The “Paper Deal—Real Deal” Gap in the Retail Market: A Field Experiment

Meirav Furth-Matzkin[[1]](#footnote-1)\*

*The Gap Theory suggests that, in competitive markets, sellers will often deviate from clear and unconditional contractual requirements to please consumers. This Article investigates this theory through the case study of product returns. In a wide-scale field experiment, testers (auditors) were sent to return items without receipts (despite a formal receipt requirement) to more than a hundred stores in Chicago. The results show that across a wide range of stores, a significant minority of retailers strategically departs from the formal policy in favor of consumers, and that sellers are about twice as likely to exercise leniency once consumers complain. These results are consistent with the Gap Theory in suggesting that sellers may deliberately adopt rigid policies on paper, with the aim of screening out certain consumers, while departing from the agreement in favor of others. Yet, at the same time the results qualify the Gap Theory by showing that most sellers insist on enforcing their policy requirements, and that this insistence largely persists even after consumers complain. These findings, I argue, have important policy implications. While Gap Theory proponents have suggested that regulators should not intervene in consumer transactions (absent evidence of fraud), these findings suggest that regulation may be needed when reputation does not sufficiently discourage sellers from adhering to excessively strict contractual arrangements. Moreover, building on new evidence and on insights from the social sciences, this Article proposes that even when gaps persist, they might harm consumers and lead to regressive distributive outcomes.*

[Introduction 1](#_Toc18539934)

[I. Background and Motivation 7](#_Toc18539935)

[A. The Gap Theory and Gap Skepticism 7](#_Toc18539936)

[B. The Case Study: Retail Stores’ Return Policies 10](#_Toc18539937)

[II. Sample & Design 12](#_Toc18539938)

[III. Results 19](#_Toc18539939)

[1. The Prevalence of Pro-Consumer Gaps 19](#_Toc18539940)

[2. The Effect of Complaining on the Gap 23](#_Toc18539941)

[3. Store Characteristics and the Gap 28](#_Toc18539942)

[IV. Discussion & Implications 32](#_Toc18539943)

[A. Pro-Consumer Gaps Persist, but only in a Minority of Stores 32](#_Toc18539944)

[B. Gaps Might Generate Distortions 37](#_Toc18539945)

[1. Ex Ante Distortions of Consumers’ Decisions 38](#_Toc18539946)

[2. Ex Post Distortions of Consumers’ Decisions 38](#_Toc18539947)

[3. Ex Ante Distortions of Sellers’ Decisions 41](#_Toc18539948)

[4. Distributional Concerns 42](#_Toc18539949)

[Conclusion 45](#_Toc18539950)

# Introduction

Standard form contracts govern our everyday transactions. Virtually every firm that sells goods or services includes in its sale contracts certain standard provisions that dictate whether and when a good can be returned, when and how to make payments, whether charges are made for services beyond those originally contracted for, and various other features of the sales relationship. Although these clear and unconditional boilerplate provisions considerably facilitate transactions,[[2]](#footnote-2) scholars and commentators have expressed concern that such terms might be excessively rigid and even harmful to consumers.[[3]](#footnote-3)

In response to these concerns, several scholars have suggested that, at least in competitive markets, sellers may implement seemingly rigid and unconditional terms more leniently and flexibly. As these scholars argue, reputational considerations will constrain sellers from enforcing their contracts to the letter, while the existence of clear, seemingly rigid terms on paper will allow them to fend off buyers who would take advantage of a more lenient or flexible written policy to extract benefits that the seller did not intend to offer.[[4]](#footnote-4) I refer to this account as the Gap Theory because it suggests that sellers considering reputational consequences will depart from their formal policies in favor of consumers, thereby generating a gap between the “paper deal”—the written contract governing sellers’ relations with buyers, and the “real deal”—the contract in action.[[5]](#footnote-5)

While the Gap Theory has attracted significant scholarly attention, academics continue to debate both its descriptive accuracy and normative consequences. In particular, some have questioned the actual ability of competitive forces, and reputation in particular, to deter sellers from adhering to the four corners of the agreement.[[6]](#footnote-6)

This debate has significant policy implications. If reputational constraints discipline sellers and prevent them from enforcing their contracts to the hilt, policymakers and courts may not need to intervene in the contents of these agreements to protect consumers.[[7]](#footnote-7) If they do not, however, then regulators and courts may need to intervene in consumer transactions to ensure the consumers are adequately protected.[[8]](#footnote-8) Yet, despite the significant practical implications of the debate, there has been little systematic empirical research on how sellers actually enforce rigid contractual provisions.[[9]](#footnote-9)

This Article represents an important step towards mitigating this deficiency. It reports the results of a large-scale field experiment in which auditors attempted to return clothing items without receipts (despite a clear receipt requirement) to over one-hundred retail stores in Chicago. The study explored whether and when sellers depart from this formal policy requirement in favor of consumers.

While a significant minority of sellers (about twenty percent) departed from this formal requirement in favor of consumers, the vast majority of sellers (almost eighty percent) strictly adhered to it, refusing to offer any concession to consumers. This held true whether the store was local or a part of a chain, and regardless of how luxurious or established the store was. Even after consumers negotiated and complained to the management, most stores (63%) were unwilling to accommodate them. To the extent that Gap theorists predict that a majority of sellers will depart from their rigid, formal requirements in favor of consumers, these findings qualify that prediction, suggesting that at least in the context studied here, most sellers are not flexible.

Second, the results show that some terms are stickier than others, such that sellers hardly ever depart from them to the consumers’ advantage. Sellers were reluctant to apply pro-consumer gaps in the contexts where gaps were expected to be most prevalent according to the Gap Theory—the cases of unequivocally rigid terms completely denying refunds.[[10]](#footnote-10) Importantly, these are also the contexts where gaps are plausibly needed the most.

These findings, I argue, carry significant legal ramifications. Many scholars have argued that sellers’ departure from their formal contracts “renders legal intervention less necessary.”[[11]](#footnote-11) To Gap Theory supporters, “courts would do well to take a hard line in enforcing the terms” of consumer contracts (in the absence of evidence of fraud).[[12]](#footnote-12) Yet, the findings reveal that reputational constraints on businesses are not always enough to prevent the enforcement of strict and unconditional contract terms. Consequently, the gap between the “paper deal” and the “real deal” does not necessarily obviate the need for regulation of contract terms.

Yet, this Article also makes a more subversive argument against the notion that the gap can be relied on to discipline sellers. It suggests that even when pro-consumer gaps are prevalent, they might generate distortions and regressive distributive effects. This is because sellers engage in complaint-based segmentation of consumers: Store employees are significantly more likely to depart from the store’s seemingly unconditional, stringent return policy once consumers complain.[[13]](#footnote-13)

Of course, sellers may apply complaint-based screening benevolently, using consumer assertiveness as a proxy for the merits of the claim (or the value of the concession to the consumer). Yet, based on accumulating empirical evidence, this Article suggests that such complaint-based segmentation might be harmful to consumers. Such potential for harm exists because consumers tend to be contract formalists: Most believe that whatever the contract says is the final word.[[14]](#footnote-14) They are thus unlikely to complain when the seller refers them to the policy’s clear and unconditional language, even if they have a meritorious claim, and plausibly even when their benefits from the seller’s more lenient accommodation exceed the costs to the seller of granting it.

In addition to harming consumers as a group, this complaint-based mechanism is likely to have regressive distributional effects. Quantitative evidence (including work conducted by this author) and interviews with store clerks indicate that lower income consumers and minority group members are less likely to complain than are higher income consumers or those belonging to majority groups. The former will consequently cross-subsidize the insistent complainers who benefit from the gap. 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. In particular, preliminary evidence from a field experiment that I have recently administered indicates that sellers treat white consumers more leniently than the paper requires while adhering to the policy significantly more frequently when facing black consumers. The troubling conclusion is that the gap most likely helps those who are already better off, while harming less empowered consumers.

