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A Psychological Account of Consent to Fine Print

*Tess Wilkinson-Ryan**

ABSTRACT: The moral and social norms that bear on contracts of adhesion suggest a deep ambivalence. Contracts are perceived as serious moral obligations, and yet they must be taken lightly or everyday commerce would be impossible. Most people see consent to boilerplate as less meaningful than consent to negotiated terms, but they nonetheless would hold consumers strictly liable for both. This Essay aims to unpack the beliefs, preferences, assumptions, and biases that constitute our assessments of assent to boilerplate. Research suggests that misgivings about procedural defects in consumer contracting weigh heavily on judgments of contract formation, but play almost no role in judgments of blame for transactional harms. Using experimental methods from the psychology of judgment and decision-making, I test the psychological explanations for this disjunction, including motivated reasoning and reliance on availability heuristics. Many commentators have argued that even though it is true that disclosures are probably ineffective, they “can’t hurt.” I conclude with a challenge to that proposition—I argue that the can’t-hurt attitude may lead to overuse of disclosures that do not affect consumer decision-making, but have implicit effects on the moral calculus of transactional harms.

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INTRODUCTION

The proposition that most people do not read the small print, heed the warning labels, or review the “Terms and Conditions” links, is no longer controversial. Nonetheless, the barrage of fine-print disclosures continues unabated, and enforcement of universally unread terms is assumed. The juxtaposition of these facts of modern contracting—widespread reliance on disclosures to protect consumers and widespread agreement that disclosures do not affect consumer behavior—is somewhat puzzling. Contracts scholars have largely approached this puzzle in normative terms, attempting to reconcile the idea of meaningful assent with the core contract doctrine of implied consent to unread terms. What scholars have overlooked in this discussion is a coherent descriptive theory of modern contracting. How do ordinary consumers understand their contractual obligations when formation of most contracts is perfunctory, but the moral and legal rhetoric of contract enforcement is robust? A psychological account of consumer consent sheds new light on the costs and benefits of fine-print contracting.

Consent to standard terms occupies an uneasy place in the existing research on the moral psychology of contracts. The relevant moral and social norms that bear on contracts of adhesion evince a deep cultural ambivalence. Contracts are understood to be serious moral obligations, and yet everyday commercial activity requires that consumers sign agreements that contain terms they have not read. Most people see consent to boilerplate as less meaningful than consent to negotiated terms, but nonetheless would hold consumers strictly liable for both. This is an area with unclear—if not bipolar—norms, and we do not know how individuals assimilate conflicting preferences and bodies of evidence into judgments of consumer consent.

At a broad level, this Essay attempts to tease out the beliefs, preferences, assumptions, and biases that constitute our assessments of assent to boilerplate. To do this, I use methods from the psychology of judgment and decision-making. This Essay presents five short vignette studies about transacting by boilerplate in an effort to examine how consumers think about modern contracting, and how the context of modern contracting bears on judgments of transactional harms. I argue that most people are sensitive to the realities of contracting via boilerplate, and are concerned that consent to fine print is compromised consent. Nonetheless, the vignettes suggest, when it comes to explaining transactional harms,¹ blaming the consumer who consented to the agreement for the harm is both psychologically attractive as well as cognitively available. Even in the face of

1. In this Essay, I will use the phrase “transactional harm” to refer loosely to a broad class of unfavorable results in consumer transactions, principally those that result from enforcement of unfavorable terms.

evidence of procedural defects or wrongdoing by the drafter, participants' instincts were to hold the consumer to the boilerplate terms.

My argument unfolds in two steps, focusing first on assent and then on enforcement. The first proposition is that the social practice of consumer contracting invokes powerful but conflicting norms and intuitions. Most people have strong feelings about individual autonomy in the marketplace, coupled with concerns about both the effectiveness of fine-print disclosures and the potential for drafters' strategic behavior to go unchecked. When asked to think about contract formation, the participants in the studies reported in this Essay recognized that readership of some terms is an unrealistic expectation, and expressed doubts that consent to boilerplate is meaningful. In other words, when people are asked to think about how we *make* contracts in the modern world, they show real ambivalence about consent to boilerplate.

The puzzle is that this ambivalence seems to dissipate entirely when questions about consent come up in the context of contract enforcement. Once the framing is about how to understand a transactional harm—the enforcement of an unfavorable term—the subjects in these studies agreed that a non-reading consumer has clearly consented to be bound and ought to bear the blame for the bad outcome, no matter how cumbersome the demands of readership. Thus, the second step of my argument is that when confronted with the task of explaining a harmful event, there is a shift in motivation and in cognition. The motivation to assign blame (and to assign blame in a psychologically comfortable way) increases, and some causal explanations of the harm grow more salient than others, drawing attention to the consumer's consent and away from other contributing factors. These studies suggest that we understand consent one way in the context of contract formation, and another in the context of enforcement.

The unread fine print has been at the center of a number of recent national debates, including subprime mortgage lending,² hurricane insurance,³ universal default clauses in credit-card contracts,⁴ and hidden

2. Aaron Smith, Note, *A Suitability Standard for Mortgage Brokers: Developing a Common Law Theory*, 17 GEO. J. ON POVERTY L. & POL'Y 377, 389 (2010) ("Unlike other business transactions where the customers understand what they are buying and what the alternatives are, mortgage customers are unlikely to comprehend the fine print that is so critical in modern mortgages.").

3. Jay S. Goldbaum, Comment, *Katrina and Beyond: Judicial Treatment of Boilerplate Language in Standardized Insurance Contracts*, 2007 MICH. ST. L. REV. 453, 454–55 (discussing insurance litigation in Mississippi following Hurricane Katrina which turned on boilerplate "flood exclusion" language).

4. Mary Beth Matthews, *The Credit CARD Act of 2009—What Is It, and What Does It Do?*, 2010 ARK. L. NOTES 65, 68 (including universal default provisions among credit card practices targeted by the Credit Card Accountability Responsibility and Disclosure Act of 2009).

fees in banking contracts.⁵ These debates raise questions of consumer responsibility, the duties of institutional parties drafting take-it-or-leave-it forms, and the background realities of consumer contracting in the modern world. Behavioral researchers have argued for decades that it is utterly unrealistic to think that consumers can read and process fine-print disclosures.⁶ Not only are form contracts unread, they are functionally unreadable (or at least indigestible) for consumers with bounded cognitive capacity—i.e., everyone. The now well-trodden biases that result from limited attentional resources have straightforward implications in the boilerplate context. Distorted risk perceptions, salience biases, and framing effects make it very unlikely that consumers will read the terms of form contracts—and even if they do read the terms, it is unlikely that they will integrate the information into their decision-making process in a sensible way.⁷

Nevertheless, the legal response to this evidence from behavioral economics has been somewhat dismissive. Modern contracts scholarship evinces a shared sense that the primary function of fine-print disclosure is not consumer information at all, but rather justification of a crucial legal fiction. A robust doctrine of implied consent to unread or unnoticed terms is central to the laws governing millions of transactions a day, including consumer contracting, product liability, informed consent to medical care, real property transfers, advertising, and financial planning. Because real readership is understood to be a lost cause, most scholarly support of mandatory disclosure policies stipulates that disclosures are unhelpful to consumers, and the scholars justify enforcement of unread terms on

5. Cindy Perman, *Gotcha! Ways Banks Burn You with Hidden Fees*, CNBC (Feb. 15, 2011, 3:39 PM), http://www.cnbc.com/id/41604971/Gotcha_Ways_Banks_Burn_You_With_Hidden_Fees (detailing different forms of banking fees that catch consumers by surprise).

6. See, e.g., Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL'Y & MARKETING 293, 293 (2012) (examining eighteen experimental studies and concluding that there is “no evidence that consumers benefit from government-mandated disclaimers in advertising”); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INSTITUTIONAL & THEORETICAL ECON. 94, 96 (2012) (“[I]ncreasing contract accessibility does *not* result in a meaningful increase in readership. . . . [T]hose (few) shoppers who actually read the contract do *not* respond to what they see there.”).

7. Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 240–43 (1995) (asserting that cognitive problems such as “bounded rationality, optimistic disposition, systematic underestimation of risks,” undue weight on the present as compared with the future, and rational ignorance cause consumers “to remain ignorant of the preprinted terms” of a form contract).

normative grounds, with reference to constructs like opportunity to read,⁸ blanket assent,⁹ or rational ignorance.¹⁰

This Essay demonstrates that psychology research has a role to play in the mandatory-disclosure debate that extends beyond documenting cognitive errors. The experimental studies reported below explore how consumers themselves understand consent to fine print—the psychology of judgment rather than the psychology of decision-making. This analysis tries to explore this question systematically, unpacking the psychological processes that bear on a commonsense morality of informed consent. I argue that the moral psychology of consumer contracting beliefs can be understood as bearing on two sets of judgments: (1) *ex ante* assessments of contract formation; and (2) *ex post* assessments of consumer liability when a warned-of harm comes to pass. Misgivings about procedural defects in consumer contracting weigh heavily on judgments of contract formation, but appear to play almost no role in judgments of blame for transactional harms.

The Essay proceeds as follows. In Part I, I set up the problem with descriptive, legal, and theoretical perspectives on consent to fine print in consumer contracting. Part II lays out evidence, from existing and new research, that consumer contracting invokes conflicting norms. Study 1 in this Part tests the relationship between contract procedures and inferences of consent, and the results show evidence that subjects may believe that it is unreasonable to expect consumers to read terms in some forms, but that they would nonetheless hold those non-reading consumers accountable for transactional harms that occur *ex post*. Parts III and IV make the case that there are psychological explanations—involving a particular set of motivations, intuitions, and cognitive processes—for these differential evaluations of consent at the formation and enforcement stages of contracting. In Part III, I present Studies 2 and 3, offering evidence that the mere fact of consumer harm motivates inferences of consumer consent to

8. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 734 (2011) (describing the argument that mandatory disclosures promote the values of “autonomy, dignity, civility, community, citizenship, [and] economic growth” by presenting consumers with an opportunity to read).

9. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370 (1960) (“Instead of thinking about ‘assent’ to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”).

10. See, e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 3, 8 (Omri Ben-Shahar ed., 2007) (“The novelty of the present analysis is that the same contract forms that are widely assumed to be based on consumer ignorance can be shown to be consistent with competition under conditions of full information.”).

that harm. Part IV includes Studies 4 and 5, which show that consumer decision-making is a highly salient link in the chain of causation that explains a transactional harm. Part V concludes with a discussion of these findings in light of procedural justice research, and I argue that the next step in the moral psychology of contracting is the development of a robust body of research on procedural justice in the consumer marketplace.

