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### Justifying Bad Deals

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## JUSTIFYING BAD DEALS

Tess Wilkinson-Ryan

*Abstract:* In the past decade, psychological and behavioral studies have found that individual commitment to contracts persists beyond personal relationships and traditional promises. Even take-it-or-leave-it consumer contracts get substantial deference from consumers—even when the terms are unenforceable, even when the assent is procedurally compromised, and even when the drafter is an impersonal commercial actor. Indeed, there is mounting evidence that people import the morality of promise into situations that might otherwise be described as predatory, exploitative, or coercive. The purpose of this Article is to propose a framework for understanding what seems to be widespread acceptance of regulation via unread terms. I refer to this phenomenon as “term deference”—the finding that people defer to the term, even when the assent is perfunctory, and even when the term is unfair.

The framework I propose is a motivated reasoning explanation: when it *feels better* to believe that contracts are fair and that assent is reliable, people are more likely to hold those beliefs. In order to predict when contractual fairness will be especially psychologically urgent, I draw on an extensive body of psychological literature on the preference for believing in a just world, or for being satisfied with the status quo. When a phenomenon or a system appears implacable and unavoidable, it is psychologically less stressful to believe that the system is good. “System justification” is a well-documented psychological phenomenon that predicts when individuals will be motivated to hold beliefs that support the status quo, even when the status quo redounds to their own disadvantage. The two studies reported here manipulate the pressure to support the status quo—to believe that firms are reasonable and contract law is fair—by varying the term’s enforceability, its consequences, and its history. The findings show the predicted patterns, that increased psychological pressure to support the status quo increases beliefs that the status quo is good and fair. These results also align with the prediction that pressure to justify the status quo is not only a psychological state, but also a trait. That trait, highly associated with political conservatism, is reflected in the results suggesting a stronger motivation to justify the status quo among subjects who report that they are more politically conservative. The results here have implications not only for contract law, but also for how we understand self-interest in legal decision-making, and for the legal understandings of consent and compliance.

# JUSTIFYING BAD DEALS

Tess Wilkinson-Ryan

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## JUSTIFYING BAD DEALS

Tess Wilkinson-Ryan\*

### INTRODUCTION

The psychology of contract law is a young field, but it has recently amassed an impressive cluster of null results that might be described as “consumers not complaining about bad deals.” It is a longstanding challenge for researchers to systematically describe a fact in the world that mostly manifests as a puzzling absence (for Sherlock Holmes fans, a dog that does not bark), because it can be hard to pin down what is so compelling about something that does *not* happen. But in the last ten years, scholars have offered detailed accounts of consumer inaction, inaction that costs them real money, across the universe of consumer contracts. A number of high-stakes examples come to mind. In 2009, in a crashing housing market, economists were perplexed to find that underwater homeowners, who could have saved hundreds of thousands of dollars by choosing foreclosure and walking away, kept paying down their inflated mortgages even as the lenders were being bailed out.<sup>1</sup> In the decade since California has banned non-compete clauses, employees with patently unenforceable non-competes in their employment contracts have nonetheless adhered to their terms and refused better job offers.<sup>2</sup> And by their own account, thousands of everyday participants in routine contracting treat the terms of their unread take-it-or-leave-it boilerplate with the same deference as negotiated deals.<sup>3</sup>

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<sup>1</sup> See, e.g., John Krainer & Stephen LeRoy, *Underwater Mortgages*, FEDERAL RESERVE BANK OF SAN FRANCISCO ECONOMIC LETTERS (2010), <http://www.frbsf.org/publications/economics/letter/2010/el2010-31.html> (last visited August 9, 2019) (reviewing the statistics on strategic default in the mortgage context).

<sup>2</sup> Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force*, UNIV. OF MICH. LAW & ECON. RESEARCH PAPER NO. 18-013 (2019), <https://ssrn.com/abstract=2625714> or <http://dx.doi.org/10.2139/ssrn.2625714> (estimating the statistical effect of non-compete clauses on employee mobility).

<sup>3</sup> Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 124–26 (2017) (reporting experimental studies of consumer responses to hidden terms).

These findings could be anomalous, or they could be rationalized, but they could also be taken seriously, as *prima facie* evidence of a behavioral phenomenon. This Article aims to describe this deference to burdensome terms as a phenomenon in its own right, and then to test the role of motivated cognition—i.e., wishful thinking—in the emerging moral psychology of consumer contracts.

The motivated reasoning hypothesis grows from the informal observation that most people would prefer to be agents than pawns. It is also, however, a natural next step in the empirical literature. The last decade of research in the psychology of consumer contracting has identified two important patterns. The first is that people take promises seriously.<sup>4</sup> This finding is easy for psychologists to explain, in the sense that it is an explicit value; many people can and do articulate that promise-keeping is a moral norm that they have internalized and hold dear.<sup>5</sup> The second pattern is that people import the conventional morality of interpersonal promising into situations that might otherwise be described as predatory, exploitative, or coercive.<sup>6</sup> That finding is less easy to explain, and the purpose of this Article is to propose a framework for understanding what seems to be widespread acceptance of regulation via unread terms. I describe this deference to terms as puzzling because it seems at odds with most people’s material self-interest. The literature suggests that people defer to the term as written, even when the assent is perfunctory, and even when the term is unfair. We ought to be surprised that people who are otherwise comparison shopping and discriminating on price are leaving value on the table.

To be intentionally tendentious: in the United States, firms unilaterally draft private legislation, without oversight, and use American contract law to enforce their rules.<sup>7</sup> Everyone *does* and everyone *must* agree to take-it-or-leave-it deals in order to participate in American economic and social life.<sup>8</sup> Taking no particular view about whether or not companies make good rules, and acknowledging that firms do not consistently choose the worst terms they can get away with,<sup>9</sup> it is still true that terms are not closely regulated by the market or the government, and

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<sup>4</sup> Tess Wilkinson-Ryan, *Legal Promise and Psychological Contract*, 47 WAKE FOREST L. REV. 843, 845–46 (2012) (reviewing the psychological correlates of promissory morality and contract morality).

<sup>5</sup> *Id.* at 846–51.

<sup>6</sup> See, e.g., Wilkinson-Ryan *supra* note 3 at 164 (“When terms are memorialized and documents shared, they assume the mantle of contract-capital-C, with all of its moral and social baggage.”)

<sup>7</sup> See, e.g., Margaret Radin, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (Princeton University Press, 2012) (presenting a sweeping overview of the role of fine print in American economic life, and articulating its implications for legal legitimacy).

<sup>8</sup> Lior J. Strahilevitz, *Toward a Positive Theory of Privacy Law*, 126 HARV. L. REV. 2011, 2027–29 (2012).

<sup>9</sup> See, e.g., Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 JOURNAL OF EMPIRICAL LEGAL STUDIES 3, 447–475 (2008) (reporting equivocal findings on the effects of competition on burdensome terms).

are not “chosen” in any interesting sense of that word by the individuals subject to their constraints.<sup>10</sup> So why is the assent analysis so sticky? Why do courts and consumers still talk about what consumers have agreed to?<sup>11</sup>

The core hypothesis for this paper is that term deference is a motivated reasoning phenomenon. What this means is that when it *feels better* to believe that contracts are fair and that assent is reliable, people are at least marginally more likely to hold those beliefs. This itself is not controversial; self-serving biases are well-documented in the law and psychology literature.<sup>12</sup> What is novel, and counterintuitive, is the proposition that it might feel good for consumers themselves to believe that consumers *should* defer to their corporate counterparties. Usually “myside bias,”<sup>13</sup> as it is sometimes called, favors the material benefit of the one making the judgment.<sup>14</sup> So why would consumers themselves support hidden fees or fine-print arbitration clauses? The prediction is twofold. First, it is psychologically appealing to believe that overall the system functions.<sup>15</sup> Consumers have very little actual control, and so it is appealing to believe in the social order. This is the just world hypothesis,<sup>16</sup> or system justification theory.<sup>17</sup> The second is that there is something particular about believing that assent—or perhaps more correctly, consent—is meaningful. It is important to believe that when humans agree, that agreement is real.

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<sup>10</sup> See, e.g., Eric A. Posner, *ProCD vs. Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1185 (2010) (arguing that terms are so burdensome to read that they should not even be provided before purchase.)

<sup>11</sup> See, e.g., Robert Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) (describing the law as one of granular analysis of when precisely the terms are available for review by the consumer).

<sup>12</sup> See, e.g., George Loewenstein, Samuel Issacharoff, Colin Camerer & Linda Babcock, *Self-Serving Assessments of Fairness and Pretrial Bargaining*, 22 J. OF LEG. STUD. 135 (1993) (showing the effects of motivated reasoning on good faith efforts to reason neutrally about fairness in a zero-sum task).

<sup>13</sup> See, e.g., Jonathan Baron, *Myside Bias in Thinking About Abortion*, 1 THINKING & REASONING 221 (1995) (explaining myside bias as a “failure to think of arguments on the other side.”).

<sup>14</sup> Keith E. Stanovich, Richard F. West & Maggie E. Toplak, *Myside Bias, Rational Thinking, and Intelligence*, 22 CURRENT DIRECTIONS IN PSYCHOLOGICAL SCIENCE 4, 259–264 (2013).

<sup>15</sup> M. J. Lerner & D. T. Miller, *Just World Research and the Attribution Process: Looking Back and Ahead*, 85 PSYCHOLOGICAL BULLETIN, 5, 1030–1051 (1978) (describing the first generation of “just world bias” research in psychology).

<sup>16</sup> *Id.*

<sup>17</sup> See *id.*

## I. THE TROPE OF THE FECKLESS CONSUMER: AN ILLUSTRATION

The core fact of consumer contracting is that individuals are sometimes subject to bad terms.<sup>18</sup> One way to interpret this fact is that firms prey on unsuspecting consumers, who are powerless to help themselves.<sup>19</sup> Another interpretation is that consumers have power that they are too lazy or short-sighted to exercise<sup>20</sup>—they are feckless, not powerless.

A familiar window into the rhetoric of all's-fair-in-love-and-contracts is the fable of the feckless consumer who did not read the fine print.<sup>21</sup> If there is one thing that almost everyone (except contracts scholars) can agree on, it is that reading contracts is good. Even in academic literature, researchers have been preoccupied with increasing readership since pre-internet days.<sup>22</sup> Readership, or failure to read, is also a perennial feature of popular contracts commentary.<sup>23</sup> Often articles exposing or criticizing bad contract terms are framed in terms of the foolish consumer who finds himself victim to the savvy firm. Take, for example, a recent op-ed in *The Washington Post* on the pitfalls of travel contracts:

It's no exaggeration to say that many, if not most, travel problems start with a failure to read the terms and conditions... [For example] cruise contracts say the staff may search your cabin for any reason at any time. The cruise line can also use your image for any purpose without compensation.

Travel insurance policies are written in gibberish. Even if you think you understand what you've read, you might want to read it again.<sup>24</sup>

Cruise ship employees with carte blanche search power is probably a term people both strongly dislike and fail to anticipate. In light of that, the rhetoric is telling. In the face of a stark

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<sup>18</sup> See, e.g., Richard Speidel, *Unconscionability, Assent, and Consumer Protection*, 31 U. PITT. L. REV. 359 (1969) (articulating the purpose of the unconscionability doctrine in the protection of consumers).

<sup>19</sup> See, e.g., Daniel Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005) (describing the power differential in contract as a core feature of consumer protection).

<sup>20</sup> See, e.g., Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117 (2007) (reviewing a variety of consumer mistakes and their effects on form contracting).

<sup>21</sup> See, e.g., Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 945 (1974) (“The nineteenth century departure from the equitable conception of contract is particularly obvious in the rapid adoption of the doctrine of *caveat emptor*.”)

<sup>22</sup> See, e.g., Griffith Garwood, Robert J. Hobbs, and Fred H. Miller, *Consumer Disclosure in the 1990s*, 9 GA. ST. U. L. REV. 777 (1992) (arguing for increased readability in contracts).

<sup>23</sup> See, e.g., Wilkinson-Ryan, *supra* note 3 (describing contract “ambivalence” in popular culture accounts).

<sup>24</sup> Christopher Elliott, *Read the Fine Print Before You Travel*, WASH. POST (July 3, 2019), [https://www.washingtonpost.com/lifestyle/travel/read-the-fine-print-before-you-travel/2019/07/03/102a0342-977b-11e9-8d0a-5edd7e2025b1\\_story.html?noredirect=on](https://www.washingtonpost.com/lifestyle/travel/read-the-fine-print-before-you-travel/2019/07/03/102a0342-977b-11e9-8d0a-5edd7e2025b1_story.html?noredirect=on).

consumer choice—accept unlimited search or do not go on your cruise—the article locates prime responsibility not with the firm that insisted on intrusive privacy terms, but with the consumer who did not read them. Indeed, the suggested remedy for what we might view as fine print overreach by the firms is to read the fine print *more than once*. Such a commitment to consumer prudence is not supported by either the evidence or by the underlying logic, which suggests the scolding tone is motivated by something other than accuracy. The belief that consumers ought to help themselves appears to be more deontological than consequentialist.

That example is cherry-picked, but it is not isolated. Those who follow contracts in the national media may recall the 2015 multi-part investigative series in the *New York Times*.<sup>25</sup> The series, a serious look at the ubiquity and equities of arbitration, nonetheless went by the subtitle, “Beware the Fine Print.”<sup>26</sup> I drew five examples from the past two years of national news media of terms that were, by the lights of the articles themselves, egregious. The purpose is largely suggestive, to bring some specificity to a cultural narrative that most of us will find very familiar.

#### A Non-Random Sample of Popular Rhetoric Around Bad Terms:

- **Class action waivers in consumer contracts:** “The next time you open a bank account or sign up for a credit card, make sure you read the fine print.”<sup>27</sup>
- **Mandatory arbitration for workplace sexual harassment claims:** “It’s easy to overlook practical tasks such as closely reading your employment contract. But that document may contain terms and conditions you should know about in advance...”<sup>28</sup>
- **Disclaimer of liability for a moving company that auctioned off a family’s possessions instead of moving them from one residence to the other:** “[I]t is important to read every word of a contract before accepting or signing it.”<sup>29</sup>

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<sup>25</sup> Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times, October 31, 2015 (reporting on the effects of mandatory arbitration across a variety of contracts domains under the series sub-hed, “Beware the Fine Print”, available at <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>)

<sup>26</sup> *Id.*

<sup>27</sup> CNN, *Ways You Sign Your Rights Away with Bank Accounts*, CNN.com, October 26, 2017, available at <https://www.wcpo.com/money/consumer/dont-waste-your-money/4-ways-can-sign-away-rights-sign-bank-account-credit-card>.