The Article proceeds as follows. Section I provides the background and motivation for the study. It introduces the Gap Theory and the debate surrounding its descriptive validity and welfare implications. It reveals the importance of shedding empirical light on the debate in view of the opposing policy prescriptions that emanate from each side. It then describes the paradigmatic example of product returns and the legal framework governing consumers’ withdrawal rights. Section II presents the sample and design of the field experiment. Section III reports the results. Section IV discusses the implications of the findings, raising some serious concerns as to the interaction between the paper deal, sellers’ on-the-ground practices, and consumer psychology.

# I. Background and Motivation

## The Gap Theory and Gap Skepticism

The Gap Theory argues that seemingly one-sided contract terms may persist in competitive consumer markets even in the absence of a market failure, because reputational forces will constrain sellers from enforcing these terms against most consumers, while the existence of these terms will protect sellers from opportunistic buyers.[[15]](#footnote-15)

Under this theory, sellers adopt one-sided terms in light of 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 without harming their reputations in the market.[[16]](#footnote-16)

The Gap Theory reflects a belief in the ability of competitive market forces, and reputation in particular, to discipline sellers. According to its proponents, reputational constraints will ensure that sellers selectively enforce harsh terms *only* against opportunistic consumers, while departing from the formal agreement to the benefit of the remaining, non-opportunistic consumers.[[17]](#footnote-17)

Sellers’ ability to adopt harsh terms on paper is important under this view, as courts are ill-equipped to distinguish between opportunistic and non-opportunistic buyers.[[18]](#footnote-18) Given the courts’ limited ability to identify the exact circumstances in a given case, it can be expected that sellers will offer contracts lacking terms benefiting the buyer. However, sellers will concurrently have an informal policy of allowing concessions not required by the contract. This descriptive theory therefore also has a normative prong: when consumer misbehavior is observable to sellers but non-verifiable, or verifiable only at a high cost to courts, the argument is that sellers should be allowed to use seemingly one-sided terms, since these terms will allow them to behave efficiently.[[19]](#footnote-19)

Sellers’ ability to adopt clear and unconditional terms on paper is important under this view, as courts are ill-equipped to identify the exact circumstances in a given case.[[20]](#footnote-20) Sellers are therefore expected to include rigid, rule-like terms in their contracts. However, sellers will concurrently have an on-the-ground policy of allowing concessions not required by the contract. This descriptive theory therefore also has a normative prong: When consumer misbehavior is observable to sellers but non-verifiable, or verifiable only at a high cost to courts, strict bright-line terms are both efficient and good for (the non-opportunistic) consumers.[[21]](#footnote-21)

Importantly, according to the Gap Theory, sellers’ willingness to depart from their contracts is not limited to interactions with repeat customers. Sellers that are repeat players in the market, with expectations of doing business with other consumers, may be discouraged from enforcing their contracts to the letter even if these sellers do not expect to have further dealings with the particular consumer.[[22]](#footnote-22)

Although the Gap Theory has gained considerable traction, some scholars have raised concerns that competitive forces might not adequately deter sellers from enforcing their strict pro-seller terms. These scholars rely mainly on the manifold evidence that informational flows in consumer markets are far from perfect, because reputational information is neither reliable nor accurate.[[23]](#footnote-23)

This debate has important policy implications. Gap Theory proponents Lucian Bebchuk and Richard Posner have suggested that “courts would do well to take a hard line in enforcing the terms of one-sided consumer contracts in the absence of evidence of fraud.”[[24]](#footnote-24) At the same time, those who point to reputational failure highlight “the centrality of the law to the future of the marketplace.”[[25]](#footnote-25) Indeed, if sellers insist on adhering to the contract even when it is not socially desirable to do so, regulation of the contents of standardized agreements may be warranted after all.

In view of the conflicting policy prescriptions stemming from these theories, exploring them in the field is of the utmost importance. Yet, notwithstanding the practical implications of this debate, empirical investigation into the gap is surprisingly lacking. This Article uses the test case of product returns to shed light on the gap theory.

The case study of product returns is particularly suitable for scrutiny because the gap literature has used return policies as the poster child example for its hypothesis[[26]](#footnote-26) without any meaningful empirical investigation into sellers’ return practices on the ground.[[27]](#footnote-27) In addition, despite the substantial economic significance of product returns to both consumers and sellers, we know far too little about the contents and actual implementation of retailers’ return policies. The next section provides background to the study by briefly presenting the legal framework governing product returns.

## The Case Study: Retail Stores’ Return Policies

In the U.S. alone, consumers spend more than $10 trillion a year in retail stores.[[28]](#footnote-28) In a significant number of cases, consumers who purchase goods or services end up regretting their purchases after the fact.[[29]](#footnote-29) In 2016, for example, Americans returned $260 billion in merchandise (or eight percent of all purchases made in the United States) to retailers.[[30]](#footnote-30)

The right to withdraw from consumer transactions is therefore an important consumer right.[[31]](#footnote-31) 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 enormous economic significance of the right to withdraw from consumer transactions, consumers are not in most cases[[32]](#footnote-32) entitled to return non-defective goods to the seller under current U.S. law.[[33]](#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,[[34]](#footnote-34) others believe that statutory intervention may not be warranted due to market incentives already in place.[[35]](#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.[[36]](#footnote-36) Yet, in recent years, stores have begun imposing more and more restrictions on consumer returns, to prevent consumers from being able to take advantage of retailers’ generous policies to obtain free product rentals.[[37]](#footnote-37) These shifts in firms’ policies have spurred consumer outrage,[[38]](#footnote-38) reviving the debate over the need to regulate consumers’ withdrawal rights.[[39]](#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.[[40]](#footnote-40) This Article presents the first comprehensive empirical account of on-the-ground retailers’ 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 test whether there is a gap between retailers’ return policy terms and their actual enforcement vis-à-vis consumers, I conducted a field experiment using an audit technique. Although legal scholars have only recently begun to conduct field studies, such studies are increasingly used in legal scholarship, and are considered as “one of the most powerful empirical tools for identifying causal relationships.”[[41]](#footnote-41) The audit technique used in this study is similar to audit techniques used in discrimination studies:[[42]](#footnote-42) Testers (white American females roughly around the same age) were sent to return clothing items to 132 retail stores located in Chicago. The testers all wore casual clothing and in their interactions with store clerks followed a memorized script.

The stores were selected from the ReferenceUSA and Hoover’s Company Directories’ databases based on 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. In addition, dollar stores were deliberately 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-43) I chose to explore 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 hassle.[[44]](#footnote-44)

In each store, testers attempted to return a clothing item (that had been purchased in advance)[[45]](#footnote-45) in its original packaging and condition, with tags attached, but *without the receipt*.[[46]](#footnote-46) They were instructed to wait in line until a store clerk became available and asked them what he or she can do for them. They 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.[[47]](#footnote-47) If asked for the receipt, testers would answer that they thought they had the receipt with them, but they had looked for it and it seems they 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. 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.

The testers’ bargaining script was designed to test the interaction between consumer assertiveness and the gap. The study predicted that sellers would be more likely to exercise leniency once consumers insisted and complained, because sellers may use complaining or assertiveness as a proxy for the value that consumers attach to the particular concession.

The purpose of the study was to identify *systematic*, rather than sporadic deviations from the paper policy. Yet, it might be the case that in some of the stores, store clerks deviated from the formal policy by mistake, and not as a result of a systematic store policy allowing for store clerk discretion on the ground. To address the concern about random divergences from the paper contract, each store was audited by *two* testers, and the analysis includes only the stores in which both testers obtained identical return outcomes.[[48]](#footnote-48)

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. Yet, this design gives me confidence that most of the observed deviations were the result of managerial policy to allow clerks to depart from the formal policy in favor of consumers. This methodological approach also mitigates the concern that, despite attempts to control for uniform tester performance and demographics (as described below), differences in testers’ bargaining behavior or other characteristics have meaningfully influenced the results.

