**Bargaining in the shadow of the Fine Print: How Unenforceable Terms Affect Consumer Behavior**

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# Abstract

*Increased awareness that consumer markets are susceptible to, and often suffer from, both traditional and behavioral market failures has resulted in growing pressure throughout the world for broader substantive regulation of consumer contracts. Yet, recent empirical evidence suggesting that sellers and landlords routinely contravene these regulatory measures by inserting unenforceable terms into their contracts casts doubt as to the effectiveness of such regulatory changes. In particular, this practice raises questions as to the impact of such clauses on post-contract negotiations between landlords and tenants. While the literature typically focuses on negotiations taking place before an agreement between the parties is reached, this paper sheds light on negotiations occurring after the contract has been signed and in its shadow. Using experimental measures, this study examines how tenants and landlords settle rental disputes. It focuses on two primary questions: To what extent unenforceable clauses affect the likelihood that negotiations will take place, and how such clauses influence the nature of the negotiations and the resulting agreement in the event that the parties choose to negotiate.*

# Introduction

It is widely acknowledged that consumers seldom read or pay attention to the fine print in legal documents before signing or clicking through.[[2]](#footnote-3) Consumers are regularly confronted with an overwhelming number of boilerplates, and it is practically impossible for them to read all of their contracts diligently.[[3]](#footnote-4) As a result, sellers often load their standardized agreements with one-sided or exploitative terms.[[4]](#footnote-5)

Scholars and commentators have consistently called for stronger, more substantive, regulation of the content of these standardized agreements.[[5]](#footnote-6) Legislatures and courts have responded by adopting substantive regulation, prohibiting sellers and landlords from including certain specified terms—deemed unfavorable to non-drafting parties—in their contracts.[[6]](#footnote-7) Substantive regulation has been adopted in a number of consumer sectors, including the rental housing market and the credit card and insurance industries.[[7]](#footnote-8)

Despite these regulatory efforts to protect consumers, growing evidence suggests that drafting parties often contravene these mandatory protections by inserting terms that are essentially unenforceable and void into their boilerplates.[[8]](#footnote-9) In particular, it has been 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.[[9]](#footnote-10)

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,[[10]](#footnote-11) little attention has been devoted to the possibility that these contracts include terms that simply contravene the law.[[11]](#footnote-12) In view of the accumulating evidence that unenforceable contract terms abound in consumer markets,[[12]](#footnote-13) it is essential to explore the implications of this drafting practice for the non-drafting parties.

This Article takes a first step towards addressing this issue, while taking the residential rental market as a test case. Building on previous work demonstrating that unenforceable terms are regularly inserted in residential agreements,[[13]](#footnote-14) it examines the role that these terms play in shaping tenants’ post-contract decisions and behavior. The question 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. This is the central issue addressed in this Article.

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.[[14]](#footnote-15) However, based on a survey of 279 tenants, I have shown elsewhere that while not all tenants read the terms of their residential leases *ex ante*—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.[[15]](#footnote-16) Drawing on these findings, this paper asks 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 argued that tenants are likely to forego their rights as a consequence, and ultimately bear costs that the law deliberately and explicitly imposed on the landlord.[[16]](#footnote-17) This supposition builds on previous work suggesting that consumers, tenants, and employees are typically uninformed of the law governing their transactions,[[17]](#footnote-18) and that they generally perceive contractual provisions as enforceable and binding.[[18]](#footnote-19)

This Article reports on a series of experiments conducted to explore the impact of unenforceable terms on tenants’ decisions and behavior. Participants, all Massachusetts residents, 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 reveal that tenants were adversely affected by the inclusion of unenforceable terms, in that they were more likely to relinquish their rights, and less likely to engage in hard bargaining with the landlord or to resort to legal means, after encountering an unenforceable provision than were tenants who encountered a contract with enforceable terms or with no relevant terms (silent leases). 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 six 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 thus far to address these issues, it describes the shift from mainly relying 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. The Article explores this hypothesis through the prism of the U.S. residential rental market.

Part III briefly surveys the legal framework governing the residential market, and the evidence for landlords’ non-compliance with the substantive regulation aimed to protect tenants.

Part IV then presents and reports the results of two 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, the experiments examined how different types of deceptive drafting techniques influence tenants’ perceptions and behavior. While the first experiment focused on comparing the impact of unenforceable terms to that of enforceable provisions and silent leases, the second experiment expanded the scope of inquiry, exploring the role of other drafting patterns, such as negative framing and legal fallback language, in shaping tenants’ decisions.[[19]](#footnote-20) The findings strongly suggest that these deceptive drafting practices—and the use of unenforceable terms in particular—have an adverse effect on tenants’ post-contract decisions and perceived bargaining positions. Part V analyzes the implications of these findings for public policy and regulation, and Part VI concludes.

# I. Consumer Market Failures and Regulatory Solutions

## Traditional and Behavioral Market Failures

Consumers face an overwhelming amount of fine print in their daily lives, and it is neither practical nor efficient for them to read all of their contracts thoroughly.[[20]](#footnote-21) 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.[[21]](#footnote-22) Sellers often make it even more difficult for consumers to read adhesion contracts by using long forms, small fonts, and complex legal jargon.[[22]](#footnote-23) All of these drafting practices essentially penalize consumers for attempting to read the fine print.[[23]](#footnote-24)

It is therefore not surprising that there is ample empirical evidence that consumers rarely read such contracts before signing them.[[24]](#footnote-25) Researchers have found that “only one or two in 1,000 shoppers access a product’s EULA for at least 1 second.”[[25]](#footnote-26) In fact, it has been found that consumers who do not read these contracts may even unwittingly agree to give up their first-born child in order to obtain Wi-Fi access,[[26]](#footnote-27) or to sell their soul in return for a video game.[[27]](#footnote-28)

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’ non-readership by hiding unfair and one-sided terms in the fine print.[[28]](#footnote-29) Such terms may include liability disclaimers, waivers of consumers’ rights to a jury trial, arbitration clauses, class action waivers, and choice-of-law clauses.[[29]](#footnote-30)

Even if certain terms are clearly disclosed in ways that make consumers aware of them, sellers regularly design contract terms in ways that take advantage of consumers’ cognitive biases and systematic misperceptions.[[30]](#footnote-31) 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.[[31]](#footnote-32) Similarly, consumers may underestimate how much they can borrow on their credit card 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 contract.[[32]](#footnote-33) In these cases, consumers might enter into inefficient transactions, as they might underestimate the costs associated with these transactions or overestimate their benefits.[[33]](#footnote-34)

These problems are not solved even in situations of perfect competition, as competition only forces sellers to maximize the *perceived* net benefit, and not the actual net benefit.[[34]](#footnote-35) 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.[[35]](#footnote-36)

 In light of the increasing realization that market forces, such as competition, cannot correct for these market failures—both traditional and behavioral—scholars and regulators have regularly advocated for broader, mandatory, regulation of consumer contracts.[[36]](#footnote-37)

## The Promise and Failure of Disclosure and Assent

One leading 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.[[37]](#footnote-38) 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.[[38]](#footnote-39) Under contract law, sellers must clearly explain their warranty terms to buyers.[[39]](#footnote-40) According to residential rental law, landlords must disclose certain information, such as information related to holding and returning the tenants’ security deposits, in their lease agreements.[[40]](#footnote-41) Consumer protection law abounds in required disclosures involving mortgages, bank accounts, credit cards, rental homes, healthcare, food, travel, house and car sales, and more.[[41]](#footnote-42)

Notwithstanding its prevalence and appeal (what could improve consumers’ choices more than providing them with the information that they undoubtedly lack?), as Ben-Shahar and Schneider have convincingly pointed out, mandated disclosure has, in many respects, failed to achieve its intended goals.[[42]](#footnote-43) Ben-Shahar and Schneider attribute the failure of mandated disclosure to several main factors:

First, mandated disclosure rests on false assumptions about how people live, think, and act. Second, it rests on false assumptions about how well information improves decisions. Third, its success requires a chain of demands on lawmakers, disclosers, and disclosees too numerous and onerous to be met often.[[43]](#footnote-44)

In view of the realization that disclosure mandates alone were not adequately protecting consumers from abusive and exploitative business practices, there has been a growing shift favoring the adoption of stronger, more substantive, interventions in consumer markets.[[44]](#footnote-45)

Two measures have attracted most regulatory attention. The first of these tools is heightened assent requirements, whereby courts and legislatures could require more meaningful manifestations of assent, making it increasingly difficult and costlier for sellers to incorporate their pre-drafted terms into the agreement.[[45]](#footnote-46) However, courts and scholars 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-47) Consequently, courts have in fact relaxed the assent rules, permitting businesses to adopt relatively lenient adoption processes.[[47]](#footnote-48)

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-49) These avenues for protection of consumers have involved applying traditional doctrines such as unconscionability and misrepresentation in order to police contract terms, such as terms 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-50)

In addition to applying these common law doctrines in order to police contract terms *ex post*, legislatures have begun imposing mandatory restrictions over permissible contracting *ex ante*. These restrictions either prohibit the inclusion in the fine print of certain contract terms deemed unenforceable as against public policy, or require sellers and landlords to include in the fine print specified terms aimed at safeguarding the non-drafting parties.[[50]](#footnote-51)

##  The Growing Ubiquity of Substantive Regulation

Because efforts to protect consumers through mandated disclosure and more effective expressions of assent failed to produce the expected results, substantive regulation of the content of standard form consumer contracts has become increasingly widespread in numerous consumer markets.[[51]](#footnote-52) For example, the Magnusson-Moss Warranty Act of 1976 prohibits sellers from excluding the implied warranties set forth in the Uniform Commercial Code.[[52]](#footnote-53) Similarly, the United States Credit Card Accountability, Responsibility, and Disclosure Act of 2009 introduced substantive restrictions, including price caps and other bans, in addition to heightened disclosure obligations, into the credit card market.[[53]](#footnote-54)

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.[[54]](#footnote-55) The practice of door-to-door selling is also regulated in some jurisdictions.[[55]](#footnote-56) And in the insurance market, all fifty states have adopted comprehensive compulsory systems mandating the terms of insurance policies.[[56]](#footnote-57)

Finally, the residential rental market is heavily regulated across all jurisdictions in 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.[[57]](#footnote-58)

## Preliminary Evidence of Non-Compliance

Despite current efforts to protect consumers, recent findings suggest that sellers, employers, and landlords often fail to comply with applicable mandatory protections, and continue to use unenforceable terms in their standardized agreements.[[58]](#footnote-59)

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.[[59]](#footnote-60) Similarly, sellers often use overbroad exculpatory clauses without narrowing them to include only negligence,[[60]](#footnote-61) and there is evidence suggesting that employers use over-reaching arbitration and non-competition clauses in employment agreements.[[61]](#footnote-62)

 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. [[62]](#footnote-63)

These findings shed substantial light on a particular pattern of contracting behavior that has not been sufficiently studied to date. While the literature on consumer contracts has generally focused on the drafters’ incentives to include enforceable yet egregiously one-sided terms, or terms that, while enforceable, exploit consumers’ cognitive biases,[[63]](#footnote-64) little attention has been given to the possibility that these contracts include terms that simply contravene the law.[[64]](#footnote-65)

The paucity of research on this issue is puzzling in light of the probability that sellers will attempt to disregard the substantive regulatory requirements that the law imposes on them in the absence of adequate enforcement. Well-informed and profit-maximizing sellers may try to leverage their familiarity with the legal rules to their advantage by drafting contracts that are likely to generate consumers’ misperceptions of the law, despite not being legally enforceable. Consequently, unenforceable terms may generate profits for sellers, by leading consumers to relinquish valid legal rights and remedies.[[65]](#footnote-66)

It is also possible for sellers to use legally invalid terms unknowingly, simply because they are uninformed about the law governing their transactions with buyers.[[66]](#footnote-67) Lawyers may include these terms in standardized agreements without realizing that the law has changed, and these terms may survive because drafting parties continue to use outdated forms, unaware of their provisions’ unenforceability. Alternatively, drafting parties may continue to use forms containing unenforceable terms if they predict, or at least hope, that the law will change in their favor.[[67]](#footnote-68)

# II. What are the Implications For Consumers?

## The Presumption of Boilerplate Enforceability

Regardless of whether the continued use of unenforceable terms in consumer contracts and leases is intentional or not, it certainly has the potential to create or reinforce consumers’ misperceptions concerning their rights and duties, consequently leading them to make decisions that could prove detrimental to them.[[68]](#footnote-69)

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 agreement. 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.[[69]](#footnote-70) 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.[[70]](#footnote-71)

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.[[71]](#footnote-72)

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.[[72]](#footnote-73) For example, consumers lack an accurate understanding of the legal standards that define “organic” or “natural” foods.[[73]](#footnote-74) Similarly, they often do not understand their privacy rights,[[74]](#footnote-75) and may fail to believe that there are important variations in residential rental laws in different jurisdictions in the United States.[[75]](#footnote-76)

Consumer psychology adds an important component to this mix: Buyers are even more unlikely to search for information about their legal rights and remedies since they are inclined to trust their contracts as accurate sources of information.[[76]](#footnote-77) 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-78) Some of them even expressed astonishment that a provision in an executed lease could be anything other than “valid and enforceable.”[[78]](#footnote-79) Mueller therefore observed that “it is possible that the tenant […] finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage.”[[79]](#footnote-80)

Nevertheless, it is precisely this prevailing commonsense presumption 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 a psychologically powerful tool to create misperceptions among consumers and tenants about their rights and remedies under the law.[[80]](#footnote-81) 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.