<sup>28</sup> Rebecca Koenig, What You Need to Know about Mandatory Arbitration, U.S. NEWS & WORLD REPORT (July 9, 2018), <https://money.usnews.com/careers/company-culture/articles/2018-07-09/what-you-need-to-know-about-mandatory-arbitration>

<sup>29</sup> Diane Walker, *What to Look Out for When Signing A Contract*, NBC 12 (May 14, 2019), <https://www.nbc12.com/2019/05/15/what-look-out-when-signing-contract/>.



- **Unenforceable non-Compete agreement:** “Free tip from a lawyer: Always read the fine print. You’re welcome.”<sup>30</sup>
- **Discontinued coverage for smoke damage in homeowners policies in a wildfire zone:** “Although all changes must be disclosed, many homeowners may not pay attention or may not read the fine print. ‘People have to be very vigilant.’”<sup>31</sup>

These five terms are each serious enough and onerous enough to be subject to plausible legal challenge.<sup>32</sup> Indeed, some of the terms reported were plainly impermissible at the time of the reporting; the purpose of covering non-compete clauses was explicitly to point out that the terms are not legally enforceable but nonetheless included in the contracts.<sup>33</sup> In each case, the article, or even the title, frames the problem as consumer failure to read carefully, but in each case we should retort, “How would that help?!”

The family whose possessions were sold off at auction by their moving company almost certainly would not have predicted that outcome from a bland waiver of liability. And how would reading a non-compete clause, which is not enforceable by the firm, be helpful to a new employee? Presumably that employee would be better off reading the Civil Code of California.<sup>34</sup> The individual job-seeker probably does not have the leverage to strike a mandatory arbitration clause, and likely has professional and financial needs that render such a clause low-priority.<sup>35</sup> Perhaps the most useful standard example is the class action waiver. There is simply no world where individual consumers make better market decisions by knowing whether a particular firm

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<sup>30</sup> Mark Gabel, *When Companies Make Workers Sign Illegal Non-Compete Agreements*, MEDIUM (May 21, 2017), [https://medium.com/@gabel\\_law\\_firm/when-companies-make-workers-sign-illegal-non-compete-agreements-4f158174d8e](https://medium.com/@gabel_law_firm/when-companies-make-workers-sign-illegal-non-compete-agreements-4f158174d8e).

<sup>31</sup> David Lazarus, *Column: How to Deal with An Insurer after Your Home Is Burned Down*, L.A. TIMES (Nov. 12, 2018), <https://www.latimes.com/business/lazarus/la-fi-lazarus-california-fire-insurance-20181112-story.html>.

<sup>32</sup> See, e.g., Richard Spiedel, *Unconscionability, Assent, and Consumer Protection* 31 U. PITT. L. REV. 359, 365-367 (1970) (reviewing state and federal approaches to term overreach).

<sup>33</sup> Gabel *supra* note 30 (“I suspect that these companies and their lawyers know exactly what they’re doing, because when we point out to them that their non-compete clause violates California law, they sometimes refuse to remove them. These companies apparently hope to intimidate the employee into working for the company for as long as the employer wants, under whatever terms the employer wants to impose, by causing the employee to fear violating the clause.”)

<sup>34</sup> California Business and Professions Code section 16600 provides that “except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.”

<sup>35</sup> See, e.g., Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 6 UKMC L. Rev. 449 (1995) (arguing that employers, as repeat players, have incentives to attend to employment contracts more carefully than employees, who are one-shot players).

does or does not waive class actions.<sup>36</sup> The probability of that term affecting any particular consumer is minute<sup>37</sup>, and indeed all the more trivial when the term is common across products and firms.<sup>38</sup>

Overall, these cases are best understood as potential catalysts for political, rather than individual, action. As such, the focus on individual responsibility here is odd, given that consumers have minimal incentives and little power to improve their own outcomes<sup>39</sup>, whereas firms can swiftly and unilaterally choose to draft different terms. Whether or not it is efficient or right for them to do so is its own question, but in this Article, I start from the proposition that some terms are widely agreed to be burdensome, and then ask the question of why they are nonetheless acceptable.

This article proceeds in four parts. Part I lays out the existing evidence that the law and psychology, respectively, of consumer contracting is highly deferential to drafters. Part II introduces the psychological theory of system justification, which posits that beliefs and preferences that justify the existing social and legal order are motivated—they are psychologically less dissonant and more appealing. This Part also draws the connections between the predictions of system justification theory and existing evidence from the social science of consumer contracting. Part III tests three hypotheses derived from that literature: that unfair terms, and the laws that favor them, are more palatable when they are difficult to challenge, likely to harm consumers, and longstanding. The evidence from these two studies suggests that term deference is at least in part the product of motivated reasoning—the more important it is to the individual to justify her place in the transactional ecosystem, the more likely she is to believe that she has agency and that the system is fair. Part IV describes the implications of this research for consumer contract law as well as for empirical methods in legal scholarship.

## II. TERM DEFERENCE: EVIDENCE FROM THE LAW AND PSYCHOLOGY OF CONTRACT

### A. *Law of Form Contracts*

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<sup>36</sup> See, e.g., Clayton Gillette, *Rolling Contracts as an Agency Problem*, 2004 Wisc. L. Rev. 679, 680 (2004) (“Even a rational buyer who anticipates that a proposed contract does not fully internalize purchaser interest, for instance, could fail to review terms if the buyer predicted that transactional breakdowns to which disfavored terms apply are unlikely to occur.”)

<sup>37</sup> See, e.g., W. Mark Weidemaier, *The Arbitration Clause in Context: How Contract Terms Do (And Do Not) Define the Process*, 40 CREIGHTON L. REV. 655 (2006).

<sup>38</sup> Theodore Eisenberg, Geoffrey Miller, and Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J. L. REFORM 871 (2008).

<sup>39</sup> See, e.g., Melvin Eisenberg, *The Limits of Cognition and the Limits of Contract*, STAN. L. REV. 211 (1995).

For the most part, American contract law treats consumer contracts as it does person-to-person and business-to-business contracts.<sup>40</sup> Assent to contracts of adhesion depends on whether the parties have manifested an intent to be legally bound. Although the doctrine of assent is the flashpoint issue for form contracting, most contemporary deals easily clear the threshold; clicking “I agree” is certainly a clearer manifestation of assent than we see in many casebook chestnuts.<sup>41</sup>

Consumer contracts have nonetheless vexed scholars and courts for long enough that the American Law Institute has recently proposed a Restatement on Consumer Contracts.<sup>42</sup> The new Restatement would create doctrinal boundaries between individual-firm contracts and business-to-business or arms-length deals that have historically been the core of contracts doctrine.<sup>43</sup> This is a remarkable development for a field that has historically insisted that form contracts are not different than anything else. As Judge Hellerstein of the Southern District of New York opined in a software licensing dispute in 2001:

Promises become binding when there is a meeting of the minds and consideration is exchanged. So it was at King’s Bench in common law England; so it was under the common law in the American colonies; so it was through more than two centuries of jurisprudence in this country; and so it is today. Assent may be registered by a signature, a handshake, or a click of a computer mouse transmitted across the invisible ether of the Internet.<sup>44</sup>

Judge Hellerstein was arguing that all online contracts do is to introduce new methods of manifesting assent, and that as such they do not disrupt assent doctrine; they just add more behaviors that are widely understood as agreement to contract. He was both right and wrong. Clicking “I Agree” took little time to be widely accepted as a mode of acceptance. However, that is not all that online contracting brought to contract doctrine. The rise *and proliferation* of online contracting has arguably moved public and academic opinion on consumer contracting

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<sup>40</sup> See Omri Ben-Shahar, *Foreword to “Boilerplate”: Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821, 826 (2006) (“On a theoretical level, boilerplate is shown to be a legal phenomenon different from contract. Is it a statute? Is it property? Is it a product?”).

<sup>41</sup> See, e.g., *Embry vs. McKittrick* (1922) (where the manifestation of assent is the employer’s reply is “You’re alright, go and get your men out and don’t worry about it.”)

<sup>42</sup> See Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, “*Searching for the Common Law*”: *The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017) (recounting and defending the empirical methods behind the draft Restatement case-counting approach).

<sup>43</sup> See Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler, *The American Law Institute’s Restatement of Consumer Contracts: Reporter’s Introduction*, 15 EUR. REV. CONTRACT L. 91 (2019) (explaining the impetus for carving consumer contracts off from commercial contracts).

<sup>44</sup> *Specht v. Netscape Commc'n Corp.*, 150 F. Supp. 2d 585 (S.D.N.Y. 2001).

for good.<sup>45</sup> What Judge Hellerstein’s argument missed, understandably in light of the historical context, was that life online would yield an unprecedented volume of standard terms. The sheer volume has, in turn, created a new urgency for those who would cleave consumer contracts from the doctrinal core.<sup>46</sup> It is not that we cannot identify when consumers manifest assent, but rather that we might think it sensible to treat them differently when non-readership is baked into the system. As many scholars and commentators have observed, documented, and bemoaned, it is not possible for any humans to both read the terms of their deals and also participate meaningfully in American economic life.<sup>47</sup>

Controversially, the ALI’s draft Restatement doubles down on the current state of assent doctrine, and then adds a more robust set of fraud and unconscionability protections on the back end.<sup>48</sup> When courts face assent issues in contracts of adhesion, especially online contracts, they typically treat the contract in isolation. Did this party in this instance have notice of the terms and an opportunity to read them before manifesting assent? This is a granular analysis, one that asks about the size of the font and the screen position of the hyperlink, but has no interest in the overall rates of readership of such terms or of the cost-benefit calculation of *ex ante* reading.<sup>49</sup>

The upshot of this state of affairs in consumer contract law is that the black letter law is itself quite deferential to firms and terms. A range of highly dubious assent contexts—from long boilerplate documents with Sign Here tabs to hyperlinked terms and conditions to rolling contracts with terms only available after acceptance—are unequivocally manifestations of assent.<sup>50</sup> Meanwhile substantive unconscionability is rarely claimed and rarely successful.<sup>51</sup> The

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<sup>45</sup> See, e.g., David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1600–06 (2016) (using experimental studies to show an association between age and intuitive formalism).

<sup>46</sup> See *Id.*

<sup>47</sup> See e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 549 (2014); Omri Ben-Shahar & Carl Schneider, *The Failure of Mandatory Disclosure*, 159 U. PA. L. REV. 647 (2011); Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1235 (2006).

<sup>48</sup> See RESTATEMENT OF THE LAW, CONSUMER CONTRACTS (AM. LAW INST.); See also Alan S. Kaplinsky, *ALI’s Restatement of The Law, Consumer Contracts: An Ill-Conceived and Poorly Implemented Project*, BALLARD SPAHR L.L.P. (May 16, 2019), <https://www.consumerfinancemonitor.com/2019/05/16/alis-restatement-of-the-law-consumer-contracts-an-ill-conceived-and-poorly-implemented-project/>.

<sup>49</sup> See Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. OF CONTRACT L 25-26 (2009) (describing the particulars of the opportunity to read as a legal fiction).

<sup>50</sup> See, e.g., Matthew Seligman, *The Error Theory of Contract Law*, 78 MD. L. REV. 147 (2018) (arguing that

<sup>51</sup> See, e.g., Nico Cornell, *A Complainant-Oriented Approach to Unconscionability and Contract Law*, 164 U. PA. L. REV. 1131 (2015).

most successful efforts to bar predatory or usurious practices have been from legislatures, prohibiting in some jurisdictions, *inter alia*, universal default in credit card bills,<sup>52</sup> no-cancellation policies for automobile purchases,<sup>53</sup> and anti-disparagement clauses.<sup>54</sup> Targeted legislative reforms have outlawed some objectionable practices, leaving firms wide latitude otherwise.

### B. *Field Evidence of Term Deference*

If the state of the law is term deference, we might describe the state of behavior as term *over-deference*. Collecting data on over-deference is challenging, for at least two reasons. The first is that it is a dog that doesn't bark—the whole point is that people do what their contracts require without making a lot of noise (and thus without creating a lot of observable activity). The second is that doing what one's contract requires is normally overdetermined; i.e., it is hard to say that it has a cause that is psychological. If I pay my Comcast bill on time, that is not psychological; I might feel morally obligated but mostly I just want the cable company to keep my internet on. However, a few examples have emerged recently of cases in which it is at least plausibly the case that honoring the terms of a contract is all-things-considered counterproductive, and yet widespread acquiescence to bad policies persists.

#### 1. Online Shoppers Who Didn't Quit a 480-item Survey

In 2008, the contracts and organizational behavior scholar Zev Eigen put a survey online.<sup>55</sup> Any participant who agreed to take the survey was promised, in return, a DVD. What participants did not know was that the survey was carefully designed to be as obnoxious as possible. It had 480 questions. The only way to answer each question was to click inside a very small button icon, and each new question appeared on a different part of the screen, preventing participants from resting the mouse in a single spot. Each question was its own pop-up, and each click to “continue” started a 4-second delay to the next question.<sup>56</sup> In other words, subjects signed up for something that they almost surely understood to be a short, simple task, in return

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<sup>52</sup> See, e.g., Adam Levitin, *Hydraulic Regulation: Regulating Credit Markets Upstream*, 26 YALE J. REG. 143, (2009) (arguing that state efforts to legislate lending practices can circumvent national failures to address financial services malfeasance).

<sup>53</sup> See, e.g., Jan Smits, *Rethinking the Usefulness of Mandatory Rights of Withdrawal in Consumer Contract Law: The Right to Change Your Mind*, 29 PENN STATE INT'L L. REV. 671 (2010) (reviewing the prevalence and utility of cooling-off periods for large-dollar purchasing decisions).

<sup>54</sup> See, e.g., Anne Fleming, *The Rise and Fall of Unconscionability as the Law of the Poor*, 102 GEO. L. J. 1383 (2013) (arguing that the fall of the unconscionability was coupled with a rise in statutory reforms targeting specific terms).

<sup>55</sup> Zev J. Eigen, Hans Bernd Schäfer & Shyam Sunder, *Experimental Evidence of the Relationship between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. INST. & THEOR. ECON. 124, 126 (2012) (reporting results from a field study of online contracts to take a survey in return for a DVD).

<sup>56</sup> *Id.* at 129.

for a relatively low-value item—these were not new release films. Instead, they were given a very unpleasant task that was clearly not worth the prize. We can safely assume that a five-dollar DVD was not sufficient incentive to get subjects to agree to complete an aggravating two-hour task.

At least two puzzles emerged from his findings. First, subjects answered a lot of questions before they quit—on average, over 100. A small but non-trivial number of subjects completed the entire survey. Second, completion rates were higher for subjects for whom a contract was more salient, and higher still for those for whom a contract was salient and a moral norm was made salient. When subjects were reminded of the fine print of their deal, they gritted their teeth and kept working.