Overall, the stores were audited by six testers, and the composition of pairs varied from audit to audit.[[49]](#footnote-49) Data collection took place between March and April 2019, well after the holiday season, so as to avoid potential changes in stores’ return policies that typically occur during that season.[[50]](#footnote-50) Both testers in a pair visited the same store, usually within a few days of one another. After leaving each store, all testers filled out a detailed report, in which they described the outcomes of the attempted returns.

In order to minimize the possibility of non-uniform bargaining, particular attention was paid to issues of experimental 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 white;
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;
6. *Contact Information:* If asked for their names when returning the item, testers would use one of two fake names.[[51]](#footnote-51)

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. Testers were accompanied by project coordinators the stores. The coordinators ensured that testers were following the script and accurately reporting the results. In addition to ensuring bargaining uniformity, the returned items’ prices were also kept constant, at between $20 to $30.

After discarding tests (due to inconsistent outcomes, deviations from the script, or scheduling difficulties), the final sample includes 190 audits from 95 retailers (two audits per store). These retailers’ mean annual revenues is $434 million (SD = 2311). The average company age is 52 years (SD = 42).[[52]](#footnote-52) Publicly traded firms comprise 41% of the sample. Seventy-one percent of the stores in the sample are national retail chains and 29% are local stores, defined as stores with only one or two locations, both in Illinois.[[53]](#footnote-53)

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.[[54]](#footnote-54) Stores were subsequently classified by two independent research assistants as having harsh, moderate or lenient paper policies as follows:

(1) *Harsh paper policies* do not allow consumers to return items for a refund, and require receipts for any exchange or return;

(2) *Moderate paper policies* allow consumers to return items for a refund conditional on showing receipts, and require receipts also for any exchange or return;

(3) *Lenient paper policies* allow consumers to return items for a refund conditional on showing receipts, while allowing consumers to return items for exchanges or store credits without receipts.[[55]](#footnote-55)

*Table 4. Paper Policy Types (n = 95)*

|  |  |  |
| --- | --- | --- |
|  | 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 |

Here are the summary statistics for each store type:

|  |  |  |  |
| --- | --- | --- | --- |
|  | Mean Revenues (in millions of dollars)  (SD) | Mean Age  (SD) | Percent Chain |
| Harsh Policy Stores  (n =23) | 0.26  (SD = 0.38) | 21  (14) | 4% |
| Moderate Policy Stores  (n = 33) | 751  (SD = 3285) | 46  (32) | 85% |
| Lenient Policy Stores  (n = 39) | 199  (SD = 1024) | 71  (48) | 97% |

The study explores the prevalence of the following deviations from the paper policy:

*Table 5: 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. This section presents the results of the field experiment.

Part 1 reports on the prevalence of pro-consumer gaps, defined as any deviations from the clear and unconditional policy terms denying refunds or requiring receipts for returns. This study reports the prevalence of pro-consumer gaps across the sampled stores.

Part 2 turns to explore the effect of complaining on the gap. Each audit produced two return outcomes: One is the return outcome that testers had achieved before complaining and one is the return outcome after complaining. Importantly, the design allows a comparison of the rates of pro-consumer gaps at the initial stage, before testers asked to speak to a manager, and after testers complained.

Finally, Part 3 reports the results of multivariate analyses aimed at testing the relationships between several store characteristics and the gap.

### The Prevalence of Pro-Consumer Gaps

Table 6 describes what happened when testers initially asked for a refund across the different types of stores. Pro-consumer gaps are highlighted in bold, and pro-seller gaps are underlined.[[56]](#footnote-56)

*Table 6. Return Outcomes at the Initial Stage.*

|  |  |  |  |  |
| --- | --- | --- | --- | --- |
| Store Type | Return Denied[[57]](#footnote-57) | 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 \*.

As expected, the results reveal that the formal terms of the contract had a strong and significant effect on testers’ initial return outcomes: Stores with lenient return policies were significantly more likely to accept non-receipted returns (for a refund, exchange or store credit) than stores with moderate return policies, and the latter were significantly more likely to accept such returns than were stores with harsh return policies.[[58]](#footnote-58)

That said, across all stores, testers received more favorable treatment than the official policy required in a significant minority of cases. Overall, the audited stores exhibited a pro-consumer gap in 22% of the cases. Figure 3 illustrates the prevalence of pro-consumer gaps in each type of store.

*Figure 3: Pro-Consumer Gaps across Stores*

As figure 3 shows, stores with moderate return policies were much more likely than stores with harsh return policies to exhibit a pro-consumer gap (moderate stores applied pro-consumer gaps in 36% of the audits, while harsh policy stores applied such gaps in only 9% of the audits).[[59]](#footnote-59) One explanation for this finding is that harsh policy stores almost exclusively consist of local retailers operating only one or two shops in Illinois. In this study, only one of the harsh policy stores (4%) belongs to a chain, while the remaining 96% belong to independent retailers.[[60]](#footnote-60) These local stores typically incur higher depreciations costs from accepting returns, in view of their lower ability to resell items or to return them to the supplier.

### The Effect of Complaining on the Gap

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.[[61]](#footnote-61) Sellers may consequently use consumer assertiveness to determine whether to depart from the paper policy in favor of consumers.

.

This Section explores the impact of consumer bargaining strategy on the gap, 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 experimental design enables testing for the interaction between consumer assertiveness and the gap by comparing testers’ initial return outcomes to their outcomes after complaining.

The results reveal that consumer assertiveness plays a major role in determining sellers’ leniency in practice. As expected, complaining significantly affected the on the ground behavior of stores. Yet, the magnitude of the effect is striking. While only 22% of the stores treated testers more leniently than the policy required before testers complained, as many as 37% of the stores treated testers more favorably after testers had complained.[[62]](#footnote-62) 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.[[63]](#footnote-63)

Figure 3 shows the effect of complaining on the gap across policy types, by reporting the return outcomes, at both the initial and final stages, across policy types.

*Figure 3. Pro-Consumer Gaps: Before and After Complaining*

As Figure 3 shows, complaining significantly improved testers’ return outcomes among both the harsh and moderate policy stores.[[64]](#footnote-64) Complaining also operated in the expected direction of improving consumers’ outcomes among the lenient policy stores, yet the effect was not significant.[[65]](#footnote-65) This is plausibly the case because of a “ceiling effect:” The lenient policy stores were already relatively generous towards consumers.

Figure 4 reports testers’ initial and final return outcomes across the different policy stores. Importantly, as the figure shows, even after testers 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,[[66]](#footnote-66) and moderate stores were significantly more likely to accept such returns than harsh policy stores.[[67]](#footnote-67)

*Figure 4: Initial and Final Return Outcomes by Policy Type*

|  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- |
| Store Type | Stage | Return Denied[[68]](#footnote-68) | 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% |

Figure 4. Pro-Consumer gaps are highlighted in bold, anti-consumer gaps are underlined. In the last column, significant differences in outcomes before and after complaints are marked in asterisks (\* for *p* < 0.1, \*\* for *p*  < 0.05, \*\*\* for *p*  < 0.01).

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 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 stores that required receipts for refunds, from 10% to 17%.

To summarize, the results reveal that, as expected, 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 before, sellers may use the gap 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-69)

Ultimately, sellers will engage in cost-benefit analyses and decide accordingly about whom to treat more favorably than the contract requires. These decisions will necessarily hinge on the inevitable compromise between the reputational harm and inconvenience sellers will incur from enforcing unwanted terms on 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. And third, complainers might refrain from entering into future transactions with the seller.

Recall, however, that the effect of complaining depended on the type of return policies the store had, so that in the context of the harsh “no refund” policies, complaining did not improve consumers’ chances of receiving a refund at all, while in the context of the other, more lenient policy terms, it had a significantly greater impact. This finding reveals, once again, that harsh “no refund” terms are sticky, such that retailers are reluctant to depart from them even after consumers complain.

