
TERMINATION WITHOUT EXPLANATION CONTRACTS

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Firms routinely terminate their contractual relationship with consumers. For example, Twitter has recently removed more than 70,000 accounts that allegedly promoted the QAnon conspiracy theory. Similarly, during 2019-2020, Facebook terminated 5.4 billion supposedly fake accounts. At the same time, WhatsApp announced that it is terminating 2 million user accounts per month for spreading fake news. As another example, Discord terminated 5.2 million user accounts for allegedly publishing spam and exploitative content.

Terminating accounts that facilitate and promote fake profiles, fake news, spam, hatred, inappropriate content, or cheating makes sense. Past incidents and consumer complaints, however, indicate that firms often terminate their relationship with consumers without explanation. Such termination without explanation may be socially costly and undesirable. First, if firms fail to explain to consumers the cause for termination, a hasty, unfounded, and erroneous termination is more likely to occur. Second, erroneous contract termination, fueled by a lack of explanation, may generate significant costs to consumers. These may include the loss of sunk investments, emotional costs, and switching costs. Third, termination without explanation may rely on nontransparent discriminatory factors. Alas, such terminations may disproportionately target and harm vulnerable consumers while eroding imperative societal values.

Given these risks and costs, this Article marks the first attempt to systematically and empirically study the phenomenon we dub “termination without explanation contracts.” We use this term to refer to consumer contracts which allow firms to terminate their relationship with their consumers without disclosing the reason for termination. In doing so, this Article empirically examines the contractual termination mechanisms of

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500 online contracts of the most popular websites in the United States. The results of our study show, among other things, that the vast majority of these contracts are nontransparent termination without explanation contracts. We therefore propose to consider imposing a duty to explain on firms. We also present a transparency index that captures key aggravating factors and can help tackle the issue from a holistic approach.

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I. INTRODUCTION

Imagine yourself locked out of your favorite social media account without knowing why or what happened. Frustrated, you try to contact the social media platform. You get no response. You search online, and you find you are not alone. This has happened to other users in the past. Being a sophisticated user, your next step is to browse the terms and conditions of the social media platform. To your horror, the terms read that “we may, at our sole discretion, terminate your account for any reason.”¹ You try again to access your account. And again. Yet with no success.

1. As the findings of this Article reveal, such terms are prevalent. *See infra* Section III.C. For two concrete examples, see *Spotify Terms and Conditions of Use*, SPOTIFY, <https://www.spotify.com/us/legal/end-user-agreement/#s16> (last visited Mar. 13, 2022) [<https://perma.cc/WYU8-EMHU>] (“Spotify may terminate these Terms . . . or suspend your access to the Spotify Service at any time. . .”); *Zillow Terms of Use*, ZILLOW, <https://www.zillow.com/z/corp/terms/> (last visited Mar. 18, 2021) [<https://perma.cc/HY27-XKX6>] (“[W]e may, in our sole discretion . . . terminate your access to your account . . . at any time for any reason, with or without notice.”).

This is not a fictional scenario. Businesses routinely close user accounts and terminate their relationship with consumers.² For example, Twitter has recently removed more than 70,000 accounts that allegedly promoted the QAnon conspiracy theory.³ Similarly, during 2019, Facebook terminated 5.4 billion supposedly fake accounts;⁴ WhatsApp announced that it is terminating 2 million user accounts per month—that is, 24 million accounts a year—for apparently spreading fake news,⁵ and Discord, an online communication platform, terminated 5.2 million user accounts for allegedly publishing spam and exploitative content.⁶ Also recently, Infinity Ward, an American video game developer, terminated 50,000 accounts due to alleged cheating and hacking by users.⁷

Firms may wish to terminate user accounts that facilitate fake profiles, fake news, spam, inappropriate content, hatred, or cheating.⁸ Firms may also legitimately wish to terminate their relationship with consumers who undermine the firms' objectives, breach the firm's guidelines or policy, risk the firm's

2. In this Article we use the terms “users” and “consumers” interchangeably.

3. Kate Conger, *Twitter, in Widening Crackdown, Removes Over 70,000 QAnon Accounts*, N.Y. TIMES (Jan. 20, 2021), <https://www.nytimes.com/2021/01/11/technology/twitter-removes-70000-qanon-accounts.html> [<https://perma.cc/92SZ-HQ4L>] (“Twitter . . . said that it had removed more than 70,000 accounts that promoted the QAnon conspiracy theory in recent days.”). Notably, Twitter had also recently banned former President Donald Trump from its service “due to the risk of further incitement of violence.” See Kate Conger & Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html> [<https://perma.cc/5766-9NY2>].

4. Brian Fung & Ahiza Garcia, *Facebook Has Shut Down 5.4 Billion Fake Accounts This Year*, CNN (Nov. 13, 2019, 8:57 PM), <https://edition.cnn.com/2019/11/13/tech/facebook-fake-accounts/index.html> [<https://perma.cc/5XQB-Q88Y>].

5. Michael Safi, *WhatsApp ‘Deleting 2m Accounts a Month’ to Stop Fake News*, GUARDIAN (Feb. 6, 2019, 11:00 AM), <https://www.theguardian.com/technology/2019/feb/06/whatsapp-deleting-two-million-accounts-per-month-to-stop-fake-news> [<https://perma.cc/S6UL-VU2H>].

6. Jon Porter, *Discord Says It’s Banning Millions of Accounts to Tackle Spam*, VERGE (Mar. 20, 2020, 2:00 PM), <https://www.theverge.com/2020/3/20/21188273/discord-transparency-report-moderation-q2-q3-q4-2019-spam-exploitative-content> [<https://perma.cc/Q4WM-TCXF>].

7. Cass Marshall, *Over 50,000 People Have Been Banned from Call of Duty: Warzone*, POLYGON (Mar. 31, 2020, 5:51 PM), <https://www.polygon.com/2020/3/31/21202101/call-of-duty-warzone-infinity-ward-ban-cheaters-battle-royale> [<https://perma.cc/WC5Z-MNV4>].

8. For a few recent examples, see Jaclyn Diaz, *Twitter Permanently Suspends Steve Bannon Account After Beheading Comments*, NPR (Nov. 6, 2020, 11:56 AM), <https://www.npr.org/2020/11/06/932052602/twitter-permanently-suspends-steve-bannon-account-after-beheading-comments> [<https://perma.cc/5YYG-FUUQ>]; Donie O’Sullivan, *Twitter Deletes China-Linked Accounts that Spread False Information About Hong Kong and Covid-19*, CNN (June 12, 2020, 11:19 AM), <https://edition.cnn.com/2020/06/11/tech/twitter-manipulation-account-removal/index.html> [<https://perma.cc/KV7G-5C3K>]; Anna Schecter, *Twitter Suspends More than 50 White Nationalist Accounts*, NBC NEWS (July 11, 2020, 2:08 PM), <https://www.nbcnews.com/tech/social-media/twitter-suspends-more-50-white-nationalist-accounts-n1233469> [<https://perma.cc/7RGZ-KJFD>]; Derrick Bryson Taylor, *Twitter Permanently Suspends Accounts of Ilhan Omar’s Potential Challenger*, N.Y. TIMES (Nov. 30, 2019), <https://www.nytimes.com/2019/11/30/us/Danielle-Stella-Twitter-Ilhan-Omar.html> [<https://perma.cc/246U-DGDA>]; Chris Velazco, *Facebook Shut Down 10 Fake-Account Networks Over the Last Month*, ENGADGET (Oct. 8, 2020), <https://www.engadget.com/facebook-inauthentic-behavior-takedown-nigeria-myanmar-turning-point-usa-175501052.html> [<https://perma.cc/JH5N-FJU7>].

security, or harm the interests of other users.⁹ Such terminations make sense, and in the online realm, they are often granted legal immunity under federal law.¹⁰

Nevertheless, consumer terminations also raise thorny questions. For starters, how does one know firms do not terminate consumers for incorrect, illegitimate, or unfair reasons? For example, might users of online dating apps be discriminated against based on their sexual orientation?¹¹ Are overweight women more likely than thin women to be banned from a platform like Instagram?¹² Can TikTok terminate users who allegedly do not adhere to the firm's "invisible modesty code?"¹³ Can online shoppers find their accounts terminated because they make "too many" returns, although the firm's return policy does not warn about such a possibility?¹⁴ Are users of some origins or ethnicities more likely than others to be unjustly or arbitrarily banished from clubs or social media platforms?¹⁵

The literature that examines the questions surrounding the formation of consumer contracts and consumers' consent *ex ante* is vast.¹⁶ At the same time,

9. See, e.g., *YouTube Community Guidelines Enforcement*, GOOGLE TRANSPARENCY REP., <https://transparencyreport.google.com/youtube-policy/removals?hl=en> (last visited Mar. 13, 2022) [<https://perma.cc/Q8GH-PPDX>] (detailing the numbers of removed channels by removal reason); see also ERICA NEWLAND, CAROLINE NOLAN, CYNTHIA WONG & JILLIAN YORK, ACCOUNT DEACTIVATION AND CONTENT REMOVAL 13 (2011).

10. See 47 U.S.C. § 230(c)(2)(A) (granting federal statutory immunity to online providers that seek, in good faith, "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected").

11. See, e.g., Jamie Frevele, *Transgender Tinder Users Are Being Banned Without Explanation*, MEDIAITE (June 4, 2015, 3:36 PM), <https://www.mediaite.com/online/transgender-tinder-users-are-being-banned-without-explanation/> [<https://perma.cc/T2SS-SDAY>].

12. See, e.g., Rebecca "Burt" Rose, *Instagram Apologizes for Deleting Plus-Size Woman's Account*, JEZEBEL (July 16, 2014, 11:10 AM), <https://jezebel.com/instagram-apologizes-for-deleting-plus-size-womans-acco-1605831194> [<https://perma.cc/5WSF-A7FG>].

13. See Sam Biddle, Paulo Victor Ribeiro & Tatiana Dias, *Invisible Censorship*, INTERCEPT (Mar. 15, 2020, 11:02 PM), <https://theintercept.com/2020/03/16/tiktok-app-moderators-users-discrimination/> [<https://perma.cc/9MW2-7NJA>] ("[W]omen who didn't hew to TikTok's invisible modesty code could have their streams terminated and their accounts banned, the livestream policy document shows.").

14. See, e.g., Khadeeja Safdar & Laura Stevens, *Banned from Amazon: The Shoppers Who Make Too Many Returns*, WALL ST. J. (May 22, 2018, 5:30 AM), <https://www.wsj.com/articles/banned-from-amazon-the-shoppers-who-make-too-many-returns-1526981401> [<https://perma.cc/G22M-4UFN>].

15. Cf. *Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012) ("Facebook 'discriminated' against [plaintiff] 'based on [his] religion and ethnicity,' specifically that he is a Muslim and his name is Mustafa.").

16. For a few examples, see Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (addressing the problem that stems from consumers' tendency not to read form contracts); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (examining whether consumers read End-user license agreements ("EULAs")); OREN BAR-GILL, *SEDUCTION BY CONTRACT I* (2012) (explaining how firms can exploit consumers' cognitive biases and draft one-sided and inefficient contracts in various important markets); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255, 2257 (2019) (empirically documenting the unreadability of online consumer form contracts); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 433 (2002) (discussing various consumers' vulnerabilities when contracting online); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976) (arguing that most standardized

key *ex post* issues are yet to receive sufficient scholarly attention. Contractual termination, this Article submits, is clearly one of these issues that merit further consideration and analysis.

Terminating one's account can have a marked adverse impact on the consumer.¹⁷ Consumers often invest significant time and effort into maintaining their accounts, facilitating social and business interactions.¹⁸ Consumers frequently store valuable information and materials on their accounts.¹⁹ Occasionally, consumers accumulate perks and benefits through their repeated use of these accounts.²⁰ Some consumers may even define themselves and their personalities using these accounts.²¹ They may develop emotional connections with the platform that provides the account and with other users.²² Thus, consumers commonly rely on these business-to-consumer ("B2C") relationships, assuming such relationships will be accessible, stable, and not hastily terminated.

Disturbingly, however, recurring anecdotal evidence indicates that firms terminate their relationship with consumers and repeatedly fail to provide consumers with any explanation. The users of Amazon, Uber, Tinder, and Facebook, for example, have publicly complained that their accounts were closed without explanation.²³ Similarly, the Consumer Financial Protection Bureau reported that consumers who complained about their bank's decision to close their account often noted that no reason for the termination was provided.²⁴

terms should be "candidates for non-enforcement"); Todd D. Rakoff, *Contracts of Adhesion: An Essay on Reconstruction*, 96 HARV. L. REV. 1173, 1176 (1983) (highlighting, among other things, the problem of non-negotiated, nonsalient boilerplate terms, arguing they should be presumptively unenforceable); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 19 (2013) (criticizing severely the current legal treatment of standard form contracts).

17. *Infra* Section II.B; see also Eric Goldman, *Online User Account Termination and 47 U.S.C. § 230 (c)(2)*, 2 U.C. IRVINE L. REV. 659, 659 (2012) ("An online provider's termination of user accounts that facilitate user-generated content can be a major—and potentially even life-changing—event for users.").

18. See *infra* Section II.B.

19. See, e.g., Uğur Gündüz, *The Effect of Social Media on Identity Construction*, 8 MEDITERRANEAN J. SOC. SCIS. 85, 85 (2017).

20. *Id.* at 87.

21. See, e.g., *id.* at 85 ("[Social media] enable[s] individuals [to] present themselves to others and determine the way they would like to be perceive[d]"); FUTURE IDENTITIES: CHANGING IDENTITIES IN THE UK: THE NEXT 10 YEARS, GOV'T OFF. FOR SCI. 25 (2013).

22. See, e.g., Amanda Lenhart, *Social Media and Friendships*, PEW RSCH. CTR. (Aug 6, 2015), <https://www.pewresearch.org/internet/2015/08/06/chapter-4-social-media-and-friendships/> [<https://perma.cc/US8U-PPDZ>]; C.B. Bhattacharya & Sankaer Sen, *Consumer-Company Identification: A Framework for Understanding Consumers' Relationships with Companies*, 67 J. MARKETING 76, 82 (2003).

23. See, e.g., Safdar & Stevens, *supra* note 14; Tony Merevick, *Uber Will Ban You if You Break These New Rules*, THRILLIST (Dec. 8, 2016), <https://www.thrillist.com/news/nation/uber-will-ban-you-if-you-break-these-new-rules> [<https://perma.cc/A5HS-2RHC>]; Frevele, *supra* note 11; Anthony Cuthbertson, *Facebook and Instagram Mysteriously Blocks Users in Hungary*, INDEPENDENT (June 20, 2019, 12:34 AM), <https://www.independent.co.uk/life-style/gadgets-and-tech/news/facebook-instagram-block-hungary-ban-users-why-a8965646.html> [<https://perma.cc/3XCV-GLXA>].

24. MONTHLY COMPLAINT REPORT, 5 CONSUMER FIN. PROT. BUREAU 1, 12 (Nov. 2015), https://files.consumerfinance.gov/f/201511_cfpb_monthly-complaint-report-vol-5.pdf [<https://perma.cc/P4TA-J7XV>].

Erroneous contract terminations are also widespread.²⁵ Consider, for instance, Mark Zuckerberg's admission that Facebook's human reviewers, who enforce its contract terms on users, "make the wrong call in more than 1 out of every 10 cases."²⁶ Facebook, unfortunately, is not alone. Twitter, Google, Microsoft, Flickr, TikTok, and Instagram have admitted that they had mistakenly terminated user accounts.²⁷

The termination of B2C relationships without explanation can be socially harmful. First, the probability of erroneous contract termination of an innocent consumer increases if the canceling firm fails to explain to consumers the cause for termination.²⁸ This is mainly because a lack of reasoning increases the risk that the termination process will be hasty and not founded on accurate facts and law.²⁹ Second, the erroneous termination of consumer contracts, facilitated by a failure to explain the reason for such actions, may generate nontrivial costs to consumers.³⁰ Most conspicuously, these costs include the loss of the consumers' prior investment in the agreement.³¹ Additional loss may come in the form of accumulated benefits and perks that become unavailable upon termination.³² Furthermore, banned users may experience embarrassment, mental anguish, and emotional distress due to an unjust termination by the firm.³³ On top of that, consumers may incur switching costs when pursuing a similar service or product elsewhere.³⁴ Third, discriminatory yet nontransparent factors may lead to termination without explanation.³⁵ Thus, such terminations may disproportionately harm vulnerable consumers while eroding imperative societal values.

The new realities of business-to-consumer contracting practices exacerbate the importance of taking the termination without explanation phenomenon

25. Mark Zuckerberg, *A Blueprint for Content Governance and Enforcement*, FACEBOOK, <https://www.facebook.com/notes/mark-zuckerberg/a-blueprint-for-content-governance-and-enforcement/10156443129>

621634/ (May 5, 2021) [<https://perma.cc/BL7K-TYXC>].

26. *Id.*

27. Samuel Okike, *Your Twitter Account May Have Been Suspended by Accident*, TECHPOINT AFR. (Aug. 8, 2019), <https://techpoint.africa/2019/08/08/your-twitter-account-may-have-been-suspended-by-accident/> [<https://perma.cc/JWZ8-J843>]; Tom Gerken, *YouTube Backtracks After Pokemon 'Child Abuse' Ban*, BBC (Feb. 18, 2009), <https://www.bbc.com/news/technology-47278362> [<https://perma.cc/AD58-7EXM>]; Paul Muschick, *Microsoft Admits Error in Xbox Ban*, MORNING CALL (Sep. 28, 2011), <https://www.mcall.com/news/local/mc-xpm-2011-09-28-mc-xbox-consoles-usbanned-092811-story.html> [<https://perma.cc/3U68-UEYT>]; *Flickr Accidentally Wipes out Account: Five Years and 4,000 Photos Down the Drain*, TECHCRUNCH (Feb. 2, 2011), <https://techcrunch.com/2011/02/02/flickr-accidentally-wipes-out-account-five-years-and-4000-photos-down-the-drain/> [<https://perma.cc/WHS7-TNVG>]; Mary Margaret Olohan, *TikTok Reinstates Live Action Account, Apologizes, Says 'Human Error' Caused Ban*, TENN. STAR (Feb. 2, 2020), <https://tennesseestar.com/2020/02/02/tiktok-reinstates-live-action-account-apologizes-says-human-error-caused-ban/> [<https://perma.cc/9H4N-6SCB>]; Rose, *supra* note 12.