An experiment conducted by Dennis Stoll and Andrew Slain in 1997 corroborates this proposition.[[81]](#footnote-82) In this study, participants read about a consumer who suffered a harm (e.g., sustaining an injury at the gym) and were randomly assigned to read a contract either with or without a liability disclaimer. 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 legal recourse. These findings were interpreted by the authors as suggesting that “consumers’ contract schema includes a general belief that written contract terms are enforceable.”[[82]](#footnote-83)

 In contrast, several other studies have found that consumers believe that the law grants them more protections than it actually does, even if their contracts disclaim or qualify these protections. For example, it has been found that consumers often overestimate the extent to which the law protects them against contractual waivers of their rights to access courts through arbitration agreements.[[83]](#footnote-84) It has also been shown 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.[[84]](#footnote-85) And, in the employment context, many at-will employees erroneously believe that the law protects them against dismissal without just cause.[[85]](#footnote-86)

Using experimental methods, this paper seeks to explore the possibility that landlords, through deceptive contract design, could induce tenants to be overly-*pessimistic* about their rights under the law. By relying on their contracts as accurate sources of information about their rights and remedies, tenants and consumers could be led to believe that the law grants them fewer protections than it actually does.

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 that they sign.[[86]](#footnote-87) In fact, as Wilkinson-Ryan and Hoffman observed, laypeople appear to be “contract formalists,” at least in certain respects. They tend to give excessive weight to written terms compared to oral agreements; 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; and relatedly, even if they perceive their contractual provisions as one-sided and unfair, consumers generally remain committed to these terms after having given their formalized assent.[[87]](#footnote-88) For example, Wilkinson-Ryan found that people 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.[[88]](#footnote-89)

Building on this work, Furth-Matzkin and Sommers recently ascertained 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 material deception.[[89]](#footnote-90) In one of their experimental studies, participants read about a consumer who, having entered into a contract without reading it, was later surprised by the imposition of a fee. Half of the participants read an explanation that the seller had misinformed the consumer prior to signing the agreement, promising the consumer that there would be no fees, and the other half did not read about any prior misrepresentation. Participants were then asked what they would do were they in the consumer’s position, whether it was fair to hold the consumer to the language of the fine print, and what they believed was the actual state of the law in such situations. The results showed that while laypeople believed it unfair to hold consumers to contracts that they had been deceived into signing, they nonetheless expected that courts would enforce such agreements as written. In fact, the presence or absence of the seller’s deception did not significantly affect their assumptions about the legal ramifications of the fine print.[[90]](#footnote-91)

Relatedly, Wilkinson-Ryan recently showed that when a consumer policy is set forth in a contract, it is perceived as more legitimate and more legally binding than if it is set forth elsewhere, even if the terms are egregious in either case. In her experiment, 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.[[91]](#footnote-92) When asked to assume that the policy rested on uncertain legal grounds, participants continued to report less willingness to pursue a claim in court when the policy was disclosed in the contract rather than elsewhere.[[92]](#footnote-93) 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.”[[93]](#footnote-94)

## Unenforceable Terms might Harm Consumers

The above-mentioned studies demonstrate that the interaction between consumers’ ignorance of the law and their formalistic preconceptions often leads them to believe that contracts are enforceable and binding even if they are egregious, one-sided, unreasonably lengthy, or conflict with a seller’s prior representations. But how do contractual arrangements that the law deems unenforceable and void affect consumers’ perceptions? Do consumers’ (mis)perceptions and contract schemas affect their post-contract decisions and outcomes when they encounter a term explicitly prohibited by law?

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 that conclusion simply because they may fail to realize that landlords may benefit from including unenforceable clauses in their contracts. Consequently, they might forego pursuing their valid legal rights and claims, and ultimately bear costs that the law deliberately and explicitly imposed on the landlord.

##  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.[[94]](#footnote-95) 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, a classic study conducted by Warren Muller in 1970 found that fifty-seven percent of the respondents in the sample had thoroughly read their rental contracts before renting an apartment.[[95]](#footnote-96)

More importantly, as I have noted elsewhere, a distinction must be made between (non-)reading *ex ante* and reading *ex post*.[[96]](#footnote-97) Namely, even if consumers do not necessarily read their contracts before entering into the transaction, they are likely to look at their contracts at a later stage when seeking to verify their rights and duties as buyers, typically after a problem occurs or a dispute with the seller arises.

At that point in time, consumers might be adversely affected by the presence of unenforceable contract terms in several ways. First, when a problem arises, consumers may unquestioningly behave in accordance with their contract terms out of ignorance of their unenforceability. Second, even if they do reach out to the seller to resolve the problem, they might back down once the seller brings the relevant contractual terms to their attention. Finally, even if consumers 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. In all of these cases, consumers are likely to relinquish valid legal rights and claims and ultimately bear costs that the law deliberately and explicitly imposed on sellers.[[97]](#footnote-98)

Indeed, in a survey of tenants from Massachusetts, fifty-one percent of them reported looking at their leases at the *ex post* stage as a result of a rental problem they had encountered.[[98]](#footnote-99) These leases played an important informational role at the post-contract phase. Several respondents explained that they would look at their lease agreement whenever they incurred a problem or question, in order to clarify their rights and obligations.[[99]](#footnote-100) Remarkably, sixty-five percent of these participants reported that they ultimately acted in accordance with their lease agreements.[[100]](#footnote-101) 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.”[[101]](#footnote-102)

## Bargaining in the Shadow of the Contract

The title of this Article draws on a groundbreaking study conducted in 1979 by Robert H. Mnookin and Lewis Kornhauser, who analyzed how married couples negotiate the dissolution of their marriage under the shadow of divorce law.[[102]](#footnote-103) Since then, ample research has been devoted to studying the impact of the law on negotiations and settlements taking place outside the courtroom in a variety of contexts.[[103]](#footnote-104)

One pioneering study was conducted by Stewart Macaulay in the 1960s. Building on interviews of 63 businessmen and lawyers in the manufacturing industry in Wisconsin, Macaulay observed that, in light of repeated interactions over time, contracting parties develop norms of negotiation and dispute resolution outside the formal legal system.[[104]](#footnote-105) Relatedly, Lisa Bernstein has found that merchants in the diamond industry enforce promises through extralegal mechanisms, such as reputation and social norms.[[105]](#footnote-106) Drawing on this line of research, Robert C. Ellickson suggested that in certain types of relationships, such as neighborly relations, negotiations are not conducted in the shadow of the law, but rather outside its shadow, as other norms, social and moral in character, outweigh the formal legal rules.[[106]](#footnote-107)

The present project extends the existing research by examining negotiations that are simultaneously within and outside the shadow of the law. They are within its shadow because the law, through its mandatory protections of tenants, has authority over the negotiations. Yet, the negotiations are also outside its shadow because the predominant norm governing the post-contract negotiations is the contract.

While the contract is itself a creature of law, at issue is a lease agreement that misrepresents the law. What, then, is the role of unenforceable contract terms in negotiations taking place after the contract has been signed, and what is the impact of the law on these exchanges? This paper explores these questions through the prism of the residential rental market.

# III. The Residential Rental Market as a Test Case

## The “Revolution” in Landlord-Tenant Law

The residential rental market is one of the most heavily regulated markets in the United States. Since the 1960s and early 1970s, almost all states in the U.S. have enacted comprehensive regulation providing tenants with a variety of rights and remedies that cannot be waived under any lease agreement. This so-called revolution in landlord-tenant law was inspired by the rise of the civil rights movement and by developments in consumer protection laws.[[107]](#footnote-108)

This transformation was rapid and pervasive, with almost all jurisdictions adopting major reforms in landlord-tenant law. In many states, legislative reform preceded and often accelerated shifts in case law, while in others, statutes codified judicial precedents. Some of these statutes focused primarily on establishing new remedies for a landlord’s failure to adhere to housing regulations. Other legislation limited itself to granting tenants new rights, and left it to the courts to determine remedies.[[108]](#footnote-109)

The development of new judicial and statutory doctrines in this field resulted in the drafting of the Model Residential Landlord and Tenant Code (the Model Code) and the subsequent enactment of the Uniform Residential Landlord and Tenant Act (URLTA), a model law for governing residential landlord and tenant exchanges, established in 1972 by the United States National Conference of Commissioners on Uniform State Laws.[[109]](#footnote-110) As of 2016, the URLTA has been adopted, in whole or in part, by twenty-six states. Many other states have enacted variations of URLTA or the Model Code.[[110]](#footnote-111)

The changes in landlord-tenant law address the crux of the landlord-tenant relationship, both in legal and practical terms. For example, before 1969, the law in most jurisdictions was simply *caveat lessee*. The landlord was generally not responsible for repairing defects in the premises, regardless of whether they were present when the premises were leased or appeared subsequently, unless the parties agreed otherwise at the time of finalizing the contract. Today, most jurisdictions follow the opposite rule and the landlord is obligated to repair all defects, both patent and latent, regardless of when they emerge and notwithstanding any agreement to the contrary.[[111]](#footnote-112)

Another fundamental change in landlord-tenant law involved the landlord’s tort liability. By 1976, over twenty state legislatures had determined that exculpatory clauses in residential leases, which purportedly disclaimed the landlord’s negligence liability for personal injuries or damage to property, were void and unenforceable, and the URLTA adopted this approach.[[112]](#footnote-113) Other changes during this period included anti-discrimination laws; regulation of the landlord’s power to evict tenants at the end of a lease, and various other measures aimed at providing tenants with enhanced protections.[[113]](#footnote-114)

## Unenforceable Terms in Leases: Empirical Evidence

Since the revolution in landlord and tenant law, there has been almost no research exploring landlords’ compliance with these regulatory reforms. Recently, a content-based analysis of residential lease agreements from Massachusetts revealed that these contracts routinely included unenforceable terms, misinforming tenants about their legal rights and remedies.[[114]](#footnote-115) Such terms included clauses attempting to disclaim or restrict the landlord’s mandatory warranty of habitability, provisions purporting to alter the landlord’s legal obligations by shifting the responsibilities for maintenance and repair from the landlord to the tenant, and provisions exculpating the landlord from liability in negligence.[[115]](#footnote-116)

Building on these findings, this paper seeks to explore the implications of unenforceable terms for tenants. It asks whether rental disputes and problems are resolved in the shadow of legally invalid terms, or rather in the shadow of the formal legal rules that are supposed to govern the parties’ relations.

# IV. 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 post-contract negotiations. Namely, the paper examines how the inclusion of unenforceable terms affects the non-drafting parties’ perceptions and behavior at the post-contract stage, regardless of the legal ramifications of these terms. The experimental studies described below explore these issues by investigating how contract terms influence tenants’ perceptions and decisions in response to rental problems they incur.

## Study 1: The Effect of Unenforceable Terms

The first experiment examines how different contract terms affect the manner in which tenants deal with tenancy-related problems. The experiment builds on previous findings that suggest that although tenants do not necessarily pay attention to the terms of their lease agreement *ex ante*, before renting the apartment, they are likely to read their contract terms *ex post*, after a tenancy-related problem occurs.[[116]](#footnote-117) Drawing on this evidence, this study’s main hypothesis is that if the contract contains unenforceable terms that restrict or deny the tenants’ rights or remedies, tenants are likely to unknowingly forego their entitlements as a result of these clauses, and ultimately bear costs that the law deliberately and explicitly imposed on the landlord.[[117]](#footnote-118)

### Sample

The study consisted of 394 participants (54% male), all Massachusetts residents, recruited using the Amazon Mechanical Turk labor pool. Participants’ responses were confidential and anonymous.[[118]](#footnote-119) The questionnaire was programmed in Qualtrics and took, on average, nine minutes to complete.[[119]](#footnote-120) Forty-five percent of the participants reportedly lived in a rented apartment at the time of taking the survey, and eighty-seven percent of respondents indicated that they had rented an apartment in the past.

### Experimental Design

All participants read two randomly presented scenarios describing a rental problem. They were asked to answer a series of follow-up questions after reading each scenario. In both scenarios, subjects were asked to assume that they were renting an apartment and that a tenancy-related problem arose one day. In the “Fridge Scenario,” the refrigerator that the landlord had installed in their rented apartment stopped working. In the “TV Scenario,” two months after complaining to the landlord about a leak in the roof, rain water seeped in from the leaking roof and ruined their television. In both scenarios, respondents were instructed to assume that the cost of repairing the malfunctioning device was $200, and the cost of replacing it with a new one was $400.

The TV scenario was based on a real case, 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.[[120]](#footnote-121) The court held that the landlord had a duty to fix the leaking roof after receiving notice, and that the law prohibited the landlord from disclaiming this duty.[[121]](#footnote-122) The Fridge Scenario was based on an online survey of tenants, who reported that such maintenance and repair problems were a common problem for renters.[[122]](#footnote-123) The two scenarios presented to participants were not meant to be compared to one another, but to be analyzed according to conditions within and across the scenarios, as explained below.

