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Even More Than You Wanted to Know About the Failures of Disclosure

Florencia Marotta-Wurgler

I. Introduction

Nobody reads fine print—even when it matters.¹ And it is everywhere: it governs activities performed daily, such as the Terms of Use and Privacy Policies of frequently visited web sites, as well as infrequent experiences like obtaining a mortgage or receiving medical treatment.² The most common regulatory approach to attenuate the (perceived) problem of non-readership has long been mandatory disclosure. A recent example is the American Law Institute’s *Principles of the Law of Software Contracts*, which promotes increased contract disclosure to encourage readership and prevent the market failures that result from imperfect information.³

In theory, disclosure is an ideal regulatory solution because it preserves consumer choice, doesn’t interfere with market mechanisms, and is cheaper to implement than more invasive alternatives such as mandatory terms or minimum standards. The theorist’s hope is that disclosure regulation forces sellers to compete on the information disclosed and thus represents a superior alternative to measures that might distort markets or reduce choice. The realist’s concern, however, is that disclosure does not work so well.

Indeed, the evidence shows that disclosure regulation has, at best, not been fully effective.⁴ Increased contract disclosure in the online market for software has not resulted in increased readership, as the ALI’s *Principles* drafters had hoped. Field and lab experiments demonstrate that simplified disclosures have not consistently helped individuals improve portfolio investment decisions⁵, choices regarding payday loans⁶, or other important decisions.⁷ These findings have mainly just encouraged

¹ See Yannis Bakos, Florencia Marotta-Wurgler, David R. Trossen, *Does Anyone Read the Fine Print?*, *Consumer Attention to Standard Form Contracts*, 43(2) J. LEGAL STUD. 1 (2014).

² See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, *MORE THAN YOU WANTED TO KNOW* (Princeton University Press, 2010); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971).

³ AM. LAW INST., *PRINCIPLES OF THE LAW OF SOFTWARE CONTRACT* (2010). See also Truth in Lending Act, 15 U.S.C. §1601 et seq. (1968), and Magnuson-Moss Warranty Act, 15 U.S.C. §2301 (1975). For an analysis of the problems created by imperfect information, see Howard Beales, Richard Craswell, and Steven Salop, *The Efficient Regulation of Consumer Information*, 24 J. Law & Econ. 491, 531-39 (1981)

⁴ See BEN-SHAHAR & SCHNEIDER, *supra* note 0. There is a large line of research that shows that many kinds of disclosures don’t work, including simplified disclosures. See, e.g., George Loewenstein Friedman JY, McGill B, Ahmad S, Linck S, Sinkula S, Beshears J, Choi JJ, Kolstad J, Laibson D, Madrian BC, List JA, Volpp KG, *Consumers’ Misunderstanding of Health Insurance*, 32 J. HEALTH ECON. 850 (2013); James J. Choi David Laibson & Brigitte C. Madrian, *Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds*, 23 (4) REV. FIN. STUD. 1405 (2010). See also Daniel E. Ho, *Fudging the Nudge*, 22 YALE L.J. 574 (2012); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INST. THEOR ECON. 94 (2012).

⁵ See, e.g., Choi et al *supra* note 4.

⁶ Marianne Bertrand & Morse, *Information Disclosure, Cognitive Biases, and Payday Borrowing*, 66(6) J. FIN. 1865 (2011)

regulation proponents to try to modify the mandates until they work. Perhaps the new crop of disclosures, including “smart,” “personalized,” and “just in time” disclosures, will finally do the trick. Perhaps they will effectively convey the fine print and lead to better consumer decisions.⁸

In *More Than You Wanted to Know: The Failure of Mandated Disclosure*, Omri Ben-Shahar and Carl Schneider offer the first systematic critique of disclosure regulation in all of its forms, including the latest innovations. Their core argument is that disclosure simply depends on the simultaneous success of too many factors for it to work. Effective regulation depends on the right information being disclosed, read, understood, and used in a way that allows individuals to make the right decision. This, the authors argue, just never happens. People don’t read (and don’t want to read), don’t want to make decisions (so why bother reading), and couldn’t read even if they wanted to because there are too many disclosures and they are written in language too complex for most readers to grasp. For the most part, the authors argue, not reading is rational because most of the fine print deals with low probability events and contracts may change anyway down the road.

