A COMPANION GUIDE TO THE RESTATEMENT OF CONSUMER CONTRACTS

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Introduction

In 2012, we were invited to serve as Reporters for a new and ambitious project of the American Law Institute ("ALI") – a Restatement of Consumer Contracts. We were charged with the task of codifying the common law governing consumer contracts. This was a gutsy move by the ALI, entrusting a sacred doctrinal enterprise in the hands of outsiders to the ALI culture. We are scholars devoted to studying the *effects* of laws and whether they achieve their intended consequences. In our research on consumer protection, we studied which regulatory reforms work well, which are futile, and which do more harm than good. Our research harbored only modest ambitions in the study of what the law *is*. Working in areas where laws and precedents vary across states, we conveniently relied on treatise writers and ALI Restatements to answer the what-are-the-rules questions. As Reporters, we now had to swim in the treacherous waters of doctrinal nuance. What could we possibly bring to a common law black letter codification project?

The common law of consumer contracts has been developing in courts over several decades, leveraging old doctrines to resolve new challenges. Our goal was to reflect it, not reform it. The ALI has deep rooted traditions for how restatements are written. It begins by identifying leading cases from apex courts. When variations and mutations are detected, a slow process of canvassing the diverse views is put in place. Together with advisers and experts, our goal was to find the most influential holdings, principles, and norms that emerge from the diverse body of case law.

These long-standing traditions, while valuable, present certain challenges. First, focusing mostly on high courts' opinions may overlook important legal developments occurring in other courts and miss influential opinions regardless of authoritative status. Second, restating the law as it stood historically carries the risk of perpetuating stale precedents and missing out on budding new trajectories. Third, a commitment to maintaining familiar language and approaches in applying rules may hinder courts from incorporating new insights from social science, preventing the adoption of clearer conceptual frameworks that could facilitate better legal outcomes.

Determined as we were to work within the conventions of the ALI, we saw this as an opportunity to bring to the project something fresh, building on our comparative strengths. We thus sought to enhance the traditional restatement writing process through three innovations. First, we introduced a new methodology to help discover what the law *is*; not to replace the ALI's traditional approach, but to supplement it. In areas where conflicting precedents seem to have emerged, we conducted additional investigation by using simple data and replicable statistical methods to identify those that have gained the most influence and to trace the evolution of the law over time across all courts. No longer relying merely on "expert" judgment which precedents have

prevailed, our objective was to highlight the actual empirical following that different holdings garnered, the intensity of their dominance, and the path by which they got there.

Second, we relied on our own academic work, and on the work of other scholars, to prioritize consumer contract rules that actually help consumers and caution against those that don't. Each of us Reporters had spent good parts of our scholarly effort on this question of efficacy, criticizing the frequent enactment of ineffectual protections. In particular, our academic work shed serious doubt on the efficacy of mandated disclosure as a way to help consumers, for the simple reason that most consumers ignore most disclosures. More forceful interventions—the type embodied in doctrines such as unconscionability and deception—must be put in place when needed. Indeed, the Restatement includes valuable rules and commentary on the unconscionability and deception doctrines (as detailed below). Unfortunately, we were less successful in curbing the expansion of mandatory disclosure rules, even in the Restatement of Consumer Contracts. We suggest one possible explanation for the resilience of mandated disclosure as a key component of consumer contract law. As Supreme Court jurisprudence limited the domain of the unconscionability doctrine to police arbitration clauses, lower courts responded by flexibly expanding the disclosure requirements, which are part of the contract formation doctrine, allowing them to strike down terms (including arbitration clauses) that were not adequately disclosed.

Third, we further relied on our own academic work and that of other scholars, which uses social science to elucidate the underlying causes of harm in consumer markets. Courts intuitively understand the problems that behavioral sciences document, but we thought they could benefit from a doctrinal framework that more rigorously incorporates such insights. For example, when the law refers to an "imbalance" in bargaining power, we could anchor this concept in the economics of market transactions. When courts justify interventions by the limited capacity of consumers to make good or safe decisions, we could offer additional rationales that rely on psychology and behavioral economics to describe the patterns and craft the solutions. This social science-based analysis informed our commentary on the rules governing unconscionability and deception.