I. MODERN CONSUMER CONTRACTING

A. *BOILERPLATE IS UBIQUITOUS AND UNREAD*

Most user agreements, terms of credit, informed-consent forms, and product warranties (to name a few) are long and difficult to understand.¹¹ Furthermore, most disclosures arise in an already crowded field of boilerplate. As such, most people have no choice but to perform a kind of triage on their reading priorities due to the overwhelming volume of information that disclosees face in a given day. To make this point, I rely heavily on the definitive account of disclosure overload by Omri Ben-Shahar and Carl Schneider.¹² In addition to their meticulous chronicling of the omnipresent fine print of modern life, they give a witty yet all-too-real account of a day in the world of “Chris Consumer.” Chris confronts detailed terms and conditions for his vitamins, his toaster, his car mechanic, an online news service, a web browser, his bank, a diner menu, a flu shot, and Monday Night Football, among others.¹³ Disclosures, fine print, standard terms—these are unavoidable facts of modern life.

Nonetheless—or perhaps, as a result—one of the truisms of empirical contracts research is that “nobody reads.” This is particularly true of online contracts, including end-user license agreements and click-through agreements that retail sites use. One recent study documented the lack of readership in painstaking detail.¹⁴ Out of 120,545 consumer visits to online

11. See *Skelton v. Gen. Motors Corp.*, 660 F.2d 311, 313–14 (7th Cir. 1981) (describing a statute’s drafters’ concern that “consumer product warranties often were too complex to be understood”); Ben-Shahar & Schneider, *supra* note 8, at 671–72 (citing evidence that “readership is effectively zero”); Michael K. Paasche-Orlow et al., *Readability Standards for Informed-Consent Forms as Compared with Actual Readability*, 348 NEW ENG. J. MED. 721, 724 (2003) (reporting that “only 8 percent [of medical schools] . . . met their own standards” for readability of informed-consent forms); Chris Kaiser, *Complex Drug Labels May Be Information Overload*, MEDPAGE TODAY (May 24, 2011), <http://www.medpagetoday.com/PublicHealthPolicy/FDAGeneral/26665> (“[T]he effectiveness of labeling in communicating adverse drug events may be diminished by the problem of overwarning, in which excessively long and complex lists of potential reactions can result in information overload” (internal quotation marks omitted)).

12. Ben-Shahar & Schneider, *supra* note 8, at 704–09.

13. *Id.* at 705–08.

14. See Yannis Bakos et al., *Does Anyone Read the Fine Print? Testing a Law and Economics Approach to Standard Form Contracts* (N.Y. Univ. Ctr. for Law, Econ. & Org., Working Paper No. 09-40, 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1443256.

retail sites, 55 of those users clicked through to see the terms and conditions¹⁵—this is roughly one out of 2200 users. The users who did click through spent a median of 29 seconds looking at the entire multi-page agreement.¹⁶

Even when investigators choose more elite population samples, they still find very low levels of readership. In a sample of University of Georgia undergraduates, 89% of respondents classified themselves as “non-readers” of click-through agreements.¹⁷ A survey of law students—a group essentially hand-picked for its propensity to read legal documents—found that only about 4% claim to read standard online form contracts.¹⁸ All available evidence suggests that online form contracts are consistently unread.

Online forms are not the only contracts that consumers are ignoring. Although there is surprisingly little empirical evidence on non-readership outside of the online context, contracts scholars regard non-readership as “folk knowledge”: a claim so obvious that data would be superfluous.¹⁹ In one of the first empirical accounts of contracts behavior, Stewart Macaulay reported that even businessmen did not read the contracts they regularly signed in the course of their commercial interactions, preferring to rely on their background sense of the deal and the counterparty.²⁰ Courts and scholars alike have noticed a similar pattern in the readership of form contracts generally. As early as 1983, well before the advent of EULAs (end-user license agreements) and click-throughs, Todd Rakoff wrote:

[T]he adhering party is in practice unlikely to have read the standard terms before signing the document and is unlikely to have understood them if he has read them. Virtually every scholar who has written about contracts of adhesion has accepted the truth of this assertion, and the few empirical studies that have been done have agreed.²¹

15. *Id.* at 26.

16. *Id.*

17. Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 297 (2012).

18. Robert A. Hillman, *Online Consumer Standard Form Contracting Practices: A Survey and Discussion of Legal Implications*, in CONSUMER PROTECTION IN THE AGE OF THE ‘INFORMATION ECONOMY’ 283, 289 (Jane K. Winn ed., 2006).

19. Ben-Shahar & Schneider, *supra* note 8, at 671 (“Empirical work is scant, perhaps because of the folk knowledge that no one reads boilerplate.”).

20. Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 59 (1963).

21. Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (footnote omitted).

The reality is that reading is costly, especially in a world in which *everything* comes with extensive standard terms.²² Meanwhile, the expected benefit of any investment in reading standard terms is low for three reasons: (1) the transaction itself is minor; (2) the probability of unfavorable terms is low;²³ and (3) the probability of a given consumer being affected by an unfavorable term is low.²⁴

The proposition that consumers do not read contracts of adhesion is increasingly uncontroversial, cited by legal scholars to support claims that consumers are rationally ignorant,²⁵ that consumers are ignorant dupes,²⁶ and that contracts of adhesion are inefficient in any case.²⁷ It is now a given that we live in a world in which boilerplate terms are ubiquitous yet unknown, ever present and never read. In the next two Subparts, I consider the relevant legal doctrines and the scholarly responses.

B. CONTRACT DOCTRINE: DUTY TO READ

The vast majority of terms no one reads are enforceable. As a matter of black letter law, not knowing the terms of one's contract does not excuse a party from liability.²⁸ This doctrine is often referred to as a party's "duty to read,"²⁹ and it has been at the center of a number of recent national debates around subprime mortgage lending,³⁰ insurance coverage after Hurricane Katrina,³¹ universal default clauses in credit card contracts,³² and hidden

22. Eric Posner has argued that the advantage of a decision like *ProCD v. Zeidenberg*, in which Judge Easterbrook enforced terms that were not available to the consumer until after purchase, is that consumers cannot, in practice, handle getting all the terms up front. Commerce would grind to a halt while consumers wasted their time listening to the "droning voice" of the sales staff reading the terms aloud. Eric A. Posner, *ProCD v. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1183-84 (2010).

23. See Florencia Marotta-Wurgler, *Are "Pay Now, Terms Later" Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309 (2009).

24. See Eisenberg, *supra* note 7, at 243.

25. *Id.* at 241-43.

26. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 531 (1971) ("An unfair form will not deter sales because the seller can easily arrange his sales so that few if any buyers will read his forms, whatever their terms, and he risks nothing because the law will treat his forms as contracts anyway.").

27. See Lee Goldman, *My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 NW. U. L. REV. 700, 716-21 (1992) (rejecting economists' assertions that contracts of adhesion are efficient).

28. See 27 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 70:113 (4th ed. 2003) ("A written contract speaks for itself and, absent fraud or mistake, ignorance of contents will not allow one to avoid its contents.").

29. *Id.*

30. Smith, *supra* note 2, at 389 ("Unlike other business transactions where the customers understand what they are buying and what the alternatives are, mortgage customers are unlikely to comprehend the fine print that is so critical in modern mortgages.").

31. Goldbaum, *supra* note 3, at 454-55 (discussing insurance litigation in Mississippi following Hurricane Katrina which turned on boilerplate "flood exclusion" language).

fees in banking contracts.³³ In some cases—universal default clauses, for example—legislatures have stepped in to regulate terms perceived as unfair.³⁴

Under the common law, though, most of these problematic clauses are relatively easy cases. Non-readership is no excuse, even when the facts are sympathetic. For example, the Fifth Circuit held that insurance policyholders denied compensation after Hurricane Katrina were bound to the written terms even where the salesman had represented that the policy's coverage included the denied claims; the court ruled that, "The insured is bound by [written] policy language that would put a reasonable person on notice of limitations to the agent's authority."³⁵ In another case, a party subject to a forum-selection clause argued that the term should be unenforceable because of the plaintiff's poor eyesight; the Seventh Circuit noted that "it is no defense to say, 'I did not read what I was signing.'"³⁶ In still another case, mortgage borrowers who discovered that their agreement contained an adjustable rate that they did not apprehend before signing were held liable; the court reasoned "[t]hat the plaintiffs did not read any of these documents does not place culpability on the defendant."³⁷ In sum, whether or not a party has read the contract is usually irrelevant to the determination of mutual assent.

What *is* required is that parties have some notice of the terms—an "opportunity to read."³⁸ If a contract term is "hidden," a court may refuse to enforce it on the grounds that the parties did not manifest their assent.³⁹ In *Specht v. Netscape*, for example, then-Judge Sotomayor confirmed that a party must have actual or constructive notice of a term in order for the term to be enforceable.⁴⁰ Parties are deemed to consent to terms they have reason to know exist, but firms must give parties reason to know of the terms.⁴¹ In

32. Matthews, *supra* note 4, at 68–71 (including universal default provisions among credit card practices targeted by the Credit Card Accountability Responsibility and Disclosure Act of 2009).

33. See Perman, *supra* note 5 (detailing different forms of banking fees that catch consumers by surprise).

34. See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, § 101(b), 123 Stat. 1734, 1736.

35. Leonard v. Nationwide Mut. Ins. Co., 499 F.3d 419, 439 (5th Cir. 2007).

36. Heller Fin., Inc. v. Midwhey Powder Co., 883 F.2d 1286, 1292 (7th Cir. 1989).

37. Strong v. Option One Mortg. Corp. (*In re Strong*), 356 B.R. 121, 144 (Bankr. E.D. Pa. 2004), *aff'd*, Nos. 01-35854BIF, 02-626, 04-CV-4699, 2005 WL 1463245 (E.D. Pa. June 20, 2005).

38. See *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17, 20 (2d Cir. 2002) (holding that an online contract provision was unenforceable because defendants "did not provide reasonable notice of the license terms").

39. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 10–12 (1981).

40. *Specht*, 306 F.3d at 35.

41. Even this is not always clear; Judge Easterbrook argued in *Gateway* that the parties had to think more terms were coming, even if they did not have any explicit notice from the company that that was so. See *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir. 1997).

general, however, courts will enforce hidden terms as long as the party has some means to exit the contract when the term is revealed, even if doing so is burdensome and unlikely.⁴²

Scholarly acknowledgment of non-readership has had periodic effects on contract doctrine, although the effects have not always been long lasting. The main effect has been the push to expand the requirement of notice to include the content of the terms.⁴³ The argument for this move is that consumers are generally on notice that a given contract includes some kinds of terms and not others. To this end, the *Restatement (Second) of Contracts* adopted section 211, affirming the general duty to read, but carving out an exception when “the other party has reason to believe that the party manifesting such assent would not do so if he knew” of the unread provision in question.⁴⁴ The comment to the *Restatement* explicitly acknowledges the reality of standardized agreements:

Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.⁴⁵

The *Restatement* approach is in accord with the doctrine of “reasonable expectations,”⁴⁶ which has also had sporadic influence since Friedrich Kessler’s 1943 proposal that the terms of form contracts be ignored in favor of the consumer’s “reasonable expectations.”⁴⁷ The proposition that courts should attend to the contract that consumers *reasonably believe* they are signing remains viable in a few contracts contexts, insurance most notably.⁴⁸

In most contracts contexts, courts have rejected the reasonable expectations doctrine, which means that the primary judicial tool for scrutiny of unfair terms is the doctrine of unconscionability.⁴⁹ The unconscionability inquiry requires both procedural and substantive unfairness, and the relationship between the two is commonly understood as a sliding scale, where “the more substantively oppressive the contract term,

42. See *Weaver v. Am. Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971) (holding that a hold harmless clause, hidden and unexplained to the plaintiff, was not enforceable).

