UNCONSCIONABILITY IN CONTRACTING FOR WORKER TRAINING

Jonathan F. Harris

UNCONSCIONABILITY IN CONTRACTING FOR WORKER TRAINING

Jonathan F. Harris[*]

Despite urgent calls for retraining and upskilling workers amidst the threat automation poses to many existing jobs, a forty-year-long reduction in public and private worker training programs means that some firms offer training only with contractual strings attached. This Article exposes the dangers of these conditional training contracts and proposes the law of unconscionability as a more effective framework for legal challenges than the statutory-based claims more commonly advanced by plaintiffs.

One type of conditional training contract, the training repayment agreement (TRA), requires an employee to pay the employer a fixed or pro rata sum if the employee received on-the-job training and quits work or is fired within a set period of time. TRAs often constrain employee mobility without providing employees the portable skills needed for quality jobs. Many courts and scholars have treated TRAs favorably, however, especially as compared to noncompete covenants, which can harm workers in ways similar to TRAs. This Article offers a set of factors to determine unconscionability in TRAs as an analogue to the group of reasonableness factors under the law of noncompetes. These proposed factors focus on the TRA repayment amount, the length of time required to work to avoid repayment, and the nexus between the repayment amount and the training's cost to the employer and benefit to the employee. The Article also compares TRAs with another type of emerging conditional training contract: the income share agreement (ISA). Under an ISA, a lender advances a certain amount of training in exchange for a set percentage of the trainee's future income.

Ultimately, worker training should be reenvisioned as a collective investment. In the meantime, an unconscionability framework for assessing conditional training contracts would be a practical step in the right direction.

INTRODUCTION

Investment in workforce training and retraining is at a four-decade low.[1] Public workforce development funding is at a quarter of its peak in the late 1970s, and private training financing has declined since at least the early 2000s.[2]

[*] Associate Professor of Law, LMU Loyola Law School (as of June 1, 2021). For helpful comments, the author thanks Thomas B. Bennett, Matthew Bodie, Jenny Breen, Miriam A. Cherry, Sherley Cruz, Nancy Ehrenreich, Andrew Elmore, Cynthia Estlund, Samuel Estreicher, Charlotte Garden, Verónica C. Gonzales-Zamora, J. Benton Heath, Jennifer Hill, Jeffrey M. Hirsch, Kathleen Kim, Livia Lam, Shirley Lin, Lilach Lurie, Deborah Malamud, Florencia Marotta-Wurgler, Martin Malin, Rachel Moran, César F. Rosado Marzán, Marley Weiss, Lauren Willis, and participants in the NYU Lawyering Scholarship Colloquium, the Colloquium on Scholarship in Employment and Labor Law, the LatCrit Conference, the Law and Society Annual Meeting, and the Southeastern Association of Law Schools Conference. The author thanks Samuel Carrigan, Miranda Katz, Mehleen Rahman, Sharila Stewart, Anne Tewksbury, Jacqueline Uranga, Alina Veneziano, and Winnie Vien for their research assistance.

1. *See* Harry J. Holzer, *Workforce Development as an Antipoverty Strategy: What Do We Know? What Should We Do?* 38 fig.1 (Inst. for the Study of Lab., Discussion Paper No. 3776, 2008), http://ftp.iza.org/dp3776.pdf (showing a sharp decline in U.S. Department of Labor worker training funding from 1979 to 2003); *Job Training*, FED. SAFETY NET, https://federalsafetynet.com/job-training.html (last visited Feb. 9, 2020) (depicting approximately four-fold drop in job training expenditures from 1979 to 2018).

2. *See Job Training*, *supra* note 1; NAT'L SKILLS COAL., AMERICA'S WORKFORCE: WE CAN'T COMPETE IF WE CUT (AUG. 23, 2018), https://www.nationalskillscoalition.org/resources/publications/file/Americas-workforce-We-cant-compete-if-we-cut-1.pdf (showing a 40% drop in Department of Labor training grants

Firms now decry a shortage of skilled workers to fill two million projected manufacturing job vacancies,[3] and workers, especially workers of color, fear the elimination of their jobs through automation with little hope of retraining for quality jobs.[4]

In the early 2000s, when private workforce training investment was beginning to decline, Katherine Stone wrote about a "new psychological contract" under which private employers replaced implied promises of employment security—that is, lifetime employment and internal career ladders—with implied promises of "employability security" through enhanced training.[5] This new psychological contract did not take hold.

Workers now bear the bulk of the costs of workforce training in three ways. First, trainees pay for their training through lower pay, or no pay, during the training period.[6] Second, firms expect more job applicants to arrive bearing degrees from higher education institutions.[7] Third, a growing number of firms are requiring workers to sign what this Article calls "conditional training contracts."

The Article primarily focuses on one species of conditional training contract, the training repayment agreement (TRA). A TRA requires an employee to pay the employer a fixed or pro rata sum if the employee received

to states since 2001); C. Jeffrey Waddoups, *Did Employers in the United States Back Away from Skills Training During the Early 2000s?*, 69 INDUS. & LAB. RELS. REV. 405, 405 (2016) (noting that firms reduced their funding of training between 2001 and 2009); *PURSUIT BOND*, PURSUIT, https://www.pursuit.org/bond (last visited Mar. 4, 2021) (stating that there is now only $28 million in annual private philanthropic funding for adult direct job training services in New York City, compared to the $60 billion needed to train the 1.7 million New Yorkers living in poverty who would benefit from training).

3. *See* THE MFG. INST. & DELOITTE, THE SKILLS GAP IN U.S. MANUFACTURING: 2015 AND BEYOND 2 (2015), https://www.themadeinamericamovement.com/wp-content/uploads/2017/04/Deloitte-MFG-Institute.-The-Skills-Gap-in-the-US-MFG-21015-and-Beyond.pdf (predicting a shortage of two million manufacturing workers in 2025 due to insufficient skills).

4. *See, e.g.*, David Baboolall et al., *Automation and the Future of the African American Workforce*, MCKINSEY & CO. (Nov. 14, 2018), https://www.mckinsey.com/featured-insights/future-of-work/automation-and-the-future-of-the-african-american-workforce (noting that African-American workers are disproportionately concentrated in support roles most likely to be automated); MELISSA JOHNSON ET AL., NAT'L SKILLS COAL., THE ROADMAP FOR RACIAL EQUITY: AN IMPERATIVE FOR WORKFORCE DEVELOPMENT ADVOCATES 43 (SEPT. 2019), https://www.nationalskillscoalition.org/resource/publications/the-roadmap-for-racial-equity (revealing that close to one-third of Black and Latinx workers occupy highly automatable jobs).

5. Katherine V.W. Stone, *Knowledge at Work: Disputes over the Ownership of Human Capital in the Changing Workplace*, 34 CONN. L. REV. 721, 729–31, 734 (2002) [hereinafter Stone, *Knowledge at Work*] (quoting ROSABETH MOSS KANTER, ON THE FRONTIERS OF MANAGEMENT 192 (1997)); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519, 568–69 (2001) [hereinafter Stone, *New Psychological Contract*] (quoting KANTER, *supra*, at 192).

6. *See* GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 35 (3d ed. 1993); Park v. FDM Grp. (Holdings) PLC, No. 16 CV 1520-LTS, 2017 WL 946298, at *3 (S.D.N.Y. Mar. 9, 2017) (holding that the trainee was ineligible for pay during the training period because she was the primary beneficiary of the training).

7. *See* MALCOLM HARRIS, KIDS THESE DAYS: HUMAN CAPITAL AND THE MAKING OF MILLENNIALS 67–88 (2017) (noting that employers expect more highly educated employees for today's "knowledge economy"); Austen Hufford, *American Factories Demand White-Collar Education for Blue-Collar Work*, WALL ST. J. (Dec. 9, 2019), https://www.wsj.com/articles/american-factories-demand-white-collar-education-for-blue-collar-work-11575907185.

on-the-job training and quits work or is fired within a set period of time.[8] This Article also discusses another form of conditional training contract, the income share agreement (ISA). ISAs allow lenders to speculate in the human capital of trainees by advancing a certain amount of training on the condition that trainees repay them as a set percentage of their future income.[9]

Courts have usually, but not always, enforced TRAs since the contracts began appearing in the 1990s.[10] Likewise, the sparse legal scholarship referencing TRAs has generally described them as preferred alternatives to noncompete covenants (noncompetes) in protecting an employer's training investment.[11] But many TRAs can be worse for low-wage workers than noncompetes; that is because preventing workers from working for a competitor may be less onerous to workers than requiring them to pay the employer a substantial sum to quit. TRAs can be especially burdensome for workers in industries accustomed to high turnover, where the average employee would not be expected to stay for the duration of the two-to-three-year TRA repayment period.[12]

TRAs impose those financial burdens on workers on top of the pre-existing shift of training costs onto employees in the form of heightened expectations of degree-holding job applicants and lower pay, or no pay, during the training period. To make things worse, there are no legal standards to ensure that training provided under TRAs is valuable to the employee—evidence suggests it often is not.

Many TRAs are presented as a mandatory condition of employment, making them ripe for analysis under the doctrine of unconscionability.[13] Unconscionability technically has two elements—procedural and substantive unconscionability—and take-it-or-leave-it contracts in employment prepared by the party with superior bargaining power can constitute procedural unconscionability.[14] The risk of procedural unconscionability in the formation

8. *See generally* Anthony Kraus, *Employee Agreements for Repayment of Training Costs: The Emerging Case Law*, 59 LAB. L.J. 213, 215–17, 219, 223 (2008) (collecting cases).

9. Shu-Yi Oei & Diane Ring, *Human Equity? Regulating the New Income Share Agreements*, 68 VAND. L. REV. 681, 684 (2015).

10. Kraus, *supra* note 8, at 215–17.

11. *See, e.g.*, Gillian Lester, *Restrictive Covenants, Employee Training, and the Limits of Transaction-Cost Analysis*, 76 IND. L.J. 49, 75–76 (2001) (calling for statutes like Colorado's, which contains an express exemption for TRAs in its ban on noncompetes); Brandon S. Long, *Protecting Employer Investment in Training: Noncompetes vs. Repayment Agreements*, 54 DUKE L.J. 1295, 1317–20 (2005); Stone, *Knowledge at Work*, *supra* note 5, at 754–55.

12. *See* U.S. BUREAU OF LAB. STAT., ANNUAL TOTAL SEPARATIONS RATES BY INDUSTRY AND REGION, NOT SEASONALLY ADJUSTED (Mar. 17, 2020), https://www.bls.gov/news.release/jolts.t16.htm (showing, for 2019, annual separations rates of 78.8% in leisure and hospitality; 63.3% in professional and business services; and 58.2% in retail trade).

13. *Cf.* Kraus, *supra* note 8, at 222 (describing unconscionability claims in certain challenges to TRAs).

14. *E.g.*, Nino v. Jewelry Exch., Inc., 609 F.3d 191, 201 (3d Cir. 2010) (holding unconscionable an employment arbitration agreement under U.S. Virgin Islands law, where the contract was a condition of the job and the employer had greater bargaining power than the employee). A collectively bargained TRA negotiated with a union can negate the procedural unconscionability element because any disparity in

of TRAs is especially pronounced in today's economy, with labor monopsony in many sectors; TRAs, along with noncompetes, foster monopsony by constraining workers' mobility.[15] If the contract is also substantively unconscionable, containing, for example, terms unreasonably favorable to the stronger party, a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable terms.[16]

Courts have rarely ruled on unconscionability claims in challenges to TRAs because, in part, most lawsuits are based on claimed violations of the Fair Labor Standards Act's (FLSA)[17] anti-kickback provision and similar state statutes or on doctrines governing noncompetes.[18] Though some plaintiffs have found success, courts have rejected most of those challenges.[19] This Article asserts that some of those suits may have failed because FLSA and the law governing traditional noncompetes may be inferior frameworks to evaluate the enforceability of many TRAs.

Like courts, contemporary legal scholars have rarely discussed the potential for TRAs to be unconscionable.[20] Indeed, many scholars have seemingly embraced TRAs. For example, Katherine Stone claimed that TRAs can be acceptable under the new psychological contract, writing that, under a TRA, an employee "is on notice that training is not an implicit term of the employment contract, but rather something that she is required to pay for by her continued employment."[21] More likely, however, this employee is on notice that she has no option but to accept a TRA in order to work for a particular employer, regardless of the TRA's terms.

---

bargaining power is thought to be neutralized. Unionization rates in this country, however, are at historically low levels, which results in most individual workers wielding much less bargaining power than their employers. *See* Quoctrung Bui, *50 Years of Shrinking Union Membership, in One Map*, NAT'L PUB. RADIO (Feb. 23, 2015), https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map.

15. *See* Alan B. Krueger & Eric A. Posner, *A Proposal for Protecting Low-Income Workers from Monopsony and Collusion* 2 (The Hamilton Project, Policy Proposal No. 2018-05, Feb. 2018) (defining labor monopsony as "the exercise of employer market power in labor markets").

16. *Nino*, 609 F.3d at 201; RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981). Scholars have remarked that, in some jurisdictions, substantive unconscionability is the only true requirement and procedural unconscionability need not always be present. *See, e.g.*, Val Ricks, *Consideration and the Formation Defenses*, 62 U. KAN. L. REV. 315, 354 (2013).

17. 29 U.S.C. §§ 201–219.

18. 29 C.F.R. § 531.35 (2019) (requiring that wages be paid free and clear and prohibiting any kickback of an employee's wages to an employer that cuts into the minimum or overtime wages owed to the worker); *see also* USS-Posco Indus. v. Case, 244 Cal. App. 4th 197, 205 (2016) (upholding a TRA under a claimed violation of California Labor Code § 2802, which requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties").

19. *See infra* Part II.A.

20. *Cf.* Stuart Lichten & Eric M. Fink, *"Just When I Thought I Was Out . . . .": Post-Employment Repayment Obligations*, 25 WASH. & LEE J. CIV. RTS. & SOC. JUST. 51, 81–82 (2018) (describing the potential for unconscionability analysis of TRAs).

21. Stone, *Knowledge at Work*, *supra* note 5, at 755–56.

The TRA is part of a more nefarious psychological contract under which employers offer no employment security or free training but simply the chance to work for an indeterminate period in exchange for committing oneself to a TRA's repayment obligation. As no-cost training used to be a staple of many jobs,[22] the multi-decade shift of training costs from employers to workers corresponds with other structural shifts disfavoring many low- and middle-wage workers, including de-unionization,[23] outsourcing and other "fissuring,"[24] a rise in precarious gig work,[25] labor monopsony,[26] and automation.[27] Moreover, the U.S. Department of Labor-certified and union-affiliated Registered Apprenticeship Program offers truly free training to hundreds of thousands of people with no repayment obligation.[28]

This Article proposes that courts use the existing doctrine of unconscionability to evaluate TRAs that are mandatory terms of employment. The procedural unconscionability element should follow the common law regarding take-it-or-leave-it contracts drafted by the party with superior bargaining power. And the substantive unconscionability element should include factors like: whether the TRA repayment obligation takes effect even if the employer fires the worker without just cause; the overall repayment amount relative to the employee's salary; whether the TRA repayment amount is amortized—that is, decreases over the time employed; the overall length of the repayment window; whether the training provides general and portable skills to the trainee sufficient to justify the repayment amount; and whether a nexus exists between the cost to the employer of the training and the initial TRA

22. This, of course, was not universally true. Many jobs available to workers of color, immigrant workers, and female workers failed to provide skills training, let alone career ladders, to quality employment. Groups of workers in those categories, however, had some success in organizing to win—and even control the provision of—skills training through their unions. *See, e.g.*, Dorothy Sue Cobble, *Organizing the Postindustrial Work Force: Lessons from the History of Waitress Unionism*, 44 INDUS. & LAB. RELS. REV. 419, 420–21 (1991) (describing "occupational unionism," in which waitresses' unions of the 1950s set industry standards and managed waitress training programs leading to career advancement).

23. *See Union Membership Rate 10.5 Percent in 2018, Down from 20.1 Percent in 1983*, U.S. BUREAU OF LAB. STAT.: ECON. DAILY (JAN. 25, 2019), https://www.bls.gov/opub/ted/2019/union-membership-rate-10-point-5-percent-in-2018-down-from-20-point-1-percent-in-1983.htm?view_full (showing a 13.3% union membership rate in 2001 compared to 10.5% in 2018). *Cf.* Jaclyn Diaz & Andrew Wallender, *Employers and Unions Talk Retraining, Just Not in Contracts*, BLOOMBERG LAW (Apr. 18, 2019), https://news.bloomberglaw.com/daily-labor-report/employers-and-unions-talk-retraining-just-not-in-contracts (showing that, in 2019, only 3% of union contracts contained workforce training provisions).

24. DAVID WEIL, THE FISSURED WORKPLACE 95, 98, 167–68 (2014) (ebook) (describing the fissuring of work through subcontracting, franchising, and outsourcing).

25. *See* Jeffrey M. Hirsch & Joseph A. Seiner, *A Modern Union for the Modern Economy*, 86 FORDHAM L. REV. 1727, 1744–45 (2018) (detailing the lack of workplace protections for gig workers due to their uncertain employment status).

26. *See* Suresh Naidu et al., *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 552–53 (2018) (revealing harms to workers of labor monopsony).

27. *See* DANIEL SUSSKIND, A WORLD WITHOUT WORK: TECHNOLOGY, AUTOMATION, AND HOW WE SHOULD RESPOND 127–31 (2020) (describing negative effects on workers of automation of work).

28. *See Registered Apprenticeship Program*, U.S. DEP'T OF LAB., https://www.apprenticeship.gov/registered-apprenticeship-program (last visited Mar. 4, 2021).

repayment amount. This set of factors for substantive unconscionability in TRAs would be an analogue to the group of reasonableness factors used to assess the enforceability of noncompetes.[29] Eventually, as a body of case law develops, a similar reasonableness standard for TRAs could supplant the more demanding and generally applicable unconscionability threshold. Until then, and amidst the explosive growth of TRAs in recent years, unconscionability would be a useful readily accessible tool to strike the most egregious TRAs.

The Thirteenth Amendment to the U.S. Constitution, which prohibits slavery, involuntary servitude, and debt peonage, provides a justification to give greater scrutiny to TRAs—that can bind workers to their jobs—than to ordinary contracts.[30] For example, the Southern District of New York compared one TRA with a $200,000 repayment scheme to indentured servitude.[31] The court found that the employer's primary incentive in requiring the TRA was employee immobility, not recoupment of training costs.[32]

Moving beyond TRAs, this Article posits the idea of a similar unconscionability analysis for another growing type of conditional training contract, the ISA. ISAs are contracts providing a certain amount of training on the condition that trainees repay a set percentage of their future income, and they have been gaining attention among Silicon Valley investors.[33] These contracts became popular as financing products for computer coding bootcamps and have since expanded to higher education and other areas of workforce development.[34] In late 2019, the U.S. Department of Education indicated a desire to "experiment" with offering ISAs at selected schools that process federal student aid.[35] ISAs, however, have not proven more successful

29. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.06 (AM. L. INST. 2015) (declaring a noncompete enforceable "only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer"). Clearly, these factors would not apply to TRAs that do not facially restrict competition, hence the need for a new set of factors.

30. U.S. CONST. amend. XIII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."); *see also* Maria L. Ontiveros, *"Liquidated Damages" in Guest Worker Contracts: Involuntary Servitude, Debt Peonage or Valid Contract Clause?*, 19 NEV. L.J. 413, 416 (2018); Kathleen Kim, *The Coercion of Trafficked Workers*, 96 IOWA L. REV. 409, 418–20 (2011) (describing the contractual coercion of Black workers post-Civil War and the genesis of legislation and caselaw prohibiting debt peonage).

