ENDING THE LICENSE TO EXPLOIT: ADMINISTRATIVE OVERSIGHT OF CONSUMER CONTRACTS

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ABSTRACT

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

The Article suggests supplementing the current means of addressing exploitation in consumer contracts with a dynamic preventive model of administrative oversight. Specifically, we propose a professional system of public supervision over the content of consumer form contracts. The Article demonstrates how such a mechanism, if shrewdly designed, can cost-effectively tackle the widespread use of unfair, unconscionable, or legally invalid terms. While not a panacea, the proposed regulatory regime has the promise of shifting the main burden of tackling exploitative boilerplate from the currently feeble and ineffective system of private enforcement to a sophisticated and robust scheme of administrative scrutiny.

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INTRODUCTION

Consumer standard form contracts ("consumer contracts") typically contain harsh and imbalanced terms that can harm consumers.\(^1\) In a sense, these terms can be compared to viruses. Like viruses, these potentially harmful terms are everywhere, yet may seem benign or dormant much of the time. Consumers can easily find themselves agreeing to such terms without being aware

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\(^1\) See, e. g., MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (detailing how consumer contracts harm consumers, undermine their rights, and challenge the rule of law). By using the term "consumer form contract" or "consumer contract" we refer to a standardized contract between a business and a consumer, which is "prepared by one party, to be signed by another party in a weaker position"; see Contracts, BLACK’S LAW DICTIONARY (11th ed. 2019).
of their existence and latent risks. Furthermore, boilerplate terms can often be modified unilaterally by firms and thus may mutate, with consumers unaware as to the nature of the mutation and the risks it might entail.

While both viruses and imbalanced consumer contracts have a bad rap, their existence can sometimes make sense and even be beneficial. Consumer form contracts can reduce friction and transaction costs. Also, some seemingly imbalanced standardized terms can be economically justified and reasonable. Such terms may reduce sellers’ costs, resulting in better prices for consumers.

Unfortunately, however, imbalanced boilerplate terms are typically not the result of a transparent economic calculus. Quite often, such terms reflect manipulative strategies and various market failures, resulting in a lack of competition over non-salient terms.

2 See, e.g., OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (discussing exploitation of consumer cognitive biases in specific key markets).


6 See generally Richard Craswell, Passing on the Cost of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationship, 43 STAN. L. REV. 361 (1991) (discussing, among other things, the relationship between better rules and protections to buyers and sellers’ ability to pass on costs and charge higher prices as a result).

7 See, e.g., Meirav Furth-Matzkin & Roseanna Sommers, Consumer Psychology and the Problem of Fine-Print Fraud, 72 STAN. L. REV. 503 (2020) (discussing firms’ practice of making loud promises that are negated in fine print); Dennis P. Stolle & Andrew J. Slain, Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue, 15 BEHAV. SCI. & L. 83 (1997) (discussing the chilling effect that exculpatory terms have on consumers); Tess Wilkinson-Ryan, A Psychological Account of Consent to Fine Print, 99 IOWA L. REV. 1745 (2014) (discussing consumers’ tendency to blame themselves for not reading fine print, even when the terms are biased and unfair); Shmuel I. Becher, Asymmetric Information in Consumer
Yet, and just like viruses, exploitative terms in consumer contracts are hard to detect, delineate, control, and contain. Following this analogy, the Article calls for a conceptual shift whereby ex ante administrative control serves as a key component in the prevention of boilerplate exploitation.

To be sure, academics have studied the phenomenon of consumer form contracts and the unique problems they create from multiple angles. Mounting theoretical insights and empirical findings explain how firms can easily impose unfair and inefficient terms on consumers by taking advantage of consumers’ lack of expertise, cognitive biases, difficulty in processing data, unfounded trust, lack of familiarity with relevant legal rules, and various other vulnerabilities. Consumers’ inferiority vis-à-vis the businesses with which they interact and their lack of interest or ability to litigate open limitless opportunities for exploitation. This persistent reality has led legislators, courts, and scholars to recognize the need to protect consumers from abusive contracting practices, including the use of certain imbalanced standard terms.

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*Contracts: The Challenge That Is Yet to Be Met, 45 AM. BUS. L.J. 723 (2008) (discussing the problem of information asymmetry between firms and consumers).*


*See also Oren Bar-Gill, Seduction by Plastic, 98 NW. U. L. REV. 1373 (2004) (“Absent legal intervention, the sophisticated seller will often exploit the consumer’s behavioral biases”); 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).*

*See, e.g., LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 215-221 (2002) (“unsophisticated buyers may become subject to value-reducing [contractual] arrangements is obvious… Welfare economic analysis may favor… replacing one-sided contract terms with more reasonable ones.”); Margaret J. Radin, What Boilerplate Said: A Response to Omri Ben-Shahar (and a Diagnosis) U. MICH. PUB. LAW RESEARCH PAPER No. 392, https://ssrn.com/abstract=2401720 (“Old-school ‘Chicago’ law-and-economics seems to be giving way to a more nuanced theoretical approach”). See also infra notes 15-18.*
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Despite this wide acknowledgment, there is little agreement over the kind and scope of the appropriate protections. At one end of the spectrum, there is the “market-based approach.” Its proponents regard the risk of exploitation as a reasonable price that consumers are, and should be, willing to pay for the benefits associated with the use of standardized contracts. Under this approach, any regulatory reform is met with great suspicion. Opportunistic exploitation and other abusive practices are better left, so they argue, to the self-regulation of the market.

At the other end lies what may be dubbed the “interventionist approach.” According to this approach, most consumer markets feature chronic market failures that justify ongoing public scrutiny. Thus, this argument goes, consumer contracts deserve radically different legal treatment than ordinary or classical business contracts. Advocates of this approach call for much stronger—and wider—legal control over both the procedural and the substantive aspects of consumer form contracts.

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13 Cf. Jean Braucher, Unfair Terms in Comparative Perspective: Software Contracts, in Commercial Contract Law: A Transatlantic Perspective (2013) (noting that “most 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”).


15 See, e.g., Lewis A. Kornhauser, Unconscionability in Standard Forms, 64 Cal. L. Rev. 1151, 1162 (1976) (“most clauses of standard form contracts are candidates for nonenforcement”); 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 a “blanket assent” to “any not unreasonable or indecent terms the seller may have on his form”); Radin, supra note 1 (severely criticizing the current legal regime and favorably discussing stronger regulatory solutions to combat harsh boilerplate
Elsewhere on this spectrum, one finds innumerable middle ground 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 ‘interventionists’. These middle ground options include the imposition of wider disclosure or transparency duties on firms;⁶ bolder judicial application of traditional contract doctrines such as unconscionability, interpretation, etc.;⁷ and the establishment of voluntary mechanisms for approving standard forms.⁸

Against this rich and versatile body of literature, the Article offers three main contributions. In Part I, the Article offers an analytical distinction between legally invalid, unconscionable, and unfair exploitative terms, thereby adding much-needed clarity to current descriptions of exploitative boilerplate. In Part II, the Article offers an up-to-date and critical assessment of the current approaches toward the problem of exploitative consumer contracts. This critical analysis highlights the need for reform. Finally, in Part III, the Article offers a fully-fledged case for administrative oversight over consumer contracts. It argues that a bold, clever, and stable system of professional public supervision will greatly reduce the potential, and incentive, for contractual exploitation of consumers.

Surprisingly, the vast American literature on consumer contracts has—until now—failed to thoroughly investigate the potential of administrative oversight over consumer contracts. While there seems to be a growing scholarly tendency to mention

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⁶ See, e.g., Ayers & Schwartz, supra note 14; Uri Benoliel & Shmuel I. Becher, The Duty to Read the Unreadable, 60 B.C. L. Rev. 2255 (2019) (courts should not apply the ‘duty to read’ to unreadable contracts); 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).

⁷ See, e.g., Jacob Hale Russell, Unconscionability’s Greatly Exaggerated Death, 53 U.C. Davis L. Rev. 965 (2019) (suggesting adjustments in the unconscionability doctrine to better address consumers’ heterogeneity); Wayne R. Barnes, Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3), 82 Wash. L. Rev. 227 (2007) (endorsing revival of the 211(3) doctrine to combat unfairness in consumer contracts). For further discussion see infra Part II.C.

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administrative regulation as an optional enforcement tool, discussions of this option have too often been sketchy and incomplete. As we delineate below, administrative scrutiny can be superior to judicial scrutiny, legislative control or market forces.

At first glance, administrative scrutiny over consumer contracts may seem a complicated measure of enforcement. We argue, however, that—like in many other domains—systematic prevention may be wiser, more effective, and ultimately cheaper than treatment. Rather than allowing harmful boilerplate terms to newly flood consumer markets uncontrolled, policymakers should make a conscious effort to significantly reduce the frequency at which harmful exploitative terms are offered to consumers in the first place. Instead of expecting uninformed, unmotivated, and dispersed consumers to challenge such standard terms in court (or in arbitration) ex post, professional public agencies can shrewdly and cost-effectively monitor consumer contracts in order to detect, deter and respond to the use of such terms ex ante, even before they harm consumers.

Under the model we envisage, the scrutinizing agency will systematically collect samples of widely distributed boilerplates in various economic sectors. It will then subject these forms to systematic scrutiny. Where exploitation seems evident, serious enough, and sufficiently widespread across a certain economic

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19 See, e.g., Furth-Matzkin, Harmful Effects, supra note 10, at 1065-1066 (briefly proposing State pre-approved lease agreements); Furth-Matzkin & Sommers, supra note 8, at 544-45 (suggesting statutory damages, fee-shifting provisions, and even administrative enforcement to combat fine-print fraud); 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…”); Radin, supra note 15, at 240 (opining that “US legislators or administrative bodies could at least consider disallowing certain [boilerplate] clauses…”); Todd D. Rakoff, The Law and Sociology of Boilerplate, 104 Mich. L. Rev. 1235, 1243 (2006) (suggesting that boilerplate scrutiny can be carried out by a variety of bodies, including “expert administrative agencies, nonprofit trade associations, [leader] law firms… and even… publicity-minded watchdog groups”); Eyal Zamir & Yuval Farkash, Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship: Comments on Florencia Marotta-Wurgler’s Studies, 12 JRSLM. REV. LEGAL STUD. 137, 167 (2015).

20 For two notable exceptions where the option was more carefully examined see Larry Bates, Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection, 16 Emory Int’l L. Rev. 1, esp. at 90-105 (2002) (strongly supporting the option, but failing to address many pragmatic challenges); Gillette, supra note 18 (assessing the challenges associated with a non-mandatory pre-approval system of standard online contracts).

21 See infra Part III.B.

sector, the agency will request the firm or business offering the suspect term to remove, revise or justify its use. If, after deliberation, no consent is reached, the agency may issue an order restraining the further use of the provisions deemed exploitative. Such an order will be bolstered by a potential civil or administrative penalty. We further envisage that the agency’s decision concerning the scrutinized form (of a given firm) will also incentivize other market participants to improve their own contracts, thus amplifying the system’s overall effectiveness.

To be sure, our proposed model involves serious challenges and is in no way a silver-bullet. As the discussion that ensues illustrates, avoiding regulatory capture, building public trust, navigating political storms, and coordinating with other enforcement agencies will require persistence, courage, and vision. However, given the enduring failures of the current system, it seems that the time is ripe for a conceptual shift towards exploitative consumer boilerplate.

