

THE HARMFUL EFFECTS OF UNENFORCEABLE CONTRACT TERMS: EXPERIMENTAL EVIDENCE

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Increased public awareness that sellers routinely insert one-sided or exploitative terms into their boilerplates has resulted in growing pressure throughout the world for broader substantive regulation of consumer contracts. However, recent evidence suggesting that sellers and landlords routinely contravene these regulatory measures by inserting unenforceable terms into their contracts casts doubt on the effectiveness of such regulatory changes. This Article empirically demonstrates the implications of this continuous practice for the nondrafting parties. Building on previous research showing that residential rental agreements often contain unenforceable terms, this Article explores how such terms influence tenants' post-contract decisions and behavior. The experimental studies reported here expose the harmful effects of unenforceable terms, revealing that tenants are significantly more likely to bear costs that the law imposes on the landlord after reading an unenforceable term as opposed to an enforceable term or even a silent lease. These findings lead to a troubling conclusion: While consumers generally enter into contracts without reading them, and thus do not notice any unenforceable terms, these same terms may adversely affect consumers ex post, when a problem or dispute with the seller arises and they then consult the contract. This new evidence suggests that even substantive regulation of consumer markets could fail to achieve its objectives as long as it relies on uninformed consumers to enforce their mandatory rights and protections. This Article discusses the significance of these findings for public policy and regulation.

INTRODUCTION

It is already well-known that consumers almost never read or take account of the fine print before signing or clicking through standardized agreements,¹ and that firms often load their agreements with one-sided terms, de-

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1. See, e.g., OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 7 (2014) (surveying evidence that consumers do not read the fine print); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Law*, 66 STAN. L. REV. 545, 579–

priving consumers of their basic rights and remedies as a result.² Such terms may include liability or warranty disclaimers, waivers of the consumer's right to a jury trial, class action waivers, and choice-of-law or choice-of-forum clauses.³

As David Hoffman recently noted, “[i]n an online ‘orgy of contract formation,’ firms have seized new opportunities to shift risks to consumers by imposing unread terms.”⁴ In her new book, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*, Margaret Radin has similarly observed that standard form contracts often include terms that “undermine or cancel the rights of users granted by legislatures.”⁵ Radin labels this problem “democratic degradation,” since standard form contracts can essentially “delete rights that are granted through democratic processes, substituting for them the system that the firm wishes to impose.”⁶

Recognizing the risks and threats that standard form contracts pose to nondrafting parties, as well as the inadequacy of the current regulatory regime

95 (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, 1 (2014) (finding that only one or two out of every one thousand retail software buyers will examine the license agreement before making the purchase); David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects*, 104 MICH. L. REV. 983, 984 (2006) (observing that “most consumers do not read boilerplate provisions or, if they do, find them hard to understand”); David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1596 (2016) (“Consumers see a larger number of contracts daily than they used to, with longer terms and under novel conditions.”); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 118 (2017) (suggesting that “[s]erious observers of modern contracting concede that the current state of the world is disclosure overload”); Eyal Zamir, *Contract Law and Theory: Three Views of the Cathedral*, 81 U. CHI. L. REV. 2077, 2102–05 (2014) (surveying the empirical evidence suggesting that consumers barely read the fine print).

2. See, e.g., NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 29 (2013) (suggesting that sellers use one-sided clauses, such as dispute resolution provisions, to hinder buyers’ access to the judicial system); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (noting that non-negotiable boilerplate terms regularly deprive nondrafting parties of their most basic rights); Richard Craswell, *Taking Information Seriously: Misrepresentation and Nondisclosure in Contract Law and Elsenbere*, 92 VA. L. REV. 565, 591 (2006) (“[I]f consumers . . . have no information (or only poor information) about the effect of the contract terms used by any individual seller, each seller will . . . have an incentive to degrade the ‘quality’ of its terms.”); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (arguing that drafting parties have an incentive to introduce self-serving terms in view of the nondrafting parties’ bounded rationality); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 18–21 (2012) (showing how sellers exploit consumers’ bounded rationality and systematic cognitive biases through contract design); Edith R. 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). For a similar claim, see J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006).

3. See, e.g., RADIN, *supra* note 2, at 4–9 (surveying the different terms that firms use in order to deprive consumers of their legal rights and remedies).

4. Hoffman, *supra* note 1, at 1596.

5. RADIN, *supra* note 2, at 16.

6. *Id.*

in protecting consumers, scholars and commentators have consistently called for stronger, more substantive regulation of the content of these standardized agreements.⁷ And indeed, regulators have followed suit by adopting substantive regulation that prohibits sellers from including certain specified terms, deemed unfavorable to nondrafting parties, in their contracts.⁸ Substantive regulation has already been adopted in multiple consumer sectors, including the credit card market, the rental housing sector, the mortgage industry, the market for the sale of goods, and the insurance industry.⁹ Nonetheless, new evidence suggests that drafting parties often contravene these mandatory protections by inserting terms that are essentially unenforceable and void into their boilerplate agreements.¹⁰ In particular, this author has recently found that residential rental agreements often contain unenforceable terms, including overbroad liability disclaimers and clauses purporting to limit or negate the landlord's warranty of habitability.¹¹

These findings shed light on a particular pattern of contracting behavior that has not been adequately studied to date. 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' nonreadership or their cognitive biases.¹² However, little attention has been devoted to the possibility that these contracts include terms that simply contravene the law or misinform consumers about their legal rights

7. See, e.g., *id.* at 246 (“State legislatures should consider including in their consumer protection legislation explicit disallowance of waiver of important recipient rights, as legislatures have done in provisions regarding residential leases.”); Gilo & Porat, *supra* note 1, at 985 (“There is ample legal writing discussing the justification for legislatures’ and courts’ intervention in consumer standard-form contracts.”); Korobkin, *supra* note 2, at 1294 (arguing that the proper policy response to nondrafting parties’ bounded rationality is greater use of mandatory contract terms and judicial modification of the unconscionability doctrine); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1262 (1983) (suggesting that “invisible terms” in adhesion contracts should be presumptively unenforceable); 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); Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JERUSALEM REV. LEGAL STUD. 137, 162–67 (expressing support for “mandatory regulation of the content of standard-form contracts through statutory or judicial invalidation of some types of clauses or by positively dictating others”).

8. See *infra* Subpart I.A for a brief overview of the substantive regulation adopted in the United States.

9. See *infra* Subpart I.A. Substantive regulation has been adopted in the labor market as well. See, e.g., Juan C. Botero et al., *The Regulation of Labor*, 119 Q.J. ECON. 1339 (2004) (looking at the regulations of eighty-five countries on their labor markets).

10. See *infra* Subpart I.B for an overview of existing evidence for noncompliance with substantive regulation.

11. Meirav Furth-Matzkin, *On the Unexpected Use of Unenforceable Contract Terms: Evidence from the Residential Rental Market*, 9 J. LEGAL ANALYSIS 1, 24 (2017) (finding, based on a sample of lease agreements from Massachusetts, that residential leases regularly include unenforceable terms).

12. See, e.g., RADIN, *supra* note 2, at 4–7 (suggesting that boilerplate provisions often excessively negate or restrict people's rights); Rakoff, *supra* note 7, at 1227 (arguing that standard form terms are often unfair and one-sided). For research suggesting that drafting parties exploit consumers' cognitive biases, see, for example, BAR-GILL, *supra* note 2, at 15–16; Korobkin, *supra* note 2, at 1206.

and remedies, and empirical investigation into this phenomenon has been particularly scarce.¹³

In light of recent evidence suggesting that unenforceable terms abound in consumer contracts and leases,¹⁴ it is essential to explore empirically the implications of this drafting practice for the nondrafting parties. This Article studies the adverse effects of unenforceable terms, using the residential rental sector as a test case. Building on previous work demonstrating that unenforceable terms are regularly inserted into residential agreements,¹⁵ this Article examines, for the first time, the role that these terms play in shaping tenants' postcontract decisions and behavior.

This Article reports on a series of experiments. Participants, all tenants in Massachusetts, were instructed to assume that they were looking for an apartment in Boston before being randomly assigned to read through and sign residential lease agreements containing different types of contractual provisions. They were then instructed to assume that a particular tenancy-related problem had arisen and were asked how they would behave under the described circumstances. The experimental findings revealed that tenants reading contracts including unenforceable terms were substantially harmed, as they were about eight times more likely to bear costs that the law imposed on the landlord than were tenants with contracts containing enforceable terms.

Study 2 set out to test whether unenforceable terms reduce tenants' propensity to search online for more information compared to silent contracts, and whether online information can mitigate the effect of unenforceable terms. The findings reveal that unenforceable terms reduce tenants' likelihood to conduct online searches. They also indicate that even when tenants search for legal information online, the adverse effect of unenforceable terms on their legal perceptions continues to persist.

Building on these findings, Study 3 explores whether providing tenants with reliable and accurate information about their legal rights may counteract the harmful effect of the unenforceable fine print. The findings suggest that such information can significantly reduce the adverse effect produced by the unenforceable fine print, yet the limitations of these findings and, in particu-

13. The few studies that addressed the use of unenforceable terms in standard form contracts have so far generally relied on anecdotal evidence and on sellers' incentives to include such clauses in their contracts. See Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 U. CIN. L. REV. 845, 845 (1988) (stating that “[c]ontracts and leases commonly include terms that are unenforceable” and referring to a few anecdotal examples of unenforceable terms); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1128–31 (2009) (admitting that “[t]here are few empirical studies of the frequency with which unenforceable-as-written clauses appear in contracts,” but adding that “the phenomenon is common enough to raise questions [as to] why it persists,” and continuing the analysis by taking “the invalidity of particular clauses as given”).

14. See *infra* Subpart I.B.

15. See Furth-Matzkin, *supra* note 11, at 24 (finding that “[a] total of fifty-one leases, constituting 73 percent of the sample, included at least one unenforceable clause”).

lar, nondrafting parties' limited ability to process legal disclosures in real life are acknowledged.

This Article is divided into four parts. Part I provides background, surveying the substantive regulations adopted to date in various consumer markets in order to protect consumers from exploitative market practices. It proceeds to review the increasing evidence suggesting that sellers and landlords often fail to comply with these mandatory requirements by continuing to insert unenforceable terms into their boilerplate agreements. Part II then presents and reports the results of three controlled experiments designed to thoroughly test how the content of standardized agreements and, in particular, the presence or absence of unenforceable contract terms, affects nondrafting parties' decisions and behavior at the postcontract stage. The findings suggest that these drafting practices, and the use of unenforceable terms in particular, have an adverse effect on tenants' postcontract decision-making and perceived bargaining positions. Part III discusses the implications of these findings for public policy and regulation.