28. *See infra* Section II.B.2.

29. *See infra* Section II.B.2.

30. *See infra* Section II.B.3.

31. *See infra* Section II.B.3.i.

32. *See infra* Section II.B.3.ii.

33. *See infra* Section II.B.3.ii.

34. *See infra* Section II.B.3.iv.

35. *See infra* Section II.B.3.iv.

seriously. On the one hand, many businesses seek to develop and nurture long-term relationships with and among consumers.³⁶ These businesses often use communal language and employ shrewd means to instill in consumers the impression that consumers and firms can constitute social-like and meaningful relationships.³⁷ Consumers might thus lower their guard and attempt to form deep relationships with firms without being aware of the risk of termination without explanation.

On the other hand, businesses use big data and complex algorithms to profile consumers, discriminate among them, and tailor B2C interactions in nontransparent ways.³⁸ At times, these technologies and algorithms can yield mistakes or be corrupt.³⁹ Too often, these black-box algorithms perpetuate existing biases and reinforce them in various practices.⁴⁰ Furthermore, human-machine interaction is currently far from perfect, and the aid of machines may introduce bias, noise, and errors into the decision-making process.⁴¹ On top of that, firms have a financial incentive to minimize their costs around termination. This, in turn, may facilitate rushed and unsubstantiated decisions that do not adequately consider the social and personal costs that erroneous terminations inflict.

Despite these important and interesting issues, little has been said about the termination of consumer agreements.⁴² This Article, which examines 500 online

36. See Shmuel I. Becher & Sarah Dadush, *Relationship as Product: Transacting in the Age of Loneliness*, 2021 U. ILL. L. REV. 1547, 1556 (2021) (explaining how firms conflate communal norms and market norms thus leading consumers to erroneously believe in “thick” B2C relationships).

37. See *id.*

38. See, e.g., MICHELE GILMAN, DATA & SOC’Y POVERTY LAWGORITHMS: A POVERTY LAWYER’S GUIDE TO FIGHTING AUTOMATED DECISION-MAKING HARMS ON LOW-INCOME COMMUNITIES I (2020) (“We live in a ‘datafied’ society in which our personal data is constantly harvested, analyzed, and sold . . . Algorithms analyze this data, sort people into categories, and serve as gatekeepers to life’s necessities. Yet people remain largely in the dark about these big data systems . . .”). Specific examples include banks, credit card and insurance companies use sophisticated yet nontransparent tools to tailor their transactions with borrowers, clients and insureds. See, e.g., Matthew Adam Bruckner, *The Promise and Perils of Algorithmic Lenders’ Use of Big Data*, 93 CHI.-KENT L. REV. 3, 15–16 (2018) (explaining that algorithms that assist lenders in making credit decisions “may have created a ‘black box’ problem”); see also Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 IOWA L. REV. 1257, 1267 (2020).

39. For an accessible review of some prominent failures see, for example, Noah Blier, *Stories of AI Failure and How to Avoid Similar AI Fails*, LEXALYTICS (Jan. 30, 2020), <https://www.lexalytics.com/lexablog/stories-ai-failure-avoid-ai-fails-2020> [<https://perma.cc/L37Q-984J>].

40. See, e.g., Sandra G. Mayson, *Bias in, Bias out*, 128 YALE L.J. 2218, 2218 (2019) (“In a racially stratified world, any method of prediction will project the inequalities of the past into the future.”).

41. Our sample includes what is known as “sign-in wrap” contracts. See *infra* note 167 and accompanying text.

42. For one exception that addresses contractual termination in a similar context yet only by online service providers and not from an empirical perspective, see Goldman, *supra* note 17, at 659–60. For noting the power that large firms have to terminate form contracts, see Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 759–61 (2015) (criticizing the lack of due process and nontransparency in the contractual termination mechanisms of Google, Yahoo and Facebook); Rory Van Loo, *Federal Rules of Platform Procedure*, 88 U. CHI. L. REV. 829, 882 (2021) (“Facebook, Amazon, and Airbnb are quick to . . . terminate accounts at the first sign of an issue, sometimes with severe consequences for small businesses, property ownership, and participation in democracy.”). While the literature on consumer termination is scant and partial, the literature on nonconsumer contract termination is

contracts of popular websites, marks the first attempt to address these issues systematically.⁴³

Specifically, this Article examines whether firms contractually adopt adequate termination mechanisms that ensure that innocent users are not harmed. Specifically, this Article focuses on whether there are sufficient guarantees to ensure that firms act in good faith when exercising their power to terminate consumer contracts. To this end, this Article first tests whether firms adopt contractual termination mechanisms which require them to explain to consumers the reasons that led to termination. Thereafter, it tests whether termination without explanation contracts (1) list the reasons that may lead to consumer termination, (2) require firms to provide consumers with notice of the termination, and (3) allow consumers a voice in the process to contest unjustified terminations.

The remainder of this Article proceeds as follows. Part II provides the conceptual framework. It defines termination without explanation contracts and presents the major social costs thereof. Part III details the empirical test of this study. It reviews the data that underlies the test and discusses its methodology and results. The results of this examination indicate that termination without explanation contracts are highly prevalent, and that most of these contracts are nontransparent and do not allow the consumer a voice in the process. In Part IV, we discuss some key normative and policy implications of our findings, proposing to consider a general “duty to explain.” Concluding remarks follow.

II. TERMINATION WITHOUT EXPLANATION CONTRACTS

This Part delineates our conceptual framework. Section A explains what termination without explanation is. Section B clarifies how termination without explanation practices contribute to the risk of erroneous terminations. It further outlines the various costs attributed to erroneous terminations.

A. *What Is Termination Without Explanation?*

Contracts often include a termination clause,⁴⁴ which permits a party to terminate its duties under certain conditions.⁴⁵ Courts regularly enforce these

relatively rich. See, e.g., Ernest Gellhorn, *Limitations on Contract Termination Rights—Franchise Cancellations*, 1967 DUKE L.J. 465, 466 (1967); Rachel Arnow-Richman, *Mainstreaming Employment Contract Law: The Common Law Case for Reasonable Notice of Termination*, 66 FLA. L. REV. 1513, 1513 (2014); Jeffrey M. Hirsch, *The Law of Termination: Doing More with Less*, 68 MD. L. REV. 89, 89 (2008).

43. See *infra* Section II.A.

44. See, e.g., Julie M. Philippe, *French and American Approaches to Contract Formation and Enforceability: A Comparative Perspective*, 12 TULSA J. COMPAR. & INT’L L. 357, 385 (2005) (“Contracting parties often use termination clauses . . .”).

45. *Cancellation Clause*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “cancellation clause” or “termination clause” as “[a] contractual provision allowing one or both parties to annul their obligations under certain conditions.”); see also *Wahl v. Country Mut. Ins. Co.*, 2002 ND 42, ¶ 15, 640 N.W.2d 689, 694 (quoting *Cancellation Clause*, BLACK’S LAW DICTIONARY (7th ed. 1999)).

termination clauses.⁴⁶ Certainly, there is nothing inherently wrong when parties agree *ex ante* on ways to end their contractual relationship *ex post*.

There are, however, different ways in which parties can contractually design the termination mechanism. For example, in some consumer contracts, a termination provision may oblige firms to clearly explain to consumers the reason for termination.⁴⁷ An illustration is Meetup.com's consumer contract, which states: "We may terminate your account When this happens, we will notify you of the reasons for the termination."⁴⁸ By employing this term, the firm commits *ex ante* to explain to the consumer the reason for terminating them *ex post*.

Conversely, a termination clause may fail to require firms to openly explain to consumers the concrete reasons that led to their termination. For example, Netflix's terms of use do not require Netflix to explain to terminated consumers the concrete reason for termination.⁴⁹ The contract simply and broadly states: "We may terminate or restrict your use of our service if you violate these Terms of Use or are engaged in the illegal or fraudulent use of the service."⁵⁰ Nevertheless, it does not compel Netflix to explain to the consumer why they were terminated. This kind of contract, which fails to require firms to explain to consumers the termination reason, is defined in this Article as a termination without explanation contract. This Article focuses on these types of termination clauses.

Termination without explanation contracts uniformly allow firms to terminate the agreement without detailing the reasons that led to their decision. Yet, such contracts may vary in their degree of unfairness. Specifically, termination without explanation mechanisms differ in three major aspects: (1) cause, (2) notice, and (3) contestability. We illustrate these three dimensions with actual contract terms in turn.

In terms of cause, termination clauses may vary in whether they determine, *ex ante*, an exhaustive set of reasons that may potentially underline a consumer

46. See, e.g., *Bonanza Int'l, Inc. v. Rest. Mgmt. Consultants, Inc.*, 625 F. Supp. 1431, 1440 (E.D. La. 1986) ("The courts have repeatedly stated that termination clauses agreed upon by the parties shall be enforced as written."); *OKI Distrib., Inc. v. Amana Refrigeration, Inc.*, 850 F. Supp. 637, 641 (S.D. Ohio 1994) ("Under Iowa law, at-will termination clauses are enforceable"); *Retail Assocs., Inc. v. Macy's E., Inc.*, 245 F.3d 694, 699 (8th Cir. 2001); *TransformaCon, Inc. v. Vista Equity Partners, Inc.*, No. 15-cv-3371, 2015 WL 4461769, at *8 (S.D.N.Y. July 21, 2015) ("Under New York law, termination clauses must be enforced as written, including those allowing termination at any time or without cause."); *Dye Constr. Co. v. Indus. Comm'n of the State of Colo.*, 678 P.2d 1066, 1069 (Colo. App. 1983) ("An unequivocal agreement contained in [an insurance] policy, by which either party may cancel the contract, is binding between the parties"); *Utah Dep't of Transp. v. Kmart Corp.*, 2018 UT 54, ¶ 22, 428 P.3d 1118, 1126 ("A termination clause is an agreed upon term between a lessor and lessee that courts should uphold under general contract principles.").

47. See, e.g., *Terms of Service*, MEETUP, <https://help.meetup.com/hc/en-us/articles/360027447252-Terms-of-Service#:~:text=The%20Terms%20of%20Service%20are,renewal%20or%20cancel%20your%20subscription> (last visited Mar. 13, 2022) [<https://perma.cc/6EWS-HGA5>].

48. *Id.*

49. *Netflix Terms of Use*, NETFLIX, <https://help.netflix.com/legal/termsfuse> (Nov. 2, 2021) [<https://perma.cc/4JAB-55S8>].

50. *Id.*

termination. On the one hand, an exploitative and nontransparent termination without explanation contract may fail to explicitly specify the potential causes that underline the termination.⁵¹ For example, Shopify's termination clause states that "[w]e reserve the right to terminate the services for any reason."⁵² That is, the contract does not detail an exhaustive list of potential cancellation reasons. On the other hand, a more balanced and transparent contract may disclose the specific causes which may potentially underlie a termination.⁵³ As one illustration, consider Google's termination clause, which delineates the reasons that may lead to termination. It states:

Google reserves the right to terminate your access to the services if any of these things happen: you materially or repeatedly breach these terms; we're required to do so to comply with a legal requirement or a court order; we reasonably believe that your conduct causes harm or liability to a user, third party, or Google.⁵⁴

True, a clause that details the reasons which may lead to termination can still be broad and provide significant leeway to firms. The fact the contract details an exhaustive list of causes does not, in and of itself, eliminate the risk of exploitation.⁵⁵ Nevertheless, even wide clauses can still provide some degree of certainty. Making such terms explicit may equally nudge firms to think about the issue more carefully, knowing exploitative terms may be identified and publicly criticized.⁵⁶ Relatedly, the mere existence of the clause might enhance the chances that termination mechanisms do not fly under the radar of consumer and watchdog organizations.⁵⁷

51. See, e.g., *Terms of Service*, SHOPIFY, <https://www.shopify.com/legal/terms> (Oct. 12, 2021) [<https://perma.cc/Z4JZ-SQXL>] ("We reserve the right to modify or terminate the Services for any reason, without notice at any time.").

52. See, e.g., *id.* Contract clauses that allow firms to terminate the contract for any reason are known as "without cause" or "at will" termination clauses or provisions. See, e.g., *Ashker v. Aurora Med. Grp., Inc.*, 2013 WI App 143, ¶ 17, 352 Wis. 2d 193, 841 N.W.2d 297 ("Aurora could terminate Ashker . . . for any reason under the 'without cause' provision."); *Little v. State Farm Mut. Auto. Ins. Co.*, No. 2:07-CV-943, 2008 WL 2076666, at *3 (D. Utah May 15), *aff'd*, 305 F. App'x 494 (10th Cir. 2008) ("[T]he Agent's Agreement contained an at-will provision that allowed either Little or State Farm to terminat[e] the relationship for any reason...").

53. Contract clauses that specify the reasons that may underlie the contract termination are known as "for cause" termination clauses or provisions. See, e.g., Leigh Augustine-Schlossinger, *Endorsement Contracts for Professional Athletes*, 32 COLO. LAW. 43, 45 (2003) ("For cause' termination clauses . . . often include reasonable conditions for either party to terminate the contract."); *Hoffman v. Harmony Pictures, Inc.*, No. B152774, 2002 WL 31716686, at *6 (Cal. Ct. App. Dec. 4, 2002) ("[T]he 'for cause' termination provision here permitted termination of the contract . . . only upon specified grounds.").

54. *Google Terms of Service*, GOOGLE, <https://policies.google.com/terms?hl=en-US> (Mar. 31, 2021) [<https://perma.cc/42DA-E6FR>].

55. For example, the terms and conditions may permit the firm to terminate its service, thus causing significant hardship to the user, due to an angry or impolite message left by the user. Cf. *Mehmet v. Add2Net, Inc.*, 886 N.Y.S.2d 397, 398 (N.Y. App. Div. 2009).

56. See, e.g., Stephen Warwick, *Facebook Is Changing Its Terms of Service, and Users Are Not Happy*, WINDOWS CENT. (Sept. 1, 2020), <https://www.windowscentral.com/facebook-changing-its-terms-service-and-users-are-not-happy> [<https://perma.cc/ML2J-AWQP>].

57. See, e.g., Tom Temin, *Increased OTA Use from COVID Contract Boom Caused Transparency Issues, Watchdog Agency Says*, FED. NEWS NETWORK (Aug. 6, 2021, 7:20 AM), <https://federalnewsnetwork.com/acquisition/2021/08/increased-ota-use-from-covid-contract-boom-caused-transparency-issues-watchdog-agency-says/> [<https://perma.cc/B8YM-567Y>].

The second aspect in which termination without explanation contracts may differ is notice.⁵⁸ Here, termination clauses may diverge in whether they allow firms to terminate the contract without providing consumers, *ex post*, with a warning or notification about the mere act of termination. A one-sided termination contract may explicitly allow a party to end the contract without providing the other party with notice.⁵⁹ For example, Jdate's contract states that "the Company may terminate your account without explanation *and without notice*."⁶⁰ Conversely, a termination clause may be more balanced and not include a notice waiver. It may even explicitly require the terminating party to notify the other party about the mere occurrence of termination.⁶¹ For example, LinkedIn's contract states: "Both you and LinkedIn may terminate this Contract . . . with notice to the other."⁶²

The third aspect in which termination without explanation contracts may differ is contestability. In this context, termination clauses may vary in whether they clarify if and how terminated consumers can question or challenge their termination. In this respect, a nontransparent termination clause may fail to explicitly disclose if and how consumers may contest their termination. For example, Amazon's termination clause states that "the licenses granted by Amazon terminate if you do not comply with these Conditions of Use."⁶³ Seemingly, the term is clear and decisive and leaves the consumer no room for negotiating or disputing the termination. Contrariwise, the termination clause may disclose if and how a consumer may question their termination. For example, Twitter's termination clause states: "If you believe your account was terminated in error you can file an appeal following the steps found in our Help Center."⁶⁴ This clause also provides a visible link to Twitter's Help Center.⁶⁵

To summarize, termination without explanation contracts allow firms to end the contractual relationship without explaining to consumers what led to said termination. However, termination without explanation contracts can come in different flavors and shades and may differ in their degree of nontransparency and oppressiveness. Firstly, some of these contracts transparently detail *ex ante* why a contract may be terminated, while others do not.⁶⁶ Secondly, some contracts provide consumers with the right to receive a notice of termination, while others do not.⁶⁷ Thirdly, some contractual mechanisms allow the

58. See *infra* notes 59–62 and accompanying text.

59. See, e.g., *Terms of Use Agreement*, JDATE, <https://about.jdate.com/legal-en/terms-of-use/> (Mar. 24, 2020) [<https://perma.cc/HH33-KUA3>].

60. *Id.* (emphasis added).

61. See, e.g., *User Agreement*, LINKEDIN, <https://www.linkedin.com/legal/user-agreement> (Aug. 11, 2020) [<https://perma.cc/67X6-4ARB>].

62. *Id.*

63. *Conditions of Use*, AMAZON, <https://www.amazon.com/gp/help/customer/display.html?nodeId=GLSBYFE9MGKKQXXM> (May 3, 2021) [<https://perma.cc/PN6M-BUEE>].

64. *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos#:~:text=You%20may%20use%20the%20Services,old%2C%20to%20use%20the%20Services> (Aug. 19, 2021) [<https://perma.cc/3Y92-XWP8>].

