Taking Boilerplate Seriously

TAKING BOILERPLATE SERIOUSLY: TACKLING EXPLOITATION IN CONSUMER CONTRACTS

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ABSTRACT

Current approaches to consumer standard form contracts assume that imbalanced and unfair terms can be adequately challenged by aggrieved consumers and effectively scrutinized by vigilant courts. Some even believe that market forces and reputational constraints can deter firms from employing exploitative terms in their form contracts or dissuade them from actually relying on such terms. Criticizing these assumptions, this Article calls for a conceptual shift toward the scrutiny of exploitative consumer standard form contracts.

The Article suggests supplementing the current means of addressing opportunistic exploitation in standard consumer contracts with a dynamic preventive machinery. Specifically, we propose a professional system of administrative oversight over the content of consumer form contracts. The Article demonstrates how such a machinery can efficiently tackle the widespread use of unfair, unconscionable and illegal terms. While not a panacea, such a regulatory regime has the promise of shifting the burden of confronting exploitation in consumer contracts from a feeble and ineffective system of private enforcement to a sophisticated and robust system of public oversight.

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INTRODUCTION

Consumer standard form contracts ("consumer contracts") are somewhat comparable to viruses. Like viruses, potentially harmful consumer contracts are everywhere, yet may seem benign or dormant much of the time. Consumers can easily find themselves agreeing to unfair or even illegal terms in such contracts without even being aware of their existence. Furthermore, boilerplate terms can often change and mutate, with the consumer unaware as to the nature of the mutation and the risks the change might entail. While both viruses and consumer contracts have a bad rap, their presence can also be beneficial. For the contribution of viruses to human welfare see, e.g., Viruses: You've Heard the Bad; Here's the Good, SCIENCE DAILY (Apr. 30, 2020) available at https://www.sciencedaily.com/releases/2015/04/150430170750.htm; Beth Skwarecki,
transaction costs, increase efficiency, serve as a potential check on salespeople and agents, and provide consumers with a sense of equality and solidarity. However, the significant costs imposed on consumers by exploitative boilerplate terms are, just like viruses, hard to detect, delineate, control, and contain. Following this analogy, this Article calls for a conceptual shift in the approach to the enforcement of fairness and legality in consumer contracts, whereby ex ante prevention is preferred over ex post treatment.

Academics have studied the phenomenon of consumer form contracts and the unique problems they create from multiple angles.2 Mounting theoretical insights and empirical findings explain how firms can easily impose unfair and inefficient burdens on consumers by taking advantage of consumers’ lack of expertise, cognitive biases, difficulty in processing data, unfounded trust, unawareness of relevant legal rules, and various other vulnerabilities.3 Consumers’ inferiority vis-à-vis the businesses with which they interact opens limitless opportunities for exploitation. This persistent reality has led to an increasing recognition of the


need to protect consumers from abusive contracting practices, including the use of unfair, inefficient, and often plainly illegal boilerplate terms.\(^4\)

Despite this wide acknowledgment, there is little agreement over the kind and scope of the appropriate protections.\(^5\) On one side of the spectrum, there is what we will call the minimalist approach. Its proponents regard the risk of exploitation as a reasonable price that consumers should pay for the benefits associated with standardized contracts, and regard any regulatory reform with great suspicion. Minimalists believe that issues such as opportunistic exploitation and contracting practices are better left to the self-regulation of the market.\(^6\) Policymakers should therefore endeavor to keep competitive markets free from state intervention, except in extreme instances of abuse or of clear market failure, that can be addressed cost-effectively.\(^7\)

Maximalists, on the other hand, submit that consumer contracts deserve radically different legal treatment than ordinary or classical business contracts. According to this approach, most consumer markets feature unequal bargaining power and suffer from chronic market failures that justify legal intervention. Advocates of this approach have called for much stronger—and

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\(^4\)See, e.g., Louis Kaplow & Steven Shavell, Fairness versus Welfare 215-221 (2002) (opining, while discussing advantage-taking in the contractual context opined, “[t]hat unsophisticated buyers may become subject to value-reducing arrangements is obvious… Welfare economic analysis may favor… replacing one-sided contract terms with more reasonable ones.”). See also infra notes 8-12.

\(^5\)Cf. Jean Braucher, Unfair Terms in Comparative Perspective: Software Contracts, in COMMERCIAL CONTRACT LAW: A TRANSATLANTIC PERSPECTIVE (2013) (noting that “[M]ost policymakers, regulators, and scholars concede that there often can be no real assent to mass-market standard terms, but then balk at meaningful solutions to address market failure.”).


wider control over both the procedural and the substantive aspects of consumer form contracts.\(^8\)

Elsewhere on this spectrum, one finds innumerable middle ground or mixed approaches. While acknowledging the gravity of the problem, members of this ever-growing camp recommend milder and more nuanced solutions than those imagined by the maximalists’ activist approach.\(^9\) These middle ground options include imposition of wider disclosure or transparency duties on firms;\(^10\) bolder judicial application of traditional contract doctrines such as unconscionability or interpretation;\(^11\) and establishment of voluntary pre-approval mechanisms.\(^12\)

\(^8\) See, e.g., Karl Llewellyn, The Common Law Tradition: Deciding Appeals 370 (1960) (suggesting that any “non-dickered” terms of a standard form should be understood as expressing not a specific assent by the consumer but rather a “blanket assent” to “any not unreasonable or indecent terms the seller may have on his form”); W. David Slawson, Standard Form Contracts and Democratic Control of Lawmaking Power, 84 Harv. L. Rev. 529, 529 (1971) (arguing that consumer contract terms are “almost universally unfair”); Lewis A. Kornhauser, Unconscionability in Standard Forms, 64 Calif. L. Rev. 1151, 1162 (1976) (suggesting that “most clauses of standard form contracts are candidates for nonenforcement”); Todd D. Rakoff, Contracts of Adhesion: An Essay on Reconstruction, 96 Harv. L. Rev. 1174, 1176, 1242, 1250-1255, 1258 (1983) (proposing that any non-negotiated terms ought to be considered presumptively unenforceable, unless clearly ‘visible’ to consumers); Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (severely criticizing the current legal regime and favorably discussing stronger regulatory solutions to combat the degrading effect of harsh boilerplate terms).


\(^10\) See, e.g., Ian Ayres & Alan Schwartz, The No-Reading Problem in Consumer Contract Law, 66 Stan. L. Rev. 545, 553 (2014) (proposing the use of warning boxes as a response to the “no-reading” problem); Lauren E. Willis, Performance-Based Remedies: Ordering Firms to Eradicate Their Own Fraud, 80 Law & Contemp. Probs. 7, 30 (2017) (positing that firms should reduce consumers’ confusion and demonstrate that their consumers comprehend key features of the firm’s products and services); Uri Benoliel & Shmuel I. Becher, The Duty to Read the Unreadable, 60 B.C. L. Rev. 2255 (2019) (courts should not insist on applying the duty to read to unreadable contracts); Shmuel I. Becher & Uri Benoliel, Sneak in Contracts: An Empirical and Legal Analysis of Unilateral Modification Clauses in Consumer Contracts, 55 Ga. L. Rev. (forthcoming, 2020) (offering a range of strategies to combat unilateral modification clauses in consumer contracts).

\(^11\) See, e.g., Jacob Hale Russell, Unconscionability’s Greatly Exaggerated Death, 53 U.C. Davis L. Rev. 965 (2019) (suggesting that the doctrine of unconscionability be tailored to the individual consumer in order to better address the problem of consumer heterogeneity). For further discussion see infra Part II.B.

\(^12\) See, e.g., Clayton P. Gillette, Pre-Approved Contracts for Internet Commerce, 42 Hous. L. Rev. 975 (2005); Shmuel I. Becher, A “Fair Contracts” Approval Mechanism:
The main contribution of this Article is twofold. First, it presents a thorough and up-to-date critical assessment of the current approaches to exploitative boilerplate terms in consumer contracts.\textsuperscript{13} We argue that the existing approaches overestimate the ability of market forces, individual consumers, courts, and even mandatory legislation to tackle this problem. In doing so, we place the debate over the appropriate treatment of unfair or illegal terms within the context of a wide, rich, and ever-growing body of conceptual and empirical literature.\textsuperscript{14}

Second and most importantly, we formulate a full-fledged argument in favor of adopting a bold, clever, and systematic administrative check on the content of consumer contracts. Effective protection from exploitative terms, we argue, requires assigning a greater role to federal and state consumer agencies. Surprisingly, the vast American literature on consumer contracts has—until now—failed to take this option seriously and to thoroughly investigate its potential. While there seems to be a growing tendency to consider administrative regulation as an optional enforcement tool, discussions of this option have too often been sketchy and incomplete.\textsuperscript{15} This Article explores this option more systematically.


\textsuperscript{13} As we explain in Section I.B infra, we use the term “exploitative” as an umbrella term for imbalanced terms that are unjustified on fairness or efficiency grounds.


\textsuperscript{15} The option is rarely considered and when mentioned barely examined even by its proponents. See, e.g., Kaplow & Shavell, supra note 4, at 217, n. 146 (2002) (mentioning the option and noting that “if reasonably accurate legal intervention were possible at low cost, then parties would generally be better off…”); Todd D. Rakoff, \textit{The Law and Sociology of Boilerplate}, 104 Mich. L. Rev. 1235, 1243 (2006) (suggesting that the job of boilerplate scrutiny be given to “expert administrative agencies, nonprofit trade associations, [leader] law firms… and even… publicity-minded watchdog groups”); Radin, supra note 8, at 240 (opining that “US legislators or administrative bodies could at least consider disallowing certain [boilerplate] clauses…”); Furth-Matzkin, \textit{Harmful Effects}, supra note 14, at 1065-1066 (briefly proposing State pre-approved lease agreements); Furth-Matzkin & Sommers, supra note 3, at 544-45 (suggesting statutory damages, fee-shifting provisions, and even administrative enforcement to combat fine-print fraud). For two notable exceptions, examining some aspects of administrative scrutiny and its potential see Larry Bates, \textit{Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of
It develops substantive and procedural principles to guide the discretion of the pertinent agencies. While doing so, it draws attention to the merits and the challenges involved in taking this path.\textsuperscript{16} At first blush, administrative scrutiny over consumer contracts may seem an unrealistic and costly measure of enforcement. Yet, this Article argues that—like in many other domains—systematic prevention is wiser, more effective, and ultimately cheaper than treatment.\textsuperscript{17} Rather than allowing harmful boilerplate terms to flood consumer markets uncontrolled, policymakers should make a conscious endeavor to prevent exploitative terms from ever reaching those markets. Instead of expecting consumers to challenge such standard terms in court (or in arbitration) \textit{ex post}, professional public agencies should shrewdly monitor consumer contracts in order to detect and respond to such terms \textit{ex ante}.

Under the model we envisage, these governmental agencies will selectively yet systematically and cost-effectively collect samples of widely distributed boilerplates in carefully selected sectors. They will then subject these contracts to professional (partly computerized) scrutiny. Where exploitation seems evident, serious, and sufficiently widespread, the agency will request the form-user to remove or revise the suspect terms. If, after deliberation, no consent is reached between the parties, an order restraining the further use of the provisions deemed exploitative will be issued, backed up with a civil or administrative penalty.

The analysis below proceeds in three stages. Part I briefly discusses the roots of exploitation in consumer contracts. It further underlines an important analytical distinction between three types of exploitative boilerplate terms. Thereafter, it highlights the significant, and at times unique, social costs involved with exploitative boilerplate terms. Part II offers a critical assessment of the three major approaches to the problem of exploitative terms in consumer contracts: the market-based approach, \textit{ex ante} statutory regulation, and judicial scrutiny.

Against this background, Part III presents the case for administrative oversight of consumer contracts. As the discussion

\textit{Consumer Protection}, 16 \textit{Emory Int’l L. Rev.} 1, esp. at 90-105 (2002) (strongly supporting the option); Gillette, \textit{Pre-Approval}, supra note 4 (assessing a more limited reform under which public agencies may be asked by form-users to approve their consumer contracts).

\textsuperscript{16} See infra Part III.

illustrates, the proposed model involves some challenges and is in no way a panacea. However, given the enduring failures of the current system, we submit that the time is ripe to prepare the ground for a conceptual shift in the treatment of exploitation in consumer contracts.

I. THE PROBLEM OF EXPLOITATIVE BOILERPLATE

It is widely recognized that when entering consumer contracts, consumers face exploitative and potentially harmful boilerplate terms of which they are often unaware and to which they have not expressed their assent in a meaningful way. This Part clarifies the nature of this risk. Section A succinctly investigates the roots of the problem. Next, Section B offers an analytical distinction between three types of exploitative boilerplate terms. Thereafter, Section C delineates the social costs of exploitative terms.

A. The Roots of Exploitation: Drafter Domination and Consumer Vulnerability

Consumer contracts are typically pre-drafted and offered on a take-it-or-leave-it basis. As a result of this fundamentally unequal bargaining power, the average consumer does not have any influence on the specific content of most of the terms included in their contracts. Hence, consumers typically lack sufficient incentive to invest efforts (time, energy, money) in studying these


19 See, e.g., Slawson, supra note 8, at 530 (“Even the fastidious few who take the time to read the standard form may be helpless to vary it. The form may be part of an offer which the consumer has no reasonable alternative but to accept.”); RADIN, supra note 8, at 9 (“Standardized form contracts, when they are imposed upon consumers, have long been called ‘contract of adhesion,’ or ‘take-it-or-leave-it contracts,’ because the recipient has no choice with regard to the terms.”).

20 See, e.g., Slawson, supra note 8, at 532 (“The power to contract in this situation is the power of one party to impose whatever terms he likes on the other.”). See also Robin Bradley Kar, The Emerging New Life of Contract Law Studies, in Symposium on Omri Ben-Shahar & Carl E Schneider, More Than You Wanted to Know, Contracts Profs Blog 101, 116 (“We need to seriously rethink how much boilerplate should be legally enforceable, so that both consumers and corporations have more equal power to decide the terms of the choices they are making.”).
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terms which, in any event, are non-negotiable.\textsuperscript{21} The inattention of consumers is especially acute with respect to “non-salient” terms, i.e., terms to which the average consumer will not pay attention.\textsuperscript{22} This, in turn, leads to a fundamental market failure known as imperfect (or asymmetric) information, where non-salient boilerplate terms are prone to become exploitative.\textsuperscript{23}

Furthermore, in certain consumer markets, consumers may face little variation in contract terms. Many firms tend to mimic and copy boilerplate terms from one another.\textsuperscript{24} This similarity further undermines consumers’ incentive to become familiar with the content of consumer contracts. It therefore comes as little surprise that consumers generally do not read their contracts,\textsuperscript{25} which are quite often unreadable to begin with.\textsuperscript{26}

In addition, consumers suffer from various cognitive biases that affect their purchasing patterns and contracting behavior. These biases make consumers less likely to appreciate the risks entailed in consumer contracts.\textsuperscript{27} Moreover, as recent experimental studies demonstrate, the fine print influences consumers’ moral

\textsuperscript{21} See, e.g., Gillette, Rolling Contracts, supra note 2, at 680 (“Failure to read may be perfectly rational, especially given the inability to negotiate around terms.”).