The authors urge us to focus instead on how individuals actually function. “People don’t want to read, they want advice.”⁹ Ben-Shahar and Schneider argue that consumers rely on expert opinion in making decisions and that current opinion services, such as Yelp, Amazon, and eBay, as well as other types, don’t need disclosure regulation to function properly. The goal of the book is to place one or more nails in the coffin of disclosure regulation and urge regulators to move aside and leave room for alternative mechanisms to emerge to address problems associated with imperfect information.

In this review, I focus on two points. First, I offer fresh evidence on the failure of mandated disclosure by looking at changes in disclosure over time in a common consumer contract, software End User License Agreements (EULAs). The evidence suggests that many of the problems identified by Ben-Shahar and Schneider have only worsened over time. In particular, during the past decade, the average EULA became more accessible *and* became longer and less buyer-friendly. It also remained highly complex. Moreover, firms that chose to increase their contract accessibility did not, on average, change their contract in a way that made it easier for consumers to read or understand and did not change the substance of their terms in a buyer-friendly direction. If anything, increases in disclosure may have allowed firms to put forth more restrictive contracts and, at the same time, enforce them more

⁷ See e.g. BEN-SHAHAR & SCHNEIDER, *supra* note 2 for examples in a wide array of areas.

⁸ For a description of “smart disclosure,” see CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, HEALTH, AND HAPPINESS* (Penguin, 2009); See also Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. Chi. L. Rev. 1349, 1369 (2011); Michael S. Barr, Sendhil Mullainathan, and Eldar Shafir, *Behaviorally Inform Financial Services Regulation*, (New America Foundation, 2008), available at <http://www.fdic.gov/about/comein/behaveApril1a.pdf>

⁹ BEN-SHAHAR & SCHNEIDER at XXX.

effectively.¹⁰

Second, I will push back at the claim that consumers crave advice and not data. Ben-Shahar and Schneider posit that intermediaries supply the type of information that consumers want and need (“ratings, rankings, scores, grades, labels, and reviews”¹¹) without the need for mandatory disclosure. While this last point might be debatable—especially when it comes to “use pattern” disclosures—relying on advice, ratings, rankings, and their progeny to inform individuals about fine print suffers from some of same maladies the authors (correctly) identify with mandatory disclosure. They assume that people will care enough to actively seek them out, understand them and use them wisely; that they will convey the right type of information; that they will be produced well and not suffer from some of the problems and conflicts that trouble disclosure regulation; and so on. But the evidence suggests that these conditions are rarely met. It might be more helpful to begin considering alternative solutions such as minimum standards and protections where (and if) warranted, such as the right to exit from the contract.¹² I am also concerned that the recommendation to do nothing will complicate the issue of enforcement, as courts rely on direct mandates and precedent to enforce contracts, and notice and “opportunity to read” have been at the heart of contractual enforcement.

This review proceeds as follows. Section II presents some new facts and analysis about the evolution of contract disclosure over time by focusing on the changes in a large sample of EULAs between 2003 and 2010. Section III suggests that relying on advice suffers from some of the same shortcomings as mandated disclosure and suggests why doing nothing about the failure of disclosure might not be desirable. Section IV concludes.

II. Seven Years of Changes in Disclosure and Corresponding Changes in Complexity and Content

Existing evidence from EULAs suggests that disclosure barely influences the probability of reading even when individuals are required to click “I agree.”¹³ Ben-Shahar and Schneider argue that failure to read is a predictable outcome of disclosure regimes. Individuals are decision-averse and also unlikely to understand fine print due to contract length and complexity, among other reasons.¹⁴ For example, EULAs

¹⁰ See Florencia Marotta-Wurgler, *Are “Pay Now, Terms Later” Contracts Worse for Buyers? Evidence from Software License Agreements*, 38(2) J. LEGAL STUD. 309 (2009). Absent price effects, however, it would be impossible to tell whether contracts that have become relatively more one-sided have hurt consumers in any way.