In 2022, a decade after we began working on it, the ALI membership voted its final approval for the Restatement, and it was ultimately published in 2024. Many courts, including state supreme courts, are finding it instructive and have begun citing and relying on it. Courts are hungry for guidance on how to resolve the surging volume of disputes over consumer contracts in the digital era. The timing is also just right: the proliferation of long boilerplate contracts, the appetite of businesses to collect their customers' personal data, the arbitration-instead-of-courts epidemic, the frequency of consumer class actions, the clever manipulative techniques to lure consumers into

transactions—all demand increasing attention and creative thinking from courts. Consumer contract law has never been so popular, and judges and arbitrators can use a 21st century Restatement that adapts the horse-and-buggy rules of the common law to the rapidly evolving, digitally clothed, numerously popping, and massively overloaded present-day contracts. For all these reasons, the Restatement will hopefully offer guidance to the legal profession and bring more predictability to the law and the commercial pipelines it governs.

Unlike Principles projects, ALI Restatements are constrained by existing rules and practices. As a result, many innovations that enrich the understanding and operation of restated rules reside in the Reporters' Notes, which do not represent the ALI's official position. Our goal in this essay is to highlight and explain such innovations in hopes that they may be useful to readers of the Restatement of Consumer Contracts and to other codifiers, in the US and beyond. These innovations rest in empirical, methodological, extralegal, and pragmatic foundations and, in our view, offer a much-needed complement to the traditional approach of Restatement drafting.

I. Discovering Precedents

The Common Law is bursting with disagreements, as competing visions and holdings jostle for prominence. Precedents emerge not by being right but by being persuasive, gaining the following of other courts. Their eminence does not appear at once but takes a while to be noticed. Because this evolution is subtle and slow, Restatements "aim at clear formulations of common law and its statutory elements, and reflect the law as it presently stands or might appropriately be stated by a court."[1] Restatements document, distill, and advertise the stock of existing precedents. In areas where courts remain in disagreement, Restatements sometimes take a position, justifying a particular approach in the hope of bolstering its prominence and shaping the path of the law.

In the domain of consumer contract law, there are central questions that required novel applications of old settled doctrines. As typically happens in these legal metamorphosis moments, opinions and solutions vary, and anecdotal non-systematic review of court decisions could give an impression of non-uniformity, of decisions "all over the place." Clarifying the law in these areas, identifying the (sometimes subtle) dominant threads, and exposing regularities where otherwise non-uniformity and discord are thought to prevail, were the primary goals of the Restatement of Consumer Contracts. For example, could a boilerplate term in a standard form contract, including one

[1] *About ALI*, AM. L. INST., https://www.ali.org/about [https://perma.cc/26VK-WX2N] .

that was prominently available for the consumer to review in advance, override express representations or promises orally given to the consumer prior to a purchase? Or, under what circumstances do terms that arrive sealed in the product box, available for review only after the purchase is completed, bind the consumer? What about standard terms that deny consumers an effective remedy for breach—are they unenforceable? Are the data privacy terms posted on websites treated as contract, whereby their adoption would be determined by the rules of contract law, or are they regarded as a sui-generis legal representation? Could a business reserve the power to modify the consumer contract solely by dispatching one-sided notices to the consumers?

These questions are controversial. The digital economy enabled consumers to interact with numerous businesses daily, and each such transaction is accompanied by digitally communicated terms of service. This format made it easier and tempting for businesses to experiment with new modes of contract formation, to draft increasingly one-sided terms and disclaimers, to collect loads of personal data, and to initiate frequent modifications of the terms. Naturally, courts addressing these contractual practices have been "innovating"—that is, creatively trying to fit the old rules of contract law to new scenarios, develop new distinctions, tweak the rationales, and ensure that consumers are not preyed upon. Inevitably, differences across jurisdictions remain.

Faced with this new reality, the "profession"—academics, lawyers, advocates, and the ALI—sought to bring more unity, and perhaps more fairness, to consumer contract law. Some court decisions that began to earn influence seemed problematic to many in the profession. Indeed, these sentiments have led to several prior ALI attempts to tweak and reform the rules. For example, in 2010, the ALI's Principles of Software Contracts sought to reject some of the more lenient holdings that made it easier for businesses to enforce their standard terms. Other proposed reforms, including an ambitious model uniform code for digital transactions ("UCITA"), similarly sought to reshape these controversial rules. But these efforts have had only minimal influence on the law.

As we started working on the Restatement of Consumer Contracts, we took special note of the failure of prior codification efforts in the field. We believed that the prior attempts failed to gain traction because courts have been unwilling to follow rules and instructions that explicitly change their existing precedents. Therefore, in this Restatement project, we sought to complement the traditional approach and identify the rules that the majority of jurisdictions follow. Which decisions are gaining influence? What holdings and rationales do most judges find persuasive? We were interested not only in the behavior of high courts, but of all courts. We wanted to identify where the leading cases were being developed and how the law was applied on the ground. Of course, we could then try to provide additional *normative* grounding for the

rules and perhaps point to their justified limits or recommend some distinctions or deviations; but our primary goal was to accurately *find and describe* the precedents.