\textsuperscript{22} See, e.g., Korobkin, supra note 3, at 1225, defining the “non-salient” terms of a transaction as those terms dealing with product attributes that are not “evaluated, compared and implicitly priced as part of the purchase decision.”

\textsuperscript{23} For further discussion of this market failure and its normative implications see infra Part II.A.

\textsuperscript{24} See, e.g., Slawson, supra note 5, at 531 (“Most buyers probably believe (correctly) that the forms they could have bought from a competing seller would have been just as bad anyway.”); Robert A. Hillman & Jeffery J. Rachlinski, Standard-form Contracting in the Electronic Age, 77 N.Y.U. L. Rev. 429, 435-36 (2002) (same). This is not to say that consumer contracts are static or that variations never exist across suppliers of similar products. See e.g. Florencia Marotta-Wurgler & Robert Taylor, Set in Stone: Change and Innovation in Consumer Standard-Form Contracts, 88 N.Y.U.L. Rev. 240 (2013) (documenting the dynamic nature of standardized End User License Agreements – hereinafter “EULAs”).

\textsuperscript{25} See Yannis Bakos et al., Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, 43 J. LEGAL STUD. 1 (2014) (establishing empirically that very few consumers read EULAs). Notably, this holds true even with respect to contract law professors: Jeff Sovern, The Content of Consumer Law Classes III, 22 J. CONSUMER & COM. L. 2, 6 (2018) (reporting survey results according to which 57% of consumer law professors “rarely or never” read consumer contracts).

\textsuperscript{26} Benoliel & Becher, supra note 10 (finding that more than 99% of the 500 standard online contracts studied are unreadable for the average consumer); Marotta-Wurgler & Taylor, supra note 24 (finding that the language used in EULAs resembles that of scientific articles).

\textsuperscript{27} See, e.g., Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. Rev. 211 (1995); Oren Bar-Gill, Seduction by Plastic, 98 NW. U. L. REV. 1373 (2004); Korobkin, supra note 3. The normative implications of consumers’ bounded rationality are further discussed infra Part II.A.
calculus, leading them to assume that they are morally and legally bound by standardized terms even when these are illegal or unenforceable. 28 Aware of these vulnerabilities, and given competitive pressure, firms are likely to employ exploitative boilerplate terms in their contracts. Such terms help firms to reduce costs and increase profits. 29 The next two Sections shed further light on the nature and effects of exploitative boilerplate.

B. The Threefold Face of Boilerplate Exploitation: Illegal, Unconscionable, and Unfair Terms

The terminology used to describe illegitimate terms in consumer contracts is inconsistent. Courts and academics refer to such terms employing a wide range of pejorative labels. These include, for instance, “imbalanced,” “one-sided,” “biased,” “unfair,” “unreasonable,” “unconscionable,” “unfavorable,” “onerous,” “abusive,” “oppressive,” “harsh,” “overreaching,” “exploitive” or “exploitative,” “misleading,” “hidden,” “surprising,” “unexpected,” “unenforceable,” “illegal,” “unlawful,” and “inefficient.”

In this Article, we have chosen the term “exploitative” to describe imbalanced boilerplate terms (i.e., terms unfavorable to the consumer) that are either morally unfair, socially (economically) harmful, or both. In this Section, we highlight an important analytical distinction between three categories of exploitative boilerplate: illegal, unconscionable, and unfair. The differences between these categories are theoretically significant and, as we explain in Part III, may have important policy implications.

1. Illegal Terms

By “illegal term,” we mean a contract clause in a consumer form contract that contradicts a cogent legal norm (statutory or


29 See, e.g., Omri Ben Shahar, Regulation through Boilerplate: An Apologia, 112 MICH. L. REV. 883, 893 (2014) (“Firms offer a variety of consumer-friendly legal arrangements… But when they do so, they make sure not to hide such attractive perks in the fine print. …It is mostly the stuff that consumers might not like (if they took the time to understand it) that is quietly tucked into the fine print.”). See also Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: The Problem of Market Manipulation, 74 N.Y.U. L. REV. 630, 743 (1999) (firms “will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits.”); Jeff Sovern, Towards a New Model of Consumer Protection: The Problem of Inflated Transaction Costs, 47 WILLIAM & MARY L. REV. 1635 (2006) (describing various tactics firms use to divert consumer’s attention from problematic standard terms, thus reducing market competition over terms); see also Korobkin, supra note 3. For further discussion of the effect of market pressure on sellers’ propensity to incorporate exploitative terms see infra Part II.A.
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common law). Traditionally, the literature on consumer contracts has given little attention to this phenomenon. This is perhaps due to the assumption that illegal terms are legally void and unenforceable, and thus cannot harm consumers. Further, from the drafting party’s perspective, it might seem futile to include an illegal term in the boilerplate that the firm will not be able to enforce against the consumer.

Reality proves this line of reasoning naïve. Upon further reflection, it becomes clear that inserting legally unenforceable terms into the fine print can greatly benefit form-drafters, at a very low risk. This is for a variety of good reasons.

First, consumers, who do not have affordable and constant access to legal counselling, may not be aware that a term is illegal. Consumers may therefore abide by it voluntarily or accept the seller’s demand to comply with it.\(^{30}\) Second, as we have already emphasized, consumers tend to believe that the fine print is legally binding even when in fact it is not, especially when the illegal term is formulated in an explicit and authoritative manner.\(^{31}\) Third, even if a consumer suspects that a term is illegal, she may still avoid confronting a powerful and experienced business, particularly one on which she may often depend. Thus, though illegal, these terms can nonetheless have a chilling effect on consumers, who may be unable or unwilling to effectively challenge these terms.\(^{32}\) On top of this, and most importantly, offering consumers boilerplate containing illegal terms has not yet, to the best of our knowledge, been recognized by courts or public enforcement agencies as an unfair or deceptive practice under UDAP laws.\(^{33}\) Hence, businesses lack a strong incentive to avoid this practice and not include illegal and unfair provisions.\(^{34}\)

\(^{30}\) See, e.g., Kurt E. Olafsen, Preventing the Use of Unenforceable Provisions in Residential Leases, 64 Cornell L. Rev. 522 (1979) (“Even though these clauses have no legal effect, landlords continue to include them in their leases. The reason is simple – a clause with no legal effect can still have tremendous practical effect if the tenant believes that it is binding.”); see also Stolle & Slain, supra note 3, at 91 (finding clear correlation between the existence of an exculpatory clause and the propensity of aggrieved consumers to forgo seeking compensation). The fact that the enforceability of certain biased terms varies from one state to another may also exacerbate the difficulty of knowing if the term is valid. Id., at 85.

\(^{31}\) See supra note 28 and preceding text.

\(^{32}\) Cf. the classic article by Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 L. & Soc. Rev. 95 (1974). The limits of individual enforcement are further discussed infra Part II.C.

\(^{33}\) For further discussion see infra Part III.

\(^{34}\) On the unfairness involved in using illegal terms see, e.g., Bailey Kuklin, On the Knowing Inclusion of Unenforceable Contract and Lease Terms, 56 U. Cin. L. Rev. 845, 846 (1988) (“It seems unfair that one should knowingly take advantage of another’s
The hypothesis that this phenomenon is both widespread and serious is supported by empirical evidence. In fact, the literature documents the continuous usage of illegal terms in form contracts in various domains, such as residential lease contracts, employment form contracts, and insurance contracts. These experimental and empirical studies suggest that, notwithstanding their unenforceability, plainly illegal terms are being incorporated by many form-drafters.

While a few scholars have highlighted this phenomenon, recent empirical studies have further established its wide scope and harmful effects. These recent studies reinforce the hypothesis that illegality in standard form consumer contracts presents a serious concern. Below we explain the role that administrative enforcement agencies may play in this context.

2. Unconscionable Terms

The unconscionability doctrine, incorporated into Article 2-302 of the Uniform Commercial Code (“UCC”) plays a vital role in ignorance of the law when, by including an unenforceable contract or lease term, one is misleading the other...)


38 See, e.g., Furth-Matzkin, On the Unexpected Use of Unenforceable Contract Terms, supra note 3 (finding that residential leases in Massachusetts regularly include unenforceable terms). See also Furth-Matzkin & Sommers, supra note 3; Furth-Matzkin, Harmful Effects, supra note 14.


40 See Wilkinson-Ryan, supra note 3; Furth-Matzkin & Sommers, supra note 3; Furth-Matzkin, Harmful Effects, supra note 14, at 1035 (“The experimental findings revealed that tenants reading contracts including unenforceable terms were... about eight times more likely to bear costs that the law imposed on the landlord than were tenants with contracts containing enforceable terms.”).

41 See infra Part III.
combating unfair terms, in contracts generally\textsuperscript{42} and in consumer contracts in particular.\textsuperscript{43} According to this doctrine, a court may refuse to enforce a contract or a clause therein if it finds them unconscionable.\textsuperscript{44} As a rule, unconscionability is considered a legal defense rather than a cause of action. A contracting party can invoke the doctrine in a standing action brought by the other party, i.e., as a ‘shield’ rather than as a ‘sword’.\textsuperscript{45}

The content of the concept of unconscionability is rarely definitively described.\textsuperscript{46} However, in due course it has become quite clear that it involves a combination or interaction of a procedural and a substantive aspect.\textsuperscript{47} Procedural unconscionability relates to

\textsuperscript{42} See Restatement (Second) of Contracts § 208 (1981) [Contract Restatement]. For the doctrine’s expansion to virtually any type of contract see e.g. Joseph M. Perillo, Calamari & Perillo on Contracts 336 (6th ed., 2009) notes 1-15.

\textsuperscript{43} Restatement of the Law on Consumer Contracts (Tentative Draft, 18 Apr., 2019) [Draft Consumer Restatement], at p. 76 (cmt. 1 to § 5) (“The doctrine of unconscionability is a primary tool against the inclusion of intolerable terms in the consumer contract”); see also Contract Restatement, § 208, Cmt. a: “Particularly in the case of standardized agreements, the rule of this Section permits the court to pass directly on the unconscionability of the contract or clause rather than to avoid unconscionable results by interpretation.”


\textsuperscript{45} See e.g. Super Glue Corp. v. Avis Rent A Car Sys., Inc., 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987); Cowin Equip. Co., Inc. v. Gen. Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984) (“the cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision…”). For many more judicial and academic references to the same extent see Brady Williams, Unconscionability as a Sword: The Case for an Affirmative Cause of Action, 107 Cal. L. Rev. 2015, 2017, fn. 4 (2019). Nonetheless, some commentators and a few courts have claimed that unconscionability can and should serve as a basis for affirmative actions as well (in restitution, damages, etc.). See, e.g. H.G. Prince, Unconscionability in California: A Need for Restraint and Consistency, 46 Hastings L.J. 459, 484-86, 545-48 (1995); James White & Robert Summers, Uniform Commercial Code, § 5, at 220-21, 236-40 (6th ed. 2010); Hazel Glenn Beh, Curing the Infirmities of Unconscionability, 66 Hastings L.J. 1011, 1021-25 (2015); Brady Williams, Unconscionability as a Sword: The Case for an Affirmative Cause of Action, 107 Cal. L. Rev. 2015 (2019) (arguing that the traditional view of unconscionability as a defense is unjustified descriptively, historically, and normatively).

\textsuperscript{46} “‘Unconscionable’ is a word that defies lawyer-like definition.” Calamari & Perillo, supra note 42, at 338.

\textsuperscript{47} See, e.g. Williams v. Walker Thomas, 350 F.2d 445, 449 (D.C. Cir. 1965) (“Unconscionability has generally been recognized to include an absence of meaningful choice… together with contract terms which are unreasonably favorable to the other party.”); Trinity Indus., Inc. v. McKinnon Bridge Co., 77 S.W.3d 159, 170-71 (Tenn. Ct. App. 2001) (same).
the specific conditions surrounding the formation of the contract. This may include the parties’ relative bargaining positions, any vulnerability of the weaker party (e.g., age, experience, mental capacity), and any dishonest or otherwise improper conduct that may have influenced the weaker party to enter the contract. In other words, procedural unconscionability is based on a defective or unfair contracting process that presumably impairs the weaker party’s freedom of choice. Substantive unconscionability, on the other hand, is based on the problematic outcome of the contracting process, namely on the content of the agreement which is deemed strongly imbalanced.

Typically, a clause or a contract will be declared unenforceable when both procedural and substantive unconscionability are clearly present, at least to a certain degree. The two elements are often said to influence one another, often described as a “sliding scale,” where more of the one element requires less of the other, and vice versa. Importantly, courts will intervene on grounds of unconscionability only if the combined effect of the substantive and

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48 See, e.g., Sitogum Holdings, Inc. v. Ropes, 352 N.J. Super. 555, 564 (2002) (“Procedural unconscionability can include a variety of inadequacies, such as age, literacy, lack of sophistication, hidden or unduly complex contract terms, bargaining tactics, and the particular setting existing during the contract formation process.”); Harrington v. Atl. Sounding Co., 602 F.3d 113, 125, 2010 U.S. App. (same).

49 See, e.g., Alan Schwartz, A Reexamination of Nonsubstantive Unconscionability, 63 Va. L. Rev. 1053, 1053 (1977) (“Nonsubstantive [procedural] unconscionability arises when certain factors, such as a lack of commercial sophistication, apparently prevent a contracting party from exercising his freedom to choose the terms of an agreement.”).

50 See, e.g., Sitogum Holdings, supra note 48, at 565 (“Substantive unconscionability simply suggests the exchange of obligations is so one-sided as to shock the court’s conscience.”).

51 This dominant approach is clearly reflected in the Draft Consumer Restatement, supra note 43, section 5(b). It is supported by Federal and State case law; see, e.g., Williams, supra note 47, at 449; Marin Storage v. Benco Contracting, 89 Cal. App. 4th 1042 (2001); Strand v. U.S. Bank Nat. Ass’n, 693 N.W.2d 918 (N.D. 2005). However, under a competing approach, either substantive or procedural unconscionability standing alone may be sufficient: Union Carbide Corp. v. Oscar Mayer Foods Corp., 947 F.2d 1333 (7th Cir. 1991) (procedural unconscionability suffices); Lowden v. T-Mobile USA, 512 F.3d 1213 (9th Cir. 2008) (substantive unconscionability may suffice). For a recent empirical study reporting on such ‘single-element’ cases see Brian M. McCall, Demystifying Unconscionability: An Historical and Empirical Analysis, 65 VILL. L. REV. (forthcoming, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3543682, at p. 37 (finding that “almost a third of all successful claims were successful notwithstanding either an explicit finding that one type of unconscionability was unproven or at least ruling based on finding only one type of unconscionability without ruling on the other”).

the procedural elements be so extreme as to "shock the conscience of the court." 53

A final and crucial point concerns the remedy for unconscionability. Because unconscionability is a legal defense rather than an element in any affirmative claim, the consumer's remedy is normally limited to a declaration of unenforceability. The result will not extend to an operative remedy, such as damages, an injunction, or restitution against the drafter. Hence, from the viewpoint of form-drafters, exposing consumers to unconscionable terms does not involve any substantial risk. 54 As we shall see later, 55 these basic features of the unconscionability doctrine pose major obstacles to the ability of the court system to effectively tackle exploitative boilerplate.

