Bargaining in the Shadow of the Contract

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Increased awareness that sellers routinely insert one-sided or exploitative terms into their boilerplates has resulted in growing pressure throughout the world for broader substantive regulation of consumer contracts. Yet, recent evidence suggesting that sellers and landlords routinely contravene these regulatory measures by inserting unenforceable terms into their contracts casts doubt on the effectiveness of such regulatory changes. This Article empirically uncovers the implications of this continuing practice for the non-drafting parties. Building on previous research showing that residential rental agreements often contain unenforceable terms, this Article explores how such terms influence tenants’ post-contract decisions and behavior. The experimental studies reported here expose the harmful effects of unenforceable terms, revealing that tenants are significantly more likely to bear costs that the law imposes on the landlord after reading an unenforceable term, rather than an enforceable term or even a silent lease. These findings lead to a troublesome conclusion: While the inclusion of unenforceable terms in contracts may not affect consumers’ choices *ex ante*, it is likely to adversely affect them *ex post*, when a problem or dispute with the seller arises. This new evidence suggests that even substantive regulation of consumer markets might fail to achieve its objectives as long as it relies on uninformed consumers to enforce their mandatory rights and protections. The Article discusses the implications of these findings for public policy and regulation.

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# Introduction

It is widely acknowledged that consumers seldom read or pay attention to the fine print in legal documents before signing or clicking through them,[[2]](#footnote-2) and that, in response, sellers often load their standardized agreements with one-sided or exploitative terms.[[3]](#footnote-3) In view of this realization, scholars and commentators have consistently called for stronger, more substantive, regulation of the content of standardized agreements,[[4]](#footnote-4) and regulators have followed suit by adopting substantive regulation, prohibiting sellers from including certain specified terms—deemed unfavorable to non-drafting parties—in their contracts.[[5]](#footnote-5) Substantive regulation has been adopted in multiple consumer sectors, including the rental housing market, the credit card market, the market for the sales of goods, and the insurance industry.[[6]](#footnote-6)

Despite these regulatory efforts to protect consumers, new evidence suggests that drafting parties often contravene these mandatory protections by inserting terms that are essentially unenforceable and void into their boilerplates.[[7]](#footnote-7) In particular, I have recently found that residential rental agreements often contain unenforceable terms, including overbroad liability disclaimers and clauses purporting to limit or negate the landlord’s warranty of habitability.[[8]](#footnote-8)

These findings shed substantial light on a particular pattern of contracting behavior that has not been adequately studied to date. While the literature on consumer contracts has generally focused on the drafters’ incentives to include enforceable, albeit egregiously one-sided terms, or terms that, while enforceable, exploit consumers’ cognitive biases,[[9]](#footnote-9) little attention has been devoted to the possibility that these contracts include terms that simply contravene the law or misinform consumers about their legal rights and remedies.[[10]](#footnote-10)

In light of the accumulating evidence that unenforceable and misleading terms abound in consumer contracts and leases,[[11]](#footnote-11) it is essential to empirically explore the implications of this drafting practice for the non-drafting parties. This Article takes a first step towards addressing this issue, taking the residential rental market as a test case. Building on previous work demonstrating that unenforceable terms are regularly inserted in residential agreements,[[12]](#footnote-12) it examines the role that these terms play in shaping tenants’ post-contract decisions and behavior.

The central question addressed in this Article is whether the resolution of post-contract disputes is determined by legally invalid contract terms or rather by the formal legal rules that are supposed to govern the parties’ relations. One possibility is that tenants are unaffected by the inclusion of unenforceable terms in their lease agreements, because residential leases, like many types of standard form contracts, remain largely unread.[[13]](#footnote-13) However, based on a survey of tenants from Massachusetts, I have demonstrated elsewhere that while not all tenants read the terms of their residential leases ex ante,or before signing the agreement, a substantial proportion of them read the contract ex post, after a tenancy-related problem or a dispute with the landlord arises.[[14]](#footnote-14) Drawing on these findings, this paper probes how tenants respond when they encounter unenforceable terms in their residential lease agreements, and whether, because of such provisions, they emerge from post-contract disputes significantly more disadvantaged than do tenants who have encountered enforceable lease terms.

This study’s primary hypothesis is that unenforceable lease terms are likely to affect tenants adversely at the post-contract negotiations stage. Given that tenants are usually ignorant of their legal rights and remedies as renters, they are likely to rely on the contract as their main, or even only, source of information about these legal issues when encountering a rental problem. If the contract contains unenforceable terms that restrict or deny the tenants’ rights, it is possible that tenants might forego their rights as a consequence, and ultimately bear costs that the law deliberately and explicitly imposed on the landlord. This proposition builds on previous work suggesting that consumers, tenants, and employees are typically uninformed of the law governing their transactions,[[15]](#footnote-15) and that they generally feel bound by the fine print, even when its legal status is uncertain.[[16]](#footnote-16)

This Article reports on a series of experiments conducted to explore the impact of unenforceable terms on tenants’ decisions and behavior. Participants, all tenants from Massachusetts, were instructed to assume that they were renting an apartment and that a particular tenancy-related problem arose. They were subsequently randomly assigned to read different types of contractual provisions and then asked to report their behavioral intentions. The experimental findings revealed that tenants were adversely affected by the inclusion of unenforceable terms. At the same time, the negative impact of the unenforceable terms was substantially alleviated once participants became informed of their rights under the law.

This Article is divided into four parts. Part I provides background, reviewing the current problems and challenges that consumer contracts pose for consumer protection and regulation. Surveying the regulatory solutions that have been adopted so far to address these issues, it describes the shift from relying mainly on disclosure mandates to adopting stronger, more coercive, interventions in consumer markets. It continues by reviewing the increasing evidence suggesting that sellers and landlords often fail to comply with these substantive mandatory requirements by continuing to insert unenforceable terms into their boilerplate agreements. Part II proceeds to present the study’s goal of identifying the implications of this deceptive contracting practice for consumers. It reviews the literature documenting that consumers are typically uninformed about their rights and remedies as buyers, as well as the growing evidence that consumers hold formalistic intuitions about contracts and the law. This Article suggests that consumers’ ignorance of the law, combined with their formalistic legal preconceptions, may lead them to perceive unenforceable contract terms as enforceable and binding, and consequently relinquish valid legal rights and claims. Part III then presents and reports the results of four controlled experiments designed to thoroughly test how the content of standardized agreements, and in particular the presence or absence of unenforceable contract terms, affects the non-drafting parties’ post-contract decisions. Using the residential rental market as a first test case, these experiments examined how different types of deceptive drafting techniques influenced tenants’ perceptions and behavior. While the first four experiments focused on comparing the impact of unenforceable terms to that of enforceable provisions and silent leases, the fifth experiment expanded the scope of inquiry, exploring the role of other potentially deceptive drafting patterns, such legal fallback language and negative framing, in shaping tenants’ decisions.[[17]](#footnote-17) The findings strongly suggest that these drafting practices—and the use of unenforceable terms in particular—have an adverse effect on tenants’ post-contract decisions and perceived bargaining positions. Part IV discusses the implications of these findings for public policy and regulation.

# I. Background

## Traditional and Behavioral Consumer Market Failures

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Consumers face an incredible amount of fine print in their daily lives, and it is neither practical nor efficient for them to read all of their contracts carefully.[[18]](#footnote-18) Even if they do read some of these contracts in their entirety, it is exceedingly challenging for consumers to understand their full meaning and legal ramifications.[[19]](#footnote-19) Sellers often make it even harder for consumers to read adhesion contracts by using long forms, small fonts, and complex legal jargon.[[20]](#footnote-20) All of these drafting practices essentially penalize consumers for attempting to read the fine print.[[21]](#footnote-21)

It is therefore not surprising that there is ample empirical evidence that consumers rarely read such contracts before signing them.[[22]](#footnote-22) Researchers have found that “only one or two in 1,000 shoppers access a product’s EULA for at least 1 second.”[[23]](#footnote-23) In fact, recent studies have even shown that non-reading consumers may unwittingly agree to give up their first-born child in order to obtain Wi-Fi access,[[24]](#footnote-24) or to sell their soul in return for a video game.[[25]](#footnote-25)

Since it is relatively common, and possibly inevitable, that consumers do not read all the terms of the standardized agreements that they are required to sign or click through, sellers can exploit consumers’ failure to read by hiding unfair and one-sided terms in the fine print.[[26]](#footnote-26) Such terms may include liability or warranty disclaimers, waivers of the consumer’s right to a jury trial, class action waivers, and choice-of-law or choice-of-forum clauses.[[27]](#footnote-27)

Even if certain terms are clearly disclosed so that consumers are made aware of them, sellers regularly design contract terms in ways that take advantage of consumers’ cognitive biases and systematic misperceptions.[[28]](#footnote-28) For example, if consumers are overly optimistic and consequently underestimate the possibility that a certain product will fail to work, sellers may introduce warranty disclaimers into the fine print while failing to adequately adjust the product’s price downwards.[[29]](#footnote-29) Similarly, consumers may underestimate how much they can borrow on their credit cards and overestimate their ability to pay their bills in time. As a result, credit card issuers can increase their late fees while lowering the more salient, annual fees, which will entice such consumers into agreeing to the contracts.[[30]](#footnote-30) In these cases, consumers might enter into inefficient transactions, as they might underestimate the costs associated with these transactions or overestimate their benefits.[[31]](#footnote-31) These problems are not solved even in situations of perfect competition, as competition only drives sellers to maximize the perceived net benefit, and not the actual net benefit.[[32]](#footnote-32) As Oren Bar-Gill explains:

When consumers are perfectly rational, sellers compete by offering a lower price. When consumers are imperfectly rational, sellers compete by designing pricing schemes that create an appearance of a lower price. The underlying problem is on the demand side of the market; imperfectly rational consumers generate biased demand. Competition forces sellers to cater to this biased demand. The result: A behavioral market failure.[[33]](#footnote-33)

## Regulatory Solutions

### The Promise and Failure of Disclosure

In light of the increasing realization that market forces, such as competition, cannot correct for consumer market failures, scholars and regulators have regularly advocated for broader, mandatory, regulation of consumer contracts.[[34]](#footnote-34) One principal regulatory tool which is applied extensively in a variety of markets is mandated disclosure. Indeed, mandated disclosure is perhaps the most common regulatory technique in American consumer protection law today.[[35]](#footnote-35) Its use is based on the straightforward reasoning that supplying consumers with information will help them make informed decisions. For example, truth-in-lending laws oblige lenders to detail their credit terms for borrowers.[[36]](#footnote-36) Under contract law, sellers must clearly explain their warranty terms to buyers.[[37]](#footnote-37) And according to residential rental law, landlords must disclose certain information, such as material related to holding and returning the tenants’ security deposits, in their lease agreements.[[38]](#footnote-38) Consumer protection law abounds in required disclosures involving mortgages, bank accounts, credit cards, rental homes, healthcare, food, travel, house and car sales, and more.[[39]](#footnote-39)

Notwithstanding its prevalence and appeal (what could improve consumers’ choices more than providing them with the information that they undoubtedly lack?) mandated disclosure has, in many respects, failed to achieve its intended goals.[[40]](#footnote-40) The failure of mandated disclosure may be attributed to several prominent factors. First, just like the rest of the contractual fine print, mandated disclosures often remain unread. Second, even when consumers *do* read the disclosed information, they will often fail to understand it, let alone to successfully incorporate it into their decision-making processes in real-time.[[41]](#footnote-41) Third, sellers have a strong incentive to convey the disclosed information in a misleading manner.[[42]](#footnote-42) Finally, regulators often require sellers to disclose all kinds of information, while failing to take consumers’ limited time and attention, as well as sellers’ perverse incentives, into account. Indeed, as Ban-Shahar and Schneider point out, disclosure—to be successful—“requires a chain of demands on lawmakers, disclosers, and disclosees too numerous and onerous to be met often.”[[43]](#footnote-43)

### The Shift towards Substantive Interventions

In view of the recognition that disclosure mandates alone have not adequately protected consumers from abusive and exploitative business practices, there has been a growing trend favoring the adoption of stronger, more substantive, interventions in consumer markets.[[44]](#footnote-44) Two measures have attracted the most regulatory attention. The first of these tools is heightened assent requirements, whereby courts and legislatures require more meaningful manifestations of assent, making it increasingly difficult and costlier for sellers to incorporate their pre-drafted terms into agreements.[[45]](#footnote-45) However, scholars and commentators have warned that in a world of lengthy standard forms, more restrictive assent rules that demand more thorough advance disclosures and more meaningful informed consent would raise transaction costs without producing substantial benefits.[[46]](#footnote-46) Consequently, courts have in fact relaxed the assent rules, permitting businesses to adopt relatively lenient adoption processes.[[47]](#footnote-47)

The resulting increase in more permissive assent rules emphasized the need to use the “remaining regulatory safeguard in consumer contracts—mandatory restrictions over permissible contracting.”[[48]](#footnote-48) These approaches for protecting consumers have involved applying traditional doctrines such as unconscionability and misrepresentation in order to police the content of standardized agreements. Courts have applied these common-law doctrines to void contractual clauses restricting the remedies that aggrieved consumers may seek, choices of law and forum clauses, terms allowing the seller discretion to unilaterally adjust contractual obligations, and so forth.[[49]](#footnote-49)

As the newly-proposed Restatement of Consumer Contracts observes, such a substantive scrutiny of contract terms is “intended to uproot terms that are so extreme that they would be unlikely to survive in an environment of meaningful free choice.”[[50]](#footnote-50) It is meant to allow businesses freedom “to draft and affix their terms to the transaction,” while at the same time preventing them “from going too far” with terms that “deceptively peel off the value the consumers bargained for.”[[51]](#footnote-51)

In addition to applying these doctrines to police contract terms *ex post*, scholars have consistently called for substantive regulation of standard-form consumer contracts *ex ante.* Noting, for example, that “unsafe contracts can involve risks to individuals and society that are no less damaging than the risks of unsafe drugs and toys,”[[52]](#footnote-52) multiple scholars have called legislatures to adopt substantive regulation of consumer contracts, seeing it as “akin to product safety regulation, or as a sui generis regime for curtailing boilerplate excesses.”[[53]](#footnote-53)

Over time, legislatures have followed suit, gradually imposing more and more mandatory restrictions on permissible contracting practices *ex ante*. These restrictions either prohibit the inclusion of certain contract terms, deemed unenforceable as against public policy, in the fine print, or require sellers and landlords to include in the fine print specified terms aimed at safeguarding the non-drafting parties.[[54]](#footnote-54)

Substantive *ex ante* regulation of the content of standard form consumer contracts has become increasingly widespread in numerous consumer markets.[[55]](#footnote-55) For example, the Magnusson-Moss Warranty Act of 1976 prohibits sellers from excluding the implied warranties set forth in the Uniform Commercial Code.[[56]](#footnote-56) Similarly, the United States Credit Card Accountability, Responsibility, and Disclosure Act of 2009 introduced substantive restrictions, including price caps and other prohibitions, in addition to heightened disclosure obligations, into the credit card market.[[57]](#footnote-57) Federal agencies have recently asserted authority under the Dodd-Frank Act and the Social Security Act to authorize regulations that prohibit mandatory arbitration clauses in certain types of consumer contracts.[[58]](#footnote-58) The practice of door-to-door selling is also regulated in some jurisdictions.[[59]](#footnote-59) And in the insurance market, all fifty states have adopted comprehensive compulsory systems mandating the terms of insurance policies.[[60]](#footnote-60) Finally, the residential rental market is heavily regulated in all jurisdictions across the United States. Such regulation includes anti-discrimination laws, the imposition of an implied warranty of habitability, regulation of the landlord’s power to evict tenants or to disclaim negligence liability, and various other rules aimed at providing tenants with enhanced protections.[[61]](#footnote-61)

## Preliminary Evidence of Non-Compliance

Despite current efforts to protect consumers, new findings suggest that drafting parties often fail to comply with applicable mandatory protections, and continue to use unenforceable terms in their standardized agreements.[[62]](#footnote-62) In particular, it has been found that insurance policies frequently contain terms deemed unenforceable and void, such as coverage exclusions or coverage grants for punitive damages or intentional torts.[[63]](#footnote-63) Similarly, sellers often use overly broad exculpatory clauses without narrowing them to include only negligence,[[64]](#footnote-64) and there is evidence suggesting that employers use over-reaching arbitration and non-competition clauses in employment agreements.[[65]](#footnote-65) A recent report has relatedly found that companies include in their arbitration clauses provisions that they know their arbitrator refuses to enforce (and that their arbitrator required them to waive).[[66]](#footnote-66) Finally, an empirical study of residential lease agreements recently revealed that these contracts frequently contain unenforceable terms, such as overly broad liability waivers, disclaimers of the landlord’s warranty of habitability, and clauses purporting to shift the landlord’s mandatory maintenance and repair duties onto the tenant. [[67]](#footnote-67)

The next sections elucidate the implications of this practice for consumers.

# II. What are the Implications For Consumers?

This Article empirically explores how the use of unenforceable contract terms affects consumers. Taking the residential rental market as a first test-case, it presents empirical research showing how tenants respond to contract terms that contradict, qualify, or misstate the law. The conventional wisdom in consumer contracts scholarship has long been that terms in the fine print are almost never read, and are therefore meaningless.[[68]](#footnote-68) This Article proposes that this prevailing account is seriously incomplete. Standardized contracts and leases may go unread at the time of contracting, but—as recent survey evidence suggests[[69]](#footnote-69)—they are often read when things go wrong after the contract is signed. And, at that point in time, the fine print colors consumers’ perceptions about the transaction, consequently affecting their behavior and outcomes in meaningful ways.

## Imperfect Information, Legal Misperceptions, and Intuitive Formalism in Contracts

When sellers misrepresent the law through their boilerplate clauses rather than disclose it fully and accurately to consumers, consumers are apt to rely on the selective and misleading information conveyed to them in the standardized agreements. They are not likely to obtain information about the law independently, and might instead rely on the assumption that the contract drafters know the law and draft their contracts to reflect it accurately. Consumers may further believe, for the most part erroneously, that regulators monitor or pre-approve standardized agreements, and that this purported oversight deters contract drafters from using terms that might expose them to legal sanctions.

Note that from a traditional economics perspective, a consumer’s decision not to obtain information about the law may be perfectly rational. First, the time and financial costs of acquiring information about the multiple and complex legal rules governing a particular transaction may be prohibitively high. Second, the expected benefits of obtaining such information may be low, at least when small stakes are involved. As long as the expected benefits from acquiring legal information do not exceed the search costs, a rational *homo economicus* will refrain from obtaining and processing information about the law.[[70]](#footnote-70)

Empirical evidence indeed indicates that consumers are often unacquainted with the law governing their relations with sellers. There is a growing body of research documenting consumers’ ignorance of the various legal rules governing their transactions.[[71]](#footnote-71) For example, consumers lack an accurate understanding of the legal standards that define “organic” or “natural” foods.[[72]](#footnote-72) Similarly, they often do not understand their privacy rights[[73]](#footnote-73) or the legal ramifications of their arbitration agreements,[[74]](#footnote-74) and hold inaccurate beliefs as to the pervasiveness of different remedies for breach of contract.[[75]](#footnote-75)

Consumer psychology adds an important component to this mix. Buyers are even more unlikely to search for information about their legal rights and remedies because they are inclined to trust their contracts as accurate sources of information.[[76]](#footnote-76) In fact, they might fail to see any reason for the well-informed seller or landlord to use legally invalid terms. Warren Mueller’s classic study from 1970 offers insight into this phenomenon. The study’s participants, students from Ann Arbor, appeared not to question the validity of their lease terms.[[77]](#footnote-77) Nevertheless, it is precisely this prevailing commonsense presumption of contract enforceability by consumers that may incentivize drafting parties to include essentially unenforceable and legally meaningless provisions in contracts. These provisions, albeit legally invalid, may serve as psychologically powerful tools for creating misperceptions among consumers and tenants about their rights and remedies under the law. For if non-drafting parties incorrectly believe that a certain contractual arrangement which disclaims, qualifies, or restricts their mandatory rights and remedies is, in fact, enforceable and binding, they might relinquish valid legal rights and claims as a result.

Using experimental methods, this paper seeks to explore the possibility that landlords, through the use of unenforceable contract terms, could mislead tenants about their rights under the law, and consequently adversely affect their decisions at the post-contract stage. By relying on their contracts as accurate sources of information about these rights and remedies, tenants (and consumers more generally) could be led to believe that the law grants them fewer protections than it actually does, and consequently unknowingly give up valid rights and claims.