43. See RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

44. *Id.* § 211(3).

45. *Id.* § 211 cmt. b.

46. Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 HARV. L. REV. 961, 967 (1970).

47. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943).

48. See, e.g., W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853, 858–62.

49. See *id.* at 863.

the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.”⁵⁰ Procedural unconscionability asks whether a consumer has had an opportunity to read and understand the terms.⁵¹ Courts typically require that a party’s duty to read be met with an opportunity to read.⁵² In *Williams v. Walker-Thomas*, for example, the court ruled that the question of consent must be resolved with reference to each party’s “reasonable opportunity to understand the terms of the contract” and considering the “maze of fine print and . . . deceptive sales practices.”⁵³

In modern academic debates, clearly egregious substantive unconscionability is easier to define than procedural unconscionability—when a term is really shocking, it is often barred by statute⁵⁴ or subject to heightened judicial scrutiny under the common law of contracts (for example, exculpatory clauses or penalty clauses). Like other scholars grappling with the meaning of consent to standard terms, the focus of my argument is on terms that may raise some fairness concerns in the context of contracts of adhesion—non-salient fees, arbitration clauses, forum-selection clauses, and limitations on firm liability—but almost certainly do not raise a plausible defense of unconscionability. The vast majority of terms that consumers receive and do not read are nonetheless enforceable. This is the challenge for legal scholars who want to support the continued vitality of consent in contract theory but nonetheless acknowledge the day-to-day reality of modern contracting.

C. THEORETICAL PERSPECTIVES

Contracts scholars have not been silent on the question of non-readership and consent. There are three primary defenses that support enforcing consent to boilerplate.

The first defense argues that what really matters is reasonable notice that terms exist, and that the role of the terms themselves is purely formal. Robert Hillman, writing in support of the American Law Institute’s disclosure-of-terms strategy for standardized online contracts, argues that what matters is the “*opportunity* to read.”⁵⁵ Hillman asserts that this notion is

50. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000).

51. See generally 8 WILLISTON & LORD, *supra* note 28, § 18:10.

52. *Sw. Adm’rs, Inc. v. Rozay’s Transfer*, 791 F.2d 769, 774 (9th Cir. 1986) (“‘Fraud in the execution’ arises when a party executes an agreement ‘with neither knowledge nor reasonable opportunity to obtain knowledge of its character or its essential terms.’” (quoting U.C.C. § 3-305(2)(c))).

53. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

54. See, e.g., 205 ILL. COMP. STAT. ANN. 675/8.5(e) (LexisNexis 2013) (barring universal default clauses in contracts for credit).

55. Robert A. Hillman & Maureen O’Rourke, *Defending Disclosure in Software Licensing*, 78 U. CHI. L. REV. 95, 105 (2011).

consistent with justifications of enforcement in other legal domains.⁵⁶ “A fundamental tenet of the rule of law is reasonable notice,” he argues.⁵⁷ “[W]e all know that people rarely read criminal statutes or understand many of the intricacies of rules governing even those wrongs of which they are aware, such as murder or theft. The point is that people *could* gain access to these materials, which legitimizes the rules as law.”⁵⁸ On this view, readership is unnecessary for disclosure to serve its normative function within the doctrinal structure. As long as disclosure is “inexpensive and, at worst, harmless,”⁵⁹ it is a justifiable regulatory approach because it legitimizes the imputation of consent.

The second defense of enforcing boilerplate contends that consumers *do* consent to boilerplate, insofar as they consent to be bound by the terms of the deal, knowing that they are not aware of what those terms are. Subjective consent to unread terms is a coherent possibility under a broader view of consent. Karl Llewellyn has argued for an inference of “blanket assent” to the non-bargained-for terms.⁶⁰ Llewellyn argues that consumers assent “to any not unreasonable or indecent terms . . . which do not alter or eviscerate the reasonable meaning of the dickered terms.”⁶¹ Similarly, Randy Barnett’s influential articulation of contractual consent argues that consent means a manifestation of an intention to be legally bound.⁶² According to this view, all that matters is agreeing to the deal, whatever the deal may hold—much like we think that people ought to be free to assent to take a risk or to be surprised, they are free to bind themselves to contracts that they do not read. This view of consent has become increasingly influential and widely accepted, and, indeed, it is compatible with much of contract doctrine. For example, a broad view of consent does not require that a person actually read his or her contract—it requires only that he sign it (or otherwise objectively manifest assent).⁶³ Barnett and Llewellyn support this approach, but note that it requires some kind of doctrinal backstop—thus

56. *See id.*

57. *Id.*

58. *Id.* at 105–06.

59. *Id.* at 107.

60. LLEWELLYN, *supra* note 9, at 370. Wayne Barnes offers a twist on this view, analogizing contract formation to voting. In Barnes’s view, a contract has known (read) and unknown (unread) terms. He argues that in the political process, it is not controversial at all to bind citizens to the decisions of legislators who make choices that were not known or even foreseeable by voters at the time of election. Like elected officials, firms desire to be re-elected; like terms of office, contracts are time delimited. Like impeachment, unconscionability provides relief in the rare instance of truly outrageous behavior. *See* Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 842–43 (2010).

61. LLEWELLYN, *supra* note 9, at 370.

62. Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 655 (2012).

63. *See, e.g.*, 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.7 (3d ed. 2004) (describing the doctrine of objective consent in the context of non-readership).

their visions of broad consent to the unread deal rely in part on a background requirement of reasonable expectations or at least a robust doctrine of unconscionability.⁶⁴

Finally, the third view holds that the absence of meaningful consent is unproblematic because market forces will prevent unwanted terms. The economic argument in favor of enforcement is that market forces will do what individuals would have done, so actual consent is not the problem we might think it is.⁶⁵ In a functioning market in which buyers are reading and comparing terms, sellers who offer worse terms will lose customers to sellers offering better terms, so sellers will offer efficient terms. Even if only a fraction of consumers reads and shops for terms, the non-readers may benefit from the minority of informed consumers, whose choices affect the firm's selection of terms.⁶⁶ In a competitive market, firms will offer terms that buyers prefer, in the sense that any requirement of more consumer-friendly terms will be costly for firms and, in turn, costly for consumers.

These three arguments are essentially normative justifications for enforcing unread terms. These arguments assert that what matters is the notice of terms rather than the readership (opportunity to read), a broad rather than a narrow consent (blanket assent), and the efficiency of market-tested terms rather than the fairness of any particular term or contract (economic efficiency). In the next Part, I present the existing literature on the psychology of the fine print—why consumers do not read it, and how they understand their obligations under it.

II. PSYCHOLOGY OF BOILERPLATE

In this Part, I set up one of my central claims: that most consumers are deeply ambivalent about consent to form contracts. First, I identify two arguably dissonant strands of psychological research in this area: the cognitive psychology literature explaining why most people do not deliberate carefully over the fine print, and the moral psychology literature suggesting that most people view their contractual agreements as serious moral obligations. This Part concludes with the first experimental study of this Essay, documenting how these conflicting views play out in a simplified contracts scenario.

64. See Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 630–31 (2002) (discussing a market-based justification for form contracts); Goldman, *supra* note 27, at 715–16 (same).

65. See generally Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 *U. PA. L. REV.* 630 (1979).

66. *Id.* at 637–39.

A. THE PSYCHOLOGY OF IGNORING FINE PRINT

Melvin Aron Eisenberg has argued that concerns about form contracts “rest ultimately on the limits of cognition.”⁶⁷ There are two sets of worries about cognitive limits—one that is easy to deal with and one that is the subject of this Essay. The easy worry is that some contract terms are hard to understand because they are so complicated, jargon-filled, illegible, or otherwise confusing on their face that they are truly difficult for most people to understand. These are true “readability” problems,⁶⁸ like the one in *Williams v. Walker-Thomas*, where a pro rata term in a layaway agreement was so opaque that it would be unreasonable to expect parties without advanced education to understand the financial risk entailed by each new purchase.⁶⁹ Although these are sometimes hard problems from a policy perspective, they are not all that complicated conceptually; most information can be conveyed in plain language and in a readable font.

Instead, the problem for this discussion is terms that are comprehensible and visible but routinely ignored. As Eisenberg and others have argued, this problem is conceptually difficult because market forces not only fail to protect consumers, but actually force firms to exploit their customers’ limited attentional resources in order to survive.⁷⁰ Humans have limited processing capacity and limited attentional resources, and many legal scholars have argued against regulation-by-disclosure on these grounds.⁷¹ Because most decision-making is affected by “bounded rationality, optimistic disposition, systematic underestimation of risks, and undue weight on the present as compared with the future,”⁷² standard terms in form contracts are systematically overlooked and underestimated.

Behavioral contracts literature has attempted to address parties’ systematic disregard of standard terms by suggesting that courts distinguish between salient and non-salient terms⁷³ and give the salience of the terms legal relevance. Salient terms like price can be left to market discipline,⁷⁴ but

67. Eisenberg, *supra* note 7, at 240.

68. See, e.g., Ronald J. Mann, “Contracting” for Credit, 104 MICH. L. REV. 899, 903–04 (2006).

69. See *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965).

70. See, e.g., Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1373 (2004) (“Absent legal intervention, the sophisticated seller will often exploit the consumer’s behavioral biases. . . . Such biased contracting is not the consequence of imperfect competition. On the contrary, competitive forces compel sellers to take advantage of consumers’ weaknesses.”).

71. See, e.g., Ben-Shahar & Schneider, *supra* note 8.

72. Eisenberg, *supra* note 7, at 241.

73. See, e.g., Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1225 (2003) (“[P]roduct attributes that are evaluated, compared, and implicitly priced as part of the purchase decision [are] ‘salient’ attributes and product attributes that are not evaluated, compared, and priced as part of the purchase decision [are] ‘non-salient’ attributes.”).