3. Unfair Terms

Under American law, the label "unfair term" is seldom applied to denote a distinct formal rule or doctrine. 56 Federal and State legislators have traditionally refrained from embracing "unfair terms" legislation, which today has become quite common in jurisdictions outside the United States. 57 Of course, as noted above, any unconscionability case may involve consideration of facts giving rise to substantive or procedural unfairness. 58 However, "fairness" or "unfairness" are not per se formal elements of the unconscionability doctrine, and are thus not formal preconditions for its application. As a result, rigorous analysis of the concept of unfair terms in consumer contracts is also absent from American scholarship and case law. As mentioned above, scholars employ a variety of labels to denote unfair standard terms without any presumption of precision or consistency of language. 59 In this regard, the label "unfair" is often used simply as a synonym for "unconscionable" or as an

53 See, e.g., Leebor v. Deltona Corp., 546 A.2d 452, 454 (Me. Sup. Ct., 1988) ("A determination of unconscionability cannot be made unless the circumstances of the case truly 'shock the conscience' of the court.")
54 For more on this see infra Part II.C.
55 Infra Part II.C.
56 A search of the phrase "unfair terms" or "unfair provisions" in the Lexis-Nexis State & Federal legislation dataset retrieved (as of 16 July 2020) only 28 results, out of which merely a handful involved statutory prohibitions or restrictions relating to "unfair terms." See, e.g., Cal Civ Code § 1812.621 [Cal. Rental-Purchase Act], mentioning "the intent of the Legislature to… (b) prohibit unfair contract terms, including unreasonable charges."; N.D. Cent. Code, § 10-04-08.1 (providing that "[t]he right to sell securities in this state shall not be granted in any case when it appears to the commissioner that… the proposed disposal of the securities is on unfair terms.").
57 For further discussion see infra Part II.C.
58 Supra text accompanying notes 47-52.
59 See supra Part I.B. (opening paragraph).
adjective describing the nature of a certain unconscionable term (or contract).  \(^{60}\)

In this Article, we employ the notion of unfair terms to refer to clauses that are illegitimately imbalanced, yet—for one reason or another—may not necessarily satisfy the formal requirements of the unconscionability doctrine. At least *prima facie*, there seems to be no justification to ignore and avoid regulating exploitative boilerplate that, though clearly unfair, does not make the consumer contract “unconscionable.” Policy makers should, in principle, seek to minimize exploitation in consumer contracts so long as this goal can be attained in a cost-effective manner. \(^{61}\)

To conclude, be what may the appropriate substantive test for unfairness, unconscionability, or illegality more generally, there seems to be no *a priori* reason to allow firms and other businesses to freely circulate illegal and unfair boilerplate in consumer markets without ensuring that effective measures of control exist. Whether this is the case is a serious question we address in Part II.

C. The Social Costs of Exploitative Boilerplate

The harm caused by exploitative terms has unique factors which make its analysis more challenging than that of losses and damages resulting from ordinary legal wrongs. Unlike the case of a tort or a breach of contract, the harm resulting from an exploitative term emanates from conduct that, on first impression, seems to be lawful. That is because such harm results from firms and consumers operating on what *prima facie* seems to be a legally binding. \(^{62}\)

Slightly restated, a consumer may face systematic hurdles in making complaints about a behavior that is based on a contract she presumably freely accepted. Another conceptual difficulty concerns the nature of the harms or losses resulting from having to abide by an exploitative term. These harms are most often, if not always, not corporeal injuries to the body or property of the consumer. Nonetheless, they are real, widespread, and significant in scope. In discussing the social costs of exploitative boilerplate, we find it useful to differentiate the types of damages. First there are the direct harms and losses suffered by

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\(^{60}\) As of 16 July 2020, searching for the label “unfair term” (or “unfair terms”) in the Lexis Nexis database resulted in 638 court decisions. Out of these 638 results, more than half (52%, 332 results) also contained the term “unconscionable” or “unconscionability.”

\(^{61}\) It should be noted here that the case for administrative oversight over unfair boilerplate does not depend on a particular concept of fairness. This, of course, does not absolve the pertinent enforcement agencies from addressing the thorny issue of defining the notion of “unfair terms.” In Part III.C. below we outline a few alternative approaches that administrative agencies can take in designing their enforcement policies and priorities.

\(^{62}\) As we have seen, this factor has a strong psychological impact on consumers. See *supra* notes 28-32 and accompanying text.
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consumers individually. Then there are the more diffuse social costs that are borne by society as a whole.

1. Harm to Consumers

The direct and immediate victims of exploitative terms are the affected consumers that abide by illegal, unconscionable, or unfair terms. This type of harm is highly idiosyncratic, as it depends on the specific effect of the exploitative term on the consumer’s welfare in a particular case. To illustrate, let us first examine a prototypical example of a potentially exploitative term.

Assume an exemption (AKA exculpatory) clause limiting a firm’s responsibility or liability towards the consumer for certain (or any) harmful misconduct. Consider, for example, a clause that limits the liability of a firm offering property inspection services for any kind of negligence to $285. Such a term can be exploitative if it potentially leaves a substantial portion of the loss caused by the firm’s negligence uncompensated. The exploitation in this case manifests itself in making the consumer waive her basic legal right to be fairly compensated for the wrong suffered. The typical loss to consumers from exploitative exemption clauses is economic. If, for example, the inspector’s negligence resulted in the consumer losing $2,000, the consumer’s direct harm is reflected in the difference between this sum and the contractual limit of $285: the quantitative harm caused by the exploitative clause here is $1,715.

However, it is important to realize that exploitative clauses may often harm important interests that are not purely financial. For example, assume that a negligent act or statement of a service provider (or one of its employees) has resulted in a personal injury to the consumer. In such a case, an exculpatory clause, if enforced against the consumer, may leave her not only economically harmed, but physically injured. It can, for instance, entail further economic damages in lost wages or earning capacity. Yet the consumer has no

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63 For useful analyses see Eike Von Hippel, The Control of Exemption Clauses: A Comparative Study, 16 INT'L & COMP. L.Q. 591 (1967); Vernie Edward II Freeman, Exculpatory Clause in Residential Apartment Lease Held Void as Unbargained For, 15 CUMB. L. REV. 765 (1985) (discussing an Alabama Supreme Court case that declared an exculpatory clause void, inter alia because it appeared in a standard form lease agreement); Stolle & Slain, supra note 3.

64 Cf. Glassford v. BrickKicker, 35 A.3d 1044, 1046 (Vt. 2011) (a clause limiting a property inspector’s liability in damages to $285 was found substantially unconscionable for similar reasons).

65 Cf. Von Hippel, supra note 63, at 592-3 (arguing that exculpatory clauses “change the general and normal allocation of risks between the parties, as it has been worked out by the courts and the legislatures, in favor of one party.”).
ability to recover her damages related to the personal injury. Such analysis applies to clauses that exempt form-drafters from liability for causing damage to property. Such exemption clauses make reparation of personal and property injuries difficult, if not impossible.

In addition to such direct losses, consumers facing exploitive exemption clauses will often experience a variety of indirect intangible losses. Naturally, the inability to fully recover for an injury or an expense that was unjustly imposed on the consumer will often lead to feelings of frustration, anger, alienation, and bitterness. Likewise, it may impose other forms of mental distress or inconvenience on the aggrieved consumer. While the exact nature and magnitude of the loss consumers suffer in any given case is context-dependent, any exemption clause is a source of risk that calls for scrutiny and oversight.

Exploitative exemption clauses are far from being the only significant example of potentially harmful boilerplate. Another noteworthy category concerns terms that illegitimately restrict consumers’ access to justice. A classic example here are forum choice provisions that oblige consumers to litigate any future dispute in a geographically remote location (usually the other party’s locus), thus making litigation inconvenient or practically impossible for the consumer. Other typical examples include restrictions on consumers’ ability to raise certain claims during litigation, unfair

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66 See, e.g., Jordan v. Diamond Equip. & Supply Co., 207 S.W.3d 525, 535 (Ark. 2005), where a sweeping exculpatory clause was upheld notwithstanding serious and permanent personal injury that allegedly resulted from negligent instructions given by the seller of a bobcat truck loader. For analysis and critique of the decision see John G. Shram, The Collision of Tort and Contract Law: The Validity and Enforceability of Exculpatory Clauses in Arkansas: Jordan v. Diamond Equipment, 28 U. Ark. Little Rock L. Rev. 279 (2006); see also Radin, supra note 8, at xv-xvi (describing the case).

67 See, e.g., Harper v. Ultimo, 113 Cal. App. 4th 1402 (2003), where a limitation clause was declared unenforceable as it prevented a consumer from obtaining meaningful compensation for damage to the consumer’s injured property.

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arbitration clauses, and indemnity clauses that make consumers liable for challenging such restrictions, particularly when done via class actions.

Just like unfair exemptions from liability, the harm caused by unfair obstructions on access to justice will vary greatly, depending on the type of restriction and on the circumstances. The typical harm, once again, involves both an economic (and thus quantifiable) loss and a softer, more amorphous (only qualifiable) kind of harm. The latter may involve a sense of repression arising from the denial of the basic right to have one’s day in court, to voice one’s complaints in front of an impartial public official, and to obtain a fair remedy for one’s grievance.

As a final example consider provisions that prohibit consumers from, or penalize consumer for, posting negative reviews online. Such terms may, in addition to depriving consumers of fundamental rights (e.g., the freedom of expression) also harm consumers as a distinct class or group. Such clauses silence consumers, isolate them from one another, and prevent them from airing their disputes and opinions in the public sphere. These clauses disempower consumers and might deprive them of their collective sense of community.

This brings us closer to the harms imposed by exploitative boilerplate on society at large, which we discuss next.

2. Harm to Society

Exploitative terms harm not only consumers as individuals, but also consumers as a class and society more generally. First and foremost, inefficient exploitative terms reduce societal welfare. For

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69 Although arbitration clauses are not per se unconscionable, some arbitration clauses may be considered unduly imbalanced and thus unenforceable. See Christopher R. Drahozal, Unfair Arbitration Clauses, 2001 U. ILL. L. REV. 695, esp. at 700-720 (2001). See also Feehey v. Dell Inc, 454 Mass. 192 (2009) (prioritizing class-actions over a contractual provision requiring individual arbitration and prohibiting class-actions).


71 This is also known as the concept of “procedural justice”, where parties often care more about the process of justice and having their day in court than the legal “bottom line.” See John M. Conley & William M. O’Barr, Rules Versus Relationships: The Ethnography of Legal Discourse (1990).

72 See, e.g., Palmer v. Kleargear.com, no. 13-cv-00175 (D. Utah, filed Dec. 18, 2013) (consumers sue an online retailer that threatens to fine them $3500 over a negative online review, and report them to credit agencies (and thus harm their creditworthiness)).

example, a forum selection clause, or an exemption clause, may yield more harm to consumers than benefit to firms and thus be socially undesirable. Similarly, a term that bans consumers from posting negative reviews online does not merely violate their freedom of expression. It also undercuts the market’s ability to offer accurate and reliable information, which is crucial for a flourishing economy.

The less competitive the market for boilerplate terms is, the greater the potential that form-drafters will act opportunistically by inserting potentially wasteful terms, or by employing these terms whenever they find it beneficial.74 Again, such opportunism does not only harm individual consumers; it may increase consumer distrust, inflate transaction costs, and even result in consumers refraining from entering into economically beneficial transactions which retards economic function.75

Whereas most scholars discuss the social costs of exploitative standardized agreements from an economic perspective, others have emphasized the non-economic harms such terms entail. It has long been recognized that under the disguise of free markets and individual autonomy, firms actually govern important legal and economic aspects in the lives of millions of consumers.76 Indeed, many believe that in an era of mass production and under the stress of high competition between firms, the use of exploitative terms has become virtually inevitable.77 This, some argue, presents a challenge to important social values such as democracy and a meaningful freedom of contract.78

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74 The effect of market forces on firm’s opportunism is further discussed infra Part II.A.
75 See, e.g., Kaplow & Shavell, supra note 4, at 217 (“A generalized awareness [by consumers] of the prospect of advantage-taking may lead buyers to avoid certain transactions (thereby reducing their well-being as they forgo otherwise valuable opportunities), to expend additional resources on investigation (a costly process that directly reduces well-being), or simply to lump it (in which case they will enter into contracts that are not value maximizing).”).
76 For an early observation along these lines see, e.g., Karl N. Llewellyn, What Price Contract?—An Essay in Perspective, 40 YALE L.J. 704, 731 (1930) (“Law, under the drafting skill of counsel, now turns out a form of contract… which… amounts to the exercise of unofficial government of some by others, via private law…”). See also Radin, supra note 8, at 33 (“When a firm’s mass-market boilerplate withdraws a number of important recipients’ rights – such as rights of redress granted by the state… it is dis-placing the legal regime enacted by the state with a governance scheme that is more favorable to the firm.”).
77 See, e.g., Slawson, supra note 5, at 531 (“Forms standardized to achieve economies of mass production… will… almost certainly be unfair, because if they were not, their issuers would probably lose money…. Competitive pressures have worked so long and so thoroughly to make standard forms unfair, that we no longer even notice the unfairness.”).
78 See, e.g., Slawson, supra note 5, at 530 (arguing that “the overwhelming proportion of standard forms are not democratic because they are not, under any reasonable test, the agreement of the consumer… to whom they are delivered.”).
Along these lines, it has been argued that exploitative terms dilute, or even “delete,” consumers’ rights. In permitting such a massive “deletion of rights” without sufficient public oversight, our society impliedly renounces its commitment to the “rule of law,” replacing it with the “rule of the firm.” Arguably, a legal system that tolerates opportunistic use of exploitative terms may enhance feelings of distrust, inequality, resentment, or antipathy within the civil society.

To conclude this point, exploitative boilerplate harms society in many ways. It disempowers consumers, weakens solidarity ties, undermines the sense of community, erodes social trust, hinders consumers’ access to justice, and instills a sense of injustice and exploitation among consumers. Exploitative terms can diminish overall wellbeing, hinder social capital, undercut the development of the law, and pressure sellers to exploit consumers’ vulnerabilities. Against this backdrop, the next Part will explore the main mechanisms that the legal system has to date employed in order to minimize these recognized social costs.

II. EXISTING APPROACHES TO EXPLOITATIVE BOILERPLATE: A CRITICAL REVIEW

Despite growing evidence and recognition of the problem of exploitative boilerplate, there is little consensus as to how it should be treated. This Part presents a critical examination of the mainstream approaches towards minimizing exploitation in consumer contracts. Section A criticizes the idea that market mechanisms alone can discipline firms and deter them from

79 These concepts are thoroughly examined in Radin, supra note 8 (especially chapters 2-3, 5-6).
80 Radin, supra note 8, at 15 (“We risk losing our claim to being a society observant of the rule of law when our courts permit too free a rein to boilerplate.”).
81 See, e.g., Brief for Appellants at p. 11, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18604, 18605) (“Each time there is a substantial injustice in a court, there is in like degree a lessening of respect for the law, and the emotions of anger and hate directed towards those persons pursuing injustice, and general antipathy toward the community which permits a system of law capable of injustice to exist.”), cited in Anne Fleming, The Rise and Fall of Unconscionability as the ‘Law of the Poor’, 102 Geo. L.J. 1383, 1415 (2014).
82 This has been the case in other consumer law contexts too. For a similar argument with respect to the problems pertaining to mandatory disclosure regimes see Kar, supra note 20, at 109 (noting that “despite this increase in knowledge and emerging consensus over the problem [relating to mandated disclosures], there is even more uncertainty and even less consensus over how consumer protection should be reformed in light of these facts.”).
employing exploitative terms. Section B addresses *ex ante* regulatory tools, namely statutory disclosure and warning duties that aim to inform consumers and thus reduce sellers’ ability and incentive to take advantage of exploitative boilerplate. Finally, Section C assesses *ex post* judicial scrutiny employing the unconscionability doctrine.

