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DETERRING UNENFORCEABLE TERMS

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Contract law doesn't work the way most people—that is, most nonlawyers—think it works. People think that if they agree to a contract, they are bound by its terms—no matter if those terms are unfair or legally unenforceable. But that's not correct. Although there is a default presumption that the law will enforce terms that parties agree to, courts can and do decline to enforce terms when they are contrary to statute, regulation, or common law.

This is a bad arrangement. Because people do not understand how enforceability works, contract drafters can include unenforceable terms and benefit from them even when they are contrary to law. Clearly unenforceable terms are used in a wide range of cases, and those terms impose costs on consumers and employees despite being formally toothless.

This Article argues for a change. The problems of unenforceable terms arise from the burden of determining whether a contractual provision is enforceable. The current law makes little effort to allocate or mitigate that burden. But in a common scenario—where a sophisticated actor

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drafts mass contracts for many unsophisticated counterparties—the drafter is much better positioned to determine the contract's enforceability. The law should therefore penalize such drafters for including clearly unenforceable terms in their contracts. This Article describes the basic normative case for such a penalty, considers how it might best be designed, and assesses the opportunities and limitations in existing law for applying a penalty to deter the use of unenforceable terms in mass contracts.

INTRODUCTION

Contract law has a process problem.

The law governing contracts is full of protections for the people who are party to a contract. Over the centuries, judges at common law have determined that a variety of potential provisions are too unfair to permit. In the modern era, legislators have passed statutes that prohibit a wide range of terms. And regulators have promulgated rules to limit what companies can put in a contract.

But to enforce these protections, contract law often relies on a flawed procedure. The background norm in contract law is that a provision that is contrary to law will not be enforced in court. And that makes sense—where the terms of an agreement violate doctrine or public policy, there is a strong argument that the state should not enforce those terms. But, other than nonenforcement, there is no general default penalty for using unenforceable terms. Individual statutes or regulations may attach a penalty for using a particular term, such as when a statute creates a penalty for including contractual provisions purporting to waive the statute's protections.[1] But absent such a specific regulation, the law does not penalize a party's choice to include an unenforceable term in their contracts.

The problem is that this arrangement does little to prevent the use of unenforceable terms in the first place.[2] Most contracts do not get litigated. Most people, meanwhile, take the terms of the contracts they sign at face value, not realizing that a term may be unenforceable and carry no legal weight.[3] As a result, a sophisticated drafter who puts unenforceable terms in their contracts may reap the benefit of those terms by influencing their counterparties' behavior.[4] An employee who thinks they are bound by an unenforceable noncompete clause may decline to look for a better job; a consumer who thinks they are bound by an unenforceable liability waiver may not file a lawsuit even when they are entitled to damages.

And if the contract does end up in litigation, the term at issue is just rendered a nullity, making the drafter no worse off than if the term had not been included. On balance, then, contract drafters often are incentivized to include unenforceable terms and try to get whatever value out of them that they can, short of relying on them in court.[5]

This arrangement is the result of a legal system that typically does not recognize a particular type of burden: the burden of learning what the law is and how it applies in a given context. To the contrary, courts embrace a clear legal fiction: that parties to a contract "are presumed to know the law."[6] As a result, although the law puts the onus on a contract drafter to

[1] See, e.g., 15 U.S.C. §§ 1693l, 1693m.

[2] See Margaret Jane Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law 147 (2013).

[3] See infra Section I.B.

[4] Radin, supra note 2.

[5] Id.

[6] E.g., R.L. Polk Printing Co. v. Smedley, 118 N.W. 984, 984 (Mich. 1908); BPP069, LLC v. Lindfield Holdings, LLC, 816 S.E.2d 755, 761 (Ga. Ct. App. 2018) ("[A]ll persons are

write clear and intelligible terms,[7] it does not typically penalize a drafter for writing unenforceable terms. The burden of understanding the enforceability of a term "lies where it falls,"[8] and if a tenant or an employee mistakenly thinks they are bound by a term, they generally just bear the cost of compliance.

But most people do not know the law. Contracts mediate huge portions of our lives, from our employment and our housing, to our communications and correspondence, to our leisure and entertainment. And the law makes little to no effort to ensure that those contracts' terms actually create enforceable obligations. Instead, the law leaves it up to everyone to figure out for themselves what parts of their contracts they must listen to and what parts they can ignore. And what's more, access to those who can help figure that out—i.e., lawyers—is incredibly unequal, with marginalized groups much less able to access legal assistance than those with more resources.[9]

This arrangement should change. This Article contends that in the contemporary world of mass contracting, the law should reallocate the burden of learning and applying the law. In many private-law contexts, the law plays a role both in the efficient allocation of costs and in the protection of less sophisticated parties. But, I argue, in the world of mass contracting, the burdens of unenforceable terms are not efficiently allocated, and the result is harm to everyday consumers and employees who sign mass contracts.

The problematic incentives posed by unenforceable terms have long been recognized.[10] But the time is ripe for a reconsideration of this basic

presumed to know the law and therefore cannot be deceived by erroneous statements of law." (quoting Lakeside Invs. Grp., Inc. v. Allen, 559 S.E.2d 491, 493 (Ga. Ct. App. 2002))).

[7] See, e.g., David Horton, Flipping the Script: *Contra Proferentem* and Standard Form Contracts, 80 U. Colo. L. Rev. 431, 437–38 (2009) (noting that the *contra proferentem* doctrine "deters imprecision" and describing its deterrent effects in the context of standard form contracts).

[8] Cf. Filosa v. Courtois Sand & Gravel Co., 590 A.2d 100, 102 (R.I. 1991) ("[W]here there is no negligence, the aggrieved party is no longer a plaintiff but is a victim of accidental misfortune, and one of the clearest and probably most draconian principles to evolve out of centuries of tort law is that accidental harm lies where it falls." (citing Brown v. Kendall, 60 Mass. (6 Cush.) 292, 298 (1850))).

[9] See infra Section II.C.

[10] See, e.g., Radin, supra note 2; Lee A. Pizzimenti, Prohibiting Lawyers from Assisting in Unconscionable Transactions: Using an Overt Tool, 72 Marq. L. Rev. 151, 158 (1989); Bailey Kuklin, On the Knowing Inclusion of Unenforceable Contract and Lease Terms, 56 U. Cin. L. Rev. 845, 846–47 (1988); Warren Mueller, Residential Tenants and Their Leases: An Empirical Study, 69 Mich. L. Rev. 247, 248 (1970).

feature of how our legal system handles contracts. Over the last decade, new empirical research has illustrated the breadth and depth of the problem of unenforceable terms—a problem that remained mostly anecdotal until recently.[11] Unenforceable terms are widespread, with studies confirming their ubiquity across economic sectors including housing,[12] employment,[13] and recreation.[14] And new empirical research also demonstrates the effect of those terms.[15] Both consumers and employees are likely to feel bound by contract terms that they have assented to, regardless of those terms' legality, and even if they have not

[11] See infra Part I. On the lack of robust evidence before the last decade or so, see Meirav Furth-Matzkin, On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market, 9 J. Legal Analysis 1, 5 (2017) [hereinafter Furth-Matzkin, Unexpected Use] ("[T]here has been so far very little empirical investigation into the prevalence of unenforceable terms in consumer contracts.").

[12] David A. Hoffman & Anton Strezhnev, Leases as Forms, 19 J. Empirical Legal Stud. 90, 90–91 (2022); see also Furth-Matzkin, Unexpected Use, supra note 11, at 17–23 (detailing contract provisions in lease housing contracts that courts have found to be unenforceable or that are prohibited by state statutes).

[13] Evan P. Starr, J.J. Prescott & Norman D. Bishara, Noncompete Agreements in the US Labor Force, 64 J.L. & Econ. 53, 60, 81 (2021) [hereinafter Starr et al., Noncompete Agreements].

[14] Edward K. Cheng, Ehud Guttel & Yuval Procaccia, Unenforceable Waivers, 76 Vand. L. Rev. 571, 577 (2023).

[15] See Tess Wilkinson-Ryan, The Perverse Consequences of Disclosing Standard Terms, 103 Cornell L. Rev. 117, 139–49, 139 nn.105–10 (2017) (surveying research); Meirav Furth-Matzkin & Roseanna Sommers, Consumer Psychology and the Problem of Fine-Print Fraud, 72 Stan. L. Rev. 503, 516 (2020) (explaining that laypeople may be discouraged from breaking a contract, even if they suspect the contract is unfair, because they assume written contracts are binding); Meirav Furth-Matzkin, The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence, 70 Ala. L. Rev. 1031, 1044–51, 1053–56 (2019) [hereinafter Furth-Matzkin, Harmful Effects] (showing through experiments that unenforceable terms adversely affect tenants' behavioral intentions and legal predictions); Evan Starr, J.J. Prescott & Norman Bishara, The Behavioral Effects of (Unenforceable) Contracts, 36 J.L. Econ. & Org. 633, 651–55, 659–66 (2020) [hereinafter Starr et al., Behavioral Effects] (suggesting that noncompetes have an effect on behavior regardless of their enforceability, and that noncompetes are associated with longer employee tenure and reduced likelihood of leaving for a competitor). For examples of older evidence in this vein, see also 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, 91–93 (1997) (finding that consumers tend to believe that all contract terms are enforceable and that exculpatory language in form contracts appears to deter consumers' propensity to seek compensation); Curtis J. Berger, Hard Leases Make Bad Law, 74 Colum. L. Rev. 791, 815–16 (1974) (explaining that "[u]ninformed or misinformed parties to a contract are easily terrorized or disarmed into foregoing their rights and remedies"); Mueller, supra note 10, at 248, 272–74 (suggesting that "the bulk of tenants [do] not appear to question the validity of terms found in their leases").

read the terms before signing.[16] There is thus now an established, increasingly robust literature documenting that unenforceable terms pose a real problem, and one that is common in the contemporary economy.

Unenforceable terms have also been highlighted by the recent actions of agencies and advocates.[17] Terms that are frequently unenforceable, like noncompete agreements and liability waivers, are at the center of recent actions by the White House,[18] Federal Trade Commission ("FTC"),[19] National Labor Relations Board ("NLRB"),[20] and Consumer Financial Protection Bureau ("CFPB").[21] And significantly, policymakers and advocates are beginning to focus not only on rendering bad contract terms unenforceable, but also on penalizing drafters for including those provisions in the contracts to begin with.[22]

Between this empirical work and recent policy developments, unenforceable terms are now in the spotlight. But that spotlight's focus has often been somewhat granular, examining one particular term or context rather than the problem of unenforceable terms writ large.[23] The

[16] See infra Part I (surveying research).

[17] See infra Section I.C.

[18] Exec. Order No. 14036, 86 Fed. Reg. 36987, 36987, 36992 (July 9, 2021) (discussing noncompete agreements).

[19] Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912). But see Ryan, LLC v. Fed. Trade Comm'n, 746 F. Supp. 3d 369, 390 (N.D. Tex. 2024) ("The [Non-Compete] Rule shall not be enforced or otherwise take effect on its effective date of September 4, 2024, or thereafter."), *appeal docketed*, No. 24-10951 (5th Cir. Oct. 24, 2024).

[20] Memorandum GC 23-08 from Jennifer A. Abruzzo, Gen. Couns., Nat'l Lab. Rels. Bd., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers, Nat'l Lab. Rels. Bd. (May 30, 2023), https://nlrbresearch.com/pdfs/09031d4583a87168.pdf [https://perma.cc/D6QA-2RPG].

[21] Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections, 88 Fed. Reg. 6906, 6906 (proposed Feb. 1, 2023) [hereinafter Registry of Supervised Nonbanks That Use Form Contracts].

[22] See infra Section I.C.

[23] The FTC's recent policy actions, for instance, focus only on noncompetes in employment contracts, while the CFPB's actions focus on waivers in consumer finance. Compare Non-Compete Clause Rule, 89 Fed. Reg. at 38342 (providing that it is an unfair method of competition to enter into noncompete clauses with workers after the Rule's effective date), with Registry of Supervised Nonbanks That Use Form Contracts, supra note 21 (proposing that nonbanks be required to register with the CFPB if they use contract terms designed to waive consumers' legal protections or limit how consumers enforce their rights).

idea of a general penalty for using unenforceable terms, meanwhile, has come up before, but typically only in passing.[24]

This Article picks up where those conversations leave off and considers the merits of a penalty for using unenforceable terms in mass contracts of adhesion. It argues for a general, affirmative prohibition on clearly unenforceable terms in contracts offered by a sophisticated drafter to large numbers of unsophisticated counterparties.

In doing so, the Article brings to bear normative concerns from both within and outside of traditional private-law theory. In particular, the problem of unenforceable terms implicates both the traditional private-law goal of cost minimization as well as the public-law goal of access to justice. That is because the question of how to approach unenforceable terms can be thought of as a question of how the law ought to distribute the costs of acquiring and applying legal knowledge. The law under the status quo makes no effort to allocate these costs, which is why there is a problem: the signers of mass adhesive contracts are unlikely to know that unenforceable terms carry no legal weight, and so may change their behavior to accommodate those terms even if doing so causes them loss or injury.

There are two basic paths that could address that problem: the signers of mass contracts can acquire and apply the legal knowledge necessary to understand terms' enforceability, or the drafters of those contracts can acquire and apply the legal knowledge necessary to prevent unenforceable terms from being included in the first place. Comparing those options, it is clear that the party who can more cheaply manage the costs of legal knowledge is the drafter. The drafter in this scenario is both a sophisticated actor (who likely already has counsel) and one who is able to amortize the cost of legal analysis over many transactions.

Placing the burden on the drafter to issue only binding, valid terms also mitigates serious inequities under the status quo. Access to legal knowledge and legal institutions in the United States is not equally distributed.[25] Marginalized groups in the United States face the double

[24] See, e.g., Furth-Matzkin & Sommers, supra note 15, at 544–45 (suggesting "statutory damages for fine-print fraud" as part of a set of policy solutions); Radin, supra note 2, at 147–48 (mentioning the possibility of fines as a component of a public regulatory regime for boilerplate terms). A more thorough consideration of an affirmative cause of action can be found in Brady Williams's *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 Calif. L. Rev. 2015, 2041, 2043–45, 2047 (2019), which argues for developing an affirmative remedy in the context of unconscionable contract provisions.

[25] See infra Part II.

bind of higher-than-average legal needs and lower-than-average income and wealth to use to manage those needs.[26] The inequities that these individuals and communities experience when it comes to the civil justice system both reflect and reinforce racial and gender inequality.[27] These legal problems will often center around transactions and relationships that are mediated by contract and involve a power imbalance—with a landlord, employer, or health care provider, for instance—and so may implicate many substantive contract law doctrines that are designed to protect less powerful individuals.[28] Restricting unenforceable terms thus avoids compounding injustice, in which a person's existing marginalization prevents them from obtaining the assistance necessary to prevent further injury.

A general penalty for unenforceable terms is the natural development of the "contract as thing" perspective introduced by Arthur Leff more than fifty years ago.[29] Mass contracts of adhesion, ubiquitous in the modern world, are more like off-the-shelf purchased products than the bespoke negotiated instruments that contract doctrine developed around. As Leff wrote, "[i]f . . . a particular contract is a mass-produced inalterable thing, then the words that make it up are just elements of the thing, like wheels and carburetors."[30] But the doctrine of unenforceability does not treat unenforceable words like wheels or carburetors, or even like other words that a company may utter about its products. A sports equipment company may face liability if its advertisement falsely touts "the highest-rated safety features on the market," but if its contract says "the company is not liable for any damages resulting from your use of our products," the standard approach of non-enforceability provides no penalty—even if that statement is, legally speaking, false.

In this way, the world of unenforceable contract terms is one of the last vestiges of the "caveat emptor" doctrine that has long been excised from

[26] See infra Part II.

[27] See, e.g., Kathryn A. Sabbeth & Jessica K. Steinberg, The Gender of Gideon, 69 UCLA L. Rev. 1130, 1143–48, 1150–61 (2023); Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, Racial Capitalism in the Civil Courts, 122 Colum. L. Rev. 1243, 1268–77 (2022).

[28] See infra Part II.

[29] See Arthur Allen Leff, Contract as Thing, 19 Am. U. L. Rev. 131, 131–32, 147–52, 155 (1970); see also Douglas G. Baird, The Boilerplate Puzzle, 104 Mich. L. Rev. 933, 933–37 (2006) (comparing the legal treatment of boilerplate and fine print contract terms to "hidden" attributes of products).

[30] Leff, supra note 29, at 153.

many other areas of the law.[31] Faced with unenforceable terms in a contract, consumers are simply left to their own recognizance. Affirmatively prohibiting clearly unenforceable terms in mass contracts would allow signers to rely on the bindingness of the terms they assent to without being lawyers—just as we can rely on the functionality of the cars we buy without being engineers or the safety of the medicines we purchase without being physicians.