I. THE PROBLEM OF EXPLOITATIVE BOILERPLATE

Consumers routinely face exploitative and potentially harmful boilerplate terms. This Part clarifies the nature of this risk. Section A succinctly depicts the roots of the problem. Next, Section B offers an analytical distinction between three types of exploitative boilerplate terms. Thereafter, Section C delineates the unique social costs of exploitative terms.

A. The Roots of Exploitation: When Drafter Domination Meets Consumer Vulnerability

Consumer contracts are typically pre-drafted and offered on a take-it-or-leave-it basis. The average consumer does not have any input on the specific content of most of the terms governing the transaction. Furthermore, in certain consumer markets,

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23 See, e.g., RADIN, supra note 15, 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.”); Slawson, supra note 15, 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.”).

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...consumers face little variation in contract terms. Therefore, it is unsurprising that consumers generally do not even attempt to read their contracts, which quite often are unreadable to begin with. Consumers typically lack sufficient incentive to invest effort (time, energy, money) into studying non-negotiable terms. Consumers’ indifference and inattention are especially acute with respect to “non-salient” terms, i.e., terms whose impact is less direct, obvious, or accessible to the average consumer. This, in turn, leads to a fundamental market failure known as imperfect (or asymmetric) information.

In addition, consumers suffer from various cognitive biases that affect their purchasing patterns and make them less likely to appreciate the legal risks entailed in consumer contracts. Moreover, as recent experimental studies demonstrate, the fine print influences consumers’ moral calculus, leading the typical consumer to assume that they are morally and legally bound by the

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25 Firms often mimic and copy boilerplate terms from one another. See, e.g., Slawson, supra note 15, 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 (“EULAs”)).

26 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).

27 Benoliel & Becher, supra note 16 (finding that more than 99% of the 500 standard online contracts studied are unreadable for the average consumer); Marotta-Wurgler & Taylor, supra note 25 (finding that the language used in EULAs resembles that of scientific articles).

28 See, e.g., Gillette, Rolling Contracts, supra note 9, at 680 (“Failure to read may be perfectly rational, especially given the inability to negotiate around terms.”).

29 See, e.g., Korobkin, supra note 8, 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.”

30 For further discussion of this market failure and its normative implications see infra Part II.A.

31 See, e.g., Bar-Gill, supra note 15; Melvin Aron Eisenberg, The Limits of Cognition and the Limits of Contract, 47 STAN. L. REV. 211 (1995); Korobkin, supra note 8. The normative implications of consumers’ bounded rationality are further discussed infra Part II.A.
fine print, even when in fact it contains clearly unenforceable terms.\textsuperscript{32}

Aware of these vulnerabilities, and given competitive pressure, firms are likely to incorporate exploitative terms into their form contracts. Such terms enable firms to reduce their overall expected costs and thus to increase their profits, or offer more competitive prices, in a way that is non-transparent to most consumers.\textsuperscript{33} However, these “hidden” burdens are not necessarily accompanied by a corresponding full price reduction, or any other benefit, to consumers.\textsuperscript{34} The next Section sheds light on the various forms that exploitative boilerplate may take.

**B. The Threefold Face of Boilerplate Exploitation: Legally Invalid, 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: “abusive,” “biased,” “exploitative” or “exploitive,” “harsh,” “hidden,” “illegal,” “imbalanced,” “inefficient,” “misleading,” “onerous,” “one-sided,” “oppressive,” “overreaching,” “surprising,” “unconscionable,” “unenforceable,” “unexpected,” “unfair,” “unfavorable,” “unlawful,” and “unreasonable.”

In this Article, we have chosen the term “exploitative” to describe potentially harmful boilerplate terms that are unfair to the

\textsuperscript{32} See Furth-Matrick, Harmful Effects, supra note 14; Furth-Matrick & Sommers, supra note 8; Wilkinson-Ryan, supra note 8; Wilkinson-Ryan, Perverse Consequences, supra note 10. One of the first to study and detect this psychological effect was W. Mueller, Residential Tenants and Their Leases: An Empirical Study, 69 MICH. L. REV. 247, 298 (1970). Exploitation through legally invalid standard terms is further discussed infra Section I.B.1.

\textsuperscript{33} See e.g., Eyal Zamir & Ian Ayers, A Theory of Mandatory Rules: Typology, Policy, and Design, 99 TEXAS L. REV. 295 (2020) (suggesting that most contractual terms in standard form contracts are “practically invisible for most consumers”).

\textsuperscript{34} 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). 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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consumer either because of the way by which they have been (mis)presented (‘procedural exploitation’) or because they are substantively unfair under a certain moral or economic test (‘substantive exploitation’). In what follows, we wish to highlight an important analytical distinction between three types or categories of exploitative terms. The differences between these categories are conceptually significant and, as we shall explain in Part III, have important policy implications.

1. **Legally Invalid Terms**

By a “legally invalid term,” we mean a contract clause that contradicts a mandatory legal norm (statutory or common law) in such a way that results in its theoretical nullity and unenforceability. Such a norm may be a rule expressly prohibiting the use of certain contractual terms\(^{35}\) or expressly declaring its nullity.\(^{36}\) It can also be any other rule or principle, statutory or common law, from which the nullity of a conflicting agreement may be inferred.\(^ {37}\) In our view, when such legally invalid terms are potentially harmful from the consumer’s perspective, they are exploitative as much as they are “illegally invalid”.\(^ {38}\)

Traditionally, the literature on consumer contracts has given little attention to exploitation of this kind. This is perhaps understandable due to the assumption that legally void terms are presumably unenforceable, and thus cannot harm consumers and cannot exploit them. Further, from the drafting party’s perspective, it might seem futile to employ a term that presumably could never be enforced against the consumer.

Reality proves this line of reasoning naïve. Upon further reflection, it becomes clear that—for a variety of reasons—legally unenforceable terms can greatly benefit form-drafters and may often be used by them against consumers.

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35 See e.g. Revised Uniform Residential Landlord and Tenant Act (2015), § 201(a) (“A lease may include terms and conditions not prohibited by this [act] or law other than this [act].”)
37 For example, the common law public policy against contractual penalties; tax legislation from which the invalidity of agreements intended to evade tax is regularly inferred.
38 On the unfairness involved in using unenforceable 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 ignorance of the law when, by including an unenforceable contract or lease term, one is misleading the other...”).
First, most consumers might not be aware that a term is legally invalid. In fact, even form-users may not always be aware of the fact that they are using legally invalid terms. For example, a firm can innocently continue to use a term that new legislation has explicitly or impliedly invalidated. Consumers may therefore abide by the legally invalid term voluntarily or accept the seller’s demand to comply with it.\(^{39}\)

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 if the term is drafted authoritatively.\(^{40}\) Third, even if a consumer suspects that a term is legally invalid, they may still avoid confronting a powerful and experienced business, particularly one on which they may often depend. Thus, a legally invalid term can nonetheless have a chilling effect on consumers, who may be unwilling or unable to effectively challenge it.\(^{41}\)

Last but not least, offering consumers forms containing legally invalid terms has not, to the best of our knowledge, been recognized by courts or public enforcement agencies as a potentially “unfair or deceptive practice” under UDAP laws.\(^{42}\) Hence, businesses lack a sufficient incentive to avoid this type of exploitation. Slightly restated, from the seller’s perspective the worst-case scenario entails not being able to enforce the provision against the consumer. However, the seller will not be subject to any additional sanction for using it in the first place.

While a few scholars have shed light on this phenomenon,\(^{43}\) only recently have empirical studies established its wide scope and its serious harmful effects on consumers.\(^{44}\) The literature has

\(^{39}\) 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 8, at 91 (finding clear correlation between the existence of an exculpatory clause and the propensity of aggrieved consumers to forgo seeking compensation).

\(^{40}\) See supra note 32 and preceding text.

\(^{41}\) See, e.g., 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.”).

\(^{42}\) For further discussion of this regulatory option see infra Part III.D.

\(^{43}\) See, e.g., Kuklin, supra note 38; Charles A. Sullivan, The Puzzling Persistence of Unenforceable Contract Terms, 70 OHIO ST. L.J. 1127 (2009).

\(^{44}\) See, e.g., Furth-Matzkin, On the Unexpected Use of Unenforceable Contract Terms, supra note 8 (finding that residential leases in Massachusetts regularly include unenforceable terms). See also Furth-Matzkin & Sommers, supra note 8; Furth-Matzkin, Harmful Effects, supra note 14; Wilkinson-Ryan, supra note 8.
documented the continuous usage of (theoretically) unenforceable terms in various domains, such as residential lease, employment, and insurance. In Part III we discuss the crucial role of administrative oversight in tackling this troubling, and largely neglected, phenomenon.

2. Voidable Unconscionable Terms

The unconscionability doctrine, incorporated into Article 2-302 of the Uniform Commercial Code ("UCC"), plays a vital role in combating exploitation in contracts generally and consumer contracts in particular. According to this doctrine, a court may refuse to enforce a contract or a clause therein, if it finds them unconscionable. In other words, contract terms that are unconscionable are legally voidable in the sense of being permanently subject, at least theoretically, to judicial nullification (or modification).

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39 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.”

The exact content of the concept of unconscionability is hard to depict and is rarely definitively portrayed. However, in due course, it has become quite clear that unconscionability involves a combination or interaction of a procedural and a substantive aspect. Procedural unconscionability relates to 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 impaired 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, or a clause therein, which is deemed unreasonably imbalanced. Typically, a clause will be declared unenforceable when both procedural and substantive unconscionability are present, at least to a certain degree. The two elements are said to influence one another.

51 "'Unconscionable’ is a word that defies lawyer-like definition.” Calamari & Perillo, supra note 48, at 338.
52 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). But see infra note 56.
53 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).
54 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.").
55 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.").
56 This dominant approach is clearly reflected in the Draft Consumer Restatement, supra note 49, 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); Ferguson v. Countrywide Credit Industries, Inc., 298 F.3d 778, 783 (9th Cir. 2002). 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
another under a “sliding scale,” where less of one element requires more of the other, and vice versa. Importantly, courts will intervene on grounds of unconscionability only if the combined effect of the substantive and the procedural elements is so extreme as to “shock the conscience of the court.” On its face, many consumer contracts contain voidable terms that may, upon judicial inspection, justify nullification. However, and as Part II.C illustrates, consumers’ ability to rely on the unconscionability doctrine to challenge one-sided standard terms is greatly limited.

3. Unfair Terms

Under American law, the label “unfair term” is seldom applied to denote a distinct formal rule or doctrine. Federal and state legislators have traditionally refrained from embracing “unfair terms” legislation, which today has become quite common in jurisdictions outside the United States. Of course, any unconscionability case may involve some elements of unfairness – substantive or procedural. It is thus unsurprising that the label “unfair” is often used as a synonym for “unconscionable.” However, “fairness” or “unfairness” are not per se formal elements of the unconscionability doctrine. As a result, rigorous analysis of the concept of fairness in the context of unfair standard terms is lacking in American scholarship and case law.
As a starting point, we employ below the notion of unfair terms to denote a standard term in a consumer contract that fulfills the following three conditions:

1) The term addresses a non-salient feature of the transaction, and is thus presumably non-transparent to the average consumer;
2) The term deprives the consumer of a pre-existing right or a reasonable expectation the average consumer would have in a transaction of such a kind; and
3) The term, if applied, might result in serious harm or loss to consumers that cannot easily be avoided, and that is not outweighed by any benefit the average consumer may obtain from the transaction.