The traditional ALI methodology for pursuing this descriptive task relies on the lawyerly expertise of Reporters and their advisers to read many decisions and handpick the influential and pivotal ones from the highest state courts. In an evolving area of the law, where there is enough case law to merit a Restatement project, yet the dust has not yet settled, this method is plagued by uncertainty and requires subjective and perhaps ideological judgment calls.

We therefore sought to supplement the traditional ALI methodology and design a new empirical path in search of the leading precedents.[2] Instead of making subjective determinations as to the prominence of specific holdings, we *quantitively measured* their impact. We collected the entire body of court decisions on the controversial issues and coded their relevant facts, characteristics, outcomes, and, most importantly, rationales. Under this approach, each case (including state, federal, published, and unpublished) was coded along numerous dimensions. We then measured how many times each rationale had been positively cited or followed, focusing on out-of-state citations, where courts are not bound by intra-jurisdictional precedent. We did not focus on the outcome of the case—as those are also determined by the specific facts or other doctrines—but rather the court's reasoning and rationale behind its ruling. We also studied trends, looking at the rate by which rulings were adopted or rejected over time by courts within and outside each court's jurisdiction using long established methods and norms employed in the fields that study judicial behavior empirically. And, for robustness, we updated this analysis throughout the (almost) decade of work. Our data, methods, and results were entirely transparent, available for replication, and indeed were dissected from every direction by the contracts professoriate.

Here is an example how the empirical search for precedent worked. One of the biggest challenges for consumer contract law is to resolve the status of "privacy policies"—the boilerplate disclosures that are typically posted, linked, or pop-up on websites and apps, in which businesses set out their data collection practices. Data privacy and protection laws require businesses to get consent from people to collect and share personal information, and thus courts must determine whether the privacy policies these businesses post online are contractually adopted.

When we started the Restatement project, the state of knowledge in the profession was that this question had not been consistently resolved by courts.

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[2] *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(1) U. Chi. L. Rev. 7 (2017) (describing in detail the empirical methodology of case selection and presenting a subset of the findings on some actively debated issues).

The ALI project on the Principles of the Law of Data Privacy further amplified the perceived ambiguity by proposing that consent to data privacy terms related to "data activity that is significantly unexpected or that poses a significant risk of causing material harm to a data subject" must be "heightened," yet failing to clarify the specific manner in which this should occur or the doctrinal basis for this specialized requirement.[3] Further, in teaching Contract Law we relied on casebooks that referred to an early appellate decision holding that privacy notices posted on websites are not meant to have the status of a contract and thus the representations they make are not contractually binding.[4] And yet, this data privacy exceptionalism seemed to us inconsistent with first principles of the common law of contracts. Unless qualified by an express statute, the rules of mutual assent and adoption of terms do not vary with the *content* of the terms. What, then, are the requirements of consent that courts have put in place with respect to data privacy terms?

Rather than rely on a single case which the profession at the time thought to be authoritative, we applied our empirical methodology. Using a broad natural language search, we collected all the cases (including those unpublished) in which a party claimed that a term in the privacy policy is part of the enforceable consumer contract or, more generally, where courts addressed the possible contractual enforceability of these privacy-related terms. Analyzing this database, we found to our surprise that privacy policies are overwhelmingly recognized by courts as contractual in their nature when they exhibit contractual features (which most do). The celebrated older case that held otherwise, which the profession deemed authoritative, was rejected by a large majority of courts. In fact, among all court decisions ruling on this issue, we found at the time of analysis that courts were *seven times more likely to recognize privacy policies as contractual in nature than not*. This trend, we showed, was only getting more definitive over time. The privacy-notices-are-contracts decisions are not only more numerous but also more influential and more likely to be followed or get cited out of state.

Here is one nice thing about this empirical methodology, which was unique to the drafting of the Restatement of Consumer Contracts. It provides a rigorous yardstick for investigating the question 'what the law *is*' and transparent data for answering it. With the data freely available from the moment we began gathering it and our methods fully spelled out, others could reread and recode the caselaw to reassess the patterns we identified. And, sure enough, others did.[5] Peer reviewers energetically dissected our coding to raise basic

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[3] The American Law Institute, *Principles of the Law of Data Privacy* §4(e)(1), (2020).

[4] *See* Dyer v. Nw. Airlines Corps., 334 F. Supp. 2d 1196 (D.N.D. 2004).

