbidding the writing of such reviews in their SFCs. Recent legislation has moved to counter that by prohibiting such provisions.[90]

The third obstacle for the formation of high-quality information flow, however, is not related to representativeness. Rather, it is the need to minimize the distribution of inaccurate information. Here the main concern is that sellers can tamper with feedback and reviews. One distortion may take the form of an agreement to manipulate the way reviews are presented. For example, review platforms and firms might conspire to post the most positive reviews first (or in other more conspicuous ways). An additional strategy a seller might employ is to hire individuals to write up fake positive reviews referring to false transactions (a practice referred to as "astroturfing").[91]

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[86] For discussing the importance of this phenomenon in detail *see* Yonathan Arbel, *On Contracts, Reputation, and Enforcement* (work in progress).

[87] For example, the 10,000th review of a local restaurant is likely to have a rather marginal little value.

[88] For a detailed analysis see Van Loo, *supra* note 45.

[89] This could be done in a variety of ways, such as rendering the revealing of the anonymous speaker difficult by setting a high bar of proof or upholding jurisdiction and choice of law clauses that impede on such claims. *See* for instance, *Feldman v. Google* 513 F. Supp. 2d 229 (E.D. Pa 2007); *Yelp, Inc v Hadeed Carpet Cleaning, Inc*, 770 SE2d 440, 444 (Va 2015).

[90] *See* discussion and example in Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, Santa Clara Univ. Legal Studies Research Paper No. 4-17 (2017).

[91] This has allegedly happened in some markets. For instance, it is claimed that in China, firms could pay powerful search engines, such as Baidu, to receive higher rankings. On another important platform, Taobao, sellers used artificial transactions that can facilitate false reviews. *See* Jun Mai, *Baidu Ordered to*

By and large, consumer review platforms are currently subjected to limited regulation and even benefit from substantial immunity from liability.[92] It is unlikely this situation will change anytime soon.[93] Yet this does not mean nothing can be done to improve data flow. Setting direct regulation aside, one attempt to improve reputational information flow would encourage consumer organizations or the FTC to issue and release objective reviews. These reviews, which can also compare contractual language and firms' behavior, will be incorporated into firms' ratings and reviews.[94] Such reviews may influence sellers' reputations, improve the flow of information about SFCs quality, and thus incentivize firms to better tailor contract language and actual behavior. This could be promoted by direct governmental funding, or indirect subsidies to the NGOs and civil society groups carrying out these tasks.

2. Ex Post Tools: Judicial Intervention in Gap Cases

Generally, in the context here discussed, courts should step in only as a last resort, where reputation is indeed an insufficient motivator for disciplining firms who may be tempted to apply the Gap in an unacceptable manner. Following this reasoning, the first judicial task is to consider whether there is a good information flow that reflects the firm's actual behavior. Courts may begin by examining the degree to which the product or service has generated sufficient information flow. Where there is insufficient information flow – in quality or quantity – courts should consider whether a Gap exists, and furthermore whether it led to problematic outcomes.[95]

As noted, firms have various motivations to use a Gap. While some motivations are acceptable, others might be questionable and worth scrutiny. Since it might be problematic to identify the exact motivation (or motivations) for employing any given Gap, we suggest that courts examine the situation and surrounding circumstances. As illustrated

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Change how it Operates by China's Internet Watchdog after Death of Student, SOUTH CHINA MORNING POST (9.5.2016), available at http://www.scmp.com/news/china/policies-politics/article/1942912/baidu-ordered-change-how-it-operates-chinas-internet; *'Cat-and-Mouse Game': Alibaba Exec on Fake Transactions*, THE WALL STREET JOURNAL (3.5.2015), available at https://blogs.wsj.com/chinarealtime/2015/03/03/cat-and-mouse-game-alibaba-exec-on-fake-transactions/.

[92] *See* 47 U.S.C. § 230, which protects online platforms from liability for third party content. This implies that websites can collect and publish consumer reviews without the fear of legal liability.

[93] For a different opinion and call for change, see Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, U.C. Davis L. Rev. (forthcoming 2018),

[94] The logic sustaining this proposal is that consumer organizations frequently have a lot of data on firms' behavior. They deal with many consumers complaints, litigate cases, interact with mass media, etc. In essence, this is another type of information that comes from experienced consumers.

[95] Becher & Zarsky, *supra* note 4.

above,[96] the context in which the Gap has been exercised may shed important light on firms' motivation. For example, if the firm exercises strict behavior only with opportunistic consumers, courts should be reluctant to intervene. Upholding the Gap against opportunistic or bad-faith players is often a fair and efficient strategy. However, intervention might still be required to assure that the individuals are provided with a minimal ability to voice their opinion or challenge the decision at stake.