In our view, there seems to be, at least prima facie, no reason to grant legal immunity to exploitative terms that fall under the definition of an unfair term. If anything, the massive use of exploitative terms justifies public scrutiny and control even when exploitative terms are not, strictly speaking, legally invalid ab initio or judicially voidable under the requirements of the unconscionability doctrine. To see why this is the case, we now move to discuss the social costs that exploitative boilerplate entails.

C. The Social Costs of Exploitative Boilerplate

The harm caused by exploitative terms has a unique factor that makes its analysis and conceptualization more challenging than that of losses and damages resulting from ordinary legal wrongs. The harm resulting from an exploitative term emanates from conduct that, on the first impression, seems lawful and which often is indeed legally valid (unless and until invalidated by a court). Such harm results from firms and consumers operating based on what prima facie seems to be a legally binding contractual


64 As we further elaborate below, this proposed definition overlaps, to a considerable extent, with the definition of “unfairness” under the Federal Trade Commission Act. See infra text preceding note 244.

65 It should be noted here that the case for administrative oversight over unfair boilerplate does not depend on adopting a particular concept of fairness. This, of course, does not absolve the pertinent agencies from addressing this thorny issue. Part III.C. infra outlines a few alternative approaches that administrative agencies can take when designing their enforcement policies and priorities in this area.
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As a result, a consumer may face systematic hurdles in making a complaint about losses emanating from being subject to a contract they presumably freely entered into. This presents a serious obstacle for consumers because the insertion of unfair, unconscionable, or even legally invalid terms into a consumer contract is not recognized as a legal wrong.

Nonetheless, the costs to consumers and society of boilerplate exploitation are very real. Their direct and immediate victims are the affected consumers that abide by legally invalid, substantially unconscionable, or otherwise unfair terms. To illustrate, assume an exemption (AKA exculpatory) clause limiting the liability of a firm offering property inspection services for any kind of negligence on its part to $285. Such a term can be exploitative if it leaves a substantial portion of the foreseeable loss that can be caused by the firm’s negligence uncompensated. While theoretically such a term could translate to lower prices consumers pay for the service provided, it is more likely to reflect the firm’s ability to impose one-sided non-salient terms without making any concessions. The exploitation, in this case, manifests itself in making the consumer waive their basic legal right—and reasonable expectation—to be fairly compensated for a wrong suffered.

The typical loss to consumers from exploitative terms is economic, as in the example just mentioned. However, exploitative terms may often harm important consumer interests that are not purely financial. For example, the inability to fully recover for an injury or an expense that was unjustly imposed on the consumer.

66 As we have seen, this factor has a strong psychological impact on consumers. See supra notes 32-41 and accompanying text.

67 Another conceptual obstacle might be posed by the avoidable consequences doctrine, which denies a plaintiff compensation for any avoidable loss. Consumers would probably be accused of failing to mitigate their losses by deciding to enter into the consumer contract without carefully reading the contract or resorting to legal consultation beforehand.

68 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). One may argue that a higher limit would result in higher prices, and that consumers can purchase insurance against such loss. Yet, it would be reasonable to assume in these cases that consumers are unaware of such terms, do not know how to value them properly, and that firms are better positioned to purchase such insurance.

69 For useful analyses of the problems associated with exculpatory clauses see, e.g., Eike Von Hippel, The Control of Exemption Clauses: A Comparative Study, 16 INT’L & COMP. L.Q. 591, 592-3 (1967) (claiming 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”); 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 8.
will often lead to feelings of frustration, anger, alienation, and bitterness, and other forms of mental distress or inconvenience. In some cases, it may even result in the consumer being unable to obtain compensation for a serious personal injury or a property loss inflicted by the seller or supplier.\(^70\)

Another noteworthy category of intangible harms caused by exploitative boilerplate concerns those losses arising from terms that unduly restrict consumers’ access to justice. A classic example here is 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.\(^71\) Other typical examples include restrictions on consumers’ ability to raise certain claims during litigation, unfair arbitration clauses,\(^72\) and indemnity clauses that make consumers liable for challenging such restrictions, particularly when done via class actions.\(^73\) Consumers may experience 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.\(^74\)


\(^{72}\) 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 Feeney v. Dell Inc, 454 Mass. 192 (2009) (prioritizing class-actions over a contractual provision requiring individual arbitration and prohibiting class-actions).


\(^{74}\) 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.”
As a final example, consider contract provisions that prohibit consumers from, or penalize them for, posting negative reviews online. Such terms may—in addition to depriving consumers of fundamental rights (e.g., freedom of expression)—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 and similar limitations on free speech and the free flow of information disempower consumers and might also deprive them of their collective sense of community.

In addition to harming consumers as individuals and as a class, exploitative terms can harm society more generally by reducing overall social welfare. For example, terms that ban consumers from posting negative reviews online does not merely violate their freedoms. It also undercuts the market’s ability to offer accurate and reliable information, which is crucial for a flourishing economy. Furthermore, exploitative fine-print can increase consumer distrust and thus inflate transaction costs for consumers. It may even result in certain consumers refraining from entering into economically beneficial transactions, for fear of harmful terms.

From a non-consequentialist perspective, one may argue that under the guise of the free market and individual autonomy, firms govern, through their boilerplate and in a non-democratic manner, important legal and economic aspects in the lives of millions of consumers. Indeed, many believe that in an era of mass production


75 See, e.g., Palmer v. Klargear.com, no. 13-cv-00175 (D. Utah, filed Dec. 18, 2013) (consumers sue an online retailer that threatens to fine them $3,500 over a negative online review, and report them to credit agencies (and thus harm their creditworthiness)). As we explained infra text accompanying note 126, such terms are now prohibited.


77 See, e.g., Kaplow & Shavell, supra note 12, 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).”).

78 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 15, 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-placeing the legal regime enacted by the state with a governance scheme that is more favorable to the firm.”).
and under the stress of high competition between firms, the use of exploitative terms has become virtually inevitable.\textsuperscript{79} This, some argue, presents a challenge to important social values such as democracy and meaningful freedom of contract.\textsuperscript{80} Along these lines, it has been argued that exploitative terms dilute, or even “delete,” consumers’ rights.\textsuperscript{81} 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.”\textsuperscript{82} Arguably, such tolerance on the part of the law towards business opportunism may enhance feelings of distrust, inequality, resentment, or antipathy within the civil society.\textsuperscript{83} This state of affairs is in itself morally disturbing and arguably socially harmful.\textsuperscript{84}

II. EXISTING APPROACHES TO EXPLOITATIVE BOILERPLATE: A CRITICAL REVIEW

Despite growing evidence and recognition of the vast and multi-faceted social costs of exploitative boilerplate, there is little consensus as to how this persistent problem should be treated.\textsuperscript{85}

\textsuperscript{79} See, e.g., Slawson, supra note 15, 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.”).

\textsuperscript{80} See, e.g., Slawson, supra note 15, 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”).

\textsuperscript{81} These concepts are thoroughly examined in Radin, supra note 15 (especially chapters 2, 3, 5, 6).

\textsuperscript{82} Radin, supra note 15, 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.”).

\textsuperscript{83} 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).

\textsuperscript{84} Cf. Zamir & Ayers, supra note 33, at 297 (“Legal norms may be important to instill commercial norms even if in most cases they are self-imposed by virtue of reputational forces…”).

\textsuperscript{85} This has been the case in other consumer law contexts too. For a similar argument regarding the problems pertaining to mandatory disclosure regimes see 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 Prof Blog (2014) 101, 109 (noting that “despite this increase in knowledge and emerging consensus over the
This Part offers 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 employing exploitative terms. Section B addresses substantive and procedural mandatory legislation that aims to minimize exploitation ex ante. Finally, Section C assesses ex post judicial scrutiny.

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 generally well informed about the quality and other traits of the products and services they sell, consumers lack important information. This informational disparity is not limited to the quality of the products and services sold; it extends to the non-negotiated terms of the consumer deal—especially those “non-salient” terms that go unnoticed by the vast majority of consumers. This, in turn, can lead to a market of so-called ‘lemons,’ where firms offer low-quality products—or disadvantageous

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”.

86 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).

87 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).


89 See supra text accompanying notes 29-30. See also Becher, supra note 8, at 733 (“Lack of familiarity with contractual terms is a specific category of asymmetric information.”).
contracts—to consumers. That is, sellers will take advantage of a consumer’s ignorance and offer biased terms that most consumers would not have accepted under conditions of full information—thus reducing, rather than enhancing, aggregate welfare.

Early law and economics commentators suggested that an informed group of consumers could correct such a market failure. According to this argument, an informed minority can adequately discipline sellers in a competitive market. Firms, who compete over consumers and cannot afford to lose the informed groups, will be deterred from using biased and inefficient terms. The reading minority would exert pressure on sellers, thus improving market equilibrium for all consumers.

However, theory and practice have refuted the informed minority thesis. To begin, many terms are obscure, unreadable,
and incomprehensible. Such fine print is unlikely to be read and understood by a significant minority. Furthermore, due to the relatively small amounts of money typically involved in many consumer transactions, consumers are unlikely to hire lawyers to assist them in this process. In addition, in many markets—such as insurance, banking, and rental cars—firms offer a quite similar set of terms. Thus, consumers cannot effectively shop among contract terms, a factor that makes them even less inclined to invest in term reading. Hence, while they may search and compare salient aspects of the transaction, consumers are unlikely to make the same effort concerning the non-salient terms. In any case, firms can easily mitigate the influence of the informed minority. They need only offer the more informed consumers better terms and treatment, thus neutralizing the minority’s potential effect on the market for terms.

Perhaps most importantly, empirical findings refute 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 accepting them is negligible. According to one study, only a minuscule fraction of consumers spend time reading online standard form contracts.


See generally Benoliel & Becher, supra note 16.

See, e.g., Croley & Hanson, supra note 95, 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.”); Meyerson, supra note 91, at 599 (“Without legal advice, consumers cannot understand how typical contract terms shift risks away from the seller and onto the consumer.”).

See, e.g., Meyerson, supra note 91, at 600; Slawson, supra note 15, at 531.

See, e.g., Kessler, supra note 24, at 632; Slawson, supra note 15, at 530–31.


See, e.g., Goldman, supra note 15, 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 91, at 601; Rakoff, supra note 15, 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”).

See, e.g., Cruz & Hinck, supra note 95, at 672-74.