65. *Id.*

66. See *supra* notes 51–54 and accompanying text.

67. See *supra* notes 58–62 and accompanying text.

consumers to challenge the termination and voice their objections, yet others do not.⁶⁸ With that in mind, the following Section examines the social costs involved in the practice of termination without explanation.

B. *Social Costs*

In this Section we argue that termination without explanation contracts can significantly harm consumers and be socially undesirable. Section 1 explains the phenomenon of erroneous consumer contract termination and its causes. Section 2 explains why termination without explanation contracts may increase the probability of erroneous termination. Thereafter, Section 3 presents the nontrivial costs that erroneous terminations, facilitated by lack of explanation, impose on terminated consumers.

1. *The Erroneous Contract Termination Phenomenon*

Erroneous contract terminations by firms can be of three major types: factual, legal, or social. A *factual* erroneous termination occurs when it is based on facts—such as names, dates, or actions—that are inaccurate. For example, an e-mail service provider may close the e-mail account of one of its users based on a wrong factual assumption that said user had sent spam via their e-mail account.⁶⁹ Likewise, a supplier may mistakenly terminate the account of an innocent user who did not breach the contract terms, conflating between the terminated user and the one who breached the contract.⁷⁰

A *legal* erroneous termination may occur when a supplier bases its termination decision on wrong legal assumptions. There are two major legal errors: statutory and contractual. A *statutory* erroneous termination occurs when the supplier terminates the contract based on wrongful assumptions about the statutory regime that governs the agreement. For example, a supplier may wrongly terminate a consumer agreement due to the consumer's race while mistakenly overlooking a statutory rule that prohibits discriminatory contract termination.⁷¹ As another example, consider a firm, which despite the Consumer Review Fairness Act of 2016, terminates a consumer who honestly criticized the business online.⁷²

68. See *supra* notes 63–65 and accompanying text.

69. See, e.g., *Hall v. Earthlink Network, Inc.*, No. 98 Civ. 5489, 2003 WL 22990064, at *1 (S.D.N.Y. Dec. 19, 2003), *aff'd on other grounds*, 396 F.3d 500 (2d Cir. 2005).

70. *Flickr Accidentally Wipes Out Account: Five Years and 4,000 Photos Down the Drain*, *supra* note 27 (stating a supplier “erroneously incinerated [the] account [of an innocent consumer] instead of the culprit’s”).

71. See, e.g., *El-Hallani v. Huntington Nat'l Bank*, 623 F. App'x 730, 732, 739 (6th Cir. 2015) (explaining that the plaintiffs alleged a bank closed their accounts because of their race, in violation of 42 U.S.C. §§ 1981 and 1982, and the Michigan Elliot–Larsen Civil Rights Act. The court ruled that the plaintiffs pleaded factual content that allowed the court to draw the reasonable inference that the defendant was liable for the misconduct alleged).

72. The Consumer Review Fairness Act of 2016 prohibits companies from contractually threatening or penalizing consumers for posting honest reviews. For discussion of a user allegation that an online business terminated his account due to the criticism he aired (before the introduction of this Act), see Jack M. Balkin,

A *contractual* erroneous termination may occur, for example, when the supplier terminates the agreement based on an incorrect interpretation of the contract. To illustrate, the contract language of a social network website may prohibit consumers from uploading to the website photos that contain nudity.⁷³ Thus, following the literal language of the contract, the supplier may block a consumer who uploaded photos of an artistic ink-on-paper drawing of a woman or man's naked upper body that may often be seen in galleries and museums. In such a case, by literally enforcing the contractual nudity prohibition, the firm may have mistakenly overlooked the purpose of the prohibition, which is mainly to prevent the publication of pornographic material (as opposed to nude artworks) on the site.

We dub the third type of erroneous contract termination “social.” Here, we refer to all those situations where the contractual termination might be legal yet problematic, unjust, or questionable from a social, fairness, or ethical perspective. Due to their nature, these instances can push the borders of the term “erroneous” and are sometimes challenging to define.

For illustration purposes, consider these alleged cases where firms terminated a consumer because he or she is overweight, gay, assertive, poor, or ugly.⁷⁴ Alternatively, consider those instances where firms may terminate a consumer because the consumer breached an unpublished code or policy,⁷⁵ or because the consumer was aggressive or insisted on their rights.⁷⁶ As yet another example, consider firms that ban consumers who promote the products or services of competitors.⁷⁷

Although these termination practices might not be (plainly or always) illegal, many will view them as unfair, dubious, and at times repugnant, if not mistaken.⁷⁸ Oftentimes, the firms themselves will acknowledge their wrongdoing and poor judgment in terminating these consumers, offering a public

Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds, 90 VA. L. REV. 2043, 2075 (2004) (“Ludlow [the user] repeatedly attacked the platform owners of The Sims Online, Electronic Arts, for allowing . . . misconduct to occur. In response, he says, Electronic Arts terminated his account, erasing his virtual property (including a virtual house) and his two virtual cats.”).

73. The following example is based on similar facts described in Miguel Helft, *Art School Runs Afoul of Facebook's Nudity Police*, N.Y. TIMES (Feb. 18, 2011, 8:50 PM), <https://bits.blogs.nytimes.com/2011/02/18/art-school-runs-afoul-of-facebooks-nudity-police/> [<https://perma.cc/D8HJ-FCNN>].

74. See *supra* notes 11–12, 14 (banning consumers due to gender identity, fat, or for returning products).

75. See *supra* note 13 (discussing TikTok's alleged termination of consumers due to breach of “an invisible code”).

76. See *supra* note 55 (terminating a consumer due to an angry or insulting message).

77. *Mentage Coaching Terms & Conditions*, MENTAGE, <https://www.mentage.co/coaching-terms> (Sept. 2021) [<https://perma.cc/TAD6-33QG>] (“The following actions are not permitted on mentage and may lead to your account being removed from the platform . . . Promoting competing services”); *Terms and Conditions*, GETSET, <https://getset.com/terms> (last visited Mar. 19, 2022) [<https://perma.cc/N2MH-SV38>] (“Any unauthorized use of the Platform terminates the permission granted by GetSet for your use of the Platform. Violations include, but are not limited to: . . . Promoting competing products, services, or brands.”).

78. While we sympathize with those who argue that such terminations should be deemed illegal, this determination is not necessary for our analysis and is beyond the scope of our investigation. For our purposes, suffice it to say that this type of termination is regarded by many as improper and unfair, and often—though not always—acknowledged by firms in retrospect as a mistake.

apology, and reversing their decisions.⁷⁹ Frequently, as we explain in more detail below, such terminations would also be socially costly.⁸⁰

Erroneous contract terminations, either factual, legal, or social, may occur for two major reasons (or their combination thereof): human error or technological fault. Humans are often involved in the termination process of the agreement. For example, many online platforms, such as Reddit, Wikipedia, and Facebook, primarily rely on human moderators who can ban problematic users.⁸¹ Humans, of course, are fallible.⁸² Humans can make mistakes due to memory failures, confusion, distraction, misunderstanding, false intuition, emotional impulses, and behavioral biases.⁸³ As a result, humans may sometimes erroneously terminate the agreement with consumers. Human errors that lead to erroneous terminations are not a rare phenomenon: Twitter, TikTok, and Flickr have already admitted that a human error led to the suspension of their customers.⁸⁴

Firms may also erroneously terminate contracts due to technological faults. For example, suppliers often rely on automated technology or software to enforce their contract terms.⁸⁵ As one illustration, some websites use bots to identify and ban users who post spam or offensive content.⁸⁶ Similarly, some social media

79. See, e.g., Monika Bickert, *Publishing Our Internal Enforcement Guidelines and Expanding Our Appeals Process*, FACEBOOK (Apr. 24, 2018), <https://about.fb.com/news/2018/04/comprehensive-community-standards/> [<https://perma.cc/8MYV-T7P7>]; Olohan, *supra* note 27.

80. See *infra* Part IV.

81. Shagun Jhaver, Iris Birman, Eric Gilbert & Amy Bruckman, *Human-Machine Collaboration for Content Regulation: The Case of Reddit Automoderator*, 26 ACM TRANSACTIONS ON COMPUT.-HUM. INTERACTION 1, 6 (2019) (“Many online platforms (e.g., Reddit, Wikipedia, Facebook Groups) largely rely on volunteer moderators who are given limited administrative power to remove unacceptable content and ban problematic users.”).

82. Bickert, *supra* note 79. The Vice President of Global Policy Management at Facebook explains that “[Facebook policy enforcement] processes involve people, and people are fallible.” *Id.* For examples of human errors that led to erroneous consumer contract terminations, see Staff, *Twitter Suspends Users’ Accounts by Mistake*, CAMPAIGN (July 6, 2009), <https://www.campaignlive.com/article/twitter-suspends-users-accounts-mistake/918072> [<https://perma.cc/MMT2-DTVJ>] (Twitter “regret[s] the human error that led to . . . mistaken [account] suspensions”); Olohan, *supra* note 27 (“TikTok reinstated a pro-life group’s account Friday and cited ‘human error’ after the platform said Live Action was permanently banned from TikTok Thursday.”).

83. For human errors due to inconsistency or confusion in the context of consumer contract enforcement, see, for example, Zuckerberg, *supra* note 25 (“Our reviewers work hard to enforce our policies . . . people are not always as consistent in their judgments.”); Flickr *Accidentally Wipes Out Account: Five Years and 4,000 Photos Down the Drain*, *supra* note 27 (A Flickr staff member writes to a user: “Unfortunately, I have mixed up the accounts and accidentally deleted yours. I am terribly sorry for this grave error . . .”).

84. Staff, *supra* note 82; see also, *Twitter ‘Confuses’ Iyad El-Baghdadi with Islamic State Leader*, BBC (Jan. 1, 2016), <https://www.bbc.com/news/world-35210527> [<https://perma.cc/QD3P-4T8C>] (discussing how Twitter erroneously suspended the account of Mr. Iyad El-Baghdadi after confusing him with the Islamic State leader, Abu Bakr al-Baghdadi); Olohan, *supra* note 27 (discussing how TikTok stated an erroneous banning of its customer “was the result of a human error by a moderator”); Flickr *Accidentally Wipes Out Account: Five Years and 4,000 Photos Down the Drain*, *supra* note 27.

85. Generally speaking, automated decision making can be viewed as “a way to divide complex decisions into discrete tasks that a computer algorithm or set of algorithms can perform on digital data[.]” GILMAN, *supra* note 38, at 4.

86. See, e.g., Jhaver et al., *supra* note 81, at 8 (“The Washington Post uses ModBot, a software application that employs NLP and ML techniques, to automatically moderate user comments on news articles.”). Along

websites rely on machine learning tools to locate images that infringe the copyrights of others.⁸⁷ Automated enforcement systems, however, are prone to faults,⁸⁸ and can be hacked.⁸⁹ Specifically, these systems may result in false positives, namely the erroneous termination of innocent consumers who did not breach the contract or the law.⁹⁰

Additionally, some firms use an automated system designed to detect and disable fake online accounts.⁹¹ A bug in the system, however, may erroneously disable nonfake accounts.⁹² In the same way, a bug in a website's anti-cheating software may mistakenly label innocent users as hackers, leading to their erroneous termination.⁹³ Likewise, an automated keyword filtering tool may mistakenly ban a user who used a prohibited keyword while ignoring the broad context in which the user employed this keyword, rendering the keyword legitimate.⁹⁴

similar lines, Reddit uses a bot that identifies and bans Reddit users that post spam or offensive content. *Id.* at 12 (explaining that Reddit's bot called "Botbust" "identifies and bans Reddit bots that post spam or offensive content or comments that provide no value to the community").

87. Jhaver et al., *supra* note 81, at 2 ("Many social media websites are using machine learning (ML) tools to identify images that violate copyright law . . .").

88. See, e.g., Athima Chansanchai, *Bug Deactivates Thousands of Facebook Accounts*, NBC NEWS (Nov. 17, 2010, 9:12 AM), <https://www.nbcnews.com/tech/tech-news/bug-deactivates-thousands-facebook-accounts-flna126340> [<https://perma.cc/GPX2-BEHN>] ("[P]erhaps thousands of accounts—seemingly all women—were deactivated by a bug in a system designed to weed out fake profiles."); Muschick, *supra* note 27 (Microsoft "says innocent users . . . had their consoles banned mistakenly because software . . . didn't work properly."); see also Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 FLA. L. REV. 181, 209–10 (2017) ("[This] study successfully extracted substantial evidence about algorithmic errors far beyond currently available anecdotes of erroneous content restrictions."); GILMAN, *supra* note 38, at 5 ("[T]he data that algorithms analyze can contain errors. Any lawyer who has reviewed a credit report with a glitch has seen the range of errors and omissions that can be baked into a credit score, which is a type of algorithmic output. In the unregulated data broker industry, errors are even higher, typically no more accurate than a coin toss.").

89. See, e.g., NEWLAND ET AL., *supra* note 9, at 5 (noting that account deactivation may occur, among other reasons, due to "hacking incidents").

90. Jhaver et al., *supra* note 81, at 8 (noting that artificial intelligence technologies "may end up resulting in many false positives").

91. Cf. Bianca Bosker, *Facebook Deactivation Bug Kills Thousands of Accounts*, HUFFPOST (Nov. 17, 2010, 12:42 PM), https://www.huffpost.com/entry/facebook-deactivation-bug_n_784871 [<https://perma.cc/99BP-ZQSE>].

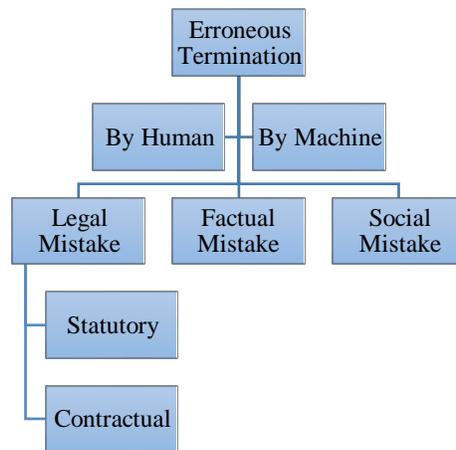
92. *Id.*

93. The following example is based on Alec Meer, *Valve Offers Free Game After 12,000 False Steam Bans*, GAMESINDUSTRY (July 27, 2010) <https://www.gamesindustry.biz/articles/valve-offers-free-game-after-12-000-false-bans> [<https://perma.cc/9NB5-PF6S>].

94. Cf. Ofcom, *Use of AI in Online Content Moderation*, 48–49 (2019), https://www.ofcom.org.uk/_data/assets/pdf_file/0028/157249/cambridge-consultants-ai-content-moderation.pdf [<https://perma.cc/TN6Z-XXXH>] (explaining that YouTube deleted the account of a user that posted content containing the abbreviation "CP," which is often used to denote child pornography. But YouTube mistakenly ignored the fact that the specific user used the abbreviation CP to refer to "combat points" used in the augmented reality game Pokémon GO). See generally Jhaver et al., *supra* note 81, at 8 ("[T]he currently available AI technologies are not good at understanding the context of a given post, user, or community."); Alexis C. Madrigal, *Inside Facebook's Fast-Growing Content-Moderation Effort*, ATLANTIC (Feb. 7, 2018), <https://www.theatlantic.com/technology/archive/2018/02/what-facebook-told-insiders-about-how-it-moderates-posts/552632/> [<https://perma.cc/88ZN-TVJ6>] ("The current stable of machine-learning technologies is not good at looking at the context of a given post or user or community group.").

To conclude this Section, the following diagram summarizes the main types of erroneous terminations.

DIAGRAM 1. ERRONEOUS TERMINATION



2. *Lack of Explanation and Erroneous Terminations*

So far, we have demonstrated the various types of erroneous terminations. Now, we move to explain how termination without explanation contracts may increase the rate of erroneous terminations.

For starters, a failure to explain can impair the firm's ability to correct errors at the initial stage of the termination decision process.⁹⁵ Specifically, if a firm fails to explain the cancellation, a careless and groundless termination action is more likely to occur.⁹⁶ Conversely, an explanation process may force the firm to consider, before ending the agreement, relevant factual and legal circumstances surrounding the act.⁹⁷ During the explanation process, the firm may discover that it cannot find appropriate factual and legal justifications for terminating an innocent consumer and thus avoid an erroneous termination.⁹⁸ An explanation requirement can, therefore, advance the cause of accurate contract termination decisions.⁹⁹

95. Cf. Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 300 (1982) (arguing that reasons requirements "help assure correct results at the initial decisionmaking stage").

96. See *id.* at 304.

97. Cf. *id.* at 300-01 ("Requiring officials to explain decisions promotes careful consideration of relevant evidence and legal standards."); Zhuang Liu, *Does Reason Writing Reduce Decision Bias? Experimental Evidence from Judges in China*, 47 J. LEGAL STUD. 83, 87 (2018) ("[R]eason giving is described as inducing introspection and self-reflective thinking and preventing intuition from dominating the decision process.").

98. Cf. Mathilde Cohen, *When Judges Have Reasons Not to Give Reasons: A Comparative Law Approach*, 72 WASH. & LEE L. REV. 483, 511-12 (2015) ("In attempting to reason her decision, a judge discovers that she cannot find an appropriate legal justification, leading her to reconsider her initial ruling and make a more accurate determination."); Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L.J. 1283, 1284-85 (2008) ("Judges frequently invoke a similar sentiment via the phrase 'it won't write,' which refers to situations where a result the judge initially thought appropriate turns out, upon an attempt to justify the result in an opinion, to be unacceptable.").

99. Cf. Morgan, *supra* note 95, at 302 ("By promoting careful consideration of relevant facts and law at the initial decision-making stage, however, reasons requirements generally advance the cause of fair and accurate decision-making significantly.").