The next Section shifts attention from the role of consumer assertiveness in shaping the gap to other determinants of outcomes on the ground. In particular, it focuses on store characteristics and their relationship with the gap.

### Store Characteristics and the Gap

This Section explores whether various store characteristics are associated with a higher likelihood of pro-consumer gaps. In particular, it tests the predictions that more luxurious stores will be more likely to depart from their formal policies even when keeping the paper policy fixed, and that chain stores will be more likely to apply pro-consumer gaps than will local stores.

The first proposition, that more luxurious 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 a series of qualitative interviews I conducted in preparation for the field experiment. For example, a former store clerk at Saks Fifth Avenue mentioned, in response to the author’s 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.”[[70]](#footnote-70) Similarly, a former store clerk at the Bally luxury shoe store stated that:

In a high-end luxury 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.[[71]](#footnote-71)

More casual stores, in contrast, build their reputations by offering lower prices. Therefore, they will likely offer no discretionary benefits but charge lower prices.[[72]](#footnote-72)

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 more luxurious 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 the gap.

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. *Luxuriousness:* Stores were classified as discount, mainstream, or luxury 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 $26). Mainstream stores were defined as all stores withe median prices between the 25th and 75th percentiles (i.e., between $26 and $70), and luxury stores were defined as all stores with median prices in the upper 25th percentile (i.e., between $70 and $350);
2. *Store Type:* Whether the store is local (0) or part of a chain (1);
3. *Experience:* As calculated as years of operation since establishment;
4. *Size*: As calculated by annual revenues (included as control);
5. *Policy Type*: Harsh, moderate, or lenient (included as control).

Table 7 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) 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 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 7: 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) |
|  |  |  |  |  |  |  |
| Luxury | 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 | 89 | 89 | 89 | 89 | 51 | 51 |
| 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 “discount” 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. P-values in parentheses (*\* p* < 0.1, \*\* *p* < 0.05, \*\*\* *p* < 0.01). The reference category for policy type is “harsh.” The reference category for prestige is “discount.”

The results reveal that, consistent with the study’s predictions, luxury stores were significantly more likely to depart from their formal policies than both mainstream and discount stores, at both the initial (pre-complaining) and final (post-complaining) stages.[[73]](#footnote-73)

In addition, and as expected, chain stores were significantly more likely to apply pro-consumer gaps than local stores.[[74]](#footnote-74) The results also show a significant relationship between a store’s age (as proxied by years since establishment) and its likelihood to depart from the paper 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.[[75]](#footnote-75) 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, *ceteris paribus*, 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.

# IV. Discussion & Implications

## Pro-Consumer Gaps Persist, but only in a Minority of Stores

The results show that pro-consumer gaps persist across various types of retail stores, including chain and local, large and small, luxury and casual. While gaps are more prevalent in some contexts and stores than in others, a significant minority of retailers behaves more leniently towards consumers than their formal policies require. These results lend support to the theory that sellers may intentionally use ostensibly rigid, unconditional terms in their standardized agreements, but selectively enforce these terms in order to distinguish between different types of consumers. As a result, clear, bright-line terms may operate as standards in practice, while store clerks exercise discretion on the ground.

Why do some stores rather than others deviate from their formal policies in favor of consumers? The results show that several store characteristics are strongly associated with a higher likelihood of applying pro-consumer gaps. In particular, more luxurious, established, and chain stores were more likely to depart from their policies when facing one-time consumers than were less luxurious, less established, and local stores.

Indeed, these sophisticated stores are typically significantly associated with more generous return policies on paper. However, even when keeping the paper policy constant across stores, more luxurious and 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.

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

Yet, importantly, most stores do not depart from their formal receipt requirements in favor of consumers. In fact, in 78% of the stores, store clerks refused to grant consumers *any concessions* absent a receipt; and non-receipted refunds were denied in 92% of the stores. To the extent that gap theorists predict that all, or even a majority, of sellers will depart from the paper deal (at least when facing non-opportunistic consumers), these findings are inconsistent with such predictions.

While more luxurious and established stores were more likely to exercise forgiveness, even among those stores, the majority of sellers were unwilling to depart from the four corners of the agreement. And while consumers’ complaints significantly increased their chances of securing more lenient behavior, the majority of sellers refused to depart from the formal requirements even after consumers had complained, and in most cases, even after consumers had bargained with the stores’ managers.

The fact that sellers often refuse to grant concessions does not, in and of itself, imply that sellers’ adherence to their formal contract terms is inefficient. In competitive markets with no informational asymmetries, sellers have strong incentives to satisfy consumers. It therefore seems unlikely that sellers will insist on enforcing their rigid, rule-like terms to the letter at the risk of driving away customers unless these terms reflect an efficient risk allocation between sellers and consumers.[[76]](#footnote-76)

Admittedly, sellers’ insistence on following the contract to the letter may be efficient, even if the particular contract term *seems* excessively rigid or unfavorable to the consumer. Yet, the results suggest that policymakers should be cautious of inferring that seemingly one-sided terms in standard form contracts generally do not warrant regulatory scrutiny based solely on the premise that sellers will depart from these terms in practice.

Indeed, the question of whether a certain contractual arrangement is desirable or welfare-enhancing is undoubtedly a difficult one, and there may be reasons other than the predictions of the Gap Theory to refrain from intervening in the contents of standardized agreements. In particular, in competitive markets *without informational asymmetries*, firms—rather than policymakers or courts—may be better equipped to determine whether specific terms are socially optimal, because they are better able to estimate both the benefits of these terms to consumers and the costs of offering them.

Yet in reality, in most consumer transactions, substantial informational asymmetries often persist. Consumers face an incredible amount of fine print in their daily lives, and it is neither practical nor efficient for them to read all of their contracts thoroughly.[[77]](#footnote-77)

Sellers often make it even harder for consumers to read standardized contracts by using long forms, small fonts, and complex legal jargon.[[78]](#footnote-78) All of these drafting practices discourage consumers from attempting to read the fine print.[[79]](#footnote-79) It is therefore not surprising that there is ample empirical evidence that consumers rarely read standard form contracts before signing or clicking through them.[[80]](#footnote-80) In the context of return policies, many consumers may fail to notice the terms governing their withdrawal rights. Sellers often hide these terms in the fine print on the back of the receipt, on a small sign placed behind the counter, or by directing consumers to go online to read their full return policy.

Sellers can exploit consumers’ failure to read by introducing excessively strict terms into the fine print.[[81]](#footnote-81) Since these terms are practically invisible for most consumers, sellers may be encouraged to include shrouded, non-salient terms that increase their profits, even if these terms decrease the aggregate surplus from the transaction.[[82]](#footnote-82)

Moreover, even if certain terms are clearly disclosed so that consumers are made aware of them, sellers regularly design contract terms in ways that take advantage of consumers’ cognitive biases and systematic misperceptions.[[83]](#footnote-83) For example, if consumers are overly optimistic and consequently underestimate the possibility that a certain product will fail to work, sellers may introduce warranty disclaimers into the fine print while failing to adequately adjust the product’s price downwards.[[84]](#footnote-84) In these cases, consumers might enter into inefficient transactions by underestimating the costs associated with these transactions or overestimating their benefits.[[85]](#footnote-85)

These problems are not solved even in situations of perfect competition, as competition only drives sellers to compete over the *perceived* rather than the *actual* benefit to consumers.[[86]](#footnote-86) As Oren Bar-Gill explains:

“We consumers are imperfectly rational, our decisions and choices influenced by bias and misperception. Moreover, the mistakes we make are systematic and predictable. Sellers respond to those mistakes. They design products, contracts, and pricing schemes to maximize not the true (net) benefit from their product, but the (net) benefit as perceived by the imperfectly rational consumer. Consumers are lured, by contract design, to purchase products and services that appear more attractive than they really are.”[[87]](#footnote-87)

If consumers underestimate the value of the benefits they will be able to extract from high-quality contract terms (either because they suffer from cognitive biases or because they simply do not read or pay attention to the contract *ex ante*), sellers will be motivated to decrease prices while saving costs through inefficient (albeit non-salient) contractual arrangements.[[88]](#footnote-88) In such cases, regulatory intervention may be needed—at least to assess whether the terms are socially desirable.[[89]](#footnote-89)

Admittedly, certain terms in retail sellers’ return policies may be relatively salient to consumers. Yet, others—such as the receipt requirement—might be less salient to consumers at the *ex ante* stage, either because they may not notice it, over-optimistically assume that they will not lose it, or underestimate the chances that they will return the purchased goods.