31. Heartland Sec. Corp. v. Gerstenblatt, No. 99 CIV. 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000).

32. *Id.*

33. *See* Michael J. Coren, *Taking a Cut of Student's Future Paychecks Has Silicon Valley Investors Funding Education*, QUARTZ (Feb. 9, 2018), https://qz.com/1190860/taking-a-cut-of-students-future-paychecks-has-silicon-valley-investors-funding-education.

34. *See* Clare McCann & Sophie Nguyen, *Income Share Agreements Aren't a Solution to Student Debt*, NEW AM. BLOG (Oct. 5, 2017), https://www.newamerica.org/education-policy/edcentral/income-share-agreements-arent-solution-student-debt.

35. *See* Heather S. Klein, *Dept. of Ed Close to Releasing Proposal that Would Facilitate Income Share Agreement Programs at Selected Title IV Schools*, CONSUMER FIN. MONITOR (Dec. 9, 2019), https://www.consumerfinancemonitor.com/2019/12/09/dept-of-ed-close-to-releasing-proposal-that-would-facilitate-income-share-agreement-programs-at-selected-title-iv-schools.

in placing trainees in high-quality jobs than other training arrangements. In fact, the top sector in which ISAs are being used, computer coding, is experiencing a supply bubble that could result in a dearth of jobs available for ISA graduates.[36] Moreover, ISA providers are reportedly selling outstanding ISAs to hedge funds for fixed sums, which both disincentivizes the ISA provider from connecting workers with good jobs and creates time bombs of personal debt akin to the subprime lending crisis of the late 2000s.[37]

ISAs offer another example of shifting training costs onto workers. The repayment condition attached to ISAs means that most trainees will pay more—sometimes exponentially more—than had they taken out traditional student loans. Some ISAs also offer preferential income repayment terms for training in higher paying professions like engineering; this can perpetuate race and gender disparities because those professions tend to hire more white and male workers.[38]

While a step in the right direction, applying the doctrine of unconscionability to conditional training contracts like TRAs and ISAs—or even creating a reasonableness standard analogous to that applied to noncompetes—will not repair the nation's broken workforce development systems. Conditional training contracts are mere symptoms of the failure to collectively invest in training the nation's current and future workforce.

Tripartite training partnerships offer a more lasting solution to the workforce training crisis. These partnerships, comprised of employers, worker organizations, and governments, have a proven history in the United States and even more so in Europe. They offer career paths for quality jobs to incumbent workers and operate pipelines to those jobs for new workers.[39] Tripartite training partnerships revive Stone's "old psychological contract,"[40] except with multi-employer career ladders and lifetime training replacing internal career ladders and lifetime employment at a single firm.[41] These partnerships could even serve as a pilot for a Ghent system in the U.S., in which worker organizations and the state compete to provide employee benefits.[42] This would make workers less dependent on a single employer for training and is in line

36. Brandon Parise, *The Death of Coding Bootcamps?*, DEV CMTY. BLOG (May 14, 2019), https://dev.to/bparise/the-death-of-coding-bootcamps-p6i.

37. *See* Vincent Woo, *Lambda School's Misleading Promises*, N.Y. MAG. (Feb. 19, 2020), https://nymag.com/intelligencer/2020/02/lambda-schools-job-placement-rate-is-lower-than-claimed.html.

38. *See* Letter from Sen. Elizabeth Warren et al., to Betsy DeVos, Sec'y of Educ. 3 (June 4, 2019), https://www.warren.senate.gov/imo/media/doc/Letter%20to%20DeVos%20re%20ISAs.pdf.

39. *See, e.g.*, WIS. REG'L TRAINING P'SHIP, https://wrtp.org (last visited Mar. 4, 2021); CULINARY ACAD. OF LAS VEGAS, https://www.theculinaryacademy.org (last visited Mar. 4, 2021).

40. Stone, *Knowledge at Work*, *supra* note 5, at 731.

41. *See* Kenneth G. Dau-Schmidt, *Employment in the New Age of Trade and Technology: Implications for Labor and Employment Law*, 76 IND. L.J. 1, 19–20 (2001) (describing these as "cluster-based" training programs).

42. *See* Matthew Dimick, *Labor Law, New Governance, and the Ghent System*, 90 N.C. L. REV. 319, 323 (2012).

with proposals for benefits portability to slow the job-displacing effects of automation.[43]

The tripartite model would differ from many existing publicly financed training programs that have had minimal success because of, in part, a shortage of appropriate mechanisms holding training providers accountable.[44] Instead, the tripartite model helps ensure that the various parties that know best how to design and implement training programs are at the table; employers know their hiring needs, workers—and their collective representatives like unions—know the skills needed for those jobs, and governments are able to work with employers to accumulate real-time information on hiring in specific sectors in their geographic areas and to coordinate trainings with the goal that trained workers have quality jobs waiting for them.

Reenvisioning workforce training as a collective investment through expanding tripartite training partnerships would reduce the chance of procedural unconscionability in the formation of TRAs because workers would have outside options for training, and requiring TRAs as a condition of employment could thus deter new hires. Moreover, allocating public and private workforce development funds through tripartite training partnerships would increase the chances that workers receive lifetime training that continuously responds to the evolving needs of changing economies.[45] This is a global prescription that reaches far beyond the near-term transition to more automated workplaces and the growing risk of job displacement.

It is true that the tripartite model has not been adopted as widely in the U.S. as in Europe and would require a level of investment and industrial trust that may be hard to envision in the immediate term. Expanding tripartite training partnerships would, however, address some of the shortcomings that contracting for training, and the inadequate legal frameworks to regulate one-sided contracts, represents.

43. *See, e.g.*, Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 306–07 (2018) ("Ideally those benefits [like health insurance] would be portable from job to job and funded on a pro rata basis by firms on behalf of all who perform work for them.").

44. *See* Jonathan F. Harris & Livia Lam, *Is There a Right to Job Quality? Reenvisioning Workforce Development*, 11 CALIF. L. REV. ONLINE 339, 342–43, 346–47 (2020) (citing Carolyn J. Heinrich et al., *Training Program Impacts and the Onset of the Great Recession*, SEMANTIC SCHOLAR 36 (Nov. 2014), https://pdfs.semanticscholar.org/7a65/de88251fb5d402c145484ad2844857fd645e.pdf) (highlighting the minimal impact of the additional $2.95 billion in training funding from the American Recovery and Reinvestment Act of 2009 and calling for accountability mandates on training providers to lead trainees to quality jobs); GORDON LAFER, THE JOB TRAINING CHARADE 6 (2004) (noting the failures of the Reagan Administration-endorsed Job Training Partnership Act due, in part, to the "network of contractors including private for-profit organizations" that "have at best a modest effect on earnings and virtually no impact on poverty").

45. *See* Thomas Geoghegan, *Educated Fools*, NEW REPUBLIC, (Jan. 20, 2020), https://newrepublic.com/amp/article/156000/educated-fools (describing the need for state and private investment in lifelong training for a knowledge-based economy); *see also* Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 705 (1993) (explaining how German hotel workers complete apprenticeships focusing on all aspects of a hotel's operation to maximize skills and dexterity, whereas British workers receive only limited training for narrowly defined jobs).

This Article proceeds as follows. Part I contextualizes conditional training contracts within the pre-existing shift of training costs onto workers and then details the workings of TRAs. Part II traces the case law and legislation governing TRAs, describing how courts tend to favor enforcement of TRAs, especially in the face of statutory challenges. Part III explains how some courts and scholars have been mistaken in describing TRAs as better for workers than noncompetes and how they overlook the dubious value to the worker of the contracted-for training. Part III then walks through the doctrine of unconscionability as a ready-made framework to reject one-sided TRAs while permitting reasonable TRAs and explains how the Thirteenth Amendment to the U.S. Constitution casts a shadow over TRAs that impede employee mobility. Part IV details another type of potentially abusive conditional training contract—the ISA—and discusses doctrinal approaches like unconscionability for setting reasonable limits. The Article concludes with a proposal for expanding tripartite training partnerships as a better model for worker training than many conditional training contracts and shows how collective investment in training partnerships can scale up workforce training and retraining to the levels needed to counteract the job-displacing effects of automation.

I. THE CONTEXT AND NATURE OF TRAS

Debates over the "Future of Work" are taking center stage, with commentators projecting the benefits and perils of the latest wave of workplace automation.[46] Often appended to these discussions are employer narratives about a "skills gap," in which available workers are woefully undertrained for the high-skill jobs that will exist in the near future.[47] This "skills gap" narrative, however, distorts the reality that many so-called skilled jobs are not quality jobs, and thus there is not only a supply-side shortage of skilled workers but also a demand-side shortage of good jobs.[48] Moreover, there is little evidence that firms are working to enhance the skills of the U.S. workforce close to the levels that they once did.[49] One can blame this inertia on a collective-action concern that competitors will freeride on an employer's training undertaking.[50] Or, one

46. *Compare* David H. Autor, *Why Are There Still So Many Jobs? The History and Future of Workplace Automation*, 29 J. ECON. PERSP. 3, 5 (2015) (arguing that automation substitutes and complements human labor, and ultimately raises the value of the labor workers supply), *with* SUSSKIND, *supra* note 27 (asserting that automation may leave workers worse off and contribute to overall inequality).

47. *See* THE MFG. INST. & DELOITTE, *supra* note 3, at 2.

48. *See* LIVIA LAM, CTR. FOR AM. PROGRESS, A DESIGN FOR WORKFORCE EQUITY 9–11, 32–33 (2019); Harris & Lam, *supra* note 44, at 340, 343.

49. *See* Waddoups, *supra* note 2, at 406; *PURSUIT BOND*, *supra* note 2.

50. *See* Laura Dresser & Joel Rogers, *Sectoral Strategies of Labour Market Reform: Emerging Evidence from the United States*, *in* VOCATIONAL AND ADULT EDUCATION IN EUROPE 269, 277–78 (Fons van Wieringen & Graham Attwell eds., 1999), https://www.cows.org/wp-content/uploads/sites/1368/2020/05/1999-Sectoral-Strategies-of-Labour-Market-Reform-Emerging-Evidence-from-the-United-States.pdf ("[O]ne firm's trainee may thus become another firm's asset, with the second firm advantaged by the benefits of

can observe that reduced worker leverage has resulted in less pressure on employers to offer truly free training. Both are correct.

In the resulting landscape, firms wishing to use training as a means to prevent employee mobility or to speculate on human capital, through TRAs and ISAs, respectively, have free rein to tie the training to whatever conditions they wish. TRAs, and ISAs to a lesser extent, are the only pure conditional training contracts—that is, contracts that, on their face, are justified by an employer's purported interest in recouping the cost of training.[51]

Noncompetes, on the other hand, are facial restrictions on employee mobility that are not tied explicitly to training. In fact, the *Restatement of Employment Law* declares that recouping an investment in an employee's training is not an interest sufficient to justify a noncompete.[52] But as discussed later in Part III.B, the common law reasonableness test applied to noncompetes—though containing factors that would clearly not apply to TRAs that do not facially restrict competition—is instructive when formulating a standard for the enforceability of TRAs.[53]

Before reaching that analysis, it is important to contextualize conditional training contracts within the broader historical shift of training costs onto workers and to understand the workings of TRAs.

A. The Historical Shift of Training Costs from Firms to Workers

1. Why Costs Have Shifted

State investment in training peaked in the late 1970s as a lingering effect of President Johnson's War on Poverty.[54] The National Advisory Committee on Civil Disorders issued its *Kerner Report* in 1968, highlighting the need for robust

training but not burdened by its costs."); Rachel S. Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes*, 80 OR. L. REV. 1163, 1203–04 (2001) ("[E]mployers may not make such investments for fear that their efforts will merely aid the competition."); *see also* Mitchell Hoffman & Stephen V. Burks, *Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training* 1 (Nat'l Bureau of Econ. Rsch, Working Paper No. 23247, Mar. 2017) ("[I]t has been recognized since Pigou . . . that general training is subject to a 'hold-up' problem: firms may be reluctant to train if workers are likely to quit after training." (citing ARTHUR C. PIGOU, WEALTH AND WELFARE (1912))).

51. This Article demonstrates that TRAs and ISAs do much more than enable recoupment of training costs. TRAs are primarily used to prevent employee mobility and ISAs, while lacking the same tendency to constrain mobility, are used as mechanisms to speculate on a worker's enhanced earning capacity. Under both contracts, the so-called training can be illusory.

52. RESTATEMENT OF EMPLOYMENT LAW § 8.07 cmt. f (AM. L. INST. 2015) (noting, however, that such a training investment interest may justify a repayment obligation).

53. *See id.* § 8.06.

54. *See* Holzer, *supra* note 1; *Job Training*, *supra* note 1.

workforce training to prevent future racial uprisings in the inner cities.[55] The threat of government-mandated affirmative action in private workplaces also encouraged voluntary affirmative action programs for training, especially in unionized settings.[56]

But since at least the early 2000s, employers have reduced direct investment in training their own employees.[57] This has shifted training costs onto workers in two distinct ways: first, through reduced or no pay during training periods and, second, through greater expectations that applicants will come bearing post-high-school degrees and a cache of general skills.[58] These shifts have occurred largely in the absence of conditional training contracts, and such contracts only place more of the training burden on workers.

Coincidentally, when these declines in private employer investment in training began in 2001 and 2002, Katherine Stone wrote about a "new psychological contract" under which employers promised *more* training and upskilling in exchange for revoking promises of lifetime employment.[59] She called this training "employability security" and claimed that it would provide transferable skills for workers to excel in their career no matter the employer.[60] Stone decried employers that breach this psychological contract through limitations on employee mobility.[61]

Stone's new psychological contract never manifested, as the above data demonstrate. Another psychological contract has manifested, however. Under this newer psychological contract, an employer offers no employment security *or* employability security but only the chance to work for an indeterminate period in exchange for the worker accepting lower pay or no pay during the training period or the worker coming to the job pretrained.[62]

55. *See* REP. OF THE NAT'L ADVISORY COMM'N ON CIV. DISORDERS 21 (1968) (recommending "on-the-job training by both public and private employers with reimbursement to private employers for the extra costs of training the hard-core unemployed, by contract or by tax credits").

56. *See* Deborah Malamud, *The Story of* United Steelworkers of America v. Weber, *in* EMPLOYMENT DISCRIMINATION STORIES 173 (Joel Wm. Friedman ed., 2006).

57. *See* Waddoups, *supra* note 2.

58. It is recognized that the second way could be, to an extent, a product of labor market dynamics of supply and demand, as slack in labor markets allows employers to demand higher qualifications. These traditional labor market dynamics were not fully apparent prior to the COVID-19-induced collapse of the job market, however, as many employers were demanding more credentials from job applicants during one of the tightest labor markets in history. *See, e.g.*, Hufford, *supra* note 7. Regardless, while the first type of cost-shifting can be reached through regulatory solutions, it is harder to reach the second type of shifting through regulation.

59. Stone, *Knowledge at Work*, *supra* note 5, at 722; Stone, *New Psychological Contract*, *supra* note 5 (quoting KANTER, *supra* note 5).

60. Stone, *Knowledge at Work*, *supra* note 5, at 754.

61. *Id.* at 738, 762.

62. Catherine Fisk also disputed Stone's description of the new psychological contract, writing: "A counter-narrative can be told about the nature of the employment, in which the exchange is not employment insecurity for employability security, but employment on whatever terms for cash plus the possibility of continued employment if the employee performs well—until the employer changes its mind." Catherine L.

A union improves the odds of a worker having employment security through just-cause termination stipulations and having employability security through union-bargained on-the-job training.[63] Indeed, collective action via a union is a proven way for workers to increase their leverage with employers on all sorts of issues.[64] Due to globalization and other forces, however, union membership is now almost half of what it was in the early 1980s.[65] With workers' reduced bargaining power comes a reduced incentive for employers to offer no-cost on-the-job training. It is no coincidence that some of the nation's most successful job training programs are born from partnerships with unions, as discussed in this Article's conclusion.

Globalization and more competitive labor market dynamics in supplier sectors also contribute to an employer's choice to reduce or eliminate free on-the-job training.[66] Policymakers have also contributed to labor market flexibility in the form of greater outsourcing of labor, subcontracting, and franchising, all of which David Weil calls workplace "fissuring."[67] Such fissuring causes a reduction in employer investment in training, as firms no longer have a direct connection to the workers making their products or serving their customers. Gig work and other precarious labor relationships are flourishing.[68] These, too, cause reduced investment in training, since firms no longer classify many of their workers as employees, but instead as independent contractors. Therefore, so-called independent contractors should train themselves, or so goes the conventional wisdom.

Technology, of course, makes the shifting of training costs onto workers easier, but it does not motivate the shift.[69] Instead, a capitalist drive for market efficiency has likely caused many firms to reduce or eliminate their offering of free on-the-job training. Perhaps social norms that checked such a relentless drive for efficiency, more primitive technology, and less employer-friendly

Fisk, *Reflections on the New Psychological Contract and the Ownership of Human Capital*, 34 CONN. L. REV. 765, 770 (2002).

63. Many collective bargaining agreements require that an employer have just cause to terminate an employee. *See generally* Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 N.C. L. REV. 343 (2014).

64. *See generally* Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA's Future*, 13 N.Y. CITY L. REV. 107, 110 (2009).

65. U.S. BUREAU OF LAB. STAT., *supra* note 23.

66. *See* Hans Gersbach & Armin Schmutzler, *The Effects of Globalization on Worker Training* 2 (Inst. for the Study of Lab., Discussion Paper No. 2403, Oct. 2006), http://ftp.iza.org/dp2403.pdf ("[P]roduct market integration may reduce the training investments of firms, ultimately leading to a collapse of general training.").

67. *See* WEIL, *supra* note 24.

68. *See* Juliet MacMahon, *Plus Ça Change? Regulating Zero-Hours Work in Ireland: An Analysis of Provisions of the Employment (Miscellaneous Provisions) Act 2018*, 48 INDUS. L.J. 447, 448 (2019); *cf.* Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMMC'N 3758, 3777 (2016) (claiming that Uber's labor model centers on "freedom, flexibility, and entrepreneurship" but that "power and information asymmetries emerge" with respect to drivers).

69. *Cf.* Estlund, *supra* note 43 (noting that technology has accelerated, but not caused, the elimination or outsourcing of jobs; this is due to "supercharged global capital markets").

government policies in prior decades kept firms from reducing their training offerings. And the resulting reduction in free on-the-job training offerings has occurred even though it became cheaper to train a worker over time.[70]

Moreover, a vicious cycle exists between labor monopsony and reduction in training, with each contributing to the other. Labor monopsony increases employer market power by reducing competition for workers in a sector or region.[71] Monopsony also reduces worker power—employers cartelizing labor markets impedes worker mobility, especially as unions shrink.[72] With fewer employers offering general skills training to employees, the employees have fewer options for employment with other firms. This, then, binds workers to the employing firm in a way that would be unnatural under competitive labor markets.

With this explanation of the "why" behind the shifting of training costs from employers to workers, an explanation is in order regarding "how" the shifting has occurred.

2. How Costs Have Shifted

Chicago School economist Gary Becker was one of the first to explicitly describe how employers shift training costs onto workers through lower pay to untrained and training workers.[73] According to Becker's human capital theory, "[g]eneral training is useful in many firms besides those providing it," but "[e]mployees pay for general on-the-job training by receiving wages below what they could receive elsewhere."[74] Specific training, on the other hand, "has no effect on the productivity of trainees that would be useful in other firms."[75] Scholars have described this training cost-shifting through lower wages as an "implicit contract."[76]

Federal employment law permits this training cost-shifting through explicit exceptions to the minimum wage. Section 14(a) of FLSA allows employers to

70. *See* Waddoups, *supra* note 2; *infra* notes 99–100 and accompanying text.

71. *See* Krueger & Posner, *supra* note 15.

72. *See* Naidu et al., *supra* note 26 ("As unions declined, . . . labor markets did not lose their rigidities. Instead, employer market power seemed to increase. The concurrent decline of unions and rise of labor market power implies that the neoliberal assumption that unions, rather than employers, are the major source of cartelization of labor markets was false.").

