Selective Enforcement of consumer Contracts:

Evidence from the retail market

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# Introduction

Most of our everyday transactions are governed by standard form contracts.[[2]](#footnote-3) Virtually every firm selling goods or services to consumers uses boilerplate provisions that dictate whether and when a good can be returned, when and how to make payments, whether charges are imposed for services beyond those originally contracted for, and various other elements of the sales relationship. Commentators have long observed that standardized provisions substantially facilitate transactions by allowing sellers to offer “take-it-or-leave-it” agreements to consumers.[[3]](#footnote-4) However, others have expressed concerns that these boilerplate agreements often contain one-sided terms favoring the seller.[[4]](#footnote-5) While researchers and policymakers continue to devote considerable attention to the formal, written terms of these standardized agreements, empirical efforts to uncover how these contracts are implemented by sellers in their ongoing interactions with consumers are surprisingly rare.

This dearth of scholarly attention is puzzling, both because of the importance of the “real deal”—the ways in which sellers actually behave in the shadow of their formal agreements—to consumers, and because in the context of business-to-business transactions, there is increasing evidence that the actual implementation of standardized agreements often differs from the “paper deal”—how these contracts appear on paper.[[5]](#footnote-6) For example, legal sociologist Stewart Macaulay already found in the 1960s that lawyers and businesspeople often diverge from their formal agreements in meaningful ways.[[6]](#footnote-7) Since then, considerable scholarly attention has been devoted to how contracting parties behave in the realm of commercial agreements,[[7]](#footnote-8) while little is known about how *consumer* contracts are applied by sellers in their relations with buyers.

One reason for the limited empirical attention to the implementation of consumer contracts is that studies in this area have been difficult to carry out. By its nature, an examination of how consumer contracts work in action requires labor-intense and costly field work, and cannot be achieved by looking at the written terms of the contracts alone. Another potential reason for the limited investigation of this issue is that it has been traditionally assumed that in the consumer setting, unlike in the context of relational contracts between businesses or merchants, sellers have little interest in deviating from the text of their formal agreements in favor of consumers.[[8]](#footnote-9) The assumption that the written agreement generally reflects the terms of the transaction has in all probability contributed to the scholarly focus on textual analyses of consumer contracts.

In recent years, however, commentators have called for “studies of consumer contracts” to “move from looking almost exclusively at the terms of the *paper deal* to looking at the terms of the *real deal*,”[[9]](#footnote-10) recognizing that the distinction between contracts on paper and their actual implementation may also be relevant to “contracts that businesses enter into with consumers.”[[10]](#footnote-11) In particular, it has been speculated that sellers’ concerns for their reputations may lead them to behave more leniently than their contracts require.[[11]](#footnote-12) Yet, so far, other than anecdotal evidence, little is known about whether, when, and to what extent sellers depart from their contracts in favor of consumers.

This Article begins to fill this gap in the literature. It reports the results of an original, large-scale field study that explores the discrepancies between how consumer contracts appear on paper and how they operate on the ground through the test case of product returns. The study uses an audit technique. Six testers (all Caucasian American females about the same age, wearing similar, casual clothing) were hired and trained to follow a uniform bargaining script, and were sent to return clothing items without receipts to ninety-five retail stores in Chicago that formally require receipts for returns. The testers were instructed to escalate their assertiveness levels by asking to speak to a manager if the return was refused. They reported the outcomes of the attempted returns, both before and after complaining to the manager. The results were then compared to the stores’ formal return policies.[[12]](#footnote-13)

The case of product returns is particularly suitable for scrutiny. Until now, only anecdotal evidence about sellers’ relaxed enforcement of their return requirements has been used to demonstrate that sellers may depart from their contracts in favor of consumers, but there has not been any meaningful investigation into sellers’ return practices on the ground.[[13]](#footnote-14) In addition, despite the substantial economic significance of product returns to both consumers and sellers, far too little is known about the contents and actual implementation of sellers’ return policies.

The findings reported in this Article reveal that retailers’ enforcement of supposedly rigid, bright-line contractual provisions is, in practice, considerably more lenient and flexible than their contracts formally require. Across a wide variety of stores—both chain and local, high-end and casual—a significant proportion of sellers (22%) departed from their formal contractual requirements in favor of consumers by accepting their returns upon consumers’ initial requests, and more than one-third of the sellers (36%) relaxed their requirements once consumers complained.

These findings provide the first systematic empirical evidence that sellers constrained by reputational forces often complement ostensibly rigid contract terms on paper with a concurrent internal policy of allowing concessions not required by the contract. At the same time, the existence of clear and unconditional terms on paper allows sellers to fend off opportunistic buyers, who would exploit more lenient (or complete) contractual language to extract gains that the seller did not intend to offer.[[14]](#footnote-15)

This Article offers the first comprehensive account of *selective enforcement of consumer contracts*—sellers’ strategy of adopting clear and rigid 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. The strategy of adopting a non-customer-facing policy allowing employees discretion to deviate from the “paper deal” can be seen as an attempt to meet the expectations of most good faith consumers, while preventing opportunistic consumers from taking advantage of more lenient terms on paper to extract gains that the seller did not intend to offer.[[15]](#footnote-16)

Sellers may value terms that they can use at their discretion to penalize customers for undesirable behavior when such objectionable behavior is hard to write into a contract due to the cost of its verification. The presence of the discretion-granting term allows sellers to use information that they can observe only *ex post* (after consumers have entered into the transaction) to screen out opportunistic buyers, without having to bear the costs of verifying their opportunistic behavior to third parties, such as arbitrators or courts.[[16]](#footnote-17)

While illustrating that sellers often relax their return requirements, this Article’s findings also offer a more nuanced portrayal of the motivations leading sellers to selectively enforce their contracts. In particular, three factors were significantly associated with sellers’ departure decisions. The first factor is store characteristics. Stores belonging to a national or global chain were significantly more likely to selectively enforce their contractual requirements than were local stores belonging to independent retailers;[[17]](#footnote-18) and higher-end and older stores were significantly more likely to selectively enforce their contractual requirements than were more casual and less established stores. These findings may be attributed to the stronger interest of higher-end and more established stores, and of chain stores, in maintaining a reputation for leniency and to the higher expectations of their customer base.[[18]](#footnote-19) It may also be related to these stores’ higher susceptibility to reputational harm through online reviews,[[19]](#footnote-20) or to their better ability to detect fraudulent returns.[[20]](#footnote-21)

The second factor is the leniency of the written agreement. Stores with harsher policies on paper—those completely denying non-receipted returns—were more likely to depart from their formal requirements than were stores with more lenient policies, such as policies allowing for exchange or store credit even absent a receipt. This finding indicates that rigidity on paper gives sellers more latitude in straying from their policies, and suggests that stores may choose to adopt a more stringent policy on paper so as to allow themselves leeway to selectively enforce it *ex post*.

The third factor in sellers’ departure decisions is consumers’ bargaining behavior. The findings reveal that sellers were significantly more likely to relax their requirements once consumers complained.[[21]](#footnote-22) It is widely assumed that “the squeaky wheel gets the grease,”[[22]](#footnote-23) but so far there has been little investigation into the ways in which sellers handle consumer complaints.[[23]](#footnote-24) This study documents the effect of complaints on sellers’ selective enforcement decisions, revealing that sellers were more than 50% likelier to deviate from the contract and accept consumers’ requests after consumers had complained. These findings demonstrate that sellers often use complaints to screen consumers, using consumer assertiveness as a proxy for the merits of the claim, or of the value of the concession to the consumer.

The Article goes on to consider the implications of the findings for consumers. Selective enforcement of consumer contracts enables good faith buyers to enjoy better treatment than that for which they originally contracted, while sellers are able to keep prices low by screening out the “bad apples” who would take advantage of a more lenient or flexible term in writing. However, consumers, to the extent that they are uninformed about sellers’ selective enforcement practices, might refrain from bringing even a just claim to the seller, because they might not realize that they may receive more than what the contract allows.

Accumulating empirical evidence suggests that consumers tend to be contract formalists, with most believing that whatever the contract says is the final word.[[24]](#footnote-25) They are thus unlikely to reach out to the seller if they erroneously believe that the seller will strictly adhere to the letter of the contract. They are even less likely to complain once the seller refers them to the contract’s clear and unconditional language. While sellers may use complaint-based segmentation benevolently in order to identify the high- value consumers, consumers might be discouraged from complaining even if they have a meritorious claim, and possibly even when their benefits from the seller’s more lenient accommodation exceed the costs to the seller of granting it.

Furthermore, as the findings indicate, sellers may vary significantly in the extent to which they are willing to depart from their standardized agreements in practice. Indeed, in the context studied here, substantial unexplained variation remained even after controlling for store characteristics. This unexplained variation might decrease consumers’ ability to distinguish between sellers that strictly adhere to their formal contract terms and those that offer better terms in practice. Consequently, consumers might make poor decisions. For example, they might be discouraged from trying to make returns to stores that would likely depart from their unconditional contract terms in consumers’ favor, or inefficiently attempt to make returns to stores that would not budge.

Finally, this Article suggests that selective enforcement of consumer contracts might have regressive distributional effects. Quantitative evidence and original interviews with store clerks indicate that lower income consumers and minority group members typically feel less entitled and are less likely to complain than are higher income consumers or those belonging to majority groups.[[25]](#footnote-26) The former will consequently cross-subsidize insistent buyers who benefit from selective enforcement.[[26]](#footnote-27) Furthermore, store clerks with discretion to deviate from the formal policy on the ground may apply their discretion inconsistently and to the disadvantage of lower income consumers and minorities.[[27]](#footnote-28) As a result, sellers’ selective enforcement of contracts might disproportionately benefit those consumers who are already better off.

The Article proceeds as follows. Section I describes the paradigmatic example of product returns and the legal framework governing consumers’ withdrawal rights. Section II presents the sample and design of the audit study. Section III reports the results. Section IV discusses the implications of the findings. It suggests that selective enforcement can be beneficial to consumers (and welfare-enhancing in general) to the extent that consumers are sufficiently informed about this practice, while raising concerns as to the outcomes of the interaction between the formal agreement, sellers’ on-the-ground practices, and consumer psychology in the absence of information about selective enforcement.

# I. The Case Study: Retailers’ Return Policies

Retail commerce in the United States accounts for $2.6 trillion in sales.[[28]](#footnote-29) In a significant number of cases, consumers who purchase goods or services end up regretting their purchases after the fact. Around eight to ten percent of purchases made in brick and mortar retail stores, and about twenty percent of online purchases are ultimately returned to the sellers.[[29]](#footnote-30) In 2016, for example, Americans returned $260 billion in merchandise to retail stores.[[30]](#footnote-31)

The ability to withdraw from consumer transactions is important to consumers.[[31]](#footnote-32) It is also considered welfare-enhancing, as it enables consumers to inspect the product and gain information that they are unable to obtain before the purchase, and allows them to cancel the transaction if they realize that it is no longer desirable or necessary. Yet, despite the significance of the ability to withdraw to consumers, the latter are not in most cases entitled to return non-defective goods to the seller under current U.S. law.[[32]](#footnote-33) Consumers cannot return items to stores unless the contract with the seller stipulates otherwise.

Against this legal backdrop, scholars and policymakers continuously debate the desirability of regulating consumers’ rights to cancel transactions. While some have proposed adopting either a mandatory or a default right to withdraw,[[33]](#footnote-34) others believe that statutory intervention may not be warranted due to market incentives already in place.[[34]](#footnote-35) That is, sellers will be incentivized to offer efficient terms—if not on paper, then in practice—so long as their reputation is at stake.

Supporters of minimal intervention rely on the liberal return policies adopted by many sellers as standard commercial practice.[[35]](#footnote-36) Yet, in recent years, stores have begun imposing more restrictions on consumer returns.[[36]](#footnote-37) These shifts in firms’ policies have spurred consumer outrage,[[37]](#footnote-38) reviving the debate over the need to regulate consumers’ withdrawal rights.[[38]](#footnote-39)

Even though underlying this debate are competing views of whether, and to what extent, market forces ensure that sellers offer favorable return policies to consumers—if not on paper, then in practice—empirical studies of retail stores’ return policies and practices are surprisingly scarce.[[39]](#footnote-40) This Article presents a comprehensive empirical account of retailers’ on-the-ground return practices. Exploring the relationships between contractual language and the contract in action, this Article illustrates how these discrepancies shape the interactions between sellers and consumers and the resulting market outcomes.

# II. Sample & Design

To explore the discrepancies between the formal terms of retailers’ return policies and their actual enforcement vis-à-vis consumers, I conducted a field study using an audit technique.[[40]](#footnote-41) Six testers (all White American females at around the same age, wearing similar—casual—clothing) were hired and trained to follow a uniform bargaining script, and were sent to return clothing items without receipts to 95 retail stores in Chicago that formally require receipts for returns. The testers were instructed to escalate their assertiveness levels by asking to speak to a manager if denied the return, and reported the outcomes of the attempted returns—both before and after complaining to the manager. The results were then compared to the stores’ formal return policies. The following sections present the sample and design of the audit study. Section A explains how the stores were selected, and presents their descriptive statistics. Section B describes the study’s design. Section C describes the training and the measures taken to ensure uniformity and control. Section D explains how the formal return policies were classified, and Section E explains how pro-consumer gaps (or deviations) were defined and measured.

## Store Selection and Descriptive Statistics

The stores were selected from the ReferenceUSA and Hoover’s Company Directories’ databases according to the following selection criteria: They all had a Chicago location, and they all required a receipt—either for any return or exchange or for a refund. The study focuses on the enforcement of “receipt required” return policies because they are both very common and strongly disliked by many consumers, who perceive the receipt requirement as an unnecessary burden.[[41]](#footnote-42) At the same time, sellers routinely require receipts for returns, mainly in order to protect themselves from shoplifters or from consumers trying to return items bought at a different store.[[42]](#footnote-43) This generates mixed incentives for stores when it comes to enforcement: They want to weed out the “bad apples,” but they also have an incentive not to unnecessarily antagonize consumers.

Dollar stores were excluded from the sample in order to make the analysis more tractable. To keep the items’ prices fixed across stores at between $20 to $30, designer stores that did not offer items for $30 or less were also excluded from the sample.[[43]](#footnote-44)

For each of the sampled stores, I collected information on basic company characteristics such as annual revenues (for the year of 2018) and age (defined as 2019 minus the year of establishment). I also collected data on whether the store is local/independent or part of a chain.[[44]](#footnote-45) I obtained most of the data from Bloomberg and Hoover’s Company Directories. Finally, as a measure of store prestige, I collected data on the median prices of all clothing and accessory items listed on each store’s website.[[45]](#footnote-46)

After applying the mentioned selection criteria and discarding tests (due to inconsistent outcomes, missing information on company characteristics, deviations from the script, or scheduling difficulties), the final sample includes 190 audits from 95 retailers (two audits per store).

The stores’ mean annual revenue is $434 million (SD = $230 million). The average company age is 52 years (SD = 42 years).[[46]](#footnote-47) Seventy-one percent of the stores in the sample are national retail chains, and 29% are local stores operated by independent retailers.[[47]](#footnote-48)

## Method & Design

For the purposes of the audit study, I hired and trained a team of six testers—all White American females of approximately the same age. They all wore casual clothing and followed a memorized script in their interactions with store clerks. Data collection took place between March and April 2019, well after the holiday season, to avoid potential changes in stores’ return policies that typically occur during that season.[[48]](#footnote-49)

In each store, testers attempted to return a clothing item that had been purchased in advance[[49]](#footnote-50) in its original packaging and condition, with tags attached, but *without the receipt*.[[50]](#footnote-51) They were instructed to wait in line until a store clerk became available and asked them what he or she could do for them. The testers were then instructed to say that they wanted to return the item, and to put the item in its original packaging on the counter. If the store clerk asked them why they wanted to return the item, testers would say that they realized they did not need it.[[51]](#footnote-52) If asked for the receipt, testers would answer that they thought they had the receipt with them, but, after looking for it, they appeared to have lost it. They were then instructed to await the store clerk’s response. If the store clerk agreed to provide a refund, testers were instructed to accept the refund, thank the clerk, and leave the store.

If, however, they were denied the return or were offered anything other than a refund (e.g., exchange or store credit), testers were instructed to ask to speak to a manager, thereby complaining. If the store clerk refused to call a manager or identified as the manager, or if a manager came to see them, testers asked once again for a refund. If still denied a refund, testers would thank the clerk or manager and leave the store. After leaving each store, all testers filled out a detailed report, in which they described the outcomes of the attempted returns.

The testers’ bargaining script was designed to test the relationship between consumer assertiveness and sellers’ enforcement decisions. The study predicted that sellers would be more likely to depart from the letter of the contract once consumers insisted and complained, because sellers may use consumers’ complaints as a proxy for the value that consumers attach to the particular concession, or, more precisely, to the magnitude of the harm that consumers are expected to impose on the store if they remain unsatisfied.

The purpose of the study was to identify *systematic*, rather than sporadic deviations from the formal policy. Yet, it is possible that in some of the stores, store clerks acted self-interestedly to avoid disputes with consumers or mistakenly deviated from the formal policy. To mitigate the concern about random divergences from the contract, each store was audited by two testers.[[52]](#footnote-53) Both testers in a pair visited the same store, usually within a few days of one another, and the analysis includes only those stores in which both testers obtained identical return outcomes.[[53]](#footnote-54)

Admittedly, it could be the case that even when the two testers obtained identical return outcomes, these outcomes were the result of store clerk error or moral hazard, rather than an informal store policy allowing for store clerk discretion on the ground. However, this design provides a certain degree of confidence that substantial proportions of the observed deviations were the result of managerial policy allowing clerks to depart from the formal policy in favor of consumers. This methodological approach also mitigates the concern that, despite attempts to ensure uniformity among testers (as described below), differences in testers’ bargaining behavior or other characteristics meaningfully influenced the results.