Notably, the law in Massachusetts places the onus of maintenance and repair responsibilities on the landlord and prohibits landlords from disclaiming their maintenance and repair duties in their lease agreements.[[123]](#footnote-124) In a similar vein, Massachusetts housing law obliges 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. 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.[[124]](#footnote-125)

The earlier study I conducted found that notwithstanding these mandatory rules, unenforceable maintenance and repair clauses, professing to alter the landlord’s maintenance obligations by shifting these responsibilities to the tenant, appeared in twenty-nine percent of the sampled leases, and that unenforceable exculpatory clauses were included in twenty-three percent of the leases.[[125]](#footnote-126) This study seeks to test how these unenforceable yet prevalent terms affect tenants’ decisions and behavior at the post-contract stage.

Participants were asked to 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.

[TV Scenario: 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 TV.]

[Fridge Scenario: One day, the refrigerator that the landlord installed in your apartment stops working. It is buzzing, and it fails to keep your food cold.]

The cost of repairing it is $200, and the cost of replacing it with a new one is $400.

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. Under the Fridge Scenario, participants assigned to the “enforceable term” condition read that their contract contained a clause placing responsibility for repair duties on the landlord, while participants assigned to the “unenforceable term” condition read that their contract contained a clause placing responsibility for repair duties on the tenant, and those assigned to the “no term” condition read that their contract did not say anything about repairs. Accordingly, under the TV Scenario, participants assigned to the “enforceable term” condition read that their contract contained a clause holding the landlord liable in negligence for damage caused to the tenant or third parties in the leased premises, while participants assigned to the “unenforceable term” condition read that their contract contained a clause disclaiming the landlord’s liability for damages to the premises, and those assigned to the “no term” condition read that their contract said nothing about the landlord’s liability for loss or damage to the tenant (the full text of both scenarios is provided in Appendix I).

The “no term” condition, in which participants were instructed to assume that their lease said nothing about repairs or landlord’s liability, enabled testing how tenants respond when they encounter a silent contract, compared to a contract containing an enforceable or an unenforceable lease provision. 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.[[126]](#footnote-127) It is therefore important to test how tenants respond when encountering a silent contract. The “no term” condition also enables us to identify tenants’ background assumptions about their legal rights and obligations when no information is provided in their contract.

After reading each scenario, respondents were asked to evaluate how they would behave under the defined circumstances. Three independent coders, blind to the study’s hypotheses and design, coded participants’ open-ended responses.[[127]](#footnote-128) The coders were instructed to classify participants’ responses in one of the following categories:

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

(2) *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;

(3) *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;

(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

Figure 1 illustrates participants’ responses, collapsing across scenarios and contract term conditions. As the figure reveals, most participants, or sixty-nine percent, expressed an intention to contact the landlord as a result of the problems described in the scenarios. At the same time, thirteen percent of the participants reported intentions to bear the repair expenses themselves, move out, or do nothing. Notably, only three percent indicated that they would initiate legal proceedings, nine percent indicated that they would consult a lawyer, and less than two percent indicated that they would take an extralegal action, such as withholding rent or contacting inspection authorities.

*Figure 1.*

Most remarkable, perhaps, is the fact that only four percent of the participants indicated that they would search for more information (by asking others for advice or by searching the internet). The vast majority of participants, eighty-seven percent, did not report any intention to search the web, consult family members or friends, or seek legal advice in order to obtain more information about their rights and remedies as renters.[[128]](#footnote-129)

 These results are consistent with a previous survey of tenants, who reported that they rarely searched for information in response to tenancy-related problems.[[129]](#footnote-130) In fact, fifty-one percent of the tenants in the previous study reported that they relied on their lease agreement as their only source of information when encountering a rental problem.[[130]](#footnote-131) These findings suggest that a substantial proportion of tenants trust their contracts and seldom turn to other sources to verify the legal environment when a rental problem occurs. It is therefore imperative to ascertain how unenforceable terms shape tenants’ post-contract decisions.

An analysis of participants’ responses reveals that the content of the residential lease agreement significantly affected tenants’ behavioral intentions in two main respects. 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 eight percent of the respondents who read an enforceable term (placing the repair duties or liability on the landlord) intended to bear the repair expenses without even contacting the landlord, thirteen percent of those in the ‘no term’ condition intended to do so, and as many as nineteen percent of the participants intended to bear the burden of repair after reading an unenforceable lease provision (placing the responsibility for repair duties on the tenant or disclaiming the landlord’s negligence liability).[[131]](#footnote-132) Figure 2 shows these results.

*Figure 2.*

Second, the content of the lease agreement significantly influenced participants’ intentions to contact the landlord. While only sixty-one percent of the participants intended to contact the landlord after reading an unenforceable clause, sixty-six percent indicated they would do so after reading a contract lacking any liability clause, and as many as eighty-one percent intended to contact the landlord after reading an enforceable term.[[132]](#footnote-133)

At the same time, the content of the residential lease agreement did not significantly affect participants’ intentions to take legal or extralegal action, and the rates of participants expressing such intentions were rather low across conditions.[[133]](#footnote-134) Figure 3 illustrates these results.

*Figure 3.*


## Study 2: The Moderating Role of Legal Information

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

Two competing hypotheses are conceivable here. First, it is possible that information about the law would counteract the negative impact of the unenforceable fine print, as it would correct tenants’ misperceptions of the applicable legal rules. 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.

Conversely, 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.[[134]](#footnote-135) This line of thought is 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.”[[135]](#footnote-136)

Recent empirical research demonstrates that people indeed feel morally obligated to comply with a contract they have signed, believing that promises should be kept.[[136]](#footnote-137) As Tess Wilkinson-Ryan and Dave Hoffman observed, “parties will sometimes perform, at a cost to themselves, not because they are formally bound but because they feel morally bound.”[[137]](#footnote-138) 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.”[[138]](#footnote-139) This line of research suggests that breaching a contract is perceived as a moral violation.

Yet, there is reason to doubt that non-drafting parties would feel morally obligated to comply with contractual arrangements to which they agreed without knowing that the term was unenforceable. In fact, there is evidence to suggest that a contractual commitment would lose its moral force once people realized that it could be invalidated or is already void.[[139]](#footnote-140) For example, Meirav Furth-Matzkin and Roseanna Sommers have found that participants felt significantly less bound to comply with a contract they signed after learning that they may be able to void the contract as a result of fraud, and that providing information about anti-deception laws to consumers significantly increased their intentions to sue the fraudulent company.[[140]](#footnote-141)

Tenants might even exhibit reactance or backlash upon learning of their rights under the law.[[141]](#footnote-142) 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 they suspect that the landlord knowingly included an unenforceable term, tenants may even be willing to bear costs or risks in order to punish the landlord for his or her unscrupulous behavior. Indeed, 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.[[142]](#footnote-143) 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 towards the fairness of the transaction.[[143]](#footnote-144) In the context of rental disputes, tenants may feel that their landlord behaved unfairly by intentionally using and relying on an unenforceable clause so as to relieve herself from her legal obligations. They might therefore resort to means that are costly and inefficient from a traditional economic perspective, and might also violate the promise-keeping norm acclaimed by the social norms literature, simply in order to punish the dishonest landlord.

At the same time, evidence suggests that 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.[[144]](#footnote-145) Put differently, tenants might fear the possibility, however low, that the contractual arrangement will be enforced despite the conflicting legal rule. 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.[[145]](#footnote-146) Relatedly, in the context of employment contracts, 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, even when employees know or suspect that the non-compete is unenforceable.[[146]](#footnote-147)

Building on this line of research, Study 2 was designed to explore how information about the law affects tenants’ post-contract decisions and behavior: Could informing tenants about the law 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 realize that the contractual arrangement is unenforceable?

### Sample

The study consisted of 390 participants (52% male), all Massachusetts residents, recruited using the Amazon Mechanical Turk labor pool. Forty-seven percent of the participants reportedly lived in a rented apartment at the time of taking the survey, and eighty-four percent of respondents indicated that they had rented an apartment in the past.

### Experimental Design

Participants read the two scenarios from before in random order. They were randomly assigned to one of the three contract-term conditions (enforceable term, unenforceable term, or no term). Yet, this time, they were also provided with information about the law. They were informed that the law places a mandatory duty (or liability) on the landlord and that this duty (or liability) cannot be disclaimed in any lease agreement. For example, after reading the Fridge scenario, 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 owner-installed equipment in the apartment. You also read that a landlord cannot disclaim this obligation under any lease agreement.

As in study 1, participants were subsequently asked an open-ended question about their behavioral intentions in these circumstances, and three independent coders coded their open-ended responses.

### 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. Informed tenants encountering an unenforceable term were not significantly more likely to bear the repair expenses themselves than tenants reading an enforceable term or a silent lease.[[147]](#footnote-148)

In order to further investigate the role of legal information in shaping tenants’ decisions and behavior, participants’ responses in study 1 were compared to the responses of participants in study 2. This comparison revealed, once again, that information about the law significantly affected participants’ behavioral intentions: While thirteen percent of the respondents intended to bear the repair expenses themselves when provided with no information about the law, only eight percent of participants receiving information about the law intended to bear these expenses.[[148]](#footnote-149) Figure 4 below compares participants’ reported intentions across contract-term conditions, with and without legal information.

*Figure 4.*

Notably, participants who read an unenforceable term were significantly affected by the presence (or absence) of legal information: While nineteen percent of these participants intended to relinquish their rights when obtaining no information about the law, only seven percent intended to do so after learning that the landlord was prohibited from inserting such a clause.[[149]](#footnote-150)

Tenants who encountered a silent lease were also significantly affected when receiving information about the law. While thirteen percent of the tenants who read a silent lease intended to relinquish their rights when receiving no information about the law, only six percent so intended after learning the truth about the legal situation.[[150]](#footnote-151) These findings suggest that tenants are often uninformed of their legal rights, and that non-disclosure has a detrimental impact on their judgments and decisions.

Although information about the law increased participants’ intentions to consult a lawyer, from nine percent to twelve percent, as well as their intentions to initiate legal proceedings, from three percent to five percent, these effects were not significant.[[151]](#footnote-152) Yet, importantly, participants who encountered an unenforceable contract term reported marginally significantly higher intentions to consult a lawyer after receiving information about the law than had they not received such information: eighteen percent versus ten percent.[[152]](#footnote-153) This finding reveals again that, as expected, information about the law played the most important role when tenants read a lease term that contradicted the actual legal state-of-affairs.

Remarkably, participants reading an unenforceable term reported significantly higher intentions to seek legal advice than did participants in the other two contract-term conditions (eighteen percent in the “unenforceable term” condition compared to twelve percent in the “no term” condition and seven percent in the “enforceable term” condition).[[153]](#footnote-154)

This finding might suggest that tenants encountering an unenforceable term exhibited some sort of reactance or backlash upon learning that the landlord had violated the law.[[154]](#footnote-155) They may have consequently been more willing to punish the landlord for misconduct and for inserting an unenforceable term into their contract.[[155]](#footnote-156) Alternatively, participants may have assumed that, to the extent that the lease included an unenforceable term, there was a small chance that the landlord would agree to renegotiate. Consequently, they may have been more prepared to resort to legal measures for lack of a negotiation alternative. Note, however, that there was no significant difference in reported intentions to initiate proceedings.[[156]](#footnote-157) This finding may suggest that even though participants read that according to an internet search, their lease provision was unenforceable, they were still deterred by its inclusion in the contract and therefore sought to consult a lawyer.

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

So far, Study 1 showed 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 the tenant would enter into post-contract negotiations with the landlord. In the presence of an unenforceable term, substantially higher proportions of tenants chose to bear the repair expenses themselves, without even contacting the landlord.

Study 2 showed that information about the law also significantly affected the probability that tenants will bear the repair costs themselves, rather than enter into post-contract negotiations with the landlord. When provided with information about the law, tenants were significantly more likely to contact the landlord, and significantly less likely to simply “lump it” and bear the repair expenses.

But how do the contract and the law affect 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.

### Methods 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 scenarios (n = XX). These participants were subsequently asked to assume that after contacting the landlord, the landlord refused to cover the repair expenses. They were then asked how likely they would be, on a seven-item scale (1 = extremely unlikely; 4 = neither likely nor unlikely; 7 = extremely likely) to: (a) insist that the landlord bear the repair costs; (b) contact an attorney for legal advice; or (c) initiate legal proceedings against the landlord.

 Participants were subsequently asked, as an open-ended question, what considerations they would take into account before deciding whether to initiate proceedings against the landlord. Finally, they were asked to indicate, on a seven-item scale as before, how likely they believed it was that the court would rule in their favor if they decided to initiate legal proceedings against their landlord.