73. BECKER, *supra* note 6, at 33, 35. Many also describe Becker as a neoliberal. *See* David Newheiser, *Foucault, Gary Becker and the Critique of Neoliberalism*, 33 THEORY, CULTURE & SOC'Y 3, 5 (2016) ("Foucault calls [Becker] 'the most radical, if you like, of the American neoliberals . . . .'" (quoting MICHEL FOUCAULT, NAISSANCE DE LA BIOPOLITIQUE 273 (2004)).

74. BECKER, *supra* note 6, at 33, 35.

75. *Id.* at 40.

76. *See* Ian Ayres & Stewart Schwab, *The Employment Contract*, 8 KAN. J.L. & PUB. POL'Y 71, 83 (1999) ("Suppose that [an] employee, out of faith in the employer, goes ahead and makes this firm-specific investment [without receiving a higher wage], and that's the reason they are getting this above-market wage later on. That was the implicit contract." (quoting Henry Butler)).

pay 85% of the minimum wage to a student-learner, or $5.44 per hour in 2020.[77] A "student-learner" is a student at least sixteen years of age "who is receiving instruction in an accredited school, college or university and who is employed by an establishment on a part-time basis, pursuant to a bona fide vocational training program."[78] FLSA also authorizes a youth minimum wage of $4.25 per hour for workers under twenty years of age.[79] Given that it is only permitted for the first ninety days of employment,[80] the youth minimum wage can be described as a subminimum wage for young trainees. In addition, FLSA allows subminimum wages for disabled workers.[81] Over 95% of the disabled workers paid subminimum wages under this waiver work in ostensibly training-oriented "sheltered workshops" but never get the chance to enter the larger labor market.[82]

In addition, a liberalizing of the test over whether interns should be paid allows a putative employer to benefit substantially from the trainee's or intern's work without having to pay a wage.[83] Under the "primary beneficiary" test, (paid) employee versus (unpaid) intern status is determined by whether the putative employer primarily benefits from the relationship or whether the putative employee primarily benefits.[84] This test is a pro-employer change from the previous test that presumed employee status, and it supports a further shift of training costs onto trainees.[85]

77. 29 U.S.C. § 214(b).

78. 29 C.F.R. § 520.300 (2019). There is no explicit age cap for a student-learner.

79. 29 U.S.C. § 206(g).

80. *Id.*

81. 29 U.S.C. § 214(c).

82. U.S. DEP'T OF LAB., SECTION 14(C) SUBMINIMUM WAGE CERTIFICATE PROGRAM, https://www.dol.gov/odep/pdf/ChapterTwo14cProgram.pdf (last visited Mar. 4, 2021).

83. *See, e.g.*, Elizabeth Heffernan, *"It Will Be Good for You," They Said: Ensuring Internships Actually Benefit the Intern and Why It Matters for FLSA and Title VII Claims*, 102 IOWA L. REV. 1757 (2017); Claire Saba, *Employment Law Violations*, 56 AM. CRIM. L. REV. 759, 782 n.178 (2019); James J. Brudney, Square Pegs and Round Holes: Shrinking Protections for Unpaid Interns Under the Fair Labor Standards Act (Aug. 2019) (unpublished manuscript), https://ssrn.com/abstract=3434653.

84. *See* Wang v. Hearst Corp., 877 F.3d 69, 72 (2d Cir. 2017) (ruling that interns at a print magazine publisher were ineligible for pay under the primary beneficiary test); Benjamin v. B & H Educ., Inc., 877 F.3d 1139, 1147–48 (9th Cir. 2017) (holding that cosmetology students were not employees under the primary beneficiary test); Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528, 536, 540 (2d Cir. 2016) (applying the primary beneficiary test in denying certification of putative FLSA collective of unpaid interns working for a media company); Schumann v. Collier Anesthesia, P.A., 803 F.3d 1199, 1214–15 (11th Cir. 2015) (ordering the district court to apply the primary beneficiary test to determine whether nurse anesthetist students were interns ineligible for pay); Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 529 (6th Cir. 2011) (holding that boarding-school students were not employees eligible for pay and that courts should assess which party derives the primary benefit from the relationship in determining whether one is an employee under FLSA).

85. *See, e.g.*, David C. Yamada, *The Legal and Social Movement Against Unpaid Internships*, 8 N.E. U. L.J. 357, 359–61, 363–65 (2016) (citing the previous standard as articulated in Department of Labor Fact Sheet No. 71 and *Walling v. Portland Terminal Co.*, 330 U.S. 148, 153 (1947), which presumed employee status unless the employer could satisfy every element of the tests).

Amidst these shifts in costs, in the past two decades, both public and private funding for workforce training has fallen dramatically. From 2001 through 2019, U.S. Department of Labor workforce development grants to states declined by 40%.[86] These grants are the backbone of the workforce development system.[87] The Department of Labor ended its Survey of Employer-Provided Training in 1995, so reliable figures on firm investment in training are scarce.[88] But a study by Jeffrey Waddoups revealed a 28% decline in private employer-paid training across almost all sectors between 2001 and 2009.[89] Moreover, according to Waddoups, "the workforce appears to have had the educational credentials by 2009 that, had they occurred in 2001, would have led to substantially more training."[90] In other words, "the workers in 2009 were more trainable than their counterparts in 2001 even though they were receiving less training."[91] Paradoxically, though, employers were less likely than before to reward higher education attainment with on-the-job training.[92]

One theory behind a particularly steep decline in employer-provided training between 2001 and 2004 was a 16.5% decline in active apprenticeship programs in those years.[93] An overwhelming portion of those apprenticeships are run in conjunction with unions through the Registered Apprenticeship Program.[94] Those programs have suffered with declining union density and leverage. Unions' institutional capabilities and resources in this domain provide additional evidence of the need for tripartite labor-management partnerships in training, as discussed in this Article's conclusion.

But even within the shrinking union sector, the commitment to training has weakened, signaling additional side effects of the reduction of union influence. In 2019, only 3% of unionized employers' collective bargaining agreements contained language on retraining programs, compared to 20% in 2011.[95] Making matters worse, a 2019 corruption scandal involving officials from the

86. NAT'L SKILLS COAL., *supra* note 2.

87. *See* Katie Spiker, *Fiscal Year 2020 Appropriations Provide Moderate - But Important - Boost to Workforce and Education Programs*, NAT'L SKILLS COAL.: SKILLS BLOG (Dec. 23, 2019), https://www.nationalskillscoalition.org/news/blog/higher-education/fiscal-year-2020-appropriations-provide-moderate-but-important-boost-to-workforce-and-education-programs (showing that state grants constitute the largest single expenditure in the federal workforce training budget of over $11 billion).

88. *See Survey of Employer-Provided Training*, U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., https://www.bls.gov/ept/home.htm (last visited Mar. 4, 2021) (explaining that surveys were conducted in 1993 and 1995).

89. Waddoups, *supra* note 2.

90. *Id.*

91. *Id.* at 429.

92. *Id.*

93. *Id.* at 430.

94. *See Registered Apprenticeship Program*, *supra* note 28.

95. Diaz & Wallender, *supra* note 23.

United Auto Workers and Fiat Chrysler led to the shuttering of the union and automaker's well-regarded training centers.[96]

At a time when governments have disinvested in workforce training, firms that once offered on-the-job training now seek pretrained workers for entry-level jobs.[97] Fortunately for employers, today's young people are the most formally educated in the nation's history.[98] In 2017, 59% of eighteen- to twenty-year-olds were enrolled in college, compared to 44% in 1986.[99] And in 2018, 43% of six- to seventeen-year-olds lived with a parent with at least a bachelor's degree, compared to only 16% in 1968.[100] But today's young people are falling into unprecedented levels of debt to obtain those degrees, with U.S. student debt topping $1.6 trillion in 2019.[101]

Citing Becker's human capital theory, self-described millennial author Malcolm Harris acknowledges that this shift in training expenses through greater formal education acquisition is a form of risk-avoidance for firms that are concerned with competitors poaching their newly trained workers: "The more capital new employees already have built in when they enter the labor market, the less risky for their employer, whoever that ends up being . . . . [T]he training burden fell to the state, and then to families and kids themselves."[102]

Consequently, economically advantaged young people who have more built-in capital through purchased degrees are at a strategic advantage when entering the job market. And higher education is a way to sort people for career prospects. Despite lack of evidence that credential stacking connects to more earning power—there are now 740,000 unique credentials in the education marketplace—in a winner-take-all economy, employers are able to pick from a pool of hyper-credentialed applicants for whatever jobs they have to offer.[103]

It is against this backdrop of the pre-existing shift of training costs from employers to workers that firms are now increasingly offering training only through TRAs.

96. *See* Hannah Lutz, *UAW-GM Training Center in Detroit Looks Doomed*, CRAIN'S DETROIT BUS. (Oct. 21, 2019), https://www.crainsdetroit.com/automotive/uaw-gm-training-center-detroit-looks-doomed.

97. *See* Peter Cappelli, *What Employers Really Want? Workers They Don't Have to Train*, WASH. POST (Sept. 5, 2014), https://www.washingtonpost.com/news/on-leadership/wp/2014/09/05/what-employers-really-want-workers-they-dont-have-to-train ("The real issue is that employers' expectations – for the skills of new graduates, for what they must invest in training, and for how much they need to pay their employees – have grown increasingly out of step with reality."); Hufford, *supra* note 7.

98. Richard Fry & Kim Parker, *Early Benchmarks Show 'Post-Millennials' on Track To Be Most Diverse, Best-Educated Generation Yet*, PEW RSCH. CTR. (Nov. 15, 2018), https://www.pewsocialtrends.org/2018/11/15/early-benchmarks-show-post-millennials-on-track-to-be-most-diverse-best-educated-generation-yet.

99. *Id.*

100. *Id.*

101. *Student Loans Owned and Securitized, Outstanding (SLOAS)*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/SLOAS (last visited Mar. 4, 2021) (showing $1.64 trillion in outstanding student debt at the end of 2019).

102. HARRIS, *supra* note 7, at 26.

103. *See* Harris & Lam, *supra* note 44, at 343–44.

B. The Workings of TRAs

TRAs are conditional training contracts between employers and employees that obligate an employee receiving training to pay the firm a fixed or pro rata sum if the employee quits work or is fired within a set time from the date of hire or completion of the training. Such time periods last usually one to five years. Some TRAs apply only if the employee resigns from the job or is fired for cause, while others apply regardless of the reason for the employment ending.

By way of example, imagine that a suburban county government requires Shelly, its GIS[104] technician, to enroll in a year-long, off-site training program in coding and web development at a cost of $25,000 to the county. Shelly believes that the county will fire her if she does not take the training. A year and a half later, and six months after having completed the training, Shelly obtains another position in the private sector and resigns from her county job. It is unclear whether the training helped her qualify for the new job or otherwise provided portable skills. At her exit interview, Shelly is informed that she owes the county $12,500 under the county's Training Cost Repayment Policy that she signed during her onboarding and that the county will withhold her final paycheck as a first payment toward the debt.

The human resources representative shows Shelly the one-page policy, which states that employees who voluntarily resign or are fired for cause within a twelve-month period following the completion of any training in which the total cost exceeds $1,000 must repay the county one-half of the total cost of all training. "Training" is defined as "training which provides the participant with expertise in a specified subject or subject area." Shelly earned $33,000 per year with the county and expects to earn $38,000 per year in her new job.[105] But she has $29,000 in student loan debt,[106] and she only has $400 in her savings account.[107] She is also the single parent of a two-year-old for whom she pays childcare.

There is a good chance that scenarios similar to this hypothetical one have played out in Cobb County, Georgia—the County maintains the above-described "Training Cost Repayment Policy."[108]

104. GIS stands for geographic information system. *GIS (Geographic Information System),* NAT'L GEOGRAPHIC, https://www.nationalgeographic.org/encyclopedia/geographic-information-system-gis (last visited Mar. 4, 2021).

105. *See* COBB CNTY. GOV'T, BIENNIAL BUDGET BOOK 90 (2017–2018) (setting the minimum salary of a GIS CADD Technician at $33,051.20 per year).

106. *See* THE INST. FOR COLL. ACCESS & SUCCESS, STUDENT DEBT AND THE CLASS OF 2018, AT 11 (Sept. 2019) (showing the average student loan debt in Georgia is $28,824).

107. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2017, AT 21 (May 2018) (revealing that only 59% of U.S. adults would be able to pay an unexpected expense of $400 without needing to sell something, borrow money, or carry a balance on a credit card).

108. COBB CNTY. GOV'T, TRAINING COST REPAYMENT POLICY (Nov. 2020).

In the 1990s, when TRAs began to appear in significant numbers,[109] the contracts were mostly limited to higher-skill and higher-wage employees such as engineers, securities brokers, and airline pilots.[110] TRAs have since become commonplace for civil servants like police officers, firefighters, and federal employees.[111] Employers also frequently use TRAs for truckers, nurses, mechanics, electricians, salespeople, paramedics, flight attendants, bank workers, repairmen, and social workers.[112] While such jobs used to be middle class and highly unionized, many workers in these sectors now struggle financially, and unionization levels have dropped.[113]

Mitchell Hoffman and Stephen V. Burks conducted the only comprehensive study of TRAs and made two conclusions: (1) TRAs harm workers, and (2) TRAs are used primarily to restrict employee mobility.[114] The single-firm study found that a trucking company's two types of TRAs, with twelve-month and eighteen-month post-training employment requirements, reduced employees' quitting by about 15% and "significantly increase[d] firm profits from training."[115] On the other hand, the TRAs decreased worker welfare relative to not having a TRA at that firm by "limit[ing] worker ability to costlessly leave the job if they f[ou]nd it to be non-lucrative or unsatisfying."[116] Aside from this study and two short articles accumulating select cases on TRAs, there is little empirical research on TRAs.[117]

II. THE CURRENT LAW ON TRAS

The law is in a state of flux, but the following description of case law on TRAs generally shows courts' favorable treatment in the face of challenges mostly under the Fair Labor Standards Act (FLSA)[118] or statutory or common law doctrines governing noncompetes. This Part also reveals the minimal existing legislation on TRAs, with two states expressly prohibiting them, a third state implicitly encouraging them, and a fourth requiring repayment not by the employee but by a poaching employer.

109. *See* Kraus, *supra* note 8, at 213.

110. *See* Anthony W. Kraus, *Repayment Agreements for Employee Training Costs*, 44 LAB. L.J. 49, 52 (1993).

111. *See* Kraus, *supra* note 8, at 213 (stating that state and local governments widely use TRAs); Hoffman & Burks, *supra* note 50, at 1 n.2 (listing categories of employees covered by TRAs).

112. *See* Hoffman & Burks, *supra* note 50, at 1 n.2.

113. *See, e.g.*, Michael Bernick, *Trucking Was Once a Middle Class Job; Can It Still Be?*, FORBES (Dec. 10, 2019), https://www.forbes.com/sites/michaelbernick/2019/12/10/trucking-was-once-a-middle-class-job-will-it-still-be/#5a1c9cba49f6 (citing deregulation and de-unionization as reasons for the decline in trucking pay and working conditions from 1970s levels).

114. Hoffman & Burks, *supra* note 50, at 19–20.

115. *Id.* at 21–22.

116. *Id.* at 19–20 (calculating "worker welfare" as the sum of earnings in trucking, taste for trucking, idiosyncratic shocks, and realizations of the fixed outside option).

117. *See id.* at 3–4. This is an area ripe for future empirical studies.

118. 29 U.S.C. §§ 201–219.

A. Courts' Treatment of TRAs

Courts began adjudicating modern TRAs in the early 1990s.[119] Though the law is still evolving, with close to three decades of jurisprudence, it is now possible to identify some patterns in the treatments of TRAs. Foremost among these patterns is a tendency to uphold TRAs in the face of statutory challenges under FLSA or challenges under the doctrines governing noncompetes.

Many of the decisions on TRAs analogize the agreements to voluntary loans that employers can rightfully demand repayment of. One of the seminal TRA cases is *Heder v. City of Two Rivers*,[120] in which new and incumbent firefighters were required to reimburse the employer for the cost of paramedic training if they left within three years of completing the training. Law-and-economics Judge Frank Easterbrook wrote for the Seventh Circuit: "A worker who left before the loan had been forgiven would have to come up with the funds from his own sources, just as [the plaintiff] must do . . . . The cost of training equates to the loan, repayment of which is forgiven after three years."[121]

The court rejected the plaintiff's challenge that the TRA was an invalid noncompete under state law.[122] Judge Easterbrook wrote that "in Wisconsin (as in other states) a covenant not to compete must be linked to *competition* . . . . But the agreement . . . does not restrict [the plaintiff's] ability to compete against the [employer] after leaving its employ."[123] Judge Easterbrook continued, "The obligation is unconditional: a firefighter departing before three years have expired must repay training costs even if he goes back to school, changes occupation, or retires. Competition has nothing to do with the matter."[124]

In another federal appellate decision, the Ninth Circuit upheld a TRA in the face of a FLSA-based challenge.[125] FLSA requires that wages be paid "free and clear" and prohibits any "kickback" of an employee's wages to an employer that cuts into the minimum or overtime wages owed to the worker.[126] This rule is meant to keep an employer from requiring workers to cover expenses that primarily benefit the employer, and the applicable regulation gives the example

119. *E.g.*, Nat'l Training Fund v. Maddux, 751 F. Supp. 120 (S.D. Tex. 1990) (upholding a TRA for a construction worker against a claim it was an unlawful restrictive covenant); City of Pembroke v. Hagin, 391 S.E.2d 465 (Ga. Ct. App. 1990) (upholding a police officer's TRA as "reasonably related to the City's interest in protecting its investment in training a new officer").

120. 295 F.3d 777 (7th Cir. 2002).

121. *Id.* at 781–82.

122. *Id.* at 780–81 (citing Wis. Stat. § 103.465, which permits noncompetes that "are reasonably necessary for the protection of the employer or principal").

123. *Id.* at 780 (emphasis in original).

124. *Id.*

125. Gordon v. City of Oakland, 627 F.3d 1092 (9th Cir. 2010).

126. 29 C.F.R. § 531.35 (2019). *See, e.g.*, City of Oakland v. Hassey, 78 Cal. Rptr. 3d 621, 631–34 (Cal. Ct. App. 2008) (upholding a TRA against a FLSA challenge that wages were not paid free and clear).

of purchasing tools for a particular job.[127] Prohibited kickbacks are distinct from employer loans or advances, which FLSA does not ban. In *Gordon v. City of Oakland*, the employer required police officers to repay a pro rata share of the police academy training costs if they resigned before five years.[128] The plaintiff quit after a year, and the city required her to repay $6,400 in training costs and withheld pay from her final paycheck.[129] The court ruled that the TRA was "a voluntarily accepted loan, not a [FLSA] kick-back."[130]

A later case distinguished *Heder* and *Gordon* in denying an employer's motion to dismiss a suit in which the plaintiff claimed that a TRA constituted an unlawful kickback under FLSA.[131] The TRA in *Ketner v. Branch Banking & Trust Co.* required college- and MBA-graduate trainees to repay $46,000 if they quit work or were fired for cause within five years of completing a six- or ten-month Leadership Development Program (LDP) to train as bank researchers and analysts.[132] The court ruled that, unlike in *Heder* and *Gordon* in which the trainees received general training (paramedic certification and police academy training, respectively), here, the LDP provided only firm-specific training.[133] Moreover, the repayment amount of $46,000 was much greater than in either *Heder* ($1,400) or *Gordon* ($8,000) and was not adjusted based on the training's duration (six or ten months), showing that the amount may not have been tied closely enough to the actual cost of training.[134] In fact, the employer supplied no justification for the $46,000 amount based on its actual cost to train each LDP trainee or otherwise. The court wrote that factual development would reveal whether the TRA was a permissible voluntary loan as the employer asserted or an unlawful kickback as the plaintiff claimed.[135]

In a subsequent case, *Bland v. Edward D. Jones & Co.*, the plaintiffs also advanced a FLSA anti-kickback challenge to a TRA that required financial advisor trainees to repay the employer up to $75,000 if their employment ceased for any reason within three years of the completion of the training.[136] The training provided Series 7 and 66 FINRA licenses to qualify as financial

127. 29 C.F.R. § 531.35 (2019); *see also* Mayhue's Super Liquor Stores, Inc. v. Hodgson, 464 F.2d 1196, 1199 (5th Cir. 1972) (describing as an unlawful kickback a requirement that "tended to shift part of the employer's business expense to the employees").

