MEIRAV FURTH-MATZKIN

John M. Olin Law & Economics Research Fellow and Lecturer in Law

University of Chicago Law School

1111 East 60th Street • Chicago, IL 60637 • (773) 702-9494 • mfurth@uchicago.edu

**Research Agenda**

My research lies at the intersection of contract law, consumer law, and behavioral law and economics. Combining observational studies with field and lab experiments, I examine the often surprising ways in which the law and contracts are implemented and interpreted by contracting parties in practice.

In recent years, I have explored how sellers exploit their superior familiarity with the law through drafting techniques that generate legal misperceptions among consumers. I currently study the intricate relationships and disparities between the formal agreements that govern commercial transactions and their implementation in reality. With this focus, it is possible to achieve a more nuanced understanding of the *actual* role that text, legal rules, and other (legal and extra-legal) forces play in shaping contracting parties’ ongoing relations, and in promoting, or threatening consumer welfare.

The goal of my research is to grapple with the important question of when and how consumer contracts and markets should be regulated. Ultimately, my hope is to assist regulators in devising regulation that will improve consumer welfare in real life, rather than on paper only.

1. **The Gap between the “Paper Deal” and the “Real Deal”**

The question of whether the contents of standardized agreements be regulated is subject to heated debate among both scholars and regulators. Some vehemently support substantive regulation of consumer contracts. Others advocate for minimal regulatory intervention, based on the assumption that in competitive markets, reputational forces sufficiently constrain sellers from fully enforcing harsh terms against consumers. My job talk paper, *The Paper Deal—Real Deal Gap in the Retail Market*, empirically explores this theory, combining observational analysis of retail stores’ return policies with field experiments testing their actual practices on the ground.

The study uses an audit technique in which testers were sent to return non-defective goods to stores with different return policies, and then reported their return outcomes. Across different contexts and policies, I find that most sellers enforce the written contract to the letter. A significant minority of sellers behave more leniently than the contract requires, but, typically, only when the consumer insists. This holds true whether the store is local or a part of a chain, and regardless of how large, luxurious, or old the store is.

These findings 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 act more forgivingly towards consumers than their contracts require. To the contrary, this article shows that the paper contract dominates most post-contract negotiations. Drawing on the findings of my previous work, this article suggests that consumers might be discouraged by the harsh language of sellers’ return policies, and consequently fail to demand concessions. These concerns illustrate that intervention in consumer transactions, both on paper and in practice, may actually be prudent.

In a working paper, tentatively titled *Price Discrimination in the Retail Market*, I explore whether return policies are enforced in ways that discriminate against black and female customers. This field study reveals that there is a significant racial gap in return outcomes.

1. **The Gap between the Contract and the Law**

My research also addresses the gap between the social reality of contracting and the law that purports to govern it. In particular, it sheds empirical light on an under-explored contracting phenomenon of the systematic use of legally unenforceable contract terms. Although such terms contravene mandatory regulation, and are therefore unenforceable in court, I have found that they are routinely included in various types of consumer contracts.

My first article on this issue, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*,9 Journal of Legal Analysis 1 (2017), examines the prevalence of such terms in the housing market. Drawing on a hand-collected sample of residential lease agreements, I found that these contracts frequently contain unenforceable terms, including overbroad liability waivers, disclaimers of the landlord’s implied warranty of habitability, and clauses purporting to shift mandatory maintenance and repair duties from the landlord onto the tenant.

The article provides evidence that these unenforceable contract terms play an important role in shaping tenants’ expectations and beliefs. Using a survey of 200 residential tenants, it shows that most tenants rely on these agreements as their main source of information about their rights and remedies, and often act in accordance with their signed agreements when rental disputes arise. What this suggests, I argue, is that landlords include these clauses in rental contracts because they are effective in shaping renters’ expectations and behavior, and *not* because they are convincing to courts.

Drawing on these findings, a subsequent article, *The Harmful Effects of Unenforceable Contract Terms*, 70 Alabama Law Review1031(2019), directly tests the effects of unenforceable liability disclaimers on tenants’ behavior through a series of controlled experiments. The results reveal that after reading contracts containing unenforceable liability disclaimers, tenants are about eight times more likely to bear costs for which a landlord is legally responsible than are tenants who read contracts with enforceable liability provisions.

Notably, the inclusion of unenforceable terms also discourages tenants from searching for information about their rights as renters online. The minority of tenants who nonetheless conduct online searches are still misled by such terms. These findings suggest that as long as tenants remain uninformed about governing law, and rely on their leases to ascertain their rights and remedies, they are unlikely to challenge non-complying landlords. I therefore discuss possible policy prescriptions, such as the imposition of statutory form leases.