[5] *See, e.g.*, Gregory Klass, *Empiricism and Privacy Policies in the Restatement of Consumer Contract Law*, 36 YALE J. REG 45 (2019); Adam J. Levitin et al., *The Faulty Foundation of the Draft Restatement of Consumer Contracts*, 36 YALE J. REG. 447 (2019); *see also Symposium on the Draft Restatement of the Law of Consumer Contracts*, YALE J. REG.: NOTICE & COMMENT

questions as to which cases ought to be "counted." In questioning our method of case selection they asked, for example, should *obiter dicta*—positions on a legal question that were not necessary for the final dispositions of the cases—be given the same weight as *ratio decidendi*? Or, should consumer disputes in areas governed by a specific statute be distinguished and even tossed out of the what-is-the-common-law measurement? Even when such challenges were fueled by our peers' discontent with the content of the discovered precedents, we welcomed these exchanges, as they offered the opportunity to refine our approach and more effectively articulate our reasoning. We were interested in capturing courts' reasoning on specific contract-related issues within the context of consumer transactions and evaluating how this reasoning shaped subsequent judicial decisions even when these issues were not determinative of the case outcome. Frequently, such issues were intertwined with claims involving statutory rights. Consequently, we avoided drawing rigid distinctions between holdings and dicta. Our adoption of an empirical strategy with clear objectives and a transparent methodology aims to promote fact-based debates, which we believe is how restatements ought to be crafted.

As it happened, the specific challenges raised by the reviewers did not change the overall direction of the rules we found and restated. Whether court opinions that classify privacy notices as contracts outnumber those that don't by a ratio of 7:1 (as we found) or 4:1 (as one critic found) should not, under any plausible conception of precedent, affect the bottom-line rule of a restatement. The conclusion of both studies agreed: courts overwhelmingly treat privacy policies as contracts when they satisfy necessary elements. What the replication studies allowed us to nevertheless accomplish is to qualify and refine some of the commentary accompanying the rules and to further explain and defend the methodological choices.

We repeated this exercise for several other key doctrinal questions that the Restatement needed to resolve, including contractual modifications, the application of the parol evidence rule in the consumer standard form contract setting, and the adoption of the highly controversial "pay now, terms later" contractual provisions ("shrinkwraps"), on which we will say more in the next section. The empirical methodology also revealed important insights about which cases become influential and how the common law develops over time. Surprisingly, most of the innovative case law began developing in federal courts, reaching the highest state courts—who ruled consistently with and were guided by federal court decisions—*years* later.[6] Had we focused only on the decisions of high state courts, we would have missed the entire

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BLOG, https://www.yalejreg.com/topic/symposium-on-the-draft-restatement-of-the-law-of-consumer-contracts/ (last updated Mar. 29, 2019) [https://perma.cc/GN2L-N5NB].

[6] *See* Samuel Issacharoff and Florencia Marotta-Wurgler*, The Hollowed Common Law*, 67 UCLA L. REV. 600 (2020).

development of the law as well as opinions whose analysis laid the foundations for the doctrine as it exists today.

The empirical analysis of the case law is included in the *Reporters' Notes*, which is not part of the ALI official text. Future reporters may want to consider conducting such analysis to gage the entire state and development of the case law and to join the current, empirically minded direction of legal research and practice. Legal scholarship has undergone massive transformation, with rigorous methods of measurement and prediction brought in to refine the understanding of the law and its effects. These tools have also become widely available in litigation and practice, including in consumer lawsuits (e.g., the use of surveys in false advertising suits). We hope our approach to complementing the traditional analysis with an empirical one can set a precedent for future restatement projects.

II. The Right to Know

Mandated disclosure reigns triumphant. Disclosure requirements—duties to give people information to help them make better decisions—appear everywhere, and nowhere more abundantly than in consumer transactions. This triumph, Carl Schneider and Omri Ben-Shahar explained in their 2014 book *More Than You Wanted Know: The Failure of Mandated Disclosure*, is understandable. People make complex decisions when dealing with more sophisticated businesses, often with no experience and poorly informed. So it makes sense to force these businesses to disclose to their customers the critical information needed for a prudent decision. Mandated disclosure is intuitively alluring and as a result it is invariably enacted with little or no opposition in every corner of consumer law (and well beyond).

The problem is that mandated disclosure does not work; it cannot be fixed; and it can do more harm than good. It has failed time after time, in place after place, in area after area, in method after method, and in decade after decade. Disclosures are not read because they describe complex facts in complex language; because they are too dense and too frequent; and because it is entirely rational for consumers, who not only face a clutter of information within each disclosure but also a clutter *across* disclosures, to spend their time in more satisfying ways than reading fine print.