Relatedly, lack of explanation may allow behavioral biases to sway the termination decision. Conversely, providing reasons for a decision can reduce the prevalence of such biases.¹⁰⁰ Consider, for example, the framing effect, which suggests that “people tend to choose differently when presented with different descriptions of the very same problem.”¹⁰¹ Thus, when people choose between two treatment options for a threat that is likely to kill 600 people, they generally prefer the option that saves 200 lives (positive framing) over the option in which 400 people will die (negative framing).¹⁰² Sieck and Yates found, however, that the framing effect less influenced subjects who had to write out an explanation for their decisions.¹⁰³

As yet another example, consider the anchoring bias, which suggests that “numeric estimates are assimilated to a previously considered standard of comparison.”¹⁰⁴ As one illustration, when people estimate the percentage of African nations in the United Nations, they tend to provide an answer anchored to an arbitrary number previously presented to them.¹⁰⁵ Mussweiler, Strack, and Pfeiffer found, however, that car experts who had to explain their price evaluations were less likely to be influenced by the anchoring bias.¹⁰⁶ Likewise, Liu found experimental evidence suggesting that written explanation provided by judges successfully reduces their impulsive behavioral reactions.¹⁰⁷

Clearly, this line of reasoning applies to our context. By not employing a reasoning process, the decision-maker within the firm is more likely to be influenced by biases and not engage in a rational and deliberative process.¹⁰⁸ Assuming termination processes often involve automated systems, lack of explanation increases the concerns around the automation bias, *i.e.*, the tendency of human decision-makers to depend on automation and ignore contradictory nonautomated information.¹⁰⁹ Unfortunately, we have already seen how this bias

100. *Cf.* Liu, *supra* note 97, at 89 (writing reasons “restrains intuition from dominating judgment and facilitates the use of deliberative thinking.”); Cohen, *supra* note 98, at 512 (“[F]orcing judges to substantiate their decisions based on facts and legal arguments enhances the accuracy of judicial decision making. It ensures that judicial decisions are not made arbitrarily or based on speculation, suspicion, or irrelevant information”).

101. Winston Sieck & J. Frank Yates, *Exposition Effects on Decision Making: Choice and Confidence in Choice*, 70 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 207, 208 (1997).

102. *Id.* See also the original famous study, Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981).

103. Sieck & Yates, *supra* note 101, at 207 (explaining rationales for the subjects’ selections “reduced framing effects in each of the experiments”).

104. *See, e.g.*, Thomas Mussweiler, Fritz Strack & Tim Pfeiffer, *Overcoming the Inevitable Anchoring Effect: Considering the Opposite Compensates for Selective Accessibility*, 26 PERSONALITY & SOC. PSYCH. BULL. 1142, 1142 (2000). See also the seminal article, Amos Tversky & Daniel Kahneman, *Judgments Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1129 (1974).

105. *See* Mussweiler et al., *supra* note 104, at 1142.

106. *Id.* at 1148 (“In a real-world setting using experts as participants, Study 1 demonstrated that judgmental anchoring can be mitigated by generating anchor-inconsistent arguments before making the numeric estimate.”).

107. *See e.g.*, Liu, *supra* note 97, at 108 (“Reason writing successfully reduces, although it does not eliminate, judges’ impulsive reactions in experiments.”).

108. *See id.* at 84.

109. *See* Linda J. Skitka, Kathleen L. Mosier & Mark Burdick, *Does Automation Bias Decision-Making?*, 51 INT’L J. HUM.-COMPUT. STUD. 991, 992 (1999) (“[T]he presence of automated decision aids might . . .

can unfold and lead to rather unfortunate results in other domains, such as false arrests.¹¹⁰ There is no reason to believe that consumer termination is immune to these problems. To add to that, relying on machines makes it possible for decision-makers within the firm to distance themselves from the decision. This reliance allows decision-makers to conceal their subjective decision-making and place the responsibility on the automated process or machine.¹¹¹

A lack of explanation is likely to increase the likelihood of erroneous consumer termination for another reason. Lack of reasoning may impair the consumers' capacity to easily and fully understand the firm's termination decision and effectively contest it if it is wrong.¹¹² In other words, an effective explanation can help terminated consumers understand the factual and legal basis that underlies the cancellation.¹¹³ Consequently, consumers may be able to assess the accuracy of the termination decision more easily¹¹⁴ and contest a wrong decision by appealing to the supplier or filing a lawsuit against it.¹¹⁵ Such an appeal may ultimately lead to a socially desirable nullification of wrong termination decisions.¹¹⁶ In short, failure to detail the reasoning for termination makes it hard for others to review and scrutinize the decision, thus reducing the likelihood of spotting possible mistakes.

introduce the possibility of making new kinds of errors People become primed to use decision aids in biased ways . . . as a replacement for more vigilant system monitoring or decision making.”).

110. See Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. TIMES (June 24, 2020), <https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html> [https://perma.cc/XX8B-FVFN] (“In Mr. Williams’s recollection, after he held the surveillance video still next to his face, the two detectives leaned back in their chairs and looked at one another. One detective, seeming chagrined, said to his partner: ‘I guess the computer got it wrong.’”); see also Bobby Allyn, “*The Computer Got It Wrong*”: *How Facial Recognition Led to False Arrest of Black Man*, NPR (June 24, 2020, 8:00 AM), <https://www.npr.org/2020/06/24/882683463/the-computer-got-it-wrong-how-facial-recognition-led-to-a-false-arrest-in-michig> [https://perma.cc/9R38-6V5A].

111. Mary L. Cummings, *Automation and Accountability in Decision Support System Interface Design*, J. TECH. STUD. 23, 25 (2006) (“Automated decision support tools . . . can cause operators to relinquish a sense of responsibility and subsequently accountability because of a perception that the automation is in charge.”); GILMAN, *supra* note 38, at 6 (noting the risk that decisionmakers will use automation systems “to mask their subjective decision-making . . .”).

112. See Sandra Wachter, Brent Mittelstadt & Chris Russell, *Counterfactual Explanations Without Opening the Black Box: Automated Decisions and the GDPR*, 31 HARV. J. L. & TECH. 841, 843 (2018).

113. See *e.g.*, *id.* at 863 (“One potential purpose of explanations is to provide the data subject with understanding of the scope of automated decision-making, and the reasons that led to a particular decision.”).

114. Cf. Morgan, *supra* note 95, at 303 (“[A]n individual adversely affected by a decision, as well as his or her attorney, can assess the decision’s factual and legal legitimacy more easily when reasons are disclosed.”); Margot E. Kaminski, *Binary Governance: Lessons from the GDPR’s Approach to Algorithmic Accountability*, 92 S. CAL. L. REV. 1529, 1580 (2019) (“Individuals may be provided with a simplified and understandable explanation of algorithmic decision-making, giving them insight into whether a decision is justified in their respective cases . . .”).

115. See, *e.g.*, *Matlovich v. Sec’y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978) (“[A] reasoned explanation [informs] the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review).”); Wachter et al., *supra* note 112, at 872 (“Another possible purpose of explanations is to provide information that helps contest automated decisions when an adverse or otherwise undesired decision is received.”); Cohen, *supra* note 98, at 510 (“[T]ransparent reasons make it much easier to narrow the issues they will need to address if they decide to appeal the decision.”).

116. See, *e.g.*, Wachter et al., *supra* note 112, at 872 (“Contesting a decision can aim to reverse or nullify the decision and return to a status where no decision has been made.”); Van Loo, *supra* note 42, at 49 (“[A] neutral appeals body could reduce racial discrimination, [and] debilitating account terminations.”).

All in all, the need to provide a meaningful explanation may deter suppliers, in the first place, from making hasty and erroneous termination decisions.¹¹⁷ When one knows that their decisions will be reviewed and examined *ex post*, one is more careful in making these decisions *ex ante*.¹¹⁸ Since consumers, the media, consumer agencies, and courts can review firms' termination explanations, firms are more likely to take the necessary precautions before opting for such a move.¹¹⁹ When an explanation is not provided, however, firms are disincentivized to take the necessary precautions.¹²⁰ This will inevitably increase the likelihood of mistakes.¹²¹

3. *Costs to Terminated Consumers*

The erroneous termination of consumer contracts, facilitated by lack of explanation, may create four significant types of costs to consumers: (i) loss of previous investment; (ii) loss of accumulated benefits; (iii) emotional costs; and (iv) switching costs. We next explain each of these costs.

(i) **Loss of previous investment.** Consumers often invest resources, including time, cognitive efforts, and money, related to the contract they have entered. First, *before* accepting the contract, consumers may invest time and effort searching for a product or service that fits their needs while comparing alternative offerings in the market.¹²² Second, *during* the contractual relationship, consumers may invest resources in order to benefit from the supplier's products or services.¹²³ For example, users who signed up for an e-commerce website may invest money to purchase access to the supplier's ebooks and streaming videos.¹²⁴ Similarly, users of virtual world websites may invest

117. Kiel Brennan-Marquez, "Plausible Cause": Explanatory Standards in the Age of Powerful Machines, 70 VAND. L. REV. 1249, 1295 (2019) ("[E]xplanatory standards . . . have salutary upstream effects: when officials know they may have to account for decisions later on, the decisions look different. Officials take greater care; they think twice.").

118. Cf. Paul R. Kleindorfer, *What if You Know You Will Have to Explain Your Choices to Others Afterwards? Legitimation in Decision-Making*, in THE IRRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD 72, 72 (Erwan Michel-Kerjan & Paul Slovic eds., 2010) ("The anticipation that one may be required to explain or justify decisions after the fact might be expected to affect the decisions that are made.").

119. See Brennan-Marquez, *supra* note 117, at 1295.

120. See *id.*

121. Cf. *id.*

122. Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 129 (2007) ("[T]he consumer is likely to spend a considerable amount of time in order to become acquainted with the good or service she is about to purchase . . ."); Vishal Lala & Goutam Chakraborty, *Impact of Consumers' Effort Investments on Buying Decisions*, 32 J. CONSUMER MKTG. 61, 62 (2015) ("Effort expended in purchasing may be in multiple forms, including the physical effort involved in . . . searching for a product within the store, or the cognitive effort involved in evaluating a set of alternatives.").

123. See, e.g., *About Amazon Prime Insider & Prime Membership Benefits*, AMAZON, <https://www.amazon.com/primeinsider/about> (last visited Mar. 19, 2022) [<https://perma.cc/2EMU-9HD8>] (offering different benefits to Amazon Prime members).

124. Cf. Kate Taylor, *Furious Customers Say They've Been Mysteriously Locked Out of Their Amazon Accounts—and They Have No Idea Why*, BUS. INSIDER (Apr. 6, 2018, 1:46 AM), <https://www.businessinsider.com.au/amazon-closes-users-accounts-customers-fight-back-2018-4> [<https://perma.cc/26NB-2RWJ>].

time and money in developing and upgrading their avatars.¹²⁵ Equally, users of social network sites may invest considerable time and effort in developing their profile or account, acquiring a reputation, and maintaining close relationships within the platform.¹²⁶

When a firm mistakenly terminates such user accounts, their investments may become sunk (nonrecoupable) in a new contractual relationship. First, the information that the consumer acquired before signing the contract about alternative products and suppliers may become obsolete due to technological, market, social, and other changes.¹²⁷ Second, the consumer's investments during the contractual relationship to benefit from the supplier's specific product or service may often be lost if the contract is mistakenly terminated.¹²⁸ For example, an e-commerce consumer may lose access to ebooks and streaming videos they had already purchased when the supplier terminates their contract.¹²⁹ Moreover, items purchased by a user on a virtual world website may be useless if the website terminates the consumer agreement.¹³⁰ Likewise, the investments made by a user of a social networking site in building an online reputation and relationships within the site or platform may often be lost since the consumer is unlikely to recover these investments when moving to a new environment.¹³¹

(ii) **Loss of accumulated benefits.** During the contractual relationship, consumers may accumulate two different types of economic benefits as a side

125. Eric Goldman, *Termination of Accounts in Virtual Worlds*, TECH. & MKTG. L. BLOG (Feb. 13, 2005), https://blog.ericgoldman.org/archives/2005/02/termination_of.htm [<https://perma.cc/CW78-QVGD>] (“Some virtual world participants invest significant time and money in their online characters—earning (or otherwise obtaining) virtual money or items, gaining experience/levels, creating or customizing online ‘property’ (such as houses or widgets that are for sale in the virtual economy) and forming social networks.”).

126. Aihui Chen, Yaobin Lu, Bin Wang, Ling Zhao & Ming Li, *What Drives Content Creation Behavior on SNSs? A Commitment Perspective*, 66 J. BUS. RSCH. 2529, 2530 (2013) (“On [social network sites], users invest considerable time and individual efforts in developing close interpersonal relationships with other members, building a reputation among them.”); Junho Choi, Jaemin Jung & Sang-Woo Lee, *What Causes Users to Switch from a Local to a Global Social Network Site? The Cultural, Social, Economic, and Motivational Factors of Facebook’s Globalization*, 29 COMPUTS. HUM. BEHAV. 2665, 2667 (2013) (“In the context of [social network site] use, the typical examples invested in the past are accumulated content, friends, and reputation over time.”); *Daily Time Spent on Social Networking by Internet Users Worldwide from 2012 to 2019*, STATISTA, <https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/> (last visited Mar. 19, 2022) [<https://perma.cc/AE2Q-WH7A>] (“As of 2019 and 2020, the average daily social media usage of internet users worldwide amounted to 145 minutes per day, up from 142 minutes in the previous year.”).

127. Cf. *About Amazon Prime Insider & Prime Membership Benefits*, *supra* note 123.

128. Cf. Van Loo, *supra* note 42, at 10 (“[A]ccount termination may deprive a user of valuable property.”).

129. Taylor, *supra* note 124 (discussing that when Amazon terminated its agreement with Amazon Prime customers, the “customers lost access to . . . previously purchased ebooks and streaming videos”); Tina Nazerian, *Amazon’s Recent Account Closures Have Affected College Students Too* (Apr. 18, 2010), <https://www.edsurge.com/news/2018-04-18-amazon-s-recent-account-closures-have-affected-college-students-too> [<https://perma.cc/8UWT-85YV>] (describing a college student who lost her access to an audiobook she needed for her class, when Amazon terminated her contract).

130. Goldman, *supra* note 125 (“In some cases, participants purchase items, cash or characters with real cash either directly from the provider or in a secondary market like eBay. All of these ‘investments’ can be lost or diminished if a virtual world provider terminates the individual’s account . . .”).

131. Choi et al., *supra* note 126, at 2667 (“[W]e consider the accumulated content, friends, and reputation in the old [social network] site [SNS] as the sunk costs which are hardly recovered by moving to a new SNS platform.”); Chen et al., *supra* note 126, at 2530 (stating that in social network sites, “[r]elationships and individual user reputation are rarely transferable or easily replicable in different networks” (citation omitted)).

effect of the relationship.¹³² First, consumers may accrue financial *rewards*.¹³³ For example, consumers may accumulate “miles” or “points” through spending on products and services such as flying, credit cards, retail merchandise, car rentals, and hotels.¹³⁴ Consumers then may redeem these rewards for flight tickets, cabin class upgrades, or various retail items.¹³⁵ Second, consumers may accrue *discount* rights during the contractual relationship.¹³⁶ Particularly, loyal consumers may receive a right to a discount on subsequent purchases.¹³⁷ For instance, insurance companies may provide their customers gradually unfolding discounts, with premiums decreasing as the contractual relationship endures.¹³⁸

When firms erroneously terminate consumer contracts, consumers may lose the economic benefits that they have accumulated during the contractual relationship.¹³⁹ For example, customers may lose unredeemed reward points when a credit card agreement is terminated.¹⁴⁰ Likewise, restaurant chain members may lose their earned discounts on drinks and food if the chain

132. See, e.g., Michael A. Jones, David L. Mothersbaugh & Sharon E. Beatty, *Why Customers Stay: Measuring the Underlying Dimensions of Services Switching Costs and Managing their Differential Strategic Outcomes*, 55 J. BUS. RSCH. 441, 442 (2002) (“Continued patronage of a provider often leads to the accrual of benefits . . .”).

133. See, e.g., Nic S. Terblanche, *Customers’ Perceived Benefits of a Frequent-Flyer Program*, 32 J. TRAVEL & TOURISM MKTG. 199, 201–03 (2015) (describing loyalty-based frequent flyer rewards).

134. *Id.* at 201 (“Miles can, apart from flying with a particular airline and its various global partners, be earned through spending on car rentals, hotels, lifestyle centres, resorts, retail stores, and banks.”).

135. Yi Gao, *A Conceptual Framework for Valuating Airline Frequent Flyer Program Miles*, 7 INT’L J. AVIATION, AERONAUTICS & AEROSPACE 1, 1 (2020) (“[Miles] can be used to redeem for flight tickets, cabin class upgrade, general merchandise, travel vouchers, etc.”).

136. Kevin P. Gwinner, *Relational Benefits in Services Industries: The Customer’s Perspective*, 26 J. ACAD. MKTG. SCI. 101, 104 (1998) (“One type of economic benefit relates to discounts . . . for those customers who have developed a relationship with an organization.”).

137. Elena M. Kiseleva, Marina L. Nekrasova, Marina A. Mayorova, Marina N. Rudenko & Vadim S. Kankhva, *The Theory and Practice of Customer Loyalty Management and Customer Focus in the Enterprise Activity*, 6 INT’L REV. MGMT. & MKTG 95, 98 (2016) (noting that under a discount program often offered by firms, the discount amount may depend “on the customer’s previous spending—the more he spent for all time of using of the company’s services, the more substantial discount he will receive on all subsequent purchases”).

138. Larry Alton, *How to Inspire Customer Loyalty Through Discounts and Rebates*, CUSTOMER THINK (July 23, 2018), <https://customerthink.com/how-to-inspire-customer-loyalty-through-discounts-and-rebates/> [<https://perma.cc/AA2M-F93D>] (“King Price Insurance offers gradually unfolding discounts to its customers, with premiums decreasing the longer you’ve been a customer.”); Louise O’Brien & Charles Jones, *Do Rewards Really Create Loyalty?*, HARV. BUS. REV. (1995), <https://hbr.org/1995/05/do-rewards-really-create-loyalty> [<https://perma.cc/A4H8-2AKY>] (“Taking into account long customer tenure and good accident history, State Farm Insurance provides individual discounts on its auto insurance policies.”).