The Article proceeds as follows. First, Part I surveys the research regarding the use of unenforceable terms and their effects on the general public. Part II then builds out the normative argument for penalizing the use of unenforceable terms in mass contracts. Part III considers questions of how such a penalty would be designed, such as how to construct a liability rule and which parties it should cover. Part IV then considers resources in existing law that could be used to combat unenforceable terms short of passing new legislation.

I. THE USE AND EFFECTS OF UNENFORCEABLE TERMS

It is well established—to the point of being rote—that consumers do not read the form contracts to which they assent during the course of daily life.[32] As David Hoffman has remarked, "the *No Reading Thesis* is the central organizing principle in the contracts academy, and rests on careful empirical inquiry."[33] This lack of reading is understandable: everyone has limited time, and the costs of reading the numerous long and byzantine contractual documents that we regularly encounter will, for most of us, outweigh the expected benefits.[34] But the bounds on people's time, knowledge, and self-control give rise to the concern that many standard form contracts will contain one-sided or otherwise unfair terms that

[31] See infra Part II.

[32] See, e.g., Ian Ayres & Alan Schwartz, The No-Reading Problem in Consumer Contract Law, 66 Stan. L. Rev. 545, 595–605 (2014); Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts, 43 J. Legal Stud. 1, 19, 22 (2014).

[33] David A. Hoffman, Defeating the Empire of Forms, 109 Va. L. Rev. 1367, 1378 (2023) (footnote omitted).

[34] See, e.g., Russell Korobkin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203, 1222 (2003) ("The problem that buyers face of choosing among product alternatives thus can be reframed as a problem of balancing the desire to make accurate choices with the mutually exclusive desire to minimize effort." (citations omitted)).

exploit consumers' and workers' limitations to the benefit of contract drafters.[35]

Courts respond to this concern, when they do, by declining to enforce certain contract terms. Although there is a default presumption that contract terms are enforceable, the primary tool that courts use to respond to contractual provisions that are particularly unfair, unlawful, or contrary to public policy is to declare them "unenforceable."[36] Courts have not, in contrast, tended to hold that including unenforceable terms in a contract is itself punishable.[37]

At least at first glance, it might seem like this arrangement would be all that is necessary to protect from the harms of unlawful terms because it deprives the drafters of those provisions of their benefits. If courts will not enforce a particular term, the thinking goes, then there is no need for a drafter's counterparty to honor the term unless they would be inclined to act consistently with the term anyway. So the drafter might as well not include such a term to begin with, and if the drafter does include the term, it will be essentially vestigial.

But in recent years, an increasingly large and robust body of research has documented flaws in this approach. In both the consumer and employment sectors, scholars have demonstrated that unenforceable terms are widespread even where the law is clear. And more significantly, they have shown that these unenforceable terms have an effect on consumer and employee behavior. This Part describes that research. It then concludes by discussing how that research has led policymakers and activists to set their sights on particular unenforceable terms, although few

[35] See id. at 1244.

[36] See, e.g., Cheng et al., supra note 14, at 580–82. It is possible for courts to decline to enforce entire contracts rather than specific terms within them, and historically courts were more hesitant to engage in the gap-filling required when rendering a term unenforceable but leaving the rest of the contract in place. See Omri Ben-Shahar, Fixing Unfair Contracts, 63 Stan. L. Rev. 869, 875 (2011). However, in the modern era, courts have demonstrated more of a willingness to enforce the contract overall while structuring some sort of replacement for the offending term. Id.

[37] See, e.g., Miller v. Atchison, Topeka & Santa Fe Ry. Co., 156 P. 780, 783 (Kan. 1916) ("It is against public policy to permit a common carrier to escape liability for loss and injury occasioned by its negligence, and for that reason certain provisions in the contract in question are void; but this is the extent to which the decisions and authorities have gone. It is not necessarily contrary to any public policy so far declared by the courts generally, or by Congress, for an interstate carrier to insert in its shipping contracts provisions which for reasons of public policy the courts will not enforce.").

have yet focused on the category of unenforceable contract provisions as a whole.

A. The Widespread Use of Unenforceable Contract Terms

For decades, both anecdotal and occasional surveys have suggested that unenforceable terms have been in regular use.[38] But more recently, rigorous and broad studies have documented the widespread use of unenforceable terms in a variety of contexts.

First, several studies in the housing context have found that residential leases frequently employ unenforceable provisions. David Hoffman and Anton Strezhnev examined approximately 170,000 residential leases that were filed in support of over 200,000 evictions over a fourteen-year period in Philadelphia.[39] They found that more than half of the leases that were not governed by housing authority subsidy regulations contained at least one unenforceable term.[40] They also found that "unenforceable and oppressive terms are becoming more common over time."[41] Their data indicated that there were so many unenforceable terms in part because leases have increasingly served as a kind of shared template, with a small number of drafters creating standardized form leases used by a large and growing number of landlords.[42]

Similar findings in other locations support the conclusion that this is a widespread phenomenon. In a study of residential leases in the Boston area, Meirav Furth-Matzkin found that seventy-three percent of leases in the sample contained at least one unenforceable clause, such as terms purporting to disclaim or limit the warranty of habitability.[43] As in the Philadelphia study, a significant portion of the leases (slightly over half of the sample) were standard form leases, drafted by commercial

[38] See, e.g., Bailey Kuklin, On the Knowing Inclusion of Unenforceable Contract and Lease Terms, 56 U. Cin. L. Rev. 845, 845 n.1, app. at 916 (1988); Charles A. Sullivan, The Puzzling Persistence of Unenforceable Contract Terms, 70 Ohio St. L.J. 1127, 1128 (2009) ("There are few empirical studies of the frequency with which unenforceable-as-written clauses appear in contracts, but the phenomenon is common enough to raise questions why it persists." (footnote omitted)); see also Berger, supra note 15, at 796–97 (describing the contract interpretation principle that ambiguity is construed against the maker of the contract); Mueller, supra note 10, at 272–73, app. at 280, 296 (documenting the use of unenforceable exculpatory provisions in leases in Michigan in 1970).

[39] Hoffman & Strezhnev, supra note 12, at 90.

[40] Id. at 98–99.

[41] Id. at 123.

[42] Id. at 123–24.

[43] Furth-Matzkin, Unexpected Use, supra note 11, at 10, 24.

publishers or by organizations of landlords or realtors.[44] In Idaho, a survey conducted by a nonprofit organization found an increase in recent years in leases with clauses that violate explicit state laws, such as terms allowing landlords to enter property without notice or to shut off utilities when tenants miss a rent payment.[45] Rather than ad hoc leases written by nonexpert, small-scale property owners, a number of these leases were from large property management companies.[46]

In the employment context, research into noncompete clauses has documented their significant reach around the country, even in jurisdictions where they are unenforceable. Based on a nationally representative sample of more than 11,000 workers, Evan Starr, J.J. Prescott, and Norman Bishara estimated that about eighteen percent of workers were under a noncompete agreement at the time of the survey and that thirty-eight percent had at some point been under a noncompete agreement.[47] They also found similar levels of noncompete agreements even in locations where noncompetes are entirely unenforceable.[48] For instance, in California, where noncompetes are essentially prohibited, the odds of an employee being subject to an employment contract with a noncompete clause were the same as in Florida, where noncompetes are often enforced.[49] And additional work by Camilla Hrdy and Christopher Seaman documents that many employment contracts include broadly drafted nondisclosure agreements that can function like noncompetes, even though such broad restrictive clauses are also not enforceable in most courts.[50]

In the world of consumer contracts, Edward Cheng, Ehud Guttel, and Yuval Procaccia have documented the ubiquity of liability waivers, which

[44] Id. at 11.

[45] Nicole Camarda, Questionable Lease Agreements on the Rise in Treasure Valley, Idaho News 6 (July 20, 2022, 7:18 PM), https://www.kivitv.com/news/questionable-lease-agreements-on-the-rise-in-treasure-valley [https://perma.cc/EH7J-E4HR]; Mia Maldonado, Boise Nonprofit Jesse Tree Finds Illegal Clauses Written into Leases of Treasure Valley Tenants, Idaho Cap. Sun (July 28, 2022, 4:35 AM), https://idahocapitalsun.com/2022/07/28/boise-nonprofit-jesse-tree-finds-illegal-clauses-written-into-leases-of-treasure-valley-tenants/ [https://perma.cc/FLB5-3MTM].

[46] Maldonado, supra note 45.

[47] Starr et al., Noncompete Agreements, supra note 13, at 60.

[48] Id. at 68.

[49] J.J. Prescott, Norman D. Bishara & Evan Starr, Understanding Noncompetition Agreements: The 2014 Noncompete Survey Project, 2016 Mich. St. L. Rev. 369, 370, 461.

[50] Camilla A. Hrdy & Christopher B. Seaman, Beyond Trade Secrecy: Confidentiality Agreements That Act Like Noncompetes, 133 Yale L.J. 669, 682–83, 707–21 (2024).

are often unenforceable but are commonly applied to all manner of everyday activity.[51] As they show, these terms are included not only in contracts for participants in somewhat risky sports, such as skiing and horseback riding, but also in those covering participants in activities that are presumably less risky, such as "volunteering at the American Cancer Society, attending trade conventions, scouting, classical music concerts, [and] even entering a dog show at the local library."[52] These liability waivers are pervasively incorporated into contracts even where they are clearly unenforceable, including in contracts drafted by a wide range of sophisticated actors, such as large companies or universities.[53] Perhaps most notably, Cheng et al. document that liability waivers are routinely included in contracts by parties even after courts have specifically held that those exact waivers, used by those exact parties, are unenforceable.[54] In other words, for many parties, it appears to be the case that a court ruling specifically invalidating their exact contract terms in precisely the context in which they use them does not cause those parties to exclude those terms from future contracts.

Given the varied nature of unenforceable terms, it is unsurprising that there has been no general study of the use of unenforceable terms across different economic sectors and different subject matters of contracting. The study by Cheng et al. comes closest, by examining a relatively broad category of terms (liability waivers) across a wide range of activity.[55] But together, the existing studies paint a consistent, coherent picture of a world in which unenforceable terms are ubiquitous—including in form contracts disseminated to many actors and institutions, in contracts drafted by sophisticated repeat players, and in contexts where courts have given drafters specific notice that the precise terms used in their contracts will not be enforced. The current evidence thus details a world in which unenforceable terms are widespread, regular occurrences across different sectors and activities, and are included by drafters with access to legal counsel and clear notice that the terms are unenforceable.

B. The Effects of Unenforceable Contract Terms

So unenforceable terms are widespread. Does that matter?

[51] Cheng et al., supra note 14, at 574.
[52] Id. at 577–78 (footnotes omitted).
[53] Id. at 582–83.
[54] Id. at 584–86 ("[T]hese flagrant cases are far more common than one might think.").
[55] Id. at 572–74.

An increasingly large and robust body of evidence indicates that the answer is yes: the use of unenforceable terms has an effect on the behavior of less sophisticated parties, such as workers and consumers, who often find themselves signing on to mass-produced adhesive contracts. This Section describes that evidence, which comes both from lab studies of consumer psychology and from observations of real-world behavior.[56] As Part II argues, the effects of unenforceable terms demonstrate why these terms are an appropriate target for regulation, and why the mere act of declining to enforce a particular contract provision is not a very good mechanism for effectuating public policy.

First, numerous studies have built up an understanding of the psychology of consumer decision-making that shows consumers to be heavily influenced by the terms in the contracts that they sign, regardless of those terms' legality.[57] As Meirav Furth-Matzkin and Roseanna Sommers put it, consumers are "contract formalists" who "put excessive weight on written terms" and "feel generally obligated to abide by terms that are imposed through formalized assent processes."[58] As a result, even though consumers often do not read the "fine print" of mass contracts of adhesion, they nonetheless feel bound by the terms within those contracts.[59] Tess Wilkinson-Ryan thus summarizes the current legal landscape as one in which the terms of consumer contracts are "afforded so little attention *ex ante*," but "have too much weight *ex post*."[60]

This background understanding of consumer psychology helps explain why unenforceable terms can influence behavior. If a consumer believes that a particular contractual provision *would* be binding in court, that should reasonably influence the consumer's behavior—for instance,

[56] In addition to evidence regarding laypersons' mistaken beliefs regarding unenforceable terms, there has been a wealth of empirical evidence in recent years regarding gaps between contract doctrine and laypersons' beliefs or actions. See, e.g., Tess Wilkinson-Ryan & David A. Hoffman, The Common Sense of Contract Formation, 67 Stan. L. Rev. 1269, 1270 (2015) (documenting mistaken beliefs regarding contract formation); Bakos et al., supra note 32, at 2 (documenting consumers' lack of reading).

[57] See Wilkinson-Ryan, supra note 15, at 139–49, 139 nn.105–10 (surveying research).

[58] Furth-Matzkin & Sommers, supra note 15, at 516 (emphasis omitted); see also Wilkinson-Ryan & Hoffman, supra note 56, at 1296–98 (discussing consumers' folk contract beliefs and noting that they sometimes "behave like nineteenth-century legal formalists").

[59] Wilkinson-Ryan & Hoffman, supra note 56, at 1299; see also Stolle & Slain, supra note 15, at 91 (finding "the presence of exculpatory language did have a deterrent effect on participants' propensity to seek compensation," and noting this effect is "consistent with previous research suggesting that consumers' contract schema includes a general belief that written contract terms are enforceable").

[60] Wilkinson-Ryan, supra note 15, at 164.

causing a tenant to pay to repair property damage if the plain terms of their lease say that they should (or at least that their landlord does not need to). Such feelings are also reinforced by broadly shared moral and psychological commitments to following through on promises.[61]

One illustrative example of this effect comes again from the housing context, in which Furth-Matzkin has demonstrated consumer harm from unenforceable terms in a series of studies.[62] The studies centered around a common unenforceable provision that disclaims the landlord's liability for loss or damage caused by the landlord's negligence or misconduct.[63] Furth-Matzkin found that consumers presented with such a lease were significantly more likely to say that they would bear the burden of repair costs for property damaged as a result of their landlord's negligence, as compared either to consumers who were given a contract with an enforceable term (acknowledging the landlord's liability for negligence) or to consumers who were given a silent contract.[64]

Furth-Matzkin's results suggest that consumers see the contracts themselves as sources of information about their legal rights and responsibilities. Even when given the option to do a web search to find out more about their landlord's legal obligations and a financial incentive to get the correct response regarding the landlord's liability, only thirty-two percent of consumers presented with an unenforceable liability disclaimer thought that the landlord would be liable for property damage, compared to eighty-nine percent of consumers with an enforceable liability provision and seventy-two percent of consumers with a lease that was silent as to the liability issue.[65] The unenforceable liability disclaimer had a real influence on the perceptions of the consumers confronted with it, and one that could not easily be countered by readily available online information.[66] The influence of these terms is strong: Furth-Matzkin and Sommers's research indicates that even when a person has assented to a contract only because of fraudulent misrepresentation, the terms in the contract will still deter them from seeking redress.[67]

[61] See Tess Wilkinson-Ryan, Legal Promise and Psychological Contract, 47 Wake Forest L. Rev. 843, 854–55 (2012).
[62] See Furth-Matzkin, Harmful Effects, supra note 15, at 1032.
[63] See id. at 1040–58.
[64] Id. at 1044.
[65] Id. at 1047–48.
[66] Id. at 1044–45.
[67] See Furth-Matzkin & Sommers, supra note 15, at 526.

The findings of these psychology studies, which often involve providing test subjects with hypothetical contracts, are corroborated by evidence of how contracts influence behavior outside of the laboratory. As noted above, noncompete clauses in employment contracts are quite common, including in states where those clauses are not enforceable.[68] Via the nationally representative study of noncompete clauses mentioned above, Starr et al. demonstrated that these noncompetes meaningfully influence employees' labor market behavior even in those states that do not enforce the clauses.[69] Among employees with noncompetes in their contracts, about forty percent reported that the noncompete was a factor in their decision to decline a job offer from a competitor of their employer—and this number was roughly the same across states that do and do not enforce noncompete clauses.[70] Starr et al. also found that individuals with noncompete clauses in their employment contracts did in fact have different labor force mobility than other employees—they stayed at their jobs longer and were more likely to switch employment to a noncompetitor rather than a competitor.[71] And perhaps most tellingly for the purposes of this paper, the study also found that these results were similar in states where noncompetes are unenforceable and in states where they are enforceable.[72]

Starr et al.'s data point to the unsurprising conclusion that employees' beliefs about the content of the law matter more for their behavior than the actual content of the law: "[B]eliefs about noncompete enforceability and the likelihood of being sued, as well as simple reminders by the employer, are strong predictors of whether an employee will decline an offer from a competitor, while the actual content of the law appears to be irrelevant."[73] As a result, the effect of noncompetes operates primarily through an "*in terrorem*" effect, in which employees base decisions at least in part on their fear that a noncompete clause could be used to impose

[68] See supra Section I.A.

[69] Starr et al., Behavioral Effects, supra note 15, at 636.