And yet courts insist on disclosure. And, in a Restatement project, the Reporters—even those who are convinced that it will do no good—must restate the law as applied by the courts. Specifically, despite the growing recognition of its futility, courts require a "reasonable notice" to the consumers of the contract terms. The scope, content, and format of this notice requirement has become the linchpin of multiple consumer contracts cases. When should the notice arrive? What wording would suffice to put consumers on alert? How accessible and understandable should the notice be? How big its font? If in

days past courts tried to scrutinize the legibility of the substantive terms themselves, much of the jurisprudence surrounding digital consumer contracts has turned to focus instead on the advance notice regarding the very presence of, and how to access, the additional boilerplate terms that govern the relationship between the business and the consumer.

This development has become most salient in the context of standard contract terms that arrive after the consumer had assented to the transaction—what is sometimes referred to as pay-now-terms-later (PNTL) contracts. Beginning in the 1990's, some courts held that standard terms shrinkwrapped inside the product's box were enforceable even though they were impossible to access and read until after the purchase was concluded. Persuaded by two influential decisions of Judge Frank Easterbrook, these courts said that so long as consumers had an opportunity to review the terms *after* the purchase and, if not to their liking, withdraw and get their money back, these terms-in-the-box are adopted as part of the contract. This line of cases was heavily criticized by contracts professors, who also pointed that some courts refused to enforce PNTL contracts. To the naked eye, therefore, the question seemed unresolved. Casebooks taught 1L students that there is a split among courts, and the scholarly literature was adamant that enforcement of terms in the box violates basic principles of contract law and basic goals of consumer protection and is therefore a temporary common law outlier.

With such rupture within the profession, it was time to take a close look at what courts on the ground actually do. As described in Part I, we conducted a survey of the entire caselaw. We found a pattern that surprised us. The split that has been presented to students in the classroom and in (thousands of) pages of law review articles does not exist in the caselaw! There is no longer any meaningful disagreement among jurisdictions: the shrinkwrap doctrine has been embraced by a commanding, and growing, majority of courts. Pre-contractual disclosure of terms was not strictly required, permissibly replaced by post-contractual disclosure coupled with an extended right to withdraw, *and* a pre-contractual notice that such terms were coming.

Accordingly, the Restatement included a provision, Section 2(b), that allows for standard contract terms to be adopted even when they are "available for review only after the consumer manifests assent to the transaction". The section's comments explain that such deferral of disclosure is largely harmless in a market reality in which consumers almost never review the content of the terms.

But consumers' "right to know" is an axiom of such mythical force that the same section 2(b) was incrementally bolstered to require a whole list of auxiliary pre-purchase notices. If the terms themselves are not yet disclosed, a stand-in notice should, at the very least, be posted to let consumers know that additional terms, which are intended to be legally binding, are coming. In addition, consumers must be notified about the opportunity to review such terms

and about the option to reject the terms by terminating the contract. The pre-purchase notice must also include an explanation that the failure to terminate would result in the adoption of those terms. Similar notices about the existence of terms is required when terms are made available before the consumer assents to the transaction. And, of course, the consumer must be able to review the terms themselves—either before or after assenting to the transaction.[7]

While a notice about the existence of terms, or that terms are coming, is typically done in a short sentence and is therefore, if read, more likely to be understood and acknowledged by consumers than the hopelessly long full disclosures of the contract terms, we doubt that it will provide much protection for consumers. For one, most consumers already know that almost every transaction comes with standard contract terms. The few consumers who don't know this are also those who are particularly unlikely to read and understand the required notice. Besides, what's the use of alerting consumers to the presence of terms they will not read?

The growing stack of notice requirements allows courts to rule that the provided notice was insufficient and thus refuse to enforce the standard terms. The contract stands, but without the pro-business boilerplate. Indeed, more and more courts have been expanding their "reasonable notice" jurisprudence for this very purpose. In the past, courts could deny enforcement of suspect terms on substantive grounds. Specifically, courts scrutinized terms in the fine print that require consumers to resolve any dispute with the business through one-on-one arbitration. Courts deemed such terms unconscionable, finding that these arbitration clauses were designed to deny consumers realistic access to any remedy for breach or other abuse by the business. But this route had been narrowed in a series of decisions by the Supreme Court. Denied the unconscionability route, lower courts now hold that these arbitration terms are not adopted in the first place. Why? Because of insufficient notice. Courts have noticeably dialed up the notice requirements and then found that these requirements have not been met. Opinions that once included substantive discussions on the merits of specific clauses now devote pages to analyzing font size, contrasting color schemes, and text placement.