### Results

Notably, the content of the residential lease agreement significantly affected tenants’ post-contract decisions across all dependent measures. Their intention to insist on their rights with the non-cooperative landlord, to seek legal advice, and to initiate legal proceedings, as well as their estimated likelihood of winning in court, were all significantly affected by the content of their lease agreement.[[157]](#footnote-158) Across all measures, tenants’ reported intentions to take action were significantly lower after reading an unenforceable, rather than enforceable, lease provision.[[158]](#footnote-159)

Figure 5 reports the percentage of respondents who intended to insist that the landlord bear the expenses, seek legal advice, or initiate proceedings, based on dichotomization of each item at the scale’s mid-point (i.e., four on each seven-item scale) and collapsing across scenarios.[[159]](#footnote-160)

*Figure 5.*

As this figure illustrates, across all dependent measures, the rates of participants who were likely to take action against the non-cooperative landlord differed significantly between contract term conditions. For example, while seventy percent of the participants reading an enforceable lease provision indicated that they would seek legal advice, only fifty-six percent reported such an intention after reading an unenforceable term.

The largest difference was observed in participants’ estimated likelihood of winning at trial. The content of the residential lease agreement significantly affected tenants’ legal predictions, so that tenants reading an enforceable lease provision were significantly more optimistic about their chances of winning in court than were their counterparts reading an unenforceable term. While eighty-eight percent of the participants reading an enforceable provision estimated that they would be likely to win in court, only forty percent of the participants shared this optimism after encountering an unenforceable lease provision.

Notably, providing tenants with information about the law again succeeded in mitigating the adverse effect of the unenforceable terms. When participants were provided with information about the law, the differences became small and insignificant in all dependent measures, except for participants’ reported intention to insist that the landlord bear the repair expenses (even after receiving information about the law, participants reading an enforceable term were more likely to insist that the landlord pay for the repairs than participants in the “no term” and “unenforceable term” conditions).[[160]](#footnote-161) Figure 6 shows these results in terms of percentage rates (again, based on dichotomization of each item at the scale’s mid-point).[[161]](#footnote-162)

*Figure 6.*

Expectedly, when participants obtained information about the law, their estimated probability of winning, as well as their reported intentions to initiate proceedings, were significantly higher than when no such information was provided.[[162]](#footnote-163) Yet, notably, while participants’ estimated lieklihood of winning was rather high when legal information was obtained, their reported likelihood of initiating proceedings was still rather low. Overall, eighty-nine percent of the participants who were informed of the legal rule anticipated that they were likely to win in court, while only forty-nine 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 the 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, they will not always seek recourse. Yet they also reveal that absent information about the law, tenants’ intuitive formalism, alongside their concomitant presumption that contract terms are enforceable, is an independent barrier to litigation.

### The Role of Pre-existing Familiarity with the Law

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 interpreted with caution, 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 governmental campaign. In real life, as opposed to the lab, consumers are confronted with myriad 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 more light on the potentially moderating role of acquaintance with the law, the study’s participants were asked, after answering all questions about their anticipated behavior, how familiar they believed they were with landlord-tenant law. This question was intended to test whether acquaintance with the law moderated the adverse effect generated by unenforceable contract terms, without 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.

It should be recalled that participants were previously asked how likely they would be to insist that the landlord bear the repair costs, 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 four items formed a coherent scale (Cronbach’s α = 0.73), allowing for a computation of a composite measure of participants’ perceived bargaining position, 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.

As the results reveal, participants’ overall perception of their bargaining position was significantly affected by their reported familiarity with landlord and tenant law. The more familiar participants were with the law, the stronger their perceived bargaining position was at the post-contract stage.[[163]](#footnote-164) Nonetheless, knowledge interacted with the contract-term condition, such that familiarity with the law significantly improved participants’ perceived bargaining position in the “no term” and “unenforceable term” conditions, but did not have a significant effect in the “enforceable term” condition.[[164]](#footnote-165) Figure 7 illustrates these results:

*Figure 7.*

## Study 4: Negative Framing & Legal Fallback Language

The studies conducted so far have shown that tenants’ post-contract positions are harmed by the inclusion of unenforceable lease terms in comparison to that of tenants with leases having enforceable terms, or even silent contracts. While the Article focused so far on the role of unenforceable terms in shaping tenants’ decisions and behavior, the main purpose of study 4 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 have previously labeled “legal fallback language,” was found to be particularly prevalent in standardized lease agreements.[[165]](#footnote-166)

An illustration of legal fallback language can be found in clauses addressing the landlord’s liability for loss or damage caused to the tenant or third parties on the leased premises. The law in Massachusetts prohibits landlords from disclaiming liability for such losses resulting from their own negligence. Notwithstanding this legal requirement, a content-based analysis of leases from Massachusetts has shown that many of the sampled leases included clauses stipulating as follows:

*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.[[166]](#footnote-167)

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.[[167]](#footnote-168) At the same time, it is possible that this language alerts tenants as to the possibility that the landlord may be liable for damages in situations that are not explicitly mentioned in the contract. At least, it is possible that legal fallback provisions are more advantageous for tenants than are unenforceable provisions that do not use such language. This experiment 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 paper 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 are enforceable, but may potentially 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.[[168]](#footnote-169)

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).[[169]](#footnote-170)

In the last two decades, researchers have also begun exploring the impact of “attribute framing” on people’s decision-making.[[170]](#footnote-171) In this type of framing, “some characteristic of an object or event serves as the focus of the framing manipulation.”[[171]](#footnote-172) 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.” They found that a sample of ground beef was rated as better tasting and less greasy when it was labeled with positive rather than negative language.[[172]](#footnote-173)

Study 4 was designed to test whether different framings of contractual terms affect tenants’ post-contract decisions. Studies exploring the impact of contract framingon consumers’ judgments and decisions are scarce.[[173]](#footnote-174) 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, 42 percent female, ages 18–61, *M*age = 26, *SD*age = 6.73), all tenants from Massachusetts, were recruited through Prolific Academic[[174]](#footnote-175) and invited to take part in the study.[[175]](#footnote-176) The questionnaire was programmed in Qualtrics and took, on average, three minutes to complete.[[176]](#footnote-177)

### Experimental Design

As in the previous experiment, participants were asked to assume that they were renting an apartment in Boston and read the TV 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 TV. Participants were randomly assigned into one of the following contract-term conditions:

|  |  |
| --- | --- |
| 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).” |
| 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.” |
| 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 repair expenses themselves, without contacting the landlord, as measured on a seven-item scale (1 = extremely unlikely; 7 = extremely likely). Subsequently, they were asked to assume that they contact the landlord, and he informs them that he is not responsible for covering the cost of the TV’s repair. They were asked how likely they would be to insist that the landlord bear these expenses, measured on a seven item-scale as before.

### Results

As anticipated, the language used in drafting the lease agreements significantly affected participants’ behavioral intentions.[[177]](#footnote-178) Figure 7 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.[[178]](#footnote-179)

*Figure 7.*

As in Study 1, participants were significantly more likely to express willingness to bear the costs of the TV’s repair after reading an unenforceable term as opposed to an enforceable clause acknowledging the landlord’s negligence liability.[[179]](#footnote-180) While only twelve percent of participants intended to bear the repair expenses themselves without contacting the landlord after reading an enforceable term, as many as thirty-seven percent of those encountering an unenforceable liability disclaimer intended to do so. These results replicate those of Study 1.

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.[[180]](#footnote-181)

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 in that participants were more likely to bear the repair expenses after reading a negatively framed, rather than a positively-framed, liability clause, these differences were not significant.[[181]](#footnote-182)

Recall that participants were also instructed to assume that the landlord refused to make the necessary repairs, and were asked how likely they would be to insist that the landlord bears the repair expenses. Notably, participants were significantly more likely to insist that the landlord bear the repair expenses after reading an enforceable rather than an unenforceable contract term.[[182]](#footnote-183) The legal fallback clause also significantly adversely affected tenants in comparison to both the positively and negatively framed enforceable provisions.[[183]](#footnote-184)

Figure 8 shows the differences in percentages of participants indicating that they were likely to engage in hard bargaining with the landlord across the different contract term conditions. Again, the scale was dichotomized based on the scale’s mid-point to produce a binary “likelihood to insist” variable.

*Figure 8.*

As the figure illustrates, while 96% and 85%, respectively, of the participants who read a positively or negatively framed provision intended to negotiate with the non-cooperative landlord, only 55% and

70%, respectively, intended to so in the legal fallback or unenforceable term conditions.[[184]](#footnote-185)

Notably, the rates of participants indicating that they would insist that the landlord bear the repairs were significantly lower among participants encountering a legal fallback provision rather than an unenforceable term.[[185]](#footnote-186) These findings suggest that the legal fallback technique not only fails to signal to tenants that the landlord may be liable in negligence, but it may also adversely affect tenants’ bargaining positions.

Tenants are not made more suspicious, and consequently more assertive, when encountering a legal fallback provision. To the contrary; they are even less inclined to negotiate with the non-cooperative landlord if legal fallback language is used. This result suggests that the use of “legalese” in leases deters tenants from engaging in negotiations with the landlord. Consequently, legal fallback language may immunize an otherwise unenforceable term from judicial intervention, while generating the same, or even stronger, behavioral effect among the uninformed tenants.

Notably, in this case, there was a 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 significantly less likely to insist that the landlord bear the repair expenses.[[186]](#footnote-187) These findings indicate that landlords’ negative framing of liability clauses adversely affects tenants’ perceived bargaining position, although the impact of this drafting pattern is significantly smaller than that of unenforceable contract terms (with or without a ‘legal fallback’ phrase).

## Summary of Results

#

The studies conducted in this Article have shown that the content of the contractual arrangement significantly influences non-drafting parties’ post-contract decisions. In particular, the experimental findings presented in this Article 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 increases 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 scenarios, participants were more than twice 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 engage in hard bargaining with the non-cooperative landlord than were participants who had read an enforceable provision or simply a silent lease.

Finally, participants who had read an unenforceable term were also significantly more reluctant to take legal action against their landlord. 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 refusing to comply with enforceable and binding contractual terms. However, as the findings reveal, although reported intentions to take the landlord to court were low across all contract-term conditions, they were significantly lower when tenants were confronted with an unenforceable term rather than an enforceable lease provision. These results highlight that unenforceable terms play an independent role: When accompanied by tenants’ formalistic intuitions, unenforceable terms are an independent barrier to litigation.

The findings also showed that other prominent drafting techniques, such as “legal fallback” and “negative framing,” might adversely affect tenants at the post-contract stage. For instance, Study 4 revealed that, rather than alerting tenants to the possibility that the exculpatory clause in their leases is unenforceable, legal fallback language is likely to generate an even stronger *in terrorem* effect, deterring tenants from trying to negotiate the terms of the contract with the non-cooperative landlord at the post-contract stage. In a similar vein, the results suggested that tenants are more reluctant to insist that the landlord assume responsibility after reading an enforceable but negatively framed clause than after reading a positively framed, enforceable provision.

Importantly, Studies 2 and 3 showed that when provided with information about applicable law, the adverse effect produced by these deceptive drafting patterns is significantly reduced. When participants who encountered an unenforceable term were provided with legal information, they were nearly equally likely to seek legal advice or take action against the landlord as participants encountering an enforceable, lease provision. These findings illustrate the important role of information about the law in shaping tenants’ post-contract decisions.

# V. Discussion and Policy Implications

## The Adverse Effect of the [Unenforceable] Fine Print

The experimental findings presented in this Article reveal that the use of unenforceable lease terms is likely to harm tenants, influencing their behavior and decisions in several ways. First, when problems arise, tenants may unquestionably behave in accordance with their contract terms, as a result of ignorance of the terms’ unenforceability. Second, even if they do reach out to the landlord in an attempt to resolve the problem, they are more likely to relent once the landlord brings the relevant unenforceable contractual terms to their attention. 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 at trial.

As these 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 relinquish valid rights and claims when a tenancy-related problem emerges. These findings are consistent with previous research showing that consumers typically believe that they will be held to the terms of almost anything they sign,[[187]](#footnote-188) and that consequently they may refrain from filing meritorious suits if their contracts include dubious disclaimers of tort liability or questionably enforceable choice-of-law or choice-of-forum clauses.[[188]](#footnote-189)

## The Problem of Asymmetric Information

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 their contract terms and the attendant regulatory rules 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 deceptive 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, deceptive information, or unenforceable terms.

##  Perverse Incentives for Drafting Parties

In markets characterized by imperfect and asymmetric information, the potentially adverse effect produced by the inclusion of unenforceable terms might, 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 will likely affect their 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 abundant evidence of the prevalence of unenforceable and deceptive terms in consumer contracts and leases.[[189]](#footnote-190)

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 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 was 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.[[190]](#footnote-191)

As sophisticated sellers and landlords may understand, 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. The deterrent effect of the fear of losing at trial, 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.[[191]](#footnote-192) This effect is exacerbated by the American rule that all litigants must bear their own attorney’s fees and expenses.[[192]](#footnote-193)

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. As Tess Wilkinson-Ryan observes:

When Discover Bank includes an unenforceable restriction on class actions, a disapproving court invalidates the term—but not the contract […]. The defendant in that case pays no real costs—if the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best.[[193]](#footnote-194)

## Policy Implications

### Disclosure and its Limitations

Whether the use of unenforceable terms is intentional or unknowing, this study shows that it adversely affects tenants. The problem that unenforceable contract terms present to tenants consists of three interrelated issues: tenants are typically ignorant of the law determining their rights and duties as renters; tenants often rely on their contracts to ascertain their rights and duties as renters; and tenants usually presume that their contractual terms are enforceable and binding.