## Training and Uniformity

In order to minimize the possibility of non-uniform bargaining, particular attention was paid to issues of uniformity and control. A major goal of the study was to choose uniform testers and to train them to behave in a standardized manner. Testers were chosen to satisfy the following criteria for uniformity:

1. *Race:* All testers were Caucasian;
2. *Gender:* All testers were female;
3. *Age*: All testers were twenty-two to thirty-years-old;
4. *Education*: All testers had between one and four years of college education;
5. *Dress*: All testers wore casual attire during the audits: jeans, t-shirt, and minimal make-up;

All testers attended a training session with the author and research team before visiting the stores. The training included not only memorizing the tester script, but also participating in mock negotiations designed to help testers gain confidence and learn how to negotiate and answer questions uniformly. The script anticipated that store clerks would ask questions and gave testers a list of contingent responses to questions that might be asked.[[54]](#footnote-55)

## Classification of Return Policies

In order to study variations between stores’ formal policies and their actual return practices, a database was created of the audited stores’ return policies, as they appeared on the stores’ websites, in-store signs, and receipts.[[55]](#footnote-56) Stores were subsequently classified by two independent research assistants as having harsh, moderate or lenient policies.[[56]](#footnote-57)

Stores are classified as having *harsh policies* (on paper)if they do not allow consumers to return items for a refund, and require receipts for any exchange or return. They are classified as having *moderate policies* if they allow consumers to return items for a refund conditional on showing receipts, and require receipts for *any* exchange or return. Finally, they are classified as having *lenient policies* if they allow consumers to return items for a refund conditional on showing receipts, while allowing consumers to return items for exchanges or store credits even without receipts.[[57]](#footnote-58) Table 1 summarizes this classification method.

*Table 1. Paper Policy Types*

|  |  |  |
| --- | --- | --- |
|  | Are refunds allowed? | Are non-receipted returns (for store credit or exchange) accepted? |
| Harsh Policy Stores  (n =23) | No | No |
| Moderate Policy Stores  (n = 33) | Yes | No |
| Lenient Policy Stores  (n = 39) | Yes | Yes |

Table 2 reports the basic company characteristics for each type of policy store. Age is defined as 2019 minus the year of establishment. I also report the proportion of chain stores and the average median prices in each category.

*Table 2. Summary Statistics*

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mean Age  (SD) | Mean of Median Prices  (SD) | Proportion of Chain |
| Harsh Policy Stores  (n =23) | 21  (14) | 198  (423) | 0.04 |
| Moderate Policy Stores  (n = 33) | 46  (32) | 70  (61) | 0.85 |
| Lenient Policy Stores  (n = 39) | 71  (48) | 59  (67) | 0.97 |

## Analysis of Gaps

The study explores the prevalence of pro-consumer gaps, defined as any of the following deviations from the paper policy in favor of consumers:

(1) *Among both Harsh and Moderate Policy Stores (that require receipts for any exchange or return)*—a pro-consumer gap was observed whenever testers were offered any concession—in the form of refund, exchange or store credit—despite their failure to show a receipt.

(2) *Among the* *Lenient Policy Stores (that require receipts for a refund, while allowing for non-receipted exchanges or store credits)*—a pro-consumer gap was observed whenever the testers received a refund despite their failure to show a receipt. In these stores, I also document whether store clerks departed from the formal policy to consumers’ detriment, by completely denying the return, while failing to offer store credits or exchanges. Table 3 describes this analysis.

*Table 3. Operationalization of Gaps*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Store Type | Paper Policy | Return Outcomes: Is there a Gap? | | | |
|  |  | **Is the Return Denied?** | **Is Exchange/Store Credit Offered?** | **Is Refund**  **Offered?** |
| Harsh | No Refund + Receipt required for *any* return | Yes = **No Gap** | Yes = **Pro-Consumer Gap** | Yes = **Pro-Consumer Gap** |
| Moderate | Refund Allowed + Receipt required for *any* return |
| Lenient | Refund Allowed + Receipt required for *refunds* | Yes = **Pro-Seller Gap** | Yes = **No Gap** |

# III. Results

The results as reported by the testers in their post-audit surveys provide a rich database for investigating the “paper deal—real deal” gap. The next three sections present the findings of the field study. Section A reports on the prevalence of pro-consumer gaps at the initial stage, after testers had requested a refund but before they complained. Section B turns to report the prevalence of pro-consumer gaps at the final stage, after testers had complained. Section C reports the results of multivariate analyses aimed at testing the relationships between several store characteristics and the gap.

## Initial Return Outcomes and the Prevalence of Gaps

Figure 1 describes what happened when testers initially asked for a refund—overall and across the different types of stores.

*Figure 1. Return Outcomes at the Initial Stage.*

*Figure 1.* Return outcomes at the initial (pre-complaining) stage. The upper bar represents return outcomes overall (n = 95), while the lower three bars represent the return outcomes across stores with different policies.

As Figure 1 illustrates, the formal terms of the contract were significantly associated with testers’ initial return outcomes. Stores with lenient return policies (formally allowing non-receipted returns for store credits or exchanges) were significantly more likely to accept non-receipted returns (for exchange or store credit) than stores with moderate return policies, and the latter were marginally significantly more likely to accept such returns than were stores with harsh return policies.[[58]](#footnote-59)

That said, across all stores, testers received more favorable treatment than the official policy required in a significant proportion of cases. Overall, the audited stores exhibited a pro-consumer gap in 22% of the cases. Figure 2 illustrates the prevalence of pro-consumer gaps in each type of store.

*Figure 2: Gaps across Stores*

*Figure 2. Gaps at the initial (pre-complaining) stage*. The upper bar represents the proportion of gaps overall (n = 95), while the lower three bars represent the proportion of gaps across stores with different policies.

As Figure 2 shows, stores with moderate return policies were significantly more likely than stores with harsh return policies to exhibit a pro-consumer gap.[[59]](#footnote-60) One plausible explanation for this finding is that harsh policy stores almost exclusively consist of local retailers operating only one or two shops in Illinois.[[60]](#footnote-61) These local stores incur higher depreciation costs from accepting returns, in view of their lower ability to resell items or to return them to the supplier. They plausibly adopted harsh policies on paper in view of these uniquely high costs, and were consequently reluctant to depart from their policies in practice.

Unexpectedly, a small subset of the lenient policy stores (8%) departed from their return policies to the consumers’ *detriment*. Store clerks in these stores not only refused to refund the testers. They also refused to accept the non-receipted item for store credit or exchange, even though they were contractually required to do so. Although the study was not designed to explore pro-seller gaps, the findings reveal that a small minority of sellers departed from their contractual arrangements to consumers’ disadvantage. Notably, the testers in these stores were denied the returns even after asking to speak to the manager. I leave these findings for future investigation.[[61]](#footnote-62)

## Final Return Outcomes and the Effect of Complaining

This study hypothesized that sellers may be significantly more likely to depart from their formal requirements after consumers complain. By waiting for the consumer to complain, the company can effectively let the high-value, high-information consumers identify themselves.[[62]](#footnote-63) Sellers may consequently use consumer assertiveness to determine whether to depart from the contract in favor of consumers.

This Section explores the impact of consumer bargaining strategy on sellers’ enforcement decisions, by testing whether sellers are more likely to depart from their policies after consumers complain. For this purpose, testers were instructed to continue to bargain with the store clerk if denied a refund at the initial stage. Testers escalated assertiveness levels throughout the bargaining process, asking to speak to a manager and then asking the manager for a refund. This design enables testing for the interaction between consumer assertiveness and sellers’ enforcement decisions by comparing testers’ initial return outcomes to their outcomes after complaining. Figure 3 reports testers’ initial and final return outcomes across the different policy stores.

*Figure 3: Initial and Final Return Outcomes by Policy Type*

*Figure 3. Return outcomes at the initial (pre-complaining) and final (post-complaining) stages.* The upper pair of bars represent return outcomes overall (n = 95), while the three lower pairs of bars represent the return outcomes across stores with different policies.

Importantly, as Figure 3 shows, even after testers had complained, the paper policy had a significant and strong effect on return outcomes, such that lenient stores were significantly more likely to accept non-receipted returns (for exchange, store credit or refund) than moderate policy stores,[[63]](#footnote-64) and moderate stores were significantly more likely to accept such returns than harsh policy stores.[[64]](#footnote-65)

At the same time, the results reveal that consumer assertiveness plays a major role in determining sellers’ leniency in practice. As expected, complaining was significantly associated with the on-the-ground behavior of stores. Yet, the magnitude of the effect is striking. While only 22% of the stores had treated testers more leniently than the policy required before testers complained, as many as 36% of the stores treated testers more favorably after testers had complained.[[65]](#footnote-66) Importantly, complaining significantly improved consumers’ likelihood of both receiving refunds and of having their returns accepted (in stores with a receipt requirement), notwithstanding their failure to show a receipt.[[66]](#footnote-67)

Figure 4 shows the effect of complaining on sellers’ enforcement decisions across policy types, by reporting the return outcomes, at both the initial and final stages, across policy types.

*Figure 4. Pro-Consumer Gaps: Before and After Complaining*

*Figure 4. Gaps at the initial (pre-complaining) and final (post-complaining) stages*. The upper pair of bars represent the proportion of gaps overall (n = 95), while the lower three pairs represent the proportion of gaps across stores with different policies.

As Figure 4 shows, complaining significantly improved testers’ return outcomes among both the harsh and moderate policy stores.[[67]](#footnote-68) Complaining also operated in the expected direction of improving consumers’ outcomes among the lenient policy stores, yet the effect was not significant.[[68]](#footnote-69) This is plausibly the case because of a “ceiling effect:” The lenient policy stores were already relatively generous towards consumers.

Importantly, complaining had no effect on consumers’ chances of obtaining a refund notwithstanding a clear “no refund” policy: All of the harsh (“no refund”) policy stores refused to provide refunds to testers both before and after they had complained. Yet, complaining significantly increased consumers’ chances of receiving an exchange or store credit (in the harsh and moderate policy stores, requiring a receipt for any exchange or return), from 23% to 39%. Finally, complaining marginally significantly increased consumers’ chances of receiving non-receipted refunds in lenient and moderate policy stores that required receipts for refunds, from 11% to 17%.

To summarize, complaining significantly increased the probability that the seller would depart from the formal policy to the consumer’s advantage. The magnitude of the effect is remarkable: Complaining almost doubled the consumer’s chances of obtaining concessions not otherwise required by the contract.

What can explain the large role of assertiveness in shaping stores’ leniency on the ground? As explained earlier, sellers may use selective enforcement to attract and keep the business of insistent consumers who complain without giving every consumer the same benefits they give complainers. Indeed, some consumers may not even realize that they can obtain concessions by complaining to the seller.

Put differently, the strategy of allowing employees to respond to consumer complaints with various forms of concessions not required by the contract may be seen as a cost-minimizing way for a store to increase the probability that it will both keep the business of insistent consumers and prevent such consumers from tarnishing its reputation (through social media, for example). By segmenting the insistent and the non-insistent buyers this way, the seller can save costs by offering the benefits only to those insistent buyers who expect them and would not buy the product without them.[[69]](#footnote-70)

A series of qualitative interviews I conducted in preparation for the audit study further sheds light on sellers’ use of the complaint-based mechanism.[[70]](#footnote-71) For example, in an interview conducted with a former store clerk at Abercrombie & Fitch (Chicago), she explained as follows:

Policy goes out the door when you have an unhappy customer. Policy goes out the door because you’re trying to keep that customer happy, so [you do] whatever you can do.[[71]](#footnote-72)

The decision about whom to treat more favorably than the contract requires involves a compromise between the costs and inconvenience sellers will incur from enforcing unwanted terms on complaining buyers and the costs saved from refusing to make concessions. Consumers who complain and continue to bargain might increase sellers’ costs of adhering to the contract for several reasons. First, in the short term, insistent consumers might create more confusion and inconvenience for the clerks and managers in the store. Second, insistent consumers are more likely to generate reputational harm to the seller than those who relent and acquiesce.[[72]](#footnote-73) And third, complainers are plausibly more likely to refrain from entering into future transactions with the seller.

The next Section shifts attention from the role of consumer assertiveness in shaping sellers’ enforcement decisions to other determinants of outcomes on the ground. It focuses on store characteristics and their relationship with sellers’ departure practices.

## Store Characteristics and the Gap

This Section explores whether various store characteristics are associated with sellers’ selective enforcement decisions.[[73]](#footnote-74) In particular, it tests the predictions that higher-end stores and chain stores will be more likely to depart from their formal agreements than will more casual (discount) and local stores.

The first proposition, that higher-end stores will be more likely to exercise leniency on the ground, even when the paper policy is controlled for, is based on the premise that these stores’ reputations derive not only from their formal policies, but also, perhaps even mainly, from their willingness to deviate from these policies when facing dissatisfied consumers.

This prediction was supported by several of the store clerks I interviewed. For example, a former store clerk at Saks Fifth Avenue mentioned, in response to my question as to whether she has ever deviated from the store’s formal return policy, that: “It’s up-scale so they want to be very customer-friendly. So they were much more bendable with the rules, and they are an expensive store so they don’t want to lose a customer fighting over $30.”[[74]](#footnote-75) Similarly, a former store clerk at the Bally high-end shoe store stated that:

In a high-end store you didn’t want to lose a good client. If you have a good client come back in, more so with the women than men, saying “you know, I’ve worn these shoes for a couple of weeks, and they really itch, and I tried to make adjustments, but they’re just not really working for me,” you’re not gonna [*sic*] lose someone spending $25,000 a year at your store over a $500 pair.[[75]](#footnote-76)

More casual stores, in contrast, build their reputations by offering lower prices. Therefore, they will likely offer no discretionary benefits but charge lower prices.[[76]](#footnote-77)

The second prediction, that chain stores will be more likely to engage in pro-consumer gaps than local stores, is based on the premise that chain stores, like higher end stores, are likely to suffer higher reputational losses from refusing to cater to their customers’ demands. Local stores, at the same time, are likely to deviate from their policies when facing repeat customers in order to maintain their loyalty. But, when dealing with one-time customers, chain stores are more likely to behave leniently than are local stores, either because, unlike many local sellers, it would be difficult for them to distinguish between one-time and recurring customers, or because even one-time customers might harm their reputation by telling others what happened through social media. These informational channels are likely to affect local sellers to a lesser degree. Finally, local sellers typically incur higher depreciation costs in terms of their lower ability to resell or return non-defective items to the manufacturer, and are therefore likely to adhere to their policy terms, while chain stores have more flexibility to deviate from the same terms.

A series of multivariate regression analyses was used to explore these hypotheses and to evaluate the determinants of sellers’ selective enforcement decisions.

In the first set of regressions, the dependent variable receives 1 if a pro-consumer gap was applied by the audited store, and 0 otherwise. The explanatory variables are the following store characteristics:

1. *Policy Type*: Harsh, moderate, or lenient;
2. *Luxuriousness:* Stores were classified as discount, mainstream, or high-end stores based on the median prices of clothing items posted on their websites. Discount stores were defined as all stores with median prices in the lower 25th percentile (i.e., lower than $28). Mainstream stores were defined as all stores with median prices between the 25th and 75th percentiles (i.e., between $28 and $78), and high-end stores were defined as all stores with median prices in the upper 25th percentile (i.e., between $78 and $1850);
3. *Store Type:* Whether the store is local or part of a chain;
4. *Experience (Age):* Calculated as logarithm of years of operation since establishment (until 2019);
5. *Size*: As calculated by logarithm of annual revenues from the year of 2018 (included as control).

Table 4 reports the results of six multivariate regression models. In Models One and Two, the dependent variable is assigned 1 if a pro-consumer gap was applied by the audited store (i.e., if non-receipted refunds, exchanges, or store credits were provided), and 0 otherwise. Model One looks at return outcomes at the first, pre-complaining stage, while Model Two looks at the final return outcomes, post-complaining. In models Three and Four, the dependent variable is whether a refund was provided notwithstanding the formal paper policy of either demanding receipts or denying refunds, while Model Three looks at outcomes at the first stage and Model Four looks at outcomes at the final stage. Finally, in Models Five and Six, the dependent variable is whether non-receipted returns were accepted (for exchange, store credit, or refund) despite testers’ failure to show a receipt, while looking only at the moderate and harsh policy stores that require a receipt for any return. Model Five looks at first stage outcomes, while Model Six looks at the final stage. Across all regression models, the dependent variable is regressed on all store characteristics, while controlling for policy type.

*Table 4. The Effects of Store Characteristics on the Gap*

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | (1)  Pro-Consumer  Gaps at Initial Stage as DV | (2)  Pro-Consumer  at Final Stage as DV | (3)  Refunds at Initial Stage as DV | (4)  Refunds at Final Stage as DV | (5)  Non-Receipted Returns at Initial Stage as DV | (6)  Non-Receipted Returns at Final Stage as DV |
| Moderate Policy | 0.355 | 0.257 | 0.220 | 0.181 | 0.182 | 0.0241 |
|  | (0.433) | (0.584) | (0.511) | (0.641) | (0.737) | (0.966) |
|  |  |  |  |  |  |  |
| Lenient Policy | 0.123 | -0.236 | 0.301 | 0.224 |  |  |
|  | (0.793) | (0.627) | (0.386) | (0.579) |  |  |
|  |  |  |  |  |  |  |
| Mainstream | 0.102 | 0.157 | -0.0492 | 0.0419 | 0.371\* | 0.447\* |
|  | (0.413) | (0.216) | (0.595) | (0.689) | (0.088) | (0.053) |
|  |  |  |  |  |  |  |
| High-end | 0.593\*\*\* | 0.470\*\*\* | 0.193 | 0.237\* | 0.678\*\* | 0.476\* |
|  | (0.000) | (0.005) | (0.102) | (0.078) | (0.011) | (0.078) |
|  |  |  |  |  |  |  |
| Chain | 0.448 | 0.688\*\* | 0.0785 | 0.173 | 0.455 | 0.711\* |
|  | (0.123) | (0.024) | (0.711) | (0.483) | (0.236) | (0.084) |
|  |  |  |  |  |  |  |
| Log Age | 0.157 | 0.237\*\* | 0.260\*\*\* | 0.211\*\* | -0.0422 | 0.0669 |
|  | (0.122) | (0.025) | (0.001) | (0.017) | (0.801) | (0.703) |
|  |  |  |  |  |  |  |
| Log Revenues | -0.0204 | -0.0365 | -0.046\*\*\* | -0.041\*\* | 0.0225 | -0.00088 |
|  | (0.384) | (0.134) | (0.010) | (0.044) | (0.555) | (0.982) |
|  |  |  |  |  |  |  |
| Constant | -1.148\*\* | -1.348\*\* | -1.200\*\*\* | -1.079\*\* | -0.411 | -0.658 |
|  | (0.033) | (0.017) | (0.003) | (0.021) | (0.600) | (0.427) |
| Observations | 95 | 95 | 95 | 95 | 56 | 56 |
| R-squared | 0.373 | 0.426 | 0.390 | 0.265 | 0.348 | 0.360 |
|  |  |  |  |  |  |  |

*Notes*. The first column (model 1) is a multivariate linear regression of pro-consumer gaps at the initial stage (taking the value of “1” if non-receipted refunds, exchanges, or store credits were provided, and “0” otherwise) on store policy type (with “Harsh” as reference category) and store characteristics. The second column (model 2) is a multivariate linear regression of pro-consumer gaps at the final stage on policy type and store characteristics. The third column (model 3) is a multivariate linear regression of refund outcomes at the initial stage on policy type and store characteristics. The fourth column (model 4) is a multivariate linear regression of non-receipted returns at the initial stage on policy type and store characteristics, and the fifth column (model 5) is a multivariate linear regression of non-receipted returns at the final stage on policy type and store characteristics. The reference category for policy type is “harsh,” the reference category for prestige is “discount,” and the reference category for store type is “local.” P-values in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01).