This hypothesis builds on previous empirical research documenting lay attitudes toward contracts, which found that consumers largely believe that they will be held to the terms of the contracts following formalized assent.[[78]](#footnote-78) For example, Tess Wilkinson-Ryan found that laypeople maintained that it was fair to hold signees to fine print terms they had not read, even if the terms were buried in a contract that they believed to be unreasonably lengthy.[[79]](#footnote-79)

Furthermore, it has been found that even if people perceive their contractual provisions as unfair, they generally remain committed to these terms after signing the contract. For example, in a study conducted by Dennis Stoll and Andrew Slain in 1997, participants read about a consumer who suffered a harm (e.g., sustaining an injury at the gym) and were randomly assigned to read either a contract containing a liability disclaimer or one without such a provision.[[80]](#footnote-80) Participants were then asked to report whether they would seek compensation in such circumstances, whether they believed that the exculpatory clause was unjust, and what they predicted would be the likely outcome of a lawsuit. The study’s findings, although somewhat inconclusive, suggested that the presence of exculpatory language had a deterrent effect on participants’ willingness to seek recourse, even though they generally perceived the clause as unfair.[[81]](#footnote-81)

Finally, Wilkinson-Ryan recently showed that when a consumer policy is set forth in a contract, it is perceived as more legitimate than if it is set forth elsewhere, even if the terms are egregious in either case.[[82]](#footnote-82) Wilkinson-Ryan therefore interpreted her results as suggesting, *inter alia,* that “people have a particular view of legal norms in this area—namely, if it’s in a contract, it’s enforceable.”[[83]](#footnote-83)

Building on this work, this Article explores what transpires when landlords exploit tenants’ legal ignorance and intuitive formalism by drafting contracts that overreach the law. The paper’s hypothesis is that under such circumstances, tenants may erroneously believe that their contract terms are enforceable and binding. They are likely to come to this conclusion simply because they may fail to realize that landlords can benefit from including unenforceable clauses in their contracts. Consequently, they might forego pursuing their valid legal rights and claims.

## Non-Reading Ex Ante and Reading Ex Post

It is important to emphasize that the use of unenforceable terms may affect tenants’ perceptions and decisions only to the extent that they rely on their contracts to ascertain their rights and remedies. Unenforceable terms will have little meaning or impact if they remain unread. Therefore, an important question is whether tenants actually read their residential lease agreements. As already mentioned, there is increasing empirical evidence that consumers do not read or pay attention to the fine print before making a purchasing decision.[[84]](#footnote-84) However, readership rates may vary across consumer markets and contracts. In fact, with certain types of consumer contracts, there is empirical evidence that consumers, or a considerable proportion of them, do read and pay attention to the fine print. For example, in the specific context of residential rental contracts, Warren Muller found that fifty-seven percent of the respondents in his 1970 study had thoroughly read their rental contracts before renting an apartment.[[85]](#footnote-85)

More importantly, as I have noted elsewhere, a distinction must be made between reading ex anteand reading ex post.[[86]](#footnote-86) Namely, even if tenants do not necessarily read their leases before renting the apartment, they are nonetheless likely to look at their contracts at a later stage when seeking to verify their rights and duties as renters, typically after a problem occurs or a dispute with the landlord arises. Indeed, a recent survey of tenants from Massachusetts has found that fifty-one percent of those who reported experiencing a rental problem also reported looking at their leases directly as a result.[[87]](#footnote-87) Remarkably, sixty-five percent of these participants reported that they ultimately acted in accordance with their lease agreements.[[88]](#footnote-88) These findings therefore suggest that “residential leases play an important role ex post, both as an informational source and as a benchmark for the solution of the problem.”[[89]](#footnote-89)

This Article focuses on the role of unenforceable terms in shaping tenants’ perceptions and behavior. Tenants might be adversely affected by the presence of unenforceable contract terms in several distinct ways. First, when a problem arises, tenants might unquestioningly behave in accordance with their contract terms out of ignorance of their unenforceability. Second, even if they do reach out to the landlord to resolve the problem, they might capitulate once the landlord brings the relevant contractual terms to their attention. Third, even if tenants succeed in reaching a compromise with the seller, it might be based on their erroneous assumption that their entire contract is enforceable and binding, thus influencing the nature of the resulting agreement. Finally, tenants might refrain from filing meritorious claims against a defiant landlord, *inter alia*,because the mere presence of an unenforceable term is likely to decrease their perceived likelihood of succeeding in court.[[90]](#footnote-90)

The next section presents a series of experiments conducted to explore how unenforceable contract terms shape tenants’ post-contract perceptions and decisions.

# III. Experimental Methods and Results

The primary goal of this article is to link the previously identified drafting practice of including unenforceable contract terms to the psychology of non-drafting parties at the post-contract stage. Specifically, the paper examines how the inclusion of unenforceable terms affects non-drafting parties’ post-contract perceptions and behavior, regardless of the legal ramifications of these terms.

Building on recent evidence that residential rental agreements from Massachusetts routinely included unenforceable terms (misinforming tenants about their legal rights and remedies),[[91]](#footnote-91) the experimental studies described below explore how such contract terms influence tenants’ perceptions and decisions in response to rental problems they incur.

## Study 1: The Effect of Unenforceable Terms

The first study examines how different contract terms affect the manner in which tenants deal with tenancy-related problems. Building on the increasing evidence that consumers are typically uninformed about their legal rights and remedies, this study’s main hypothesis is that if the contract contains unenforceable terms that restrict or deny these rights or remedies, consumers and tenants are likely to unknowingly forego their entitlements as a result of these clauses.[[92]](#footnote-92)

### Sample

The study consisted of 397 participants, fifty-three percent male, all Massachusetts residential tenants, recruited using the Amazon Mechanical Turk labor pool.[[93]](#footnote-93) Participants’ responses were confidential and anonymous.[[94]](#footnote-94) The questionnaire was programmed in Qualtrics and took, on average, nine minutes to complete.[[95]](#footnote-95)

### Experimental Design

#### Vignettes

All participants read a scenario describing a rental problem and were asked to answer a series of follow-up questions. In the scenario, participants were asked to assume that two months after complaining to their landlord about a leak in the roof, rain water seeped in from the leaking roof and ruined their television. They were instructed to assume that the cost of repairing the TV was $200, and the cost of replacing it with a new one was $400.

They read the following:

“Assume that you have been searching for an apartment, and have finally found one that you like and that meets your budget. You recently moved to this apartment, after signing a lease agreement with your landlord. One day, you notice that the roof in your apartment is leaking. You call your landlord and you tell him about the leak. Your landlord does nothing in response, even after you send him a letter of complaint asking him to fix the leaking roof. Two months later, rain water falls from a leak in the roof and damages your television. The cost of repairing it is $200, and the cost of replacing it with a new one is $400.”

The scenario was based on a real case from 2011, in which the Supreme Judicial Court of Massachusetts held the landlord liable in negligence for damage caused to the tenant as a result of a leak in the roof.[[96]](#footnote-96) The court held that the landlord had a statutory duty to fix the leaking roof after receiving notice, and that the law prohibited the landlord from disclaiming liability for loss or damage to the tenant or third parties as result of failure to do so.[[97]](#footnote-97) Indeed, the law in Massachusetts obliges residential landlords both to maintain all structural elements of the apartment (including the roof) and to ensure that the premises are protected from wind, rain, and snow.[[98]](#footnote-98) Landlords are further prohibited from disclaiming their liability for loss or damage to tenants or third parties in the leased premises as a result of the landlord’s negligence, omission, or misconduct. Any lease clause purporting to disavow such liability is deemed void and unenforceable.[[99]](#footnote-99)

My earlier study had found that notwithstanding these mandatory rules, unenforceable liability clauses, professing to exculpate the landlord from liability for loss or damage caused to the tenant or third parties on the leased premises, were included in twenty-three percent of the sampled leases.[[100]](#footnote-100) This study seeks to test how these unenforceable yet prevalent terms affect tenants’ decisions and behavior at the post-contract stage.

#### Experimental Manipulation

Each participant was randomly assigned to one of three conditions: “enforceable term,” “unenforceable term,” or “no term.” The conditions were designed to be as similar as possible on all dimensions except the content (and respective legal status) of the contract term. Participants read as follows:

|  |  |
| --- | --- |
| *Condition* | *Text* |
| *Unenforceable Term* | You look at your lease, and you notice that it contains a clause titled “Loss or Damage,” stipulating as follows: “Landlord will not be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises (including damage caused by the landlord’s negligence or recklessness).” |
| *Enforceable (Compliant) Term* | You look at your lease, and you notice that it contains a clause titled “Loss or Damage,” stipulating as follows: “Landlord will be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises by the landlord’s negligence or recklessness.” |
| *No Term* | You look at your lease, but it says nothing about the landlord’s liability for loss or damage to the tenant. |

The “no term” condition, in which participants were instructed to assume that their lease said nothing about repairs or landlord’s liability, enabled testing tenants’ background assumptions about their legal rights and obligations when no information is provided in their contracts. As revealed in my previous study of residential leases, residential rental contracts are often silent about various rights and remedies that the law grants tenants.[[101]](#footnote-101) In the particular context of landlord’s liability for loss or damage caused to the tenant or third parties on the leased premises, sixteen percent of the sampled leases did not mention the issue at all.[[102]](#footnote-102) It is therefore pertinent to test tenants’ assumptions and behavior when encountering a silent contract.

#### Dependent Measures

After reading each scenario, respondents were asked to evaluate how they would behave under the defined circumstances. Two independent coders, blind to the study’s hypotheses and design, coded participants’ open-ended responses.[[103]](#footnote-103) The coders were instructed to classify participants’ responses into one or more of the following categories[[104]](#footnote-104):

(1) *Search for Information*: in cases where participants indicated that they would search for more information about their rights, remedies, or obligations, by searching the web or by consulting with family, friends, or other tenants, for example;

(2) *Contact Landlord*: in cases where participants indicated that they would discuss the issue with the landlord, negotiate, or demand that the landlord make or pay for the required repairs;

(3) *Relinquishment*: in cases where participants indicated that they would bear the repair or replacement costs by themselves, do nothing, or move out of the apartment;

(4) *Extralegal Action*: in cases where participants indicated that they would withhold rent, contact inspection authorities, or tarnish the landlord’s reputation;

(5) *Legal Advice*: in cases where participants indicated that they would seek legal services;

(6) *Legal Action*: in cases where participants indicated that they would initiate proceedings against the landlord.

### Results

The findings reveal that the content of the residential lease agreement significantly affected tenants’ behavioral intentions. First, the contract terms that tenants were assigned to read had a significant impact on their intentions to capitulate and bear the repair expenses themselves: While only two percent of the respondents who read an enforceable term (acknowledging the landlord’s negligence liability) intended to bear the repair expenses themselves, sixteen percent of those in the “no term” condition intended to do so, and as many as twenty-two percent of the participants intended to bear the burden and costs of repair after reading an unenforceable lease provision, disclaiming the landlord’s negligence liability.[[105]](#footnote-105) Figure 1 illustrates these results.

Second, the content of the lease agreement significantly influenced participants’ intentions to contact the landlord. While only forty-eight percent of the participants intended to contact the landlord after reading an unenforceable clause (and sixty-one percent indicated they would do so after reading a contract lacking any liability clause), as many as seventy-five percent intended to contact the landlord after reading an enforceable term, acknowledging the landlord’s negligence liability.[[106]](#footnote-106) At the same time, the contents of the residential lease agreements did not significantly affect participants’ intentions to search for more information,[[107]](#footnote-107) seek legal advice,[[108]](#footnote-108) or take legal or extralegal action.[[109]](#footnote-109)

Remarkably, collapsing across conditions, only six percent of the participants indicated that they would ask friends or relatives for advice or search the web for information about their legal rights and remedies. These findings are surprising, in light of the ease and accessibility of online information. Indeed, as Eyal Zamir and Yuval Farkash observed, “in recent years, the Web […] has emerged as a primary source of information. Even if people do not read standard-form contracts ex ante, they might read them and seek additional information once they are dissatisfied with the transaction.”[[110]](#footnote-110) The study’s findings, however, indicate that a substantial proportion of tenants rely on their contracts as their only sources of information and seldom turn to search the internet to verify the legal environment when a rental problem occurs.

Of course, if the stakes are higher, tenants may be more inclined to invest time, energy, and resources in seeking out more information about their rights and remedies. Yet, the findings point to a troublesome conclusion: even when the costs are substantial, tenants might not seek out information outside the four corners of the contract. [[111]](#footnote-111)

## Study 2: The Moderating Role of Legal Information

Study 1 demonstrated that tenants who read unenforceable lease terms were adversely affected in that they were significantly more likely to bear costs that the law actually imposed on the landlord than were tenants reading an enforceable term or a silent lease. These findings offer strong support for the main hypothesis of this Article. They suggest that tenants’ decisions and behavior at the post-contract stage are, to a large extent, driven by their ignorance of the law, accompanied by their common-sense assumption that their contract terms are enforceable and binding. Yet, these results also raise a natural question: Could the adverse effect produced by the unenforceable fine print be mitigated by tenants’ learning about the law?

It is plausible that information about the law could counteract the negative impact of the unenforceable fine print, as it would correct tenants’ misperceptions. If uninformed tenants are likely to relinquish valid rights and claims because they may erroneously believe that unenforceable terms—negating or restricting their legal rights and remedies—are enforceable and binding, then informing them about the legal rules might offset the deceptive, and consequently deterrent, effect of the unenforceable fine print.

Admittedly, even informed tenants could be influenced to abide by a contract term—despite its unenforceability—because of their moral commitment to a contract that they have signed and agreed to. Legal philosophers have long argued that breaching a contract is morally wrong.[[112]](#footnote-112) Recent empirical research demonstrates that people indeed feel morally obligated to comply with a contract they have signed, believing that promises should be kept.[[113]](#footnote-113) As Tess Wilkinson-Ryan and Dave Hoffman observed, “parties will sometimes perform [their contractual obligations], at a cost to themselves, not because they are formally bound but because they feel morally bound.”[[114]](#footnote-114) Similarly, Tess Wilkinson-Ryan and Jonathan Baron conjectured that “[p]eople’s moral intuitions about contract law make breach less frequent than is economically efficient.”[[115]](#footnote-115) This may be the case, even when the law does not require the parties to abide by the contract they signed. As Janice Nadler and Pam Mueller have pointed out, “parties to contracts imbue those contracts with morality, even when the law governing the contract does not reflect that morality.”[[116]](#footnote-116)

Yet, there is reason to doubt that non-drafting parties would feel morally obligated to comply with contractual arrangements to which they agreed when they lacked knowledge that the term was unenforceable. In fact, this Article hypothesizes that a contractual commitment would lose its moral force once people realized that it could be invalidated or that it was already void.[[117]](#footnote-117) Indeed, tenants might even exhibit reactance or backlash upon learning of their rights under the law.[[118]](#footnote-118) Namely, they may become more willing to engage in hard bargaining with the landlord or to take legal or extralegal action in view of the landlord’s immoral conduct. If tenants suspect that the landlord knowingly included an unenforceable term, hoping to deceive them about the law, they may even be willing to bear costs or risks in order to punish their landlords for their unscrupulous behavior.

Considerable literature in the field of psychology demonstrates people’s willingness to punish wrongdoers for their immoral or unfair conduct, even at a cost to themselves.[[119]](#footnote-119) For example, Oren Bar-Gill & Omri Ben-Shahar proposed that a decision to breach a contract can be credible even if it is not financially efficient for the breaching party, when it is motivated by sentiments regarding the fairness of the transaction.[[120]](#footnote-120) Janice Nadler & Pam Mueller similarly observed that “norms of fairness govern the behaviors of contracting parties. People are more willing to breach a contract when they perceive the other party to have behaved badly—such as walking away from an underwater mortgage after it came to light that the bank harmed communities with subprime loans.”[[121]](#footnote-121) In the context of rental disputes, tenants may feel that their landlords behaved unfairly by using and relying on an unenforceable clause in order to relieve themselves of their legal obligations. Such tenants might therefore violate the promise-keeping norm, and even resort to means that are costly and inefficient from a traditional economic perspective, simply in order to punish the dishonest landlord.

On the other hand, non-drafting parties might be deterred from taking action by the mere presence of unenforceable or questionably enforceable fine print, even if they have reasons to believe that the term is unenforceable. Namely, tenants might fear the possibility, however slight, that the contractual arrangement will be enforced despite the legal rule deeming it unenforceable. For example, Tess Wilkinson-Ryan recently demonstrated that even when participants were asked to assume that a certain policy clause rested on questionable legal grounds, they nonetheless reported a low willingness to pursue a claim in court when the policy clause was included in the contract.[[122]](#footnote-122)

With these findings in mind, Study 2 was designed to explore how information about the law affects tenants’ post-contract decisions and behavior. This study asked whether informing tenants about the law would counteract the adverse effect generated by the unenforceable fine print, or would the fine print continue to deter tenants from taking action against the non-compliant landlord even when they realized that the contractual arrangement was unenforceable.

### Sample

The study consisted of 396 participants, fifty-two percent male, all Massachusetts tenants, recruited using the Amazon Mechanical Turk labor pool.[[123]](#footnote-123)

### Experimental Design

Participants read the scenario presented above, and were randomly assigned to one of the three contract term conditions (an “enforceable term”, an “unenforceable term”, or “no term”) as before. However, in this study, participants were also provided with information about the law. They were informed that the law places mandatory repair duties on the landlord, and that the landlord’s liability for failure to perform these duties cannot be disclaimed in any lease agreement. Participants read the following text:

Assume that you search the web, and you read that according to the law in your state, the landlord is obligated to maintain and repair all structural elements of the apartment, including the roof, ceilings and windows, so that wind, rain and snow are excluded. You also read that the landlord cannot disclaim liability for loss or damage caused by landlord’s negligence or misconduct under a lease agreement.

As in Study 1, participants were subsequently asked an open-ended question about their behavioral intentions in these circumstances, and two independent coders coded their open-ended responses.[[124]](#footnote-124)

### Results

The results of Study 2 revealed that information about the law succeeded in mitigating the adverse effect of the unenforceable fine print. When tenants received information about the law, the difference in their reported intentions to relinquish their rights across contract term conditions became negligible and insignificant. In other words, informed tenants encountering an unenforceable term were not significantly more likely to bear the repair expenses themselves than were tenants reading an enforceable term or a silent lease.[[125]](#footnote-125)

In order to further investigate the role of legal knowledge in shaping tenants’ decisions and behavior, participants’ responses from Studies 1 and 2 were compared. This comparison revealed, once again, that obtaining legal information significantly affected participants’ behavioral intentions. Respondents who received no information about the law reported significantly higher intentions to bear the repair expenses themselves than participants receiving legal information.[[126]](#footnote-126) Figure 2 below compares participants’ reported intentions to bear the repair expenses across contract term conditions, with and without legal information.

Notably, participants who read unenforceable terms were deeply affected by the presence or absence of legal information: While twenty-two percent of these participants intended to relinquish their rights when they had no information about the law, only six percent intended to do so after learning that the landlord was prohibited from inserting such clauses.[[127]](#footnote-127) Tenants who encountered a silent lease were also significantly affected when receiving information about the law: While sixteen percent of the tenants who read a silent lease intended to relinquish their rights when they had no information about the law, only three percent so intended after learning the truth about the legal situation.[[128]](#footnote-128) These findings suggest that tenants are often uninformed about their legal rights, such that both unenforceable terms and non-disclosure have a detrimental impact on their judgments and decisions.

Although information about the law increased participants’ intentions to consult a lawyer, from seventeen percent to nineteen percent, as well as their intentions to initiate legal proceedings, from five percent to ten percent, these effects were not significant.[[129]](#footnote-129)

Remarkably, participants reading an unenforceable term reported significantly higher intentions to seek legal advice than did participants in the other two contract term conditions.[[130]](#footnote-130) It is possible that this finding suggests that tenants encountering an unenforceable term exhibited some elements of reactance or backlash upon learning that their landlords had violated the law.[[131]](#footnote-131) Consequently, they may have been more willing to punish their landlords for misconduct and for inserting unenforceable terms into their contracts. Alternatively, participants may have assumed that, because the leases included unenforceable terms, there was little chance that the landlords would agree to renegotiate. Consequently, they may have been more prepared to resort to legal measures for lack of a negotiation alternative. Note that, at the same time, there was no significant difference in reported intentions to initiate legal proceedings.[[132]](#footnote-132) This finding may suggest that even when tenants learn that their lease provisions are unenforceable, they might still be discouraged from taking legal action.[[133]](#footnote-133)

## Study 3: Bargaining in the Shadow of the Lease

Thus far, Study 1 has shown that the content of the residential lease agreement, and, in particular, the presence or absence of an unenforceable contract term, significantly affected the likelihood that tenants would enter into post-contract negotiations with their landlords when a rental problem arises. In the presence of an unenforceable term, a substantially higher proportion of tenants chose to bear the repair expenses themselves, without even contacting their landlords. Study 2 demonstrated that acquiring knowledge about the law also significantly affected tenants’ willingness to bear the repair costs themselves rather than enter into post-contract negotiations with their landlords. When provided with information about the law, tenants were significantly more likely to contact the landlord and significantly less likely to simply capitulate and bear the repair expenses.