## 2. California Employees Who Didn't Leave Their Jobs for Better Offers

Non-compete clauses in employment contracts purport to limit the choices of a worker who wants to leave her firm, ostensibly in order to protect a firm's investment in training and to protect trade secrets.<sup>57</sup> These terms have been widely criticized, especially as applied to low-level workers, and are often unenforceable.<sup>58</sup> Evan Starr, J.J. Prescott, and Norman Bishara have recently shown that the terms receive deference from employees whether or not they are legal.<sup>59</sup> They used a national survey of employee data from U.S. labor force participants, with 11,505 respondents covering every state. They then compared participants on two key dimensions: first, whether or not the respondent was himself or herself subject to a noncompete in her current job; and second, whether the state law governing the employment contract enforced noncompete clauses. California, for example, does not permit noncompetes, or at least does not enforce them. They found that employees with a non-compete were overall 5-6 percentage points more likely to report that they would not ever move to a competitor firm. They also asked subjects whether their non-compete agreement would be an important factor. About half of subjects said that it would, whether they lived in a state with high enforcement or low/no enforcement. Non-compete agreements were associated with less job mobility—longer tenures at the employer with the non-compete, and less reported willingness to move jobs—even without a realistic prospect of suit.

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<sup>57</sup> Chiara F. Orsini, *Protecting an Employer's Human Capital: Covenants Not to Compete and the Changing Business Environment*, 62 U. PITT. L. REV. 175, 176–77 (2000) (reviewing evidence and theory in support of non-compete agreements for employees across employment sectors).

<sup>58</sup> Rachel Argenbright Rioux, *The Necessity for Employer Liability in Unenforceable Non-Compete Agreements*, 86 UMKC L. REV. 995, 996–98 (2018) (describing the widespread use of non-compete agreements in contracts with employees unlikely to challenge or bring suit).

<sup>59</sup> Starr, Prescott & Bishara, *supra*.

### 3. Homeowners Who Didn't Walk Away

In the months and years following the crisis, millions of American homeowners realized that they lived in homes worth considerably less than their outstanding mortgage debt—they were “underwater.” Economists predicted widespread “strategic default” in non-recourse states; lenders too feared that some of their clients would see that foreclosure was all things considered cheaper than staying and paying, and that they would turn over the keys to the bank and start fresh.<sup>60</sup> What they found to be surprising is that this did not happen, at least not in the droves they feared. Many underwater homeowners stayed in their homes and continued paying loans for homes that would never again be worth the outstanding debt.<sup>61</sup> Here was another example of a widespread failure to rebel.

Luigi Guiso, Paola Sapienza, and Luigi Zingales offered an answer.<sup>62</sup> They used survey data and found that willingness to default was strongly associated with moral beliefs. One of the strongest negative predictors of willingness to default was endorsement of the statement that it would be morally wrong to walk away. That is, that it would be unfair of the homeowner, vis a vis the banks and the social fabric, to undermine the system.

Each of these examples describes a situation in which we have real world evidence that people who could get out of their contracts nonetheless stayed on and took a real loss. Although the loss in the survey example was perhaps a matter of a few annoying minutes, the employment and homeownership cases involve the highest stakes of almost any contract that the average American will ever sign. Those cases also suggest that the power that firms have is not entirely based on the state's willingness to put *its* power behind them; deference to terms is deference both to the firm and to the system of consumer contracting.

Deference to the “system” is something that psychologists have been unpacking for at least fifty years. The next section recounts the puzzle of system justification from the perspective of psychological research, and iterates its natural connections to the phenomenon of term deference.

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<sup>60</sup> Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 VAND. L. REV. 1547, 1548–51 (2011) (describing the strategic default predictions, and testing the role of moral norms in economic decision-making).

<sup>61</sup> *Id.*

<sup>62</sup> Luigi Guiso, Paola Sapienza & Luigi Zingales, *The Determinants of Attitudes toward Strategic Default on Mortgages*, 68 J. FIN. 1473 (2013).

### III. JUSTIFYING THE SYSTEM

Why would people legitimize and support social arrangements that conflict with their own self-interest? There are hedonic benefits to minimizing the unpredictable, unjust, and oppressive aspects of social reality.<sup>63</sup>

Readers familiar with behavioral research, in economics, sociology, or psychology, will find the notion of over-deference to authority quite familiar. We see it in studies of everything from political dissent<sup>64</sup> to abusive intimate relationships<sup>65</sup> to groupthink.<sup>66</sup> One of the core insights from various disciplines is that compliance is psychologically more attractive—it takes fewer personal, emotional, or cognitive resources—than protest. Psychologists have been systematically exploring this phenomenon since at least the 1950s, building on Stanley Milgram’s insights into obedience to form Melvin Lerner’s just world hypothesis: “People want to and have to believe they live in a just world so that they can go about their daily lives with a sense of trust, hope and confidence in their future.”<sup>67</sup> John Jost’s more complex and testable theory of system justification built on this foundation to move from the just world to the justified system.<sup>68</sup>

#### A. *A Just World Feels Good*

Like many of us, the psychologist Melvin Lerner was puzzled when he heard about Stanley Milgram’s experiments at the Yale psychology lab. After World War II, Milgram had famously set out to show that Americans are less blindly obedient than citizens from elsewhere. Instead he found that many ordinary people were willing to shock one innocent victims at outrageously high levels on nothing more than a bland command to “keep going.”<sup>69</sup> Generations of research on obedience and conformity shows a high rate of people going along with situations that are otherwise not in line with their own values, preferences, or even material self-interest. Lerner took a particular view on this research: he theorized that people feel better when they can match personal outcomes with personal choices—they feel better about a world in which people get what they deserve.

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<sup>63</sup> Melvin. J. Lerner, *The Belief in a Just World* in *THE BELIEF IN A JUST WORLD A FUNDAMENTAL DELUSION* 14 (1980).

<sup>64</sup> See e.g., Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 *AM. PSYCHOLOGIST* 1–11 (2009).

<sup>65</sup> See e.g., Jessica J. Eckstein, 26 *JOURNAL OF FAMILY VIOLENCE* 21 (2011).

<sup>66</sup> See e.g., Knud S. Larsen, *The Asch Conformity Experiment: Replication and Transhistorical Comparison*, 5 *J. SOC. BEH. & PERSONALITY* 163 (1990).

<sup>67</sup> Lerner *supra* note 63 at 14.

<sup>68</sup> See, e.g., John T. Jost & Rick Andrews, *System Justification Theory*, in *THE ENCYCLOPEDIA OF PEACE PSYCHOLOGY* (2011).

<sup>69</sup> Stanley Milgram, *Behavioral Study of Obedience*, 67 *J. ABNORMAL & SOC. PSYCH.* 371 (1963).



In the 1960's, Lerner began a systematic investigation of the informal observation many of us have made: people seem to blame victims for their bad luck. His first studies informed subjects that students who worked on a particular task were then entered into a lottery for a prize; the prize winner was chosen randomly. The subjects were asked to then assess how hard the students worked on the task. What Lerner found was that the winner was judged to have worked harder on the task than the losers, a “tendency to match the student’s performance with his fate.”<sup>70</sup> Lerner formulated a line of research testing the “just world hypothesis”, a set of testable predictions about human behavior:

Individuals have a need to believe that they live in a world where people generally get what they deserve. The belief that the world is just enables the individual to confront his physical and social environment as though they were stable and orderly. Without such a belief it would be difficult for the individual to commit himself to the pursuit of long-range goals or even to the socially regulated behavior of day-to-day life. Since the belief that the world is just serves such an important and adaptive function for the individual, people are very reluctant to give up this belief, and they can be greatly troubled if they encounter evidence that suggests that the world is not really just or orderly at all.<sup>71</sup>

Lerner’s argument feels counterintuitive on a first pass: people must believe that they deserve their own bad outcomes in order to feel better? Surely I feel worse when I have both suffered a harm *and* committed a wrong, both worse off and guilty. Is it not preferable to believe that the firms I do business with are bad and I am good? The insight from Lerner is that certain kinds of blame judgments implicate a broader need for stability and optimism rather than self-exoneration. I may think that I am right in any particular dispute with Apple, but in a world in which my Apple products are all-but-irreplaceable, it may feel better to situate myself psychologically as a party with agency rather than a pawn to the whims of Big Business.

#### B. *The Dissonance Resolution Motivation*

At its core, the just world hypothesis tests a form of cognitive dissonance resolution. The dissonant cognitions are: 1) Someone is suffering a harm and 2) The world is fair and orderly. If the tension cannot be resolved in the world—that is, observers cannot meaningfully remediate or eliminate the harm—then it must be resolved within the observer herself, by changing her beliefs. As a matter of rational processing of evidence, evidence that an innocent person is suffering should undermine faith in a just world. The key insight of Lerner and others was that the belief in the just world is adaptive, motivated, and strong—so if the just world

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<sup>70</sup> Melvin J. Lerner & Dale T. Miller, *Just World Research and the Attribution Process*, 85 PSYCH BULL. 1030, 1031 (1978).

<sup>71</sup> *Id.* at 1030–31.

belief will not give, and the dissonance cannot stand, the vulnerable belief is the belief in innocent suffering.

The canonical example of the just world belief has been demonstrated in the context of rape victimization. In 1973, Jones and Aronson conducted a study in which they described the rape of either a high-status or low-status woman, with otherwise identical details as to the nature of the attack.<sup>72</sup> (This study describes a set of pre-tested assumptions and a set of findings which are embedded in a social and historical context that was quite hostile toward women's sexual autonomy; the method and results described here are, by design, reinforcing pernicious gender stereotypes.) Subjects who read about the high-status woman (in this case, a virgin) were more likely to recommend a harsh punishment for the rapist. This was not surprising. What was surprising, though, was that those subjects were also more likely to report that the victim had engaged in risky behavior. That is, when the rape was viewed as particularly threatening—even a virgin can be randomly victimized!—her behavior was judged more harshly.<sup>73</sup>

In 1994, John Jost and Mahzarin Banaji pioneered a new line of psychological research that took the just-world hypothesis and couched in terms of a larger set of motivated reasoning processes. They observed that there were substantial bodies of literature devoted to the explication of *justification* as a psychological process. They pointed out that researchers had considered justificatory motivations in the context of the self and of the in-group, but that they could not account for some consistent findings of self- or group-derogation. They proposed system justification: the “psychological process by which existing social arrangements are legitimized, even at the expense of personal and group interest.”<sup>74</sup>

The consequences of system justification are well-trodden. System justification *makes people feel better*—it is associated with increased positive affect for both advantaged and disadvantaged groups. Indeed, is hard to overstate the importance of system justification in the sense of self and world. It is literally associated with mental health:

There is evidence that, at the individual level, system-justifying beliefs and ideologies serve the palliative function of decreasing negative affect and increasing positive affect and satisfaction with one's situation...members of disadvantaged groups (such as blacks) who reject egalitarian alternatives to the status quo tend to suffer in terms of subjective well-being as indexed by levels of self-esteem and depression.

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<sup>72</sup> Cathaleene Jones & Elliot Aronson, *Attribution of Fault to A Rape Victim as A Function Of Respectability of The Victim*, 26 J. OF PERSONALITY AND SOC. PSYCH. 415 (1973) (studying victim-blaming as a function of motivated cognition).

<sup>73</sup> *Id.* at 418.

<sup>74</sup> John Jost & Mahzarin Banaji, *The Role of Stereotyping in System-Justification and the Production of False Consciousness*, 33 BRITISH J. OF SOC. PSYCH. 1, 2 (1994).

System justification should be of particular interest to legal scholars, because it describes the tension at the core of much legal scholarship: what is the relationship between *is* and *ought*? Lerner himself argued that “one of the most commonly observed characteristics of social existence is that people imbue social regularities with an ‘ought’ quality”.<sup>75</sup>

The study of system justification is a study of subtle cognitive shifts, and thus the causation question was subject to experimental manipulation by using not actual manipulations of power but rather by manipulating the subjective availability of power. Measuring the relationship between power and system justification is challenging, because many of the most salient associations are derived from observational rather than experimental settings. If it is true, as researchers have found repeatedly, that the feeling of powerlessness is correlated with perceived legitimacy of the socioeconomic system<sup>76</sup>, we should still want to know which way the causation cuts. Psychologists at the University of California at Berkeley randomly assigned undergraduate subjects to a powerful or a powerless condition.<sup>77</sup> The experimental manipulation was indirect; they were interested in the feeling of powerlessness, and thus subjects were asked to either write about a time when they had power over someone else, or to write about a time when someone else had power over them. The dependent measure was the score on a system justification scale, including items like “In general, I find society to be fair” or “Society is set up so that people usually get what they deserve.” What the researchers found was that powerlessness yielded increased justification; those who had worked themselves into a more dependent mindset were more likely to ratify existing hierarchies.

One way to conceptualize the motivation described in the studies below is by thinking about the just world/system justification literatures as being about pressure and relief. When people experience themselves as helpless or dependent, they experience a cognitive pressure to make their situation acceptable. The way to relieve the pressure is to either change the situation (unlikely by stipulation) or to develop a positive attitude toward the source of dependence.

### C. *System Justification and Ideology*

For scholars of system justification in psychology, system justification might be triggered by something about a situation, but it also might be triggered by something about the person. Numerous studies have essentially measured system justification as an individual variable, something stable like a character or personality trait.

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<sup>75</sup> Lerner *supra* note 63.

<sup>76</sup> John Jost, Brett Pelham, Oliver Sheldon & Bilian Ni Sullivan, *Social Inequality and the Reduction of Ideological Dissonance on Behalf of the System: Evidence of Enhanced System Justification Among the Disadvantaged*, 33 EUR. J. OF SOC. PSYCH. 13 (2003).

<sup>77</sup> Jojanneke van der Toorn, Matthew Feinberg, John Jost, Aaron Kay, Tom Tyler, Robb Willer & Caroline Wilmoth, *A Sense of Powerlessness Fosters System Justification: Implications for the Legitimation of Authority, Hierarchy, and Government*, 36 POLITICAL PSYCH. 93 (2015).

Perhaps unsurprisingly, system justification has been studied as a predictor of political ideology, and its association with conservatism.<sup>78</sup> The connection is intuitive on the language alone, but it has also been borne out in the literature. John Jost and his co-authors have looked at political conservatism across 12 countries and concluded that conservatism is a form of system justification, providing moral and intellectual support for the status quo,<sup>79</sup> and this result has been replicated longitudinally.<sup>80</sup> (An interesting exception to this rule is extreme conservatism, which is associated with less system justification.<sup>81</sup>) Jost’s commentary on “working class conservatism” identifies the psychological advantages of conservatism.<sup>82</sup> This research has explicitly connected the protective psychological function of system justification with observations that conservatives tend to be happier than liberals.<sup>83</sup>

Although the research offered in this Article is not primarily focused on individual differences, the evidence from studies of conservatism suggests that if term deference is a motivated phenomenon, it may manifest differentially across the ideological spectrum. As such, it is treated as an important moderating variable in the experimental research described below.

