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Title: *Selective Enforcement of Consumer Contracts: Evidence from the Retail Market*

Word count: \_\_( without footnotes)

Dear Editors,

I am pleased to submit my Article, “*Selective Enforcement of Consumer Contracts: Evidence from the Retail Market,*” for your consideration. This article is submitted exclusively to the *Harvard Law Review*, the *Stanford Law Review*, and the *Yale Law Journal* for a period of one week.

The issue of whether the contents of standardized agreements should be regulated is subject to heated debate among scholars and regulators. Many commentators and consumer advocates strongly support substantive regulation of consumer contracts, arguing that these contracts, which typically go unread, often include one-sided terms. Others call for minimal regulatory intervention, based on the assumption that competition and reputational forces sufficiently constrain sellers from adopting one-sided and unfair contractual arrangements. This Article sheds empirical light on a critical factor in this debate, which has thus far been overlooked for the most part: that is, the question of whether and when sellers *actually* enforce the terms of their standardized agreements in their dealings with consumers.

This Article combines original qualitative interviews with a wide-scale field study to explore this question, using product returns as the natural first test case. In this study, pairs of testers (auditors), using a uniform script, were hired and trained to try to return clothing items without receipts to ninety-five retail stores in Chicago which had a receipt requirement. Across different contexts and policies, I found that a significant proportion of sellers behave more leniently than the contract requires. Yet, departure decisions vary across stores, terms, and consumers. Some terms (the harsher ones) are stickier than other terms, some stores (the more local, casual and less experienced ones) are less likely to depart from their terms than are other stores, and some customers (the more insistent ones) are more likely to benefit from these departures than are other customers.

These findings provide the first robust, real-world account of the interaction between contractual language and sellers’ actual on-the-ground practices, illustrating how the resulting discrepancies shape the relationships between sellers and consumers and the resulting market outcomes. They reveal an underexplored contracting phenomenon: *selective enforcement of consumer contracts*—sellers’ strategy of adopting clear, bright-line contract terms in their formal agreements alongside a policy authorizing their employees to depart from these terms in their on-the-ground dealings with consumers.

These findings also have important normative implications. Prominent scholars have suggested that courts should refrain from intervening in the contents of standardized agreements, arguing that reputational considerations force sellers to adopt lenient policies towards consumers. These findings reveal that reputational considerations compel sellers to act more forgivingly towards consumers than their contracts require, and that more lenient treatment is often exercised in response to consumer discontent. Yet, informed by accumulating empirical evidence (including the findings of my previous and forthcoming work), I argue that even with those retailers acting more leniently than their formal policies require, uninformed consumers might be discouraged by the harsh language of the policies, and consequently fail to demand concessions. These concerns suggest that regulatory intervention in consumer transactions, both on paper and in practice, should be seriously considered. More generally, this Article calls on regulators and researchers to shift attention from focusing almost exclusively on the “paper deal”—the written, formal terms of the agreement—and begin looking more closely at the “real deal”—how sellers actually operate in the shadow of the contract—as well as at the law and the other forces that shape or constrain their behavior.

I am an empirical legal researcher specializing in consumer contract law. My previous research has been published (or is forthcoming) in leading academic journals, including the *Stanford Law Review*, the *Minnesota Law Review*, and the *Journal of Legal Analysis*. The current manuscript has been presented at Harvard Law School, the University of Chicago Law School, and at various other conferences and seminars. I have been invited to present it at the Empirical Contracts Workshop at New York University School of Law in May 2020.

Thank you for your consideration.

Sincerely,

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