[70] Id. at 663.

[71] Id. at 651–52. Starr et al. note that this result on its own may not be enough to infer a causal relationship between the noncompete and the observed mobility differences. Id. at 635. For instance, as they note, there is no particular reason to think that selection into noncompete clauses is random, and some reasons to think that it is not. Id. at 666–67. But they employ additional strategies to support the conclusion that noncompetes do have a causal role in at least some labor market mobility differences. Id. at 666–68.

[72] Id. at 655.

[73] Id. at 666.

costs on them—such as the costs of a lawsuit or being on the wrong side of a court judgment—rather than on accurate knowledge about the state of the law.[74]

There is also some evidence that suggests that employers may not particularly care about whether their noncompetes are enforceable in court. A separate study examines a recently enacted law in the state of Washington that makes noncompete clauses categorically unenforceable for workers earning less than $100,000 per year.[75] If employers valued the enforceability of noncompete clauses, you might expect to see "bunching" of employees just over the threshold and disproportionately few employees just below the threshold, as firms would be able to give slight raises to their employees to make the noncompetes in their contracts enforceable.[76] But no such phenomena have occurred since the law has gone into effect.[77] This evidence certainly is not dispositive of what employers value, given other plausible explanations that are available.[78] But the study does support the conclusion that employers derive value from noncompete clauses because of their effects on employees' beliefs rather than because of their actual enforceability in court.

Outside of the context of academic studies, there is also strong anecdotal evidence that members of the bar believe in the effect of disclaimers on consumers even though they are unenforceable. As Cheng et al. note, lawyers and insurers advocate for the use of unenforceable terms in a variety of contexts, specifically pointing to the psychological

[74] Id. at 662–66. It also may be the case that a person's behavior is influenced by the existence of unenforceable contractual language simply because that language makes them believe they are more likely to be sued if they engage in actions contrary to that language—which could be true even if they do not believe the relevant term would be enforced in court. Lawsuits are expensive, and parties typically must pay their own way in a suit, even if they win. A consumer or employee could thus be agnostic about the validity of a contractual term (as opposed to affirmatively believing it to be enforceable), but still feel pressured to comply with that term so as not to provoke a lawsuit. It would be difficult to determine how much effect the contractual language itself would have in such a scenario—people can intimidate others with the threat of lawsuits even without relevant contractual language—but it may be that the presence of one-sided contractual language makes that possibility more salient to consumers or employees in some contexts.

[75] Takuya Hiraiwa, Michael Lipsitz & Evan Starr, Do Firms Value Court Enforceability of Noncompete Agreements? A Revealed Preference Approach, Rev. Econ. & Stat., July 18, 2024, at 2.

[76] Id.

[77] Id. at 22–25.

[78] See id. at 25–26, 28–29.

effects that they will have on unsophisticated parties.[79] One law firm, for instance, provided its clients with a model liability waiver for children, along with a note that such waivers "are simply of no validity" but may "achiev[e] a psychological value" that will cause some parents not to sue.[80] Similarly, one insurance company that recommends the use of broad waivers hypothesizes that not only may they deter some lawsuits, but they may also "have a psychological impact on some juries when it comes to deciding the amount of damages."[81] This advice long predates the studies discussed above, reflecting a long-standing professional judgment that the use of unenforceable terms can be advantageous given their psychological effect.

It is important to note that neither the prevalence of unenforceable terms nor the fact that they have real effects necessarily says much about a drafter's mental state or intentions. There are many reasons these terms may be sticking around, including mistake, ignorance, or inertia, aside from the knowing or intentional desire to take advantage of the behavioral effects of these terms. The desire to minimize costs may also mean that drafters include terms for all of their counterparties, even if those terms are unenforceable in some jurisdictions, simply because it is easier to have a single standardized form that gets used across different geographic regions. Because the vast majority of consumer contracts are boilerplate duplicates, some combination of inertia and cost avoidance would make it easy for unenforceable terms to proliferate.[82] This explanation is relatively innocuous compared to the more intentionally manipulative

[79] Cheng et al., supra note 14, at 588–90. In the words of one law firm, which represents corporations in a state that holds liability waivers to be unenforceable, such unenforceable waivers "do create an additional hurdle" to litigation, and businesses may wish to include such terms because they "may be a deterrent to a [lawsuit]." James V. Irving, Enforceability of Waivers of Prospective Liability, Bean, Kinney & Korman (Sept. 1, 2012), https://www.beakinney.com/article/enforceability-of-waivers-of-prospective-liability/ [https://perma.cc/GQ3Z-ZCXP], *cited in* Cheng et al., supra note 14, at 588 n.102.

[80] Cheng et al., supra note 14, at 589 (quoting Stewart H. Diamond & Henry E. Mueller, Pre-Activity Waivers and Releases of Liability, Ill. Parks & Recreation, Mar./Apr. 1989, at 22, 22–23, https://www.lib.niu.edu/1989/ip890322.html [https://perma.cc/7NER-XEAN]).

[81] Id. at 589 (quoting FAQs, Sportsinsurance.com, https://www.sportsinsurance.com/faqs/ [https://perma.cc/XA9E-Z237] (last visited Apr. 6, 2025)). As Cheng et al. note, this assertion may not be particularly plausible given that it is unclear why the existence of such a term would be made known to a jury. Id. at 589 n.104.

[82] See Stolle & Slain, supra note 15, at 84–85.

practices described by Cheng et al.[83] But regardless of the intention of the drafting party, the effects of unenforceable terms on consumers and workers make them an appropriate target for regulatory policy, as the next Section begins to describe.

C. Policy Responses to Unenforceable Terms

Supported by the empirical evidence described above, there has been significant recent activity by policymakers in the realm of unenforceable terms. This Section describes notable recent responses to the problem of unenforceable terms.[84]

The most significant recent actions have come in the realm of noncompete clauses. In May 2024, the Federal Trade Commission issued a final "Non-Compete Clause Rule" that creates an affirmative ban on noncompete clauses under federal law.[85] In its rationale for the ban, the FTC pointed to the evidence that noncompetes are broadly used even in states where they are unenforceable, and read this evidence to "suggest[] that employers may believe workers are unaware of their legal rights, or that employers may be seeking to take advantage of workers' lack of knowledge of their legal rights."[86] In a statement regarding the proposed

[83] Cf. Cheng et al., supra note 14, at 588–90 (describing the intentional inclusion of unenforceable waivers designed to lead victims to "erroneously conclude that they have no valid claim against the injurer").

[84] In addition to these recent efforts, there are individual provisions targeting contract terms in certain contexts scattered throughout the U.S. Code as well as state laws. The Electronic Funds Transfer Act, for instance, limits waivers of its protections not simply by making such waivers unenforceable, but by prohibiting consumer contracts from "contain[ing] any provision" waiving a right conferred by the statute's terms. 15 U.S.C. § 1693l. California's ban on non-disparagement clauses in consumer contracts not only bans the inclusion of such provisions in contracts, but also bans companies from threatening to enforce or seeking to enforce such provisions. See Cal. Civ. Code § 1670.8(a)(2). In contrast, the federal analog—the Consumer Review Fairness Act—bans only the inclusion of non-disparagement terms in the first place. See 15 U.S.C. § 45b(c). Some state courts have interpreted other specific consumer protection statutes with less explicit language to prohibit the inclusion of unlawful terms as well. See, e.g., Kline v. SouthGate Prop. Mgmt., LLC, 895 N.W.2d 429, 439–40 (Iowa 2017) ("Although 'uses' in this context obviously subsumes the conduct of attempting to enforce a prohibited provision, we believe it also encompasses the separate egregious act of inserting such a provision in a rental agreement with knowledge that it is prohibited." (quoting the Iowa Uniform Residential Landlord Tenant Act, Iowa Code § 562A.11(2) (2015) (amended 2021))); Sw. Inv. Co. v. Mannix, 557 S.W.2d 755, 763–64 (Tex. 1977) (interpreting the Texas Consumer Credit Code).

[85] See Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

[86] Id at 38377.

rule, three FTC Commissioners further noted that the proposed rule "draws on key lessons learned from state efforts to limit or ban the use of noncompetes," and in particular, the fact that declaring noncompetes null and void in certain states has not been effective at causing employers to cease using the clauses.[87] The rule thus requires employers both to stop using noncompete clauses in their new employment contracts and also to affirmatively communicate to their existing workers that the noncompete clauses in earlier versions of their contracts have become void and unenforceable.[88]

The National Labor Relations Board has also taken recent action against noncompetes. In May 2023, the General Counsel of the NLRB, Jennifer Abruzzo, issued a memorandum concluding that noncompetes violate the National Labor Relations Act because they hinder employees' ability to quit or change jobs, chilling their power to engage in protected activity such as concerted threats to resign.[89] Notably, Abruzzo's conclusion appears to reach the inclusion of noncompetes in contracts per se, as the memo determines that the "proffer [and] maintenance" of noncompetes, not just their enforcement, violates the National Labor Relations Act.[90]

Outside the realm of noncompetes, the Consumer Financial Protection Bureau has also recently taken action to combat the use of unenforceable waivers in consumer contracts. At the beginning of 2023, the CFPB proposed the creation of a registry of contract terms in which certain companies within its jurisdiction would have to register their use of terms in mass consumer contracts that purport to waive or limit consumers' rights and legal protections.[91] Terms that would be included within the registry include limitations on consumers' ability to file complaints or post reviews, as well as waivers of specific claims or limitations on consumers' ability to participate in class actions or other collective legal

[87] Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3537 (proposed Jan. 19, 2023).

[88] See Non-Compete Clause Rule, 89 Fed. Reg. at 38342.

[89] See Memorandum GC 23-08, supra note 20, at 1–2.

[90] Id. at 1.

[91] See Press Release, Consumer Fin. Prot. Bureau, Statement of CFPB Director Rohit Chopra on Proposed Registry of Supervised Nonbanks That Use Form Contracts to Impose Terms and Conditions That Seek to Waive or Limit Consumer Legal Protections (Jan. 11, 2023), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-proposed-registry-of-supervised-nonbanks-that-use-form-contracts-to-impose-terms-and-conditions-that-seek-to-waive-or-limit-consumer-legal-protections/ [https://perma.cc/4KL7-UHCP]; see also Registry of Supervised Nonbanks That Use Form Contracts, supra note 21.

actions.[92] The proposal does not itself forbid the use of any terms or create liability for the use of forbidden terms; instead, the CFPB's rationale for the rule is in part that it would "facilitate public awareness and oversight by other regulators" of the use of such terms, including contractual provisions "that waive or limit consumer protections under State law and Tribal law."[93] The rule's analysis argues that unenforceable waivers in contracts may "deceiv[e] consumers into thinking the underlying legal protection no longer applies or that they cannot enforce a right, when in fact that is not [the] case."[94] The CFPB notes that no such database exists already, and the public has "access to only limited data" about the use of waivers in mass consumer contracts.[95]

In addition to these federal efforts, there have been a small number of attempts at the state level to leverage legal ethics rules to combat at least some types of unenforceable terms. Over the last several years, the Committee on Professional Responsibility and Conduct of the State Bar of California considered, but ultimately declined to adopt, a draft opinion on the topic of "illegal contract provisions," a somewhat ambiguous phrase that seems like it would include some, but perhaps not all, unenforceable terms.[96] The opinion concluded that lawyers' ethical duties both prohibit them from recommending the use of contractual provisions they know to be illegal and affirmatively compel them to counsel clients not to use such provisions.[97] Where a client insists on using such provisions, the opinion stated, "the lawyer shall not participate in presenting the illegal provision to the third party and shall not assist the client in enforcing the provision against a third party."[98] Although there was pressure on the committee to adopt the rule from a range of consumer

[92] See Registry of Supervised Nonbanks That Use Form Contracts, supra note 21.
[93] Id. at 6907.
[94] Id. at 6916.
[95] Id. at 6924.
[96] See State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Formal Op. Interim No. 19-0003, at 2 n.2 (2021), https://www.calbar.ca.gov/Portals/0/documents/publicComment/2021/19-0003-Improper-Contracts-Provision-60day-PC.pdf [https://perma.cc/V4W5-PMYE] ("The opinion is not intended to address provisions that are legal, but against public policy, unenforceable or subject to some other prohibition . . . .").
[97] Id. at 7.
[98] Id. at 7–8.

and employee advocacy organizations,[99] the committee eventually decided not to move forward with the rule.[100]

Additionally, in Washington, D.C., then-Attorney General Karl Racine lobbied the D.C. Bar's Legal Ethics Committee in late 2022 to adopt a similar ethics opinion.[101] Drawing heavily on the example of noncompete contracts, Racine argued that the opinion should adopt a rule determining "that it is misleading, and therefore misconduct, for an attorney to draft a contract with an illegal or unenforceable term."[102] The D.C. Bar does not yet appear to have publicly responded to Racine's request.

The legal ethics approach to unenforceable terms is notable because it provides a potential way to regulate the use of these terms across the board rather than a piecemeal, term-by-term approach. But so far, that approach both is geographically limited and has yet to take hold anywhere. More concrete regulatory approaches remain domain-limited, although the surge in activity in both the consumer and employment realms suggests some contemporary attentiveness to the use of unenforceable terms per se.

II. THE CASE FOR REGULATING UNENFORCEABLE TERMS

The previous Part established that unenforceable terms are frequently present in consumer and employment contracts and have an effect on consumer and employee behavior. This effect is often contrary to the interests of the consumer or employee in question, who might decline a job opportunity because of an unenforceable noncompete or fail to pursue redress because of an unenforceable liability waiver. This negative effect on the more vulnerable parties in frequent transactions raises the question of why the law should allow this state of affairs to persist. And, as the last

[99] See Press Release, Worker and Consumer Advocates Issue Call for Regulation of Attorneys Who Draft the Fine Print, Towards Just. (Mar. 6, 2023), https://towardsjustice.org/2023/03/06/press-release-worker-and-consumer-advocates-issue-call-for-regulation-of-attorneys-who-draft-the-fine-print/ [https://perma.cc/LN5T-62VS].

[100] State Bar of Cal. Standing Comm. on Pro. Resp. & Conduct, Opinion Log (June 21, 2024), https://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000032606.pdf [https://perma.cc/7ZRC-QBHX] (noting that the committee "[d]eclined to move forward" with the draft rule).

[101] See Letter from Karl A. Racine, Att'y Gen., District of Columbia, to Legal Ethics Comm., District of Columbia Bar (Dec. 16, 2022), https://oag.dc.gov/sites/default/files/2023-01/12.16.22%20WRAS%20Letter%20to%20DC%20Bar%20Legal%20Ethics%20Committee.pdf [https://perma.cc/A4MJ-CX6V].

[102] Id. at 3–4.

Section showed, there have been efforts to regulate the use of contracts containing these terms in some circumstances. These efforts, though, have all been piecemeal—focused on particular terms such as noncompete agreements rather than on the problem of unenforceable terms as a category.

This Part makes the case for a broader regulation of unenforceable terms. In particular, the normative discussion here focuses on the "core case" of unenforceable terms in adhesive contracts: a scenario in which a sophisticated actor drafts a contract with the assistance of counsel, that contract is designed to be adhered to by many counterparties with little or no negotiation of its terms, and those terms include one or more provisions that are clearly unenforceable under existing statutory or judge-made law at the time the contract is drafted. This core case appears to both be common[103] and have some normatively distinctive features. In particular, where sophisticated actors are employing legal counsel, the marginal cost of additional review will be lower. And where the contract is one that is being designed with many counterparties in mind, that cost can be amortized over a larger number of transactions. This core case is therefore worth focusing on as a target for legal intervention.[104]

The strength of the case for legal intervention will, of course, depend in part on just what kind of intervention is being considered. For the conversation in this Part, it is enough to begin from the starting point that restricting the *use* of unenforceable terms just means doing something more than declining to enforce the terms in court—it means creating some sort of affirmative penalty to deter the use of the terms and to compensate for harms that arise from that use. After this Part lays out the basic normative case for such a policy, the next Part discusses in more detail considerations of what a policy restricting unenforceable terms might look like.[105]

[103] See supra Section I.A.

[104] Of course, there are many scenarios outside of this core case in which unenforceable terms arise, and they may be worth considering as targets for regulation as well.

[105] One point about phrasing: throughout this and subsequent Sections, I refer to a stylized transaction in which the sophisticated party described above is the "drafter" of the contract of adhesion and the consumer or employee who signs on to the contract is the "signer" or "counterparty." This certainly happens frequently, but it also obscures a significant additional scenario, in which the offeror of the contract terms did not originally draft them but is instead using a form contract provided by a third party. That scenario is also frequent and is discussed further in the next Section.

A. Minimizing Costs

When a person acts against their own interests because of a mistaken belief that they are contractually obligated to do so, that person suffers a harm.