¹¹ BEN-SHAHAR, *supra* note 2, at 183.

¹² Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. LEGAL STUD. 115 (2011).

¹³ See Bakos et al, *supra* note 1; Florencia Marotta-Wurgler, *Does Increased Disclosure Help? Evaluating the Recommendations of the ALI’s Principles of the Law of Software Contracts*, 78 (1) U. CHICAGO L. REV. 165 (2011).

¹⁴ OREN BAR-GILL, *SEDUCTION BY CONTRACT: LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER MARKETS* (Oxford University Press, 2012); Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form*

are on average around 2,000 words and written in a way that requires a graduate degree to understand them (as measured by Flesch-Kincaid readability scores).¹⁵ The authors call these problems “overload” and “illiteracy.”¹⁶ That is, even if individuals wanted to read, they would be deterred by length and complexity.

Here I offer more evidence on the failure of disclosure regimes by comparing trends in disclosure and content. In a recent paper, Robert Taylor and I examined the changes in EULAs from 264 firms from 2003 to 2010 and found that EULAs became 30% longer as well as more one-sided, while remaining as complex as ever.¹⁷ In other words, the overload problem has worsened, and the illiteracy problem has not gotten any better. We did not break the results out by disclosure level, however. I do so here, and the results are rather interesting.

I categorize EULAs according to the salience of their disclosure. Clickwraps are the most salient, as they require consumers to click on “I agree” before completing a purchase. Next come browsewraps, which are contracts that are posted on the seller’s website but require individuals to click on a hyperlink that may or may not be easy to find. Finally, “pay now, terms later” (PNTL) contracts can be read only after consumers purchase the product because the contract comes bundled with it.

Table 1 shows the changes in disclosure from 2003 to 2010. There has been a substantial trend toward increased disclosure. In 2003, 45% (120 out of 264, etc.) of the EULAs in the sample were PNTLs, 49% were browsewraps, and only 6% were clickwraps. But the bottom row shows that by 2010, PNTLs had fallen to 30%, while browsewraps had increased their share to 60% and clickwraps to 10%. Clickwraps had nowhere to go but toward less disclosure, and some did. Browsewraps changed in both directions (with a slight tendency toward more disclosure). Most of the action was the move away from PNTLs. Almost half of PNTLs moved toward greater disclosure, mostly to browsewraps. Disclosure advocates should welcome these changes, especially given the perception that sellers use PNTLs to take advantage of consumers.¹⁸

Contracting in the Age of Online User Participation, 14 MICH. TELECOMM. & TECH. L. REV. 303 (2008), Oren Bar-Gill, *Seduction by Plastic*, 98 NW U. L. REV. 1373(2004); Oren Bar-Gill, *Bundling and Consumer Misperception*, 73 U. CHI. L. REV. 33 (2006); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505 (2006).

¹⁵ See Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change in Innovation in Consumer Standard Form Contracts*, 88 NYU L. REV. 240 (2013).

¹⁶ BEN-SHAHAR, *supra* note 2, at 22.

¹⁷ Marotta-Wurgler, *supra* note 15.

¹⁸ See e.g. Deborah Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 Touro L. Rev. 1205 (2000); Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 Wayne L. Rev., 1805 (2000); Roger C. Bern, “*Terms Later*” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J. L. & Pol’y

Table 1. Number of Contracts by Disclosure Type, 2003 and 2010

		2010			
		Clickwrap	Browsewrap	PNTL	N
2003	Clickwrap	7	7	1	15
	Browsewrap	16	102	11	129
	PNTL	4	49	67	120
	Total	27	158	79	264

These changes were voluntary, so we cannot rigorously answer whether mandatory disclosure would change contract characteristics; we can't answer whether sunlight is the best disinfectant. We can, however, ask whether firms who decide to change disclosure levels also change other important features of the contract. And this tells us a lot: if sunlight is a strong disinfectant, we would be surprised to see that firms would voluntarily increase disclosure when their contracts were highly biased or becoming more so.