74. See, e.g., Victor P. Goldberg, *Institutional Change and the Quasi-Invisible Hand*, 17 J.L. & ECON. 461, 485 (1974) (arguing that competition is based on price and not other terms).

courts ought to scrutinize non-salient terms that consumers will ignore.⁷⁵ When terms require people to take into account low-probability events⁷⁶ or calculate the effects of small, disaggregated fees,⁷⁷ for example, consumers are less likely to consider the consequences of the terms or factor them into a cost-benefit analysis of the transaction. Psychological research suggests that it is not only that terms are difficult or time-consuming to read, but also that people have limited attentional resources and will overlook non-salient features of any transaction. The psychological approach to fine print argues that there are cognitive explanations for why consumers do not deliberate over fine-print terms, and these cognitive explanations ought to make us cautious about construing consent to those terms.

B. MORAL OBLIGATION OF CONTRACT

We do, and indeed must, ignore scores of fine-print terms every day. Nonetheless, a considerable body of evidence shows that most people take their contractual obligations very seriously. Studies from behavioral decision research, including experimental contracts research, document a strong norm of promise keeping—in the contracts context, a norm of performance. For over 50 years, scholars have been collecting evidence of an intuitive moral theory of contract that neither existing contract law nor straightforward economic incentives can easily explain.⁷⁸ People take contracts very seriously and regard their promissory obligations as moral commitments. In questionnaire studies, participants report that breach of contract is immoral.⁷⁹ They prefer to avoid breach of contract, even when breach is more profitable than performance.⁸⁰ Participants indicate that breach should be punished with damages above expectation levels, and that harms resulting from breach of contract should be punished more heavily than identical harms resulting from negligence in tort.⁸¹ And many people report a preference for specific performance as a default remedy for breach

75. See Korobkin, *supra* note 73, at 1207.

76. See *id.* at 1231–32 (arguing that underweighting of small risks and overconfidence may contribute to the low salience of terms addressing low-probability events).

77. See Peter A. Alces & Jason M. Hopkins, *Carrying a Good Joke Too Far*, 83 CHI-KENT L. REV. 879, 889–90 (2008) (“Banks that engage in ‘shrouding’ effectively hide the true cost of contracting. So customers making the initial purchase decision, i.e., opening the checking account, may not consider shrouded attributes such as maintenance costs and hidden fees for account-related services.” (footnote omitted)).

78. See, e.g., Macaulay, *supra* note 20, at 60 (finding that Wisconsin businessmen believed that their contract obligations were supported by moral obligations).

79. Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. EMPIRICAL LEGAL STUD. 405 (2009).

80. *But see* Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 MICH. L. REV. 633, 659 (2010) (reporting the results of an experiment in which participants indicated greater willingness to breach a contract that included a liquidated damages clause than one that did not).

81. Wilkinson-Ryan & Baron, *supra* note 79, at 417–20.

of contract, even when the value of the performance in question is easily measured in dollars.⁸²

Furthermore, we have some experimental and real-world evidence that people honor the terms of contracts that appear quite unfair. One of the recent puzzles for economists is that so many homeowners are currently underwater (owing more on their mortgages than their homes are worth), and yet relatively few of these underwater homeowners strategically default.⁸³ Surveys of homeowners and experimental questionnaire studies both offer evidence that homeowners do not walk away from their mortgages because they consider their loan obligations to be morally binding contracts.⁸⁴

It may seem intuitive that these strong views of contract morality would not apply to form contracts, but the evidence on this is quite mixed. Some studies have identified differences between perceptions of negotiated and non-negotiated contracts and mounted strong arguments that people distinguish between them, on moral and practical grounds. The same is true for known and unknown terms. However, at least one study on the commonsense moral attitude toward standard-form contracting shows that when contract terms are clear and unambiguous, questionnaire participants report that breach of a standard form contract is no less morally problematic than breach of a negotiated contract.⁸⁵ Subjects in that study reported that in the event that a term is clear, enforcement should not depend on the term's provenance (negotiation or boilerplate).⁸⁶ Similarly, Zev Eigen has found that reminding the subjects of their moral obligation is the most effective way to secure performance—even for terms embedded in lengthy boilerplate contracts.⁸⁷

It should not be surprising that evidence on form contracts is mixed, because the social norms of contract appear quite ambiguous. On the one hand, there is a pervasive rhetoric around the idea of “keeping your word.” On the other hand, most ordinary consumers live in a world in which contract formation is hasty by design, often completed with the explicit understanding that it is a meaningless formality.⁸⁸ What do terms that are

82. *Id.* at 413–14.

83. See Luigi Guiso et al., *Moral and Social Constraints to Strategic Default on Mortgages* 2–3, 9–12 (Nat'l Bureau of Econ. Research, Working Paper No. 15145, 2009), available at http://www.nber.org/papers/w15145.pdf?new_window=1.

84. Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547 (2011).

85. Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?*, 100 GEO. L.J. 5, 30 (2011).

86. *Id.* at 27–30.

87. Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 88 (2012).

88. Cf. Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 125 (2007) (arguing that sellers take advantage of various psychological phenomena

available only via a click-through, or as part of a multi-page agreement presented at checkout while a line of other customers waits, say about the sanctity of a contract? Most people get mixed messages about how seriously they are supposed to be taking these contracts. The goal of Study 1, below, is to start to document how consumers understand these mixed messages.

C. JUDGING CONSUMER CONSENT

The first study tries to address in a systematic way the tension observed in the existing psychology literature. The study question is how people take the information about limited capacity for reading terms and use it to inform their inferences of consumer consent and culpability for transactional harms. In order to test the role of contracting procedures on judgments of assent and enforcement, the subjects were randomly assigned to read about a readable contract (2 pages) and an unreadable contract (15 pages).

1. Study 1: Blame and the Reasonable Consumer

a. Method

The goal of the first study is to explore attitudes about consumer consent. Because the studies in this Essay rely on similar methods, I explain the methodology in detail here and then refer to the methods in a more shorthand way in subsequent studies. These studies tested a series of propositions about beliefs and judgments of consumer consent with short vignette experiments. Generally, this methodology asked subjects to consider hypothetical contracts scenarios and answer questions to report their reactions and assessments. In each study, subjects were randomly assigned to see one of two versions of a scenario, such that a variable of interest may be tested experimentally. Subjects were drawn from one of two adult subject pools: Amazon Mechanical Turk⁸⁹ or a proprietary pool of online survey-takers who have signed up through the University of

when they present consumers with standard form contracts at the end of the transaction, increasing “the chances that consumers will not carefully examine the contract they enter”).

89. Amazon Mechanical Turk is an online platform that permits people to sign up as workers and perform short tasks for small amounts of money. It has been widely used for surveys and questionnaire experiments. Subjects are recruited via a short online posting offering between \$0.50 and \$1.50 to answer questions for research. After the pre-specified number of subjects have completed the survey, the task link is disabled on Amazon. Growing evidence supports the use of this sample; indeed, U.S. workers on Mechanical Turk are arguably closer to the U.S. population as a whole than subjects recruited from traditional university subject pools. See Gabriele Paolacci, Jesse Chandler & Panagiotis G. Ipeirotis, *Running Experiments on Amazon Mechanical Turk*, 5 JUDGMENT & DECISION MAKING 411, 411 (2010).

Pennsylvania. The particular subject pool is noted in the Methods section of each study.⁹⁰

Study 1 asked how judgments of consumer and firm behavior at the time of contract formation affect attributions of consent and blame at the time of enforcement. In order to experimentally manipulate the variable of interest here (attributes of contract formation), I tested a scenario describing a hidden fee in a credit card contract, randomly assigning subjects to read about either a short or a long set of terms:

Kevin has recently purchased a credit card. He shopped around to find a card that meets his main preferences, including a low interest rate and high bonus points to build frequent flyer miles. When his application is approved, he receives the new card in the mail along with a [2-page] [15-page] contract that goes with such cards. The contract between a customer and a credit card company does not begin until the customer calls and activates the card. He activates the card without reading the contract, and the next month finds that the terms included information about the \$5 fee charged for paying the bill online. This was how Kevin had planned to pay his bill. Kevin is unhappy. Please indicate your agreement with the statements below.

Subjects were then asked to indicate their agreement with a set of statements, on a 1 to 7 scale where 1 was “strongly disagree,” 4 was “neither agree nor disagree,” and 7 was “strongly agree.”

- (1) Kevin is to blame for this problem.
- (2) It is reasonable to expect Kevin to read a [2-page][15-page] contract.
- (3) Companies should explain fees in ways other than the clause in the form contract.
- (4) Kevin consented to this fee.
- (5) Hidden fees like this should be banned.

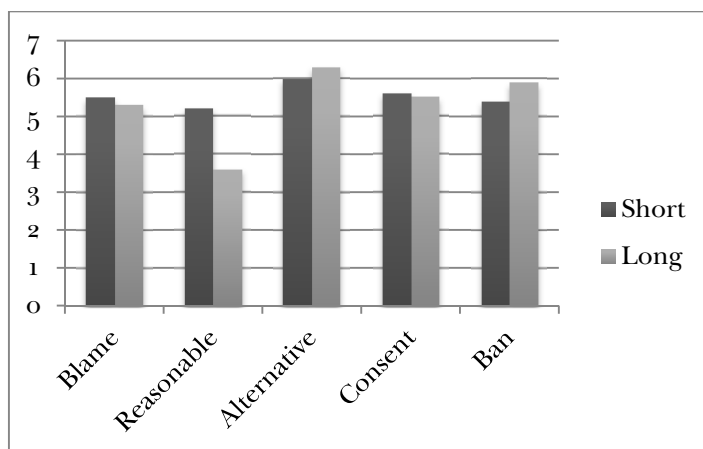
90. In the University of Pennsylvania’s Proprietary Pool, subjects were recruited over a ten-year period, mostly through their own efforts at searching for ways to earn money by completing questionnaires. Approximately 90% of respondents were U.S. residents (with the rest mostly from Canada). The panel is roughly representative of the adult U.S. population in terms of income, age, and education, but not in terms of sex, because (for unknown reasons) women predominate in this respondent pool. For each study, an email was sent to about 500 members of the panel, saying how much the study paid and where to find it on the World Wide Web. Each study was a series of separate web pages, programmed in JavaScript. The first page provided brief instructions. Each of the others presented a case, until the last, which asked for (optional) comments and sometimes contained additional questions. Each case had a space for optional comments. Otherwise the subject had to answer all questions to proceed.

Each subject saw both versions of the scenario, but the order was assigned randomly to permit between-subjects analysis of the first question only. One hundred subjects participated in the study via Amazon Mechanical Turk. They were paid \$0.75 each for participation in a two-minute survey. Ages ranged from 18 to 65 with a median age of 29; 60% of subjects were male.

b. Results

Figure 1 documents the mean differences for each of the five variables identified above. Subjects in the Long condition thought that it was significantly less reasonable to expect the consumer to read the contract than subjects in the Short condition.⁹¹ In other words, the length of the contract shifted the balance from one side of the scale (reasonable) to the other (unreasonable).⁹² In the Long condition, 34% of the subjects thought that it was reasonable (5 to 7 on the scale) to expect the consumer to read; in the Short condition, 76% thought reading was a reasonable expectation.