Understanding that the problem of unenforceable contract terms is most onerous when all three pre-conditions 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 such terms is significantly reduced. Therefore, it is essential that regulators seeking to enhance tenants’ protection insist on measures requiring that tenants be informed about their rights and remedies under the law.

In fact, the study’s findings suggest that information about the law, if adequately conveyed to tenants, may be as efficient in improving tenants’ positions as mandating the content of the lease agreement.

Of course, the problem is that landlords might fail to meet their disclosure obligations, just as they fail to meet the substantive obligations that the law now imposes.[[194]](#footnote-195) And, even if they meet these obligations, consumers and tenants might suffer from disclosure overload, so that disclosing such information would be useless.[[195]](#footnote-196) Finally, because sellers are incentivized to keep consumers ignorant of their rights and remedies, they might use deceptive techniques like legal fallback language or negative framing in order to misinform consumers about the law without exposing themselves to legal sanctions.[[196]](#footnote-197)

These caveats are real, but it may be possible to overcome them, at least to a certain extent, either by launching governmental information campaigns instead of requiring firms to disclose said information or by effectively encouraging class action suits.

### Class Actions

In many states in the U.S., including Massachusetts, tenants are allowed to bring class actions based on the inclusion of certain unenforceable terms in a rental agreement, provided that the class of tenants suffered a “similar injury” as a consequence.[[197]](#footnote-198) 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.”[[198]](#footnote-199) 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 sue in a class action. The court determined that the claim for breach of the warranty of habitability was too individualized for class certification.[[199]](#footnote-200)

 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 costs

### Public Enforcement

Importantly, the research findings presented in this Article have clear implications for consumer protection regulation in general. It should be recalled that in recent years, there has been a gradual shift towards more substantive policing of standard form contract terms. Seeking to enhance consumer protection, the new proposal for a Restatement of Consumer Contracts also calls for enhanced substantive intervention in the content of standard form contracts, particularly by strengthening the doctrines of fraud and unconscionability. Recognizing “the increasing [. . .] presence of highly permissive adoption rules,” the proposal acknowledges the “importance of the remaining regulatory safeguards in consumer contracts—mandatory restrictions over permissible contracting.” Central to this approach are doctrines that allow the courts to strike down one-sided terms and provisions in agreements that undermine consumers’ benefits. “If consumers are not expected to scrutinize the legal terms up front, courts would scrutinize them *ex post*,” the Restatement declares.[[200]](#footnote-201)

Nevertheless, this study’s findings cast substantial doubt on the ability of the proposed Restatement to eliminate the deceptive market practices that it is meant to address. According to the findings of this study, 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 can actually be subject to judicial scrutiny and invalidation, or are already void and unenforceable according to the law. Strong public enforcement mechanisms are needed to ensure that consumers are adequately protected from deceptive market practices, as consumers—due to their misperceptions about contracts and the law—appear unlikely to protect themselves.

# VI. Conclusion

In view of the accruing evidence that the inclusion of unenforceable contract terms in standardized agreements is prevalent in consumer markets, it is essential to explore the implications of this drafting practice for the non-drafting parties: consumers and tenants. This Article has used the residential rental market as a first test case. Building on previous work showing that unenforceable terms are regularly inserted in residential rental agreements in Massachusetts, this Article examined the role that these terms play in shaping tenants’ post-contract decisions and behavior.

The study’s findings 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 are prone to relinquish their legal rights and remedies, and ultimately bear costs that the law has deliberately and explicitly imposed on landlords.

While these findings appear disturbing in terms of protecting consumers, there is also cause for optimism. Informing tenants about their rights under the law substantially mitigates the harms generated by the presence of unenforceable lease terms. Therefore, solutions based on increasing tenants’ awareness of the legal environment, combined with strong public enforcement mechanisms, may help overcome these deceptive market practices.

# Appendix I: The Full Scenarios

## The Fridge Scenario

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, the refrigerator that the landlord installed in your apartment stops working. It is buzzing, and it fails to keep your food cold. The cost of repairing it is $200, and the cost of replacing it with a new one is $400.

|  |  |
| --- | --- |
| Unenforceable Term Condition | You look at your lease, and you notice that it contains a clause titled “Repairs”, stipulating as follows: “Tenant will, at the Tenant’s sole expense, keep and maintain the apartment and all equipment therein (including owner-installed equipment) in good condition and repair during the term of this Agreement and any renewal thereof.” |
| Enforceable (Compliant) Term Condition | You look at your lease, and you notice that it contains a clause titled “Repairs”, stipulating as follows: “Landlord will, at the Landlord’s sole expense, keep and maintain the apartment and all equipment therein (including owner-installed equipment) in good condition and repair during the term of this Agreement and any renewal thereof.” |
| No Term Condition | You look at your lease, but it says nothing about repairs. |

|  |  |
| --- | --- |
| Legal Information - Mandatory Condition  | You search the web, and you read that according to the law in your state, the landlord is obligated to maintain and repair all owner-installed equipment in the apartment. You also read that a landlord cannot disclaim this obligation under any lease agreement. |
| No Information Condition | \_ |

Questions:

1. What would you do as a first step? [open-ended]
2. Out of the following options, what would you be most likely to do:
	1. I would bear the fridge’s repair/replacement expenses myself
	2. I would contact the landlord and ask who should pay for the refrigerator’s repair/replacement
	3. I would contact the landlord and demand that the landlord pays for the fridge’s repair/replacement
3. Assume that you contact the landlord and he refuses to cover the repair expenses.
	1. How likely would you be to insist? [1 = extremely unlikely; 7 = extremely likely]
	2. How likely would you be to contact an attorney for legal advice? [1 = extremely unlikely; 7 = extremely likely]
	3. How likely would you be to initiate legal proceedings against the landlord? [1 = extremely unlikely; 7 = extremely likely]
4. What are the considerations that you would probably take into account when deciding whether to initiate legal proceedings against your landlord?
5. If you do initiate legal proceedings against your landlord, how likely do you think it is that the Court would rule in your favor? [1 = extremely unlikely; 7 = extremely likely]

## The TV Scenario

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 TV. The cost of repairing it is $200, and the cost of replacing it with a new one is $400.

|  |  |
| --- | --- |
| Unenforceable Term Condition | 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 Term Condition | 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 Condition | You look at your lease, but it says nothing about the landlord’s liability for loss or damage to the tenant. |

|  |  |
| --- | --- |
| Legal Information – Mandatory Condition [web search] | 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. |
| No Information Condition | \_ |

Questions:

