ENDING THE LICENSE TO EXPLOIT: ADMINISTRATIVE OVERSIGHT OF CONSUMER CONTRACTS

YEHUDA ADAR*
SHMUEL I. BECHER**

Abstract: Current approaches to consumer standard form contracts generally assume that aggrieved consumers can adequately detect and challenge exploitative terms and that vigilant courts can effectively scrutinize them. 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. This Article suggests supplementing the current means of addressing exploitation in consumer contracts with a dynamic preventive model of administrative oversight. Specifically, this Article proposes a professional system of public supervision over the content of consumer form contracts. This Article demonstrates how such a mechanism, if shrewdly designed, can cost-effectively tackle the widespread use of unfair, unconscionable, or legally invalid terms. Although 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.

INTRODUCTION

Consumer standard form contracts (consumer contracts) typically contain harsh and imbalanced terms that can harm consumers.[1] In a sense, these terms

* Faculty of Law, University of Haifa. LL.D., LL.B. (Hebrew University of Jerusalem).
** Professor, Victoria University of Wellington. J.S.D., LL.M. (Yale University).

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[1] *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (detailing how consumer contracts harm consumers, undermine their

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 of their existence and latent risks.[2] 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.[3]

Although both viruses and imbalanced consumer contracts have a negative reputation, their existence can sometimes make sense and even be beneficial.[4] Consumer contracts can reduce friction and transaction costs.[5] Also, some seemingly imbalanced standardized terms can be economically justified and reasonable. Such terms may reduce sellers' costs, resulting in better prices for consumers.[6]

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,[7] resulting in a lack of

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rights, and challenge the rule of law). The terms "consumer form contract" or "consumer contract," refer to those standardized contracts, otherwise known as "adhesion contracts," between a business and a consumer, which are "prepared by one party, to be signed by another party in a weaker position." *See Contract*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[2] *See* discussion *infra* Part I (examining exploitative boilerplate terms and their social costs). *See generally* OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012) (discussing exploitation of consumer cognitive biases in specific key markets).

[3] For discussion of the issue of unilateral modifications of consumer contracts, see, for example, Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 8–26 (2010); Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA. L. REV. 657, 666–87 (2021).

[4] For discussions of how viruses could potentially contribute to human welfare, see, for example, Am. Soc'y for Microbiology, *Viruses: You've Heard the Bad; Here's the Good*, SCI. DAILY (Apr. 30, 2015), https://www.sciencedaily.com/releases/2015/04/150430170750.htm [https://perma.cc/987R-P7JX]; Beth Skwarecki, *Friendly Viruses Protect Us Against Bacteria*, SCIENCE (May 20, 2013), https://www.sciencemag.org/news/2013/05/friendly-viruses-protect-us-against-bacteria [https://perma.cc/GM42-ZEM2]. *See also* Katherine J. Wu, *Nothing Eats Viruses, Right? Meet Some Hungry Protists*, N.Y. TIMES, https://www.nytimes.com/2020/09/24/science/virus-eaters-protists.html [https://perma.cc/89FR-96CH] (Sept. 25, 2020) ("Rather than acting only as disease-causing agents of chaos and snuffing out life, viruses might in some cases play a role in fueling and sustaining it.").

[5] *See, e.g.*, Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 89 (1977) ("The form contract economizes on the costs of contract negotiation by providing a set of terms to govern in the absence of explicit negotiations.").

[6] *See generally* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 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* Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to Be Met*, 45 AM. BUS. L.J. 723, 733–35 (2008) (discussing the problems arising from information asymmetry between firms and consumers). *See generally* Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503 (2020)

competition over non-salient terms.[8] Yet, like viruses, exploitative terms in consumer contracts are hard to detect, delineate, control, and contain.[9] Following this analogy, this Article calls for a conceptual shift whereby *ex ante* administrative control serves as a key component in the prevention of boilerplate exploitation.[10]

To be sure, academics have studied the phenomenon of consumer contracts and the unique problems they create from multiple angles.[11] 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.[12] 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.[13] This persistent reality has led legislators, courts, and scholars to

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(discussing firms' practice of making loud promises that are negated in the fine print of their consumer contracts); 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. SCIS. & 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).

[8] *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1238–39 (2003) (discussing circumstances wherein a term's salience to particular groups of consumers may result in drafters avoiding competition over those consumers and instead targeting consumers for whom the term is non-salient).

[9] *See* discussion *infra* Part I (discussing the varying forms of exploitation in consumer contracts).

[10] *See* discussion *infra* Part III (exploring the central justifications behind an administrative solution to boilerplate exploitation, as well as its benefits and shortcomings).

[11] *Cf.* Clayton P. Gillette, *Rolling Contracts as an Agency Problem*, 2004 WIS. L. REV. 679, 679 (noting that the literature on consumer contracts "is prodigious").

[12] For some recent analyses of how firms use exploitative terms to the detriment of consumers, see generally Shmuel I. Becher & Tal Z. Zarsky, *Minding the Gap*, 51 CONN. L. REV. 69 (2019) (discussing the concern that firms will impose harsh contracts terms on vulnerable consumers yet reveal leniency toward others); Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1 (2017) [hereinafter Furth-Matzkin, *Unexpected Use*] (discussing unenforceable terms in the context of landlord and tenant law); Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031 (2019) [hereinafter Furth-Matzkin, *Harmful Effects*] (discussing the results of experimental studies relating to unenforceable terms in residential rental agreements); Tess Wilkinson-Ryan, *Justifying Bad Deals*, 169 U. PA. L. REV. 193 (2020) (discussing consumer psychology and particularly consumers' deference to terms in consumer contracts); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017) [hereinafter Wilkinson-Ryan, *Perverse Consequences*] (discussing consumer responses, or lack thereof, to the disclosure of terms in the fine print of consumer contracts).

[13] *See, e.g.*, Oren Bar-Gill, *Seduction by Plastic*, 98 NW. U. L. REV. 1373, 1373 (2004) ("Absent legal intervention, the sophisticated seller will often exploit the consumer's behavioral biases."); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1176, 1242,

recognize the need to protect consumers from abusive contracting practices, including the use of certain imbalanced standard terms.[14]

Despite this wide acknowledgment, there is little agreement over the kind and scope of the appropriate protections.[15] 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 elicits great suspicion. Opportunistic exploitation and other abusive practices are better left, so they argue, to the self-regulation of the market.[16]

1250–55, 1258 (1983) (proposing that any non-negotiated terms ought to be considered presumptively unenforceable, unless clearly "visible" to consumers).

[14] *See, e.g.*, LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 215–21 (2002); *id.* at 217 ("Welfare economic analysis may favor . . . replacing one-sided contract terms with more reasonable ones . . . . That unsophisticated buyers may become subject to value-reducing [contractual] arrangements is obvious."); Margaret Jane Radin, *What* Boilerplate *Said: A Response to Omri Ben-Shahar (and a Diagnosis)* 1 (Univ. of Mich. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 392, 2014), https://ssrn.com/abstract=2401720 [https://perma.cc/S3F9-FRU8] ("Old-school 'Chicago' law-and-economics seems to be giving way to a more nuanced theoretical approach . . . ." (footnote omitted)); *see also infra* notes 17–20 and accompanying text (noting those who advocate for non-market-based solutions to consumer protection from exploitative boilerplate); *infra* Sections II.B–C (discussing existing legislative and judicial approaches to boilerplate consumer exploitation).

[15] *Cf.* Jean Braucher, *Unfair Terms in Comparative Perspective: Software Contracts*, *in* COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 339, 339 (Larry A. DiMatteo et al. eds., 2013) ("[M]ost policymakers, regulators, and scholars concede that there often can be no real assent to mass-market standard terms, but then balk at meaningful solutions to address market failure.").

[16] For arguments in favor of market solutions to exploitative boilerplate terms, see generally Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827 (2006) (justifying seemingly "exploitative" terms on grounds of asymmetric risk of harm to the firm's reputation); Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111 (2006) (discussing consumer mistakes and maturation and noting the corrective sufficiency of existing legal and market remedies); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 809 (2008) ("[A]mbitious efforts to combat cognitive mistakes by direct regulation or disclosure provisions do not . . . overcome the strong presumption of error under which they should be evaluated."); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975) (advocating a thin procedural approach to unconscionability on libertarian and utilitarian grounds). Notably, even under this approach, state intervention may be justified in face of clear market failures if those failures can be remedied cost-effectively. *See generally* KAPLOW & SHAVELL, *supra* note 14, at 217; Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 553 (2014) (proposing the mandatory use of warning boxes as a response to consumers' tendency not to read boilerplate terms); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297 (1981) (noting conceptions of consumer product warranties as exploitative but arguing for a view of such warranties as a mutual investment between the consumer and firm to prolong the life of the product); Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630 (1979) (arguing that legal actors should only intervene in consumer markets after the market has been determined to be noncompetitive).

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 contracts.[17]

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;[18] bolder judicial application of traditional contract doctrines such as unconscionability, interpretation, etc.;[19] and the establishment of voluntary mechanisms for approving standard forms.[20]

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[17] *See, e.g.*, KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 370 (1960) (suggesting that, in addition to consumers' broader assent to unread but reasonable terms that do not undermine the meaning of the bargained-for terms, the only boilerplate terms to which consumers specifically assent are those few that were bargained for); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971) (arguing that consumer contract terms are "almost universally unfair"); Lewis A. Kornhauser, Comment, *Unconscionability in Standard Forms*, 64 CALIF. L. REV. 1151, 1162 (1976) ("Most clauses of standard form contracts are candidates for nonenforcement."). *See generally* RADIN, *supra* note 1 (severely criticizing the current legal regime and favorably discussing stronger regulatory solutions to combat harsh boilerplate terms).

[18] *See, e.g.*, Ayres & Schwartz, *supra* note 16, at 555; 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 their interactions and dealings with the firm). *See generally* Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019) (arguing that courts should not apply the "duty to read" to unreadable contracts).

[19] *See generally* RESTATEMENT (SECOND) OF CONTS. § 211(3) (AM. L. INST. 1981) ("Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."); 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); 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). For further discussion, see *infra* Section II.C (assessing the efficacy of judicial scrutiny in regulating boilerplate terms).

[20] *See, e.g.*, Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 770 (2009); Clayton P. Gillette, *Pre-approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 983–84 (2005); *cf.* Bar-Gill & Davis, *supra* note 3, at 7–8 (envisioning a voluntary approval-based solution to issues posed by unilateral contract modification). For a critical discussion of this idea, see *infra* Subsection III.B.4 (arguing that administrative oversight is a more effective solution to consumer exploitation than voluntary pre-approval).

Against this rich and versatile body of literature, this Article offers three main contributions. Part I of this Article suggests an analytical distinction between legally invalid, unconscionable, and unfair exploitative terms, thereby adding much-needed clarity to current descriptions of exploitative boilerplate.[21] Part II provides an up-to-date and critical assessment of the current approaches toward the problem of exploitative consumer contracts.[22] This critical analysis highlights the need for reform. Finally, Part III supplies a fully-fledged case for administrative oversight over consumer contracts.[23] 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. Although there seems to be a growing scholarly tendency to mention administrative regulation as an optional enforcement tool,[24] discussions of this option have too often been sketchy and incomplete.[25] As this Article delineates below, administrative scrutiny can be superior to judicial scrutiny, legislative control, or market forces.[26]

At first glance, administrative scrutiny over consumer contracts may seem a complicated measure of enforcement. This Article argues, however, that—like in many other domains—systematic prevention may be wiser, more effec-

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[21] *See infra* notes 28–96 and accompanying text.

[22] *See infra* notes 97–198 and accompanying text.

[23] *See infra* notes 199–275 and accompanying text.

[24] *See, e.g.*, KAPLOW & SHAVELL, *supra* note 14, at 217 & n.146 (mentioning the administrative option and noting that "[i]f reasonably accurate legal intervention were possible at low cost, then parties would generally be better off" (footnote omitted)); RADIN, *supra* note 1, at 240 ("US legislatures or administrative bodies could at least consider disallowing certain [boilerplate] clauses . . . ."); Furth-Matzkin & Sommers, *supra* note 7, at 544–45 (suggesting statutory damages, fee-shifting provisions, and even administrative enforcement to combat fine-print fraud); Furth-Matzkin, *Harmful Effects*, *supra* note 12, at 1065–66 (briefly proposing state pre-approved lease agreements); Todd D. Rakoff, Commentary, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1243 (2006) (suggesting that a variety of bodies, including administrative agencies, can carry out boilerplate scrutiny); 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 JERUSALEM REV. LEGAL STUD. 137, 167 (2015) (positing that the tendency toward disclosure-based protections is inadequate as compared to effective administrative oversight).