The results reveal that, consistent with the study’s predictions, high-end stores were significantly more likely to depart from their formal policies than discount stores, at both the initial (pre-complaining) and final (post-complaining) stages. In addition, chain stores were significantly more likely to apply pro-consumer gaps than local stores.[[77]](#footnote-78) The results also show a significant relationship between a store’s age (as determined by years since establishment) and its likelihood to depart from the policy in favor of consumers: The older, more experienced the store was, the more likely it was to behave more forgivingly than the formal policy dictated.[[78]](#footnote-79) Surprisingly, controlling for all other determinants, smaller stores were more likely to provide refunds despite testers’ failure to meet the policy requirements than larger stores. It is possible that, all else equal, smaller stores need to behave more forgivingly in order to be able to compete with the larger stores, yet this relationship should be further explored in future studies.

Why are higher end, more established, and chain stores more likely to depart from their policies when facing one-time consumers than were more casual, less established, and local stores?

Indeed, these sophisticated stores are typically significantly associated with more generous return policies on paper.[[79]](#footnote-80) However, even when keeping the paper policy constant across stores, higher end and more established stores, and stores operating as part of a chain, were more likely to depart from their policies in order to satisfy consumers’ demands. These findings suggest that product and store quality is signaled by, and reflected in, more generous return policies, both on paper and in practice. These findings also imply that “real deal” leniency and “paper deal” leniency are both correlated with product quality. Some consumers care about their withdrawal rights, and are willing to pay more for a better deal (on paper and in practice).

# IV. Discussion & Implications

## Selective Enforcement of Consumer Contracts

The results show that across various types of retail stores, sellers frequently depart from their formal return requirements in favor of consumers seeking to make returns. While this practice is more prevalent in some stores than in others, a significant proportion of retailers behaves more leniently towards consumers than their formal policies require, and this tendency is heightened once consumers complain.

What can explain this leniency on the ground? Some of the observed departures might be the result of store clerk error or a principal-agent problem. In particular, store clerks—seeking to avoid disputes, to please consumers, or to minimize commotion at the store (especially if it is crowded)—might depart from the store’s formal policy even if they do not believe that it is in the best interests of the store to provide the concession.[[80]](#footnote-81) Yet, the magnitude and systematic patterns of the findings, together with qualitative evidence from the interviews, suggest that sellers often use ostensibly rigid, unconditional terms in their standardized agreements for the purpose of distinguishing between different types of consumers. Consequently, even clear, bright-line terms in consumer agreements may be selectively enforced as store clerks exercise discretion on the ground.

For example, one store clerk, who had previously worked at a Halloween customs store, reported that the store had a strict receipt requirement because “many times people would shoplift from other stores and then attempt to return [the item].” Yet, the store had an informal policy that gave store clerks discretion on the ground. The store clerk continued to explain how he would exercise his discretion, reporting that “if I saw someone with a kid with them, or I saw someone I recognized from the neighborhood, I could make an exception, but [other than that], no [non-receipted returns were accepted].”[[81]](#footnote-82)

Another interviewee, who had previously worked at a large retail store, similarly explained that “the policy was written down, because if not, people could use a purse for twenty years, and then try to bring it back saying they don’t have a receipt. There were obviously cases of people who just lost their receipts. It happened to me as well—you think you put [it] in a safe place and you lose it, but there were cases in which people bought something back that was obviously used or damaged, [in which case] we would say that we can’t take it back without a receipt.”[[82]](#footnote-83)

As these examples illustrate, sellers are encouraged to complement clear and unconditional terms on paper with a concurrent policy authorizing their employees to diverge from these terms when courts are ill-equipped to identify opportunistic consumers.[[83]](#footnote-84) When the value of the benefit to consumers or the cost to the seller of offering it is observable to sellers but non-verifiable, or verifiable to courts only at a high cost, sellers may be incentivized to use such discretion-granting terms since these terms enable them to offer the benefits only to those consumers who ascribe to the benefits a value greater than the cost to the seller of providing them.

The strategy of allowing employees the discretion to grant case-specific benefits beyond those required by standard form contracts can also be viewed as a sophisticated way for the firm to increase its revenues by gaining the loyalty of existing customers while also establishing a good reputation that attracts new buyers.

As the findings reveal, sellers often use complaints to evaluate the value that consumers place on the specific benefit. Sellers may also focus on persistent customers out of fear that those who complain will create bad will for them, or because they assume that complaining customers who obtain relief will remain loyal and may even recommend the sellers to others.[[84]](#footnote-85)

Whatever the motivation, sellers often instruct store clerks to call the manager once consumers complain, while authorizing the latter to deviate from the formal terms in order to please complainers. As one of the interviewees, who had previously worked as a store clerk in Macy’s explained: “if someone came without a receipt, we would need to get the department manager’s approval if the customer started to get irate about it. If someone started to get angry, I would have to call the manager over, and then that manager would have a leeway on whether or not to accept the return.”[[85]](#footnote-86) Similarly, an interviewee who had previously worked in Marshall Field’s explained that “the manager obviously had more discretion, but part of calling the manager was to let the people know that […] the manager could be more firm, say this is damaged, let me show you a copy of the store’s return policy.”

Note that rather than giving managers on-the-ground discretion to deviate from the formal agreement on a case-by-case basis, sellers may authorize their representatives to operate according to a different set of rules.[[86]](#footnote-87) The decision whether to grant employees discretion or to provide them with clear-cut instructions on whether, when and how to deviate from the formal agreement will ultimately depend on the trade-off between the informational advantage that employees may obtain and the costs to the sellers of monitoring their employees’ exercise of discretion.

Importantly, the findings illustrate that sellers’ willingness to depart from their contracts need not be limited to interactions with repeat customers. Sellers that are repeat players in the market, with expectations of doing business with other consumers, are often discouraged from enforcing their rigid contractual requirements to the letter against consumers who make reasonable requests in good faith, even when the sellers do not expect to have further dealings with these particular consumers.

This tendency could be explained by the inherent asymmetry between sellers and consumers. While sellers are constrained by reputational forces, buyers typically are not. Consumers may therefore abuse a seller’s policy term without incurring reputational costs, while sellers will not be able to insist on enforcing the policy to its fullest extent against the consumer (even if the consumer is a one-time buyer) without harming their reputations in the market.[[87]](#footnote-88)

## Implications for Consumers

Selective enforcement of consumer contracts may be beneficial to consumers and welfare-enhancing overall, to the extent that (good-faith or high-value) consumers can receive benefits that exceed their contractual entitlements, while sellers can protect themselves from opportunistic buyers who would exploit a more lenient contractual arrangement.[[88]](#footnote-89) Yet, to the extent that consumers are inadequately informed about sellers’ selective enforcement practices, these practices might distort consumers’ and sellers’ decisions. The next section explains why distortions might occur, and surveys the types of *ex ante* and *ex post* distortions that “paper deal—real deal” disparities might generate.

### *Ex Ante* Distortions of Consumers’ Decisions

At the *ex ante,* pre-purchase stage,consumers might be unable to distinguish between sellers that strictly enforce their formal policies and those that, by not doing so, provide higher quality services. This informational lacuna could distort consumers’ purchasing decisions. For example, consumers might refrain from buying items from particular sellers because they may wrongly assume that these sellers enforce their policies to the letter, while, in fact, the latter often behave more leniently than their policies dictate.

Firms that enforce their terms to the letter will have no incentive to let consumers know that they provide lower quality services by virtue of their refusal to grant concessions. Sellers that systematically deviate from their policies when facing non-opportunistic consumers may be incentivized to advertise this practical leniency, thereby distinguishing themselves from the stores that strictly adhere to the written agreement vis-à-vis all consumers. But if a store’s policy to systematically under-enforce its policy is made public, store clerks might not be able to fend off those opportunistic consumers against whom the formal policy was adopted to protect in the first place. The fact that non-lenient firms benefit from the behavior of lenient firms by cloaking themselves as such might, in turn, lower the incentives of firms to be lenient, thereby resulting in a “lemons equilibrium.”[[89]](#footnote-90)

So why do gaps persist? One reason is that even if most consumers could not distinguish between high quality, lenient stores and low quality stores *ex ante*, stores may gain consumer loyalty and create a customer base by applying a gap *ex post* when consumers complain, thereby informing their more sophisticated consumers about their lenient policies in practice. Still, less sophisticated and one-time customers might not be able to distinguish among stores, and might make inefficient consumption decisions because of this informational asymmetry.

### *Ex Post* Distortions of Consumers’ Decisions

The observed gaps might also distort consumers’ behavior at the post-contract stage. First, consumers might be discouraged from even trying to obtain concessions from the seller that either vary from or directly contravene its formal policy. In the specific context of returns, consumers may be discouraged by the clear language of the policy and may consequently refrain from trying to return items to the seller if, according to the explicit terms of the policy, the items are not eligible for returns or if the consumers otherwise fail to meet the conditions set forth in the policy. In fact, sellers may adopt harsh contract terms precisely in view of this *in terrorem* effect on consumers.[[90]](#footnote-91)

Second, even if consumers do request concessions from sellers, they may relinquish their claims once sellers refer them to the contracts that they had “agreed” to enter into. Hence, the complaint-based mechanism observed in this study might be harmful to consumers. In this study, store clerks referred testers to the formal policy in the vast majority of stores, including half of the stores in which a gap was ultimately applied. Testers were instructed to continue to bargain and complain despite initial rejections of their claims. Yet, recent evidence suggests that other purchasers, perhaps most, would react to the store clerks’ initial negative responses dismissing their requests by acquiescing and accepting the formal contractual terms without dispute.[[91]](#footnote-92)

This reaction can be attributed to the fact that laypeople are contract formalists.[[92]](#footnote-93) They tend to believe that the contract is the final word, and this preconception may be particularly strong in the context of standardized consumer agreements.[[93]](#footnote-94) Consumers are often demoralized by harsh and unconditional contractual language, and consequently refrain from bringing claims to the seller.[[94]](#footnote-95) In fact, previous research has shown that consumers rarely question the validity of contracts that disclaim their mandatory rights and remedies.[[95]](#footnote-96) Consumers are similarly unlikely to challenge contracts induced by fraud because they feel bound by contracts they signed.[[96]](#footnote-97)

In the specific context of the gap, consumers are not likely to realize that sellers may depart from their policies upon consumers’ requests.

Indeed, a survey of 952 American cardholders has found that only one in ten cardholders has ever asked for a break on the annual fee, although more than half of those who asked succeeded in getting their annual fee waived (and 31 percent got the fee reduced). Similarly, only one in four customers asked for their late fees to be waived and only 19 percent asked for a lower interest rate, even though as many as 87 percent of those who asked received a late payment fee waiver, and 69 percent were able to obtain a lower interest rate.[[97]](#footnote-98) Consumers’ failure to ask for a more lenient treatment than required by their credit card agreements has persisted over time, despite headlines touting the success rates of cardholders who ask for late fee waivers and interest rate reductions.[[98]](#footnote-99)

Consumers may reasonably assume that if the seller’s policy was one of leniency, the seller would put this policy in writing in order to increase sales. If substantial proportions of high-value, non-opportunistic consumers are unlikely to complain, even when their gains from the concession exceed the costs to the seller, the observed complaint-based segmentation of consumers might lead to inefficient outcomes.

Yet, even if consumers do not relent and continue to bargain and complain, ultimately, if the sellers remain firm in their decision to strictly enforce their agreements, consumers do not have any real ability to discipline them. Having no legal entitlement, consumers cannot even threaten to take legal action.[[99]](#footnote-100)

Some of these concerns may be addressed and mitigated through informational flows. For example, consumers may post online reviews praising stores that exercise leniency while criticizing or shaming those that do not. Indeed, a substantial majority of consumers incorporates online reviews into their purchasing decision-making process. In a recent survey, 82% of the public said they at least sometimes read online ratings or reviews before purchasing items for the first time, and around 40% said they always or almost always do so.[[100]](#footnote-101) Sellers, in turn, may be incentivized to depart from one-sided terms, fearing the risks of reputational harm, either from attempting to impose unwanted terms on buyers or from becoming known as inflexible when disputes arise. Yet, there are reasons to fear that these informational flows will be inadequate in disciplining sellers.

First, consumers may not feel wronged by a seller’s adherence to the written policy, even if a seller is known for exercising leniency towards other consumers. In such cases, consumers may believe that the seller has a legitimate reason for failing to exercise leniency or to respond to their complaints, reasoning that a store that enforces the terms of its contracts, even selectively, is merely doing what it has a contractual right to do.

Concurrently, when sellers depart from the contract in favor of consumers, consumers might not report this more lenient behavior because they may believe, perhaps erroneously, that the seller’s leniency was a one-time occurrence rather than strategic, albeit concealed, behavior. Consumers are unlikely to realize that sellers use these harsh terms in order to fend off opportunistic consumers. For why would sellers advertise strict policies or terms that might discourage or scare away consumers, rather than more lenient terms that could encourage consumers to buy more, if sellers actually intended to behave leniently towards consumers at the post-contract stage? As a result, consumers may not share their experiences of sellers’ leniency with others.

But even if they did provide information about sellers’ deviations from their formal policies on social media, other consumers might fail to realize that these deviations reflect an informal policy, rather than one-time deviations, for the same reasons mentioned earlier. Furthermore, consumers might fail to search for information about sellers’ actual practices online, instead relying on the formal, written agreement or on the seller’s oral assertions.[[101]](#footnote-102)

### *Ex Ante* Distortions of Sellers’ Decisions

In addition to distorting consumers’ purchasing decisions, the ability to apply a gap might also lead sellers to adopt inefficient contractual risk allocations. It has so far been assumed that sellers’ strategy of combining rigid standard terms with *ex post* tailored forgiveness is welfare enhancing. For example, Jason Scott Johnston has argued that firms’ practice of providing benefits to consumers beyond those that their standard forms oblige them to provide help maintain “cooperative, value-enhancing relationships” between firms and their customers. Johnston further maintains that “were firms legally required to extend such benefits . . . —as would result either from judicial invalidation of the tough standard-form performance terms or legislatively mandated generous standard-form performance terms—then both firms and their customers would be worse off.”[[102]](#footnote-103)

Yet, this may not be true because of the *ex post* chilling effect of rigid, bright-line terms on consumers. Sellers may find it profitable to begin with a strict term, even if it is harmful to consumers as a group, under the assumption that a sufficient number of buyers will be discouraged from complaining about the contractual arrangement (or at least resign once the seller refers them to its written policy). If the aggregate costs of accommodating buyers who complain, of discouraging consumers from buying at the store, and of leavingbuyers who fail to complain disappointed—are lower than the costs of accommodating the claims of all consumers (including the non-insistent and the opportunistic), sellers will adopt the strict term denying the accommodation and depart only selectively in favor of those consumers who complain.[[103]](#footnote-104) Importantly, as the above analysis suggests, sellers may adopt the strict term (combined with *ex post*, complaint-based forgiveness) even if a more lenient term reflects a more efficient risk allocation from a social welfare perspective.

### Distributional Concerns

If consumer assertiveness is correlated with socio-economic status, sellers’ tailored forgiveness might have troubling distributive implications.[[104]](#footnote-105) There is abundant evidence that people from lower socio-economic backgrounds exhibit a lower sense of entitlement, a lower willingness to bargain over payoffs, and a higher inclination to accept unfavorable offers than do people from higher socio-economic strata.[[105]](#footnote-106) Similarly, race and gender were found to influence what people expect and feel they deserve, with blacks and females feeling significantly less entitled than do Caucasians and males.[[106]](#footnote-107) In the particular context of contracts, evidence suggests that consumers belonging to minority groups (e.g., black and female buyers) and to lower socio-economic status are more likely to feel bound by standardized agreements and to view the four corners of these agreements as the final word.[[107]](#footnote-108)

It is plausible therefore, that lower-income, less-educated consumers, as well as members of disadvantaged groups, will feel more discouraged and demoralized by the formal policy or by sellers’ initial refusals to grant concessions. This, in turn, might lead to a troubling conclusion that due to sellers’ selective enforcement of their formal agreements, poorer, less educated consumers, and racial and gender minority groups ultimately cross-subsidize those consumers who are better-off.

Take the credit card market, for example. According to a recent survey, higher-income consumers (earning annual salaries of over $75,000) were significantly more successful at securing late fee waivers, annual fee waivers, and credit limit increases than those who earn less.[[108]](#footnote-109)

The interviews conducted for this research provide further support for this prediction. For example, a former store clerk at a Chicago rug store explained, in response to the Author’s question as to whether he has ever deviated from the store’s formal return policy, that:

“Our policy was to charge a $100 delivery fee, but there might be something in the conversation […] where I’d say: ‘Ok, I’ll waive it for you’ if they ask. […] Those who managed to get their fees waived were typically white baby-boomers. […] There are plenty wealthy people of color who buy rugs, but to my memory, the people who would get their fees waived were mainly white. The black customers wouldn’t typically ask for their fees to be waived.”[[109]](#footnote-110)

Sellers’ complaint-based segmentation of consumers is likely to exacerbate these distributional effects. In this particular study, stores were nearly twice as likely to depart from the contract once consumers complained. If lower income, less educated consumers, and consumers belonging to minority groups, generally feel less entitled, they might be more likely to acquiesce and less likely to complain, compared to consumers with higher socio-economic backgrounds and majority group members.

