**Experimental Jurisprudence of Consumer Contracts**

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# Introduction

Most of the contracts we sign are standard form consumer contracts. These contracts, also known as boilerplates or fine print, are the most common type of economic contract, applying to billions of commercial transactions each year (for example, Bakos et al. 2014, p. 1-2; Wilkinson-Ryan 2014). Standardized consumer contracts are so commonly used because, by introducing uniform, one-size-fits-all agreements too all consumers making the same purchase, they considerably facilitate transactions and reduce contracting costs. In competitive markets, this costs reduction for sellers translates into lower prices for consumers (Butler 2015). Yet, despite the clear advantages of standardization, consumer form contracting has posed new challenges to contract law theory and doctrine.

Standardized consumer contracts are at odds with classic contract law theories. Classical theories of contract law typically view contracts as consensual, bargained-for exchanges (for example, Farnsworth 2004; Williston and Lord 1990), whether they emphasize the parties’ autonomy (for example, Fried 1981; Fried 2015), the social benefits of contracting (Shavell 2009), or the need to protect the parties’ reliance interests (for example, Fuller and Perdue 1936) as the main justification for enforcing them. The Restatement (Second) of Contracts [hereafter: the Restatement Second] reflects the traditional understanding that consent is the basis for creating legally binding agreements. According to the Restatement Second, for a contract to be formed, the parties need to manifest mutual assent (Restatement (Second) of Contracts, §201).

While classic contract law theories view contracts as mutually agreed-upon transactions, consumer form contracts are typically drafted by sellers and presented as take-it-or-leave-it offers to consumers. These contracts are rarely negotiated and often non-negotiable (for example, Radin 2013). Indeed, form contracts are often not even readable or comprehensible to the average or lay consumer (for example, Becher and Ben-Uliel 2019).

This mismatch between consumer contracting realities and classic contract law theories has important implications for law and policy. In particular, it indicates that current contract law doctrines might fail to adequately protect consumers from unfair or deceptive contracting practices, and that consumer contracts should consequently be governed by more specific, tailored, regulations and statutes, than other, commercial, or business-to-business contracts. While some consumer-protective statutes and regulations have already been adopted (see, for example, state and federal UDA(A)P laws), and the law of consumer contracts continues to gradually develop (see, for example, the draft of the Restatement (Third) of Consumer Contracts), the heated debate about when, how, and to what extent consumer contracts should be regulated, is still ongoing. Much of this debate hinges on empirical questions, such as whether and when consumers read and understand form contracts, whether and when consumers fall prey to deception, and how consumers perceive the unread fine print. Yet, systematic empirical research of consumers’ perceptions and behavior is relatively scarce. Much of the normative debate surrounding the regulation of consumer contracts rests on shaky empirical grounds.

More particularly, experimental research of consumers’ perception and behavior in this context is still very much in its infancy. As this review of existing research will highlight, experimental research may significantly inform the regulatory and normative debates surrounding consumer contracts by providing empirical evidence as to both the scope of the problems that consumer contracts generate and the effectiveness of the regulatory tools under consideration or those currently implemented.

Experimental analysis can guide policymakers along two important dimensions. First, it can identify contexts in which consumers make mistakes or are particularly vulnerable to exploitation. Second, it may test the efficacy of consumer-protective regulation.

This Essay reviews existing experimental scholarship on consumer contracting, with the goal of elucidating its contributions to our knowledge while at the same time highlighting what still needs to be done.[[1]](#footnote-1) The essay focuses on experimental studies revolving around three main issues: (1) Consumers’ contracting realities–how do consumers behave around form contracts? (2) Consumer psychology--how do consumers perceive form contracts and the law governing them? And (3) Regulation of consumer contracts–how could various regulatory interventions shape these contracting realities?

This Essay briefly surveys dominant experimental studies in these contexts, while focusing on these three core issues. It does not attempt to capture all that has been done experimentally in the context of consumer protection and regulation. For example, this Essay does not survey research on sellers’ marketing and contracting techniques, including contractual design and pricing, including techniques that sellers use to trigger or exploit consumers’ cognitive biases (for dominant contributions in this context, see Bar-Gill 2012; Korobkin 1998; Zamir and Teichman 2018). This survey also does not cover research on consumers’ perceptions of contract formation, and touches on consumer contract formalism only in passing (for dominant contributions in this context, see Wilkinson-Ryan 2015; Wilkinson-Ryan and Hoffman 2015; for a survey of the literature, see Sommers 2021). Finally, while the focus of this Essay is experimental research, it also refers to survey work and observational analyses when those are relevant or even necessary to complete the picture.