[25] For two notable exceptions where the administrative 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, 90–105 (2002) (strongly supporting the option, but failing to address many pragmatic challenges) and Gillette, *supra* note 20, at 986–88 (assessing the challenges associated with a non-mandatory pre-approval system of standard online contracts).

[26] *See* discussion *infra* Section III.B.

tive, and ultimately cheaper than treatment.[27] Rather than allowing harmful boilerplate terms to freely flood consumer markets uncontrolled, policymakers should make a conscious effort to significantly reduce the frequency at which consumers face harmful exploitative terms 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 that this Article envisages, 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 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. A potential civil or administrative penalty will bolster such an order. This Article further envisages that the agency's decision concerning the scrutinized form of a given firm will also incentivize other market participants to improve their own form contracts, thus amplifying the system's overall effectiveness.

To be sure, this 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. Nevertheless, given the enduring failures of the current system, it seems that the time is ripe for a conceptual shift toward 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. [28] Next, Section B offers an analytical distinction between three types of exploitative boilerplate terms. [29] Thereafter, Section C delineates the unique social costs of exploitative terms. [30]

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[27] *Cf.* Shmuel I. Becher, *Unintended Consequences and the Design of Consumer Protection Legislation*, 93 Tul. L. Rev. 105, 112–13 (2018) (discussing the reasons that may lead people to undervalue prevention in the context of consumer protection legislation).

[28] *See infra* notes 31–42 and accompanying text.

[29] *See infra* notes 43–75 and accompanying text.

[30] *See infra* notes 76–96 and accompanying text.

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.[31] The average consumer does not have any input on the specific content of most of the terms governing the transaction.[32] Furthermore, in certain markets, consumers face little variation in contract terms.[33] Therefore, it is unsurprising that consumers generally do not even attempt to read their contracts,[34] which quite often are unreadable to begin with.[35] Consumers typically lack sufficient incentive to invest effort (including time, energy, and money) into studying non-negotiable terms.[36] Consumers' indifference and inattention are especially acute with respect to "non-salient" terms—that is to say, terms

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[31] *See, e.g.*, RADIN, *supra* note 1, at 9 ("Standardized form contracts, when they are imposed upon consumers, have long been called 'contracts of adhesion,' or 'take-it-or-leave-it contracts,' because the recipient has no choice with regard to the terms." (footnote omitted)); Slawson, *supra* note 17, 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.").

[32] *See, e.g.*, Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 142–43 (1970) [hereinafter Leff, *Contract*]; Slawson, *supra* note 17, at 532 ("The power to contract in this situation is the power of one party to impose whatever terms he likes on the other."). *See generally* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) (discussing the evolution and proliferation of boilerplate consumer contracts); Arthur Allen Leff, *Unconscionability and the Crowd—Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349 (1970) [hereinafter Leff, *Consumers*] (discussing unconscionability in the context of typical consumer contracts, wherein the consumer simply accepts the terms as presented).

[33] Firms often mimic and copy boilerplate terms from one another. *See, e.g.*, Robert A. Hillman & Jeffery J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 435–36 (2002); Slawson, *supra* note 17, 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."). This is not to say that consumer contracts are static or that variations never exist across suppliers of similar products. *See generally* 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), a common type of boilerplate form used for online software product transactions).

[34] *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 32 (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, 4 (2018) (reporting survey results according to which 57% of consumer law professors "rarely or never read [consumer] contracts").

[35] *See* Benoliel & Becher, *supra* note 18, at 2277–78 (finding that more than 99% of the five hundred standard online contracts studied were unreadable for the average consumer); Marotta-Wurgler & Taylor, *supra* note 33, at 253 (finding that the language used in EULAs resembles that of scientific articles).

[36] *See, e.g.*, Gillette, *supra* note 11, at 680 ("[F]ailure to read may be perfectly rational, especially given the inability to negotiate around terms . . . .").

whose impact is less direct, obvious, or accessible to the average consumer.[37] This, in turn, leads to a fundamental market failure known as imperfect (or asymmetric) information.[38]

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.[39] 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 fine print, even when it contains clearly unenforceable terms.[40]

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.[41] Nevertheless, these "hidden" burdens are not necessarily accompanied by a corresponding full price reduction, or any other benefit, to consumers.[42] The next Section sheds light on the various forms that exploitative boilerplate may take.

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[37] *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 priced as part of the purchase decision").

[38] For further discussion of the market failure of asymmetric information and its normative implications, see discussion *infra* Section II.A.

[39] *See, e.g.*, Bar-Gill, *supra* note 13, at 1375–76; Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213–25 (1995); Korobkin, *supra* note 8, at 1216–44. For further discussion of the normative implications of consumers' bounded rationality, *see infra* Part II.A.

[40] *See* Furth-Matzkin & Sommers, *supra* note 7, at 541–42; Furth-Matzkin, *Harmful Effects*, *supra* note 12, at 1058–59; Wilkinson-Ryan, *Perverse Consequences*, *supra* note 12, at 140–44; Wilkinson-Ryan, *supra* note 7, at 1760–62. One of the first to study and detect this psychological effect was Warren Mueller. *See* Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 276–77 (1970). For further discussion of exploitation through legally invalid standard terms, *see infra* Subsection I.B.1.

[41] *See, e.g.*, Eyal Zamir (featuring Ian Ayres), *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 295 (2020) (suggesting that most contractual terms in standard form contracts are "practically invisible for most consumers").

[42] *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) (noting that firms "will respond to market incentives by manipulating consumer perceptions in whatever manner maximizes profits"). *See generally* Jeff Sovern, *Toward a New Model of Consumer Protection: The Problem of Inflated Transaction Costs*, 47 WM. & 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* Section II.A.

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, legislatures, and academics refer to such terms employing a wide range of pejorative labels, such as bad, onerous, oppressive, imbalanced, outrageous, exploitive, one-sided, and unfair.[43] This Article uses the term "exploitative" to describe potentially harmful boilerplate terms that are unfair to the consumer either because of the way by which they have been (mis)represented (procedural exploitation) or because they are substantively unfair under a certain moral or economic test (substantive exploitation). In what follows, this Article highlights an important analytical distinction between three types or categories of exploitative terms. The differences between these categories are conceptually significant and, as Part III explains, have important policy implications.

1. Legally Invalid Terms

This Article uses the phrase "legally invalid term" to indicate 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[44] or expressly declaring its nullity.[45] It can also be any other rule or principle from statutory or common law from which the nullity of a conflicting agreement may be inferred.[46] In our view, when such legally invalid terms are potentially harmful from the consumer's perspective, they are exploitative as much as they are invalid.[47]

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[43] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 448 (D.C. Cir. 1965) (using the term "exploitive"); RESTATEMENT (SECOND) OF CONTS. § 208 cmt. d (AM. L. INST. 1981) (applying the term "unfair"); Barnes, *supra* note 19, at 241 (referring to the notions "oppressive" and "outrageous"); Gillette, *supra* note 20, at 982 (employing the term "one-sided"); Kornhauser, *supra* note 17, at 1164, 1166 (mentioning the terms "bad" and "onerous").

[44] *See, e.g.*, REVISED UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 201(a) (UNIF. L. COMM'N 2015) ("A lease may include terms and conditions not prohibited by this [act] or law other than this [act]."); *id.* § 203(a) (prohibiting the inclusion of certain requirements in residential leases).

[45] *See, e.g.*, Consumer Review Fairness Act of 2016 § 2, 15 U.S.C. § 45b(b)(1) (invalidating as "void from the inception" certain standardized terms that impede consumer review of the firm's products, services, or actions).

[46] For example, the common law public policy against contractual penalties makes any agreed-to contract damages that serve as a penalty unenforceable. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 356(1); DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 12.9(1) (3d ed. 2018).

[47] On the unfairness involved in using unenforceable terms, see, for example, Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845–46,

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 can neither harm consumers nor exploit them. Further, from the drafting party's perspective, it might seem futile to employ a term that it presumably could never enforce against the consumer.

Reality proves this line of reasoning naive. For a variety of reasons, legally unenforceable terms can greatly benefit form-drafters who may often use them against consumers.

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 implicitly invalidated. Consumers may therefore abide by the legally invalid term voluntarily or accept the seller's demand to comply with it.[48]

Second, as we have already emphasized, consumers tend to believe that the fine print is legally binding even when it is not, especially if the term is drafted authoritatively.[49]

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.[50]

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 Unfair or Deceptive Acts or Practices (UDAP) laws.[51] 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

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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 . . . .").

[48] *See, e.g.*, Kurt E. Olafsen, Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522, 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 7, at 91 (finding a clear correlation between the existence of an exculpatory clause and the propensity of aggrieved consumers to forgo seeking compensation).

[49] *See supra* note 40 and accompanying text.

[50] *See, e.g.*, Furth-Matzkin, *Harmful Effects*, *supra* note 12, 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.").

[51] For further discussion of this regulatory option, see *infra* Section III.D.

provision against the consumer. Nevertheless, the seller will not be subject to any additional sanction for using it in the first place.

Although a few scholars have shed light on this phenomenon,[52] only recently have empirical studies established its wide scope and serious harmful effects on consumers.[53] The literature has documented the continuous usage of (theoretically) unenforceable terms in various domains, such as residential leasing,[54] employment,[55] and insurance.[56] Part III of this Article discusses the crucial role of administrative oversight in tackling this troubling, and largely neglected, phenomenon.

2. Voidable Unconscionable Terms

The unconscionability doctrine, incorporated into section 2-302 of the Uniform Commercial Code (UCC), plays a vital role in combating exploitation in contracts generally[57] and consumer contracts in particular.[58] According to this

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[52] *See, e.g.*, Kuklin, *supra* note 47, at 845–46. *See generally* Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127 (2009) (discussing the widespread inclusion of unenforceable contract terms as a market failure).

[53] *See, e.g.*, Furth-Matzkin, *Unexpected Use*, *supra* note 12, at 40 (finding that residential leases in Massachusetts regularly include unenforceable terms); *see also* Furth-Matzkin & Sommers, *supra* note 7, at 546 (concluding from empirical studies that consumers felt bound by boilerplate terms even when those terms contradicted the seller's prior misrepresentations about the contents of their contracts); Furth-Matzkin, *Harmful Effects*, *supra* note 12, at 1035–36 (finding, based upon experimental studies, that respondent-tenants seeking Massachusetts residencies were more likely to bear costs legally intended for landlords and to refrain from conducting further online research due to the inclusion of unenforceable terms in boilerplate residential leases); Wilkinson-Ryan, *supra* note 7, at 1765 (finding, based upon experimental studies, that respondents believed the use of fine print terms to impose fees was inappropriate on the part of the seller but also that respondents strongly believed consumers who agreed to terms without reading them are blameworthy for transactional harms).

[54] *See, e.g.*, Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836, 836 (1974) ("The Uniform Residential Landlord and Tenant Act threatens terms contained in almost all current leases . . . ." (footnote omitted)); Furth-Matzkin, *Unexpected Use*, *supra* note 12, at 40 (noting the use of unenforceable terms in residential leases); David Vance Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204, 206 (1976) (arguing that residential leases reflect contract law's inability to manage form contracts); Olafsen, *supra* note 48, at 523–24 (discussing certain terms in residential leases determined to be unenforceable by courts and legislatures).

[55] *See* Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782–83 (2002) (positing that employers in California often use unenforceable non-compete clauses); Sullivan, *supra* note 52, at 1147–57 (discussing the inclusion of unenforceable postemployment non-compete clauses and arbitration agreements in employment contracts).

[56] *See generally* Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions*, 42 AKRON L. REV. 519 (2009) (discussing certain illegal exclusions of, or restrictions on, insurance coverage).

[57] *See* U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM'N 2017); RESTATEMENT (SECOND) OF CONTS. § 208 (AM. L. INST. 1981). For a discussion of the doctrine's expansion to virtually any type

doctrine, a court may refuse to enforce a contract or a clause therein if the court finds it unconscionable.[59] 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).

The exact conceptual content of unconscionability is hard to depict and is rarely definitively portrayed.[60] Nevertheless, in due course, it has become quite clear that unconscionability involves a combination or interaction of a procedural and a substantive aspect.[61] 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 (for example, age, experience, and mental capacity), and any dishonest or otherwise improper conduct that may have influenced the weaker party to enter the contract.[62] In other words, procedural unconscionability is based on a defective or unfair contracting process that presumably impaired the weaker party's freedom of choice.[63] Substantive unconscionability, on the other hand, is based on the

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of contract, see JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 9.39 & nn.1–15 (6th ed. 2009).