See Bakos et al., supra note 26, 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
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 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 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 if in theory an informed minority could discipline the market, empirically there are simply not enough informed consumers to attain that goal.\footnote{See, e.g., Zamir & Ayers, supra note 33, at 296 (concluding that “for all practical purposes... the informed minority hypothesis may be disregarded, at least in routine transactions.”).}

Furthermore, consumers (including sophisticated ones) 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., Bar-Gill, supra note 31; Eisenberg; supra note 31; Hillman & Rachlinski, supra note 25; Korobkin, supra note 8; 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 32-41.} Even ignoring all of these biases, consumers are simply unable to rationally assess the probability that a one-sided term will indeed be relied upon by the seller; and in that event, to assess the probability that they will be able to successfully negotiate the issue with the firm, or challenge the term before a court or an arbitrator.\footnote{Cf. Zamir & Ayers, supra note 33, at 299.} Simply put, behavioral biases and natural limitations on consumers' alone is shaping software license terms”). See also 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”); Sovern, supra note 26.
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capacity prevent them from properly assessing the risks latent in one-sided boilerplate.

One may still argue that information flows may nonetheless assist consumers in disciplining markets. Following this logic, by posting their negative experiences online, the more sophisticated aggrieved consumers can inform and protect many others. This, in turn, enhances the potential reputational harm to firms who employ exploitative terms.109 In the era of unprecedented online information flows, the argument goes, word of mouth could adequately deter and discipline sellers who care about their reputation.110

While theoretically appealing, this argument has its faulty 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.111 As such, and given the notorious “free-rider” problem, there would be little incentive for the minority to share with the uninformed majority their valuable information, since that information is the leverage with which they could extract a discount from sellers.112 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.113 Moreover, as before, firms will have a profit-incentive to identify these consumers and address their issues separately and discreetly, while ignoring the weaker, less assertive, and less sophisticated consumers.114 Armed with big data and sophisticated analytics, there are reasonable grounds to assume that

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112 Cf. Cruz & Hinck, supra note 95, at 668-69 (arguing that “all buyers would prefer that an informed minority existed... but none [would] want to incur the cost... if nobody else does it, then the cost of becoming informed is simply a waste to the hapless buyer who does; and if enough other buyers do it, then it is more profitable not to read and to free ride off those who do”).

113 See, e.g., Arbel, supra note 111, at 1262-70 (describing online reputational information as sluggish, prone to regress to the extreme, and often unreliable).

firms will find ways to defuse the impact of any particularly assertive, vocal, and informed consumers.\textsuperscript{115}

More generally, the argument that employing one-sided contracts will inevitably cause grievous injury to the seller’s reputation still awaits empirical proof.\textsuperscript{116} It is unlikely that the public will find the story of a consumer who has encountered an unfair term very interesting or exciting, absent extraordinary circumstances.\textsuperscript{117} Furthermore, if most firms in a market or industry use the same biased terms, the terms are more likely to become an accepted norm.\textsuperscript{118}

Considering 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: non-salient standard terms are—and continue to be—frequently biased against consumers.\textsuperscript{119} Since market mechanisms cannot guarantee an efficient and fair equilibrium, legal intervention may be warranted to restrain exploitative boilerplate terms.\textsuperscript{120} We now turn to precisely this.

\textbf{B. Legislative Intervention}

Market forces and reputational concerns do not guarantee efficient contract terms. Thus, legislatures have often been compelled to intervene to protect consumers from pre-drafted, non-negotiable exploitative terms. This Section critically discusses legislatures’ two typical responses to the problem of exploitative boilerplate: First, substantive regulation of the content of the forms that firms draft and offer consumers; second, regulation of the procedure governing the formation of consumer contracts.


\textsuperscript{116} For an interesting related discussion see Jeff Sovern, \textit{Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets} (working paper, on file with authors).

\textsuperscript{117} See Becher & Zarsky, \textit{supra} note 109, at 317 (“Stories of imbalanced contractual provisions rarely engage the mass media, which must tailor their content to meet a broad audience with a limited attention span in a very competitive setting.”).

\textsuperscript{118} See Becher, \textit{supra} note 8, at 751.

\textsuperscript{119} See, e.g., Marotta-Wurgler & Taylor, \textit{supra} note 25, at 257 (reporting that terms in the end user license agreements the authors studied became more pro-seller over time).

\textsuperscript{120} 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.
1. **Substantive Regulation**

Substantive regulation of consumer contracts can be done either by invalidating specific types of clauses or by defining such terms as presumptively unfair. U.S. legislatures have chosen this path only exceptionally, in particular areas that have been perceived as posing especially complex problems that necessitate public regulation and supervision. One established exception is the insurance industry, where mandatory laws subject many types of insurance contracts to comprehensive oversight by state and federal public authorities. Some banking contracts have also been subject to substantive scrutiny, with respect to price-fixing, privacy policy, and other issues. For example, under the Consumer Credit Protection Act, a private education lender is prohibited from incorporating “a fee or penalty on a borrower for early repayment or prepayment” into a standard form contract for any private education loan. Another important example is the Magnuson-Moss Warranty Act, which safeguards minimum substantive standards of warranties concerning tangible consumer products.

Finally, a recent and less traditional example is the Consumer Review Fairness Act. This Act, which is not limited to a specific industry or market, prohibits firms from including in their standardized forms terms that threaten or penalize consumers for sharing and posting honest reviews. Some additional examples of mandatory substantive content regulation exist at the state level.

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128 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 has adopted lists of unconscionable terms for different consumer products. For
And yet, regulating the content of consumer contracts is widely perceived in the U.S. as a strong, exceptional, and disfavored form of legal intervention.129

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.130 The Directive provides a general definition for an unfair term.131 It also stipulates an indicative and non-exhaustive list of 17 terms that may be regarded as unfair towards consumers.132 A similar approach has been taken by other countries, such as Australia,133 Israel,134 New Zealand,135 and the United Kingdom.136

Importantly, in these jurisdictions, statutes specifically empower courts to strike down exploitative terms or modify them to remove their exploitative aspects.137 Some legislatures, such as Australia, Germany, Israel, and the United Kingdom, have also allowed consumer organizations or public agencies to directly apply...
to courts and litigate cases of unfair terms in the name of the public interest.\textsuperscript{138}

Nonetheless, as we shall argue in Part III, even a statutory regime that comprehensively addresses substantive unfairness—a regime that generally does not exist in the U.S.—requires supplementation by an administrative system to implement, refine and adapt it to the dynamic realities of the market.\textsuperscript{139}

2. Procedural Regulation

Returning our focus on the United States, state legislatures have quite often opted to regulate the procedural aspects of the consumer transaction. One pervasive technique is disclosure. Mandated disclosures, which aim to directly tackle asymmetric information, have traditionally been considered less intrusive and more efficient than substantive content-based regulation.\textsuperscript{140} Ideally, disclosures have two advantages: first, they can make important information available to consumers; second, they can ensure that the information is observable and easy to absorb.

Various versions of mandatory disclosures have been adopted in the context of consumer contracts. An important example is Regulation Z enacted under the Truth in Lending Act.\textsuperscript{141} Regulation Z requires, \textit{inter alia}, disclosure of “the circumstances under which a finance charge may be imposed.”\textsuperscript{142} Another important regulation concerns the market for used vehicles. The Federal Trade Commission Used Motor Vehicle Trade Regulation Rule requires car dealers to conspicuously and clearly warn customers by noting in

\textsuperscript{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 46l that a term in a standard form consumer contract is an unfair contract term.”); 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.”). In Germany, consumer organizations, rather than administrative agencies, are vested with the power to bring suit in such matters. See Bates, supra note 20, at 56, 62-65. In Scandinavian countries, the public body that deals with unfair terms is the Ombudsman. See Ewoud H. Hondius, \textit{Unfair Contract Terms: New Control Systems}, 26 AM. J. COMP. L. 525, 535-40 (1978).

\textsuperscript{139} See infra Part II.B.1.

\textsuperscript{140} The relationship between procedural and substantive contract regulation is discussed in Zamir & Ayers, supra note 33, esp. at 289-302; Collins, supra note 63.


\textsuperscript{142} 12 C.F.R. § 226.6(a) (2000).
print in the Buyer’s Guide form “IMPORTANT: Spoken promises are difficult to enforce. Ask the dealer to put all promises in writing.”

Warnings are another popular regulatory tool in the arsenal of policymakers. Here, the legislation can condition the enforceability of specific “suspected” terms on the fulfillment of special formal duties by the drafting party, intended to highlight the risk involved in assenting to these terms. For example, section 2-316 of the UCC requires warranty disclaimers to be made “conspicuous.” In the same vein, UCC section 2-209 demands that contractual terms barring oral modification be “separately signed.” State legislation has adopted similar rules in various contexts. Presumably, such measures can draw consumers’ attention to certain important contractual terms and thus increase their salience and visibility—and the corresponding likelihood a consumer will actually read them.

Disclosures and warnings, however, are by no means a silver bullet. As currently deployed, they do not discipline consumer markets. Indeed, the literature has severely criticized both mandatory disclosures in general, and disclosure of imbalanced terms in consumer contracts in particular. To begin, firms devise shrewd ways to divert consumers’ attention from the disclosed information. But even when this is not the case, making terms

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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 105, at 849-50 (“Many commentators seem to have lost faith in disclosure as a remedy for market failures in standard-form contracting…”); Zamir & Ayers, supra note 33, at 297 (“[T]here is a growing recognition – including by some lawyer-economists – that disclosure duties are often ineffective.”).

149 See generally Todd Barlow & Michael S. Wogalter, Alcoholic Beverage Warnings in Magazine and Television Advertisement, 20 J. CONSUMER RES. 147, 151–152 (1993); Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. Rev. 1193, 1225–1226 (1994); Lars Noah, The Imperative to Warn: Disentangling the
clear and conspicuous will not improve consumers’ understanding if the disclosed or noticeable terms remain lengthy, complex, and unreadable— as is often the case.\textsuperscript{150}

Moreover, consumers can only process a limited amount of information. When consumers are bombarded with so much information, it is hard for them to locate and heed the important parts from within all of the disclosures and terms.\textsuperscript{151} Multiple disclosures and dense text can cause confusion, fatigue, mental distress, and information overload.\textsuperscript{152} Additionally, consumers are typically presented with disclosures at 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.\textsuperscript{153} Finally, as mentioned earlier, the mere use of boilerplate induces consumers to feel obliged to comply with the written terms, all the more so if the terms were previously disclosed and clearly presented.\textsuperscript{154} At the end of the day, disclosures and warnings, as important as they may be in specific contexts, cannot be considered an effective overall solution to the problem of exploitative boilerplate.

\textbf{C. Judicial Scrutiny}

Courts have an important role to play in protecting consumers from exploitative terms. Alongside other concepts developed to

\textsuperscript{150} For the unreadability of consumer contracts see Marotta-Wurgler & Taylor, \textit{supra} note 25; Benoliel & Becher, \textit{supra} note 16.

\textsuperscript{151} \textit{See}, e.g., Ben-Shahar & Schneider, \textit{supra} note 147. As one example, firms often employ a “multi-state form” which contains disclosures from all the states in which they operate. That, of course, piles on the fine print, and makes much of the disclosed information irrelevant for an individual consumer, furthering the consumer’s disinterest.

\textsuperscript{152} \textit{See generally} Melvin Aron Eisenberg, \textit{Text Anxiety}, 59 S. Cal. L. Rev. 305 (1985); Korobkin, \textit{supra} note 8; 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.”).