# Experimental Research on Consumers’ Contracting Realities

## *Do Consumers Read the Fine Print?*

Much of the heated and longstanding debate around regulating consumer contracts has rested on one simple question: whether consumers read the fine print.[[2]](#footnote-2) If consumers generally read the terms of sellers’ agreements before signing, competition over terms could emerge, and there would arguably be no need to regulate or intervene in the contents of consumer contracts. However, if most consumers do not scrutinize or understand form contracts, sellers could introduce excessively pro-seller terms into their boilerplate agreements without fear of losing consumers. Under these circumstances, regulation of consumer form contracts (including heightened legislative or judicial scrutiny of the terms of these agreements) could be necessary to protect consumers (for example, Radin 2013; Zamir and Ayres, 2020).

The conventional wisdom in the theoretical contract law literature has so far been that most consumers do not read most form contracts most of the time. Yet, disputes emerged on whether a minority of consumers does read and may be able to discipline sellers. Several commentators, and perhaps most prominently Alan Schwartz and Louis Wilde (1979), have argued that even if most consumers do not read standard form contracts, there is a significant minority of consumers who does read them. This informed minority of readers can help non-readers by incentivizing sellers to offer high-quality terms to *all* consumers. When sellers in competitive markets cannot distinguish between reading and nonreading consumers, nonreading buyers may benefit from an informed minority of reading consumers whose willingness to pay for the product is sufficiently sensitive to the quality of the standard terms (that is , the marginal consumers), because sellers will offer higher-quality terms to all buyers to capture the marginal consumers.[[3]](#footnote-3)

The “informed minority” theory has thrived for decades and was often invoked to resist substantive regulation of form contracts and to advocate in favor of restricting regulation to measures aimed at securing and facilitating consumer readership, such as requiring sellers to simplify their contracts (see, for instance, Baird 2006; Gillette 2005; Beales, Craswell, and Salop 1981).

Yet, in practice, empirical data was until recently missing, both as to whether a minority of reading consumers exists, and as to whether—to the extent that it does—it can sufficiently discourage sellers from introducing excessively pro-seller terms into their boilerplate agreements. Notwithstanding the important law and policy implications of these questions and the long-standing debates about whether and how to intervene, there has been a dearth of empirical investigations into consumers’ reading behavior.

Researchers have started addressing this question mainly through survey studies. For example, researchers have surveyed law and business students (Hillman 2006; Becher and Unger-Aviram 2010) about their contract reading behavior. Their findings suggested that, beyond price and product description, the vast majority of consumers (96%) do not read online agreements (Hillman 2006, p. 842); and that consumers’ decisions of whether to read the fine print before making the deal is largely dependent on context (for example, the stakes involved in the transaction) (Becher and Unger-Aviram 2010 , p. 222-27; Stark and Choplin 2009, p. 40). Similarly, researchers have surveyed residential tenants about their leases (Mueller 1970; Furth-Matzkin 2017). They found that tenants are significantly more likely to read the terms of their lease agreement when a problem or question about their rights or remedies arises after the contract is entered into, rather than before they enter the transaction (for example, Furth-Matzkin 2017, p. 42).

While these surveys are important starting points, they focused on students and residential tenants and on specific types of transactions, making it difficult to generalize from their findings that most consumers do not read most form contracts. Furthermore, they were based on participants’ self-reports, rather than on observed behavior.

A significant progress in observing consumers’ reading behavior directly was achieved by Yannis Bakos, Florencia Marotta-Wurgler, and David Trossen (2014), who conducted a wide-scale observational study to examine the browsing behavior of more than 40,000 online software buyers. Their findings revealed that only a very small fraction of consumers (less than 1 percent of the households) even accessed the software’s online “terms and conditions” webpage, and those who did spent very little time reviewing the terms. These findings indicate that, at least in the context of end-user license agreements, there is no informed minority of reading consumers to sufficiently deter sellers from inserting one-sided terms favoring the seller.

In recent years, scholars have also begun using experimental methods to explore questions revolving around consumer readership. For example, in a recent online experiment of more than 500 undergraduate students, participants were given an option to join a new social networking site (Obar and Oeldorf-Hirsch 2020). They could join either by clicking the “sign-up” option, which informed them that by clicking it, they agreed to the website’s privacy policy, or by accessing the website’s privacy policy first. Seventy-four percent of the participants chose the “sign-up” option, completely ignoring the privacy policy of the social networking service, and the remaining participants barely spent any time reading the terms of the policy. In fact, the average time spent reading these ~8,000 words’ policies was less than two minutes (Obar and Oeldorf-Hirsch, p. 135-37).