Either way, when taken together with the finding that sellers rarely depart from these seemingly stringent requirements, these insights cast serious doubt on the view that “regulation (or much of it) should be abandoned altogether, leaving the scene to market forces of reputation and competition.”[[90]](#footnote-90)

## Gaps Might Generate Distortions

Even when gaps persist, they might generate distortions—both *ex ante* and *ex post*.

### *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 paper 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 consumers 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 are apparently 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.”[[91]](#footnote-91)

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 may also lead to several inefficiencies at the post-contract stage. First, some 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.[[92]](#footnote-92)

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. 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.[[93]](#footnote-93)

This reaction can be attributed to the fact that consumers are contract formalists.[[94]](#footnote-94) 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.[[95]](#footnote-95) Consumers are often demoralized by harsh and unconditional contractual language, and consequently refrain from bringing claims to the seller.[[96]](#footnote-96) In fact, previous research has shown that consumers rarely question the validity of contracts that disclaim their mandatory rights and remedies.[[97]](#footnote-97) Consumers are similarly unlikely to challenge contracts induced by fraud because they feel bound by contracts they signed.[[98]](#footnote-98)

In the specific context of the gap, consumers are not likely to realize that sellers often depart from their policies upon consumers’ requests. Indeed, 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-99)

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. Sellers, in turn, will 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 may fail to realize that these deviations reflect a systematic inclination, rather than one-time deviations, for the same reasons mentioned earlier.

### *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. The traditional assumption in the gap literature is that complaint-based segmentation of consumers may be welfare enhancing. For example, Jason Scott Johnston has argued that firms’ practice of providing “benefits to consumers who complain” 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.”[[100]](#footnote-100)

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, 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 combined costs of accommodating buyers who complain and any reputational loss from disappointed buyers who fail to complain are lower than the costs of accommodating the claims of all disappointed consumers (including the non-complainers), sellers will adopt the strict term denying the accommodation and depart only selectively in favor of those consumers who complain.[[101]](#footnote-101) Importantly, sellers may adopt the strict term even if a more lenient term reflects a more efficient risk allocation from a social welfare perspective (to the extent that these terms are not sufficiently salient to consumers *ex ante*, and therefore cannot be translated into higher prices).

### Distributional Concerns

Stores were nearly twice as likely to depart from the paper contract once consumers complained. This complaint-based segmentation of consumers effectively leads to the cross-subsidization of the complaining consumers by the more acquiescent, non-complaining consumers.

If consumer assertiveness is correlated with socio-economic status, this complaint-based discrimination might have troubling distributive implications.[[102]](#footnote-102) 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.[[103]](#footnote-103) 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 whites and males.[[104]](#footnote-104)

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.[[105]](#footnote-105)

In the context of the gap, 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.

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-bloomers. […] 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.”[[106]](#footnote-106)

In addition, allowing store clerks discretion in exercising leniency toward certain consumers might produce regressive distributional outcomes to the extent that store clerks would use this discretion to the systematic disadvantage of certain group members.[[107]](#footnote-107) 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). At least in the context of race, such discrimination violates the Civil Rights Act of 1991, which prohibits racial discrimination in making, performing, modifying, and terminating contracts and in restricting access to “the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”[[108]](#footnote-108)

The potentially harmful effects of sellers’ departures from their contractual arrangements—both to consumers as a group and to members of disadvantage groups—illustrate, once again, that if the “paper deal” is excessively harsh, regulators may need to intervene in the contents of consumer transactions in order to enhance consumer welfare, even when pro-consumer gaps are relatively prevalent.

# 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 Gap Theory, at least in the context of product returns, the “real deal” often departs in meaningful ways from the “paper deal.” Store clerks behave more mercifully towards consumers than their stores’ formal policies require. Yet, the findings at the same time reveal that 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.

Given the observed divergence between the terms of the paper deal and the terms of the “real deal,” it is important for policymakers and courts to uncover the terms of the “real deal” before concluding that regulatory intervention is unnecessary (or desirable). More generally, this Article suggests at least shifting 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.”

[Appendices --- to be added]