1. What would you do as a first step? [open-ended]
2. Out of the following options, what would you be most likely to do:
	1. I would bear the TV’s repair/replacement expenses myself
	2. I would contact the landlord and ask who should pay for the TV’s repair/replacement
	3. I would contact the landlord and demand that the landlord pays for the TV’s repair/replacement
3. Assume that you contact the landlord and he refuses to cover the repair expenses.
	1. How likely would you be to insist? [1 = extremely unlikely; 7 = extremely likely]
	2. How likely would you be to contact an attorney for legal advice? [1 = extremely unlikely; 7 = extremely likely]
	3. How likely would you be to initiate legal proceedings against the landlord? [1 = extremely unlikely; 7 = extremely likely]
4. What are the considerations that you would probably take into account when deciding whether to initiate legal proceedings against your landlord?
5. If you do initiate legal proceedings against your landlord, how likely do you think it is that the Court would rule in your favor? [1 = extremely unlikely; 7 = extremely likely]
1. \* S.J.D. candidate, Harvard Law School, Terrence M. Considine Fellow at the John M. Olin Center for Law, Economics and Business, and Research Fellow at the Program on the Foundations of Private Law and at the Program on Negotiation, Harvard Law School. This project benefited from the generous financial support of the Program on Negotiation and the John M. Olin Center for Law, Economics, and Business, Harvard Law School. I am deeply indebted to Oren Bar-Gill for invaluable thoughts and suggestions. I thank Netta Barak-Corren, Omri Ben-Shahar, Dave Hoffman, William Hubbard, Louis Kaplow, Ori Katz, Steve Shavell, Tess Wilkinson-Ryan, Eyal Zamir, Aluma Zernik, the participants at the Penn Empirical Contracts Workshop, the Hebrew University Empirical Studies Workshop, the Harvard Law & Economics Seminar, […]. I’m also grateful to Colby Wilkinson and Laura Ash Smith for excellent research assistance. This project benefited from the generous support of the Harvard Program on Negotiation and the Mind, Brain and Behavior Program, Harvard University. [↑](#footnote-ref-2)
2. *See, e.g.*, 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 (2011) (finding that mandating disclosure in the setting of End User License Agreements does not meaningfully increase readership rates); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Law*, 66 Stan. L. Rev. 545 (2014) (proposing a solution to the “no-reading” problem in consumer contracts); 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) (finding that only one or two out of every thousand retail software buyers enters the license agreement before making the purchase, and proposing that these results cast doubt on the relevance of the “informed minority” mechanism in disciplining sellers from using one-sided terms in their standardized agreements) [hereinafter: Bakos et al.]; Omri Ben-Shahar & Carl E. Schneider. More Than You Wanted to Know: The Failure of Mandated Disclosure (Princeton U. Press 2014) (surveying the multiple evidence that consumers don’t read the fine print, and arguing that regulation which focuses on increasing disclosure in contracts is useless, if not harmful) [hereinafter: Ben-Shahar & Schneider]; 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 (noting that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand”) [hereinafter: Gilo & Porat]. [↑](#footnote-ref-3)
3. *See,* *e.g*., Ben-Shahar & Schneider, *supra* note 1, at 10 (noting that “mandated disclosure seems plausible only on logically reasonable but humanly false assumptions” because consumers do not read or understand the disclosed information in the fine print, and surveying the evidence of non-readership in consumer contracts); Wilkinson-Ryan, *supra* note 18, at 118 (beginning her Article by suggesting that “serious observers of modern contracting concede that the current state of the world is disclosure overload”); Gilo & Porat, *supra* note 1, 984 (noting that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand”); 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, on average, 244 hours per year, amounting to $781 billion in lost productivity); Eric Felten, *Postmodern Times: Are We All Online Criminals?*, Wall St. J., Nov. 18, 2011, at D8; Hoffman, *supra* note 1, at 1595–96 (“Consumers see a larger number of contracts daily than they used to, with longer terms and under novel conditions.”). [↑](#footnote-ref-4)
4. Margaret J. Radin, Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law (2013) (noting that non-negotiable boilerplate terms regularly deprive non-drafting parties of their most basic rights, such as their right of access to justice) [hereinafter: Radin]; 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); David A. Hoffman, *From Promise to Form*: *How Contracting Online Changes Consumers*, 91 N.Y.U. L. Rev. 1595, 1596 (2016) (suggesting that “in an online ‘orgy of contract formation,’ firms have seized new opportunities to shift risks to consumers by imposing unread terms”) [hereinafter: Hoffman]; Oren Bar-Gill, Seduction by Contract: Law, Economics, and Psychology in Consumer Markets (Oxford U. Press 2012) (showing how sellers exploit consumers’ bounded rationality and systematic cognitive biases through contract design) [hereinafter: Bar-Gill]; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. Chi. L. Rev. 1203 (2003) (arguing that drafting parties have an incentive to introduce self-serving terms in view of the non-drafting parties’ bounded rationality) [hereinafter: Korobkin]. [↑](#footnote-ref-5)
5. *See, e.g.*, 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 4, at 217–42 (advocating for substantive regulation of boilerplate clauses, and surveying various regulatory tools); Korobkin, *supra* note 4, 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: “The design of salient contract terms is best left to the private market because sellers have profit incentives to draft efficient terms. The design of non-salient terms is better assigned to government institutions because the market will not create pressure toward efficiency and state actors, as imperfect as they will be, at least can aim at the proper target”); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. Pitt. L. Rev. 21, 23 (1984) (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) (suggesting that “invisible terms” in adhesion contracts should be presumptively unenforceable). K. N. Llewellyn, *The Standardization of Commercial Contracts in English and Continental Law (Book Review)*, 52 Harv. L. Rev. 700, 704 (1939) (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) (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) (calling for an “expanded notion of unconscionability” to prevent “uneven exchanges”). [↑](#footnote-ref-6)
6. Substantive regulation has been adopted in the consumer, labor, and residential markets. *See* Part I.C., *infra*,for an overview of the substantive regulation adopted in the United States. [↑](#footnote-ref-7)
7. *Id.* [↑](#footnote-ref-8)
8. *See* Part I.D., *infra*, for an overview of existing evidence for non-compliance with substantive regulation. [↑](#footnote-ref-9)
9. Meirav Furth-Matzkin *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. Legal Analysis1 (2017) (finding, based on a sample of lease agreements from Massachusetts, that residential leases regularly include unenforceable terms) [hereinafter: Furth-Matzkin]. [↑](#footnote-ref-10)
10. For research suggesting that drafting parties exploit consumers’ bounded rationality through contract and product design, *see,* *e.g.*, Korobkin, *supra* note 4; Bar-Gill, *supra* note 4. [↑](#footnote-ref-11)
11. For notable exceptions, *see* Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. Cin. L. Rev. 845 (1988) (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) [hereinafter: Kuklin]; Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 Oh. St. L. J. 1127, 1128–31 (2009) (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”) [hereinafter: Sullivan]. [↑](#footnote-ref-12)
12. *See* Part I.D., *infra*. [↑](#footnote-ref-13)
13. *See* Furth-Matzkin, *supra* note 9. [↑](#footnote-ref-14)
14. *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 EULA buyers visit the “terms and conditions” webpage at negligible rates). [↑](#footnote-ref-15)
15. *See* Furth-Matzkin, *supra* note 9, 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”). [↑](#footnote-ref-16)
16. *Id.* at 3. [↑](#footnote-ref-17)
17. *See,* *e.g.*, Oren Bar-Gill & Kevin Davis, *(Mis)perceptions of Law in Consumer Markets*, 19 Am. Law & Econ. Rev. 245, 246 (2017) (observing that “people make mistakes about the law” and examining how systematic misperceptions about the law may affect consumer behavior); Warren Mueller, *Residential Tenants and their Leases: An Empirical Study*, 69 Mich. L. Rev. 247, 272–73 (1970) (surveying 100 tenants from Michigan, finding that they often harbor misperceptions as to the enforceability of exculpatory clauses in their state of residence) [hereinafter: Mueller]; 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) (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 11, 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-18)
18. 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) (finding that consumers are reluctant to file meritorious suits if their contracts include legally dubious disclaimers of tort liability); Tess Wilkinson-Ryan, *The Perverse Behavioral Economics of Disclosing Standard Terms*, 103 Cornell L. Rev. 117 (2017) [hereinafter: Wilkinson-Ryan] (finding that consumers are unlikely to question the enforceability of egregious contract terms—even when in fact, these terms rest on shaky legal grounds—as long as they are included in a contract that they signed); [↑](#footnote-ref-19)
19. *See* Part III.C., *infra*. [↑](#footnote-ref-20)
20. *See,* *e.g*., Ben-Shahar & Schneider, *supra* note 1, at 10 (noting that “mandated disclosure seems plausible only on logically reasonable but humanly false assumptions” because consumers do not read or understand the disclosed information in the fine print, and surveying the evidence of non-readership in consumer contracts); Wilkinson-Ryan, *supra* note 18, at 118 (beginning her Article by suggesting that “serious observers of modern contracting concede that the current state of the world is disclosure overload”); Gilo & Porat, *supra* note 1, 984 (noting that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand”); 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, on average, 244 hours per year, amounting to $781 billion in lost productivity); Eric Felten, *Postmodern Times: Are We All Online Criminals?*, Wall St. J., Nov. 18, 2011, at D8; Hoffman, *supra* note 1, at 1595–96 (“Consumers see a larger number of contracts daily than they used to, with longer terms and under novel conditions.”). [↑](#footnote-ref-21)
21. *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) (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 contained such a clause failed to understand its legal implications, interpreting the findings as suggesting that “consumers lack awareness of arbitration agreements and do not understand those agreements when they are aware of them”); 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-22)
22. *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) (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”)[hereinafter: Stark & Choplin]; Janan Smither & Curt Braun, *Readability of Prescription Drug Labels by Older and Younger Adults*, 1 J. Clinical Psychol. in Med. Settings 149 (1994) (showing that user-unfriendly features, like font size and length, increase fatigue, particularly among the elderly) [hereinafter: Smither & Braun]. [↑](#footnote-ref-23)
23. 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); Smither & Braun, *supra* note 22. [↑](#footnote-ref-24)
24. *See,* *e.g.*,Bakos et al., *supra* note 1 (finding that only one in a thousand online buyers as much as accesses the ‘terms and conditions’ webpage before purchasing EULAs); Ayres & Schwartz, *supra* note 1 (responding to the problem of “search costs” resulting from the incredible amount of terms and disclosures available to consumers); Wilkinson-Ryan, *supra* note 18, at 118–20 (acknowledging that “the current state of the law is disclosure overload” and recognizing “the now-uncontroversial fact of universal non-readership”); Hoffman, *supra* note 3, at 1605 (“[O]f course, almost no one reads any of these additional, increasingly long contracts.”). [↑](#footnote-ref-25)
25. *See,* *e.g.*, Bakos et al., *supra* note 1, at 3. [↑](#footnote-ref-26)
26. 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-27)
27. *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-28)
28. *See* Bar-Gill, *supra* note 2; Korobkin, *supra* note 2; Warkentine, *supra* note 2. [↑](#footnote-ref-29)
29. *See, e.g.,* Radin, *supra* note 3, at 4–9 (surveying the different terms that firms use in order to deprive consumers of their legal rights and remedies, such as choice-of-law and choice-of-forum clauses, exculpatory clauses, class action waivers, and so forth). [↑](#footnote-ref-30)
30. Bar-Gill, *supra* note 4; Korobkin, *supra* note 4. 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-31)
31. *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, product strict liability may be preferred because the price of the product will then accurately reflect the associated risk). [↑](#footnote-ref-32)
32. Bar-Gill, *supra* note 4, 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-33)
33. Bar-Gill, *supra* note 4, at 15–16. [↑](#footnote-ref-34)
34. *Id*. at 16. [↑](#footnote-ref-35)
35. *Id.* at 16. [↑](#footnote-ref-36)
36. *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-37)
37. *See,* *e.g.*, Ben-Shahar & Schneider, *supra* note 1, at 4 (observing that “mandated disclosure has been the principal regulatory answer to some of the principal policy questions of recent decades”); Bar-Gill, *supra* note 4, at 7 (focusing the discussion on a single regulatory tool: disclosure mandates); Radin, *supra* note 5, at 219 (“Even when the need for regulation [. . .] is democratically recognized, the US 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-38)
38. 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 [hereinafter: the CARD Act], and its implementing regulations, enhanced the mandatory disclosure regime governing credit cards. It requires 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 requires that issuers calculate and disclose the monthly payment that would pay off the cardholder's balance in three years, as well as the savings—in total payments—from this faster repayment schedule *See,* *e.g.*, Bar-Gill, *supra* note 4, at 55, 111. [↑](#footnote-ref-39)
39. 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 3, 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-40)
40. *See,* *e.g.*, Furth-Matzkin, *supra* note 9, at 10; Unif. Residential Landlord & Tenant Act (1972). [↑](#footnote-ref-41)
41. *See,* *e.g.*, Radin, *supra* note 3, 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 4, at 7, 105–15, 174–84, 238–47 (surveying the ubiquitous disclosure requirements in the mortgage, credit card, and cellular industries). [↑](#footnote-ref-42)
42. 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 3, 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 18, 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”); *But see* 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” and proposing an alternative mode of disclosure that “aims simply to influence rather than instruct.”). [↑](#footnote-ref-43)
43. Ben-Shahar & Schneider, *supra* note 1, at 12. [↑](#footnote-ref-44)
44. *See* Barr et al., *supra* note 32, 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.”). 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-45)