Taken together, these findings may be taken to suggest that in many cases, there is no meaningful minority of reading consumers to sufficiently deter sellers from introducing unfavorable terms to the fine print. Sellers may therefore insert excessively pro-seller terms, safe in the assumption that no one will read. Indeed, in Obar and Oeldrof-Hirsch’s experiment, the social networking service’s agreement included a clause assigning consumers’ first-born child to the networking service (Obar and Oeldorf-Hirsch 2020, p. 134). Beyond anecdotes, observational studies of standard form consumer contracts have provided systematic evidence that terms in form contracts are often more pro-seller than are statutory default arrangements (for example, Marotta-Wurgler, 2007; Schwarcz 2012).

Consumers’ failure to read the fine print is plausibly the result of the high costs that contract readership would impose on consumers if they chose to read form contracts. One study estimated that if consumers were to read every privacy policy to which they agreed, it would take them an average of 244 hours each year, amounting to $781 billion in lost productivity (McDonald and Cranor 2008, p. 563-64). Thus, it may be rational for consumers to adopt a strategy of terms-ignorance to economize on the use of their time and attention (Simkovic and Furth-Matzkin 2021, p. 238). This is particularly true if consumers intuit that even if they did devote time and attention to read form contracts, they would not be able to understand them. To experimental research of consumer comprehension of form contracts this chapter now turns.

## *Do Consumers Understand Form Contracts?*

Evidence suggests that even if consumers were to read the terms, many of them would not understand their meaning and implications. Consumer contracts are often drafted in complex legal jargon, and understanding their terms often requires legal expertise.[[4]](#footnote-4) In a recent demonstration of this problem (Sovern et al. 2015), respondents were presented with a credit card agreement which included an arbitration clause. The study revealed that most respondents (57%) did not know that the contract they had just signed included an arbitration clause, and that only few (less than 20%) realized that an arbitration clause would prevent them from filing a claim in court.

In a more recent study, Arbel and Toler (2020) told participants that they were simulating a free-trial sign up for a new music streaming service. They were presented with an agreement similar to the Spotify “terms and conditions” and were subsequently asked questions about their cancellation rights. Remarkably, less than half of the participants (44%-46%) answered correctly. Most participants failed to realize that they could cancel the subscription after the free-trial period ended. In a subsequent experiment, participants were asked to rate the difficulty of reading and understanding the contract they read on a sliding scale of 1-100, where 100 indicates the greatest difficulty. Participants’ reported difficulty level for reading was 59.8 on average, and their reported difficulty for understanding the contract was 54.6, suggesting that consumers perceive form contracts as difficult to both read and comprehend, (Arbel and Toler 2020, p. 37).

 Consumers’ failure to read and comprehend form contracts is a problem, because it typically results in lower-quality terms. For example, Florencia Marotta Wurgler (2007) has found that software contracts typically favor sellers more than the underlying legal rules do. Studies have also found that most privacy policies are worse to the buyers than the applicable regulatory guidelines (Marotta-Wurgler 2016), and that insurance agreements often contain excessively one-sided terms favoring the insurance provider (Schwarcz 2012 ). But before discussing regulatory efforts to enhance readership and comprehension of form contracts, this review turns to survey experimental work showing that consumers also often misperceive the law governing their relations with sellers.

# Experimental Research on Consumer Psychology

##  *Consumers as Contract Law Naïfs*

Experimental evidence suggests that consumers not only fail to understand the legal meaning of the terms in the contracts they sign, but also that they at the same time believe that these terms fully govern the deal and the relations between the parties, and are enforceable as written (for example , Furth-Matzkin, 2017; Wilkinson-Ryan 2017).

Consumers’ assumption that sellers’ form contracts are authoritative and binding is so strong that they will often look to their contracts for guidance on their legal rights and obligations (for example, Mueller 1970; Furth-Matzkin 2017). For example, a recent survey of residential tenants revealed that when tenants encounter a rental problem, such as a broken fixture requiring repair, they rarely search the internet or consult a lawyer to learn about their legal rights and obligations. Instead, they often look at their leases (Furth-Matzkin 2017). Thus, although consumers typically do not read form contracts at the time of signing (or clicking: “I agree”), they may read them when a problem or question arises. At that point, they are likely to defer to the written terms. In one survey, 65 percent of the respondents—all residential tenants—reportedly adhered to the terms of their lease agreements when encountering a rental problem or a dispute with their apartment owner (Furth-Matzkin 2017, p. 39). Respondents explained that they would look at their leases to understand their rights and duties, as well as the owner’s rights and remedies. For example, respondents mentioned looking at their leases to see if they could end the lease early, hang pictures on the walls, have a pet, or sublet the apartment, if they would incur late fees for paying rent late or if the owner was responsible for repairs (Furth-Matzkin 2017, p. 38-39).