#### D. *Fine Print as Status Quo*

The close nexus between legal judgment and system justification is easily perceived. Law *is* the system. It is the traditional, inescapable articulation of state power. Contract law is a salient instantiation of legal authority appears in daily life; consumer contracting, meanwhile, is also the enforcement mechanism for the power of firms over individuals.

About ten years ago, scholars from at least four different methodological disciplines began to observe and probe the fact of widespread fealty to contracts of adhesion. Conceptually (if not always chronologically), the first insight was simply that it is not possible to read all the fine print. In 2011 Omri Ben-Shahar and Carl Schneider laid out in hilarious detail the ridiculous

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<sup>78</sup> John T. Jost, Danielle Gaucher, and Chadly Stern, “*The World Isn’t Fair*”: *A System Justification Perspective on Social Stratification and Inequality*, in 2 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 317–40 (M. Mikulincer & P. R. Shaver ed., 2015).

<sup>79</sup> John T. Jost et al., *Political Conservatism as Motivated Social Cognition*. 129 PSYCH. BULL. 3, 339–375 (2003).

<sup>80</sup> Miriam Matthews et al., *A Longitudinal Test of the Model of Political Conservatism as Motivated Social Cognition*, 30 POL. PSYCH. 6, 921–36 (2009).

<sup>81</sup> Luca Caricati, *Evidence of Decreased System Justification Among Extreme Conservatives in Non-American Samples*, J. SOCIAL PSYCH., Jan. 2019, at 1–22.

<sup>82</sup> John T. Jost, *Working Class Conservatism: A System Justification Perspective*, 18 CURRENT OPINION IN PSYCH. 73–78 (2017).

<sup>83</sup> Sebastian Butz et al., *Why Are Conservatives Happier than Liberals? Comparing Different Explanations Based on System Justification, Multiple Group Membership, and Positive Adjustment*, 47 EUROPEAN JOURNAL OF SOCIAL PSYCHOLOGY 3, 362–72 (2017).

demands that disclosures make on consumers.<sup>84</sup> They made a convincing case that reading contracts would be incompatible with the basic functions of human life—you cannot hold down a job or have a social life or participate responsibly in family obligations and also read all your disclosures.<sup>85</sup> Yannis Bakos, Florencia Marotta-Wurgler and David R. Trossen analyzed a data set of hundreds of thousands of online license agreements, and documented readership of online agreements at a rate well below one tenth of one percent of consumer parties.<sup>86</sup> Victoria Plaut and Bobby Bartlett surveyed consumers and found that the majority reported rarely reading their form contracts, with many citing the difficulty (too long and/or too complex to understand) or the lack of choice.<sup>87</sup> In each of these studies, researchers described a world in which individuals do not and largely cannot read the terms of their contracts, but one where manifestations of assent are required to participate in economic and social activity.

This raised a serious question for scholars interested in norms: how could such a state of affairs be acceptable? Why did people continue to click, or continue to perform, or continue to patronize firms requiring these practices? Even if the answer to those questions had to do with pragmatic participation in a market with few alternatives—why were there no high-profile op-eds or consumer advocacy movements gaining traction? In other words: why defer to terms?

In 2014 I published a study that pinpointed, though certainly did not resolve, the perplexing tension. Subjects read a story about a consumer subject to a fine that surprised him, buried as it was in the fine print of his banking contract. Subjects were randomly assigned to read either that the contract was very long (15 pages) or pretty short (2 pages). They answered two important questions: Was it reasonable to expect him to have known about the fee? Whose fault is it that he did not know about the fee? Subjects in the two conditions clearly differentiated as to the first question; they thought it was unreasonable to expect readership of a long contract and reasonable to expect it with a short contract. However, in both conditions, subjects thought that the consumer was clearly to blame for his predicament.<sup>88</sup>

As discussed above, traditional system justification research in psychology has been motivated by the anecdotal reports that disadvantaged groups often support the very system that has

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<sup>84</sup> BEN-SHAHAR & SCHNEIDER, *supra*, at 705–09.

<sup>85</sup> *Id.*

<sup>86</sup> Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEG. STUD. 21–24 (2014).

<sup>87</sup> Victoria Plaut & Robert P. Bartlett III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUMAN BEH. 293 (2012) (positing a cluster of reasons that justify or bolster non-readership, including trust in firms and trust in government oversight).

<sup>88</sup> See Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014) (reporting an experimental study of consumer judgments based on procedural fairness).

worked to subjugate them.<sup>89</sup> The disadvantaged claim that their own inequitable position or outcome is the result of a fair process. This is a reasonable way of describing the state of the scholarship in consumer contracting: the American consumer marketplace requires individuals to manifest consent to a range of terms without meaningful opportunity to understand, challenge, or refuse those terms. There is little evidence of revolt or complaint, and indeed there is ample evidence of compliance—people comply even when compliance is costly, as in the mortgage case, and they justify compliance by arguing that contracting as a system is fair.

Prior research in psychology predicts motivation to justify the system in particular contexts, each of which is fundamentally associated with the sense that something unfair needs to be rationalized.<sup>90</sup> Recently experimental research in contract psychology directly links to at least three relevant factors:<sup>91</sup>

**1. Inevitability.** There is more pressure to justify a situation that feels more inevitable; if it were escapable, the situation rather than the cognition could shift. We already have evidence from contracts that this factor is in play. I have explored the inevitability variable in a small follow-up study reported in 2017, in which I asked subjects to evaluate whether a company hiding a fee in documents not obviously presented as part of the contract was fair or not. Half of the subjects read that a consumer complained about the fee in small claims court and the judge ruled it enforceable; half read that the judge ruled it unenforceable. The overall fairness of the company's business practice was deemed overall fair when it looked enforceable, but when subjects were introduced to the idea that it might not be so inevitable, they judged it more harshly.

**2. Inequity salience.** There is more pressure to justify a bad outcome, because it feels worse and thus requires cognitive remediation. This is referred to in the literature as “inequity salience.” The idea is just that people are motivated to defend the system when it becomes especially clear that the system poses a threat. This has also been shown in the contract context. In one study in 2014, I asked subjects to read a description of a consumer whose insurance policy included a hidden clause prohibiting recovery for damage by vandalism. Subjects thought that the hidden clause was

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<sup>89</sup> See e.g., John T. Jost, *Working Class Conservatism: A System Justification Perspective*, 18 CURRENT OPINION IN PSYCHOLOGY 73, 73–78 (2017).

<sup>90</sup> “System justification motivation is activated (or increased) when (a) the individual feels dependent on or controlled by the system and its authorities; (b) the status quo is perceived as inevitable or inescapable; (c) inequality in the system is made especially salient; (d) the system is criticized, challenged, or threatened; and (e) the system is perceived as traditional or longstanding.” John T. Jost, Danielle Gaucher & Chadly Stern, *“The World Isn’t Fair”: A System Justification Perspective on Social Stratification and Inequality*, 2 APA HANDBOOK ON PERSONALITY AND SOC. PSYCHOLOGY 317 (2015).

<sup>91</sup> *Id.*

problematic—unless they read that the policyholder had been vandalized. Once the harm was a *fait accompli*, they rated the contract as more fair overall.

**3. Tradition:** There is greater pressure to justify longstanding systems; a more entrenched status quo is less malleable. This is true for contract terms, too. In one relevant study, subjects indicated that they were more likely to defer to banks that were “traditional and conservative” than those who were offering novel financial products in the mortgage market.<sup>92</sup> A similar finding from 2014 described a term permitting a retailer to share personal information with third parties. In the control condition subjects on average judged the consumer to be slightly more to blame than the firm, but when the term was described as “recently changed” by the drafter, the comparative blame burden shifted to the firm.<sup>93</sup>

In the three studies that follow, I use new scenario studies to sharpen these inferences, homing in on the causal connection between these proposed triggers of justificatory motivation and support for firm-deferential contract law.

#### IV. EXPERIMENTAL SURVEY STUDIES

The goal of the experimental studies is to test the hypothesis that term deference is motivated reasoning. The studies draw directly from the existing literature in cognitive psychology on motivated reasoning, leveraging four known predictors of justificatory pressure: inevitability, tradition, inequity, and ideology.

These studies are also exploratory. Term deference involves at least three relevant actors: the consumer, the firm, and the state. The primary prediction here is that attitudes toward consumer contract enforcement are motivated by psychological pressure to justify the existing system. As such, they should be responsive to manipulations that increase or decrease that pressure. Negative attributions about victims of bad terms (consumers) and more positive attributions about the perpetrators of the terms (firms) should also reflect the level of justificatory pressure. Third, but less clearly, these studies aim to explore the extent to which attributions of meaningful consent are motivated reasoning phenomena, insofar as a reasonable resolution of dissonance is to attribute harm to the victim’s knowing consent. Finally, each of these predictions is assessed in light of subjects’ self-reported ideological orientation, reflecting the longstanding finding that political conservatism is associated with preference for the status quo.

##### A. Study 1: Inevitability

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<sup>92</sup> See Wilkinson-Ryan *supra* note 60 at 1568.

<sup>93</sup> *Id.*

One of the central reasons to like the system we have is that it is not easily changed. As anyone who compares a casebook from 2020 with a casebook from 1950 will see, contract law is very slow to change. However, individual terms themselves are not so implacable. Many terms are absolutely subject to successful challenge. In this study, I predict that a term that is deemed certainly enforceable under current law will be viewed as better (more fair, more reasonable, reflecting more favorably on the firm) than the same term described as potentially unenforceable. Although there are reasons to believe that all else being equal, enforceable terms are actually on average more fair and reasonable than unenforceable terms, the scenario here is designed to try to parcel that out. In both cases consumers receive information that the term was recently challenged, and in both cases they have full information about the content of the term. The dependent variable is whether, irrespective of its legal status, enforcement of the term is fair. The central question for this study is: Does the inevitability of consumer contract enforcement motivate positive attitudes toward terms and drafters?

## 1. Method

The method described in both studies here is a short vignette study. Subjects were recruited from the online survey platform, Prolific, and were paid \$1.00 to complete a 3-minute questionnaire advertised as a “Cell Phone Study.”

The vignette describes a consumer, Ashley, who is subject to an unexpected change in her cell phone plan after she misses a single payment. Recall that one of the predictors of system justification instantiation is the belief that the system is inevitable. The less room for the system to move, the more adjustment people have to do cognitively. The basic scenario read as follows:

When Ashley bought her last phone, a new phone but an older model, she signed up for a two-year contract with her service provider under their Summer Unlimited Data Deal promotion. The phone company was offering an unlimited data plan plus a monthly payment plan on the phone, which came out to about \$79 per month.

Ashley signed up for the deal at the store. She asked the sales agent about the phone’s warranty (90 days, no coverage for cracked screen) and the late fees (\$10 fee for late payment of any bill).

The paper contract the agent had her sign was quite long—around 17 total sheets of paper with pretty small print. She did not read it in the store, but initialed each page and signed her name at the very end. The sales agent told her where she could find a complete copy of the terms on their website. She did not follow up to read them.



One of the clauses in the contract read:

**“39: Late Payment Plan Reversion: Promotional data rates only valid with User’s payment plan compliance. In the event of one or more late payments, data plan will revert to standard data pricing for the remainder of contract term.”**

Ashley’s payment slipped her mind while she was on vacation the following August, and her payment was a week late, so she included an extra \$10. The following bill was for \$115. She called the company, confused, and they referred her to Clause 39.

Subjects in this study were randomly assigned to one of two conditions.<sup>94</sup> In a previous study, described in Part III, I have shown that a judicial opinion stating that an unfair term is unenforceable has a strong effect on consumer perceptions of that term. This study was meant to replicate that finding, but without directly conveying that a legal authority had denounced the term. As such, both subjects read about a challenge to the term (thus conveying in both conditions that the term had made at least some people unhappy), but one read that the suit was ongoing and another read it had been resolved in favor of the firm. Resolution in favor of the firm means that the term is literally inevitable, and ongoing suit suggests an escape route.

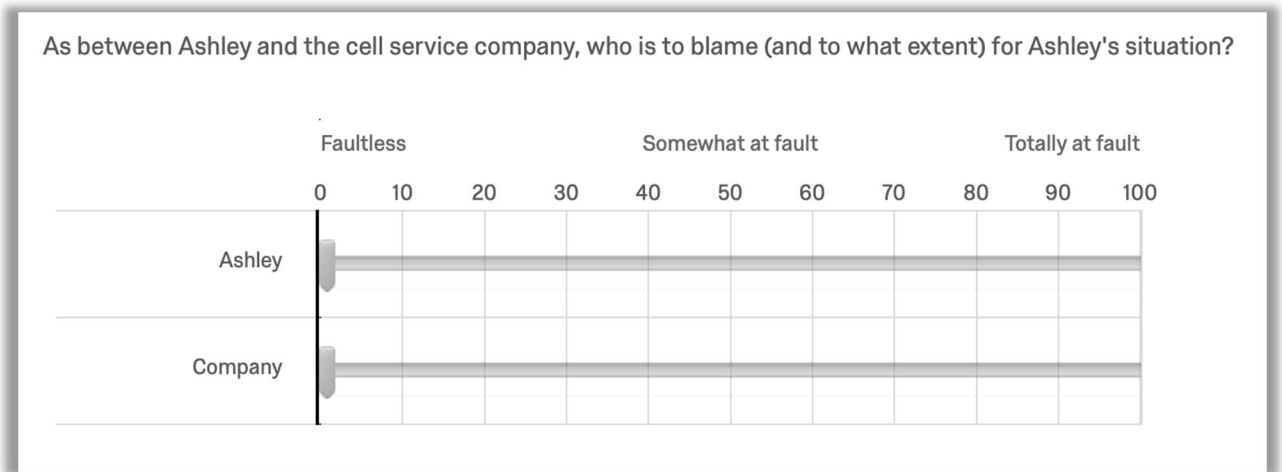
<b>Inevitable</b>	The customer service agent she spoke to was friendly and sympathetic, but did not have much to offer.  <b>He told Ashley, “We’ve actually gotten sued about this before, and the company won. This contract is here to stay.”</b>
<b>Escapable</b>	The customer service agent she spoke to was friendly and sympathetic.  <b>He told Ashley, “We’re actually getting sued over this now. I think there’s a chance this policy is on its way out.”</b>

<sup>94</sup> Other subjects who took this same study were exposed to four other possible conditions pilot-testing hypotheses and stimuli related to this project. Some results were significant. However, I do not report those results here because on review, it was clear that the wording created too many confounding factors, including ambiguity about the facts and at least one concern about demand effects.

