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

Word count: \_\_( without footnotes)

Dear Editors,

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

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

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

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

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

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

Thank you for your consideration.

Sincerely,

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