The question remains as to how the contract and the law influence the decisions and behavior of those who choose to negotiate the contract with the landlord at the post-contract stage. In particular, what happens if the landlord refuses to cooperate? In such cases, will the content of the residential lease agreement affect tenants’ propensity to take action? Will legal information again succeed in alleviating the harmful effect of unenforceable fine print? Study 3 explores these questions.

### Sample and Design

The sample of the third study consisted of all of the participants from Studies 1 and 2 who indicated that they would contact the landlord as a result of the rental problems described in the different scenarios (602 participants, fifty-two percent male, with a mean age of thirty-seven). These participants were subsequently asked to assume that after contacting the landlord, the latter refused to cover the repair expenses. They were then asked how likely they would be, on a seven-item Likert scale (1 = extremely unlikely; 4 = neither likely nor unlikely; 7 = extremely likely) to: (a) contact an attorney for legal advice; or (b) initiate legal proceedings against the landlord. Participants were subsequently asked, in the form of an open-ended question, what considerations they would take into account before deciding whether to take legal action against the landlord. Finally, they were asked to indicate, on a seven-item scale as above, how likely they believed it was that the court would rule in their favor if they decided to take the landlord to court. The last item was included in order to allow measuring the effect of the contract on participants’ legal predictions. This item is important, since even if tenants are unlikely to take the landlord to court, their estimations as to the likelihood of succeeding in trial is likely to affect their perceived bargaining position vis-à-vis the landlord.

These three items (“legal advice,” “legal proceedings,” and “chances of winning”) formed a coherent scale (Cronbach’s α = 0.73), allowing for a computation of a composite measure of participants’ perceived bargaining positions, by averaging participants’ responses to all four questions, with higher values signifying a stronger perceived bargaining position and lower values indicating a weaker perceived position.

### Results

When participants were provided with no information about the law, the contract-term condition that participants were assigned to read significantly affected their perceived bargaining position.[[134]](#footnote-134) Participants’ intentions to take legal action, as well as their estimated likelihood of winning in court, were significantly lower after reading an unenforceable, rather than an enforceable, lease provision.[[135]](#footnote-135) Figure 3 reports the percentage of respondents who intended to seek legal advice or initiate proceedings, as well as the percentage of respondents who believed that they would win in court, based on dichotomization of each item at the scale’s mid-point (i.e., four on each seven-item scale).[[136]](#footnote-136)

As this figure illustrates, the content of the residential lease agreement significantly affected tenants’ legal predictions, so that seventy-four percent of the participants reading an enforceable provision estimated that they would be (slightly to extremely) likely to win in court, while only twenty-two percent of the participants shared this optimism after encountering an unenforceable lease provision.[[137]](#footnote-137)

Importantly, providing tenants with information about the law again successfully mitigated the adverse effect of the unenforceable terms. When participants were provided with information about the law, the differences were small and insignificant in all dependent measures.[[138]](#footnote-138) Figure 4 shows these results in terms of percentage rates, again, based on dichotomization of each item at the scale’s mid-point.[[139]](#footnote-139)

As anticipated, when participants obtained information about the law, their estimated probability of success, as well as their reported intentions to initiate proceedings, were significantly higher than when no such information was provided.[[140]](#footnote-140) Yet, notably, while participants’ estimated likelihood of success was rather high when legal information was obtained, their reported likelihood of initiating proceedings was still rather low: Overall, eighty-one percent of the participants who were informed of the legal rule anticipated that they were likely to win in court, while only fifty-six percent indicated that they would be likely to initiate legal proceedings against the landlord. Indeed, when asked about their considerations for deciding whether to initate proceedings against a non-cooperative landlord, only five percent of the participants mentioned their chances of winning the case, while thirty-seven percent cited the costs associated with going to trial, and the remaining respondents discussed other conisderations, such as mistrust of the legal system, the existence of better alternatives, and so forth. These findings indicate that even if tenants are aware of their legal rights and remedies, few will actually seek legal recourse. However, they also reveal that absent information about the law, tenants’ intuitive formalism—supported by their attendant presumption that contract terms are enforceable—serves as an independent barrier to litigation.

## Study 4: The Role of Pre-Existing Familiarity with the Law

### Motivation, Sample, and Design

When provided with information about the law, participants were significantly less affected by the presence or absence of unenforceable contract terms. Yet, these results should be taken with a grain of salt, because the experimental design rendered the information about applicable law more salient to consumers than it would be if it were communicated through real life channels, such as the media or a government campaign. In real life, unlike the laboratory, consumers are confronted with a myriad of disclosures and educational campaigns. They may have difficulty processing and incorporating relevant information into their decision-making processes when they encounter unenforceable contract terms in real time.

In view of these constraints, and in order to shed additional light on the potentially moderating role of acquaintance with the law, after answering all the questions about their anticipated behavior, the first study’s participants (n = 397) were asked to indicate, on a five-item likert scale, how familiar they believed they were with landlord-tenant law (1 = not familiar at all, 3 = moderately familiar, 5 = extremely familiar). This question was intended to test whether acquaintance with the law moderated the adverse effect generated by unenforceable contract terms, thereby countering the concern that exposing participants to information about the law as part of the experiment would make the legal information more salient than such information typically is in reality.

As recalled, participants were previously asked how likely they would be to contact an attorney for legal advice, to initiate legal proceedings against the landlord, and to prevail in court if they decided to initiate proceedings. These three items then formed a coherent scale (Cronbach’s α = 0.73), allowing for a computation of a composite measure of participants’ likelihood to take action, with higher values signifying a higher likelihood and lower values indicating a weaker likelihood to take action.

For the purpose of exploring whether previous acquaintance with the law interacts with the content of the lease agreement, participants were divided into two groups according to their reported familiarity with landlord and tenant law: (1) participants who indicated that they were moderately to extremely familiar with the law (3 to 5 on the scale) were classified as “legally informed”; and (2) participants who indicated that they were not familiar at all or only slightly familiar with the law (1 or 2 on the scale) were classified as “uninformed.”

The study’s hypothesis was that the contract term condition will interact with participants’ familiarity with the law, such that participants belonging to the “legally informed” group will be significantly more inclined to take action in the “unenforceable” and “no term” conditions than those belonging to the “uninformed” group.

### Results

As the results reveal, participants’ overall behavioral intentions were significantly associated with their reported familiarity with landlord and tenant law: The more familiar participants were with the law (according to their self-reports), the stronger were their intentions to take action at the post-contract stage.[[141]](#footnote-141) Nonetheless, knowledge interacted with the contract term conditions, such that familiarity with the law significantly increased participants’ reported likelihood to take action in the “no term” condition, but did not have a significant effect in the “enforceable term” or “unenforceable term” conditions (although results were in the expected direction across all contract-term conditions).[[142]](#footnote-142) Figure 5 illustrates these results.

Of course, it may be possible that there are other differences between participants who belong to the “ legally informed” group and those who belong to the “uninformed” group, and the results should therefore be considered suggestive, and subject to further investigation. In addition, since participants were asked how familiar they were with tenant and landlord law after being exposed to the experimental manipulation, the contract term that they were assigned to read might have influenced their responses. It is therefore not possible to compare participants’ responses across conditions, only within each condition.

## Study 5: Negative Framing and Legal Fallback Language

The studies conducted so far have shown that tenants’ post-contract positions are weakened by the inclusion of unenforceable lease terms, in comparison to the post-contract positions of tenants with leases having enforceable terms, or even silent contracts. Up to this point, this article has focused on the role of unenforceable terms in shaping tenants’ decisions and behavior. Broadening this inquiry, the primary purpose of Study 5 is to explore how tenants respond to two other types of potentially deceptive drafting techniques: legal fallback language and negative framing.

Many of the standardized agreements consumers sign include clauses stipulating that the terms are “subject to applicable law,” or that they apply “to the extent permissible by law,” and so forth. Such language, which I previously labeled “legal fallback language,” was found to be particularly prevalent in standardized lease agreements.[[143]](#footnote-143) An illustration of legal fallback language can be found in clauses addressing the landlord’s warranty of habitability, which is the warranty that the landlord makes that the premises are fit for human occupation.[[144]](#footnote-144) The law in most U.S. Jurisdictions, including Massachusetts, prohibits landlords from disclaiming their implied warranty of habitability.[[145]](#footnote-145) Notwithstanding this legal arrangement, residential leases in some of these jurisdictions were found to include clauses stipulating as follows:

THERE IS NO IMPLIED WARRANTY [that] THE PREMISES ARE FIT FOR HUMAN OCCUPATION (HABITABILITY) except so far as governmental regulation, legislation or judicial enactment otherwise requires.[[146]](#footnote-146)

As previously suggested, this drafting technique may be intended to shield otherwise unenforceable provisions from judicial intervention, while misinforming tenants about their rights and remedies.[[147]](#footnote-147) Indeed, as the Supreme Judicial Court of Massachusetts observed in *Leardi v. Brown*, when upholding the lower court’s decision to deem unenforceable such a contractual disclaimer of the landlord’s warranty of habitability:

In determining whether an act or practice is deceptive “regard must be had, not to the fine spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public.” … Taken as a whole, [the provision] clearly tends to deceive tenants with respect to the “landlord’s obligation to deliver and maintain the premises in habitable condition.” [It] suggests […] that the implied warranty of habitability is “the exception and not the rule, if it exists at all.”

The Court went on to suggest that the “average tenant, presumably not well acquainted with our decision in Boston Housing Authority v. Hemingway is likely to interpret the provision as an absolute disclaimer of the implied warranty of habitability” and that the clauses “suggests to tenants that their signatures on the lease constitute a waiver of their right ot habitable housing.”[[148]](#footnote-148)

Although, as the Court noted, such a clause has the potential to deceive tenants about their legal rights, it is also plausible that the “legal fallback” language may alert tenants to the possibility that they might be entitled to certain rights and remedies in case the premises are not fit for human habitation. At the very least, it is possible that legal fallback provisions are more advantageous for tenants than are unenforceable provisions that do not use such language. This study seeks to explore how legal fallback language affects tenants’ decisions and behavior, if it all.

Another type of potentially misleading drafting practice is what this Article terms “negative framing.” An example of negative framing is a liability clause which, instead of acknowledging that the landlord is legally liable for any damage caused to the tenant on the leased premises by the landlord’s negligence, stipulates that the landlord will *not* be liable for any such damage, *unless* caused by the landlord’s negligence. Such negatively framed clauses—frequently used in residential lease agreements—are enforceable, but may potentially adversely affect tenants’ decisions and behavior.

Although the impact of negatively framed clauses on post-contract negotiations has not yet been explored, in general, framing effects have been found to influence people’s judgments and decision-making in areas as diverse as medical and clinical decisions, perceptual judgments, consumption choices, and responses to social dilemmas.[[149]](#footnote-149) People’s perceptions and assessments are strongly affected by context, and are typically comparative in nature, rather than context-independent or reflecting absolute measures.[[150]](#footnote-150) Therefore, framing can be a powerful tool, used to influence people’s decisions by presenting information in positive or negative terms. In general, framing effects suggest that “people choose, in effect, between descriptions of options rather than between the options themselves.”[[151]](#footnote-151) People tend to accept the frame presented to them an evaluate their options based on the reference point suggested by the framing.[[152]](#footnote-152)

Most of the framing effect literature has focused on risky choice framing,as introduced by Amos Tversky and Daniel Kahneman in 1981. In this type of framing, the outcomes of a potential choice involving options presenting diverse risk levels are described in different ways. The classical example of risky choice framing effects can be found in Tversky and Kahneman’s “Asian disease problem,” where the researchers demonstrated that discrete choices between a risky and a riskless option of equal expected value depended on whether the options were expressed in positive terms (i.e., lives saved) or negative terms (i.e., lives lost).[[153]](#footnote-153) In the last two decades, researchers have also begun exploring the impact of “attribute framing” on people’s decision making.[[154]](#footnote-154) In this type of framing, “some characteristic of an object or event serves as the focus of the framing manipulation.”[[155]](#footnote-155) Most recent examples of attribute framing involve consumption choices or other forms of item evaluation. For example, Levin and Gaeth showed that perceptions of the quality of ground beef depended on whether the beef was labeled as “75% lean” or “25% fat,” although the two descriptions were substantively identical. They found that the positive framing not only increased the likelihood of purchase, but also the ex post rating of the product when it was consumed. The ground beef was rated as better tasting and less greasy when it was labeled with positive rather than negative language.[[156]](#footnote-156) Similarly, it has been found that car buyers are sensitive to the framing of information on fuel efficiency: When the fuel efficiency of cars is framed in terms of fuel per distance instead of distance per units of fuel, consumers have a more accurate understanding of potential fuel savings. The framing of said information was also found to affect buyers’ car choices.[[157]](#footnote-157)

While the literature on framing effects is flourishing, studies exploring the impact of contract framingon consumers’ judgments and decisions are rather scarce.[[158]](#footnote-158) The few studies that have so far addressed this issue mainly focused on effect of price framing on consumers’ perceptions and decisions.[[159]](#footnote-159) For example, it has been suggested that giving a “cash discount” makes paying with cash seem more attractive to consumers than when they are told that there is a surcharge for credit.[[160]](#footnote-160)

Study 4 was designed to test whether framing of contractual terms in negative, rather than positive, terms affects consumers’ post-contract decisions. More specifically, this experiment examines whether framing a liability clause in a positive or negative manner influences tenants’ post-contract judgments and decisions.

### Sample

Participants (*n* = 482, forty-two percent female, ages 18–61, *M*age = 26, *SD*age = 6.73), all tenants from Massachusetts, were recruited through Prolific Academic[[161]](#footnote-161) and invited to take part in the study.[[162]](#footnote-162) The questionnaire was programmed in Qualtrics and took, on average, three minutes to complete.[[163]](#footnote-163)

### Experimental Design

As in the previous experiments, participants were asked to assume that they were renting an apartment in Boston and read the television scenario introduced earlier. As recalled, in this scenario, participants were instructed to assume that one day they noticed that the roof in their rented apartment was leaking and so notified the landlord. Two months after notifying the landlord, rain water dripped in from the leak in the roof and destroyed their television. Participants were randomly assigned to one of the following contract term conditions:

|  |  |
| --- | --- |
| Enforceable and Positively Framed Term Condition | Now assume that you look at your lease and you notice that it contains a clause entitled “Loss or Damage” stipulating that: “Landlord will be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises by the landlord’s negligence.” |
| Enforceable and Negatively Framed Term Condition | Now assume that you look at your lease and you notice that it contains a clause entitled “Loss or Damage” stipulating that: “Landlord will not be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises, unless caused by the landlord’s negligence.” |
| Unenforceable Term Condition | Now assume that you look at your lease and you notice that it contains a clause entitled “Loss or Damage” stipulating that: “Landlord will not be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises (including damage caused by the landlord’s negligence).” |
| Unenforceable Term with Legal Fallback Language | Now assume that you look at your lease and you notice that it contains a clause entitled “Loss or Damage” stipulating that: “Subject to applicable law, landlord will not be liable for any damage to property or personal injury caused to the tenant or to third parties on the leased premises (including damage caused by the landlord’s negligence).” |

Participants were asked how likely they would be to bear the TV’s repair expenses themselves, without contacting the landlord, as measured on a seven-item scale (1 = extremely unlikely; 7 = extremely likely).

This design was meant to test two main questions: (1) Whether “legal fallback” language alerts tenants as to their rights and remedies under the law, thereby leading them to become more reluctant to bear the TV’s repair expenses themselves (compared to “unenforceable” term with no “legal fallback” clause); and (2) Whether enforceable but negatively framed liability clauses adversely affect tenants, leading them to become more prepared to bear the TV’s repair expenses themselves (compared to enforceable but positively framed clauses).

### Results

As anticipated, the language used in drafting the lease agreements significantly affected participants’ behavioral intentions.[[164]](#footnote-164) As in Study 1, participants were significantly more likely to express willingness to bear the costs of the television’s repair after reading an unenforceable term as opposed to an enforceable clause acknowledging the landlord’s negligence liability.[[165]](#footnote-165) At the same time, the differences in participants’ intentions to bear the costs themselves between those encountering unenforceable and legal fallback provisions were not significant: Participants were as likely to bear the repair costs themselves after reading that the liability clause was “subject to applicable law” as they were after reading an unenforceable clause that did not use the legal fallback language.[[166]](#footnote-166)

There was also no significant difference in participants’ responses after reading an enforceable and positively framed provision compared to an enforceable and negatively framed provision. Although results reflected experimental expectations that participants would be more likely to bear the repair expenses after reading a negatively framed, rather than a positively framed, liability clause, these differences were not significant.[[167]](#footnote-167) Figure 6 illustrates the differences in percentages of participants who indicated that they would be likely to bear the repair expenses according to the different contract term conditions (after dichotomizing the scale based on its mid-point to create a binary “likelihood to bear the expenses” variable).[[168]](#footnote-168)

The study’s findings suggest that the legal fallback technique fails to signal to tenants that the landlord may be liable in negligence, and consequently adversely affects their decisions and outcomes, compared to an enforceable term (whether positively or negatively framed). Tenants are not made more suspicious, and consequently more assertive, when encountering a legal fallback provision. They are as inclined to bear the repair expenses themselves as after reading an unenforceable term without “legal fallback” language. Consequently, legal fallback language might immunize an otherwise unenforceable term from judicial intervention, while generating a similar behavioral effect among the uninformed tenants as unenforceable terms without legal fallback clauses.[[169]](#footnote-169)

With respect to the effect of negative framing, although results pointed at the expected direction, there was no significant difference between tenants who read the negatively framed clause and those who read the positively framed clause, with participants encountering the negatively framed condition similarly likely to bear the repair expenses. The effect of negative framing should be further tested in the future. In the meantime, the results may be taken to suggest that at least in certain domains, negative framing does not significantly alter consumers’ post-contract perceptions and decisions.

## Summary of Results

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The studies reported in this Article have shown that the content of the contractual arrangement significantly influences non-drafting parties’ post-contract decisions. In particular, the findings reveal that the inclusion of unenforceable terms in contracts is harmful to tenants, as it is likely to adversely influence their behavior and decisions in several ways. First, the inclusion of an unenforceable term significantly increased the probability that tenants would bear the repair expenses themselves without even contacting the landlord. While the majority of participants indicated that they would contact the landlord when encountering a rental problem of the kind described in the scenario, participants were about ten times more likely to bear the expenses themselves after reading an unenforceable, as opposed to an enforceable, lease provision.

Second, the presence or absence of an unenforceable term significantly shaped tenants’ perceived bargaining position. Participants who had read an unenforceable term were significantly less likely to take legal action against the non-cooperative landlord than were participants who had read an enforceable provision or simply a silent lease. Admittedly, as the results suggest, there may be various reasons, including the costs associated with legal recourse, for tenants’ disinclination to initiate proceedings against their landlords, even those landlords refusing to comply with enforceable and binding contractual terms. However, as the findings reveal, reported intentions to take the landlord to court were relatively low across all contract term conditions, they were significantly lower when tenants were confronted with unenforceable rather than enforceable lease provisions. These results highlight that unenforceable terms play an autonomous role, serving as distinct barriers to litigation when accompanied by tenants’ formalistic intuitions.

The findings also showed that other prevalent drafting techniques, and particularly “legal fallback” language, could adversely affect tenants at the post-contract stage, compared to enforceable terms. For example, Study 5 revealed that, rather than alerting tenants to the possibility that the exculpatory clauses in their leases were unenforceable, legal fallback language was likely to generate a similar *in terrorem* effect, deterring tenants from trying to negotiate the terms of the contract with the non-cooperative landlord at the post-contract stage.

Importantly, the findings illustrated that when tenants are provided with information about applicable law, the adverse effect produced by these deceptive drafting patterns is significantly reduced. When participants who encountered unenforceable terms were provided with legal information, they were almost as likely to take action against the landlords as were participants encountering enforceable lease provisions. These findings illustrate the important role of information about the law in shaping tenants’ post-contract decisions.