The problem is that sellers, realizing that consumers intuit that form contracts are enforceable and binding, may knowingly insert legally unenforceable terms into their contracts, without fear of consumers ever noticing the unenforceability or disputing it in court. For example, empirical research has shown that unenforceable terms are frequently included in residential lease agreements (Furth-Matzkin 2017; Hoffman and [Strezhnev](https://onlinelibrary.wiley.com/action/doSearch?ContribAuthorRaw=Strezhnev%2C+Anton) 2022).

Experimental research confirms that consumers’ enforceability assumption holds even when the terms included in the fine print are unconscionable, unenforceable, or void (Furth-Matzkin 2019; Wilkinson-Ryan 2017; Stolle and Slain 1997).

In one study, participants were asked to imagine they were looking for a new apartment (Furth-Matzkin 2019). They were then randomly assigned to read and sign one of three residential agreements, and to answer questions about rental scenarios. In one of the agreements, an unenforceable liability disclaimer was included, while the other agreements included either a provision acknowledging the landlord’s liability or no liability provision at all. The inclusion of the unenforceable liability disclaimer significantly affected participants’ legal beliefs. While most participants (72%) realized that the apartment owner was responsible for repair damages caused by the owner’s negligence when the contract was silent, and almost participants understood this when the contract specifically articulated the owner’s responsibility, only a minority of tenants (32%) realized that the owner was responsible for the repair costs after encountering an agreement with an unenforceable liability disclaimer (Furth-Matzkin 2019, p. 1047-48).

Remarkably, consumers believe that terms in form contracts are enforceable as written even when they contradict or qualify what the seller represented to consumers at the pre-contractual stage. In an experimental demonstration of these beliefs, Furth-Matzkin & Sommers (2020) presented participants with various scenarios in which the seller defrauds a consumer about a material aspect of the transaction to induce the consumer to make the purchase, while the contract contains a provision that disclaims or contradicts the seller’s assertions.

 In one scenario, a consumer signs an auto-loan payment program after the salesperson tells him it would save him money. After signing the agreement, the consumer discovers that the plan imposes hidden fees that outweigh any actual savings. The fees were disclosed in the fine print of the form the consumer signed to enroll, but the consumer failed to read or notice that the fine print contradicted the seller’s assertion that no fees would be imposed.

The law protects consumers from fraud and courts typically invalidate terms that contradict sellers’ pre-contractual statements under these circumstances.[[5]](#footnote-5) Indeed, courts have explained that upholding these terms would “reward the ingenuity of draftsmen at the expense of sound public policy” and “invite sale agents, armed with impenetrable contracts, to lie to their customers” (Cirillo v. Slomin’s Inc., 768 N.Y.S.2d 759, 768 (Sup. Ct. 2003)). Yet, while all participants, including legal professionals, thought that holding the consumer to the fine print would be unfair, lay participants—as opposed to lawyers and law students—strongly expected that a court would uphold the contract and require the consumer to pay the fees, regardless of the fraud.[[6]](#footnote-6)

Remarkably, as a second experiment demonstrated, when the contract disclosed the fees, the absence or presence of pre-contractual deception had almost no effect on laypeople’s legal predictions. In the experiment, participants were randomly assigned to see one of two versions of the scenario. In one version, the seller did not deceive the consumer about the fees. Rather, the consumer assumed that no fees would be charged, and signed the contract without noticing the fee disclosure. In another version, the seller deceptively assured the consumer that no fees would be imposed. Participants were equally likely to believe that a court would uphold the contract and force the consumer to pay the fees in both cases. With or without fraud, laypeople strongly expected that courts would require the consumer to pay the fees when the contract specifically mentioned them. These findings suggest that consumers feel bound by form contracts and not because they believe them to be fair, but because they believe they assumed the risk of being bound by these unread terms by non-reading.

These findings are consistent with earlier research that showed that consumers blame themselves for failing to read the fine print, regardless of length or complexity. In one experiment, Tess Wilkinson-Ryan showed participants a scenario describing a hidden fee in a credit card contract. Participants were randomly assigned to read about either a short (2-page) or a long (15-page) credit card agreement and were then asked whether they thought the consumer is to blame for not reading, whether it was reasonable to expect the consumer to read, whether the consumer consented to pay the fees, and whether hidden fees should be prohibited. Participants strongly felt that using fine print to impose fees on consumers is inappropriate: subjects overwhelmingly reported that companies should find other ways to inform consumers about fees and many subjects thought that hidden fees should be banned altogether. Yet, at the same time they felt equally strongly that the non-reading consumer consented to the contract and bears the blame for the resulting transactional harm, regardless of contract length (Wilkinson-Ryan 2014, p.1763-65).