Figure 1. Mean Agreement, on Scale of 1 to 7, with Statements About Consumer Behavior and Disclosure Policy, in Short and Long Conditions.



None of the other between-subjects differences were statistically significant. This means that subjects' judgments of consumer consent and consumer blame were essentially unaffected by an otherwise highly salient feature of the contract. Even though subjects reported that it is unreasonable to expect a consumer to read a 15-page contract, they

91. Between-subjects comparisons are analyzed with a non-parametric test, which does not assume a normal distribution of responses. The Wilcoxon rank-sum test used here tests the hypothesis that the median difference between conditions is not zero.

92. The mean in Short condition was 5.18; the mean in Long condition was 3.62 (W=1885.5, $p < .0001$).

nonetheless felt that the non-reading consumer was as responsible for his non-readership as the consumer who had only two pages of terms to wade through.⁹³ The same was true for judgments of consent; 86% of subjects in the Short condition and 82% of subjects in the Long condition agreed (5 to 7 on the scale) that Kevin consented to the fee.⁹⁴

On the other hand, generally subjects were also concerned about the company's role in this transaction—and they were concerned even when the contract was short. They overwhelmingly agreed (by selecting 5 to 7 on the scale) that the company should find an alternative way to communicate information about fees (92% agreed in the Short condition; 96% in the Long condition)⁹⁵ and even tended to agree that hidden fees like these should be banned (82% in the Short condition; 88% in the Long condition).⁹⁶

These results present a picture of ambivalence about consumer consent. Respondents clearly believed that using fine print to impose fees on consumers is inappropriate—subjects overwhelmingly reported that companies should find other ways to inform consumers about fees and many subjects thought that hidden fees should be banned altogether. And subjects were sensitive to the reality of consumer contracting, indicating that it is somewhat unreasonable to expect a consumer to read 15 pages of boilerplate. The puzzle, then, is that these beliefs seem entirely disconnected from subjects' equally strong feelings that the non-reading consumer consented to the contract and bears the blame for the resulting transactional harm.

The question for the remainder of this Essay is how to explain these findings. I propose that subjects' coherent normative theories of consent cannot fully explain these results. These results suggest that when people are asked to think about contract formation—how the parties draft and manifest their assent to terms—most people are sensitive to the context and are generally concerned about boilerplate transacting. But when the question is about performance and enforcement, judgment becomes much more stark: The consent was real and the consumer is to blame.

Of course it is possible that consumers take an explicitly strict-liability view of contracting. Like the law of contracts, subjects may believe that consumers are to blame for their transactional harms insofar as entering any transaction entails a certain assumption of risk. In fact, this explanation is borne out in the within-subjects results to some extent. Within-subjects comparisons ask to what extent the average subject differentiated among the

93. The mean in Short condition was 5.48; the mean in Long condition was 5.28 (W=1409, p=.253).

94. The mean in Short condition was 5.62; the mean in Long condition was 5.50 (W=1246.5, p=.983).

95. The mean in Short condition was 6.04; the mean in Long condition was 6.06 (W=1116, p=.322).

96. The mean in Short condition was 5.40; the mean in Long condition was 5.86 (W=1067, p=.154).

two conditions—because subjects responded to the scenario in both conditions, it is possible to discern their views of the difference between the two situations.

Table 1. Within-Subject Differences in Judgments of Long and Short Contracts

Item	Difference Between Long and Short
Blame	-.78***
Reasonableness	-2.31***
Alternative Presentation	.32***
Consent	-.42***
Ban	.40***

*** $p < .0001$

The differences in Table 1 show how differently the average subject felt about the variables—consent, blame, etc.—given the difference in the length of the contract. Each subject read the scenario in both versions. Thus, on the second item subjects were really being asked to think about how their intuitions about the contract were different when the contract length was changed. There were significant differences on every variable.

Two findings stand out. The first is that when the subjects' task was one of comparison, their blame attributions were more responsive to the contract length. Nonetheless, even in this within-subjects comparison in which subjects are aware of the variable being tested, the magnitude of the difference between scenarios for Blame is much smaller than the difference between scenarios for Reasonableness. This means that many subjects explicitly, knowingly reported that they would blame a consumer no less for having failed to read an admittedly unreasonably long contract.

Of course, judgments of consumer consent are at least in part founded in explicit moral theories of individual autonomy. However, there are also implicit psychological processes affecting the differential judgments of contract formation and judgments of contract enforcement. What I mean by this is that there is evidence from various domains of psychology, which I will take up in turn below, that there is something fundamentally different about the cognitive processes invoked when people are asked to explain harms. Importantly, analysis of contract enforcement requires such an explanation of harms. Making attributions of culpability, the underlying judgment task in constructing the narrative of a harm, raises a distinct set of cognitions and motivations. Different cues are more or less salient, and there is pressure to assign blame in a way that does not conflict with an underlying worldview. In the next Part, I test the hypothesis that some of the change in stance toward

consent attributions is implicit, that the task of judgment is different when we are assessing an agreement (contract formation) than a harm (enforcement).

III. MOTIVATION TO IMPUTE CONSENT

In the face of ambiguous or mixed evidence, our desires often shape our beliefs.⁹⁷ Knowledge of a transactional harm makes attributions of consent more psychologically appealing. Psychologists have observed for over fifty years that most people, when confronted with information that someone has suffered a harm, are motivated to assign blame.⁹⁸ Not only do they want to assign blame, they want to assign blame in a way that is psychologically comfortable.⁹⁹ Study 2 tests the proposition that judgments of consumer harms involve motivated reasoning.

A. CONTRACTING IN A JUST MARKETPLACE

The study below is patterned on research of a particular manifestation of motivated reasoning, referred to as the “just world hypothesis”¹⁰⁰ or “system justification theory.”¹⁰¹ These terms describe the idea that people are uncomfortable with information that threatens to falsify their preferred hypothesis that the system we live in is reasonable and fair. We prefer to believe that things happen for a reason, and thus that victims of harms deserve their fate.¹⁰² Legal scholars have observed and discussed this kind of motivated blaming in other domains. For example, a strong just world belief makes observers more likely to think that victims of sexual harassment or sexual assault contributed to their own victimization.¹⁰³ It increases

97. See, e.g., Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568 (1992) (discussing motivated judgment literature and applying it to research illustrating that individuals evaluate information consistent with their beliefs less critically when reaching a preferred conclusion).

98. See, e.g., Melvin J. Lerner & Carolyn H. Simmons, *Observer’s Reaction to the “Innocent Victim”: Compassion or Rejection?*, 4 J. PERSONALITY & SOC. PSYCHOL. 203 (1966) (showing experimentally that subjects who were unable to prevent a harm were motivated to derogate the victim).

99. *Id.*

100. See generally Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030 (1978).

101. See generally 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. PSYCHOL. 881 (2004).

102. Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 676 n.50 (1998) (“Just world’ theory posits that people have an intense psychological need to view the world as a fair place because this perception provides a sense of control over their lives. The ‘just world’ theory predicts that people will blame a rape victim to maintain the belief that the world is fair, people get what they deserve, and there is a sense of order over the environment.” (citation omitted)).

103. See Kristen M. Klein et al., *Attributions of Blame and Responsibility in Sexual Harassment: Reexamining a Psychological Model*, 35 LAW & HUM. BEHAV. 92, 94 (2011).

attributions of blameworthiness in criminal prosecutions,¹⁰⁴ and it may help explain how jurors determine causation in torts cases.¹⁰⁵ I propose that the just world belief also has bite in the transactional context.

Study 2 predicts that endorsement of strict liability for objective manifestations of consumer consent, whether in a given case or as a default stance in contracts more generally, fits nicely into a theory of the world in which individual agents interact with a fair and orderly marketplace. The idea that the harm is attributable to the consumer's consent is psychologically appealing. In order to find out whether the fact of harm has an independent effect on attributions of consent, Study 2 asks subjects to evaluate assent to a form contract in light of various details about the transaction and the context. Although subjects were asked to assess assent, half of them had information about a negative outcome of the transaction. The hypothesis is that subjects who know that the transaction has ended badly for the consumer will be more likely to believe that the consumer consented to the contract than subjects who learn about the consent process but not the outcome.

1. Study 2: Effect of Harm on Attributions of Consent

a. Method

This study tested the hypothesis that subjects would be more willing to conclude that a consumer consented to an unread, unfavorable term if they learned that the term had in fact affected the consumer. Subjects were randomly assigned to either the Control condition or the Harm condition. Each subject read two scenarios, one describing a homeowners insurance policy and the other describing a new car warranty. Subjects in the Harm condition also read a short description of the term's negative effect on the consumer. In order to minimize the possibility that subjects would be more likely to attribute consent to unfavorable terms to consumers engaging in risky behavior, the consumer's behavior is described as being relatively routine, even cautious, and the property damage results from the negligent or intentional act of a third party. The scenarios read as follows:

Insurance Policy:

George is a single 32 year-old restaurant manager. He lives in a small Midwestern city with his two dogs. George purchased a homeowners insurance policy when he recently bought a condominium in a renovated factory downtown. To get insurance, George met with an insurance agent who gave him the rates for different levels of coverage, promising to send the complete list of terms once the deal was done. George chose a mid-level plan

¹⁰⁴. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1428 (2003).

¹⁰⁵. Jon Hanson & Michael McCann, *Situationist Torts*, 41 LOY. L.A. L. REV. 1345, 1369-71 (2008).

(neither the cheapest nor the most expensive). He signed up for a payment plan and signed the policy contract. A week later, he received a “welcome packet” from his insurance company, including a ten-page document specifying the details of the policy. George did not read the policy details, but kept a copy for his files. Policyholders are permitted to cancel coverage or switch plans at any time.

One of the terms of George’s policy, explained under the heading “Personal Valuables,” is that the insurance company will not cover personal items valued at over \$5000 unless the homeowner has already notified the insurance company that such items are in the home prior to the damage or loss. George has a small collection of valuable baseball cards, four of which are valued at over \$10,000 each. He plans to sell the cards within the year.

Harm Condition:

George stores his baseball cards in a cabinet in his home office in his condominium. One morning, a plumbing problem in his upstairs neighbor’s bathroom causes a big leak in George’s condo, right into his home office. Water drips into the cabinet and the baseball cards are ruined.

New Car Warranty:

Jill is a 40 year-old high school teacher who lives in a suburban California neighborhood with her husband and young daughter. Jill has recently bought a new car. She shopped around and found a well-reviewed car with a good warranty. It came with a twenty-page Detailed Warranty in addition to the basic warranty information provided at sale (50,000 miles or five years, some restrictions apply, see Detailed Warranty for details). Jill did not read the Detailed Warranty, provided in the glove compartment of her new vehicle. One thing that is not covered is external damage related to “vandalism, theft, or other criminal activity.” Jill does not live in a dangerous area, but there are reports of petty theft and property damage here and there in the local newspaper.