Like many harms, this harm could be prevented with some effort. The mistaken belief could be prevented in one of two ways. First, the signer of the contract could become informed about their legal obligations, learning that the contract term is unenforceable and thereby harmonizing their beliefs with reality. Or second, the drafter of the contract could decline to include the unenforceable term in the contract to begin with, preventing the mistaken belief from forming in the first place.

The first, most basic normative argument for burdening the drafter in this scenario comes from a simple observation: these two parties are not similarly situated. In the core case described above, the contract drafter is a sophisticated actor who has hired counsel to draft terms that will be presented to many counterparties. This drafter, in other words, has already engaged counsel to create or review terms for inclusion in the draft. In such circumstances, the fact that a provision is clearly unenforceable is likely to come up during the course of drafting and review. And if that does not happen, it is likely to be only a small marginal cost to determine whether a term that is already being reviewed by a legal expert is clearly invalid.

In contrast, the cost would be much higher for the consumer or employee on the other side of the contract to make an assessment of legality. Unless the consumer or employee signer happens to be a lawyer, even the concept that terms may be unenforceable will likely have to be learned.[106] Then, on top of that, the signer would have to learn *how* to determine whether the particular term at issue is enforceable or not—how to consult statutes, case law, and secondary material. Finally, the signer would then have to actually make that determination as to the term at issue. But this last step is the only step that would need to be taken by the drafter's counsel—a significantly lower cost.

Compounding that cost differential, the drafter would need to take the step only once, with any resulting changes to the contract affecting all their counterparties. In contrast, if the counterparties are the ones who

[106] See supra Section I.B (describing consumers as contract formalists who tend to believe terms are binding).

have to make the determination as to the term's legality, many individuals may have to incur effectively redundant costs.

The drafter is, in other words, the "least-cost avoider" for preventing the harm that arises from mistaken beliefs about contractual obligations. The concept of the least-cost avoider (or "cheapest cost avoider")[107] is a tool more typically encountered in the world of tort law,[108] but it has some roughly analogous bearing here. The basic relevance is that, as a descriptive matter, the law has often selected default rules that "tend to put the burden of various risks on the party best able to take actions to prevent, mitigate, or insure against these risks: the least-cost-avoider."[109] Although the normative desirability of these rules in particular contexts has been debated for decades, there is a strong argument to be made that such an arrangement is often efficient.[110] By assigning the cost of a risk of harm to the person or entity most cheaply able to avoid it, the law can minimize the joint costs of harms and harm avoidance.[111]

Right now, the law makes no particular effort to allocate the risk of harm resulting from the false impression of contractual terms' bindingness. Instead, the law lets the costs of determining the legality of contract terms fall on both parties. There is no obligation for contract drafters to ensure their terms' validity.[112]

But when it comes to preventing the harms of unenforceable terms in mass contracts, the parties are clearly unequally situated. As just discussed, the drafters of mass contracts are more easily able to prevent clearly unenforceable terms from becoming part of their contracts. As a result, a legal rule assigning the costs of prevention to them would tend to be more cost-effective than requiring the adherents to these contracts to shoulder the burden of determining the legality of their terms.

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[107] Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1062 (1972).

[108] See, e.g., Stephen G. Gilles, Negligence, Strict Liability, and the Cheapest Cost-Avoider, 78 Va. L. Rev. 1291, 1294–95 (1992) ("[T]he cheapest cost-avoider criterion provides a powerful descriptive explanation for central doctrines of the common law, including not only causation but also some conceptions of negligence.").

[109] George M. Cohen, The Negligence-Opportunism Tradeoff in Contract Law, 20 Hofstra L. Rev. 941, 945 (1992).

[110] See generally Gilles, supra note 108, at 1293 ("[T]he cheapest cost-avoider criterion is unrivaled as the best—most general and most often efficient—economic conception of strict liability.").

[111] See Cohen, supra note 109, at 945–46.

[112] See supra notes 36–37 and accompanying text.

This reasoning is in some ways a natural extension of the line of argument that Arthur Leff kicked off with his reconceptualization of "contract as thing."[113] As Leff pointed out, the terms in modern contracts of adhesion are essentially product attributes rather than bargained-for deals.[114] And when it comes to the world of products liability, judges long ago abandoned the idea of "caveat emptor," in which the buyer was expected to know everything relevant about the product just by being able to observe the product before purchase.[115] Instead, the question became what a reasonable purchaser of the product knew or ought to have known about the product under the circumstances of the purchase.[116]

The "contract as thing" perspective, in turn, suggests that the empirical evidence discussed in the previous Part can help determine what reasonable consumers and employees should be expected to know about contracts. Borrowing from one formulation of products liability law, the evidence suggests that "the ordinary knowledge common to the community"[117] does not include the legal validity of specific clauses in contracts and may not include the more basic fact that courts decline to enforce certain terms in contracts.

As a result, the status quo is a kind of perpetuation in contract law of the caveat emptor regime that has long been rejected in tort law. Those who assent to terms in mass-produced contracts are simply left to their own recognizance to determine what to do about those terms, even if it is unreasonable to expect them to understand the legal status of those terms or the broader enforcement regime in which they operate. The features of a product that come in the form of written terms are thereby exempted from the scrutiny given to the non-written features of a product by products liability doctrine.[118]

In contrast, an affirmative prohibition on unenforceable terms in contracts would put the burden on the drafter to include only terms that a

[113] See Leff, supra note 29, at 150–55.

[114] Id. at 153 ("If . . . a particular contract is a mass-produced inalterable thing, then the words that make it up are just elements of the thing, like wheels and carburetors.").

[115] See id. at 152.

[116] Id. at 152–53; see also Tincher v. Omega Flex, Inc., 104 A.3d 328, 387–97 (Pa. 2014) (describing the role of consumer expectations in modern product liability doctrines).

[117] Vautour v. Body Masters Sports Indus., Inc., 784 A.2d 1178, 1182 (N.H. 2001) (quoting Bellotte v. Zayre Corp., 352 A.2d 723, 725 (N.H. 1976)).

[118] The products liability argument has been made before regarding specific types of contracts, especially with respect to insurance contracts. See Daniel Schwarcz, A Products Liability Theory for the Judicial Regulation of Insurance Policies, 48 Wm. & Mary L. Rev. 1389, 1436–39 (2007).

person would reasonably expect to create binding legal obligations. Such a restriction would harmonize the regulation of the text of mass-produced contracts with the regulation of other mass-produced products.[119]

There are a couple of objections to this "cost minimization" justification for a restriction on unenforceable terms. One is the argument that if this were an optimal allocation of burdens, the parties could contract for it themselves.[120] Unsophisticated actors, knowing that they do not have the resources to hire a lawyer but that their counterparties likely have thoroughly vetted their contracts, could demand terms that guarantee the legal validity of other terms within the contract. So why have the state require such a rule rather than let the parties decide?

There are two answers here. First, these are contracts of adhesion, not negotiated documents—most terms are unread, and failing to read or care much about the fine print is probably a rational response by individuals to the explosion of contractual language in the modern world.[121] Expecting everyone not only to vet the baseline terms of contracts they enter into, but also to seek out terms establishing the validity of those other terms is expecting too much.

Second, there is a chicken-and-egg problem here. How should unsophisticated parties be expected to know the legal validity of a contract term that requires contract terms to be valid? In the hypothetical (and probably fantastical) world in which consumers or employees had the inclination to raise ex ante the burdens of determining legality, they would have no means of assuring themselves of the efficacy of such a contractual provision without making some sort of initial legal validity determination.[122] That itself would be costly (and could easily be costlier than the entire value of all sorts of everyday consumer contracts). As both a theoretical and a practical matter, the idea of parties allocating these burdens themselves via contract is infeasible.

A more significant objection is that establishing this kind of penalty is best understood not as an allocation of existing costs, but rather as the imposition of a new cost. It must be the case that in the vast majority of circumstances, the costs to consumers and employees of determining the

[119] See Leff, supra note 29, at 152–53.

[120] Cf. Robert E. Scott & George G. Triantis, Anticipating Litigation in Contract Design, 115 Yale L.J. 814, 866–78 (2006) (describing how parties can use contractual design to allocate the burdens of anticipated litigation).

[121] See Korobkin, supra note 34, at 1233–34.

[122] See supra notes 57–58 and accompanying text.

legal validity of the terms in contracts they have entered into are nonexistent. Most people do not even read the terms that they are subject to in typical contracts;[123] even fewer of them will read those terms and consider their legality (let alone conduct research or hire legal counsel to do so). Most contractual transactions do not result in disputes, and many disputes about a transaction are likely to be over something other than particular contractual terms. As a result, many contractual terms get agreed to and never considered again; boilerplate may pass from company to company without being thoroughly vetted, and particular terms may never arise in transactions or in disputes about those transactions. Requiring drafters to review all terms in all of their mass contracts thus is likely to create costs in at least some—and possibly many—circumstances where there were none before.

This critique has real merit and should temper any regulatory regime regarding unenforceable terms. As Part I notes, one of the difficulties of understanding the costs associated with unenforceable contract terms is that those costs are typically opaque.[124] When a consumer is chilled from bringing a lawsuit, or an employee chooses not to apply for a new job because of a noncompete, those actions often will not be legible to policymakers in the way that, for instance, a filed lawsuit would be. A real concern with regulating unenforceable terms is thus overregulation, such that the cure will be worse than the disease.

Nonetheless, several factors counterbalance the concern that any regulation would be too much. To begin, as already discussed, several factors mitigate the cost of compliance in the core scenario. Sophisticated actors are likely to deploy lawyers anyway to draft and evaluate their mass contracts. And many cost-minimization techniques are available to contemporary contract drafters. Perhaps most obviously, there is copying—a company can copy materials from a prior version of its own contracts or another company's contracts.[125] There is also technology-assisted contract review, in which (increasingly sophisticated) computer programs can scan drafts and flag potential problems.[126]

[123] See supra note 32 and accompanying text.

[124] See supra Section I.B.

[125] Whether terms are unenforceable can, of course, change over time, making older contracts less reliable. Part III further addresses the issue of legal change over time.

[126] See Yasmin Lambert, In-House Legal Teams Start to See AI Gains, Fin. Times (Sept. 13, 2024), https://www.ft.com/content/285f1c78-6deb-47ac-b5d3-1b59b78e15c1.

Next, as Part I detailed, there are real harms associated with the status quo. In some markets, like housing and employment, the presence of unenforceable terms is ubiquitous and appears to have a meaningful influence on many individuals' behavior.[127] These costs, like the costs of complying with a potential restriction on unenforceable terms, are hard to quantify. But the relevant baseline with which to compare the costs of compliance is not the firms' existing costs; it is the costs that are currently internalized by the firms' many diffuse counterparties. Given the relatively generalizable findings from the housing and employment markets, it seems likely that these costs are felt in a variety of contexts throughout the economy.

Finally, there are important values other than cost minimization at play as well. Perhaps most obviously, there are significant distributive considerations that come into play. Contract law and many other areas of the law favor rules that protect less sophisticated parties against more sophisticated parties.[128] The status quo does the opposite, allowing more sophisticated parties to take advantage of their less sophisticated counterparties.

The next two Sections briefly describe additional values that a restriction on unenforceable terms would advance.

B. Avoiding Deception and Opportunism

In addition to the typical private-law goal of cost minimization, another common goal that supports regulating the use of unenforceable terms is avoiding deception and opportunism. Avoiding both opportunism and deception is a goal across many legal areas, most notably (for these purposes) in contract law and consumer protection law.[129]

There are a variety of circumstances in which the use of unenforceable terms can be deceptive and can create chances for opportunism. First, such terms may be included by the drafter with the intent to deceive some

[127] See supra Sections I.A–B.

[128] See Eric A. Posner, Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract, 24 J. Legal Stud. 283, 301–09 (1995).

[129] See, e.g., Gregory Klass, Meaning, Purpose, and Cause in the Law of Deception, 100 Geo. L.J. 449, 449–50 (2012) (arguing "that the law of deception is a natural legal kind"); Cohen, supra note 109, at 953–61 (describing the "[o]pportunism [t]radition" in understanding a variety of legal rules, particularly in contract law).

portion of counterparties for whom the term becomes relevant.[130] As described in Part I, some lawyers explicitly advise their clients to use terms they know to be unenforceable because those terms may lead counterparties to misunderstand their rights.[131]

Second, even if the drafter did not intend to deceive their counterparties at the time of drafting, a dispute in which an unenforceable term arises may present the drafter with the opportunity to mislead, for instance by threatening to go to court to enforce the unenforceable term or by leaning on the unenforceable term in the dispute as if it would hold up in court.

And finally, regardless of the drafter's intention at any point, a counterparty can be misled by the presence of unenforceable terms into thinking that they lack rights or have obligations contrary to what a court would hold if the dispute were to be adjudicated.[132]

It seems likely that in the situations in which the drafter is behaving most abusively—making affirmative misrepresentations for their own gain, for instance—existing legal rules against fraud and other sharp practices could already provide a reasonably straightforward remedy. But the last category mentioned, in which deception occurs simply through the existence of the terms themselves, is a particularly important one to tackle. That is because the problems stemming from the use of unenforceable terms can operate on consumers or employees without any further action by the drafter other than including the terms in the contract in the first place. Although a drafter could lean on the terms in post-dispute communications with an employee or consumer, that need not happen in every instance. The evidence of contract terms' psychological effects suggests that it is reading the terms themselves that has a psychological effect without requiring some additional prodding or threatening from a counterparty.[133]

A law premised on the misleading effect of unenforceable terms, even without the addition of deceptive intent or an affirmative falsehood by the drafter (beyond the term itself), is in keeping with a variety of existing approaches to deception in the marketplace.[134] Many consumer protection laws are based not on the premise that language must be actually false to be misleading, but instead on the premise that aspects of a transaction can

[130] See supra notes 79–81 and accompanying text.
[131] See supra notes 79–81 and accompanying text.
[132] See supra Section I.B.
[133] See, e.g., Furth-Matzkin & Sommers, supra note 15, at 529.
[134] See Klass, supra note 129, at 466–69.

have a tendency to mislead based on consumers' typical behaviors and understandings.[135] As Gregory Klass puts it, "causal-predictive" regulations of deceptive practices take into account empirical studies of consumer behavior and biases as well as "the application of everyday folk psychology to predict informational effects" when determining a commercial practice's tendency to deceive.[136] And, as Part I discussed, there is an increasingly robust research base from which to conclude that nonlawyers encountering unenforceable terms in everyday contexts are misled by those terms into thinking they have given up rights or undertaken obligations when the law actually does not support that conclusion.

C. Promoting Public Policy and Access to Justice

The previous two Sections have focused on norms and reasons that are more common in the area of private law. But there are significant arguments in favor of regulating unenforceable terms that come from more of a public-law direction as well. One of these arguments comes from the domain of public policy, a set of doctrines that arise in contract litigation that often invoke public laws.[137] Another of these arguments comes from the domain of access to justice, an area concerned with the distribution of access to public legal institutions.

First, and perhaps obviously, restricting the use of unenforceable terms would help promote whatever public policy rendered those terms unenforceable in the first place.[138] Many unenforceable terms are made unenforceable in judicial decisions specifically because of particular public policies that militate against the enforcement of those terms.[139]

[135] See id.

[136] Id. at 466.

[137] See, e.g., Farshad Ghodoosi, The Concept of Public Policy in Law: Revisiting the Role of the Public Policy Doctrine in the Enforcement of Private Legal Arrangements, 94 Neb. L. Rev. 685, 697 (2016) ("[T]he modern doctrine of public policy rests on the idea that enforcing a contract is a matter of public law. Delivering justice is a public affair and is done at the public expense and, therefore, should be monitored. Public resources should not be employed for the execution of an agreement that is injurious to public morality or interest.").

[138] See, e.g., David A. Super, The Rise and Fall of the Implied Warranty of Habitability, 99 Calif. L. Rev. 389, 424 (2011) ("Many states recognized that reading an implied warranty of habitability into leases that was waivable would accomplish little. Yet even unenforceable lease terms may compound tenants' confusion about their rights." (footnote omitted)).

[139] See, e.g., Potvin v. Metro. Life Ins. Co., 997 P.2d 1153, 1161 (Cal. 2000) ("California courts . . . are loathe to enforce contract provisions offensive to public policy." (citations omitted)); Saggese v. Kelley, 837 N.E.2d 699, 704 (Mass. 2005).

These public policies cover a wide range of subject matters, from the rule against penalty clauses in contracts,[140] to rules against contract killing, to rules promoting "the common law right to fair procedure."[141] A court may decline to enforce a contract term due to judge-made law or because of a statute prohibiting the kind of term at issue.[142]

Because of the diversity of grounds upon which courts and legislatures base their policy decisions, it is hard to generalize about this line of contract doctrine.[143] Arthur Corbin's famous treatise, for instance, enumerated 128 different types of public policy defenses.[144] But, taking the pluralism of public policy doctrine as a given, there is a straightforward argument that a restriction on unenforceable terms would tend to advance the values behind whatever particular public policy it is that renders the terms in any particular context unenforceable. Given that those who assent to a contract's terms often believe those terms are valid even when they are not, penalizing the use of unenforceable terms to begin with will prevent some individuals from believing themselves to be bound in contravention of public policy.