[58] RESTATEMENT OF THE L. ON CONSUMER CONTS. § 5 cmt. 1 (AM. L. INST., Tentative Draft 2019) ("[T]he doctrine of unconscionability is a primary tool against the inclusion of intolerable terms in the consumer contract."); *id.* § 5 & cmts. 1–5; *see also* RESTATEMENT (SECOND) OF CONTS. § 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.").

[59] *See* U.C.C. § 2-302(1). The literature on unconscionability is vast. *See generally* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969) (defending the doctrine of unconscionability as a useful legal standard); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (discussing the drafting of the unconscionability clause of the UCC); Colleen McCullough, Comment, *Unconscionability as a Coherent Legal Concept*, 164 U. PA. L. REV. 779 (2016) (examining developments in the doctrine of unconscionability in the context of contracts of adhesion).

[60] *See, e.g.*, PERILLO, *supra* note 57, § 9.40 ("'Unconscionable' is a word that defies lawyer-like definition." (footnote omitted)).

[61] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." (footnote omitted)); Trinity Indus., Inc., v. McKinnon Bridge Co.,77 S.W.3d 159, 170–71 (Tenn. Ct. App. 2001) (stating that a finding of unconscionability "may arise from . . . (procedural unconscionability) or . . . (substantive unconscionability)"), *abrogated by* Bowen *ex rel.* Doe v. Arnold, 502 S.W.3d 102 (Tenn. 2016). *But see infra* note 65 and accompanying text (noting that most jurisdictions require both procedural and substantive unconscionability to invalidate a contract clause as unconscionable).

[62] *See, e.g.*, Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002) ("[P]rocedural 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." (citations omitted)).

[63] *See, e.g.*, Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1053 (1977) ("Nonsubstantive [procedural] unconscionability arises when certain factors,

problematic outcome of the contracting process, namely on the content of the agreement, or a clause therein, which is deemed unreasonably imbalanced.[64]

Typically, a clause will be declared unenforceable when both procedural and substantive unconscionability are present, at least to a certain degree.[65] The two elements are said to influence one another under a "sliding scale," where less of one element requires more of the other, and vice versa.[66] Importantly, courts will only intervene on the grounds of unconscionability if the combined effect of the substantive and procedural elements is so extreme as to "shock the conscience of the court."[67] On its face, many consumer contracts contain voidable terms that may, upon judicial inspection, justify nullification. Nevertheless, and as Part II.C. illustrates, consumers' ability to rely on the unconscionability doctrine to challenge one-sided standard terms is greatly limited. [68]

3. Unfair Terms

Under American law, the label "unfair term" is seldom applied to denote a distinct formal rule or doctrine.[69] Federal and state legislators have traditionally refrained from embracing "unfair terms" legislation, which today has become quite common in jurisdictions outside the United States.[70] Of course, any uncon-

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such as a lack of commercial sophistication, apparently prevent a contracting party from exercising his freedom to choose the terms of an agreement.").

[64] *See, e.g.*, *Sitogum Holdings*, 800 A.2d at 921.

[65] For a clear reflection of this dominant approach, see RESTATEMENT OF THE L. ON CONSUMER CONTS. § 5(b) (AM. L. INST., Tentative Draft 2019). It is also supported by federal and state case law. *See, e.g.*, Ferguson v. Countrywide Credit Indus., 298 F.3d 778, 783 (9th Cir. 2002); *Williams*, 350 F.2d at 449; Marin Storage & Trucking, Inc., v. Benco Contracting & Eng'g, 107 Cal. Rptr. 2d 645, 653 (Cal. Ct. App. 2001); Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 922–23 (N.D. 2005). Nevertheless, under a competing approach, either substantive or procedural unconscionability standing alone may be sufficient. For a recent empirical study reporting on such "single-element" cases, see Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 814 (2020) (finding that almost a third of all successful claims did not require proof of both elements).

[66] *See, e.g.*, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 12 (2012).

[67] *See, e.g.*, Leeber v. Deltona Corp., 546 A.2d 452, 454, 456 (Me. 1988) (internal quotations omitted) ("A determination of unconscionability cannot be made unless the circumstances of the case truly 'shock the conscience' of the court." (citations omitted)).

[68] *See* discussion *infra* Section II.C. (assessing the disadvantages of relying on judicial scrutiny to remedy exploitative consumer contract terms).

[69] Only a handful of state and federal laws involve statutory prohibitions or restrictions relating to "unfair terms" or "unfair provisions." *See, e.g.*, California Rental-Purchase Act, CAL. CIV. CODE § 1812.621 (West 2021) (mentioning that the Legislature's intent was to prohibit unfair conduct targeting consumers in rental-purchase transactions); Securities Act of 1951, N.D. CENT. CODE § 10-04-08.1 (2021) (providing that "[t]he right to sell securities in this state shall not be granted in any case when it appears to the commissioner that . . . the proposed disposal of the securities is on unfair terms . . . .").

[70] For further discussion, see *infra* Subsection II.B.1.

scionability case may involve some elements of unfairness—substantive or procedural.[71] It is thus unsurprising that the label "unfair" is often used as a synonym for "unconscionable."[72] Nevertheless, "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.[73]

As a starting point,[74] 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 that 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.[75] 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, Section C discusses the social costs that exploitative boilerplate entails.

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[71] *Cf. supra* notes 61–66 and accompanying text (discussing the interplay between substantive and procedural unconscionability).

[72] Alternatively, "unfair" is often used as an adjective describing the nature of a certain unconscionable term (or contract). In the majority of federal and state contract disputes concerning "unfair terms," courts also discuss or use the term "unconscionability." *See, e.g.*, Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Moore v. U.S. Dep't of State, 351 F. Supp. 3d 76 (D.D.C. 2019); Triple 7 Commodities, Inc. v. High Country Mining, Inc., 857 S.E.2d 403 (W. Va. 2021).

[73] Nevertheless, the concept of fairness is sometimes analyzed in the context of UDAP laws. *See generally* Emily Beale, Comment, *Unfair-but-Not-Deceptive: Confronting the Ambiguity in Washington State's Consumer Protection Act*, 43 SEATTLE U. L. REV. 1011 (2020) (discussing ambiguity in the concept of unfairness related to the Washington Consumer Protection Act). For a discussion of the issue in European scholarship, see, for example, HUGH COLLINS, REGULATING CONTRACTS 256–86 (1999); Spencer Nathan Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17, 21–22 (1988).

[74] This proposed definition overlaps, to a considerable extent, with the definition of "unfairness" under the Federal Trade Commission Act. *See infra* note 272 and accompanying text.

[75] 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. Section III.C outlines a few alternative approaches that administrative agencies can take when designing their enforcement policies and priorities in this area.

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 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 provision.[76] As a result, a consumer may face systematic hurdles in making a complaint about losses emanating from being subject to a contract presumably entered into freely. 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.[77]

Nonetheless, the costs to consumers and society of boilerplate exploitation are very real. The direct and immediate victims are the affected consumers that abide by legally invalid, substantially unconscionable, or otherwise unfair terms. To illustrate, assume an exemption (or 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. Although such a term could theoretically translate to consumers paying lower prices 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.[78] The exploitation, in this case, manifests itself in making the consumer waive their basic legal right—and reasonable expectation—to fair compensation for a wrong suffered.[79]

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[76] As previously discussed, this factor has a strong psychological impact on consumers. *See supra* notes 39–50 and accompanying text.

[77] Another conceptual obstacle might be posed by the avoidable consequences doctrine (also known as the mitigation of damages doctrine) or the comparative/contributory negligence defense, which deny or reduce recovery for avoidable losses. *See, e.g.*, Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 783–84 (2013). Hence, consumers could be accused of failing to mitigate their losses (or contributing to them) by deciding to enter into the consumer contract without carefully reading the contract or resorting to legal consultation beforehand.

[78] *Cf.* Glassford v. BrickKicker, 35 A.3d 1044, 1046 (Vt. 2011) (finding a clause limiting a property inspector's liability in damages to $285 to be 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.

[79] For useful analyses of the problems associated with exculpatory clauses, see, for example, Stolle & Slain, *supra* note 7, at 91 (finding that exculpatory clauses deterred a study's participants

The typical loss to consumers from exploitative terms is economic, as in the example just mentioned. Nevertheless, 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 may lead to feelings of frustration, anger, alienation, 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 that the seller or supplier inflicted.[80]

Another noteworthy category of intangible harms arises 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.[81] Other typical examples include restrictions on consumers' ability to raise certain claims during litigation,[82] unfair arbitration clauses,[83] and indemnity clauses that make consumers liable for challenging such restrictions, particularly when done via class

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from seeking compensation); Eike von Hippel, *The Control of Exemption Clauses: A Comparative Study*, 16 INT'L & COMPAR. L.Q. 591, 592 (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 favour of one party"); Vernie Edward Freeman II, Casenote, *Property—Landlord and Tenant—Exculpatory Clause in Residential Apartment Lease Held Void as "Unbargained For."* Lloyd v. Service Corp., *453 So.2d 735 (Ala. 1984)*., 15 CUMB. L. REV. 765, 765–67 (1985) (discussing a Supreme Court of Alabama case that declared an exculpatory clause void, *inter alia*, because it appeared in a standard form lease agreement).

[80] *See, e.g.*, Jordan v. Diamond Equip. & Supply Co., 207 S.W.3d 525, 528, 535–36 (Ark. 2005) (upholding a sweeping exculpatory clause notwithstanding serious and permanent personal injury that allegedly resulted from negligent instructions regarding the use of a bobcat truck loader). For analysis and critique of the decision, see generally John G. Shram, Note, *Contract Law—The Collision of Tort and Contract Law: Validity and Enforceability of Exculpatory Clauses in Arkansas.* Jordan v. Diamond Equipment, *2005 WL 984513 (2005)*., 28 U. ARK. LITTLE ROCK L. REV. 279 (2006). *See also* Harper v. Ultimo, 7 Cal. Rptr. 3d 418, 421–22, 427 (Ct. App. 2003) (holding a limitation clause contained in an arbitration agreement unenforceable because it prevented a consumer from obtaining meaningful compensation for property damage caused by a contractor).

[81] *See, e.g.*, Fteja v. Facebook, Inc., 841 F. Supp. 2d 829, 831 (S.D.N.Y. 2012). *Shute v. Carnival Cruise Lines* reflects the judicial debate over the validity of forum selection clauses in consumer contracts. 897 F.2d 377, 387–89 (9th Cir. 1990), *rev'd*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991). For cases where such terms have been invalidated, see, for example, Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574–75 (App. Div. 1998) and Dix v. ICT Grp., 106 P.3d 841, 843–45 (Wash. Ct. App. 2005).

[82] *See, e.g.*, *Jordan*, 207 S.W.3d at 528 (upholding a clause that waived the right to raise certain claims of negligence).

[83] 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, 700–720; *see also* Feeney v. Dell Inc., 908 N.E.2d 753, 763–64 (Mass. 2009) (prioritizing class actions over a contractual provision that required individual arbitration and prohibiting class actions), *abrogated in part by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) (pertaining to the holding only as applied to FAA arbitration agreements).

actions.[84] 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.[85]

As a final example, consider contract provisions that prohibit consumers from, or penalize them for, posting negative reviews online.[86] Such terms may—in addition to depriving consumers of fundamental rights (for example, 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.[87]

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 do not merely violate their freedoms. They also undercut the market's ability to offer accurate and reliable information, which is crucial for a flourishing economy.[88] 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.[89]

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[84] *See, e.g.*, Lennar Homes of Cal., Inc. v. Stephens, 181 Cal. Rptr. 3d 638, 649 (Cal. Ct. App. 2014) (holding an indemnity clause interacting with the anti-strategic lawsuit against public participation statute in California to be unconscionable); Util. Serv. & Maint., Inc. v. Noranda Aluminum, Inc., 163 S.W.3d 910, 913 (Mo. 2005) (en banc) (emphasizing that indemnity clauses must be clear and conspicuous in consumer contexts).

[85] This is also known as the concept of "procedural justice," wherein parties often care more about the process of justice and having their day in court than the legal "bottom line." *See* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 127–30 (1990).

[86] *See, e.g.*, Complaint at 1, Palmer v. KlearGear.com, No. 13-cv-00175 (D. Utah filed Dec. 18, 2013) (detailing a consumer's suit against an online retailer that threatened to fine them $3,500 over a negative online review and report them to credit agencies—and thus harm their creditworthiness). *See infra* notes 143–144 and accompanying text (explaining that such terms are now prohibited).