I. BACKGROUND AND MOTIVATION

A. *Substantive Regulation of Consumer Contracts and Leases*

In view of the recognition that consumers often neglect to read the fine print before signing or clicking through standardized agreements, and that sellers frequently take advantage of consumers' nonreadership by inserting one-sided terms into the fine print, recent decades have witnessed a growing worldwide trend of enhancing consumer protection through the adoption of stronger, more substantive interventions in consumer markets and contracts in tandem with "softer" disclosure requirements.¹⁶ These stronger interven-

16. See, e.g., MICHAEL S. BARR, SENDHIL MULLAINATHAN & ELДАР SHAFIR, BEHAVIORALLY INFORMED FINANCIAL SERVICES REGULATION 2 (2008) (discussing U.S. usury laws and product and price restrictions); EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS 318–23 (2018) (observing that, "[g]iven the limitations of disclosure duties and other liberty-preserving regulatory means (such as default rules), sometimes the most sensible response to behavioral (and other) market failures in consumer markets is compulsory regulation of the content of contracts and their performance" and surveying examples of mandatory substantive regulation worldwide); Oren Bar-Gill & Omri Ben-Shahar, *Regulatory Techniques in Consumer Protection: A Critique of European Consumer Contract Law*, 50 COMMON MKT. L. REV. 109, 111–15 (2013) (surveying the mandatory consumer protection laws in Europe); Omri Ben-Shahar & Ariel Porat, *Personalizing Mandatory Rules in Contract Law*, 86 U. CHI. L. REV. (forthcoming 2019) ("By now, it is widely accepted that, especially in transactions involving unsophisticated parties, not everything should be left to 'freedom of contract'—that some basic protections should be non-disclaimable."); Spencer L. Kimball & Werner Pfennigstorff, *Legislative and Judicial Control of the Terms of Insurance Contracts: A Comparative Study of American and European Practice*, 39 IND. L.J. 675 (1964) (discussing mandatory regulation of insurance policies); Doron Teichman, *Too Little, Too Much, Not Just Right: Seduction by Contract and the Desirable Scope of Contract Regulation*, 9 JERUSALEM REV. LEGAL STUD. 52, 54–60 (2014) (reviewing BAR-GILL, *supra* note 2, and noting that disclosure mandates do not sufficiently protect consumers, at least in sophisticated financial markets, and advocating for stronger, more intrusive regulation of financial products and contracts); Zamir

tions typically take the form of mandatory restrictions on permissible contracting,¹⁷ either by deeming certain contract terms unenforceable and void as against public policy or by requiring drafting parties to include in the fine print specified terms aimed at safeguarding the nondrafting parties.¹⁸

Substantive *ex ante* regulation of the content of standard form consumer contracts has become increasingly widespread in numerous consumer markets. For example, the Magnuson–Moss Warranty Act prohibits sellers from disclaiming the implied warranties set forth in the Uniform Commercial Code.¹⁹ Similarly, the United States Credit Card Accountability Responsibility and Disclosure Act of 2009 introduced substantive restrictions, including price caps and other prohibitions, into the credit card market,²⁰ and 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.²¹ The practice of door-to-door selling is also regulated in numerous jurisdictions.²² In the insurance sector, all fifty states have adopted comprehensive compulsory systems mandating the terms of insurance policies.²³ Finally, the residential rental sector is

& Farkash, *supra* note 7, at 167 (observing that “European and other legal systems have long realized that since lack of available information is not the sole or even primary impediment to fair and efficient transactions, the solution cannot be solely information-based” and advocating for mandatory policing of standard-form contract terms). 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).

17. RESTATEMENT OF CONSUMER CONTRACTS 4 (AM. LAW INST., Preliminary Draft No. 3, 2017).

18. See, e.g., RADIN, *supra* note 2, at 220–32. In addition to this type of *ex ante* regulation, the content of standardized agreements could be regulated *ex post* through judicial scrutiny of the terms. See, e.g., Korobkin, *supra* note 2, at 1247–90 (discussing the pros and cons of *ex ante* legislative prescription and *ex post* judicial policing of contract terms); Zamir & Farkash, *supra* note 7, at 167 (distinguishing between “two paradigms of content regulation—*ex post* judicial supervision based on vague standards such as unconscionability, and *ex ante* statutory or administrative supervision through the invalidation or prohibition of incorporation of certain terms in contracts, or even dictating certain terms,” and suggesting that “the latter appears to be much more effective”).

19. See Magnuson–Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 2308 (2012).

20. See Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734 (codified in scattered sections of 15 U.S.C.). These substantive restrictions include “the prohibition on allocating payments to low-interest balances first.” BAR-GILL, *supra* note 2, at 105.

21. See, e.g., Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 921, 124 Stat. 1376 (2010) (codified in scattered sections of Titles 7, 12, and 25 of the U.S. Code) (authorizing the Securities Exchange Commission to regulate broker-dealers’ use of arbitration in consumer contracts); *id.* § 1028 (authorizing the Consumer Financial Protection Bureau to regulate firms’ use of arbitration agreements in financial markets); *id.* § 1057(d) (banning arbitration of certain whistle-blower 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, for example, David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985 (2017).

22. RADIN, *supra* note 2, at 220.

23. The Affordable Care Act, for example, requires insurance policies to provide specified health benefits, deemed essential, to insured consumers. See 42 U.S.C. § 18022(b) (2012). 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, 523–24 (2009) (discussing

subject to heavy regulation in all jurisdictions across the United States, including antidiscrimination laws, the imposition of an implied warranty of habitability, regulation of the landlord's power to evict tenants or to disclaim negligence liability, and a variety of other rules aimed at providing tenants with enhanced protections.²⁴

B. Evidence of Noncompliance

Although these substantive regulatory measures seem promising, new findings reveal that drafting parties continue to use unenforceable terms in their standardized agreements. In particular, this author has found that residential lease agreements 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.²⁵ Similarly, it has been observed that insurance policies often contain terms deemed unenforceable and void, including prohibited coverage exclusions or restrictions.²⁶ According to a recent report, companies include provisions in their arbitration agreements that they know their arbitrators refuse to enforce.²⁷ Finally, sellers often use overly broad exculpatory clauses without narrowing them to include only negligence,²⁸ and there is evidence suggesting that employers use overreaching arbitration and noncompetition clauses in employment agreements.²⁹

various cases in which courts invalidated certain exclusions of, or restrictions on, insurance coverage). For an overview of mandatory policing of insurance contract terms in the United States, see, for example, Tom Baker & Kyle D. Logue, *Mandatory Rules and Default Rules in Insurance Contracts*, in RESEARCH HANDBOOK ON THE ECONOMICS OF INSURANCE LAW 377 (Daniel Schwarcz & Peter Siegelman eds., 2015).

24. See, e.g., Roger A. Cunningham, *The New Implied and Statutory Warranties of Habitability in Residential Leases: From Contract to Status*, 16 URB. L. ANN. 3 (1979); Furth-Matzkin, *supra* note 11, at 9–10; Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521–40 (1984).

25. Furth-Matzkin, *supra* note 11, at 24–29 (finding that residential leases from Massachusetts regularly included unenforceable terms).

26. Tucker, *supra* note 23, at 526.

27. See Jeff Sovern, *Report that Companies Include Provisions in Arbitration Clause that They Know the Arbitrator Won't Enforce—But that Might Suppress Claims Even More*, PUBLIC CITIZEN: CONSUMER LAW & POLICY BLOG (Mar. 8, 2018), <http://pubcit.typepad.com/clpblog/2018/03/report-that-companies-include-provisions-in-arbitration-clause-that-they-know-the-arbitrator-wont-en.html>.

28. See, e.g., *Broadley v. Mashpee Neck Marina, Inc.*, 471 F.3d 272, 276 (1st Cir. 2006) (striking down an overly broad exculpatory clause, observing that “[a]ny competent lawyer could write a straightforward exclusion of liability for negligence that we would sustain”).

29. See Catherine L. Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 782–83 (2002) (observing that employers in California often use unenforceable covenants not to compete); Sullivan, *supra* note 13, at 1147–57 (finding that “with both postemployment noncompetition clauses and arbitration agreements, employers often draft language that they know will not be enforced as written”); Evan Starr, J.J. Prescott & Norman Bishara, *Noncompetes in the U.S. Labor Force* (Univ. of Mich. Law & Econ., Research Paper No. 18–013, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714 (finding that noncompetition clauses are surprisingly common even in states that do not enforce them).

C. The Goal of This Article

Building on this evidence, this Article seeks to explore the possibility that drafting parties, through the use of unenforceable contract terms, could mislead nondrafting parties—consumers, tenants, and employees—about their rights under the law and consequently adversely affect their decisions at the postcontract stage. By relying on their contracts as accurate sources of information about these rights and remedies, nondrafting parties could be led to believe that the law grants them fewer protections than it actually does. They are likely to arrive at this conclusion simply because they may misperceive their contract terms as enforceable and binding, failing to realize that drafting parties can benefit from including unenforceable clauses in their contracts.³⁰ Consequently, consumers, tenants, and employees might forgo pursuing their valid legal rights and claims.

This Article explores this hypothesis through a series of experiments and focuses on the residential rental market as a first test-case. The residential rental market is rapidly growing: as of July 2017, more than a third of U.S. households live in rental housing, and the current renting level is the highest in fifty years.³¹ As mentioned above, a recent study conducted by this author revealed that, at least in Massachusetts, residential agreements often contain unenforceable terms, and there is evidence to suggest that such terms persist in rental agreements in other jurisdictions as well.³²

It is important to emphasize at the outset that the use of unenforceable terms may affect nondrafting parties' 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. This question is especially pertinent in view of the mounting evidence that consumers do not read or pay attention to the fine print before making their purchasing decisions.³³ However, it is important to note that survey evidence suggests that, in contrast to most types of consumer

30. For a similar proposition, see Warren Mueller, *Residential Tenants and Their Leases: An Empirical Study*, 69 MICH. L. REV. 247, 274 (1970) (“It is possible that the tenant . . . finds it difficult to see any logic in filling a lease form with *legally* worthless verbiage.”).

31. See Anthony Cilluffo et al., *More U.S. Households Are Renting Than at Any Point in 50 Years*, PEW RES. CTR. (July 19, 2017), <http://www.pewresearch.org/fact-tank/2017/07/19/more-u-s-households-are-renting-than-at-any-point-in-50-years/>.

32. See Nora Crawford, *Filling in the (Unenforceable) Blank: A Case Study of the Philadelphia Rental Market* (Aug. 1, 2015) (seminar paper, University of Pennsylvania) (on file with author) (finding that unenforceable terms are often included in residential lease agreements from Philadelphia).

33. See, e.g., Bakos et al., *supra* note 1; Agata Blaszczyk-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/> (showing that nonreading consumers may even agree to sell their firstborn child in return for Wi-Fi access); Hoffman, *supra* note 1, at 1596.

contracts, residential leases are often read by a considerable proportion of tenants prior to signing.³⁴

More importantly, as this author has observed elsewhere,³⁵ a distinction must be made between reading a contract *ex ante* and *ex post*. Namely, even if tenants (and consumers more broadly) do not necessarily read their leases before renting the apartment, they are nonetheless likely to look at their contracts at a later stage when seeking to verify their rights and duties as renters, typically after a problem occurs or a dispute with the landlord arises. Indeed, a recent survey of tenants from Massachusetts has found that 51% of those who reported experiencing a rental problem also reported looking at their leases as a direct result of the problem.³⁶

In light of these findings, this Article examines how the inclusion of unenforceable clauses in residential leases affects tenants' perceptions and decisions when responding to rental problems that they incur.

II. EXPERIMENTAL METHODS AND RESULTS

A. Study 1: How Do Unenforceable Terms Affect Tenants' Decisions?

1. Sample and Design

The study consisted of 397 participants,³⁷ 53% male, all Massachusetts residents,³⁸ recruited using the Amazon Mechanical Turk (MTurk) labor pool.³⁹

34. For example, in the specific context of residential rental contracts, 57% of the respondents in Warren Mueller's classic study reported to have thoroughly read their rental contracts before renting an apartment. See Mueller, *supra* note 30, at 256.

35. Furth-Matzkin, *supra* note 11.

36. *Id.* at 39.

37. Participants' ages ranged from twenty to eighty-six, with a mean age of thirty-six. Sixty-two percent of the participants were Caucasian, 24% were Asian, 5% were African-American, 5% were Hispanic, and the remainder identified as a mixture of different categories. Ten percent of the participants had obtained a high school degree or less than a high school education, 51% had obtained a college degree, 23% had begun but had not finished college, 14% had advanced degrees, and 2% had professional degrees. Of the sample's participants 4% had an advanced law degree. Regarding income, 35% reported an annual income below \$30,000, 24% reported an annual income between \$30,000 and \$50,000, 30% reported an annual income between \$50,000 and \$100,000, and 11% reported an annual income above \$100,000. With regard to political affiliation, 19% viewed themselves as Republicans, 39% as Democrats, and 35% percent as Independents, with 4% reporting that they had no preference and 3% identifying as "Other." In terms of ideology, 23% perceived themselves as slightly, somewhat, or extremely conservative, 34% as moderate, and 44% as slightly, somewhat, or extremely liberal.

38. In order to ensure that participants were indeed Massachusetts residents, the Amazon Mechanical Turk System Qualification for location (and subdivision) was used. Importantly, 45% of the subjects reportedly lived in a rented apartment at the time of taking the survey, and 85% of the remaining respondents indicated that they had rented an apartment in the past. Statistical analyses were conducted both with and without participants who reportedly did not live in a rented apartment at the time of taking the survey.