In some circumstances, this argument is weak. This is probably most true in circumstances involving flagrantly illegal contracts, such as murder for hire. The possibility of an additional civil penalty for using unenforceable terms in a criminal contract is unlikely to deter those who are not already deterred by the criminal prohibition on the underlying conduct. So, the public policy against murder is unlikely to be meaningfully advanced by a restriction on unenforceable terms.

But the case for the restriction is stronger in other contexts. Liability disclaimers, for instance, are often void for public policy reasons.[145] One important reason to render such terms unenforceable is to promote reasonable care: if providers of goods and services are able to waive liability for their negligence, for instance, they may lack adequate

[140] See, e.g., Am. Car Rental, Inc. v. Comm'r of Consumer Prot., 869 A.2d 1198, 1205 (Conn. 2005) (citing Berger v. Shanahan, 118 A.2d 311, 314 (Conn. 1955)).

[141] *Potvin*, 997 P.2d at 1156–57.

[142] See, e.g., id.; *Saggese*, 837 N.E.2d at 704.

[143] See, e.g., David A. Hoffman & Erik Lampmann, Hushing Contracts, 97 Wash. U. L. Rev. 165, 190 (2019) ("No one has fit public policy cases into a neat box.").

[144] See David Adam Friedman, Bringing Order to Contracts Against Public Policy, 39 Fla. St. U. L. Rev. 563, 573 (2012) (discussing 15 Grace McLane Giesel, Corbin on Contracts: Contracts Contrary to Public Policy § 79.5 (Joseph M. Perillo ed., rev. ed. 2003)).

[145] See, e.g., Cheng et al., supra note 14, at 580–81.

incentives to protect the health and safety of their counterparties.[146] Similarly, allowing unenforceable liability waivers to persist in contracts undermines this goal to the extent that it dissuades would-be plaintiffs or complainants from pursuing redress for their injuries. Restricting the use of unenforceable terms thus advances the goals behind making those terms unenforceable in the first place. As Cheng et al. put it, "[i]f courts or legislatures have declared certain liability waivers to be void as against public policy, it is obviously not in the public interest to have consumers hoodwinked into believing that those waivers are valid."[147] More generally, wherever public policy seeks to prevent a particular type of harm to a counterparty, but that harm could still arise in whole or in part simply due to the presence of a term, a restriction on unenforceable terms will advance the public policy.

The second normative argument for such restrictions that draws on public-law reasoning comes from the domain of access to justice. The costs of unenforceable terms are in part a function of the distribution of legal knowledge in our society. If everyone knew what terms are or are not enforceable, there would be no harms associated with unenforceable terms.

But people do not know what terms are or are not enforceable without expending time or money to access legal knowledge. This makes the harms of unenforceable terms another domain affected by the huge disparities in access to legal knowledge that are characteristic of the United States.[148] Most basically, individuals without significant income or wealth are often unable to hire a lawyer or otherwise find legal assistance, yet they are more likely than higher-income individuals to encounter problems with a legal dimension in their everyday lives.[149] As with many serious inequalities that persist in the United States, the disparity in access to justice both reflects and reinforces inequity along

[146] Id. at 573.

[147] Id. at 592.

[148] See generally Pamela K. Bookman & Colleen F. Shanahan, A Tale of Two Civil Procedures, 122 Colum. L. Rev. 1183, 1186–87 (2022) (discussing inequities between federal courts, where litigants are typically represented by counsel, and state courts, where litigants are often lawyer-less); Brooke D. Coleman, One Percent Procedure, 91 Wash. L. Rev. 1005, 1005 (2016) (arguing that "federal civil procedure is . . . a one percent regime" where wealthy litigants "have an incongruent influence on how the Federal Rules of Civil Procedure and procedural doctrine develop").

[149] See Rebecca L. Sandefur & James Teufel, Assessing America's Access to Civil Justice Crisis, 11 U.C. Irvine L. Rev. 753, 766–68 (2021).

race and gender lines.[150] And because of the way that legal problems are interwoven into everyday life, gaps in access to the justice system compound problems arising out of deep social needs, such as health care and housing.[151]

The legal problems faced by disadvantaged groups are especially likely to be ones mediated by contracts: issues that arise in the context of employment as well as core consumer areas, such as housing, health care, finance, and education.[152] In these contexts, there are often significant power imbalances between private actors, which the law can either reinforce or mitigate. And many of the doctrines and policies that render terms unenforceable are designed to mitigate these imbalances. A common version of the unconscionability doctrine, for instance, focuses on "unequal bargaining power" during the contracting process, as well as whether the terms are substantively "unfairly one-sided."[153] But those doctrines go unenforced unless a defendant has the knowledge to invoke them.

Restricting the use of unenforceable terms thus promotes public policy goals while mitigating access disparities. A well-intentioned statute or common law doctrine is less likely to be effective if its efficacy requires widespread knowledge among laypeople. And what effectiveness it does have is likely to be unevenly distributed, accruing more to those with access to legal knowledge and the wherewithal to subject themselves to the risk that not complying with a contract term may bring. The rationale for a more restrictive approach to unenforceable terms is thus supported not only by a desire to allocate costs efficiently, but also by a desire to

[150] See Sabbeth & Steinberg, supra note 27, at 1142–63; Brito et al., supra note 27, at 1268–77.

[151] See Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark & Anna E. Carpenter, The Institutional Mismatch of State Civil Courts, 122 Colum. L. Rev. 1471, 1497–1502 (2022).

[152] See Legal Servs. Corp., The Justice Gap: The Unmet Civil Legal Needs of Low-Income Americans 34–35 (2022). The relationship between race and exposure to unenforceable terms in particular is multifaceted and could use more research. Hoffman and Strezhnev's study on housing leases, for example, found that unenforceable terms were more likely to appear in the leases of wealthier white tenants, which they attribute to the increased use of form leases in more expensive properties. See Hoffman & Strezhnev, supra note 12, at 115, 121–22. But, they noted, in majority-white census tracts, Black tenants were particularly likely to sign leases with unenforceable terms. Id. at 91.

[153] See, e.g., Discover Bank v. Super. Ct., 113 P.3d 1100, 1108 (Cal. 2005) (quoting Little v. Auto Stiegler, Inc., 63 P.3d 979, 983–84 (Cal. 2003)), *abrogated on other grounds by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

enforce public policy fairly and evenly in a setting where mass contracting is common.

And the potential harms of using unenforceable terms are most likely to fall on unsophisticated parties, as the harms primarily stem from mistaken beliefs about the force and effect of contractual language. As a result, restricting the use of unenforceable terms will promote access to justice by mitigating the consequences of the inequitable distribution of legal knowledge and resources endemic to the civil justice landscape today.

* * *

The normative arguments advanced here do not exhaust the field. One could imagine, for instance, arguments against unenforceable terms derived more from the norms of unjust enrichment,[154] or fraud, or other forms of intentional wrongdoing. Unenforceable contract terms can easily arise in many circumstances where there are strong arguments that they should not be enforced. But, significantly, the arguments described above are general ones, designed to apply to the core, common example of mass contracts of adhesion by a sophisticated drafter with many unsophisticated counterparties. In such a circumstance, well-established normative values from private and public law support affirmative restrictions on the use of unenforceable terms. The following Part considers some features of what these restrictions might look like.

III. DESIGNING RESTRICTIONS ON UNENFORCEABLE TERMS

An affirmative ban on the use of unenforceable terms would need to be carefully designed. As the research canvassed in Part I demonstrates, these terms are ubiquitous in our economy. And as the normative discussion in Part II acknowledges, a ban on the use of unenforceable terms will not simply reallocate costs but is likely to impose at least some new costs. It is therefore important to be sensitive to the scope of the normative arguments in Part II and not overregulate in a way that is blind to costs.

Being conscientious about the costs of new regulation is particularly important in this area because there are likely to be at least some circumstances where the real-world harm from unenforceable contract terms is minimal or nonexistent. As established in Part I, there is strong

[154] See, e.g., Williams, supra note 24, at 2027–28.

evidence that unenforceable terms can mislead people and lead to changes in their behavior.[155] But it is also clear, especially in the consumer context, that people typically do not read the terms of the contracts that they sign.[156] It also seems to be the case that many contract terms are not even really vetted by sophisticated drafters, who may simply be copying standard language without significant care rather than inserting it specifically to gain an advantage.[157] There may therefore be many copies of unenforceable terms out in the world that are essentially never noticed and cause no harm. Any regulatory regime for unenforceable terms should be cognizant of that reality when it comes to imposing regulatory costs to try and get the most social benefit for a given regulatory burden. Continuing to borrow from the logic of tort law, a good goal is for contract drafters to take the optimal level of care in drafting their language,[158] a goal that leaves room for, among other things, harmless errors.

Regulating unenforceable terms while remaining sensitive to these considerations will require numerous decisions. Any regulation must specify "what," "who," and "when"—what terms to regulate, who should be covered by the regulation, and whether to enforce that regulation ex ante or ex post. This Part considers those questions in turn.

A. The Changing Rules of Enforceability

Perhaps the most difficult set of issues faced by a liability regime targeting the use of unenforceable terms will be the fact that what terms are "unenforceable" is a moving target. A liability regime will have to address at least four different ways in which unenforceability is a dynamic

[155] See supra Section I.B.

[156] See supra note 32 and accompanying text.

[157] See Hoffman & Strezhnev, supra note 12, at 124 (arguing that the dominance of copied language gives "reasons to doubt that landlords are deliberately inserting unenforceable terms in leases to extract surplus from their tenants"); cf. Robert E. Scott, Stephen J. Choi & Mitu Gulati, Commercial Boilerplate: A Review and Research Agenda, 20 Ann. Rev. L. & Soc. Sci. 201, 204–06 (2024) (reviewing the empirical evidence that contract terms in the commercial context can be "sticky" and widespread even when they are poorly understood, suggesting widespread and relatively automatic copying by drafters). In the commercial context, the prevalence of this kind of sticky boilerplate may be in part due to thick commercial markets such as the market for corporate bonds, where parties want fungible and tradable instruments. Id. at 208–210. In contrast, in at least some consumer markets where a contract exists between one repeat player and many consumers—such as Alphabet's terms of service—the incentives for the repeat player to draft a bespoke contract and invest time and attention into its terms may be greater.

[158] See Schwarcz, supra note 118, at 1398.

and shifting designation: unenforceability changes over time, is different in different jurisdictions, depends on particular factual circumstances, and can be adjudicated at different levels of abstraction. This Section briefly describes each of these problems before describing a potential solution.

1. Types of Variation

First, the enforceability of particular contract terms changes over time. A contract term may be developed and come into widespread use, and may even be upheld in court, only to be challenged later under a novel theory and invalidated. Or a statute, regulation, or other non-court pronouncement with the force of law may render a previously enforceable term invalid.

Second, the enforceability of contract terms changes by place. This is pretty straightforward: a term that is enforceable in one state may be unenforceable in another.[159] In addition, though, there is the added wrinkle that contracts may have provisions that affirmatively select a source of law to apply to the contract other than the state of contract formation. And a complex web of choice-of-law doctrine means that it can be difficult to determine in advance when those provisions will or will not be honored.[160]

Third, the enforceability of contract terms may depend on the facts of particular cases. Some doctrines and policies render certain types of terms categorically unenforceable, while others will depend on the particular circumstances surrounding a contract. With noncompete clauses, for instance, the FTC has adopted a categorical ban,[161] while some states currently have multipronged inquiries into the circumstances of each contract to determine the noncompetes' validity.[162]

Such factual variability may depend on facts that arise either ex ante or ex post. Take the case of liquidated damages provisions, for instance, which are generally held to be unenforceable when they constitute a

[159] See supra notes 47–49 and accompanying text.

[160] See, e.g., Kermit Roosevelt III, The Myth of Choice of Law: Rethinking Conflicts, 97 Mich. L. Rev. 2448, 2449–50 (1999) (describing the "underdeterminative" and unpredictable rules governing choice-of-law decisions).

[161] See Non-Compete Clause Rule, 89 Fed. Reg. 38342, 38342 (May 7, 2024) (to be codified at 16 C.F.R. pts. 910, 912).

[162] See, e.g., Automile Holdings, LLC v. McGovern, 136 N.E.3d 1207, 1218 (Mass. 2020) (describing Massachusetts's multipronged inquiry into determining the validity of a noncompete clause).

penalty disproportionate to damages.[163] Such an enforceability determination can be made with reference to the contracting parties' knowledge and estimation of damages at the time of signing, or it may be made with reference to the actual damages that a party suffers when a breach occurs.[164]

Fourth, and relatedly, the articulation of which terms are unenforceable can come at different levels of generality.[165] Consider, for instance, the type of language that is common in cases involving terms rendered unenforceable for reasons of public policy: contracts are void for reasons of public policy where they "contravene[] an established interest of society"[166] or are "clearly repugnant to the public conscience."[167] Even when courts get more specific, they can still articulate public policies in broad terms whose application may be unclear in advance, such as whether the rejection of terms that "tend to introduce corrupt means in the influencing of public officials"[168] requires the conclusion that "contracts which provide for contingency awards for securing public monies are against public policy."[169] Plus, even where unenforceability turns on a statute rather than a general common law principle, the particular application of the statute in any particular context may be unclear. This lack of clarity is related to the variability that can come from fact-dependent doctrines of unenforceability, but the variability may also come at the level of vague or unclear statements of law, rather than clear statements that may simply create variability on the ground due to changing factual circumstances.

[163] See, e.g., Garden Ridge, L.P. v. Advance Int'l, Inc., 403 S.W.3d 432, 440 (Tex. App. 2013).

[164] See id. at 439–40.

[165] Cf. Adam M. Samaha, Levels of Generality, Constitutional Comedy, and Legal Design, 2013 U. Ill. L. Rev. 1733, 1743–61 (discussing the concept of levels of generality).

[166] E.g., City of Hialeah Gardens v. John L. Adams & Co., 599 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1992) (citing Am. Cas. Co. v. Coastal Caisson Drill Co., 542 So. 2d 957, 958 (Fla. 1989)).

[167] E.g., Sinu v. Concordia Univ., 983 N.W.2d 511, 522 (Neb. 2023) (citing SFI Ltd. P'ship 8 v. Carroll, 851 N.W.2d 82, 92 (Neb. 2014)).

[168] *John L. Adams & Co.*, 599 So. 2d at 1324. This principle was derived from the Supreme Court of Florida's decision in *Wechsler v. Novak*, 26 So. 2d 884, 888 (Fla. 1946) (en banc), but the Supreme Court of Florida subsequently disagreed with such an application of the principle. See Rotemi Realty, Inc. v. Act Realty Co., 911 So. 2d 1181, 1183 (Fla. 2005).

[169] Act Realty, Co. v. Rotemi Realty, Inc., 863 So. 2d 334, 336 (Fla. Dist. Ct. App. 2003), *rev'd*, 911 So. 2d 1181 (Fla. 2005).

2. Clear Unenforceability

Each of the types of variability just discussed creates questions that must be resolved for any liability regime to succeed. If a drafter may be held liable for issuing a contract with unenforceable terms, does that apply only when the drafter knows at the time of drafting that the terms are unenforceable? Reasonably knew or should have known? If the terms become unenforceable, will liability attach automatically? After some reasonable rescission period? And under what law is the enforceability determination made? If the contract contains a choice-of-law clause, does that affect the analysis? And what if the facts that rendered the term unenforceable were not present at the time of drafting? Does it matter if they were reasonably foreseeable facts?

These are just the most obvious questions that arise when grappling with the possibility of assessing liability for unenforceable terms. So far, policy regimes that address unenforceable terms have been cabined enough that they do not raise these issues in any significant way.[170] But if a jurisdiction were to try and make a general rule assessing liability for unenforceable contracts, these issues would be likely to arise quickly.

Despite the twists and turns that are possible given all of the sources of variation just discussed, there is still a relatively stable target for regulation: contract terms that are clearly unenforceable at the time a contract is drafted. The fact that some terms' enforceability will be unclear at the point of drafting does not mean that that problem will befall all terms. To the contrary, much of the research described in Part I is interesting precisely because there is a meaningful, recognizable category of "unenforceable contract terms," and it turns out that contracts carrying those terms are in active circulation.[171] Often, there are bright-line statutory provisions clearly stating that terms like liability waivers or noncompete agreements are unenforceable, and yet these terms persist in consumer and employee contracts.[172]

An enforcement regime could therefore include a "clearly established" requirement, under which drafters would be subject to liability only for

[170] See supra Section I.C.

[171] See supra Part I.