[87] *See generally* Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575 (2020) (identifying the emotional harm of mandated arbitration on consumers).

[88] *See infra* notes 103–106 and accompanying text (discussing the role of information in consumer markets).

[89] *See, e.g.*, KAPLOW & SHAVELL, *supra* note 14, 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)." (footnote omitted)).

From a non-consequentialist perspective, one may argue that, under the guise of the free market and individual autonomy, firms govern over important legal and economic aspects in the lives of millions of consumers in a non-democratic manner through their boilerplate language.[90] Indeed, many believe that in an era of mass production and under the stress of high competition between firms, the use of exploitative terms has become virtually inevitable.[91] This, some argue, presents a challenge to important social values such as democracy and meaningful freedom of contract.[92] Along these lines, it has been argued that exploitative terms dilute, or even "delete" consumers' rights.[93] In permitting such a massive "deletion of rights" without sufficient public oversight, our society implicitly renounces its commitment to the "rule of law," replacing it with the "rule of the firm."[94] Arguably, such tolerance on the part of the law toward business opportunism may reinforce feelings of distrust, inequality, resentment, and antipathy within the civil society.[95] This state of affairs is morally disturbing and socially harmful.[96]

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[90] For an early observation along these lines, see, for example, Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 731 (1931) ("Law, under the drafting skill of counsel, now turns out a form of contract which resolves all questions in advance in favor of one party to the bargain. It is a form of contract which . . . amounts to the exercise of unofficial government of some by others, via private law."). *See also* RADIN, *supra* note 1, 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 displacing the legal regime enacted by the state with a governance scheme that is more favorable to the firm.").

[91] *See, e.g.*, Slawson, *supra* note 17, at 531 ("Forms standardized to achieve economies of mass production and mass merchandising 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.").

[92] *See, e.g.*, *id.* at 530 ("[T]he 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.").

[93] For a thorough examination of the concept of consumer rights being diluted through exploitative terms, see RADIN, *supra* note 1, at 16, 19–51, 82–119.

[94] *Id*. at 15 ("[W]e risk losing our claim to being a society observant of the rule of law when our courts permit too free a rein to boilerplate.").

[95] *See, e.g.*, Brief for Appellants at 11, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (Nos. 18,604 & 18,605) ("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."); Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 GEO. L.J. 1383, 1415 (2014).

[96] *Cf.* Zamir, *supra* note 41, 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.").

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.[97] This Part offers a critical examination of the mainstream approaches toward minimizing exploitation in consumer contracts. Section A criticizes the idea that market mechanisms alone can discipline firms and deter them from employing exploitative terms.[98] Section B addresses substantive and procedural mandatory legislation that aims to minimize exploitation *ex ante*.[99] Finally, Section C assesses *ex post* judicial scrutiny.[100]

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

Contracts allow parties to maximize their utility and thus increase overall social welfare.[101] Economists generally opine that governments should limit their interventions to market failures that can be addressed cost-effectively.[102] 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.[103] Although sellers are generally well-informed about the quality and other traits of the

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[97] 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 101, 109 (Oct. 11, 2014) (reviewing OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2508719 [https://perma.cc/E87X-BCAZ] ("[D]espite this increase in knowledge and emerging consensus over the problem [relating to mandated disclosures], there is even more uncertainty and even less consensus over how consumer protection should be reformed in light of these facts.").

[98] *See infra* notes 101–135 and accompanying text.

[99] *See infra* notes 136–172 and accompanying text.

[100] *See infra* notes 173–198 and accompanying text.

[101] This proposition is often attributed to ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (New York, Modern Library 2000) (1776). *See also* Terence Hutchison, *Adam Smith and* The Wealth of Nations, 19 J.L. & ECON. 507, 517 (1976).

[102] 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 generally F.A. HAYEK, THE ROAD TO SERFDOM (1944).

[103] *See, e.g.*, George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488, 490–91 (1970) (modeling information asymmetry through the example of the automobile market); Schwartz & Wilde, *supra* note 16, at 655–56 (developing criteria to assess when imperfect information should be regarded as resulting in a market failure that justifies regulation). *See generally* Carl Shapiro, *Consumer Information, Product Quality, and Seller Reputation*, 13 BELL J. ECON. 20 (1982) (analyzing consumers' imperfect information with respect to unobservable product tributes and the limited impact of reputation). On the effect of imperfect consumer information on the market price under a monopoly, see generally Steven Salop & Joseph Stiglitz,

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 and especially to those "non-salient" terms that go unnoticed by the vast majority of consumers.[104] This, in turn, can lead to a market of so-called "lemons," where firms offer low-quality products—or disadvantageous contracts—to consumers.[105] That is, sellers will take advantage of consumers' ignorance and offer biased terms that most consumers would not have accepted under conditions of full information—thus reducing, rather than enhancing, aggregate welfare.[106]

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.[107] Firms, who compete over consumers and cannot afford to lose the informed groups, will be deterred from using biased and inefficient terms.[108] The reading minority would exert pressure on sellers, thus improving market equilibrium for all consumers.[109]

Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion, 44 REV. ECON. STUD. 493 (1977).

[104] *See supra* notes 37–38 and accompanying text; *see also* Becher, *supra* note 7, at 733 ("Lack of familiarity with contractual terms is a specific category of asymmetric information.").

[105] *See, e.g.*, Akerlof, *supra* note 103, at 490 ("[B]ad cars drive out the good because they sell at the same price as good cars . . . . [T]he bad cars sell at the same price as good cars since it is impossible for a buyer to tell the difference between a good and a bad car; only the seller knows.").

[106] *See, e.g.*, Bebchuk & Posner, *supra* note 16, at 829, 834–35 (recognizing the phenomenon of one-sided inefficient terms in consumer contracts due to information asymmetry and discussing a possible economic justification for their existence); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 505 (2006) (noting that "informational shrouding flourishes even in highly competitive markets," even when it results in inefficient allocations); Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 603–08 (1990) (discussing the detrimental economic effect of imperfect information on sellers' and consumers' behavior); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1389 (1983) (distinguishing between three sources of asymmetric information in consumer contracts, of which ignorance as to contract quality is one).

[107] *See* M.J. Trebilcock & D.N. Dewees, *Judicial Control of Standard Form Contracts*, *in* THE ECONOMIC APPROACH TO LAW 93, 105–06 (Paul Burrows & Cento G. Veljanovski eds., 1981); *see also* Schwartz & Wilde, *supra* note 16, at 682 ("[W]hen markets are competitive, individuals are protected from the adverse consequences of making decisions in the face of imperfect information."); *id.* at 637–38 (explaining the circumstances under which market competition over the researching shoppers will also protect the non-researching shoppers).

[108] *See* Schwartz & Wilde, *supra* note 16, at 638; *see also* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 616 (1982) ("If there is competition among sellers, and good information about buyer preferences, sellers will offer whatever terms they think buyers will pay for.").

[109] *See* Kennedy, *supra* note 108, at 616; Schwartz & Wilde, *supra* note 16, at 638.

Nevertheless, theory and practice have refuted the informed minority thesis.[110] To begin, many terms are obscure, unreadable, and incomprehensible.[111] A significant minority is unlikely to read and understand such fine print.[112] 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.[113] Thus, consumers cannot effectively shop among competitors' contract terms, a factor that makes them even less inclined to invest in term reading.[114] Hence, although they may search and compare salient aspects of the transaction,[115] consumers are unlikely to make the same effort concerning the non-salient terms.[116] 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.[117]

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[110] The model has been questioned and criticized from various perspectives and in different contexts. *See, e.g.*, Avery Katz, *The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation*, 89 MICH. L. REV. 215, 290 (1990) ("The only circumstance in which the group of informed buyers would not unravel is where a nontrivial proportion of buyers faced no positive cost in becoming informed."); *see also* Meyerson, *supra* note 106, at 601 ("[T]here generally will be too few informed consumers to produce a competitive market for contract terms."). *See generally* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) (criticizing reliance on competitive markets in the context of products liability); R. Ted Cruz & Jeffrey J. Hinck, *Not My Brother's Keeper: The Inability of an Informed Minority to Correct for Imperfect Information*, 47 HASTINGS L.J. 635 (1996) (favoring market solutions over legal intervention, but nonetheless criticizing reliance on an informed minority of consumers).

[111] *See, e.g.*, Benoliel & Becher, *supra* note 18, at 2283–84 (discussing empirical evidence demonstrating how consumers will often encounter unreadable terms).

[112] *See, e.g.*, Croley & Hanson, *supra* note 110, at 771 ("Consumers must do more than read the words in a warranty; they must know what the words mean . . . . [T]he fact that the costs of reading a warranty or warning are low does not necessarily mean that the costs of becoming well informed also will be low."); Meyerson, *supra* note 106, at 599 ("Without legal advice, consumers cannot understand how typical contract terms shift risks away from the seller and onto the consumer.").

[113] *See, e.g.*, Meyerson, *supra* note 106, at 600; Slawson, *supra* note 17, at 531.

[114] *See, e.g.*, Kessler, *supra* note 32, at 632; Slawson, *supra* note 17, at 530–31.

[115] *See, e.g.*, Patricia M. Danzon, *Comments on Landes and Posner: A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 569, 571–73 (1985); Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 CARDOZO L. REV. 2193, 2204 (1989); Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819, 826 (1992).

[116] *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, 719 (1992) ("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." (footnote omitted)); Meyerson, *supra* note 106, at 601; Rakoff, *supra* note 13, at 1226 ("[F]or most consumer transactions, the close reading and comparison needed to make an intelligent choice among alternative forms seems grossly arduous.").

[117] *See, e.g.*, Cruz & Hinck, *supra* note 110, at 672–74.

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 portion of consumers spends time reading online standard form contracts.[118] Another study has shown that consumers are rarely aware of the fact that they have acceded to an arbitration clause, thus having waived their right to a trial in front of a court or jury.[119] More anecdotally, sellers and agents often admit that consumers very rarely read their contracts.[120] Thus, even if, in theory, an informed minority could discipline the market, there are simply not enough informed consumers to attain that goal.[121]

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.[122] Even ignoring all of these biases, consumers are simply unable to

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[118] *See* Bakos et al., *supra* note 34, at 4 ("[T]he fraction of consumers who read such [software license] contracts is so small that it is unlikely that an informed minority alone is shaping software license terms."); *see also* Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 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 34, at 4 (finding among a survey of consumer law professors that less than one in six respondents normally read contracts or disclosures).

[119] Jeff Sovern et al., *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 2 (2015) (reporting survey results that "suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers").

[120] *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) (noting a business whose "licensing agreement promised a 'consideration' to anyone who read their terms and sent an email to an address listed in the agreement"). Only after "four months and more than 3,000 downloads" did a consumer respond with an email. *Id.* For yet another illustrative story, see Planet Money, *Summer School 8: Risk & Disaster*, NPR, at 10:45 (Aug. 26, 2020), https://www.npr.org/2020/08/26/906243873/summer-school-8-risk-disaster [https://perma.cc/3GJE-Y4BM] (recording an insurance agent's opinion that, in the course of six years, only three people, out of thousands of customers, read the insurance fine print—or part of it—and raised any issues with it).

[121] *See, e.g.*, Zamir, *supra* note 41, at 296 ("For all practical purposes, . . . the informed-minority hypothesis may be disregarded, at least in routine transactions." (footnote omitted)).

[122] *See, e.g.*, Bar-Gill, *supra* note 13, at 1375–76; Eisenberg, *supra* note 39, at 213–25; Hillman & Rachlinski, *supra* note 33, at 450–54; Korobkin, *supra* note 8, at 1290–93; Debra Pogrund 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 & L. 85, 96–105 (2010) (discussing fourteen cognitive and social psychological barriers that prevent disclosures in the mortgage market from being effective); *see also supra* notes 39–50 and accompanying text (discussing certain psychological factors that drive consumers to accept the harm caused by sellers' inclusion of invalid, unenforceable terms in their boilerplate contracts).

rationally assess the likelihood that the seller will indeed rely upon a one-sided term and, in that event, to assess the likelihood that they will be able to successfully negotiate the issue with the firm or challenge the term before a court or an arbitrator.[123] Simply put, behavioral biases and natural limitations on consumers' capacity prevent them from properly assessing the risks latent in one-sided boilerplate.

One could 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 that employ exploitative terms.[124] 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.[125]

Although 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.[126] 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 because that information is the leverage with which they could extract a discount from sellers.[127] 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, seriously distorted, and inaccurate.[128] 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 sophisti-

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[123] *Cf.* Zamir, *supra* note 41, at 299.