1. \* Olin Law & Economics Research and Teaching Fellow, University of Chicago Law School. [acknowledgments to be added]. This project benefited from the generous support of the Harvard Institute for Quantitative Social Science. [↑](#footnote-ref-1)
2. *See*Henry Butler, Christopher Drahozal, & Joanna Shepherd, Economic Analysis for Lawyers 183 (3d ed. 2015) (explaining that *“*[f]orms reduce transactions costs and benefit consumers because, in competition, reductions in the cost of doing business show up as lower prices”); Melissa T. Lonegrass, *Finding Room for Fairness in Formalism-the Sliding Scale Approach to Unconscionability*, 44 Loy. U. Chi. L.J. 1, 27 (2012) (explaining how standard-form contracts reduce transaction costs, promote efficient transactions, and benefit consumers); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1173, 1221 (1983) (explaining how form contracts save money and promote transactions).  [↑](#footnote-ref-2)
3. *See, e.g.*,Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013)(noting that non-negotiable boilerplate terms regularly deprive non-drafting parties of their most basic rights); Edith Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 Seattle U. L. Rev. 469, 515 (2007) (observing that drafting parties often hide one-sided terms in their boilerplates); Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (2012) (showing how sellers exploit consumers’ bounded rationality and systematic cognitive biases through contract design); 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); 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.”); Nancy S. Kim, Wrap Contracts: Foundations and Ramifications 29 (2013) (suggesting that sellers use one-sided clauses, such as dispute resolution provisions, to hinder buyers’ access to the judicial system); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*,59 Vand. L. Rev. 1735 (2006); Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 Eur. Rev. Contract L. 1 (2009) (questioning consumers’ ability to understand and comprehend contract terms and discussing the rampant use of boilerplate or one-sided terms); David A. Hoffman, *Relational Contracts of Adhesion*, 85 U. Chi. L. Rev. 1395, 1396 (2018) (explaining that “[b]ecause consumers don’t read their contracts, firms can make “hidden” terms worse without lowering prices”).  [↑](#footnote-ref-3)
4. *See, e.g.*, Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 Mich. L. Rev. 215, 281 (1990) (“Having the terms [unfavorable to the consumer] in the writing gives a seller the discretion to invest in goodwill in circumstances where it is most valuable to do so, while leaving him the option of enforcing the contract to the letter at other times.”); Robert A. Hillman & Jeffrey Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 441 (2002); Clayton P. Gillette, *Rolling Contracts as an Agency Problem*,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) (observing that sellers may use “ostensibly oppressive terms” to allow themselves “discretion to treat buyers who appear to be acting in good faith differently from those who appear to be acting opportunistically”); Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 Mich. L. Rev. 827, 828 (2006) (suggesting that “reputational considerations” may “induce the seller to treat the buyer fairly even when such treatment is not contractually required.”); Jason Scott Johnston, *The Return of the Bargain: An Economic Theory of how Standard Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 Mich. L. Rev. 857 (2006) (suggesting that firms use “clear and unconditional standard-form contract terms not because they will insist upon these terms, but because they have given their managerial employees the discretion to grant exceptions from the standard-form terms on a case-by-case basis”); 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.”); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077 (2014); 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). For a similar claim in the context of franchise agreements, see Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 Am. Econ. Rev. 356, 358–60 (1980) [Klein]. [↑](#footnote-ref-4)
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).Since then, several scholars have applied this terminology in the consumer contracts setting. *See, e.g.*, Bernstein and Volvovsky, *supra* note 3, at 129 (suggesting that “studies of consumer contracts in particular contexts should move from looking almost exclusively at the terms of the paper deal to looking at the terms of the real deal”). [↑](#footnote-ref-5)
6. *See, e.g.*,David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. Rev. 1595, 1641 (2016) (explaining that “[t]he problem is that firms might be able to insist (in the law’s shadow) that consumers comply with unenforceable [one-sided] terms, simply because those consumers misconstrue the operative rules”); Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, Wake Forest L. Rev. (forthcoming 2019) (arguing that reputation fails to adequately discourage sellers from enforcing harsh terms to the letter); Manisha Padi, *The Exercise of Contract Rights* (draft; on file with the Author) (finding that, in the context of foreclosures, “market forces, such as competition across lenders or consumer bargaining, are not strong enough to discipline” lenders from exercising contract rights inefficiently); Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 Conn. L. Rev. 1, 12 (forthcoming 2019) (arguing that online information flow is less powerful when the firm’s conduct is not aligned with its contractual language). [↑](#footnote-ref-6)
7. *See, e.g.*, Gillette, *supra* note 3, at 712; Bebchuk & Posner, *supra* note 3, at 834. [↑](#footnote-ref-7)
8. *See, e.g.*, Arbel, *supra* note 5; Becher & Zarsky, *supra* note 5, at 14; *see also* Zamir & Teichman, *supra* note 22, at 304 (noting the “ongoing, heated debate over the appropriate legal treatment of one-sided clauses in standard-form contracts”); Eyal Zamir & Ian Ayres, *Mandatory Rules* (Hebrew Univ. of Jerusalem Legal Research Paper No. 19-12, 2019), https://ssrn.com/abstract=3420179 (noting that while “some are inclined to conclude that regulation (or much of it) should be abandoned altogether, leaving the scene to market forces of reputation and competition,” others call “for more serious and systematic consideration of the use of mandatory regulation of the content of transactions”). [↑](#footnote-ref-8)
9. Scholars who discussed the gap and its implications for public policy have acknowledged the empirical deficiency, calling for future empirical work on these issues. *See, e.g.*,Gillette, *supra* note 3, at 698; Becher & Zarsky, *supra* note 5, at 13 (suggesting, for example, that “further empirical and analytical work is required” in order to distinguish sellers’ systematic deviations from their formal contracts from more sporadic departures). [↑](#footnote-ref-9)
10. *See, e.g.*, Gillette, *supra* note 3, 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”); Becher & Zarsky, *supra* note 5, at 1 (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-10)
11. Schmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 3 DePaul Bus. & Com. L.J. 199, 208 (2010). [↑](#footnote-ref-11)
12. Bebchuk & Posner, *supra* note 3, at 834. [↑](#footnote-ref-12)
13. This finding is consistent with the predictions of several authors. *See,* e.g., Gillette 2004, *supra* note 3, at 707 (hypothesizing, without providing empirical data, that sellers might distinguish between insistent and non-insistent buyers); Johnston, *supra* note 3, at 881 (suggesting that firms use customer complaints in order to determine the value of the concessions to consumers). [↑](#footnote-ref-13)
14. *See* sources cited *infra* note 98. [↑](#footnote-ref-14)
15. *See* sources cited *supra* note 3. [↑](#footnote-ref-15)
16. *See, e.g.*, Gillette, *supra* note 3, at 704–07; Bebchuk & Posner, *supra* note 3, at 827. [↑](#footnote-ref-16)
17. Bebchuk & Posner, *supra* note 3, 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.”). [↑](#footnote-ref-17)
18. Gillette, *supra* note 3, at 704; Bebchuk & Posner, *supra* note 3, at 831. On problems of observability by courts in the context of franchise agreements, see Benjamin Klein, *Transaction Cost Determinants of “Unfair” Contractual Arrangements*, 70 Am. Econ. Rev. 356 (1980). [↑](#footnote-ref-18)
19. Gillette, *supra* note 3, at 704; Bebchuk & Posner, *supra* note 3, at 834. [↑](#footnote-ref-19)
20. Gillette, *supra* note 3, at 704; Bebchuk & Posner, *supra* note 3, at 831. [↑](#footnote-ref-20)
21. Gillette, *supra* note 3, at 704; Bebchuk & Posner, *supra* note 3, at 834. [↑](#footnote-ref-21)
22. Bebchuk & Posner, *supra* note 3, at 828 (“As our analysis highlights, . . . the distinction is also relevant to contracts that businesses enter into with consumers who are not repeat players. As long as the business is a repeat player with the consumer side of the market, its expectation of doing business with other consumers in the future may dissuade it from enforcing a one-sided contract to the hilt against a particular customer even though the business does not expect to have further dealings with that consumers.”). [↑](#footnote-ref-22)
23. Eyal Zamir & Doron Teichman, Behavioral Law & Economics 311 (2018); Becher & Zarsky, *supra* note 5, at 14 (arguing that “there is no guarantee that online information flow indeed features the seller’s lenient treatment” because “consumers may experience the lenient treatment yet refrain from posting it online due to insufficient motivation”); Arbel, *supra* note 5, at 5 (suggesting that we have reached a point of “reputational failure”). [↑](#footnote-ref-23)
24. Bebchuk & Posner, *supra* note 3, at 834. [↑](#footnote-ref-24)
25. Arbel, *supra* note 5, at 1. [↑](#footnote-ref-25)
26. *See, e.g.,* Bebchuk & Posner, *supra* note 3 (using the case of return policies in their model); Gillette, *supra* note 3, 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”); Becher & Zarsky, *supra* note 5, at 1 (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-26)
27. So far, commentators have only relied on limited anecdotal evidence suggesting that retailers behave more leniently towards consumers. *See, e.g.*, Johnston, *supra* note 3, at 873 (suggesting that “Retail-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). [↑](#footnote-ref-27)