**A. Market Self-Regulation: The Theory and Its Shortcomings**

Contracts allow parties to maximize their utility and thus increase overall social welfare.  

Economists generally opine that governments should limit their interventions to market failures that can be addressed cost-effectively.  

Below we examine the key market failures pertaining to consumer contracts and investigate the market’s capacity to correct them without legal intervention.

Consumer markets are characterized by asymmetric information.  

While sellers are well informed about their products and services, consumers lack important information. This asymmetry is not limited to information regarding the quality of products and services; the disparity extends to the quality of the non-negotiated terms included in a consumer contract – especially those “non-salient” terms that go unnoticed by consumers.  

This asymmetry, in turn, can lead to a market of so-called ‘lemons,’ where firms offer low-quality products, or contracts, to consumers.  

That is, sellers will take advantage of consumer’s ignorance and will offer

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83 This proposition is often attributed to **Adam Smith, An Inquiry to the Wealth of Nations** (1776). See also Terrence Hutchison, **Adam Smith and the Wealth of Nations**, 19 J. L. & ECON. 507 (1976).

84 For the general argument that governments should not interfere in markets and that central planning is bound to fail and erode freedom and liberal values see **Friedrich A. Hayek, The Road to Serfdom** (1945).


86 See *supra* text accompanying notes 22-23. See also Becher, **Asymmetric Information**, *supra* note 3, at 733 (“Lack of familiarity with contractual terms is a specific category of asymmetric information”).

87 See, e.g., Akerlof, *supra* note 85, at 490 (explaining that “bad cars drive out the good because they sell at the same price as good cars. …the bad cars sell at the same price as good cars since it is impossible for a buyer to tell the difference between a good and a bad car; only the seller knows.”).
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biased terms that most consumers would not have accepted under conditions of full information.\textsuperscript{88}

Early law and economics commentators suggested that an informed group of consumers can correct the market failure. According to this argument, if markets are competitive, an informed minority can adequately discipline sellers.\textsuperscript{89} Firms, who compete over consumers and cannot avoid losing the informed groups, will be deterred from using biased and inefficient terms.\textsuperscript{90} Thus, a minority of consumers that read consumer contracts would exert pressure on sellers and thus improve market equilibrium for all shoppers.\textsuperscript{91}

Theory and practice refute the informed minority thesis.\textsuperscript{92} To begin, many terms are obscure, unreadable and incomprehensible.\textsuperscript{93} Such fine print is unlikely to be read and understood by a significant

\textsuperscript{88} Alan Schwartz & Louis L. Wilde, \textit{Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests}, 69 VA. L. REV. 1387, 1389 (1983) (distinguishing between three sources of asymmetric information in consumer contracts, of which ignorance as to contract quality is one); Michael I. Meyerson, \textit{The Efficient Consumer Form Contract: Law and Economics Meets the Real World}, 24 GA. L. REV. 583, 603-608 (1990) (discussing the detrimental economic effect of imperfect information on sellers’ and consumers’ behavior); Bebchuk & Posner, \textit{ supra} note 7 (recognizing the phenomenon of one-sided inefficient terms in consumer contracts due to information asymmetry, and discussing a possible economic justification for their existence); Becher, \textit{ Asymmetric Information, supra} note 3, at 734 (opining that “asymmetric information is a serious market failure that can undermine the efficiency of many consumer transactions.”).

\textsuperscript{89} See Schwartz & Wilde, \textit{supra} note 85, at 630, 638 (“[W]hen markets are competitive, individuals are protected from the adverse consequences of making decisions in the face of imperfect information. …When the preferences of searchers are positively correlated with the preferences of nonsearchers, competition among firms for searchers should tend to protect all consumers.”); Michael J. Trebilcock & D. N. Dewees, \textit{Judicial Control of Standard Form Contracts}, in \textit{THE ECONOMIC APPROACH TO LAW} 93 (Paul Burrows & Cento G. Veljanovski eds., 1981).

\textsuperscript{90} \textit{Id.} See also Duncan Kennedy, \textit{Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power}, 41 MD. L. REV. 563, 615 (1982) (“If there is competition among sellers, and good information about buyer preferences, sellers will offer whatever terms they think buyers will pay for.”).

\textsuperscript{91} \textit{Id.}


\textsuperscript{93} See generally Benoliel & Becher, \textit{supra} note 10.
minority. In addition, in many markets—such as insurance, banking, and rental cars—firms offer quite similar sets of terms. Thus, consumers cannot effectively shop among contract terms, a factor that makes them even less inclined to invest in term reading. Furthermore, due to the relatively small amounts of money typically involved in many consumer transactions, consumers are also unlikely to hire lawyers to assist them in this process. Hence, while they may search and compare salient aspects of the transaction they consider, consumers are unlikely to make the same effort to learn about non-salient contract terms and shop for better ones. Besides, firms can easily mitigate the influence of the informed minority. They need only offer the more informed consumers better terms and treatment, and thus neutralize the minority’s potential effect on the market for terms.

Most importantly, empirical findings cast doubt on the informed minority thesis. Studies prove that the percentage of consumers who spend time examining the terms and conditions of their standard contracts prior to signing them is negligible. According to one study, only 0.1% of consumers spend time reading online standard form contracts. Another study has shown that consumers are rarely aware of the fact that they have acceded to an arbitration clause, thus having waived their right to a trial in front...

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94 See, e.g., Meyerson, supra note 88, at 599 (“Without legal advice, consumers cannot understand how typical contract terms shift risks away from the seller and onto the consumer”); Croley & Hanson, supra note 92, at 771 (“Consumers must do more than read the words of a warranty; they must know what the words mean… the fact that the cost of reading a warranty or warning is low does not necessarily mean that becoming well informed also will be low.”).

95 See, e.g., Meyerson, supra note 88, at 600; Slawson, supra note 5, at 531.

96 See, e.g., Kessler, supra note 18, at 632; Slawson, supra note 5, at 530–31.


98 See, e.g., Rakoff, supra note 8, at 1226 (arguing that “for most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous.”); Goldman, supra note 8, at 719 (“Although purchasers may frequently investigate and compare prices, the far greater cost involved in searching for and obtaining subordinate terms suggests that few markets will maintain the ‘core’ of informed shoppers necessary to protect the uninformed majority.”); Meyerson, supra note 86, at 601; Korobkin, supra note Goldman, supra note 8, at 719.

99 See, e.g., Cruz & Hinck, supra note 91, at 672–74.

100 See Bakos et al., supra note 25, at 4 (finding that “[t]he fraction of consumers who read such [software license] contracts is so small that it is unlikely that an informed minority alone is shaping software license terms.”). See also Sovern, supra note 25; Shmuel I. Becher & Esther Unger-Aviram, The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction, 8 DEPAUL BUS. & COMM. L.J. 199 (2010) (reporting on the finding of surveys which “do not support the assumption found in some literature that a substantial minority of consumers read their contracts and thus might discipline sellers”).
of a court or jury.\footnote{Jeff Sovern et al., ‘Whimsy Little Contracts’ with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 Md. L. Rev. 1 (2015) (reporting survey results that “suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers”).} More anecdotally, sellers and agents often admit that consumers very rarely read their contracts.\footnote{See, e.g., Robert A. Hillman, Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?, 104 Mich. L. Rev. 837, 842 n. 31 (2006) (“PC Pitstop’s licensing agreement promised a ‘consideration’ to anyone who read their terms and sent an email to an address listed in the agreement. It took four months and more than 3,000 downloads before anyone wrote the email.”). For a somewhat similar anecdote see Allison Klein, How This Woman Won $10,000 by Reading the Fine Print in Her Insurance Contract, WASH. POST (Mar. 7, 2019), https://www.washingtonpost.com/lifestyle/2019/03/07/how-this-woman-won-by-reading-fine-print-her-insurance-contract/. For yet another illustrative story see Robert Smith & Jacob Goldstein, Summer School 8: Risk & Disaster, PLANET MONEY 11:00 (26 Aug., 2020) (an insurance agent opines that in the course of five years only three people, out of thousands of customers, read the insurance fine print (or part of it) and raised any issues with it).} Thus, even relaxing the theoretical critique of the informed minority thesis, there are simply not enough informed consumers to incentivize dealers to offer efficient contract terms.

On top of that, consumers—including the savvy minority—suffer from various cognitive biases. Consumers are likely to exhibit unrealistic optimism, misperceive small risks, commit to sunk cost, suffer from information overload, and yield to social norms of signing form contracts as presented and abiding by the fine print.\footnote{See, e.g., Eisenberg; supra note 27; Hillman & Rachlinski, supra note 24; Bar-Gill, supra note 27; Korobkin, supra note 3; Debra P. Stark & Jessica M. Choplin, A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending, 16 Psych. Pub. Pol’y. & Law, 85-131 (2010) (discussing 14 cognitive and social psychological barriers that prevent disclosures in the mortgage market from being effective). See also supra text accompanying notes 28-32.} These biases, simply put, prevent consumers from properly assessing the risks that form contracts entail and reacting to them in a rational manner.

One may still argue that information flows may nonetheless assist the few informed and fully rational and sophisticated consumers in disciplining markets. Following this logic, by posting their negative experiences online, the more sophisticated aggrieved consumers can inform many others. This, in turn, enhances the potential reputational harm to firms who employ exploitative terms.\footnote{See Shmuel I. Becher & Tal Z. Zarsky, E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation, 14 Mich. Telecomm. & Tech. L. Rev. 303, 315 (2008).} This word of mouth, in the era of unprecedented online
information flows, could deter and discipline sellers who care about their reputation.\textsuperscript{105}

While theoretically appealing, this argument has its own assumptions and shortcomings. The information that sophisticated consumers acquire after a costly investigation into the quality and value of a form contract is a public good.\textsuperscript{106} As such, and given the notorious 'free-rider' problem, there would be little incentive for the minority to share their valuable information, with which they can extract a discount from sellers, with the uninformed majority.\textsuperscript{107} Furthermore, there are good reasons to believe that those consumers who share their experiences online might not represent the general pool of consumers, and that reputational information may be slow to develop and seriously distorted and inaccurate.\textsuperscript{108} Moreover, as before, firms will have a profit-incentive to identify these consumers and address their issues separately and discreetly. Armed with big data and sophisticated analytics, there is a reasonable ground to assume that firms will find ways to defuse the impact of any particularly assertive, vocal or informed consumers.\textsuperscript{109}

More generally, the argument that employing one-sided contracts will inevitably cause grievous injury to the seller’s reputation still awaits empirical proof. Recall that for many consumers, the fine print is a non-salient aspect of the transaction at stake. Along similar lines, when things do go wrong and imbalanced terms in fact harm consumers, it is unlikely that the public will find the story very interesting or exciting.\textsuperscript{110} Furthermore, if all firms in a market or industry use the same biased terms, the terms are more likely to become an accepted norm.\textsuperscript{111}

Considering all the above, the assumption that reputational constraints alone will correct the failures of consumer markets seems rather speculative and unsounded. If anything, empirical
findings indicate that the proof is in the pudding: consumer form contracts are—and continue to be—frequently biased against consumers.\textsuperscript{112} Since market mechanisms cannot guarantee an efficient and fair equilibrium, legal intervention may be warranted to restrain exploitative boilerplate.\textsuperscript{113} We now turn to precisely this.

\textbf{B. Ex Ante Regulation: Disclosures and Warnings}

Market forces and reputational concerns do not guarantee balanced contract terms. Thus, legislatures have often been compelled to intervene and protect consumers from pre-drafted, non-negotiable exploitative terms. This Section critically discusses legislatures’ typical responses to the concern that sellers will exploit consumers’ weaknesses by employing exploitative boilerplate.

\textbf{1. Substantive Regulation}

Legislators can utilize two distinct key techniques as means to prevent exploitation via consumer contracts. First, legislation can regulate the substantive content of the forms that firms draft and offer consumers. This can be done either by prohibiting specific types of disfavored clauses, or by defining such terms to be presumably unfair, unconscionable or simply unenforceable.

While U.S. legislatures seldom choose this path, a few exceptions exist. One notable and relatively recent example is the Consumer Review Fairness Act.\textsuperscript{114} The Act prohibits firms from including in their standardized forms terms that threaten or penalize consumers for sharing and posting honest reviews.\textsuperscript{115} Another example of substantive content regulation can be found under the Consumer Credit Protection Act.\textsuperscript{116} According to this Act, a private education lender is prohibited from imposing “a fee or penalty on a borrower for early repayment or prepayment of any private education loan.”\textsuperscript{117} Such a term is thus considered unlawful if incorporated into a standard form contract. Yet another example is the Magnuson-Moss Warranty Act,\textsuperscript{118} which safeguards minimum

\textsuperscript{112} See, e.g., Marotta-Wurgler & Taylor, supra note 24, at 257 (reporting that over time terms in the end user license agreements the authors studied became more pro-seller).
\textsuperscript{113} We use the term “may” since there is still a need to engage in a cost-benefit or cost-effectiveness analysis, to ensure that the proposed intervention yields more benefit than harm.
\textsuperscript{117} 15 U.S.C. § 1650(e).
standards of warranties and prohibits deceptive or misleading terms. Some additional examples of content regulation exist at the state level.

Still, regulating contractual content is generally perceived in the U.S. as a strong and disfavored form of legal intervention. Interestingly, this is in stark contrast to the legislative landscape in many other jurisdictions. For example, all state members of the EU are subject to the Unfair Contract Terms Directive. The Directive orders the states to ensure that effective legislative and administrative measures exist under their national laws to prevent “the continued application of unfair terms in consumer contracts.”

More conspicuously, the directive provides a general definition for an unfair term, and stipulates an indicative and non-exhaustive list of 17 terms that may be regarded as unfair towards consumers. Examples include terms “requiring any consumer who fails to fulfil his obligation to pay a disproportionately high sum in compensation;” “automatically extending a contract of fixed duration where the consumer does not indicate otherwise, when the deadline fixed for the consumer to express this desire not to extend the contract is unreasonably early;” and “irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract.”