[172] See, e.g., Cheng et al., supra note 14, at 580 ("[A]ll jurisdictions hold at least some forms of liability waivers unenforceable."); Cal. Bus. & Prof. Code § 16600(a) (West, Westlaw through Ch. 1 of 2023–2024 2d Extraordinary Sess. and Ch. 1017 of 2024 Reg. Sess.) ("Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

using terms whose unenforceability was obvious at the time of drafting. Such an approach has several advantages. First, it would significantly reduce the complexity of the task of determining which terms to restrict, given the dynamic nature of contract law. Rather than having to create distinct rules governing each dimension of variability described above, there would be a simpler, single rule: if any source of variability meant that it was not clear that a term would be unenforceable, the drafter would not be subject to liability.

Second, such an approach would mitigate one of the main concerns with this type of regulatory regime in the first place, namely that it could become too burdensome. As discussed in Part II, restrictions on using new unenforceable terms would likely introduce new costs to the drafting process for some.[173] And as discussed in Part III, it may be difficult to calibrate damages, raising concerns of overly punitive remedial regimes.[174] Both of these concerns would be exacerbated by a law that threatened to sweep lots of different contracting behavior into its ambit, and both would be mitigated by limiting the range of potential liability to a more tractable and identifiable universe of terms.

Third, a "clear unenforceability" regime would fit more appropriately with a federated system of government in which different actors may take actions to render a term unenforceable. One approach to unenforceable terms would be to create some sort of centralized enforcement scheme: perhaps a regulatory agency tasked with supervising or approving contracts,[175] or a formal registry that contains a "white list" of permissible terms or a "black list" of impermissible terms, for instance.[176] These approaches would have many advantages as well,[177] and a "clear unenforceability" regime could be combined with any of them. But an advantage that "clear unenforceability" would bring is that it would not require a single agency or other actor to track all legal changes across all industry sectors and all jurisdictions simultaneously. Instead, the burden

[173] See supra Section II.A.

[174] See infra Section III.C.

[175] See, e.g., Yehuda Adar & Shmuel I. Becher, Ending the License to Exploit: Administrative Oversight of Consumer Contracts, 62 B.C. L. Rev. 2405, 2449–51 (2021).

[176] See, e.g., Radin, supra note 2, at 227–32 (discussing the "white list" and "black list" approaches); see also Larry Bates, Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection, 16 Emory Int'l L. Rev. 1, 62 (2002) (describing the use of different types of lists in the German consumer protection system).

[177] See Bates, supra note 176, at 44–90 (comparing different regimes' approaches to the regulation of terms in standard form contracts).

would be placed on drafters to know the law that applies to them, and the "clearly unenforceable" standard would assess the law as it was at the relevant time.[178]

Of course, limiting restrictions to only clearly unenforceable terms has a potential cost, too: underinclusiveness. In the world of civil rights, where qualified immunity doctrine means that only "clearly established" violations of legal rights are actionable, surmounting that threshold has become extraordinarily difficult.[179] As the travails of that area of the law demonstrate, the ability to articulate legal principles and their application at different levels of generality is a potent tool for judges looking to deny recovery.[180] Limiting regulation of unenforceable terms to scenarios in which it can be "clearly established" that the terms were unenforceable at the time of signing thus would risk limiting the efficacy of the regulation in the first place.

There are at least a couple of reasons to think that the benefits of a "clearly established" rule in this context would be worth the risks of underinclusiveness. First, clearly unenforceable terms are more plausibly the terms that we should care the most about regulating in the first place because the normative arguments for regulating them are stronger. As Part II discussed, core arguments in favor of regulating unenforceable terms are (1) that there will be a relatively low cost for sophisticated actors to comply, and (2) that such a regulation is justified in part to avoid consumers' deception in believing themselves bound by terms that they are not really bound by.[181] Both of these arguments are stronger where the terms involved are more clearly unenforceable and less strong where the terms are questionably enforceable. For (1), the cheapness of complying with such a regulation requires it to be relatively easy to determine what terms are and are not enforceable. As for (2), it is less deceptive for consumers to believe themselves bound by text when there are better

[178] Additionally, unlike a preapproval system, a "clearly unenforceable" regime would likely be more conducive to experimentation with contract terms, as drafters would not have to obtain approval before using new terms and would only face liability for those new terms if they were clearly unenforceable at the time they were written.

[179] See, e.g., Adam A. Davidson, Procedural Losses and the Pyrrhic Victory of Abolishing Qualified Immunity, 99 Wash. U. L. Rev. 1459, 1475–85 (2022) (summarizing criticism of qualified immunity); Joanna C. Schwartz, The Case Against Qualified Immunity, 93 Notre Dame L. Rev. 1797, 1814–20 (2018) (describing how the "clearly established" requirement in qualified immunity has frustrated the vindication of constitutional rights).

[180] See, e.g., Schwartz, supra note 179, at 1815.

[181] See supra Sections II.A–B.

arguments that they would, in fact, be bound by that text. There certainly can be terms of unclear enforceability that are bad for consumers or employees, but the argument for restraining unenforceable terms per se (as opposed to just bad terms in general) is stronger where those terms are clearly unenforceable.

Second, one advantage that this "clearly unenforceable" rule has in comparison to the "clearly established" rule in qualified immunity is that there are many statutes that straightforwardly invalidate particular contract terms. Unlike qualified immunity, in other words, the determination of clear unenforceability will not always be an exercise in parsing judge-made law and examining the factual similarity of different cases. In California, for instance, the statute banning noncompetes provides that (with specified exceptions), "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."[182] There will always, of course, be something to litigate—such as, with that statute, whether a particular term in a contract "restrain[s] [someone] from engaging in a lawful profession, trade, or business."[183] But the presence of direct statutory language specifically designed to rule out certain types of contracts gives some reason to think that a "clearly unenforceable" rule will still capture a significant portion of terms that lawmakers have attempted to void or otherwise prohibit.

B. The Scope of Regulation

In addition to the question of what terms a restriction would apply to, there is also the question of to whom the restriction applies. The process of contract drafting, revision, offer, and acceptance can be messy, with many different parties and types of parties involved. If a corporate landlord takes lease language from a trade association and has an outside law firm tweak some terms, who is the appropriate regulatory target?

The normative case described in Part II is strongest where there is a large, sophisticated party able to amortize the cost of compliance over numerous unsophisticated counterparties. In contrast, the normative case is weaker where there will not be many counterparties or where the

[182] Cal. Bus. & Prof. Code § 16600(a) (West, Westlaw through Ch. 1 of 2023–2024 2d Extraordinary Sess. and Ch. 1017 of 2024 Reg. Sess.).
[183] Id.

difference in sophistication between the counterparties is not particularly high.

This maps onto the question of whom to regulate relatively easily in some circumstances. The primary targets for the regulation of unenforceable terms are large companies who draft contracts to use in identical (or nearly identical) form with many natural-person counterparties.[184] Such companies might include a large employer, a social media company, or a large provider of rental housing.

By the same token, there will be some clear cases where the argument for prohibiting unenforceable terms is weaker and a regulation probably should not apply. That would include circumstances where the contract is negotiated rather than a contract of adhesion. Where the terms of a contract may change with each counterparty, the compliance costs of a regulatory regime would become much more challenging. Similarly, there is less of a case for regulation where the offeror of a contract is a small entity, such as a small employer or small landlord. Such entities are less likely to have numerous counterparties, are more likely to use boilerplate language rather than drafting their own terms, and are less able to bear the cost of compliance.

But although those potential regulatory targets are reasonably clear, there are more difficult questions that arise as well. Two scenarios appear reasonably likely to arise that also do not have as clear an answer. First, what should the law do about small drafters who are likely to have many counterparties? This is particularly easy to find in the digital world, where a small company online can reach hundreds of thousands or millions of users, all under its same terms of service. And second, what should the law do about entities that draft contracts for use by others? This is a scenario that arises when, for instance, a trade organization creates a model contract for its members.[185]

In the context of small drafters with many counterparties, a few factors weigh in favor of continuing to restrict the use of clearly unenforceable

[184] The question of what counts as an "identical" or "nearly identical" contract may present a scenario where it is easier to govern with a standard rather than a rule. Too narrow a definition of "identical" would allow companies to skirt regulation by making trivial, automatic changes to contracts. Instead, the inquiry should focus on what the material terms are, and whether differences between contracts with one counterparty and another counterparty are designed to achieve some significant goal other than avoiding regulation.

[185] See, e.g., NAA Click & Lease, Nat'l Apartment Ass'n, https://naahq.org/lease [https://perma.cc/UGA9-X92G] (last visited Apr. 6, 2025) (providing lease-drafting services to landlords in fifty states, Washington, D.C., and Canada).

terms. First, to the extent that the goal of such a regulation is to enable unsophisticated parties to rely on the bindingness of contract terms, the parties who issue mass contracts are the most important ones to target. The cost of exempting any mass drafters in terms of regulatory efficacy is much higher than the cost of exempting drafters of small numbers of contracts.

Second, the notion of "size" or "sophistication" is relatively hard to implement practically, while a policy that kicks in based on the number of counterparties an entity has is relatively easier. There are many possible ways to measure an entity's size—number of employees, revenue, market capitalization, etc. None of these is a clear choice for tracking the most normatively salient feature in this calculus, i.e., the ability to bear the costs of regulatory compliance. In contrast, a willingness to regulate even smaller mass contractors means that size can largely drop out of the picture and be replaced only with the question of the number of counterparties.[186]

Contracts that are drafted by one entity for use by another raise different concerns. There are a variety of productive arrangements that deploy this kind of contracting. Trade associations, for instance, draft model contracts for use by their members.[187] Profit-seeking companies may provide model contracts for their clients to use with those clients' customers.[188] Governments may provide model contracts for businesses and citizens to use.[189] Not-for-profit private organizations may provide

[186] Picking a number of counterparties sufficient to trigger liability will still be somewhat arbitrary. Should someone be deemed a mass contractor if they use the same standard form contract for fifty customers? One hundred? Five hundred? But this arbitrariness is a feature of many policies, and it will be somewhat inevitable to try and limit the policy's scope to mass contracts. Using this number in isolation, rather than adding another criterion to track the "size" of a drafter, limits at least some of the inherent arbitrariness of line-drawing.

[187] See, e.g., Model Contracts & Clauses, Insights Ass'n, https://www.insightsassociation.org/Resources/Model-Contracts-Clauses [https://perma.cc/QKP6-DM4Z] (last visited Apr. 6, 2025); Model Contracts, Am. Staffing Ass'n, https://americanstaffing.net/legal/legal-resources/model-staffing-contracts/ [https://perma.cc/5WBR-CEYZ] (last visited Apr. 6, 2025).

[188] See, e.g., Craft a Solid Terms of Service with Our Generator, Shopify, https://www.shopify.com/tools/policy-generator/terms-and-conditions [https://perma.cc/6LWY-24D2] (last visited Apr. 6, 2025).

[189] See, e.g., Fair Housing Information, Off. of Equity & C.R., City of Balt., https://civilrights.baltimorecity.gov/fair-housing-information [https://perma.cc/6L4Z-2TMK] (last visited Apr. 6, 2025) (providing a sample lease as a "fair housing resource[]").

model contracts for general use as well.[190] In these scenarios, who should be liable if the contract contains clearly unenforceable terms?

There is likely no perfect answer here, as any approach will incur costs in a complex web of trade-offs. There are many social benefits of one-to-many drafting scenarios where one organization can take on the burden of drafting and many can cheaply or freely use the contract for their own deals. Assigning liability to the drafters risks chilling those benefits. But at the same time, the ubiquity of this model means that exempting it from regulation would create a meaningful gap in coverage.

One baseline principle when dealing with this problem should be that liability should follow any contract offeror who has many counterparties, regardless of who drafted the contract. This avoids the creation of a loophole in which exemptions for some contract drafters could be taken advantage of by entities that have many counterparties and seek to avoid liability by not drafting their own contracts. It also still preserves the possibility of economies of scale in some one-to-many drafting arrangements, as drafters and mass offerors could establish indemnification agreements in the event that it is more efficient to have a centralized drafter create model contracts, even though liability will attach to the offerors of those contracts.

Beyond this principle, some jurisdictions may reasonably decide to exempt drafters in one-to-many drafting scenarios, or at least decide to exempt certain kinds of drafters, such as government agencies or nonprofits, or drafters within certain industries. Line drawing here is likely to be tricky and imperfect, but a rule that liability follows all mass offerors will at least capture a significant portion of many markets.

C. Enforcement Ex Ante Versus Ex Post

When it comes to enforcing a restriction against unenforceable terms, one basic question is whether enforcement should occur ex ante or ex post. In other words, should restrictions on unenforceable terms be freestanding sources of civil liability that could give rise to a cause of action even where no subsequent dispute has materialized? Or should they be assessed as punitive damages in contract disputes in which the terms arise?

[190] See, e.g., The Model Lease, Phila. Fair Lease Project, https://philadelphiafairlease.org/the-model-lease/ [https://perma.cc/KXV2-SP36] (last visited Apr. 6, 2025).

In the context of unenforceable liability waivers, Cheng et al. argue for an ex post approach. They propose that courts encountering such purported waivers should apply punitive damages.[191] They argue that such an enforcement method can be better tailored than a blanket, ex ante civil liability approach—punitive damages can better take into account the nature of the harm suffered in each case as well as any behavior or circumstances that exacerbate the drafter's culpability.[192]

Recognizing that one of the main problems of such terms is that they deter litigation in the first place, Cheng et al. advocate for assessing punitive damages based on the "detection rate" of the clauses, or the rate at which the clauses are "detected" by courts via litigation.[193] So if, for instance, three tort victims suffer $10,000 in injuries, but only one brings suit, this method would suggest adding $20,000 in punitive damages to the $10,000 in compensatory damages in that suit so that the defendant fully internalizes the costs of its actions, despite the inclusion of the liability waiver in its contract.[194] Such a system, they argue, would remove the incentive to include liability waivers, as defendants would have to "disgorge the ill-gotten gains" that they obtain by using unenforceable terms; it also might provide an affirmative incentive for more risk-averse defendants to refrain from including those clauses at all, so as to avoid the possibility of large judgments.[195]

In an idealized case with perfect information, such an ex post approach—with damages tailored to the specific harms involved and calibrated to achieve proportionate deterrence—likely makes sense. But there are several problems that such an approach runs up against when attempting to generalize it to the world of unenforceable terms more broadly.

First, the widespread use of unenforceable terms and the difficulty of detecting individual cases in which they have had a negative influence on counterparty behavior pose significant challenges. An ex post method's efficacy depends on being able to award punitive damages based on the ratio of litigated cases to instances in which harm occurs but does not get litigated.[196] But the number of instances of harm that are not litigated will

[191] See Cheng et al., supra note 14, at 601–06.
[192] Id. at 601, 606.
[193] Id. at 601.
[194] Id. at 601–02.
[195] Id. at 602.
[196] See id. at 601–02.

frequently (maybe always) be impossible to determine. It may also be difficult to even estimate well. The nature of the problem of unenforceable terms is that, in many circumstances, the consumer or employee who reads the term assumes that it is enforceable and adjusts their behavior accordingly—quite possibly leaving no particularly reliable indicator for others to discover when attempting to set an appropriate level of punitive damages.[197]

The context that Cheng et al. focus on—waivers of tort liability—may be the most plausible one for setting up such a system, as the kind of significant physical injuries that could generate lawsuits are more likely to generate some sort of record, whether in a hospital, newspaper, or at least the defendant's business records. But if a tenant decides not to break a lease due to an unenforceable penalty clause, or an employee decides not to job hunt due to an unenforceable noncompete clause, there may be no record of that anywhere that would be discoverable or prompt an investigation.

Additionally, while the punitive damage model may be more reasonable in contexts with a smaller number of injured parties and higher damages valuations—like Cheng et al.'s tort hypothetical described above—it may break down in circumstances with more numerous injured parties and lower stakes.[198] This is for a couple of reasons. First, where the parties who do not make it into court are numerous and the "detection rate" is therefore low, the ratio of punitive damages to compensatory damages that would be necessary for effective deterrence may be above the relatively low ratios that the Supreme Court has suggested courts should be willing to tolerate.[199] Second, it may be more possible to "buy off" one-shot plaintiffs who have small claims, and a defendant facing potentially significant punitive damages would have a strong incentive to settle any disputes before they were adjudicated in court.[200] And the detection rate may be particularly hard to come up with in circumstances where the potential number of affected consumers or employees is vast, such as the user base of a large internet company.

[197] See supra Section I.B.

[198] See supra Section I.B.

[199] Cheng et al. note this problem as well. See Cheng et al., supra note 14, at 605–06.

[200] A plaintiff's settlement calculus will, of course, be informed by the size of punitive damages that are on the table, but significant uncertainty regarding the punitive damages that a court would award might lead a rational plaintiff to accept a deal that benefits both parties but leaves the defendant under-deterred.