I measure the relative buyer-friendliness of a contract by comparing 32 typical terms against the default rules of Article 2 of the Uniform Commercial Code. A contract with a score of 0 would have terms that match the default rules of Article 2. Each term that is worse (less pro-buyer) is scored as a -1, each term that is better is scored as a +1. The overall contract bias is the sum of the 32 scores. The mean and median number of words measures contract length. Flesch-Kinkaid readability scores, a standard measure of text complexity that takes into account the average length of a sentence and the average length of a word, measure complexity. Lower numbers indicate more complicated texts. For reference, texts that score from 0 to 30 generally require a college degree or more to be understood, while individuals with an eighth-grade education can read texts that score 60 or 70.

Table 2 shows that in 2003, more disclosure is associated with slightly more contract bias, length, and complexity. Clickwraps are the most biased form of contract, with an average of a little over six terms that are less buyer-friendly than Article 2 default rules (Index of -6.07). Browsewraps and PNTLs are somewhat less biased. Clickwraps and browsewraps tend to be longer (1,503 and 1,847 words long, respectively) than the hard to access PNTLs (1,164), and that they are slightly harder to read, with lower Flesch-Kinkaid scores.

These same qualitative relationships are the same or stronger in 2010. Contracts with the highest level of disclosure are even more clearly the worst in terms of bias and length compared to contracts with the lowest level of disclosure. The average clickwrap is 76% longer (median 40%), and the

641 (2004); Stewart Macaulay, Symposium: *Freedom of Contract: Solutions in Search for a Problem?*, Wis. L. Rev. 777 (2004). *But see* Marotta-Wurgler, *supra* note 10.

average PNTL is 47% longer (median 29%) in 2010. Ben-Shahar and Schneider would say that overload problems have gotten worse, and illiteracy remains the norm. Moreover, at a substantive level, clickwraps are now more pro-seller than PNTLs by an average of more than two terms.

Table 2. Disclosure, Bias, Length, and Complexity, 2003 and 2010

		N	Bias Index	N (mean)	Words (median)	Flesch
2003	Clickwrap	15	-6.07	1503	1412	31.25
	Browsewrap	129	-5.29	1847	1261	32.56
	PNTL	120	-5.13	1164	998	34.41
2010	Clickwrap	27	-6.67	2658	1986	31.91
	Browsewrap	158	-5.33	1932	1307	33.13
	PNTL	79	-4.65	1713	1288	34.52

Tables 3, 4, and 5 dig deeper into these findings. Table 3 focuses on changes in disclosure and changes in bias. It shows that all contracts became less buyer-friendly, including those that became increasingly accessible. For example, PNTLs that became clickwraps also became a little over one term less buyer-friendly on average. The relatively few contracts that became less accessible also became less buyer-friendly. Finally, the contracts that did not change location, those on the diagonal, also became less buyer-friendly on average.

Table 3. Disclosure and Changes in Bias, 2003 and 2010

		2010		
		Clickwrap	Browsewrap	PNTL
2003	Clickwrap	-0.57	-1.71	0
	Browsewrap	-0.18	-0.41	-1.27
	PNTL	-1.25	-0.51	-0.73

Table 4 repeats this exercise with changes in contract length. Again, it reveals a tendency towards increased length, including for contracts that became more accessible. For instance, while the percentage of clickwraps increased in 2010, a “victory” for disclosure, these contracts also became significantly longer, making it harder for any willing individual to read. Again, there is no suggestion that firms are increasing disclosure because they are making their contracts more appealing.

Table 4. Disclosure and Changes in Number of Words, 2003 and 2010

		2010		
		Clickwrap	Browsewrap	PNTL
2003	Clickwrap	+293	+130	+7
	Browsewrap	+604	+384	+1118
	PNTL	+460	+511	+361

Table 5 looks at changes in writing complexity. There is no obvious pattern here, and the average changes are modest. My view, based on reading the contracts, is that complexity did not increase because contracts were already in typical legalese in 2003.

Table 5. Disclosure and Changes in Complexity (Flesch-Kinkaid Score), 2003 and 2010.