Participants were asked to assume that after searching for a new apartment in Boston, they had finally found one that they liked and that met their budget. They were then randomly assigned to read and sign one of three residential lease agreements. These agreements were based on a standard form lease drafted by the Greater Boston Real Estate Board, and they were completely identical, with the exception of one contract term. One third of the contracts contained an enforceable liability provision acknowledging the landlord's liability for loss or damage caused to the tenants or third parties on the leased premises as a result of the landlord's negligence or misconduct; one third contained an unenforceable liability disclaimer absolving the landlord of any liability for loss or damage caused to the tenants or third parties on the leased premises (including damage caused as a result of the landlord's negligence or misconduct); and one third contained no term pertaining to the landlord's liability at all. Instead, the third type of contract contained a clause pertaining to the apartment's keys and locks. (The full text of the three contracts is reproduced in the Appendix.)

The lease with no term condition (in which the contract said nothing about the landlord's liability) facilitated the testing of respondents' background assumptions about their legal rights and remedies when no information is provided in their contracts. As my previous study of residential leases revealed, residential rental contracts are often silent about tenants' various rights and remedies under the law.⁴⁰ In the particular context of landlords' liability for loss or damage caused to tenants or third parties on the leased premises, 16% of the sampled leases did not mention the issue at all.⁴¹ It was therefore important to test tenants' assumptions and behavior when encountering a silent contract.

After signing, participants were asked to download their contracts and

The results reported in the Article include all participants, but differences between current tenants and non-tenant participants—when such existed—are reported in the footnotes.

39. MTurk is commonly used by researchers to recruit participants in exchange for small sums of money. Tess Wilkinson-Ryan explains: “[MTurk] has been studied extensively at this point. Its advantages are that populations recruited via Turk are more representative of the national population than convenience samples (e.g., undergraduates) and that a variety of experimental findings have been replicated using [MTurk]. There is also evidence, both systematic and anecdotal, that Turk subjects are particularly attentive, perhaps due to the formal mechanisms available for receiving feedback that affects reputation ratings. The disadvantage of [MTurk] as compared to the sample procured by a commercial survey firm is the young and leftward skew of the population. Turk respondents are ‘wealthier, younger, more educated, less racially diverse, and more Democratic’ than national samples.” Wilkinson-Ryan, *supra* note 1, at 150 n.162 (citation omitted); see also Kristin Firth, David A. Hoffman & Tess Wilkinson-Ryan, *Law and Psychology Grows Up, Goes Online, and Replicates*, 15 J. EMPIRICAL LEGAL STUD. 320 (2018) (concluding that MTurk samples are highly reliable and useful). For an example of a recent legal study conducted using MTurk, see Kevin P. Tobia, *How People Judge What Is Reasonable*, 70 ALA. L. REV. 293, 318–24 (2018).

40. Furth-Matzkin, *supra* note 11, at 25–29 (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 mandatory warranties and covenants were also rarely mentioned in the leases”).

41. *Id.* at 25 (eleven out of seventy leases, or 16%, did not contain any clause related to the landlord's liability, while sixteen out of seventy leases, or 23%, included an unenforceable liability disclaimer).

keep a copy for their records. They were advised that they “may want to view this file later.” After being presented with some photos of the apartment, participants read a scenario describing a rental problem and were asked to answer a series of follow-up questions. In the scenario, participants were asked to assume that, two months after complaining to their landlord about a leak in the roof, rain water seeped in from the leaking roof and ruined their television. They were instructed to assume that the cost of repairing the TV was \$200 and that the cost of replacing it with a new one was \$400. (The full text of the scenario is reproduced in the Appendix.)

The scenario was based on an actual case from 2011, in which the plaintiff sued her landlord for damage caused as a result of a leak in the roof of the rented premises.⁴² In that case, the Supreme Judicial Court of Massachusetts held the landlord liable for the damage caused to the plaintiff as a result of the landlord’s failure to fix the leaking roof, notwithstanding contractual language purporting to disclaim the landlord’s liability in such cases.⁴³ The court held that the landlord had a statutory duty to fix the leaking roof after receiving notice, and that the law prohibited the landlord from disclaiming liability for loss or damage to the tenant or third parties as a result of the failure to do so.⁴⁴ Indeed, the law in Massachusetts obliges residential landlords both to maintain all structural elements of the apartment, including the roof, and to ensure that the premises are protected from wind, rain, and snow.⁴⁵ The law further deems any lease clause purporting to disclaim the landlord’s liability for loss or damage to tenants or third parties in the leased premises as a result of the landlord’s negligence as void and unenforceable.⁴⁶

42. *Bishop v. TES Realty Tr.*, 942 N.E.2d 173 (Mass. 2011).

43. *Id.* at 180 (holding the landlord liable for injury caused to the tenant when ceiling plaster fell into her eye as a result of a leak in the roof).

44. *Id.* at 180–81.

45. MASS. GEN. LAWS ANN. ch. 186, § 19 (West 2014) (determining that the landlord owes a duty to “exercise reasonable care” to remedy an “unsafe condition” upon notice and that “[t]he tenant or any person rightfully on said premises injured as a result of the failure to correct said unsafe condition within a reasonable time shall have a right of action in tort against the landlord or lessor for damages”); *id.* (stating that a landlord may not obtain a waiver of this duty in any lease or other rental agreement and that any such waiver “shall be void and unenforceable”); *see also* MASS. OFFICE OF CONSUMER AFFAIRS & BUS. REGULATION, A MASSACHUSETTS CONSUMER GUIDE TO TENANT RIGHTS AND RESPONSIBILITIES (2007), <http://www.mass.gov/ocabr/docs/tenantsrights.pdf>.

46. MASS. GEN. LAWS ANN. ch. 186, § 15 (determining that any lease provision indemnifying or exonerating the landlord from liability arising from the landlord’s negligence on any part of the leased premises or common areas is “against public policy and void”). Note that, as the Supreme Court of Massachusetts explains in *Bishop*, this statute “did not expand the scope of a landlord’s liability beyond the common law; it merely declared void any attempt by a landlord . . . to nullify by contract the already narrow scope of common-law liability.” *Bishop*, 942 N.E.2d at 177; *see also* *Norfolk & Dedham Mut. Fire Ins. Co. v. Morrison*, 924 N.E.2d 260, 266 (Mass. 2010). The Uniform Residential Landlord and Tenant Act (URLTA), a sample law governing residential landlord and tenant exchanges, established in 1972 by the U.S. National Conference of Commissioners on Uniform State Laws, also follows this approach. *See* UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 1.403(a)(4) (UNIF. LAW COMM’N 1972). The URLTA has been adopted (in whole or in part) by most states in the U.S., including Massachusetts.

After reading the scenario, respondents were asked to evaluate how they would behave under the defined circumstances. Two independent coders, blind to the study's hypotheses and design, coded participants' open-ended responses.⁴⁷ The coders were instructed to classify participants' responses into one of the following categories:

- (1) *Relinquishment*: in cases where participants indicated that they would bear the repair or replacement costs by themselves (without mentioning any other action, like talking to the landlord or searching for more information first);
- (2) *Contact Landlord*: in cases where participants indicated that they would discuss the issue with the landlord, negotiate, or demand that the landlord make or pay for the required repairs (without mentioning any other action, like searching for more information or taking legal or extralegal action);
- (3) *Search for Information*: in cases where participants indicated that they would search for more information about their rights, remedies, or obligations by searching the web or by consulting with family, friends, or other tenants;
- (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 or Action*: in cases where participants indicated that they would seek legal services or initiate proceedings against the landlord.

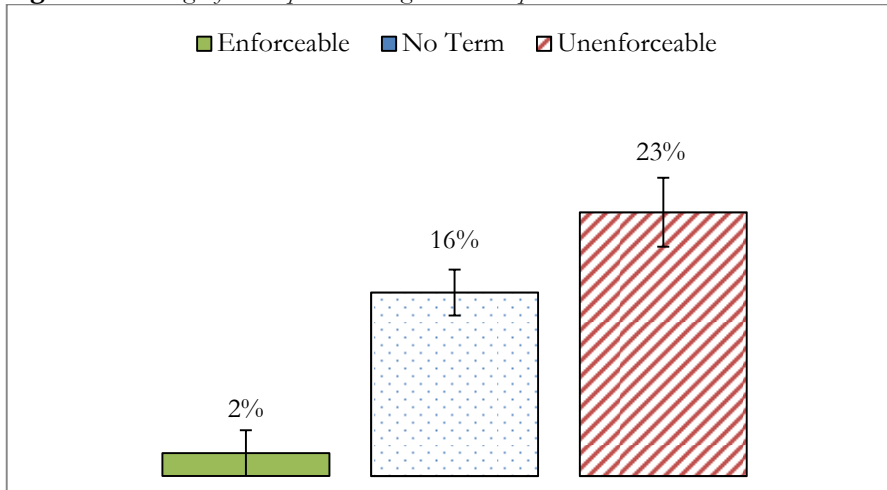
2. Results

The findings reveal that the content of the residential lease agreement significantly affected participants' behavioral intentions. First, the contract terms that tenants were assigned to read had a significant impact on their intentions to capitulate and bear the repair expenses themselves: While only 2% of the respondents who read an enforceable term (acknowledging the landlord's negligence liability) intended to bear the repair expenses themselves (without even approaching the landlord first), 16% of those in the no term condition intended to do so, and as many as 23% of the participants intended to bear the bur-

47. Participants who failed to respond or whose responses were unintelligible were excluded from the analysis ($n = 14$). The two coders were in agreement 88% of the time. In cases when the two coders were not in agreement about the proper code to assign to a response, a third independent coder was asked to code the response. In these cases, the minority vote was excluded, and the coding chosen by the two-person majority was used for the purposes of the analysis.

den and costs of repair after reading an unenforceable lease provision, disclaiming the landlord's negligence liability.⁴⁸ Figure 1 illustrates these results.

Figure 1. *Percentage of Participants Willing to Bear Expenses Across Conditions*



Participants ($n = 397$) were asked what they would do in the described circumstances. Figure 1 shows the percentages of participants indicating that they would bear the TV's repair expenses themselves across experimental conditions. The difference between experimental conditions was highly statistically significant (according to a chi-square analysis, $\chi^2(2) = 8.6912$, $p < 0.05$).

Second, the content of the lease agreement significantly influenced participants' intentions to contact the landlord. While 71% of the participants intended to contact the landlord after reading an enforceable term acknowledging the landlord's negligence liability and 48% indicated they would do so after reading a contract lacking any liability clause, only 42% intended to contact the landlord after reading an unenforceable clause.⁴⁹ At the same time, the contents of the residential lease agreements did not significantly affect participants' intentions to search for more information⁵⁰ or to take legal or extralegal action, and such reported intentions were relatively low across conditions.⁵¹

48. According to a chi-square test, this effect was significant: $\chi^2(2) = 8.6912$, $p < 0.05$. An analysis that included only participants who reportedly lived in rental housing when taking the survey yielded similar results: While only 5% of the respondents who read an enforceable term intended to bear the repair expenses themselves, 9% intended to do so in the no term condition, and 20% so intended after reading an unenforceable lease provision.

49. According to a chi-square analysis, $\chi^2(2) = 30.25$, $p < 0.001$. An analysis that included only participants who reportedly lived in rental housing when taking the survey yielded similar results: 74% in the enforceable term condition, compared to 59% in the no term condition and 52% in the unenforceable term condition.

50. Regarding intentions to search for more information (either by searching the web or by asking friends for advice), 8% with the unenforceable term condition, 4% with the no term condition, and 2% with the enforceable term condition so intended, $\chi^2(2) = 2.9506$, $p = 0.229$.

51. Regarding intentions to take legal action (e.g., consult a lawyer), 25% with the unenforceable term condition, 22% with no term condition, and 18% with the enforceable term condition so intended,

Table 1. *Participants' Behavioral Intentions across Contract Conditions*⁵²

	Enforceable	No Term	Unenforceable
Relinquishment	2%	16%	23%
Contact Landlord	71%	48%	42%
Search Information	2%	4%	8%
Legal Advice/Action	18%	22%	25%
Non-Legal	2%	2%	4%

Remarkably, collapsing across conditions, only 8% of the participants indicated that they would ask friends or relatives for advice or search the internet for information about their legal rights and remedies. These findings are surprising in light of the ease and accessibility of online information. Indeed, as Eyal Zamir and Yuval Farkash observed, “[i]n recent years, the Web . . . has emerged as a primary source of information. Even if people do not read standard-form contracts *ex ante*, they might read them and seek additional information once they are dissatisfied with the transaction.”⁵³ This study’s findings, however, indicate that a substantial proportion of tenants rely on their contracts as their only source of information and seldom search the internet to verify their legal status when a rental problem occurs.