Next, another significant hurdle for an ex post regulatory regime is the widespread use of arbitration clauses.[201] Because arbitration clauses are ubiquitous in consumer and employment contracts, many disputes in the consumer and employment context will never make it into court. In some circumstances, the class action waivers that frequently accompany arbitration clauses will also make it so that the relevant consumer or employee complaints never get adjudicated by either a court or an arbitrator. Where that is the case, the availability of punitive damages in adjudicated cases will essentially be theoretical and will not provide an actual incentive for an entity to change its use of unenforceable terms. And even in contexts where arbitration clauses do not serve mainly to suppress claims, and some disputes actually make it to an arbitrator, the secrecy typical of arbitration proceedings will make it difficult or impossible to come up with an informed "detection rate" ratio for punitive damages.

In contrast, ex ante approaches can manage this problem by being more enforceable by regulators. Affirmative enforcement by government officials need not depend on punitive damages and "detection rate" ratios—it can proceed much as any statutory ban on conduct proceeds, with regulators making enforcement decisions based on their perception of the public need and their enforcement priorities. The relevant question in an ex ante context is how many contracts were adhered to with unenforceable terms rather than how many disputes arose regarding those terms. This is a question whose answer is likely to be much more legible.[202] In such a context, which need not rely on tallying up ex post disputes, arbitration clauses are not as much of an impediment to enforcement and deterrence.

Ex ante approaches also allow for enforcement without the need to assess compensatory damages, which may be difficult or impossible in many contexts. The kinds of injury suffered by people who are misled by

[201] See, e.g., Imre Stephen Szalai, The Prevalence of Consumer Arbitration Agreements by America's Top Companies, 52 U.C. Davis L. Rev. Online 233, 234–35 (2019); Imre S. Szalai, Emp. Rts. Advoc. Instit. for L. & Pol'y, The Widespread Use of Workplace Arbitration Among America's Top 100 Companies 11 (2018), https://civiljusticeinitiative.org/wp-content/uploads/2019/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf [https://perma.cc/KCK3-VABK].

[202] For instance, for many companies the question will simply be how many customers they had who signed on to a given version of the company's contract or terms of service. In a digital era, where contracts are often managed automatically, it may be possible to frequently get the exact number with no estimation needed.

unenforceable terms will sometimes be concrete—say, if they pay a specific amount of money to a counterparty because a contract says that amount is due even though the relevant provision is unenforceable. But it will often take the more nebulous form of an opportunity cost—someone not undertaking a job search or housing search because they thought they were bound by contract not to, or someone forgoing an attempt to dispute or litigate an issue because they thought a waiver provision was valid.[203] Proving the damages associated with such a missed opportunity will often be difficult, as they can raise complex causal questions—would the plaintiff have succeeded in a job search, and at what salary level? Would a lawsuit seeking to establish liability have been successful, and with what damages? In contrast, an ex ante approach that assigns liability for the use of unenforceable terms per se does not raise these kinds of causal issues.

These advantages to an ex ante approach make clear that a regulatory regime for unenforceable terms is more likely to be successful if it aims at deterrence rather than compensation. Because detecting and quantifying the harms of unenforceable terms is so difficult, an enforcement regime predicated on identifying specific instances of harm and compensating them is unlikely to cause defendants to internalize the full costs of their actions. In contrast, an ex ante regime facilitated by tools such as statutory damages is more likely to be an effective deterrent.

Of course, ex ante approaches face hurdles as well. Just as calibrating damages based on a "detection rate" ex post will be difficult, so too will calibrating damages with some other method ex ante. These features are all in keeping with other regulatory regimes that use statutory damages to set super-compensatory damages primarily in an effort to deter wrongdoing rather than to compensate its victims.[204] But statutory damages can easily lead to overdeterrence, with compensation levels that over-incentivize litigation and end up being too punitive.[205] And on the flip side, arbitration clauses, too, would still deter private enforcement in an ex ante context and could lead to under-enforcement.

These problems are real, and any liability regime for unenforceable terms will have to approach the question of damages calibration carefully. But ultimately, the difficulty of aggregating specific instances of wrongdoing militates strongly in favor of an ex ante approach. And

[203] See, e.g., supra Section I.B (describing consequences of unenforceable terms).

[204] See, e.g., Bert I. Huang, Surprisingly Punitive Damages, 100 Va. L. Rev. 1027, 1046–50 (2014).

[205] Id.

although the ex post approach does allow for tailoring and context sensitivity, such values can also be present in the ex ante approach, particularly where regulations are designed to be enforced by public actors with discretion and accountability. Public actors also will not be bound by arbitration clauses between businesses and customers. As a result, both the need for accountable discretion to avoid over-enforcement and the need to avoid arbitration and under-enforcement point to a robust role for public enforcers in any successful regime.

IV. IMPLEMENTING RESTRICTIONS ON UNENFORCEABLE TERMS

The previous Sections have made the generalized normative case for attaching liability ex ante to the use of unenforceable terms by sophisticated parties in mass contracts of adhesion. This Part discusses how to implement such an approach to unenforceable terms.

Perhaps most obviously, an ex ante ban on unenforceable terms, along with associated penalties, could be achieved by new legislation. New legislation would be the most effective way of maximizing the number of contexts in which a new ban would apply and would also allow for precise tailoring of liability—e.g., by focusing only on larger actors or particular industries where harm seems especially likely. Or new legislation could create new kinds of regulatory frameworks, such as by creating an agency tasked with reviewing and preapproving certain kinds of mass contractual terms.[206]

But several other approaches would be possible without legislative involvement, although each has its own drawbacks and limitations. This Part considers three distinct approaches: litigation under consumer protection "UDAP" statutes, application of existing legal ethics rules, and development of a judge-made cause of action. These approaches all have limitations compared to hypothetical new legislation that is ideally tailored. But such legislation may always remain hypothetical, while this

[206] When it comes to insurance contracts, for instance, state regulators are often given authority to review contracts for their compliance with specific rules as well as with broad standards such as fairness and reasonableness. See Kenneth S. Abraham & Daniel Schwarcz, Insurance Law and Regulation 151 (7th ed. 2020). Such a system would have its own advantages and disadvantages compared with a more court-focused approach. See, e.g., Schwarcz, supra note 118, at 1424 (arguing that "state regulatory review cannot be relied on to police the substantive content of insurance policies absent support from the judiciary" because of regulatory capture).

Part describes resources in existing law that could be used to confront mass-produced unenforceable terms.

A. UDAP Statutes

One particularly plausible line of attack against unenforceable terms is the application of "UDAP" statutes. "UDAP" is a broad term given to state and federal statutes that prohibit the use of unfair and deceptive acts and practices in the consumer context.[207] The phrase originates with the FTC's organic statute, and all fifty states also have versions of UDAP statutes often known as "little FTC acts."[208] The CFPB also has an analogous authority to enforce a prohibition on "unfair, deceptive, or abusive" acts or practices.[209]

Although the precise definitions and doctrines of these consumer protection statutes vary, they generally provide a broad basis for enforcers to challenge commercial entities' actions where those actions are deceptive or unfair.[210] There are reasonable arguments that the use of unenforceable terms in the "core" case described above—in which a sophisticated actor with counsel drafts a contract with clearly unenforceable terms intended to be assented to by large numbers of less-sophisticated counterparties—is both deceptive and unfair. UDAP statutes are typically designed to have a broad, flexible reach to protect against a wide range of consumer harm,[211] so it is unsurprising that, where consumer harm can be found, a plausible UDAP theory exists.[212]

First, the fact that consumers are likely to be misled by unenforceable terms provides solid ground for a finding of a deceptive practice. The standard for proving that an act is deceptive varies in its formulation, but it typically looks to the likelihood that the conduct in question would

[207] See, e.g., 15 U.S.C. § 45(n).

[208] Dee Pridgen, The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws, 81 Antitrust L.J. 911, 912 (2017).

[209] See 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

[210] Prentiss Cox, Amy Widman & Mark Totten, Strategies of Public UDAP Enforcement, 55 Harv. J. on Legis. 37, 44–46 (2018).

[211] See, e.g., Carolyn L. Carter & Jonathan Sheldon, Unfair and Deceptive Acts and Practices § 3.1.2 (10th ed. 2021).

[212] For an argument that California's consumer protection statute in particular could be interpreted to support an affirmative cause of action against unconscionable contract terms, see Williams, supra note 24, at 2041–43.

deceive a reasonable consumer.[213] This often need not involve a showing that a statement was actually false or that particular individuals were actually misled, but instead involves a broader inquiry showing general likelihoods and tendencies among the consuming public.[214] In Massachusetts, for instance, "an advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently from the way they otherwise would have acted."[215]

As the evidence in Part I suggests, there is a tendency among the public to be misled by unenforceable contract terms.[216] After assenting to a contract, members of the public feel bound by its terms, potentially taking on obligations that the law does not truly assign them or believing they have relinquished rights that the law would actually allow them to maintain. In any particular context, of course, there may be some unenforceable term that does not have that effect. But given the evidence of how unenforceable terms can have a meaningful impact on consumer and employee behavior and how that impact derives from a misperception of how the law works, bans on deceptive practices are a plausible path to liability for companies who use unenforceable terms in their mass contracts.

The case that using an unenforceable term constitutes a deceptive act is bolstered by UDAP interpretation over the decades. To begin, some UDAP statutes list specifically prohibited acts, and at least two include the insertion of unconscionable contract terms in their lists.[217] Additionally, courts have at times interpreted broad and general anti-deception language in UDAP statutes to cover the inclusion of unenforceable terms per se. In *People v. McKale*, for instance, the California Supreme Court rejected a mobile home park's argument that including unlawful terms in the park's rules and regulations was not a

[213] See, e.g., Fed. Trade Comm'n v. Roomster Corp., 654 F. Supp. 3d 244, 261 (S.D.N.Y. 2023) ("Generally, State UDAP laws say that acts are 'deceptive' if the conduct in question has the capacity to deceive or is likely to deceive reasonable consumers."); id. at 261 n.11 (collecting cases and statutes).

[214] See id. at 264.

[215] Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 488 (Mass. 2004).

[216] See supra Part I.

[217] California includes "[i]nserting an unconscionable provision in [a] contract" in its list of prohibited practices. Cal. Civ. Code § 1770(a)(19) (West 2025); see also D.C. Code § 28-3904(r) (2025) (providing that it is a violation of the D.C. UDAP provision to "make or enforce unconscionable terms or provisions of sales or leases").

violation because it had not attempted to enforce those terms.[218] The court held that including the terms was a deceptive practice under the statute, reasoning specifically that "[t]enants are likely to believe a park has authority to enforce rules it requires its tenants to acknowledge."[219] As a result, those tenants "are likely to be deceived" when they are required by the park to sign terms that the park cannot enforce.[220]

Similar reasoning was used by the Supreme Judicial Court of Massachusetts in *Leardi v. Brown*, in which the court confronted a scenario where a defendant landlord had included unenforceable provisions waiving the implied warranty of habitability.[221] The defendants had not sought to enforce the provision, but the court held that the provision itself "clearly tends to deceive tenants," noting that "the average tenant, presumably not well acquainted with our decision in *Boston Hous. Auth. v. Hemingway* . . . is likely to interpret the provision as an absolute disclaimer of the implied warranty of habitability."[222] The court's aside about its own case points directly to one of the main normative arguments considered in Part II: the asymmetric legal knowledge between sophisticated drafters and the average signer.

The Consumer Financial Protection Bureau has also recently emphasized that it interprets its statutory authority over deceptive practices to apply to unenforceable terms in certain contexts.[223] In official guidance, the agency drew a through-line through previous actions it had taken, as well as provisions of several statutes and regulations, detailing how they stood for the proposition that liability can attach to the inclusion of unlawful terms in contracts.[224] The CFPB has, for instance, identified contractual clauses broadly waiving rights in certain financial documents

[218] 602 P.2d 731, 735 (Cal. 1979). This case did not involve the "[i]nserting an unconscionable provision" language mentioned in the previous footnote. Cal. Civ. Code § 1770(a)(19) (West 2025). It instead involved the broad statutory language prohibiting "unfair or fraudulent business practice[s]." *McKale*, 602 P.2d at 735 (quoting People ex rel. Mosk v. Nat'l Rsch. Co. of Cal., 20 Cal. Rptr. 516, 521 (Cal. Dist. Ct. App. 1962)).

[219] *McKale*, 602 P.2d at 735.

[220] Id. at 736.

[221] 474 N.E.2d 1094, 1099–1100 (Mass. 1985).

[222] Id. (citing Bos. Hous. Auth. v. Hemingway, 293 N.E.2d 831, 843 (Mass. 1973)).

[223] Consumer Fin. Prot. Bureau, Consumer Financial Protection Circular 2024-03, at 4–5 (June 4, 2024), https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2024-03/ [https://perma.cc/7TQU-SBEG].

[224] Id.

as being deceptive and therefore violating the Dodd-Frank Act.[225] As the CFPB sees it, these clauses are deceptive "where reasonable consumers could construe the waivers as barring them from bringing claims in court" related to their mortgages, despite the fact that consumers have a right to bring such claims in court.[226] Implicit in such an interpretation is that reasonable consumers do not fully understand their legal rights, so they may be deceived by contract language that purports to waive rights but is legally unenforceable. As the agency noted in its guidance, "[a] contractual provision stating that a consumer agrees not to exercise a legal right is likely to affect a consumer's willingness to attempt to exercise that right in the event of a dispute."[227]

In addition to running afoul of bans on deception, unenforceable terms may also potentially be held to be unfair in some circumstances. Unfairness as a concept is not reducible to deception; it focuses instead on conduct that inappropriately takes advantage of market power.[228] As with deception, there is heterogeneity in what different jurisdictions consider "unfair," with arguably broader variation in the elements that different actors apply compared to deception. The current standard applied by the FTC is not universal, but it has significant influence.[229] Under that standard, a business practice is "unfair" if (1) it causes or is likely to cause substantial injury to consumers; (2) consumers could not reasonably avoid that injury; and (3) the injury is not outweighed by any countervailing benefits to consumers or competition.[230] Additionally, agencies and courts often look to existing declarations of public policy when determining whether a particular practice is unfair.[231]

[225] See Supervisory Highlights: Summer 2017, 82 Fed. Reg. 48703, 48708 (Oct. 19, 2017) ("Supervision determined the waiver to be deceptive and required the servicer(s) to remove it from the agreements.").

[226] Id.

[227] Consumer Fin. Prot. Bureau, supra note 223, at 3–4.

[228] See, e.g., Carter & Sheldon, supra note 211, § 4.2.2.

[229] See id. § 4.3.3.3.2. Most states apply an older FTC standard, known as the "S&H" standard, but in the view of one leading consumer protection treatise, the two standards are similar. Id. § 4.3.3.3.

[230] See 15 U.S.C. § 45(n); see also Luke Herrine, The Folklore of Unfairness, 96 N.Y.U. L. Rev. 431, 439–44 (2021) (discussing and critiquing an "official" history of the FTC's unfairness doctrine).

[231] See, e.g., 49 Fed. Reg. 7740, 7743 (1984) ("We have thus considered established public policy 'as a means of providing additional evidence on the degree of consumer injury caused by specific practices.'" (quoting Letter from Michael Pertschuk, Chairman, Fed. Trade Comm'n, et al., to Wendell H. Ford, Chairman, Consumer Subcomm., Comm. on Com., Sci. & Transp., & John C. Danforth, Ranking Minority Member, Consumer Subcomm., Comm.

Compared to deception, it is harder to make a generalizable case that the use of unenforceable terms is unfair. Because members of the public generally have the tendency to believe that terms they assent to are enforceable, unenforceable terms in general carry the risk of deception. But, as discussed above, they may not all carry the risk of substantial injury.[232] Unfairness under this definition thus may not be an ideal basis for creating a generalized rule or doctrine assigning liability to the use of unenforceable terms writ large.

Nonetheless, there may be many specific instances in which the use of an unenforceable term is unfair. "Substantial injury" can be satisfied by a small injury to a large number of people,[233] and a risk of injury can be enough.[234] And where that prong is satisfied, there will likely be strong arguments for the two remaining requirements. The determination whether consumers could reasonably avoid the injury does not look to whether it is physically or conceptually possible for consumers to avoid the harm.[235] It instead considers consumers as they really are in the marketplace, including considerations of time and resource constraints and knowledge gaps between consumers and their counterparties.[236] Where harm arises from "technical" defects not known by the average consumer, courts are likely to side with the consumer.[237] And the third prong is perhaps where the argument for the consumer is easiest—it is hard to come up with a benefit of including unenforceable terms in mass contracts other than the gains that may accrue to a drafter due to their counterparties' mistaken beliefs.

State and federal UDAP prohibitions thus provide one avenue through which existing law could be used to tackle a variety of scenarios involving the mass promulgation of unenforceable contract terms by sophisticated actors. One downside to this approach is that it may be limited to the consumer context, failing to capture other domains of activity—most

on Com., Sci. & Transp. (Dec. 17, 1980), https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness [https://perma.cc/5HLP-6BAA])).

[232] See supra notes 155–58 and accompanying text.