		2010		
		Clickwrap	Browsewrap	PNTL
2003	Clickwrap	-0.30	-0.94	+0.20
	Browsewrap	+0.08	+1.15	-1.37
	PNTL	+0.25	-1.05	-0.06

To summarize—disclosure is increasing in this market. In particular, the use of PNTL contracts is in decline even though courts have become increasingly comfortable enforcing them.¹⁹ Yet, the data also show a general reduction in consumer protection over time, an increase in the number of words, and no change in the complexity of language. In other words, despite a trend toward increased disclosure, there has been a deterioration of contract quality from the buyer’s perspective.

This is not a perfectly clean experiment where we can say how contracts will change if disclosure is mandated. However, given that firms are actually making contracts worse for consumers even as they are voluntarily disclosing them more, they clearly do not feel that they have much to fear from sunlight, at least in this market. Perhaps this is because they believe, correctly, that consumers don’t read or don’t understand what they read if they try. But the bottom line is that increased disclosure is unlikely to help much here. None of this would come as a surprise to Ben-Shahar and Schneider.

While these results cast a shadow on traditional disclosure regimes focused mainly on increasing access, they cannot say much about the efficacy of the newer breed of “smart” disclosures. These focus on the content as well as the manner of contract presentation and seek to avoid many of the problems identified by the authors.

Recent studies offer some hope for smart disclosure, provided that individuals pay attention to the disclosure in the first place. For instance, Beshears et al found that simplified choices in saving and

¹⁹ See Marotta-Wurgler, *supra* note 10.

escalation choices increased employee participation in retirement plans.²⁰ Simplified choices have also been shown to increase understanding of health insurance plans, though they affected behavior only modestly. Use pattern disclosures, especially in the contexts of products such as cell-phones and credit cards, might also inform effectively if they are crafted in ways that address the problems identified in this book. More research is necessary to understand how much more successful this form of regulation will be than mandatory disclosure.²¹

III. Now What? On Expert Opinion and Doing Nothing

“When we abandon the unreal world in which people tirelessly sponge up disclosures and diligently make informed decisions and instead ask how people really make choices, we see that they are likelier to want *opinion* than data. [emphasis added]...Many markets voluntarily provide advice in the form of ratings, rankings, scores, grades, labels, warnings, and reviews.”

Ben-Shahar and Schneider argue that one of the many reasons why disclosure fails is that individuals prefer advice to data, and that the intermediaries who produce such advice do not need mandatory disclosures to inform the public.²² The authors suggest discarding mandatory disclosure regulations and simply leave the door open for market forces or other types of regulation to emerge. I have concerns both with both the efficacy of relying on advice and the recommendation to abandon disclosure regulation and replace it with nothing.

a. Opinion Data as Disclosure

One of my general concerns is that for opinions— “ratings, rankings, scores, grades, labels, warnings, and reviews”—to effectively inform consumers, some of the same conditions necessary for effective disclosure regulation must also be met. Opinions must be informed themselves and not suffer from the same problems and conflicts associated with disclosure. Individuals must also actively seek them out, read them, understand them, and act on them.²³

Some examples of the opinions that Ben-Shahar and Schneider may have in mind are those given

²⁰ John Beshears, James J. Choi, David Laibson, & Brigitte C. Madrian *Simplification and Saving*, 95 (C) J. ECON. BEHAV. ORG. 130 (2013).

²¹ Loewenstein, *supra* note 4. See also Becher, *supra* note 14.

²² The authors also point out that disclosure is not necessary for the proper functioning of the informed minority and for reputational sanctions to work. See also Becher, *supra* note 14.

²³ Becher and Zarsky offer a complete account on the role of opinion data informing consumers *ex ante*. Becher, *supra* note 14. See also Scott R. Peppet, *Freedom of Contract in an Augmented Reality: The Case of Consumer*, 59 UCLA L. REV. 676 (2012).

on Amazon.com, TripAdvisor, and Yelp. Amazon.com aggregates reviews for consumer goods, TripAdvisor does the same for hotels, and Yelp does the same for restaurants and services. Individuals who post their experiences with particular goods or services generate these rankings. Positive online ratings affect sales, indicating that others rely on them in making decisions.²⁴ This is promising so far.