\textsuperscript{153} 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 Shmuel I. Becher, \textit{Behavioral Science and Consumer Standard Form Contracts}, 68 La. L. Rev. 117, 125-35 (2007) (discussing possible exploitations of consumer biases and psychology).


protect weaker parties.\textsuperscript{155} Unconscionability stands out as the most straightforward and thus valuable tool for tackling exploitative boilerplate terms.\textsuperscript{156} The flexibility of this legal concept allows courts to respond to a wide range of vulnerabilities under a variety of circumstances.\textsuperscript{157} Yet, too much reliance on this doctrine or on the judicial system in general to solve the problem of legally invalid or grossly unfair standard terms would be misguided and imprudent. This is because, as we shall now see, the cumulative effect of the doctrine’s entrenched features makes it too feeble to have a strong disciplining power on suppliers of exploitative terms.

\section{A Deficient Legislative Framework}

As mentioned above, a systematic statutory framework addressing exploitative terms is missing from the regulatory landscape.\textsuperscript{158} This void limits the ability of courts to develop unconscionability as an effective regulatory check in two ways. First, the main 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 alike. Secondly, courts lack guidance as to the legislature’s concepts of unfairness, exploitation, or—for that matter—unconscionability. This greatly reduces the doctrine’s potential to efficiently address the unique problems associated with the use of exploitative fine print.

\section{Vagueness and Subjectivity}

As critics have long recognized, the concept of unconscionability is vague, obscure, and overly malleable. This makes its implementation in any given case unpredictable and, in the long run, inconsistent.\textsuperscript{159} This is far from surprising, given the great flexibility of the doctrine. Employing the doctrine requires a

\begin{itemize}
  \item Such as the doctrine of “unfair surprise,” the “reasonable expectation” test, and the “reasonably communicated” test. For discussion see, e.g., Becher, \textit{supra} note 8, at 768-69.
  \item The doctrine’s basic features were discussed \textit{supra} Part I.B.2.
  \item The potential of the doctrine in these respects is discussed in Becher, \textit{supra} note 8, at 764-69.
  \item See \textit{supra} Part II.B.1.
  \item See, e.g., Robert A. Hillman, \textit{Debunking Some Myths about Unconscionability: A New Framework for UCC Section 2-302}, 67 \textit{CORNELL L. REV.} 1, 15 (1981) (“Critics of flexible standards… have argued that the absence of specific guidance in such standards increases the potential for unreasoned or arbitrary decisions based on personal value judgments.”); Slawson, \textit{supra} note 15, at 564 (opining that the elements of the unconscionability doctrine may be “too numerous and complex to be workable in large numbers of contract cases”). But see McCall, \textit{supra} note 56 (arguing that the outcomes of unconscionability cases are more predictable than is often presumed).
\end{itemize}
subjective judicial assessment of the appropriate balance between the need to preserve free and stable markets and the desire to protect weaker contracting parties from exploitation. This subjectivity, which can hardly be avoided, undermines the extent to which the judicial system is capable of providing clear guidance as to what is unconscionable.

3. Demanding Standards and Limited Precedential Value

Another serious obstacle concerns the demanding standards for applying the doctrine and the limited precedential value of most unconscionability cases. For starters, unconscionability is considered a legal defense, rather than an independent cause of action. That is, it functions as a shield, not a sword. In other words, consumers will typically invoke the alleged unconscionability of a term to evade liability (typically for breach of contract) or to challenge a seller’s attempt to evade liability based on a biased term, rather than to impose liability on the seller for offering the unfair term in the first place.

On top of that, recall the demanding standards required for establishing unconscionability. First, because most courts require proof of both substantive and procedural unconscionability, even clearly oppressive terms are unlikely to be struck down absent procedural abuse—which is often hard to establish. Second, a finding of unconscionability entails a high standard of oppressiveness, such as is sufficiently egregious so to “shock the conscience of the court.” Practically speaking, this amounts to granting immunity to many unfair standard terms which, though troubling and exploitative, may not always meet this demanding threshold. Indeed, a recent comprehensive study has found that both the overall number of cases brought on the basis of the

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160 Becher, supra note 3, at 770-71.
162 See supra 56 and accompanying text.
163 Supra note 58.
unconscionability doctrine and the number of successful claims have greatly declined in the last decade.\textsuperscript{164}

Furthermore, recall that procedural unconscionability is considered, under the prevalent approach, a necessary element of the doctrine. This means that a finding of unconscionability requires a careful factual examination of the specific circumstances surrounding the contract formation process with the particular consumer in the litigated case.\textsuperscript{165} Naturally, this feature increases the consumer’s litigation costs and expenditure of judicial resources.\textsuperscript{166} 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 (or absent) in one of the cases but not in the other. The limited precedential value of unconscionability cases makes it easier for firms to continue relying on an unfair term even after a court has declared it is substantively unconscionable.

4. Institutional Limitations and Under-Deterrence

Even if courts could apply the doctrine of unconscionability consistently, objectively, and frequently enough, firms would still likely not be deterred from incorporating exploitative terms into their standard forms. From the perspective of a rational form-drafter, the expected penalty for using a term that might be declared unconscionable is relatively trivial. If worse comes to worst and the consumer’s defense is successful, the firm will only lose the ability to enforce the specific term or to rely on it in the specific case. However, it will not be penalized, nor even liable in damages (or restitution) for using the unfair term in the first place or for attempting to rely on it.\textsuperscript{167}

What’s more, that other contracts using the same form, and thereby the same unfair terms, are not affected by the ruling.

\textsuperscript{164} See McCall, supra note 56, at 824 (finding that about three out of four unconscionability claims decided between 2013 and 2017 have ultimately failed, and that the number of claims based on the doctrine is declining).
\textsuperscript{165} 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.”).
\textsuperscript{166} See e.g. CALAMARI & PERILLO, supra note 48, 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”).
\textsuperscript{167} The only exception would be the risk of class action lawsuits to invalidate a particular term, which could have a significant impact. The current legal landscape, however, severely limits consumers’ ability to initiate class actions; see infra Part II.C.5.
Likewise, a court cannot ban the future use of an exploitative term that was found to be substantively unconscionable. This limits the ability of judicial decisions to have a wider beneficial effect—whether on other customers of the same firm or other firms operating in similar markets. This greatly reduces the deterrent effect of the doctrine and leaves ample incentive for firms to continue employing exploitative terms of the same type.  

5. Access to Justice

Regardless of any of the frailties of the unconscionability doctrine, courts are simply unable to significantly reduce the widespread use of exploitative terms due to consumers’ limited access to justice. When consumers are subject to such terms, the most prevalent response appears to be no response at all. This is because consumers face substantial hurdles to access justice.

For starters, many consumers are unaware of their rights, which is a prerequisite for taking any legal action. 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. For instance, an FTC survey revealed that only 10% of defrauded consumers take any action. Consumers may be intimidated by confronting firms and may have difficulties accessing and funding legal counsel. Others may simply distrust the legal system, and thus avoid resorting to it.

168 See, e.g., Wilkinson-Ryan, Perverse Consequences, supra note 10, 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”).


172 For detailed data on attorney costs see Ron Burdge, United States Consumer Law Attorney Fee Survey Report 2017-2018 at 26 (finding that “the average hourly rate for the typical Consumer Law attorney in the United States is $345”). In addition, firms may use manipulative strategies to distort consumers’ perception of the business-to-consumer relationships, so as to reduce consumers’ propensity to stand for their rights. See Shmuel I. Becher & Sarah Dadush, Relationship as Product: Transacting in the Age of Loneliness, U. ILL. L. REV. (forthcoming, 2021).

Furthermore, many consumer transactions involve relatively small amounts of money. This greatly reduces consumers’ incentive to confront sellers or to bring suit. This is especially true given the high expense involved in the litigation process, even in the face of clear exploitation.174

Relatedly, specific exploitative terms may directly undermine consumers’ access to justice. One example is terms that prohibit class actions—a mechanism seemingly intended to overcome the small money disincentive and give consumers a stronger bargaining position as a group.175 Terms mandating arbitration pose another significant obstacle.176 Likewise, forum selection and choice of law clauses make it harder—if not practically impossible—for consumers to pursue their rights.177 Integrated clauses that bar oral or external evidence,178 and impose caps on firms’ liability179 are further examples of prevalent discouraging terms that might have the same effect.


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


177 See supra note 71. 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).


179 See supra note 68 (discussing a contract term that limited the liability of a property inspector to $285).
To conclude, the inherent features of consumer litigation coupled with the unique characteristics of the unconscionability doctrine make judicial scrutiny a costly, time-consuming, and ultimately very feeble regulatory mechanism for combating the problem of exploitative boilerplate. 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 [individual] lawsuits against inventive ‘wrongdoers.’

With this in mind, let us move to examine a completely different regulatory means for policing exploitative consumer contracts: public administrative oversight.

III. THE WAY FORWARD: ADMINISTRATIVE OVERSIGHT

Given the failures of the three mainstream strategies explored in Part II, this Part suggests a novel way to tackle the problem of exploitative consumer contracts. Section A explains the core idea behind the proposed model and its underlying assumptions. Next, Section B delineates the comparative advantages of administrative oversight. Acknowledging that the devil is in the details, Section C addresses a variety of normative and pragmatic concerns associated with the implementation of the envisioned reform. Finally, Section D addresses the imperative challenge of legitimacy.

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...”

The fundamental goal behind our proposal for administrative oversight is straightforward: drastically minimizing the free use of exploitative terms in consumer markets. Just like physical objects, consumer contracts require supervision to minimize the legal risks

\(^{180}\) Leff, Consumers, supra note 24, at 356.

\(^{181}\) Id. at 357-58.
they entail. In fact, administrative agencies have long been responsible for protecting consumers from dangerous products and unfair and deceptive business practices. The proposal we consider here is therefore in line with the already deep, and at times inevitable, governmental involvement in economic markets for the protection of consumers and the promotion of fair and efficient competition. 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, we believe, promote not only fairer but also more efficient results. The ensuing discussion is intended to substantiate this claim.

At this preliminary stage, we find it useful to highlight two fundamental guiding principles underlying our proposal. The first emphasizes the advantage of prevention over treatment. Generally speaking, it is more effective and often cheaper to prevent a serious problem or a risk from materializing than trying to solve the problem or mitigate the losses after the fact. Ex ante prevention is especially attractive when a problem is recurrent and has extensive scope, and when ex post means have consistently failed to resolve it – as is the case in our context.

The second conceptual principle builds on the idea of exploitative boilerplate as an agency problem. The argument is as follows: because consumers do not have any impact on most of the content of the contracts they enter into, and because such content is...

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182 This analogy was recognized and developed half a century ago by Arthur Leff. See Leff, *Contract*, supra note 24. See also infra note 185.

183 For example, the FTC is granted with sweeping powers and authority under the Federal Trade Commission Act; see 15 U.S.C. §§ 41-58. Similar authority is granted at the state level to certain administrative agencies or government ministries (most often the department of justice) under UDAP legislation. See, e.g., *Consumer Legal Remedies Act*, CAL. CIV. CODE §§ 1750–1784; *Department of Law Article*, N.Y. EXC. LAW § 63(12).

184 "The FTC works to advance government policies that protect consumers and promote competition" (opening policy statement on the FTC’s official website, https://www.ftc.gov/policy; last visited 1/30/21).