139. Jones et al., *supra* note 132, at 442 (“Continued patronage of a provider often leads to the accrual of benefits and perquisites that are lost if the relationship is terminated.”) (citation omitted); see also Thomas A. Burnham, Judy K. Frels & Vijay Mahajan, *Consumer Switching Costs: A Typology, Antecedents, and Consequences*, 31 J. ACAD. MKTG. SCI. 109, 111 (2003) (“In switching to a new provider, consumers may lose points they have accumulated and discounts or benefits that are not afforded to new customers.”).

140. See, e.g., Gao v. JPMorgan Chase & Co., No. 14 Civ. 4281, 2015 WL 3606308, at *1 (S.D.N.Y. June 9, 2015) (“Chase revoked the unredeemed rewards points when terminating [the customer] account.”); Samuels v. Old Kent Bank, No. 96 C 6667, 1997 WL 458434, at *8 (N.D. Ill. Aug. 1, 1997) (“We, of course, recognize that cancellation of the [CardMiles] program worked, at least collectively, a significant forfeiture on Old Kent cardholders, many of whom presumably chose Old Kent over other credit card providers on the basis of the CardMiles program.”).

terminates their membership agreement.¹⁴¹ Equally, consumers of online travel services may lose frequent flyer miles, access to executive lounges, or membership reward coupons, when their contract is erroneously terminated.¹⁴²

(iii) **Emotional and nonquantifiable costs.** An erroneous termination of the consumer-supplier relationship may result in emotional costs to terminated consumers.¹⁴³ When a supplier mistakenly terminates a consumer contract, the innocent consumer may experience various negative emotions. Anger, frustration, distress, betrayal, embarrassment, and mental anguish can all arise from erroneous termination.¹⁴⁴

Several reasons may lead consumers to experience such negative emotions. First, the wrong termination is a coercive and one-sided act that may offend and unpleasantly surprise the innocent consumer.¹⁴⁵ Second, the termination of the agreement may break social relationships that the consumer had built during the contract term.¹⁴⁶ Particularly, contract termination may break social relationships that the consumer developed with the supplier's employees (*e.g.*, a

141. See, *e.g.*, Taylor Soper, *Starbucks Cancels Thousands of Gold Accounts Over Issues with Birthday Information*, GEEKWIRE (Aug. 27, 2014, 9:53 AM), <https://www.geekwire.com/2014/starbucks-cancels-thousands-gold-accounts-birthday-issue/> [<https://perma.cc/U6GP-GNZU>].

142. Michelle Carter, Ryan Wright, Jason Bennett Thatcher & Richard Klein, *Understanding Online Customers' Ties to Merchants: The Moderating Influence of Trust on the Relationship Between Switching Costs and E-Loyalty*, 23 EUR. J. INFO. SYS. 185, 190 (2014) ("With regard to online travel services, [termination] costs include loss of frequent flyer miles, loss of access to executive lounges . . . and/or loss of membership reward points.").

143. See, *e.g.*, Vikas Mittal, Matthew Sarkees & Feisal Murshed, *The Right Way to Manage Unprofitable Customers*, HARV. BUS. REV. 95, 102 (2008).

144. *Id.* ("In our survey, 80% of divested consumers reported feeling angry, frustrated, or embarrassed about being cut off [by the supplier]—and reasonably so."); Michael Haenlein & Andreas M. Kaplan, *Unprofitable Customers and Their Management*, 52 BUS. HORIZONS 89, 94 (2009) ("While abandonment may be an attractive option from the company's perspective, the unprofitable customer who is 'fired' is likely to feel dissatisfied [or] angry."); Amin Nazifi, Dahlia El-Manstrly & Katja Gelbrich, *Customers' Reactions to Different Organizational Tactics in a Service Termination Context*, 54 EUR. J. MKTG. 26, 27 (2020) (describing terminated customers who "often feel angry"); *Wheat v. Chase Bank*, No. 3:11-CV-309, 2014 WL 457588, at *28 (S.D. Ohio Feb. 3, 2014) ("Embarrassment, mental anguish, and emotional distress might be the inevitable and unfortunate effects of [a bank's termination of the Plaintiff's bank account agreement].").

145. Christina M. Haenel, Hauke A. Wetzel & Maik Hammerschmidt, *The Perils of Service Contract Divestment: When and Why Customers Seek Revenge and How It Can Be Attenuated*, 22 J. SERV. RSCH. 301, 307 (2019) ("[D]ivestment decisions are deliberate, intentional, and one-sided decisions made by a provider, causing harm to the customer. The appraisal of willingly being treated unfairly by a firm elicits anger as a negative emotion.") (citation omitted).

146. Burnham et al., *supra* note 139, at 111–12 (explaining consumer switching costs include "the affective losses associated with breaking the bonds of identification that have been formed with the people with whom the customer interacts").

bank clerk)¹⁴⁷ or other consumers (e.g., users of a dating website or social network).¹⁴⁸

Third, consumers may often feel a personal identification with the brand of their supplier (e.g., Starbucks, Apple, or Microsoft).¹⁴⁹ Many firms pretend to cultivate deep relationships with consumers, expressing emotions and care toward them.¹⁵⁰ As a result, the termination of a supplier-consumer relationship may frustrate consumers' expectations and break the emotional sense of identification that the consumer had developed with the supplier's brand.¹⁵¹

Fourth, terminated consumers might believe that firms discriminate against them. For instance, if the consumer believes that the firm deactivated their account because of their race, religion, sexual orientation, or weight, they may experience anger and humiliation.¹⁵² Along somewhat similar lines, in some circumstances—such as social media platforms—terminating consumers may undermine their ability to express themselves.¹⁵³ Finally, the economic harm that

147. Nikita Dzhain, Jussi Ilmari Nykanen, Esko Penttinen & Timo Saarinen, Impact of Switching Costs and Network Effects on Selection of Mobile Platforms, 2015 48th Hawaii International Conference on System Sciences, in INST. ELEC. & ELECS. ENG'RS (2015), at 1187, 1188 (“The relational switching costs include personal relationship loss costs that refer to the loss of contact with the employees from the previous business”). Cf. Burnham et al., *supra* note 139, at 112 (“Consumers’ familiarity with incumbent provider employees creates a level of comfort that is not immediately available with a new provider.”).

148. See, e.g., Alina Tugend, *Barred from Facebook, and Wondering Why*, N.Y. TIMES (Sept. 20, 2014), <https://www.nytimes.com/2014/09/20/your-money/kicked-off-facebook-and-wondering-why.html> [<https://perma.cc/3EP7-EW6Y>] (“[Professor Eric Goldman explains that] [w]hen Facebook makes a termination decision, it’s potentially life-altering for some people . . . They’re cut off to access to their communities.”); see also *What I Learned When Facebook Disabled My Account*, OPTIMIZATION TODAY (Feb. 3, 2012), <http://www.optimizationtoday.com/what-i-learned-when-facebook-disabled-my-account/> [<https://perma.cc/5XP T-QQV4>] (“[A Facebook user, who was terminated by the website, wrote] “[t]here were well over 2000 photos, countless videos, blog posts (notes), plus all the contacts (I still haven’t been able to reconnect with many who were all lost when Facebook disabled my account). This was looking to be a very bleak situation as I further realized just what was lost.”); *Account Suspended for No Reason!*, REDDIT, https://www.reddit.com/r/OkCupid/comments/85p3eq/account_suspended_for_no_reason/ (last visited Mar. 19, 2022) [<https://perma.cc/S5ZS-UHC2>].

149. Kenneth Wilson Graham & Kelly M. Wilder, *Consumer-Brand Identity and Online Advertising Message Elaboration*, 14 J. RSCH. INTERACTIVE MKTG. 111, 113 (2020) (“Brands have become integral to many consumers because they serve as objects of both personal and social identification.”) (citation omitted); Noel Albert, Dwight Merunka & Pierre Valette-Florence, *Brand Passion: Antecedents and Consequences*, 66 J. BUS. RSCH. 904, 904 (2013) (“Strong relationships bind consumers and their preferred brands, such that some consumers may develop into a true cult for some brands.”) (citations omitted).

150. See generally Becher & Dadush, *supra* note 36 (explaining how firms use various communications to lead the consumer to believe in deep and communal B2C relationships).

151. See *id.* at 1550.

152. See, e.g., Frevele, *supra* note 11 (discussing the allegation that transgender Tinder users are banished from the platform); Rose, *supra* note 12 (reporting that “Instagram Apologizes for Deleting Plus-Size Woman’s Account”); Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012) (discussing a suit brought by a plaintiff who argued that Facebook terminated his account because of his ethnicity).

153. *Self-Esteem and Social Media*, REACH OUT, <https://parents.au.reachout.com/skills-to-build/wellbeing/things-to-try-social-media/self-esteem-and-social-media> (last visited Mar. 19, 2022) [<https://perma.cc/H9C3-PKHS>].

termination inflicts on consumers, such as the loss of sunk costs and accumulated benefits,¹⁵⁴ can naturally trigger negative emotions.¹⁵⁵

(iv) **Switching costs.** In addition to the costs detailed thus far, erroneous termination frequently entails the need to incur the costs of switching to a new supplier.¹⁵⁶ Consumers may be required to invest time and cognitive efforts in collecting information about potential new suppliers.¹⁵⁷ Remarkably, in differentiated product markets, such as online retailing or airlines,¹⁵⁸ the costs of searching and analyzing data about the various alternatives can be high.¹⁵⁹ Consumers are likely to face a deluge of information. They may also find it challenging to evaluate the credibility of the information presented and the (often inconsistent) reviews they encounter.¹⁶⁰

The switching costs that consumers may need to incur include *economic risk costs*; that is, the uncertainty entailed in switching to a new supplier.¹⁶¹ This uncertainty may relate to various aspects of the transaction. First, it may relate to the quality and accuracy of the service/product that the new supplier provides.¹⁶² It also relates to whether the new service or product includes hidden charges or otherwise utilizes manipulative tactics at the expense of consumers.¹⁶³ Uncertainty may also exist regarding legal aspects, such as whether the new

154. See *supra* notes 122–42 and accompanying text.

155. See *supra* notes 122–42 and accompanying text.

156. See *supra* notes 26–27, 55, 88 (listing conspicuous examples surveyed).

157. Burnham et al., *supra* note 139, at 111 (“Time and effort are associated with collecting the information needed to evaluate potential alternative providers.”); Dwayne Whitten & Robin L. Wakefield, *Measuring Switching Costs in IT Outsourcing Services*, 15 J. STRATEGIC INFO. SYS. 219, 231 (2006) (“Search costs include the time and effort to locate alternatives.”).

158. Ali Aouad, Retsef Levi & Danny Segev, *Approximation Algorithms for Dynamic Assortment Optimization Models*, 44 MATHEMATICS OPERATIONS RSCH. 487, 487 (2018) (noting that online retailing and airlines are highly differentiated markets).

159. Pei-yu Chen & Lorin M. Hitt, *Information Technology and Switching Costs*, in 1 HANDBOOK IN INFO. SYS. 437, 446 (Terrence Hendershott, ed. 2006) (in differentiated product markets “the costs of acquiring sufficient information about product alternatives and the cost of consumers processing of this information can be high”).

160. George Balabanis, Nina Reynolds & Antonis Simintiras, *Bases of E-store Loyalty: Perceived Switching Barriers and Satisfaction*, 59 J. BUS. RSCH. 214, 215 (2006) (“[Online search costs] include the difficulty for shoppers to determine the credibility and authenticity of review reports [and] to evaluate the multitude of often contradictory customer reviews . . .”).

161. Wenhua Shi, Jianmei Ma & Chen Ji, *Study of Social Ties as One Kind of Switching Costs: A New Typology*, 30 J. BUS. & INDUS. MKTG. 648, 649 (2015) (“Economic risk costs are the uncertainty of potential negative outcomes when consumers switch to unfamiliar providers.”); Burnham et al., *supra* note 139, at 111 (“Economic risk costs are the costs of accepting uncertainty with the potential for a negative outcome when adopting new provider about which consumer has insufficient information.”); Lan-Ying Huang & Ying-Jiun Hsieh, *Consumer Electronics Acceptance Based on Innovation Attributes and Switching Costs: The Case of E-book Readers*, 11 ELEC. COM. RES. & APPLICATIONS 218, 219 (2012) (“Economic risk costs refer to the costs resulting from adverse performance when a consumer adopts a new product or service with insufficient information.”).

162. Burnham et al., *supra* note 139, at 122 (explaining that economic risk costs include the fear of consumers that “the service offered by other service providers won’t work as well as expected”); Balabanis et al., *supra* note 160, at 217 (“[O]nline shoppers have to pay in advance and cannot be sure whether or when their purchases will be delivered.”).

163. Burnham et al., *supra* note 139, at 122; Arunesh Mathur et al., *Dark Patterns At Scale: Findings from a Crawl of 11K Shopping Websites*, 3 PROC. ACM HUM.-COMPUT. INTERACTION 81:1, 81:3 (2019) (identifying and classifying various prevalent hidden manipulations found in online platform).

supplier will breach the consumer's privacy.¹⁶⁴ For example, a consumer who needs to find a new credit card company may face uncertainty about whether their credit card and personal information will be kept confidential by the new supplier.¹⁶⁵

* * *

In this Part we explained how termination without explanation facilitates erroneous termination, which can be socially destructive and rather harmful to terminated consumers. While anecdotal evidence suggests that firms terminate consumers erroneously and without explanation, there is no empirical evidence as to how prevalent termination without explanation contracts actually are. There is also no evidence as to the degree of nontransparency and potential exploitation that accompany such contracts. The next Part aims to empirically explore precisely that.

III. THE EMPIRICAL TEST

This Part empirically studies the frequency and nature of termination without explanation contracts. Our sample includes 500 consumer contracts used by highly popular websites in the United States. Our empirical examination seeks to answer three major questions. First, how widespread termination without explanation contracts are. Second, to what extent termination without explanation contracts are nontransparent. Third, whether there is a relationship between the *degree* of nontransparency of a website's termination without explanation contract and the website's popularity, measured by its online traffic. Here, we hypothesize that highly popular firms such as Google and Amazon—who are more often scrutinized and criticized by policymakers, online venues, and mass media—will be less likely to adopt nontransparent and exploitative termination without explanation clauses.¹⁶⁶

A. Data

To examine the frequency of termination without explanation contracts, we focus on an important and prevalent type of consumer agreement: the sign-in-wrap contract. In such contracts, the website usually states that the user agrees to the contract by signing up for the service.¹⁶⁷ The user can typically view the

164. Ezlika Ghazali, David Arnott & Dilip Mutum, *Conceptualizing and Measuring Online Switching Costs*, 9 EUR. ADVANCES CONSUMER RSCH. 151, 151 (2011) (“Uncertainty costs should be more important in online services, where . . . privacy issues [is] important.”).

165. Balabanis et al., *supra* note 160, at 217 (“Security concerns regarding the provision of personal and credit card information over the Internet . . . may force shoppers to rely on a small number of trusted e-tailers.”).

166. Cf. Shmuel I. Becher & Uri Benoliel, *Sneak in Contracts*, 55 GA. L. REV. 657, 673 (2021) (testing the statistical relationship between a website's traffic ranking and the degree of the explicit transparency of change-of-terms provisions).

167. *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75–76 (2d Cir. 2017) (stating that sign-in-wrap agreements inform the consumer that he or she assents to terms of use by signing up to use the website); *TopstepTrader, LLC v. OneUp Trader, LLC*, No. 17 C 4412, 2018 WL 1859040, at *3 (N.D. Ill. Apr. 18, 2018) (noting that, amidst

contract terms by clicking a hyperlink located next to a sign-up button displayed on the screen.¹⁶⁸ The website often labels this hyperlink as “Conditions of Use,” “Terms of Service,” “Terms and Conditions,” or simply “Terms.”¹⁶⁹

This Article’s sample contains the 500 most popular websites in the U.S. that use sign-in-wrap agreements. The initial source of data was the Alexa Top Sites web service, which provides a ranked list of the most popular websites in the United States.¹⁷⁰ The Alexa Top Sites service is a leading website traffic measurement tool¹⁷¹ based on millions of internet users.¹⁷² Since it is built on one of the largest samples of internet users,¹⁷³ it is widely used in empirical research.¹⁷⁴

The categories of the websites in this Article’s sample are highly heterogeneous. They include search engines, social networks, general merchandise, news and media, video games, file sharing, e-mail, software, financial management, sports, movies, directories, real estate, business services, programming, dictionaries, encyclopedias, music, telecom, consumer electronics, tourism, web hosting, coupons, and home and garden.¹⁷⁵

the registration process, sign-in-wrap agreements often display language to the effect of “By signing up for an account with [website provider], you are accepting the [website]’s terms of service”).

168. *TopstepTrader, LLC*, 2018 WL 1859040, at *3 (explaining that sign-in-wrap agreements provide a hyperlink to the terms of service); see Robert V. Hale II, *Recent Developments in Online Consumer Contracts*, 71 BUS. LAW. 353, 357 (2015) (noting that sign-in-wrap agreements make the terms accessible by means of a hyperlink).