A similar approach has been taken by other non-EU countries. For example, the Australian Consumer Law states what an unfair term is, and provides a non-exhaustive list of 14 kinds of terms

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\text{120 For instance, many states prohibit forum-fixing or forum-moving clauses and clauses that have a consumer waive a right of action against the creditor or seller. Furthermore, California often has a list of unconscionable terms based on the product (insurance, goods, etc). For example, the California Automobile Sales Financing Act has a list of prohibited terms at Cal. Civ. Code § 2983.7.}
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\text{121 The Unfair Contract Terms Directive (93/13/EEC).}
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\text{id. Preamble.}
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\text{122 Id., Article 3(1) (“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”).}
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\text{123 Id. Annex section 1.}
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\text{124 Id. Article 3(1) (“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”).}
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\text{125 Id. Annex section 1(e), (h) and (i) (respectively).}
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\text{126 The Australian Consumer Law (ACL) is set out in Schedule 2 of the Competition and Consumer Act 2010.}
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\text{127 Id. section 24(1) (“A term of a consumer contract is unfair if: (a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.”).}
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that may be unfair. This list includes, for example, “a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract,” and “a term that permits, or has the effect of permitting, one party (but not another party) to renew or not renew the contract.” Similarly, the New Zealand Fair Trading Act also defines the criteria for an unfair terms and provides an indicative list of 13 possibly unfair types of standard terms. These include, among other things, “a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract”, and “a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract.”

As a final example we shall mention Israel where the Standard Form Contracts Law enlists 12 types of clauses that are considered presumably unfair unless the supplier of the form proves otherwise. The law also details two types of terms that are plainly illegal. Among the examples of presumably unfair terms are a standardized clause that “denies or limits a right or remedy available to the customer under law...” and a clause that “stipulates the Law regarding place of jurisdiction or confers on the supplier exclusive right to choose the place of jurisdiction...”

Importantly, in most of these jurisdictions courts are specifically empowered by statute to strike down exploitative terms or modify them so to remove unfair exploitation. Some legislatures, such as Australia and Israel, have also allowed consumer organizations and enforcements agencies to directly apply to courts and litigate cases of unfair terms in the name of the public.

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128 Id. section 25.
129 Id. section 25 (a) and (c) (respectively).
130 The Fair Trading Act 1986 section 46L (providing a similar definition to the Australian one, supra note 127.
131 The Fair Trading Act 1986 section 46M.
132 Id. sub-sections (b) and (d) (respectively).
135 Id. section 5.
136 Id. sub-sections 4(6) and 4(9) (respectively).
137 See e.g., Fair Trading Act 1986 section 26A (New Zealand); The Standard Form Contracts Law 1982 Section 3 (Israel) reads: “A court and the Tribunal will, under the provisions of this law, annul or change any condition of a standard contract which, having regard to the totality of the contract's conditions and to other circumstances, involves exploitation of customers or an unfair advantage for the supplier, which is likely to lead to the customers' exploitation.”
interest. Presumably, such a move is required in order to ensure that the public interest is properly represented, protected, and enforced.

Such comprehensive protective regimes do not exist in the U.S. on the federal level, and are sporadic at best at the state level. As we have noted above, the substantive content-based regulation of consumer contracts is currently underdeveloped and rather scarce. This makes exploitation via consumer contracts more likely to occur, and more difficult to prevent and deter.

2. Procedural Regulation

So far, we have seen that systematic substantive regulation of consumer form contracts is lacking. Much more often, federal and state legislatures opt to regulate the formal or procedural aspects of the consumer transaction. More conspicuously, with respect to many consumer markets, the legislation imposes a variety of specific disclosure duties on firms offering standard terms. Such mandated disclosures, which directly tackle asymmetric information, are considered less intrusive than substantive content-based regulation. Ideally, disclosures have two advantages: first, they can make important information available to consumers; second, they can also ensure that the information is observable and easy to absorb.

Various versions of mandatory disclosure have been adopted in the context of consumer contracts. An important example is the regulation enacted under the Truth in Lending Act. The regulation requires, among other things, disclosure of “the circumstances under which a finance charge may be imposed.” Another important regulation concerns the market for used vehicles. Here, under the Federal Trade Commission Used Motor Vehicle Trade Regulation Rule, car dealers are required to conspicuously and clearly warn customers by stating “IMPORTANT: Spoken

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138 See, e.g., Fair Trading Act 1986 section 46H(1) (New Zealand) (“The [Commerce] Commission may apply to the High Court or the District Court... for a declaration under section 46I that a term in a standard form consumer contract is an unfair contract term.”); The Standard Form Contracts Law 1982 Section 16(a) (Israel) (“The Attorney General or his representative, the Commissioner of Consumer Protection and Fair Trade under the Consumer Protection Law 1981, any customers’ organization and public authority designated by regulations, and a customers’ organization approved by the Minister of Justice for a particular matter may apply... for the annulment of an unduly disadvantageous condition of a standard contract.”).

139 In some state, such as Massachusetts, New York, and California, state attorney generals are quite active on consumer matters, representing the public interest in courts.


141 12 C.F.R. § 226.6(a) (2000).

promises are difficult to enforce. Ask the dealer to put all promises in writing.”143

Another regulatory means in the arsenal of policymakers is to condition the enforceability of specific “suspected” terms on the fulfillment of certain informational duties by the drafting party. For example, section 2-316 of the UCC requires warranty disclaimers to be made “conspicuous.”144 In the same vein, section 2-209 demands that contractual terms barring oral modification be “separately signed.”145 State legislation has adopted similar disclosure rules in various contexts.146 Presumably, such measures can draw consumers’ attention to certain important contractual terms and thus increase their salience and visibility.

Unfortunately, disclosures and warnings are by no means a silver bullet. As currently deployed, these regulatory tools are insufficient to discipline consumer markets. To be sure, the literature has severely criticized mandatory disclosure in general147 and disclosure of imbalanced terms in consumer contracts in particular.148

To begin, firms devise shrewd ways to divert consumers’ attention from the disclosed information.149 But even when this is not the case, making terms clear and conspicuous will not improve consumers’ understanding, if the disclosed or noticeable terms

143 Id.
144 UCC § 2-316(2) (2005) (“[T]o exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous.”).
145 UCC § 2-209(2) (2005) (“A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.”).
146 See, e.g., Omri Ben-Shahar & Carl E. Schneider, The Failure of Mandated Disclosure, 159 U. PA. L. REV. 647, 658 n. 36-38 (2011), who also note that undisclosed terms can be considered procedurally unconscionable.
147 See, e.g., id. For a more comprehensive presentation of the thesis see Omri Ben-Shahar & Carl E. Schneider, More Than You Wanted To Know: The Failure of Mandated Disclosure (2014).
148 See, e.g. Hillman, supra note 102, at 849-50 (“Many commentators seem to have lost faith in disclosure as a remedy for market failures in standard-form contracting...”).
remain lengthy, complex and unreadable.\footnote{150} Moreover, consumers are often bombarded with so much information that it is hard for them to locate and heed the important information contained in such mandatory disclosures.\footnote{151} As one example, firms use the same form contract across multiple jurisdictions by employing a “multi-state form,” which contains disclosures from all the applicable states. That, of course, piles on the fine print that. In turn, it makes much of the disclosed information irrelevant for any individual consumer, furthering the consumer's disinterest.

Consumers can only process a limited amount of information. Thus, multiple disclosures and dense text can cause confusion, fatigue, mental distress, and information overload.\footnote{152} Additionally, consumers are typically presented with disclosures in a late stage—namely, after they have essentially made up their mind to enter the transaction. At this late stage, the disclosed information might not provide a sufficient force to counter consumers' self-commitment.\footnote{153}

Recent findings illustrate a remarkable, important way in which disclosures can further backfire. Experimental evidence suggests that the mere use of boilerplate induces consumers to feel obliged to comply with the written terms, especially if the terms were conspicuously disclosed and clearly presented.\footnote{154} This is probably because laypeople tend to adopt a formalistic view of contracts and contract law generally,\footnote{155} and blame themselves for not having carefully read the terms of their written agreement.\footnote{156} That is, consumers infer legitimacy from boilerplate language purely because it is part of a formal contract. Thus, the fact that an imbalanced or harmful contract provision has been disclosed and formulated in a clear and explicit way only exacerbates the problem: it discourages consumers from challenging exploitative boilerplate.

From yet another perspective, the relationship between information disclosures and consumers' ability to absorb this

\footnote{\textit{See, e.g.}, Ben-Shahar & Schneider, \textit{supra} note 147.}

\footnote{\textit{See generally} Melvin Aron Eisenberg, \textit{Text Anxiety}, 59 S. CAL. L. REV. 305 (1985); Korobkin, \textit{supra} note 3; Ben-Shahar & Schneider, \textit{supra} note 146, at 686-90 (“Even if disclosees wanted to read all the disclosures relevant to their decisions, they could not do so proficiently, and practically they could not do so at all. They soon learn their lesson and give up any inclination they may have had to devote their lives to disclosures.”).}

\footnote{A variety of behavioral factors may lead consumers to ignore the information at stake and carry on with the transaction they decided to accept. These factors are discussed in Becher, \textit{Behavioral Science}, \textit{supra} note 3, at 125-35.}

\footnote{Wilkinson-Ryan, \textit{Perverse}, \textit{supra} note 14.}


\footnote{Wilkinson-Ryan, \textit{supra} note 3.}
information is complex. The design of smart disclosures,\footnote{For discussing the idea of “smart disclosures” see Oren Bar-Gill, Smart Disclosures: Promise and Perils, BEHAV. PUB. POL’Y, (July 11, 2019).} and a cost-benefit analysis of information disclosures, require high expertise which legislators are not likely to possess.\footnote{For an early general argument along these lines see, e.g., F. A. Hayek, The Use of Knowledge in Society, 35 AM. ECON. REV. 519 (1945). See also Becher, supra note 17, at 108 (“Institutional limitations and lack of expertise render the legislative process prone to mistakes.”).} Coupled with other institutional limitations,\footnote{See also infra Part III (discussing and comparing institutional limitations of legislators and administrative agencies).} it is unsurprising that mandated disclosures often fail to provide a satisfactory remedy to exploitative boilerplate.

To sum up, the ex ante regulatory measures currently employed in the U.S. fall short of protecting consumers from exploitative terms. Given the inefficacy and incompleteness of these measures, one might hope that courts can fill in the gap and come to the rescue. The next Section will assess to what extent this hope is sound and realistic.

\section*{C. Ex Post Judicial Scrutiny}

Courts have a potentially important role to play in protecting consumers from exploitative consumer contracts. Alongside other concepts courts have developed for the protection of weaker contractual parties,\footnote{Such as the doctrine of “unfair surprise,” the “reasonable expectation” test, and the “reasonably communicated” test. For discussion see, e.g., Becher, Asymmetric Information, supra note 3, at 768-69.} the doctrine of unconscionability stands out as the most straightforward and thus valuable tool for tackling exploitative boilerplate.\footnote{The doctrine’s basic features were discussed supra Part I.B.2.} The flexibility of this legal concept allows courts to respond to wide range of vulnerabilities under a variety of circumstances.\footnote{The potential of the doctrine in these respects is discussed in Becher, Asymmetric Information, supra note 3, at 764-69. However, as we explain below, this flexibility is also a cause for concern. See infra text accompanying notes 164-166.} Yet, relying exclusively on the judicial system to discipline sellers and deter them from using exploitative terms would be imprudent. This Section details five key reasons that justify such skepticism.

\subsection*{1. A Deficient Legislative Framework}

First, consider the incompleteness of the current supervisory mandate courts have over the content of consumer contracts. As
mentioned above, a systematic statutory framework addressing exploitative terms is clearly missing from the regulatory landscape.\textsuperscript{163}

This statutory void negatively affects the ability of courts to use the unconscionability doctrine as an effective check on the opportunistic use of boilerplate in two ways. First, given the partial and deficient statutory framework, courts lack guidance as to the legislature’s concepts of unfairness, exploitation, or—for that matter—unconscionability. Secondly, the statute authorizing courts to intervene (namely, the UCC) applies equally to negotiated and non-negotiated contract terms, and to consumer and non-consumer (commercial) contracts. Such a wide scope of application makes the development of doctrine uniquely aimed at protecting consumers from exploitative fine print challenging. This leads us to the second key weakness of the unconscionability doctrine as a potential policing mechanism.

2. Vagueness and Subjectivity

As critics have long recognized, the concept of unconscionability is vague, obscure, and overly malleable. This feature inevitably makes its implementation in any given case unpredictable. In the long run, the application of the doctrines is bound to result in inconsistency,\textsuperscript{164} for which the doctrine is notoriously known.\textsuperscript{165}

Designing the scope of the unconscionability doctrine requires courts to strike a balance between two competing normative forces.\textsuperscript{166} On the one hand, courts ought to consider values such as the preservation of free markets, and the importance of predictability, certainty and stability in commerce and in legal relationships. On the other hand, courts must consider the need to protect non-drafting, weaker parties from illegitimate, imbalanced terms. Certainly, individual judges may have different normative views on how to strike this balance. This may undermine the extent to which it is possible for courts to systematically and coherently police the use of exploitative boilerplate.

When judges interpret and implement flexible and vague doctrines, they are prone to be influenced by their background,
experience, status, culture, and personal worldview. But beyond that, they may also fall prey to believing that their own subjective views are the common accepted norm—also known as the false consensus effect. In our context, such effect may make judges even more confident in their own view of what should be deemed unconscionable. Thus, it reduces judges’ capacity to deliberate and consider other possible outlooks. This potential diversity between judges might be another explanation for the failure of courts to agree on what ought to be considered unconscionable in consumer contracts.

3. Demanding Standards and Limited Applicability

Another serious obstacle concerns the demanding standards and the limited applicability of the unconscionability doctrine. For starters, the reader will recall that unconscionability is a legal defense, rather than an independent cause of action. That is, unconscionability is basically functions as a shield, not a sword. This entails that consumers cannot ordinarily harness the doctrine in order to initiate litigation and challenge businesses for using (or threatening to use) exploitative terms. Similarly, it is quite unusual for courts to award consumers damages for losses suffered (or restitution for money paid) due to unconscionable terms. In other words, consumers will typically rely on the alleged unconscionability of a term in order to evade liability (typically for breach of contract), rather than to impose liability on a devious firm. This feature significantly undercuts the ability of the doctrine to serve as a monitoring device on sellers’ opportunistic use of boilerplate.

On top of that, recall the demanding standards required for establishing unconscionability. First, most courts require satisfying both components of the doctrine, namely substantive and procedural unconscionability. This means that absent procedural abuse, even clearly oppressive and unfair terms are unlikely to be struck down.

Second, a finding of unconscionability entails a high standard of oppressiveness, one that clearly goes beyond mere unfairness or one-sidedness. As noted earlier, in order to be found unconscionable a term must be so extremely biased as to “shock the conscience of the court.” This is a demanding threshold. As such, it is difficult

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169 See supra note 45 and accompanying text.
170 See supra note 51 and accompanying text.
171 Supra note 53.
for courts to protect consumers in less extreme yet troubling cases of boilerplate exploitation.

Finally, recall that procedural unconscionability—a necessary element under the prevalent approach—focuses on the contracting process (rather than on its outcomes). This means that a finding of unconscionability requires a factual analysis of the specific circumstances of the litigated case. Therefore to reach a finding of unconscionability entails a careful examination of any evidence regarding the process of contract formation with the particular consumer. Naturally, this increases the consumer’s litigation costs and expenditure of judicial resources. But more significantly, it reduces the precedential value of any judicial finding of unconscionability. Future cases may be easily distinguishable from any previously decided case, if only by reference to a unique (procedural) factor that was present in the latter case but is absent in the former or vice versa. Thus, firms are able again to evade the courts’ enforcement powers.