Subjects answered five follow-up questions, presented in random order:

- Consent: Ashley consented to Clause 39 imposing the late payment data plan reversion.
- Fair Law: A law enforcing the clause is fair.
- Reasonable Practice: This contract reflects a reasonable business practice by the company.
- Consumer Blame & Company Blame were presented as paired sliders, shown in Figure 1.

**Figure 1. Blame response sliding indicators**



## 2. Results

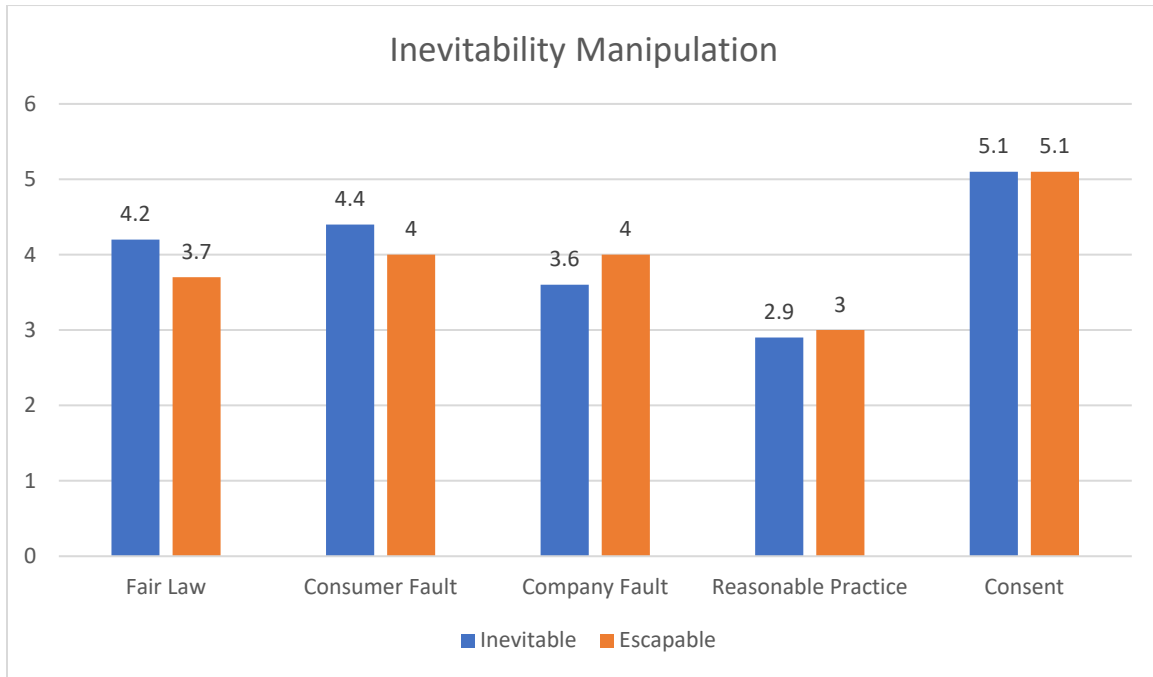
989 subjects participated via the online research platform Prolific. 51.8% of subjects were male. Ages ranged from 18 to 72 with a median age of 28. On a 100-point scale where 0 was “Extremely Conservative” and 100 was “Extremely Liberal”, the median subject rated their political views at 64, and fewer than one quarter of subjects indicated that they were more conservative than 50. 189 subjects were randomly assigned to the Inevitable condition and 175 subjects to the Escapable condition. There were no differences in political affiliation by condition.

### a. Main Effects of Manipulation

The predicted effect of the experimental manipulation was that when the term seemed less vulnerable to challenge, the inevitability would increase pressure on subjects to justify consumer contract enforcement. The data bore this out here. When the term was robust to legal challenge, subjects thought enforcement was more fair ( $W=188862$ ,  $p=.014$ ), that the customer was more

at fault ( $W=18673.5$ ,  $p=.025$ ), and that the company was less at fault ( $W=14245$ ,  $p=.073$ ).<sup>95</sup> Neither the Consent nor the Reasonable Practice variables were significantly different by condition. Figure 2 shows the main results as mean comparisons.

**Figure 2. Mean responses, by Inevitability condition, for each response variable.**



b. Results by Ideology

In an exploratory analysis of these results, in part to confirm the mechanism, results were also parsed by political affiliation. First, I ran a simple linear regression with politics, age, and sex as the independent variables and each response variable as the dependent variable. Here, for simplification I report the estimate and the significance level only (where \* is  $p < .1$ , \*\*  $p < .05$ , \*\*\*  $p < .01$ ). Results statistically significant at the  $p < .10$  level are bolded.

**Table 2. Regression coefficients of Political Affiliation, Age, and Sex for each response variable.**

	Politics	Age	Sex
Fair Law	-.006	-.014	<b>-.326*</b>
Consumer Fault	<b>-.139***</b>	.164	.743

<sup>95</sup> Statistical significance is tested using Wilcoxon rank-sum tests here. A rank-sum statistical tests the null hypothesis that one median in a pair is not higher or lower than the other—i.e., is not predictably ranked higher (rather than the more familiar t-test, which tests the null hypothesis that two samples have the same mean). This is a more conservative test of significance than the t-test, but it does not assume normal distribution, which is largely more appropriate for Likert-scale data.

Company Fault	<b>.275***</b>	-.051	.513
Reasonable Practice	<b>-.014***</b>	-.006	-.007
Consent	<b>-.006*</b>	.001	.141

As the table shows, for Consent, Consumer Fault, Company Fault, and Reasonable Practice, ideology was significantly predictive of subject responses, collapsing across conditions. The direction of the effect was as expected; conservative subjects were statistically more likely to support enforcement, infer consent, blame the consumer, and favor the firm.

Previous work on motivated reasoning and political beliefs suggest that ideology may not only predict an overall affinity for reinforcing the status quo, but that it may also interact with a trigger, such as inevitability—that some people are more responsive than others to systems salience manipulations. I conducted this analysis in a relatively blunt way: I divided subjects into two groups, with 50 and below classified as “conservative” and 51 and above classified as “liberal.” This yielded 125 conservative subjects and 239 liberal subjects. (Note that both here and in the following studies, the response midpoint—here 50—is coded as conservative. Although it is not strictly important where the cut is made, since any cut bifurcates the sample into “more liberal” and “more conservative,” the choice to include subjects who are presumably indicating that they view themselves as moderate in the conservative group reflects an emerging body of literature suggesting a liberal skew in self-reported indices of political ideology.<sup>96</sup>)

First, collapsing across conditions, as I reported above, conservative subjects as a group were significantly more likely to find consent, to blame Ashley, to not blame the firm, and to find the business practice reasonable.

Second, there were no clear interactions for consent or reasonable practice (both groups stayed relatively even across conditions). There were also no interaction effects for the Fair question; both groups found the law more fair when it was inevitable. Statistical reports are described in the footnote, and these comparisons are illustrated in Figures 3-6, and considered further as part of an overall picture in the discussion following the Figures.<sup>97</sup>

### 3. Discussion of Study 1 Results

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<sup>96</sup> See, e.g., Andy Brownback & Aaron Novotny, *Social desirability bias and polling errors in the 2016 presidential election*, 74 J. BEH. EXP. PSYCH. 38 (2018) (documenting the relationship between anti-conservative social desirability beliefs and pro-liberal polling bias in the 2016 election.)

<sup>97</sup> The result is significant for Liberal subjects only. Conservative:  $W=2249.5$ ,  $p=.123$ ; Liberal:  $W=8116$ ,  $p=.046$ . Consumer to Blame, Conservative:  $W=1900.5$ ,  $p=.820$  vs. Liberal:  $W=8690$ ,  $p=.002$ . Company to Blame, Conservative:  $W=1929.5$ ,  $p=.823$  vs. Liberal:  $W=5620$ ,  $p=.014$ .

Study 1 showed some clear patterns and some suggestive puzzles. First, all subjects were more likely to judge a law enforcing the term as fair when they learned that a challenge to the term had failed in court—that is, when they were given to understand that enforcement was indeed the law rather than when enforcement was uncertain. Enforcement, here the operationalization of inevitability, predicted justification of the system.

This pattern also played out for the blame variables, but it was more nuanced. Conservative subjects blamed the consumer more than the company whether or not the term was certainly enforceable. Liberal subjects, on the other hand, blamed the company more than the consumer when enforcement was uncertain, and the consumer more than the firm when it was inevitable.

The Reasonable Practice variable, meant to be a judgment of whether the firm’s behavior was acceptable (justified) was highly related to ideology and unaffected by the experimental manipulation. Overall, subjects found the company’s behavior to be neutral-to-slightly-unreasonable.

Finally, Consent was weakly associated with conservatism in the regression analysis, but unaffected by the experimental manipulation. Perhaps the most striking result here was the overall valence of consent responses. Very few subjects thought that Ashley had not consented. 74% of subjects found unequivocal to the term, and only 17% thought she had not consented. The median rating of consent on the 1-7 scale was 6. This is a striking result, insofar as it suggests that whether or not subjects thought Ashley was the victim of an unfair firm or an unfair rule, they viewed her participation as a constant.

#### *B. Study 2: Tradition, Inequity, and Ideology*

The second study takes up two additional predictors of motivated reasoning: inequity salience and longevity. Previous research argues that motivation to defend the status quo increases when there is something to defend—that is, when a harm or inequity becomes more salient. Separate studies also offer evidence that motivation to defend the status quo increases when the status quo appears entrenched over a long time.

Study 2 essentially takes the predictions of tradition and inequity salience and turns them on their heads. It uses a control scenario in which the contract is explicitly harmful to the protagonist and implicitly standard or longstanding, and then uses experimental manipulations designed to take the justificatory pressure off the subject.

In No Harm, subjects see either the core scenario in which Ashley is removed from the cheaper phone plan, or a scenario with no salient harm—reducing the motivation to justify the term because there is no harm to assimilate. In New Term, subjects see either the core scenario or a

scenario that suggests that the term is a novel practice for the firm, which is predicted to make it less urgent to defend.

1. Method

Study 2 used the same core scenario from Study 1. In Study 2, the control condition was the same base scenario described above, with no additional narrative describing any conversation with the sales representative. Instead, the two comparison conditions were: No Harm and New Contract. Both of these conditions are compared to the core scenario from Study 1. The No Harm condition removes the information about the charges Ashley faced, and the New Contract condition included information that the contract terms were newly drafted. Exact language is below:

No Harm	Harm
<p>...</p> <p>The paper contract the agent had her sign was quite long—around 17 total sheets of paper with pretty small print. She did not read it in the store, but initialed each page and signed her name at the very end. The sales agent told her where she could find a complete copy of the terms on their website. She did not follow up to read them.</p> <p>One of the clauses in the contract read:</p> <p><b>“39: Late Payment Plan Reversion: Promotional data rates only valid with User’s payment plan compliance. In the event of one or more late payments, data plan will revert to standard data pricing for the remainder of contract term.”</b></p>	<p>...</p> <p>The paper contract the agent had her sign was quite long—around 17 total sheets of paper with pretty small print. She did not read it in the store, but initialed each page and signed her name at the very end. The sales agent told her where she could find a complete copy of the terms on their website. She did not follow up to read them.</p> <p>One of the clauses in the contract read:</p> <p><b>“39: Late Payment Plan Reversion: Promotional data rates only valid with User’s payment plan compliance. In the event of one or more late payments, data plan will revert to standard data pricing for the remainder of contract term.”</b></p> <p>Ashley’s payment slipped her mind while she was on vacation the following August, and her payment was a week late, so she included an extra \$10. The following bill was for \$115. She called the company, confused, and they referred her to Clause 39.</p>

New	Traditional
<p>...</p> <p>The paper contract the agent had her sign was quite long—around 17 total sheets of paper with pretty small print. The sales agent said, “The legal team just added in a bunch of terms, so this is hot off the presses!” She did not read it in the store, but initialed each page and signed her name at the very end. The sales agent told her where she could find a complete copy of the terms on their website. She did not follow up to read them.</p> <p>One of the new clauses in the contract read:</p> <p><b>“39: Late Payment Plan Reversion: Promotional data rates only valid with User’s payment plan compliance. In the event of one or more late payments, data plan will revert to standard data pricing for the remainder of contract term.”</b></p> <p>Ashley’s payment slipped her mind while she was on vacation the following August, and her payment was a week late, so she included an extra \$10. The following bill was for \$115. She called the company, confused, and they referred her to Clause 39.</p>	<p>...</p> <p>The paper contract the agent had her sign was quite long—around 17 total sheets of paper with pretty small print. She did not read it in the store, but initialed each page and signed her name at the very end. The sales agent told her where she could find a complete copy of the terms on their website. She did not follow up to read them.</p> <p>One of the clauses in the contract read:</p> <p><b>“39: Late Payment Plan Reversion: Promotional data rates only valid with User’s payment plan compliance. In the event of one or more late payments, data plan will revert to standard data pricing for the remainder of contract term.”</b></p> <p>Ashley’s payment slipped her mind while she was on vacation the following August, and her payment was a week late, so she included an extra \$10. The following bill was for \$115. She called the company, confused, and they referred her to Clause 39.</p>

## 2. Results

800 subjects were paid \$.75-1.00 to complete a 3-minute questionnaire.<sup>98</sup> 43.8% of respondents were male. Ages ranged from 18 to 74 with a median age of 29. Political ideology was measured on a 0-7 scale, where 0 was Extremely Conservative, 3-4 was Moderate, and 7 was Extremely Liberal. The median response was a 5 and the modal response was 4, with a mean of 4.6. There were no significant differences in political ideology by condition.

<sup>98</sup> The variable payment was an error; all subjects were supposed to be paid \$1.00. There were no differences in results by payment level.

In order to compare some basic effects of ideology, I isolated the data from the control condition only. Regression coefficients including ideology as well as age and sex are reported in the footnote, and means are reported in Table 3.<sup>99</sup> Political Ideology here is reported as a binary variable with 1-4 coded as Conservative and 5-7 coded as Liberal. These results draw only from the Control condition, which had 107 subjects coded as Conservative and 145 subjects coded as Liberal.<sup>100</sup>

**Table 3. Study 2 Mean Differences for Response Variables, Control Condition only, by Political Ideology**

	<b>Conservative</b>	<b>Liberal</b>	<b>p-value<sup>101</sup></b>
Consent	5.25	5.47	.226
Fair Law	4.50***	3.79	.001
Consumer Fault	71.23**	62.95	.019
Company Fault	47.60	52.83	.174
Reasonable Practice	4.09**	3.66	.043

Liberalism was associated (not necessarily significantly) with finding the law to be less fair, the consumer to be less to blame, the company to be more to blame, and the business practice to be less reasonable.

a. No Harm (Non-Salient Inequity)

There was no main effect (i.e., no effect by condition without dividing the sample by ideology) for Consent, Fair Law, or Reasonable Practice. There were main effects of condition for both blame variables, in the predicted directions<sup>102</sup>, meaning that when there was no harm resulting

<sup>99</sup> Study 2 Regression coefficients of Political Affiliation, Age, and Sex for each response variable (Control condition Only):

	<b>Politics</b>	<b>Age</b>	<b>Sex</b>
Consent	<b>.105*</b>	.018	<b>-.018**</b>
Fair Law	<b>-.263***</b>	-.012	.159
Consumer Fault	<b>-2.35**</b>	.044	<b>6.93**</b>
Company Fault	<b>2.38**</b>	-.103	-4.81
Reasonable Practice	<b>-.181**</b>	-.004	.048

<sup>100</sup> Control condition only is used here in order to test the effect of ideology in a single snapshot rather than aggregating across conditions where we might expect the effect of ideology to vary by condition.