[124] *See* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMMS. & TECH. L. REV. 303, 315–18 (2008).

[125] For the disciplinary role of reputation in the context of standard form contracts, see, for example, Bebchuk & Posner, *supra* note 16, at 830. *See also* Oren Bar-Gill, *Consumer Transactions*, *in* THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 406, 409–11 (Eyal Zamir & Doron Teichman eds., 2014) (ebook) (discussing market solutions and reviewing the role of reputation).

[126] *See, e.g.*, Yonathan A. Arbel, *Reputation Failure: The Limits of Market Discipline in Consumer Markets*, 54 WAKE FOREST L. REV. 1239, 1242 & n.7 (2019).

[127] *Cf.* Cruz & Hinck, *supra* note 110, at 668–69, 669 ("[A]ll 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." (footnote omitted)).

[128] *See, e.g.*, Arbel, *supra* note 126, at 1243, 1262–70 (describing online reputational information as "sluggish" and overly reflective of unusual consumer experiences, leading to the information's unreliability (emphasis omitted)).

cated consumers.[129] Armed with big data and sophisticated analytics, there are reasonable grounds to assume that firms will find ways to defuse the impact of any particularly assertive, vocal, and informed consumers.[130]

More generally, the argument that employing one-sided contracts will inevitably cause grievous injury to the seller's reputation still awaits empirical proof.[131] 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.[132] Furthermore, if most firms in a market or industry use the same biased terms, the terms are more likely to become an accepted norm.[133]

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.[134] Because market mechanisms cannot guarantee an efficient and fair equilibrium, legal intervention may be warranted to restrain exploitative boilerplate terms.[135]

B. Legislative Intervention

Market forces and reputational concerns do not guarantee efficient contract terms.[136] 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

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[129] *See, e.g.*, Becher & Zarsky, *supra* note 12, at 90; Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279, 280–81 (2012); Zamir, *supra* note 41, at 297.

[130] *See, e.g.*, Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 959–71 (2020) (describing how firms leverage data and analytics to identify and subdue assertive consumers before the firm suffers any undesirable reputational or legal consequences).

[131] For an interesting related discussion, see generally Jeff Sovern, *Six Scandals: Why We Need Consumer Protection Laws Instead of Just Markets*, MICH. BUS. & ENTREPRENEURIAL L. REV. (forthcoming) (St. John's Legal Stud., Rsch. Paper No. 21-0001, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765745 [https://perma.cc/D97T-Q5BK] (examining six occurrences in which companies' misconduct became public but did not result in uniform reputational harm or diminished sales).

[132] *See* Becher & Zarsky, *supra* note 124, 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.").

[133] *See* Becher, *supra* note 7, at 751.

[134] *See, e.g.*, Marotta-Wurgler & Taylor, *supra* note 33, at 257 (reporting that terms in the end user license agreements the authors studied became more favorable to sellers over time).

[135] We use the term "may" because 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.

[136] *See supra* Section II.A.

draft and offer consumers,[137] and second, regulation of the procedure governing the formation of consumer contracts.[138]

1. Substantive Regulation

Substantive regulation of consumer contracts can be done either by invalidating specific types of clauses or by defining such terms as presumably 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.[139] Some banking contracts have also been subject to substantive scrutiny with respect to price-fixing, privacy, and other issues.[140] For example, under the Higher Education Opportunity 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."[141] Another important example is the Magnuson-Moss Warranty Act, which safeguards minimum substantive standards of warranties concerning tangible consumer products.[142]

Finally, a recent and less traditional example is the Consumer Review Fairness Act of 2016.[143] This Act, which is not limited to a specific industry or market, prohibits firms from including terms in their standardized forms that threaten or penalize consumers for sharing and posting honest reviews.[144] Some additional examples of mandatory substantive content regulation exist at the state

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[137] *See infra* notes 139–156 and accompanying text.

[138] *See infra* notes 157–172 and accompanying text.

[139] *See, e.g.*, Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 377, 402–08 (Daniel Schwarcz & Peter Siegelman eds., 2015) (discussing different forms of administrative control over insurance policies); Spencer L. Kimball & Werner Pfennigstorf, *Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice*, 39 IND. L.J. 675, 681–704 (1964) (discussing legislative and judicial intervention into U.S. insurance policy terms). For an up-to-date survey of the key federal and state agencies overseeing the insurance market, see *Federal Insurance Office (FIO)*, NAIC, https://content.naic.org/cipr_topics/topic_federal_insurance_office_fio.htm [https://perma.cc/MYK4-XRXJ] (Aug. 25, 2021).

[140] For a general survey of financial consumer protection laws, see Patricia Born, *Financial Consumer Protection in the United States*, *in* AN INTERNATIONAL COMPARISON OF FINANCIAL CONSUMER PROTECTION 379, 387–94 (Tsai-Jyh Chen ed., 2018).

[141] Higher Education Opportunity Act § 1011(a), 15 U.S.C. § 1650(e).

[142] Magnuson-Moss Warranty Act, 15 U.S.C. §§ 2301–2312.

[143] Consumer Review Fairness Act of 2016 § 2, 15 U.S.C. § 45b.

[144] For a detailed analysis of the Consumer Review Fairness Act of 2016, see generally Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMMS. & TECH. L. REV. 1 (2017).

level.[145] And yet, regulating the content of consumer contracts is widely perceived in the United States as a strong, exceptional, and disfavored form of legal intervention.[146]

Interestingly, this is in stark contrast to the legislative landscape in many other jurisdictions. For example, all state members of the European Union are subject to the Unfair Contract Terms Directive.[147] The Directive provides a general definition for an unfair term.[148] It also stipulates an indicative and non-exhaustive list of seventeen terms that may be regarded as unfair toward consumers.[149] Other countries, such as Australia,[150] Israel,[151] New Zealand,[152] and the United Kingdom,[153] have taken a similar approach.

Importantly, in certain jurisdictions, statutes specifically empower courts to strike down exploitative terms or modify them to remove their exploitative aspects.[154] Some legislatures, such as those in Israel, New Zealand, Germany, Sweden, and Denmark, have also allowed consumer organizations or public

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[145] 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 example, the California Automobile Sales Finance Act provides a list of six prohibited terms that may not be included in a conditional sale. *See* CAL. CIV. CODE § 2983.7 (West 2021).

[146] For a useful summary of content-based contract regulation in the United States, see Zamir, *supra* note 41, at 302, 309–10 (claiming that, although such regulation is less exceptional than often thought, it is "significantly less common in the United States than in many other countries" and that "U.S. law still largely addresses unfair clauses in [standard form contracts] through general, vague, and not very effective doctrines").

[147] Council Directive 93/13/EEC, 1993 O.J. (L 95) 29.

[148] *Id.* art. 3(1), at 31 (defining unfair term in consumer contracts).

[149] *Id.* annex ¶ 1, at 33. For further analysis, see Colin Scott, *Enforcing Consumer Protection Laws*, *in* HANDBOOK OF RESEARCH ON INTERNATIONAL CONSUMER LAW 466, 474–76 (Geraint Howells et al. eds., 2d ed. 2018).

[150] *Competition and Consumer Act 2010* (Cth) sch 2 (Austl.). The Australian Consumer Law (ACL) is set out in Schedule 2 of the Competition and Consumer Act 2010. *Id.* The ACL defines what constitutes an unfair term in a consumer contract. *Id.* s 24. It further details a non-exhaustive list of fourteen potentially unfair categories of terms. *Id.* s 25.

[151] *See* Standard Contracts Law, 5743–1982, LSI 37 6 (1982–83) (Isr.), https://www.nevo.co.il/law_html/law150/laws%20of%20the%20state%20of%20israel-37.pdf [https://www.perma.cc/5VWY-JTNX]. The statute provides a general definition of "unduly disadvantageous" terms and details suspect and illegal terms. *Id.* §§ 3–5. For a succinct and updated summary of the Israeli law of standard form contracts, see Eyal Zamir & Tal Mendelson, *Three Modes of Regulating Price Terms in Standard-Form Contracts—The Israeli Experience*, *in* CONTROL OF PRICE-RELATED TERMS IN STANDARD FORM CONTRACTS 429, 433–37 (Yeşim M. Atamer & Pascal Pichonnaz eds., 2020).

[152] *See* Fair Trading Act 1986, s 46L (N.Z.) (providing a similar definition to the ACL); *id.* s 46M (detailing a list of terms that may be unfair).

[153] Consumer Rights Act, (2015) §§ 61–76, 9(2) HALS. STAT. (4th ed.) 1112, 1169–79 (Eng.). The Consumer Rights Act 2015 devotes sixteen provisions to "Unfair Terms." *Id.* It provides that "[a]n unfair term of a consumer contract is not binding on the consumer." *Id.* § 62(1), at 1169. Further, it contains a list of no less than twenty terms that "may be regarded as unfair." *Id.* § 63(1), at 1170, sch. 2, at 1188–90.

[154] *See, e.g.*, § 3, Standard Contracts Law (Isr.); Fair Trading Act 1986, s 26A (N.Z.).

agencies to directly apply to courts and litigate cases of unfair terms in the name of the public interest.[155]

Nonetheless, as Part III contends, even a statutory regime that comprehensively addresses substantive unfairness—a regime that generally does not exist in the United States—requires supplementation by an administrative system. Such a system would facilitate the need to implement, refine, and adapt the regime to the dynamic realities of the market.[156]

2. Procedural Regulation

Returning focus to the United States, state legislatures have quite often opted to regulate the procedural aspects of consumer transactions. 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.[157] Ideally, disclosures have two advantages: first, they can make important information available to consumers, and 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.[158] Regulation Z requires, *inter alia*, disclosure of "[t]he circumstances under which a finance charge may be imposed."[159] Another important regulation concerns the market for used vehicles. The Federal Trade Commission (FTC) Used Motor Vehicle Trade Regulation Rule requires the use of a Buyer's Guide form that states: "IMPORTANT: Spoken promises

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[155] *See, e.g.*, § 16(a), Standard Contracts Law (Isr.) ("The Attorney-General or his representative, the Commissioner of Consumer Protection under the Consumer Protection Law, 5741–1981, any customers' organisation and public authority designated by regulations, and a customers' organisation approved by the Minister of Justice for a particular matter may apply . . . for the annulment of an unduly disadvantageous condition of a standard contract." (footnote omitted)); Fair Trading Act 1986, s 46H(1) (N.Z.) ("The [Commerce] Commission may apply to the High Court or the District Court . . . for a declaration under section 46I that a term in a standard form consumer contract is an unfair contract term."). In Germany, consumer organizations, rather than administrative agencies, are vested with the power to bring suit in such matters. *See* Bates, *supra* note 25, at 56, 62–65. In certain Scandinavian countries, the public body that deals with unfair terms is the "Ombudsman." *See* Ewoud H. Hondius, *Unfair Contract Terms: New Control Systems*, 26 AM. J. COMPAR. L. 525, 535–40 (1978).

[156] *See* discussion *infra* Part III.

[157] For a discussion of mandatory disclosure regimes and the relationship between procedural and substantive contract regulation, see COLLINS, *supra* note 73, at 279–86; Zamir, *supra* note 41, at 289–302.

[158] *See* Truth in Lending Act, Pub. L. No. 90-321, 80 Stat. 146 (1968) (codified as amended at 15 U.S.C. §§ 1601–1667f); 12 C.F.R. § 226.6(a) (2021).

[159] 12 C.F.R. § 226.6(a).

are difficult to enforce. Ask the dealer to put all promises in writing."[160] The rule thereby mandates car dealers to provide conspicuous and clear warnings to customers with whom they are negotiating a sale.[161]

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."[162] In the same vein, section 2-209 demands that contractual terms barring oral modification be "separately signed."[163] State legislatures have adopted similar rules in various contexts.[164] 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,[165] and disclosure of imbalanced terms in consumer contracts in particular.[166] To begin, firms can devise shrewd ways to divert consumers' attention from the disclosed information.[167] Even when this is not the case, making terms clear and conspicu-

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[160] 16 C.F.R. § 455 figs.1, 2 (2020) (providing a form that encourages consumers to put agreements resulting from negotiations with car dealers in writing).

[161] *See id.* § 455.2; *see also id.* § 455.1 (addressing the dealer's obligation).

[162] U.C.C. § 2-316(2) (AM. L. INST. & UNIF. L. COMM'N 2017) ("[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.").

[163] *Id.* § 2-209(2) ("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.").

[164] *See, e.g.*, Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 658 & nn.36–38 (2011) ("Undisclosed terms can be procedurally unconscionable . . . ." (footnote omitted)).