Of course, outside the lab, tenants may be more inclined to invest time, energy, and resources in seeking out more information about their rights and remedies. However, the findings point to the troubling conclusion that in many cases tenants may not seek out information beyond the confines of their contracts.

B. Study 2: Could Online Information Help?

Study 1 demonstrated that tenants who read unenforceable lease terms were adversely affected, in that they were significantly more likely to bear costs that the law actually imposed on the landlord than were tenants who

$\chi^2(2) = 0.6267, p = 0.731$. Regarding intentions to take extralegal action, 4% with the unenforceable term condition, 2% with no term condition, and 2% with the enforceable term condition so intended, $\chi^2(2) = 0.2442, p = 0.885$.

52. Percentages might not total 100% since some responses did not fall under any of the mentioned categories. Percentages might exceed 100% due to rounding.

53. Zamir & Farkash, *supra* note 7, at 159. For a similar assertion, see Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 320–27 (2008) (suggesting that the web “facilitates the construction of communities in which users can both seek out knowledge and provide responses, while minimizing time and attention constraints”).

read an enforceable term or a silent lease. These results raise the inevitable question of whether the adverse consequences resulting from the unenforceable fine print could be mitigated by tenants' learning about the law.

It is plausible that information about the law could counteract the negative impact of the unenforceable fine print by correcting tenants' misperceptions. If uninformed tenants are likely to relinquish valid rights and claims because they 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.

A primary source of information about tenants' rights and remedies is the internet. Although participants in Study 1 showed little intention of searching online to learn more about their rights and remedies and were reportedly inclined to rely on their leases instead, some participants did express an interest in searching the web for more information. Study 2 was designed to explore what happens when tenants conduct online searches about their rights and remedies: Could information obtained online mitigate the effect of unenforceable terms?

1. *Sample and Design*

The study consisted of 105 participants,⁵⁴ 53% male, all Massachusetts residents,⁵⁵ recruited using the Prolific Academic labor pool.⁵⁶ Participants

54. Participants' ages ranged from eighteen to seventy-one, with a mean age of thirty-three. Sixteen percent of the participants had obtained a high school degree or less than a high school education, 41% had obtained a college degree, 27% had begun but had not finished college, 15% had advanced degrees, and 1% had professional degrees. Five percent of the sample's participants had an advanced law degree. Regarding income, 24% reported an annual income below \$30,000, 27% reported an annual income between \$30,000 and \$50,000, 27% reported an annual income between \$50,000 and \$100,000, and 22% reported an annual income above \$100,000. In terms of ideology, 10% perceived themselves as slightly, somewhat, or extremely conservative, 15% as moderate, and 75% as slightly, somewhat, or extremely liberal. Sixty-two percent of the participants were reportedly living in rental housing at the time of taking the survey. The results reported in the Article include all participants, but differences between current tenants and non-tenant participants—when such existed—are described in the footnotes.

55. To ensure that participants were indeed Massachusetts residents, the Academic Prolific prescreening tool was used. Academic Prolific has a variety of mechanisms in place to vet participants and minimize fraud. For example, the platform works with an online trust and verification startup (www.smyte.com), which uses a variety of techniques to catch fraud. The platform also limits the number of accounts that can use the same IP address and prevents duplicate accounts. In addition, all participants need to verify their identity with a mobile phone number that cannot be used across multiple accounts. Finally, participants cannot immediately change their prescreening responses, and may only re-enter them after the currently active studies are completed.

56. Prolific Academic is a participant recruitment platform for researchers. Participants recruited through Prolific Academic tend to be more diverse than those recruited from MTurk. 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 produces higher quality data: Participants are more honest and less experienced with taking surveys. *Id.* Well-known psychological findings have been

were randomly assigned to read and sign one of three contracts as before and read the same leaking roof scenario as in Study 1. However, in Study 2, they subsequently read the following:

Assume that your landlord's failure to fix the leaking roof was negligent. Would you be able to ascertain if your landlord is legally obligated to pay for the TV's repair or replacement? You can use any resources you like, including the web, to try to find this information.

If you answer correctly, you will receive a \$2 bonus, twice as much as you would be paid otherwise!

Does your landlord have to pay for the TV's repair?

- (1) Yes
- (2) No

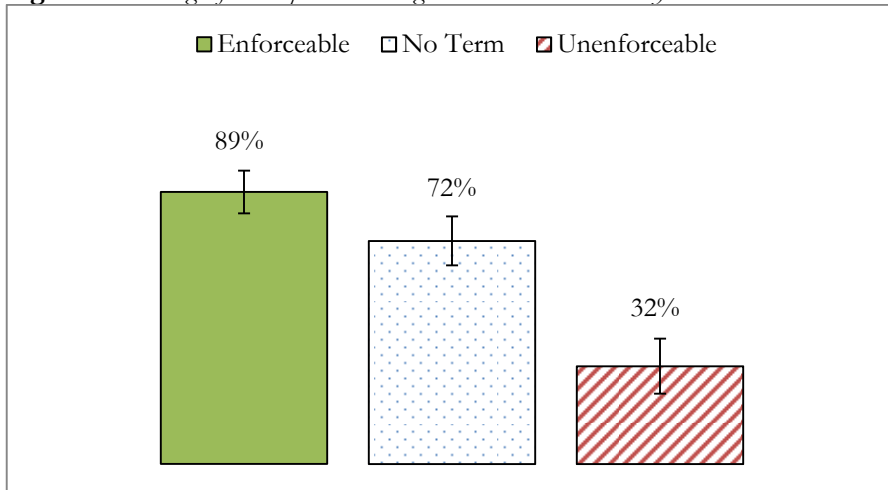
After answering this question, participants were asked what steps they had taken in order to answer the question. Those who reported searching the web were subsequently asked how much time they had spent on their searches. Finally, they were asked various questions about their demographic characteristics.

2. Results

As Figure 2 below illustrates, the content of the lease agreement significantly shaped participants' legal perceptions: When encountering an enforceable liability provision, 89% of the participants indicated that the landlord would be liable for the TV's repair. In contrast, 72% of those encountering a silent lease so indicated, and only 32% of those encountering an unenforceable liability disclaimer thought that the landlord would be liable to pay for the TV's repair.⁵⁷

replicated in samples drawn from both Prolific Academic and MTurk, suggesting that crowdsourcing is a legitimate alternative to lab-based research.

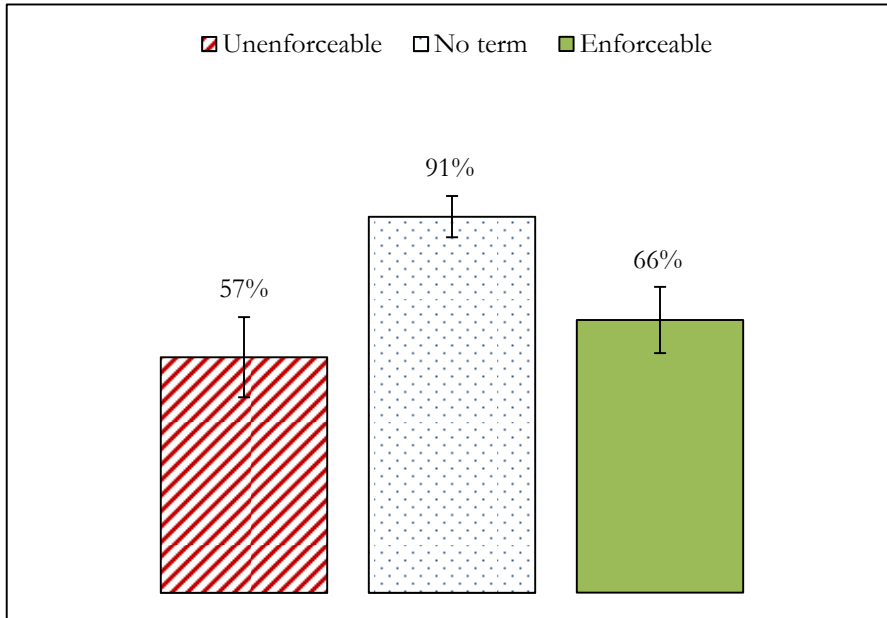
57. According to a chi-square analysis, $\chi^2(2) = 26.2036, p = 0.000$. Notably, participants who reportedly lived in rental housing significantly differed in their responses from participants who reportedly lived in their own apartments. Yet, the content of the lease agreement significantly affected both groups of participants. Among participants who reportedly lived in rental housing, 48% who had the unenforceable term condition believed that the landlord is liable to pay the expenses, compared to 74% who had no term condition and as many as 92% who had the enforceable condition. Among non-renters, only 13% believed that the landlord is liable to pay the expenses in the unenforceable term condition, compared to 71% who had the lease with no term condition and 82% with the enforceable term condition.

Figure 2. *Percentage of Participants Believing Landlord Is Liable to Pay*

Participants ($n = 105$) were asked whether their landlord has to pay for the TV's repair. This Figure shows the percentages of participants indicating that they believed the landlord would be liable, inferring that they themselves would not bear the TV's repair expenses, across experimental conditions. The difference between experimental conditions was highly statistically significant (according to a chi-square analysis, $\chi^2(2) = 26.2036$, $p = 0.000$).

The experimental condition also significantly affected participants' propensity to search the web for more information, with unenforceable terms significantly decreasing participants' search rates. While 91% of the participants searched the web after encountering a silent lease, only 57% of the participants searched online after encountering a lease containing an unenforceable liability disclaimer.⁵⁸

58. $\chi^2(2) = 10.35$, $p = 0.006$. Interestingly, 66% of the participants reading an enforceable liability clause also searched the web, suggesting that even when encountering an enforceable term, tenants were still unsure that the landlord would be liable for the TV's repair. Notably, when presented with an unenforceable term, renters were marginally significantly more likely to search the web than nonrenters ($\chi^2(1) = 3.6$, $p < 0.1$): while 71% of renters searched online when presented with an unenforceable term, only 40% of nonrenters reportedly conducted online searches with the unenforceable term condition.

Figure 3. Percentage of Participants Who Searched the Web

Participants ($n = 105$) were asked whether their landlord has to pay for the TV's repair. This Figure shows the percentages of participants who reportedly conducted online searches in order to answer the question correctly across experimental conditions. The difference between experimental conditions was highly statistically significant (according to a chi-square analysis, $\chi^2(2) = 10.35, p < 0.01$).

As expected, participants who did not search the web were significantly less likely to realize that the landlord was liable for the TV's repair expenses than were those who searched online. Collapsing across contract conditions, only 45% of the participants who did not search online realized that the landlord was liable, compared to 72% of the participants who conducted online searches.⁵⁹

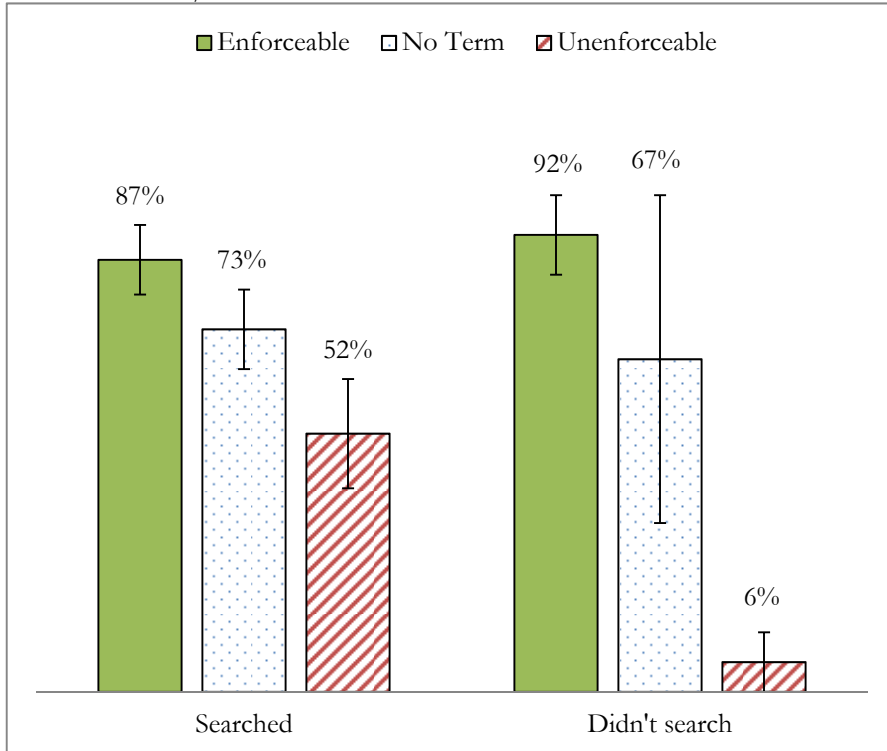
Importantly, the contractual provisions participants were assigned to read had a significant impact both on those who decided to conduct online searches and on those who neglected to do so.⁶⁰ Within the group of participants who reportedly did not conduct online searches, 92% thought that the landlord was liable to pay for the repairs after reading an enforceable liability clause, 67% held this same belief after encountering a silent lease, and 6% of those encountering an unenforceable liability disclaimer believed that the land-

59. $\chi^2(2) = 7.1169, p = 0.008$. Note, however, that since participants could choose whether to conduct online searches or not, the differences between the responses of those who conducted online searches and those who did not may have been driven, at least in part, by the different prior beliefs of participants belonging to each of these groups. Study 3 addresses this limitation by randomly assigning participants to one of two information conditions. See *infra* Subpart II.C.