While this seems like an improvement over what we know about individuals' attitudes towards disclosures, as a practical matter the content of "user-generated" reviews can be systematically biased. For example, they tend to become increasingly negative as ratings environments mature.²⁵ Reviewers also adjust their evaluations based on the reviews previously left by others rather than provide an independent view.²⁶ There is the ongoing problem of shill reviews. These behaviors introduce noise and bias and can produce ratings that do not reflect the views of the most informed customer base.²⁷

There is a general issue of coverage, in terms of products as well as their fine print. In the cases of Amazon, TripAdvisor, and Yelp, the rankings and opinions are generally short, sometimes just a number. They are used for one-dimensional decisions such as whether to read a book or trust for sushi. A 2010 study found no meaningful relationship between Amazon.com reviews of software products and the content of EULAs, consistent with reviews reflecting product functionality as opposed to fine print.²⁸ For opinions to be any better than mandatory disclosure of fine print, we actually need opinions—on the fine print. Or opinions that correlate positively with the fine print.

Expert-generated reports, like those in Consumer Reports, have some advantages over user-generated reviews in these respects. Experts review, test, and experience the good or service, and might also report some contract features (such as warranties) for big-ticket items. Specialized intermediaries, such as PrivacyChoice, The Fine Print Project, and FairContracts.org offer summarized reviews of the content of disclosures. Indeed, there are sites and blogs that seek to simplify fine print disclosures to consumers, including the terms in online privacy policies.²⁹ Individuals who seek the opinion of experts might fare better in becoming informed about the nature of the goods and services they consider,

²⁴ Becher, *supra* note 14, Wendy Moe & Michael Trusov, *Measuring the Value of Social Dynamics in Online Product Ratings Forums*, 49 (3) J. MARKETING RES. (2011).

²⁵ See, e.g., Xinxin Li & Lorin M. Hitt, *Self-Selection and Information Role of Online Product Reviews*, 19(4) INFORMATION SYSTEMS RESEARCH 456 (2008); David Godes & Jose Silva, *Sequential and Temporal Dynamics of Online Opinion*, 31 MARKETING SCI. 448 (2013); Wendy W. Moe & Michael Trusov, *The Value of Social Dynamics in Online Product Ratings Forums*, 48 J. MARKETING RES. 444 (2011).

²⁶ Ann Schlosser, *Posting Versus Lurking: Communicating in a Multiple Audience Context*, 32 J. CONSUMER RES. 260 (2005).

²⁷ Wendy Moe & David Schweidel, *Online Product Opinion: Incidence, Evaluation and Evolution*, 31 MARKETING SCI. 372 (2012).

²⁸ Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 NYU L. REV. 1618 (2010).

²⁹ See, e.g., *The Fine Print Project*, TOSBack, FAIRCONTRACTS.ORG, <http://www.faircontracts.org/>. See also references cited in Becher & Zarsky, *supra* note 0, and Peppet, *supra* note 0.

including the fine print. Of course, these general evaluations would not help individuals in selecting products and services whose desirability depends on individual use patterns.³⁰ And, it seems unlikely that there will ever be expert (or popular) opinion data for a very large fraction of consumer goods' standard terms. For example, it is hard to imagine that opinions will ever be available for all 246 of the EULAs in the sample studied above. The best we might reasonably expect are remarks on the license terms of Microsoft and the other largest producers.

Unfortunately, there is a problem even when (good) opinions data on fine print exist. Just as individuals fail to read fine print when it is disclosed, they fail to seek out such specialized intermediaries. In the context of shopping for software online, only 0.1% accessed a software product review while shopping for software. Note that this is essentially the same rate at which shoppers read disclosed EULAs. Also, of those few visits to product review sites, none pertained to the terms of the EULA as opposed to the functionality of the software. Finally, not a single shopper visited any of the specialized sites that discuss contract terms, including EULAs and other fine print. The fact that millions of people access Amazon.com and TripAdvisor daily is not a defense here; we are concerned with the likelihood that consumers will seek out advice on fine print, not the overall product itself.