[165] *See generally id*. (positing that mandated disclosure regimes fail to protect consumers). For a more comprehensive presentation of the thesis, see generally OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[166] *See, e.g.*, Hillman, *supra* note 120, at 849–50 ("Many commentators seem to have lost faith in disclosure as a remedy for market failures in standard-form contracting . . . ." (footnote omitted)); Zamir, *supra* note 41, at 297 ("[T]here is a growing recognition—including by some law-and-economics scholars—that disclosure duties are often ineffective." (footnote omitted)).

[167] *See* Todd Barlow & Michael S. Wogalter, *Alcoholic Beverage Warnings in Magazine and Television Advertisements*, 20 J. CONSUMER RSCH. 147, 153–54 (1993); Howard Latin, *"Good" Warnings, Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193, 1225–26 (1994); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. U. L. REV. 1165, 1177 (2003). *See generally* Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Consumer Product Hazards*, 11 YALE J. ON REGUL. 293 (1994) (positing

ous will not improve consumers' understanding if the disclosed or noticeable terms remain lengthy, complex, and unreadable—as is often the case.[168]

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.[169] Multiple disclosures and dense text can cause confusion, fatigue, mental distress, and information overload.[170] Additionally, consumers are typically presented with disclosures at a late stage—namely, after they have essentially made up their minds to enter the transaction. At this late stage, the disclosed information might not provide a sufficient force to counter consumers' self-commitment.[171] 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.[172] 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.

C. Judicial Scrutiny

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

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that warnings are counterproductive because they drive consumers to either ignore or overreact to product labels).

[168] For a discussion on the unreadability of consumer contracts, see Benoliel & Becher, *supra* note 18, at 2277–78; Marotta-Wurgler & Taylor, *supra* note 33, at 253. *See also supra* notes 34–37 and accompanying text (discussing consumers' indifference and lack of incentive toward reading boilerplate contracts).

[169] *See, e.g.*, BEN-SHAHAR & SCHNEIDER, *supra* note 165, at 94–106.

[170] *See* Ben-Shahar & Schneider, *supra* note 164, at 686–90, 690 ("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."); Melvin Aron Eisenberg, Comment, *Text Anxiety*, 59 S. CAL. L. REV. 305, 310 (1986) ("Consumers faced with such text have found a very simple way to avoid information overload. They don't load any information at all." (footnote omitted)); Korobkin, *supra* note 8, at 1225, 1225–27 ("[I]ncreased information load causes increased selectivity in the information processed [by decisionmakers]." (footnote omitted)).

[171] A variety of behavioral factors may lead consumers to ignore the information at stake and carry on with the transaction they decided to accept. *See, e.g.*, Shmuel I. Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 LA. L. REV. 117, 125–35 (2007) (discussing possible exploitations of consumer biases and psychology).

[172] For an interesting discussion of consumers' perceived moral obligation to fulfill the terms of their contracts, see generally Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269 (2015); Wilkinson-Ryan, *Perverse Consequences*, *supra* note 12.

ties,[173] unconscionability stands out as the most straightforward and thus valuable tool for tackling exploitative boilerplate terms.[174] The flexibility of this legal concept allows courts to respond to a wide range of vulnerabilities under a variety of circumstances.[175] 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 the cumulative effect of the doctrine's entrenched features makes it too feeble to have a strong disciplining power on suppliers of exploitative terms.

1. A Deficient Legislative Framework

As mentioned above, the regulatory landscape lacks a systematic statutory framework addressing exploitative terms.[176] This void limits the ability of courts to develop unconscionability as an effective regulatory check in two ways. First, the main statutory framework 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.[177] Secondly, courts lack adequate guidance as to legislatures' 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.

2. 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.[178] This is far from surprising, given the great flexibility of the doctrine. Employing the doctrine

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[173] Examples of concepts developed to protect weaker bargaining parties include the doctrine of "unfair surprise," the "reasonable expectation" test, and the "reasonably communicated" test. *See, e.g.*, Becher, *supra* note 7, at 769 n.201.

[174] For a discussion on the unconscionability doctrine's basic features, see *supra* Subsection I.B.2.

[175] *See* Becher, *supra* note 7, at 764–69 (discussing the potential of the unconscionability doctrine in these respects).

[176] *See supra* Subsection II.B.1.

[177] *See* U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 2017).

[178] *See, e.g.*, Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 15 (1981) ("Critics of flexible standards such as unconscionability have argued that the absence of specific guidance in such standards increases the potential for unreasoned or arbitrary decisions based on personal value judgments." (footnote omitted)); Slawson, *supra* note 17, 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 generally* McCall, *supra* note 65 (arguing that the outcomes of unconscionability cases are more predictable than is often presumed).

requires a 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.[179] 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."[180] 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.[181] Second, a finding of unconscionability entails a high standard of oppressiveness, such as sufficient egregiousness so as to "shock the conscience of the court."[182] 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 un-

[179] Becher, *supra* note 7, at 770–71.

[180] Super Glue Corp. v. Avis Rent A Car Sys., 517 N.Y.S.2d 764, 766 (N.Y. App. Div. 1987); *see also* Cowin Equip. Co. v. Gen. Motors Corp., 734 F.2d 1581, 1582 (11th Cir. 1984) ("[T]he cases which have addressed the issue have consistently rejected the theory that damages may be collected for an unconscionable contract provision . . . ."). Nonetheless, some have claimed that unconscionability can and should serve as a basis for affirmative actions as well. *See, e.g.*, Hazel Glenn Beh, *Curing the Infirmities of the Unconscionability Doctrine*, 66 HASTINGS L.J. 1011, 1021–25 (2015); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 484–86, 545–48 (1995); Brady Williams, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. L. REV. 2015, 2050–64 (2019); JAMES WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE §§ 5-3, 5-8 (6th ed. 2010).

[181] *See supra* note 65 and accompanying text.

[182] *See supra* note 67 and accompanying text (quoting Leeber v. Deltona Corp., 546 A.2d 452, 456 (Me. 1988)).

conscionability doctrine and the number of successful claims have greatly declined in the last decade.[183]

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.[184] Naturally, this feature increases the consumer's litigation costs and the expenditure of judicial resources.[185] 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 concluded 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 a court might declare 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. Nevertheless, it will face no penalty, nor even liability in damages (or restitution), for using the unfair term in the first place or for attempting to rely on it.[186]

Moreover, the ruling would not affect other contracts using the same form, and thereby the same unfair terms. Likewise, a court cannot ban the fu-

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[183] *See* McCall, *supra* note 65, at 824 (finding that about three out of four unconscionability claims decided between 2013 and 2017 ultimately failed and that the number of claims based on the doctrine is declining).

[184] *See, e.g.*, Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965) ("Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.").

[185] *See, e.g.*, PERILLO, *supra* note 57, § 9.39 (noting that "[m]any 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").

[186] *Cf.* discussion *supra* Subsection I.B.1 (reviewing consumer behavior and firm incentives regarding the inclusion of legally invalid terms in boilerplate forms). 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* discussion *infra* Subsection II.C.5.

ture 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.[187]

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 so 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.[188] Moreover, even if consumers can name the harm, they may still find it arduous to blame the counterparty, to make a claim, or to insist upon their rights.[189] For instance, an FTC survey revealed that less than ten percent of defrauded consumers complained to "Official Sources" such as state-level consumer agencies, the FTC, or the Better Business Bureau.[190] Consumers may be intimidated by the prospect of confronting firms and may have difficulties accessing and funding legal counsel.[191] Others may simply distrust the legal system and thus avoid resorting to it.[192]

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[187] *See, e.g.*, Wilkinson-Ryan, *Perverse Consequences*, *supra* note 12, at 171 ("[O]ur current enforcement regime imposes no real costs to firms that overreach. . . . [I]f 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.").

[188] *See generally* Oren Bar-Gill & Kevin E. Davis, *(Mis)perceptions of Law in Consumer Markets*, 19 AM. L. & ECON. REV. 245 (2017) (investigating the implications of consumers' misperception of law from an economic perspective).

[189] *See, e.g.*, William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. (SPECIAL ISSUE) 631, 631 (1980–1981).

[190] *See* KEITH B. ANDERSON, CONSUMER FRAUD IN THE UNITED STATES: AN FTC SURVEY 80–81, 80 tbl.5-1 (2004), https://www.ftc.gov/sites/default/files/documents/reports/consumer-fraud-united-states-ftc-survey/040805confraudrpt.pdf [https://perma.cc/5VAL-6GSF].

[191] For detailed data on attorney's fees, see RONALD L. BURDGE, UNITED STATES CONSUMER LAW: ATTORNEY FEE SURVEY REPORT 2017–2018, at 26 (2019), http://burdgelaw.com/wp-content/uploads/2019/10/US-Consumer-Law-Attorney-Fee-Survey-Report-2017-2018.pdf [https://perma.cc/5V9K-3GCT] ("[T]he 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*, 2021 U. ILL. L. REV. (forthcoming 2021) (manuscript at 1597), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3590786 [https://perma.cc/SW23-Q6NZ].

[192] *See generally* BENJAMIN H. BARTON, AMERICAN (DIS)TRUST OF THE JUDICIARY (2019), https://iaals.du.edu/sites/default/files/documents/publications/barton_american_distrust_of_the_judiciary.pdf

Furthermore, many consumer transactions involve relatively small amounts of money. This greatly reduces consumers' incentive to confront sellers or to bring suit, which is especially true given the high expense involved in the litigation process, even in the face of clear exploitation.[193]

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.[194] Terms mandating arbitration pose another significant obstacle.[195] Likewise, forum selection and choice of law clauses make it harder—if not practically impossible—for consumers to pursue their rights.[196] Integrated clauses that bar oral or external evi-

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[https://perma.cc/854C-KVG5] (contextualizing recent declines in American trust of the judiciary within a history of cyclical distrust for U.S. courts since the nation's founding); JAMES M. LYONS, TRUMP AND THE ATTACK ON THE RULE OF LAW (2019), https://iaals.du.edu/sites/default/files/documents/publications/lyons_trump_and_the_attack_on_the_rule_of_law.pdf [https://perma.cc/3SA9-FMDH] (discussing President Donald Trump's role as a "centerpiece" in the modern-day degradation of trust in the rule of law); CHASE T. ROGERS & STACY GUILLON, GIVING UP ON IMPARTIALITY: THE THREAT OF PUBLIC CAPITULATION TO CONTEMPORARY ATTACKS ON THE RULE OF LAW (2019), https://iaals.du.edu/sites/default/files/documents/publications/rogers-guillon_giving_up_on_impartiality.pdf [https://perma.cc/L7MQ-AW9D] (opining that political sensationalism has skewed news media coverage and yielded distrust in the judiciary).

[193] *Cf.* Amy J. Schmitz, *Enforcing Consumer and Capital Markets Law in the United States*, *in* ENFORCING CONSUMER AND CAPITAL MARKET LAW: THE DIESEL EMISSIONS SCANDAL 339, 339–40 (Beate Gsell & Thomas M.J. Möllers eds., 2020) (noting that class actions are especially relevant to "small dollar claims, where the cost to individually litigate is disproportionate to the eventual judgment"). For further discussion of litigation expenses in the context of consumer remedies, see Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1301 (2002); Samuel Issacharoff, *Group Litigation of Consumer Claims: Lessons from the U.S. Experience*, 34 TEX. INT'L L.J. 135, 144 (1999) ("A $50 loss does not justify a filing fee, let alone protracted litigation."); Meyerson, *supra* note 106, at 599; Edward L. Rubin, Essay, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 288 (2003). *See generally* Iain D.C. Ramsay, *Consumer Redress Mechanisms for Poor-Quality and Defective Products*, 31 U. TORONTO L.J. 117 (1981) (positing that an effective system of redress requires reconceptualizing individual harms as broad, collective harm to consumers).

[194] *See* Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1536 (2016) (discussing how limitations on class actions may have a particularly adverse effect on marginalized and low-income consumers).

[195] *See, e.g.*, Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 665 (2008) ("Arbitration privatizes the justice system, hiding litigation involving consumers from government review."). *See generally* Imre S. Szalai, *The Supreme Court's* Lamps Plus *Arbitration Decision: A Fading Light for Class Actions*, 25 HARV. NEGOT. L. REV. 1 (2019) (arguing that, by opting out of the traditional judicial system, firms are creating private justice mechanisms that result in loss of access to the courts for consumers and employees).