60. $\chi^2(2) = 20.8213, p = 0.000$ for those who reportedly failed to conduct online searches; $\chi^2(2) = 6.5293, p = 0.04$ for those who reportedly conducted online searches.

lord had to pay.⁶¹ Perhaps even more importantly, among participants who *searched* the web the differences were still large and significant (albeit smaller than the differences among those who refrained from conducting online searches). While 87% of the participants reading an enforceable liability clause thought that the landlord was liable to pay for the TV's repair, only 73% of those encountering a silent lease thought that the landlord was liable, compared to 52% of those encountering an unenforceable term.⁶²

Figure 4. *Percent of Participants Believing Landlord Is Liable Across Conditions of Those Who Searched/Didn't Search Online*



Participants ($n = 105$) were asked whether their landlord has to pay for the TV's repair. This Figure shows the percentages of participants who believed that the landlord was liable to pay of those who searched and did not search online across experimental conditions. The differences between experimental conditions were significant among those who did not search the web ($\chi^2(2) = 20.8213, p = 0.000$) and those who conducted online searches ($\chi^2(2) = 6.5293, p = 0.04$).

To summarize the findings of Study 2, the misinformation generated by the unenforceable terms significantly decreased tenants' likelihood to search online for more information about their rights (compared to silent leases). At the same time, even among those participants who conducted online searches,

61. $\chi^2(2) = 20.8213, p = 0.000$.

62. $\chi^2(2) = 6.5293, p = 0.04$.

the differences between participants who read an unenforceable term and those who read enforceable clauses were significant and large: Almost half of the participants who searched the web still wrongfully assumed that the landlord was not liable for the TV's repair expenses after reading an unenforceable liability disclaimer, compared to only 13% of those reading an enforceable liability provision.

Admittedly, most of the participants who searched the web (83%) reportedly did not spend more than ten minutes searching for online information. Outside the lab, when the stakes are higher, people's incentives to invest more resources in searching for information are greater. But the study's findings can be taken to suggest that unenforceable terms substantially decrease tenants' propensity to search for more information and adversely affect the legal perceptions of those who do make the effort to conduct online searches.

C. Study 3: Could Disclosure Help?

Study 2 showed that even if information that might be helpful for the tenant is available and accessible online (albeit potentially costly to acquire), tenants might not invest the time to conduct such research. Indeed, the findings revealed that the mere presence of an unenforceable term decreases tenants' propensity to search online for information about their rights, as tenants tend to rely on the information provided to them in the lease agreements.

Although the findings of Study 2 also suggested that online searches for information could prove effective, such searches did not eliminate the adverse effect produced by the unenforceable fine print, possibly because online legal information is relatively complex and hard to locate and process,⁶³ and laypeople's presumption of contract enforceability is very difficult to rebut. Study 3 was meant to directly explore whether providing free, clear, and reliable legal information to tenants could help eliminate the adverse effects of the unenforceable fine print. By manipulating the type of information provided to participants, this study compares the responses of participants who were exposed to legal information to those who were not exposed to such information.

1. Sample and Design

The study consisted of 405 participants, 51% male, all Massachusetts ten-

63. Admittedly, the second study's design did not allow for observation of the type of information that participants found and were exposed to. It is probable that participants differed in terms of the websites that they surveyed and the types of information they obtained. Study 3 was meant to address this limitation by providing the same information to all participants and comparing their responses to a control group who did not receive said information.

ants, recruited using MTurk.⁶⁴ As in Studies 1 and 2, participants were randomly assigned to one of three contract term conditions: an “enforceable term,” an “unenforceable term,” or “no term.” They also read the same scenario presented in the first two studies. However, in this study, participants were also randomly assigned to one of two information conditions: “no information” and “legal information.”

Participants assigned to the “no information” condition received no further information, whereas participants assigned to the “legal information” condition were informed that the law places mandatory repair duties on the landlord and that the landlord’s liability for loss or damage caused by the landlord’s negligence, or failure to perform these duties, cannot be disclaimed in any lease agreement. Participants were then asked an open-ended question about their behavioral intentions in these circumstances, and two independent coders coded their open-ended responses.⁶⁵

Subsequently, participants were asked to assume that they had decided to contact the landlord, who refused to cover the TV’s repair expenses. They were then asked to indicate, on a seven-item scale (1 = extremely unlikely; 4 = neither likely nor unlikely; 7 = extremely likely), how likely they were to seek legal advice, how likely they were to initiate proceedings against the landlord, and—to the extent they decided to take their landlord to court—how likely they believed it would be that a housing court would rule in their favor. The last question was included to measure the effects of the contract terms and the disclosed information on participants’ legal expectations. This question is important because, even if tenants are unlikely to take the landlord to court, their estimations of their probabilities of succeeding at trial are likely to affect their perceived bargaining positions vis-à-vis the landlord.

64. *See supra* note 39 (discussing MTurk). Participants’ ages ranged from nineteen to ninety-eight, with a mean age of thirty-seven. Sixty-four percent of the participants were Caucasian, 20% were Asian, 5% were African-American, 5% were Hispanic, and the remainder identified as a mixture of different categories. Fourteen percent of the participants had obtained a high school degree or less than a high school education, 45% had obtained a college degree, 25% had begun but had not finished college, 14% had advanced degrees, and 2% had professional degrees. Five percent of the participants had an advanced law degree. Regarding income, 36% reported an annual income below \$30,000, 23% reported an annual income between \$30,000 and \$50,000, 32% reported an annual income between \$50,000 and \$100,000, and 9% reported an annual income above \$100,000. With regard to political affiliation, 21% viewed themselves as Republicans, 41% as Democrats, and 32% as Independents, with 5% reporting that they had no preference and 2% identifying as “Other.” In terms of ideology, 24% perceived themselves as slightly, somewhat, or extremely conservative, 31% percent as moderate, and 45% percent as slightly, somewhat, or extremely liberal.

65. The two coders were in agreement 87% of the time. As before, in cases when the two coders were not in agreement about the proper code to assign to a response, a third independent coder was asked to code the response. In these cases, the minority vote was excluded, and the coding chosen by the two-person majority was used for the purposes of the analysis.

2. Results

The results of Study 3 revealed, once again, that unenforceable terms adversely affected tenants' behavioral intentions and legal predictions.⁶⁶ Yet, they also demonstrated that information about the law succeeded in mitigating the adverse effect of the unenforceable fine print. When tenants received information about the law, the difference in their reported intentions to relinquish their rights across contract term conditions became negligible and insignificant. In effect, informed tenants encountering an unenforceable term were not significantly more likely to bear the repair expenses themselves than were tenants reading an enforceable term or a silent lease.⁶⁷ Similarly, providing tenants with information about the law also significantly affected their behavioral intentions and legal predictions. In fact, when participants received legal information, there were no significant differences in their behavioral intentions or legal predictions across contract term conditions.⁶⁸

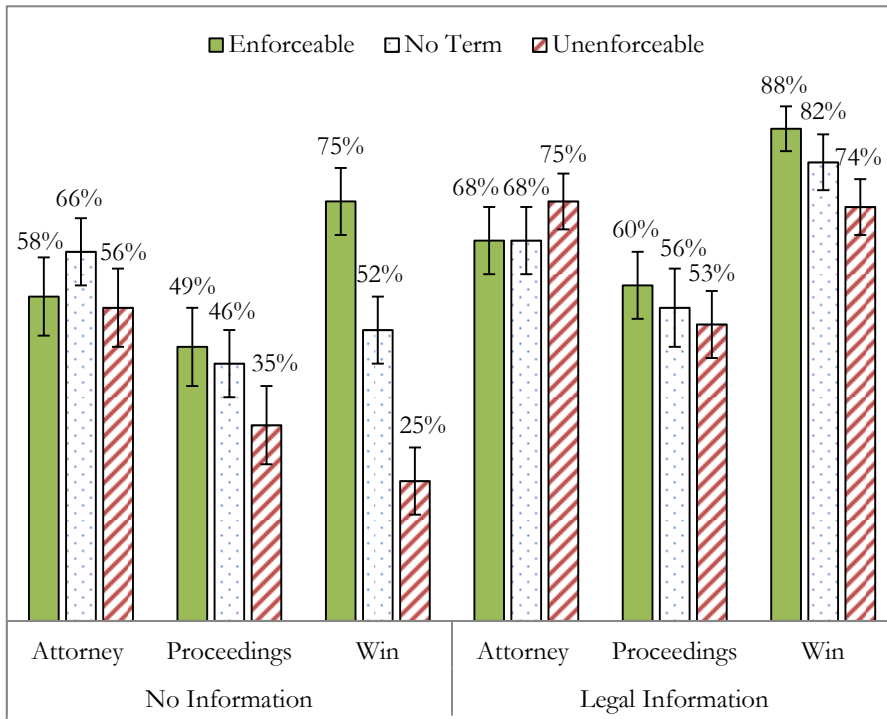
Figure 5 below compares participants' behavioral intentions and legal predictions, across contract term conditions with and without legal information.

66. In terms of intentions to resign and bear the repair expenses, 3% of the participants assigned with the enforceable term so intended, compared to 13% with no term condition and 22% with the unenforceable term condition, $\chi^2(2) = 17.7628, p = 0.000$. In terms of intentions to initiate legal proceedings, 49% of the participants assigned with the enforceable term so intended, compared to 46% with no term condition and 35% with unenforceable term condition, $\chi^2(2) = 8.8447, p = 0.012$. In terms of legal predictions, 75% of the participants assigned to the enforceable term believed they were slightly to extremely likely to win, compared to 50% with no term condition and 25% with the unenforceable term condition, $\chi^2(2) = 50.0708, p = 0.000$. There was no significant difference, however, in terms of intentions to consult a lawyer: 58% of the participants assigned to the enforceable term intended to consult a lawyer, compared to 66% with the no term condition and 56% with the unenforceable term condition, $\chi^2(2) = 1.5511, p = 0.46$.

67. Two percent of participants indicated the intention to bear the repair expenses with the enforceable term condition, 3% with no term condition, and 5% with the unenforceable term condition ($\chi^2(2) = 0.8104, p = 0.67$). The differences in participants' intentions to resign and bear the repair expenses remain small and insignificant across contract conditions, even if we look only at participants who reportedly lived in rental housing when taking the survey, while excluding nonrenters ($\chi^2(2) = 1.53, p = 0.465$).

68. In terms of intentions to consult a lawyer, $\chi^2(2) = 0.97, p = 0.62$. In terms of intentions to initiate proceedings against the landlord, $\chi^2(2) = 0.23, p = 0.891$. In terms of legal predictions, $\chi^2(2) = 4.5105, p = 0.105$. The differences in participants' legal predictions remain small and insignificant across contract conditions even if looking only at participants who reportedly lived in rental housing when taking the survey, while excluding nonrenters ($\chi^2(2) = 0.18, p = 0.913$).