In addition, allowing store clerks discretion in exercising leniency toward certain consumers might produce troublesome distributional outcomes to the extent that store clerks would use this discretion to the systematic disadvantage of certain group members.[[110]](#footnote-111) Store clerks might use their discretion in a discriminatory fashion either for animus-based or statistical-based reasons (for example, store clerks could potentially use race, gender, or perceived socioeconomic status as proxies of value to the firm of keeping such customers satisfied).

# V. Limitations and Future Directions

This study represents a first step towards uncovering an important and widespread, yet generally overlooked, phenomenon: selective enforcement of standard form consumer contracts. The results of the field study reveal that retail sellers selectively enforce the terms of their return polices to segment consumers *ex post*, after the transaction is consummated. As with any first step, the study inevitably leaves open many questions for future research, including questions concerning the generalizability of the findings, the mechanisms underlying the practice and the findings’ implications for consumers and consumer welfare.

Notably, this study has focused on a specific type of contract in a particular product market in one city. Future work could expand on the research by examining other types of consumer markets and contracts in different cities and states. For example, researchers could explore whether and how banks selectively enforce overdraft or other fees, how residential companies selectively enforce clauses pertaining to tenants’ obligations, how Uber or Lyft decide to waive their cancellation fees, and how credit card issuers decide whether or not to collect late payment fees.

Even within the context of product returns in the retail market, it is important to acknowledge the limitations of the study design. Six design choices in particular should be acknowledged. First, testers gave one specific reason for returning the purchased item, telling the clerk that they simply realized they did not need it. Although a customer’s change of mind is one of the leading reasons for returns,[[111]](#footnote-112) it may be the case that if the testers had given a different, perhaps more elaborate, reason, the observed gaps may have been higher. Higher gaps could arise especially if the reason for the return was that the item was defective. If this is indeed the case, it may mean that sellers’ departure decisions are substantially influenced by the information conveyed by the consumer, even when sellers cannot verify the accuracy of that information.

Second, the items were purchased using cash. One concern is that payment in cash may have resulted in sellers being less willing to accept the returns in view of their greater suspicion that the item was stolen or bought at another store. Yet, recent surveys of U.S. consumers show that, despite the growing popularity of credit cards, most Americans still use cash for some of their everyday purchases.[[112]](#footnote-113) Since testers returned relatively low-priced items, the concern that payment in cash may have raised store clerks’ suspicions is further reduced.

Third, the price of the items could have influenced sellers’ departure decisions. In this study, items’ prices were kept constant at around $20–$30, to ensure that price differentials were not driving the differences in return outcomes across stores. If items’ prices were higher, sellers may have been more reluctant to accept the returns, leading to lower rates of pro-consumer gaps, and vice versa. In addition, items’ prices were kept constant across all stores—high-end, mainstream, and discount. Since median prices at the high-end stores were significantly higher than $30, these stores may have had a stronger tendency to accept the returns than they otherwise would have if the returned items were more expensive. In future research, it may be worthwhile to return items with prices conforming to the median price at the store to control for sellers’ potential differences in treatment of returns according to item prices. It would also be useful to vary the prices of the items returned in order to explore whether higher prices result in lower willingness to accept the returns (even though the formal policy is uniform across items).

Fourth, this study has focused on a large city, Chicago. Admittedly, results may have been different if the study had been conducted in a suburb or a smaller city. For example, retailers in suburban areas and smaller cities may have different, less anonymous, clientele, consisting mostly of repeat customers. Sellers in these areas may, therefore, be more reluctant to depart from their contracts in favor of testers whom they have never met before, compared to sellers working in larger urban areas. This means that in other, less urban, areas, sellers would be even more reluctant to apply pro-consumer gaps when interacting with unfamiliar, one-time customers.

A fifth, related, qualification is that this study only allowed for an examination of how sellers behave towards one-time customers. However, it is possible, even likely, that repeat customers receive more generous treatment on the ground (even though the formal policy is the same for all customers). Indeed, the interviews I conducted with store clerks support this suggestion. One interviewee specifically mentioned that, “you didn’t want to lose a good client,” and that he was instructed to relax the formal return policy requirements in order to please repeat customers.[[113]](#footnote-114) If the observations from these interviews prove true, this may mean that sellers’ strategy of adopting harsh terms on paper alongside selective enforcement of these terms also helps firms nurture their clientele by discriminating in favor of repeat customers.

The differential treatment of repeat customers compared to one-time consumers might interact with the store type. For example, chain stores may be less likely than local stores to behave differently towards repeat customers, simply because such retailers cannot adequately identify repeat customers (unless the latter take part in loyalty programs or use membership cards). At the same time, local “mom and pop” stores that typically rely on a steady clientele are likely to treat repeat customers considerably more favorably than they treat one-time customers. This may also help explain why local stores adopt harsher terms to begin with. In addition to their higher costs of accepting returns, they might adopt harsher terms in order to segment repeat buyers and one-time customers, by enforcing their terms against the latter, while departing from these terms in favor of the former.

Finally, within the context of product returns, this study has focused on sellers’ enforcement of the receipt requirement. In the future, it may be beneficial to examine other restrictive terms and determine whether sellers’ departure decisions vary depending on the type and contents of the term in question. For example, would similar patterns persist if testers tried to return items to stores after the return period elapsed? Would they persist if testers tried to return items without their original packaging or with tags detached? It is reasonable to assume that sellers’ departure decisions are a function of the costs of departure on one hand, and the costs of keeping the particular consumer dissatisfied on the other. If the harm from failing to provide the benefit to the consumer exceeds the costs of exercising more leniency, sellers will provide the benefit notwithstanding the formal policy.

In addition to the future research directions identified above, several additional research directions are particularly noteworthy. First, the relationship between store type (chain or local), policy type (harsh, moderate, or lenient), and sellers’ departure decisions should be further explored. The study’s findings suggest that stores with harsher policies are less likely to depart from their policies than are stores with more lenient policies; but they also suggest that local stores are significantly more likely to adopt harsher policies than are chain stores. Since chain stores almost never adopt harsher policies on paper, it is impossible to assess whether, given the presence of a harsh formal policy, chain stores will behave differently than local stores. What the findings do suggest, however, is that chain stores are more likely to adopt more lenient policies than are local stores, and are also more likely to depart from their policies compared to local stores.

Second, as mentioned above, some of the observed pro-consumer departures could be the result of a moral hazard problem, with store clerks acting out of self-interest to avoid friction with consumers, rather than an internal policy of the store to selectively enforce its contractual requirements. In future work, it may be useful to send more testers to a single store over periods when different clerks are on duty. If results are consistent across store clerks within the same store, such findings will be supportive of this study’s hypothesis that the observed return decisions generally reflect store policy, and are not the result of individual clerks’ exercise of discretion or moral hazard.

Yet, the study does not enable us to distinguish between two potential types of internal policies. One type gives the seller’s representative discretion to grant case-specific benefits beyond those required by standard form contracts. The other type of policy instructs employees to employ a different set of rules, which are specific and clear-cut, allowing for no discretion, but not customer-facing. For example, some airlines have an informal “flat tire” rule, stating that customers who miss their flight due to unforeseen circumstances beyond their control—like a flat tire—are able to get on the next flight to their destination at no charge, as long as they arrive within two hours of the missed flight. While this policy is not customer-facing and could not be found in any of these airlines’ contracts of carriage, it does not actually allow airline representatives to exercise discretion. Rather, it provides for a different set of rules to be applied by the representatives on the ground instead of those stipulated in the formal contracts.[[114]](#footnote-115) At the same time, credit card issuers have reported making decisions about interest rate reductions, credit limit bumps and fee waivers on a case-by-case basis.[[115]](#footnote-116)

The strategy of allowing employees the discretion to grant case-specific benefits beyond those required by standard form contracts can be viewed as a sophisticated way for the firm to increase its revenues by gaining the loyalty of existing customers as well as establishing a good reputation that attracts new customers.[[116]](#footnote-117)

Third, this study has focused on brick and mortar stores.. Although e-commerce retail sales currently account for only ~15% of all retail sales worldwide, online shopping is increasingly gaining popularity.[[117]](#footnote-118) According to a 2016 Pew Research Center survey of U.S. consumers, roughly 80% of Americans do some of their shopping online. It is therefore important to explore sellers’ enforcement practices in online settings as well.[[118]](#footnote-119) Should we expect to see more, lower, or similar rates of selective enforcement with online platforms? On one hand, online platforms will allow sellers to use big data and algorithmic intelligence to better personalize contracts (in addition to products) *ex ante*, thus perhaps reducing the need to segment consumers *ex post*. At the same time, in cases where it is difficult to segment consumers *ex ante*, these same technological tools will enable sellers to better segment consumers *ex post*. In the context of product returns, for example, sellers will be able to track serial returners automatically and segment them based on type. Sellers may choose to accommodate customers who purchase several items with the intent of keeping only that one that fits best, while enforcing the formal policy against customers who buy items with no intention of keeping them afterwards based on the customers’ purchasing histories.[[119]](#footnote-120) In terms of distributional outcomes, sophisticated and high-income customers are likely to benefit from online selective enforcement more than their lower-income, less sophisticated counterparts. However, the effects of race and gender may be less pronounced in the online settings. Furthermore, market discrimination could be reduced if sellers have more transactional information on consumers, such as their purchasing history and past return behavior.[[120]](#footnote-121)

Another important research direction pertains to pro-seller gaps. Since this study has found that 8% of the stores exercised pro-seller departures, it is important to continue exploring this phenomenon in future research. Pro-seller gaps could arguably have been the result of clerks having been new, untrained, or simply having made mistakes. However, the finding that these mistakes were not corrected at the managerial level raises concerns that some sellers might be intentionally departing from their contractual commitments to consumers’ detriment, at least when consumers do not explicitly raise their contractual entitlements. In future work, it would be beneficial to manipulate whether testers mention their contractual entitlements and see whether this variable affects store clerks’ behavior.

To summarize, future studies should explore whether and when sellers selectively enforce their contract terms in other types of consumer markets, and further investigate the determinants of selective enforcement, the effect of consumer complaints on sellers’ decisions, and the implications of this practice for consumer welfare.

# Conclusion

This Article uncovers substantial discrepancies between return policies on paper and in action and illustrates how these discrepancies shape the interactions between sellers and consumers and the resulting market outcomes.

Consistent with the predictions of the prior literature, at least in the context of product returns, the “real deal” departs in meaningful ways from the “paper deal” in a non-negligible minority of stores. Yet, departure patterns vary across stores, policy terms, and consumers: Some terms are stickier than other terms, some stores are less likely to depart from their paper terms than other stores, and some customers are more likely to benefit from these departures than other customers. In particular, rigid “no refund” terms are less likely to be departed from than other, “softer” policy requirements; chain stores, high-end stores, and more experienced stores are more likely to exercise tailored forgiveness than local, more casual, and less experienced stores; and consumers who bargain and complain are more likely to obtain concessions than non-insistent consumers.

Given the observed variation in the divergence between the terms of the “paper deal” and the terms of the “real deal,” it is important for policymakers to unravel the terms of the “real deal” before concluding that regulatory intervention is warranted or unnecessary.

In addition to providing a descriptive framework, this Article also questions, on a normative level, the prevailing assumption that “pro-consumer” gaps are welfare-enhancing and conducive to consumers as a group. It proposes, rather, that these gaps might be harmful to consumers.

The Article points to two types of distortions: *ex ante* and *ex post*. *Ex ante*, consumers might not enter into beneficial transactions because they fail to realize that they will be able to benefit from a more lenient treatment than the policy requires. *Ex post*, consumers might fail to realize that the seller can depart from the “paper deal” in their favor, and might consequently refrain from requesting the benefit, or relent once the seller refers them to the standardized agreement. Sellers, at the same time, will not be incentivized to offer more lenient terms in their standard form contracts, even if they are efficient from a social welfare perspective, as long as the costs sellers incur from having to provide the benefit to *all* consumers (including opportunistic buyers) exceed the costs of discouraging certain consumers from buying at the store.

Finally, this Article suggests that gaps might lead to problematic distributional outcomes, both because insistence and assertiveness are correlated with higher socio-economic status, gender, and race, and because store clerks may apply their on-the-ground discretion discriminatorily. If these concerns are corroborated in future research, it may be warranted to monitor sellers’ behavior through the use of audit techniques similar to the technique used in this study.

While there is still much to be discovered about the gap and its implications, this Article makes an initial attempt to shift scholarly and regulatory attention from looking almost exclusively at the terms of the “paper deal” to looking more critically at the terms of the “real deal” in consumer markets and its implications for consumer welfare.

# Appendices

## A. Appendix A: Study Materials

### Interview Questionnaire

[*Interviews were conducted at the University of Chicago Law School in November 2018 in preparation for the field study. Fifteen interviewees—all current or former store clerks in Chicago—were recruited using online platforms (Craigslist and UChicago Marketplace). Interviews lasted 30 minutes and interviewees were rewarded $15 for their participation]*

1. Please tell me about your workplace—Where and when did you start working as a salesperson, and for how long?
2. Could you tell me about your training—Did you have any formal training when you started working as a salesperson? Who trained you? What did you learn during training? Were you provided with information about the stores’ return policy?
3. What is the store’s return policy? Did you receive instructions on how to implement the store’s return policy?
4. Do you remember if, during your time working at the store, customers asked to return items they had purchased from the store?
5. What would customers typically ask for when trying to make returns?
6. Did customers need a receipt to make a return?
7. Have customers ever asked you to return an item without a receipt?
8. If so, could you tell me what you would typically do in these cases? What were you supposed to do, according to the store’s management rules?
9. Did customers ever ask you to return an opened item? If so, could you tell me what you would typically do in these cases? What were you supposed to do, according to the store’s management rules?
10. Did customers ever ask you to return a damaged item? If so, could you tell me what you would typically do in these cases? What were you supposed to do, according to the store’s management rules?
11. Do you remember any situations in which you were told you can deviate from the store’s formal policy? If so, could you tell me about those situations?
12. Do you remember any other situations in which the store’s formal policy was different from the actual policy in terms of how it was applied to customers? If so, could you please explain?
13. Do you remember any situations in which customers complained or asked to talk to the store’s manager? What would the manager typically do under these situations?
14. Do you feel that different customers received different treatment when trying to return items to the store or in other situations?
15. Do you feel that some customers—for example African-Americans, Latinos, women, lower-class individuals—received different treatment? If so, could you explain how? And why do you think they received different treatment?
16. How important was it for the store to keep clients satisfied, and why?

### Summarized Instructions to Purchasers

Thank you for agreeing to participate in the study.

This is a study about retail stores’ return practices. You will be asked to go and buy items from stores located in downtown Chicago, while recording various details about the stores and the items purchased (please see the survey form).

You will be provided with a list of stores and their addresses. All stores are located in Chicago. You will be provided with money so that you could pay in cash for the items.

In each store, please buy two items for $20-$30. If there are no items within that price range in the store, please indicate so in the survey form and leave the store.

Please buy a clothing accessory if possible (i.e., a hat, gloves, socks, a scarf, a purse, or a bag). Otherwise, please buy a shirt, pants or another clothing item. Please do not buy underwear, swimwear, jewelry, electronic devices, “last act”/clearance/sale items, or any item that is not be eligible for returns (or will have stricter return requirements) according to the store’s return policy.

When making the purchase, please pay in cash and ask for separate bags and receipts for each item. Please keep the receipts—you will be required to bring the original receipts to the research team.

If the store clerk offers you to join a credit card/membership/sign up for something or asks for any personal details or contact information, please politely refuse and do not provide any such information.

If the store clerk asks if you would like a bag, please say yes and put each item in a separate bag.

While at the store, please see if there is a return policy sign anywhere. Please answer the related questions on the survey form and take a photo of the return policy as it appears on the sign. Please make sure the photographed policy is readable and scan the photo and email it to the project manager, Laura Ash Smith at: lsmith@jd20.law.harvard.edu.

### Summarized Instructions to Testers (Auditors)

*Before attending the training session, testers were provided with the following summarized instructions*:

Thank you for agreeing to participate in the study. This is a study about retail stores’ return practices. You will be asked to go and make non-receipted returns to stores located in Chicago, while following a memorized script, and to record the outcomes of your attempted returns as explained in detail below.

Preparation (before going to stores):

Please memorize the script below and follow it to the letter. We will practice the script during our simulation sessions. You will be provided with a list of stores and their addresses. All stores are located in Chicago. You will also be provided with items that you will need to return to the stores. Each item will be in its original package with tags attached. You will not have the receipt. Please come to the stores dressed in casual clothes: jeans, t-shirt, and minimal make-up.

At the store:

When you enter into the store, please record the following:

The date and time in which you entered the store.

Whether you see a sign with the return policy in the store.

How easy/difficult it was to find the sign in the store.

The font size of the in-store sign.

How crowded the store is

Please approach the first available store clerk at the service/check-out counter. If no clerk is available, please wait in line until a store clerk becomes available. If more than one store clerk is available, please choose the store clerk standing to the right. Please record the perceived race and gender of the store clerk. When it is your turn, and after the store clerk asks you: “what can I do for you?” please say: “I want to return this” and put the item you bought, unopened and in its original packaging, on the counter.

If the store clerk asks you why you want to return the item, please say: “Oh, I just realized I don’t need it.” At this stage, the store clerk will probably try to see if there is a receipt in the bag, and will ask you if you have your receipt. Please answer: “No, I thought I had it with me, but I looked for it, and it seems I lost it.”

If the store clerk asks you for your name, please say your name is Emily Baker / Allison O’Brian [you will receive a list of stores with the name you need to use in each]. If the store clerk asks for your ID, please say “Oh, I don’t have an ID on me at the moment.”

If they ask you when you bought the item, please say that you bought it a few days ago. If they ask you if you remember when exactly, please say: “I don’t remember when exactly.”

If the store clerk gives you a full cash refund, say “thank you” and leave the store. Please record this outcome as “full cash refund” under “outcome 1” in the survey form.