## Consumers as Contract Law Defeatists

When consumers fail to read the contract, blame themselves for not reading, and believe they have assumed the risk of encountering unfair but enforceable terms ex post, they will often fail to take action even when the seller deceived or manipulated them into signing the agreement (Furth-Matzkin and Sommers 2020) or when the contract includes terms that are unenforceable, unconscionable, or legally void (Furth-Matzkin 2019; Wilkinson-Ryan 2017; Stolle and Slain 1997).

In the experimental study of residential tenants mentioned above (Furth-Matzkin 2019), tenants reading the contracts with the unenforceable disclaimer were significantly more likely to bear the costs of repairing damages caused by landlord’s failure to fix a leaking roof, and significantly less likely to reach out to the landlord or take any action (for example, consult a lawyer, withhold rent, or initiate legal proceedings) to enforce their rights, than were tenants reading contracts that did not contain liability disclaimers (Furth-Matzkin 2019, p. 1043-1045). Furthermore, the inclusion of an unenforceable disclaimer discouraged tenants from searching online for legal information about their rights and remedies, and the terms misled even the few tenants who conducted online searches about their rental rights and duties (Furth-Matzkin 2019, p. 1049-50).

Similarly, Stolle and Slain (1997) and Wilkinson-Ryan (2017) have found, through a series of controlled experiments, that the fine print discourages consumers from seeking legal redress or challenging dubious firm behavior. In one experiment, Stolle and Slain presented students with a membership contract for a health club. They varied the presence of an exculpatory clause that would waive liability for “any...cause of action whatsoever for...death, personal injury, property damage, or loss of any kind.” Although this clause was of questionable enforceability, it decreased participants’ self-reported intentions to seek compensation in the event of an injury.

In the fine print fraud study mentioned above (Furth-Matzkin and Sommers 2020), participants were asked what they would do if they—like the consumer in the vignette study—were told by a company representative there would be no fees only to find out that the contract they signed without reading allowed the company to charge fees each time they made a payment. The vast majority of respondents—73%-- indicated they would just “lump it” and pay the fees. In contrast, participants who were told that the seller promised there would be no fees but the company charged fees without permission in the written agreement—most participants (81%) wanted to take some kind of action (legal or reputational), and relatively few (15%) were inclined to accept the situation and move on (Furth-Matzkin and Sommers 2020, p. 526).

Taken together, this evidence suggests that sellers may include unenforceable terms in contracts because they are highly effective in shaping consumers’ expectations and behavior, not in convincing courts. For the same reasons, sellers can use fine print to get away with deceptive misrepresentations without risking legal sanctions or harming their reputations.

# Experimental Research on Regulation of Consumer Contracts

The above review has shown that consumers often do not read form contracts before signing them; that when they do, they often do not understand the legal meaning of the terms; and that they nonetheless view these terms as authoritative and binding. These beliefs shape consumers’ behavior. Consumers typically look at the terms of sellers’ agreements when they want to know their rights, duties, and remedies as buyers. And they typically defer to these terms when a problem or question arises during the life of the contract.

This means that sellers can introduce lengthy, complicated, pro-seller terms into contracts that no one will read, but that consumers will abide by, and courts will uphold. As the above review shows, unscrupulous sellers can engage in fraud or introduce unenforceable terms into their boilerplates, safe in the assumption that consumers will not challenge their deceptive practices or dispute them in court.

Scholars and regulators have begun experimenting with regulatory interventions to better protect consumers. The first wave of regulation and scholarship has focused on enhancing contract readership. The presumption was that if a considerable minority of consumers read sellers’ agreements, sellers will have sufficiently strong incentives to compete over the terms of their agreements.

## Requiring more meaningful assent

Regulators have contemplated whether to require that consumers have a meaningful opportunity to read prior to signing. Yet, empirical research suggests that making the contracts available ex ante does not significantly increase contract readership. For example, Florencia Marotta-Wurgler (2011) has followed the clickstream behavior of almost 50,000 households who purchased software online. She found that requiring buyers to click “I agree” to the terms of the online software agreement before finalizing a purchase increased readership by only a negligible amount (0.36 percent) (Florencia Marotta-Wurgler 2011, p. 179-81). Furthermore, experimental research suggests that requiring ex ante disclosures of the terms does not lead consumers to question or challenge the validity of terms introduced only ex post. Snyder and Mirabito (2019) have found, based on a series of experiments, that—when faced with terms limiting a company’s liability for a defective product— consumers do not see a difference between Pay-Now-Terms-Later agreements (PNTLs) and contracts presented prior to purchase, neither in terms of a company’s moral obligations nor in terms of its legal obligations to compensate consumers for the product failure.