169. Hale, *supra* note 168, at 354.

170. See *Alexa Top Sites*, AMAZON WEB SERVS., INC., <https://aws.amazon.com/alexa-top-sites/> (last visited Mar. 19, 2022) [<https://perma.cc/77E8-SQUN>]. According to Alexa, the ranking of a website is determined by a combination of unique visitors and page views. *Id.*

171. See, e.g., Adela-Laura Popa, Naiana Nicoleta Tarca & Teodora-Mihaela Tarcza, *The Online Strategy of Romanian Higher Education Institutions: Present and Future*, in *ENTREPRENEURSHIP, BUS. & ECON.* 413, 420 (Mehmet Huseyin Bilgin & Hakan Danis eds., 2016) (noting that Alexa traffic rank is one of the most prominent and frequently used tools to assess a website’s performance); Joel R. Reidenberg et al., *Disagreeable Privacy Policies: Mismatches Between Meaning and Users’ Understanding*, 30 *BERKELEY TECH. L.J.* 39, 54 (2015) (“Alexa.com [is] the most prominent measurement company for web traffic data.”); Arjun Thakur, A.L. Sangal & Harminder Bindra, *Quantitative Measurement and Comparison of Effects of Various Search Engine Optimization Parameters on Alexa Traffic Rank*, 26 *INT’L J. COMPUT. APPLICATIONS* 15, 16 (2011) (describing the significant popularity of Alexa Traffic Rank as a tool to measure website traffic).

172. Greg Orelind, *Top 6 Myths About the Alexa Traffic Rank*, ALEXA INTERNET, INC., <https://blog.alexa.com/top-6-myths-about-the-alexa-traffic-rank/> (last visited Mar. 19, 2022), [<https://perma.cc/NW45-BKGX>].

173. *Alexa Top Sites*, *supra* note 170 (“Alexa’s site popularity traffic rankings are based on the anonymous usage patterns of one of the largest . . . samples of internet users available in the world.”).

174. For examples of studies using Alexa, see Stephen K. Callaway, *Internet Banking and Performance: The Relationship of Web Site Traffic Rank and Bank Performance*, 26 *AM. J. BUS.* 12, 16 (2011); Christine Ennew, Andy Lockett, Ian Blackman & Christopher P. Holland, *Competition in Internet Retail Markets: The Impact of Links on Web Site Traffic*, 38 *LONG RANGE PLAN.* 359, 362 (2005); Chun-Yao Huang & Shin-Shin Chang, *Commonality of Web Site Visiting Among Countries*, 60 *J. AM. SOC’Y FOR INFO. SCI. & TECH.* 1168, 1172 (2009); Agnieszka Wolk & Sven Theyssohn, *Factors Influencing Website Traffic in the Paid Content Market*, 23 *J. MKTG. MGMT.* 769, 779 (2007).

175. The website categories were identified using the SimilarWeb search engine. See *SIMILARWEB*, <https://www.similarweb.com/> (last visited Mar. 19, 2022), [<https://perma.cc/YJ5Y-ZDLP>] (providing a means of analyzing internet traffic information).

B. Methodology

To examine how frequent termination without explanation contracts are, we first examined, for each sample contract, whether it included a termination clause. To that end, we searched within each contract for terms associated with these clauses. We specifically searched for the following words: “terminate,” “disable,” “deactivate,” “block,” “suspend,” and “ban.” Clauses that included these words were then read to ascertain whether they are, in fact, termination clauses. Subsequently, for each contract that included a termination clause, we examined whether the clause included a requirement that the firm will explain to a terminated consumer the reason for said termination. If the answer was negative, we labeled the contract as a termination without explanation contract.

Next, we looked for additional aggravating factors that make termination without explanation practices even more worrisome. Moreover, to further measure the level of nontransparency of each termination without explanation contract, we developed an index. Our index considers three key variables, and a contract’s total score depended on the number of variables present in its termination clause. In line with our analysis thus far, the criteria included:

- 1) Whether the contract fails to specify, *ex ante*, the potential exhaustive causes which may underline consumer termination;¹⁷⁶
- 2) Whether the contract explicitly allows the firm to terminate the contract without providing the consumer *notice* about the mere act of termination;
- 3) Whether the contract fails to clarify if and how a terminated consumer can *contest* their termination if they believe the termination is erroneous.

Each of the variables 1–3 that appeared in a termination without explanation contract was awarded a score of “1.”¹⁷⁷ Conversely, if the variable was not present, it was awarded a “0.”

Based on this data, the next step was to define a three-level nontransparency index. The index was labeled “highly non-transparent” if the sum of the three dimensions was “3.” The index was labeled “moderately non-transparent” if the sum was “2” and “slightly non-transparent” if the sum was “1” or “0.”

We then examined the statistical relationship between a website’s traffic ranking and the degree of nontransparency of the website’s termination without explanation contract. First, we determined the website’s traffic rank via Alexa’s traffic ranking database.¹⁷⁸ A site’s ranking, according to Alexa, is based on two

176. By “exhaustive” we mean that if the term does not limit the causes for termination, but rather seems to accord the firm with unrestricted discretion, it was awarded 0. For instance, a term that reads “The firm may, in its sole discretion, terminate or suspend your access to all or part of the Services for any reason, including, without limitation, breach or assignment of these Terms of Service” is not exhaustive. The same logic applies to a term that stipulates that “The firm may terminate your account for any reason at any time”.

177. The implicit assumption here, of course, is that each of these variables largely carries the same equal import. One might develop other indexes, which do not attribute the same weight to each of the variables, once further attention is given to this matter.

178. See *Alexa Top Sites*, *supra* note 170.

measures: “reach” and “pageviews.”¹⁷⁹ Reach is defined as “the number of unique Alexa users who visit a site on a given day.”¹⁸⁰ Pageviews are defined as “the total number of Alexa user page requests for a site.”¹⁸¹ Accordingly, the site with the highest combination of users and pageviews is ranked first.¹⁸² The sites in our sample ranked anywhere from one (most popular) to 886 (least popular).¹⁸³

Thereafter, to test if there is a statistical association between a website’s popularity rank and its nontransparency index, we used the Wilcoxon-Mann-Whitney test (also known as the Mann-Whitney test).¹⁸⁴ We employed this test because, as required in our study, it is based on the order of data values, namely their ranking, rather than their actual value.¹⁸⁵ Prior to using the Wilcoxon-Mann-Whitney test, we used the Kruskal-Wallis (K-W) test to verify that there is an overall difference between the website popularity ranks among the three different nontransparency levels. The results of the K-W test were positive.¹⁸⁶

C. Results

The results of our study indicate that termination clauses are widespread in consumer contracts. Out of the 500 contracts in our initial dataset, the vast majority ($n=485$, 97%) include a termination clause that enables the firm to terminate the agreement. Disturbingly, the results also indicate that termination *without explanation* contracts are highly widespread. Of these 485 agreements, almost all of them (99.38%, $n=482$) are termination without explanation contracts, which fail to require firms to explain to consumers the reason for contract termination.

The results also indicate that most termination without explanation contracts are nontransparent regarding essential aspects of the termination. First, out of 482 termination without explanation contracts, 68.46% ($n=330$) fail to include an exhaustive list of causes that may underlie a contract cancellation, thus being nontransparent *ex ante* as to the reasons that may lead to termination. Second, most contracts (59.96%, $n=289$) include an explicit notice waiver,

179. *Id.* A website’s reach and page views are computed, according to Alexa, over a trailing three-month period. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. The average rank of a website in our sample was 404.3 (SD258.2). See Table 3.

184. See, e.g., Anna Hart, *Mann-Whitney Test Is Not Just a Test of Medians: Differences in Spread Can Be Important*, 323 *BJM* 391, 391 (2001). Notably, prior to using the Wilcoxon-Mann-Whitney test, we used the Kruskal-Wallis (K-W) test in order to assure that there is an overall difference between the website popularity ranks among the three different transparency levels. The results of the K-W test were positive ($P=0.0003$). For the K-W test, see, for example, Yvonne Chan & Roy P Walmsley, *Learning and Understanding the Kruskal-Wallis One-Way Analysis-of-Variance-by-Ranks Test for Differences Among Three or More Independent Groups*, 77 *PHYSICAL THERAPY* 1755, 1755 (1997).

185. Francis Sahngun Nahm, *Nonparametric Statistical Tests for the Continuous Data: The Basic Concept and the Practical Use*, 69 *KOREAN J. ANESTHESIOLOGY* 8, 12 (2016) (stating the Mann-Whitney test “ranks the original data values. That is, it collects all data instances from the samples and ranks them in increasing order”).

186. $P=0.0003$. For the K-W test see, for example, Chan & Walmsley, *supra* note 184, at 1755.

allowing suppliers to terminate the agreement without notifying consumers about the mere act of termination. Third, almost all termination without explanation contracts (98.13%, $n=473$) fail to clarify if and how consumers can challenge their termination if they believe it was erroneous.

Table 1 below summarizes these findings. The table details the distribution, among the 482 termination without explanation contracts found in our sample, of the contractual nontransparency variables. A value of “1” in the table means that the relevant nontransparency variable appears in the termination clause. Conversely, a value of “0” indicates that the variable did not appear in the clause.

TABLE 1. DISTRIBUTION OF NONTRANSPARENCY VARIABLES (N=482)

Variable	Value	n	%
No Exhaustive Termination Causes	0	152	31.54
	1	330	68.46
Explicit Notice Waiver	0	193	40.04
	1	289	59.96
No Clarification on the Appeal Right and Process	0	9	1.87
	1	473	98.13

Alarming, only seven contracts (1.45%) of the 482 sampled contracts had a low nontransparency index value of zero. Of these 482 contracts, ninety-one contracts (18.87%) had a value of one, 151 contracts (31.32%) had a value of two, and almost half of the contracts, 233 of them (48.5%), had the highest nontransparently value of three. Table 2 depicts these results.

TABLE 2. DISTRIBUTION OF THE LEVELS OF NONTRANSPARENCY (N=482)

Level of Non-Transparency Index	Sum of 3 Variables	n	%
Low	0	7	1.45%
	1	91	18.87%
Moderate	2	151	31.32%
High	3	233	48.34%

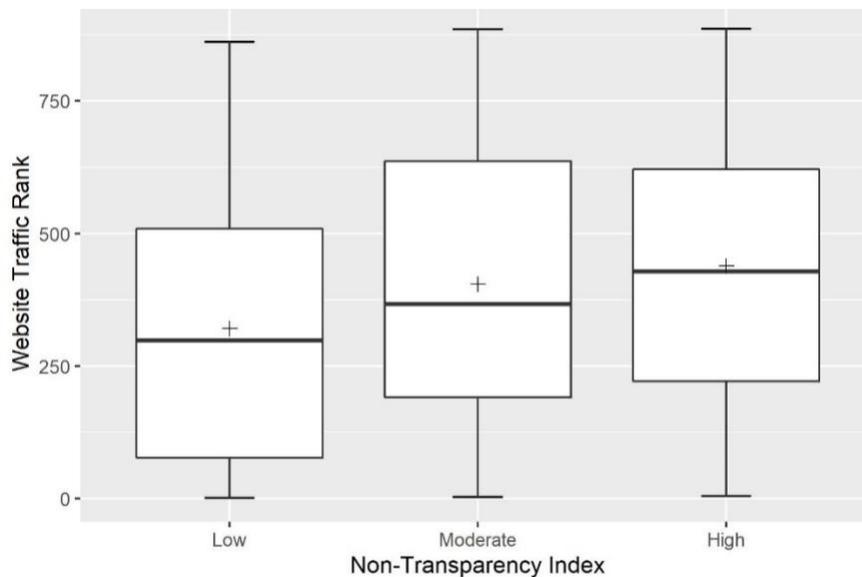
The results also support our hypothesis of an association between a website's traffic and its nontransparency level. Thus, more popular sites with a higher popularity ranking tend to have more transparent (or, more accurately, less nontransparent) termination procedures. Notably, while the mean website ranking within the low nontransparency level was 321, the mean website ranking within the high nontransparency level was 439.1. Also, the mean website ranking within the low nontransparency level was higher than the mean website ranking within the moderate nontransparency level, at 404.6. Similar results were observed regarding the median website ranking within the three transparency levels. Table 3 summarizes these results.

TABLE 3. MEAN AND MEDIAN WEBSITE TRAFFIC RANKS WITHIN LEVELS OF THE NONTRANSPARENCY INDEX (N=482)

Level of Non-Transparency Index	Website Traffic Rank	
	Mean	Median
High	439.1	428
Moderate	404.6	367
Low	321.0	298
All	404.3	387.5

Similarly, casual observation shows that sites with a low nontransparency level had significantly higher traffic rankings than those within the moderate and high transparency levels. To illustrate, Figure 1 below shows a graphical box plot representation of website traffic ranks within levels of the transparency index.

FIGURE 1. BOX PLOT OF WEBSITE TRAFFIC RANKS WITHIN LEVELS OF THE NONTRANSPARENCY INDEX¹⁸⁷



We employed the Wilcoxon-Mann-Whitney statistical test to verify the relationship between a website's traffic and its nontransparency level.¹⁸⁸ Similar to our earlier observations, the sites within the low level of nontransparency had significantly higher traffic rankings than those within the moderate and high

187. The horizontal lines of each box show the 25th, 50th (median) and 75th percentiles; each "+" shows the mean; the whiskers extend to the minimum and maximum data values. See *infra* Section III.C.

188. See *supra* note 184 and accompanying text.

nontransparency levels.¹⁸⁹ Although there was a difference between the website traffic rankings within the moderate and high levels of nontransparency, it was not statistically significant.¹⁹⁰

IV. NORMATIVE DISCUSSION AND POLICY RECOMMENDATIONS

Our key empirical findings are that firms frequently include termination without explanation clauses in their contracts, and that these clauses are often nontransparent. Alas, these contracts may contribute to erroneous terminations, which are socially undesirable and can be rather harmful to consumers. Section A of this Part explains why one should not assume that consumers happily accept such mechanisms as the cost of doing business. Section B urges regulators and courts to attend to consumer termination from a holistic perspective and consider imposing on firms a duty to explain. Section C then discusses possible objections and concerns regarding our proposal.

A. *Consumer Contracting Realities*

Firms often erroneously terminate their contracts with consumers,¹⁹¹ and termination without explanation contracts may contribute to erroneous terminations.¹⁹² As we have seen, such erroneous terminations can harm consumers and be socially wasteful.¹⁹³ We have also illustrated that termination without explanation contracts are often accompanied by additional aggravating factors: they are likely to be nontransparent and oppressive.¹⁹⁴

One might argue, however, that termination without explanation contracts are a likely result of a fair contracting process. As the argument goes, firms should be protected from external intervention under the fundamental principle of freedom of contract.¹⁹⁵ Accordingly, firms need broad discretion and extensive power to quickly terminate consumers. This ability, it might be argued, is necessary to ensure, for instance, the removal of harmful or dangerous content in a timely and determined fashion.¹⁹⁶ At the same time, consumers get products and services at lower prices in exchange for their consent to termination (and other possibly biased or exploitative) terms.¹⁹⁷ Thus, according to this argument, consumers concerned about excessive termination power can reject the contract at stake. They may also look for alternative providers who offer more balanced termination arrangements.

This theoretical argument, in our view, is misguided. It misperceives, if not ignores, important consumer contracting realities. Consumers do not read form

189. $P=0.008$ and $P<0.0001$, respectively.

190. $P=0.16$.

191. See *supra* notes 26–27, 55, 88 (listing conspicuous examples surveyed).

192. See *supra* Section II.B.2.

193. See *supra* Section II.B.3.

194. See *infra* Section III.C.

195. See Balkin, *supra* note 72, at 2075.

196. See, e.g., Goldman, *supra* note 17, at 659–60.

197. See Bakos et al., *supra* note 16, at 22.

contracts,¹⁹⁸ and for good reasons.¹⁹⁹ Form contracts are long.²⁰⁰ They are written in an inaccessible manner and employ legal jargon and terminology impenetrable for the average consumer.²⁰¹ Such contracts are offered on a take-it-or-leave-it basis, meaning they cannot be negotiated and changed.²⁰² Form contracts typically address future contingencies and risks, which consumers naturally downplay due to myopia and unrealistic optimism.²⁰³ Consumer contracts also grant firms broad discretion to change the contractual terms *ex post*, after the consumer already accepted the contract.²⁰⁴ This further diminishes the benefit that consumers can derive from reading their contracts.

Since consumers do not read, understand, or adequately evaluate contract terms, firms have a profit incentive to degrade their quality.²⁰⁵ It is, therefore, of little surprise that many firms tend to offer low-quality termination terms. If anything, the proof is in the pudding. As our study suggests, many consumer contracts do not require firms to detail the reasons that led to termination.²⁰⁶ In addition, the majority of these contracts do not include a comprehensive list of

198. See, e.g., *id.* (finding that consumers rarely read EULAs); see also *Restatement of the Law: Consumer Contracts* 63 (Am. L. Inst., Tentative Draft, 2019), https://www.ali.org/media/filer_public/05/30/053007a1-2b37-4142-b9c3-7a881e847d50/consumer_contracts_-_td_-_online.pdf?utm_campaign=The%20Interface&utm_medium=email&utm_source=Revue%20newsletter [<https://perma.cc/GE5S-LX49>] (“[S]tandard contract terms are invisible to most consumers.”).

199. See, e.g., Hillman & Rachlinski, *supra* note 16, at 435–54 (detailing economic, behavioral and social reasons that lead consumers not to read form contracts); Yonathan Arbel & Shmuel I. Becher, *Contracts in the Age of Artificial Readers*, 90 GEO. WASH. L. REV. 83, 99–100 (explaining that consumers do not read form contract for linguistic, rational, psychological, social and expectational reasons).

200. See, e.g., Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J. L. & POL’Y FOR THE INFO. SOC’Y 543, 563 (2008) (“[I]f all American Internet users were to annually read the online privacy policies word-for-word each time they visited a new site, the nation would spend about 54 billion hours reading privacy policies.”). In another study, the Norwegian Consumer Council found that “the average consumer could easily find themselves having to read more than 250,000 words of app terms and conditions.” See Rick Noack, *How Long Would It Take to Read the Terms of Your Smartphone Apps?*, WASH. POST (May 28, 2016), <https://www.washingtonpost.com/news/worldviews/wp/2016/05/28/how-long-would-it-take-to-read-the-terms-of-your-smartphone-apps-these-norwegians-tried-it-out/> [<https://perma.cc/5CD6-FGXT>].