When considering legal intervention, the courts' toolkit comprises of a range of doctrines and principles. Under some circumstances, manipulating the Gap may be considered to be "bad faith" behavior. Reliance on provisions which have not been applied in the past might undermine basic notions of fairness.[97] Furthermore, under relevant circumstance court might determine that some contractual provisions at stake are unconscionable. For instance, provisions (which were not exercised) providing firms with broad and unilateral termination rights could be considered to be imbalanced and therefore struck down, especially if they are seldom being used (thus indicating that even the firm did not find them to be of merit). However, these doctrinal tools might be overbroad and inject a considerable degree of uncertainty to markets and contractual relationships. For these and other reasons courts might be reluctant to apply them.

Another specific and important doctrine is that of "reasonable expectations", which has been adopted and employed in various consumer law cases.[98] Here, consumers might argue that firms' lenient treatment (as opposed to the one-sided SFCs) vis-à-vis other consumers has shaped their "reasonable expectations". Therefore, if firms revert to the contractual language it may violate such expectations. Of course, determining what should be considered as a reasonable expectation is not easy.[99] A reasonable expectation should be based, at least in part, on an inquiry as to whether an effective information flow exists and whether this flow reflects the contract or the firm's behavior. Here the firms will try and argue that the expectation must be a reflection of the contractual language, and other data sources are unreliable. Thus, applying this doctrine would be an uphill battle as well.

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[96] *Supra* Part II.

[97] *Cf.* Lewis A. Kornhauser, *Comment: Unconscionability in Standard Forms,* 64 CAL. L. REV. 1151 (1976). *See also* Alan Schwartz, *Unconscionability and Imperfect Information: A Research Agenda*, 19 CAN. BUS. L. J. 437, 446 (1991)

[98] According to this doctrine, "[i]n dealing with standardized [consumer] contracts, courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's 'calling' and to what extent the stronger party disappointed reasonable expectations based on the typical life situation." Gray v. Zurich Ins. Co., 419 P.2d 168, 172 (Cal. 1966) (citing Kessler). *See* also Darner Motor Sales v. Universal Underwriters Ins. Co., 140 Ariz. 383 (1984) (en banc).

[99] For an interesting proposal *see* Ayres and Schwartz, *supra* note 3. Another possibility might be to use neuro-science finding that can reveal what consumers actually think. *Cf.* Mark Bartholomew, *Neuromarks,* (work in progress, on file with author).

Another potential doctrine is that of "usage of trade", which refers to a general practice regularly observed.[100] As before, this doctrine is not a panacea. Under this doctrine, particular contracts will take preference over trade in general.[101] Therefore, in situations in which firms engage in discrimination of specific consumers, the doctrine might not provide relief as the specific treatment will constitute a particular contract. However, where there is a general change in the firm's practice (as discussed above with respect to Scenario "A"),[102] the Gap might indicate a change in trade practices. In such cases, and on the basis of the "usage of trade" doctrine, consumers might be able to rely upon this new policy of practice. Other possible doctrines may include unfair surprise, estoppel, and a ban on selective enforcement. All these doctrines are worth a separate, detailed discussion.[103]

Another noteworthy judicial tool is to declare that the terms of the contract have changed in light of the firm's behavior, while invoking the "Course of Performance" doctrine.[104] In such a case and while relying on this doctrine, courts can remove the Gap and modify the agreement along the lines of the firm's actual actions. Here, contract law has accepted the notion that contract terms may be modified by the parties' behavior, while adding new obligations and privileges.[105] Accepting such changes will, in turn, protect reasonable reliance and expectation.[106] In some states, this doctrine enables contract modification even if the original contract included a "No Oral Modification" clause, which clearly stipulated that all amendments must be made in writing.[107] This additional doctrinal step is crucial in the context here discussed, as without it, SFC drafters can easily include a "No Oral Modification" provision in their agreements, thus sidestepping much of the discussion to follow (as enforcing this provision by courts will render our discussion of this doctrine moot).

There are several strong general arguments against the application of the "Course of Performance" doctrine which require specific scrutiny. Yet, they are easily countered in our context. First, one might argue that the firm's conduct does not reflect the way it intends courts to interpret its contract. Therefore, performance alone cannot lead to contract

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[100] *See* UCC § 1-303(c). For further discussion *see* Uri Benoliel, *The Course of Performance Doctrine in Commercial Contracts: An Empirical Analysis*, p. 7 (draft, 2018), available at ssrn.com/abstract=3113761. See also, David McGowan, Recognizing Usages of Trade: A Case Study from Electronic Commerce, 8 Wash. U. J. L. & Pol'y 167 (2002),

[101] *Id.* at 7.

[102] *Supra* Section III.A.

[103] As this article attempts to make the first steps to sketch a new framework an in-depth analysis of these doctrines is beyond its scope. We hope to undertake such an analysis in the future, once the theoretical and doctrinal foundations of our proposal develop.