It remains to be seen how long this "reasonable notice" approach to the policing of consumer contracts can stay effective. We suspect that businesses will learn to draft disclosures that meet the courts' requirements (clear statement of legal effect, large fonts, bold face, contrasting colors, central location on the computer or smartphone screen, etc.), which is not very difficult or

[7] Similar disclosures are also required for the modification of standard contract terms. Section 3 of the Restatement requires: (1) a notice of the proposed modified, (2) a reasonable opportunity to review the terms, (3) a notice of the opportunity to reject the proposed modified terms and continue the contractual relationship under the existing terms, and (4) a notice that continuing the contractual relationship without rejecting the proposed terms will result in the modification being adopted.

costly. And we fear that the heightened disclosure could backfire: the more disclosures firms provide, the harder it would be to successfully mount a defense of unconscionability (specifically, it would be difficult to satisfy the procedural unconscionability prong) or deception. Any protections consumers are currently enjoying as a result of this increased notice requirement are thus likely to be short-lived.

III. Social Science Realism – Take I: Unconscionability

Consumer contracts are its own species of private law because they are interactions between the least sophisticated parties on one side and the most sophisticated on the other. This is a minefield of manipulations, opportunism, disappointments, and various psychological-cognitive biases. It is therefore ripe for legal interventions crafted through the lens of the social sciences, particularly those that analyze market failures and distortions and provide concrete formulations of these landmines.

In our scholarship on consumer contracts, we studied contract doctrines through the lens of economics and psychology. To us, consumer contract law's primary purpose is to correct or offset distortions that occur in consumer markets—the market failures and decision impairments that economists and psychologists study. As Reporters, we sought to clarify the scope of the protective doctrines in the field through reliance on these social science tools.

For example, when the law refers to "imbalance" in bargaining power, could we anchor this concept in the economics of market transactions? The fact that parties are not symmetric in their capacities does not necessarily result in imbalance, so long as competition weeds out exploitative behavior. Imbalance nevertheless arises if consumers have limited information, literacy, numeracy, or cognitive capacity. It could owe to some consumers' tendency to make rash and regrettable decisions, or to purchase things they don't need. Imbalance could also arise from tactics employed by businesses that defeat competitive pressures. Such tactics include subtle influences to agree, choice architecture that makes it costly to say no, transaction design that is unnecessarily complex, an overload of features that are unfamiliar to consumers, and so forth. Surely, courts developing legal protections in these scenarios are responding intuitively to these challenges. We thus sought to deploy the relevant body of social science knowledge to clarify the incidence of and reasons for legal interventions.

There is one doctrine of consumer contract law particularly befitting such treatment – *procedural unconscionability*. It is an element in the broader doctrine of unconscionability, itself one of the primary tools to rid the contract of particularly abusive terms which gravely diminish the value that consumers get. Recognizing, however, that sometimes consumers agree to receive low quality and less protections in exchange for bargain-basement prices, the

common law developed the additional requirement of procedural unconscionability. It requires that there be some distortion or failure in the bargaining process, some feature in the transaction environment that helped the business slip in the abusive term without the consumer noticing or objecting. The typical test courts employ to describe the presence of procedural unconscionability is "unfair surprise" or "lack of meaningful choice." Both qualifiers – 'unfair' and 'meaningful' – leave much room for discretion. Could this discretion be guided by social science research?

"Unfair surprise" is a test that would particularly benefit from a bit of behavioral economics. In fact, so much of consumer protection law, including the statutory doctrines of anti-deception, the law of false advertising, and doctrines of informed consent, are founded on concerns akin to unfair surprise. The test seems to refer to consumers' state of mind (are they subjectively surprised?), but its legal formulation is notoriously vague. The law does not know a person's subjective state, so proxies and objective indicia must be used to infer it. The problem becomes harder because every boilerplate term is a "surprise" if it is not part of the "core" terms that lured the consumer to make the purchase. Consumers typically know only the general description of the product, its price, and maybe the extent of a right to withdraw. All other terms and conditions are technically a surprise. Does that meant that they rise to the level of *unfair* surprise?