# IV. Policy Implications

## Drafters’ Incentives to Use Unenforceable Terms

As the findings suggest, absent specific information to the contrary, tenants believe that their lease provisions are enforceable and binding, even if such terms are clearly void under the law. Consequently, they might relinquish valid rights and claims when a tenancy-related problem emerges. The potentially adverse effect produced by the inclusion of unenforceable terms may, in turn, provide a distorted incentive for drafting parties. Sophisticated landlords, for example, might realize that they can leverage their superior acquaintance with the law to their advantage by drafting contracts that are unlikely to affect tenants’ ex ante renting decisions, but are likely to affect tenants’ perceptions of their legal rights, and subsequently their *ex post* decisions after a contract has been signed. Therefore, it is perhaps not surprising that there is increasing evidence of the prevalence of unenforceable and deceptive terms in consumer contracts and leases.[[170]](#footnote-170)

The case of Apple provides a good illustration. In 2011, Apple was fined €900,000 by Italian authorities for misleading its customers about its product warranty period. Apple had informed its customers that they were entitled to a one year warranty at no additional cost, while offering to extend the warranty to two or even three years if the customers purchased the “Apple Care Protection Plan.” However, Apple failed to inform its European customers that under European Union Consumer Protection Law, they were automatically entitled to a two-year product warranty free of charge. Strikingly, one year after Apple had been fined, the European Justice Commissioner, Ms. Vivian Reding, reported that Apple continued to misinform consumers about their warranty rights in at least twenty-one out of twenty-seven European Union countries.[[171]](#footnote-171) Or take another example. In 2009, the United States Court of Appeals for the Fifth Circuit held that a liability limitation clause in Air France’s contract of carriage, limiting passengers’ recovery to amount lower than the liability cap under the Montreal convention, was null and void.

As these examples illustrate, sophisticated sellers and landlords may understand that even if consumers suspect that a clause is unenforceable, they might still be deterred from contravening the contractual agreement to which they had “voluntarily” consented, or from challenging its enforceability in court. Non-drafting parties might be discouraged from pursuing their rights in court in light of their perception of the probability, however low, that the contractual clause in question will be upheld.[[172]](#footnote-172) The deterrent effect of the fear of losing in court, despite the unenforceability of the contractual provision in question, has been recognized in numerous contexts. In the case of employment agreements, for example, several scholars have suggested that unenforceable non-compete clauses can induce employees to reject job offers from competitors in order to avoid the risk of a lawsuit.[[173]](#footnote-173) This effect is exacerbated by the American rule that all litigants must bear their own attorneys’ fees and expenses.[[174]](#footnote-174)

The low costs of non-compliance make the situation far more problematic. Even if drafting parties do not actively choose to use legally invalid terms, they may simply lack the incentive to ensure that their contracts comply with the regulatory requirements. When a seller includes an unenforceable term, a disapproving court will typically invalidate the term—but not the contract. The seller in that case does not bear substantial costs or risks: If the worst thing that could happen is that the term will not be upheld, sellers may be incentivized to include it in their contracts. [[175]](#footnote-175)

## Regulatory Solutions

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### Disclosure and Legal Education Campaigns

The problem that unenforceable contract terms present to consumers consists of three interrelated prongs: consumers are typically ignorant of the law determining their rights and duties as buyers; consumers often rely on their contracts to ascertain their rights and duties; and consumers usually presume that their contractual terms are enforceable and binding. Understanding that the problem of unenforceable contract terms is most onerous when all three preconditions are met may help suggest a path for its solution. Indeed, this study’s findings illustrate that tenants, generally assuming that their contracts contain enforceable terms, are influenced by the content of these terms.

However, this study also demonstrates that when information about the law is provided to tenants, the effect of these unenforceable terms is significantly reduced. In fact, informed participants facing an unenforceable term were not significantly more likely to bear the repair costs themselves than participants reading an enforceable lease provision. More importantly perhaps, the findings revealed that disclosure mandates may have an important role ex post, even when the residential lease agreements do not contain unenforceable terms. Indeed, the results showed that participants reading enforceable terms, describing their rights and remedies under the law, were significantly less likely to give up their rights than those reading silent contracts. These findings illustrate that prohibiting landlords from including certain terms in their lease agreements is not as efficient as requiring them to disclose information through their leases. Therefore, it is essential that regulators seeking to enhance consumer protection insist on measures requiring that consumers be informed about their rights and remedies under the law.

As acknowledged earlier, the experimental findings should be interpreted with caution: The difference between people’s ability to process simplified information conveyed to them in a survey and their ability to process information in real-time should not be discounted or ignored. However, the study’s findings can at least be taken to suggest that information about the law, if *adequately designed and conveyed*, may improve the non-drafting party’s positions in post-contract negotiations.

Disclosure duties are already widely used in various consumer sectors, in part because disclosure regulation is considered less intrusive than other regulatory measures.[[176]](#footnote-176) Notably, however, disclosure mandates are typically targeted at informing consumers about the product’s *attributes*: They are often designed to alert consumers as to non-salient features of the transaction, in view of the concern that consumers might not fully take these features into account when making their purchasing decisions.[[177]](#footnote-177)

This Article seeks to advocate for a different type of disclosure: disclosure of information on *consumers’ rights and remedies under the law*.[[178]](#footnote-178) Disclosure regulation is often justified when sellers have more accurate information than consumers, and they are unlikely to disclose it voluntarily.[[179]](#footnote-179) While sellers presumptively have better information about their products’ attributes (and sometimes even about consumers’ product use-patterns), consumers and tenants presumably have an equivalent access to information about the law governing their transactions. In fact, information about the law is just a mouse-click away. Yet, as the study’s findings suggest, tenants (and consumers more generally) almost never search for information about their legal rights and remedies, and often perceive their contracts as accurate sources about the legal state-of-affairs.

Landlords, in turn, do not have an incentive to voluntarily inform tenants about their mandatory protections through the lease. In fact, they have a perverse incentive. In an informal interview with a residential landlord from Boston, the latter admitted that he deliberately refrained from disclosing information about the tenant’s rights and remedies in the leases he used, explaining that “the law applies whether or not it’s in the lease, but if you mention it there, you risk drawing the tenant’s attention to it. Now if I make even a tiny mistake, the tenant knows how to retaliate.”[[180]](#footnote-180) In my previous research, I found that the vast majority of the tenants’ mandatory rights and remedies are not mentioned in any of the sampled leases.[[181]](#footnote-181) I therefore concluded that “it seems that the drafters of these leases intentionally refrain from using any term that might armor tenants with information that could backfire against the landlord.”[[182]](#footnote-182)

In light of landlords’ superior information and perverse incentives to disclose information about the law to tenants, mandated disclosure may be warranted. The problem, however, is that sellers might fail to meet their disclosure obligations, just as they currently fail to meet the substantive obligations that the law now imposes.[[183]](#footnote-183) In fact as my previous research revealed, landlords in Massachusetts often fail to meet the minimal disclosure obligations that the law currently imposes.[[184]](#footnote-184)

Even if landlords complied with the regulatory disclosure requirements, consumers might suffer from information overload, such that disclosing said information would be useless or even harmful.[[185]](#footnote-185) As previously observed, “in any given unit of time, there is a limit to the amount of information people can perceive and process, and once this limit is surpassed, the quality of decisions tends to deteriorate.”[[186]](#footnote-186)

Finally, because sellers are incentivized to keep consumers ignorant of their rights and remedies, they might use deceptive techniques, like legal fallback language, in order to misinform consumers about the law without exposing themselves to legal sanctions. As Michael S. Barr, Sendhil Mullaintahan, & Eldar Shafir recognize, “whatever gave the discloser incentives to confuse consumers remains in the face of the regulation. While officially complying with the rule, there is market pressure to find other means to avoid the salutary effects on consumer decisions that the disclosure was intended to achieve.”[[187]](#footnote-187)

These caveats are real, but it may be possible to overcome them, at least to a certain extent, by launching government information campaigns instead of requiring firms to disclose the relevant information themselves; and by designing “smart disclosures”—which are both simple and salient.[[188]](#footnote-188)

Simple disclosure should include only the necessary information, so as to ease the processing of the relevant information in real-time and to prevent tenants from facing disclosure overload.[[189]](#footnote-189) This means, for example, that it may be desirable to focus on only the most important rights and remedies granted to tenants under applicable law, such as the right to habitable housing (known as the landlord’s warranty of habitability) or the right to pay rent within 14 days of an eviction notice in order to cure the breach and avoid eviction.

Simplicity also means that the information should be conveyed in an easily comprehensible language, without complex legal jargon and unfamiliar terminology. Saliency requires that the legal information will be prominently disclosed (rather than simply buried in the fine print), such that tenants will be made aware of it. For example, regulators could use a “warning box” of the type recently proposed by Ian Ayres and Alan Schwartz.[[190]](#footnote-190)

Admittedly, many of the existing disclosure mandates are poorly designed, and are consequently ineffective. Yet, this Article’s findings suggest that disclosure policies may be useful, and are not inevitably doomed to fail. Smart and simplified disclosure regulation is gradually evolving, and has proven to be effective to at least some extent in various consumer markets.[[191]](#footnote-191)

### Statutory Form Leases

Another potential regulatory solution involves the imposition of statutory form leases. Landlords could be required to use one of several pre-approved leases.[[192]](#footnote-192) Such forms will accurately reflect the law, informing tenants’ of their mandatory rights, duties, and remedies. Such a solution may be perceived as a more coercive intervention at first glance, but it should be kept in mind that the law already imposes multiple substantive obligations and liabilities on the landlord, and prohibits landlords from disclaiming or limiting these duties and liabilities through their leases. A statutory form lease will only disclose the mandatory arrangements that the regulator has already chosen to impose on the landlord. In a sense, obliging landlords to use statutory form leases may therefore be seen as a form of comprehensive disclosure mandate, rather than a stronger, more coercive, intervention in the market.

As this study’s findings demonstrate, silent leases, and not only leases containing unenforceable terms, might be harmful to tenants: When leases are silent about a certain aspect of the landlord-tenant relationship, tenants—who are often unaware of their rights—are more likely to bear costs that the law imposed on the landlord than tenants had a lease agreement containing an enforceable term. Moreover, the study’s findings reveal that tenants are unlikely to search for information about their rights and remedies elsewhere, at least when relatively small stakes are involved.

Since evidence suggests that the vast majority of the tenants’ rights and remedies are almost never mentioned in the leases currently used in the market,[[193]](#footnote-193) requiring landlords to use one of several statutory form leases may substantially enhance tenants’ protection at a relatively low administrative cost. Notably, such a solution has already been adopted in the insurance market.[[194]](#footnote-194)

An in-between solution, somewhere on the spectrum between imposing more disclosure obligations and requiring landlords to use a statutory form lease, would be to require landlords to disclose some of the most basic mandatory rights and remedies granted to tenants, in a Schumer-type box. For example, landlords could be required to attach a statement of tenants’ legal rights and the landlord’s legal obligations in a salient box in the first page of the lease.

Again, as the Article’s findings suggest, some landlords might fail to offer compliant leases or use the required statutory forms. Indeed, the findings reveal that any regulatory solution is doomed to failure if it is not adequately enforced. It is therefore important to complement these regulatory measures with enforcement—both public and private, as will be discussed later in this section.

### Private Enforcement Mechanisms

#### Deceit and Consumer Protection Laws

The Article’s findings reveal the deceptive effect of unenforceable terms. The question that immediately arises is whether relief could be sought by the common law doctrine of deceit or through consumer protection laws prohibiting sellers from engaging in unfair or deceptive acts or practices.[[195]](#footnote-195) Such laws, also known as Unfair and Deceptive Acts or Practices Statutes (or UDAP laws), have been adopted in all states in the U.S., and they often allow for punitive (double or treble) damages.[[196]](#footnote-196)

1. Deceit

The common-law tort of deceit is traditionally defined as “a fraudulent or deceptive misrepresentation of fact made with the intent to deceive or mislead another, with that other acting in reliance upon the misrepresentation to his detriment.”[[197]](#footnote-197) The elements of the action of deceit, as characterized by the separate titles of the Restatement (Second) of Torts are: fraudulent character of misrepresentation; expectation of influencing conduct; justifiable reliance; causation; and damages for fraudulent misrepresentation.[[198]](#footnote-198)

The inclusion of a term in a contract is undoubtedly a representation, but the question is whether the use of unenforceable terms constitutes a *fraudulent or deceptive misrepresentation.* Historically, the action of deceit was restricted to misrepresentation of *fact*, not law.[[199]](#footnote-199) There was no liability for “an opinion on a question of law, or for a misrepresentation or misunderstanding as to the law, as to which both parties are presumed to have equal knowledge.”[[200]](#footnote-200) The underlying rationale was that “statements of law […] are commonly said to be mere assertions of opinion, which are insufficient as a basis for deceit […] or equitable relief.”[[201]](#footnote-201)

The rationales justifying excluding misstatements of law from the scope of deceit seem to be irrelevant in the case of the use of unenforceable terms in residential lease agreements (and consumer contracts more generally). First, the residential rental market, like many other types of consumer markets, is characterized by asymmetric and imperfect information. Notwithstanding that both parties may be imperfectly informed, landlords typically know more about the regulatory rules governing tenant-landlord relations than do their tenants, or at least landlords may find it relatively easier and less expensive to become informed.

As this research demonstrates, when landlords misstate the law in their leases, most tenants assume that their leases accurately reflect the law and rely on the information provided to them in the contract rather than try to obtain information independently. Indeed, as the study’s findings suggest, tenants rarely search the internet, consult others, or seek legal advice, even when their leases contain no information, partial information, or unenforceable terms.

Second, assertions of law should not be perceived as mere *expressions of opinion* here, at least in cases where the drafting party is a residential rental company, a landlords’ association, a housing attorney, or a commercial publisher. In such cases, the contract drafter is presumed to be legally informed, and should be expected to represent this legal knowledge accurately. Admittedly, this presumption becomes questionable in the context of individual landlords, the “moms and pops”, who own and operate only few apartments. Still, it may be argued that even imperfectly informed “moms and pops” can gain information on their lease terms’ enforceability relatively more easily (and cheaply) than their tenants.[[202]](#footnote-202) Even if individual landlords are often uninformed of the relevant legal rules, they will typically enter into more rental agreements than their tenants. They will usually need to obtain information about landlord-tenant laws themselves, and could pass the costs of obtaining said information to tenants, through the rental price.[[203]](#footnote-203)

More importantly, perhaps, it seems that the law has gradually shifted in this regard: courts and legislatures increasingly recognize misstatements of law as fraudulent misrepresentations.[[204]](#footnote-204) Indeed, the American Law Institute explicitly mentions *misrepresentation of law*, avoiding the distinction between misstatements of fact and law, by stipulating as follows:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[[205]](#footnote-205)

When the terms expressing the landlord’s “judgment as to the legal consequences that would be attached to the particular state of facts if the question were litigated” are likely to mislead the tenant about the law, a deceit claim may be brought to court.[[206]](#footnote-206) Yet, the tenant will still have to surmount certain hurdles.

First, the tenant might not be able to prove that the landlord’s representation was meantto induce the tenant to rely on it. Indeed, it is plausible that unenforceable terms are sometimes used unintentionally, out of landlord’s ignorance of the legal rule or due to unexpected changes in the law. But even in cases where the landlord *intentionally* uses unenforceable terms, the tenant will face the often insurmountable burden of proving the landlord’s state of mind. While it may be presumed that if residential rental companies, who are sophisticated and repeat market players often assisted by lawyers, use unenforceable terms knowingly, the same could not be so easily presumed when “moms and pops”, who rent out few apartments, are involved.

One solution is to withdraw the intentionality requirement and adopt a strict liability standard. This solution may be justified from an economic standpoint, to the extent that most landlords (even if imperfectly informed “moms and pops”) are typically the “least cost avoiders,” or at least, can gain the information on their lease terms’ enforceability relatively more easily (and cheaply) than their tenants.[[207]](#footnote-207) At the same time, it might seem overly harsh to impose liability on a landlord who used unenforceable terms inadvertently, or whose lease makes legal assertions that are reasonably defensible at the time of contracting, but later become indefensible, due to changes in the law.[[208]](#footnote-208)

Even if strict liability regime is adopted, the tenant might still not be able to prove “pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.” Actual damages may be difficult to assert, and the tenant’s reliance on the contract may not be deemed “justifiable” as long as he or she could have easily become informed of the applicable legal rule. Yet, importantly, as the study’s findings suggest, tenants often unquestioningly assume that their contracts accurately reflect the law, and therefore do not realize that they need to obtain more information elsewhere.[[209]](#footnote-209) As Bailey Kuklin notes:

One naturally assumes that the offeror has substantial reason to be fully aware of the relevant law and, though the offeror himself may not be trained in the law, he would go to the trouble to find out from one who is if there is any significant doubt. One cannot survive in a business by guessing about the controlling law.[[210]](#footnote-210)

In view of these hurdles, it is important to consider another venue: tenants could bring a UDAP violation claim.

1. UDAP Laws

Unfair and Deceptive Acts or Practices Statutes, or UDAP laws, adopted in all states in the U.S., are considered “the main lines of defense protecting consumers from predatory, deceptive, and unscrupulous business practices.”[[211]](#footnote-211) UDAP laws prohibit deceptive practices in consumer transactions, although they vary widely from state to state: Some UDAP laws contain a general prohibition on deception, some prohibit misstatement of fact, and some address both misstatements of fact and law.

Examples for the latter group include the Michigan Consumer Protection Act, which prohibits businesses from “entering into a consumer transaction in which the consumer waives or purports to waive a right, benefit, or immunity provided by law, unless the waiver is clearly stated and the consumer has specifically consented to it;”[[212]](#footnote-212) The West Alaska Unlawful Acts and Practices Act, which similarly determines that the term “unfair or deceptive acts or practices” includes, *inter alia*, “representing that an agreement confers or involves rights, remedies, or obligations that it does not confer or involve, or that are prohibited by law;”[[213]](#footnote-213) And the Massachusetts Consumer Protection law, deeming the inclusion of certain unenforceable clauses (*e.g*., a penalty clause or a tax escalator clause not in conformity with the applicable law and a clause requiring advanced payments in excess of those allowed by the law) as “unfair or deceptive acts or practices.”[[214]](#footnote-214)

This Article proposes that UDAP laws which only refer to misstatements of fact, or only generally refer to deceptive statements, should be similarly interpreted as incorporating a prohibition on misrepresentations of law.

### (3) Class Actions and Punitive Damages

In addition to individual claims, class actions may also be used to combat the inclusion of unenforceable terms in consumer contracts. Class action is an efficient tool, enabling consumers to obtain redress by aggregating multiple individualized claims when the dollar amount per person is relatively small (thereby overcoming a potential problem of collective action).[[215]](#footnote-215) Additionally, it is likely to solve the problem of relying on misinformed tenants to bring claims to court, by incentivizing lawyers to inform tenants about their rights. From the landlord’s perspective, this mechanism raises deterrence not only by increasing the probability of detection, but also, and perhaps mostly, by increasing the expected magnitude of the sanction.

In the specific context of residential leases, many jurisdictions in the United States allow tenants to bring class action suits based on the inclusion of unenforceable terms in a rental agreement, provided that the class of tenants suffered a “similar injury” as a consequence.[[216]](#footnote-216) Yet, courts in many jurisdictions have adopted a hostile approach towards the class action mechanism. In Massachusetts, for example, the Supreme Judicial Court held that: “a plaintiff bringing an action for damages [. . .] must allege and ultimately prove that she has, as a result, suffered a distinct injury or harm that arises from the claimed unfair or deceptive act itself.”[[217]](#footnote-217) This ruling bars tenants from pursuing claims against their landlords for including unenforceable terms in their leases, unless they can prove actual harm. In a similar vein, the Second Appellate District Court in Los Angeles County recently upheld a lower court’s decision to deny certification of a class by a group of tenants asking to bring a class action suit. The court determined that the claim for breach of the warranty of habitability was too individualized for class certification.[[218]](#footnote-218)

Such decisions severely impede tenants from suing their landlords by undermining one of their strongest tools: the class action mechanism. Given such rulings, tenants are forced to sue and resolve rental disputes individually, and are likely to be deterred from filing such suits in light of the attendant litigation costs. Perhaps even more problematic is the fact that sellers and landlords often insert class action waivers, choice-of-law clauses, or arbitration provisions, into their boilerplate agreements.[[219]](#footnote-219) These clauses are generally enforceable, and may therefore be used by companies to shield themselves from class actions.[[220]](#footnote-220)

### Public Enforcement Mechanisms

The Article’s findings highlight the importance of complementing private enforcement with strong public enforcement mechanisms. Indeed, the findings indicate that even substantive regulation will fail to produce its intended effect if it relies on consumers to bring claims to court, as consumers may often fail to realize that the contractual terms to which they have consented are void and unenforceable.

Public enforcement can take place both *ex ante*, before the transaction is completed, and *ex post,* after the contract is entered into.