If the store clerk offers anything other than a full cash refund, please say “Are you sure I can’t receive a cash refund? I just bought this [\_\_\_] a few days ago and then realized I don’t need it.” If the store clerk still refuses to give you a full cash refund, please say: “Can you please call the manager? Maybe the manager could help…” If the manager comes, please tell him/her the following: “I bought this [\_\_\_] a few days ago, and I realized I don’t need it. For some reason, I can’t find my receipt. Is it possible to receive a refund?”

If the store clerk tells you “I’m the manager”, please say the following: “Oh…and are you sure there is nothing you can do?” If the answer is still no, or if the manager refuses to provide a refund, say “Ok, thank you, I’ll go back to search for the receipt, then” and leave the store.

If the store clerk refuses to call a manager, saying that he/she already knew what the manager was going to say, please say “Ok, thank you, I’ll go back to search for the receipt, then” and leave the store.

In some stores, the store clerk might tell you that the store does not accept returns (with or without a receipt). If this happens, please write it down in the comments.

### Post-Audit Surveys: Purchasers

Survey Forms for Store Purchasers

**Purchaser’s Name:** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Store number** (how many stores have you visited before this one): \_\_\_\_\_

**Please complete this form while at the store or immediately after leaving the store:**

*Background:*

1. Name of store: \_\_\_\_\_\_\_\_\_\_\_\_\_
2. Date of visit: \_\_\_\_\_\_\_\_\_\_\_\_\_\_
3. Time of visit: \_\_\_\_\_\_\_\_\_\_\_\_\_\_
4. Item Purchased (please check one):
   1. Hat \_\_\_\_\_
   2. Gloves \_\_\_\_\_
   3. Scarf \_\_\_\_\_\_
   4. Purse/Bag \_\_\_\_
   5. Shirt \_\_\_\_
   6. Pants \_\_\_\_
   7. Other: \_\_\_\_\_\_\_
5. Item Price: \_\_\_\_\_\_\_
6. If the store doesn’t offer any item within the $20-$30 price range, please check here: \_\_\_\_\_. Please don’t buy any item and leave the store.

*In-Store Sign:*

1. Is there a sign in the store that describes the return policy? Yes \_\_\_\_ No \_\_\_
   1. If there is a sign, how easy was it to find? Please check one:
      1. Very easy: \_\_\_\_
      2. Easy: \_\_\_\_
      3. Neither difficult nor easy: \_\_\_\_
      4. Difficult: \_\_\_\_
      5. Very difficult: \_\_\_\_
   2. If there is a sign, how big is its font (in your opinion)? Please check one:
      1. Very small (very difficult to read): \_\_\_\_
      2. Small (difficult to read): \_\_\_\_
      3. Neither small nor large: \_\_\_\_
      4. Large (easy to read): \_\_\_\_
      5. Very large (very easy to read): \_\_\_\_

*Inside the Store:*

1. How crowded is the store? Please check one:
   1. Not crowded at all: \_\_\_\_
   2. A little crowded: \_\_\_\_
   3. Moderately crowded: \_\_\_\_
   4. Crowded: \_\_\_\_
   5. Very crowded: \_\_\_\_
2. How would you describe the store? Please check one:
   1. Luxury (Upscale): \_\_\_\_\_\_
   2. Mainstream (Casual): \_\_\_\_\_\_
   3. Discount: \_\_\_\_\_\_
   4. Other: \_\_\_\_\_\_
3. Based on looking at items in the store, how would you describe their prices (on average, and based on your overall impression)?
   1. Very expensive: \_\_\_\_
   2. Quite expensive: \_\_\_\_
   3. Moderately priced: \_\_\_\_
   4. Quite cheap: \_\_\_\_
   5. Very cheap: \_\_\_\_
4. Was there a line at the service counter? Yes \_\_\_\_ No \_\_\_\_
   1. How many people were in front of you in the line? \_\_\_\_\_\_\_\_\_\_\_\_
   2. How many people were behind you in the line? \_\_\_\_\_\_\_\_\_\_\_\_\_\_
   3. How much time did it take you to reach the front of the line? \_\_\_\_ minutes.
5. Did the store clerk say anything about the store’s return policy when you made the purchase? If so—Please describe: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
6. Did the store clerk ask you for your name? \_\_\_\_\_

*Other:*

1. Do you have any other comments or issues that arose from your visit? If so, please explain: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

### Post-Audit Surveys: Testers

Survey Forms for Store Auditors

**Auditor’s Name:** \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

**Store audit number** (how many stores have you audited before this one):\_\_

**Please complete this form while at the store:**

*Background:*

1. Name of store: \_\_\_\_\_\_\_\_\_\_\_\_\_
2. Date of visit: \_\_\_\_\_\_\_\_\_\_\_\_\_\_
3. Time of visit: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Item Type: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

Item Price: \_\_\_\_\_\_\_\_\_\_\_\_\_\_

*In-Store Sign:*

1. Is there a sign in the store that describes the return policy? Yes \_\_\_\_ No \_\_\_
   1. If there is a sign, how easy was it to find? Please check one:
      1. Very easy: \_\_\_\_
      2. Easy: \_\_\_\_
      3. Neither difficult nor easy: \_\_\_\_
      4. Difficult: \_\_\_\_
      5. Very difficult: \_\_\_\_
   2. If there is a sign, how big is its font (in your opinion)? Please check one:
      1. Very small (very difficult to read): \_\_\_\_
      2. Small (difficult to read): \_\_\_\_
      3. Neither small nor large: \_\_\_\_
      4. Large (easy to read): \_\_\_\_
      5. Very large (very easy to read): \_\_\_\_

*Inside the Store:*

1. How crowded is the store? Please check one:
   1. Not crowded at all: \_\_\_\_
   2. A little crowded: \_\_\_\_
   3. Moderately crowded: \_\_\_\_
   4. Crowded: \_\_\_\_
   5. Very crowded: \_\_\_\_
2. How would you describe the store? Please check one:
   1. Luxury (Upscale): \_\_\_\_
   2. Mainstream (Casual): \_\_\_\_
   3. Discount: \_\_\_\_
   4. Other: \_\_\_\_\_\_
3. Based on looking at items in the store, how would you describe their prices (on average, and based on your overall impression)? Please check one:
   1. Very expensive: \_\_\_\_
   2. Quite expensive: \_\_\_\_
   3. Moderately priced: \_\_\_\_
   4. Quite cheap: \_\_\_\_
   5. Very cheap: \_\_\_\_
4. **Please complete this form upon leaving the store:**

*Background:*

1. Was there a line at the service counter? Yes \_\_\_\_ No \_\_\_\_
   1. How many people were in front of you in the line? \_\_\_\_\_\_\_\_\_\_\_\_
   2. How many people were behind you in the line? \_\_\_\_\_\_\_\_\_\_\_\_\_\_
   3. How much time did it take you to reach the front of the line? \_\_\_\_ minutes.
2. For the store clerk you spoke with:
   1. What do you think their race was? Please check one:
      1. Black: \_\_\_\_
      2. White: \_\_\_\_
      3. Asian American: \_\_\_\_
      4. Hispanic: \_\_\_\_
      5. Native American: \_\_\_\_
      6. Mixed: \_\_\_\_
      7. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   2. What do you think their gender was? Please check one:
      1. Female: \_\_\_\_
      2. Male: \_\_\_\_
      3. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   3. What do you think their age was? Please check one:
      1. Younger than 18: \_\_\_\_
      2. 18—30 years old: \_\_\_\_
      3. 31—50 years old: \_\_\_\_
      4. 51—70 years old: \_\_\_\_
      5. Older than 70: \_\_\_\_
3. Did the store clerk ask for:
   1. Your name? Yes \_\_\_\_ No \_\_\_\_
   2. Your ID? Yes \_\_\_\_ No \_\_\_\_
   3. Other information?
      1. Yes (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
      2. No \_\_\_\_
4. Did the store clerk ask you any other question?
   1. Yes (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   2. No \_\_\_\_
5. At first, what did the store clerk offer you? Please check one:
   1. Refund \_\_\_\_
   2. Store Credit \_\_\_\_
   3. Exchange \_\_\_\_
   4. Exchange for a different size/color only \_\_\_\_
   5. Nothing offered \_\_\_\_
   6. Other (please explain):\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
6. When you asked if the store clerk was sure that you could not receive a full cash refund, what did they say (please check all that applies)?
   1. That unfortunately that is all they could do without a receipt
   2. That they could ask a manager
   3. They called/asked a manager
   4. They called/asked another clerk at the store
   5. They offered:
      1. Refund \_\_\_\_
      2. Store Credit \_\_\_\_
      3. Exchange \_\_\_\_
      4. Exchange for a different size/color only \_\_\_\_
      5. Nothing \_\_\_\_\_\_
   6. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   7. Any additional comments? \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
7. When you asked to see a manager, what did the store clerk say/do?
   1. Said that he/she was the manager
   2. Said that the manager is not available
   3. Refused to call manager, saying he/she already knew what the manager was going to say
   4. Called the manager
   5. Went and spoke to manager
   6. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
8. Did you see a manager? Yes \_\_\_\_ No \_\_\_\_
   1. What do you think their race was? Please check one:
      1. Black: \_\_\_\_
      2. White: \_\_\_\_
      3. Asian American: \_\_\_\_
      4. Hispanic: \_\_\_\_
      5. Native American: \_\_\_\_
      6. Mixed: \_\_\_\_
      7. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   2. What do you think their gender was? Please check one:
      1. Female: \_\_\_\_
      2. Male: \_\_\_\_
      3. Other (please explain): \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_
   3. What do you think their age was? Please check one:
      1. Younger than 18: \_\_\_\_
      2. 18—30 years old: \_\_\_\_
      3. 31—50 years old: \_\_\_\_
      4. 51—70 years old: \_\_\_\_
      5. Older than 70: \_\_\_\_
9. When you talked to the manager, what did they offer you? Please check one:
   1. Refund: \_\_\_\_
   2. Store Credit: \_\_\_\_
   3. Exchange: \_\_\_\_
   4. Exchange for a different size/color only: \_\_\_\_
   5. Nothing offered: \_\_\_\_

*Other:*

1. Do you have any other comments or issues that arose from your visit? If so, please explain: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

## B. Appendix B: Supplemental Analyses

### Simple Linear Regressions of the Gap on Store Characteristics

*Table 1. Simple Linear Regression of the Gap on Store Prestige*

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) |
|  |  |  |  |  |  |  |
| Mainstream | 0.0278 | 0.0167 | 0.0269 | 0.0915 | 0.262 | 0.292 |
|  | (0.691) | (0.595) | (0.778) | (0.401) | (0.215) | (0.177) |
|  |  |  |  |  |  |  |
| High-End | 0.183\*\* | 0.317\*\* | 0.191\* | 0.319\*\* | 0.200 | 0.200 |
|  | (0.039) | (0.040) | (0.092) | (0.015) | (0.370) | (0.380) |
|  |  |  |  |  |  |  |
| Constant | 0.15 | 0.25\*\* | 0.0588 | 0.0556 | 0.200 | 0.400\*\* |
|  | (0.104) | (0.017) | (0.452) | (0.528) | (0.208) | (0.017) |
|  |  |  |  |  |  |  |
| Observations | 95 | 95 | 95 | 95 | 56 | 56 |
| R-squared | 0.077 | 0.071 | 0.053 | 0.093 | 0.053 | 0.061 |

*Notes*. The first column (model 1) is a simple linear regression of pro-consumer gaps at the initial stage (taking the value of “1” if non-receipted refunds, exchanges, or store credits were provided, and “0” otherwise) on store prestige. The second column (model 2) is a simple linear regression of pro-consumer gaps at the final stage on store prestige. The third column (model 3) is a simple linear regression of refund outcomes at the initial stage on store prestige. The fourth column (model 4) is a simple linear regression of non-receipted returns at the initial stage on store prestige (out of the stores that require a receipt for any return or exchange), and the fifth column (model 5) is a simple linear regression of non-receipted returns at the final stage on store prestige (out of the stores that require a receipt for any return or exchange). The reference category for store prestige is “discount.” P-values are reported in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01).

The results show that the store’s prestige significantly was significantly associated with return outcomes. High-end stores were significantly more likely than discount stores to apply a pro-consumer gap, both at the initial and final stages. High-end stores were also significantly more likely than discount stores to provide non-receipted refunds.

*Table 2. Simple Linear Regression of the Gap on Store Experience*

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) |
|  |  |  |  |  |  |  |
| Experience | 0.0863 | 0.0901 | 0.123\*\* | 0.0888 | 0.0853 | 0.218\* |
|  | (0.233) | (0.264) | (0.021) | (0.163) | (0.449) | (0.069) |
|  |  |  |  |  |  |  |
| Constant | -0.0795 | 0.0235 | -0.351\* | -0.162 | 0.000533 | -0.257 |
|  | (0.777) | (0.940) | (0.086) | (0.509) | (0.999) | (0.544) |
|  |  |  |  |  |  |  |
| Observations | 95 | 95 | 95 | 59 | 56 | 56 |
| R-squared | 0.021 | 0.019 | 0.079 | 0.029 | 0.019 | 0.103 |

*Notes*. The first column (model 1) is a simple linear regression of pro-consumer gaps at the initial stage (taking the value of “1” if non-receipted refunds, exchanges, or store credits were provided, and “0” otherwise) on store experience (measured by years since establishment). The second column (model 2) is a simple linear regression of pro-consumer gaps at the final stage on store experience. The third column (model 3) is a simple linear regression of refund outcomes at the initial stage on store experience. The fourth column (model 4) is a simple linear regression of non-receipted returns at the initial stage on store experience (out of the stores that require a receipt for any return or exchange), and the fifth column (model 5) is a simple linear regression of non-receipted returns at the final stage on store experience (out of the stores that require a receipt for any return or exchange). P-values are reported in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01).

*Table 3. Simple Linear Regression of the Gap on Store Size*

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) |
|  |  |  |  |  |  |  |
| Revenues (Log) | 0.00652 | 0.0122 | -0.00827 | -0.00659 | 0.0267 | 0.0398\* |
|  | (0.705) | (0.513) | (0.518) | (0.627) | (0.221) | (0.084) |
|  |  |  |  |  |  |  |
| Constant | 0.255\*\*\* | 0.339\*\*\* | 0.125\*\*\* | 0.141\*\*\* | 0.322\*\*\* | 0.500\*\*\* |
|  | (0.000) | (0.000) | (0.006) | (0.004) | (0.001) | (0.000) |
|  |  |  |  |  |  |  |
| Observations | 95 | 95 | 95 | 95 | 56 | 56 |
| R-squared | 0.003 | 0.008 | 0.008 | 0.004 | 0.057 | 0.111 |

*Notes*. The first column (model 1) is a simple linear regression of pro-consumer gaps at the initial stage (taking the value of “1” if non-receipted refunds, exchanges, or store credits were provided, and “0” otherwise) on store size (measured logarithm of annual revenues from the year of 2018). The second column (model 2) is a simple linear regression of pro-consumer gaps at the final stage on store experience. The third column (model 3) is a simple linear regression of refund outcomes at the initial stage on store experience. The fourth column (model 4) is a simple linear regression of non-receipted returns at the initial stage on store experience (out of the stores that require a receipt for any return or exchange), and the fifth column (model 5) is a simple linear regression of non-receipted returns at the final stage on store experience (out of the stores that require a receipt for any return or exchange). P-values are reported in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01).

*Table 4. Simple Linear Regression of the Gap on Store Size (Chain or Local)*

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
|  | (1) | (2) | (3) | (4) | (5) | (6) |
| Chain | 0.212\*\* | 0.153 | 0.0837 | 0.0928 | 0.340\*\*\* | 0.396\*\*\* |
|  | (0.023) | (0.159) | (0.208) | (0.235) | (0.003) | (0.002) |
|  |  |  |  |  |  |  |
| Constant | 0.0714 | 0.250\*\*\* | 0.0357 | 0.0714 | 0.0741 | 0.259\*\*\* |
|  | (0.356) | (0.007) | (0.521) | (0.276) | (0.347) | (0.006) |
|  |  |  |  |  |  |  |
| Observations | 95 | 95 | 95 | 95 | 56 | 56 |
| R-squared | 0.054 | 0.021 | 0.017 | 0.015 | 0.154 | 0.157 |

*Notes*. The first column (model 1) is a simple linear regression of pro-consumer gaps at the initial stage (taking the value of “1” if non-receipted refunds, exchanges, or store credits were provided, and “0” otherwise) on store type—chain or local (defined as a store that has no more than two locations, both in Illinois). The second column (model 2) is a simple linear regression of pro-consumer gaps at the final stage on store type. The third column (model 3) is a simple linear regression of refund outcomes at the initial stage on store type. The fourth column (model 4) is a simple linear regression of non-receipted returns at the initial stage on store type (out of the stores that require a receipt for any return or exchange), and the fifth column (model 5) is a simple linear regression of non-receipted returns at the final stage on store type (out of the stores that require a receipt for any return or exchange). P-values are reported in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01).

### Tables of Return Outcomes across Stores: Initial and Final Stages

Return Outcomes at the Initial Stage:

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Store Type | Return Denied[[121]](#footnote-122) | Exchange/Store Credit | Refund Offered | Pro-Consumer Gaps |
| Harsh  (No Refund)  )n = 23) | 91%\*\*\* | 9%\*\*\* | 0% | 9%\*\* |
| Moderate  (Receipt required for *any* return)  (n = 33) | 64%\*\*\* | 33%\*\*\* | 3%\*\* | 36%\*\* |
| Lenient (Receipt required for refund only)  (n = 39) | 8%\*\*\* | 74%\*\*\* | 18%\*\* | 18%\* |

*Note:* When the differences in return outcomes between two policy type categories are significant at the 1% level, they are marked as \*\*\*, when they are significant at the 5% level they are marked as \*\*, and when they are significant at the 10% level, they are marked as \*.

Return Outcomes at the Initial and Final Stages:

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Store Type | Stage | Return Denied[[122]](#footnote-123) | Exchange/Store Credit | Refund Offered | Pro-Consumer Gaps |
| Harsh  (No Refund)  (n = 23) | Initial | 91% | 9% | 0% | 9%\* |
| Final | 70% | 30% | 0% | 30%\* |
| Moderate  (Receipt required for *any* return)  (n = 33) | Initial | 64% | 33% | 3% | 36%\* |
| Final | 42% | 45% | 12% | 57%\* |
| Lenient (Receipt required for refund only)  (n = 39) | Initial | 8% | 74% | 18% | 18% |
| Final | 8% | 72% | 21% | 21% |

*Note:* When the differences in return outcomes between the initial and final stages (within policy category) are significant at the 1% level, they are marked as \*\*\*, when they are significant at the 5% level they are marked as \*\*, and when they are significant at the 10% level, they are marked as \*.