<sup>101</sup> All p-values calculated from Wilcoxon rank-sum tests.

<sup>102</sup> Consumer Blame: No Harm 61.9, Harm 66.5 (W=28759.5, p=.017). Company Blame: No Harm 54.7, Harm 50.5 (W=34850, p=.080).



from the term, subjects were more likely to blame the company and less likely to blame the consumer.

Liberal subjects did not significantly differentiate between the No Harm and Harm conditions.<sup>103</sup> Conservative subjects found the law significantly more fair when the bad term led to a harm.<sup>104</sup> See Figure 3.

A similar pattern emerged for Consumer Blame. Liberal subjects did not significantly differ by condition. Conservative subjects levied substantially more blame against the consumer when they learned there was a concrete harm from the term.<sup>105</sup> These effects are pictured in Figure 4 below.

b. New Term (Non-traditional)

For the New Term test, the prediction was that the newly-drafted contract, because it is less “traditional or long-standing,” should provoke less pressure to justify, and therefore should be viewed as less fair, less the consumer’s fault, and more the fault of the firm.

There was a significant main effect of the manipulation on Consent, Company Fault, and, marginally, on Reasonable Practice. There was no main effect on Consumer Fault or Fair Law, though both overall trended in the predicted direction. Overall, subjects were more likely to indicate that the consumer had consented to the term when the term was traditional ( $W=39928.5$ ,  $p=.028$ ).

Subjects were marginally less likely to find the company’s practice reasonable in the New Term condition, but the difference was not statistically significant (New Term mean: 3.62, Traditional Term mean: 3.85,  $W=38539.5$ ,  $p=.119$ ).

Liberal subjects did not differentiate significantly between the New Term and Control contract condition for the Fair variable ( $W=11450$ ,  $p=.928$ ). Conservative subjects found the law significantly less fair in the New Term condition ( $W=7738$ ,  $p=.027$ ). The same pattern emerged for the Consumer Fault variable (Liberal:  $W=10917$ ,  $p=.751$ ; Conservative:  $W=7670.5$ ,  $p=.040$ ).

In Study 2, the pattern of results on the Fair and Blame variables is almost exactly what prior research would predict. For conservative but not liberal subjects, the law is fair and the consumer is to blame unless the justificatory pressure is reduced by either lack of harm or by a non-traditional term.

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<sup>103</sup>  $W=10897$ ,  $p=.328$ .

<sup>104</sup>  $W=5114.5$ ,  $p=.013$ .

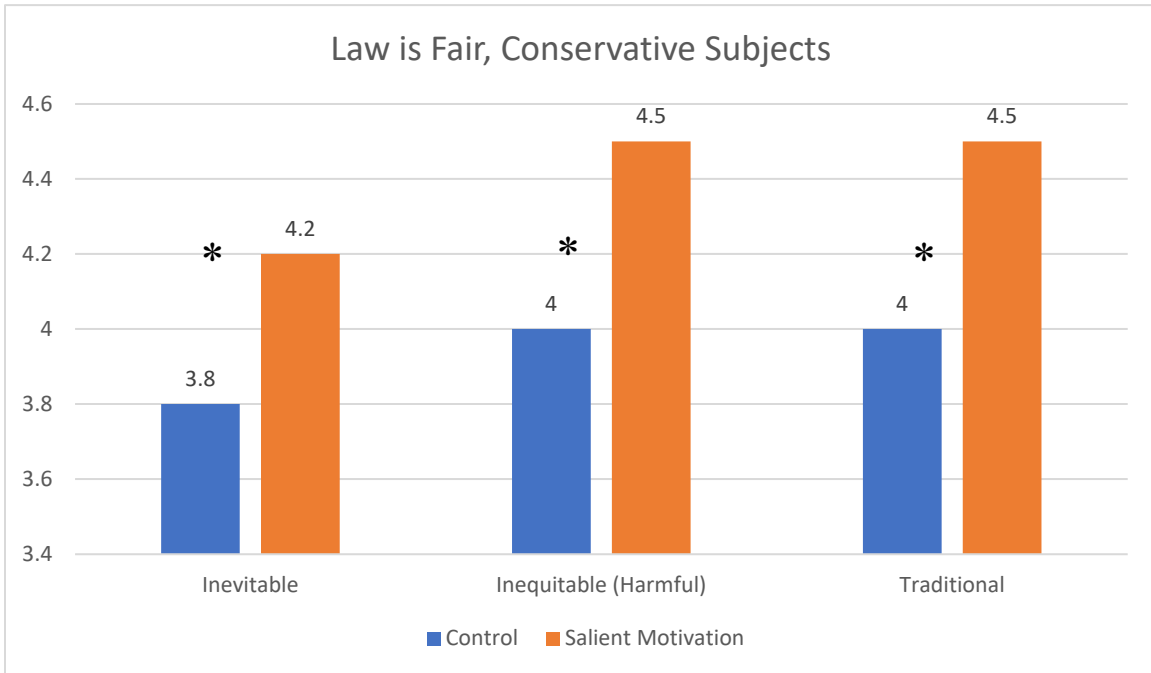
<sup>105</sup>  $W=4940.5$ ,  $p=.006$ .

The consent results here are uneven. Subjects overall indicated substantially less consent to a new term. It is possible that this pattern is also latent in the Harm manipulation, where those who did not see a harm were less certain about consent than those who did see the harm, but there is not enough power here to discern whether this trend is robust.

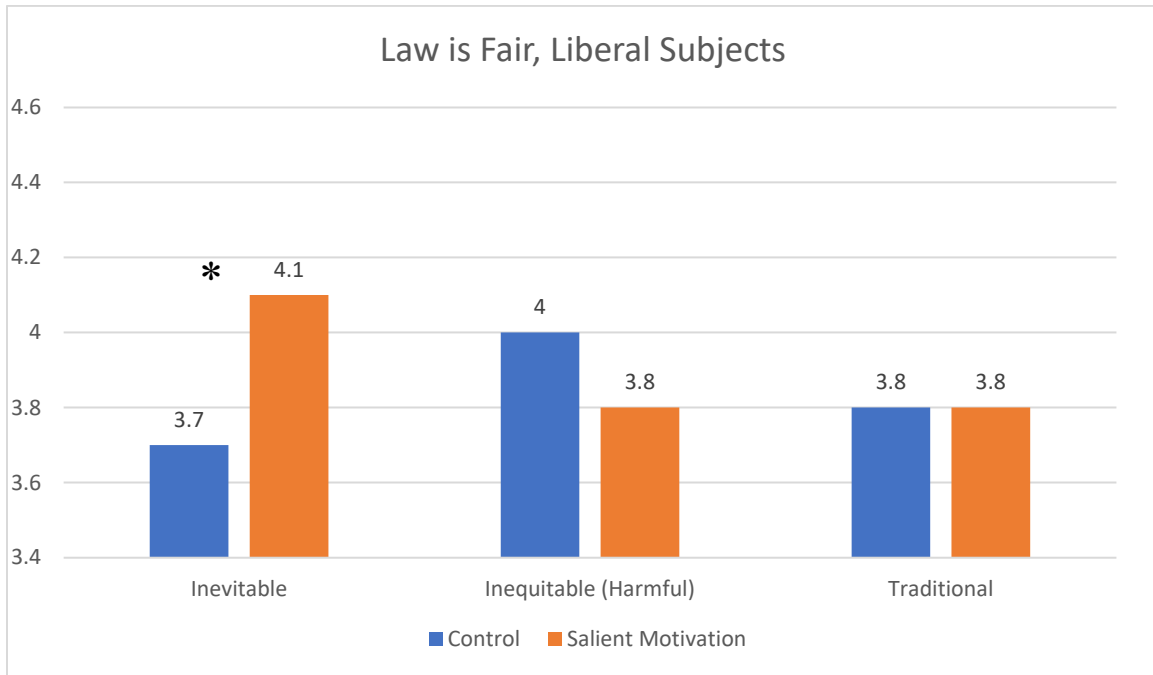
C. *Summary Results for Studies 1 and 2: Fairness, Blame, Ideology, and Motivation*

Figures 3-6 below aggregate results from Studies 1 and 2 for two main variables of interest: Is the law fair?, and Is the consumer to blame? These charts are presented in pairs for purposes of comparison. They show the effects for each manipulation, for conservatives and for liberals, respectively. Note that in each case significant differences are marked on histograms with an asterisk (\*) symbol. Significance tests reported above.

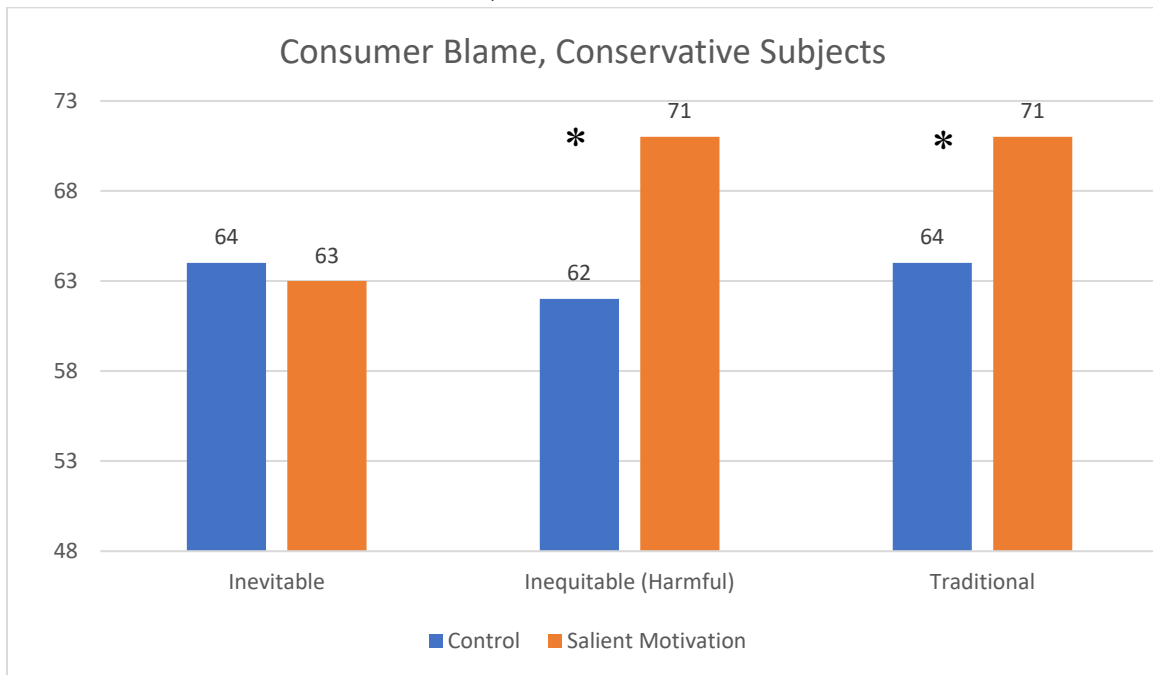
**Figure 3. Effect of Experimental Manipulations on Judgments of Fairness, Conservative Subjects**



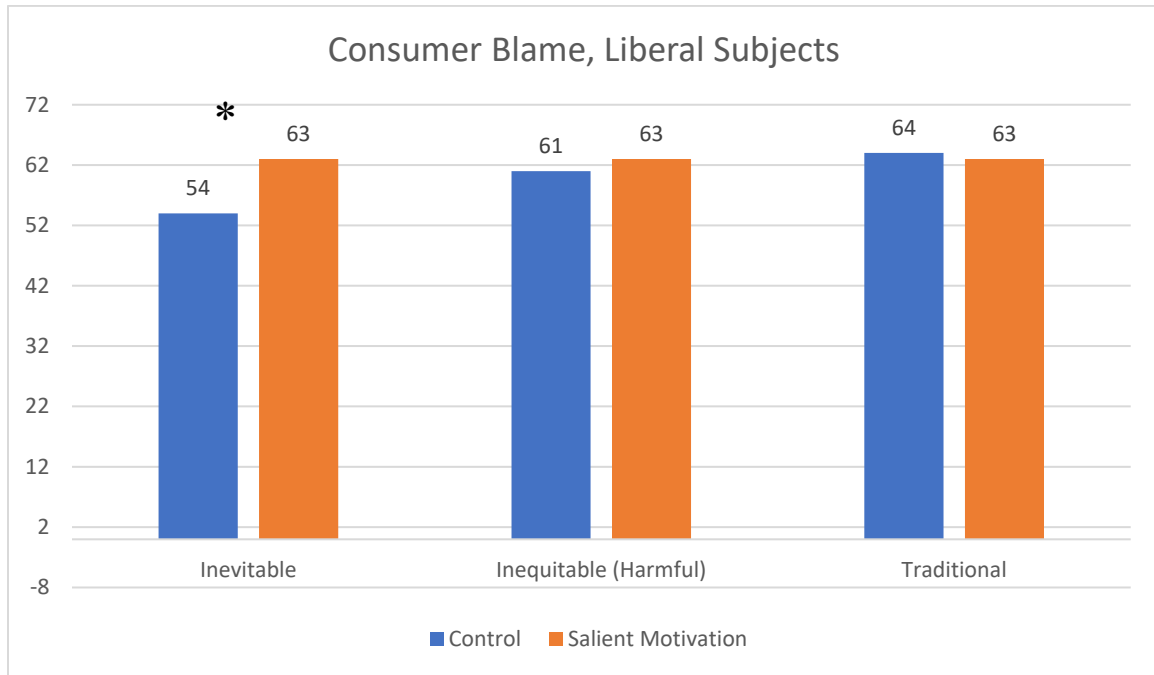
**Figure 4. Effect of Experimental Manipulations on Judgments of Fairness, Liberal Subjects**



**Figure 5. Effect of Experimental Manipulations on Judgments of Consumer Blameworthiness, Conservative Subjects**



**Figure 6. Effect of Experimental Manipulations on Judgments of Consumer Blameworthiness, Liberal Subjects**



## V. DISCUSSION & IMPLICATIONS

### A. Discussion of Results

The broad hypothesis of the studies here is that term deference is a motivated reasoning phenomenon that increases with intensity as individuals feel increased psychological pressure to ameliorate their attitudes toward the status quo. I measured deference in two primary ways: perceived fairness of the law was one, and allocation of blame between the parties was the other. The more fair the law, and the more blame shouldered by the consumer, the more deference. The prediction for each study was that as subjects felt more psychological pressure to justify a contract, they would be more deferential to the term and the law.