#### Ex Ante Regulation: A Pre-Approval Requirement

In terms of *ex ante* regulation, regulators can require landlords to pre-approve their standard form leases before using them.[[221]](#footnote-221) This could be achieved by establishing a special tribunal that is authorized to pre-approve standard form leases—or, alternatively, an administrative agency with a similar regulatory power. Landlords using leases without administrative or judicial approval could then be subject to relatively high sanctions. Conversely, landlords using contracts that have been pre-approved could so indicate on their forms, thereby bestowing upon their leases the benefit of a strong presumption of enforceability (or even immunity from judicial intervention).[[222]](#footnote-222) In the U.S. insurance market several states require pre-approval of certain policy forms by the regulator.[[223]](#footnote-223) In the context of residential lease agreements, this solution might be less compatible, however, as the residential rental market consists of both residential rental companies and individual landlords (“moms and pops”), who own and operate few apartments. It might therefore be perceived as too burdensome and costly, both to the individual landlords and to the state (that would incur the costs of administrative or judicial review), to require each and every landlord to have his or her lease approved before using it.

#### Ex Post Enforcement: Prosecuting Mechanisms

In terms of ex post solutions, public agencies could be authorized to file claims against non-compliant landlords on behalf of the tenants.

If agencies could bring claims to court on behalf of tenants, the problem of the latter’s imperfect information and misperceptions may be significantly mitigated. Such a solution is not visionary. Section 5 of the Federal Trade Commission Act already authorizes the Federal Trade Commission (FTC) to take appropriate action when unfair or deceptive acts or practices are discovered, and sets out the FTC’s investigative powers and enforcement authority.[[224]](#footnote-224) The FTC is authorized to enforce the requirements of consumer protection laws by both administrative and judicial means. In a similar vein, the FTC could be authorized to ensure landlords’ compliance with the substantive requirements under landlord and tenant law. Agencies with similar authorities already exist in some jurisdictions. In Massachusetts, for example, the Attorney General is authorized by law to bring claims against any landlord suspected to be engaging in unfair or deceptive acts or practices.[[225]](#footnote-225)

# Conclusion

In view of the accruing evidence that the inclusion of unenforceable contract terms in standardized agreements is prevalent in consumer markets, this Article explored the implications of this drafting practice for consumers. Building on previous work showing that unenforceable terms are regularly included in residential rental agreements, this Article elucidates the role that these terms play in shaping tenants’ post-contract decisions and behavior.

The experimental findings presented in this Article suggest that if tenants are uninformed of the law governing their relations with landlords, they are likely to be adversely affected by the inclusion of unenforceable terms in their lease agreements, as they are generally apt to perceive terms embedded in contracts as enforceable and legally binding. Consequently, while tenants are not necessarily likely to take the fine print into account before making their renting decisions, they are nonetheless likely to be affected by the fine print ex post, after a tenancy-related problem or a dispute arises. Consequently, tenants—and consumers more generally—are prone to give up their legal rights and remedies. The study’s participants, for example, were about ten times more likely to bear repair expenses that the law imposed on the landlord after reading an unenforceable, rather than enforceable, lease term.

While these findings appear disturbing in terms of protecting consumers, there is also cause for optimism: Informing non-drafting parties about their rights under the law substantially mitigates the harm generated by the presence of unenforceable contract terms. Therefore, solutions based on increasing consumer awareness of the legal environment, combined with strong public enforcement and class action mechanisms, may help overcome these deceptive market practices.