[104] Benoliel, *supra* note 100, at 4.

[105] *Id.* at 6.

[106] *Id.* at 10, n. 31 (referring to the work of Omri Ben Shahar).

[107] *Id.* at 17-18. 14-15

modification.[108] For contract interpretation, the firm expects courts to rely on the precise text used in the written contract.

We concede this argument carries weight in Business-to-Business commercial contexts, where two informed parties enter a contract. However, the argument fails in the Business-to-Consumers realm, where consumers do not read their contracts. Here, one can hardly argue that consumers have agreed that the SFC will trump future modifications and constitute the final document to be considered by courts.

The second often- voiced concern regarding the application of this doctrine is that accepting the "Course of Performance" doctrine will incentivize firms to act rigidly. That is, firms will be reluctant to exercise flexibility throughout the contractual relationship even though such flexibility is efficient, knowing that such a behavior will later backfire in court.[109] While this general claim has merit, our analysis above presented the various nuanced motivations guiding firms when deciding whether to generate a Gap. As noted, "flexibility" is too broad a term to encapsulate the firm's conduct, and such flexibility might lead to substantial detriments for consumers. Therefore, this general argument should be here replaced with the elaborate discussion this Article provided.

Notably, the doctrine works well in the case of Scenario A, where the firm changed its overall strategy and behavior. However, one may wonder how courts should approach instances in which the consumer has no history of firm's performance, or that the firm has chosen to selectively treat a specific consumer rigidly (as opposed to others, who are receiving lenient treatment). This specific consumer can hardly claim the firm's course of performance towards him led to contract modification. Thus, to fit the paradigm at hand, the doctrine itself must be modified.

This brings us to an important novelty of our suggested approach towards the "Course of Performance" doctrine. Here, we suggest that when applying this principle in Gap cases, courts should factor into their analysis firms' behavior towards third parties. We opine that when a firm acts in a certain way vis-à-vis *specific* consumers, this behavior may also set the tone for the relation, or "performance", between the firm and *other* consumers. Slightly restated, firms' conduct towards their customers can legitimately shape other consumers' expectation and reliance, the crucial elements that this doctrine aims to protect.

At the procedural level, proving the presence of a Gap in court or to a regulator may be challenging.[110] It would be very difficult for a consumer to prove that an overall shift from the contractual language has taken place. It is also challenging for an individual to go beyond her limited interaction with the firm and seek records and evidence.

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[108] *Id.* at 11 (referring to Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 592 (2003)).

[109] *Id.* at 13 (referring to the work of Lisa Bernstein).

[110] Compare Benoliel, *supra* note 100, at 14-15 (making a similar point with regard to the "Course of Performance" Doctrine).

Therefore, most often consumers should not be expected to provide information as to how a given firm interacts with other consumers. Slightly restated, due to these information asymmetries, placing the burden of proof on consumers to prove a Gap was created and possibly abused will often be unfair and can lead to the failure of their case. To prevent this, courts can employ presumptions to shift the burden of proof onto firms.

Since firms control information as to their actions, they can easily dispel unsubstantiated claims regarding the creation of a Gap. Such a presumption can be used, for instance, when a firm employs harsh, one-sided terms while its online reviews and reputation are excellent. In addition, the burden might be shifted if a substantial amount of reviews regarding the firm's behavior contradict the contractual language. This might indicate the existence of a Gap, and a practice which may fall within one of the contractual doctrines noted above.

C. Limitations and Potential Obstacles

Before concluding, it is important to note three main limitations and potential obstacles in our analysis. The first is its scope. Our analysis addresses classic SFCs that consumers do not read. In such cases, information flow may substitute reading in the context of disciplining sellers. Where the Gap exists, information flow may not generate the necessary pressure to restrain sellers and encourage them to draft fair SFCs. However, it is imperative to note instances where consumers *are* likely to read their SFCs rather than relying on information flows. In some relatively rare instances – such as book contracts, real-estate contracts and day-care agreements – consumers (or their lawyers) indeed tend to read SFCs (or part of them).[111] Where consumers read their SFCs, they may become familiar with their content via reading – rather than via information flows. And where consumers are not lured or manipulated by the Gap, our analysis does not hold, but requires some tinkering.

The second problem that may arise from our recommendations is the enhancement of *ex ante* discrimination. If sellers lose the ability to discriminate among their customers *ex post*, sellers may be more motivated to engage in *ex ante* discrimination. For instance, firms may be more tempted to use big data and employ sophisticated online segmentation. That is, they may seek to regain their ability to provide different consumers different treatment, by profiling consumers *ex ante* and provide different consumers different contractual terms.[112] In other words, firms will strive to discriminate in any event, and eliminating the

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[111] *See* Becher & Unger-Aviram, *supra* note 25 (distinguishing car rental, laundry, day-care and bank account SFCs).