Harm Condition:

Jill parks her car in the parking lot of a nearby supermarket. When she returns, she finds that her car has been “keyed”—that is, someone has used their keys and made a long scratch in the paint on the driver’s side doors.

Subjects either read both scenarios in the control condition (no harm) or both scenarios in the harm condition. They were then asked to what extent they agreed with four statements, on a seven-point scale from “Totally Disagree” at the low end, “Neither Agree nor Disagree” at the midpoint, and

“Totally Agree” at the high end. The key question was presented first, and it asked: “Think back to Jill’s warranty. To what extent do you agree that Jill has consented to the vandalism term?” Subjects were also asked to assess the consumer’s responsibility, caution, and likability.

In this study, 149 Amazon Mechanical Turk subjects were paid \$1.50 each to participate in a five-minute survey online. Ages ranged from 20 to 69 with a median of 37, and 56.4% of the respondents were women.

b. Results

This comparison had one main effect: Subjects were more likely to agree that the promisee had consented to the unfavorable term when they had information that the term affected the promisee.¹⁰⁶ Means are shown in Table 2. In general, the trends for the Responsible, Cautious, and Likable variables were in the predicted direction (less favorable when the party suffers a harm), but none were statistically significant. In other words, a party who has suffered a harm is perceived as more likely to have consented to that harm than a party who has made similar representations of consent but has not been harmed. Or, put differently, subjects were ambivalent about the meaning of consent to the unread term until they received information that motivated a decision to attribute consent.

Table 2. Mean Agreement that the Party in Question “Consented to” the Unfavorable Term.

	Control	Harm
Insurance Scenario	4.80	5.20
Warranty Scenario	4.66	5.55

In this study, the mere fact of a transactional harm changes how individuals think about consent. One can imagine an explicit theory (as opposed to psychologically motivated reasoning) that justifies the disjunction between reasonable expectations of readership and consumer blame in Study 1—it might be that we know consumer contracting is burdensome but believe that consumers should be held to a high standard whenever they voluntarily enter the marketplace. Study 2 does not lend itself to this kind of explicit explanation. Subjects were asked to indicate the nature of the consumer’s gamble in consent terms; the only difference between the consumer in the Control and Harm conditions is that in the

106. For the Insurance scenario, the difference in Consent values across conditions is marginally significant in a two-sided Wilcoxon rank-sum test ($W=2276$, $p=.053$). For the Warranty scenario, the difference is highly significant using a two-sided Wilcoxon rank-sum test ($W=1871$, $p=.0005$).

Harm case, the consumer has lost his bet. Normatively, knowledge of the outcome should not affect the assessment of the decision.

If the just world hypothesis makes people more likely to attribute culpability or complicity to the victims of random violent attacks, it should not be surprising that it has purchase in the contracts context. In contract, a consumer knowingly consents to be bound to the contents of the contract; the cognitive leap is barely noticeable—and indeed easily defensible. Adam Benforado has explicitly drawn the connection between the just world belief and the derogation of financially struggling consumers, arguing that the tendency to blame the victim explains much of the popular rhetoric blaming underwater homeowners or borrowers in bankruptcy for their fates.¹⁰⁷ If feckless consumers are making poor choices, transactional harms are consistent with the belief that the marketplace is a reasonable, fair place where consumers have control over their deals—and, indeed, this approach is probably best for the individual consumer. Consumers *should* be cautious, should seek to understand their high-stakes agreements, and should assume that the choices they make matter. The question is whether and how this prudential stance ought to affect our judgments of blameworthiness.

The results of Study 2 suggest that when asked to judge a transactional harm, inferences of consumer consent may result from a form of motivated reasoning. That is, people prefer to make the judgment, “It’s your fault.” Notwithstanding this preference, it seems plausible that this judgment could be quite uncomfortable. On the one hand, no one wants to think that the system is rigged. Yet, on the other hand, most people *are* ordinary consumers, so blaming consumers for transactional harms places the blame on people very much like oneself. In the next experiment, I test the proposition that a very well-known psychological bias, the overconfidence effect, gives people a way to distance themselves from consumers affected by a transactional harm: “It’s your fault—and I’m not like you.”

B. OVERCONFIDENCE

There is reason to think that individuals may overestimate their own skill and caution in consumer transactions, thus making it easier to blame others who do not read their contracts carefully. Broadly speaking, most people are motivated to form positive assessments of their own attributes, including their own luck. For example, 88% of the general American population rates their own driving as safer than the median driver;¹⁰⁸ two-thirds of college professors believe that their teaching is in the top

107. Adam Benforado, *Don’t Blame Us: How Our Attributional Proclivities Influence the Relationship Between Americans, Business and Government*, 5 *ENTREPRENEURIAL BUS. L.J.* 509, 540–41 (2010).

108. Ola Svenson, *Are We All Less Risky and More Skillful Than Our Fellow Drivers?*, 47 *ACTA PSYCHOLOGICA* 143, 146 (1981).

quartile;¹⁰⁹ and roughly 85% of a random sample of residents of New Jersey thought that they had “below-average” risk of getting food poisoning.¹¹⁰

Study 3 predicts that this kind of overconfidence applies to one’s consumer activities; many people agree that fine print is problematic but overestimate their own skill and caution in the marketplace.

1. Study 3: Overestimating One’s Own Readership

This study tests the hypothesis that even though many people believe that others are inattentive to their respective contracts, people believe that their *own* likelihood to read contracts is much higher.

a. Method

This questionnaire study was conducted with 120 subjects from the proprietary University of Pennsylvania subject pool described in Part II.¹¹¹ Subjects read short vignettes about contracts and then answered questions about them. The study used three core vignettes, each presented in two conditions. The vignettes described, respectively, a contract for a new credit card, a contract for a home computer, and a car warranty. The two conditions were Self and Other. Subjects were asked to answer how much of the contract that they would likely read, and how much of the contract that the average person would likely read.

The three scenarios in the Self condition are as follows. The Other condition is identical except that it asks subjects to think about “consumers” generally.¹¹²

Credit Card Contract:

Please imagine that you are applying for a new credit card. You shop around to find a card that meets your main preferences (low interest rate, good bonus features, easy to pay bill and redeem points, etc.). Your application for the card is approved, and you receive the new card in the mail along with the three-page contract. The contract between you and the credit card company does not begin until you call and activate the card.

109. K. Patricia Cross, *Not Can, but Will College Teaching Be Improved?*, 17 NEW DIRECTIONS FOR HIGHER EDUC., Spring 1977, at 10.

110. Neil D. Weinstein, *Optimistic Biases About Personal Risks*, 246 SCIENCE 1232, 1232 (1989).

111. See *supra* note 90 and accompanying text.

112. The Other condition of this scenario, for example, read, “Imagine consumers who are applying for new credit cards. They shop around to find a card that meets their main preferences (low interest rate, good bonus features, easy to pay bill and redeem points, etc.). When their applications are approved, they receive the new cards in the mail along with the three page contracts that go with such cards. The contract between a customer and a credit card company does not begin until the customer calls and activates the card.”

Computer Purchase:

Please imagine that you are purchasing a home desktop computer. It costs about \$1500. It comes with a set of detailed contract terms, approximately six pages. You do not need to sign them, but if you do not return the computer within five days of purchase, it is understood that you have agreed to the terms and conditions that came in the contract that was in the box.

Car Warranty:

Please imagine that you are purchasing a new car from a dealership. When you buy the car you must deal with the financing, the sales agreement, and the warranty. The warranty is their New Vehicle Warranty, and it is contained in a short Warranty Information Booklet (a five-inch booklet of about 20 pages). The booklet's first page gives a summary of its contents.

After each vignette, subjects were asked to estimate both the number of minutes that they (or the average consumer) would spend reading the contract, as well as the percentage of the text that they would read, "either carefully or skimming attentively enough to get the gist." Subjects were randomly assigned to complete either all of the Self or all of the Other items first, and then all subjects saw the items in the other condition, permitting both between- and within-subjects analyses. Order of items within blocks was randomized.

b. Results

Subjects reported that they would spend more time, and read enough to "get the gist" of a greater fraction of the contract, than the average consumer reading the same contract.¹¹³ Means are reported in Table 3.

113. The between-subject's Self and Other difference was significant for minutes spent reading the credit card contract ($t=3.18$, $df=115.86$, $p=.004$) and estimated percent of credit card contract covered ($t=5.92$, $df=115.12$, $p=.000$). The Self and Other difference was significantly different for estimated minutes spent reading the computer contract ($t=2.95$, $df=105.56$, $p=.004$) and the estimated percent of computer contract read ($t=4.54$, $df=115.68$, $p=.000$). The difference was not significant for minutes spent reading the car warranty ($p=.205$), but it was marginally significant for fraction of warranty read ($t=1.92$, $df=118.5$, $p=.057$). The subject's sex did not affect overall differences. Overall, women predicted more time reading contracts than men, except in the Car Warranty example.

Table 3. Estimated Time Spent Reading Contracts, and Fraction of Contracts Read, for Self and for Average Consumer.

	Self	Average Consumer
Credit Card: Minutes	10.6	6.1
Credit Card: Fraction	65.3%	33.0%
Computer: Minutes	12.4	6.8
Computer: Fraction	56.5%	31.4%
Car Warranty: Minutes	14.2	11.6
Car Warranty: Fraction	54.5%	43.8%

In addition to the between-subjects differences reported in the table above, there is also a strong within-subjects effect, meaning that a given subject reported higher minutes and percentages for Self than for Average Consumer.¹¹⁴

This kind of motivated reasoning facilitates attributions of consent when other consumers are harmed, both by supporting the notion that fine print is readable (“I would have read it”) and by distancing one’s self from the consumer–victims. Subjects may believe that they are generally more cautious than others and/or that their own disclosure triage process prioritizes high-stakes contracts more effectively than others’ processes. In either case these are self-serving beliefs. Here, these self-serving beliefs are part of the consent attribution psychology. People who believe in their own careful reading of boilerplate can feel comfortable blaming others for failing to do so.

In this Part, I have tried to make the case that judgments of transactional harms are disconnected from judgments of contract formation, in part due to the motivations associated with how we judge harms that happen to other people. In the next Part, I consider how cognitive heuristics—rules of thumb that individuals use when they do not have information about the distribution of outcomes—especially heuristics based on salience, might affect judgments of transactional harms.

114. Subjects thought that they would spend 2.0 minutes more than the average consumer reading the credit card contract ($t=2.80$, $df=121$, $p=.006$), 4.7 more minutes reading the computer terms ($t=3.70$, $df=120$, $p=.000$), and 3.7 more minutes reading the car warranty ($t=3.94$, $df=120$, $p=.000$). Similarly, they thought that they would read 23.7% more of the credit card contract than the average consumer ($t=8.05$, $df=121$, $p=.000$), 21.5% more of the computer contract ($t=7.11$, $df=121$, $p=.000$), and 15.1% more of the car warranty ($t=5.12$, $df=121$, $p=.000$).