185 See Zamir & Ayers, *supra* note 33, at 299-300 (“Just as regulators set minimal standards for the safety of physical products… they should set such standards for the safety of contractual products, which may be just as risky.”); see also Zamir & Farkash, *supra* note 19, at 164 (“As the subprime crisis has demonstrated, unsafe contracts can involve risks to individuals and society that are no less damaging than the risks of unsafe drugs and toys.”).

186 As the famous adage goes, “an ounce of prevention is worth a pound of cure.”


determined unilaterally by form users that enjoy superior expertise and bargaining power, the latter should be regarded as agents acting not on behalf of themselves alone but also of the consumers with which they interact.\(^{189}\) However, because drafters have structured incentives to (ab)use their power and ignore the interests of consumers, special scrutiny over the agents’ acts is warranted.\(^{190}\) That is precisely where administrative agencies can step in and make sure the interests of consumers are properly considered by form-users.

**B. The Relative Advantage of Administrative Oversight**

Before moving from theory to practice, it is important to highlight the relative advantage of administrative supervision compared with other regulatory tools. Accordingly, this Section explains why administrative agencies are qualified for this task and can do a far better job than courts and legislatures in tackling exploitative terms in consumer contracts. We begin our comparison with judicial scrutiny, continue with statutory content-based regulation, move on to mandatory disclosures, and conclude with voluntary pre-approval mechanisms.

1. **Advantages over Judicial Scrutiny**

One key advantage of administrative control is that it 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.\(^{191}\) 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 public administrator is free from the inherently idiosyncratic, and often inconsistent considerations, that motivate and influence individual litigation. Rather than seeking redress for any individual instance of actual exploitation, as courts do, enforcement agencies can channel public resources more efficiently and focus on the overall most problematic terms for consumers as a group.\(^{192}\)

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\(^{189}\) Differently put, the seller is expected to be “other-regarding” while drafting the non-negotiated terms of the consumer contract. Cf. Peter M. Gerhart, Contract Law and Social Morality (2014), Ch. 12.

\(^{190}\) Cf. Kar, supra note 24, 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”).

\(^{191}\) See supra Part II.C.5.

\(^{192}\) The relative weakness of private enforcement compared to public enforcement has been recognized even in jurisdictions where statutory regulation of unfair standard terms is
Significantly, administrative action is not limited to providing redress for particular past grievances, which is the traditional goal of court remedies. Rather, the administrative remedy can be, and most often is, forward-looking and wider in scope and effect. Its prime objective should be to discipline unruly businesses from using exploitative boilerplate in the first place, thus deterring other firms from engaging in similar practices. As the next Section details, the specific preventive measures we suggest adopting are more far-reaching than any remedy a court can grant in a particular case. These mitigating measures can impact countless consumers at once, as they immediately affect the rights of every consumer with which the disciplined business has ever contracted.

Administrative agencies are also superior from a comparative institutional perspective. Such agencies are better suited to make broad and macro calls on market efficiency. They have a superior ability to engage in 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 industry customs, the relationship between terms and prices, and the potential impact of agencies’ intervention on third parties (suppliers, investors, lenders, servicers, other industries, etc.). This information is not generally available—and indeed is often inaccessible—for judges presiding in traditional civil cases. Without reliable information

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. PRIVAT LAW 589 (2015) (surveying the European landscape and making this observation).

193 See, e.g., Walter Gellhorn, The Legislative and Administrative Response, 17 VAND. L. REV. 91, 100 (1963) (“The sanctions courts can apply are limited in variety and range... these operate chiefly... to offset wrongs already done.”).

194 Cf. Ewoud H. Hondius, Unfair Contract Terms: New Control Systems, 26 AM. J. COMP. LAW 525, 528 (1978) (noting 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”).

195 See, e.g., Hillman & Rachlinski, supra note 25, 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...”).

196 See, e.g., Gillette, supra note 18, 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.”). See also 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”)

Electronic copy available at: https://ssrn.com/abstract=3720946
on these matters, one cannot expect courts to decide whether a particular standard term is harmful or inefficient.

Administrative agencies are also better capable of managing a complex process of deliberation with all stakeholders.\(^\text{197}\) Agencies operating in consumer markets (e.g., the FTC and the CFPB, on the federal level) have constant access to complex information. They have organized units and experienced personnel to conduct investigations, gather data, and process it to develop remedies. These agencies, and their counterparts on the state level, consist of industry-experienced or analytically-trained persons. They are generally not made up of elected positions, which are inevitably more vulnerable to capture by interested groups. 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. They are also better able to maintain and utilize institutional memory. All in all, this makes administrative agencies more competent than courts to study, detect, assess, and ultimately respond effectively to any detected exploitative boilerplate.

2. Advantages over Statutory Content-Based Regulation

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

Recall that in the U.S., content-based regulation of consumer contracts is the exception, rather than the rule.\(^\text{198}\) Where it exists, it is piecemeal and partial in coverage.\(^\text{199}\) This is far from surprising. Legislators are likely to view issues through a political lens, which makes it harder for them to form a sensible policy that is objective, evidence-based, and empirically informed.\(^\text{200}\) Moreover, consumers are often under-represented in the legislation process, whereas

\(^{197}\) The importance of deliberation is further discussed *infra* Part III.C.

\(^{198}\) See *supra* Part II.B.1.

\(^{199}\) As Budnitz notes, “Federal consumer protection law is not uniform and its coverage is not comprehensive”; see *supra* note 176, at 666.

\(^{200}\) Cf. Becher, *supra* note 22, at 141 (discussing the predominant flaws in the legislative process and arguing, *inter alia*, that “virtually every evidence-based issue in the realm of consumer law policy can become politicized”).
legislatures are frequently heavily influenced by professional lobbyists representing businesses and trade organizations.201

Most importantly, detecting exploitation in a standard form contract requires a detailed legal and economic analysis. Such analysis entails acquaintance not only with the specific economic sector and the overall market conditions surrounding the type of transaction at hand, but also an analysis of its unique terms and their potential harms and benefits. It is therefore very difficult, if not impossible, to formulate concrete, let alone exhaustive, statutory rules in advance that will effectively and comprehensibly define what an exploitative term will look like in any particular consumer transaction.202 The legislature is not in a good position to make such calls, which require acquaintance with the conditions of dynamic consumer markets.

In all of these respects, administrative control enjoys major advantages over statutory regulation.203 Administrative agencies have superior institutional competence, are better capable of responding to market dynamics, are more isolated from political pressure, and thus may be less vulnerable to capture by interest groups.204

That said, the importance of a basic legislative scheme should not be underestimated. Where exploitation is clear-cut, a statutory ban of especially harmful terms can be of great value. Legislation also has the important role of stating the social goals to be promoted by the regulation of consumer form contracts and the key means towards their fulfillment. In so doing, legislatures set the stage and provide the authority for other branches of government to step in

201 Id. at 109-10.
202 See, e.g., Collins, supra note 196, 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.").
203 For further discussion of some of these advantages see Becher, supra note 22, at 140-44.
204 See, e.g., Jeremy A. Blumenthal, Expert Paternalism, 64 FLA. L. REV. 721 (2012) (claiming that anti-paternalist arguments are contested by empirical evidence and that in many areas experts are better decision-makers than laypeople); see also Zamir & Ayers, supra note 33, at 300 (arguing that expert administrative agencies are less prone to make bad decisions and judgements due to cognitive biases and incomplete information). Of course, this is not to say that public agencies are immune from political pressure. Political changes can and do greatly impact their performance, priorities and personnel. An unfortunate recent example is the Consumer Financial Protection Bureau under the administration of President Donald 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, N.Y. TIMES (April 16, 2019); Adam Liptak & Alan Rappeport, Supreme Court Lifts Limits on Trump’s Power to Fire Consumer Watchdog, N.Y. TIMES (June 29, 2020).
and promote the legislative goals. At the end of the day, content-based regulation of consumer contracts would perform best if it is coupled with supplementary administrative control.205

3. Administrative Oversight and Mandatory Disclosure

The preceding analysis is largely applicable to mandated disclosures, the success of which is highly contested.206 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 administrative model we propose focuses primarily on the substantive content of consumer form contracts.

However, on further inspection, the two tools can actually supplement one another. First, the administrative model we offer is by no means inherently limited to overseeing the substantive aspects of consumer contracts. 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 being obeyed. Thus, administrative oversight of consumer form contracts should have two functions. Most prominently, it should strive to prevent substantive exploitation by the widespread use of unfair terms. As a secondary goal, it should also assist in the enforcement of mandatory disclosure duties, by collecting valuable, reliable data regarding their actual implementation in various economic sectors.

4. Administrative Oversight and Voluntary Pre-approval

A fairly recent reform proposal in the field of standard form contracts is “voluntary pre-approval.”207 Generally speaking, the idea here is to grant businesses the opportunity to apply to a nominated professional body (be it private or public) for 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 use it as a shield against future complaints and judicial review.

205 See, e.g., Gellhorn, supra note 93193, at 104-107 (discussing why and how legislatures and administrators should work in tandem).

206 See supra Part II.B.2. For a comprehensive and forceful critique see őEN-ŠAHAR & SCHNEIDER, supra note 147.

207 For sources developing this concept see supra note 18.
Alas, voluntary pre-approval involves difficulties. First and foremost, its success depends on sellers’ inclination to apply for approval. The complexity and uncertainty of such approval mechanisms may fuel skepticism for sellers regarding their utility. More importantly, approval entails the potential removal (or revision) of exploitative terms, which firms 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 with, and if they have little to lose from keeping the contracts away from the public eye, voluntary pre-approval is unlikely to gain much traction. On top of sellers’ hesitations, pre-approval bodies might be exposed to economic pressure and capture by industry interests. This can distort the integrity of the process and undermine consumers’ trust.

The administrative enforcement model we propose has superior potential vis-à-vis the voluntary pre-approval model. 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 cannot impose.\(^{208}\) 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.\(^{209}\) Furthermore, while the fear of capture is not eliminated under our model, it is arguably greatly reduced. This is due to various factors, including public stature, commitment, relative transparency, and exposure to judicial review, that characterize administrative action.

Last but not least, pre-approval compels the approving body to attend to whatever contracts are being brought before it, regardless of the social costs and 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.\(^{210}\) This has a major advantage in light of the severe budget constraints under which most consumer protection agencies regularly operate.

\(^{208}\) See infra Part III.C.4.

\(^{209}\) On the focus of the inquiry under our model, see infra Part III.C.2.

\(^{210}\) On this see infra Part III.C.1.
C. Administrative Oversight in Action

“We think that it is time, in consumer protection law... to look for regulation with bite.”211

The forgoing analysis underlined the many promises of administrative oversight as a regulatory tool. To make things viable, a precise and workable framework is required. This Section proposes such an account.

Before addressing the scrutiny process on a granular level, a brief note about its operational principles is due. The goal of the project should be to cost-effectively minimize consumer exposure to the risks of exploitative boilerplate. We intentionally choose the term “minimize,” since completely eradicating boilerplate exploitation is probably an unrealistic utopia. Relatedly, it should also be acknowledged that resource constraints can have a deep impact on the operation, structure, content, and success of the scrutiny process. This entails, of course, the need to prioritize enforcement efforts.212

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 requires developing clear enforcement policies and priorities. In this context, three operational guidelines seem to be most important. First, an effective oversight mechanism will require an optimized combination of human skills and technological capacities. Second, to capitalize on their advantages, agencies should implement simple and low-cost operational procedures to facilitate a dynamic and swift reaction to exploitative boilerplate once detected. Third, the agency should adopt a holistic approach to markets and should strive to be evidence-based, rather than politically driven.