[196] *See supra* note 81 and accompanying text. Indeed, some have argued that forum choice clauses should be considered invalid per se. *See, e.g.*, Goldman, *supra* note 116, at 730.

dence and impose caps on firms' liability are further examples of prevalent discouraging terms that might have the same effect.[197]

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 and frustrating course than to seek to regulate . . . 'contract' quality through repeated [individual] lawsuits against inventive 'wrongdoers.'"[198] With this in mind, Part III of this Article examines 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.[199] Next, Section B delineates the comparative advantages of administrative oversight.[200] 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.[201] Finally, Section D addresses the imperative challenge of legitimacy.[202]

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."*[203]

The fundamental goal behind the proposal for administrative oversight is straightforward: drastically minimizing the free use of exploitative terms in consumer markets. Just like physical objects, consumer contracts require su-

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[197] *See, e.g.*, Glassford v. BrickKicker, 35 A.3d 1044, 1046 (Vt. 2011) (holding a clause limiting a property inspector's liability in damages to $285 to be invalid); Debra Pogrund Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 618 (2009) (discussing clauses that bar oral or external evidence regarding the seller or its agent's representations outside of the written contract).

[198] Leff, *Consumers*, *supra* note 32, at 356 (footnote omitted).

[199] *See infra* notes 203–212 and accompanying text.

[200] *See infra* notes 213–236 and accompanying text.

[201] *See infra* notes 237–261 and accompanying text.

[202] *See infra* notes 262–275 and accompanying text.

[203] Leff, *Consumers*, *supra* note 32, at 357.

pervision to minimize the legal risks they entail.[204] In fact, administrative agencies have long been responsible for protecting consumers from dangerous products and unfair and deceptive business practices.[205] The proposal that this Article considers 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.[206] 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.[207] In both cases, such intervention can promote fairer and more efficient results. The ensuing discussion is intended to substantiate this claim.

At this preliminary stage, it is useful to highlight two fundamental guiding principles underlying this Article's proposal. The first emphasizes the advantage of prevention over treatment.[208] 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.[209] *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 the context of exploitative consumer contract terms.

The second conceptual principle builds on the idea of exploitative boilerplate as an agency problem.[210] The argument is that because consumers do not

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[204] *See infra* note 207 and accompanying text. This analogy was recognized and developed half a century ago by Arthur Leff. *See generally* Leff, *Contract*, *supra* note 32.

[205] For example, the FTC holds sweeping powers and authority. *See* Federal Trade Commission Act, 15 U.S.C. §§ 41–58. Similar authority exists at the state level for 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 (West 2021), *invalidated in part by* Perez v. Nidek Co., 657 F. Supp. 2d 1156 (S.D. Cal. 2009), *aff'd*, 711 F.3d 1109 (9th Cir. 2013), and *invalidated in part by In Re:* Apple iPhone 3G Prods. Liab. Litig., 728 F. Supp. 2d 1065 (N.D. Cal. 2010); N.Y. EXEC. LAW § 63(12) (McKinney 2021).

[206] The opening policy statement on the FTC's website states: "The FTC works to advance government policies that protect consumers and promote competition." *Policy*, FED. TRADE COMM'N, https://www.ftc.gov/policy [https://perma.cc/36MN-K7T6].

[207] *See* Zamir, *supra* note 41, 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." (footnote omitted)); *see also* Zamir & Farkash, *supra* note 24, at 163 ("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.").

[208] As the famous adage goes, "an ounce of prevention is worth a pound of cure."

[209] Admittedly, the issue is often more complex, and the challenge is one of striking a balance between prevention and treatment. *Cf.* J. Paul Kelleher, *Prevention vs. Treatment: What's the Right Balance?*, NOTRE DAME PHIL. REVS. (Mar. 18, 2012), http://ndpr.nd.edu/news/29529-prevention-vs-treatment-what-s-the-right-balance/ [https://perma.cc/QS98-P5ED] (reviewing PREVENTION VS. TREATMENT: WHAT'S THE RIGHT BALANCE? (Halley S. Faust & Paul T. Menzel eds., 2012)).

[210] *See* Gillette, *supra* note 11, at 683.

have any impact on most of the content of the contracts they enter into, and because such content is 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.[211] Nevertheless, because drafters have structured incentives to abuse their power and ignore the interests of consumers, special scrutiny over the agents' acts is warranted.[212] That is precisely where administrative agencies can step in and make sure that form-users properly consider the interests of consumers.

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. The comparison begins 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.[213] None of the contractual obstructions—such as bans on class actions, mandatory arbitration, and indemnity clauses—facing consumers and limiting their access to justice affect public enforcement actions. 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.[214]

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[211] *Cf. id.* at 689. Differently put, the expectation is that the seller be "other-regarding" while drafting the non-negotiated terms of the consumer contract. *Cf.* PETER M. GERHART, CONTRACT LAW AND SOCIAL MORALITY 157, 160 (2021).

[212] *Cf.* Kar, *supra* note 97, 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").

[213] *See* discussion *supra* Subsection II.C.5.

[214] The relative weakness of private enforcement compared to public enforcement has been recognized even in jurisdictions where statutory regulation of unfair standard terms is well developed and where consumer organizations have standing. *See generally* Reinhard Steennot, *Public and Private*

Significantly, administrative action is not limited to providing redress for particular past grievances, which is the traditional goal of court remedies.[215] Rather, the administrative remedy can be 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 that this Article suggests adopting reach further than any remedy a court can grant in a particular case.[216] These mitigating measures can impact countless consumers at once, as they immediately affect the rights of every consumer with whom the disciplined business has ever contracted.[217]

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.).[218] This information is not generally available—and indeed is often inaccessible—for judges presiding in traditional civil cases.[219] Without reliable information on these matters, one cannot expect courts to decide whether a particular standard term is harmful or inefficient.

Enforcement in the Field of Unfair Contract Terms, 23 EUR. REV. PRIV. L. 589 (2015) (surveying the European landscape and making this observation).

[215] *See, e.g.*, Walter Gellhorn, *The Law's Response to the Demand for Both Stability and Change: The Legislative and Administrative Response*, 17 VAND. L. REV. 91, 100 (1963) ("The sanctions courts can apply are limited in variety and range. . . . [T]hese operate chiefly . . . to offset wrongs already done.").

[216] *Cf.* Hondius, *supra* note 155, at 528 ("[T]he 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, far transcending the single contracts at stake in traditional litigation.").

[217] *See, e.g.*, Hillman & Rachlinski, *supra* note 33, at 441 ("[C]ourts 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 . . . .").

[218] *See* Becher, *supra* note 27, at 140–44.

[219] *See, e.g.*, Gillette, *supra* note 20, at 982 ("[G]iven 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." (footnote omitted)); *see also* Hugh Collins, *The Freedom to Circulate Documents: Regulating Contracts in Europe*, 10 EUR. L.J. 787, 793 (2004) ("[C]ourts 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." (footnote omitted)).

Administrative agencies are also better capable of managing a complex process of deliberation with all stakeholders.[220] Agencies operating in consumer markets (on the federal level, for example, the FTC and the Consumer Financial Protection Bureau) have constant access to complex information. They have organized units and experienced personnel to conduct investigations, gather data, and process it to develop remedies.[221] 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.[222] 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. Arguably, administrative agencies are also better able to maintain and utilize institutional memory. Administrative action is directed at wide sectors rather than contingent cases. Presumably, therefore, the norms governing administrative oversight can be more consistent than those emanating from case-by-case rulings by courts. Furthermore, administrative action is much swifter than judicial review.[223] 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 the case of exploitative terms, are all the more acute.

Recall that, in the United States, content-based regulation of consumer contracts is the exception rather than the rule.[224] Where it exists, it is piecemeal and partial in coverage.[225] This is far from surprising. Legislators are likely to

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[220] For further discussion on the importance of deliberation, see *infra* Section III.C.

[221] *See Bureau Structure*, CONSUMER FIN. PROT. BUREAU, https://www.consumerfinance.gov/about-us/the-bureau/bureau-structure/ [https://perma.cc/ST2V-2AR7] (Aug. 17, 2021); *Bureaus & Offices*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/bureaus-offices [https://perma.cc/QFY3-ZMAM].

[222] *See infra* note 230 and accompanying text (discussing, *inter alia*, the capability of administrative agencies to resist capture by interested groups).

[223] For discussion highlighting some of the advantages of administrative agencies, see FRANK E. COOPER, ADMINISTRATIVE AGENCIES AND THE COURTS 14–20 (1951).

[224] *See* discussion *supra* Subsection II.B.1.

[225] *See* Budnitz, *supra* note 195, at 666 ("Federal consumer protection law is not uniform and its coverage is not comprehensive.").

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.[226] Moreover, consumers are often under-represented in the legislation process, whereas legislatures are frequently heavily influenced by professional lobbyists representing businesses and trade organizations.[227]

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, exhaustive statutory rules in advance that will effectively and comprehensibly define what an exploitative term will look like in any particular consumer transaction.[228] 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.[229] 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.[230]

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[226] *Cf.* Becher, *supra* note 27, at 108–13, 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").

[227] *Id.* at 109–10.

[228] *See, e.g.*, Collins, *supra* note 219, at 793 ("The open-textured standard has the potential to address the problem of precise rules that they may prove insufficiently responsive to the particular market conditions of a transaction.").

[229] For further discussion of some of the advantages that administrative agencies enjoy over statutory regulation, see Becher, *supra* note 27, at 140–44.

[230] *See* Zamir, *supra* note 41, at 300 (arguing that expert administrative agencies are less prone to make bad decisions and judgments due to cognitive biases and incomplete information). *See generally* 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). 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 Trump. For some accounts, see Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019) https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/ZKN7-V5AA]; Adam Liptak & Alan Rappeport, *Supreme Court Lifts Limits on Trump's Power to Fire Consumer Watchdog*, N.Y. TIMES (June 29, 2020) https://www.nytimes.com/2020/06/29/us/politics/cfpb-supreme-court.html [https://perma.cc/V7EC-M6WG]; Planet Money, *Mulvaney vs the CFPB*, NPR (Mar. 28, 2018) https://www.npr.org/sections/money/2018/03/28/597761300/episode-832-mulvaney-vs-the-cfpb [https://perma.cc/3R53-9JQH].

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 contracts and the key means toward their fulfillment. In so doing, legislatures set the stage and provide the authority for other branches of government to step in 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.[231]

3. Administrative Oversight and Mandatory Disclosure

The preceding analysis is largely applicable to mandated disclosures, the success of which is highly contested.[232] On the face of it, there seems to be no necessary interaction between this regulatory technique and administrative oversight. Although disclosure focuses on the procedural aspects of the bargaining process, the proposed administrative model focuses primarily on the substantive content of consumer contracts.

Nevertheless, on further inspection, the two tools can actually supplement one another. First, the administrative model is by no means inherently limited to overseeing the substantive aspects of consumer contracts. When inspecting consumer contracts, the administrative authority can also monitor procedural aspects. Second, and relatedly, a systematic monitoring system along the proposed lines will enable the government to verify if, and to what extent, firms are obeying mandatory disclosure rules. Thus, administrative oversight of consumer 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." Generally speaking, the idea 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 com-

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[231] *See, e.g.*, Gellhorn, *supra* note 215, at 104–07 (discussing why and how legislatures and administrators should work in tandem).

[232] *See* discussion *supra* Subsection II.B.2. For a comprehensive and forceful critique of mandatory disclosure, see generally BEN-SHAHAR & SCHNEIDER, *supra* note 165.

municate this approval to attract consumers and possibly use it as a shield against future complaints and judicial review.[233]

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 captured 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, which the pre-approval model cannot impose.[234] 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.[235] Furthermore, although the fear of capture is not eliminated under this model, we argue it is greatly reduced. This, we believe, may be due to various potential factors, including public stature, commitment, relative transparency, and exposure to judicial review that often 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 the proposed model, the administrative agencies will be able to cherry-pick the most problematic terms, contracts, or markets rather than satisfy the needs of interested sellers.[236] This can assist agencies in prioritizing their efforts and aligning them with their goals and budgets.

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[233] For sources developing the concept of voluntary pre-approval, see *supra* note 20 and accompanying text.

[234] *See* discussion *infra* Subsection III.C.4.

[235] On the focus of the inquiry under this model, see discussion *infra* Subsection III.C.2.

[236] *See* discussion *infra* Subsection III.C.1.