IV. AVAILABILITY AND SALIENCE IN CAUSAL ATTRIBUTION

Substantial evidence indicates a shared preference for holding people to their contracts, however egregious the terms.¹¹⁵ In this Part, I argue that there are psychological processes that contribute to the arguably outsized role of any fact of consent in attributions of culpability for transactional harms.

A. COUNTERFACTUAL REASONING

Making a causal attribution is a psychologically demanding judgment task. The psychological study of causation reveals the heavy role of salience and availability for these kinds of judgments. For example, the first and last event in a chain of causality will receive more attention than those in the middle.¹¹⁶ Unlikable people are perceived as playing a greater causal role in harmful events than others, even when there is no other evidence of differential culpability.¹¹⁷ And events that are under personal control tend to be more salient than those that are not.¹¹⁸ Research in this area has found that people rely heavily on counterfactual reasoning when they are judging harms: “[F]or negative outcomes, counterfactuals are after-the-fact realizations of ways that would have been sufficient to prevent the outcomes—and especially ways that actors themselves could have prevented their misfortunes.”¹¹⁹

Imagine that we are considering the plight of an underwater homeowner facing a sudden increase in the payments on her adjustable-rate mortgage loan. Further imagine that this homeowner might have qualified for a traditional fixed-rate mortgage, avoiding this problem altogether. One natural explanation for the homeowner’s situation is that she failed to avoid a very avoidable problem. This theory of social judgment predicts that each actual experience evokes “counterfactual alternatives,” and that we understand experiences in reference to their un-realized alternatives.¹²⁰ This

115. See, e.g., Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 272–74 (1970) (conducting a study that documented that many participants assumed terms in standard-form leases were enforceable when in fact courts had held the terms violated public policy).

116. See Barbara A. Spellman, *Crediting Causality*, 126 J. EXPERIMENTAL PSYCHOL.: GEN. 323, 324–26 (1997) (describing the hypothesis that people assign more causal effect to events that happen first and last in the causal chain).

117. See, e.g., Mark D. Alicke, *Culpable Control and the Psychology of Blame*, 126 PSYCHOL. BULL. 556, 556 (2000) (finding that “evidence concerning the event is reviewed in a manner that favors ascribing blame to the person or persons who evoke the most negative affect or whose behavior confirms unfavorable expectations”).

118. Neal J. Roes, *Counterfactual Thinking*, 121 PSYCHOL. BULL. 133, 139 (1997).

119. Barbara A. Spellman & David R. Mandel, *When Possibility Informs Reality: Counterfactual Thinking as a Cue to Causality*, 8 CURRENT DIRECTIONS PSYCHOL. SCI. 120, 122 (1999).

120. Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives*, 93 PSYCHOL. REV. 136 (1986). The following is a classic example of counterfactual alternatives: Imagine two people rushing to the airport, both of whom get stuck in traffic and arrive 30

research predicts that bad outcomes feel more regrettable as it becomes easier to imagine how they could have been avoided. The salience of different counterfactuals depends on many factors, but some counterfactuals are consistently more salient than others.

Reliance on counterfactuals (sometimes referred to as “norm theory”) is an availability heuristic.¹²¹ When an event or an attribute is particularly salient, it is very easy to call to mind (or very cognitively “available”). Furthermore, studies have shown that blame—whether directed at the self or others—depends on the salience of the counterfactual.¹²²

Consumer consent is a causal link that is easy to call to mind. In a variety of studies, subjects assigned greater blame to those persons whose choices were easier to mentally unwind—that is, the easier it is to imagine how someone might have avoided a harm, the easier it is to find them responsible for that harm. This has particular purchase in the disclosure setting for a number of reasons. Research suggests that the more available counterfactual is the one that changes the more obviously controllable and mutable elements of the situation—for example, the individual actor’s choices rather than the background decisions of a large firm.¹²³ Second, more recent occurrences in a series of events evoke counterfactual alternatives more strongly and are more likely to be blamed for negative outcomes.¹²⁴ In the world of contract, drafting comes first, and consent later.

The hypothesis of Study 4 is that when a consumer experiences a transactional harm, the consumer’s consent is a very salient link in the chain of causation. Whereas the firm’s actions may be diffused and hard to piece together, the consumer’s agreement is a single moment, memorialized, easily attributable to a single actor. For most individuals, imagining what a consumer could do differently is much easier than imagining what a company drafting a contract could do differently—we have lots of experience with the former and next to none with the latter.

In the study reported below, the goal was to manipulate the salience of the counterfactual, such that either the consumer’s decision to consent or the firm’s decision to include the term was more salient. One method of testing norm theory predictions is to change the foreground and background actors. A common finding in the counterfactual reasoning literature is that the salient counterfactual is typically the one that changes

minutes after the flight is scheduled to leave. One is told that his flight left on time, and the other that her flight left 25 minutes late, only five minutes before. Almost everyone thinks that the person who missed the flight by five minutes is more upset.

121. *Id.*

122. In a study of accident victims, for example, victims’ self-blame was predicted by the degree to which they believed they could have avoided the accident, even holding causal attributions constant. Christopher G. Davis et al., *Self-Blame Following a Traumatic Event: The Role of Perceived Avoidability*, 22 PERSONALITY & SOC. PSYCHOL. BULL. 557, 562–65 (1996).

123. Roese, *supra* note 118, at 139.

124. Dale T. Miller & Saku Gunasegaram, *Temporal Order and the Perceived Mutability of Events: Implications for Blame Assignment*, 59 J. PERSONALITY & SOC. PSYCHOL. 1111, 1111 (1990).

the behavior of the “protagonist” or the foreground actor.¹²⁵ In order to test the role of counterfactual thinking, subjects in this study were randomly assigned to read about a firm’s drafting decision as a background state or as a recent decision. A decision is easier to mentally unwind than a background state, so this study’s hypothesis is that culpability attributions would shift toward the firm in the decision condition.

1. Study 4: Making Firm Behavior More Salient

I predicted that the natural reading of consumer contracts scenarios is that firm behavior is taken as a given, as background, whereas the consumer decisions are easy to mentally unwind. However, it is possible to make firm choice more salient by highlighting the possibility that firm behavior is not immutable by couching the firm’s inclusion of the unfavorable term in active language.

a. Method

Respondents to this scenario were drawn from two online pools of adult subjects.¹²⁶ Their responses are collapsed for this analysis.

Subjects were asked to read the following scenario and answer follow-up questions. Subjects in the control group read:

Ben purchases an item from an online retailer he has never used before. Soon afterward, he starts receiving two to four letters a day from mortgage and credit card lenders, offering to open new lines of credit for him. He is annoyed, and looks to figure out how his name got on these mailing lists. He soon finds that it was the online purchase he made. The company’s default policy is to share customer addresses with “affiliated businesses.” Details of the privacy policy were described on a pop-up screen accessible by a link next to the “I agree to Terms and Conditions” button. Ben clicked the “Agree” button without clicking through to the privacy policy page. Indicate your agreement with the statements below.

Subjects in the Active Firm (norm) group read the same scenario, except the sentence about the company’s default policy was changed to read, “The company recently changed its default privacy policy and it now shares customer addresses with ‘affiliated businesses.’”

125. Ruth M.J. Byrne & Vittorio Girotto, *Cognitive Processes in Counterfactual Thinking*, in HANDBOOK OF IMAGINATION AND MENTAL SIMULATION 151, 151–52 (Keith D. Markman et al. eds., 2009).

126. One hundred and ten subjects from the Penn proprietary subject pool were paid \$1.50 to complete a five-minute survey. One hundred and two subjects participated via Amazon Mechanical Turk. They were paid \$1 for participating in the five-minute study. There were no significant differences in patterns of responses by subject pool, so their data were collapsed for analysis.

Each subject was asked to indicate the extent to which the consumer was to blame for the disclosure of his address, and the extent to which the company was to blame.

b. Results

In general, most subjects thought that both the consumer and the company were to blame. Responding on a seven-point scale, those in the control group assigned average blame to the company at 4.33, and to the consumer at 4.83; those in the norm group assessed the company's blame at 4.91 and the consumer's blame at 4.61.

There were no effects of condition on assessments of consumer blame or firm blame. However, the important question here is arguably how subjects apportioned blame between consumer and firm. Accordingly, in order to test the effect of the scenario, I compared—across conditions—the average subject's differential assignment of blame to consumer and firm. There was a significant difference—making the firm's behavior more salient changed how subjects ranked the blameworthiness of the parties. Specifically, the average subject in the control group thought that the consumer was about a half-point (.49 on a seven-point scale) more blameworthy than the firm; the average subject in the norm group thought that the firm was slightly (.3 points) more culpable than the consumer.¹²⁷

To the extent that narratives of transactional harm focus on the choices of the consumer (e.g., should the consumer have signed the contract or not), the framing of the problem tends to make the consumer's choice set highly salient and the firm's role apparently a *fait accompli*. Unless participants are prompted to think about the firm's drafting process as a set of choices, the drafter's role is not a salient factor in judgments of blame.

Inquiries into consumer consent are about the consumer's decisions against a set of background facts, including the contracts of adhesion that consumers encounter. In the last study of this Essay, I turn to one additional background reality of consumer decision-making that is often overlooked in judgments of consent and transactional harms: reading terms in a context of disclosure overload.

B. INATTENTION TO OVERLOAD: ITEM BRACKETING

One of the challenges of thinking about disclosure policies is that individual policies are considered separately, and each one sounds like a plausible solution for informing consumers. In the aggregate, though, the myriad disclosures become overwhelming. This is precisely the kind of situation in which behavioral researchers have observed the effects of "choice bracketing."¹²⁸ Choice bracketing research shows that people make different decisions when choices are presented in a broad bracket—all decisions made together—than they do when the decisions are made in a

127. W=6045.5, p=.043.

128. Daniel Read et al., *Choice Bracketing*, 19 J. RISK & UNCERTAINTY 171, 171-72 (1999).

narrow bracket—decisions made serially.¹²⁹ Broad bracketing often leads to higher-utility choices because it permits people to consider the interdependent consequences of a particular plan or action.¹³⁰ Study 5 tests the proposition that failure to read standard terms is deemed less blameworthy when subjects are reminded of the disclosure-full marketplace.