This is not surprising. As the authors suggest in their book, this behavior might be perfectly rational. It might also be perfectly rational for reviewers to ignore the fine print. After all, it seems unlikely that an arbitration clause, or a term in stating that the vendor will collect certain types of information, will affect an individual's purchase decision. Whether and what to do about the terms that are ignored but which might affect substantive rights of individuals later is an important question that needs to be addressed, especially given the current challenges to class action litigation.³¹ What seems clear is that, just as disclosure, opinion ratings might not offer a satisfying solution to this problem.

b. Is “Nothing” the Answer?

In their final chapter, the authors recommend abandoning disclosure and leaving room for new, bespoke market-correcting techniques to emerge. This makes sense if one believes the premise that disclosure is doomed to fail; we have little to lose. But even if a clean slate encourages innovation in the regulatory landscape, it might create problems in other areas.

Consider the role of courts in enforcing fine print. As Ben-Shahar and Schneider point out, courts

³⁰ See Bar Gill, *supra* note 14.

³¹ See e.g. Samuel Issacharoff, *Disclosure, Agents, and Consumer Protection*, 167(1) J. INST. THEOR. ECON 56 (2011); Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARVARD L. REV 78 (2011); Catherine Fisk & Erwin Chemerinsky, Erwin, *The Failing Faith in Class Actions: Dukes v. Wal-Mart and AT&T Mobility v. Concepcion*, 7 DUKE L. CONST. L. & PUB. POL. (2011).

have relied heavily on notice and “opportunity to read” in deciding whether to enforce the terms of a standard form contract. Indeed, the notion that individuals must be given notice and offered a choice when entering contracts has been used a proxy for meaningful assent by courts and is at the heart of contractual enforcement. Given the canon rules in this area, it would not be workable to instruct courts that rely on precedent absent a direct federal mandate to “do nothing.” (To tie this back to the discussion above, the opportunity to read can hardly be interpreted to mean the opportunity to seek out opinion data.)

If “opportunity to read” is not a meaningful way to capture assent, as the authors argue, then it should be replaced by an approach that more meaningfully captures assent. And if meaningful assent is just not possible, then the analysis in the book offers the opportunity to think of other ways of ensuring that the interests of individuals are protected. Projects like the ALI’s Restatement on Consumer Contracts might help in that regard.

IV. Conclusion

Ben-Shahar and Schneider offer a thorough and expert account of why mandatory disclosure fails as a regulatory tool and why it cannot (or would be hard to) be fixed. Individuals don’t want to read fine print, don’t care about it, and in the few instances when they might or should care, they become overwhelmed by its magnitude and its complexity. Individuals don’t want to read; they want advice, according to the authors. The authors urge us to let go of the mirage of disclosure, as attractive as it is, and leave the door open to new forms of regulation, if and whenever necessary. It is clearly a thought-leading book in this arena.

In this review, I first offer new evidence supporting the claim that disclosure suffers from a variety of maladies identified in Ben-Shahar’s and Schneider’s account. I find that over time, software EULAs have become significantly longer, more biased against consumers, and remained equally difficult to comprehend—despite an increasing degree of disclosure. Indeed, contracts that became more accessible have a particular tendency to grow longer and more one-sided. Since evidence suggests that individuals do not read contracts even when prominently disclosed, these results suggest that the increases in disclosure do not generate any meaningful benefits to individuals, and may actually be facilitating the enforcement of aggressive fine print.

Next, I explore the author’s idea that opinion ratings have a better chance at helping individuals make choices and that mandatory disclosure is not needed to opinion data aggregators to produce their rankings. Just like disclosure, however, opinion data suffers from many of the problems identified by Ben-Shahar

and Schneider. Opinions, when they exist, are subject to biases and noise, and more fundamentally the evidence suggests that individuals are unlikely to seek them out. Just like mandatory disclosure, opinion ratings are no panacea, and in some cases seem even less likely to be effective than disclosure.

Finally, while I agree that we should leave the door open for new kinds of effective regulation to arise and address problems of imperfect information in consumer markets, I question whether this same recommendation is desirable, or even feasible, when it comes to contract enforcement. Many contract doctrines involving fine print incorporate disclosure and “opportunity to read” in ascertaining whether there has been meaningful assent and the contract should be enforced. Courts cannot operate in a vacuum, so the authors could use this opportunity to offer some alternatives to this approach.