## Defaults and Mandatory Rules

Since requiring a meaningful opportunity to read form contracts prior to signing has not sufficiently protected consumers from being bound by unread, one-sided, pro-seller terms, regulators have moved to attempt to protect consumers from exploitative drafting practices by adopting more consumer-friendly background rules that apply when the contract is otherwise silent. For example, the Uniform Commercial Code introduces default rules which govern the sales of goods (UCC, article 2). Yet, firms often opt out of these defaults by adopting more seller-friendly terms (for example, Marotta-Wurgler 2007). Even when legislatures supplement the default arrangement with a mandatory requirement that sellers obtain meaningful assent before opting consumers back into a seller-friendly contract provision, sellers with sufficiently strong incentives to contravene this regulation can often find ways to make consumer-friendly default rules slippery (Willis 2013). For example, in response to a new regulation from the Federal Reserve Board requiring banks to obtain consumer consent before opting them into an expansive overdraft program, banks have nudged customers to opt into these costly overdraft programs by using language that triggered consumers’ loss aversion (“Don’t lose your ATM and Debit Card Overdraft Protection” and “STAY PROTECTED with [ ] ATM and Debit Card Overdraft Coverage”) (Willis 2013, p. 1192).

In response to these problems, policymakers often adopt mandatory, or immutable rules and regulations, conferring on consumers rights and remedies that cannot be contracted around or waived (for example, Zamir and Ayres, 2020). Yet, as mentioned, sellers can ignore consumer-protective legislation by including in their agreements terms they know to be unenforceable and void. Most consumers do not read the contract before signing, are surprised by its terms when a problem materializes, and are misled by unenforceable terms into surrendering their formally non-waivable rights.

Regulators can, and sometimes do, sanction sellers for using unenforceable terms in their contracts (for example, Furth-Matzkin 2019; Zamir and Ayres 2020). Yet, experimental research shows that even when contracts are silent, consumers hold mistaken beliefs about their rights under the law (for example, Furth-Matzkin 2019; Furth-Matzkin and Sommers 2020). For example, even when a contract does not contain a “merger” or a “no-reliance” clause, which negates the validity of any pre-contractual assertions or representations, consumers believe that a contract provision that disclaims or qualifies what the salesperson represented to them, orally or in writing, prior to the purchase, will be upheld in court. This is their belief even when they learn that the salesperson engaged in deception in order to lure them into signing the contract (Furth-Matzkin and Sommers 2020). In another experiment, participants were asked whether their apartment owner was liable for damages resulting from the owner’s negligence (Furth-Matzkin 2019). The law clearly holds the owner liable in these circumstances. But a third of the participants who read a lease which was silent about the owner’s liability thought that the owner was not liable for the damages (Furth-Matzkin 2019, p. 1030-31).

Importantly, while consumers are pessimistic and defeatist about their legal rights and remedies where their contracts purport to limit or negate those rights and remedies, they may often be overly optimistic about the extent to which the law protects them when the contract is silent (for example, Bar-Gill and Davis 2017). For example, consumers generally overestimate the extent to which the law protects their privacy and curbs firms’ ability to share their personal information with third parties (Hoofnagle and Urban 2014, p. 281–82).[[7]](#footnote-7) Indeed, even when the contract contains a consumer-unfriendly term, such as an arbitration clause, consumers may unwittingly assume that the law still allows them to bring claims to court (Sovern et al. 2015, p. 70).

To overcome the problem of consumers’ legal ignorance and misperceptions, policymakers often complement substantive regulation with disclosure obligations.

## Disclosures

Disclosure is arguably the most pervasive regulatory tool in consumer law in the U.S. (Ben-Shahar and Schneider 2014, p. 3). Yet, evidence on the effectiveness of mandated disclosures in shaping consumers’ behavior and choices is mixed. Some studies have called to question whether disclosures can significantly affect consumer choice, while others have shown that when adequately designed and conveyed, disclosures can significantly improve consumers’ perceptions and decisions.