[233] See, e.g., Brodsky v. HumanaDental Ins. Co., No. 10-cv-03233, 2011 WL 529302, at *9 (N.D. Ill. Feb. 8, 2011), *on reconsideration*, No. 10-cv-03233, 2011 WL 13248442 (N.D. Ill. Mar. 2, 2011).

[234] See 15 U.S.C. § 45(n).

[235] See, e.g., In re Intel Corp. CPU Mktg., Sales Pracs. & Prods. Liab. Litig., No. 18-md-02828, 2020 WL 1495304, at *30–31 (D. Or. Mar. 27, 2020).

[236] See id.

[237] Id.

notably, employment law. The domain of UDAP statutes is generally restricted to transactions that are entered into "for personal, family, or household purposes,"[238] a phrase that at least some courts have interpreted as excluding transactions entered into for employment or career purposes.[239]

Not every court agrees, however, and the variation in state statutes[240] and state courts' approaches has led to varying applications of UDAP statutes in some work-related contexts.[241] And, as Jonathan Harris has documented, there has been an active use in recent years of UDAP statutes to protect workers' interests in the workplace, including with respect to provisions of employment contracts such as Training Repayment Agreement Provisions and other forms of employer-provided credit.[242] The use of UDAP statutes to combat unenforceable terms therefore may not be as limited as the traditional consumer-focused application of those statutes would at first suggest.

The other potential limitation on the UDAP approach to unenforceable terms is the statutory injury requirements. Some UDAP statutes require that plaintiffs be "injured," with varying degrees of restrictiveness as to what counts as an injury.[243] Some states, for instance, require a loss of money or property to bring a claim.[244] Others may not delimit specific categories like money or property, but may still decline to hold that merely signing an unenforceable term, without more, constitutes harm.[245]

[238] See, e.g., Mich. Comp. Laws § 445.902(1)(g) (2025).

[239] See, e.g., MacDonald v. Thomas M. Cooley L. Sch., 724 F.3d 654, 661 (6th Cir. 2013); Reynolds v. Concordia Univ., No. 21-cv-02560, 2022 WL 1323236, at *18 (D. Minn. May 3, 2022).

[240] See, e.g., Kan. Stat. Ann. § 50-624(b) (2025) (defining "[c]onsumer" to include someone acquiring property or services for "business" purposes in addition to "personal, family, [or] household" purposes).

[241] See, e.g., Miranda v. Xavier Univ., 594 F. Supp. 3d 961, 976 (S.D. Ohio 2022) (rejecting *MacDonald v. Cooley* on the grounds that Ohio courts have interpreted the "personal, family, or household" purposes language differently than courts in Michigan); Sibeto v. Capella Univ., No. 13-cv-01674, 2014 WL 3547344, at *1 n.4 (W.D. Pa. July 17, 2014) (disagreeing with the reasoning of *MacDonald v. Cooley*).

[242] Jonathan F. Harris, Consumer Law as Work Law, 112 Calif. L. Rev. 1, 30–41 (2024).

[243] Nat'l Consumer L. Ctr., Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws 40 (2018).

[244] Id.

[245] See, e.g., Meyer v. Sprint Spectrum L.P., 200 P.3d 295, 299 (Cal. 2009) (rejecting the argument "that the very presence of unconscionable terms within a consumer contract . . . constitutes a form of damage within the meaning of" the relevant UDAP statute).

This matters for unenforceable terms because there is a distinction between a drafter's including an unenforceable term in a contract at the drafting stage and acting on that term in some way later on. There is a straightforward case that if a consumer gets into a dispute with a company, and that company points to an unenforceable term in the relevant contract and says, "If we go to court this clause means that I will win," that is a deceptive practice (and it could be unfair and abusive as well). But for it to be a UDAP violation just to *include* a clearly unenforceable term in a mass contract in the first place, the theory of liability cannot rest solely on such downstream actions—as there will be plenty of circumstances in which there is no dispute between the consumer and the company, or in which the company never makes any affirmative representations about the unenforceable term in the context of the dispute. Statutory, constitutional, or judge-made injury requirements could scuttle the use of a UDAP statute to broadly police the inclusion of unenforceable terms per se. UDAP statutes thus may be a promising approach in some states and some contexts but are unlikely to be a universal path to regulating unenforceable terms.

B. Legal Ethics Rules

In addition to laws governing the parties who draft contracts, another potential source of authority to limit the use of unenforceable terms is the law governing lawyers. Because lawyers are often involved in contract drafting, restricting their ability to include or recommend unenforceable contract terms could reduce the frequency with which those terms appear in mass contracts.

The idea that legal ethics could restrict the terms a lawyer can put in a contract is not new. The first discussion draft of the Model Rules of Professional Conduct contained a proposal that lawyers should not draft agreements "that the lawyer knows or reasonably should know [are] illegal, contain[] legally prohibited terms, would work a fraud, or would be held to be unconscionable as a matter of law."[246] The proposal did not

[246] Model Rules of Pro. Conduct r. 4.3 (Am. Bar Ass'n, Discussion Draft 1980); see also William T. Vukowich, Lawyers and the Standard Form Contract System: A *Model Rule* That Should Have Been, 6. Geo. J. Legal Ethics 799, 799–800 (1993) (describing the proposal in the American Bar Association's first discussion draft of the Model Rules). This proposal was potentially a continuation of language from a 1959 report saying that lawyers should not "participate as a legal adviser in a line of conduct that is . . . of *doubtful legality*." See Lee A. Pizzimenti, Prohibiting Lawyers from Assisting in Unconscionable Transactions: Using an

make it into the final version of the Model Rules,[247] but there have been periodic arguments since then that other rules that have been adopted themselves militate in favor of an ethical bar either on unenforceable terms in general or on some subset of those terms, such as unconscionable terms.[248] As mentioned in Part I, officials in both California and Washington, D.C., are currently considering the possibility that ethics rules prohibit the inclusion of unenforceable terms in some circumstances.[249]

This approach has some natural appeal. After all, as Part II describes, one of the defining reasons for a ban on unenforceable terms is the information asymmetry between sophisticated drafters and unsophisticated signers. That information asymmetry is often embodied in a person: the lawyer. Lawyers are the people in the contracting process most equipped to recognize which terms are unenforceable, and so placing a duty directly on them makes some sense.[250]

A duty not to draft unenforceable terms also aligns with some existing norms of legal ethics as indicated by rules of professional conduct and their interpretation. The Model Rules prohibit lawyers from counseling their clients to engage in fraudulent conduct[251] and instruct lawyers not to knowingly make false statements of law or fact, including via "misleading statements or omissions that are the equivalent of affirmative false statements."[252] And the general duty of zealous representation does not

Overt Tool, 72 Marq. L. Rev. 151, 158 (1989) (quoting Professional Responsibility: Report of the Joint Conference, 44 A.B.A. J. 1159, 1161 (1958)).

[247] The provision was critiqued for being too broad and indeterminate. See, e.g., Gary T. Lowenthal, A General Theory of Negotiation Process, Strategy, and Behavior, 31 U. Kan. L. Rev. 69, 103–05 (1982).

[248] See Vukowich, supra note 246, at 799–802 (arguing that the original proposed model rule should have been implemented); Paul D. Carrington, Unconscionable Lawyers, 19 Ga. St. U. L. Rev. 361, 379 (2002) (suggesting that Model Rule 1.2 might proscribe "the imposition of invalid and unconscionable provisions on unwary citizens"); Pizzimenti, supra note 246, at 158 (arguing for a rule of professional conduct "prohibiting attorneys from drafting unconscionable contracts"); Gregory M. Duhl, The Ethics of Contract Drafting, 14 Lewis & Clark L. Rev. 989, 1012 (2010) (arguing that "lawyers should be required to avoid drafting or otherwise conspicuously disclose terms they know are invalid in all circumstances").

[249] See supra notes 96–102 and accompanying text.

[250] See, e.g., Pizzimenti, supra note 246, at 152 (arguing that "the best and most overt way to minimize the occurrence of unconscionable contracts is to forbid a lawyer from drafting them").

[251] Model Rules of Pro. Conduct r. 1.2(d) (Am. Bar Ass'n 2022).

[252] Model Rules of Pro. Conduct r. 4.1 cmt. 1 (Am. Bar Ass'n 2022).

clearly weigh in favor of permitting lawyers to draft clearly unenforceable terms for mass contracts of adhesion. When a lawyer is drafting a standard form contract, there is no adversary on the other side to push back or otherwise serve as a check.[253] In such a context, legal ethics rules place additional obligations on lawyers compared to when they are engaging with a party who is represented by their own counsel.[254] Existing legal ethics rules thus have some resources as a tool for policing the use of unenforceable terms, as reflected in the draft opinion by the California Standing Committee on Professional Responsibility and Conduct mentioned in Part I.

But this route of addressing unenforceable terms also has limitations. Among other things, there is a chronic under-enforcement problem when it comes to lawyer discipline.[255] Disciplinary authorities are frequently underfunded and unable to handle the volume of issues they face, with the result being that they handle only the most egregious cases.[256] Relying on attorney disciplinary authorities is therefore likely to result in a much less robust enforcement regime than relying on other consumer protection authorities.

And even if there were no problems with robust enforcement, a legal ethics regime would still have gaps in comparison to direct regulation of contracting parties. First, and most basically, people do not need lawyers to draft contracts. Especially in today's environment, where written contracts are easily found and copied, plenty of actors can use preexisting contracts to accomplish their goals. Regulation that focuses on lawyers will therefore fail to reach some contracts.

But there is also a more subtle, related point: although there is a good argument that ethical rules might prohibit lawyers from (a) recommending the use of unenforceable terms in a contract or (b) drafting contracts for clients' use with such terms in them, it seems much more difficult to contend that ethical rules would prohibit (c) informing a client

[253] See Pizzimenti, supra note 246, at 161 (citing Harry W. Jones, Lawyers and Justice: The Uneasy Ethics of Partisanship, 23 Vill. L. Rev. 957, 968–69 (1978)).

[254] Id. at 159–60.

[255] See, e.g., Comm'n on Evaluation of Disciplinary Enf't, Am. Bar Ass'n, Lawyer Regulation for a New Century (Sept. 18, 2018), https://www.americanbar.org/groups/professional_responsibility/resources/report_archive/mckay_report/ [https://perma.cc/XA3S-WYB9].

[256] Id. ("[F]unding and staffing have not kept pace with the growth of the profession. Most agencies handle cases of serious misconduct effectively, but some agencies are so underfunded and understaffed that they offer little protection against unethical lawyers.").

that a term is unenforceable or (d) informing a client that using the term is unlikely to result in a penalty for the client. And a lawyer who can tell a client (c) and (d) can allow the client to connect the dots and insert the term in the contract themselves. There may even be an argument that competent representation would require informing the client of (c) and (d) in some situations—for instance, if the client raised a question about any particular unenforceable term.[257] As a result, so long as including unenforceable terms in contracts is a lawful act for a client to take, there will only be so much that can be accomplished by putting the screws to lawyers.

Finally, lawyer discipline is unlikely to compensate people harmed by unenforceable terms. That is in part by design—lawyer discipline "seeks to protect a general public interest in the integrity of the legal process" rather than to compensate individuals who are harmed by wrongdoings.[258] That general public interest is a valid and worthwhile one. But the harms associated with unenforceable terms go beyond questions of the integrity of the legal process and instead implicate consumer and employee well-being. A remedial scheme that can more directly address those interests therefore has an advantage over one that does not.

C. Judicially Created Duties

The previous two Sections considered ways that unenforceable terms could potentially be addressed within existing laws. In addition to these options, a final option short of new legislation remains—judge-made law. Courts could fashion common law penalties for drafters who use unenforceable terms, such as by creating a cause of action for those who are deceived by such terms. Such a doctrine might be thought of as an "implied warranty of enforceability," or an "implied warranty of validity," placing the burden on drafters of mass contracts of adhesion to ensure that the terms they use in those contracts are valid ones.[259] Or Gregory Klass and Ian Ayres have suggested a "tort of bad-faith drafting,"

[257] See, e.g., Pizzimenti, supra note 246, at 157 ("[L]awyers may feel compelled as a matter of competent representation to advise the client that, while a court would not enforce a clause, the vast majority of people would believe the clauses were valid and would act accordingly.").

[258] Id. at 185.

[259] Cf. Christine H. Monahan, Private Enforcement of the Affordable Care Act: Toward an "Implied Warranty of Legality" in Health Insurance, 126 Yale L.J. 1118, 1118 (2017) (arguing for an "implied warranty of legality" for individual health insurance plans).

which could encompass both substantive terms that are unenforceable as well as certain kinds of undesirable contract formation practices.[260]

Such a judge-made rule is supported by the same kinds of normative considerations that have justified previous implied warranties, such as the implied warranty of merchantability and the implied warranty of habitability.[261] In particular, as described in Part II, the current regime governing unenforceable terms is one of the last refuges of "caveat emptor" in the consumer marketplace. When it comes to contract terms, consumers are simply left to their own resources to deal with questions of legality and enforceability. A company would face false advertising liability if it put untrue safety claims about its product in its advertisements or on its product packaging. But if it puts the untrue statement that "this company is not liable for any damages resulting from the use of our product" in its contractual terms, there would be no penalty under the current doctrine of non-enforceability.

A duty for offerors to take care that contract provisions are valid would remedy this discrepancy by bringing the law governing contract terms into harmony with the law governing other product features. As the research canvassed in Part I established, nonlawyers entering into contracts of adhesion tend to view the terms that they have entered into as legally binding.[262] A judge-made duty, where it applied, would align that baseline expectation with commercial practice by requiring contract drafters to police their own terms for bindingness.

The fact that such a duty is a plausible extension of the reasoning behind other warranties does not, of course, mean that it is likely to occur—it has been quite some time since courts demonstrated much interest in the creation of implied warranties, for instance.[263] But as with the implied warranties of merchantability and habitability, this judge-

[260] Ian Ayres & Gregory Klass, How to Use the Restatement of Consumer Contracts: A Guide for Judges, 15 Harv. Bus. L. Rev., no. 2, 2025, at 21–22.

[261] See, e.g., Lawrence M. Friedman, A History of American Law 410–11 (3d ed. 2005) (describing the use of implied warranty as a way of moving the law away from the rule of caveat emptor); Paula A. Franzese, Abbott Gorin & David J. Guzik, The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform, 69 Rutgers U. L. Rev. 1, 9 (2016) (noting that before the implied warranty of habitability, "the governing norm was *caveat lessee*, or tenant beware").

[262] See supra Section I.B.

[263] The implied warranty of habitability in the housing context arose in the 1960s and 1970s. See Nicole Summers, The Limits of Good Law: A Study of Housing Court Outcomes, 87 U. Chi. L. Rev. 145, 154–58 (2020). The implied warranty of merchantability is even older. See, e.g., Gammell v. R.B. Gunby & Co., 52 Ga. 504, 505 (1874).

made duty would be justified in part because of the changing commercial landscape.[264] In today's world, the proliferation of electronic devices and low transaction costs has led to a life suffused with unnegotiated, often unread contracts.[265] The idea of "contract as thing" has been around for more than fifty years,[266] but in recent years, the explosion of contracts has increasingly made the "things" that are contracts part of every aspect of contemporary life.[267] Just as the implied warranty of merchantability accompanied the rise in manufactured goods,[268] and the implied warranty of habitability accompanied the rise of urban dwelling and increased standards of living,[269] a duty of valid drafting would appropriately reflect an age in which many aspects of everyday life are mediated by written terms that do not always operate according to consumer expectations.

CONCLUSION

More than fifty years ago, Arthur Leff persuasively argued that mass consumer contracts should be considered "thing[s]" rather than "contracts"—in other words, products subject to regulation as products, rather than contracts as then traditionally understood in doctrine.[270] Since then, adhesive contracts have become even more ubiquitous, and the law around such contracts has changed in a variety of ways.[271] But unenforceable terms remain widespread.[272]

Rather than resting on the fiction that everyone knows the law, contract law should consider the world as it is. If contracts are products, these terms are best understood as product defects. They are features of the product that do not work as people expect them to—because people expect contracts to be binding.[273] Just as the law assigns liability for

[264] See Friedman, supra note 261, at 410–11 (describing how the implied warranty of merchantability developed with the market for manufactured goods); see also Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1074 (D.C. Cir. 1970) (justifying the implied warranty of habitability in part by reference to the changing nature of shelter from the feudal era to modern cities).

[265] See Hoffman, supra note 33, at 1371–72.

[266] See Leff, supra note 29, at 131, 146–47.

[267] See id.

[268] Friedman, supra note 261, at 410–11.

[269] See Franzese et al., supra note 261, at 9–11.

[270] Leff, supra note 29, at 147.

[271] See generally Restatement of Consumer Contracts (Am. L. Inst., Tentative Draft No. 2, 2022) (describing developments in the law of consumer contracting in the modern era).

[272] See supra Section I.A.

[273] See supra Section I.B.

defective manufactured products, it should also assign liability for defective written contracts.