1. Study 5: Salience of Disclosure Overload

This study tests the hypothesis that disclosure overload is not a naturally salient feature of the consent judgment, but that subjects will be less likely to blame non-reading consumers for transactional harms when the study scenario makes the context of disclosure overload more salient.

a. Method

The hypothesis of the study was that support for disclosure regimes would weaken when subjects were prompted to think about the number of disclosures that an average American citizen encounters each day. Subjects were randomly assigned to a Control condition or a Prompt condition. Subjects in the Prompt condition saw the following item before moving to the policy questions:

Disclosures can include everything from information about changes in your insurance policy to a list of a drug's side effects you see in an ad for prescription medication to the FBI warning at the beginning of a DVD movie you've bought. Please estimate the number of disclosure statements that the average person encounters in a single day.

Participants were then asked to consider three situations in which consumers were surprised by an adverse term in a warranty or disclosure. They read as follows:

Privacy Policy:

Ben purchases an item from an online retailer. Soon afterward, he starts receiving two to four letters a day from mortgage and credit card lenders, offering to open new lines of credit for him. He is annoyed, and looks to figure out how his name got on these mailing lists. He soon finds that it was the online purchase he made, which had a privacy policy next to it informing him that they would share his name and address with "affiliates." He had not read the policy, which was provided in a box on the retailer's checkout page.

129. *Id.* at 172–73.

130. *Id.*

Car Warranty:

Greg has recently bought a new car. It comes with a 20-page Detailed Warranty in addition to the basic warranty information provided at sale (50,000 miles or five years, some restrictions apply, see Detailed Warranty for details). Six months after purchase, Greg's car is briefly submerged in water after a flash flood makes a small pond in his driveway, a highly unusual occurrence in his area. He brings it to the dealer and finds out that flood damage is not covered. If his car had been parked in the garage, it would not have been affected by the flooding. He had not read the warranty closely enough to see the flood provision, which was provided on page 13.

Credit Card Penalty:

Jill has a credit card with National Bank. She receives a bill from them in the mail every month. Three months ago, her bill included an additional flyer, a one-page document with normal type. At the top in red letters it said: "Important: New Information About the Terms of Your Credit Card Contract." Among other things, it informed customers that the previous policy of interest rate increases after three late payments would be amended to permit interest rate increases after only two late payments. Jill did not read the flyer. While moving from one apartment to another, Jill's bill paying systems get disorganized. She pays her credit card bill late two months in a row, paying a small late fee each time. When she goes to pay her bill the next month (on time) she sees that her interest rate has dramatically increased. She calls the credit card company and they point her to the flyer that she did not read.

After each scenario, subjects were asked to indicate their agreement with three statements. The first statement was about the extent to which it is the consumer's responsibility to read the disclosure carefully. The second asked to what extent this kind of disclosure was a good policy.¹³¹ The third asked whether the subjects believed that they would have read the disclosure.

131. The privacy policy question statement read: "Requiring the company to disclose the ways they share information with other companies is a good way to address customer privacy concerns." Car Warranty: "Requiring the company to disclose the flood restriction in the warranty is a good way to help consumers compare the sales terms in order to choose the best deal on a new car." Credit Card Penalty: "Requiring the credit card company to send a flyer to alert customers to new terms is a good way to prevent the credit card companies from taking advantage of borrowers."

b. Results

The median estimate for the number of disclosures a consumer sees in a day was ten; the mean was fifteen.¹³²

Using a two-sided Wilcoxon rank-sum test, I compared how responses to each question differed by condition.¹³³ Mean differences are reported in Table 4. The prompt had consistent effects on the participants' endorsement of the idea that reading the contracts in question was the consumer's responsibility, on the support for the disclosure policy, and on participants' beliefs that, had they been in the consumer's position, they would have read the disclosure or contract.

Table 4. Mean Differences, Control Minus Prompt

	Consumer's Responsibility	Disclosure Is Good Policy	I Would Have Read It
Privacy Policy	.33	.30	.69
Car Warranty	.21	.37	.34
Credit Card Penalty	.20	.33	.43

The study showed that subjects were less likely to endorse strict adherence to constructive consent doctrines in contract when they were prompted to think about disclosure overload.

In sum, this Part presents evidence that consumer choice is a very salient feature of how we understand transactional harm. Many people would agree that as drafters, firms have control over form contracts that individuals do not. And they would also agree that a reasonable person who wants to participate in the consumer marketplace must sign many contracts without reading the terms. These considerations are arguably central features of any judgment of consumer consent, but in an assessment of harm, they are much less cognitively available than the consumer's behavior.

132. One hundred and twenty-three subjects participated in an online survey via Amazon Mechanical Turk. Subjects were paid \$1.50 each to participate in a 15-minute survey. Subjects were all recruited from Amazon Mechanical Turk. Ages ranged from 19 to 69 with a median age of 35, and 56.1% of subjects were female.

133. Privacy Policy: Responsibility ($W=1516$, $p=.033$); Policy ($W=1389.5$, $p=.004$); Would Read ($W=1436$, $p=.014$). Car Warranty: Responsibility ($W=1589$, $p=.073$); Policy ($W=1411.5$, $p=.007$); Would Read ($W=1693$, $p=.244$).

V. TOWARD A PROCEDURAL JUSTICE OF CONTRACTS

Together, these studies sketch a picture of the moral psychology of consent to fine print. Many subjects reported misgivings about the policy of disclosing important terms via fine print, and many expressed uncertainty that consent to unread fine print was meaningful consent. The existence of disclosures in assessments of consent *ex post*, though, was dispositive. Unless prompted to consider alternate explanations for transactional harms—firm wrongdoing or disclosure overload—subjects in these studies understood transactional harms as products of consumer consent.

This juxtaposition raises the possibility of a “procedural justice” of contracts. In psychology, procedural justice research describes the role of process in judgments of fairness. People are more willing to accept disadvantageously inequitable outcomes when they perceive that there was a fair process for determining who got what—even if there is clear evidence that the elements of procedural “fairness” were essentially meaningless.¹³⁴ A classic example is as follows.¹³⁵ Participants in a laboratory experiment were each to be assigned a certain number of tasks, such that some participants would bear a heavier burden than others. They were randomly assigned to one of two conditions, voice or no voice. In the voice condition, subjects could express an opinion about the number of tasks they had been assigned. In the no voice condition, they were not invited to do so. The opinions expressed by those in the voice condition had no bearing on the number of tasks they were assigned, and this was transparent to the subjects themselves. Nonetheless, those who had a “voice” judged the assignment procedure to be fairer and judged their own number of assigned tasks to be more acceptable. In other words, the pretense of a fair process was enough to quell objections to arbitrary outcomes.

The results I have presented here are troubling for that reason; they suggest that the presence of disclosures may have implicit effects on attributions of consent and blame that most consumers and most policymakers would not anticipate. Thus, we might be ambivalent about whether a consumer has really consented to some hidden term. Given our ambivalence, we might assume that doubts about the consent will factor into decisions about enforcement. When it is time to ask questions about enforcement, though, the fact of the disclosure is dispositive. Some commentators have argued that even though it is true that disclosures are probably ineffective, they “can’t hurt.”¹³⁶ My contention is that this kind of attitude leads to overuse of disclosures that do not affect consumer decision-

134. See, e.g., E. Allan Lind, Ruth Kanfer & P. Christopher Earley, *Voice, Control, and Procedural Justice: Instrumental and Noninstrumental Concerns in Fairness Judgments*, 59 J. PERSONALITY & SOC. PSYCHOL. 952, 955–56 (1990).

135. See generally *id.* at 954–55 (describing a study in which some participants were given a voice and others were not, finding that participants that were given a voice were happier with the outcome).

136. See Hillman, *supra* note 18, at 295–300.

making, but have implicit effects on the moral calculus of transactional harms.

In the tort and criminal law contexts, psychologists have identified a similar problem with respect to the fair process effect. Someone who is thinking about what constitutes a fair process would not conclude that the ability to contribute feedback into a never-opened suggestion box is the same as having a meaningful voice in the process.¹³⁷ Nonetheless, the ability to put comments in that box affects how people view the fairness of the resulting outcome. Similarly, in contract, most people are troubled by the unrealistic demands on consumers to consent to terms that they cannot read. Nonetheless, the mere fact of the signature or the “I Agree” click has a profound effect on how they view the outcomes of that transaction.

The fair process effect may be something of a heuristic.¹³⁸ It is probably sensible in many applications, but it raises thorny questions for the normative standing of consent. As psychologist Robert MacCoun says: “In the procedural justice domain, the concern is that authorities can use the appearance of fair procedure (dignity, respect, voice) as an inexpensive way to coopt citizens and distract them from outcomes that by normative criteria might be considered substantively unfair or biased.”¹³⁹ On the other hand: “[T]here is also discomfort with the implicit notion that we scholars can assert that ordinary people are mistaken in their understanding of their social world—a notion that seems politically elitist and epistemologically naive.”¹⁴⁰ In the context of contract, the concern is that sophisticated parties (e.g., corporations and other repeat players) use consumer consent in a distorted way—presenting disclosures or terms that consumers will not read, but will nonetheless insulate the firm from both legal liability and consumer backlash.

The literature on procedural justice has largely overlooked (with the notable exception of Rebecca Hollander-Blumoff’s studies of just negotiation¹⁴¹) the possibility of a troubling fair process effect in transactional contexts. The evidence from this Essay suggests that at least some attributions of consent to unfavorable terms outweigh thin, formalistic assent procedures that most observers would find problematic if assessing

137. See Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 238–39 n.118 (2012) (reviewing literature suggesting that even non-meaningful participation leads people to view a process as more fair).

138. As noted above, a *heuristic* is a rule of thumb that individuals use when they do not have information about the distribution of outcomes.

139. Robert MacCoun, *Voice, Control, and Belonging: The Double-Edged Sword of Procedural Fairness*, 1 ANN. REV. L. & SOC. SCI. 171, 189 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1693356.

140. *Id.*

141. See Rebecca Hollander-Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 381 (2010); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 L. & SOC. INQUIRY 473 (2008).

them in the context of contract formation. My hope is that this project is the first in a larger research agenda around transactional procedural justice.

CONCLUSION

The problem that I have raised in this Essay has vexed legal scholars for decades: How seriously should contract law take consent in a world in which consumers must consent lightly to most of their contractual obligations? The common wisdom is that the approach that we have isn't working. Yet, regulating contracts by mandating disclosure serves a normative function, even as we acknowledge that it fails its ostensible communicative function. Indeed, this view is reasonable enough as long as the limits of the legal fiction are equally salient *ex post* as they are *ex ante*.

The experiments I have presented here raise the possibility that although people agree that disclosures do not have noticeable effects on the assent process, they have enormous effects on how we understand transactional harms. That is, the grain of salt with which people take consent to standard terms is nowhere to be found when the question is whether a consumer is to blame for having agreed to an unfavorable term. Any objective manifestation of assent is highly salient in the attribution of culpability for transactional harms, obscuring procedural defects that people are otherwise quick to identify. The next steps in the study of the moral psychology of contract must take on the possibility that consumer consent, and attributions of consumer consent, are more complex than we have allowed.