128. *Gordon*, 627 F.3d at 1093.

129. *Id.* at 1094. Of note, the court ruled that the withholding from the final paycheck did not bring the employee below the minimum wage, and thus did not violate the FLSA. *Id.* at 1095. Scholars have recently debated the need for payday altogether, so collecting partial TRA repayment amounts in this manner could be more difficult if workers are paid with greater frequency. *See generally* Yonathan A. Arbel, *Payday*, 98 WASH. U. L. REV. 1 (2020).

130. *Gordon*, 627 F.3d. at 1096.

131. Ketner v. Branch Banking & Tr. Co., 143 F. Supp. 3d 370, 383–84 (M.D.N.C. 2015).

132. *Id.*

133. *Id.*

134. *Id.* at 384.

135. *Id.*

136. 375 F. Supp. 3d 962, 969–71 (N.D. Ill. 2019).

advisors.[137] The repayment amount included "the cost of selection and hiring" of the trainee, and the court expressed some skepticism about that partial justification for the high sum.[138] The court upheld the TRA, however, writing that like in "*Heder*, instead of requiring employees to pay for all the necessary training out of their own pocket, Defendants made an investment in their employees, . . . [and], unlike . . . in *Ketner*, the training here did result in Plaintiffs' receiving portable credentials."[139]

The *Bland* court took its cues from another decision in a case from the financial services sector, *Park v. FDM Group (Holdings) PLC.*[140] In *Park*, a former employee challenged a scheme in which trainees were unpaid for their entire six-month training period and were then subject to a two-year TRA requiring a repayment amount of $30,000 for termination in the first year or $20,000 for termination in the second year.[141] The plaintiff, forced to pay $20,000 under the TRA, alleged that the arrangement misclassified trainees as nonemployees ineligible for pay and that the TRA repayment constituted an unlawful kickback under FLSA.[142] Like in *Bland*, the plaintiff's starting annual salary, after completing the unpaid six-month training period, was only $23,000.[143]

The *Park* court determined, however, that the trainees were not employees during the training period because they acknowledged their nonemployee status at the beginning of the relationship and thus had no expectation of remuneration.[144] Moreover, the court ruled the TRA repayment amount was not an unlawful kickback under FLSA and was authorized under a valid liquidated damages clause, citing *Gordon* and *Heder*.[145] The court understandably applied a quite literal reading of the FLSA anti-kickback regulation, finding that the TRA repayment amount was not "a deduction . . . for tools used or costs incurred in the course of Plaintiff's performance of her job as a consultant."[146]

137. *Id.* at 969.

138. *Id.* at 977.

139. *Id.* (citation to complaint omitted). Though it opined on the validity of the TRA, the court dismissed the case without prejudice because the employer had not sued the plaintiffs to enforce the TRA, and the plaintiffs thus lacked standing. *Id.* at 978.

140. No. 16 CV 1520-LTS, 2017 WL 946298, at *3 (S.D.N.Y. Mar. 9, 2017), *vacated in part on other grounds*, No. 16-CV-1520-LTS, 2018 WL 4100524, at *1 (S.D.N.Y. Aug. 28, 2018). The case was settled after five years of litigation. *See* Park v. FDM Grp., Inc., No. 16-CV-1520 (LTS)(SN), 2021 WL 227339 (S.D.N.Y. Jan. 22, 2021) (order granting approval of the class and collective action settlement).

141. *Id.* at *2.

142. *Id.* at *2–3.

143. *Id.* at *3.

144. *Id.*

145. *Id.* at *4 (citing Gordon v. City of Oakland, 627 F.3d 1092, 1096 (9th Cir. 2010); Heder v. City of Two Rivers, 295 F.3d 777, 783 (7th Cir. 2002)).

146. *Id.*; *see also* 29 C.F.R. § 531.35 (2019)("For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act.").

Such a typical reading demonstrates how the FLSA anti-kickback provision is not suited for many challenges to TRAs.[147]

The California Courts of Appeal have looked at the value of training to the worker and found persuasive the distinction between general and specific training in determining whether TRAs violated California Labor Code § 2802.[148] That law requires an employer to "indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties."[149] In *In re Acknowledgment Cases*,[150] the TRA required all newly hired police officers to repay $34,000, the claimed cost of the Los Angeles Police Academy, if they served fewer than sixty months—five years—following graduation. The court found that the requirement to repay the cost of a peace offer training certification would not, by itself, violate § 2802 because the training was mandated by law for all police officers.[151] The court, however, ruled the entire contract void because the additional Los Angeles-specific training was not mandated by law and thus not useful in other police departments.[152]

The following year, a California Court of Appeal upheld a different TRA against a Labor Code § 2802 challenge. In *USS-Posco Industries v. Case*,[153] the applicable TRA required a trainee participating in a voluntary skilled maintenance technical electrical (MTE) certification training to repay the employer a pro rata portion of $30,000 if employment ceased within thirty months of the training's completion.[154] The trainee quit two months after completing the training, and the employer sued to enforce the TRA.[155] In upholding the TRA, the court distinguished *In Re Acknowledgement Cases* in that the MTE training was not a condition of employment and provided general training for a portable skill, as opposed to the Los Angeles-specific training provided to the police officers.[156]

Other decisions that have refused to enforce TRAs have done so only because the TRA was combined with a traditional noncompete clause. The Ninth Circuit opined in dicta that TRAs without noncompete provisions likely do not violate the state's broad prohibition against noncompetes because an

147. *See* Lichten & Fink, *supra* note 20, at 71–72 (noting that the *Park* plaintiff should have challenged the validity of the formation of the TRAs instead of using FLSA).

148. *See generally* CAL. LAB. CODE § 2802(a) (West 2019).

149. *Id.* A new § 2802.1 was added in 2020 to clarify that § 2802 prohibits TRAs for employees—and applicants for employment—in direct patient care positions in general acute care hospitals. Assemb. B. 2588, 2019–2020 Reg. Sess. (Cal. 2020).

150. 192 Cal. Rptr. 3d 337 (Cal. Ct. App. 2015).

151. *Id.* at 1507.

152. *Id.* at 1502 (citing California Labor Code § 2804, which declares any violation of § 2802 renders a contract null and void).

153. 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016).

154. *Id.* at 203.

155. *Id.*

156. *Id.* at 206–07.

employee promise to reimburse an employer for "a voluntarily undertaken and valuable educational opportunity" does not "curb competition."[157] In addition, in *Brunner v. Hand Industries, Inc.*, a TRA required a newly hired polisher of orthopedic equipment to repay up to $20,000 if he quit within three years of beginning employment and worked for a competitor.[158] At the plaintiff's request, the court applied the common law doctrine governing restraints in trade "because the [TRA] provision is targeted only toward employees who work for a competitor after leaving Hand Industries."[159]

The Southern District of New York addressed in plain and bold language the abusive nature of a TRA with a noncompete provision, comparing it to indentured servitude.[160] In *Heartland Sec. Corp. v. Gerstenblatt*, a TRA required workers at a security brokerage firm to pay the firm up to an astonishing $200,000 in "liquidated damages" if they quit within four years and worked in the industry for another firm.[161] The employer attempted to justify the liquidated damages amount as the cost of training.[162] The court found that justification incredible, asserting instead that the TRAs were "designed to chill people from changing jobs, and thus, function as restrictive covenants."[163] In addition, the inclusion of the noncompete provision took the agreement out of the realm of a simple TRA: "If the refund of training costs provision was intended merely to recoup training costs, those costs to the company should be the same no matter what the employee does after leaving Heartland."[164] The court continued, "There simply is no rationale to explain the forgiveness of repayment section except as an obnoxious way to discourage employees from leaving the company."[165]

The *Gerstenblatt* court also acknowledged that "[r]equiring repayment of up to $200,000, particularly of a recent college graduate in his first post-college job, approaches indentured servitude."[166] This raises the possibility of Thirteenth Amendment implications regarding TRAs, discussed later in Part III.C. The thoroughness of the *Gerstenblatt* decision, however, stands as a rarity among TRA cases.

157. Golden v. Cal. Emergency Physicians Med. Grp., 896 F.3d 1018, 1023 (9th Cir. 2018) (internal quotation marks omitted) (quoting *Case*, 197 Cal. Rptr. 3d at 802).

158. 603 N.E.2d 157 (Ind. Ct. App. 1992).

159. *Id.* at 159 n.1 (emphasis omitted).

160. Heartland Sec. Corp. v. Gerstenblatt, No. 99 CIV. 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000).

161. *Id.* at *2.

162. *Id.* at *6.

163. *Id.*

164. *Id.* at *7.

165. *Id.*

166. *Id.*

B. Legislatures' Treatment of TRAs

Only three state legislatures have directly addressed TRAs, with Connecticut and California prohibiting mandatory TRAs for at least some types of workers and Colorado explicitly permitting TRAs as an exception to the state's ban on enforcement of noncompetes.[167] In outlawing mandatory TRAs, with certain exemptions, Connecticut took a blunt approach to contracting for training, but one that shows similarities to the unconscionability factors proposed below in Part III.B. Likewise, California recently prohibited TRAs for employees—and applicants for jobs—in direct patient care settings in general acute care hospitals.[168] On the other hand, Colorado continues to myopically focus on prohibiting formal barriers to competition through traditional noncompetes, while ignoring labor immobility caused by TRAs.

In 1985, Connecticut enacted General Statute § 31-51r which prohibits an employer from requiring, "as a condition of employment, any employee or prospective employee to execute an employment promissory note."[169] An "employment promissory note" is any agreement requiring an employee to pay an employer "a sum of money if the employee leaves such employment before the passage of a stated period of time . . . . [And it] includes any such instrument or agreement which states such payment of moneys constitutes *reimbursement for training* previously provided to the employee."[170]

A 1987 amendment added the following exemptions from the statute's coverage: cash advances to an employee, payments for equipment sold or leased to an employee, educational sabbatical leave contracts, and TRAs negotiated under a union contract.[171] These exemptions mirror proposed factors for both procedural unconscionability (TRAs as a mandatory condition of employment and union-negotiated TRAs to correct imbalances in bargaining power) and substantive unconscionability (the other exemptions providing benefits to the employee) detailed below in Part III.B.

A Connecticut court declared that "the purpose of the statute was to prevent employers from artificially creating an unfair if not insuperable barrier to an employee leaving employment."[172] In that case, the court denied cross-motions for summary judgment where an employee sought to use the law to invalidate a contract requiring that he repay a signing bonus if his

167. CONN. GEN. STAT. ANN. § 31-51r(b) (West 2019); CAL. LAB. CODE § 2802(a) (West 2019); COLO. REV. STAT. ANN. § 8-2-113(2)(c) (West 2019).

168. Assemb. B. 2588, 2019–2020 Reg. Sess. (Cal. 2020) (adding Labor Code § 2802.1).

169. CONN. GEN. STAT. ANN. § 31-51r(b) (West 2019). The Connecticut State Library has no records revealing the initial law's statutory purpose.

170. *Id.* § 31-51r(a)(3) (emphasis added).

171. *Id.* § 31-51r(c).

172. Glencore, LTD. v. Winkler, No. FSTCV135014052S, 2015 WL 4880274, at *3 (Conn. Super. Ct. July 10, 2015).

employment ceased within the first year.[173] The court acknowledged that the highly compensated plaintiff was probably not the type the legislature contemplated needing protection, even if the law contained no salary ceiling.[174] In addition, the court seemed persuaded that the signing bonus was likely a cash "advance" that exempted it from the law and that, in any case, the bonus repayment was not a condition of employment.[175]

There has been only one challenge to a genuine TRA under the Connecticut statute. In that case, the court ruled that the collectively bargained exemption applied where a police department sued to attach the property and bank accounts of three police officers that quit during the TRA repayment period.[176] The collectively bargained statutory exemption in the statute likely arose because of the abundance of highly unionized police and fire departments seeking TRAs, under the assumption that union workers have greater bargaining power and protections than nonunion ones. This assumption is generally true and many unions understandably agree to TRAs in exchange for higher pay or better benefits. There is nothing wrong with such a bargain. But most workers do not have union representation to level out the power imbalances inherent in most employer–employee relationships.[177]

California, at the urging of the California Nurses Association, recently passed a law barring TRAs for employees and applicants for employment in direct patient care in general acute care hospitals.[178] This law, effective on January 1, 2021, is the first to prohibit *prospective* employers of applicants from requiring that the applicants incur the costs of required training.[179] It also protects job seekers from retaliation by prospective employers if the applicants refuse to enter into employment arrangements that violate the law and allows plaintiffs prevailing in actions brought under the law to recoup attorney's fees and costs, as well as injunctive relief.[180] This is quite remarkable, as it provides legal rights to those that have not formally entered into the employer–employee relationship.[181]

173. *Id.* at *1.

174. *Id.* at *3.

175. *Id.*

176. Town of Stonington v. Charron, No. CV054002439, 2006 WL 538412, at *2 (Conn. Super. Ct. Feb. 21, 2006).

177. This introduces the danger of procedural unconscionability in TRA formation, discussed below in Part III.B.

178. Assemb. B. 2588, 2019–2020 Reg. Sess. (Cal. 2020) (creating a new Labor Code § 2802.1); Assemb. Floor Analysis, Assemb. B. 2588, 2019–2020 Reg. Sess., at 1–2 (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201920200AB2588. The Author previously worked for the California Nurses Association.

179. Assemb. B. 2588, 2019–2020 Reg. Sess. (Cal. 2020).

180. *Id.*

181. *See* Harris & Lam, *supra* note 44, at 342 (advocating for "a legal doctrine [protecting job seekers] that is analogous to laws protecting incumbent employees' rights").

According to the nurses' union, though California's Labor Code already required employers to pay for or reimburse such costs for incumbent employees,[182] some hospitals were exploiting a loophole in that law and requiring applicants to sign TRAs.[183] The union asserted that trainings did not confer any benefits to the employees and could cost up to $15,000.[184] As a clarification of existing law, Labor Code § 2802.1 applies retroactively, opening the door for employees in direct patient care who signed TRAs as job seekers to bring actions.[185]

On the other hand, Colorado expressly permits TRAs with repayment periods of less than two years.[186] As part of its prohibition against enforcement of noncompetes, the law declares void "[a]ny contractual provision providing for recovery of the expense of educating and training an employee who has served an employer for a period of . . . two years" or more.[187] Proponents of TRAs have hailed the Colorado law as a reasonable alternative to traditional noncompetes because it allows employers to require TRAs with no more than two years' duration.[188] Even TRAs with shorter repayment periods, however, have many of the same negative traits as noncompetes and can be worse for low-wage workers than noncompetes, as discussed below in Part III.A.

In addition, Mississippi adopted a law requiring that any police department that hires an officer from another department within the state reimburse the latter for the officer's police academy costs, if the officer leaves within three years of beginning employment.[189] Such a law, similar to a non-poaching agreement, has an indirect effect on employee mobility by discouraging other police departments from hiring an officer. The effect, however, is not as severe as that from a TRA requiring that the officer, and not the second hiring department, repay the training cost.

In sum, the above case law and legislation reveal the need for a more appropriate framework for assessing TRA enforceability. The following Part

182. This is not completely accurate, as the previously discussed decision, *USS-Posco Industries v. Case*, 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016), held that California Labor Code § 2802 permits some TRAs that provide general skills training.

183. Assemb. Floor Analysis, Assemb. B. 2588, 2019–2020 Reg. Sess., at 1–2 (Cal. 2020), https://leginfo.legislature.ca.gov/faces/billAnalysis Client.xhtml?bill_id=201920200AB2588.

184. *Id.* at 3.

185. *See* KRISTINA LAUNEY ET AL., 2020 CALIFORNIA LEGISLATIVE UPDATE: NEW CHALLENGES FOR EMPLOYERS 40, SEYFARTH SHAW LLP (Oct. 15, 2020); Diane Kimberlin & Bruce Sarchet, *California Acute Care Hospitals Must Reimburse Training Costs*, LITTLER (Oct. 12, 2020), https://www.littler.com/publication-press/publication/california-acute-care-hospitals-must-reimburse-training-costs ("It seems likely that covered employers and job seekers may take to the courts to probe the limits of just who is a covered 'job applicant.'").

186. COLO. REV. STAT. ANN. § 8-2-113(2)(c) (West 2019).

187. *Id.*

188. *See, e.g.*, Lester, *supra* note 11; Long, *supra* note 11, at 1319–20.

189. MISS. CODE. ANN. § 45-6-13(4) (West 2019).

introduces unconscionability as a ready-made doctrine to do just that, at least in the short term.

III. PROPOSING AN UNCONSCIONABILITY FRAMEWORK FOR TRAS

This Part begins by exploring legal scholars' treatment of TRAs and reveals how some describe TRAs as more benevolent alternatives to noncompetes for employers wishing to obtain returns on investment in training human capital. Parts of those assessments are misguided, however, because they fail to recognize the negative traits inherent in TRAs that reduce worker mobility and bargaining power while promoting labor monopsony and failing to ensure workers receive general skills training.

This Part then shows how the existing doctrine of unconscionability would be an immediately available framework for challenges to TRAs that is at least superior to the statutory FLSA-based or noncompete-based challenges used by many plaintiffs.[190] This prescription would not require new legislation, as courts already have the doctrine at their disposal. Though seldom used and viewed with skepticism by some practitioners, the law of unconscionability provides a sound basis in the short term to evaluate the enforceability of conditional training contracts and to block the most egregious forms of TRAs amidst the explosive growth of the contracts in recent years.

Specifically, courts should deem unconscionable TRAs that are required as a condition of employment and that contain offensive terms or that fail to show a nexus between the contractual repayment amount and the training's cost to the employer and benefit to the employee. This Part also explains how challenges under the existing doctrine of unconscionability would have been more fitting in many of the cases described above in Part II.A, possibly even leading to different outcomes. The Part concludes with a discussion of the Thirteenth Amendment's prohibition against debt peonage and indentured servitude and its implications for TRAs that effectively prohibit workers from quitting.

A. TRAs and Noncompetes as Restraints on Worker Mobility

Some commentators have described the TRA as a superior hybrid option to a traditional noncompete, claiming that the TRA assists employers in obtaining returns on their training investment without the unmanageability and uncertainty of traditional noncompetes.[191] Such a mindset, however, ignores

190. Of course, a TRA containing a noncompete clause could also be challenged under the doctrine prohibiting unreasonable noncompetes, though this approach alone risks a court "blue penciling" out the noncompete clause and upholding the remainder of the TRA.

191. *See, e.g.*, Lester, *supra* note 11, at 75; Long, *supra* note 11, at 1320.

that many employers' principal use of TRAs is to prevent employee mobility, not to recoup training costs or to enhance workers' general skills.[192]

For decades, legal scholars have debated the merits of the noncompete as an employee retention mechanism.[193] The *Restatement of Employment Law* reflects a scholarly consensus that has long frowned on the use of noncompetes to recoup training costs.[194] The most recent literature on the topic decries the anticompetitive and labor-monopsony-promoting characteristics of noncompetes and other restrictive covenants in employment.[195] Yet comparatively little scholarship focuses on TRAs. The references to TRAs are often indirect and,[196] with few exceptions, the writing on the subject is mostly limited to favorable comparisons to noncompetes as tools to protect an employer's training investment.[197]

Many TRAs could be described as noncompetes in sheep's clothing and could even be more harmful to low-wage workers than traditional noncompetes.[198] Indeed, Rachel Arnow-Richman wrote that "if the payments required are substantial, the [TRA] may prove more constraining [than a traditional noncompete] because it forces the employee to produce cash and provides no option to comply with the agreement by refraining from competitive employment."[199] Given that close to half of the nation's workers

192. *See* Hoffman & Burks, *supra* note 50, at 12–13 (finding that, in a study of TRAs in the trucking industry, the employer's primary motivation was preventing employees from quitting).