 In future work, I plan to explore whether unenforceable terms are included even in highly regulated industries. A working paper, tentatively titled *What’s in an Airline’s Contract of Carriage?*, reports on the prevalence of unenforceable contract terms in the airline industry. Drawing on a hand-collected sample of 150 contracts of carriage used by certified U.S. air carriers, this study finds that unenforceable terms are routinely used in these contracts. These terms include clauses limiting the airline’s liability for damages caused to passengers as a result of lost, delayed, or mishandled baggage to an amount lower than the mandatory minimum, clauses allowing airlines to change terms and conditions retroactively to passengers’ detriment, and unlawful restrictions on passengers’ rights to cancel or change flights or to receive refunds of certain fees in the event of flight cancellation or overbooking. This paper discusses policy implications and proposes normative solutions, such as interpreting current Unfair or Deceptive Acts or Practices (UDAP) laws as prohibiting misstatements of law in addition to misstatements of fact, or establishing a pre-approval mechanism for airlines’ contracts of carriage.

1. **The Gap between the Contract and Pre-Contractual Representations**

My work on unenforceable terms suggests that consumers are contract formalists, believing that they will be held to whatever the contract says. Building on these findings, a new article titled *Consumer Psychology and the Problem of Fine Print Fraud* (forthcoming in the StanforD Law Review) that I wrote with Roseanna Sommers demonstrates that consumers’ formalistic preconceptions about contracts extend even to cases of clear and material fraud. In a series of lab experiments, participants were presented with scenarios in which a seller makes a representation that is later disclaimed or qualified in the contract, and the consumer signs the contract in reliance on the seller’s false representation, without reading the terms or noticing the discrepancy.

Across all experiments, Sommers and I found that laypeople are contractual formalists, not only because they trust that the representations in the contracts they sign are true but, more profoundly, because they believe that all contracts, even those induced by fraud, are legally binding. This common preconception reflects laypeople’s somewhat cynical view of the law. Even though most of the respondents in our study believed that it is unfair to hold consumers to terms they had been deceived into signing, they nonetheless believed that the law would enforce such contractual provisions to the letter. In fact, we found that in many cases, the fact that the contract contradicts what the consumer was promised prior to signing made almost no difference to laypeople’s perceptions about whether the contract would be enforced as written. These findings hold true regardless of whether the misrepresentation was oral or written, and across all types of transactions. The results lead to the troubling conclusion that consumers may be discouraged from challenging contracts induced by fraud, because they might blame themselves for failing to read the fine print.

In future work, I intend to explore whether and how these behavioral insights could be used to encourage consumers, especially lower income, less educated customers, to pursue their legal claims and rights, and what interventions could be adopted to mitigate the harmful effects of contract terms that are at best voidable, and, at worst, already void.

1. **Behaviorally Informed Regulation**

My work on regulating consumer contracts is part of my broader interest in the applications of behavioral economics insights to law and public policy. I am especially interested in how behaviorally informed regulation, and nudges in particular, can shape consumers’ attitudes, decisions, and behavior. In *Social Influences on Policy Preferences: Conformity and Reactance*, 102 Minnesota Law Review 101 (2018), Cass Sunstein and I explore whether a particular type of nudge—social proof disclosure (i.e., informing people about what others do or think)—influences not only people’s decisions and behavior, but also their policy judgments.

To study the influence of beliefs about majority opinion on individual attitudes, we surveyed hundreds of Americans with diverse political views. We presented them with identical policies. Half were asked to assume that most people supported these policies, while half were asked to assume that most people opposed them. The findings revealed that support for different governmental policies was significantly influenced by people’s perception of majority opinion—sometimes enough to turn minority support into majority support, or vice versa. At the same time, when respondents reported feeling strongly about an issue, or stated that it related to their core values, they were much less influenced by the majority viewpoint.

In a future paper tentatively titled *Nudges for Bad*, I plan to study how firms can use behaviorally informed techniques, such as social proof disclosure, to shape people’s consumption preferences. I will then explore whether the law should intervene by restricting firms’ use of nudges to consumers’ detriment (or sludge) in consumer markets, even though they do not involve deception. This question necessarily hinges on whether firms’ practices could or should be considered as unfair simply because they target consumers’ more intuitive and automatic thinking, and not because they convey deceptive information. I also intend to explore the ways in which policymakers could counteract the impact of commercial nudges through extra-legal policy tools, by applying psychological insights similar to the ones that firms use to influence consumer choices.

In future work, I also plan to test the distributional consequences of bad nudges through a combination of lab and field experiments. For example, in a future paper tentatively titled *Who Pays the Price of Price Discrimination?*,Tamar Krichely-Katz and I plan to examine whether behaviorally informed price discrimination techniques, such as automatic renewals, differently affect consumers from different socio-economic backgrounds. The conventional wisdom holds that price discrimination results in wealthier consumers cross-subsidizing the poor, because the wealthier have a higher willingness or ability to pay. However, recent empirical findings regarding the effects of scarcity on people’s judgments suggest that these assumptions may be inaccurate. Building on this evidence, we hypothesize that behaviorally informed price discrimination may have regressive distributional consequences. To test this hypothesis, we have partnered with a retailer to conduct a field experiment. In the experiment, participants/consumers will be entered into an automatic renewal program and will need to make an active decision to opt out at the end of a trial period. This setting will enable us to explore the demographic differences between those who opt out of the plan and those who do not, despite the plan’s excessive costs to consumers and the availability of a clearly dominant consumption strategy.