An Offer You Can't Understand

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Lauren Willis, *Performance-Based Consumer Law*, 82 **U. Chi. L. Rev.** (forthcoming), available at SSRN.

Two decades ago, contract law ran headlong into online terms of service, looked around briefly in confusion, and announced that it needed to go take a nap. It has not been heard from since. In its place we have something that looks like contract law, and claims to be contract law, but is oddly ignorant of things that the real contract law would know. This usurper, part Martin Guerre and part pod person, is formalistic to a fault, obsessed with meaningless details, lazy beyond belief, and utterly devoid of human feeling.

Generations of scholars have tried to unmask this impostor, to little effect. Lauren Willis's *Performance-Based Consumer Law* offers a different and more promising way of protecting consumers from overreaching and incomprehensible terms of service. Consumer law cares about form contracts, too, but it can afford to be more realistic about how well consumers actually understand them — or don't.

Scholars since Karl Llewellyn's day have pointed out the obvious: courts enforcing form contracts bind consumers to terms they have not read and could not reasonably be expected to read. This is a problem for any theory based on upholding voluntary agreements, or at least it ought to be. Impostor contract law doesn't care. It remains firmly committed to what Gregory Klass calls an "interpretive" approach to contractual meaning: a contract means what it says, even if almost no one actually knows it says that. So while there must be an unambiguous manifestation of assent by the user, that assent can relate to a mess of undigestible text vomited up on the page.

Scholars at least since Llewellyn have resisted this reasoning, trying to bring either some substantive scrutiny or some realism about what people do and don't read to the table. For a time in the in the 1960s and 1970s, they took ground on both fronts. Unconscionability doctrine recognized that some contractual terms were simply fairer than others, and false advertising law recognized that even statements that were literally true in theory could be hopelessly misleading in practice. But both offensives bogged down in the deregulatory rainy season of the 1980s. Combine this doctrinal rigidity with ubiquitous user agreements and the result has been bad news for consumers. The only difference is that mouse clicks have replaced signatures and the mess of undigestible text is vomited up on the screen rather than on the page.

This formalistic compromise gives firms bizarre and perverse incentives. They can be dinged for not having terms of service (or their close cousins, privacy policies). They can be dinged for lying about what is in the terms. And they can be dinged for omitting important terms. But adding more is always safe. I like to show my students the *reductio ad absurdum* of this trend, the user agreement toward which all terms of service naturally trend: the 35,000-word user agreement of the Central Pacific Railroad Photographic History Museum, complete with staring eyeballs and warnings not to self-diagnose yourself with smallpox or engage in "vigilante activities."

It is all but impossible make substantive regulatory progress in such an environment. Any attempt to empower consumers — think "notice and choice" in privacy law — ends up tossing a few more shovelfuls of disclosure onto the contractual dung heap. Now consumers have "notice" of the practice

regulators want them to know about. But their "choice" is emptier than ever.

Willis's article builds on a few recent turns towards realism in online contracting — attempts to point out that consumers don't and can't read these behemoths, and that law can recognize this fact without bringing the whole e-commerce crashing down. The Federal Trade Commission's consumer-protection docket includes numerous cases recognizing that consumers don't click on every link, and insisting that it's not enough that the user agreement fully "discloses" a term if that term undercuts the messages consumers actually receive from its ads. And Ian Ayres and Alan Schwartz's *The No-Reading Problem in Consumer Contract Law* helpfully suggested that perhaps the legal system should seek empirical evidence about whether consumers *actually* understand specific contract terms rather than simply positing that they do. (Klass calls this approach "causal-predictive"; it relies on surveys and on psychology to make informed claims about what consumers think and do.) Their proposed solution — a "warning box" with a special border for unexpected and unfavorable terms — is a bit of an epicycle, one that recreates the problem they set out to solve. But their core insights and the FTC's are important: incomprehensible terms shouldn't count, and the best way to learn whether a term is comprehensible to consumers is to ask consumers.

Performance-Based Consumer Law is the keystone in this arch: the conclusion toward which everything has been building, the piece that locks everything into place. Willis's central observation is that the law can regulate what products *do* as well as what they *are*. Instead of telling a factory to use a particular kind of smokestack scrubber (a design standard), the government can tell it to reduce its emissions by 60%, any way it wishes (a performance standard). Performance standards can make it easier for regulated entities to comply, and they can make it harder for those entities to wriggle out from regulations they dislike.

In the consumer context, required disclosures and contract formalties are design standards. They regulate inputs to the consumer contracting process, but there is no guarantee those inputs make the slightest difference. Regulating the outputs of that process using performance standards lets us get at the real questions. Willis identifies two kinds. There are *suitability* standards: do consumers sign up for services that are right for them? And there are *comprehension* standards: do consumers understand the terms?

Suitability standards and comprehension standards are the old two lines of attack on form contracts — substantive scrutiny and realism about the behavior of contracting parties, respectively — updated for the 21st century. And when we understand them as *consumer* law, the power of Willis's reframing becomes clear. The old contract law we knew and loved isn't coming back; we're stuck with this soulless reboot of the franchise instead. Applying performance standards to consumer contracting takes these familiar critiques and hands them to another body of law capable of pushing back against what contract law has become. The point is not to be skeptical about terms of service just to be skeptical about terms of service, but instead to be skeptical when there is some consumer-protection reason to care.

Willis offers thrilling suggestions about what performance-based consumer law could look like in practice. Survey evidence would become routine, and if surveys showed that consumers misunderstood important terms or made head-slappingly bad choices, there would be serious consequences. The most elegant remedy would be to deny enforcement to any systematically misunderstood term. More mildly, regulators could use this evidence to decide which firms to investigate. More severely, regulators could treat a failure to hit a comprehension or suitability benchmark as *per se* unfair, deceptive, or abusive. The point of imposing sanctions is not just to punish firms whose lawyers write like lawyers. Rather, it pushes firms to help consumers understand their choices and to choose wisely. It aligns firms' incentives with their customers'.

Performance-Based Consumer Law is a rich article, and I am not doing it full justice by dwelling on its application to terms of service. Willis's examples include overdraft fees and over-the-counter drugs; she is thoughtful about pragmatic questions of how (and how not) to implement performance standards. But when you have been beating your head against a nail for years and someone hands you a hammer, it is natural to apply it to the problem close at hand, even if there are other bodies of law also in need of a good pounding. Consumer contracts are terrible for consumers, and Willis offers a way to do something about it.

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