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2. *See, e.g.*, 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 (2014) [hereinafter Bakos et al.] (finding that only one or two out of every one thousand retail software buyers will examine the license agreement before making the purchase, and proposing that these results cast doubt on the relevance of the “informed minority” mechanism for preventing sellers from using one-sided terms in their standardized agreements); Omri Ben-Shahar & Carl E. Schneider. More Than You Wanted to Know: The Failure of Mandated Disclosure (2014) [hereinafter Ben-Shahar & Schneider] (surveying the multiple evidence that consumers do not read the fine print and arguing that regulation which focuses on increasing disclosure in contracts is useless, if not harmful); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. Chi. L. Rev. 2077, 2102–105 (2014) [hereinafter Zamir] (surveying the empirical evidence suggesting that consumers barely read the fine print, thereby refuting the “informed-minority” hypothesis); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 Mich. L. Rev. 983, 984 (2006) [hereinafter Gilo & Porat] (observing that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand.”); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Law*, 66 Stan. L. Rev. 545 (2014) [hereinafter Ayres & Schwartz] (proposing a solution to the “no-reading” problem in consumer contracts); Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117, 118 (2017) [hereinafter Wilkinson-Ryan] (beginning her article by suggesting that “serious observers of modern contracting concede that the current state of the world is disclosure overload”); David A. Hoffman, *From Promise to Form*: *How Contracting Online Changes Consumers*, 91 N.Y.U. L. Rev. 1595, 1595–96 (2016) [hereinafter Hoffman] (“Consumers see a larger number of contracts daily than they used to, with longer terms and under novel conditions.”). [↑](#footnote-ref-2)
3. *See, e.g.*,Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) [hereinafter Radin] (noting that non-negotiable boilerplate terms regularly deprive non-drafting parties of their most basic rights, such as their right of access to justice); Edith Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 Seattle U. L. Rev. 469, 515 (2007) (observing that drafting parties often hide one-sided terms in their boilerplates and surveying the judicial treatment of these unfavorable hidden terms); Zamir, *supra* note 1, at 2096 (observing that “given the documented one-sidedness of these [standard-form] contracts, there is hardly a more pressing challenge facing contract law”); Hoffman, *supra* note 1, at 1596 (suggesting that “in an online ‘orgy of contract formation,’ firms have seized new opportunities to shift risks to consumers by imposing unread terms”); Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (Oxford U. Press 2012) [hereinafter Bar-Gill] (showing how sellers exploit consumers’ bounded rationality and systematic cognitive biases through contract design); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003) [hereinafter Korobkin] (arguing that drafting parties have an incentive to introduce self-serving terms in view of the non-drafting parties’ bounded rationality); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsewhere*, 92 Va L. Rev. 565, 591 (2006) (“[I]f consumers […] have no information (or only poor information) about the effect of the contract terms used by any individual seller, each seller will […] have an incentive to degrade the “quality” of its terms.”); Nancy S. Kim, Wrap Contracts: Foundations and Ramifications 29 (2013) (suggesting that sellers use one-sided clauses, such as dispute resolution provisions, to hinder buyers’ access to the judicial system). For a similar claim, *see* J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements,* 59 Vand. L. Rev. 1735 (2006). [↑](#footnote-ref-3)
4. *See, e.g.*, Eyal Zamir and Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 Jerusalem Rev. Leg. Stud. 137, 162–67 (expressing support for “mandatory regulation of the content of standard-form contracts through statutory or judicial invalidation of some types of clauses or by positively dictating others,” and explaining why they believe such regulation is superior to alternative solutions, such as disclosure); Gilo & Porat, *supra* note 1, at 985 (“There is ample writing discussing the justifications for legislatures’ and courts’ intervention in consumer standard-form contracts.”); Radin, *supra* note 2, at 246 (“State legislatures should consider including in their consumer protection legislation explicit disallowance of waiver of important recipient rights, as legislatures have done in provisions regarding residential leases.”); Korobkin, *supra* note 2, at 1294 (arguing that the proper policy response to non-drafting parties’ bounded rationality is greater use of mandatory contract terms and judicial modification of the unconscionability doctrine); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. Pitt. L. Rev. 21, 23 (1984) [hereinafter Slawson] (proposing that the “reasonable expectations” of the parties be enforced); Todd Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 Harv. L. Rev. 1174, 1262 (1983) [hereinafter Rakoff] (suggesting that “invisible terms” in adhesion contracts should be presumptively unenforceable); Karl N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law (Book Review)*, 52 Harv. L. Rev. 700, 704 (1939) [hereinafter Llewellyn] (arguing that unreasonable form terms should not be enforced); Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. Miami L. Rev. 1263, 1299 (1993) [hereinafter Meyerson] (suggesting that consumers should be bound only to the terms they know and understand); Jeffrey L. Harrison, *Class, Personality, Contract and Unconscionability*, 35 Wm. & Mary L. Rev. 445, 489 (1994) [hereinafter Harrison] (calling for an “expanded notion of unconscionability” to prevent “uneven exchanges”). [↑](#footnote-ref-4)
5. *See* Part I.B., *infra*,for a brief overview of the substantive regulation adopted in the United States. [↑](#footnote-ref-5)
6. *Id.* Substantive regulation has been adopted in the labor market as well. *See, e.g.,* Juan C. Botero et al., *The Regulation of Labor*, 119 Q. J. Econ. 1339 (2004). [↑](#footnote-ref-6)
7. *See* Part I.C., *infra*, for an overview of existing evidence for non-compliance with substantive regulation. [↑](#footnote-ref-7)
8. Meirav Furth-Matzkin *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Analysis1 (2017) [hereinafter Furth-Matzkin] (finding, based on a sample of lease agreements from Massachusetts, that residential leases regularly include unenforceable terms). [↑](#footnote-ref-8)
9. *See*, *e.g.*, Rakoff, *supra* note 3 (arguing that standard form terms are often unreasonable and should be considered presumptively unenforceable); Radin, *supra* note 2, at 4–7 (suggesting that boilerplate provisions often negate or restrict people’s rights, such as the right to a jury trial, the right of an injured party to receive remedy in torts, and so forth); For research suggesting that drafting parties exploit consumers’ cognitive biases through contract and product design, *see,* *e.g.*, Korobkin, *supra* note 2, at 1206 (arguing that drafting parties have an incentive to introduce self-serving terms in view of the non-drafting parties’ bounded rationality); Bar-Gill, *supra* note 2, at 15–16. (analyzing the ways sellers use contract design to exploit consumers’ systematic cognitive biases); Zamir, *supra* note 1, at 275 (suggesting that unilateral change clauses may survive because loss-averse consumers are reluctant to switch to another supplier even after the contract terms are changed to their detriment). [↑](#footnote-ref-9)
10. For notable exceptions, *see* Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845 (1988) [hereinafter Kuklin] (suggesting that drafting parties have an incentive to include unenforceable terms to generate profit, and exploring the economic and ethical implications of this drafting practice); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 Oh. St. L. J. 1127, 1128–31 (2009) [hereinafter Sullivan] (observing that “there are few empirical studies of the frequency within which unenforceable-as-written clauses appear in contracts,” and examining why these terms “continue to exist”). [↑](#footnote-ref-10)
11. *See* Part I.C., *infra*. [↑](#footnote-ref-11)
12. *See* Furth-Matzkin, *supra* note 11, at 24 (finding that “a total of fifty-one leases, constituting 73 percent of the sample, included at least one unenforceable clause”). [↑](#footnote-ref-12)
13. *See,* *e.g.*,Ben-Shahar & Schneider, *supra* note 1, at 67 (documenting the pervasiveness of disclosures in standardized agreements and noting that it is impossible to diligently read these terms: “[M]uch evidence suggests that people often overlook disclosures, ignore them when they notice them, treat them perfunctorily when they read them, forget and misinterpret much they have read, and incorporate little of their learning into decisions. The Internet transactions of disclosees are easily tracked, so we *know* that nobody reads the terms (like the iTunes contract) they agree to.”); Bakos et al., *supra* note 1, at 17–21 (finding that online software buyers visit the “terms and conditions” webpage at negligible rates). [↑](#footnote-ref-13)
14. *See* Furth-Matzkin, *supra* note 11, at 39 (finding that “a significant portion of the renters who reported incurring a rental problem—as many as 131 tenants out of 258 or 51 percent—reported looking at their leases directly as a result”). *See also* Ontario Report (finding, based on a large-scale survey, that ninety-two per cent of the surveyed tenants reported to have “read” their lease prior to signing it); Warren Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 Mich. L. Rev. 247, 256–57 (1970) [hereinafter Mueller] (finding, based on a survey of 100 tenants from Ann Arbor, that fifty-seven percent of them reportedly read their leases carefully before signing it). [↑](#footnote-ref-14)
15. *See,* *e.g.*, Oren Bar-Gill & Kevin Davis, *(Mis)perceptions of Law in Consumer Markets*, 19 Am. Law & Econ. Rev. 245, 246 (2017) [hereinafter Bar-Gil & Davis] (observing that “people make mistakes about the law” and examining how systematic misperceptions about the law may affect consumer behavior); Mueller, *supra* note 19, at 272–73 (1970) [hereinafter Mueller] (surveying one hundred tenants from Michigan and finding that they often harbor misperceptions regarding the enforceability of exculpatory clauses); Meirav Furth-Matzkin & Roseanna Sommers, *When Fine Print Meets Deception: Exploring Consumer Psychology in “Fraud and Fine Print” Situations* (unpublished manuscript, on file with the authors) [hereinafter Furth-Matzkin & Sommers] (finding that consumers are often unaware that consumer protection statutes in their states may enable them to void a transaction as a result of fraud); Sullivan, *supra* note 15, at 1137 (“Empirical evidence that employees are unaware of even their most basic rights–whether their employer needs a good reason to discharge them–suggests that it would not be hard to convince employees that an overbroad noncompetition clause is valid.”). [↑](#footnote-ref-15)
16. *See* Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers’ Propensity to Sue*, 15 Behav. Sci. & L. 83 (1997) [hereinafter Stolle & Slain] (finding that consumers are reluctant to file meritorious suits if their contracts include questionably enforceable disclaimers of tort liability); Wilkinson-Ryan, *supra* note 1, at 117 (finding that consumers are unlikely to question the enforceability of egregious contract terms, as long as they are included in contracts that they signed, even when these terms rest on shaky legal grounds). [↑](#footnote-ref-16)
17. *See* Part III.D., *infra*. [↑](#footnote-ref-17)
18. *See, e.g.*,Bakos et al., *supra* note 1, at 17–21 (showing that contract readership effectively does not exist); Alleecia M. McDonald & Lorrie F. Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & Pol’y for Info. Soc’y 543, 563–64 (2008) (estimating that if people actually read privacy policies, it would take them 244 hours per year, on average, amounting to $781 billion in lost productivity). [↑](#footnote-ref-18)
19. *See,* *e.g.*, Jeff Sovern et al., *Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. Rev. 1, 4 (2015) [hereinafter Sovern et al.] (reporting that most of the study’s respondents did not know whether the contract they had just read included an arbitration clause, and that those who realized that it did contain such a clause failed to understand its legal implications); Ben-Shahar & Schneider, *supra* note 1, at 11 (“How many men with prostate cancer try to decipher their prospects of cure and of side effects with each of the principal treatments, much less learn and remember enough to use the data? Nearly nobody, since patients do not read, understand, and remember *much* simpler medical information.”). [↑](#footnote-ref-19)
20. *See,* *e.g.*,Debra Pogrund Stark & Jessica Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J. L. & Bus. 617, 656–58 (2009) [hereinafter Stark & Choplin] (noting, *inter alia*, that “one reason why consumers might not read contracts is that the contract forms are often user-unfriendly. Font sizes are often very small, and the clauses within sentences can be very long, which can make it physically difficult and taxing for consumers to read.”); Janan Smither & Curt Braun, *Readability of Prescription Drug Labels by Older and Younger Adults*, 1 J. Clinical Psychol. in Med. Settings 149 (1994) [hereinafter Smither & Braun]. (showing that user-unfriendly features, like font size and length, increase fatigue, particularly among the elderly). *See also* Eyal Zamir, *Law’s Loss Aversion*, *in* The Oxford Handbook of Behavioral Economics and the Law 268, 275 (Eyal Zamir & Doron Teichman eds., 2014) [hereinafter: Zamir 2014] (suggesting that the “non-readership” phenomenon in consumer contracts may be exacerbated by the fact that sellers often present their standard-form contract terms only at the end of the shopping process. By that point in time, consumers might avoid reading the contract because of the fear that the time and effort already spent in the buying process would go to waste if they find the terms unacceptable). For a similar observation, see Shmuel Becher, *Behavioral Science and Consumer Standard Form Contracts*, 68 La L. Rev. 117 (2007). [↑](#footnote-ref-20)
21. See, *e.g.*, Gilo & Porat, *supra* note 1, at 986 (observing that sellers often use these features in order to impose transaction costs on consumers from which the sellers expect to gain). For evidence that user-unfriendly features increase fatigue, *see*: George E. Legge, *Psychophysics of Reading: Font Effects in Normal and Low Vision*, 37 Investigative Ophthalmology & Visual Sci. 1492 (2007); Jorge Frascara, *Typography and Visual Design of Warnings*, *in* Handbook of Warnings 385, 385–403 (2006); Wallace H. Wulfeck et al., *Document and Display Design*, 4 Advances in Reading/Language Res. 183 (2006). [↑](#footnote-ref-21)
22. *See,* *e.g.*,Ayres & Schwartz, *supra* note 1 (responding to the problem of search costs resulting from the overwhelming number of terms and disclosures by which consumers are deluged); Wilkinson-Ryan, *supra* note 1, at 118–20 (recognizing “the now-uncontroversial fact of universal non-readership”); Hoffman, *supra* note 1, at 1605 (“[O]f course, almost no one reads any of these additional, increasingly long contracts.”). [↑](#footnote-ref-22)
23. *See,* *e.g.*, Bakos et al., *supra* note 1, at 3. [↑](#footnote-ref-23)
24. Agatah Blaszczak-Boxe, *Give Up Firstborn for Free Wi-Fi? Some Click ‘I Agree,’* CNET (Sept. 30, 2014),http://www.cnet.com/news/give-up-firstborn-for-free-wi-fi-some-click-i-agree/ [hereinafter Blaszczak-Boxe]. [↑](#footnote-ref-24)
25. *7,500 Online Shoppers Unknowingly Sold Their Souls*, Fox News (Apr. 15, 2010), http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls.html. [↑](#footnote-ref-25)
26. *See, e.g.*,Korobkin, *supra* note 2, at 1206; Bar-Gill, *supra* note 2, at 15–16. [↑](#footnote-ref-26)
27. *See, e.g.,* Radin, *supra* note 2, at 4–9 (surveying the different terms that firms use in order to deprive consumers of their legal rights and remedies). [↑](#footnote-ref-27)
28. Bar-Gill, *supra* note 2; Korobkin, *supra* note 2. In the employment context, Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 Michi. St. L. Rev. 963, 981 (2006) (“It is likely that [. . .] cognitive failures occur when workers assess standardized terms like noncompete agreements. Even if employees legitimately prefer a higher salaried job with a noncompete to a lower paying job with no restraints on competition, there is no reason to assume that an efficient trade has been reached regarding the scope of the restraint, and it may well be that the standardized terms adopted by the employer overreach.”). [↑](#footnote-ref-28)
29. *See*, *e.g.*, Gilo & Porat, *supra* note 1, at 985 (observing that “there is a risk that the supplier will extract payment from the consumer without the latter being aware of the fact that the payment does not reflect the reduction of value due to the harsh clause.”); *see also* Thomas J. Miceli & Kathleen Segerson, *Liability versus Regulation for Dangerous Products when Consumers Vary in their Susceptibility to Harm and May Misperceive Risk* 9 Rev. Law & Econ. 341 (2013) (arguing that when consumers misperceive risk, the application of strict product liability may be preferred because the price of the product will then accurately reflect the associated risk). [↑](#footnote-ref-29)
30. Bar-Gill, *supra* note 2, at 15–16; Michael S. Barr, Sendhil Mullaintahan, & Eldar Shafir, Behaviorally Informed Financial Services Regulation (New Am. Found. 2008) [hereinafter Barr et al.], at 12. [↑](#footnote-ref-30)
31. Bar-Gill, *supra* note 2, at 15–16. [↑](#footnote-ref-31)
32. *Id*. at 16. [↑](#footnote-ref-32)
33. *Id.*  [↑](#footnote-ref-33)
34. *See* Radin, *supra* note 2, at 217–42; Korobkin, *supra* note 2, at 1294; Slawson, *supra* note 3; Rakoff, *supra* note 3; Llewellyn, *supra* note 3; Meyerson, *supra* note 3; Harrison, *supra* note 3. [↑](#footnote-ref-34)
35. *See,* *e.g.*, Ben-Shahar & Schneider, *supra* note 1, at 4 (“Mandated disclosure has been the principal regulatory answer to some of the principal policy questions of recent decades.”); Bar-Gill, *supra* note 2, at 7 (focusing the discussion on the single regulatory tool of disclosure mandates); Radin, *supra* note 2, at 219 (“Even when the need for regulation [. . .] is democratically recognized, the U.S. preference for private, market solutions leads to a tendency to provide for disclosure rather than substantive regulation, so that individuals may make up their own minds about what to do.”). [↑](#footnote-ref-35)
36. The Truth in Lending Act (TILA) requires creditors to disclose information about the amount of the loan, the annual percentage rate (APR), and finance charges, including late fees. *See* 15 U.S.C. § 1637(c); 12 C.F.R. §§ 226.18, 226.5a. The Credit Card Accountability Responsibility and Disclosure Act of 2009 (the CARD Act), and its implementing regulations enhanced the mandatory disclosure regulations governing credit cards. These require that issuers disclose a Minimum Payment Warning on the monthly bill that includes information on the amount of time it will take to pay off the balance and the aggregate total payment if only the minimum amount is paid each month. The CARD Act also compels issuers to calculate and disclose the monthly payment that would suffice to pay off the cardholder's balance in three years, as well as the savings, in total payments resulting from this faster repayment schedule. *See,* *e.g.*, Bar-Gill, *supra* note 2, at 55, 111. [↑](#footnote-ref-36)
37. For example, the Magnusson-Moss Warranty Act requires that a warranty disclaimer be conspicuously disclosed in simple and readily understood language. *See* 15 U.S.C. § 2301 et seq., 1975. *See,* *e.g.*, Radin, *supra* note 2, at 220. For an overview of the Magnusson-Moss Warranty Act and its impact on product warranties, *see* Michael J. Wisdom, *An Empirical Study of the Magnusson-Moss Warranty Act*, 31 Stan. L. Rev. 1117 (1979). [↑](#footnote-ref-37)
38. *See,* *e.g.*, Furth-Matzkin, *supra* note 11, at 10; Unif. Residential Landlord & Tenant Act (1972). [↑](#footnote-ref-38)
39. *See,* *e.g.*, Radin, *supra* note 2, at 219–20; Ben-Shahar & Schneider, *supra* note 1, at 33 (“Thousands of disclosures provide billions of words to help us with millions of decisions, typically unfamiliar and complex, often consequential.”); Bar-Gill, *supra* note 2, at 7, 105–15, 174–84, 238–47 (surveying the ubiquitous disclosure requirements in the mortgage, credit card, and cellular industries). [↑](#footnote-ref-39)
40. Ben-Shahar & Schneider, *supra* note 1, at 4 (observing that “mandated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure” and explaining why disclosure fails, proposing that “it cannot be fixed”); *see also* Radin, *supra* note 2, at 219 (recognizing that “the propensity to use disclosure as the solution tends to overwhelm recipients with disclosures and firms with paperwork (or its electronic equivalent) without accomplishing much.”); Wilkinson-Ryan, *supra* note 1, at 119 (“The requirement of disclosure in consumer contracting is utterly uncontroversial. And yet, disclosure requirements lead inexorably to more disclosures. The resulting state of affairs is a deluge of unreadable terms that courts and policymakers simultaneously require and regret.”); Zamir & Farkash, *supra* note 3, at 161 (“While some disclosure techniques do make things better, generally speaking they fail to meet their stated goals”). [↑](#footnote-ref-40)
41. *See, e.g*., Zamir & Farkash, *supra* note 3, at 158 (observing that “the task of providing customers with reasonably complete and accurate information […] is made even more challenging when one takes into account a host of cognitive limitations and heuristics that affect people’s attention to, and perception and processing of information”). [↑](#footnote-ref-41)
42. *See,e.g.,* Ryan Bubb & Rischard Pildes, *How Behavioral Economics Trims its Sails and Why*, 127 Harv. L. Rev. 1593, 1648–49 (2014) (suggesting that sellers have strong incentives to find ways to undermine the effectiveness of mandated disclosure). [↑](#footnote-ref-42)
43. Ben-Shahar & Schneider, *supra* note 1, at 12. *See, in contrast,* Ryan Bubb, *TMI: Why the Optimal Architecture of Disclosure Remains TBD*, 113 Mich. L. Rev. 1021 (2015) (suggesting that “while debunking excessive faith in mandatory disclosure [. . .] Ben-Shahar and Schneider develop an ism of their own—what we might call *antidisclosurism*—by arguing for total abandonment of, or at least a presumptive bar against, mandatory disclosure”). [↑](#footnote-ref-43)
44. Barr et al., *supra* note 33, at 1 (“By contrast to disclosure regulation, usury laws and product restrictions start from the idea the certain prices or products are inherently unreasonable, and that consumers need to be protected from making bad choices.”); Zamir & Farkash, *supra* note 3, at 167 (observing that “European and other legal systems have long realized that since lack of available information is not the sole or even primary impediment to fair and efficient transactions, the solution cannot be only information-based” and advocating for mandatory policing of standard-form contract terms); Doron Teichman, *Too Little, Too Much, Not Just Right: Seduction by Contract and the desirable Scope of Contract Regulation*, 9 Jerusalem Rev. Legal Stud. 52, 54–60 (2014). For an overview of the various legal tools used by courts to address unfavorable terms in boilerplates, *see* Robert A. Hillman & Jeffrey J. Rachlinski, *Standard Form Contracting in the Electronic Age*, 77 N.Y.U. L. Rev. 429, 456–60 (2002). [↑](#footnote-ref-44)
45. *See,* *e.g*., Porat & Gilo, *supra* note 1, at 984 (“At times, courts conclude that harsh terms have not been accepted by consumers in the first place and therefore are not included in the contract.”); Wilkinson-Ryan, *supra* note 1, at 129 (“[I]t should perhaps not be surprising that, until very recently, the policy responses to non-readership were about how to get terms to be more readable and how to get consumers to read them.”). [↑](#footnote-ref-45)
46. S*ee, e.g*., Omri Ben-Shahar, *The Myth of Opportunity to Read in Contract Law*, 5 Eur. Rev. Cont. Law (2009) [hereinafter Ben-Shahar]; Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts”,* 78 U. Chi. L. Rev. 165, 168 (2011) [hereinafter Marotta-Wurgler] (analyzing the browsing behavior of 47,399 U.S. households, and finding that requiring online software buyers to click on an “I agree” box did not meaningfully increase readership). *See also* Restatement of Consumer Contracts, *supra* note 6, at 3 (“Since advance disclosure of standard terms generally does not render the assent process any more meaningful, because consumers rarely read the disclosed terms, the ‘opportunity to read’ technique has been losing much of its attraction in consumer-contracts assent doctrine. Some commentators have even argued that mandated disclosure may ‘backfire’ by creating a false presumption of meaningful assent, thus undercutting the second regulatory technique—ex post scrutiny of abusive terms.”). [↑](#footnote-ref-46)
47. *See, e.g.*, ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). In this case, a buyer purchased a CD-ROM containing a database, accompanied by license terms restricting the consumer to non-commercial use of the database. These terms were “shrink-wrapped:” They were packaged inside the box with the CD-ROM and thus were not available to the buyer for examination prior to the sale. In an opinion written by Judge Frank Easterbrook, the Seventh Circuit Court of Appeals held that the buyer was given notice of the licensing restriction because acceptance took place, not when the buyer paid for the product, but only later, when the buyer opened the box. *See also* Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997),which applied the theory of ProCD v. Zeidenberg to the purchase of a computer by telephone. For an overview of the critiques of these decisions, *see,* *e.g.*, Omri Ben-Shahar & Eric A. Posner, *The Right to Withdraw in Contract Law*, 40 J. Legal Stud. 115, 139–40 (2011). *See also* Restatement of Consumer Contracts, *supra* note 6, at 3 (“[C]ourts have permitted parties to use adoption processes that rely less and less on affirmative gestures of advance disclosure and mutual agreement.”). [↑](#footnote-ref-47)
48. *Id.* at 4. [↑](#footnote-ref-48)
49. *Id*. at 2; *see also* Korobkin, *supra* note 2, at 1208 (providing recommendations for how courts can and should modify the unconscionability doctrine to better police inefficient contract terms, suggesting that “courts should liberally refuse to enforce terms found unconscionable under this standard, and even refuse to enforce entire contracts on some occasions, in order to provide an incentive to sellers to draft efficient form contract terms ex ante when the market fails to provide such an incentive.”). [↑](#footnote-ref-49)
50. *See* Restatement of Consumer Contracts (Preliminary Draft No. 3, October 26, 2017), 4 [hereinafter Restatement of Consumer Contracts]. [↑](#footnote-ref-50)
51. *Id.* [↑](#footnote-ref-51)
52. Zamir & Farkash, *supra* note 3, at 163. *See also id.* at (observing that “absence of regulation does not typically yield greater freedom to both parties, but rather more power to the drafters of standard-form contracts to have their way in the contractual relationships, at the expense of customers”). [↑](#footnote-ref-52)
53. Radin, *supra* note 2, at 218. *See also* references in footnote 49. [↑](#footnote-ref-53)
54. *See,* *e.g.*, Radin, *supra* note 2, at 220–32; Zamir & Farkash, *supra* note 3, at 167 (distinguishing between “two paradigms of content regulation—ex post judicial supervision based on vague standards such as unconscionability, and ex ante statutory or administrative supervision through the invalidation or prohibition of incorporation of certain terms in contracts, or even dictating certain terms,” and suggesting that “the latter appears to be much more effective.”). [↑](#footnote-ref-54)