In order to operationalize the psychological pressure, I borrowed from the system justification literature. In particular, I borrowed two main findings. The first is that people feel more pressure to justify a system when the inequitable results of the system are salient—i.e., when the system seems worse there is a greater need to rationalize it. The second is that people feel more pressure to justify a system when the system seems particularly entrenched. The idea here is that when a bad outcome can be remediated or avoided with action, people often choose that path. When the outcomes are unmoveable, it is the perceptions that must change instead. Study 1 operationalized that intransigence by making either the law itself or the contract itself

seem more or less open to challenge, and Study 2 operationalized it by casting the term as either a standard part of an existing contract or a new term recently added.

The motivated reasoning literature in psychology measures not only situational triggers but also individual differences. System justification is associated with, among other things, political conservatism. As such, I also explored the possibility that I would see stronger results among conservative respondents than among liberal respondents, which I tested more systematically in Study 2.

The results showed a consistent pattern: subjects overall responded to the Fairness and Blame questions as predicted. When there was more pressure to justify—when the consumer had been hit by the term’s penalty, or when the contract was standard, or when the law was clearly in favor of the drafter—they found the law more fair, the company less to blame, and the consumer more to blame.

Overall, term deference was associated with conservatism. This was true whether I compared responses to a single scenario, or whether I compared the effects of the experimental manipulations for conservative versus liberal respondents.

Finally, the consent variable did not yield any easily-summarized patterns. The one manipulation that showed clear results was that subjects thought that the consumer had consented less to the new term than to the control. Otherwise consent was only marginally associated with political ideology, and the sign reversed from Study 1 to Study 2. Perhaps the most important data point on assent was the widespread agreement among subjects that the consumer did consent. The median consent rating in Study 1 was 6 out of 7, for example. Even as the other variables shifted and hovered around the midpoint, consent ratings were very high. This is essentially a null result, but I discuss some possible interpretations in line with parallel literatures from other scholars below.

In sum, these results come together to offer at least proof of concept: deference to contract terms increases with increased psychological pressure to justify the existing regime. This is evidence to support the proposition that acceptance of terms is a motivated reasoning phenomenon. It feels better to believe that the system works.

## B. *Implications for Contract Law*

### 1. Rhetoric

One of the persistent challenges for descriptive research in legal scholarship is the jump from a characterization of what the world is like to a prescription for what law should be like.<sup>106</sup> To start cautiously: this research suggests that existing legal rules may be out of line with evolving norms or technologies and perhaps insufficiently protective of consumer vulnerabilities. It is not obvious that contract law itself is the right medium for increasing challenges to bad terms, but it is the case that judicial rhetoric—i.e., the way courts talk about assent—has not caught up to the modern realities of consumer contracting.<sup>107</sup> Granular assent analyses with detailed attention to the location of the hyperlink or the size of a font are not transparent about the state of modern readership.<sup>108</sup> One of the benefits of loosening assent analysis, as in the proposed Restatement of Consumer Contracts draft, is the possibility that courts might be more frank about the tradeoffs that they are making.<sup>109</sup> Courts might admit that almost any hidden term is as non-salient as any other, and that the consumer’s “duty to read” is no longer analytically sensible, much less dispositive. Whether or not we agree with what courts are deciding, it seems clear that courts are not justifying their decisions in terms of the realities of the world their litigants inhabit.<sup>110</sup> This is a critique of assent rhetoric, a suggestion that courts could serve as a counterpoint to the cultural tropes of the feckless consumer described in Part I.

## 2. Enforcing Unenforceability: Reforming or Disrupting

By contrast, the doctrinal implications that rise to the fore from this research are largely about allocating rights and remedies when parties—either parties to the contract or public agencies—bring a court a contract with unenforceable terms. Any student of contract law is familiar with

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<sup>106</sup> See generally, Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593 (2013) (articulating a frustration with the limited normative and prescriptive arguments from traditional descriptive scholarship).

<sup>107</sup> See, e.g., Adam Levitin, Nancy S. Kim, Christina L. Kunz, Peter Linzer, Patricia A. McCoy, Juliet Moringiello, Elizabeth A. Renuart & Lauren E. Willis, *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447 (2019).

<sup>108</sup> See, e.g., Wilkinson-Ryan, *supra* note 3 at 127-128 (“All told, the law of assent in consumer contracting leaves us in an uneasy place: anyone reading a judicial opinion in contract law would have no reason to think that assent to standard terms is dead. But surely analyzing assent to consumer contracts in any kind of granular way is disingenuous when we all know that consumer contracts are unreadable all the time, no matter how close or how far the link to the “Privacy Policy” is to the “Checkout” button.”).

<sup>109</sup> See, e.g., the Draft Restatement of Consumer Contracts from April 2015, arguing in favor of a “grand bargain” approach that “allows for relatively easy adoption of the standard contract terms that businesses draft, balanced by a set of substantive boundary restrictions that prohibit businesses from going too far.” See RESTATEMENT OF CONSUMER CONTRACTS, Council Draft No. 2, Introductory Note, *on file with author*.

<sup>110</sup> See, e.g., Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (proposing to solve the problem of non-readership with updated empirical information about consumer expectations).

the remedies for breach of contract—expectation damages<sup>111</sup>, reliance damages<sup>112</sup>, maybe specific performance if you're very lucky and/or transferring land<sup>113</sup>. But most scholars have spent much less time on the “remedies” for bad terms.<sup>114</sup> In this section, I briefly outline two possible ways of conceptualizing how courts approach bad deals. The first is a form of reformation, the idea that the court seeks to reform the contract to bring it in line with a version of the deal that is legally acceptable.<sup>115</sup> The second approach is a sort of blowing-up rather than a smoothing-over; a court might treat the unenforceable term as a reason to trash the deal rather than repair it.

#### a. Reformation

In the first-year contracts course, students learn that the remedy for a contract based on a misrepresentation, or an unconscionable deal, is that the contract is void and the consumers go back to square one—i.e., restitution damages, the deal unwound and the parties extricated from one another.<sup>116</sup> But what happens if a contract includes a single unenforceable term? What happens if a contract includes, for example, a stipulated damages clause that is unenforceable as a penalty?<sup>117</sup> In that case, does the court declare that the parties have no obligations to one another? No, the court strikes the clause and replaces it with the default remedy of judicially-determined expectation damages.<sup>118</sup> The same is true for unfair terms generally. The default position in contract law is that contracts are severable such that unenforceable terms can be

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<sup>111</sup> See, e.g., Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach*, 61 S. CAL. L. REV. 629 (1987) (describing the incentive effects of the default rule of expectation damages).

<sup>112</sup> See generally L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L. J. 52 (1936).

<sup>113</sup> See, e.g., Henry Cox, *Specific Performance of Contracts to Sell Land*, 16 KY. L. J. 338, 338 (1927) (“Whatever the explanation may be, it is generally undisputed that where land or any interest land is the subject matter of an agreement, equity has jurisdiction to enforce specific performance, and it does not depend on the inadequacy of the legal remedy in the particular case.”)

<sup>114</sup> Cf. Omri Ben-Shahar, *Fixing Unfair Contracts*, 63 STAN. L. REV. 869 (2011) (analyzing court approaches to addressing unenforceable terms).

<sup>115</sup> For a traditional analysis of the meaning of reformation in contracts, see George E. Palmer, *The Effect of Misunderstanding on Contract Formation and Reformation Under the Restatement of Contracts Second*, 65 MICH. L. REV. 33 (1966) (describing the option of reforming—i.e., judicially fixing—contracts that are based on misunderstanding).

<sup>116</sup> See, e.g., Edward S. Thurston, *Recent Developments in Restitution: Rescission and Reformation for Mistake, Including Misrepresentation*, 46 MICH. L. REV. 1037 (1948).

<sup>117</sup> See, e.g., Samuel A. Rea, Jr., *Efficiency Implications of Penalties and Liquidated Damages*, 13 J. LEG. STUD. 147 (1984).

<sup>118</sup> See, e.g., Charles Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977).

excised from the contract without destroying the rest of the obligations.<sup>119</sup> Courts then choose how to fill the gap left by the severed term: a “reasonable” gap-filler, a punitive term, or a solution that is “minimally tolerable.”<sup>120</sup> These solutions aim largely to reform the deal, to move the parties from an unacceptable deal to a deal that is both viable in court and approximating a deal that would be acceptable to similarly situated parties.<sup>121</sup>

A majoritarian approach, constrained by doctrinal accounts of fairness, sounds eminently reasonable on its face, but the experimental research from psychology, including the study reported here, gives us reason for concern about a reformatory approach. Reformation removes bad terms as quietly as possible, and that quiet helps sustain an overall impression that consumer contracts are functionally law. The reformation preserves the status quo largely through its perverse incentives for firms. When the only cost to a company for including a bad term is that the term will be cleanly removed by a court and replaced with something slightly-less-firm-favoring, the expected value of the term is positive.<sup>122</sup> Sometimes people will do what the term says without challenging it<sup>123</sup>, sometimes a court will strike it down<sup>124</sup>—at worst, it’s a little bit useful as leverage outside the courts<sup>125</sup>; at best, it heads off complaints before they even make it to the customer service agent.<sup>126</sup>

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<sup>119</sup> See, e.g., Mark L. Movesesian, *Severability in Statutes and Contracts*, 30 GA. L. REV. 47-48 (1995) (“A court will sever an illegal term and enforce the remainder of an otherwise valid contract, but only where the illegal term ‘is not an essential part of the agreed exchange’. Whether a given provision is an essential part of the agreed exchange turns on the intent of the parties to the contract.”)

<sup>120</sup> See, e.g., Ben-Shahar, *supra* note 113 (“Drafting a contract that contains terms other than the most reasonable ones is not illegal nor is it uncommon. It is only when these advantages are excessive—when they reach beyond a level that is regarded as tolerable—that the law steps in to invalidate them. Thus, if a court is to reform the unfair contract, it is only the illegitimate element of the one-sided term that needs to be struck. Effectively, then, the court would fill the gap with a term that is still one-sided, still favorable to the same party who dictated the original excessive term, but moderated sufficiently so that it would be tolerated.”)

<sup>121</sup> *Id.* at 452.

<sup>122</sup> See, e.g., Steven Shavell, *The Design of Contracts and Remedies for Breach*, 99 Q. J. ECON. 121 (1984) (formally modeling expected value of contracts terms under conditions of traditional remedies for breach).

<sup>123</sup> See, e.g., Wilkinson-Ryan, *supra* note 3 at 164 (summarizing the results of an experimental study showing that contract policies were more likely to go unchallenged than identical policies in a non-contract form).

<sup>124</sup> See, e.g., Eric Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEG. STUD. 283 (1995).

<sup>125</sup> See, e.g., Dennis Stolle & Andrew Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 BEH. SCI. & L. 83 (1997) (reporting a study that a sample of readers who saw a gym contract with an unenforceably broad limitation on liability for the gym reported that they would be less likely to sue in the event of injury than if the clause were not present).

<sup>126</sup> Wilkinson-Ryan, *supra* note 3 at 164.



Further, the more unenforceable terms exist, the more normal they seem.<sup>127</sup> One of the key findings in David Hoffman’s 2016 influential article on age and contracting was that younger subjects, those who grew up with the internet, were more likely to be “formalists on steroids”<sup>128</sup>. His experiments suggested that those who were more familiar with contracts via online contracting were less likely to predict that terms could be unenforceable on the basis of unconscionability; and he surmised that “millennials indeed naively believe that contract law does not account for fairness or moral norms, but is instead a bit of a game.”<sup>129</sup> The argument here is that the terms that you see shape what you think contract law is. To the extent that boilerplate looks impregnable, it will feed the very justificatory phenomenon I have described experimentally—it will retain the sense that it is foundational and unremarkable rather than the unstable results of in-house counsel adding terms prophylactically over time.

## b. Disruption

When consumers are over-deferential to terms, we ought to worry about a counterproductive inhibition to challenge and debate. When unenforceable terms may be voided by a court, but firms are not otherwise penalized, those terms will persist.<sup>130</sup> By contrast, courts and legislatures have a robust toolkit of remedial approaches that might be productively disruptive. We can think of different ways of approaching bad terms as existing on a continuum very accommodating to very disruptive. Accommodation here refers to the way that the court accommodates the contract and the parties, identifying a solution that tries to repair and smooth. A very accommodating approach might be severability plus a term that is basically firm-favorable. A very disruptive approach, on the other hand, might be a public FTC action with monetary penalties for any unfair practices.<sup>131</sup> This is disruptive in the sense that it creates a noisy remedy and potentially destroys salvageable pieces of the parties’ deal. And, of course, there are a series of potential approaches in between, some of which are highlighted below.

### 1. Refusal to Sever Bad Terms

Although some of the most famous cases of unconscionable terms in contract go to the core of the deal, most of the terms I have described in this Article are part of the boilerplate—these are terms about arbitration, or limitations on liability, or class action waivers. In such cases, it is the default approach of courts faced with an unenforceable term to excise that term and

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<sup>127</sup> See generally Hoffman *supra* note 45.

<sup>128</sup> Hoffman, *supra* note 32 at 1622.

<sup>129</sup> *Id* at 1627.

<sup>130</sup> See, e.g., Meirav Furth-Matzkin, *On The Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9.1 J. LEG. ANALYSIS 1 (2017).

<sup>131</sup> See Greg Dickenson, *Survey of Recent FTC Privacy Enforcement Actions and Developments*, 70 BUSINESS LAWYER 247, 250 (2015) (reviewing FTC enforcement actions).

interpret the remainder of the contract. And in the case of mass market forms, severability will often be an explicit term, instructing the court that any single unenforceable term should not affect the enforceability of the contract as a whole. This approach, described above as a species of reformation, is both quite firm-favorable and highly non-salient to the ordinary consumer. Refusal to sever is just the opposite; it offers a noisy, disruptive remedy that is aversive enough to the firm that it is likely to change firm drafting practices.