Keeping in mind these general principles, we now turn to consider the pragmatic aspects of administrative oversight in more detail. Naturally, this is merely the first step of a dramatic law reform. Any initially implemented framework should be revisited

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211 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=Mld7vSrAP4&ab_channel=TheUniversityofChicago (criticizing mandated disclosure as inefficient and ineffective means to protect consumers).

212 See infra Part III.C.1.
and developed as experience is gained and further lessons are learned.

1. Setting Priorities

Recall that exploitative boilerplate may take three shapes: legally invalid terms, terms voidable under the unconscionability doctrine, and unfair terms under the wider and more flexible definition proposed above.\textsuperscript{213} Each of these terms requires a different level of scrutiny and involves different processes. The main dividing line, we suggest, is between preventing exploitation in the widest sense and preventing it only when it involves legally invalid terms. Let us explain.

Enforcing substantive fairness (or conscionability, for that matter) in the sense of preventing exploitation in consumer contracts will significantly widen the scope of the enforcer's intervention in the market. It will involve the challenge of applying vague standards, considering conflicting values, and deciding borderline cases. For instance, a determination of whether an arbitration clause, a forum-selection clause, an exemption clause, or a unilateral modification clause is unconscionable or unfair can become a fairly complex and loaded decision, at least in certain contexts. Detecting legally invalid terms, on the other hand, will typically require significantly less administrative discretion and resources. To illustrate, a term that fines a consumer for posting a genuine and honest negative review online is clearly invalid,\textsuperscript{214} and as such raises no complex dilemmas. Such a case presents a straightforward instance of exploitation that should be simply eliminated by the pertinent authorities.

Besides, since legally invalid terms are theoretically unenforceable, enforcing legality on form-drafters does not impose any new burdens on them. Enforcing substantive fairness (or unconscionability), however, will place significant new burdens on firms. Here, the enforcer interferes with a term that is merely unfair or voidable (under the unconscionability doctrine) rather than void or invalid \textit{per se}. An administrative order prohibiting the further use of an unfair (or unconscionable) term is therefore typically more intrusive and may be more controversial than restraining the further use of legally invalid) terms.

Seemingly, the above analysis justifies adopting a humble and thin approach that would target only legally invalid terms. However, administrators should realize that the risks unfair or unconscionable terms pose to consumers are no less significant and,

\textsuperscript{213} Supra text accompanying note 65.
\textsuperscript{214} See the Consumer Review Fairness Act, supra note 126.
as a matter of fact, much more prevalent than flatly ‘illegal’ terms. Hence, a thicker reform that would target both invalid and unfair terms can have a much broader effect on consumer markets.

Next, we propose that enforcement efforts should examine both substantive and procedural issues, although the focus should generally be on the former. Procedural issues may include, for instance, unordered and excessively long contracts, noncompliance with mandated disclosures or other formal requirements,215 inaccessible or illegible text, and the like. A substantive inquiry, on the other hand, will require assessing the legal and economic significance of the imbalanced terms – a mission that would be much more challenging for the overseeing agency. That said, we generally recommend prioritizing substantive supervision over procedural oversight. As emphasized above, there are good reasons to doubt whether improving the procedural aspects of consumer contracts, will indeed have a considerable positive impact on consumers’ behavior.216 The removal of exploitative terms from numerous forms following administrative action, on the other hand, will significantly benefit the market and will have a direct impact on the welfare of countless consumers. We would not, therefore, recommend relinquishing the effort of investing in the prevention of substantive exploitation in favor of a thin regulatory approach that would focus on safeguarding procedural fairness alone.217

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

To confront this challenge, administrative agencies should consider the following factors, among others. First is the nature of the risk. We submit that special attention should be given to risks that endanger important non-pecuniary consumer interests. These may include, for instance, the right to privacy, free speech, and access to justice. A second important factor is market size. Clearly, the greater the number of consumers exposed to an exploitative form, the bigger the scope of the potential harm. A third crucial factor is the magnitude of the expected loss. For example, if the typical risk latent in an exploitative term is largely pecuniary, it makes sense to invest more efforts in screening contracts that are being frequently used in economically large transactions. Examples

215 Examples may include making a term conspicuous or having terms separately signed.
216 See supra Part II.B.2.
217 For support see Zamir & Ayers, supra note 33.
may include, but are not limited to, long-term or high-cost services, credit card and bank agreements, real estate transactions, telecommunication services, vehicle purchases, mobile phone, cable and internet service contracts, etc. Fourth, enforcement agencies must look beyond mere numbers. Priority should also be given to instances in which vulnerable consumers (e.g., low-income or elderly) are often affected.

Obviously, the exact balancing act ought not to be set in stone, nor should it remain unchanged from year to year. Instead, it is better left open for future reconsideration and should be constantly subject to revision and incremental shifts based on the collection of new data.

Finally, reputational constraints, levels of competition, and consumer complaints can also assist in identifying suspect markets. However, 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 advocates or assistance groups, industry regulators, and law enforcement units—will assist enforcers to use these factors wisely, rather than being swayed by them.218

2. Gathering and Reviewing Consumer Contracts

After identifying possible suspect markets and contracts, the next step is to obtain the required information and begin processing it. Initially, we suggest issuing formal notices, informing the target firms of the agency’s intention to review their standard consumer forms. The notice should include a list of the types of transactions the administrative agency is focused on, and a request to provide the agency with: (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, complete, and accurate.219

With this information and other relevant data,220 the agencies will now face the most crucial and challenging stage of identifying exploitative terms in the forms handed over for their inspection. At the preliminary stage, the agency should employ a computerized


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

220 This may include data on consumer complaints, previous litigation, data from other consumer organizations or governmental units on past complaints, etc.
advanced language analysis of the inspected forms. The market already offers some impressive technological tools that can read, explicate, simplify, tailor, and benchmark consumer contracts. The sophistication and effectiveness of these machine learning algorithms will only grow with time. Enforcement agencies would be wise to adopt artificial intelligence technologies and contribute to their design and development as means to assist in sampling, classifying, and ultimately detecting exploitative terms in a cost-effective way.

At the next stage, the agency should focus on the non-salient pro-seller provisions that stand out as deserving careful analysis. Though seemingly straightforward, such a focus is a double-edged sword. Assessing terms in isolation, rather than in the context of the contract as a whole, can give the decision-maker a wrong impression. A pro-seller term that may seem exploitative in itself can be balanced elsewhere in the contract and thus be ultimately fair. On the other hand, a term that in itself may not cross the threshold for unconscionability (or substantive unfairness) may add-up, with other one-sided terms, to make the contract exploitative as

221 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, International Conference on Computed Aided Verification (2019).


223 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 114. In a sense, when price terms become complex, they may actually become non-salient, and thus justify inspection, under our definition.

224 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 (prescribing a similar test).

225 See, e.g., Gillette, supra note 18, at 980, 996 (noting that, for instance, unilateral change terms “can be exploitative or not, depending on whether the risks are priced and 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”).

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a whole. For instance, a contract that includes a class action waiver, an arbitration clause, a choice of law clause, and a forum selection clause may, in aggregation, have a strong chilling effect on consumers’ overall access to justice; one that goes beyond the individual terms when viewed in isolation. Thus, while a focus on specific suspect terms is cost-effective, the agency must remain cognizant that further legal and economic analysis by its professional and experienced personnel may justify a different conclusion than that reached by any algorithmic analysis, sophisticated as it may eventually become.

Per this insight, and because the unfairness of any term must be sensitive to sellers’ rationale for incorporating it, the next step should introduce a procedure by 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 at first blush are indeed exploitative. Hopefully, this stage will minimize enforcement errors and increase cooperation with the business sector.

As experience develops and knowledge accumulates, administrative enforcement agencies may identify a set of prima facie problematic terms, either in the context of specific economic markets or more generally. In such cases, we advise the careful and gradual development of tentative and non-exhaustive lists of such terms for each relevant sector. The lists should be revisited and updated periodically. Such lists should also be communicated, or at least publicly accessible and transparent, so that businesses, consumers, and professional associations could consider these tentative lists.

In this context, one should recall that various suppliers who operate within a specific market often adopt the same set of contractual terms. So far, this has contributed to the proliferation of exploitative terms. Under our proposal, however, this reality can actually augment the positive impact of any of the agency’s rulings or findings. This is so, since modifications that follow the agency’s

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227 Cf. id.

228 For further discussion, findings and analysis see, e.g., Mark R. Patterson, Standardization of Standard-Form Contracts: Competition and Implications, 52 WM. & MARY L. REV. 327 (2010); Florencia Marotta-Wurgler, Competition and the Quality of Standard Form Contracts: The Case of Software License Agreement, 5 J. EMPIRICAL LEGAL STUD. 447, 475 (2008); Margaret Jane Radin, Boilerplate Today: The Rise of Modularity and the Waning of Consent, 104 MICH. L. REV. 1223 (2006). See also supra note 25.
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scrutiny of the forms used by one supplier, may be voluntarily adopted by its competitors. That is, though the agency’s decisions were made vis-à-vis a specific actor, other players within the market may opt to revise their contracts accordingly, either for fear of being called to scrutiny, or, ideally, as a result of healthy competition over the quality of consumer forms.

A final recommendation pertains to the evidentiary standard the agency should apply. Here, we suggest adopting a rather conservative standard, under which a term or a contract will trigger administrative reaction only if it is highly exploitative.229 The main drawback of such a demanding standard is clear: it will 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. To minimize the risk of overshooting during this formative period, a more demanding standard is justified. Likewise, a high standard that can be relaxed with time will minimize the chances of the agency 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 must be invested as cost-effectively as possible. Arguably, focusing on the most obvious examples of consumer exploitation reduces the risk of wasteful investments in borderline or niche cases. It will also reduce how frequently the agency expends resources to defend controversial decisions in court or the media. Therefore, at least during the formative phase of the proposed regulatory project, we suggest adhering to a relatively demanding threshold.

3. The Formal Investigatory Stages

Carefully designed procedures are an essential component in the successful implementation of any serious reform. To be sure, covering the whole range of procedural issues is impractical at this stage. Nonetheless, some key guidelines are of importance and should be briefly discussed.

For starters, the formal stages of the agency’s work should be informed by the following two sets of values. The first concerns fairness, voice, and due process. Here, we allude to the fact that sellers’ interests may be jeopardized following the review of their

229 And Compare Omri Ben-Shahar, Fixing Unfair Contracts, 63 Stan. L. Rev. 869 (2011) (claiming, in a different context, that courts invalidating unconscionable standard terms should supplement them not with the most appropriate term but with a term reflecting the minimal level of protection for the consumer).
form contracts. Therefore, it is necessary to allow them to participate in the deliberation process, ensuring that they are heard with full attention and an open mind. The second value, and to an extent a conflicting one, is efficiency without creating the expectation of a trial-like back and forth or formal defense. There is a need to facilitate low-cost and swift administrative reaction to boilerplate exploitation.