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 18, 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-46)
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) (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 (Preliminary Draft No. 3, October 26, 2017), 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.”) [Hereinafter: Restatement of Consumer Contracts]. [↑](#footnote-ref-47)
47. *See, e.g.*, ProCD 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 for the buyer to examine 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 *ProCD* theory 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 46, 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-48)
48. *Id*. at 4. [↑](#footnote-ref-49)
49. *Id*. at 2; *see also* Korobkin, *supra* note 4, 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-50)
50. *See,* *e.g.*, Radin, *supra* note 3, at 220–32. [↑](#footnote-ref-51)
51. Radin, *supra* note 3, 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 U.S.). [↑](#footnote-ref-52)
52. 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); *see also* Michael J. Wisdom, *An Empirical Study of the Magnusson-Moss Warranty Act*, 31 Stan. L. Rev. 1117 (1979). [↑](#footnote-ref-53)
53. *See* the CARD Act, *supra* note 38. These substantive restrictions include the prohibition on allocating payments to low-interest balances first. *See,* *e.g.*, Bar-Gill, *supra* note 4, at 105. [↑](#footnote-ref-54)
54. *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 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-55)
55. Radin, *supra* note 3, at 220. [↑](#footnote-ref-56)
56. 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) (discussing various cases in which courts invalidated certain exclusions of, or restrictions on, insurance coverage) [hereinafter: Tucker]. For an overview of mandatory policing of insurance contract terms in the U.S., *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-57)
57. *See,* *e.g*., Furth-Matzkin, *supra* note 9, 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-58)
58. Furth-Matzkin, *supra* note 9 (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 11, 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 11, at 1128 (acknowledging that “there are few empirical studies of the frequency within which unenforceable-as-written clauses appear in contracts,” but adding that “the phenomenon is common enough to raise questions as why it persists”); 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-59)
59. Tucker, *supra* note 56, at 526 (noting that insurance companies often continue to use policy provisions that have been invalidated by courts). [↑](#footnote-ref-60)
60. *See,* *e.g.*, Broadley v. Mashpee Neck Marina, Inc., 471 F.3d 272, 276 (1st Cir. 2006) (striking down an overbroad 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-61)
61. Sullivan, *supra* note 11, 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” and surveying the judicial treatment of these clauses). [↑](#footnote-ref-62)
62. *See*, *e.g*., Furth-Matzkin, *supra* note 9. [↑](#footnote-ref-63)
63. *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); Korobkin, *supra* note 2 (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 (analyzing the ways sellers exploit consumers’ systematic cognitive biases through contract design). [↑](#footnote-ref-64)
64. For notable exceptions, *see,* *e.g.*, Kuklin, *supra* note 11; Sullivan *supra* note 11. [↑](#footnote-ref-65)
65. *See*, *e.g*., Furth-Matzkin, *supra* note 9, at 41; Sullivan, *supra* note 11, at 1136 (suggesting that “the obvious reason why one party would seek a clause it knew to be unenforceable is that it believed the other party to be unaware of the fact and likely to remain unaware of it. This might be because the second party lacks sophistication and legal counsel. Further, at least in some contexts the insisting party might reinforce the clause’s implicit message that it is enforceable as written”). *See also* Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 Conn. L. Rev. 765, 782–83 (2002) (“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-66)
66. *See* Furth-Matzkin, *supra* note 9, at 2. [↑](#footnote-ref-67)
67. *See, e.g.,* Sullivan, *supra* note 11, at 1129 (“It is also possible that clauses continue to be used, despite having been invalidated by courts or legislatures, because a change in the law is anticipated or at least hoped for.”). [↑](#footnote-ref-68)
68. *See*, *e.g*., Furth-Matzkin, *supra* note 9, at 41. [↑](#footnote-ref-69)
69. *Id.* at 42. [↑](#footnote-ref-70)
70. *See,* *e.g.*, Bar-Gill & Davis, *supra* note 15, at 247 (noting that “when deciding whether to purchase these products and services, consumers often rely on the law. They know that the law polices the content of consumer contracts and prevents sellers from inserting excessively egregious terms. Implicitly, then, consumers form beliefs about the legal standard–what sellers can and cannot write into the contract–and these beliefs influence their purchasing decisions”). [↑](#footnote-ref-71)
71. *See,* *e.g.*, *id.* at 246 (“[F]or example, 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 9, at 42 (observing that a consumer’s decision not to become informed about the multiple legal rules that govern her transactions may be rational, especially if small stakes are involved). Similarly, authors have argued that failure on the part of 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 46, 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-72)
72. See citations in footnote 17. *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 16, 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 11, 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-73)
73. 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-74)
74. Chris J. Hoofnagle & Jennifer M. Urban, *“Alan Westin’s Privacy* Homo Economicus,” 49 Wake Forest L. Rev. 261, 270 (2014) (“[T]he average consumer appears to operate in the marketplace with a flawed, yet optimistic, perception of business practices and legal protections that could lead undermine her ability to choose effectively.”). [↑](#footnote-ref-75)
75. Mueller, *supra* note 17, at 273 (“It is noteworthy that the tenants made almost no distinction between what they believed to be the legal position in Michigan and that in the majority of states… It would appear that, whatever their views with regard to enforceability, tenants do not think it likely that the situation would vary from state to state.”). [↑](#footnote-ref-76)
76. Furth-Matzkin, *supra* note 9, at 42. [↑](#footnote-ref-77)
77. Mueller, *supra* note 17, at 273. [↑](#footnote-ref-78)
78. *Id.* [↑](#footnote-ref-79)
79. *Id.* at 274. [↑](#footnote-ref-80)
80. Furth-Matzkin, *supra* note 9, at 6. [↑](#footnote-ref-81)
81. Stolle & Slain, *supra* note 16. [↑](#footnote-ref-82)
82. *Id.* at 91. [↑](#footnote-ref-83)
83. Sovern et al., *supra* note 21. [↑](#footnote-ref-84)
84. Hoofnagle & Urban, *supra* note 75, at 281–82. [↑](#footnote-ref-85)
85. 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). [↑](#footnote-ref-86)
86. *See,* *e.g.,* Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation,* 67 Stan. L. Rev. 1269 (2015) [hereinafter: Wilkinson-Ryan & Hoffman]; Yuval Feldman & Doron Teichman, *Are All Contractual Obligations Created Equal?* 100 Geo. L. J. 5 (2012) [hereinafter: Feldman & Teichman]; Hoffman, *supra* note 3. For a review of deontological theories of breach of contract, *see* Eyal Zamir & Barak Medina, Law, Economics and Morality 260–61 (2010). [↑](#footnote-ref-87)
87. *See,* *e.g.,* Wilkinson-Ryan & Hoffman, *supra* note 87, at 1281–94, 1296–98. [↑](#footnote-ref-88)
88. *See,* *e.g.*, Tess Wilkinson-Ryan, *A Psychological Account of Consent of Fine Print*, 99 Iowa L. Rev. 1745 (2013). [↑](#footnote-ref-89)
89. Furth-Matzkin & Sommers, *supra* note 17. [↑](#footnote-ref-90)
90. *Id*. at 31 (“Laypeople are deeply affected by the content of unread standard form contracts. In fact, people feel so deeply committed to the fine print, that they do not give almost any weight to prior, deceptive, representations made by the seller.”). [↑](#footnote-ref-91)
91. Wilkinson-Ryan, *supra* note 18, at 161. [↑](#footnote-ref-92)
92. *Id*. at 161*.* [↑](#footnote-ref-93)
93. *Id.* at 164. [↑](#footnote-ref-94)
94. *See, e.g.,* Bakos et al., *supra* note 1; Blaszczak-Boxe, *supra* note 26; Hoffman, *supra* note 3. [↑](#footnote-ref-95)
95. Mueller, *supra* note 17, at 256. [↑](#footnote-ref-96)
96. Furth-Matzkin, *supra* note 9, at 36. [↑](#footnote-ref-97)
97. *Id.* at 2–3. [↑](#footnote-ref-98)
98. *Id.* at 39. [↑](#footnote-ref-99)
99. *Id* at 38 (noting that one participant reported looking at the lease “when I had a problem or question, [in order] to clarify what I could do about it,” and another participant reported looking at the lease “to be sure that I understood it and whether my issue could be solved by it”). [↑](#footnote-ref-100)
100. *Id.* at 39–40. [↑](#footnote-ref-101)
101. *Id.* at 40. [↑](#footnote-ref-102)
102. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950 (1979) (suggesting that when parties negotiate their divorce outside the courtroom, they take the expected outcome of a judicial resolution of their marriage into account). [↑](#footnote-ref-103)
103. *See, e.g.*, Stewart Macaulay, *Non-contractual relations in business: A preliminary study*, 28 Am. Soc. Rev. 55 (1963) (describing interviews with businessmen in Wisconsin in the 1960s, finding that in light of repeated interactions over time, they developed informal, relational, norms of negotiation and dispute resolution) [hereinafter: Macaulay]; Lisa Bernstein, *Opting out of the legal system: Extralegal Contractual Relations in the Diamond Industry,* 21 J. Legal Stud*.* 115 (1992) (studying merchants in the diamond industry, and observing the moral and reputational constraints on their relations) [hereinafter: Bernstein]. [↑](#footnote-ref-104)
104. Macaulay, *supra* note 105, at 61 (for example, Macaulay cited one of his interviewees, who noted that “you don’t read legalistic contract clauses at each other if you want to do business again. One doesn’t run to lawyers if he wants to stay in business because one must behave decently”). [↑](#footnote-ref-105)
105. Bernstein, *supra* note 105. [↑](#footnote-ref-106)
106. Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (1991) (studying how residents of rural Shasta County, California, resolve cattle disputes, finding that neighbors often apply informal norms, rather than formal legal rules, to resolve most of the issues that arise among them). [↑](#footnote-ref-107)
107. Rabin, *supra* note 57, at 521 (describing the “revolution” in landlord-tenant law, and the corresponding radical changes in landlord-tenant relations). [↑](#footnote-ref-108)
108. *See* Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. Rev. 503, 523, 575 (1982) (describing the developments in landlord-tenant law, and the enhanced protections granted to tenants in many jurisdictions in the United States, observing that landlord-tenant law has “escaped from the realm of private ordering, in which the stronger party typically has the advantage and has become the subject to regulation ‘in the public interest.’”). [↑](#footnote-ref-109)
109. Unif. Residential Landlord & Tenant Act (1972). [↑](#footnote-ref-110)
110. National Conference of State Legislatures, *State Adoptions of URLTA Landlord Duties*, NCSL (2018), http://www.ncsl.org/research/environment-and-natural-resources/state-adoptions-of-urlta-landlord-duties.aspx. [↑](#footnote-ref-111)
111. *See, e.g.*, Rabin, *supra* note 57, at 521–22 (explaining that the law in at least forty jurisdictions has changed from the *caveat lessee* principle to the opposite rule: “Landlords in these jurisdictions have a duty to repair all defects, regardless of when they arise.” Rabin notes that this duty is generally thought to rest on an “implied warranty” made by the landlord to the tenant that the premises are fit for human habitation). [↑](#footnote-ref-112)
112. Unif. Residential Landlord & Tenant Act §1.403(a)(4) (1972). [↑](#footnote-ref-113)
113. *See, e.g.*, Rabin, *supra* note 57, at 531–39 (surveying the limitations on landlord’s common law rights, including the limitation on the landlords right to choose tenants or to evict them at the termination of the lease). [↑](#footnote-ref-114)
114. Furth-Matzkin, *supra* note 9. [↑](#footnote-ref-115)
115. *Id.* at 24–31. [↑](#footnote-ref-116)
116. *Id*. [↑](#footnote-ref-117)
117. For similar predictions, *see* Kuklin, *supra* note 11, 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 9, at 3 (suggesting that the use of unenforceable terms is likely to adversely affect consumers, since they are likely to give up valid legal rights and claims in view of their ignorance of the law). [↑](#footnote-ref-118)
118. Participants’ ages ranged from 19 to 98 years, with a mean age of 36 years. Sixty-three percent of the participants were White, 22% were Asian, 6% were Afro-American, 5% were Hispanic, and the rest identified as mixed of different categories. Eleven percent of the participants obtained a high school degree or less than a high school education, 47% obtained a college degree, 25% had begun but had not finished college, 15% had an advanced degree, and 2% had a professional degree. Fifty-eight participants, or 5% of the sample, had an advanced law degree. In terms of income, 36% reported income below $30,000, 23% reported income between $30,000 and $50,000, 32% reported income between $50,000 and $100,000, and 9% reported income above $100,000. In terms of political affiliation, 20% viewed themselves as Republicans, 42% as Democrats, 31% as Independents, 5% reported that they had no preference, and 2% identified as “other.” In terms of ideology, 23% viewed themselves as conservative (slightly/somewhat/extremely), 31% as moderate, and 46% as liberal (slightly/somewhat/extremely). [↑](#footnote-ref-119)
119. Participants who took less than three minutes to complete the survey were excluded from the study. [↑](#footnote-ref-120)
120. Bishop v. Tes Realty Trust, 942 N.E.2d 173 (Mass. 2011). [↑](#footnote-ref-121)
121. *Id*. at 180–81. [↑](#footnote-ref-122)
122. For more details about this survey, *see* Furth-Matzkin, *supra* note 9, 35–40. [↑](#footnote-ref-123)
123. *Id.* at 19; Mass. Gen. Laws. ch. 186 § 15B(4); 105 Mass. Code Regs. §§ 410–500; Mass. Gen. Laws ch. 111, § 127 (2016). [↑](#footnote-ref-124)
124. Mass. Gen. Laws. ch. 186, § 15 (2016); *see also* Norfolk & Dedham Mutual Fire Insurance Co. v. Morrison, 924 N.E.2d 260, 266 (Mass. 2010); Bishop v. Tess Realty Trust, 942 N.E.2d 173 (Mass. 2011) (holding landlord liable for injury caused to the tenant when ceiling plaster fell into her eye); 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-125)
125. *Id.* at 24–6. [↑](#footnote-ref-126)
126. Furth-Matzkin, *supra* note 9, 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-127)
127. Participants who failed to respond or whose responses were unintelligible were excluded from the analysis. Whenever the three coders were not in unanimous agreement about the proper code to assign to a response, the minority vote was dropped and the coding given by the two-person majority was used for the purposes of the analysis. [↑](#footnote-ref-128)