28. 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-28)
29. *See, e.g.*,Zamir & Teichman, *supra* note 22, at 290–91; Shmuel Becher & Tal Zarsky, *Open Doors, Trap Doors and the Law*, 74 L. & Contemp. Probs. 63, 73 (2011). [↑](#footnote-ref-29)
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-30)
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, e.g.,Zamir & Teichman, *supra* note 22, at 290–91. [↑](#footnote-ref-31)
32. 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”). [↑](#footnote-ref-32)
33. 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. Still others require stores to disclose their return policies, or else mandate a right to withdrawal for stores where policies prohibiting returns are not clearly displayed. [↑](#footnote-ref-33)
34. *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 22, 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.”); Shmuel I.Becher & Tal Z. Zarsky, *Open Doors, Trap Doors, and the Law*, 74 L. & Contemp. Probs. 63, 63–64, 89 (2011) (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)
35. *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)
36. Johnston, *supra* note 3, at 873–74; Zamir & Teichman, *supra* note 22, at 291; Ben-Shahar & Posner, *supra* note 33, at 120–21; Becher & Zarsky, *supra* note 5, at 73. [↑](#footnote-ref-36)
37. *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)
38. *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 it 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* 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)
39. *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)
40. 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 a meta-analytic review of this literature see 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); *see also* Scott Davis, Michael Hagerty, & Eitan Gerstner, *Return Policies and the Optimal Level of Hassle*, 50 J. Econ. & Bus. 445 (1998). [↑](#footnote-ref-40)
41. *See* 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. For literature on the methodological value (and limitations) of field experiments, see, e.g., Kosuke Imai, Luke Keele, Dustin Tingley, & Teppei Yamamoto, *Unpacking the Black Box: Learning about Causal Mechanisms from Experimental and Observational Studies*, 105 Pol. Sci. Rev. 765 (2011); Kosuke Imai, Dustin Tingley, & Teppei Yamamoto, *Experimental Designs for Identifying Causal Mechanisms*, 176 J. Royal Statistical Soc’y 5 (2012); Alan S. Gerber & Donald P. Green, Field Experiments: Design, Analysis, And Interpretation (2012). For articles specifically addressing the use of field studies in legal research, see, e.g., Donald P. Green & Dane R. Thorley, *Field Experimentation and the Study of Law and Policy*, 10 Annual Rev. L. & Soc. Sci. 53 (2014) (providing an overview of the history of field experiments in the legal context and a number of helpful examples of well-done studies); Michael Abramowicz, Ian Ayres, & Yair Listokin, *Randomizing Law*, 159 U. Pa. L. Rev. 929 (2011); Laurens Walker, *Protecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 L. & Contemp. Probs. 67, 67 (1988); D. James Greiner & Andrea Matthews, *Randomized Control Trials in the United States Legal Profession* (Harvard Public Law Working Paper No. 16-06, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract\_id=2726614. [↑](#footnote-ref-41)
42. For discrimination studies using an audit technique, *see, e.g.*, Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Care Negotiations*, 104 Harv. L. Rev. 817 (1991); Ian Ayres and Peter Siegelman, *Race and Gender Discrimination in Bargaining for a New Car*, 85 The American Economic Review 304 (1995). Audit studies necessarily involve a certain degree of deception, and therefore inevitably raise important questions of research ethics. On the ethical concerns raised by field studies, see, e,g., Kopas & Thorley, *supra* note 40; Abramowicz et al., *supra* note 41. 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. [↑](#footnote-ref-42)
43. While the study’s sample includes luxury 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 luxurious designer stores. I leave this for future research. [↑](#footnote-ref-43)
44. For evidence that receipt requirements are perceived as a hassle by consumers, see,e.g., Janakiraman, Syrdal, & Freling, *supra* note 40. [↑](#footnote-ref-44)
45. Research assistants (purchasers) were sent to purchase the items in advance. 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 purchasing 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 they did not remember them making the purchase at the store in the first place. It could be therefore the case that, at least in the smaller stores, the findings underestimate the likelihood of a gap. 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 remember the particular buyer. [↑](#footnote-ref-45)
46. The study was designed to minimize differences in treatment *between* 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, “last act”/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-46)
47. It is possible that store clerks’ willingness to depart from the formal policy would vary depending on the pretext offered by testers. For example, if testers said that they 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 opens the door to asking for a cash refund rather than exchange or store credit only. [↑](#footnote-ref-47)
48. Testers obtained inconsistent return outcomes in 15% of the sample. In 40% of the stores with inconsistent audit outcomes, one tester obtained a worse outcome than the formal paper policy offered (i.e., a pro-seller gap was observed), while the other obtained the same outcome as described in the paper policy. In the remaining 60%, one tester obtained a concession compared to the paper policy, while the other obtained the return outcome mentioned in the paper policy. Interestingly, after complaining (by asking to speak to management), testers were offered the return outcome described in the paper policy in 77% of the stores that had exhibited a pro-seller gap at the first (pre-complaining) stage. Among stores that had treated one tester more leniently, the other tester’s complaining improved outcomes in only 33% of the cases. [↑](#footnote-ref-48)
49. 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-49)
50. For consistency, testers were instructed to audit the stores on weekdays in the afternoons. [↑](#footnote-ref-50)
51. In order to keep testers’ fake names fixed across stores, the names used in this study were Emily Baker and Allison O’Brian. These names were identified as “white-sounding” in recent discrimination field experiments. *See, e.g.*,Marianne Bertnard and Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination*, 94 Am. Econ. Rev. 991 (2004); Benjamin Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 Am. Econ. J. 1 (2017). [↑](#footnote-ref-51)
52. Firm data, including revenue, public versus private status, and years since incorporation, were obtained primarily from Bloomberg Law and Hoover’s Company Directories’ databases. Age refers to the number of years of operation since incorporation, and size refers to number of employees as of 2019. [↑](#footnote-ref-52)
53. This generally reflects the market share division between local and chain stores in Chicago. The most current study has found that individual retailers control about 30% of the market share. *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-53)
54. For the purpose of documenting in-store signs and receipts, 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. Subsequently, they purchased a clothing item or accessory in each store and scanned the receipt. [↑](#footnote-ref-54)
55. Importantly, the sample did not include any stores that did not allow for refunds, while at the same time allowing for non-receipted returns for 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-55)
56. Unexpectedly, a small subset of stores (8% of the stores with lenient policies) 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 experiment was not designed to explore pro-seller gaps, it is puzzling that sellers allow themselves to depart from their express policies to consumers’ disadvantage. Additionally, 40% of the stores with inconsistent audit outcomes treated one of the testers worse than they were contractually obliged to. These findings uncover the under-explored phenomenon of pro-seller gaps, that although more rare than pro-consumer gaps, justify future investigation. If pro-seller gaps are prevalent, they might justify regulatory interventions in the form of audits, because intervening in the contents of the contracts will not be sufficient. Indeed, stores already promise more than they deliver in the contract, and the mere contractual promise does not sufficiently deter them from retracting from these obligations, at least when consumers seem to be unaware of their contractual rights. 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. [↑](#footnote-ref-56)
57. 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-57)
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-58)
59. [↑](#footnote-ref-59)
60. 59 Stores with moderate policies were also 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 harsh and mainstream stores (9% and 36% respectively) (*b =* 0.83, SE = 0.09, *p* < 0.001). 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-60)
61. This prediction is consistent with previous writings on the gap. *See, e.g.*, Gillette 2004, *supra* note 3, at 707 (hypothesizing, without providing empirical data, that sellers might distinguish between insistent and non-insistent buyers); Johnston, *supra* note 3, at 881 (suggesting that firms use customer complaints in order to determine the value of the concessions to consumers). For research about how firms treat consumers who complain more generally, *see*, *e.g.*, Rory Van Loo, *The Corporation as Courthouse*, 33 Yale J. on Reg. (2016) (arguing that corporations’ responses to consumers’ complaints are influenced by consumers’ characteristics, including past behavior, social influences, and buying power). [↑](#footnote-ref-61)
62. 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-62)
63. 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-63)
64. 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-64)
65. *b =* 0.02, SE = 0.09, *p* = 0.8. [↑](#footnote-ref-65)