One important goal in the context of disclosure regulation is to simplify the disclosed information so that consumers will be able to understand it and incorporate it into their decision-making processes. Yet, even simplified disclosures are not always helpful to consumers. Some studies have suggested that simplified disclosures, including warning boxes, may generate only limited success in shaping consumer choices (for example, Ben-Shahar and Chilton 2016, p. 65). At the same time, other studies have shown that smart disclosure designs may yield considerable effects. In the context of nutrition labels, experiments have shown that differences in label format affected consumer choice (Ducrot et al. 2018 ; Sonnenberg et al. 2013). For example, researchers have found, based on an online experiment simulating grocery shopping situations, that nutrition labels using color-coded and graded scales indicating the overall nutritional quality was effective in promoting healthier food consumption decisions (Ducrot et al. 2018 ). Several other studies have found a significant positive effect of smart nutrition disclosures on consumer consumption intentions (for example, Feunekes et al. 2008; Sonnenberg et al. 2013). In some areas, experiments have demonstrated that smart disclosures may correct consumers’ misperceptions. For example, experimental evidence suggests that health warnings on cigarette packs—both graphic and textual—significantly improve smokers’ assessments of the health risks associated with cigarette smoking (see, for example, Jolls 2013; FDA report on experimental study on warning statements, 2020), and for some smokers—these warnings can even reduce cigarette consumption (Shadel et al. 2019). But can smart or simplified disclosures help consumers better understand their contracts or their rights and remedies under the law? Can disclosure encourage consumers to take action—legal or extralegal—in response to seller fraud or failure to meet mandatory consumer-protective rules?

Furth-Matzkin (2019) conducted an experiment to test whether disclosure of the law could counteract the deceptive and chilling effect of unenforceable contract terms. Participants were randomly assigned to review one of three contracts. In one, an unenforceable liability disclaimer was inserted; in another, the contract acknowledged the owner’s liability; in yet another, the contract was silent about owner liability. Then, a randomly selected sample of the participants read a disclosure about the law, explaining that the owner cannot disclaim liability for under these circumstances in a contract. All participants were then asked an open-ended question about their behavioral intentions. They were also asked how likely they thought it would be that a court of law would uphold the liability disclaimer if they decided to initiate legal proceedings against the owner. The findings revealed that information about the law had limited success: it improved participants’ understanding and legal predictions but did not counteract the harmful effects of the unenforceable contract term (p. 1054).

Furth-Matzkin and Sommers (2020) similarly tested whether legal information could encourage victims of consumer fraud to take action—including posting bad reviews online— against the fraudulent seller, notwithstanding the presence of a term in the fine print which contradicts or qualifies what they were told. Participants were told about a consumer who found out that he was lied to by the salesperson before signing a contract that allowed the seller to charge fees each time he made a payment. Only some of the participants were randomly selected to receive legal disclosure (the “information” condition). They were informed that the law prohibits consumer fraud even when the seller’s deceptive statement is contradicted by what is written in the contract. After reading the scenario, participants indicated what they would do if they were in the consumer’s shoes. Next, they rated how likely they would be to take the matter to court. The findings showed that providing legal information significantly affected participants’ legal judgments. First, participants in the Information condition were more likely to expect that the consumer would prevail in court. Second, providing information about the law also affected participants’ self-reported intentions to take action against the deceptive seller. Yet, the informational intervention, again, did not completely eliminate the adverse effect of the fine print on participants’ legal predictions (p. 541). As the authors in both studies acknowledge, legal disclosures may be even less effective in real-world settings (outside the lab), where consumers are confronted with multiple disclosures and may suffer from “disclosure overload.” Researchers have thus attempted to simulate real-world settings to test for the effectiveness of disclosures.

Omri Ben-Shahar and Adam Chilton (2016) have simulated a real-world setting in the context of data privacy. They simulated a real-world task by (deceptively) informing participants that they were participating in a survey on risky sexual behaviors that would be used to develop an app to improve existing dating services. They then randomized the format of the privacy disclosures provided to respondents before agreeing to participate in the study. The substance of the disclosure (in terms of the ways in which participants’ personal data would be collected and shared) remained identical across conditions, but the format of the disclosure varied. Specifically, the authors randomly presented respondents with disclosures that employed different sets of the best practices that are most commonly found in guides for developing model disclosures. These include legible font, short-form summaries of each provision, the use of examples, and plain language.

Can disclosures inform consumers about the terms governing their personal data? Can disclosures affect consumers’ willingness to share private, even sensitive information with sellers?

The researchers found, first, that most respondents spent only a few seconds reviewing their privacy policies before accepting them, regardless of how the disclosure was presented (p. 552-553), and that only 2.4 percent of the respondents spent enough time (a minute and a half or more) to meaningfully review even the shortest, most simple, disclosure (p. 553). Regardless of the formal properties of the disclosure, nearly all participants clicked through without taking the time to review the privacy policy’s provisions. Participants who spent more time reading were more likely to answer comprehension questions correctly, but the improvement was relatively modest, and most participants could not answer most questions about the terms of the privacy policy to which they have consented correctly (p. 554). Finally, the researchers found no significant difference in participants’ willingness to report risky sexual behaviors based on the format of the privacy policy to which they were exposed (p. 555-61).