1. \* Olin Law & Economics Teaching Fellow and Lecturer in Law, University of Chicago Law School. E-mail: mfurth@uchicago.edu. This research was generously supported by the Coase-Sandor Institute at the University of Chicago and the Institute for Quantitative Social Science at Harvard University. [Acknowledgements to be added.] The methods used in this study have been approved by the University of Chicago Institutional Review Board prior to data collection (IRB Study Number: IRB 18-1529). [↑](#footnote-ref-2)
2. It has been estimated that ninety-nine percent of all commercial contracts are standard form contracts. *See, e.g.*, Florencia Marotta-Wurgler, *What’s in a Standard Form Contract*, 4 J. Empir. Leg. Stud. 677, 678 (2007) (citing David Slawson, *Standard Form Contracts and Democratic Control of Law Making Power*, 84 Harv. L. Rev. 599 (1971)). [↑](#footnote-ref-3)
3. *See, e.g.*,Henry Butler, Christopher Drahozal, & Joanna Shepherd, Economic Analysis for Lawyers 183 (3d ed. 2015) (explaining that “[f]orms reduce transaction costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices”); Randy E. Barnett, *Consenting to Form Contracts*, 71 Fordham L. Rev. 627, 630–31 (2002) (noting that “most professors and practitioners . . . know that form contracts make the world go round” and that “by using the form for each transaction, sellers standardize risks and reduce bargaining costs”); Robert A. Hillman, *Rolling Contracts*, 71 Fordham L. Rev. 743, 747 (2002)(explaining that standard forms benefit both sellers andconsumers by facilitating transactions); Richard A. Posner, Economic Analysis of Law 115 (6th ed. 2003) (explaining that sellers prefer form contracts to individual negotiations because they reduce transaction costs in addition to agency costs). [↑](#footnote-ref-4)
4. *See, e.g.*,Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va. L. Rev. 565, 591 (2006) (“[I]f consumers . . . have no information (or only poor information) about the effect of the contract terms used by any individual seller, each seller will . . . have an incentive to degrade the ‘quality’ of its terms.”); Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (noting that non-negotiable boilerplate terms are often overly harsh); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1202–03 (1983) (expressing concerns that since consumers often do not read the terms of their agreements with sellers, these terms tend to be one-sided and to favor the drafters); Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 Mich. L. Rev. 1235, 1235 (2006) (suggesting that boilerplate agreements typically contain “invisible” terms, defined as “terms not disciplined by the actual bargaining or shopping behavior of consumers even in price-competitive markets”). Other researchers have suggested that consumer contracts often contain terms that exploit consumers’ cognitive biases and misperceptions. *See, e.g.*, Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012) (showing how sellers design contracts that exploit consumers’ limited rationality and attention); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003) (arguing that drafting parties have an incentive to introduce self-serving terms in view of the non-drafting parties’ bounded rationality). [↑](#footnote-ref-5)
5. I borrow the terms “paper deal” and “real deal” from Stewart Macaulay, who used these terms in his work on divergences between formal agreements and their actual implementation in business-to-business transactions. *See, e.g.*,Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 Mod. L. Rev. 44, 79 (2003); Stewart Macaulay & William Whitford, *The Development of Contracts: Law in Action*, 87 Temple L. Rev. 793 (2014). [↑](#footnote-ref-6)
6. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963) (explaining how contracts in action differ from traditional legal views of contract using a case study of business people and lawyers). [↑](#footnote-ref-7)
7. *See e.g.*,Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 Va. L. Rev. 1089 (1981); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. Pa. L. Rev. 1765, 1787–88 (1996) (showing that “sophisticated merchant-transactors” often depart from official terms of agreements because of social norms, commercial custom, trust, or fear of non-legal sanctions, such as reputational damages); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001); Robert C. Ellickson, Order Without Law (1994) (studying how disputes are resolved in the cattle industry). [↑](#footnote-ref-8)
8. *See, e.g.*, Rakoff, *supra* note 3, at 1222–23 (explaining that “[t]he characteristics of firms counsel the adoption of standard forms and rigidify allegiance to them,” and arguing that the use of standard form contracts keeps “wayward sales personnel” in check by ensuring adherence to the terms of the form contract); *see also* Stewart Macaulay, *Private Legislation and the Duty to Read - Business Run by IBM Machine, the Law of Contracts and Credit Cards,* 19 Vand. L. Rev. 1051, 1059 (1966) (noting that form contracts efficiently control salesmen because they put customers on notice “of the salesman’s limited authority” and that firms want “to avoid being legally bound to expectations its salesman has created by his conduct that are inconsistent with company policy”).  [↑](#footnote-ref-9)
9. *See* Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts: Comment on the Work of Florencia Marotta-Wurgler*, 12 Jrsl. Rev. Legal Stud. 128, 129 (2015). [↑](#footnote-ref-10)
10. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 828 (2006). [↑](#footnote-ref-11)
11. *See, e.g.*, Bebchuk & Posner, *supra* note 9, at 828 (suggesting that “reputational considerations” may “induce the seller to treat the buyer fairly even when such treatment is not contractually required”); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wis. L. Rev. 679, 704–12 (2004) (suggesting that sellers may use a “contract clause that assigns an entitlement to the seller, but that the seller may underenforce when it is dealing with a good claimant”); Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Houston L. Rev. 975, 977 (2005) (making a similar observation); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation between Businesses and Consumers*, 104 Mich. L. Rev. 857, 858 (2006). For a similar observation in the context of franchise agreements, see Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 Am. Econ. Rev. 356, 358–60 (1980) (explaining that franchisors may include harsh termination clauses in their agreements to prevent cheating, while reputational mechanisms will constrain them from relying on these terms opportunistically). For a more recent paper suggesting that firms’ behavior is often more generous than their contractual language, see Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 69 (2019). [↑](#footnote-ref-12)
12. A preliminary question is whether return policies are legally binding contracts, given that they are typically presented on the back of the receipt, or on the store’s “terms and conditions” webpage, and are not always displayed on an in-store sign that the consumer can review prior to purchase. (In this study, in-store policy signs were posted in only 64% of the stores, while 88% had their policies laid out on their “terms and conditions” webpage and 80% included them on the back of their receipts.) “Pay-now-terms-later” or “shrink wrap” agreements are generally recognized as legally binding contracts, as long as the consumer had a reasonable opportunity to cancel the transaction after the terms were made available for review. *See, e.g.*, ProCD, Inc. v. Zeidenberg 86 F. 3d 1447 (7th Cir. 1996); Bischoff v. DirectTV, Inc., 180 F. Supp. 2d 1097, 1101 (C.D. Cal. 2002); Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 572 (N.Y. App. Div. 1998); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 308 (Wash. 2000). [↑](#footnote-ref-13)
13. *See, e.g.*,Gillette 2004, *supra* note 10, at 705 (suggesting that “the seller may offer a full refund to a buyer . . . notwithstanding that the terms of the contract permit a lesser remedy”); Bebchuk & Posner, *supra* note 9, at 833; Johnston, *supra* note 10, at 873 (suggesting that “[r]etail-return policies . . . dramatically illustrate the reality and significance” of what he terms “two-part standard-form contracts”—the contract on paper and the contract on the ground, while relying solely on anecdotal evidence); Becher & Zarsky 2019, *supra* note 10, at 69 (suggesting that “a vendor may stipulate a “no refund and no returns” policy, yet exhibit—at least in some circumstances—accommodating, lenient behavior”). [↑](#footnote-ref-14)
14. These findings provide the first systematic empirical support for the predictions made in the theoretical literature cited earlier. *See, e.g.*, Bebchuk & Posner, *supra* note 9, at 827–28; Gillette 2004, *supra* note 10, at 704–12 (suggesting that sellers may use a “contract clause that assigns an entitlement to the seller, but that the seller may underenforce when it is dealing with a good claimant”). [↑](#footnote-ref-15)
15. Similar observations have been made by several scholars, but without any meaningful empirical investigation into sellers’ actual practices. *See, e.g.*, Bebchuk & Posner, *supra* note 9, at 827–28 (“A seller concerned about its reputation can be expected to treat consumers better than is required by the letter of the contract. But the seller’s right to stand on the contract as written will protect it against opportunistic buyers.”); Gillette 2004, *supra* note 10, at 704–12 (suggesting that sellers may use a “contract clause that assigns an entitlement to the seller, but that the seller may underenforce when it is dealing with a good claimant”). [↑](#footnote-ref-16)
16. Several papers have similarly emphasized the problems of observability by courts in this context. *See, e.g.*,Gillette 2004, *supra* note 10, at 704; Bebchuk & Posner, *supra* note 9, at 834; Johnston, *supra* note 10, at 882. [↑](#footnote-ref-17)
17. The finding that chain stores are more likely to selectively enforce their return requirements than are local “mom and pop” stores is inconsistent with common perceptions of the latter stores as more customer-friendly and generous than chain stores. Yet, this result may be attributed to the lower ability of local stores to resell returned items or return them to the supplier. In addition, while the findings suggest that local stores are less likely to deviate from their contracts in favor of one-time customers than are chain stores, the former stores may be willing to display more leniency towards their recurring buyers. A further investigation of the relationship between the customer type (repeat or one-time buyer) and store type (local or chain) is warranted. [↑](#footnote-ref-18)
18. *See, e.g.*, Douglas Baird, Reconstructing Contracts 129 (2013) (“For all I knew, Norm had a form that disclaimed the implied warranty of merchantability, but such a disclaimer was irrelevant as long as reputational forces ensured that he would make amends if his goods did not pass in his trade.”); Yonathan Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop it*,Vand. L. Rev. (forthcoming 2020) (describing how large commercial firms have a special interest in identifying and placating consumers posing risks to the firm's reputation).  [↑](#footnote-ref-19)
19. *See, e.g.*, Robert Brendan Taylor, *Consumer-Driven Changes to Online Form Contracts*, 67 N.Y.U. Ann. Surv. Am. L. 371, 381 (2011) (noting that “firms whose products and contracts are exposed to a large number of people [will] be more likely to face scrutiny online”). [↑](#footnote-ref-20)
20. Elliot Regenstein, *Food Stamp Trafficking: Why Small Groceries Need Judicial Protection from the Department of Agriculture (and from Their Own Employees)*, 96 Mich. L. Rev. 2156, 2168 (1998) (discussing how larger stores are better able to detect consumer fraud than are smaller stores in the context of grocery store establishments); Joanna Shapland, *Preventing Retail-Sector Crimes*, 19 Crime & Just. 263, 268 (1995) (discussing the difficulties smaller stores face in preventing fraud or other crime in the retail context); Laura Fleming, *How Much Does J. Crew Really Know About You?: The Harsh Reality of A Mega-Retailer's Privacy Policy*, 31 Syracuse J. Sci. & Tech. L. 1, 9 (2015) (describing the sophisticated systems large retailers like J. Crew have in place for detecting consumer fraud in the return context, which can influence large retailers’ leniency or strictness in their return acceptance practices). [↑](#footnote-ref-21)
21. This finding is consistent with some of the predictions made in the literature, while conflicting with others. Jason Johnston, for example, has suggested that under certain circumstances, it is efficient for a firm to have strict rules that can be secretly relaxed in favor of those who complain (see Johnston, *supra* note 10, at 881), while Clayton Gillette has argued that it would often be useful for firms to enforce rules strictly against complaining consumers while relaxing them in favor of cooperative customers (see Gillette 2004, *supra* note 10, at 707). [↑](#footnote-ref-22)
22. *See, e.g.*, Arbel & Shapira, *supra* note 17 (suggesting that “nudniks” who complain often obtain better outcomes, as well as discipline sellers from misbehaving towards other consumers); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*,39 Pepp. L. Rev. 279 (2012). [↑](#footnote-ref-23)
23. Most of the literature on consumer complaints focuses on the consumer side, while little is known on when and how sellers segment consumers or handle consumer complaints. *See, e.g.*, Torben Hansen, Ricky Wilke, & Judy Zaichkowsky, *How Retailers Handle Complaint Management*, 22 J. Consumer Satisfaction 1, 1 (2009) (“[W]hile many studies have investigated the complaint process from the consumer side, those from the side of business are few and far between.”). For notable exceptions, see Christian Homburg & Andreas Furst, *See No Evil, Hear No Evil, Speak No Evil: A Study of Defensive Organizational Behavior Towards Customer Complaints*, 35 J. Acad. Marketing Sci. 523 (2007); Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. on Reg. (2016); Anthony Dukes & Yi Zhu, *Why Customer Service Frustrates Consumers: Using a Tiered Organizational Structure to Exploit Hassle Costs*, 38 Marketing Sci. 500 (2019) (suggesting that sellers use complaints to screen less severe and illegitimate claims). [↑](#footnote-ref-24)
24. *See, e.g.*, Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. Pa. L. Rev. 2109 (2015); Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 Stan. L. Rev. 1269, 1281–98 (2015) (finding that laypeople put excessive weight on written terms compared to oral agreements, believe that contracts are formed primarily through formalities such as signature and payment, even though contract law does not require such formalities for a contract to be formed, and feel generally obligated to abide by terms that follow formalized assent processes); Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 Geo. L.J. 5, 5 (2012) (arguing that laypeople feel they are bound to the signed contract); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Anal. 1 (2017) (finding, based on a survey of residential tenants, that tenants often rely on the written lease agreements as their main, or only source of information when disputes with the landlord arise); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 4 Ala. L. Rev. 1032 (2019) (providing experimental evidence that tenants fail to even contemplate the possibility that their leases contain unenforceable terms that restrict or deny their rights and remedies as renters); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 Stan. L. Rev. (forthcoming 2020) (providing experimental evidence that consumers are demoralized by fraudulent fine print even when it contradicts what they were promised at the pre-contractual stage). [↑](#footnote-ref-25)
25. *See infra* notes 99–104. [↑](#footnote-ref-26)
26. For similar distributional predictions, see, e.g., Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077, 2100 (2014) (suggesting that reputational forces “are much more likely to work in favor of large, recurring, and sophisticated customers—whose goodwill the supplier values highly—than in favor of the weak, occasional, and unsophisticated customer, whose goodwill is valued less”); Becher & Zarsky 2019, *supra* note 10, at 91 (suggesting that “uninformed and weak groups of consumers” will be disadvantaged, as “sophisticated and informed” groups will plausibly be treated more forgivingly or generously). [↑](#footnote-ref-27)
27. A follow-up study conducted by this author reveals that selective enforcement of consumer contracts might result in discriminatory exercise of discretion. The study uses an audit technique similar to the one reported on in this Article. Sixty retail stores (all belonging to national chains) located in downtown Chicago were audited by a team of 19 testers (five white male, five white female, five African American male, and four African American females). Each store was visited by four members of the research team—one white male, one white female, one African American male, and one African American female. They followed the same bargaining script used in this study and returned clothing items to each of the audited stores. The findings reveal that the audited stores were significantly less likely to accept non-receipted returns from African American testers, compared to white testers. [↑](#footnote-ref-28)
28. *See, e.g.*, Andrea Stojanoivc, *60 Latest Retail Statistics to Help you Build Your Business* (Aug. 5, 2019), available at https://www.smallbizgenius.net/by-the-numbers/retail-statistics/#gref; *see also* Lucas Reilly, *By the Numbers: How Americans Spend Their Money*, Mental Floss(July 17, 2012), available at http://mentalfloss.com/article/31222/numbers-how-americans-spend-their-money. [↑](#footnote-ref-29)
29. *See, e.g.*, Aaron Orendoff, *The Plague of Ecommerce Return Rates and How to Maintain Profitability* (Feb. 27, 2019), available at https://www.shopify.com/enterprise/ecommerce-returns. [↑](#footnote-ref-30)
30. Courtney Reagan, *A $260 Billion ‘Ticking Time Bomb’: The Costly Business of Retail Returns*, CNBC (Dec. 16, 2016), available at https://www.cnbc.com/2016/12/16/a-260-billion-ticking-time-bomb-the-costly-business-of-retail-returns.html. [↑](#footnote-ref-31)
31. According a recent consumer poll, 91% of consumers consider return policies as very important to their purchasing decisions. *See* Rimma Kats, *Many Consumers Avoid Retailers with Strict Return Policies*, eMarketer (Jan. 1, 2018), available at https://retail.emarketer.com/article/many-consumers-avoid-retailers-with-strict-return-policies/5a4c05a7ebd40008a852a26c; AllBusiness.com, *The Importance of a Good Return Policy*, N.Y. Times (July 10 2007), https://archive.nytimes.com/www.nytimes.com/allbusiness/AB4353479\_primary.html. On the importance of the right to withdraw to consumers, see alsoEyal Zamir & Doron Teichman, Behavioral Law and Economics 290–91 (2018) (arguing for the importance of the right to withdraw given that consumers may be subject to sellers’ deceptive “low-ball[ing]” and “bait-and-switch” tactics); Shmuel Becher & Tal Zarsky, *Open Doors, Trap Doors and the Law*, 74 L. & Contemp. Probs. 63, 72–73 (2011) (discussing how sellers often use generous “open door policies” allowing consumers to return purchases in order to attract consumers to buy at the store). [↑](#footnote-ref-32)
32. There are few notable exceptions to this general rule. Federal law provides for a cooling-off period in a handful of door-to-door transactions. *See* 16 C.F.R. § 429 (stating the federal “Cooling-Off Rule,” which stipulates that buyers are entitled to a three-day “cooling-off period” during which the buyer can cancel certain door-to-door sale transactions). The Truth in Lending Act of 1968 similarly allows consumers three business days to cancel credit transactions (see 15 U.S.C. §§ 1601). *See also* 27 C.F.R. § 11.32 (granting consumers the right to return defective products); 27 C.F.R. § 11.33 (granting consumers the right to return products in case of “any discrepancy between products ordered and products delivered”). At the state level, some jurisdictions provide little additional protections beyond those laid out federally, and some (e.g., Illinois, Connecticut, Washington, Pennsylvania, and Michigan) have even expanded the federal three-day right to cancel transactions to extend to certain purchases not covered under federal law (e.g., gym memberships). Still others require stores to disclose their return policies, or else (e.g., New York and Massachusetts) mandate a right to withdrawal for stores where policies prohibiting returns are not clearly displayed. [↑](#footnote-ref-33)