55. Radin, *supra* note 2, at 220–32 (observing that “state legislation and judge-made law also goes beyond disclosure to create substantive regulations of contract law in particular areas,” and mentioning examples of such regulation in different types of consumer markets in the United States). [↑](#footnote-ref-55)
56. Warrantors may limit the duration of the implied warranty to the duration of the written warranty, but only if the limitation is prominently displayed on the face of the warranty and is in clear and simple language. In addition, any limitation on implied warranty duration must be accompanied by a standard declaration alerting consumers to the possibility that such limitations may be invalid under state law. *See* Magnusson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301–2312 (1976). [↑](#footnote-ref-56)
57. *See* the CARD Act, *supra* note 39. These substantive restrictions include the prohibition against allocating payments to low-interest balances first. *See,* *e.g.*, Bar-Gill, *supra* note 2, at 105. [↑](#footnote-ref-57)
58. *See, e.g.,* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 921, 124 Stat. 1376 (2010) (codified in Titles 7, 12, and 25 of the U.S. Code) (authorizing the Securities Exchange Commission to regulate broker-dealers’ use of arbitration in consumer contracts); *id*. § 1028 (authorizing the Consumer Financial Protection Bureau to regulate firms’ use of arbitration agreements in financial markets); *id.* § 1057(d) (banning arbitration of certain whistleblower claims under the Dodd-Frank Act); *id.* § 1414 (prohibiting the use of arbitration provisions in residential mortgage agreements). For an overview of the regulation of agreements to arbitrate in recent years, *see, e.g.,* David L. Noll, *Regulating Arbitration*, 105 Cal. L. Rev. 985, 987 (2017) (beginning the article by proposing that: “in recent years, policymakers in Congress and federal administrative agencies have begun to perform a fundamentally new function: regulating arbitration agreements and other ‘procedural contracts’ that govern the forum and procedures for resolving legal claims.”). [↑](#footnote-ref-58)
59. Radin, *supra* note 2, at 220. [↑](#footnote-ref-59)
60. The Affordable Care Act, for example, requires insurance policies to provide specified health benefits deemed essential, including ambulatory patient services, emergency services, hospitalization, maternity and newborn care, and so forth, to insured consumers. *See* 42 U.S.C. § 18022(b). Some jurisdictions also prohibit insurers from excluding coverage in specific circumstances. *See, e.g.*, Robert L. Tucker, *Disappearing Ink: The Emerging Duty to Remove Invalid Policy Provisions,* 42 Akron L. Rev. 519, 523–524 (2009) [hereinafter Tucker] (discussing various cases in which courts invalidated certain exclusions of, or restrictions on, insurance coverage). For an overview of mandatory policing of insurance contract terms in the United States, *see,* *e.g.*, Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, forthcoming *in* The Law & Economics of Insurance (2018). [↑](#footnote-ref-60)
61. *See,* *e.g*., Furth-Matzkin, *supra* note 11, at 9–10 and citations therein; Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984); Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 Urb. L. Ann. 3 (1979). [↑](#footnote-ref-61)
62. Furth-Matzkin, *supra* note 11 (finding that residential leases from Massachusetts regularly include unenforceable terms); Juliet P. Kostritsky, *Illegal Contracts and Efficient Deterrence: A Study in Modern Contract Theory,* 74 Iowa L. Rev. 115 (1988) (noting that courts often refuse to enforce “illegal” contracts, or contracts that conflict with public policy); Kuklin, *supra* note 13, at 845 (observing that “contracts and leases commonly include terms that are unenforceable as contrary to common or statutory law,” and referring to a few anecdotal examples of unenforceable terms); Sullivan, *supra* note 13, at 1137 n. 34 (presenting preliminary empirical evidence that employers often draft overly broad non-competition clauses); Curtis J. Berger, *Hard Leases Make Bad Law,* 74 Colum. L. Rev. 791, 791 (1974) (finding that residential landlords continued to use form leases containing invalid clauses even though they lost a majority of the cases in which such clauses were at issue); Catherine L. Fist, *Reflections on the New Psychological Contract and the Ownership of Human Capital,* 34 Conn. L. Rev. 765, 782–83 (2002) (observing that “in California, covenants not to compete have been unenforceable against employees since 1872. Employers have nevertheless sought to restrict their employees from working for competitors. Employers ask their employees to sign such contracts anyway, presumably counting on the *in terrorem* value of the contract when the employee does not know that the contract is unenforceable.”). [↑](#footnote-ref-62)
63. Tucker, *supra* note 57, at 526 (noting that insurance companies often continue to use policy provisions that have been invalidated by courts). [↑](#footnote-ref-63)
64. *See,* *e.g.*, Broadley v. Mashpee Neck Marina, Inc., 471 F.3d 272, 276 (1st Cir. 2006) (striking down an overly broad exculpatory clause without narrowing it to include only negligence: “Any competent lawyer could write a straightforward exclusion of liability for negligence that we would sustain.”). [↑](#footnote-ref-64)
65. Sullivan, *supra* note 13, at 1147–57 (finding that with both “postemployment noncompetition clauses and arbitration agreements, employers often draft language that they know will not be enforced as written.”). [↑](#footnote-ref-65)
66. *See* Jeff Sovern, *Report that Companies Include Provisions in Arbitration Clause that They Know the Arbitrator Won’t Enforce—But That Might Suppress Claims Even More*, (Consumer Law & Policy Blog; March 8, 2018). [↑](#footnote-ref-66)
67. Furth-Matzkin, *supra* note 9. [↑](#footnote-ref-67)
68. *See, e.g.,* Wilkinson-Ryan, *supra* note 1, at 136 (citing commentators who mentioned that “irrelevance of standard terms,” and interpreting their comments as suggesting that “the existence of the standard terms is a fact of life not to be taken seriously*—*probably not beneficial, but harmless”); Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 Mich. L. Rev. 837, 844 (2006) (noting that “consumers are as unlikely to read terms after a transaction as during one”). [↑](#footnote-ref-68)
69. Furth-Matzkin, *supra* note 11, at 36–40 (reporting that fifty-one percent of the surveyed tenants who reported experiencing a rental problem also reported looking at their leases directly as a result). [↑](#footnote-ref-69)
70. *See,* *e.g.*, Bar-Gill & Davis, *supra* note 18, at 246 (observing that “consumers of food products cannot observe directly whether food products have been adulterated. Accordingly it is rational for them to base their purchasing decisions on beliefs about the stringency of the food regime”); *see also* Furth-Matzkin, *supra* note 11, at 42 (observing that a consumer’s decision not to become informed about the multiple legal rules governing his or her transactions may be rational, especially if small stakes are involved). Similarly, authors have argued that failure by consumers to read the fine print is rational. *See, e.g.,* Zev J. Eigen, *Experimental Evidence of the Relationship Between Reading the Fine Print and Performance of Form-Contract Terms*, 168 J. Institutional & Theoretical Econ. 124, 134 (2012) (arguing that one of the main factors underlying low readership is the “low stakes of the exchange”); Ben-Shahar, *supra* note 47, at 15 (“If we succeed in reading the text and understanding it, we are often struck by the remoteness of the contingencies it covers–ones that we don’t expect to materialize, such that the cost of figuring out and improving the terms that apply to these contingencies is not worth it.”). [↑](#footnote-ref-70)
71. See citations in footnote 21. *See also* Ben-Shahar & Schneider, *supra* note 1, at 10 (noting that “many people make decisions with scant information and slight deliberation. They overlook, skip, or skim disclosures. Far from gathering information, people strip it away to make choices manageable.”); Wilkinson-Ryan, *supra* note 1, at 119 (“For almost all of our legally binding agreements, we know there are standard terms that govern the peripheral features of our deals, and we do not know what those terms say.”); Sullivan, *supra* note 13, at 1137 (“Empirical evidence that employees are unaware of even their most basic rights–whether their employer needs a good reason to discharge them–suggests that it would not be hard to convince employees that an overbroad noncompetition clause is valid (or that a slanted arbitration regime is all they are entitled to)).”). [↑](#footnote-ref-71)
72. Benjamin L. Campbell et al., “*U.S. and Canadian Consumer Perception of Local and Organic Terminology*”, 17 Int’l Food & Agribusiness Mgmt. Rev. 21 (2014); Deborah Olsen, “*Say No to ‘Natural’ on Food Labels: Why Consumer Reports is Launching a Campaign to Ban the Ubiquitous Term*”, Consumer Reports (June 16, 2014). [↑](#footnote-ref-72)
73. Chris J. Hoofnagle & Jennifer M. Urban, *“Alan Westin’s Privacy* Homo Economicus,” 49 Wake Forest L. Rev. 261, 270 (2014) [hereinafter Hoofnagle & Urban] (finding that consumers generally overestimate the extent to which the law protects their privacy against incursions by firms which obtain personal information in the course of various transactions: “[T]he average consumer appears to operate in the marketplace with a flawed, yet optimistic, perception of business practices and legal protections that could undermine her ability to choose effectively.”). [↑](#footnote-ref-73)
74. Sovern et al., *supra* note 22, at 4 (finding that “consumers lack awareness of arbitration agreements and do not understand those agreements when they are aware of them.” For example, the authors observed that “less than 9% [of participants] realized both that the contract had an arbitration clause and that it would prevent consumers from suing in court.”). Similarly, in the employment context, many at-will employees erroneously believe that the law protects them against dismissal without just cause. *See* Pauline Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105 (1997). As Janice Nadler and Pam Mueller observe, it is possible that “people tend to assume that the applicable legal rule is the one that matches their intuitions.” *See* Janice Nadler & Pam A. Mueller, *Social Psychology and the Law*, *in* 1 Oxford Handbook L. & Econ. 124, 147 (Francesco Parisi ed., 2017) [hereinafter Nadler & Mueller]. [↑](#footnote-ref-74)
75. Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 Mich. L. Rev. 633 (2010) [hereinafter Wilkinson-Ryan] (finding that people tend to believe that specific performance and punitive damages are common remedies, although they typically are not). *See also* Furth-Matzkin & Sommers, *supra* note 14 (finding that laypeople believed that contract terms that contradict, qualify, or disclaim a seller’s pre-contractual representation could not be voided even in cases of clear and material deception). [↑](#footnote-ref-75)
76. Furth-Matzkin, *supra* note 11, at 42. [↑](#footnote-ref-76)
77. Mueller, *supra* note 18, at 273. Some of the study’s participants even expressed astonishment that a provision in an executed lease could be anything other than “valid and enforceable.” *Id.* Consequently, Mueller concluded that “it is possible that the tenant […] finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage.” *Id.* at 274. [↑](#footnote-ref-77)
78. *See,* *e.g.,* Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation,* 67 Stan. L. Rev. 1269, at 1281–94, 1296–98 (2015) [hereinafter Wilkinson-Ryan & Hoffman] (finding that laypeople are “contract formalists,” in several respects: They tend to give excessive weight to written terms compared to oral agreements and they are likely to believe that contracts are created through formalities such as signature and payment, despite the fact that contract law does not require such formalities for the creation of a contract); Hoffman, *supra* note , at 1623–24 (presenting experimental findings suggesting that “while individuals generally are contract formalists, millennials are formalists on steroids”). [↑](#footnote-ref-78)
79. *See,* *e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print*, 99 Iowa L. Rev. 1745 (2013). [↑](#footnote-ref-79)
80. Stolle & Slain, *supra* note 19. [↑](#footnote-ref-80)
81. *Id.* at 91. [↑](#footnote-ref-81)
82. Wilkinson-Ryan, *supra* note 1, at 161. The study’s subjects were randomly assigned to read about a consumer policy communicated either as a standard form contract term or as a company’s policy available on its website. The results revealed that laypeople were more likely to perceive unfair policies as legally enforceable and morally defensible when these policies were embedded in the fine print rather than when they appeared on a firm’s website. [↑](#footnote-ref-82)
83. *Id.* at 164. [↑](#footnote-ref-83)
84. *See, e.g.*,Bakos et al., *supra* note 1; Blaszczak-Boxe, *supra* note 27; Hoffman, *supra* note 1. [↑](#footnote-ref-84)
85. Mueller, *supra* note 18, at 256. [↑](#footnote-ref-85)
86. Furth-Matzkin, *supra* note 11, at 36. [↑](#footnote-ref-86)
87. *Id.* at 39. [↑](#footnote-ref-87)
88. *Id.* at 39–40. [↑](#footnote-ref-88)
89. *Id.* at 40. [↑](#footnote-ref-89)
90. *Id.* at 2–3. [↑](#footnote-ref-90)
91. *Id*. at 25–26. [↑](#footnote-ref-91)
92. For similar predictions, *see* Kuklin, *supra* note 13, at 845 (suggesting that “if the offeree never learns of his rights and a dispute arises, the offeror might gain an advantage not otherwise obtainable, such as an immediate capitulation by the offeree or a beneficial settlement”); Furth-Matzkin, *supra* note 11, at 3 (suggesting that the use of unenforceable terms is likely to adversely affect consumers, since they are likely to relinquish valid legal rights and claims due to their ignorance of the law). [↑](#footnote-ref-92)
93. MTurk is commonly used by researchers to recruit participants in exchange for small sums of money. Tess Wilkinson-Ryan explains: “[Mturk] has been studied extensively at this point. Its advantages are that populations recruited via Turk are more representative of the national population than convenience samples (*e.g.*, undergraduates) and that a variety of experimental findings have been replicated using MTurk. [. . .] There is also evidence, both systematic and anecdotal, that Turk subjects are particularly attentive, perhaps due to the formal mechanisms available for giving them feedback that affects reputation ratings. The disadvantage of MTurk as compared to the sample procured by a commercial survey firm is the young and leftward skew of the population. Turk respondents are ‘wealthier, younger, more educated, less racially diverse, and more Democratic’ than national samples.” Wilkinson-Ryan, *supra* note 1, at 150 n. 162 (internal citations omitted). *See also* Kristin Firth, David A. Hoffman, & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, Fac. Scholarship 1884(2017) (concluding that MTurk samples are highly reliable and useful). [↑](#footnote-ref-93)
94. Participants’ ages ranged from twenty to eighty-six, with a mean age of 36. Sixty-two percent of the participants were Caucasian, twenty-four percent were Asian, five percent were African-American, five percent were Hispanic, and the remainder identified as a mixture of different categories. Ten percent of the participants had obtained a high school degree or less than a high school education, fifty-one percent had obtained a college degree, twenty-three percent had begun but had not finished college, fourteen percent had advanced degrees, and two percent had professional degrees. Four percent of the sample’s participants had an advanced law degree. Regarding income, thirty-five percent reported an annual income of below $30,000, twenty-four percent reported an annual income of between $30,000 and $50,000, thirty percent reported an annual income of between $50,000 and $100,000, and eleven percent reported an annual income of above $100,000. With regard to political affiliation, nineteen percent viewed themselves as Republicans, thirty-nine percent as Democrats, and thirty-five percent as independents, with four percent reporting that they had no preference, and three percent identifying as “other.” In terms of ideology, twenty-three percent perceived themselves as slightly, somewhat, or extremely conservative, thirty-four percent as moderate, and forty-four percent as slightly, somewhat, or extremely liberal. [↑](#footnote-ref-94)
95. Participants who took less than three minutes to complete the survey (n = 9) were excluded from the study. [↑](#footnote-ref-95)
96. Bishop v. Tes Realty Trust, 942 N.E.2d 173 (Mass. 2011) [hereinafter Bishop v. Tes Realty Trust] (holding the landlord liable for injury caused to the tenant when ceiling plaster fell into her eye as a result of a leak in the roof). [↑](#footnote-ref-96)
97. *Id*. at 180–81. [↑](#footnote-ref-97)
98. Mass. Gen. Laws. ch. 186, § 19 (2016) (determining that the landlord owes a duty to “exercise reasonable care” to remedy an “unsafe condition” upon notice, and that “the tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages.” A landlord may not obtain a waiver of this duty in any lease or other rental agreement; any such waiver “shall be void and unenforceable.” *Id.*). *See also* Consumer Affairs & Business Regulation, *A Massachusetts Consumer Guide to Tenant Rights and Responsibilities*, Mass.Gov (May 2007), <http://www.mass.gov/ocabr/docs/tenantsrights.pdf>. [↑](#footnote-ref-98)
99. Mass. Gen. Laws. ch. 186, § 15 (2016) (determining that any lease provision indemnifying or exonerating the landlord from liability arising from the landlord’s negligence on any part of the leased premises or common areas is “against public policy and void.” Note that, as the Supreme Court of Massachusetts explains in Bishop v. Tes Realty Trust, this statute “did not expand the scope of a landlord’s liability beyond the common law; it merely declared void any attempt by a landlord to nullify by contract the already narrow scope of common law liability.”’ *Id.* at 177. *See* also Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison, 924 N.E.2d 260, 266 (Mass. 2010). The Uniform Residential Landlord and Tenant Act (URLTA)—a sample law governing residential landlord and tenant exchanges, established in 1972 by the U.S. National Conference of Commissioners on Uniform State Laws, also follows this approach (see URLTA §1.403(a)(4) (1972)). The URLTA has been adopted (in whole or in part) by most states. [↑](#footnote-ref-99)
100. *Id.* at 24–6. [↑](#footnote-ref-100)
101. Furth-Matzkin, *supra* note 11, at 25–9 (noting, for example, that “most of the mandatory rights granted to tenants were not mentioned in any of the sampled leases” and that “the landlord’s warranties and covenants were also rarely mentioned in the leases.”). [↑](#footnote-ref-101)
102. *Id.* at 25 (eleven out of seventy leases, or sixteen percent, did not contain any clause related to the landlord’s liability, while sixteen out of seventy leases, or twenty-three percent, included an unenforceable liability disclaimers). [↑](#footnote-ref-102)
103. Participants who failed to respond or whose responses were unintelligible were excluded from the analysis (n = 14). The two coders were in agreement eighty-eight percent of the time. In cases when the two coders were not in agreement about the proper code to assign to a response, a third independent coder was asked to code the response. In these cases, the minority vote was excluded and the coding chosen by the two-person majority was used for the purposes of the analysis. [↑](#footnote-ref-103)
104. All categories were developed by the principal investigator, except for the “extralegal action” category, which was proposed by one of the coders based on participants’ responses. [↑](#footnote-ref-104)
105. According to a chi-square test, this effect was significant: χ2(2) = 8.5913, *p <* 0.05. [↑](#footnote-ref-105)
106. According to a chi-square analysis, χ2(2) = 29.25, *p* < 0.001. [↑](#footnote-ref-106)
107. Regarding intentions to search for more information (either by searching the web or by asking friends for advice), ten percent with the unenforceable term condition, seven percent with the no term condition so intended, and two percent with the enforceable term condition so intended, χ2(2) = 2.9506, *p* = 0.229. [↑](#footnote-ref-107)
108. Regarding intentions to seek legal advice, sixteen percent with the unenforceable term condition, twenty-one percent with the no term condition so intended, and eleven percent with the enforceable term condition so intended, χ2(2) = 2.096 *p* = 0.351. Admittedly, these rates of self-reported intentions to seek legal advice might be higher than the rates of tenants who would actually seek legal advice under these circumstances in practice, as people tend to be overly-optimistic about the likelihood that they will take action, while in reality, inertia and procrastination often kick in. [↑](#footnote-ref-108)
109. Regarding intentions to take legal action, eight percent with the unenforceable term condition, two percent with the no term condition so intended, and seven percent with the enforceable term condition so intended, χ2(2) = 2.1539, *p* = 0.341; Regarding intentions to take extra-legal action, four percent with the unenforceable term condition, four percent with the no term condition so intended, and two percent with the enforceable term condition so intended, χ2(2) = 0.2442, *p* = 0.885. [↑](#footnote-ref-109)
110. Zamir & Farkash, *supra* note 3, at 159. For a similar assertion, *see* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 Mich. Telecom & Tech. L. Rev. 303, 320–27 (2008) (suggesting that the web “facilitates the construction of communities in which users can both seek out knowledge and provide responses, while minimizing time and attention constraints”). [↑](#footnote-ref-110)
111. It should be acknowledged that the experiments reported here were not incentive-compatible: They did not provide participants with financial incentives to find the accurate legal rule. Rather, participants were merely asked to assume the role of tenants, and to estimate how they would react under the described circumstances. Therefore, it may be the case that participants were not sufficiently incentivized, under this experimental setting, to look for outside sources, like the web, for more information. In order to explore whether, then tenants are financially motivated, they are significantly more likely to look elsewhere for legal information, and whether such information moderates the effect of unenforceable terms, I have begun conducting another study. In this study, participants read the scenarios describing rental problems, and were asked questions about their rights under the law. They were randomly assigned to read one of three leases as in the studies reported here. Only this time, they were told that if they answered the question correctly, they would be awarded additional $10. The findings, although preliminary, suggest that when incentives or stakes are higher, participants are significantly more likely to look for information through the web, but since legal information is complicated to process and understand, many are still adversely affected by the inclusion of unenforceable terms, compared to silent leases or leases containing enforceable terms. [↑](#footnote-ref-111)
112. *See, e.g.,* Charles Fried, Contract as Promise: A Theory of Contractual Obligation 17 (2015) (arguing that a contract is a promise, and that breach of contract is immoral for the same reasons that it is morally wrong to break a promise: “By virtue of the basic Kantian principles of trust and respect, it is wrong to […] make a promise, and then to break it.”); Wilkinson-Ryan, *supra* note 77, at 639–40 (viewing breach as a “moral harm”); Nadler & Mueller, *supra* note 76, at 147 (“Most people think of a contract as a kind of promise, and that breaking a contract is a moral violation deserving of punishment over and above the damages associated with the breach”); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. Empirical Legal Stud. 405 (2009) [hereinafter Wilkinson-Ryan & Baron] (providing experimental evidence that moral judgments affect people’s perceptions of breaches of contract). This line of thought is also reflected in the language of the Restatement (Second) of Contracts, which refers to the “sanctity of contract and the resulting moral obligation to honor one’s promises.” *See* Restatement (Second) of Contracts, ch. 16, intro. note (1981). *For a different view, see* Eyal ive & Barak Medina, Law, Economics and Morality 260–61 (2010) (noting that “it is unclear whether there is an independent moral duty to keep one’s promises; and if no such independent duty exists, whether the very breach of a promise necessarily harms the promisee.”). [↑](#footnote-ref-112)
113. Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?* 100 Geo. L. J. 5, 9 (2012) (observing that “forces such as the moral commitment to promise keeping [. . .] may affect contractual relationships,” and experimentally measuring non-instrumental motivations to comply with contractual obligations); Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. Legal Stud. 67 (2012) (showing that participants in a tedious online survey were more likely to continue answering the survey when they were reminded that they had agreed to complete it and were morally committed to keep their promises); Nadler & Mueller, *supra* note 76, at 147 (“The promise-keeping framework that governs most people’s perceptions of contract obligations sometimes leads to a hesitance to breach even in cases of efficient breach”). [↑](#footnote-ref-113)
114. Wilkinson-Ryan & Hoffman, *supra* note 83, at 1279. [↑](#footnote-ref-114)
115. Wilkinson-Ryan & Baron, *supra* note 114, at 422. [↑](#footnote-ref-115)
116. Nadler & Mueller, *supra* note 76, at 147. [↑](#footnote-ref-116)
117. It is already well-known that legal rules have an expressive function. Legislation can signal what is socially approved: sometimes law expresses what most people expect on to do or refrain from doing. *See, e.g.,* Richard H. McAdams, The Expressive Powers of Law: Theories and Limits (2015); Janice Nadler, *Expressive Law, Social Norms, and Social Groups*, 42 Law & Soc. Inquiry 60, 71 (2017) [↑](#footnote-ref-117)
118. Reactance is generally defined as an individual’s negative response when a freedom has been threatened or lost. *See, e.g.*, Sharon S. Brehm & Jack W. Brehm, Psychological Reactance: A Theory of Freedom and Control 4 (2013) [hereinafter Brehm & Brehm]; Robert A. Wicklund, Freedom and Reactance (1974) [hereinafter Wicklund]. [↑](#footnote-ref-118)
119. *See,* *e.g*., Oren Bar-Gill & Omri Ben-Shahar, *Threatening an “Irrational” Breach of Contract*, 11 Sup. Ct. Econ. Rev*.* 143 (2004) [hereinafter Bar-Gill & Ben-Shahar]; Daniel Kahneman, Jack L. Knetsch, & Richard Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 4 Am. Econ. Rev. 728 (1986). [↑](#footnote-ref-119)
120. *See,* *e.g*., Bar-Gill & Ben-Shahar, *supra* note 121, at 146. [↑](#footnote-ref-120)
121. *See* Nadler & Mueller, *supra* note 76, at 147; Tess Wilkinson-Ryan, *Breaching the Mortgage Contract: The Behavioral Economics of Strategic Default*, 64 Vand. L. Rev. 1547 (2011). [↑](#footnote-ref-121)
122. Wilkinson-Ryan, *supra* note 1, at 117. [↑](#footnote-ref-122)