Figure 5. *Participants' Behavioral Intentions and Legal Predictions Across Contract & Information Conditions*



Participants ($n = 405$) were asked what they would do in the described circumstances and how likely they would be to win in trial had they decided to take their landlord to court. This Figure shows the percentages of participants who were reportedly likely to bear the TV's repair expenses, as well as the percentages of participants who believed they were (slightly to highly) likely to win in court, across contract and information conditions. While the differences in reported intentions to bear the repair expenses, as well as in estimated probability of winning, were highly significant in the no information condition (in terms of intentions to resign, $\chi^2(2) = 17.7628$, $p = 0.000$; in terms of likelihood of winning, $\chi^2(2) = 50.0708$, $p = 0.000$), they became insignificant in the legal information condition (in terms of intentions to resign, $\chi^2(2) = 0.8104$, $p = 0.67$; in terms of likelihood of winning, $\chi^2(2) = 4.5105$, $p = 0.105$).

Notably, participants who read an unenforceable term were deeply affected by the presence or absence of legal information. While 22% of these participants intended to relinquish their rights when they had no information about the law, only 5% intended to do so after learning that the landlord was prohibited from inserting such clauses.⁶⁹ In a similar vein, participants encountering an unenforceable term were significantly less optimistic about their chances of winning in court when no information about the law was provided than when such information was supplied: While only 25% of the participants who encountered an unenforceable term estimated they would be slightly to ex-

69. $\chi^2(1) = 10.1377$, $p < 0.01$.

tremely likely to win in trial, as many as 74% so believed after obtaining information about the law.

Tenants who encountered a silent lease were also significantly affected by the information provided to them about the law. While 13% of the tenants who read a silent lease intended to relinquish their rights when they had no information about the law, only 3% so intended after learning the truth about the legal situation.⁷⁰ These participants also became significantly more optimistic about their likelihood of prevailing at trial, from 52% in the no information condition to 82% in the legal information condition.

These findings suggest that tenants are often uninformed about their legal rights, such that both unenforceable terms and nondisclosure have a detrimental impact on their judgments and decisions.

D. Summary of the Findings

The studies reported in this Article demonstrated that the content of the contractual agreement significantly influenced tenants' postcontract perceptions and decisions. In particular, the findings revealed that the inclusion of unenforceable terms in contracts was detrimental to tenants as it was likely to adversely affect their behavior and decisions in several ways. First, as Study 1 showed, the inclusion of an unenforceable term significantly increased the probability that tenants would bear the repair expenses themselves without even contacting the landlord. While the majority of participants indicated that they would contact the landlord when encountering a rental problem of the kind described in the scenario, participants were about ten times more likely to bear the expenses themselves after reading an unenforceable, as opposed to an enforceable, lease provision. The results therefore indicate that the misinformation generated by the use of unenforceable clauses is likely to adversely affect tenants' behavior, thereby generating an unlawful welfare redistribution from tenants to landlords.

Second, as Study 2 revealed, the presence of an unenforceable term also significantly reduced tenants' inclination to search for information about their rights and remedies outside the four corners of their lease agreements. The misinformation generated by the use of unenforceable terms decreases the likelihood that tenants will search for more information since unenforceable terms, like all contract terms, enjoy a strong, commonsensical presumption of enforceability among laypeople. In other words, people either do not know that contract terms can be unenforceable or tend to believe that an unenforceable contract term would not be included in the standardized agreement, and they thus tend not to question the enforceability of standard contract terms. Importantly, even those who conducted online searches were signifi-

70. $\chi^2(1) = 5.6224, p < 0.05$.

cantly less likely to realize that the landlord was legally liable for the damage caused as a result of the landlord's negligence after reading an unenforceable lease provision, compared to an enforceable term or even a silent lease.

Finally, the content of the lease agreement shaped tenants' perceived bargaining positions. Participants who had read an unenforceable term reported being significantly less optimistic about their likelihood of succeeding in a trial against the non-cooperative landlord than did participants who had read an enforceable provision or simply a silent lease, and they were reportedly less likely to initiate legal proceedings against the landlord. These results suggest that unenforceable terms may discourage tenants from taking action—legal or extra-legal—against a noncompliant landlord.

Admittedly, there may be various reasons for tenants' disinclination to take action (and particularly legal action) against their landlords, including even those landlords refusing to comply with enforceable and binding contractual terms. Such reasons may include the costs of deteriorating one's relationship with the landlord, such as the need to move to a new apartment, not to mention litigation costs in case legal action is pursued. Yet, the findings suggest that when tenants are presented with unenforceable, rather than enforceable, lease provisions, they may be significantly more reluctant to take action or even to reach out to their landlords and negotiate a compromise. These results strengthen the proposition that unenforceable lease terms play an autonomous role, serving as distinct barriers to either litigation or renegotiations, when reinforced by tenants' formalistic preconceptions about contracts and the law.

Importantly, the findings of Study 3 demonstrate that when tenants are provided with clear, reliable, and accurate information about applicable law, the adverse effects of misinformation through the unenforceable fine print are significantly reduced. When participants who encountered unenforceable terms were provided with legal information, they were almost as unlikely to bear the repair expenses themselves as were participants encountering enforceable lease provisions and were almost as optimistic as their counterparts about their chances of winning in court. These findings illustrate the important role of information about the law in shaping tenants' postcontract decisions.

Admittedly, as acknowledged earlier, these experimental findings should be interpreted with caution. In particular, the disparity between people's ability to process simplified information conveyed to them in a survey and their ability to process information in real time should not be discounted or ignored. Much has been written about the failure of mandated disclosure to achieve its intended goals.⁷¹ Indeed, as Omri Ben-Shahar and Carl Schneider

71. See, e.g., BEN-SHAHAR & SCHNEIDER, *supra* note 1, at 4 (observing that “mandated disclosure is a Lorelei, luring lawmakers onto the rocks of regulatory failure”); see also RADIN, *supra* note 2, at 219 (recog-

point out, disclosure—to be successful—“requires a chain of demands on lawmakers, disclosers, and disclosees too numerous and onerous to be met often.”⁷² In particular, consumers’ limited ability to read the information they are bombarded with, comprehend it, and incorporate it into their decision-making processes in a manner that maximizes their well-being may render many disclosure efforts fruitless.⁷³ However, the study’s findings can at least be taken to suggest that information about the law, if *adequately designed and conveyed*, may improve tenants’ positions in postcontract negotiations.

It should be noted as well that, outside the lab, even if tenants have reasons to believe that a certain lease term is unenforceable, they may still be deterred from taking action by the mere presence of a dubious term in the contract. First, tenants might fear the possibility, however slight, that the contractual terms will be enforced despite the legal rule deeming them unenforceable.⁷⁴ Indeed, Tess Wilkinson-Ryan recently demonstrated that even when participants were asked to assume that a certain clause rested on questionable legal grounds, they nonetheless reported low willingness to pursue a claim in court when the clause was included in the contract.⁷⁵ Second, the presence of an unenforceable term in their leases might signal to tenants that the landlord will refuse to compensate them, and seeking to avoid disputes, they might refrain from taking action even if they believe that the law is on their side. Finally, tenants could be motivated to relinquish their rights by the fear of undermining their relationship with the landlord and thereby needing to move to a new apartment. While these concerns are acknowledged, the findings strongly suggest that legal information influences tenants’ legal per-

nizing 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”); 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, 182–83 (2011) (presenting empirical findings suggesting that increased disclosure in online software agreements does not by itself change readership or contracting practices to a meaningful degree); Teichman, *supra* note 16, at 55 (suggesting that behavioral insights cast doubts regarding the effectiveness of disclosure policies); Wilkinson-Ryan, *supra* note 1, at 119 (“The requirement of disclosure in consumer contracting is utterly uncontroversial. And yet, disclosure requirements lead inexorably to more disclosures. The resulting state of affairs is a deluge of unreadable terms that courts and policymakers simultaneously require and regret.”); Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 767–68 (2006) (describing consumers’ cognitive limitations, including information overload, as a barrier to the effectiveness of disclosure mandates in financial markets).

72. BEN-SHAHAR & SCHNEIDER, *supra* note 1, at 12.

73. Consumers’ limited ability to read and process disclosures is a direct corollary of their cognitive limitations, and in particular, of *information overload*. This means that there is a limit to the amount of information that human beings can process, and once this limit is overreached, people’s decision-making capabilities are typically diminished. See, e.g., ZAMIR & TEICHMAN, *supra* note 16, at 285.

74. See, e.g., 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, 91 (1997) (finding that exculpatory language had a deterrent effect on participants’ willingness to seek legal recourse).

75. Wilkinson-Ryan, *supra* note 1, at 117.

ceptions and consequently improves their bargaining positions vis-à-vis the landlord.

III. DISCUSSION AND IMPLICATIONS

A. *Drafters' Incentives to Use Unenforceable Terms*

As the findings indicate, absent specific information to the contrary, tenants believe that their lease provisions are enforceable and binding, even if the terms are clearly void under the law. Consequently, they may relinquish valid rights and claims when tenancy-related problems emerge.⁷⁶

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 landlords at least 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.

In markets characterized by imperfect and asymmetric information, the potentially adverse effect produced by the inclusion of unenforceable terms may actually provide a distorted incentive for drafting parties. Sophisticated landlords, for example, might realize that they can leverage their superior knowledge of the law to their advantage by drafting contracts that are unlikely to affect tenants' *ex ante* renting decisions but are likely to affect tenants' perceptions of their legal rights, and thus their *ex post* decisions, after a contract has been signed. Therefore, it is perhaps not surprising that there is increasing evidence of the prevalence of unenforceable and deceptive terms in consumer contracts and leases.⁷⁷

Sophisticated sellers and landlords are likely to understand that even if consumers suspect that a clause is unenforceable, they may still be deterred from contravening the contractual agreement to which they had "voluntarily" consented or from challenging its enforceability in court.⁷⁸ Nondrafting par-

76. These findings are consistent with previous research showing that consumers may refrain from filing meritorious suits if their contracts include dubious terms. *See, e.g.,* Stolle & Slain, *supra* note 74, at 91–92.

77. *See supra* Subpart I.B.

78. *See, e.g.,* Wilkinson-Ryan, *supra* note 1, at 165 (noting that "a policy's inclusion in a form contract may reduce the likelihood that consumers will challenge a practice using market power, informal dispute mechanisms, the court system, or the political process"); *see also* Zamir & Farkash, *supra* note 7, at 158 (observing that "even legal experts sometimes find it hard to predict whether a court would enforce a certain term or declare it unenforceable, especially when the applicable legal norms are vague and the legal precedents vary").

ties 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.⁷⁹

The low costs of noncompliance can further aggravate the situation. When a seller includes an unenforceable term, a disapproving court will typically invalidate the term but not the contract. The seller or landlord in such a case does not bear substantial costs or risks. As a result, drafting parties may be incentivized to include unenforceable terms in their contracts.⁸⁰ Indeed, even if they do not actively choose to use legally invalid terms, sellers and landlords may simply lack the incentive to ensure that their contracts comply with the regulatory requirements.

B. Policy Implications

The observed contracting practice is harmful to consumers. Regulatory solutions are therefore considered below.

1. *Unfair and Deceptive Acts or Practices Statutes*

Unfair and Deceptive Acts or Practices Statutes (“UDAP laws”) have been adopted in all states in the United States. These laws are considered “the main lines of defense protecting consumers from predatory, deceptive, and unscrupulous business practices.”⁸¹ Although UDAP laws vary widely from state to state, all of them prohibit deceptive practices in consumer transactions. Some UDAP laws contain a general prohibition on deception, some prohibit misstatements of fact, and some address both misstatements of fact and law.

Examples of the latter type, addressing both misstatements of fact and law, include the Alaska Unfair Trade Practices and Consumer Protection Act,

79. The deterrent effect of the fear of losing in court, despite the unenforceability of the contractual provision in question, has been recognized in numerous contexts. In the case of employment agreements, for example, several scholars have suggested that unenforceable noncompete clauses can induce employees to reject job offers from competitors in order to avoid the risk of a lawsuit. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not to Compete*, 73 HARV. L. REV. 625, 632–37 (1960); Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383, 410 (1993). This effect is exacerbated by the American rule that all litigants must bear their own attorneys’ fees and expenses. (Under some statutes, tenants are entitled to attorneys’ fees, but even when tenants are aware of this policy, they may be reluctant to expend the necessary resources to defend their rights and remedies, for fear of the risk, however slight, that the court would refuse to strike down the objectionable lease provision.)

80. *See, e.g.*, Wilkinson-Ryan, *supra* note 1, at 171 (“[I]f the worst thing that will happen is that the term will get thrown out, there is no reason not to include it and hope for the best.”).