193. *See, e.g.*, Harlan M. Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625 (1960); Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement of Employee Covenants Not to Compete—A Proposal for Reform*, 57 S. CAL. L. REV. 531 (1984).

194. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.07 (AM. L. INST. 2015); *see also, e.g.*, Cynthia L. Estlund, *Between Rights and Contract: Arbitration Agreements and Non-Compete Covenants as a Hybrid Form of Employment Law*, 155 U. PA. L. REV. 379, 393–94 (2006) (arguing that the value of training afforded to an employee is not a legitimate or protectable employer interest sufficient to validate a noncompete).

195. *See* Naidu et al., *supra* note 26, at 536 (discussing antitrust and labor monopsony concerns of noncompetes); Orly Lobel, *Gentlemen Prefer Bonds: How Employers Fix the Talent Mark*et, 59 SANTA CLARA L. REV. 663 (2020) (highlighting disparate anticompetitive effects of noncompetes and other restrictive covenants like non-poaching agreements on women, workers of color, and older workers).

196. *See, e.g.*, Ken Matheny & Marion Crain, *Disloyal Workers and the "Un-American" Labor Law*, 82 N.C. L. REV. 1705, 1742 n.242 (2004) (including TRAs, referred to as "tuition contracts," among a list of contractual mechanisms employed to enforce worker loyalty by restricting mobility).

197. *See, e.g.*, C. W. Von Bergen & William T. Mawer, *Recouping Training and Development Costs Using Preemployment Agreements*, 19 EMP. RESPS. & RTS. J. 127 (2007); Edward M. Schulman, *An Economic Analysis of Employee Noncompetition Agreements*, 69 DENV. U. L. REV. 97, 120 (1992); *cf.* Thomas Earl Geu & Martha S. Davis, *Work: A Legal Analysis in the Context of the Changing Transnational Political Economy*, 63 U. CIN. L. REV. 1679, 1720–21 (1995) (endorsing H. Ross Perot's policy of binding employees to TRAs in a failed attempt to rehabilitate his Wall Street securities firm).

198. *See* Lichten & Fink, *supra* note 20, at 87 ("'[C]ompetition neutral' post-employment repayment obligations can inhibit employee mobility and restrain labor market competition even more than traditional noncompetes."); *cf.* Kraus, *supra* note 8, at 218 (advising employers to remove noncompete clauses from TRAs to increase likelihood of enforceability, despite the fact that the noncompete clause makes it "more employee-friendly and less of [a] restraint on employee mobility").

199. *See* Arnow-Richman, *supra* note 50, at 1221–22. A TRA with a reasonable amortization period might be much less constraining, however, and could even be less constraining than a noncompete that takes effect whenever the employee leaves, even if that is twenty-five years after beginning employment. The high

would be unable to produce more than $400 at any given moment, the cash barrier to early exit under a TRA could be unconquerable for many.[200] Many low-wage workers would thus find it easier to refrain from working for a competitor in the same sector under a traditional noncompete and instead take a job in another sector than to stockpile thousands of dollars to pay an employer under a TRA.

TRAs can even restrain mobility for middle-wage workers. For example, a Dallas hospital sued twenty-two nurses under TRAs that required repayment of up to $20,000 plus the hospital's attorneys' fees and had no amortization scheme.[201] Nurses regretted signing the TRAs, with one overworked nurse, Stacy Elder, proclaiming, "I should have walked out with everybody else who didn't sign that contract."[202]

A worker's fear of quitting during a TRA repayment period or of challenging a repayment obligation likely explains, at least in part, why there has been relatively little litigation over TRAs. There could also be fewer lawsuits because TRA litigation often arises in the form of a counterclaim in employees' suits against their employers. Using TRAs, therefore, likely chills workers from challenging discrimination or wage theft in the workplace. Regardless of the reason, for every TRA that is the subject of a court opinion, tens of thousands remain unchallenged.[203]

This deterrence against employees challenging TRAs cannot be addressed until there is a mechanism to reveal the contracts' legal vulnerability—that is where the existing law of unconscionability becomes important. As discussed next in Part III.B, a challenge based on the law of unconscionability likely would be more successful in uprooting many overly one-sided TRAs—and upholding appropriate TRAs—than the past litigation based on FLSA statutory rights or doctrines governing noncompetes.

Once a body of case law developed applying unconscionability doctrine to TRAs, courts could address the structural barriers to employee court challenges to what would be unenforceable TRAs. That barrier, the *in terrorem* effect, is already ubiquitous in challenges to unenforceable noncompetes.[204] Many workers likely feel compelled to stay in their jobs through the entire TRA repayment period or unquestioningly pay the employer the repayment

turnover in many low-wage sectors could help determine the reasonableness of one over the other in particular circumstances.

200. BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 107.

201. Kevin Krause, *For Nearly Two Dozen Nurses, Leaving Parkland Early Comes at a Cost*, DALL. MORNING NEWS (Jul. 3, 2020), https://www.dallasnews.com/business/health-care/2020/07/03/for-nearly-two-dozen-nurses-leaving-parkland-early-comes-at-a-cost.

202. *Id.* (internal quotation marks omitted).

203. *Cf.* Kraus, *supra* note 110, at 50 ("Such agreements are often utilized repeatedly for large numbers of employees.").

204. For a thorough discussion of *in terrorem* effects of noncompetes, see Rachel Arnow-Richman, *Cubewrap Contracts and Worker Mobility: The Dilution of Employee Bargaining Power via Standard Form Noncompetes*, 2006 MICH. ST. L. REV. 963, 967, 980–84 (2006).

amount.[205] Rachel Arnow-Richman observed that there could also be an information disparity preventing workers from challenging noncompetes, writing that "the prevalence of overbroad restraints and their consequent *in terrorem* effects may owe as much to legal uncertainty as to employer overreaching."[206] If there were a law of unconscionable TRAs, the same could be said about TRAs ruled unenforceable. Moreover, other workers might decline to resign from their jobs out of a feeling of duty or moral obligation to comply with the TRA.[207] An unenforceable TRA coupled with a mandatory arbitration agreement or waiver of class arbitration for employment disputes, ubiquitous in today's workplaces, might have an additional *in terrorem* effect on a worker contemplating a legal challenge to a TRA. For these reasons, many scholars have criticized the continued use of noncompetes in jurisdictions that do not allow courts to enforce noncompetes.[208] These concerns, however, should not get in the way of establishing consistent standards for adjudicating TRAs.

As for the specific terms of TRAs, Brandon Long has compared TRAs favorably to noncompetes because, under TRAs, "courts can more closely evaluate the nexus between the dollars spent and the value derived from an investment."[209] Long proposed that employers use sophisticated software to track employee hours and derive the duration and repayment amount of a TRA from the number of those hours "that leveraged the initial investment made in the employee's education."[210]

Returning to the new psychological contract, Katherine Stone also advocated for TRAs over noncompetes "[i]n cases in which a firm is only willing to provide training if it can realize a short-run profit from the training investment."[211] In those situations, according to Stone, TRAs without noncompete provisions and containing repayment amounts reasonably related to the actual costs of training are enforceable: "[E]nforcement of such an

205. *See id.* at 989.

206. *Id.*

207. *See id.* at 967 (discussing noncompetes).

208. *See, e.g.*, Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contract Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1038, 1039 n.29 (2019) (citing Fisk, *supra* note 62, at 782–83 (2002)); Charles A. Sullivan, *The Puzzling Persistence of Unenforceable Contract Terms*, 70 OHIO ST. L.J. 1127, 1147–57 (2009); Evan Starr et al., *Noncompete Agreements in the U.S. Labor Force* (Univ. of Mich. L. & Econ., Research Paper No. 18-013, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625714). Orly Lobel has recently argued that antitrust and regulatory mechanisms may be more effective than contract law in dissuading employers from exacting unenforceable employment contract terms. Orly Lobel, *Noncompetes, Human Capital Policy & Regional Competition* 18–20 (San Diego Legal Stud. Paper No. 19-417, July 30, 2020), https://ssrn.com/abstract=3473186.

209. Long, *supra* note 11, at 1320.

210. *Id.* at 1318–19.

211. Stone, *Knowledge at Work*, *supra* note 5, at 754.

agreement, unlike enforcement of a broad covenant not to compete, does not undermine her psychological contract."[212]

Long and Stone seem to acknowledge that only TRAs with certain limitations would be appropriate. What they do not do, however, is examine in detail the factors that would distinguish enforceable from unenforceable TRAs.[213] That examination follows in Part III.B and is framed within the existing doctrine of unconscionability.

For example, Long argued that the main consideration in TRA enforcement should be an employer's need to have a more enforceable damages provision than under a traditional noncompete.[214] But even accepting as true that presumption, Long provided no empirical evidence comparing the relative ease in calculating damages between TRAs and traditional noncompetes. And the Hoffman and Burks study of TRA-bound truckers shows that calculating damages under TRAs is anything but simple. The authors asserted that "defining the actual 'cost' of training is a difficult matter (e.g. there is the issue of average versus marginal cost, as well as the fact that one of the main costs of training is the time spent by employees working with trainees, which is hard to price)."[215] Attempting to classify repayment amounts as liquidated damages for breach of contract, therefore, can easily move TRA repayments into the realm of impermissible punitive damages provisions meant to intimidate workers into remaining at a bad job.[216]

Moreover, Long's analysis considered only the training cost to the employer, while ignoring the value of the training, if any, to the employee. That is, Long failed to consider whether the employee received any benefit from the training, such as portable skills. This gives rise to concerns that firms may be misrepresenting the value to the employee of the so-called training as a thin veil hiding the real purpose of the TRA: worker immobility.[217]

Indeed, the Hoffman and Burks study of truckers—the only empirical study of TRAs to date—found that the surveyed firm's top reason for using TRAs was employee immobility.[218] It is understandable, of course, that Long did not address this because he wrote his article many years prior to the study.[219]

212. *Id.* at 755–56; *see id.* at 755 n.189 (citing Milwaukee Area Joint Apprenticeship Training Comm. for the Elec. Indus. v. Howell, 67 F.3d 1333, 1339 (7th Cir. 1995)).

213. To be fair, Stone's scholarship has been focused primarily on other topics and not on TRAs. At no time did she purport to put forth a framework for evaluating the enforceability of TRAs.

214. Long, *supra* note 11, at 1319–20.

215. Hoffman & Burks, *supra* note 50, at 13–14; *see also* Kraus, *supra* note 8, at 219–20 (noting that proving costs of training for a particular employee can be complicated if there is no hard evidence of a specific disbursement made to train the employee).

216. *See* Kraus, *supra* note 110, at 53 ("If the amount is not a reasonable projection of the actual cost of the training, it can be construed as a penalty designed to intimidate the employee into continued service.").

217. Such a situation could violate a state's unfair and deceptive acts and practices law, as a form of fraudulent misrepresentation of the training's value to the employee.

218. *See* Hoffman & Burks, *supra* note 50, at 13–14.

219. *Compare id.* (2017), *with* Long, *supra* note 11 (2005).

But this new empirical evidence shows that the argument is nonsensical that TRAs are used solely to reimburse an employer for training costs.

To that end, anecdotal evidence from the nursing sector suggests that less desirable hospitals tend to more frequently require TRAs than their higher paying counterparts because they are unable or unwilling to compete on wages and other benefits.[220] These hospitals often include TRAs as mandatory conditions of employment to retain entry-level nurses with fewer initial employment options. Moreover, the usefulness of some of the training is dubious, with some new graduate nurses reporting that outside vendors provided mostly useless training content, or that the training did not include classroom components and seemed no more robust than what would be offered during a routine orientation and preceptorship. Yet the new nurses are bound by TRAs with payback amounts ranging between $5,000 and $50,000, some with no amortization schemes and that require the nurse to pay the hospital's attorneys' fees and costs if the hospital sues to enforce the TRA.[221] The doctrine of unconscionability is a ready-made framework to challenge such overly one-sided TRAs in the short term, as discussed next.

B. Applying the Doctrine of Unconscionability to TRAs

As discussed earlier in Part II.A, most challenges to TRAs have been based on statutory rights under FLSA or under noncompete doctrines, in certain cases to the plaintiffs' detriment. The law of unconscionability, this Subpart argues, would more often provide a superior method to evaluate TRA enforceability.

The doctrine of unconscionability dates to at least as far back as the 1400s in Anglo legal traditions.[222] According to Val Ricks, "The word *unconscionable* stems ultimately from the name of the chancellor's jurisdiction. The chancellor was the keeper of the king's conscience."[223] The doctrine is a defense against the bargain's formation,[224] and, according to the *Restatement (Second) of Contracts*,

> [i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the

220. The observations in this paragraph come from the author's employment with a nurses' union.

221. *See, e.g.*, Krause, *supra* note 201 (describing a TRA binding Dallas nurses that reportedly required nurses to pay employer's attorneys' fees and repayment amounts that reportedly were not amortized).

222. *See* Ricks, *supra* note 16, at 331 (first citing Burton v. Gryville, (1420–22) 10 SELDEN SOC. 118, 119 (case no. 121) (Ch.); and then R.M. JACKSON, THE HISTORY OF QUASI-CONTRACT IN ENGLISH LAW 6–7 (1936)).

223. Ricks, *supra* note 16, at 331.

224. Some assert that unconscionability is a defect in consideration. *See, e.g.*, *id.* at 354–55. Others claim it is a defect in assent. *See, e.g.*, Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 22–24 (2012).

> application of any unconscionable term as to avoid any unconscionable result.[225]

Unconscionability case law has developed into a two-element test—procedural and substantive unconscionability.[226] Procedural unconscionability results when a party with superior bargaining power prepares a contract and presents it "for signature on a take-it-or-leave-it basis."[227] Substantive unconscionability requires that the bargain contain terms unreasonably favorable to the more powerful party.[228] General examples of such terms include those that impair the integrity of the bargaining process, terms that contravene the public interest or public policy, or boilerplate terms that "attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law, fine-print terms, or provisions that seek to negate the reasonable expectations of the nondrafting party, or unreasonably and unexpectedly harsh terms having to do with price or other central aspects of the transaction."[229]

Despite this two-element test, Val Ricks asserted that "the *sine qua non* of unconscionability in the U.S. has traditionally been substantive unconscionability—that the exchange is not on fair terms."[230] *Williston on Contracts* has noted that, if the contract contains harsh or unreasonable terms, "substantive unconscionability may be sufficient in itself even though procedural unconscionability is not."[231] This is due in large part to the blurriness between procedural and substantive abuses, as "use of fine print or incomprehensible legalese may reflect procedural unfairness."[232]

In applying the doctrine of unconscionability to the employment context, the first element of procedural unconscionability can usually be satisfied if the employer drafted the contract and presented it as a mandatory condition of employment. This is because employers typically have superior bargaining power over individual employees, though that bargaining power differential is less pronounced in unionized workplaces when a TRA results from collective bargaining.[233]

225. RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

226. 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993) ("The concept of unconscionability was meant to counteract two generic forms of abuses: the first of which relates to procedural deficiencies in the contract formation process . . . and the second of which relates to the substantive contract terms themselves and whether those terms are unreasonably favorable to the more powerful party . . . .").

227. Nino v. Jewelry Exch., Inc., 609 F.3d 191, 201 (3d Cir. 2010) (citations and internal quotation marks omitted) (holding unconscionable an employment arbitration agreement). Contracts of adhesion, alone, have been deemed acceptable under contract law.

228. 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993).

229. *Id.*

230. Ricks, *supra* note 16, at 354.

231. 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 1993).

232. *Id.*

233. This could explain, at least in part, why many courts have upheld TRAs negotiated by unions, even if not under an unconscionability analysis.

Therefore, as with other contracts, the second element of substantive unconscionability is the key to the realm. In assessing substantive unconscionability, courts use various factors depending on the type of employment agreement. For example, in a successful unconscionability challenge under U.S. Virgin Islands law to a mandatory arbitration agreement that bound employees of a jewelry retailer, the Third Circuit considered terms such as whether the parties must bear their own attorneys' fees, costs, and expenses because those terms work to "the disadvantage of an employee needing to obtain legal assistance."[234] And in a suit over enforcement of a noncompete, a Florida court explained in dicta that "had [the employer] hired [the employee] under the same terms and then terminated him without cause after a very short time, even though the termination would not be wrongful under the [state's] at-will employment doctrine, [the employer's] conduct might be deemed unconscionable."[235]

Notably, the Supreme Court of Canada recently refused to enforce a mandatory arbitration agreement binding Uber drivers in Ontario, declaring the contract unconscionable.[236] Applying the same two-element test that predominates in the U.S., the Court found an inequality in bargaining power between the driver and Uber as a large multinational corporation, rendering the agreement procedurally unconscionable.[237] As for substantive unconscionability, or the "improvident" terms, the Court considered that the mandatory arbitration agreement was a boilerplate term and "part of a standard form contract."[238] Moreover, the contract required mediation and arbitration in the Netherlands, with the driver assuming travel expenses.[239] Last, the agreement required the driver to pay $14,500 USD in administrative fees to initiate the arbitration, a sum close to the driver's annual income and that probably would have topped any award he could have anticipated receiving at the time he signed the contract.[240]

Despite popular belief that the defense of unconscionability is a last-ditch effort to invalidate a contract term, Jacob Hale Russell recently documented how unconscionability is alive and well in the courts.[241] Russell explains that, at least in the consumer context, courts have "rewritten or voided payday loans, signature loans, overdraft fees, and mortgage contracts on the grounds that

234. Nino v. Jewelry Exch., Inc., 609 F.3d 191, 203 (3d Cir. 2010) (citation and internal quotation marks omitted).

235. RESTATEMENT OF EMPLOYMENT LAW § 8.06 cmt. f (AM. L. INST. 2015) (quoting Kupscznk v. Blasters, Inc., 647 So. 2d 888, 891 (Fla. Dist. Ct. App. 1994)).

236. Uber Technologies Inc. v. Heller, 2020 SCC 16, [2020] S.C.R. (Can.).

237. *Id.* ¶ 98.

238. *Id.* ¶ 93.

239. *Id.* ¶ 93–94.

240. *Id.* ¶ 94.

241. Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 965–67 (2019).

their interest rates, prices, or other core terms were unconscionably unfair."[242] He advocates for *ex ante* treatment of these contracts using a tailored approach that better suits the individual nuances of various consumer contracts than one-size-fits-all regulations.[243] Employment contracts, including conditional training contracts, retain many of the same characteristics as consumer contracts—especially for low-wage workers and consumers. Thus, one could advance a similar argument for applying an unconscionability analysis to TRAs.

In determining how to formulate factors to adjudicate substantive unconscionability in TRAs, it is instructive to look to the reasonableness factors under the common law of noncompetes as an analogue. The *Restatement (Second) of Contract* notes that "[a] promise is in restraint of trade if its performance would . . . restrict the promisor in the exercise of a gainful occupation," and applies a "rule of reason."[244] According to the *Restatement of Employment Law*, a noncompete is enforceable "only if it is reasonably tailored in scope, geography, and time to further a protectable interest of the employer."[245] Legal scholars have commented on the desirability of applying the doctrine of unconscionability to noncompetes that are required of employees at some point after employment has commenced.[246] Another scholar has asserted that the doctrine of unconscionability would be appropriate for assessing noncompetes, and compared the doctrine with that of unreasonableness in invalidating restrictive postemployment covenants.[247] On the other hand, it would be illogical to apply the noncompete reasonableness factors—scope, geography, and time of the competition restriction—to TRAs that do not contain facial restrictions on competition.