[112] *Cf.* Oren Bar-Gill, *Algorithmic Price Discrimination.* Generally speaking, the same tactics that vendors have utilized for price discrimination might also be in play for other sorts of discrimination. For instance, some stores have engaged in return policy discrimination. Here, sellers may not allow returns for consumers from some areas (identified, for example, by their residential zip code).

Gap will merely shift discrimination to other realms – perhaps to those society finds to be worse.

Our response to this concern has several facets. First, while this argument has merit it should also be acknowledged that firms already engage in *ex ante* discrimination.[113] If firms already employ ex ante discrimination, it is doubtful whether eliminating ex post discrimination will make things worse. Second, *ex ante* discrimination is potentially more transparent and is therefore likely to be less harmful than *ex post* discrimination. When firms engage in *ex ante* discrimination, consumers might not know that they are being discriminated. However, they are able to become aware of the terms they are offered (that is, even if these terms are worse than the terms granted to other consumers). Consumers may be able to review those terms and hence make relatively informed decisions. At the same time, ex post discrimination of the kind discussed here is neither transparent nor predictable. Due to the Gap, consumers cannot know if they will be subject to lenient or harsh policies. Third, since *ex ante* discrimination may indeed pose a problem, stronger enforcement of rules against ex ante discrimination should be explored.[114]

The last possible concern is excessive litigation. As noted, consumers do not typically hold the relevant information relating to the Gap, so the Gap may be hard to prove. Moreover, even once proven, sellers' motivation may be hard to determine as well. This implies that proving a Gap and its allegedly unfair consequences and implications may involve costly litigation. The Gap, in short, adds another layer of legal complexity. This carries its own costs for the parties involved and for the public more generally. For that reason, the key to solving this matter would also involve introducing unique procedural measures. As we delineated above,[115] shifting burdens in suspicious instances may be beneficial.

CONCLUSION

Courts and legislators have long been struggling to determine which contractual provisions in SFCs should not be enforced. In this article, we suggest a new approach that might assist policy makers to form a more holistic, updated approach. We illustrate how digital realities, online peer-to-peer information flows and firm's contracts and conduct interact.

Traditionally contract law has assessed the fairness of the contractual language in isolation, without looking into the parties' behavior. This behavior vis-à-vis the contractual language is assumed to be relevant

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[113] *See, e.g.,* Acquisti *et al*., *The Economics of Privacy* 52 J. ECON. LIT. (2016). *See also* Natasha Singer, *The Governments Consumer Data Watchdog*, NEW YORK TIMES, (May 23, 2015) (quoting the chief economist of google).

[114] For a discussion of a similar balance of interests *see* Lior Jacob Strahilevitz, *Privacy versus Antidiscrimination*, 75 U. CHI. L. REV. 363, 371 (2008).

[115] *See supra* text following n. 110.

mainly with respect to issues such as breach of contract, estoppel or bad faith. Contract law also insists on drawing a line between pre-contract and post-contract stages. Our analysis blurs these lines. It demonstrates why this distinction cannot always hold. Post-contract behavior (regarding one group of consumers) can influence pre-contract decisions (of another group).

Consumer markets, especially in the digital age are elaborate mazes, and some of the information sets they feature amount to consumer mousetraps. To avoid such traps, our analysis offers two main lessons. First, the Gap is not an innocent phenomenon. In the context of consumers' assent to SFCs, much of the literature focuses on the way *consumers* make decisions, form preferences and behave. However, we suggest attributing much more attention and importance to *firms'* behavior ex post.[116] Therefore, regulating behavior in the context of SFCs should not be confined to behaviors that amount to unfair contracting practices, deceptive behavior or breach. It should also encompass the nuanced implications of "good," lenient behavior.

Second, online information flow is a two-sided coin. On the one hand, high-quality information flow conveys important information intuitively and smoothly. For that reason, it can advance consumer protection and reduce the need for legal intervention. On the other hand, the internet changes accepted notions of social trust while creating new forms of trusted parties. As a result, firms might be tempted to tinker with this reality and exploit it unfairly. In our context, self-interested firms can manipulate information flow by utilizing the Gap. In such cases information flows can aggravate the problem of information asymmetry, rather than cure it. It can lead consumers to form a distorted perspective, which in turn will result in sub-optimal decision making. The traditional concern of asymmetric information relates to consumer form *contracts*. We, however, suggest that paying close attention to asymmetric information in firms' *behavior* is frequently a crucial point not to be missed.

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[116] *See also* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print,* 99 IOWA L. REV. 1745, 1777-78 (2014) (exploring whether highlighting firms' behavior changes the way we view consumers' behavior, responsibility and blame).