81. *See, e.g.*, CAROLYN L. CARTER, NAT’L CONSUMER LAW CTR., CONSUMER PROTECTION IN THE STATES: A 50-STATE REPORT ON UNFAIR AND DECEPTIVE ACTS AND PRACTICES STATUTES (2009), http://www.nclc.org/images/pdf/udap/report_50_states.pdf.

which determines that the term “unfair or deceptive acts or practices”⁸² includes, *inter alia*, “representing that an agreement confers or involves rights, remedies, or obligations that it does not confer or involve, or that are prohibited by law”;⁸³ and the Massachusetts Consumer Protection law, deeming the inclusion of certain unenforceable clauses, such as a tax escalator clause not in conformity with the applicable law or a clause requiring advanced payments in excess of those allowed by the law, as “unfair or deceptive acts or practices.”⁸⁴

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

Importantly, tenants are unlikely to file UDAP violation claims as long as they remain uninformed of their legal rights and remedies. Therefore, additional regulatory tools, such as imposing disclosure obligations or statutory form leases, should be considered, as discussed below.

2. *Disclosure and Statutory Form Leases*

The problem that consumers face when confronted by unenforceable contract terms consists of three interrelated elements: consumers are typically ignorant of the law determining their rights and duties as buyers; they often rely on their contracts to ascertain their rights and duties; and they usually presume that terms in their contracts are enforceable and binding. Understanding that the problem of unenforceable contract terms is most onerous when all three preconditions are met may help suggest a path for its solution. This study’s findings illustrate that providing information about the law to tenants substantially reduces the adverse effect produced by unenforceable fine print. In fact, informed participants facing an unenforceable term were not significantly more likely to bear the repair costs themselves than were participants reading an enforceable lease provision.

Disclosure mandates are already widely used in various consumer sectors, in part because disclosure regulation is considered less intrusive than other regulatory measures.⁸⁵ Admittedly, many of the existing disclosure mandates

82. Alaska Unfair Trade Practices and Consumer Protection Act, ALASKA STAT. § 45.50.471 (2018).

83. *Id.* § 45.50.471(b)(14).

84. MASS. GEN. LAWS ANN. ch. 93A, § 2(a), (c) (West 2006) (declaring that “unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful and authorizing the Attorney General to enact rules and regulations determining which acts fall under this definition); 940 MASS. CODE REGS. 3.17(3) (2017) (setting forth a non-exhaustive list of clauses whose inclusion in residential lease agreements would constitute an unfair or deceptive act or practice, which includes relatively few provisions: a penalty clause or a tax escalator clause not in conformity with the applicable law and a clause requiring advanced payments in excess of those allowed by the law). The law similarly determines that failure to disclose the legal requirements governing the hold and return of security deposits also constitutes an unfair or deceptive act or practice. *Id.* at 3.17(3)(b)(3).

85. See, e.g., BAR-GILL, *supra* note 2, at 32 (describing disclosure mandates as “the least intrusive form of regulation”); BEN-SHAHAR & SCHNEIDER, *supra* note 1, at 5 (observing that mandated disclosure “seems

are poorly designed and are consequently ineffective.⁸⁶ Yet, this Article's findings may be cautiously taken to suggest that smart and simplified disclosure policies may be useful and are not inevitably doomed to fail.⁸⁷

Disclosure mandates are typically designed to alert consumers about non-salient features of the transaction (in response to the concern that consumers might not notice or fully take these attributes into account when making their purchasing decision).⁸⁸ For example, suppliers are required to disclose in a salient manner the conditions of the product's warranty or the circumstances under which the contract might be terminated or altered unilaterally.⁸⁹ This Article seeks to advocate for a different type of disclosure: disclosure of information on *consumers' rights and remedies under the law*. For example, landlords could be required to disclose their maintenance and repair duties or their liability for loss or damage caused to the tenants or third parties in their lease agreements.⁹⁰

Undeniably, disclosure regulation is mainly justified when sellers have more accurate information than do consumers and when they are unlikely to disclose this information voluntarily.⁹¹ While sellers presumably have better information about their products' attributes, and sometimes even about consumers' product use patterns, consumers and tenants are presumed to have an equivalent access to information about the law governing their transactions. Yet, as the study's findings suggest, tenants rarely search for information about their legal rights and remedies and often perceive their contracts as accurate sources of information about the legal state of affairs.

Landlords, in turn, lack any incentive to voluntarily inform tenants about their mandatory protections in the leases they offer. In fact, they have a con-

to regulate lightly" because it "lets sellers sell and buyers buy, as long as buyers know what sellers are selling?"); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1595 (2014) (describing "smart disclosure" and default rules as "minimalist forms of government action that preserve freedom of choice").

86. See generally BEN-SHAHAR & SCHNEIDER, *supra* note 1. See also Uri Benoliel & Xu (Vivian) Zheng, *Are Disclosures Readable? An Empirical Test*, 70 ALA. L. REV. 237, 238–39 (2018) (concluding that "disclosures are often unreadable" based on an empirical study showing that franchise disclosures required an average of "more than twenty years of education to understand").

87. See, e.g., BAR-GILL, *supra* note 2, at 33 (suggesting that smart and simplified disclosure regulation is evolving gradually and has proven to be effective at least to some extent in different consumer markets).

88. See, e.g., *id.* at 34 (noting that "existing and proposed disclosure mandates focus solely on product-attribute information"); ZAMIR & TEICHMAN, *supra* note 16, at 34 (observing that "[p]roperly designed disclosures can highlight important attributes of the contract, and help consumers make informed choices that best serve their interests"). Note that in recent years scholars have also begun calling for another type of information disclosure: disclosure of *product-use information*. See generally Oren Bar-Gill & Oliver Board, *Product-Use Information and the Limits of Voluntary Disclosure*, 14 AM. L. & ECON. REV. 235 (2012).

89. See, e.g., ZAMIR & TEICHMAN, *supra* note 16, at 34.

90. This idea is not revolutionary. In fact, obligations to disclose legal information already exist in different contexts, including in the residential rental industry. For example, Massachusetts law requires landlords to disclose information concerning the hold and return of security deposits, the limitations on termination of the lease due to nonpayment, and so forth. See Furth-Matzkin, *supra* note 11, at 27.

91. See, e.g., BAR-GILL, *supra* note 2, at 34–35.

trary incentive.⁹² A recent study provides evidence supportive of this proposition. In an interview, a housing lawyer from Philadelphia confirmed that he deliberately refrained from disclosing information about the tenant's rights and remedies in the leases he drafted, explaining that "the law applies whether [it is] in the lease or not, but if you put it in the lease, you draw the tenant's attention to it."⁹³

In light of landlords' superior information and negative incentives to disclose information about the law to tenants, mandated disclosure may be warranted. In particular, regulators may consider compelling landlords to use one of several pre-approved leases.⁹⁴ Such forms would accurately reflect the law, informing tenants of their mandatory rights, duties, and remedies. At first glance, such a solution may be perceived as an excessive intervention in the market, but it should be kept in mind that the law already imposes multiple substantive obligations and liabilities on landlords. A statutory form lease will merely disclose the mandatory obligations that the regulator has already chosen to impose. Therefore, obliging landlords to use statutory form leases can be seen as a form of comprehensive disclosure mandate, rather than as a stronger, more coercive intervention in the market.

As this study's findings demonstrate, silent leases, and not only leases containing unenforceable terms, can prove harmful to tenants. When leases are silent about a certain aspect of the landlord-tenant relationship, tenants—who are often unaware of their rights and remedies—are more likely to bear costs that the law imposed on the landlord than are tenants with a lease agreement containing an enforceable term accurately informing them of their legal rights and remedies. Since evidence suggests that the vast majority of the tenants' rights and remedies are almost never mentioned in the leases currently used in the market,⁹⁵ requiring landlords to use one of several statutory form leases may substantially enhance tenants' protections at a relatively low administrative cost. Notably, such a solution has already been adopted in the insurance sector and should be seriously considered in the residential rental market as well.⁹⁶ Yet, it is important to highlight several caveats here.

92. Furth-Matzkin, *supra* note 11, at 40 (suggesting that "the drafters of these leases intentionally refrain from using any term that might armor tenants with information that could backfire against the landlord").

93. Crawford, *supra* note 32, at 41.

94. This solution has been previously proposed by several scholars and commentators. *See generally* Allen R. Bentley, *An Alternative Residential Lease*, 74 COLUM. L. REV. 836 (1974); David Kirby, *Contract Law and the Form Lease: Can Contract Law Provide the Answer?*, 71 NW. U. L. REV. 204 (1976); Kurt Olafsen, Note, *Preventing the Use of Unenforceable Provisions in Residential Leases*, 64 CORNELL L. REV. 522 (1978).

95. Furth-Matzkin, *supra* note 11, at 27–29 (finding, based on sample of seventy leases from Massachusetts, that the landlords' warranties and covenants were rarely mentioned in the leases, and that, in a similar vein, most of the mandatory rights granted to tenants were not mentioned in any of the leases and some were occasionally mentioned in a small subset of leases).

96. *See generally* Daniel Schwarcz, *Reevaluating Standardized Insurance Policies*, 78 U. CHI. L. REV. 1263 (2011).

First, landlords might fail to use the required statutory form leases, just as they currently fail to meet the substantive and disclosure obligations that the law now imposes. Therefore, these regulatory measures should be backed up with strong enforcement mechanisms, both public and private. Second, tenants could suffer from information overload, rendering disclosure of such information useless or even harmful.⁹⁷ It is thus essential to design “smart statutory leases,” which disclose the legal information in a simple and salient manner.⁹⁸ Such disclosures should include only the necessary information in order to make the processing of the relevant information in real time easier.⁹⁹ This means, for example, that it may be desirable to focus on only the most important rights and remedies granted to tenants under applicable law. In addition, the information should be conveyed in easily comprehensible language, without complex legal jargon or unfamiliar terminology. Finally, the information should be prominently disclosed so that tenants will be made aware of it. For example, regulators could use a “warning box” of the type recently proposed by Ian Ayres and Alan Schwartz.¹⁰⁰ The third caveat is that landlords might use deceptive drafting techniques in order to misinform tenants about the law without exposing themselves to legal sanctions. As Michael S. Barr, Sendhil Mullainathan, and Eldar Shafir recognized, “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.”¹⁰¹ This caveat is real, but it may be possible to overcome it, at least to a certain extent, by launching government information campaigns in addition to requiring landlords to disclose the relevant information in their contracts.

3. *Class Actions*

Class actions can be effectively used to combat the inclusion of unenforceable terms in consumer contracts. A class action is an efficient tool, enabling consumers to obtain redress by aggregating multiple individualized

97. See, e.g., ZAMIR & TEICHMAN, *supra* note 16, at 285 (“[I]n any given unit of time, there is a limit to the amount of information people can perceive and process, and once this limit is surpassed, the quality of decisions tends to deteriorate.”); Korobkin, *supra* note 2, at 1222–25; Ellen Peters et al., *Less Is More in Presenting Quality Information to Consumers*, 64 MED. CARE RES. & REV. 169, 187 (2007); Willis, *supra* note 71, at 767–68.

98. See, e.g., BAR-GILL, *supra* note 2, at 37 (“To be effective . . . disclosures must be kept simple. . . .”); Cass R. Sunstein, *Nudges.gov: Behaviorally Informed Regulation*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 719, 727–33 (Eyal Zamir & Doron Teichman eds., 2014).

99. See, e.g., BAR-GILL, *supra* note 2, at 37 (“A disclosure that is simple enough for consumers to understand will inevitably exclude some relevant information.”).

100. Ayres & Schwartz, *supra* note 1, at 553.

101. BARR ET AL., *supra* note 16, at 6–7.

claims when the dollar amount per person is relatively small, thereby overcoming one of the obstacles to an individual action.¹⁰² Additionally, resorting to class actions can help solve the problem of relying on misinformed tenants to bring claims to court by incentivizing lawyers to inform tenants about their rights. From the landlord's perspective, this mechanism strengthens deterrence not only by increasing the probability of detection but also, and perhaps primarily, by increasing the expected magnitude of the sanction.