For starters then, courts should look to the following factors in determining whether a TRA presented as a mandatory condition of employment is substantively unconscionable: whether the TRA repayment obligation takes effect even if the employer fires the worker without just cause; the overall

242. *Id.* at 965.

243. *Id.* at 969–70.

244. RESTATEMENT (SECOND) OF CONTRACTS § 186(2) & cmt. a (AM. L. INST. 1981).

245. *See* RESTATEMENT OF EMPLOYMENT LAW § 8.06 (AM. L. INST. 2015). The Restatement lists the below exceptions to enforceability and describes "protectable interests" in a subsequent subsection:

> (a) the employer discharges the employee on a basis that makes enforcement of the covenant inequitable;
>
> (b) the employer acted in bad faith in requiring or invoking the covenant;
>
> (c) the employer materially breached the underlying employment agreement; or
>
> (d) in the geographic region covered by the restriction, a great public need for the special skills and services of the former employee outweighs any legitimate interest of the employer in enforcing the covenant.

Id.

246. Jordan Leibman & Richard Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After at-Will Employment Has Commenced: The "Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1552 (1987).

247. William H. White, *"Common Callings" and the Enforcement of Postemployment Covenants in Texas*, 19 ST. MARY'S L.J. 589, 596–98 (1988).

repayment amount relative to the employee's salary; whether the TRA repayment amount is amortized—that is, decreases over the time employed; the overall length of the repayment window; whether the training provides general and portable skills to the trainee sufficient to justify the repayment amount; and whether a nexus exists between the cost to the employer of the training and the initial TRA repayment amount.

Perhaps for low-wage and middle-wage workers, those TRAs that have repayment amounts exceeding half a year's salary should be presumptively unconscionable. Likewise, TRAs that take effect even if an employee is fired without just cause, TRAs that are not amortized, or TRAs that have repayment windows longer than three years should probably be found unconscionable. And courts should consider voiding as substantively unconscionable TRAs that fail to provide sufficient general skills to justify the repayment amount or that have repayment amounts that are in no way related to the employer's cost of providing the training.

Each of these factors can be justified according to the discussions of the TRA case law in Part II.A above. Had those courts applied these factors to the cases discussed, some may have rendered different outcomes. Just as importantly, however, many outcomes would have remained the same, but the justifications would have been better supported and more comprehensible. To date, employees have rarely invoked the doctrine of unconscionability to challenge TRAs, and the few times that they have, the employee has lost the challenge.[248] But this is less of a comment on the suitability of the law of unconscionability to evaluate TRAs than on the objective weaknesses of those specific plaintiffs' claims which were rightly dismissed.[249]

Indeed, Gillian Lester has asserted that unconscionability could be an appropriate doctrine governing TRAs.[250] In describing the previously discussed *Brunner v. Hand Industries* decision, which rejected the TRA binding a polisher of orthopedic products that contained an increasing repayment amount topping out at $20,000,[251] Lester noted that "the court might have concluded that the price charged for the training was unreasonable, and if accompanied by

248. *See* Pittard v. Great Lakes Aviation, 156 P.3d 964 (Wyo. 2007) (holding that a TRA for a pilot was not unconscionable because it did not unreasonably favor the employer, even though the pilot moved for the new job prior to signing the TRA); Smith v. Kriska, 113 S.W.3d 293, 298 (Mo. Ct. App. 2003) (ruling that a TRA for a unionized police officer was not unconscionable because the terms did not show a strong, gross, and manifest inequality, and there was an amortized repayment schedule).

249. *See Pittard*, 156 P.3d at 974 (ruling that, while procedural unconscionability may have been met, substantive unconscionability was lacking because the plaintiff left after only one month into a relatively short fifteen-month repayment period and the repayment amount of $7,500 was a reasonable amount in light of valuable training tendered to the plaintiff pilot); *Smith*, 113 S.W.3d at 295–96 (finding no procedural unconscionability in a TRA binding a unionized police officer and that the terms requiring the officer to repay $4,253.40 as a pro rata payment for police academy training because he left within the four-year repayment window were not substantively unconscionable).

250. Lester, *supra* note 11, at 67.

251. Brunner v. Hand Indus., 603 N.E.2d 157 (Ind. Ct. App. 1992).

irregularities in the formation process, might have concluded that the contract was unconscionable."[252] In so writing, Lester seemed to signal that she would have found an unconscionability justification more convincing than the unenforceable noncompete reasoning applied by the court.

Lester is correct, as the TRA in *Brunner* would have been unconscionable even without the noncompete provision. "As a condition of his employment, [the employee] was required to execute" the TRA.[253] This, together with the employer's superior bargaining power as the drafter of the TRA, revealed procedural unconscionability. More importantly, the proposed substantive unconscionability factors were satisfied because the employer "sought to impose upon [the employee] a substantial cost for the use of his general knowledge and skills acquired in the course of his employment."[254] Moreover, the repayment amount was excessive for a low-wage employee, and it strangely increased rather than decreased over the course of the three-year repayment term, from $2,000 to $20,000.[255] By failing to include an unconscionability claim, the plaintiff may have mistakenly allowed the court to leave the door open for future similar TRAs that did not contain noncompete clauses.

On the other hand, had the Seventh Circuit in *Heder v. City of Two Rivers*[256] and the Ninth Circuit in *Gordon v. City of Oakland*[257] considered unconscionability challenges, they could have reached the same outcomes—upholding the TRAs—but with more appropriate reasoning: that there was no procedural unconscionability because the TRAs in those cases were collectively-bargained with the respective unions, dispelling any disparity in bargaining power.[258] Indeed, Judge Easterbrook in *Heder* touched on the portability of the paramedic credential in support of his decision to uphold the TRA;[259] this is one of this Article's proposed substantive unconscionability factors.

Brunner, *Heder*, and *Gordon* all show how unconscionability could have been used to better justify, and even strengthen, the holdings the courts reached—rejecting the TRA in the first case and upholding the TRAs in the latter two cases. Instead, the cases resulted in an excessively narrow holding for the plaintiff in *Brunner* and overwhelming losses for the plaintiffs in *Heder* and

252. Lester, *supra* note 11, at 67.

253. *Brunner*, 603 N.E.2d at 158.

254. *Id.* at 160.

255. *Id.* at 159–61 (showing that the employee was compensated at a rate ranging from $5.50 to $9.50 per hour).

256. 295 F.3d 777 (7th Cir. 2002).

257. 627 F.3d 1092 (9th Cir. 2010).

258. *Heder*, 295 F.3d at 778; *Gordon*, 627 F.3d at 1093. Had the TRAs' implementation not been collectively bargained, however, the take-it-or-leave-it TRAs could have been procedurally unconscionable. *See* Nino v. Jewelry Exch., Inc., 609 F.3d 191, 201 (3d Cir. 2010) (holding procedurally unconscionable an employment arbitration agreement where the contract was a condition of the job and the employer had greater bargaining power than the employee).

259. *Heder*, 295 F.3d at 778.

Gordon; indeed, the *Heder* and *Gordon* plaintiffs' noncompete- and FLSA-based challenges to the TRAs, respectively, were asking the courts to go into contortions to apply the doctrines in their favor.[260]

In *Ketner v. Branch Banking & Trust Co.*, also discussed above in Part II.A, the court denied the employer's motion to dismiss the FLSA anti-kickback suit challenging the TRA and stated that factual development would reveal whether the TRA could be upheld as a voluntary loan, not an unlawful kickback.[261] But the court could have, perhaps more seamlessly and convincingly, gone in another direction. The judge essentially conducted an examination of this Article's proposed substantive unconscionability factors, explaining that: (1) the plaintiff claimed the training program failed to "confer[] to him any benefit that is recognized within the broader marketplace or to him as an associate";[262] (2) "the costs of the training programs in *Heder* and *Gordon* were substantially less than the alleged costs of [the instant employer's] training program; . . . [i]n this case, the training costs of the [Leadership Development Program] is [sic] the same as [the plaintiff's] entire yearly salary";[263] and (3) the employer "did not adjust the cost of the training despite some training programs allegedly lasting six months while others ten months."[264] And procedural unconscionability was present, as the TRA was a mandatory condition of employment[265] drafted by the bank—a party that had superior bargaining power over the individual union-less employees. As it stands, and with at least one federal appellate court having ruled that TRAs are voluntary loans and not FLSA kickbacks,[266] the *Ketner* decision could have been ripe for reversal on appeal, had the employer decided to pursue one.[267] An unconscionability rationale, on the other hand, would have been more appropriate and likely more resilient to any appeal.

Bland v. Edward D. Jones & Co.,[268] also discussed above in Part II.A, provides an even more stark example of how a TRA that survived a FLSA challenge could be held unconscionable, had unconscionability been the basis of the plaintiffs' challenge. Just as in *Ketner*, the training in *Bland* was a take-it-or-leave-it requirement of the job,[269] and the employer–drafter of the TRA had superior bargaining power, satisfying the element of procedural

260. It could be argued that the *Heder* and *Gordon* plaintiffs should never have brought their cases as they were destined to fail under any doctrine.

261. Ketner v. Branch Banking & Tr. Co., 143 F. Supp. 3d 370, 384 (M.D.N.C. 2015).

262. *Id.*

263. *Id.* (citing *Heder*, 295 F.3d at 782 ("noting that the full cost of tuition and books came to approximately $1,400"); *Gordon*, 627 F.3d at 1093 ("noting that the cost of training was $8,000").

264. *Id.*

265. *Id.* at 375.

266. *Gordon*, 627 F.3d at 1096 (citing *Heder*, 295 F.3d 777).

267. The court approved settlement of the case prior to trial. Order Granting Joint Motion for Approval of Settlement and Attorneys' Fees and Costs, *Ketner*, 143 F. Supp. 3d 370 (No. 1:14CV967).

268. 375 F. Supp. 3d 962 (N.D. Ill. 2019).

269. *See id.* at 968.

unconscionability. As to substantive unconscionability, the court conducted no investigation into the basis of the $75,000 maximum repayment amount, which the employer admitted encompassed more than the actual cost of the training.[270] Instead, the court pointed to the language of the procedurally unconscionable TRA itself and dismissingly wrote that the "[p]laintiffs explicitly agreed that the reimbursable amount 'bears a reasonable relationship to the computed damages Edward Jones would suffer from a breach by [the plaintiffs] and that Edward Jones will suffer demonstrable loss as result of [the plaintiffs'] breach.'"[271]

The court also failed to examine the value of the so-called portable credentials to the employees. In fact, the price of competitive in-person, instructor-led exam preparation packages for the FINRA Series 7 and 66 examinations offered with the training in *Bland*, plus the cost of the licenses, total less than $1,000.[272] Therefore, the question should not have been whether the plaintiffs received portable credentials, but rather the value of those credentials compared to the $75,000 TRA repayment amount. On the other hand, the TRA repayment amount was amortized after the first year, with a reduction of $9,375 per quarter starting the beginning of year two.[273] That substantive unconscionability factor, proposed by this Article, would weigh in favor of upholding the TRA.

Another proposed factor, however, is the relative repayment amount compared to the plaintiffs' salary. The plaintiffs had a guaranteed salary of only $23,660 per year.[274] Had they failed out of the training, as many trainees apparently did,[275] the trainees would have been in debt for the equivalent of their next three years of hypothetical pay. Such a scenario calls up potential comparisons with debt peonage, in which an individual is unable to quit because of a requirement to work for a specific person in exchange for payment of a debt.[276]

Indeed, the *Bland* court hinted that the plaintiffs would have had a better chance of success with an unconscionability claim, writing that the employer might never sue to enforce the TRA "for fear that the [TRA] could be struck

270. *Id.* at 977.

271. *Id.*

272. *Compare Series 7 and 66 Study Packages*, KAPLAN FIN. EDUC., https://www.kaplanfinancial.com/securities/series-7-66/study-packages (last visited Mar. 4, 2021) (showing a fee of $259 for an online exam prep course and $489 for a live, instructor-led course); *Series 7 – General Securities Representative Exam*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/registration-exams-ce/qualification-exams/series7 (last visited Mar. 4, 2021) (showing a $245 fee for a Series 7 exam); *Series 66 – Uniform Combined State Law Exam*, FIN. INDUS. REGUL. AUTH., https://www.finra.org/registration-exams-ce/qualification-exams/series66 (last visited Mar. 4, 2021) (showing a $177 fee for a Series 66 exam).

273. *Bland*, 375 F. Supp. 3d at 969.

274. *Id.* at 983 (citation to complaint omitted).

275. Second Amended Class and Collective Action Complaint at ¶ 18, *Bland*, 375 F. Supp. 3d 962 (No. 18-cv-01832).

276. *See* Ontiveros, *supra* note 30, at 416.

down under state law as unconscionable."[277] Moreover, though it dismissed the suit without prejudice because the employer had not yet sued to enforce the TRA, the court recognized that "[a]ll the arguments that Plaintiffs raise against the [TRA] . . . are either potential defenses to the enforcement of the contract that Plaintiffs could raise if and when Defendants attempt to enforce the provision or possible reasons to invalidate the contract as a matter of state law."[278] Those arguments—"that $ 75,000 does not bear a rational resemblance to the costs Defendants actually incurred in their training, that Defendants used the threat of the [TRA] to force Plaintiffs to work extra allegedly uncompensated time, *etc.*"[279]—speak to the proposed substantive and procedural unconscionability factors, respectively. And unconscionability is a defense to contract formation.

Another case discussed above in Part II.A, *Park v. FDM Group (Holdings) PLC*,[280] may have also resulted in a speedier, and thus more favorable, outcome for the plaintiffs had they combined an unconscionability claim with causes of action that allow for attorneys' fees, instead of relying on the FLSA anti-kickback provision to challenge the TRA.[281] Under such an approach, the plaintiffs probably could have established procedural unconscionability because the TRAs were mandatory conditions of the job,[282] and the financial firm that drafted the TRAs likely had superior bargaining power over the individual trainees/employees. In fact, the trainees/employees were not even paid until up to six months into their time with the firm,[283] showing their deficit of leverage.

More importantly for the unconscionability test, several of this Article's proposed substantive unconscionability factors likely would have been satisfied in *Park*. The unreasonably excessive repayment amounts, between $20,000 and $30,000, essentially equaled or exceeded the plaintiffs' starting annual salary of

277. *Bland*, 375 F. Supp. 3d at 974.

278. *Id.* at 977–78.

279. *Id.* at 977.

280. Park v. FDM Group (Holdings) PLC, No. 16 CV 1520-LTS, 2017 WL 946298, (S.D.N.Y. Mar. 9, 2017), *vacated in part on other grounds*, No. 16-CV-1520-LTS, 2018 WL 4100524 (S.D.N.Y. Aug. 28, 2018). Five years after commencing, the case ultimately settled with payments to the plaintiffs because the court certified the FLSA collective on grounds other than the FLSA anti-kickback provision. *See* Park v. FDM Grp. Inc., No. 16-CV-1520 (LTS)(SN), 2019 WL 2205715, at *3 (S.D.N.Y. May 22, 2019) (order conditionally certifying the FLSA collective); No. 16-CV-1520 (LTS)(SN), 2021 WL 227339 (S.D.N.Y. Jan. 22, 2021) (order granting approval of the class and collective action settlement).

281. *See* Lichten & Fink, *supra* note 20, at 71–72 (claiming the *Park* plaintiffs should have proceeded on other grounds, including unconscionability). FLSA allows for attorneys' fees, 29 USC § 216(b), as do state law wage-and-hour causes of action. *See, e.g.*, N.Y. Lab. Law § 198 (McKinney). And some argue that attorneys' fees should be available for successful unconscionability claims. *See, e.g.*, Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees As A Remedy for Contractual Overreaching*, 44 GA. L. REV. 317, 319 (2010).

282. *Park*, 2017 WL 946298, at *3.

283. *See id.* at *1.

$23,000.[284] While the repayment amounts were discounted from $30,000 to $20,000 in the second year[285]—a factor weighing in favor of upholding the TRAs—that amortization scheme was inordinately harsh on the trainees because it still hovered around the plaintiffs' salary, even at its lowest end. In addition, the employer made no attempt to justify the repayment amounts in relation to the cost of providing the training, and the court did not inquire into the existence of any such nexus.[286] If the training content was similar to the FINRA Series 7 and 66 credentialing for the financial-advisor trainees in *Bland*, which cost less than $1,000 on the open market,[287] this Article's proposed nexus factor would have weighed in favor of rejecting the TRA. A similar inquiry into the portability of the training to the trainees/employees and whether the training provided general skills, as opposed to firm-specific skills, would have also weighed into the substantive unconscionability decision.

Last, both California decisions discussed above in Part II.A, *In re Acknowledgment Cases*[288] and *USS-Posco Industries v. Case*,[289] offer examples of courts deciding cases based on what would be a compelling factor under this Article's proposed substantive unconscionability framework: the training's portability, or its benefit to the employee. Moreover, *USS-Posco* is revealing in that the court essentially determined there to be no procedural unconscionability because signing the TRA was not a mandatory condition of employment. These comparisons demonstrate that courts could still apply the common law doctrine of unconscionability to invalidate TRAs, even in states without statutes like California Labor Code § 2802.

In sum, the above cases demonstrate that many courts examining TRAs have evaluated, if not in name, the proposed factors to satisfy unconscionability. Given that unconscionability inquiries in many jurisdictions focus predominantly on the second element of substantive unconscionability, courts have already shown their openness to unconscionability in practice as a method to adjudicate TRA enforceability. The challenge now will be to convince courts to do what they have already been doing but under its true name of unconscionability doctrine. Litigators willing to use the law of unconscionability will be essential to such a project and could have more success than previous attempts to fit the square peg of TRAs into the round holes of FLSA or the law of traditional noncompetes.

284. *Id.* at *3.

285. *Id.* at *2.

286. *Id.* at *4; *see also* Lichten & Fink, *supra* note 20, at 71.

287. *See supra* note 272 and accompanying text.

288. 192 Cal. Rptr. 3d 337 (Cal. Ct. App. 2015).

289. 197 Cal. Rptr. 3d 791 (Cal. Ct. App. 2016).

C. TRAs Implicating the Thirteenth Amendment

As discussed earlier, some examples of conditional training contracts call up images of debt peonage and indentured servitude, especially when an employee cannot afford to quit. And in the at-will regime governing employment relationships in the U.S., prohibiting an employee from quitting is perhaps the worst thing that can happen to her. A litigator challenging TRAs binding Dallas hospital nurses used the term "indentured servitude" when describing her cases,[290] and the court in *Heartland Sec. Corp. v. Gerstenblatt* likened the $200,000 TRA repayment amount to indentured servitude.[291] Section 2 of the Thirteenth Amendment to the U.S. Constitution allows Congress to pass legislation to prohibit slavery and involuntary servitude.[292] Even if § 2 has not been widely used to prohibit exploitative employment arrangements, it casts a shadow over TRAs that preclude employee mobility and provides reason to scrutinize TRAs more closely than ordinary contracts.

The U.S. Supreme Court case *Bailey v. State of Alabama*[293] is oft-cited for the proposition that the Thirteenth Amendment unquestionably prohibits involuntary servitude, in addition to slavery.[294] In that case, Mr. Bailey, a Black farm laborer, contracted with the Riverside Company for a salary of $12 per month.[295] He received an advance of $15 that was due back in monthly installments, but he quit work after six weeks and before paying off the advance.[296] He was sentenced to 136 days of hard labor for violating an Alabama false pretenses statute.[297] The U.S. Supreme Court ultimately reversed the conviction, finding that the statute violated the Thirteenth Amendment's prohibition against involuntary servitude.[298]

Legal scholars have detailed arrangements that could constitute debt peonage or involuntary servitude.[299] Maria Ontiveros has scrutinized liquidated-damages provisions in visa contracts through the lens of the Thirteenth Amendment, explaining that

290. Krause, *supra* note 201 (quoting plaintiffs' attorney Ashley Tremain).

291. No. 99 CIV 3694 WHP, 2000 WL 303274, at *7 (S.D.N.Y. Mar. 22, 2000).

292. U.S. CONST. amend. XIII, § 2.

293. 219 U.S. 219 (1911).