128. Subjects who read a silent lease or an unenforceable term (placing repair duties on the tenant or disclaiming the landlord’s negligence liability) were significantly more likely to search for information about their rights than participants whose contract indicated that the landlord is responsible for repairs (6% in ‘no term’ condition and 5% in the ‘unenforceable term’ condition, versus 1% in ‘enforceable term’ condition, χ2(2) = 4.1062, *p* = 0.04). These findings indicate that, as expected, when a contract is silent rather than informative, tenants are more likely to search for outside information about the legal state-of-affairs. But why were tenants more likely to search for information when encountering an unenforceable, rather than an enforceable, contract term? It is possible that participants were more inclined to look for information after reading an unenforceable term because they suspected that the term was questionable, because they wanted to make sure that it is, in fact, enforceable before they bear the associated costs, or a combination of both these explanations. [↑](#footnote-ref-129)
129. In a survey of 279 tenants from Massachusetts, 24% reported searching the web for their rights as a result of a rental problem they incurred, and 33% reported consulting a family member or friend *See* Furth-Matzkin, *supra* note 7, at 39. [↑](#footnote-ref-130)
130. *Id.* [↑](#footnote-ref-131)
131. Collapsing across scenarios, χ2(2) = 6.3316, *p* < 0.05. In the TV Scenario, 2% in the ‘enforceable term’ condition, 15% in the ‘no term’ condition, and 22% in the ‘unenforceable term’ condition intended to resign. This effect was highly significant: χ2(2) = 8.5913, *p =* 0.01). In the Fridge Scenario, 11% in the ‘enforceable’ term condition, 11% in the ‘no term’ condition, and 15% in the ‘unenforceable term’ condition intended to resign; χ2(2) = 0.68406, *p* = 0.71 (note that the effect here is not significant, although results point in the expected direction). [↑](#footnote-ref-132)
132. Collapsing across scenarios, χ2(2) = 26.33, *p* < 0.001. In the Fridge Scenario, 81% in the ‘unenforceable term’ condition, versus 81% in the ‘no term’ and 84% in the ‘enforceable term’ condition intended to contact the landlord; χ2(2) = 0.82749, *p* = 0.66; In the TV Scenario, 48% in the ‘unenforceable term’ condition, versus 61% in the ‘no term’ and 75% in the ‘enforceable term’ condition, intended to resign; χ2(2) = 29.25, *p <* 0.001. [↑](#footnote-ref-133)
133. For intentions to take non-legal action: χ2(2) = 0.396, *p* = 0.82 (1% so intended in the ‘enforceable’ term condition, 2% so intended in the ‘no term’ condition, and 2% so intended in the ‘unenforceable’ term condition). For intentions to take legal action (seek legal advice or initiate proceedings), χ2(2) = 1.0693, *p* = 0.59 (9% so intended in the ‘enforceable’ term condition, 13% so intended in the ‘unenforceable’ term condition, and 13% in the ‘no term’ condition). In the Fridge Scenario, 4% in the ‘unenforceable term’ condition, versus 5% in the ‘no term’ condition and 4% in the ‘enforceable term’ condition, intended to resign; χ2(2) = 0.2, *p* = 0.9. In the TV Scenario, these figures were, respectively, 22%, 22%, and 17%; χ2(2) = 0.44948, *p* = 0.80. [↑](#footnote-ref-134)
134. *See, e.g.,* Charles Fried, Contract as Promise: A Theory of Contractual Obligation p.? (2015); Tess Wilkinson-Ryan, *Do Liquidated Damages Encourage Breach? A Psychological Experiment*, 108 Mich. L. Rev. 633, 639–40 (2010) (viewing breach as a “moral harm”); *But see* Zamir & Medina, *supra* note 2, at 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-135)
135. Restatement (Second) of Contracts, ch. 16, intro. Note (1981). [↑](#footnote-ref-136)
136. Feldman & Teichman, *supra* note 87, at 9 (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 promise); Tess Wilkinson-Ryan & Jonathan Baron, *Moral Judgment and Moral Heuristics in Breach of Contract*, 6 J. Empirical Legal Stud. 405 (2009) (providing experimental evidence that moral judgments affect people’s perceptions of contract breach). [↑](#footnote-ref-137)
137. Wilkinson-Ryan & Hoffman, *supra* note 87, at 1279. [↑](#footnote-ref-138)
138. Wilkinson-Ryan & Baron, *supra* note 138, at 422. [↑](#footnote-ref-139)
139. Furth-Matzkin & Sommers, *supra* note 17, at 29-34. [↑](#footnote-ref-140)
140. Furth-Matzkin & Sommers, *supra* note 17, at 35 (finding that “if we educate consumers about consumer protection statutes that allow for rescission on the basis of fraud, participants adjust their perceptions. They express more intention to pursue legal and non-legal recourse, and the no longer believe that a court would enforce the written provision. Indeed, they even alter their fairness judgments and consent evaluations, believing the surprising term to be less consensual and more unfair”). [↑](#footnote-ref-141)
141. Reactance is generally defined as an individual’s negative response when a freedom has been threatened or lost. Reactance is typically inferred when people adopt a position or behavior opposite from the behavior or position advocated or when they perceive the behavior or object associated with the threatened freedom to be more attractive. *See, e.g.*, Sharon S. Brehm & Jack W. Brehm, Psychological Reactance: A Theory of Freedom and Control 4 (2013); Robert A. Wicklund, Freedom and Reactance (1974). [↑](#footnote-ref-142)
142. *See,* *e.g*., Oren Bar-Gill & Omri Ben-Shahar, *Threatening an “Irrational” Breach of Contract*, 11 Sup. Ct. Econ. Rev*.* 143 (2004); 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-143)
143. *See,* *e.g*., Bar-Gill & Ben-Shahar, *supra* note 147, at XX. [↑](#footnote-ref-144)
144. Wilkinson-Ryan, *supra* note 18; Stolle & Slain, *supra* note XX. [↑](#footnote-ref-145)
145. *Id*. [↑](#footnote-ref-146)
146. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 Harv. L. Rev. 625, 632–37 (1960); Sullivan, *supra* note 11, at 622–23; Stewart E. Sterk, *Restraints on the Alienation of Human Capital*, 79 Va. L. Rev. 383, 410 (1993). [↑](#footnote-ref-147)
147. Collapsing across scenarios, χ2(2) = 0.29035, *p* = 0.86. In the Fridge Scenario, these figures were 9% in the ‘enforceable term’ condition, 9% in the ‘no term’ condition, and 8% in the ‘unenforceable term’ condition; χ2(2) = 0.12489, *p* = 0.94. In the TV Scenario, these figures were 3% in the ‘enforceable term’ condition, 3% in the ‘no term’ condition, and 6% in the ‘unenforceable term’ condition; χ2(2) = 2.1072, *p* = 0.35. [↑](#footnote-ref-148)
148. χ2(1) = 11.442, *p* < 0.001. [↑](#footnote-ref-149)
149. Collapsing across scenarios, χ2(1) = 9.6897, *p* =0.02. In the TV Scenario: 22% in ‘no information,’ versus 6% in ‘legal information, reported an intention to resign; χ2(1) = 8.3523, *p* = 0.004. In the Fridge Scenario, these figures were 15% in ‘no information’ and 8% in ‘legal information,’ respectively; χ2(1) = 1.3724, *p* = 0.2414. [↑](#footnote-ref-150)
150. Collapsing across scenarios, χ2(1) = 3.976 , *p =* 0.0462. [↑](#footnote-ref-151)
151. For intentions to consult a lawyer: χ2(1) = 1.783, *p* = 0.182. For intentions to initiate legal proceedings against the landlord: χ2(1) = 2.069, *p* = 0.15. [↑](#footnote-ref-152)
152. χ2(1) = 3.061, *p* = 0.0802. [↑](#footnote-ref-153)
153. χ2(2) = 15.19, *p* < 0.001. [↑](#footnote-ref-154)
154. *See* Brehm & Brehm, *supra* note 134, at 4; Wicklund, *supra* note 134. [↑](#footnote-ref-155)
155. See references in footnote 147 *supra*. [↑](#footnote-ref-156)
156. 5% in ‘unenforceable,’ versus 4% in ‘enforceable’ and 5% in ‘no term;’ χ2(2) = 0.787, *p* = 0.675. [↑](#footnote-ref-157)
157. Insist: F(2, 347) = 21.17, *p* = 0.000; Attorney: F(2, 354) = 3.45, *p* = 0.03; Proceedings: F(2, 35) = 5.35, *p =* 0.0052; Win: F(2, 354) = 54.07, *p* = 0.000; Composite: F(2, 358) = 27.43, *p* = 0.000. [↑](#footnote-ref-158)
158. In the Fridge Scenario: MUnenforceable\_Fridge = 5.36, SD = 1.7; MNo term\_Fridge = 5.74, SD = 1.54; MEnforceable\_Fridge = 6.21, SD = 1.17; F(2, 1069) = 29.66*, p* = 0.0000. In the TV Scenario: MUnenforceable\_TV = 5.66, SD = 1.53; MNo term\_TV = 5.91, SD = 1.43; MEnforceable\_TV = 6.27, SD = 1.18; F(2, 1081) = 17.60*, p* = 0.0000. [↑](#footnote-ref-159)
159. Insist: χ2(2) = 19.076, *p* = 0.000; Attorney: χ2(2) = 5.3384, *p* = 0.069; Proceedings: χ2(2) = 3.3746, *p* = 0.185; Win: χ2(2) = 54.18, *p* = 0.000. [↑](#footnote-ref-160)
160. Insist: F(2, 365) = 4.09, *p* = 0.0175; Attorney: F(2, 364) = 1.53, *p* = 0.2171; Proceedings: F(2, 365) = 0.67, *p* = 0.5120; Win: F(2, 362) = 1.85, *p* = 0.16; Composite: F(2, 365) = 1.04, *p* = 0.3541. [↑](#footnote-ref-161)
161. In terms of percentage rates, there was only a marginally significant difference in participants’ intention to insist (χ2(2) = 5.4175, *p* = 0.067). Except for likelihood to insist and to win in court, the differneces across contract conditions were not significant. Insist: χ2(2) = 5.4175, *p* = 0.067; Attorney: χ2(2) = 0.9895, *p* = 0.610; Proceedings: χ2(2) = 2.675, *p* = 0.263. [↑](#footnote-ref-162)
162. Overall, and collapsing across scenarios and contract term conditions, information about the law significantly affected participants’ intentions to initiate proceedings: While 35% indicated such an intention in the ‘no information’ condition, as many as 49% so indicated in the ‘legal information’ condition; χ2(1) = 14.39, *p =* 0.000. [↑](#footnote-ref-163)
163. A simple linear regression predicting overall bargaining position (the composite measure) by 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* = 0.19, SE = 0.04, *p* < 0.000) was highly significant. A two-tailed t-test also yielded highly significant differences in mean bargaining position scores (*t* = -3.8, df = 1106, *p =* 0.0002). This effect was robust across all information conditions. Better-informed participants had significantly stronger perceptions of their bargaining positions than did those in both the ‘no information’ and ‘legal information’ conditions. A multiple linear regression predicting overall bargaining position (the composite measure) by familiarity with the law for participants in the ‘no information’ and ‘legal information’ groups, that included the ‘contract term’ variable as control, also yielded a significant effect. [↑](#footnote-ref-164)
164. For unenforceable: *t* = -3.215, *p* = 0.00141. For no term: t = -4.926, *p* < 0.001. [↑](#footnote-ref-165)
165. Furth-Matzkin, *supra* note 9, at 29–31 (finding that many residential leases contained legal fallback phrases). [↑](#footnote-ref-166)
166. *Id.*  [↑](#footnote-ref-167)
167. *Id.* at 30. [↑](#footnote-ref-168)
168. *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-169)
169. Tversky and Kahneman found a “preference reversal,” such that the majority of the subjects who were given the positively framed version (a sure saving of 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 sure loss of two-thirds of the lives, versus a two-thirds chance of losing all the lives) selected the risky option. Amos Tversky & Daniel Kahneman, *The Framing of Decisions & the Psychology of Choice*, 211 Sc. 453, 453 (1981). [↑](#footnote-ref-170)
170. The distinction between *risky choice framing* and *attribute framing* was 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 Organizational, Behav. & Hum. Decision Processes 149 (1998) [hereinafter Levin]. [↑](#footnote-ref-171)
171. *Id.*, at 150. [↑](#footnote-ref-172)
172. Irwin P. Levin & Gary J. Gaeth, *Framing of Attribute Information Before and After Consuming the Product*, 15 J. Consumer Res. 374, 374–78 (1988). [↑](#footnote-ref-173)
173. 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-174)
174. 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: participants are more honest and less experienced with taking surveys. *Id.* Well-known psychological findings have been replicated in samples drawn from both Prolific Academic and MTurk, suggesting that crowdsourcing is a legitimate alternative to lab-based research. [↑](#footnote-ref-175)
175. Participants who did not complete the survey (*n* = 5) and duplicate IP addresses (*n* = 18) were excluded from the analysis. [↑](#footnote-ref-176)
176. Sixty-nine percent of the participants were White, 13% were Asian, 6% were Afro-American, 5% were Hispanic, and the rest identified as mixed of different categories. Fifteen percent of the participants obtained a high school degree or less than a high school education, 39% obtained a college degree, 31% had begun but had not finished college, 11% had an advanced degree, and 1% had a professional degree. Twenty-four participants, or 5% of the sample, had an advanced law degree. In terms of income, 28% reported income below $30,000, 22% reported income between $30,000 and $50,000, 34% reported income between $50,000 and $100,000, and 11% reported income above $100,000. In terms of ideology, 20% viewed themselves as (slightly/somewhat/extremely) conservative, 19% as moderate, and 61% as (slightly/somewhat/extremely) liberal. [↑](#footnote-ref-177)
177. F(3, 478) = 21.68, *p* = 0.00. [↑](#footnote-ref-178)
178. The scale was dichotomized based on the scale’s mid-point to create a binary “likelihood to bear the expenses” variable (participants who reported they were slightly, moderately, or extremely likely to bear the expenses were categorized as “likely to bear the expenses”). Under a chi-square analysis, the ‘contract term’ had a significant effect on subjects’ decisions (χ2(3) = 36.125, *p* = 0.000). [↑](#footnote-ref-179)
179. Munenforceable = 3.39, SD = 1.98; Menforceable = 2.01, SD = 1.60; F(1, 248) = 37.41, *p* < 0.001. [↑](#footnote-ref-180)
180. Munenforceable = 3.39, SD = 1.98, Mlegal\_fallback = 3.28, SD = 2.07; F(1, 244) = 0.12, *p* = 0.73. [↑](#footnote-ref-181)
181. Menforceable = 2.01, SD = 1.60; Mnegative\_frame = 2.18, SD = 1.75; F(1, 234) = 0.611, p = 0.44. [↑](#footnote-ref-182)
182. Menforceable = 6.39, SD = 0.99, Munenforceable = 5.08, SD = 1.77; F(3, 478) = 35.5, *p <* 0.000. [↑](#footnote-ref-183)
183. Mlegal\_fallback = 4.52, SD = 1.92, Mnegatively\_framed = 5.85, SD = 1.47; *p* < 0.000 for both pairs under *post-hoc* tests using Bonferroni adjustments. [↑](#footnote-ref-184)
184. According to a Pearson chi-square analysis, the ‘contract term’ treatment was significantly associated with participants’ intentions to insist, χ2(3) = 67.32, *p*  = 0.000.  [↑](#footnote-ref-185)
185. MLegal\_Fallback = 4.52, SD = 1.92, MUnenforceable = 5.08, SD = 1.77, *p* = 0.04. χ2(1) = 5.595, *p*  = 0.018. [↑](#footnote-ref-186)
186. χ2(1) = 6.849, *p* = 0.011. [↑](#footnote-ref-187)
187. *See, e.g.*, Wilkinson-Ryan & Hoffman, *supra* note 76; Wilkinson-Ryan, *supra* note 18. [↑](#footnote-ref-188)
188. *See, e.g.*, Stolle & Slain, *supra* note 18; Wilkinson-Ryan, *supra* note 18. [↑](#footnote-ref-189)
189. *See* Part I.D., *supra*. [↑](#footnote-ref-190)
190. *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-191)
191. *See,* *e.g*., Blake, *supra* note 137; Sullivan, *supra* note 11, at 622–23; Fisk, *supra* note 65, at 782–83. [↑](#footnote-ref-192)
192. Under some statutes, tenants are entitled to attorney’s fees, but even if they are aware of these, 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. Ultimately, consumers and tenants might give in to the written contracts they signed (or to which they clicked “I agree”), even if they suspect that the clauses they contain will not be upheld by the court. [↑](#footnote-ref-193)
193. Wilkinson-Ryan, *supra* note 18, at 171 (citations omitted). [↑](#footnote-ref-194)
194. Ben-Shahar & Schneider, *supra* note 1; [others on failure of disclosure]. [↑](#footnote-ref-195)
195. Wilkinson-Ryan, *supra* note 18, at 118 (noting that “the current state of the world is disclosure overload”). [↑](#footnote-ref-196)
196. In a similar vein, see Barr et al., *supra* note 32, at 7 (“While an ex ante rule provides certainty to creditors, 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.”). [↑](#footnote-ref-197)
197. *See* Mass. Gen. Laws ch. 93A, § 9(3); 940 Code of Massachusetts Regulations 3.17 (stating 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-198)
198. Tyler v. Michaels Stores, Inc., 984 N.E.2d 737, 744 (2013). [↑](#footnote-ref-199)
199. *See* Hendleman v. Lost Altos Apartments, L.P., 160 Cal. Rptr. 3d 730 (2013). [↑](#footnote-ref-200)
200. Restatement of Consumer Contracts, *supra* note 46, at 2. [↑](#footnote-ref-201)