C. Administrative Oversight in Action

"We think that it is time, in consumer protection law . . . to look for regulation with bite."[237]

The foregoing analysis underlined the many promises of administrative oversight as a regulatory tool. A viable administrative solution requires a precise and workable framework. 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 minimize consumer exposure to the risks of exploitative boilerplate in a cost-effective manner. We intentionally choose the term "minimize" because completely eradicating boilerplate exploitation is currently an unrealistically utopian goal. Relatedly, we also acknowledge that resource constraints can have a deep impact on the operation, structure, content, and success of the scrutiny process. This entails the need to prioritize enforcement efforts.[238]

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, this Section now turns 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 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

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[237] The Univ. of Chi., *More Than You Wanted to Know: The Failure of Mandated Disclosure*, YOUTUBE, at 04:42 (Mar. 26, 2014), https://www.youtube.com/watch?v=Mlfd7vSrAP4&ab_channel=TheUniversityofChicago [https://perma.cc/U3U9-WG9J] (quoting Omri Ben-Shahar) (criticizing mandated disclosure as inefficient and ineffective means to protect consumers).

[238] *See* discussion *infra* Subsection III.C.1.

under the wider and more flexible definition proposed above.[239] 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.

Enforcing substantive fairness (or conscionability, for that matter) in the sense of preventing exploitation in consumer contracts will significantly widen the scope of the administrative 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 pretty 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 and, as such, raises no complex dilemmas. Such a case presents a straightforward instance of exploitation that the pertinent authorities should simply eliminate.[240]

Besides, because 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 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. Nevertheless, administrators should realize that the risks unfair or unconscionable terms pose to consumers are no less significant and, 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, this Article proposes 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, unreadable and excessively long contracts, non-compliance with mandated disclosures or other formal requirements, inaccessible or illegible text, and the like.[241] A substantive inquiry, on the other hand, will require assessing the legal and economic sig-

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[239] *See* discussion *supra* Section I.B.; *see also supra* note 75 and accompanying text (describing our proposed definition of unfair terms).

[240] *See* Consumer Review Fairness Act of 2016 § 2, 15 U.S.C. § 45b.

[241] Examples may include making a term conspicuous or having terms separately signed.

nificance 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.[242] 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 focused on safeguarding procedural fairness alone.[243]

The next priorities-related challenge is the need to identify which markets or contracts the administrative enforcer ought to supervise 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. Although 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. 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 a widespread 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 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. Administrators should also prioritize instances in which vulnerable consumers (for example, low-income or elderly consumers) 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.

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[242] *See supra* Subsection II.B.2.

[243] For support of substantive mandatory rules, see generally Zamir, *supra* note 41.

Finally, reputational constraints, levels of competition, and consumer complaints can also assist in identifying suspect markets. Nevertheless, given the fickle nature of these indications, policy-makers should 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.[244]

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. It should further request the firms 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.[245]

With this information and other relevant data, the agencies will now face the most crucial and challenging stage of identifying exploitative terms in the forms handed over for their inspection.[246] At the preliminary stage, the agency should employ a computerized advanced language analysis of the inspected forms.[247] 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

[244] Such collaborations have already occurred in other consumer protection domains. *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC, Partners Conduct First Compliance Sweep Under Newly Amended Used Car Rule (July 12, 2018), https://www.ftc.gov/news-events/press-releases/2018/07/ftc-partners-conduct-first-compliance-sweep-under-newly-amended [https://perma.cc/FY54-V5M2].

[245] 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.

[246] Relevant information for identifying exploitative terms may include data on consumer complaints, previous litigation, data from other consumer organizations or governmental units on past complaints, etc.

[247] Computerized language analysis is an ever-growing and fast-developing field of computer science. For some of its relatively recent achievements, see generally COMPUTER AIDED VERIFICATION: 31ST INTERNATIONAL CONFERENCE PROCEEDINGS PT. 1, *reprinted in* LECTURE NOTES IN COMPUTER SCIENCE 11561 (Isil Dillig & Serdar Tasiran eds., 2019).

assist in sampling, classifying, and ultimately detecting exploitative terms in a cost-effective way.[248]

At the next stage, the agency should focus on the non-salient, pro-seller provisions that stand out as deserving careful analysis.[249] 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.[250] A pro-seller term that may seem exploitative in itself can be balanced elsewhere in the contract and thus be ultimately fair.[251] 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 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.[252] Thus, although a focus on specific suspect terms may be more 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 proce-

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[248] For a detailed discussion and illustrative examples, see generally Yonathan A. Arbel & Shmuel I. Becher, *Contracts in the Age of Smart Readers*, 90 GEO. WASH. L. REV. (forthcoming) (Univ. of Ala. Legal Stud., Rsch. Paper No. 3740356, 2020), https://ssrn.com/abstract=3740356 [https://perma.cc/5L8H-JHEK]. See Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121, 146–51 (2018), for an interesting analysis of the advantages of artificial intelligence in administrative sampling processes.

[249] 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* Zamir & Mendelson, *supra* note 151, at 437–43. In a sense, when price terms become complex, they may actually become non-salient and thus justify inspection under the administrative proposal.

[250] 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 1986, s 46L(2) (N.Z.) ("In determining whether a term in a consumer contract is unfair, the court . . . must take into account— . . . (b) the contract as a whole."); § 3, Standard Contracts Law, 5743–1982, LSI 37 6 (1982–83) (Isr.) (prescribing a similar test).

[251] *See, e.g.*, Gillette, *supra* note 20, at 979–80 (noting that, for instance, unilateral change terms "may be exploitative or not, depending on whether the risks are priced and perhaps on the propriety of the supplementary terms that are ultimately inserted"); *id.* at 996 ("[T]he 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.").

[252] *Cf.* Shmuel I. Becher & Uri Benoliel, Dark Contracts 29–32 (Aug. 25, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3911528 [https://perma.cc/RRD6-D2YR] (discussing the aggregate impact that non-transparent contracts may have on consumers).

dure 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.[253] So far, this has contributed to the proliferation of exploitative terms. Under this Article's proposal, however, this reality can actually augment the positive impact of the agency's rulings or findings. This is so, because suppliers may voluntarily adopt modifications that follow the agency's scrutiny of a competitor's forms. 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.[254] The main drawback of such a demanding standard is clear: it will leave many questionable terms to circulate freely in consumer markets.

Nonetheless, 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

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[253] *See supra* note 33 and accompanying text. For further discussion, findings, and analysis, see generally Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447 (2008); Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327 (2010); Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223 (2006).

[254] *See generally* 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).

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, because the implementation of the proposed model will no doubt entail significant public resources, those resources 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 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 possible outcomes of the investigation and the administrative steps that may follow.

Next, if preliminary analysis points to presumably exploitative terms, the agency should inform the relevant firm about these findings. At this stage, the administrative authority should summon the firm to commence a deliberation

process with an agency official.[255] 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 that may outweigh the burdens imposed by the term at issue. 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.[256]

Importantly, the deliberation process can 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 become 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 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 that the agency imposed in response to the finding of exploitative terms; most typically a declaration or a restraining order.[257] The agency must convey the decision to the pertinent firm whose terms were subject to 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 the seller does not use

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

[256] 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.

[257] For discussion of these remedies, see *infra* Subsection III.C.4.

those exploitative terms in any future similar transactions. Accordingly, the agency should be empowered to issue orders guaranteeing these results.[258]

This entails an authority to issue official orders of two distinct types. First, it should issue an order or declaration invalidating any term it finds 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 agency would order the firm 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 (for example, an order to cease and desist) prohibiting the seller from further use of similar exploitative terms in any substantially similar transactions.[259]

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.[260] 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.[261]

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 web-

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[258] See *infra* Section III.D (discussing the formal legal basis for the agency's actions).

[259] This raises the thorny issue of which transactions are "substantially similar" to the ones in which the authority found exploitation. For instance, can contracts be sufficiently "similar" if they deal with vehicles rather than real estate? While acknowledging this practical challenge, some useful guidelines as to what would be considered a "similar transaction" can, in due course, be developed and made public.

[260] For a comparable argument in favor of such an administrative penalty system, see generally Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, U. PA. L. REV. (forthcoming), https://ssrn.com/abstract=3721256 [https://perma.cc/GY2J-ARN2] (arguing in favor of the FTC penalizing repeated misconduct by firms with greater severity after firms have received formal condemnation for their violatory practices).

[261] *Cf.* Paul R. Kleindorfer, *What if You Know You Will Have to Explain Your Choices to Others Afterwards? Legitimation in Decision Making*, *in* THE IRRATIONAL ECONOMIST: MAKING DECISIONS IN A DANGEROUS WORLD 72, 72 (Erwann Michel-Kerjan & Paul Slovic eds., 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.").

site. 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.

D. The Legitimacy Challenge

Radical law reforms face serious challenges, and this 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.[262] 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 somewhat more realistically, consumer protection agencies can take the initiative to legitimize the agency action. These agencies can begin implementing the 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.[263] This, of course, requires agencies (and governments) to embrace the idea that firms offering consumers exploitative terms is an unfair or deceptive business practice.

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 be 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.[264]

In fact, a thorough examination of UDAP legislation will reveal a surprising fact: five jurisdictions already explicitly regard the inclusion of unconscionable terms in a consumer contract as an unfair practice. In California, for example, the Consumer Legal Remedies Act defines "[i]nserting an uncon-

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[262] *See infra* note 155 and accompanying text (surveying international consumer protection practices).

[263] *See supra* note 205 and accompanying text.

[264] *See* discussion *supra* Subsection I.B.1. (discussing the prevalence of legally invalid terms); *see also* Beale, *supra* note 73, at 1017 (defining deception as a "representation, omission, or practice that is likely to mislead a reasonable consumer").

scionable provision in the contract" as an unlawful act.[265] 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."[266] The same is true for New York if such practice is "repeated,"[267] and for Indiana, though under somewhat more restrictive conditions.[268]

Recently, 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 one thousand dollars for every offense.[269]

True, defining "unconscionable" under these statutes poses an interpretive challenge.[270] In this context, an unconscionable provision should be understood as a substantively, rather than procedurally, unfair term. This aligns with our tentative definition of unfairness,[271] which overlaps, to a considerable extent, with the three-pronged fairness test of section 5 of the Federal Trade Commission Act.[272] 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 twenty-eight states, UDAP legislation delegates rulemaking authority to the state consumer protection agencies.[273] 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 en-

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[265] CAL. CIV. CODE § 1770(a)(19) (West 2021), *amended by* Assemb. B. 790, 2021–2022 Leg., Reg. Sess. (Cal. 2021) (enacted).

[266] D.C. CODE § 28-3904(r) (2021).

[267] N.Y. EXEC. LAW § 63(12) (McKinney 2021).

[268] 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. IND. CODE § 24-5-0.5-10(b)(1) (2021).

[269] VT. STAT. ANN. tit. 9, § 6055 (2021).

[270] *See* discussion *supra* Subsection 1.B.2. (noting, *inter alia*, the conceptual ambiguity of unconscionability as a doctrine).

[271] *See supra* notes 74–75 and accompanying text.

[272] Federal Trade Commission Act § 5, 15 U.S.C. § 45(n). This Act limits the agency's enforcement powers to an act or practice that "causes or is likely to cause substantial injury to consumers [prong one] which is not reasonably avoidable by comsumers themselves [prong two] and not outweighed by countervailing benefits to consumers or to competition [prong three]." *Id.*

[273] *See* David Berman, Note, *A Critique of Consumer Advocacy Against the* Restatement of the Law of Consumer Contracts, 54 COLUM. J.L. & SOC. PROBS. 49, 52, 85–89 (2020) (advocating the revitalization of UDAP statutes to combat unfair terms by publishing "blacklists" of prohibited terms).

hance the impact of the agency's activity and, with it, the potential success of the proposed reform.[274]

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.[275] These are legitimate concerns that accompany any proposal for additional regulation of economic markets. Serious as they are, they are not unique to this context and do not, in themselves, justify relinquishing efforts to improve efficiency and fairness in consumer markets. 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' interests and offer transparent, fair, and efficient terms. Nevertheless, 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 policy-makers in the United States 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 wonders—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

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[274] *See id.* at 86–89 (calling on states to revive UDAP legislation to allow consumer protection agencies to prohibit the use of unfair terms).

[275] For a thorough and illuminating discussion of this concern under the pre-approval model, see Gillette, *supra* note 20, at 1005–12.

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 this proposal is exposed to various criticisms and challenges. Although this Article addressed some of these challenges, critical readers—and reality itself—may identify or bring about others. Challenges and critiques are inherent to any effort to explore a new path toward the solution of an old and persistent problem. In fact, they should serve as important checks and valuable stepping stones on the way to developing a better legal regime.

Rather than allowing harmful boilerplate terms to continue flooding consumer markets, policy-makers should make a conscious effort to significantly reduce the frequency at which firms offer such terms 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, this 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, this proposal 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.