Each of these entrenched characteristics of the unconscionability doctrine seriously impairs its ability to serve as an effective policing device. Combined, their cumulative effect makes the potential reach of the doctrine too feeble to have a strong disciplining power over consumer form contracts.

4. Institutional Limitations and Under-Deterrence

Even if courts could apply the doctrine of unconscionability consistently, objectively, and frequently enough, this would still be unlikely to deter firms from incorporating exploitative terms into their contracts. From the perspective of a form-drafter, the negative consequences are relatively trivial if a certain term (or contract form) is found unconscionable by a court. If worst comes to worst and the consumer’s defense is successful, the firm will only lose the ability to enforce the specific contract(s) against the specific consumer. As we have already noticed, the firm will not be liable for damages (or restitution), because unconscionability does not give rise to such remedies. The firm will not be penalized or fined for having applied the unconscionable term in the first place.

What is more, the court cannot ban the future use of an exploitative term that was found to be substantively unconscionable. The only recourse is voiding the specific term or contract before the

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172 See, e.g., Williams, 350 F2d at 449 (“Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.”).
173 See e.g. CALAMARI & PERILLO, supra note 42, at 337 (noting that “Many cases have held that the provision mandates an evidentiary hearing or a full fledged trial on the merits” and opining that adopting such a conservative stance might make unconscionability “the primary dilatory defense in contract litigation.”).
court which contains the exploitative term. This clearly limits the ability of court decisions to have a wider beneficial effect—whether on other customers of the same firm or on other firms operating in similar markets. This institutional feature undermines the deterrent effect of the judgment. It leaves ample incentive for firms to employ exploitative terms if they find it beneficial.\textsuperscript{174}

\section{Consumers' Access to Justice}

Common law courts develop the law on a case-by-case basis. This makes judicial scrutiny costly, time-consuming, and ultimately very limited as a regulatory mechanism. As Arthur Leff noted decades ago: “One cannot think of a more expensive way and frustrating course than to seek to regulate...’contract’ quality through repeated lawsuits against inventive ‘wrongdoers.’”\textsuperscript{175} This is especially true if judicial scrutiny depends on the individual initiative of consumers.

Consumers are unlikely and unable to systematically challenge exploitative boilerplate in courts. When consumers are subject to exploitative terms, the most prevalent response would be no response at all. This is because in order to access justice, consumers face numerous substantial hurdles.

For starters, many consumers are unaware of their rights, which is a prerequisite for taking any legal action.\textsuperscript{176} Moreover, even if consumers can name the harm, they may still find it arduous to blame the counterparty, to make a claim or insist upon their rights.\textsuperscript{177} For instance, an FTC survey reveals that only 10\% of defrauded consumers take any action.\textsuperscript{178} Consumers may be intimated from confronting firms due to their inferior bargaining power, and difficulty accessing or affording legal advice and representation.\textsuperscript{179} In addition, consumers may wish to avoid confrontation and emotional stress or preserve their relationship

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\textsuperscript{174} See, e.g., Wilkinson-Ryan, Perverse, supra note 14, at 171 (explaining that “our current enforcement regime imposes no real costs to firms that overreach... if the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best.”).

\textsuperscript{175} Leff, Consumers, supra note 18, at 356.

\textsuperscript{176} See generally Oren Bar-Gill & Kevin E. Davis, (Mis)perceptions of Law in Consumer Markets, 19 AM. L. & ECON. REV. 245 (2017) (investigating the implications of consumers’ misperception of law from an economic perspective).

\textsuperscript{177} See, e.g., William L. Felstiner et al., The Emergence and Transformation of Disputes: Naming, Blaming Claiming..., 15 L. & SOC’Y REV. 631 (1981).

\textsuperscript{178} See Keith B. Anderson, FTC, Consumer Fraud in The United States: An FTC Survey 80-81, 80 tbl.5-1 (2004), https://perma.cc/H23N-Q2UP.

\textsuperscript{179} See generally Galanter, supra note 32.
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with the firm, upon which they often continue to depend.\textsuperscript{180} Others may simply distrust the legal system, and thus avoid resorting to it.\textsuperscript{181}

Furthermore, typical consumer transactions involve relatively small amounts of money. Since expectation damages (i.e., the loss of the expected benefit from the bargain) are typically minor, consumers are left with little economic incentive to stand on their rights.\textsuperscript{182} At the same time, the legal expenses associated with initiating litigation are significant.\textsuperscript{183} Simple cost-benefit analysis will therefore subvert consumers' incentive to litigate, even in the face of a clear exploitation.\textsuperscript{184}

Relatedly, specific exploitative terms may further undermine consumers’ access to justice; some contractual terms are designed for this purpose. One example is terms that prohibit class actions—a mechanism intended to overcome the small money disincentive and give consumers stronger bargaining position as a group.\textsuperscript{185} Terms mandating arbitration are another example that restrict consumers’ access to the legal system.\textsuperscript{186} Likewise, forum selection and choice of

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\textsuperscript{182} Cf. Amy J. Schmitz, \textit{Enforcing Consumer and Capital Markets Law in the United States}, in \textit{Enforcing Consumer and Capital Market Law—The Diesel Emissions Scandal} 339-40 (2020) (explaining that class actions are especially relevant to “small dollar claims, where the cost to individually litigate is disproportionate to the eventual judgment.”).

\textsuperscript{183} See, e.g., Edward L. Rubin, \textit{Trial by Battle. Trial by Argument}, 56 ARK. L. REV. 261, 288 (2003) (“The converse problem with relying upon trial by argument is that many social policies are under-enforced… Litigation ranges from being rather expensive, to extremely expensive, to ferociously expensive, to make-your-hair-stand-up-on-and-knock-your-teeth-out-one-by-one expensive… Common law was remarkably blind to this difficulty. It devoted enormous attention to the measurement of damages, but ignored trial expenses…”).


\textsuperscript{185} Limiting class actions may have a particular adverse effect on marginalized and low-income consumers. See Myriam Gilles, \textit{Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket}, 65 EMORY L.J. 1531 (2016).


\end{footnotesize}
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law clauses may make it harder on consumers—if not practically impossible—to pursue their rights. Integrated clauses that bar oral or external evidence, and caps on firms liability, are further examples of prevalent discouraging terms.

Finally, recall the chilling effect of fine print more generally. As noted, empirical evidence illustrates that people generally believe that the fine print is binding. This is true even if people were defrauded into entering a contract, and even if the contract contains illegal or unfair terms. This further entails that consumers will be unlikely to challenge exploitative boilerplate in courts.

* * *

Current law and policy measures fail to protect consumers properly from exploitative boilerplate. Ex ante regulation in the U.S. is underdeveloped, and as currently designed is unlikely to achieve the anticipated results. Courts do not have the appropriate regulatory tools in their arsenal, and consumers’ access to them is in any event virtually barred. Ex post judicial scrutiny of consumer form contracts is anemic, anecdotal, relatively rare and frail. All in all, trusting courts to monitor exploitative terms belies an overreliance on private enforcement. Alas, market forces and reputational constraints cannot substitute for legal intervention, and do not provide a sufficiently strong incentive to avoid using exploitative boilerplate. The next Part will examine whether a

private justice mechanisms, which result in loss of access to the courts for consumers and employees). See also Jessica Silver-Greenberg & Robert Gebeloff, Arbitration Everywhere, Stacking the Deck of Justice, N.Y. TIMES (Oct. 31, 2015), available at https:// www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

187 See supra note 68. Indeed, some have argued that forum choice clauses should be considered invalid per se. See, e.g., Lee Goldman, My Way and the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts, 86 NW. U. L. REV. 700, 716 (1992).


189 See supra note 64 (discussing a contract term that limited the liability of a property inspector to $285).

190 See Wilkinson-Ryan, supra note 3; Furth-Matzkin, supra note 3.

191 See Furth-Matzkin & Sommers, supra note 3.

192 See, e.g., Olafson, supra note 30; Stolle & Slain, supra note 3.
sophisticated system of administrative oversight over consumer form contracts may be the way out.

III. THE WAY FORWARD: ADMINISTRATIVE OVERSIGHT

Exploitative boilerplate is a persistent, troubling phenomenon that cannot be easily cured. In view of this recognition, this Part suggests a novel way to tackle exploitative consumer contracts: administrative enforcement. We ask the reader to keep in mind that while attempting to be systematic and relatively thorough, the subsequent discussion is merely a preliminary step towards a functional and cost-effective model of administrative oversight.

Section A of this Part explains the core idea behind the proposed model and its underlying assumptions and principles. Next, Section B delineates the comparative advantages of administrative oversight. Finally, acknowledging that the devil is in the details, Section C examines key practical aspects of, and some challenges to, the envisioned reform.

A. The Basic Idea

“Remember, the idea is to change as many nasty forms and practices as possible, not merely to add to the glorious common law tradition of eventually coping…”193

The fundamental goal behind our proposal for administrative oversight is straightforward: promoting legal safety for consumers as a class. Just like physical objects, consumer contracts also require supervision to minimize the legal risks they entail.194 In fact, administrative agencies have been continuously responsible for protecting consumers from dangerous products and deceptive business practices.195 The proposal we consider here is therefore in

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193 Leff, Consumers, supra note 18, at 357-58.
194 The analogy was recognized and developed half a century ago by Arthur Leff. See Leff, Contract, supra note 18.
195 Under the Federal Trade Commission Act, the FTC is empowered to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce; to seek monetary redress and other relief for conduct injurious to consumers; to prescribe rules defining with specificity acts or practices that are unfair or deceptive, to establish requirements designed to prevent such acts or practices; to gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; and to make reports and legislative recommendations to Congress and the public. 15 U.S.C. §§ 41-58. Similar authority is granted at the state level to certain administrative agencies or government ministries (most
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line with the already deep, and at times inevitable, governmental involvement in consumer markets.

Our proposal relies on two supplementing tenets. First, that governments are, and should be, committed to the welfare—including the legal safety—of their citizens. Second, that administrative bodies can do a far better job than courts and legislatures in tackling exploitative consumer contracts. Combined, these imply the need to seriously consider administrative control over exploitative boilerplate.

The ensuing discussion is intended to demonstrate that a systematic administrative scrutiny of consumer contracts is not only legitimate, but practically feasible. In fact, we argue, it is a necessary step towards ensuring a safer, fairer, and ultimately more efficient market environment. To be sure, administrative scrutiny of consumer contracts constitutes a form of governmental intervention, which is often ideologically contested. That said, just as governmental efforts to clean markets from unsafe products and dishonest advertising practices are principally justifiable, so are efforts to free consumer markets from harmful boilerplate. In both cases, such intervention can, in fact, promote fair and efficient results.

At this preliminary stage we find it useful to further highlight two principles underlying our proposed model of administrative oversight. The first conceptual principle emphasizes prevention over treatment, following the famous adage: “an ounce of prevention is worth a pound of cure.” Generally speaking, it is more effective and efficient to prevent a problem or a risk, than trying to solve the problem or mitigate the risk once they transpire. As we saw, ad hoc judicial scrutiny presents a very poor remedy for boilerplate exploitation. The advantages of ex ante prevention over ex post treatment are especially evident when a problem is recurrent and has extensive scope, as in the case of exploitative boilerplate.

Importantly, our call for administrative control does not entail throwing out the baby with the bathwater and forgoing all the other

often the department of justice) under UDAP legislation. See e.g. CONSUMER LEGAL REMEDIES ACT, CAL. CIV. CODE §§ 1750–1784; N.Y. Exec. LAW § 63(12).

196 The saying is often attributed to Benjamin Franklin, who opened with it in a letter he submitted to The Pennsylvania Gazette (published February 4, 1735) although it is probably much more ancient.


198 See supra Part II.C.
protective measures. In other words, our proposal does not seek to undermine or refute existing mechanisms and protections. Indeed, administrative control is not a silver bullet. Rather, it is an additional preventive regulatory tool that has been unduly neglected for too long. Hence, we submit that administrative oversight should supplement current approaches, not replace them.

The second conceptual principle borrows from the idea of framing exploitative boilerplate as an agency problem. The argument is as follows: Consumers do not read form contracts and do not negotiate or seek to modify them. Firms pre-draft form contracts, offering them on a ‘take-it-or-leave-it’ basis. Thus, the seller is being granted—either by individual consumers or by the legal system more generally—an implied permission to design the contract for both parties. But power can easily corrupt, and firms have a profit-incentive to advance their interests at the expense of consumers. When drafters have structured incentives to (ab)use their power and ignore the interests of consumers, special scrutiny is warranted. That is exactly where administrative agencies can step in and represent the interests of consumers. The next Section explains why administrative agencies are qualified for this task.

B. The Relative Advantage of Administrative Oversight

Before moving on from theory to practice, it is important to highlight the relative advantage of administrative supervision of boilerplate compared to other regulatory tools. We begin our comparison with judicial scrutiny, continue with statutory content-based regulation, move to mandatory disclosures, and conclude with voluntary pre-approval mechanisms. Since we heavily rely on the analysis of the previous Parts, the discussion below is relatively succinct.

1. Advantages Over Judicial Scrutiny

While judicial scrutiny of exploitative contracts is done ex post, administrative control enjoys the advantages of an ex ante review. One key concrete advantage is that the administrative oversight does not depend on the private initiative of individual consumers. For various reasons delineated above, individual consumers are not likely to insist upon their rights. Public enforcement actions are unaffected by any of the contractual obstructions—such as bans on class actions, mandatory arbitration, and indemnity clauses—facing consumers and limiting their access to justice. Furthermore, the

199 See, e.g., Gillette, Rolling Contracts, supra note 2.
200 Cf. Kar, supra note 20, at 116 (linking the need to revisit mandatory disclosure rules to the fact that current rules “often allow corporations to disorient consumers and manipulate their subjective choices—thus creating imbalances of power.”).
201 See supra Part II.C.5.
public administrator is free from the inherently idiosyncratic considerations that motivate and influence individual consumers. Rather than seeking redress for any individual instance of actual exploitation, enforcement agencies can channel public resources more efficiently and focus on the overall most problematic terms for consumers as a group.202

Significantly, administrative enforcement also entails that the pertinent remedies and sanctions for exploitative boilerplate will not be merely backward-looking, as is typically the case in civil litigation. Administrative enforcement is not focused on invalidating a particular term in a particular transaction made with a particular consumer. That is, the chief aim is not to provide redress for past grievances. Rather, the remedy or sanction that accompanies administrative enforcement, as we see it, is primarily forward-looking. The objective would be to discipline unruly businesses from using exploitative boilerplate in the future and prevent other firms from copying the bad practices of their brethren. As the next Section details, the preventive measures we envision are much more far-reaching in their scope than any remedy a court can grant in a particular case.203 Undeniably, these remedial measures can impact countless consumers, as they pertain to entire markets rather than individual injuries.204

Administrative agencies are also superior from a comparative institutional perspective. Such agencies are better suited to make broad and macro calls on market efficiency. Administrative agencies have a better ability to engage in a market analysis, consult big data and compare aggregate harms to consumers and aggregate benefits for firms. These agencies are better equipped to analyze data pertaining to levels of competition, market structure, prevalent commercial customs, the relationship between terms and prices, and the potential impact of intervention on third parties (suppliers,

202 The relative weakness of private enforcement compared to public enforcement has been recognized even in jurisdictions where statutory regulation of unfair standard terms is well developed, and where consumer organizations have standing. See, e.g., Reinhard Steennot, Public and Private Enforcement in the Field of Unfair Contract Terms 23 EUROPEAN REV. PRIVATE LAW 589 (2015) (surveying the European landscape and making this observation).