We viewed this phenomenon of bargaining over invisible terms in a market context. What courts must ask is whether the specific suspect term is one that affects consumers' contracting decisions. Did the presence of the term factor into the consumer's choice to enter the contract? Did it impact the price consumers paid? A term that affects the contracting decisions of a substantial number of consumers is more likely to be subject to forces of market competition, even if it is not negotiated and even if it appears in the contracts of all businesses in the relevant market. Such a term may be policed by market forces, and so policing by courts—through the unconscionability doctrine—is less necessary and may lead to undesirable results, including a reduction in consumer choice. Conversely, terms that do not affect consumers' contracting decisions are not subject to market discipline, and so the unconscionability doctrine is necessary to police such terms.

Consider two contrasting examples: termination penalties and arbitration clauses. Many subscription services (e.g., to fitness centers) offer a menu of price options, including "lock-in" deals that involve a lower periodic charge along with high termination penalties. Consumers who seek to terminate prematurely may be angered by such exit fees, but they typically understand the tradeoff that led to their inclusion, and the general impact of such provisions is typically a central part of the transaction, which affects consumers' contracting decisions. Thus, an agreement that includes a consumer's long-term commitment backed by the termination fee is not procedurally unconscionable.

On the other hand, arbitration clauses are not part of the pricing scheme or the bargaining options that consumers face when entering the contract. They are complex and they deal with contingencies that are infrequent and obscure. Rarely if ever do consumers reflect on them when deciding whether to make the deal. Indeed, it is telling that many of these clauses are adopted not during the original bargain but in the course of one of the many modifications of the standard terms that the business initiates. Since these clauses do not affect consumers' contracting decisions, courts could find that they are procedurally unconscionable. To be clear: We believe that most standard terms do not affect consumers' contracting decisions and thus are more like arbitration clauses than termination penalties. Accordingly, the Restatement includes a presumption that standard terms are procedurally unconscionable.

In developing this market-oriented test and offering it as a foundation for the inquiry of "unfair surprise," the cognitive notion of *salience* should play a central role. A term that is salient is likely to affect the contracting decisions of a substantial number of consumers, and competition can normally be counted on to police it. While the term "salience" itself is not in the black letter of the unconscionability section, nor the comments, the underlying test—whether the term is likely to affect the contracting decisions of a substantial number of consumers—is clearly articulated in the comments. We hope that these comments will help to shift the "unfair surprise" doctrine away from legal tests of conspicuousness of disclosure texts and towards this non-legal criterion that builds on a social scientific understanding of contracting dynamics. Specifically, standard contract terms could be non-salient even if they satisfy legal-mechanical requirements of disclosure, of affirmative signatures, or of lay language. Many courts and various statutes in consumer contract law have relied on such ceremonial rituals of disclosure to determine whether a term is sufficiently conspicuous, as a gateway to the application of the law's policing doctrines. In our view, this jurisprudence needs to be reformed. It is cognitively impossible for people to process and comprehend dense quantities of information packaged in standard forms, and therefore disclosures are ineffective even if technically conspicuous. If courts were to focus instead on the criterion of salience – namely, on what penetrates the cognition of consumers at the time of the deal – to determine whether the provision at question was indeed part of the bargain in fact, they would better serve the protective goals of the unconscionability doctrine.

IV. Social Science Realism – Take II: Deception

Social-scientific research is also useful in elucidating the doctrine of deception (and related rules). The starting point is common law fraud, an important but relatively narrow doctrine that prohibits outright lies—deliberate misrepresentations and negligent material misrepresentations. In consumer

cases, where courts adjudicate contract law claims alongside claims based on consumer protection law, the basis for invalidating deceptive practices is broader.

The Restatement's treatment of deception, in Section 7, begins with the common and unfortunate scenario in which a seller makes a promise or affirmation, orally or in an advertisement, and then negates or trims down this promise or affirmation in the fine print. While this practice might not technically qualify as fraud—after all the seller provided all relevant information in the standard terms at the decisive moment of contract formation, the deception here is obvious. Consumers do not read the fine print. But they often rely on affirmations and promises that are communicated through more salient means—an oral conversation with a sales agent or an advertisement. Giving priority to the less salient communication is a recipe for manipulation and deception.

The rules in the Restatement reflect this realism. It is deceptive to promise that a product has a certain feature or capability and then walk back this promise in the fine print, even if such actions would not constitute fraud (since the walking back was disclosed to the consumer before assent was manifested). The deceptive term, or the entire contract, is rendered unenforceable. The law's prioritization of the salient promise or affirmation over the non-salient fine print also manifests in other rules in the Restatement. Section 8 makes clear the salient affirmation or promise is binding, including in circumstances where it is issued by a third party in the chain of distribution (e.g., the producer rather than the direct seller). And Section 9 reflects courts' willingness to weaken the strict application of the parol evidence rule in consumer contracts, where it is far less plausible that the written fine print terms reflect an agreement by consumers to override the prior oral affirmations or promises that had lured them into the transaction.