In the specific context of residential leases, many jurisdictions in the United States allow tenants to bring class action suits based on the inclusion of unenforceable terms in rental agreements, provided that the class of tenants suffered a "similar injury" as a consequence.¹⁰³ However, 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."¹⁰⁴ 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 class certification to a group of tenants asking to bring a class action suit.¹⁰⁵ The court determined that the claim for breach of the warranty of habitability was too individualized for class certification.¹⁰⁶

Such decisions severely harm tenants' ability to sue their landlords by undermining the class action mechanism, which is one of their strongest tools. Given such rulings, tenants are forced to sue and resolve rental disputes individually and are likely to be discouraged from filing such suits in light of the attendant litigation costs.¹⁰⁷ Perhaps even more problematic is the fact that sellers and landlords often insert class action waivers, choice-of-law clauses, or

102. As Congress has recognized, class action lawsuits "permit the fair and efficient resolution of legitimate claims of numerous parties by allowing the claims to be aggregated into a single action against a defendant that has allegedly caused harm." Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 2(a), 119 Stat. 4, 4 (codified at 28 U.S.C. §§ 1332, 1453, 1711–1715 (2012)).

103. See, e.g., MASS. GEN. LAWS ANN. ch. 93A, § 9(2) (West 2006); 940 MASS. CODE REGS. 3.17 (2014) (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. MASS. GEN. LAWS ANN. ch. 93A, § 9(3).

104. Tyler v. Michaels Stores, Inc., 984 N.E.2d 737, 745–46 (Mass. 2013).

105. Hendleman v. Los Altos Apartments, L.P., 160 Cal. Rptr. 3d 730, 734 (Ct. App. 2013).

106. *Id.* at 743.

107. It is well-known that litigation costs often deter consumers from filing individual claims. See, e.g., Lisa Bernstein & Hagay Volvovsky, *Not What You Wanted to Know: The Real Deal and the Paper Deal in Consumer Contracts—Comment on the Work of Florencia Marotta-Wurgler*, 12 JERUSALEM REV. LEGAL STUD. 128, 129–30 (2015) ("Given the dollar value of the harm a typical individual (as opposed to business) consumer would be likely to suffer from such a breach, almost any individual lawsuit a consumer could file would have a negative expected value . . .").

arbitration provisions into their boilerplate agreements.¹⁰⁸ These clauses are generally enforceable and may therefore be used by sellers and landlords to shield themselves from class actions.¹⁰⁹ It is therefore essential to complement private enforcement with strong public enforcement mechanisms.

4. Public Enforcement Mechanisms

Public enforcement mechanisms could be applied both *ex ante* and *ex post*. With regard to *ex ante* enforcement, regulators can require landlords to obtain pre-approval for their standard form leases before using them.¹¹⁰ This could be achieved by establishing a special judicial tribunal that is authorized to pre-approve standard form leases, or alternatively, by turning to an administrative agency with a similar regulatory power. Landlords using leases without judicial or administrative approval could then be subject to relatively high sanctions. Conversely, landlords using contracts that have been pre-approved could so indicate on their forms, thereby endowing their leases with the benefit of a strong presumption of enforceability or even immunity from judicial intervention.¹¹¹

In the United States, several states require pre-approval of certain insurance policy forms by the regulator.¹¹² This solution may be less suitable for the residential rental market, however, as the rental market consists of both residential rental companies and individual landlords that own and operate only a few apartments. It might therefore be perceived as too burdensome and costly, both for the individual landlords and for the state, which would incur the costs of administrative or judicial review, to require each and every

108. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 402–04 (2005).

109. See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341–52 (2011). For an analysis of this case and its implications, see Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012). Recall, however, that federal agencies have recently asserted authority under the Dodd–Frank Act and the Social Security Act to authorize regulations prohibiting mandatory arbitration clauses in certain types of consumer contracts. See *supra* note 21 and accompanying text.

110. Cf. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 983 (2005).

111. See *id.* at 984–86.

112. See, e.g., Kimball & Pennigstorf, *supra* note 16, at 683. A pre-approval process of standard form contracts also exists in Israel: The Israeli Standard Contract Law of 1982 allows sellers to submit a standard form contract for pre-approval by a special tribunal, established pursuant to this law. Such approval exempts the contract from scrutiny for a five-year period. See, e.g., Sinai Deutch, *Controlling Standard Contracts: The Israeli Version*, 30 MCGILL L.J. 458, 473–75 (1985). For a critical review of the Israeli tribunal's work and limited success, see, for example, Eyal Zamir & Tal Mendelson, *Three Modes of Regulating Price Terms in Standard-Form Contracts: The Israeli Experience* 4–6 (Sept. 29, 2017) (on file with Hebrew University Jerusalem) (explaining that “firms rarely applied to have their contracts validated, because the prospect of five-year immunity was not worth the risk of invalidation of their contract terms” and that “over time it became evident that the Tribunal's actual impact on the formulation of standard-form contracts in Israel was negligible, while its operation was rather costly”); Sinai Deutch, *Standard Contract Act: Failure and Recommendation*, 1 MEHKAREI MISHPAT [BAR-ILAN L. STUD.] 62, 69 (1980) (Isr.).

landlord to have his or her lease approved before using it.

With regard to *ex post* solutions, public agencies could be authorized to file claims against noncompliant landlords on behalf of tenants. Such a solution is not unrealistic. Section 5 of the Federal Trade Commission Act already authorizes the Federal Trade Commission (FTC) to take appropriate action when unfair or deceptive acts or practices are discovered and sets out the FTC's investigative powers and enforcement authority.¹¹³ The FTC is authorized to enforce the requirements of consumer protection laws by both administrative and judicial means. In a similar manner, the FTC could be authorized to ensure landlords' compliance with the substantive requirements under landlord and tenant law. State-level agencies with similar authority already exist in some jurisdictions. In Massachusetts, for example, the attorney general is authorized by law to bring claims against any landlord suspected of engaging in unfair or deceptive acts or practices.¹¹⁴

CONCLUSION

In view of the accumulating evidence that the inclusion of unenforceable contract terms in standardized agreements is prevalent in consumer markets, this Article explores, for the first time, the implications of this drafting practice for the nondrafting parties. More specifically, building on previous work demonstrating that unenforceable terms are regularly included in residential rental agreements, this Article sought to elucidate the role that these terms play in shaping tenants' post-contract decisions and behavior.

The experimental findings presented here suggest that tenants, who are typically uninformed of the law governing their relations with landlords, are 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. While tenants are not necessarily inclined to take the fine print into account before making their renting decisions, they are nonetheless likely to be affected by the fine print *ex post*, after a tenancy-related problem or a dispute arises. Consequently, tenants, and consumers more generally, are prone to relinquish their legal rights and remedies as a result of the misinformation conveyed in the unenforceable fine print. In this study, participants reading an unenforceable liability disclaimer, absolving the landlord of liability in negligence, were about ten times more likely to bear repair expenses that the law imposed on the landlord than participants reading

113. Federal Trade Commission Act of 1914, 15 U.S.C. §§ 41–58 (2012).

114. See MASS. GEN. LAWS ANN. ch. 93A, § 4 (West 2006) (“Whenever the attorney general has reason to believe that any person is using or is about to use any method, act, or practice declared by section two to be unlawful, and that proceedings would be in the public interest, he may bring an action in the name of the commonwealth against such person to restrain by temporary restraining order or preliminary or permanent injunction the use of such method, act or practice.”).

an enforceable lease term. The experimental findings also reveal that the presence of unenforceable terms discourages tenants from searching information online (compared to silent contracts), impedes tenants' ability to accurately process legal information obtained through online searches, and decreases the likelihood that they will take action against the noncompliant landlord when a dispute arises.

While these findings appear disturbing in terms of protecting tenants and consumers, there is also cause for cautious optimism. Informing nondrafting parties about their rights under the law substantially mitigates the harm generated by the presence of unenforceable contract terms. Admittedly, legal disclosure is not without limits. In particular, consumers' and tenants' limited time and attention should be taken into account. Therefore, solutions based on increasing consumer awareness of the legal environment should be combined with strong public enforcement and access to class action mechanisms. Such solutions may help overcome the deceptive power of unenforceable contract terms in consumer markets.

APPENDIX

A. Materials for Study 1

Please read the following scenario carefully and answer the following questions. Thank you for your cooperation.

Assume that you have been searching for an apartment and have finally found one that you like and that meets your budget. It's a two-bedroom apartment in Boston, MA.

After contacting the landlord, you receive the attached lease agreement. Please read it and then sign it in order to move into the apartment.

MASSACHUSETTS FIXED TERM RESIDENTIAL LEASE AGREEMENT**Tenant Copy****1. Parties**

The parties agree as follows: The tenant rents the leased premises in Boston, Massachusetts from the landlord.

2. Term of Lease

The lease shall last for a term of 12 months, beginning on May 1, 2018 and ending on April 30, 2019.

3. Rent

The tenant agrees to pay rent to the landlord at the rate of \$2,000 (two thousand dollars) per month on the first day of each and every month in advance so long as this lease is in force and effect.

4. Pets

No pets or animals shall be kept in the leased premises without the landlord's prior written consent.

[Unenforceable Condition:

5. Loss or Damage

The 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 Condition:

5. Loss or Damage

The 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 or recklessness.]

[Stand-in provision for lease with no term pertaining to landlord liability:

5. Keys and Locks

Locks shall not be changed or replaced by tenant without the written permission of the landlord. Any locks installed with the landlord's permission shall become the property of the landlord and shall not be removed.]

6. Compliance with Laws

The tenant shall not make or permit any use of the leased premises which will be unlawful, improper, or contrary to any applicable law or municipal ordinance, or which will make voidable or increase the cost of any insurance maintained on the leased premises by the landlord.

7. Assignment and Subletting

The tenant shall not assign this Agreement or sublet or grant any license to use the premises or any part thereof without the prior written consent of the landlord.

8. Early Termination

If the tenant does not comply with any obligation imposed on the tenant under this lease, the landlord may terminate the lease by notification to the tenant. The termination will become effective seven (7) days after the notice is given, except when the tenant has failed to pay rent, in which case the termination will become effective fourteen (14) days after the notice is given.

9. Entire Agreement

This document constitutes the entire Agreement between the parties. Any modifications to this Agreement must be made in writing and signed by the landlord and the tenant.



Please download the attached lease agreement and keep a copy for your records. You may want to view this file later.

Congratulations! Here are some photos of your new apartment: . . .

Now assume that after moving in, you notice that the roof of your apartment is leaking. You call your landlord and report the leak.

Your landlord does nothing in response, even after you send a letter of complaint requesting that the leaking roof be repaired.

Two months later, rain water enters the apartment from the leak in the roof and damages your television. The cost of repairing it is \$200, and the cost of replacing it with a new one is \$400.

What would you do under these circumstances?

[Demographics and Renting Experience Questions]

B. Materials for Study 2

[Same scenario as in Study 1. After reading the scenario, participants read as follows:]

Assume that your landlord's failure to fix the leaking roof was negligent. Would you be able to ascertain if your landlord is legally obligated to pay for the TV's repair or replacement? You can use any resources you like, including the web, to try to find this information.

If you answer correctly, you will receive a \$2 bonus, twice as much as you would be paid otherwise!

Does your landlord have to pay for the TV's repair?

- (1) Yes
- (2) No

Please explain briefly why or why not:

What did you do in order to answer this question? Please check all that apply [randomized order]:

- (1) Searched the web
- (2) Called a friend
- (3) Read the lease
- (4) Relied on my intuition
- (5) Relied on my previous knowledge
- (6) Other:

[If "searched the web" is selected:]

How long did you search the web?

- (1) 10 minutes or less
- (2) 10–20 minutes
- (3) 20–30 minutes
- (4) 30 minutes or more

[Demographics and Renting Experience Questions]

C. Materials for Study 3

[Same Scenario as in Studies 1 and 2. Participants in the Legal Information Condition also read as follows:]

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

[All participants were subsequently asked:]

What would you do under these circumstances?

Assume that you contact the landlord, and he tells you that he is not responsible for covering the expenses of the TV's repair.

How likely would you be to:

1. Contact an attorney for legal advice [1 = extremely unlikely; 3 = neither likely nor unlikely; 7 = extremely likely]
2. Initiate legal proceedings against the landlord [1 = extremely unlikely; 3 = neither likely nor unlikely; 7 = extremely likely]

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; 3 = neither likely nor unlikely; 7 = extremely likely]

[Demographics and Renting Experience Questions]