294. *See* Ontiveros, *supra* note 30, at 431; Kim, *supra* note 30, at 420.

295. *Bailey*, 219 U.S. at 229.

296. *Id.* at 229–30.

297. *Id.* at 231.

298. *Id.* at 244. The Court, however, did not challenge the Alabama law's racially discriminatory motive. *Id.* at 231 ("The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho.").

299. *See, e.g.*, Tamar R. Birckhead, *The New Peonage*, 72 WASH. & LEE L. REV. 1595 (2015); James Gray Pope, *Contract, Race, and Freedom of Labor in the Constitutional Law of "Involuntary Servitude,"* 119 YALE L.J. 1474, 1487–88 (2010); Noah D. Zatz, *A New Peonage?: Pay, Work, or Go to Jail in Contemporary Child Support Enforcement and Beyond*, 39 SEATTLE U. L. REV. 927 (2016).

> "[d]ebt peonage" focuses on the harms that arise when that inability to quit is linked to a requirement that the employee work for a *specific person* in exchange for payment of a debt. These harms occur even if the individual voluntarily entered into the arrangement and even if the debt is relatively small.[300]

Meanwhile, "'[i]nvoluntary servitude' focuses on the harms to an individual and society when an employee is unable to quit work because the individual is unable to pay a large debt or for other reasons."[301]

Harrowing examples of TRAs from other countries could also reveal situations in which a similar TRA could be found void in the U.S. as a violation of the Thirteenth Amendment's prohibition of debt peonage. For example, a pilot for Qatari Airways was bound by a TRA requiring a training cost repayment of the equivalent of $162,000 in U.S. dollars if she quit work or was fired within a set period.[302] When the airline terminated her employment after seven years—still within the unusually lengthy TRA repayment window—the airline demanded payment of the entire $162,000.[303] According to reports, she could be prohibited from leaving the country and could face imprisonment if she does not pay the debt.[304] There is not enough detail to determine the value of the training to the employee, as pilots' training can be costly and her training presumably provided a portable skill. Other important details are also missing. But the arrangement may have constituted debt peonage under the Thirteenth Amendment.

Though this Article does not endeavor to conduct a fulsome analysis of conditional training contracts under the Thirteenth Amendment, such a project is ripe for future research. The next Part also offers a preliminary assessment of another form of conditional training contract, the ISA.

IV. INCOME SHARE AGREEMENTS (ISAS)

ISAs are conditional training contracts that allow lenders to advance a certain amount of training on the condition that the borrower repay the lender at a predetermined percentage of the borrower's future earnings.[305] ISAs have

300. *See* Ontiveros, *supra* note 30, at 416 (footnote omitted).

301. *Id.*

302. Mateusz Maszczynski, *Qatar Airways Demands Sacked Pilot Repay Over $162,000 in Training Costs*, PADDLE YOUR OWN KANOO (May 10, 2020), https://www.paddleyourownkanoo.com/2020/05/10/qatar-airways-demands-sacked-pilot-repay-over-162000-in-training-costs.

303. *See id.*

304. *Id.*

305. This Article uses the terms "lender" and "borrower" because ISAs are, at base, training loans with corresponding debt. *See* JOANNA PEARL & BRIAN SHEARER, STUDENT BORROWER PROT. CTR., CREDIT BY ANY OTHER NAME: HOW FEDERAL CONSUMER FINANCIAL LAW GOVERNS INCOME SHARE AGREEMENTS (July 2020); BENJAMIN ROESCH, STUDENT BORROWER PROT. CTR., APPLYING STATE CONSUMER FINANCE AND PROTECTION LAWS TO INCOME SHARE AGREEMENTS (Aug. 2020); *cf.* Warren, *supra* note 38 (describing how the ISA is a type of student debt with characteristics similar to a student loan). Moreover, a number of state regulators have spoken out about ISAs being loans, debt, or credit. Iowa regulators have not only

become popular with Silicon Valley investors interested in financing higher education or shorter term vocational programs like computer coding bootcamps.[306] These bootcamps typically offer three- to twelve-month courses but do not offer degrees in computer science.[307] Many programs target lower income populations and youth of color,[308] which is consistent with a longer history of saturating those communities with financial products like subprime housing loans, payday loans, and prepaid cards.[309] ISAs are so new that no court has decided the merits of an ISA.[310] Despite the untested nature of ISAs, at least one workforce development board already uses public funds to finance ISAs—the San Diego Workforce Partnership offers ISAs for training in

identified ISAs as debt, but also stated that they are "regulated by the Iowa Consumer Credit Code, and the terms of most ISAs would violate the law's limits on interest rates, late fees, grace periods, and more, if they were offered to Iowa students." *New Form of Debt Is a Risky Gamble for College Students*, CONSUMER FOCUS (MONTHLY NEWSL.) (Iowa Dep't of Just. Off. of the Att'y Gen.), Sept. 25, 2019, https://www.iowaattorneygeneral.gov/for-consumers/consumer-focus/consumer-focus/student-loan-debt-income-sharing-agreement/student-debt-income-sharing-agreement. The state of Washington's financial aid agency has also stated that ISAs are "student loan product[s]." *See* Jen Mishory & Anthony Walsh, *ISA Industry Relies on Age-Old Strategy to Ignore Existing Regulations*, CENTURY FOUND. (Aug. 7, 2020), https://tcf.org/content/commentary/isa-industry-relies-age-old-strategy-ignore-existing-regulations. In addition, Oregon's Attorney General Ellen Rosenblum warned that the argument that ISAs are not credit or debt is a "red flag for regulators and law enforcement officials," and the Pennsylvania Senior Deputy Attorney General Nick Smyth stated that ISAs are "clearly credit products." *Id.* (internal quotations omitted).

306. *See* Imogen Crispe, *All About ISAs: Income Share Agreements & Deferred Tuition at Bootcamps*, COURSE REP. BLOG, https://web.archive.org/web/20200921185147/https://www.coursereport.com/blog/coding-bootcamp-income-share-agreements-deferred-tuition (last updated June 2, 2020) ("Many schools use a third party organization . . . to design, implement, and 'take the complexity out of' offering Income Sharing Agreements.").

307. *See id.*

308. *See, e.g.*, Stephen J. Dubner, *The $1.5 Trillion Question: How To Fix Student-Loan Debt?*, FREAKONOMICS (May 8, 2019), http://freakonomics.com/podcast/student-debt (transcript) (quoting the Head of Admissions and Enrollment at a for-profit software-engineering college, Holberton School, which boasts that over 60% of the school's students are people of color, over 40% are first-generation post-secondary students, and 30% speak a language other than English at home); *About BFF*, BETTER FUTURE FORWARD, https://www.betterfutureforward.org/about-bff (last visited Mar. 4, 2021) (offering ISAs to "low-income students"); *How To Apply*, PURSUIT, https://www.pursuit.org/apply#eligibility (last visited Mar. 4, 2021) (targeting applicants in New York City metropolitan area with incomes below $45,000); *PURSUIT FELLOWSHIP*, PURSUIT, https://web.archive.org/web/20191220081346/https:/www.pursuit.org/fellowship (last visited Mar. 4, 2021).

309. *See* JOE VALENTI & DANYELLE SOLOMON, CTR. FOR AM. PROGRESS, COMMUNITIES OF COLOR CANNOT AFFORD A WEAKENED CFPB 1 (Mar. 28, 2017) (calling such financial products targeted at communities of color "wealth-stripping"); Gillian B. White, *Why Blacks and Hispanics Have Such Expensive Mortgages*, ATLANTIC (Feb. 25, 2016), https://www.theatlantic.com/business/archive/2016/02/blacks-hispanics-mortgages/471024 (noting that high-cost home loans are targeted at communities of color and describing particular effects of the subprime loan crisis on the Hispanic population).

310. Courts have decided only one ISA-related case, in which the court partially dismissed a suit between various ISA providers regarding breach of confidentiality. Student Advantage Fund I LLC v. Kennedy Lewis Mgmt. LP, No. 19-cv-2401 (PKC), 2019 WL 6117586, at *1 (S.D.N.Y. Nov. 18, 2019). In addition, a computer programming company, Lambda Labs, Inc., has sued the ISA-provider Lambda School for, in part, reputational harms due to negative attention on the Lambda School being mistakenly directed toward Lambda Labs. Amended Complaint, Lambda Labs, Inc. v. Lambda, Inc., No. 4:19-CV-04060-JST (TSH), 2020 WL 4036387 (N.D. Cal. Mar. 11, 2020), (No. 47).

computer technology.[311] ISAs do not have the same tendency to constrain employee mobility that TRAs have, but some ISAs may still be unconscionable.

The Chicago School economist Milton Friedman first proposed a model for ISAs seventy-five years ago, with an admittedly "fantastic" analogy to selling "stock" in oneself.[312] The typical modern ISAs include lending institutions or training providers offering no-upfront-cost training, with trainees committing to repaying the lender or trainer a percentage of their future pretax annual salary, usually between 6% and 17%, for the first three to ten years of employment.[313] Upon completion, if the trainee fails to earn a certain minimum income, typically between $20,000 to $60,000 per year and regardless of whether the trainee obtained a job in the field for which the trainee studied, the ISA repayments are "deferred" on a month-to-month basis until the trainee earns that minimum income.[314] Lenders outsource payment collection, income and employment verification, and other tasks to third-party loan servicers.[315]

Consider the ISA offered by Pursuit, a New York-based lender and computer coding trainer that claims to turn "blue-collar worker[s] [in]to software engineer[s]."[316] The company offers ten-month full-time or twelve-month part-time classroom training to New York City metropolitan area residents who earn less than $45,000 and demonstrate other economic need.[317] Pursuit boasted a 2019 cohort of 144 students.[318]

311. *The Workforce Income Share Agreement Fund*, SAN DIEGO WORKFORCE P'SHIP, https://web.archive.org/web/20210210165624/https://workforce.org/isa (last visited Mar. 4, 2021).

312. MILTON FRIEDMAN & SIMON KUZNETS, INCOME FROM INDEPENDENT PROFESSIONAL PRACTICE 90 n.20 (1945).

313. *See, e.g.*, Yannis Peyret, *What Is an Income Share Agreement?*, HOLBERTON SCH. (Sept. 30, 2019), https://blog.holbertonschool.com/what-is-an-income-share-agreement (requiring payment of 17% of pre-tax monthly income for forty-two months); *ISA FAQs & Terms*, SAN DIEGO WORKFORCE P'SHIP, https://workforce.org/isa-faqs (last visited Mar. 4, 2021) (requiring payment of 6%–8% of monthly income for thirty-six to sixty months); Avenify Corp., Sample Income Share Agreement (on file with author) (requiring payment for ten years as long as the borrower earns at least $20,000 per year).

314. *See, e.g.*, Peyret, *supra* note 313 (as long as the student earns at least $40,000, the student pays 17% of pre-tax income "*for any type of jobs (in software engineering or not)*"; otherwise, the student is placed in deferment status) (emphasis in original); Avenify Corp., *supra* note 313.

315. *See, e.g.*, Imogen Crispe, *Holberton School's Income Share Agreement: What You Need To Know*, COURSE REPORT (Oct. 4, 2019), https://www.coursereport.com/blog/holberton-school-income-share-agreement ("[The Holberton School] work[s] with Vemo, a company specialized in ISA collection in the education industry. This company collects offer letters, end of year W2, and audits graduates' 1040 tax filings on a yearly basis."); LEARNERS GUILD, https://learnersguild.vemo.com (last visited Jan. 30, 2020) (instructing borrowers to use their Vemo account to make payments and provide income verification); Press Release, Strayer Education, Inc., New York Code + Design Academy Introduces New Income Share Agreement Payment Model, (Aug. 15, 2017), https://www.businesswire.com/news/home/20170815005370/en/New-York-Code-Design-Academy-Introduces-New (designating Vemo to handle employment verification and payment transfers).

316. *Pursuit Levelup*, PURSUIT, https://www.pursuit.org/levelup (last visited Jan. 28, 2020).

317. *Pursuit Fellowship*, *supra* note 308 ("Applicants may demonstrate need if they are unemployed, underemployed, or are currently receiving public benefits such as unemployment insurance, Medicaid, subsidized housing, nutrition or income support.").

318. *Id.*

Upon completion of the training and receiving "tech jobs" or otherwise earning at least $60,000 per year, trainees must pay Pursuit 12% of their salary for each of their first three years of employment.[319] Pursuit claims that its graduates earn on average $85,000.[320] That average salary requires a total payback amount of $30,600, which is between two and four and a half times the estimated cost of comparable bootcamps.[321] This amount is also almost twice the average total student debt of graduates of four-year public universities, yet the Pursuit Fellowship provides only a quarter of the education time and no BA or BS degree.[322] The company does not advertise what is required to prove one has not obtained a tech job or to prove that one has not earned at least $60,000, so as to defer payments.

Payback terms like these would be usurious in some states.[323] Moreover, California prohibited one well-financed lender, the Lambda School, from offering ISAs because the ISAs did not meet Bureau for Private Postsecondary Education requirements that the total cost of any education program be disclosed in the enrollment agreement.[324] And the potential to live under the shadow of a conditional debt is daunting if the worker fails to earn a minimum income due to disability or another reason.

Perhaps equally concerning, ISA lenders are marketing their products to investors as opportunities to reap hefty profits by speculating in people desperate for skills training. Avenify, an ISA lender targeting nursing school

319. *Id.*

320. *Id.* It does not specify whether that is the average starting salary, however.

321. *Compare* SAN DIEGO WORKFORCE P'SHIP, INCOME SHARE AGREEMENT (ISA) FINAL DISCLOSURE, https://workforce.org/wp-content/uploads/2020/10/Front-End-Web-ISA-Sample-Contract.pdf (last visited Mar. 9, 2021) (listing a cost of $6,500 for nine- to twelve-month certification programs taught by The University of California San Diego Extension program), *with Pursuit Reviews*, COURSE REPORT, https://www.coursereport.com/schools/pursuit?shared_review=16444#reviews/review/16444 (last visited Mar. 9, 2021) (noting for Pursuit Fellowship an estimated average return to the lender of $30,600 for providing an estimated $15,000 worth of training).

322. ASS'N OF PUB. & LAND-GRANT UNIVS., PUBLIC UNIVERSITY VALUES, https://www.aplu.org/projects-and-initiatives/college-costs-tuition-and-financial-aid/publicuvalues/publicuvalues-q2.pdf (last visited Mar. 9, 2021) (showing average student debt of $16,300).

323. *Compare* Richie Bernardo, *Usury Laws by State, Interest Rate Caps, the Bible & More*, WALLETHUB (June 20, 2014), https://wallethub.com/edu/cc/usury-laws/25568 (noting loan repayment annual interest rate limits of 4.75% and 6% for Kentucky and Pennsylvania, respectively), *with* Annie Nova, *Income Sharing Agreements Could Mean Interest Rates for Students Above 18%*, CNBC (Aug. 26, 2019), https://www.cnbc.com/2019/08/25/income-sharing-agreements-could-cost-students-more-than-loans.html (noting a possible 18.4% interest rate under an ISA, compared to 5% for federal student loans). Retail installment contracts (RICs) may have no maximum rates in some states, but ISAs are not RICs because the exact ISA repayment amount is not known at the time of enrollment, as shown in the following footnote and accompanying text.

324. *See* Tony Wan, *Coding Bootcamp Lambda School Lands $74 Million and CA Approval — with a Concession*, EDSURGE (Aug. 24, 2020), https://www.edsurge.com/news/2020-08-24-coding-bootcamp-lambda-school-lands-74-million-and-ca-approval-with-a-concession. For this reason, the Lambda School chose to offer its California students an RIC option only, which included most of the same terms as the ISA (17% of salary above $50,000 for twenty-four months) but allowed for satisfaction of the contract only through payment of the full $30,000, not through completing twenty-four payments or after sixty deferred payments. *Id.*

applicants, estimated a $21,670 return on an initial investment of $10,000, and 12%–15% annual internal rates of return for investors.[325] Meanwhile, Pursuit seeks to finance its up-front training costs by marketing the "Pursuit Bond" to investors, which it analogizes to highly secure municipal bonds.[326] Pursuit has also signaled its intention to expand to sectors outside of computer coding, writing, "The Pursuit Bond structure is broadly applicable to all industry sectors and professions, as long as there is a measurable and meaningful increase in earnings."[327] And the Lambda School began partnering with Edly, an ISA marketplace where schools can post shares of their ISAs for a fee and investors can compile portfolios of ISAs to purchase through Edly notes.[328] Edly has two investment options with similar return rates: an 8% target return for principle-protected notes, using U.S. Government Bonds, and a 14% return for the high-yield strategy.[329] Edly's data showed a historical return to investors of 16.57%.[330] Compared to the Avenify ISA, the Lambda ISA includes a 17% income share for twenty-four months on a $30,000 loan.[331]

Training programs suffer when ISA lenders sell ISAs to investment firms. According to a *New York Magazine* investigation, one ISA provider, the Lambda School, has quietly sold its outstanding ISAs to a hedge fund for $10,000 per ISA, thus removing financial stakes for the training provider in the success of its graduates.[332] The Lambda School reportedly paid its "Team Leads" around $13 per hour and sometimes tasked them with designing curriculum or teaching free material copied from other platforms' online tutorials.[333] But the Team Leads were actually student contractors who "ha[d] only just learned the material they [we]re then tasked with explaining to the next batch of students."[334] According to the investigation and a student letter, the

325. Avenify Corp., *supra* note 313; Justin Potts, Comment to *Avenify 2.0: A Marketplace for Human Potential*, PROD. HUNT (Jan. 21, 2020, 11:50 AM), https://www.producthunt.com/posts/avenify-2-0#comment-955144. One example of an Avenify ISA includes a 13.5% income share for sixty months on a $15,000 loan. Callen Hedglen, Comment to *Avenify 2.0: A Marketplace for Human Potential*, PROD. HUNT (Jan. 21, 2020, 8:29 AM), https://www.producthunt.com/posts/avenify-2-0#comment-955031.

326. *Pursuit Bond*, *supra* note 2.

327. *Id.*

328. Austen Allred, *Announcing Our New ISA Financing Blueprint and $100M in New Financing*, LAMBDA SCH.: COMMONS (Feb. 19, 2020), https://lambdaschool.com/the-commons/announcing-our-new-isa-financing-blueprint-and-100m-in-new-financing; *Edly Review: A Way To Invest in Income Sharing Agreements (ISAs)*, FIN. SAMURAI (Sept. 17, 2020), https://www.financialsamurai.com/edly-review-income-sharing-agreement-platform.

329. *Edly Review*, *supra* note 328.

330. *Id.*

331. *Tuition & Income Share Agreement (ISA) Questions*, LAMBDA SCH., https://lambdaschool.com/faq#isa (last visited Mar. 9, 2021).

332. Woo, *supra* note 37 ("The school's secret financing arrangements are a violation of Lambda's central promise to its students – that Lambda only makes money when the students make money.").

333. *Id.*

334. *Id.*

"substandard, disorganized, or completely lacking curriculum"[335] "is unlikely to help students pass even a first-round programming interview," causing students to organize "to negotiate the cancellation of their ISAs."[336]

A. Attempts to Legitimize ISAs

Though courts have not yet seen legal challenges to ISA enforceability, ISA providers have sought both regulatory and congressional approval of these conditional training contracts. Since 2014, Republican congressmembers have introduced bills to explicitly authorize ISAs and treat them as qualified education loans.[337] The Investing in Student Success Act of 2017 proposed granting ISAs immunity from state laws that limit interest rates or regulate assignments of future income and proposed excluding a business offering ISAs from the definition of an "investment company" under the Investment Company Act of 1940.[338] Most disturbingly, the 2017 bill would have made ISAs non-dischargeable in bankruptcy.[339]

The ISA Student Protection Act of 2019 celebrated the financial product's human-capital-speculation purposes, following the lead of the grandfather of ISAs, Milton Friedman.[340] The Act defines an ISA as follows:

> [An ISA is] an agreement . . . between an individual and an ISA funder . . . under which . . . the ISA funder credits towards the tuition or other obligations of, or pays amounts to, or on behalf of, such individual for costs associated with a postsecondary training program, or any other program designed to increase the individual's human capital, employability, or earning potential . . . and . . . such individual pays to such ISA funder . . . income-share payments for a defined term; and . . . *is not a loan*. [341]

335. *Id.* (quoting a letter from a group of students enrolled in the Lambda School).