33. *See, e.g.*, Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. Legal Stud. 115, 139–40 (2011) (advocating for a default right to withdraw); Zamir & Teichman, *supra* note 30, at 292 (discussing the desirability of regulating the right to withdraw from a behaviorally informed perspective, and suggesting that “[a]t the very least, contract terms that unreasonably raise the costs of exercising the return option appear to warrant regulation”); Becher & Zarsky 2011, *supra* note 30, at 63–64, 89 (suggesting that regulators who embrace “the open door dynamic”—i.e., those who promote mandatory or default rights of withdrawal—may misunderstand “crucial elements” of consumer psychology that explain consumers’ reluctance or inability to invoke those rights in practice). In support of regulating consumer contracts more generally, see, e.g., Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 Wm. & Mary L. Rev. 1635 (2006) (arguing that sellers are often financially incentivized to inflate—rather than reduce—consumer transaction costs). [↑](#footnote-ref-34)
34. *See, e.g.*, Jan M. Smits, *Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind?*, 29 Pa. St. Int’l L. Rev. 671, 678–83 (2011) (questioning the utility of imposing mandatory withdrawal rights, due to their ability to undermine sellers’ incentives to grant withdrawal rights anyway for the purposes of “creating trust and attracting consumers”). [↑](#footnote-ref-35)
35. Johnston, *supra* note 10, at 873–74 (discussing the commonality of liberal return policies as standard practice in, e.g., consumer electronics and other retail areas). Others have relied on the observed commercial norms to justify more comprehensive regulation of consumers’ withdrawal rights. *See, e.g.*, Zamir & Teichman, *supra* note 30, at 291 (advocating the importance of lenient return policies with cooling-off periods to protect consumers); Ben-Shahar & Posner, *supra* note 32, at 120–21 (noting that “nearly all retail stores in the United States permit customers to return merchandise for a refund,” and calling for the adoption of a default right to withdraw). [↑](#footnote-ref-36)
36. *See, e.g.*, Tiffany Hsu, *L.L. Bean, Citing Abuse, Tightens its Generous Policy on Returns*, N.Y. Times (Feb. 9, 2018), available at https://www.nytimes.com/2018/02/09/business/ll-bean-returns-policy.html (explaining L.L. Bean’s decision to amend its lifetime return policy to a one-year return policy, with proof of purchase, in response to consumer abuse); *see also* Khadeeja Safdar & Laura Stevens, *Banned From Amazon: The Shoppers Who Make Too Many Returns*, Wall Street J. (May 22, 2018), available at https://www.wsj.com/articles/banned-from-amazon-the-shoppers-who-make-too-many-returns-1526981401 (explaining Amazon’s decision to close accounts of consumers taking advantage of its generous return policy). [↑](#footnote-ref-37)
37. *See, e.g.*, Ariella Gintzler, *L.L. Bean’s Lifetime Return Policy is No More*, Outside (Feb. 9, 2018), available athttps://www.outsideonline.com/2280581/ll-bean-tightens-generous-return-policy (describing a class action suit filed against L.L. Bean in response to the changes the company made to its return policy); Shirley v. L.L. Bean, Inc., No. 3:18-cv-02641 (filed May 4, 2018) [class action complaint], available at https://www.documentcloud.org/documents/4475198-LLBean2.html. At the same time, some stores are adopting more generous return policies. *See, e.g.*, Donna L. Montaldo, *Target Bucks the Trend with a New Super Lenient Return Policy*, The Balance (Aug. 6, 2019), available at https://www.thebalance.com/target-s-new-return-policy-939859. [↑](#footnote-ref-38)
38. *See, e.g.*, Jeanine Skowronski, *Shopper Outrage: Refund Loopholes*, The Street (Feb. 28, 2011), available at https://www.thestreet.com/slideshow/12795160/1/shopper-outrage-refund-loopholes.html. [↑](#footnote-ref-39)
39. Retailing and marketing studies offer some insight into retailers’ return policies, but they typically focus on the relationship between return policy leniency and consumers’ purchasing and withdrawal decisions. For meta-analytic reviews of this literature, see generally Narayan Janakiraman, Holly A. Syrdal, & Ryan Freling, *The Effect of Return Policy Leniency on Consumer Purchase and Return Decisions: A Meta-analytic Review*, 92 J. Retailing 226 (2016); Scott Davis, Michael Hagerty, & Eitan Gerstner, *Return Policies and the Optimal Level of Hassle*, 50 J. Econ. & Bus. 445 (1998). [↑](#footnote-ref-40)
40. The audit technique used in this study is similar to audit techniques used in discrimination studies. For discrimination studies using an audit technique, see, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 Harv. L. Rev. 817, 822–27 (1991) (employing audit methodology to study discrimination in car dealerships, finding that sellers in retail car dealerships systematically offered substantially better prices on identical cars to white men than they did to African-American and women); Ian Ayres and Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 Am. Econ. Rev. 304, 305–06 (1995) (same). These studies necessarily involve a certain degree of deception, and therefore inevitably raise important questions of research ethics. On the proposed guidelines of the Federal Judicial Center Advisory Committee on Experimentation in the Law for limiting the use of deception in legal experimentation, see Advisory Comm. on Experimentation in the Law, Fed. Judicial Center, Experimentation in the Law 46 (1981) (concluding that “[d]eception requires (1) that the concealment itself be indispensable to the validity of experimental results, and (2) that the burden of justification for the practice concealed not merely be met, but met by a clear and convincing margin”). On the ethical concerns raised by field studies in law more generally, see, e.g., Jacob Kopas & Dane Thorley, *Experiments in the Court: The Legal and Ethical Challenges of Running Randomized Field Experiments in the Courtroom* (June 20, 2018), available at https://ssrn.com/abstract=2994298; Michael Abramowicz, Ian Ayres, & Yair Listokin, *Randomizing Law*, 159 U. Pa. L. Rev. 929 (2011); D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession*, 12 Annual Rev. L. & Soc. Sci. 295, 305–08 (2016). The study’s design sought to minimize the effects of the tests on sellers by conducting tests at off-peak hours (mid-afternoons during the week). In addition, in accordance with IRB instructions (and with the law in Illinois), the testers’ conversations with store clerks were not recorded or videotaped. Rather, testers recorded their audit results using survey forms prepared by the Author. Ultimately, the benefits from documenting such potentially significant market practice—selective enforcement of consumer contracts—hopefully outweigh the costs and justify the use of deception in this study. [↑](#footnote-ref-41)
41. In a larger sample of 192 retail stores (established for a separate study), receipt requirements were mentioned in 84% of the return policies. For evidence that receipt requirements are perceived as a hassle by consumers, see, e.g., Janakiraman, Syrdal, & Freling, *supra* note 38. [↑](#footnote-ref-42)
42. Another opportunistic behavior that retail sellers often try to protect themselves from is “buy-to-rent” strategies, whereby consumers purchase a product in order to use it for a specific purpose or event, and then return it for a full refund afterwards, thereby obtaining free rent. In order to protect themselves from such opportunistic behavior, retailers often formally require consumers to return items “unused” and “with tags attached.” The receipt requirement is less effective in protecting sellers from the “buy-to-rent” problem, since consumers can buy the item, use it, and then return it with a receipt. In order to minimize concern that sellers’ reluctance to accept the returns would be driven by their suspicions that the items were stolen, testers were instructed to return the items unused, in their original packaging, and with tags attached. [↑](#footnote-ref-43)
43. While the study’s sample includes high-end stores (as long as at least one of the items they offered in store met the price criterion), it can admittedly shed limited light on the return practices of the most expensive stores that do not offer items for $30 or less. I leave this issue for future research. [↑](#footnote-ref-44)
44. A local/independent retailer is defined as any retailer with ten or fewer locations, in accordance with the definition of the Census Bureau. [↑](#footnote-ref-45)
45. Python was used to scrape the stores’ websites. Some stores blocked access to their websites, and these websites (n = 17) were manually coded. Coders and programmers were instructed to derive the median prices of the items based on clothing items only, in order to keep the analysis tractable across stores with different offerings. Median prices were chosen instead of mean prices, as mean prices—unlike median prices—are affected by outliers (i.e., extremely expensive or very cheap products). [↑](#footnote-ref-46)
46. Age refers to the number of years of operation since incorporation. Data on firms’ revenues and age were obtained primarily from Bloomberg Law and Hoover’s Company Directories’ databases. [↑](#footnote-ref-47)
47. Independent “mom and pop” retailers account for nearly half of the total retail sales in the United States. *See* Nicole Leinbach-Reyhle, *Celebrating Independent Retailers: Their Surprisingly Strong Future*, Forbes (July 3, 2014), available at https://www.forbes.com/sites/nicoleleinbachreyhle/2014/07/03/celebrating-independent-retailers-their-strong-future/. [↑](#footnote-ref-48)
48. For consistency, testers were instructed to audit the stores on weekdays in the afternoons. [↑](#footnote-ref-49)
49. Research assistants (purchasers) were sent to purchase the items in advance. They paid in cash so that sellers would not obtain any personal information from the purchase. The items were then returned by different members of the research team—the testers. This design was chosen for several reasons. First, it allowed for the purchase of two identical items from each store, so that items would not vary within stores. Second, it mitigated the concern that in some stores, store clerks would remember the person making the return whereas in others, testers would encounter different store clerks. Still, this design raises the concern that in some stores, particularly the smaller ones, store clerks were more suspicious of the testers making the returns because the clerks did not remember the testers making the purchase at the store in the first place. It could therefore be the case that, at least in the smaller stores, the findings underestimate the likelihood of a pro-consumer departure. The results should therefore be interpreted as testing whether, in view of reputational constraints, sellers depart from the formal policy even when they do not identify the particular, one-time buyer. [↑](#footnote-ref-50)
50. The study was designed to minimize differences in treatment *among* stores. For that purpose, purchasers were instructed to buy a clothing accessory (i.e., a hat, gloves, socks, scarves, purses, or bags). If no accessories were available, they were instructed to buy a shirt, pants, or another clothing item. They were specifically instructed to refrain from buying underwear, swimwear, jewelry, electronic devices, “final”/clearance/sale items, or any item that was specifically not eligible for returns according to the stores’ formal return policies. Prices were kept constant at between $20 to $30. [↑](#footnote-ref-51)
51. It is possible that store clerks’ willingness to depart from the formal policy would vary depending on the reason offered by testers. For example, if testers had said that they had bought the wrong size, or received the item as a gift and did not like it, store clerks may have responded differently. The generic excuse used in the study was meant to allow testers to request a refund, rather than merely exchange or store credit. Unlike returning a gift or exchanging an item for a different size, explicitly saying that they do not need the product makes asking for a cash refund rather than an exchange or store credit more credible and reasonable. [↑](#footnote-ref-52)
52. The composition of pairs varied from audit to audit: Rather than matching tester A with tester B for all tests, A was sometimes matched with B, sometimes with C, and so on. [↑](#footnote-ref-53)
53. Testers obtained inconsistent return outcomes in 15% of the stores sampled (n = 132). An analysis that includes the stores in which inconsistent observations were obtained does not significantly change the results. Pro-consumer gaps (defined as any case in which at least one of the testers obtained a more lenient treatment than the contract requires) were present in 23% of the sampled stores (while the more conservative analysis, reported in the main text, has yielded a 22% rate of pro-consumer gaps). No significant relationship between inconsistency of results and stores’ characteristics was observed. [↑](#footnote-ref-54)
54. Testers were accompanied by project coordinators to the stores. The coordinators ensured that testers were following the script and accurately reporting the results. [↑](#footnote-ref-55)
55. For the purpose of documenting in-store signs, research assistants (RAs) were sent to the sampled stores. The RAs were instructed to look for a return policy sign and take a clear photo of any sign they managed to locate. [↑](#footnote-ref-56)
56. Whenever one or more of the informational sources—receipts, in-store signs, or websites—included a receipt requirement or a “no refund” policy term, the return policy was coded accordingly. The two coders were in agreement 91% of the time. Whenever the two coders were not in unanimous agreement about the proper classification to assign to a policy, a third RA coded the policy; and the coding given by the two-person majority was used. [↑](#footnote-ref-57)
57. Importantly, the sample did not include any stores that did not allow for refunds while at the same time allowing for non-receipted exchanges or store credits. Similarly, by design, the sample did not include any stores that did not explicitly require receipts (either for a refund or for any return or exchange). [↑](#footnote-ref-58)
58. Under a simple regression of initial return outcomes (defined as a categorical variable taking 0 if returns are denied, 1 if exchange or store credit is offered, and 2 if refund is provided) on store policy type (harsh, moderate, or lenient), *b* = 0.26, SE = 0.14, *p* < 0.1 for moderate policies, and *b* = 0.97, SE = 0.13, *p* < 0.001 for lenient policies (with harsh policies serving as the reference category). The difference between lenient policy stores and harsh policy stores remains significant once store demographics (i.e., age and size) are controlled for, but the difference between moderate and harsh policy stores becomes insignificant. [↑](#footnote-ref-59)
59. 56 Stores with moderate policies were also marginally significantly more likely (at the 10% level) to depart from their policies than were stores with lenient return policies. Yet, this finding should not be surprising in view of the fact that lenient policy stores formally allow consumers to return non-receipted items for exchanges or store credits, whereas the other stores do not. Indeed, in terms of overall return outcomes, consumers obtained significantly higher rates of returns among the lenient policy stores (92%) than among the mainstream stores (36%), *b =* 0.83, SE = 0.09, *p* < 0.001. [↑](#footnote-ref-60)
60. In this study, only one of the harsh policy stores (4%) belongs to a chain, while the remaining 96% belong to independent retailers. The correlation between store type (chain or local) and policy type is 0.75. A regression of formal policy type on stores’ characteristics reveals that local stores are significantly more likely to adopt harsh policies, compared to chain stores, even when controlling for the store’s age and size and for whether the store is public or private (*b =* 0.22, SE = 0.05, *p* < 0.001). [↑](#footnote-ref-61)
61. In the script, consumers were instructed to complain and ask to speak to the manager if denied the return, but they were instructed not to mention the contractual language. In future research, it is desirable to explore how sellers react when testers/consumers point them to the language that entitles them to the denied benefit (by manipulating the script, such that half of the stores are audited by “informed” consumers and half are audited by “ignorant” buyers). [↑](#footnote-ref-62)
62. *See, e.g.*, Gillette 2004, *supra* note 10, at 707 (hypothesizing, without providing empirical data, that sellers might distinguish between insistent and non-insistent buyers); Johnston, *supra* note 10, at 881 (suggesting that firms use customer complaints to determine the value of the concessions to consumers). [↑](#footnote-ref-63)
63. *b* = 0.35, SE = 0.09, *p* < 0.001. [↑](#footnote-ref-64)
64. *b* = 0.27, SE = 0.11, *p* < 0.05. More particularly, lenient stores were significantly more likely to offer exchanges or store credits than both moderate (*b* = 0.26, SE = 0.11, *p* < 0.05) and harsh policy stores (*b* = 0.46, SE = 0.12, *p* < 0.001). They were also marginally significantly more likely than harsh policy stores to offer refunds (*b* = 0.16, SE = 0.09, *p* < 0.1). [↑](#footnote-ref-65)
65. Under a regression of return outcomes (where 1 = pro-consumer gap, 0 otherwise) on the complaining treatment, *b* = 0.14, SE = 0.07, *p* < 0.05. [↑](#footnote-ref-66)
66. A paired t-test analysis reveals that for refund the effect was marginally significant: t = 1.64, df = 94, *p* = 0.052; for non-receipted returns: t = 1.78, df = 55, *p* < 0.05. [↑](#footnote-ref-67)
67. The effect of complaining on the gap among the moderate policy stores is significant at the 10% level, *b* = 0.21, SE = 0.12, *p* = 0.09. For moderate stores, complaining significantly improved the chances of receiving a non-receipted return or exchange (*p* < 0.05), while its effect on refund rates was marginally significant (*p* < 0.1). The effect of complaining on the gap among the harsh policy stores is significant at the 10% level, *b* = 0.21, SE = 0.11, *p* = 0.06. For harsh policy stores, complaining significantly improved the chances of receiving a non-receipted return or exchange (*p* < 0.05) but there was no effect on refund outcomes. [↑](#footnote-ref-68)
68. *b =* 0.02, SE = 0.09, *p* = 0.8. [↑](#footnote-ref-69)
69. *See, e.g.*, Dukes & Zhu, *supra* note 22 (suggesting that sellers use complaints to screen out less meritorious claims). [↑](#footnote-ref-70)
70. Before embarking on the audit study, I had interviewed fifteen store clerks from Chicago about their interactions with customers and management. Store clerks were recruited for the interviews through two online platforms: Craigslist and UChicago Marketplace. The interviews were semi-structured, and mainly focused on exploring whether and when store clerks are given discretion to depart from the stores’ formal policies in practice. *See* “Interview Questionnaire” in Appendix A, *infra*. [↑](#footnote-ref-71)
71. Interview #12 with Abercrombie & Fitch store clerk (interview script on file with the Author). [↑](#footnote-ref-72)
72. *See, e.g.*,Janelle Barlow & Claus Moller, A Complaint is a Gift: Recovering Customer Loyalty When Things Go Wrong(2008) (suggesting that “the more dissatisfied customers become, the more likely they are to use word-of-mouth to complain about the business”). [↑](#footnote-ref-73)
73. The store clerks’ characteristics, including race and gender, may also be associated with their willingness to depart from the contract. To explore these relationships, testers were asked to report the perceived race and gender of the store clerks. A regression analysis of the gaps on store clerks’ and managers’ characteristics reveals no significant association between the race or gender of the store clerk/manager and return outcomes on the ground. [↑](#footnote-ref-74)