201. See, e.g., Benoliel & Becher, *supra* note 16, at 2277–78 (documenting the linguistic complexity of online consumer contracts and finding them to be written at the level of academic articles).

202. This aspect has been repeatedly discussed in the literature. See, e.g., Rakoff, *supra* note 16, at 1176, 1242, 1250–55, 1258 (arguing that non-negotiated, nonsalient standardized terms should be considered presumptively unenforceable); RADIN, *supra* note 16, at 94 (“[I]n boilerplate schemes that replace the entitlements of the state with the entitlements desired by firms we have exit (we can refuse to buy the product or service) but we have no voice.”).

203. See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1400–08 (2004) (explaining how these cognitive biases can be exploited in the credit market).

204. See, e.g., Becher & Benoliel, *supra* note 166, at 660 (finding that the vast majority of consumer contract include nontransparent and one-sided unilateral change-of-terms clauses).

205. See generally Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003) (providing a detailed and sophisticated analysis as to why firms will “race to the bottom” with respect to the quality of nonsalient contract terms).

206. See *supra* Section III.C (finding that 482 out of the 500 contracts (96.4%) in the examined sample are termination without explanation contracts).

reasons for termination, do not require the firm to give consumers notice, and do not grant the consumer a voice in the termination process.²⁰⁷

Consumers are also unlikely to challenge these terms *ex post*, even if harmed. To begin with, consumers are generally unaware of their rights.²⁰⁸ They are also reluctant to stand up for their rights, even once they become aware of them.²⁰⁹ Consumers may be deterred by unequal bargaining power,²¹⁰ and prefer to avoid unpleasant and expensive conflicts.²¹¹ Furthermore, arbitration clauses and class action waivers undermine consumers' incentive to challenge imbalanced terms.²¹² Termination without explanation aggravates these concerns, since consumers may find it difficult to effectively contest the termination on factual or legal grounds while not knowing them. As we have seen, most consumer contracts do not require an explanation.

Additionally, consumers, as laypeople, are contract formalists.²¹³ Consumers regard the written contracts as enforceable and valid, even if they include exploitative, onerous, and even unconscionable, illegal, or unenforceable terms.²¹⁴ Therefore, consumers are likely to believe that courts will enforce the contract as written if the contract grants firms excessive power. The current regulatory landscape, which grants firms wide power to terminate their contracts

207. See *supra* Section III.C. (finding that out of the 482 contracts examined, 473 did not allow consumers a voice, 330 failed to detail the reasons that can lead to termination, and 289 allowed firms not to notify the consumer about a termination).

208. See, e.g., Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280 (2012) (“[R]elatively few consumers are aware of available remedies, and even fewer seek assistance.”).

209. See, e.g., William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC’Y REV. 631, 632 (1980) (discussing how consumers may fail to respond to injustice and injuries).

210. *Id.*

211. For detailing the costs of consumer law attorneys, see RONALD L. BURDGE, ESQ., UNITED STATES CONSUMER LAW ATTORNEY FEE SURVEY REPORT 2017-2018 26 (2018) (“[T]he average hourly rate for the typical Consumer Law attorney in the United States is \$345”). For a general discussion of the high costs of litigation, see, for example, David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer, Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 74 (1983) (commenting that litigation costs may become a barrier to some litigants).

212. For a detailed discussion, see, for example, Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 580 (2020) (detailing the far-reaching consequences that arbitration clauses have on consumers not only as individuals but also as a class); David Berman, *A Critique of Consumer Advocacy Against the Restatement of the Law of Consumer Contracts*, 54 COLUM. J.L. & SOC. PROBS. 49, 77–79 (2020) (surveying literature that discusses the prevalent use of arbitration clauses and class action waivers and their chilling effect on consumers).

213. See generally Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015) (explaining how laypeople attribute excessive import to formal aspects of contract law, failing to realize the more nuance reality surrounding substantive issues).

214. See, e.g., Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 122 (2017) (explaining how the usage of standard terms leads laypeople to view policies and rules as more legitimate and enforceable); Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745, 1758–60 (2014) (explaining the force of fine print in consumers’ moral calculus); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1035 (2019) (documenting the chilling effect of unenforceable terms on lessees).

with consumers, can further reinforce consumers' reluctance to act against termination without explanation contracts.²¹⁵

The overall picture should be clear: consumers are unaware of these terms at the time of contracting. The law should not expect consumers to educate themselves about this risk by reading the fine print. Consumers cannot negotiate such terms or easily find alternative providers who offer better terms. They are also likely to find it intricate and costly to challenge such terms *ex post* once terminated (without explanation).²¹⁶

Given these realities, firms can easily exploit consumers' ignorance and misperception. By incorporating termination without explanation clauses, firms reduce the costs of doing business. They reduce operating costs (providing explanations) and minimize the risks resulting from exposure, scrutiny, and complaints. This reality, in turn, calls for further legal scrutiny, to which we now turn.

B. *Introducing a Duty to Explain*

Under current contract law principles, a terminating party typically has no duty to explain the reason for terminating the agreement.²¹⁷ Indeed, courts often reject consumers' claims that firms terminated their contracts without providing adequate explanation or reason.²¹⁸ Unfortunately, however, the alarming results of our study illustrate that nontransparent termination without explanation contracts are prevalent.²¹⁹

Given the social costs of termination mechanisms, we submit that policymakers should consider imposing a general explanation duty on firms. Under this proposed duty, firms that terminate a consumer contract must explain to their terminated consumers the specific reason(s) that lead to termination. The explanation surrounding the termination decision should be meaningful and include, at a minimum, two major elements. First, the firms must explain the facts that underlie the termination. For example, if the termination is based on a breach of contract by the consumer, the business must clearly explain the actions

215. See cases cited *supra* note 46 (detailing judicial decisions); 47 U.S.C. § 230(c)(2)(A) (granting online providers with wide power to terminate contracts).

216. Kendall W. Artz & Patricia M. Norman, *Buyer-Supplier Contracting: Contract Choice and Ex Post Negotiation Costs*, 14 J. MANAGERIAL ISSUES 399, 404 (2002).

217. See, e.g., *Israel v. Nat'l Canada Corp.*, 658 N.E.2d 1184, 1191–92 (Ill. App. Ct. 1995) (“Ordinarily the party terminating the contract need not explain his reason at the time of termination, providing that some legally adequate reason exists.”); *First Commodity Traders, Inc. v. Heinold Commodities, Inc.*, 766 F.2d 1007, 1013 (7th Cir. 1985) (reasoning similarly); see also *White v. Roche Biomedical Labs., Inc.*, 807 F. Supp. 1212, 1215 (D.S.C. 1992), *aff'd*, 998 F.2d 1011 (4th Cir. 1993) (“When an employer has the right to terminate at will[,] . . . the employer is not required to explain its decision to the employee.”); *Envall v. Indep. Sch. Dist. No. 704*, 399 N.W.2d 593, 596 (Minn. Ct. App. 1987).

218. See, e.g., *Ruales v. Spencer Sav. Bank*, Civ. No. 18-9192, 2019 WL 140794, at *3 (D.N.J. Jan. 9, 2019) (“Mr. Ruales does not point to any law or industry standard that requires the Bank to provide reasons for the closure of an account.”); *Doe v. Bank of Am. Corp.*, 273 F. Supp. 3d 203, 211 (D.D.C. 2017); see also *Goldman*, *supra* note 17, at 668 (“Courts typically honor termination-for-convenience clauses on their face” and refer to such clauses as being “so legally powerful.”).

219. See discussion *supra* Part III.

that constituted the alleged breach. Alternatively, the firm should explicitly explain the illegal behavior if the termination is based on such behavior. The same is true if commercial purposes, such as lack of user activity, triggers the termination. Second, firms must also clearly explain to their terminated consumers the exact legal basis for the termination. For example, in a breach of contract termination, the business must explain which specific contract term the consumer breached. Likewise, if a violation of the law prompted the termination, the business must explain, in clear and accessible language, what exact law provision was allegedly violated.²²⁰

All in all, an explanation duty has a few notable advantages. First, *ex post*, an explanation duty reduces the risk that courts will accept, *ex post*, pretextual justifications.²²¹ This is especially important given the general immunity for online providers noted above, which courts seem to construe generously.²²² Furthermore, it spares the plaintiff from the burdensome obligation to provide evidence to convince a court that the firm behaved in bad faith.²²³ Plaintiffs are not privy to the firm's decisions and are not exposed to internal policies. They are thus not well-positioned to provide such evidence.

At the macro level, such a duty signals to firms that they should not abuse their power. A duty to explain reduces the risks that firms will terminate users for arbitrary, capricious, or even malicious reasons.²²⁴ In addition, the duty will increase the likelihood that termination reasons are transparent and that consumers, watchdogs, and the media can scrutinize them. The proposed duty can therefore contribute to a healthier public discourse around the legitimate reasons for terminating consumers.

From another perspective, firms often lure consumers into believing that they establish a social, meaningful relationship with the service provider or other users by entering a contract.²²⁵ Requiring good faith explanations indicates to firms that the law takes these promises seriously. It portends that luring consumers with soft promises *ex ante* is not aligned with an *ex post* stringent and

220. While we focus here on the context of the duty to explain, policymakers should increase its effectiveness by giving sufficient attention to the way the information is presented and the notice to consumers is designed. This is also known as 'smart disclosures,' a tool academics, agencies, and governments have been utilizing for some time. *See, e.g.,* Cass Sunstein, *Informing Consumers Through Smart Disclosure*, WHITE HOUSE (Mar. 30, 2012, 8:19 AM), <https://obamawhitehouse.archives.gov/blog/2012/03/30/informing-consumers-through-smart-disclosure> [<https://perma.cc/97WX-H5DV>].

221. *Inferring Pretext in Employment Discrimination Cases: A Baker's Dozen*, CONFORTO L. GRP. (Feb. 1, 2016), <https://www.bostonemploymentattorneyblog.com/inferring-pretext-in-employment-discrimination-cases-a-bakers-dozen/> [<https://perma.cc/6GEL-LQ8P>].

222. *See, e.g.,* *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1178 (9th Cir. 2009) (Fisher, J., concurring) (referring to "the generous coverage of § 230(c)(2)(B)'s immunity language").

223. *See, e.g.,* Goldman, *supra* note 17, at 666 ("[Currently,] if plaintiffs have the obligation to show subjective bad faith, they are unlikely to do so. They would need to find convincing evidence of bad faith, an unlikely situation in most cases.>").

224. A point that may currently be viewed as unsettled. *See id.* at 667 (noting that a subjective approach to the requirement to behave in good faith when terminating a consumer "still leaves open the question of whether an online provider could terminate a user for provably capricious or even malicious reasons and still claim § 230(c)(2) immunity").

225. Becher & Dadush, *supra* note 36.

tyrant behavior. As humans, we need human-like communications to assure us in our everyday lives and facilitate trust.²²⁶ The act of explaining is an essential component in maintaining a humane, civilized, and respectful society.²²⁷ People appreciate reasons and explanations.²²⁸ Providing a reason for such a significant decision as that of agreement termination better respects one's autonomy. It also provides consumers with feedback on their behavior, allowing them to learn from experience and avoid similar mistakes in the future.

More generally, the explanation duty may decrease social waste in the form of erroneous terminations. During an explanation process, firms may discover that they cannot find appropriate factual and legal justifications for terminating innocent consumers and avoid wrongful terminations.²²⁹ A meaningful explanation also helps terminated consumers to understand the factual and legal basis that underlies the cancelation.²³⁰ In turn, consumers can more effectively contest a wrongful termination decision and provide firms with the opportunity to reinstate the contract.²³¹

Additionally, the need to provide an explanation might mitigate another cause for erroneous terminations, namely the tendency to over-rely on automation processes. For instance, by keeping the human decision-makers within the firm engaged in providing the explanation, the risk that humans fully recede to machines declines.²³² Along these lines, assuming a human decision-maker will be involved in providing the explanation (even if the final termination text is automated), the decision-makers will be more likely to view themselves as accountable.²³³ This, in turn, will further reduce erroneous termination decisions.

226. See, e.g., Rikke Friis Dam, *Social Evolution and Why We Need to Communicate*, INTERACTION DESIGN FOUND. (2017), <https://www.interaction-design.org/literature/article/social-evolution-and-why-we-need-to-communicate> [https://perma.cc/2SXY-Z43C] (citing the psychologist Rollo May saying that “[c]ommunication leads to community, that is to understanding and mutual valuing,” and explaining that “[h]uman beings evolved as social animals, and with that evolution of social behaviour came the need to communicate”).

227. See *id.*

228. For discussing the power of explanation, even when such explanation is “empty” and has no true value see Ellen Langer, Arthur Blank & Benzion Chanowitz, *The Mindlessness of Ostensibly Thoughtful Action: The Role of “Placebic” Information in Interpersonal Interaction*, 36 J. PERSONALITY & SOC. PSYCH. 635, 635 (1978). For discussing the importance of human-like interactions in human-machine interaction and ways to advance it see Michelle ME Van Pinxteren, Mark Pluymaekers & Jos G.A.M. Lemmink, *Human-Like Communication in Conversational Agents: A Literature Review and Research Agenda*, 31 J. SERV. MGMT. 203, 203 (2020) (seeking “to identify which human-like communicative behaviors used by conversational agents have positive effects on relational outcomes and which additional behaviors could be investigated in future research”).

229. Cf. Cohen, *supra* note 98, at 511–12; Oldfather, *supra* note 98, at 1284–85.

230. See, e.g., Wachter et al., *supra* note 112, at 863.

231. See, e.g., *Matlovich v. Sec’y of the Air Force*, 591 F.2d 852, 857 (D.C. Cir. 1978) (explaining that a reasoned explanation informs “the aggrieved person of the grounds of the administrative action so that he can plan his course of action (including the seeking of judicial review)”); Wachter et al., *supra* note 112, at 872; Cohen, *supra* note 98, at 511.

232. This lesson has long been implemented in the context of airplane pilots, where navigation systems are programmed in a way that ensures constant human engagement. For an interesting discussion, see In Machine We Trust, *AI in the Driver’s Seat*, PODTAIL (Sept. 9, 2020), <https://podtail.com/en/podcast/in-machines-we-trust/ai-in-the-driver-s-seat/> [https://perma.cc/5CUE-8LHA].

233. See *id.*

Of course, the duty to explain should be carefully crafted and balanced with a firm's possible need to act quickly and adamantly. Thus, when there is an urgent reason to terminate a consumer due to security, safety, or other pressing reasons, firms should be able to do so. In such cases, the explanations can follow the termination rather than precede it.

Admittedly, explaining to consumers the reasons for their termination may not be free. Such a duty will impose costs on firms.²³⁴ At least presumably, however, firms already have this information and are assumed to consider the relevant evidence in making the termination decision. Firms also have cheap and effective communication channels, such as e-mails and user accounts, to utilize for this purpose. Therefore, we submit that termination without explanation can, at times, amount to termination in bad faith,²³⁵ constitute unfair surprise,²³⁶ and may go against consumers' reasonable expectations.²³⁷

Interestingly, some cases may support the contention that termination without explanation can amount to termination in bad faith. While courts generally approve firms' discretion to terminate consumers, cases like *Smith v. Trusted Universal Standards in Electronic Transactions* seem to support a more nuanced approach.²³⁸ In *Smith*, the Court found that failing to detail a reason for blocking an online user may be considered bad faith.²³⁹ Importantly, this is despite the general immunity that online providers have when blocking or terminating users.²⁴⁰ The judge noted:

[A] reasonable jury could conclude that Comcast acted in bad faith when it failed to respond to Plaintiff's repeated requests for an explanation why it continually blocked Plaintiff's outgoing e-mail . . . the Court is not convinced that an internet service provider acts in good faith when it simply

234. Cf. NEWLAND ET AL., *supra* note 9, at 2 ("While the costs associated with creating channels for customer support, responses to user inquiries, appeals processes, and similar mechanisms should not be underestimated, positive outcomes often rely on proactive and transparent communications with users from the outset and at each stage of interaction between the company and a user.")

235. See U.C.C. § 1-201(20) (AM. LAW INST. & NAT'L CONF. OF COMM'RS ON UNIF. ST. L. 2017) (defining "Good faith" as "honesty in fact and the observance of reasonable commercial standards of fair dealing"); see also *id.* §§ 2-305(2), 2-306(1), 2-311(1), 2-615(a) (detailing the obligation to perform a contract in good faith).

236. According to the doctrine of unfair surprise, courts will not enforce contract terms that violate the reasonable expectations of a contracting party. See, e.g., *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 120-24 (Ct. App. 1982).

237. According to the "reasonable expectation" test, "[i]n dealing with standardized 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) (quoting Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943)). This doctrine is primarily used in the context of insurance contracts. For an argument that the "reasonable expectation" test is underutilized and that its application should not be limited to insurance contracts, see Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 231 (2007).

238. See generally *Smith v. Trusted Universal Standards in Elec. Transactions*, No. 09-4567, 2011 WL 900096 (D.N.J. Mar. 15, 2011).

239. See *id.* at *9; see also *Smith v. Trusted Universal Standards in Elec. Transactions, Inc.*, No. 09-4567, 2010 WL 1799456, at *7 (D.N.J. May 4, 2010) (holding Comcast not entitled to Good Samaritan immunity because the complaint alleged sufficient facts for potential bad faith).