203 Cf. Ewoud H. Hondius, Unfair Contract Terms: New Control Systems, 26 AM. COMP. LAW 525, 528 (1978) (nothing that “the introduction of injunctions and cease-and-desist orders against further use of specific clauses endows the new-type [judicial] decisions with an effect on a large number of future transactions, transcending the single contract at stake in traditional litigation.”).

204 See, e.g., Hillman & Rachlinski, supra note 24, at 441 (“courts typically frame the issue as a dispute between a single consumer and a business, rather than as an aggregate policy that affects the vast majority of consumers and businesses…”).
investors, lenders, etc.). This information is not generally available—and indeed often inaccessible—for judges presiding in traditional civil cases.\textsuperscript{205} Without reliable information on these matters, in turn, one cannot expect courts to efficiently address exploitative terms.\textsuperscript{206}

Administrative agencies are also capable of managing a complex process of deliberation.\textsuperscript{207} Agencies operating in consumer markets (e.g., the FTC and the CFPB) have constant access to complex information. They have organized units and experienced personnel to conduct investigations, gather data, and process it. These agencies consist of industry-experienced or analytically-trained persons, and are generally not made up of elected positions. On top of that, and unlike the judiciary, administrative bodies are much more accustomed to teamwork, information sharing, and coordination with other branches of government or independent experts. Furthermore, administrative bodies are better able to maintain and utilize institutional memory. All in all, this makes administrative agencies clearly more apt than courts to effectively study, detect, and ultimately respond to exploitative boilerplate.

2. Advantages Over Statutory Content-Based Regulation

At first blush, legislation may seem a proper regulatory tool for controlling exploitative boilerplate. Legislators enjoy a high degree of formal legitimacy. Lawmaking involves vibrant and transparent deliberation, and results in stable and accessible rules. But upon further reflection it becomes clear that legislation also has considerable limitations.

Recall that in the U.S., content-based regulation of consumer contracts is the exception, rather than the rule.\textsuperscript{208} Where it exists, it is piecemeal and partial in coverage.\textsuperscript{209} This is far from surprising. Legislators are likely to view issues through a political lens, which makes it harder to form a sensible policy that is evidence-based and

\textsuperscript{205} See, e.g., Gillette 2005, supra note 12, at 982 (“given the limited resources available to courts to reverse engineer the contracting process, there is little reason to believe that judicial decisions will reflect a coherent analysis of the conditions that distinguish exploitation from efficient risk allocation.”).

\textsuperscript{206} See, e.g., Hugh Collins, The Free Circulation of Documents: Regulating Contracts in Europe, 10 EUROPEAN L.J. 787, 793 (2004) (noting that “courts do not have access to reliable information about the operation of particular markets in practice, so that in concentrating on the balance of the formal terms they may not understand the idiosyncratic conditions under which the market sector has to operate.”).

\textsuperscript{207} We discuss this process in detail infra Section II.C.

\textsuperscript{208} See supra Part II.B.1.

\textsuperscript{209} As Budnitz notes, “Federal consumer protection law is not uniform and its coverage is not comprehensive”. Supra note 186, at 666.
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...empirically informed. Moreover, consumers are not appropriately represented in the legislation process, whereas legislatures may be captured or heavily influenced by lobbyists and interest groups.

We have already clarified that whether a term is exploitative frequently depends upon some further, macro analysis. Such further analysis should usually consider overall market conditions and the features of the transaction under discussion. It is very difficult, if not impossible, to formulate concrete rules in advance that will effectively and comprehensibly address exploitative boilerplate. Legislation is not designed to respond to dynamic markets, and indeed is playing catch-up. Legislators are also not equipped with the necessary resources and expertise to analyze markets from a holistic perspective. Thus, legislatures frequently leave such tasks, and often rightly so, to other agencies or branches—most often governmental bodies. At the end of the day, legislation performs best when coupled with vibrant administrative regulation and enforcement.

To conclude, administrative control has a few central advantages over statutory content-based regulation. First, administrative agencies have superior institutional competence. Second, administrative bodies enjoy flexibility, and thus can better respond to dynamic markets. Third, administrative agencies are better isolated from political pressure and interest groups. Fourth, administrative agencies enjoy more professional personnel, who are mostly not publicly elected and hence are not committed to a political agenda.

That said, the importance of legislation should not be underestimated. Where exploitation is clear-cut and easily identifiable, a legislative declaration of the unlawfulness of specific terms can be useful and beneficial if adequately enforced.

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210 Cf. Becher, supra note 17, at 141 (“It is easy to view consumer law policy as a political debate…. it seems that virtually every evidence-based issue in the realm of consumer law policy can become politicized.”).

211 Id. at 109-10.

212 See, e.g., Collins, supra note 206, at 793 (“The open-textured standard has the potential to address the problem of precise rules that may prove insufficiently responsive to the particular market conditions of a transaction.”); Becher, supra note 17, at 108-09.

213 For discussing these advantages in more detail see Becher, supra note 17, at 140-44.

214 Of course, this is not to say that they are totally immune from political pressure and that political changes cannot greatly impact their performance, priorities and personnel. An unfortunate recent example is the Consumer Financial Protection Bureau under the administration of President Trump. For some accounts see Planet Money, Mulvaney Vs The CFPB (March 29, 2018); Nicholas Confessore, Mick Mulvaney’s Master Class in Destroying a Bureaucracy From Within, NY TIMES (April 16, 2019); Adam Liptak & Alan Rappeport, Supreme Court Lifts Limits on Trump’s Power to Fire Consumer Watchdog, NY TIMES (June 29, 2020).
Legislation also has the important role of declaring the social goals to be promoted and the key means towards their fulfillment. In so doing legislatures set the scene and provide the authority for other branches of government to step in and promote the legislative goals.

3. Administrative Oversight and Mandatory Disclosure

The preceding analysis is largely applicable to mandated disclosures, which are highly debated among academics. On the face of it, there seems to be no necessary interaction between this regulatory technique and administrative oversight. While disclosure focuses on the procedural aspects of the bargaining process, the envisaged administrative model we propose focuses primarily on the substantive content of consumer form contracts.

However, the two tools can actually supplement one another. First, the administrative model we offer is by no means inherently limited to overseeing substantive aspects. When inspecting consumer contracts, the procedural aspects can also be monitored. Second and relatedly, a systematic monitoring system along the lines we propose will enable the government to verify if, and to what extent, mandatory disclosure rules are obeyed. Thus, administrative oversight of standard form consumer contracts can have two functions. Most prominently, it should strive to prevent exploitation. As a by-product, it can also improve the enforcement of existing mandatory disclosure duties, while collecting valuable, reliable data regarding their actual implementation in various consumer markets.

4. Administrative Oversight and Voluntary Pre-approval

A fairly recent reform proposal in the field of standard form contracts is “voluntary pre-approval.” Generally speaking, the idea here is to grant traders the opportunity to apply to a nominated professional body (private or public) for an approval of their form contracts. The approval, once given, carries a promise that the examined contract is not exploitative. Sellers can then communicate this approval so to attract consumers and possibly make their contracts immune against complaints and judicial review.

However, voluntary pre-approval depends on sellers’ motivation to apply for approval. If consumers do not attribute much importance to form contracts, and if contracts are largely non-salient for consumers, sellers may not gain much by obtaining form approval. The complexity and uncertainty of such approval

215 See supra Part II.B.2. For a comprehensive and forceful critique see BEN-SHAHAR & SCHNEIDER, supra note 147.

216 While mandatory pre-approval exists in some markets (such as insurance and consumer lending) it is quite exceptional and is clearly inapt at this stage for overseeing consumer contracts generally. We thus focus here on the idea of voluntary pre-approval. For sources developing this concept see supra note 12.
mechanisms may fuel skepticism towards their utility for sellers. More importantly, approval entails the potential removal (or revision) of exploitative terms, which firms clearly benefit from and would hesitate to expose. This will make exploitative sellers disinclined to take the risk involved in submitting their forms for authoritative inspection. In short, if sellers are not sufficiently incentivized to compete over the quality of their form contracts to begin, and if they have little to lose from keeping them away from the public eye, voluntary pre-approval is unlikely to gain much traction.

The proposal we develop here has superior potential vis-à-vis voluntary pre-approval. First and foremost, it does not depend on the goodwill of firms being willing to submit to scrutiny. Second, it provides stronger deterrence mechanisms, in the form of fines, penalties, and other administrative measures with bite, which the pre-approval model does not include.217 Third, administrative control, as we envision it, does not end with immunity or approval of entire forms and thus does not require the abundant resources associated with the pre-approval process.218 Fourth, pre-approval compels the approving body to attend to whatever contracts are being brought before it, regardless of the costs and social gains from inspection. Administrative control, instead, leaves the enforcing agency with full discretion to choose which contracts and markets to scrutinize. Thus, under our model, the administrative agencies will be able to cherry-pick the most problematic terms, contracts, or markets rather than to satisfy the needs of interested sellers.219

With all this in mind, let’s see how exactly the proposed scheme could work.

C. Administrative Oversight in Action

“We think that it is time, in consumer protection law... to look for regulation with bite.”220

217 See infra sub-Section C.4.
218 On the focus of the inquiry under our model see infra sub-Section C.2.
219 On this see infra Section C.1.
220 Professor Omri Ben-Shahar, Interview on “More Than You Wanted to Know: The Failure of Mandated Disclosure” (March 26, 2014), available at: https://www.youtube.com/watch?v=Mflfd7vSrAP4&ab_channel=TheUniversityofChicago (criticizing mandated disclosure as inefficient and ineffective means to protect consumers).
The forgoing analysis underlined the many promises of administrative oversight. Clearly, to make things viable, a precise and workable framework is required. This Section proposes a detailed account of how the administrative control of consumer contracts should unfold.

Before addressing the nitty-gritty of the scrutiny process, a brief note about its goal and operational principles is due. Building on the “safety for consumers” idea, the goal of the project should be to cost-effectively minimize consumer exposure to the risks of exploitative boilerplate. We intentionally chose the term “minimize,” since completely eradicating boilerplate exploitation is currently an unrealistic utopia. Relatedly, it should also be acknowledged that budget constraints can have a deep impact on the operation, structure, and content of the scrutiny process. This entails, of course, the need to prioritize enforcement efforts.\textsuperscript{221}

As a starting point, administrative agencies should channel their resources to tackle the more significant legal risks, in terms of both scope and severity. This necessitates the development of clear operational principles. Among such operational guidelines we find the following three most valuable. First, and as detailed in sub-Section 2 below, an effective oversight mechanism will require an optimal combination between human skills and technological capacities.\textsuperscript{222} Second, to capitalize on its advantages, enforcement agencies should implement simple and low-cost operational procedures to facilitate a dynamic and swift reaction to exploitative boilerplate once detected. Third, the project should adopt a holistic approach to markets, and be evidence-based and empirically driven.

Keeping in mind these general principles, we now turn to consider some of the practical issues in more detail. Naturally, this is merely a first step of a dramatic law reform. Any initially implemented framework should be revisited and developed as experience is gained and further lessons are learned.

1. Setting Priorities

Recall that exploitative terms may be of three types: illegal, unconscionable, and unfair.\textsuperscript{223} Each of the three types requires a different level of scrutiny and involves different processes. Here we distinguish between enforcing fairness and tackling unconscionable terms (regarded together as “fairness”) on one hand and addressing illegality on the other.

Enforcing fairness will require the enforcer to cope with vague standards, conflicting values, and gray areas. For instance, a

\textsuperscript{221} See \textit{infra} sub-Section 1.
\textsuperscript{222} For discussion of the potential of new technologies to level the consumer-business contractual playing field see Yonathan Arbel & Shmuel I. Becher, \textit{Contracts in the Age of Artificial Intelligence Readers} (working paper, 2020).
\textsuperscript{223} \textit{Supra} Section I.A.
determination of whether an arbitration clause, a forum-selection clause, an exemption clause, or a unilateral modification clause is unconscionable or unfair is a complex and loaded decision. Detecting illegality, on the other hand, will most often require much less administrative discretion and resources. A term that fines a consumer for posting a genuine and honest negative review online is clearly illegal, and thus raises no complex policy dilemmas.

There are other important differences between enforcing illegality and unfairness (or unconscionability). Since illegal terms are void, enforcing legality on form-drafters does not impose any new burdens on them. Enforcing fairness, however, will place new and additional burdens on firms. In enforcing fairness, the enforcer interferes with a term that was thought to be legally valid, even if morally or socially questionable. On average, therefore, administratively invalidating (or revising) unfair terms is likely to be more intrusive and controversial than restraining the use of plainly illegal terms.

In setting enforcement priorities, administrators will need to decide whether and to what extent to enforce fairness, legality, or both. Seemingly, the above analysis justifies adopting a humble approach, mainly targeting illegal terms. This is not necessarily the case. In fact, administrators should realize that the risks unfair terms pose to consumers are significant and merit further attention. A thicker approach that is willing to target unfair terms can have a much wider effect on consumer markets than a thinner approach that only strives to confront clearly illegal terms.

Next, we propose that enforcement efforts should examine both substantive and procedural issues. Procedural issues may include, for instance, unreadable and excessively long contracts, noncompliance with mandated disclosures or other formal requirements, inaccessible or illegible text, and the like. That said, we generally recommend prioritizing substantive issues. This is mainly for the key objective noted earlier, i.e., the larger potential impact of regulating unfair contract terms. While there are good reasons to doubt whether improving the procedural aspects will indeed make a significant difference for consumers, the removal of

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224 See the Consumer Review Fairness Act, supra note 114.

225 If the thicker approach is chosen, enforcement agencies could, and perhaps should, build reliable, accessible, and comprehensive databases of consumer contracts. Such a dataset would better facilitate informed policy choices and a more holistic, efficient, and consistent framework.

226 Examples may include making a term conspicuous or having terms separately signed.

227 This may be due to the ineffectiveness of disclosures, consumers’ bounded rationality, the chilling effect of fine print, and other reasons we delineated throughout the preceding analysis.
unfair terms will clearly benefit them greatly. Investing in the prevention of substantive exploitation therefore seems a safer bet—at least initially—than advancing procedural fairness.

The next priorities-related challenge is the need to identify the markets or contracts that ought to be supervised in any given period of time. Based on the analysis so far, we suggest that supervision efforts be focused on markets where the aggregate expected loss from exploitative boilerplate is the greatest. While theoretically simple, applying this principle is admittedly challenging.