123. Participants’ ages ranged from 19 to 98, with a mean age of 37. Sixty-four percent of the participants were Caucasian, twenty percent were Asian, five percent were African-American, five percent were Hispanic, and the remainder identified as a mixture of different categories. Fourteen percent of the participants had obtained a high school degree or less than a high school education, forty-five percent had obtained a college degree, twenty-five percent had begun but had not finished college, fourteen percent had advanced degrees, and two percent had professional degrees. Five percent of the participants had an advanced law degree. Regarding income, thirty-six percent reported an annual income of below $30,000, twenty-three percent reported an annual income of between $30,000 and $50,000, thirty-two percent reported an annual income of between $50,000 and $100,000, and nine percent reported an annual income of above $100,000. With regard to political affiliation, twenty-one percent viewed themselves as Republicans, forty-one percent as Democrats, and thirty-two percent as independents, with five percent reporting that they had no preference, and two percent identifying as “other.” In terms of ideology, twenty-four percent perceived themselves as slightly, somewhat, or extremely conservative, thirty-one percent as moderate, and forty-five percent as slightly, somewhat, or extremely liberal. [↑](#footnote-ref-123)
124. The two coders were in agreement eighty-seven percent of the time. In cases when the two coders were not in agreement about the proper code to assign to a response, a third independent coder was asked to code the response. In these cases, the minority vote was excluded and the coding chosen by the two-person majority was used for the purposes of the analysis. [↑](#footnote-ref-124)
125. Two percent of participants indicated intention to bear the repair expenses with the enforceable term condition, three percent with the no term condition, and four percent with the unenforceable term condition: χ2(2) = 0.8004, *p* = 0.67. [↑](#footnote-ref-125)
126. χ2(1) = 11.442, *p* < 0.001. [↑](#footnote-ref-126)
127. χ2(1) = 9.1377, *p* = 0.003. [↑](#footnote-ref-127)
128. χ2(1) = 5.6324, *p =* 0.018. [↑](#footnote-ref-128)
129. For intentions to consult a lawyer: χ2(1) = 0.4023, *p* = 0.526. For intentions to initiate legal proceedings against the landlord: χ2(1) = 2.217, *p* = 0.136. [↑](#footnote-ref-129)
130. Twenty-six percent intended to seek legal advice in the “unenforceable term” condition compared to twenty percent in the “no term” condition and fourteen percent in the “enforceable term” condition, χ2(2) = 13,252, *p* = 0.001. [↑](#footnote-ref-130)
131. *See* Brehm & Brehm, *supra* note 120, at 4; Wicklund, *supra* note 120. [↑](#footnote-ref-131)
132. Six percent with the unenforceable condition, seven percent with the enforceable condition and five percent with the no term condition: χ2(2) = 0.2990, *p* = 0.861. [↑](#footnote-ref-132)
133. Quote tess and Stolle & Slain and Marks, Colin P., Online Terms as In Terrorem Devices (March 12, 2018). Available at SSRN: <https://ssrn.com/abstract=3138763> or [http://dx.doi.org/10.2139/ssrn.3138763](https://dx.doi.org/10.2139/ssrn.3138763) [↑](#footnote-ref-133)
134. According to a one-way ANOVA, Composite: F(2, 163) = 8.50, *p* = 0.0003. MUnenforceable = 5.66, SD = 1.53; MNo term = 5.91, SD = 1.43; MEnforceable = 6.27, SD = 1.18. [↑](#footnote-ref-134)
135. According to a one-way ANOVA, Proceedings: F(2, 163) = 4.99, *p =* 0.0079; Win: F(2, 163) = 14.37, *p* = 0.000; In terms of participants’ intentions to consult an attorney, the differences only approached significance, F(2, 163) = 2,80, *p* = 0.0637. [↑](#footnote-ref-135)
136. Proceedings: χ2(2) = 5.473, *p* = 0.065; Win: χ2(2) = 50.0708, *p* = 0.000; Attorney: χ2(2) = 1.1096, *p* = 0.574; [↑](#footnote-ref-136)
137. χ2(2) = 50.0708, *p* = 0.000. [↑](#footnote-ref-137)
138. Attorney: F(2, 191) = 0.71, *p* = 0.4927; Proceedings: F(2, 191) = 0.41, *p* = 0.6635; Win: F(2, 191) = 1.11, *p* = 0.3333; Composite: F(2, 191) = 0.15, *p* = 0.8462. [↑](#footnote-ref-138)
139. Attorney: χ2(2) = 1.0671, *p* = 0.587; Proceedings: χ2(2) = 0.7239, *p* = 0.696; Win: χ2(2) = 4.5105, *p* = 0.105. [↑](#footnote-ref-139)
140. While fifty-two percent of those in the “no information” condition estimated that they would probably win in court, as many as eighty-one percent of those assigned with the “legal information” condition so believed, χ2(1) = 34.5797, *p* = 0.000. Relatedly, while forty-four percent of those in the “no information” condition indicated an intention to initiate proceedings, as many as fifty-six percent of those assigned with the “legal information” condition so indicated: χ2(1) = 5.3349, *p =* 0.021. [↑](#footnote-ref-140)
141. A simple linear regression predicting overall intention to take action (the composite measure) according to familiarity with the law (an ordinal variable reported on a 5-item scale from “not familiar at all” to “extremely familiar”) yielded that the beta coefficient of familiarity (*b* = 0.22, SE = 0.06, *p* < 0.000) was highly significant. A two-tailed t-test also yielded highly significant differences between non-familiar and familiar participants in mean bargaining position scores (*t* = -1.9239, df = 188, *p =* 0.03). These results revealed that better informed participants had significantly higher intentions to take action than participants who were reportedly less familiar with the law. [↑](#footnote-ref-141)
142. For “unenforceable”: *t* = -1.1782, *p* = 0.1216; For “no term”: t = -2.1794, *p* = 0.0163; For “enforceable”: *t* = -0.7174, *p* = 0.2382. [↑](#footnote-ref-142)
143. Furth-Matzkin, *supra* note 11, at 29–31 (finding that many residential leases contained legal fallback phrases). [↑](#footnote-ref-143)
144. *See, e.g.*, Boston Housing Authority v. Hemingway, 293 N.E.2d, 843 (Mass. 1973) (holding that “in a rental of any premises […], there is an implied warranty that the premises are fit for human occupation,” and that) [hereinafter Boston Housing Authority v. Hemingay]; Javins v. First National Realty Corp. 428 F2d 1071 (D.C. Cir.) 1970 (one of the leading rulings on the implied warranty of habitability). [↑](#footnote-ref-144)
145. Boston Housing Authority v. Hemingway, *supra* note 168, at 843 (“This warranty […] cannot be waived by any provision in the lease or rental agreement.”). [↑](#footnote-ref-145)
146. *See, e.g.,* Leardi v. Brown, 474 N.E.2d, 156 (1985). [↑](#footnote-ref-146)
147. *Id.* [↑](#footnote-ref-147)
148. *Id.*  [↑](#footnote-ref-148)
149. *See, e.g.*, Irwin P. Levin, Sandra L. Schneider & Gary J. Gaeth, *All Frames Are Not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 Organizational Behav. & Hum. Decision Processes 149 (1998) (“Over the past decade, studies of ‘framing effects’ in the area of human judgments and decision making have proliferated, expanding to include domains as diverse as cognition, psycholinguistics, perception, social psychology, health psychology, clinical psychology, educational psychology, and business. The existence of framing effects has been documented in medical and clinical decisions […], perceptual judgments, consumer choices, responses to social dilemmas, bargaining behaviors, auditing evaluations, and many other decisions.”). [↑](#footnote-ref-149)
150. Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economists,* 93 Am. Econ. Rev. 1449, 1454–55 (2003); Eyal Zamir & Doron Teichman, Behavioral Law and Economics 59 (forthcoming, 2018; on file with author)[hereafter Zamir & Teichman 2018]; Thomas Mussweiler, *Comparison Processes in Social Judgment: Mechanisms and Consequences,* 110 Psychol. Rev. 472 (2003). [↑](#footnote-ref-150)
151. Amos Tversky, *Contrasting Rational and Psychological Principles of Choice, in* Wise Choices: Decisions, Games, and Negotiations 5, 7 (Richard Zeckhauser et al. eds., 1996). [↑](#footnote-ref-151)
152. James Bettman et al., *Constructive Consumer Choice Processes*, 25 J. Consumer Res. 187, 208 (1998). [↑](#footnote-ref-152)
153. Tversky and Kahneman found a preference reversal, whereby the majority of the subjects given the positively framed version (a certainty of saving one-third of the lives, versus a one-third chance of saving all the lives and a two-thirds chance of saving no lives) selected the option with the certain outcome, whereas the majority of subjects who were given the negatively framed option (a certain loss of two-thirds of the lives, versus a two-thirds chance of losing all the lives) selected the riskier option. Amos Tversky & Daniel Kahneman, *The Framing of Decisions & the Psychology of Choice*, 211 Sc. 453, 453 (1981). [↑](#footnote-ref-153)
154. The distinction between risky choice framingand attribute framingwas developed by Levin et al. *See* Irwin P. Levin et al., *All Frames are not Created Equal: A Typology and Critical Analysis of Framing Effects*, 76 Org. Behav. & Hum. Decision Proc. 149, 158–67 (1998) [hereinafter Levin] (defining and reviewing the literature on attribute framing). [↑](#footnote-ref-154)
155. *Id.*, at 150. [↑](#footnote-ref-155)
156. Irwin P. Levin & Gary J. Gaeth, *How Consumers are Affected by the* *Framing of Attribute Information Before and After Consuming the Product*, 15 J. Consumer Res. 374, 374–78 (1988). [↑](#footnote-ref-156)
157. T. M. Schouten et al., *Framing Car Fuel Efficiency: Linearity Heuristic for Fuel Consumption and Fuel-Efficiency Ratings*, 7 Energy Efficiency 891 (2014). [↑](#footnote-ref-157)
158. Prominent exceptions include: Lauren E. Willis, *When Nudge Fail: Slippery Defaults*, 80 U. Chi. L. Rev. 1157 (2013) (proposing that companies frame the default option in agreements as “recommended” or “advised” in order to discourage consumers from opting out); Yi Fen Chen & Hsien Kuang Pu, *Effects of Framing Message on Extended Warranty Intention: The Moderating Role of Risk Preference, Time Period, and Product Type*, Proceedings of 8th Asian Business Research Conference, Thailand (2013). [↑](#footnote-ref-158)
159. *See, e.g.,* Zamir & Teichman 2018, *supra* note 175, at Ch. 8.C; Sunil Gupta & Lee G. Cooper, *The Discounting of Discounts and Promotion Thresholds,* 19 J. Consumer Res. 401 (1992). [↑](#footnote-ref-159)
160. *See, e.g.,* Zamir 2014, *supra* note XX, at 274 (“[L]oss aversion and related phenomena may affect consumer behavior in various ways. Such an effect is expected, for instance, when prices are presented as involving discounts rather than surcharges. While economically equivalent, giving a cash discount may seem more attractive than adding a surcharge for credit, as the former frames credit as entailing a forgone gain, rather than a loss”); *See also* Richard H. Thaler, *Toward a Positive Theory of Consumer Choice*, 1 Journal of Economic Behavior and Organization 39, at 45 (1980); Smith and Nagle, *Frames of Reference and Buyers’ Perceptions of Price and Value*, 38 California Management Rev. 98, 99-101 (1995). [↑](#footnote-ref-160)
161. Prolific Academic is a participant recruitment platform for researchers. Participants recruited through Prolific Academic tend to be more diverse than those recruited from Mechanical Turk. Eyal Peer et al., *Beyond the Turk: Alternative Platforms for Crowdsourcing Behavioral Research*, 70 J. Experimental Soc. Psychol. 153 (2017). Previous research has shown that Prolific Academic produced higher quality data, as participants were more honest and less experienced with taking surveys. *Id.* Well-known psychological findings have been replicated in samples drawn from both Prolific Academic and Mechanical Turk, suggesting that crowdsourcing is a legitimate alternative to lab-based research. [↑](#footnote-ref-161)
162. Participants who did not complete the survey (*n* = 5) as well as duplicate IP addresses (*n* = 18) were excluded from the analysis. [↑](#footnote-ref-162)
163. Sixty-nine percent of the participants were Caucasian, thirteen percent were Asian, six percent were African-American, five percent were Hispanic, and the remainder identified themselves as a mixture of different categories. Fifteen percent of the participants had obtained a high school degree or less than a high school education, thirty-nine percent had obtained a college degree, thirty-one percent had begun but had not completed college, eleven percent had advanced degrees, and one percent had a professional degree. Twenty-four participants, or five percent of the sample, had an advanced law degree. Regarding income, twenty-eight percent reported an annual income of below $30,000, twenty-two percent reported an annual income of between $30,000 and $50,000, thirty-four percent reported an annual income of between $50,000 and $100,000, and eleven percent reported an annual income of above $100,000. With regard to ideology, twenty percent perceived themselves as slightly, somewhat, or extremely conservative, nineteen percent as moderate, and sixty-one percent as slightly, somewhat or extremely liberal. [↑](#footnote-ref-163)
164. According to a one-way ANOVA, F(3, 478) = 21.68, *p* = 0.00. [↑](#footnote-ref-164)
165. According to post hoc tests using the Bonferroni correction, Munenforceable = 3.39, SD = 1.98; Menforceable = 2.01, SD = 1.60; *p* < 0.001. [↑](#footnote-ref-165)
166. According to post hoc tests using the Bonferroni correction, Munenforceable = 3.39, SD = 1.98; Mlegal\_fallback = 3.28, SD = 2.07; *p* = 0.73. [↑](#footnote-ref-166)
167. According to post hoc tests using the Bonferroni correction, Menforceable = 2.01, SD = 1.60; Mnegative\_frame = 2.18, SD = 1.75; *p* = 0.44. [↑](#footnote-ref-167)
168. Participants who reported that they were slightly, moderately, or extremely likely to bear the expenses were categorized as “likely to bear the expenses.” Using a chi-square analysis, the contract term had a significant effect on subjects’ decisions (χ2(3) = 36.125, *p* = 0.000). [↑](#footnote-ref-168)
169. Notably, in certain cases, courts have already ruled that legal fallback language does not immunize an otherwise unenforceable term from judicial invalidation (e.g., Leardi v. Brown, *supra* note 170, at 156 (“The defendants content that this provision is rendered perfectly lawful by the inclusion, in small print, of words to the effect that the implied warranty is disclaimed ‘except so far as governmental regulation, legislation or judicial enactment otherwise requires.’ We disagree.”) , but this might depend on the type of clause and circumstances of each particular case. [↑](#footnote-ref-169)
170. *See* Part I.C., *supra*. [↑](#footnote-ref-170)
171. *See* Zack Whittaker, *EU Plans Stronger Consumer Law Enforcement after Apple Warranty Case,* Between the Lines(March 19, 2013)*,* http://www.zdnet.com/Article/eu-plans-stronger-consumer-law-enforcement-after-apple-warranty-case/ (last accessed June 26, 2016). [↑](#footnote-ref-171)
172. *See, e.g.,* Zamir & Farkash, *supra* note 3, at 158 (observing that “suppliers the world over also habitually use standard-form clauses that have long been declared unenforceable,” and that “the difficulty lies in the fact that even legal experts sometimes find it hard to predict whether a court would enforce a certain term or declare it unenforceable, especially when the applicable legal norms are vague and the legal precedents vary”). [↑](#footnote-ref-172)
173. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 632–37 (1960); Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 Va. L. Rev. 383, 410 (1993); Fisk, *supra* note 66, at 782–83. [↑](#footnote-ref-173)
174. Under some statutes, tenants are entitled to attorneys’ fees, but even when tenants are aware of this policy, they may be reluctant to expend the necessary resources to defend their rights and remedies, for fear of the risk, however slight, that the court would refuse to strike down the objectionable lease provision. [↑](#footnote-ref-174)
175. *See, e.g.,* Wilkinson-Ryan, *supra* note 1, at 171 (“[I]f the worst thing that could happen is that the term will get thrown out, there is no reason not to include it and hope for the best.”). [↑](#footnote-ref-175)
176. *See, e.g.,* Bar-Gill, *supra* note 2, at 32 (describing disclosure mandates as “the least intrusive form of regulation”); Bubb & Pildes, *supra* note XX, at 1595 (describing “smart disclosure” and default rules as “minimalist forms of government action that preserve freedom of choice”); Ben-Shahar & Schneider, *supra* note XX, at 5 (observing that mandated disclosure “seems to regulate lightly” because it “lets sellers sell and buyers buy, as long as buyers know that sellers are selling.”). [↑](#footnote-ref-176)
177. *See, e.g.,* Bar-Gill, *supra* note 2, at 34 (noting that “existing and proposed disclosure mandates focus solely on product-attribute information” and proposing that disclosure mandates should target product-use information as well); Zamir & Teichman 2018, *supra* note XX, at ch. 8, 34 (“properly designed disclosures can highlight important attributes of the contract, and help consumers make informed decisions that best serve their interests”). For example, suppliers might be required to disclose in a salient manner the conditions of the product’s warranty, or the circumstances under which the contract might be terminated or altered unilaterally. Similarly, disclosures might help ease the problems consumers face when they attempt to understand complex multidimensional pricing dimensions. One option on this front is to require suppliers to present a standardized measure that captures the various dimensions of the price. The APR (annual percentage rate), mandated in the United States by the Truth in Lending Act, attempted to achieve this goal in the area of borrowing, by providing borrowers with a single figure that presented the effective cost of a loan, thereby facilitating comparisons between complex financial products (see Truth in Lending Act, Pub. L. No. 90-321, § 107, 82 Stat. 146, 149 (1968) (codified as amended at 15 U.S.C. § 1606 (2012)) (defining APR)). [↑](#footnote-ref-177)
178. Note, that in recent years, scholars have also begun calling for another type of information disclosure: disclosure of *product-use information*. Bar-Gill, *supra* note 2, at 34; Oren Bar-Gill & Oliver Board, *Product Use Information and the Limits of Voluntary Disclosure*, 14 Am. L. & Econ. Rev. 235 (2012). As far as the author knows, no scholarly attention has been given to mandating disclosure of information about the consumers’ legal rights and remedies. [↑](#footnote-ref-178)
179. *See, e.g.,* Bar-Gill, *supra* note 2, at 34–5. [↑](#footnote-ref-179)
180. Telephone interview with an anonymous residential landlord from Boston (March 22, 2015). [↑](#footnote-ref-180)
181. [↑](#footnote-ref-181)
182. Furth-Matzkin, *supra* note XX, at 40. In recent years, it has been suggested that sellers retain self-serving terms in standard form contracts to protect themselves from opportunistic consumers, but that they only selectively enforce these terms on account of reputational considerations (*see, e.g.,* Bebchuk & Posner 2005; Johnston 2007; Becher & Zarsky?). Landlords’ failure to disclose the tenants’ rights and remedies in their leases may similarly be seen as landlord’ attempt to immunize themselves from opportunistic tenants. [↑](#footnote-ref-182)
183. *See, e.g.,* Ben-Shahar & Schneider, *supra* note 1. [↑](#footnote-ref-183)
184. Such disclosure obligations include, *inter alia,* obligations to disclose information concerning the hold and return of security deposits, information about notice periods before termination of the lease due to non-payment, and so forth. See Furth-Matzkin, *supra* note XX, at ; cite legislation; add pages finding that landlords fail to meet disclosure obligations [↑](#footnote-ref-184)
185. *See, e.g.,* Ellen Peters et al., *Less is More in Presenting Quality Information to Consumers*, 64 Med. Care Res. & Rev. 169 (2007); Korobkin, *supra* note XX, at 1222–25; Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price,* 65 Md. L. Rev. 707, 767–68 (2006). [↑](#footnote-ref-185)
186. Zamir & Teichman 2018, *supra* note XX, ch. 8 at 5. [↑](#footnote-ref-186)
187. Barr et al., *supra* note 33, at 7. [↑](#footnote-ref-187)
188. *See e.g.*, Cass Sunstein, *Nudges.Gov: Behaviorally Informed Regulation*, *in* The Oxford Handbook of Behavioral Economics and the Law, *supra* note 100, at 719, 727–33; Bar-Gill, *supra* note 2, at 37 (“To be effective […] disclosures must be kept simple”). [↑](#footnote-ref-188)
189. *See, e.g.,* Bar-Gill, *supra* note 2, at 37 (“A disclosure that is simple enough for consumers to understand will inevitably exclude some relevant information.”). [↑](#footnote-ref-189)
190. Ayres & Schwartz, *supra* note 2, at XX. [↑](#footnote-ref-190)
191. *See, e.g.,* Bar-Gill, *supra* note 2, at 33. [↑](#footnote-ref-191)
192. This solution has been previously proposed by several scholars and commentators. See Bentley 1974; Kirby 1976; Olafsen 1978. [↑](#footnote-ref-192)
193. Furth-Matzkin, *supra* note XX, at 27–9 (finding, based on sample of seventy leases from Massachusetts, that the landlord’s warranties and covenants were rarely mentioned in the leases. In a similar vein, most of the mandatory rights granted to tenants were not mentioned in any of the leases, and some were occasionally mentioned in a small subset of leases). [↑](#footnote-ref-193)
194. *See, e.g.,* Schwarz 2011 (take from JLA paper). [↑](#footnote-ref-194)
195. The common-law doctrine of fraud seems to be irrelevant in the case of unenforceable terms, as it may only allow the defrauded tenant to *void the contract*. The tort action of deceit, on the other hand, allows for pecuniary damages caused by the deceived party’s “justifiable reliance upon the misrepresentation.” See [↑](#footnote-ref-195)
196. *Id.* at 23. [↑](#footnote-ref-196)
197. Kuklin, *supra* note XX, at 896; W. Prosser & W. Keeton, *supra* note XX, §105. [↑](#footnote-ref-197)
198. Restatement (Second) of Torts ch. 22 (1965). [↑](#footnote-ref-198)
199. Kuklin, *supra* note XX, at 900. [↑](#footnote-ref-199)
200. Joyce, Damages § 2215, at 2280 (1904) (footnotes omitted). [↑](#footnote-ref-200)
201. W. Prosser & W. Keeton, at 758.(from Kuklin 901). [↑](#footnote-ref-201)
202. *See* Kuklin, *supra* note, at 864–65 (“Even if the offeror himself is originally uninformed of the relevant law, it is often efficient to impose upon him the legal duty to obtain the information an pas it along to the offeree.”) [↑](#footnote-ref-202)
203. For a similar view, see Kuklin, *supra* note, at 865 (“Initially obtaining the information regarding the unenforceable term may usually be done more cheaply by the offeror than by the offeree. The offeror may have an attorney on retainer or as an employee. He may be a member of a trade association or other business group that makes this information readily available. […] The offeree, by supposition, enters few comparable transactions over which to amortize his information costs.”) [↑](#footnote-ref-203)
204. *See* Kuklin, *supra* note, at 901 (“That misrepresentations of law are not actionable is a proposition not today in favor”); Prosser & Keeton, *supra* note XX, at 759. [↑](#footnote-ref-204)
205. The Restatement (Second) of Torts § 525 (1965). [↑](#footnote-ref-205)
206. *Id.* at § 525 Comment d. [↑](#footnote-ref-206)
207. *See* Kuklin, *supra* note, at 864–65 (“Even if the offeror himself is originally uninformed of the relevant law, it is often efficient to impose upon him the legal duty to obtain the information and pass it along to the offeree.”) [↑](#footnote-ref-207)
208. For a similar view, see Kuklin, *supra* note XX, at 899 (“It is the overarching offeror who takes advantage of another’s ignorance of the law who is to be deterred, not the businessperson who desires reasonable doubt to be resolved in his favor.”). [↑](#footnote-ref-208)
209. Warren Mueller similarly found that most tenants in his study shared the “questionable assumption” that the exculpatory provisions in their leases were enforceable “since the lessor had taken the trouble of inserting them in the lease.” Mueller, *supra* note X, at 276. [↑](#footnote-ref-209)
210. Kuklin, *supra* note XX, at 901. [↑](#footnote-ref-210)
211. *See, e.g.,* Carolyn L. Carter, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (February 2009), Summary [hereafter NCLC Report]. [↑](#footnote-ref-211)
212. Michigan Consumer Protection Act 331 445.903  Sec. 3 (t) (1976). [↑](#footnote-ref-212)
213. West Alaska Unlawful Acts and Practices Act (AS § 45.50.471, AK ST § 45.50.471 sec. b (14). [↑](#footnote-ref-213)
214. Mass. Gen. Laws ch. 93A §2(a),(c) (2016) (declaring that “unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful, and authorizing the Attorney General to enact rules and regulations determining which acts fall under this definition); 940 Mass. Code Regs. §3.17.3 (2017) (setting forth a non-exhaustive list of clauses whose inclusion would constitute an unfair or deceptive act or practice. This list currently includes relatively few provisions: a penalty clause or a tax escalator clause not in conformity with the applicable law and a clause requiring advanced payments in excess of those allowed by the law) see *id*. The law similarly determines that failure to disclose the legal requirements governing the hold and return of security deposits also constitutes an unfair or deceptive act or practice (*id.* at §3.17.3(b)(3)). [↑](#footnote-ref-214)
215. As Congress has recognized, class action lawsuits “permit the fait and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm.” *See* Class Action Fairness Act of 2005, Sec. 2(a). [↑](#footnote-ref-215)
216. *See* Mass. Gen. Laws ch. 93A, § 9(3); 940 Code of Massachusetts Regulations 3.17, which states that the inclusion of an unenforceable term in a rental agreement constitutes an “unfair or deceptive act or practice” under the Consumer Protection Act. Upon finding that a landlord knowingly or willfully engaged in such an act, the court may award each injured tenant actual damages or twenty-five dollars, whichever is greater. [↑](#footnote-ref-216)
217. Tyler v. Michaels Stores, Inc., 984 N.E.2d 737, 744 (2013). [↑](#footnote-ref-217)
218. *See* Hendleman v. Lost Altos Apartments, L.P., 160 Cal. Rptr. 3d 730 (2013). [↑](#footnote-ref-218)
219. *See, e.g.*,Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 402–404 (2005). [↑](#footnote-ref-219)
220. *See* AT&T Mobility LLC v. Concepcion 131 S. Ct. 1740 (2011). For an analysis of the decision and its implications, *see, e.g.,* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 Or. L. Rev. 703 (2012). Recall, however, that federal agencies have recently asserted authority under the Dodd-Frank Act and the Social Security Act to authorize regulations prohibiting mandatory arbitration clauses in certain types of consumer contracts. *See* footnote 63 and the citations there. [↑](#footnote-ref-220)
221. See, *e.g.*, Radin, *supra* note XX, at 147; Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 Hous. L. Rev. 975 (2005) [hereafter Gillette]. [↑](#footnote-ref-221)
222. *See* Gillette, *supra* note XX,at 984-5. [↑](#footnote-ref-222)
223. *See, e.g*., Spencer L. Kimball & Werner Pennigstorf, *Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice*, 39 Ind. L. J. 675 (1964). A pre-approval process of standard form contracts also exists in Israel: The Israeli Standard Contract Law of 1982 allows sellers to submit a standard form contract for pre-approval by a special tribunal, established pursuant to this law. Such approval exempts the contract from scrutiny for a five-year period). *See,* e.g., Sinai Deutch, *Controlling Standard Contracts: The Israeli Version,* 30 McGill L. J. 458, 473–475 (1985); Eyal Zamir & Tal Mendelson, *Three Modes of Regulating Price Terms in Standard-Form Contracts– The Israeli Experience*, Hebrew University of Jerusalem Legal Studies Research Paper Series No. 17-40, 1, 4-6 (2017) (explaining that “firms rarely applied to have their contracts validated, because the prospect of five-year immunity was not worth the risk of invalidation of their contract terms” and that “over time it became evident that the Tribunal’s actual impact on the formulation of standard-form contracts in Israel was negligible, while its operation was rather costly”). *See also* Sinai Deutch, *Standard Contract Act: Failure and Recommendation*, 1 Mehkarei Mishpat (Bar-Ilan L. Rev.) 62, 69 (1980) (in Hebrew). [↑](#footnote-ref-223)
224. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012). [↑](#footnote-ref-224)
225. See Mass. Gen. Laws ch. 93A, §4 (“Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice”). [↑](#footnote-ref-225)