We can look to an example from Philadelphia’s housing code for a good proof of concept. The city of Philadelphia recently implemented a new regulation: in order for a landlord to begin eviction proceedings or otherwise bring a claim against a tenant, the landlord would need to show a lease in compliance with local regulations.<sup>132</sup> Lease terms are notoriously rife with unenforceable terms, with landlords claiming no liability for dangerous conditions, for example.<sup>133</sup> The landlords who want to be able to leverage a lease, therefore, have an incentive to bring it into compliance. This type of remedy restructures the incentives for the drafters, introducing a positive probability of financial losses if bad terms come to light—if you want to include unenforceable terms, you risk the possibility that the court will deem the entire instrument unenforceable.

## 2. Civil Fines

An even more explicit reordering of incentives—imposing fines—is the mechanism some state statutes rely on for deterring aggressive actions against consumers. One way to penalize, and thus deter, the inclusion of unenforceable terms is for courts to impose direct financial costs when courts see bad terms. California’s “Yelp law” statutes operate in this way.<sup>134</sup> The state of California has outlawed anti-disparagement clauses that would prevent consumers from complaining online about negative experiences with firms, doctors, restaurants, or other sellers.<sup>135</sup> Firms who include such terms, and try to enforce them, are subject to a civil penalty.<sup>136</sup> These kinds of mechanisms can shift the incentives for firms to promulgate contracts that are, at the least, in line with existing legal rules.<sup>137</sup> Indeed, even civil fines for firms with bad terms

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<sup>132</sup> See Jake Blumgart, *Philadelphia Renters Just Scored a Courtroom Win*, WHYY.com, January 25, 2018 (“Under the new rule, if a landlord is seeking back rent or eviction, and they can’t show a certificate of rental suitability for the entire period attached to the complaint, the court will not enter a default judgment or judgment by agreement.”)

<sup>133</sup> See, e.g., Furth-Matzkin, *supra* note 130 at 4.

<sup>134</sup> See generally Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMM. & TECH. L. REV. 1 (2017) (describing the genesis and impact of California’s legislative effort to ban anti-disparagement clauses).

<sup>135</sup> *Id.* at 2 (arguing that the ability to lodge public complaints facilitates an efficient market).

<sup>136</sup> See, e.g., Wayne Barnes, *The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law After the Consumer Review Fairness Act*, 53 GA. L. REV. 549 (2018).

<sup>137</sup> See Ben-Shahar, *supra* note 120 at 120 (outlining a conceptual framework for understanding the incentive effects of judicial responses to bad terms).

could in fact be pushed further by creating a private cause of action. California’s anti-disparagement remedy does not kick in until the firm tries to bring a legal action, meaning that it offers essentially a defense for the consumer. In the same way that consumers can bring complaints under federal and state Unfair and Deceptive Practices statutes for misleading statements of fact<sup>138</sup>, legislatures could authorize a private right of action for firms that purport to require impermissible promises from their consumers. Such a move would, among other benefits, incentivize a crowdsourced hunt for unenforceable terms by consumers, and thus dramatically increase the probability of detection.

### 3. Public Actions

Finally, and perhaps most disruptively, the CFPB and the FTC could bring public actions against firms promulgating unenforceable deals. This is, of course, a core part of the enforcement power of both agencies, and indeed their current actions feature some of the same core analytic claims. Both the Consumer Financial Protection Bureau and the Federal Trade Commission are authorized to file claims in federal court or to initiate administrative proceedings against a company charged with consumer violations.<sup>139</sup> Such actions are not unusual, even in administrations with more conservative consumer protection goals. For example: in 2018, the CFPB required CitiBank to pay 335 million in restitution to credit card holders who paid more in APR than they should have been required to pay.<sup>140</sup> In 2019 the FTC settled with AT&T to enjoin the wireless company from promising “unlimited data” but not specifying data speeds, which were reduced with high use.<sup>141</sup> And in 2020, the CFPB sued Think Finance for collecting debts against tribal borrowers for loan terms that were impermissible under state law.<sup>142</sup> In each of these cases, we can characterize the agency action as essentially a response to a bad term. If, however, we were interested in creating more robust challenges to consumer contracts, we might want to suggest that agencies should have the ability to bring actions against firms with unenforceable terms even when the terms have not caused concretel

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<sup>138</sup> See, e.g., Jeff Sovern, *Private Actions Under Deceptive Trade Practices Acts: Reconsidering the FTC Act as Rule Model*, 52 OHIO ST. L.J. 437, 437 (1991) (“Most states—in an effort further to discourage inappropriate trade practices and to compensate injured consumers—have extended to private consumers the right to sue for deceptive and, in some states, unfair trade practices.”)

<sup>139</sup> See, e.g., Adam Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 344-358 (2013) (taxonomizing agency powers over consumer protection actions).

<sup>140</sup> In the Matter of Citibank, N.A. (2018) available at [files.consumerfinance.gov/f/documents/bcftp\\_citibank-na\\_consent-order\\_2018-06.pdf](https://files.consumerfinance.gov/f/documents/bcftp_citibank-na_consent-order_2018-06.pdf)

<sup>141</sup> Federal Trade Commission vs. AT&T Mobility LLC (2019) available at [https://www.ftc.gov/system/files/documents/cases/doc\\_190\\_2019-11-05\\_proposed\\_stipulated\\_final\\_order.pdf](https://www.ftc.gov/system/files/documents/cases/doc_190_2019-11-05_proposed_stipulated_final_order.pdf)

<sup>142</sup> CFPB vs. ThinkFinance, LLC U.S.D.Mt. (2020) available at [https://files.consumerfinance.gov/f/documents/cfpb\\_think-finance\\_stipulated-final-consent-order\\_2020-02.pdf](https://files.consumerfinance.gov/f/documents/cfpb_think-finance_stipulated-final-consent-order_2020-02.pdf)

losses to consumers. Unenforceable class action waivers, for example, may not in themselves cause traceable financial losses to individual consumers, but may nonetheless be a target for FTC or CFPB actions.

The argument here is that different enforcement mechanisms for policing unfair terms have differential effects on how consumers understand their legal world. When unenforceable terms are excised and smoothed over, contracts stay long and formal, and consumer law looks like a monolith. When they receive public approbation or private penalties, the contracts themselves change and the public perception may follow, in turn creating a more robust political and cultural conversation around how firms create legal obligations for consumers.

### *C. Measuring Attitudes About Law*

Although the primary aim of this research involves a set of questions about contract law and behavior, these studies also raise some important methodological questions for legal and social science scholars who measure attitudes about law. For at least a half-decade, legal scholarship has embraced and internalized the assumptions, values, and language of economic theory.<sup>143</sup> At the core of that embrace is the faith in self-interest, the belief that humans can, should, and will take steps to pursue their own goals, however broadly defined.<sup>144</sup> Psychologists have long observed that people often appear to evince beliefs that are in direct tension with their own self-interest, or at least their apparent self-interest.<sup>145</sup> The explanation from psychologists essentially challenges the shallow notion of self-interest—what is in my interest is not just what would ultimately make me richer or happier, but also the choices that dignify the life I am living now.<sup>146</sup> System justification theory, for example, argues that there are particular contexts in which motivated reasoning captures more than material self-interest. It captures instead a preference to perceive control or orderliness in the universe or, conversely, to avoid feeling chronically angry or depressed at an unfair world.

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<sup>143</sup> See, e.g., Lewis A. Kornhauser, *An Introduction to the Economic Analysis of Contract Remedies*, 57 U. COLO. L. REV. 683, 687 (1986); see also Alan Schwartz & Louis Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979).

<sup>144</sup> See, e.g., Jack Hirschleifer, *The Expanding Domain of Economics*, 75 AMER. ECON. REV. 53 (1985) (arguing that economic theory encompasses a wide scope of preferences and values more often associated with disciplines like moral philosophy).

<sup>145</sup> See, e.g., John T. Jost, *Working Class Conservatism: A System Justification Perspective*, 18 CURRENT OPINION PSYCH., 73–78 (2017) (describing the apparent paradox of low-income voters choosing political candidates who eschew redistributive policies).

<sup>146</sup> See, e.g., John T. Jost, Danielle Gaucher, and Chadly Stern, “*The World Isn’t Fair*”: *A System Justification Perspective on Social Stratification and Inequality*, in 2 APA HANDBOOK OF PERSONALITY AND SOCIAL PSYCHOLOGY 317–40 (M. Mikulincer & P. R. Shaver ed., 2015) (outlining the theory of system justification).

It is in this light that it might be worth revisiting the consent results here. The main inference we can reasonably draw from these results on consent is that contractual assent looks like “real” consent to most people. Consent ratings were consistently definitive and high. Contracts here may provide a window into a broader social and psychological phenomenon: the preference to see oneself as a subject and not an object. Roseanna Sommers, Vanessa Bohns, Meirav Furth and others have begun to write about consent across an array of contexts, including contracting but also around issues of medical decision-making, sexual contact, and privacy intrusions. Sommers, for example, asked a series of questions about whether or not various personal violations were consensual when they were procured by intentional deception. Is sex consensual when a partner claims to be unmarried but is not? Is an elective surgery consensual when the doctor lies about its cost? The remarkable finding of Sommers’s studies was subjects’ consistent resistance to judgments of non-consensuality. The only one of her many examples to get less than half (49.4%) of all subjects finding consent was deception about HIV status resulting in HIV transmission.<sup>147</sup>

In research with Vanessa Bohns, Sommers plumbed the psychology of consent further.<sup>148</sup> They asked subjects to come into the lab and randomly assigned them to one of two conditions: real request or hypothetical request. The request in each case was for the subjects’ phone. A research assistant asked either, “Could you unlock your phone so I can take it for a minute?” or “If I asked you to unlock your phone and let me take it for a minute, would you let me?” Subjects who got the hypothetical request essentially said no; a little more than a quarter of the subjects reported that they’d let the researcher look at their unlocked phone. Subjects in the real request condition handed their phones over essentially every time. The magnitude of the difference between the two conditions, in other words, was about 70 percentage points. No one thought they would consent to a privacy intrusion under the extraordinarily light pressure of an adolescent RA making a polite request; everyone consented.

If the first of these consent findings is that subjects do not view consent as being meaningfully vitiated when its manifestation is elicited through trickery<sup>149</sup>, the second finding might be that they do not view themselves as people who would likely manifest consent lightly.<sup>150</sup> We can think of this as separate phenomena, as I did in a 2014 paper: there is a preference to think of oneself as careful, or savvy, or discerning (I would not risk a bad outcome by consenting)<sup>151</sup>; and then there is a preference to think of the world as orderly and just (This bad outcome is

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<sup>147</sup> Roseanna Sommers, *Commonsense Consent*, YALE L. J. (forthcoming 2020).

<sup>148</sup> Roseanna Sommers & Vanessa K. Bohns, *The Voluntariness of Voluntary Consent: Consent Searches and the Psychology of Compliance*, 128 YALE L.J. 1792 (2019).

<sup>149</sup> Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Consent and the Problem of Fine Print*, STAN. L. REV. (forthcoming 2020).

<sup>150</sup> Sommers *supra* note 148; see also Wilkinson-Ryan *supra* note 88 at 214 (showing results of a study suggesting that people overestimate their own likelihood to read carefully before signing a contract and underestimate the difficulty of assenting with full knowledge).

<sup>151</sup> *Id.*

not evidence of malfeasance, it is the result of my choice to take a risk). In other words, these are species of overconfidence or overoptimism.<sup>152</sup> But scholars might do well to think of these as part of an integrated and specific phenomenon—a belief that consent is special.<sup>153</sup> Indeed, we might think about consent as a means of facilitating system justification more generally—if I agreed to it, it is not, by definition, out of my control or morally wrong. I cannot be a victim if the outcome was my choice.

In much of economics, rational actor models are employed to describe consumption patterns, but it is not unusual to consider arguably non-consumptive choices in terms of rationality. For example: is it rational to vote?<sup>154</sup> Is it rational to commit a violent felony?<sup>155</sup> Is it rational to get married?<sup>156</sup> It will not escape the reader's notice that these choices are all questions with real legal ramifications. When decision-making implicates a broad set of moral, social, and legal norms, as well as more immediate visceral and financial well-being, evaluating rationality per se is naturally more fraught. These studies measured attitudes toward a series of legal constructs—contracts, contract rules, and parties—much like the consent research described above. The insight from the research here is that the attitudes that subjects reported were a) malleable and b) motivated in ways that would not be obvious. Measuring attitudes about legal rules or legal constructs is a distinctive task in at least two ways. The first is that legal decision-making *always* involves anticipating what an authority believes about your choice. The second is that legal decision-making is situated within the context of a society. That is, it naturally implicates social and moral values—what we owe each other. These are fundamentally social beliefs, and therefore fall within the natural parameters of social psychology.

## CONCLUSION

In the past decade, psychological and behavioral studies have found that individual commitment to contracts persists beyond personal relationships and traditional promises. Even take-it-or-leave-it consumer contracts get substantial deference from consumers—even when

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<sup>152</sup> *Id.* at 210 (reporting a study of the relationship between overconfidence in one's own readership and blame for non-reading consumers).

<sup>153</sup> *See, e.g.,* Sommers, *supra* note 141 (describing the unique role of consent in judgments of moral harm and moral blame).

<sup>154</sup> *See, e.g.,* Aaron Edlin, Andrew Gelman & N. Kaplan, *Why and How People Vote to Improve the Well-Being of Others*, RATIONALITY AND SOCIETY (2007) (arguing that voting is rational when people have other-regarding preferences).

<sup>155</sup> *See, e.g.,* Irving Piliavin, Rosemary Gartner, Craig Thornton, and Ross L. Matsueda. *Crime, Deterrence, and Rational Choice*, 45 AMER. SOC. REV. 101 (1986) (specifying the economic model for crime deterrence under a rational actor theory).

<sup>156</sup> *See, e.g.,* Elizabeth Scott, *Rational Decision-Making about Marriage and Divorce*, 76 VA. L. REV. 9 (1990) (describing family law and family behavior in light of rational bargaining models).

the terms are unenforceable<sup>157</sup>, even when the assent is procedurally compromised<sup>158</sup>, and even when the drafter is an impersonal commercial actor.<sup>159</sup> It is puzzling to find that the very population most likely to be subject to unfair provisions or harsh contractual penalties is relentlessly sanguine about their apparent vulnerability. In some sense, the explanation offered here is the simplest—people accept their deals, defer to their terms, because it feels better than the alternative. Legal rules and fine print are implacable parts of our landscape. These studies suggest that some term deference is motivated by an underlying drive to make peace with the status quo, especially when the status quo is seems firmly rooted. The results here have implications not only for contract law, but also for how we understand self-interest in legal decision-making, and for the legal understandings of consent and compliance.

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<sup>157</sup> Furth-Matzkin & Sommers, *supra* note 149.

<sup>158</sup> Wilkinson-Ryan *supra* note 3.

<sup>159</sup> Guiso, Sapienza & Zingales, *supra* note 62.