In our view, when identifying and prioritizing supervision efforts, administrative agencies should consider, among other things, the following factors. First is the nature of the risk. We submit that special attention should be given to risks that endanger important non-pecuniary interests of consumers. These may include, for instance, the right to privacy, free speech, access to justice, and the like. A second important factor is market size. Clearly, the greater the number of consumers exposed to an exploitative form, the bigger the potential scope for harm. Third, the magnitude of the expected loss to consumers is another crucial factor. For example, if the risk is purely pecuniary, it makes sense to invest more efforts in screening contracts that are being used in economically large transactions. Examples may include, but are not limited to, long-term or high-cost services, real estate transactions, vehicle purchases, etc. Fourth, it is imperative that enforcement agencies look beyond mere numbers. Priority should also be given to instances in which vulnerable consumers (e.g., low-income or elderly) are affected. The exact balancing act ought not be set in stone. Instead, it is better left open for future reconsideration and incremental shifts and development.

Finally, reputational constraints, levels of competition and consumer complaints can also assist in identifying suspect markets. That being said, given the fickle nature of these indications, we urge policymakers to approach them with healthy skepticism. Ideally, good coordination with other relevant bodies—such as consumer advocate or assistance groups, regulators, and law enforcement units—will assist enforcers to use these factors wisely, rather than being swayed by them.

2. Gathering and Reviewing Consumer Contracts

After setting up a list of possible suspect markets and contracts begins the process of obtaining the required information and processing it. Initially, we suggest that the administrative agency issues formal notices, informing the chosen firms of the agency’s intention to review their consumer contracts. The notice will include a list of the types of transactions on which the administrative agency seeks to focus. To supplement and verify the
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data that the agency has been able to collect, firms will be requested to provide: (1) an electronic folder containing copies of all available versions of the relevant transactions; (2) the (estimated) number of affected consumers; and (3) a statement confirming that the provided information is, inasmuch as possible, updated, full, and accurate.

With this information at hand, the agency will now face the most crucial and challenging stage of identifying risky, exploitative terms. In working its way towards achieving this purpose, we advocate taking the following steps. To begin, the agency should employ a computerized language analysis. The market already offers some impressive technological tools that can read, explicate, simplify, tailor, and benchmark consumer contracts. The sophistication and effectiveness of these programs will only grow with time. Enforcement agencies would be wise to adopt these technologies and contribute to their design and development.

At the next stage, the agency should focus on detecting the non-salient pro-seller provisions of the examined consumer contracts. Though seemingly straightforward, such a focus is a double-edged sword. Assessing terms in isolation, rather than the contract as a whole, can give the wrong impression. A pro-seller term that may seem exploitative can be balanced elsewhere in the contract. Thus, while a focus on specific suspect terms is cost-

228 For instance, the agency might be able to collect the firm’s current form contract(s), consumer complaints, previous litigation, data from other consumer organizations or governmental units, as well as conduct its own mystery shopping.

229 As in other areas of enforcement, the agency must be equipped with authority to investigate and verify the reliability of the information and to collect other relevant material.

230 Computerized language analysis is an ever-growing and fast-developing field of computer science. For some of its relatively recent achievements see, for example, COMPUTER AIDED VERIFICATION: LECTURE NOTES IN COMPUTER SCIENCE (2019).

231 For a detailed discussion and illustrative examples see Arbel & Becher, supra note 222.

232 Though focusing on non-salient terms is sensible, this is not to imply that salient terms should automatically be immune from scrutiny. If anything, recent scholarship demonstrates that even price terms can be manipulative. See CONTROL OF PRICE-RELATED TERMS IN STANDARD FORM CONTRACTS, supra note 133.

233 Indeed, some foreign legislatures expect courts to examine the contract as a whole prior to determining whether a term is unfair. See, e.g., Fair Trading Act (New Zealand), § 46L(2)(b) (“In determining whether a term in a consumer contract is unfair, the court... must take into account... the contract as a whole); Standard Form Contracts Law (Israel), § 3 (“A court and the Tribunal will, under the provisions of this law, annul or change any condition of a standard contract which, having regard to the totality of the contract’s conditions and to other circumstances, involves an undue disadvantage to customers or an unfair advantage for the supplier...”); (emphasis added).

234 See, e.g., Gillette, supra note 12, at 980, 996 (noting that, for instance, unilateral change terms “can be exploitative or not, depending on whether the risks are priced and
effective, the agency must remain cognizant that further legal and economic analysis may justify a different conclusion than the agency’s first impression.

Accordingly, the next step should introduce a procedure in which the seller and the agency’s staff can deliberate the suspect terms. The process should facilitate exchanging views, allow context-dependent clarifications, and advance information sharing. Enforcers would do well to bear in mind that this stage is designed to ensure that terms that seem unreasonably imbalanced are indeed exploitative. Hopefully, this stage will assist in minimizing enforcement errors and increase cooperation.

As experience develops and knowledge accumulates, administrative enforcement agencies may identify a set of prima facie problematic terms. In such cases, we advise that the agency carefully and gradually develop non-exhaustive lists of suspect terms. The terms included in these lists should be regarded as tentative in nature, and the lists should be revisited and updated periodically.

A final recommendation pertains to the evidentiary standard the agency should apply. Here, we suggest adopting a rather conservative standard. According to this standard, terms will trigger administrative reaction only if they are clearly exploitative. The main drawback of such a demanding standard is that it will surely leave many questionable terms to circulate freely in consumer markets. Nonetheless, we believe the advantages of such a cautious approach will outweigh this admitted weakness.

Firstly, as with any newly introduced law reform, it will take some time for the system to adjust and gain expertise. In order to minimize the risk of overshooting during this formative period, a more demanding standard should be adopted. Likewise, a high standard that can be relaxed with time will minimize the chances of losing public trust and of being justly criticized or even politically threatened.

Secondly, since the implementation of the proposed model will no doubt entail significant public resources, these resources must be invested as cost-effectively as possible. Arguably, focusing on the most obvious examples of exploitative terms reduces the risk of wasteful investments in borderline cases. It will also reduce the frequency of the need to defend controversial decisions in courts or in the media. Therefore, at least during its formative phase, we perhaps on the propriety of the supplementary terms that are ultimately inserted... The agency would presumably want to investigate whether any ostensibly pro-seller effects were offset either by pro-buyer terms elsewhere in the contract or by a pricing scheme that reflected the risks taken by buyers.

235 Of course, different sectors, markets and types of transactions may result in different type of lists.
submit that administrative agencies should respond only to instances of clear exploitation.

3. The Formal Investigatory Stages

Carefully designed procedures are an essential component in the successful implementation of the proposed reform. Obviously, covering the whole range of procedural issues is impractical at this stage. Nevertheless, in this sub-Section we briefly present some key guidelines.

For starters, the formal stages should be informed by the following two sets of values. The first stage concerns fairness, voice, and due process. Here, we allude to the fact that sellers’ interests may be jeopardized following the review of their form contracts. It is therefore necessary to allow them to be part of the process and ensure they are heard with full attention and an open mind. Second is efficiency. Here, we refer to the need to facilitate low-cost and swift administrative reaction to boilerplate exploitation.

In accordance, several sets of procedural rules ought to be developed to enable a smooth and efficient implementation of the oversight process. At the outset, the process should include a formal first notice, whereby the agency informs the chosen firms of the administrative decision to inspect their forms. Such notice should detail the businesses’ specific rights and obligations under the review procedure, as well as their general duty to cooperate with the investigation. This first notice should also detail the general enforcement scheme, elucidating the possible outcomes of the investigation and the administrative steps that may follow.

Next, if the preliminary analysis points to presumably exploitative terms, the relevant firm should be informed about these findings. At this stage, the firm should be summoned to commence a deliberation process with an agency official. The aim of the deliberation process, as explained above, is to facilitate a discussion between the parties and allow the firm the opportunity to refute the presumption that the terms are exploitative. At the discretion of the enforcing agency, this (and later) stages may also involve a consultation with consumer advocacy organizations.

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236 See supra text accompanying notes 228-229.
237 In this circumstances firms will regularly retain an attorney who then engages with the agency in this deliberation process, usually with a representative from the firm as well. Thus, a third party—beyond the firm and the agency—would almost always be involved in the review process.
238 Consultation with consumer advocacy organizations is a coin with two sides. On the one hand, it gives consumers some type of representation in the process. The organizations may also assist in shedding light on the risks involved in some of the suspected terms and on consumer complaints. On the other hand, this will inevitably increase administrative costs.
Importantly, the deliberation process can, and as experience shows often will, yield consensual agreements between the firm and the agency (“the parties”). In such cases, the parties will reach an agreement as to eliminating exploitation from the firm’s forms. Such an agreement should be made public, so to allow further feedback and scrutiny before it becomes final and binding. Being transparent in the process will also minimize the risk of regulatory capture or unjustified compromises. The public nature of the procedure may also encourage other firms to check that their contracts come into line, before the enforcing agency turns to them.

After considering the information presented during the deliberation process, the agency should reach a final decision regarding the terms at stake. The decision should be documented in an official report or opinion, which is publicly available. The final decision should also detail the process and the legal and economic reasoning for the remedy. A summary describing the agency’s final conclusions, recommendations, or order must be conveyed to the pertinent firm.

4. Responding to Exploitative Boilerplate

Recall that the overall goal of the proposed reform is to minimize consumer exposure to exploitative terms. In light of this goal, we submit that the administrative response to boilerplate exploitation should be twofold. First, backwards looking, the agency must ensure that exploitative terms that consumers have already accepted become ineffective.239 Second, forward looking, it must ensure that exploitative terms are not used by the seller in any future similar transactions.240 Accordingly, the agency should be empowered by statute to achieve these results by itself, or to apply to a court to achieve them.

Under the more conventional alternative, the agency would be authorized to seek a judicial declaration that the exploitative terms are void and unenforceable. Alternatively, the remedy sought could be modification of the exploitative term, so to eliminate its and dilate the timeframe. It may even backfire, if consumer organizations begin quarreling with each other, as sometimes happens in other contexts. See, e.g., Homer Kripke, Reflections of a Drafter, 43 OHIO ST. L.J. 577, 583 (1982) (“Even our efforts during the drafting period of the UCCC [Uniform Consumer Credit Code] to bring consumer representatives in to the drafting process proved to have been a failure, because the representatives . . . were later repudiated by some more radical consumer spokesmen.”).

239 This would apply to any consumer transaction previously concluded with the seller on the basis of any of the standard forms that were scrutinized by the agency.

240 Another thorny issue pertains to the definition of “similar” transaction. Interestingly, under the Standard Forms Contract Law section 18 (Israel), a declaration of a contract term void or a revision order will usually apply to any essentially similar form contracts offered by the seller, including contracts that have been concluded prior to the decision.
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exploitative aspect. Additionally, the agency could seek an injunction or an order, restraining the seller from further using the exploitative terms in similar, future transactions. Failure to comply with these judicial orders should, as is usually the case, result in civil or administrative penalties for non-compliance.

There is, however, a bolder, and arguably more efficient, enforcement model. Under this second model, the agency itself would be allowed to issue direct cease and desist orders (or to apply for such orders before an administrative tribunal). Such orders will prohibit the firm from further use of exploitative terms in essentially similar transactions. Here again, failure to comply with these restraining orders will expose unruly sellers to civil penalties or administrative fines for non-compliance. In addition, according to this second model, the agency is empowered to declare exploitative terms void and unenforceable. Alternatively, the agency could also order the seller to revise all relevant forms so to eliminate any exploitative elements therein. Such measures can further incentivize other firms to review their own forms. Loyal to the guiding principle of due process and voice, any operative decision by the administrative agency should be subject to appeal or judicial review.

Not all processes and results need be fully adversarial. As noted, the deliberation process should allow for a consensual accord between the agency and the seller. This may remove the need to complete a full-fledged investigation. In our view, the consensual option should remain open even after the completion of the oversight process. In fact, an agreement that is reached after the issuance of the final report should be often expected to achieve better results. This is so for two main reasons. First, it can reflect and incorporate the conclusive, rather than the tentative, findings of the agency, which can be rather different – and more accurate. Second, since the seller consents to the result and is part of its development, the seller is more likely to comply and further collaborate with the agency.

Finally, enforcement agencies can entertain the interesting idea of rewarding firms whose boilerplate contracts are found to be especially fair and balanced. The reward or recognition can take various forms. One example is a sympathetic publication on the agency’s website. Another is a formal “fair trader” certification

241 To materialize the effect of this remedy, consumers should be informed of such a decision and its effects. First, firm would have a duty to inform consumers that any given term is no longer effective or enforceable. Second, and since consumer may not read these notices, the decision should also be communicated using other means, e.g., publication in the media or on the agency’s official website.

242 Supra text following note 238.
which the seller may use in advertisements. Presumably, such an award can be a legitimate consideration in future legal procedures or disputes.

CONCLUSION

Faced with lengthy, dense, unreadable, and non-negotiable form contracts, consumers forgo any attempt to read and comprehend them. Ideally, form-drafters should factor in consumers’ interest and offer fair and efficient terms. Firms, however, have a strong profit-incentive to protect their interests at the expense of consumers. Firms’ discretion, interest, knowledge and power, coupled with the inherent failures of consumer markets to self-regulate, inevitably creates a widespread potential for exploitative boilerplate.

Recognizing the harm of exploitative consumer contracts, scholars and policymakers in the U.S. have offered three main disciplinary options. First is ex ante regulation by legislatures and agencies, which can address both procedural and substantive issues. Second is ex post judicial scrutiny, which can protect consumers, ad hoc, from unconscionable terms. Third is market-based forces, mainly in the form of informed, active, or assertive consumers, coupled with reputational constraints. On top of these, some scholars have also offered the establishment of voluntary pre-approval mechanisms.

Each of these alternatives has severe limitations. Unfortunately, combined they still fail to adequately protect consumers. Despite decades of scholarship and debate, the results are questionable at best, and clearly deficient. Mounting evidence suggests that, at the end of the day, consumers are still frequently exposed to illegal, unconscionable, and unfair terms. This harms consumers, honest traders, and society as a whole.

Given this resounding failure, one might ask ‘where to from here?’ This Article’s answer is administrative control. Such control has conspicuous advantages in comparison to current approaches. Its potential is promising. Surprisingly enough, though, this path has been left largely unexplored.

Just like in the fight against an evasive virus, the best tactic to confront the widespread use of exploitative terms is not to chase them individually ex post. Rather, a superior approach would focus on preventing exposure to mass exploitative boilerplate ex ante. Accepting that the exact scheme should be gradually developed and carefully applied, this Article delineated some of the key aspects in the formation of workable system of bold administrative scrutiny.

To be sure, administrative oversight is not a panacea, and our proposal is exposed to various criticisms and challenges. From the right, minimalists may question our core motivation in introducing another layer of scrutiny and government intervention. From the
left, maximalists may criticize our moderate and middle-ground approach, emphasizing the need to further articulate unfairness and adopt even more forceful measures. Beyond these ideological objections, critical readers may identify other challenges. One such challenge is ensuring that the administrative agencies gain sufficient legitimacy and public trust to effectively exert control. Another is ensuring that enforcement agencies are well-coordinated among themselves and the control of consumer contracts is consistently done.

We embrace these critiques and challenges and believe they should be kept in mind. Challenges are an inherent part of exploring a new path. They can serve as important checks and valuable steppingstones. We believe the time is ripe to consider a fresh approach and face such challenges head-on. Ultimately, American consumers and markets deserve better protection from the harms of contractual exploitation.