Beyond this treatment of potential conflicts between salient affirmations and promises and non-salient fine print, the Restatement shines light on other instances of deception, using insights from social science. First, the Restatement classifies as deceptive the various representations, including the suppression of facts, that have the effect of obscuring or deprioritizing critical information. As we explain in the Comments to Section 7 on Deception, "Businesses naturally highlight positive and favorable aspects of the product and the transaction, but when the practices of selective presentation of information manipulatively obscure the less favorable but critical aspects, they have a deceptive quality." This form of deception, which does not involve outright lies but rather more subtle avenues of manipulation, is common in contracts, where "price is multidimensional, comprised of different fees, rates, discounts, rebates, add-ons, etc." With such complex, multi-dimensional pricing, "[i]t is misleading for a business to unduly emphasize certain price dimensions as part of the core deal terms, while relegating other price dimensions to

the non-core standard contract terms, if such emphasis obscures the total cost. When certain price dimensions are contingent upon the occurrence of future events, it is deceptive for a business to make a false or misleading affirmation of fact or promise about the likely occurrence or nonoccurrence of such events." Similarly, "it is deceptive to invite consumers into a transaction while obscuring the fact that beneficial attributes consumers reasonably expect from such transactions, and which are central to consumers' contracting decisions, are absent." We emphasize that "a business may deceptively obscure a term or its effect in an affirmative manner, as when information necessary to correct misperceptions is overshadowed by other terms the business prioritizes." But that "[t]he obscuring may also result from an omission by the business, as when the business has reason to believe that the consumer reasonably but mistakenly expects a particular term or a particular benefit and fails to correct that expectation."

In articulating these categories of deception, the Restatement relies on social science research that emphasizes consumers' limited capacity to absorb and process information about product attributes. Because of this limited capacity, sellers can manipulate consumers by strategically prioritizing information about their product's benefits and de-prioritizing information about the product's shortcomings.[8] This form of manipulation harms consumers and thus the law has evolved to protect them against it by rendering the offensive term, or the entire contract, deceptive and thus unenforceable.

Conclusion

This is a short essay on the *subtext* of the Restatement of Consumer Contracts. The document itself spells out the state of the art of consumer contract law, and it also introduces methodological innovations to the craft of common law codification and highlights the directions in which this body of law is moving.

Three pragmatic ambitions guided us in our work. First, to build a structural process of case review that would deliver greater precision to the task of identifying what the law is. Cases are data. While there are important benefits to giving experts discretion in identifying the "leading" precedents, such a qualitative approach runs the risk of missing much of the data and being influenced by subjective choices. Our work demonstrated how critical it is to go beyond that initial qualitative step and spread the net more widely, examine the case law more systematically, and present the influential decisions more transparently.

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[8] *See* Oren Bar-Gill and Omri Ben-Shahar, *Misprioritized Information: A Theory of Manipulation*, 52 J. Legal Stud. 305 (2023).

Contract law is a unifying framework for all types of contracts, and yet consumer contract law exists as a category for pragmatic reasons. Chief among these reasons is the recognition that the general rules of contract law need some adjustments to fit transactions between parties so asymmetrically positioned, if we are to preserve the benefits of voluntary bargains. Accordingly, our second ambition as Reporters was to emphasize consumer protections that work and deemphasize ones that don't. On the emphasizing end we had some drafting success: sharpening the anti-deception and anti-manipulation tools of contract law to address the more subtle forms of undue influence; and promoting a market-based understanding of procedural unconscionability. On the deemphasizing end, we were hoping *not* to do what many others in this area often do, which is to heighten the disclosure mandates and to require various notices that consumers never notice anyway. But, alas, courts do require such "protections" and as reporters of an ALI Restatement we halfheartedly but obediently restated them, noting in the Introduction and the comments that they are almost never effective.

Consumer contracts are vulnerable to various market failures often caused by cognitive handicaps of consumers, including judgment errors that are strategically heightened by businesses. Addressing these failures through the rules of contract law in a manner that does not overly restrict private choices requires careful diagnoses of the patterns of misjudgment. Accordingly, our third ambition was to enrich the conceptual and terminological handbook of consumer contract law with social science underpinnings. This was not merely scholarly vanity. It is a pragmatic step towards refocusing the law's policing doctrines on behaviors where harm to consumers is greater, and on interventions that are more likely to be useful. It is a step towards marking the boundaries of legal rules by factors and criteria that vary across markets and that could be more readily measured.