74. Interview #7 with Saks Fifth Avenue store clerk (recorded interview on file with the Author). [↑](#footnote-ref-75)
75. Interview #4 with Bally store clerk (recorded interview on file with the Author). [↑](#footnote-ref-76)
76. This, in turn, might lead consumers who do not value the concessions that certain stores offer to switch to buying at stores that do not provide concessions, but offer lower prices. Still, some stores will continue to offer concessions as long as a sufficiently large group of consumers values these concessions and is willing to pay higher prices for them. These stores will be unlikely to change their formal policies, however, as they will still need to fend off opportunistic consumers by relying on the harsh paper terms to dismiss their claims. [↑](#footnote-ref-77)
77. While chain stores were not significantly more likely to provide refunds, they were more likely (at the 10% significance level) to accept non-receipted returns at the final (post-complaining) stage. [↑](#footnote-ref-78)
78. This effect is driven by older stores’ greater likelihood to provide refunds notwithstanding testers’ failure to show a receipt. Older stores were not significantly more likely to allow for non-receipted returns more generally, as Models Five and Six show. [↑](#footnote-ref-79)
79. In an ongoing work, I am studying the variation in return policy leniency across stores. For this purpose, I established a database of return policies as they appeared on the stores’ websites, in-store signs, and receipts. The policies belong to 192 randomly selected clothing retail stores operating in Chicago. The return policies were then analyzed according to a policy leniency index that I constructed. The results show that high-end stores offer significantly better terms than other, more casual stores. In the particular context of permissible time for returns, older and higher-end stores offered significantly lengthier return periods than did newer, more casual stores. [↑](#footnote-ref-80)
80. In order to explore whether store clerks are more motivated to depart from the formal policy when the store is crowded, testers were instructed to report the length of the line at the store. There was no significant correlation between the reported line at the store and store clerks’ departure decisions, indicating that store clerks’ interests in avoiding commotion is not the main driver of their departure decisions. [↑](#footnote-ref-81)
81. Interview #15 with a Halloween customs store clerk (recorded interview on file with the Author). [↑](#footnote-ref-82)
82. Interview #3 with a Marshall Field’s store clerk (recorded interview on file with the Author). [↑](#footnote-ref-83)
83. *See, e.g.*,Gillette 2004, *supra* note 10, at 704; Bebchuk & Posner, *supra* note 9, at 834; Johnston, *supra* note 10, at 882. [↑](#footnote-ref-84)
84. *See* Lenden Webb, Brainstorming Meets Online Dispute Resolution, 15 AM. REV. INT’L ARB. 337, 357–58 (2004) (citing studies showing that customers who obtain satisfactory resolution of their complaints are more loyal to a business than are customers who never experience disputes);Tibbett L. Speer, They Complain Because They Care, AM. DEMOGRAPHICS, May 1996, at 13 (discussing how complaining consumers “are likely to remain loyal” and recommend a retailer to others if it is attentive to their complaints). [↑](#footnote-ref-85)
85. Interview #1 with a Macy’s store clerk (recorded interview on file with the Author). [↑](#footnote-ref-86)
86. For example, some airlines have an informal “flat tire” policy. Under this policy, airline representatives on the ground are instructed to allow customers who missed their flight due to unforeseen circumstances beyond their control—like a flat tire—to get on the next flight to their destination at no charge, as long as they arrive within two hours of the missed flight. These selective enforcement practices seem to operate on the basis of clear-cut rules that are simply non-customer-facing, rather than on employees’ discretionary case-by-case decisions. *See, e.g.*,Claire Nowak, *This Little-Known Airplane Rule Can Help When You Miss Your Flight*, Reader’s Digest, available at https://www.rd.com/advice/travel/missed-flight-flat-tire-rule/; Amanda Harding, *This Surprising Airline Rule Can Help If You Miss Your Flight*, Shobiz Cheatsheet (May 5, 2018), available at https://www.cheatsheet.com/culture/this-surprising-airline-rule-can-help-if-you-miss-your-flight.html/. [↑](#footnote-ref-87)
87. *See, e.g.*, Gillette, *supra* note 10, at 704–07; Bebchuk & Posner, *supra* note 9, at 827. Online information flows enable even one-time customers to cause tremendous reputational harm to sellers through online platforms and social media. See Schmitz, *supra* note 21, at 286 (citing evidence suggesting that “[o]ne complaining consumer is likely to share his or her negative experiences with roughly twenty-one others”). Notably, however, the big data revolution increasingly enables sellers to impose reputational costs on opportunistic consumers. *See, e.g.,* Arbel & Shapira, *supra* note 17 (observing that sellers use big data on consumers’ past behavior and personality traits, which they then turn into consumer scores and predictions about future behavior). *See also* Pam Dixon & Robert Gellman, The Scoring of America: How Secret Consumer Scores Threaten Your Privacy and Your Future 6–10 (2014), <https://www.ftc.gov/system/files/documents/public_comments/2014/08/00014-92369.pdf> (noting that consumers are being scored on a variety of metrics by multiple sellers using large databases from various sources). [↑](#footnote-ref-88)
88. Of course, sellers might also use selective enforcement less benevolently, so as “to create obstacles to recovery and then accede to the demands of the occasional insistent buyer, regardless of the underlying claim’s merits.” *See, e.g.*, Gillette, *supra* note 10, at 707. [↑](#footnote-ref-89)
89. *See* George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. Econ. 488 (1970). [↑](#footnote-ref-90)
90. *See, e.g.*, Gillette 2004, *supra* note 6, at 706 (“Sellers may use contract terms in an *in terrorem* effort to deter requests for redress, or as an initial response to buyer complaints.”). [↑](#footnote-ref-91)
91. *See, e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print*, 99 Iowa L. Rev. 1745 (2014) (finding that people maintained that it was fair to hold signees to fine print terms they had not read, even if the terms were buried in a contract that they believed to be unreasonably lengthy); Furth-Matzkin 2019, *supra* note 20 (finding that most tenants in an experimental survey acquiesced to whatever their lease terms said, even when they contained unenforceable liability disclaimers); Furth-Matzkin & Sommers, s*upra* note 20 (finding that consumers are unlikely to take action against deceptive sellers after reading contractual terms that conflict with the sellers’ prior representations). [↑](#footnote-ref-92)
92. *See supra* note 20. [↑](#footnote-ref-93)
93. *See, e.g.*, Furth-Matzkin 2017, *supra* note 20 (finding, based on a survey of residential tenants, that tenants often rely on the written lease agreements when disputes with the landlord arise); Furth-Matzkin 2019, *supra* note 20 (providing experimental evidence that tenants perceive their lease terms as enforceable and binding, even when they contain unenforceable contract terms); Furth-Matzkin & Sommers, *supra* note 20 (finding that consumers are demoralized by fraudulent fine print even when it contradicts what they were promised at the pre-contractual stage). [↑](#footnote-ref-94)
94. *See generally, e.g.*, Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017); Furth-Matzkin 2019, *supra* note 20; Furth-Matzkin & Sommers, *supra* note 20. [↑](#footnote-ref-95)
95. Furth-Matzkin 2019, *supra* note 20. In a similar vein, Dennis P. Stolle and Andrew J. Slain find that consumers are reluctant to file meritorious suits if their contracts include legally dubious disclaimers of tort liability. *See* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 Behav. Sci. & L. 83 (1997). [↑](#footnote-ref-96)
96. Furth-Matzkin & Sommers, *supra* note 20. [↑](#footnote-ref-97)
97. *See* Michelle Crouch, *Poll: You Can Get Better Credit Card Terms Just by Asking* (March 27, 2017), available at https://www.creditcards.com/credit-card-news/late-fee-waiver-poll.php. [↑](#footnote-ref-98)
98. *Id.* [↑](#footnote-ref-99)
99. Several scholars have suggested that even when sellers grant concessions to consumers, legal entitlements are preferable because, “from a welfare perspective receiving something as a matter of entitlement is more conductive to one’s welfare . . . than receiving the same thing as a favor.”; Zamir & Teichman, *supra* note 30, at 311–12. For a similar argument, see Rakoff, *supra* note 3, at 1236 (suggesting that relying on reputational forces to discipline sellers when disputes with consumers arise raises concerns in terms of the individual liberty of consumers); Daphna Lewinsohn-Zamir, *In Defense of Redistribution through Private Law*, 91 Minn. L. Rev. 326, 358–65 (2006) (arguing in favor of the efficacy of legal entitlements, in the context of redistributive legal rules). [↑](#footnote-ref-100)
100. Aaron Smith & Monica Anderson, *Online Shopping and E-Commerce*, Pew Res. Ctr. (Dec. 19, 2016), available at https://www.pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/ (discussing the results of a 2016 Pew Research Center survey of U.S. consumers). [↑](#footnote-ref-101)
101. *See, e.g.*, Furth-Matzkin 2019, *supra* note 23 (finding that consumers are discouraged by unenforceable fine print from searching for online information about their rights and often rely on the contractual language instead). [↑](#footnote-ref-102)
102. Johnston, *supra* note 6, at 858. [↑](#footnote-ref-103)
103. For a similar assertion, *see* Gillette 2004*, supra* note 6, at 706 (suggesting that sellers might choose an inefficient risk allocation if the “cost of absorbing the costs of all defects” exceeds the costs of “accepting the risk for insistent buyers and any reputational loss from alienating disappointed but noninsistent buyers”). The analysis here adds two other components to sellers’ cost-benefit calculation: the costs of scaring away consumers *ex ante* and the costs of accommodating opportunistic consumers. [↑](#footnote-ref-104)
104. For similar observations, see, e.g., Zamir, *supra* note 23, at 2100; Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 Jrsl. Rev. L. Stud. 137, 166 (2015); Van Loo, *supra* note 21, at 579–80. Regressive distributional concerns might yield different policy prescriptions than an analysis that only addresses overall efficiency (or welfare). *See, e.g.*, Lewinsohn-Zamir, *supra* note 94, at 396–97 (explaining the benefits of redistributive private law rules as a matter of public policy); Lee Fennell & Richard McAdams, *The Distributive Deficit in Law and Economics*, 100 Minn. L. Rev. 1051, 1053 (2016) (explaining that “both efficiency and distribution matter to welfare,” with different associated policy prescriptions). [↑](#footnote-ref-105)
105. *See generally, e.g.*, John T. Jost, Mahzarin R. Banaji, & Brian A. Nosek, *A Decade of System Justification Theory: Accumulated Evidence of Conscious and Unconscious Bolstering of the Status Quo*, 25 Pol. Psych. 881 (2004); Brett W. Pelham & John J. Hetts, “Underworked and Overpaid: Elevated Entitlement in Men’s Self Pay,” 37 J. Exper. Soc. Psych. 92, 92 (2001) (demonstrating that women exhibit “depressed entitlement by paying themselves less than men pay themselves for the same work,” due to variations in their respective *perceptions* of self-worth and performance); Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 Personality & Soc. Psych. Bulletin 34 (2014) (demonstrating that higher socioeconomic class status is associated with higher levels of entitlement); Candace N. Joyner, *Entitled to Expect: System Justification Theory, Socioeconomic Status, and the Ultimatum Game* (Spring 2017) (unpublished B.S. thesis, University of Oregon) (on file with the Department of Psychology and the Clark Honors College of the University of Oregon) (showing, based on an ultimatum game experiment, that socioeconomic status predicts expectations and sense of entitlement); Brenda Major, *From Social Inequality to Personal Entitlement*, 26 Advances in Exper. Soc. Psych. 293 (1994) (arguing that objectively disadvantaged groups experience lesser senses of personal entitlement); Jie Hu, Yuan Cao, Philip R. Blue, & Xiaolin Zhou, *Low Social Status Decreases the Neural Salience of Unfairness*, 8 Frontiers in Behav. Neurosci. 402 (2014) (demonstrating that a lower position within the social hierarchy is associated with a lesser inclination to believe that one is being treated unfairly); Laurie T. O’Brien & Brenda Major, *Group Status and Feelings of Personal Entitlement: The Roles of Social Comparison and System-justifying Beliefs, in* John T. Jost, Aaron C. Kay, & Hulda Thorisdottir, Series in Pol. Psych.: Soc. & Psych. Bases Ideology & System Justification(2009) (explaining that one’s sense of personal entitlement is impacted by both system justification and social comparison processes, by which low-status groups ultimately experience lesser senses of entitlement); Annette Lareau, *Invisible Inequality: Social Class and Childrearing in Black Families and White Families*, 67 Am. Soc. Rev. 747 (2002)(suggesting that middle and upper income white families raise their children with a sense of entitlement and assertiveness to get what they want later in life, while childrearing strategies among the lower classes and racial minorities tend to result in a lack of assertiveness and a lesser sense of entitlement, thereby limiting their access to educational and job opportunities later in life). [↑](#footnote-ref-106)
106. *See generally, e.g.*, Laurie T. O’Brien, Brenda N. Major, & Patricia N. Gilbert, *Gender Differences in Entitlement: The Role of System-Justifying Beliefs*, 34 Basic & Applied Soc. Psych. 136 (2012) (finding lower levels of perceived pay entitlement among women in comparison to men); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987) (arguing for racial differences in perceptions of rights-entitlements). Black and lower-income people were also found to be less likely to seek legal help when encountering civil legal problems. *See, e.g.*, Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 Iowa L. Rev. 1263 (2016). [↑](#footnote-ref-107)
107. *See, e.g.*, Furth-Matzkin & Sommers, *supra* note 20 (finding that nonwhite participants were inclined to see the consumer as more bound by the fine print than white participants); Jean Braucher, *An Informal Resolution Model of Consumer Product Warranty Law*, 1985 Wis. L. Rev. 1405, 1448-51 (1985) (providing anecdotal evidence that the relatively poor buyers are least likely to complain about defective goods); Schmitz, *supra* note 21, at 312 (“Research indicates that complainers have not only greater “consumer sophistication” in terms of knowledge and experience regarding their contract rights, but also higher incomes and educational resources than average consumers.”); Matthew A. Seligman, *The Error Theory of Contract*, 78 Md. L. Rev. 147 (2018) (showing that “people with less education or lower household income are significantly more likely to have false beliefs about contract remedies than people with more education or higher household income”); Jessica M. Choplin, Debra Pogrund Stark, & Jasmine N. Ahmad, *A Psychological Investigation of Consumer Vulnerability to Fraud: Legal and Policy Implications*, 35 L. & Psychol. Rev. 61, 94 (2011) (presenting findings indicating that “those with lower status are more likely to agree and accept senseless explanations . . . . Those with higher status seem to be more vigilant, perhaps in an effort to protect their higher status”). This evidence supports assumptions made in prior contract law literature. *See, e.g.*, Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 Wm. & Mary L. Rev. 445 (1994) (arguing that social class is an important determinant of one’s sense of entitlement, and that people with a higher sense of entitlement are more likely to bargain and to require more from their contracting parties during contract negotiations). [↑](#footnote-ref-108)
108. *See* Crouch, *supra* note 92. [↑](#footnote-ref-109)
109. Interview #13 with a local rug store clerk (recorded interview on file with the Author). [↑](#footnote-ref-110)
110. Preliminary evidence from a field experiment I administered supports this hypothesis. In the experiment, black and white male and female testers were sent to make non-receipted returns in 60 retail stores located in downtown Chicago. The results reveal a large and significant racial gap in return outcomes: Black customers were almost twice as likely to be denied a return as white customers, and the difference was larger after asking to speak to the store’s manager. [↑](#footnote-ref-111)
111. Orendoff, *supra* note 25 (describing the reasons consumers provide for making returns, finding that 12% of returns are made because the customer has reportedly changed his or her mind). [↑](#footnote-ref-112)
112. *See, e.g.*,Smith & Anderson, *supra* note 95 (discussing the results of a 2016 Pew Research Center survey of U.S. consumers; the survey reveals that most Americans, 76%, still use cash for some or all of the purchases they make in a typical week). [↑](#footnote-ref-113)
113. Interview #4 with Bally store clerk (recorded interview on file with the Author). [↑](#footnote-ref-114)
114. *See, e.g.*,Claire Nowak, *This Little-Known Airplane Rule Can Help When You Miss Your Flight*, Reader’s Digest, available at https://www.rd.com/advice/travel/missed-flight-flat-tire-rule/; Amanda Harding, *This Surprising Airline Rule Can Help If You Miss Your Flight*, Shobiz Cheatsheet (May 5, 2018), available at https://www.cheatsheet.com/culture/this-surprising-airline-rule-can-help-if-you-miss-your-flight.html/. [↑](#footnote-ref-115)
115. *See, e.g.,* Crouch, *supra* note 92. [↑](#footnote-ref-116)
116. One set of questions relates to when we should expect sellers to grant their employees discretion on the ground. This ties into the vast literature on rules and standards, and to the inevitable trade-off between the main advantage of granting discretion—that sellers’ agents will be able to act on information observed *ex post*, and the disadvantage of such discretion—that agents will follow their own interests, even when those are misaligned with the interests of the firm. For a general discussion of the optimal level of discretion in adjudication, see, e.g., Steven M. Shavell, *Optimal Discretion in the Application of Rules*, 9 Am. L. & Econ. Rev. 175 (2007); Louis Kaplow, *General Characteristics of Rules, in* 7 Encyclopedia of Law and Economics 18 (2012). [↑](#footnote-ref-117)
117. *See, e.g.*, Stojanoivc, *supra* note 24. [↑](#footnote-ref-118)
118. *See* Smith & Anderson, *supra* note 95. Research of sellers’ departure decisions in online markets may also help shed light on whether sellers’ departures from their rigid contract terms are the result of an internal policy to selectively enforce contracts or, rather, of a principal-agent problem, as online settings are less susceptible to a moral hazard problem (store clerks do not have to face the consumers at the store). [↑](#footnote-ref-119)
119. *See, e.g.*, Orendoff, *supra* note 25. [↑](#footnote-ref-120)
120. *See, e.g.*, Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, Nw. U. L. Rev. 102 (2008); Lior Jacob Strahilevitz, *Less Regulation, More Reputation, in* The Reputation Society 71 (2012) (suggesting that “an important potential upside of new regulation tracking technologies is their potential to displace statistical discrimination on the basis of race, gender, age, appearance, and other easily observable characteristics”). [↑](#footnote-ref-121)
121. Outcomes were coded as “return denied” if the store clerk either refused to offer any concession when testers came without receipt or only allowed testers to exchange the item for different size or color. [↑](#footnote-ref-122)
122. These figures include cases where store clerks only allowed testers to exchange the item for different size or color. [↑](#footnote-ref-123)