240. See 47 U.S.C. § 230(c)(2)(A).

ignores a subscriber's request for information concerning an allegedly improper e-mail blockage . . . , there is no reason why Comcast could not articulate its immunity (or provide another rationale for the blockage) when asked to do so by a paying customer.²⁴¹

A few other cases also seem to support the approach that termination without explanation can be contrary to good faith and fair dealing. For example, in *Young v. Facebook, Inc.*, the Court noted that "it is at least conceivable that arbitrary or bad faith termination of user accounts, or even termination of user accounts with no explanation at all, could implicate the implied covenant of good faith and fair dealing."²⁴²

We encourage more courts to take this path. In this context, the index this Article develops can help courts determine whether a termination has been executed in bad faith or amounts to unfair surprise.²⁴³ Recall that our index considers whether the firm (1) has detailed in its contract the possible reasons for termination, (2) gave notice to the terminated consumers, and (3) allowed the consumer to voice their perspective and contest the termination.²⁴⁴ Indeed, firms should be encouraged to clearly communicate with the consumer the reasons that may lead to termination; provide consumers with a notice regarding termination decisions; facilitate voice and due process; consider human and civil rights when making decisions.²⁴⁵

We do not assume that policymakers would be enthusiastic and quick to regulate these practices directly. By considering all these aspects, however, courts can reach a more informed decision that better accounts for the multilayered aspects of termination decisions. Such an approach will also signal to firms the importance they should attribute to termination mechanisms.

Clearly, Congress and state legislatures can also step in and develop a duty to explain.²⁴⁶ Remarkably, legislatures have already adopted an explanation regime similar to the general explanation duty in the context of consumer credit.²⁴⁷ The federal Equal Credit Opportunity Act, as implemented by Regulation B, requires a creditor that takes adverse action against a consumer, including the termination of the consumer's extension of credit, to notify consumers of the action taken.²⁴⁸ According to this regulation, the notification

241. *Smith*, 2011 WL 900096, at *9.

242. *Young v. Facebook, Inc.*, No. 5:10-cv-03579, 2010 WL 4269304, at *4 (N.D. Cal. Oct. 25, 2010) (emphasis added). *But see*, *Doe v. Bank of Am. Corp.*, 273 F. Supp. 3d 203, 213 (D.D.C. 2017) (holding a terminated consumer's claim for "breach of implied covenant of good faith would . . . fail under any applicable state law").

243. *See supra* Section III.B (developing the proposed index).

244. *See supra* Section III.B.

245. *Cf. NEWLAND ET AL.*, *supra* note 9, at 2–4 (detailing these steps as a "Recommendation for Companies" in the context of user termination in user-generated-content platforms).

246. *See, e.g.*, Equal Credit Opportunity Act (Regulation B), 12 C.F.R. §§ 1002.9(a)(2), 1002.9(b)(2) (2021) (a creditor that take an adverse action against a consumer shall send the consumer a statement of reasons for the action taken or a disclosure of the consumer's right to such statement).

247. *See, e.g., id.*; *see also* 15 U.S.C. § 1666(d) (2018) ("[A] creditor operating an open end consumer credit plan may not . . . restrict or close an account [due to a consumer's] failure to pay" a disputed amount until the creditor has sent a written explanation). Relatedly, *see Am. Exp. Co. v. Koerner*, 452 U.S. 233, 237 (1981).

248. 12 C.F.R. §§ 1002.2(a), 1002.2(c)(ii), 1002.9(a)(1).

shall be in writing. It should contain, among other things, a statement of reasons for the action taken or disclosure of the consumer's right to such a statement.²⁴⁹ The statement of reasons must be specific and indicate the principal reasons for the adverse action.²⁵⁰ The specific reasons disclosed must relate to, and accurately describe, the factors actually considered by the creditor.²⁵¹ We recommend expanding this idea and adopting a broader explanation duty in consumer contracts.

C. Criticism and Concerns

Against our proposal, one might argue that firms already have sufficient incentives to exercise their discretion wisely and avoid terminating consumers hastily and unjustly. One such argument is that firms have a profit incentive to have as many consumers as possible.²⁵² Users create economic value in the form of revenue, data, popularity, and attention.²⁵³ If the platform is economically incentivized not to terminate user accounts, the argument goes, what could possibly go wrong.

We respectfully reject this logic. While market forces may help in disciplining sellers, these forces are not enough to render legal scrutiny superfluous. Naturally, firms have financial incentives not to terminate *some* of their users. Firms also have a financial incentive to minimize their costs around termination, however, which may encourage hurried and unfounded decisions. At the same time, firms may have an incentive to increase the costs imposed on consumers so as to prevent them from acting.²⁵⁴ Relatedly, firms may be interested in yielding to machines rather than paying full attention to individual consumers. As noted, viewing termination decisions as technical ones allows decision-makers to detach themselves from the decision and ignore qualitative aspects relating to the decision and the affected individuals.²⁵⁵

Furthermore, firms may not have a financial incentive to disclose their motivation to terminate when done on questionable bases such as gender, race, ethnicity, appearance, or sophistication.²⁵⁶ Firms may have an economic incentive to terminate users that they regard as "unattractive" or less beneficial, even if such terminations create social externalities that they do not fully

249. *Id.* § 1002.9(a)(2).

250. *Id.* § 1002.9(b)(2).

251. *Id.*

252. *See, e.g.,* Goldman, *supra* note 17, at 672 (submitting that online providers may "terminate customers reluctantly because users generate economic value for the provider.").

253. *See id.*

254. For a general illuminating discussion on firms' motivation to exploit consumers by amplifying their transaction costs, see Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & MARY L. REV. 1635, 1637 (2006).

255. *Cf.* Kleindorfer, *supra* note 118, at 74 (noting that as a consequence of the need to legitimize decisions, "technical decision analytic models of experts [in the context of hazardous facilities] were eschewed in favor of more qualitative and participative models").

256. *See, e.g.,* Frevele, *supra* note 11.

internalize.²⁵⁷ Thus, without further scrutiny, firms will not fully consider the harm to consumers. Firms are sometimes further likely to overlook important societal values.²⁵⁸

Another criticism of our proposal is that firms care about their reputation and need to nourish their relationship with consumers. Thus, the argument goes, unjust consumer termination can harm the firm's reputation and prompt consumers to join competitors that better treat their customers.²⁵⁹ In the age of robust online information flows, this provides a good check on firms' power and actual behavior.²⁶⁰ Thus, in other words, while the "contract deal" (*i.e.*, the contractual terms) may provide firms with broad discretion and power to terminate consumers without explanation, and while this power may lead to incorrect termination of consumers, the "real deal" consists of careful and balanced execution of this power by firms, so to minimize mistaken terminations. Slightly restated, while the form contract permits nontransparent termination without explanation, this is not to say that firms actually misuse their discretion and erroneously terminate many consumers.

Theoretically appealing as that may be, the assumption that reputational mechanisms will effectively regulate termination decisions is questionable. For starters, firms may not suffer significant deprecations from terminating consumers if the number of terminated consumers who complain does not reach a critical mass or threshold. After all, most consumers are not terminated, and termination is merely one component of a firm's overall reputation, which in itself can be biased and noisy.²⁶¹ Thus, complaints against unfair termination without explanation may be lost in the vast information that contains many other online reviews, user feedback, and other forms of B2C communications.²⁶²

Moreover, to reduce reputational threats, firms can use big data and sophisticated algorithms to discriminate among their consumers. Firms will then facilitate vocal and assertive consumers who may significantly threaten the firm's reputation, revealing leniency toward them and thus neutralizing their

257. See M. Todd Henderson, *The Nanny Corporation and the Market for Paternalism* 33 (Univ. of Chi., Working Paper No. 456, 2009).

258. See NEWLAND ET AL., *supra* note 9, at 2.

259. See, e.g., Goldman, *supra* note 17, at 672 ("Capricious termination of user accounts undermines the remaining users' trust. This can sour the provider's relationship with the remaining users, prompting them to seek out replacement venues . . .").

260. For a general discussion, 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) (explaining the potential power of online information flows to discipline firms from abusing their power and exploiting consumers).

261. See Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1253 (2019) ("[R]eputational information may be costly to obtain, noisy, distorted by the incentives of intermediaries, or ineffectual . . ." (citations omitted)); Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1200–11 (2016) (explaining how reputational sanctions work and why they are inherently noisy).

262. See, e.g., Shapira, *supra* note 261, at 1200.

complaints.²⁶³ But weaker or less assertive consumers who are not likely to jeopardize the firm's reputation will not receive the same lenient treatment.²⁶⁴ Thus, ironically, by facilitating assertive and influential consumers *ex post*, firms may buttress their reputation rather than undermine it.²⁶⁵

Furthermore, it seems unreasonable and unfair to expect consumer advocates to provide clear evidence of the precise scope of erroneous terminations. Under the current prevalent commercial custom of nontransparent termination without explanation, it is difficult to decipher the exact magnitude of the phenomenon. In fact, it is precisely this nontransparent practice that makes it hard to argue against it. If anything, firms—that hold the relevant information—should face the burden to prove that they do not frequently terminate consumers erroneously. Only once such proprietary information becomes public and accessible can policymakers and scholars be expected to engage in systematic cost-benefit analysis.

Relatedly, if firms do not intend to (ab)use termination clauses, there is no reason to allow them to draft contracts that allow them to do so. All in all, we believe that deterring firms from exploiting consumers and unfairly terminating them requires a coordinated effort. An *ex ante* duty to explain can thus supplement the *ex post* disciplining power of consumers complaints and judicial scrutiny.

Perhaps a more traditional concern regarding our proposal is that firms employ nontransparent and oppressive termination mechanisms to reduce their operational costs.²⁶⁶ Thus, one may plausibly argue that imposing a duty to explain will increase the cost of doing business, including the costs of dealing with aggravated consumers. Moreover, in response to the requirement to be more transparent and fairer, firms may pass at least some of these costs onto consumers. Consumers will then need to pay more for the same products and services. Introducing a duty to explain, the argument goes, is a paternalistic measure that will force consumers to accept (presumably better) contracts at higher prices.²⁶⁷ Alternatively, firms may offset these costs by degrading other aspects of the product/service or their contracts.²⁶⁸ Worse yet, such an

263. See, e.g., Schmitz, *supra* note 208, at 281 (“[O]ut of the consumers who take any action, only a very small handful have the requisite confidence and resources to . . . capture businesses’ attention and obtain remedies.”).

264. See, e.g., Bruckner, *supra* note 38, at 33.

265. See, e.g., Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 956–57 (2020) (explaining the potential role of assertive and persistent consumers in disciplining firms); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69, 85 (2019) (illustrating how such a strategy may benefit firms and explaining that “[w]hen aggrieved consumers approach vendors for relief, the vendor will first direct them to the contractual provision. Then, the vendor will offer a consumer-friendly policy and forgo the formal, contractual rights. This might allow vendors to manipulate consumers into thinking that they have received accommodating, perhaps even personal, treatment”).

266. See discussion *supra* Section IV.A.

267. James M. Ebejer & Michael J. Morden, *Paternalism in the Marketplace: Should a Salesman Be His Buyer’s Keeper?*, 7 J. BUS. ETHICS 337, 338 (1988).

268. See discussion *supra* Section IV.A.

intervention may reduce firms' ability to respond to immediate needs and terminate consumers swiftly and efficiently.²⁶⁹

As emphasized throughout, we do not argue that firms should not be allowed to terminate consumers, or that termination should be allowed only under specific circumstances. Instead, we propose that firms inform their counterparties as to the reasons that led to their termination. Of course, this does not prevent firms from: continuing to use technological means to aid their decision-making process; warning consumers of possible termination in due cases; soliciting consumers' response to their seemingly improper behavior; temporarily suspending contracts and accounts in urgent or otherwise justified circumstances (such as clear and substantial breaches that risk or harm third-parties); and using generic automated notices to terminate fake accounts that are set up by automated programs.²⁷⁰

When making a termination decision, the firm has already investigated the reasons and is thus holding the relevant information.²⁷¹ A duty to explain only entails sharing this already existing information with the consumer. Given the wealth of cheap and effective modern means of communication, the associated costs should not be overblown.²⁷² Requiring firms to disclose their motivation and reasons to terminate consumers seems like a small price compared to the multiple harms that terminations without explanation can trigger. Moreover, by advancing a more transparent regime, consumers could better evaluate firms' practices and prioritize products and services.

Finally, a legitimate caveat to our analysis relates to our sample of contracts, which encompasses 500 contracts from popular websites. Theoretically, these online contracts may incorporate different mechanisms than offline consumer contracts or less popular online contracts.²⁷³ For instance, some of the online contracts in our sample involve products and services offered free of charge.²⁷⁴ In such contracts, the argument goes, consumers may be more willing to accept the risk of termination without explanation.

While there is no empirical evidence to support such an argument, it might indeed be that online, popular contracts have unique characteristics. Importantly, however, even if the contracts in our sample do have distinctive characteristics, our analysis still holds. First, the results of our study indicate that less popular sites tend to have termination mechanisms that are even less transparent than

269. See Arbel *supra* note 261, at 1251.

270. For the fight against fake accounts that are created by machines see, for example, Rob Lever, *Fake Facebook Accounts: The Never-Ending Battle Against Bots*, PHYS.ORG (May 24, 2019), <https://phys.org/news/2019-05-fake-facebook-accounts-never-ending-bots.html> [<https://perma.cc/96XU-GFXV>].

271. See *supra* Section IV.C.

272. See, e.g., 8 *Effective Ways to Communicate with Customers*, WALDEN UNIV., <https://www.waldenu.edu/online-bachelors-programs/bs-in-communication/resource/eight-effective-ways-to-communicate-with-customers> (last visited Mar. 19, 2022) [<https://perma.cc/R2ED-3FFR>].

273. We made similar comments in a somewhat different context. See Becher & Benoliel, *supra* note 166, at 726–29.

274. Of course, this ignores that price that consumers pay in terms of information, privacy, and attention—as in the B2C context, there is no free lunch. See, e.g., John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 548–49 (2018).

more popular websites.²⁷⁵ This may imply that less popular websites and firms are likely to have even more imbalanced termination mechanisms. Second, the popularity of the websites in our sample—and the potential harm they can cause consumers—make these contracts sufficiently significant in and of themselves. The number of users such contracts involved, combined with the findings we present and the risks these findings entail, merit legal vigilance.

V. CONCLUDING REMARKS

Our empirical examination indicates that almost all consumer contracts in our sample of 500 popular online contracts employ termination without explanation clauses. These mechanisms, however, should not be viewed in isolation since they are often coupled with other aggravating contractual terms. To make matters worse, consumer contracts often (1) do not specify a list of causes for termination, (2) do not require the firm to notify the consumer of the termination act, and (3) do not lend the consumer a voice in the process. Indeed, we found 80% of the termination without explanation contracts in our sample to be moderately or highly nontransparent, *i.e.*, employing at least two out of these three features.²⁷⁶

Termination without explanation increases the risk of wrongful termination. Erroneous terminations can be painful for individual consumers on multiple levels. At times, questionable, if not appalling, motivations might trigger such terminations.²⁷⁷ Furthermore, many terminations may involve human or machine biases.²⁷⁸ Additionally, termination decisions may rely upon dubious policies, of which the public is unaware.²⁷⁹ Termination practices might deepen inequalities and target minorities and marginalized groups.²⁸⁰

The current legal regime accords firms with broad discretion to terminate consumers and does not encourage them to adequately consider the consequences of their termination decisions.²⁸¹ Nor does it inspire firms to behave transparently and ensure due process.²⁸² As a result, firms make important decisions invisibly and unilaterally, without adequate consumer and public input.²⁸³

To combat these risks, this Article offers to impose on firms the duty to explain consumers' termination decisions. We argued that such a duty would make termination decisions more observable and transparent and thus desired on multiple grounds. The mere knowledge that one needs to justify their decisions

275. See *supra* Section III.C, especially text accompanying Table 3 and Figure 1 (detailing the relationship between website traffic and nontransparency).

276. See *supra* Section III.C.

277. See, e.g., Frevele, *supra* note 11.

278. See Skitka et al., *supra* note 109, at 992.

279. McDonald & Cranor, *supra* note 200, at 551–52, 563.

280. See Mayson, *supra* note 40, at 2259 (discussing bias and inequality).

281. See *supra* Section III.B; see also *supra* note 176 and accompanying text.

282. For a general discussion, see Shmuel I. Becher & Uri Benoliel, *Dark Contracts*, 64 B.C. L. REV. (forthcoming 2023).

283. See *supra* Section II.B.2.

“can have significant effects on the decision process” and may incentivize the decision-maker “to align behavior with norms that are viewed as applicable to the decision context.”²⁸⁴ In our context, a duty to explain would minimize mistakes and biases. It would also assure that firms pay more attention to the interests of consumers and the public.

Firms may face difficult termination decisions, which necessitate balancing among competing considerations. Such considerations may include, for instance, the firm’s policies and guidelines, government pressure, societal values, free expression, user privacy, and the safety and security of the firm and other consumers.²⁸⁵ One should not lose sight of the forest for the trees and regard our call for transparency as an argument against account termination.

We fully acknowledge the complex and nuanced reality that may surround account termination. We propose a duty to explain to increase transparency and fairness—not dictate the legitimate reasons for consumer termination.²⁸⁶ Such a duty, of course, should balance firms’ discretion and necessity to terminate consumers swiftly, with minimum standards of transparency, due process, and fairness.

This Article also offers to view termination without explanation from a holistic perspective. To that end, we propose an index that may help to determine to what extent the contractual termination mechanism is nontransparent and exploitative. Courts and policymakers can utilize such an index when tackling the issue, thus making more informed decisions.

In all, we hope that the framework we develop here can minimize the risks of contractual discrimination, exploitation, and unfairness. Consumers who trust firms and engage with them should at least be allowed to know the reasons for their termination. While not a panacea, a more transparent, balanced, and rigorous discourse concerning termination practices would constitute an important step forward.

284. Kleindorfer, *supra* note 118, at 74.

285. See NEWLAND ET AL., *supra* note 9, at 2 (noting that good termination practices require balancing “complex and often competing considerations—the enforcement of site guidelines, responses to government pressure, the free expression and privacy rights of users, and the potential risks faced by activists . . .”).

286. Though beyond the scope of this Article, we doubt whether there could be a one-size-fits-all guidelines for terminating consumers for all firms.