Some commentators, and perhaps most prominently Ian Ayres and Alan Schwartz (2014), have suggested that regulators could use smarter, simpler, shorter, and more salient disclosures—for example in the form of bold warning boxes—to better inform consumers about their legal rights and duties. Specifically, Ayres and Schwartz proposed to use these warnings to alert consumers to surprising terms in contracts. Can such warning boxes succeed where other disclosure formats have failed? At the very least, could it alert consumers to unexpected terms that are typically hidden in the fine print?

In a follow-up experiment, Ben-Shahar and Chilton (2016, p. 61) specifically tested whether warning boxes of the type proposed by Ayres and Schwartz could indeed be useful in alerting consumers about the legal situation in the context of data privacy. They randomly assigned participants to read either a warning-box disclosure of data privacy policy or other forms of simplified disclosures, all identical in substance. They found that respondents who received the warning box treatment were significantly more likely to answer comprehension questions about their data privacy provisions correctly than were participants presented with other disclosures (p. 563). Notably, participants who reviewed the warning-box disclosure were also less likely to share personal information regarding their prior risky sexual behaviors than those presented with other disclosures (although the difference in reported behavior was not significant) (p. 563). This finding suggests that, improving comprehension through warning-box disclosures may also, in turn, influence consumer choice. Other experiments in the context of data privacy have also observed some improved understanding by consumers who encountered simplified disclosure boxes compared to other forms of disclosure (Kelley et al. 2010).

In addition to warning box disclosures, commentators and policymakers have also considered, and at times—even adopted regulation—requiring that sellers capitalize a contractual term, based on the assumption that the use of all-caps will make an otherwise non-salient term more salient to consumers. A recent experiment shows, however, that all-caps fail to improve consumer notice or comprehension of contract terms in any discernable manner (Arbel and Toler 2020). In the experiment, participants were told that they were simulating a free-trial sign up for a new music streaming service. They were presented with an agreement similar to the Spotify “terms and conditions” and were subsequently asked questions about their cancellation rights. Participants were randomly assigned to one of two conditions: in the treatment condition, participants’ contract contained one single paragraph—describing their cancellation rights—in all-caps. In the control condition, participants’ contract was identical in substance, but was entirely in low-caps. They found no evidence that all-caps improved consumers’ understanding. To the contrary, there was even evidence (albeit limited) that all-caps decrease older consumers’ comprehension of the terms described in all-caps. This suggests that companies insert ALL-CAPS clauses not in order to alert consumers, but rather to shield themselves from liability.

# Conclusion

This Essay reveals that, while surveys and experiments have contributed to our understanding of consumers’ contracting realities, experimental methodologies could be more extensively used, both to identify the problems currently permeating consumer protection and to assess the effectiveness of proposed solutions. While experimental (and survey) research has limitations and its findings should be taken with caution, data-driven research can undoubtedly assist regulators in their efforts to better protect consumers.

1. I use the term “experimental” broadly, to include not only experiments but also surveys. [↑](#footnote-ref-1)
2. The literature here is vast. For some prominent examples, see Rakoff 1983; Radin 2013; Craswell 2006; Kim 2013; Hoffman 2018; Ayres and Schwartz 2014; Wilkinson-Ryan 2017. [↑](#footnote-ref-2)
3. This theory is also based on the assumption that consumers have a similar taste for contract terms. If non-reading consumers have different tastes than reading consumers, then the informed minority of consumers will be unable to ensure that non-reading consumers receive what they view as higher-quality contract terms. [↑](#footnote-ref-3)
4. Uri Benoliel and Shmuel Becher have recently applied well-established linguistic readability tests to the 500 most popular websites in the U.S. that use sign-in-wrap agreements. They found that the vast majority of online “terms and conditions” (99.6 percent of the contracts in their sample) are drafted at a level of difficulty that would make them incomprehensible to most consumers (Benoliel and Becher, 2019). [↑](#footnote-ref-4)
5. Indeed, consumers have a legal “duty to read” the fine print (for example,, Ayres and Schwartz 2014). If they have a reasonable opportunity to review the terms of their agreement but choose not to, they will be seen as “assuming the risk” that unexpected terms will bind them. However, fraud (and especially consumer fraud) is an exception to the “duty to read” doctrine. See Furth-Matzkin and Sommers 2020, p. 516-17. [↑](#footnote-ref-5)
6. Lay participants also believed that the consumer had *consented* to pay the fees despite the seller’s material deception. This finding is consistent with work showing that although people disapprove of deception, they think it is possible to consent when materially deceived (Sommers 2020). [↑](#footnote-ref-6)
7. In the related employment context, many “at will” employees falsely believe that the law protects them against dismissal without just cause (Kim 1997). [↑](#footnote-ref-7)