Accordingly, several sets of procedural rules ought to be developed to enable a smooth and efficient oversight process. The process would begin with a formal first notice which would: (1) alert the firm that the administrative agency intends to inspect their forms; (2) explain the firm’s rights and obligations in the review process; and (3) affirm the firm’s duty to comply and cooperate with the investigation. The 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.230 The aim of deliberation, as explained above, is to allow the firm the opportunity to refute the presumption that the terms are exploitative, by pointing out their economic necessity or highlighting particular benefits to the consumer which may outweigh the burdens the term at issue imposes. In certain cases, at the full discretion of the enforcing agency, these (and later) stages can involve consultation with consumer advocacy organizations as well as pertinent trade unions.231

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, which might take the shape of a “consent order,” should be made public, as 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 whether their contracts come

230 It is reasonable to assume that many firms will regularly retain an attorney to accompany it in the deliberation process, which will add to the fairness and transparency of the procedure.

231 This is a coin with two sides. On the one hand, it can give the consumer and the firm more voice in the process. On the other hand, this will inevitably increase administrative costs and dilate the timeframe.
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into line with the agency’s standards before the enforcing agency turns to them for inspection.

Thereafter, if the parties have not reached an accord, the agency should make a final decision regarding the terms at stake. The decision should explain the legal and economic reasoning behind the agency’s conclusions. It will also clarify the remedy or sanction imposed by the agency in response to the finding of exploitative terms; most typically a declaration or a restraining order.\textsuperscript{232} The decision must be conveyed to the pertinent firm whose terms were subject to the agency’s scrutiny. Importantly, a record of the decision should be publicly available in an official report and on the agency’s website. We strongly recommend actively communicating such decisions to any major enterprise active in the relevant sector.

4. Responding to Exploitative Boilerplate: Remedies and Sanctions

To realize the goal of minimizing consumer exposure to exploitative terms, two remedial responses seem necessary. First, the agency must ensure that exploitative terms that consumers have already accepted become ineffective as soon as possible. Second, it must ensure that exploitative terms are not used by the seller in any future similar transactions. Accordingly, the agency should be empowered to issue orders guaranteeing these results.\textsuperscript{233}

This entails an authority to issue official orders of two distinct types. First, order or declaration invalidating any term found to be exploitative in any contract previously executed with any consumer based on the same inspected form (or conditioning its validity on neutralizing its exploitative aspect). To materialize the remedial effect of this sanction, the firm would be ordered to make a reasonable effort to inform all relevant consumers, within a prescribed period of time, that the invalidated terms are no longer effective or enforceable—or explain the nature of the remedy the agency has ordered. Second, the agency may—and absent special circumstances should—issue an administrative injunction (an order to “cease and desist”), prohibiting the seller from any further use of similar exploitative terms in any substantially similar transactions.\textsuperscript{234}

\textsuperscript{232} These remedies are discussed \textit{infra} Part III.C.5.

\textsuperscript{233} The formal legal basis for the agencies’ actions is discussed \textit{infra} Part III.D.

\textsuperscript{234} This raises the thorny issue of which transactions are “substantially similar” to the ones in which exploitation was found. For instance, can contracts be sufficiently “similar” if they deal with vehicles rather than real estate. While acknowledging this practical challenge, we believe that some useful guidelines as to that would be considered a “similar transaction” can, in due course, be developed and made public.

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Importantly, failure to comply with any of these administrative orders should result in either administrative or civil penalties for non-compliance. Potentially higher penalties for repeat offenders, who have continued to use terms previously declared to be exploitative, should also be available.\(^{235}\) Additionally, the imposition of any such administrative sanctions and remedies must be publicly visible and subject to judicial review or at least an appeal before an appropriate, impartial administrative tribunal. The mere option of challenging the agency’s decision will, in and of itself, incentivize the agency to be cautious and professional in its decision-making.\(^{236}\)

Finally, enforcement agencies can entertain the interesting idea of rewarding—rather than sanctioning—firms whose contracts are found to be especially fair, balanced, and (relatively) transparent. 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 which the seller may lawfully use in certain advertisements. The overseeing agencies should also have the authority to combine various types of positive incentives.

\textit{D. The Legitimacy Challenge}

Radical law reforms face serious challenges, and our proposal is no exception. Many of the challenges have been addressed above. This Section briefly tackles an additional key challenge: formal legitimacy.

Two alternative options can serve as the formal legal basis for the agency’s actions. Ideally, federal and state legislators would promulgate comprehensive statutory schemes that govern the agency’s mission, along the lines of the European model. Such legislation could define exploitation (or unfairness), provide lists of presumably unfair terms, and vest the appropriate federal or state agencies with explicit authority to detect and respond to exploitative boilerplate as delineated above.

Alternatively, and arguably somewhat more realistically, consumer protection agencies can take the initiative to legitimate the agency action. These agencies can begin implementing the


\(^{236}\) Cf. Paul R. Kleindorfer, \textit{What if You Know You Will Have to Explain Your Choices to Others Afterwards? Legitimation in Decision-making}, in \textit{THE IRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD} 72, 72 (2010) (“The anticipation that one may be required to explain or justify decisions after the fact might be expected to affect the decisions that are made.”).
proposed reform as part of their general mandate under the Federal Trade Commission Act and parallel UDAP statutes to protect consumers from “unfair and deceptive” business practices. This, of course, requires agencies (and governments) to embrace the idea that offering consumers exploitative terms is an unfair or deceptive business practice.

In our view, such an interpretation is not far-fetched. Repeatedly and pervasively offering consumers one-sided, non-salient terms to which the informed consumer would not agree seems to us an unfair practice. When the exploitative term is legally invalid, as often is the case, such a practice may not only be unfair, but also deceptive. The term’s inclusion in an otherwise binding contract can deceive consumers into believing that they are likewise bound by the legally invalid term, when in fact they are not.237

In fact, a thorough examination of UDAP legislation will reveal a surprising fact: five states already explicitly regard the inclusion of unconscionable terms in a consumer form contract as an unfair practice. In California, for example, the Consumer Legal Protection Act defines “inserting an unconscionable provision in the contract” as an unlawful act.238 Similarly, in the District of Columbia, it is an unfair or deceptive trade practice “to make or enforce unconscionable terms or provisions in sales or leases.”239 The same is true for the State of New York if such practice is “repeated,”240 and for Indiana, though under somewhat more restrictive conditions.241

Recently, the State of Vermont has taken matters a step further, enacting detailed legislation that defines certain one-sided form terms as presumably unconscionable. If that presumption is not rebutted, a court may find the drafting party responsible for committing an unfair and deceptive practice and order it to pay up to $1,000 for every offense.242

True, defining “unconscionable” under these statutes poses an interpretive challenge. We opine that in this context, an unconscionable provision should be understood as a substantively, rather than procedurally, unfair term. This aligns with our tentative

237 See also Beale, supra note 63 (defining deception as a “representation, omission, or practice that is likely to mislead a reasonable consumer”).
239 D.C. Code § 23-3904(r).
240 N.Y. Exec. Law § 63(12).
241 In Indiana the solicitation of a person to enter a contract containing “oppressively one-sided” terms is a deceptive practice, at least under certain restrictive conditions. Indiana Code § 24-5-0.5-10(b).
242 9 V.S.A. § 6055 (Unconscionable Terms in Standard-Form Contracts Prohibited).
definition of unfairness, which overlaps, to a considerable extent, with the three-pronged fairness test of Section 5 of the Federal Trade Commission Act. Arguably, this federal standard, which seems quite demanding, can serve as a useful guideline for both federal and state enforcement agencies.

Finally, it is also worth noting that in at least 28 states, UDAP legislation delegates rulemaking authority to the state consumer protection agencies. This can serve as a basis not only for responding to exploitative boilerplate but also for promulgating and publishing rules that will clarify the types of terms that shall be presumed exploitative in different types of consumer transactions across different economic sectors. This, in turn, can enhance the impact of the agency’s activity, and with it—the potential success of the proposed reform.

Additional legitimacy-related challenges concern securing public trust and confidence in the agency’s competence and integrity and minimizing the risk of regulatory capture by interested groups. These are legitimate concerns that accompany any proposal for additional regulation of economic markets. Serious as they are, they are not unique to our context and do not, in themselves, justify relinquishing efforts to improve efficiency and fairness in consumer markets. We believe that the formation of holistic, consistent, transparent, and innovative operating policies can ensure that such challenges are considered seriously and met with success.

CONCLUSION

Faced with lengthy, dense, unreadable, and non-negotiable form contracts, consumers forgo any attempt to negotiate these terms or to evaluate their significance. Ideally, form-drafters should factor in consumers’ interest and offer transparent, fair, and

243 Supra text accompanying notes 64-65.
244 Federal Trade Commission Act, 15 U.S.C. §45(n). This Act limits the agency’s enforcement powers to an act or practice that 1) “causes or is likely to cause substantial injury to consumers;” is 2) “not reasonably avoidable by consumers;” and is 3) “not outweighed by countervailing benefits to consumers or to competition.”
246 See also id. at 86-89 (calling on states to revive that UDAP legislation to allow consumer protection agencies to prohibit the use of unfair terms).
247 For a thorough and illuminating discussion of this concern under the pre-approval model see Gillette, supra note 16, at 1005-12.
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efficient terms. However, firms’ superior knowledge, power, and near-absolute discretion as to the content of their contracts, coupled with the inherent failures of consumer markets to self-regulate, inevitably results in the widespread use of exploitative contract terms.

Scholars and policymakers in the U.S. have offered three main disciplinary options to tackle this problem. Unfortunately, each of these alternatives has severe limitations. There seems to be an ever-growing consensus that, even combined, market forces, legislative intervention, and judicial scrutiny still fail to adequately discipline sellers from using and relying on unfair, unconscionable, and even legally invalid terms. This ongoing reality harms consumers, honest traders, and society as a whole.

Given this resounding failure, one asks ‘where to from here?’ This Article’s answer is administrative control. Such a strategy has clear advantages compared 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 terms ex ante. This Article is a first attempt to delineate the contours of such an enforcement model and to fill it with detailed process suggestions.

To be sure, administrative oversight is not a panacea, and our proposal is exposed to various criticisms and challenges. While we addressed some of these challenges, we are well aware that critical readers—and reality itself—may identify or bring about others. Challenges and critiques are inherent to any effort to explore a new path towards the solution of an old and persistent problem. In fact, they should serve as important checks and valuable steppingstones on the way to develop a better legal regime.

Rather than allowing harmful boilerplate terms to continue flooding consumer markets, policymakers should make a conscious effort to significantly reduce the frequency at which such terms are offered to consumers in the first place. Instead of expecting consumers to identify, understand, and react to exploitative standard terms, a shrewd and cost-effective public monitoring system could detect, deter, and effectively respond to the massive use of such terms.

Importantly, our call for administrative control does not entail throwing out the baby with the bathwater and forgoing all the other protective measures currently in use. Rather, it is an additional preventive regulatory tool that has been unduly neglected for too long. Ultimately, American consumers and markets deserve better
protection from the harms of exploitative boilerplate. Administrative oversight of consumer contracts could be an important component in ending firms’ license to contractually exploit consumers.