66. *b* = 0.35, SE = 0.09, *p* < 0.001. [↑](#footnote-ref-66)
67. *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-67)
68. These figures include cases where store clerks only allowed testers to exchange the item for different size or color. [↑](#footnote-ref-68)
69. Indeed, in an interview conducted with a former store clerk at Abercrombie & Fitch (Chicago), she mentioned that the “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.” Interview #12 with Sarah (Abercrombie) (recorded interview on file with the Author). [↑](#footnote-ref-69)
70. Interview #7 with Leila (Saks Fifth Avenue) (recorded interview on file with the Author). [↑](#footnote-ref-70)
71. Interview #4 with Michael (Bally shoe store) (recorded interview on file with the Author). [↑](#footnote-ref-71)
72. 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-72)
73. [add Wald test results] [↑](#footnote-ref-73)
74. 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-74)
75. 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-75)
76. In the case of return policies, for example, strict “no refund” policies are often adopted by local sellers. It is reasonable to assume that these sellers typically incur high depreciation costs from facilitating returns because of their lower ability to resell used items or return them to the supplier. [↑](#footnote-ref-76)
77. *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted to Know: The Failure of Mandated Disclosure 10 (2014) (observing that “many people make decisions with scant information and slight deliberation. They overlook, skip, or skim disclosures. Far from gathering information, people strip it away to make choices manageable”). Even if they do read some of these contracts in their entirety, it is exceedingly challenging for consumers to understand their full meaning and legal ramifications. *See,* *e.g.*, Jeff Sovern et al., *Whimsy Little Contracts with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. Rev. 1, 4 (2015) (reporting that most of the study’s respondents did not know whether the contract they had just read included an arbitration clause, and that those who realized that it did contain such a clause failed to understand its legal implications). [↑](#footnote-ref-77)
78. *See,* *e.g.*,Debra Pogrund Stark & Jessica Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & Bus. 617, 656–58 (2009). [↑](#footnote-ref-78)
79. *See,* *e.g.*, David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of* *Consumers, and Anticompetitive Effects*, 104 Mich. L. Rev. 983, 986 (2006) (observing that sellers often use these features in order to impose transaction costs on consumers from which the sellers expect to gain). For empirical evidence that user-unfriendly features penalize consumers by increasing fatigue, see Janan Smither & Curt Braun, *Readability of Prescription Drug Labels by Older and Younger Adults*, 1 J. Clinical Psychol. in Med. Settings 149 (1994); George E. Legge, *Psychophysics of Reading: Font Effects in Normal and Low Vision*, 37 Investigative Ophthalmology & Visual Sci. 1492 (2007). [↑](#footnote-ref-79)
80. *See,* *e.g.*,Ayres & Schwartz, *supra* note 1 (responding to the problem of search costs resulting from the overwhelming number of terms and disclosures by which consumers are deluged); Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 118–20 (2017) (recognizing “the now-uncontroversial fact of universal non-readership”); Hoffman, *supra* note 5 at 1605 (“[O]f course, almost no one reads any of these additional, increasingly long contracts.”); Zev J. Eigen, *Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. Inst. & Theoretical Econ. 124, 132 (2012) (finding that almost a third of the study’s participants did not review their online form contract at all, and the mean time spent reviewing the contract among the remaining participants was less than two minutes); Bakos et al., *supra* note 1, at 3 (finding that “only one or two in 1,000 shoppers access a product’s EULA for at least 1 second”); [↑](#footnote-ref-80)
81. *See, e.g.*,Korobkin, *supra* note 2, at 1206; Bar-Gill, *supra* note 3, at 15–16; Radin, *supra* note 2, at 4–9. [↑](#footnote-ref-81)
82. *See, e.g.*, Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia and Information Suppression in Competitive Markets*, 121 Q. J. Econ. 505 (2006) (observing that “informational shrouding flourishes even in highly competitive markets, even in markets with costless advertising, and even when the shrouding generates allocational inefficiencies”). [↑](#footnote-ref-82)
83. Bar-Gill, *supra* note 2; Korobkin, *supra* note 2. In the employment context, *see* Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 Mich. St. L. Rev. 963, 981 (2006). [↑](#footnote-ref-83)
84. *See*, *e.g.*, Gilo & Porat, *supra* note 83, at 985 (observing that “there is a risk that the supplier will extract payment from the consumer without the latter being aware of the fact that the payment does not reflect the reduction of value due to the harsh clause”); *see also* Thomas J. Miceli & Kathleen Segerson, *Liability versus Regulation for Dangerous Products when Consumers Vary in their Susceptibility to Harm and May Misperceive Risk* 9 Rev. L. & Econ. 341 (2013) (arguing that when consumers misperceive risk, the application of strict product liability may be preferred because the price of the product will then accurately reflect the associated risk). Similarly, consumers may underestimate how much they can borrow on their credit cards and overestimate their ability to pay their bills in time. As a result, credit card issuers can increase their late fees while lowering the more salient, annual fees, which will entice such consumers into agreeing to the contract. *See, e.g.,* Bar-Gill, *supra* note 2, at 15–16; Michael S. Barr, Sendhil Mullaintahan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation 12 (New Am. Found. 2008). [↑](#footnote-ref-84)
85. Bar-Gill, *supra* note 2, at 15–16. [↑](#footnote-ref-85)
86. *Id*. at 16. [↑](#footnote-ref-86)
87. *See* Bar-Gill, *supra* note 2, at 2. [↑](#footnote-ref-87)
88. *Id.* [↑](#footnote-ref-88)
89. *See, e.g.*, Zamir & Ayres, *supra* note 7, at 1 (noting that “market failures (including behavioral ones) call for serious consideration of regulation, and continuing to analyze the optimal design of mandatory rules). [↑](#footnote-ref-89)
90. *Id.* at 3 (describing the normative position of various scholars who support minimal regulation of consumer markets). [↑](#footnote-ref-90)
91. *See* George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488 (1970). [↑](#footnote-ref-91)
92. *See, e.g.*, Gillette, *supra* note 3, at 706 [↑](#footnote-ref-92)
93. *See, e.g.*, Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 4 Ala. L. Rev. 1032 (2019) (finding that most tenants in an experimental survey acquiesced to whatever their lease terms said, even when they contained unenforceable liability disclaimers); Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 Stan. L. Rev. \_\_ (forthcoming 2020); Wilkinson-Ryan 2017, *supra* note 84. [↑](#footnote-ref-93)
94. *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 due to “moral commitments, social norms, and motivated reasoning”). [↑](#footnote-ref-94)
95. *See, e.g.*, Furth-Matzkin 2019, *supra* note 97; Furth-Matzkin & Sommers, *supra* note 97; Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print*, 99 Iowa L. Rev. 1745 (2013) (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). [↑](#footnote-ref-95)
96. *See, e.g.*, Furth-Matzkin 2019, *supra* note 97; Furth-Matzkin & Sommers, *supra* note 97; Wilkinson-Ryan 2017, *supra* note 84. [↑](#footnote-ref-96)
97. Furth-Matzkin 2019, *supra* note 97. In a similar vein, Dennis P. Stolle & 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-97)
98. Furth-Matzkin & Sommers, *supra* note 97. [↑](#footnote-ref-98)
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, *supra* note 3, at 2100; Zamir & Teichman, *supra* note 22, at 311–12). For a similar argument, see Daphna Levinson-Zamir, *In Defense of Redistribution through Private Law*, 91 Minn. L. Rev. 326, 358–65 (2006). [↑](#footnote-ref-99)
100. Johnston, *supra* note 3, at 858. [↑](#footnote-ref-100)
101. For a similar assertion, *see Gillette, supra* note 3, at 706. [↑](#footnote-ref-101)
102. Regressive distributional concerns might yield different policy prescriptions than an analysis that only addresses overall efficiency (or welfare). *See, e.g.*, Daphna Levinson-Zamir, *In Defense of Redistribution Through Private Law*, 91 Minn. L. Rev. 326 (2006); Lee Fennell & Richard McAdams, *The Distributive Deficit in Law and Economics*, 100 Minn. L. Rev. 1051 (2016). [↑](#footnote-ref-102)
103. *See, 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 (2001); Paul K. Piff, *Wealth and the Inflated Self: Class, Entitlement and Narcissism*, 40 Personality & Soc. Psych. Bulletin 34 (2014); Candace N. Joyner, *Entitled to Expect: System Justification Theory, Socioeconomic Status, and the Ultimatum Game* (2017) (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); 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); 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 Political Psychology: Social and Psychological Bases of Ideology and System Justification(2009); 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 people and racial minorities tend to result in a lack of assertiveness or lack of a sense of entitlement, thereby limiting their access to educational and job opportunities later in life). [↑](#footnote-ref-103)
104. *See, 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); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 Harv. C.R.-C.L. L. Rev. 401 (1987). [↑](#footnote-ref-104)
105. *See, e.g.*, Furth-Matzkin & Sommers, *supra* note 97 (finding that nonwhite participants were inclined to see the consumer as more bound by the fine print than nonwhite participants); 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 et. al., *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) (explaining that [↑](#footnote-ref-105)
106. Interview #13 with David (rug store) (recorded interview on file with the Author). [↑](#footnote-ref-106)
107. 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-107)
108. 42 U.S.C. §§ 1981(a), 1981(b). *See also* Hill v. Kookies, Inc., 1999 WL 608713 (N.D. Ill. 1999) (applying Illinois law). [↑](#footnote-ref-108)