336. *Id.* (citing Zoe Schiffer & Megan Farokhmanesh, *The High Cost of a Free Coding Bootcamp*, VERGE (Feb. 11, 2020), https://www.theverge.com/2020/2/11/21131848/lambda-school-coding-bootcamp-isa-tuition-cost-free).

337. *See* ISA Student Protection Act of 2019, S. 2114, 116th Cong. (July 15, 2019); ISA Act of 2017, H.R. 3145, 115th Cong. (July 26, 2017); Investing in Student Success Act of 2017, S. 268, 115th Cong. (Feb. 1, 2017); Jeff Schwartz, *The Corporatization of Personhood*, 2015 U. ILL. L. REV. 1119, 1174 n.327 (2015) (citing Investing in Student Success Act of 2014, S. 2230, 113th Cong. (Apr. 9, 2014)).

338. 15 U.S.C. §§ 80a-1 to -64.

339. S. 268; H.R. 3145. For an argument that ISAs should be dischargeable in bankruptcy, see Saige Elizabeth Jutras, Note, *Human Capital Contracts and Bankruptcy: Balancing the Equities Between Exception to Discharge and the Opportunity To Prove Undue Hardship*, 50 SUFFOLK U. L. REV. 133, 136 (2017). One blog asserts that ISAs are a bit of a "grey area" under New York law but are otherwise largely unregulated. *See* Crispe, *supra* note 306 ("In New York state, the Bureau of Proprietary School Supervision (BPSS) requires that schools ensure all students are charged the same tuition rates for the same course." (internal citation omitted)).

340. *See* S. 2114; FRIEDMAN & KUZNETS, *supra* note 312, at 90 n.20.

341. S. 2114 (emphasis added).

This last clause appears to be an offering to the ISA lenders that market their products as non-loans.[342] For example, one ISA lender, Avenify, targets its ISAs at nursing students, promising "interest-free funding."[343] Other ISA providers boast messages like, "[P]ay no tuition until you're hired"[344] and "Pay nothing until you're earning $30,000 or more."[345] But ISAs are, at base, loans for training with repayment amounts determined by one's future income.[346]

Even the name "ISA Student Protection Act" is deceptive because the Act's practical function is to protect ISA lenders—not students—by permitting lenders to take advantage of vulnerable young people in need of training. The Act would allow lenders of "Qualified ISAs" to require borrowers to repay up to 20% of their post-training income for over a decade and would permit annual repayments of 7.5% of income for up to thirty years.[347] The minimum post-training income to trigger repayment could be no less than 200% of the poverty level for a single person, or around $25,000 per year as of 2020.[348] Moreover, banks could charge a separate fee even during repayment deferral months during which the trainee/borrower did not meet the income threshold to make a payment on the ISA's principal.[349] But there would be no cap on the number of deferral months, meaning that a borrower could be bound for life.[350] Due to their lack of leverage with employers and lenders and the historical shift of other training costs described above in Part I, many prospective trainees—especially trainees of color and low-income trainees—would be quite vulnerable to unconscionable ISA loan terms permitted by the ISA Student Protection Act of 2019.

The Trump Administration's Department of Education was a proponent of ISAs and, in late 2019, proposed a set of "experiments" with ISAs as a replacement for traditional student loans at selected schools that process federal student aid.[351] According to the plan, colleges would assume students' federal

342. *See, e.g.*, *The Workforce Income Share Agreement Fund*, *supra* note 311 ("It's not a loan. And you're not alone."); *FAQ About Back a Boiler - ISA Fund*, PURDUE UNIV., https://www.purdue.edu/backaboiler/FAQ/index.html (last visited Mar. 9, 2021).

343. AVENIFY, https://avenify.com (last visited Mar. 9, 2021) ("We give you money to pay for nursing school . . . [.] Pay nothing until you're earning $30,000 or more[.]").

344. LAMBDA SCHOOL, https://lambdaschool.com (last visited Mar. 9, 2021).

345. AVENIFY, *supra* note 343.

346. *See supra* note 305.

347. ISA Student Protection Act of 2019, S. 2114, 116th Cong. (July 15, 2019); *see also* Kevin Carey, *New Kind of Student Loan Gains Major Support. Is There a Downside?*, N.Y. TIMES: UPSHOT (Dec. 16, 2019), https://www.nytimes.com/2019/12/16/upshot/student-loan-debt-devos.html.

348. S. 2114; Off. of the Assistant Sec'y for Plan. & Evaluation, *2019 POVERTY GUIDELINES*, U.S. DEP'T HEALTH & HUM. SERVS., https://aspe.hhs.gov/2019-poverty-guidelines (last visited Mar. 9, 2021).

349. *See* S. 2114.

350. *See id.* The text of Senate Bill 2114 itself does not include a cap on deferred payments.

351. *See* Heather S. Klein, *Dept. of Ed Close to Releasing Proposal that Would Facilitate Income Share Agreement Programs at Selected Title IV Schools,* BALLARD SPAHR LLP: CONSUMER FIN. MONITOR (Dec. 9, 2019), https://www.consumerfinancemonitor.com/2019/12/09/dept-of-ed-close-to-releasing-proposal-that-would-facilitate-income-share-agreement-programs-at-selected-title-iv-schools (citing MICHAEL BRICKMAN,

loan debt, which students would repay through an ISA.[352] One critic wrote that "[t]he Department plan[ned] to oversee a perversion of the federal loan program in which, essentially, federal loan dollars w[ould] be used to fund private education loans."[353] In so doing, this experimental program would have allowed the Department of Education to bypass laws governing student lending.[354]

Far from regulating ISAs to protect students and other trainees, however, congressmembers and the DeVos Department of Education endorsed state-sanctioned long-term conditional indebtedness schemes. This is particularly concerning given the nation's fraught history of quasi-indentured servitude arrangements like sharecropping.[355] For these and other reasons, ISAs should be subject to scrutiny under existing legal doctrines, including the doctrine of unconscionability.

B. The Perils of ISAs

"Welcome to the world of subprime children."[356] This is how author Malcolm Harris describes the projected fallout from ISAs in a future in which private lenders screen applicants for investment potential using an "I.S.A. algorithm."[357] ISA-fueled speculation on human capital could lead to Harris's technological dystopia. ISAs also promote uncertainty for trainees who already experience precariousness in their work and home lives. Moreover, ISAs can perpetuate race and gender discrimination in the workplace. These objections do not even take into consideration the potential for lender abuse, which is significant and would remain so under lender-favoring laws similar to the ISA Student Protection Act of 2019.[358] And while it is clear that ISAs shift more

U.S. DEP'T OF EDUC., A NEW EXPERIMENTAL SITE: INSTITUTIONAL INVESTMENT IN STUDENT SUCCESS (Dec. 2019), https://fsaconferences.ed.gov/conferences/library/2019/2019FSAConfSession32.pdf).

352. Paul Fain, *Federal Loans and ISAs*, INSIDE HIGHER ED (Dec. 16, 2019), https://www.insidehighered.com/news/2019/12/16/experiment-would-allow-federal-loans-be-repaid-through-income-share-agreements.

353. Clare McCann et al., *Education Department Proposes To Repurpose Federal Student Loans as Private Loans*, NEW AM. (Dec. 11, 2019), https://www.newamerica.org/education-policy/edcentral/education-department-proposes-repurpose-federal-student-loans-private-loans.

354. *Id.*

355. *See* Amos N. Jones, *The "Old" Black Corporate Bar: Durham's Wall Street, 1898–1971*, 92 N.C. L. REV. 1831, 1840–41 (2014) ("Under this crop lien system, most black sharecroppers became ensnared in a system of debt whereby they had to work for the rest of their lives in order to repay outstanding credit charges with interest rates as high as sixty percent.").

356. Malcolm Harris, Opinion, *What's Scarier than Student Loans? Welcome to the World of Subprime Children*, N.Y. TIMES (May 11, 2019), https://www.nytimes.com/2019/05/11/opinion/sunday/student-loans.html.

357. *Id.*

358. ISA Student Protection Act of 2019, S. 2114, 116th Cong. (July 15, 2019); *see* Warren et al., *supra* note 38 (describing the abusive nature of ISAs); Jillian Berman, *Chicago Fed President: For Some Students, 'It Is Not Always Obvious that College Is an Investment that Pays Off*,' MARKETWATCH (May 9, 2019), https://www.marketwatch.com/story/chicago-fed-president-for-some-students-it-is-not-always-obvious-that-college-is-an-investment-that-pays-off-2019-05-09 (quoting Chicago Federal Reserve President Charles

training costs onto workers, the benefits to trainees of ISA-funded training are dubious.

Indeed, ISAs do little to ensure that jobs for which the trainee is training will be available in that region. Computer coding bootcamps, the most frequent providers of ISAs among workforce sectors, have been closing *en masse* over the last several years due to a potential overestimation of demand and to the possibility that trainees are not receiving the skills or experience they need.[359] One commentator has described a computer coding bootcamp bubble and noted that employers may prefer computer science degree holders over coding bootcamp graduates.[360] Others have reported that coding bootcamp students at the Lambda School claim that the program's curriculum is similar to free training available online and is not worth the money owed under the ISA's 17%-of-salary annual repayment scheme.[361]

In addition, computer coding bootcamps and other ISA lenders target ISAs at people of color and low-income communities.[362] But students of color are already more dependent on education loans than white students, making them particularly vulnerable to abusive terms in an ISA.[363] Also, ISAs can encourage discrimination against people of color because ISA lenders sometimes offer varied repayment terms based on secret proprietary algorithms.[364] A Student Borrower Protection Center study revealed that ISAs issued by Stride Funding, Inc., an ISA lender, required students attending Historically Black Colleges and Universities (HBCUs) to pay significantly more for the same ISA than comparably identical ISA borrowers attending non-HBCUs, even if that school is ranked lower than the HBCU.[365]

Many ISAs offer preferable terms to those with the highest human capital, measured by one's projected salary. In 2019, Senator Elizabeth Warren and House members Ayanna Pressley and Katie Porter penned a letter to Education Secretary Betsy DeVos noting how "[u]nequal ISA terms based on program of study or other student characteristics can obviously have a clear discriminatory effect because some programs are highly correlated with gender or race, as are

Evans in describing ISAs: "[A]s with all new loan products, limiting the scope for unfair, deceptive, and abusive practices will be important.").

359. *See* Woo, *supra* note 37; Parise, *supra* note 36.

360. Parise, *supra* note 36.

361. *See* Schiffer & Farokhmanesh, *supra* note 336.

362. *See* sources cited *supra* note 308.

363. For those entering college in the 2003–2004 academic year, half of all African-American student loan borrowers defaulted within twelve years. BEN MILLER, CTR. FOR AM. PROGRESS, THE CONTINUED STUDENT LOAN CRISIS FOR BLACK BORROWERS 1 (Dec. 2, 2019).

364. Stacy Cowley, *A Novel Way to Finance School May Penalize Students From H.B.C.U.s, Study Finds*, N.Y. TIMES (Mar. 25, 2021), https://www.nytimes.com/2021/03/25/business/student-loans-black-students-hbcu.html.

365. STUDENT BORROWER PROT. CTR., INEQUITABLE STUDENT AID: A CASE STUDY OF DISPARATE LENDING PRACTICES AND EDUCATIONAL REDLINING TACTICS IN THE MARKET FOR INCOME SHARE AGREEMENTS (Mar. 2021).

the fields that graduates would generally enter after college."[366] Indeed, Black and Latinx students are significantly underrepresented in highly paid majors like engineering, and white men receive engineering degrees at a rate of more than eleven times that of Black women and six times that of Latinas.[367]

"I have been this close to buying a nursing school."[368] Those were the words of the Lambda School CEO Austen Allred. The company provides ISAs for computer coding and data science training and hopes to use venture capital to expand into ISAs for careers like nursing and cybersecurity.[369] One of its executives speculated that the company could be worth $100 billon.[370]

The speculative nature of ISAs emanates from Milton Friedman's idea that "if individuals sold 'stock' in themselves, i.e., obligated themselves to pay a fixed proportion of future earnings, investors could 'diversify' their holdings and balance capital appreciations against capital losses."[371] Under this model, a lender would "advance him the funds needed to finance his training on condition that he agree to pay the lender a specified fraction of his future earnings."[372] Friedman made no attempt to hide the common foundations that these financial products share with other forms of speculation in human capital like sharecropping and indentured servitude.[373]

Indeed, Gary Becker, Friedman's University of Chicago mentee,[374] lamented the Thirteenth Amendment limitations on speculation in another's human capital "because such capital cannot be offered as collateral, and courts have frowned on contracts that even indirectly suggest involuntary servitude."[375] Yet that is precisely what ISAs do—speculate in a human's potential by allowing an investor to reap returns well above the cost of training

366. Warren et al., *supra* note 38, at 3.

367. *See* CJ LIBASSI, CTR. FOR AM. PROGRESS, THE NEGLECTED COLLEGE RACE GAP: RACIAL DISPARITIES AMONG COLLEGE COMPLETERS 1 (May 23, 2018).

368. *Lambda, an Online School, Wants to Teach Nursing*, ECONOMIST (Apr. 27, 2019), https://www.economist.com/business/2019/04/27/lambda-an-online-school-wants-to-teach-nursing (internal quotation marks omitted).

369. Andrew Ross Sorkin, *No Tuition, but You Pay a Percentage of Your Income (if You Find a Job)*, N.Y. TIMES: DEALBOOK (Jan. 8, 2019), https://www.nytimes.com/2019/01/08/business/dealbook/education-student-loans-lambda-schools.html.

370. Woo, *supra* note 37 (quoting a since-deleted tweet by Trevor McKendrick asserting that "if you don't think Lambda is at least a $100B company you don't understand the American economy").

371. FRIEDMAN & KUZNETS, *supra* note 312, at 90 n.20.

372. Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST 123, 138 (Robert A. Solo ed., 1955).

373. *Cf.* Oei & Ring, *supra* note 9, at 708, 720 ("Detractors argue that ISAs create unacceptable ownership stakes in the young at the outset of their careers, akin to indentured servitude"; "like the servitude or slavery analogy, whether an ISA can be classified or analogized as debt will depend on the economics of the individual transaction.").

374. *See Becker Friedman Institute Established at University of Chicago*, UCHICAGO NEWS (June 17, 2011), https://news.uchicago.edu/story/becker-friedman-institute-established-university-chicago (describing Becker and Friedman as "Chicago iconoclasts who became icons in the field").

375. BECKER, *supra* note 6, at 93.

if the trainee obtains and keeps a high-paying job.[376] Moreover, if the lender and the hiring firm were the same entity, nothing would prevent the firm from tailoring the training content to be firm-specific—and virtually useless for the trainee's mobility—while simultaneously offloading the training costs onto the trainee through the ISA. This could have additional labor monopsony-promoting effects.

Leaving workforce training to the whims of speculative markets can be dangerous and unethical. ISAs make trainees especially vulnerable at a time when the psychological contract now requires workers to bear almost all other costs of training while assuming the risks of failure in obtaining quality employment. One need not strain to see the slippery slope of consequences arising out of both exorbitant returns on investments in another's human capital and epic investment failures that cause the trainee to remain under a cloud of long-term conditional indebtedness. A sort of reverse indentured servitude is even possible with ISAs in which, instead of being unable to quit a job, a borrower with other outstanding loans cannot afford to obtain a job due to the ISA repayment obligations that would ensue.[377] In this way, the borrower would face a catch-22—either remain in perpetual deferment on the ISA loan via unemployment, or work for a salary above the minimum threshold for ISA repayment but have insufficient funds with which to pay other loans. In either case, long-term financial uncertainty likely would be the result.

C. Applying Unconscionability to ISAs

Reasonable restrictions should be placed on ISAs and a similar unconscionability framework proposed for TRAs could also work, at least in the short term, for ISAs. Courts using this doctrine now to check the explosive growth of questionable ISAs could lead to the creation of reasonableness factors, as with noncompetes, or even *ex ante* regulations.

376. *See, e.g.*, SAN DIEGO WORKFORCE P'SHIP, *supra* note 321 (explaining a training cost of $6,500 and a payback cap set at $11,700, rendering a potential 80% return on investment); *Pursuit Reviews*, *supra* note 321 (noting an estimated average return to Pursuit Fellowship investors of $30,600 for providing an estimated $15,000 worth of training, a 104% return on investment).

377. *Cf.* Ontiveros, *supra* note 30, at 416 (describing involuntary servitude).

A handful of legal commentators have written about ISAs, mostly in the context of higher education financing,[378] but also for professional athletes[379] and celebrities.[380] While no consensus has emerged, some have called for regulating the ISA market.[381] Others argue that, instead of enacting new ISA-specific regulations, ISAs should be governed by analogy to other sorts of financial products.[382] This latter approach could be more practical because it requires no new legislation.[383]

For example, one could envision a court applying the following factors for a substantive unconscionability assessment of ISAs: whether the repayment amount is a relatively low percentage of the trainee's future salary; whether the income threshold to trigger repayment is relatively high; whether the lender places relatively low caps on the absolute repayment amount (not to exceed the cost of the training to the lender) and on the time period in which a trainee remains bound by the ISA; whether the lender adjusts the terms of repayment to favor higher income projected training programs; whether the lender sells the ISA debt prior to repayment; whether the debt is dischargeable in bankruptcy; and whether provisions exist for disability or other emergent situations the trainee may face.

Elaborating on these proposed unconscionability factors for ISAs and on other existing legal doctrines to regulate the financial products is a project ideal for future research. If nothing else, this Article endeavors to begin the conversation about the ways in which other forms of conditional training

378. *See* Jutras, *supra* note 339, at 136; Benjamin M. Leff & Heather Hughes, *Student Loan Derivatives: Improving on Income-Based Approaches to Financing Law School*, 61 VILL. L. REV. 99, 144 (2016); Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal To Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67 (2010); Oei & Ring, *supra* note 9, at 681; Shu-Yi Oei & Diane M. Ring, *The New "Human Equity" Transactions*, 5 CALIF. L. REV. CIR. 266 (2014); Miguel Palacios, *Human Capital Contracts: "Equity-Like" Instruments for Financing Higher Education*, CATO INST. POL'Y ANALYSIS NO. 462 (Dec. 16, 2002); Schwartz, *supra* note 337, at 1119; Ritika Kapadia, Note, *A Solution to the Student Loan Crisis: Human Capital Contracts*, 9 BROOK. J. CORP. FIN. & COM. L. 591 (2015).

379. *See* Oei & Ring, *supra* note 9, at 683–88 (describing a platform allowing the public to trade in shares that track the "brand performance" of a professional football player).

380. *See* Victoria L. Schwartz, *The Celebrity Stock Market*, 52 U.C. DAVIS L. REV. 2033 (2019) (calling for celebrity stock "initial public offerings," but with limitations).

381. *See, e.g.*, Timothy Machat, Note, *Catalyzing Innovation with Regulation: Income Share Agreements and the Student Debt Crisis*, 70 RUTGERS U. L. REV. 257, 261 (2017); *cf.* Leff & Hughes, *supra* note 378, at 150 ("[The] creation of a market for income-share agreements might necessitate new regulation, and this new regulation would implicate a series of policy trade-offs.").

382. *See* Oei & Ring, *supra* note 9, at 681. *Cf.* Letter from Ashok Chandran, Assistant Counsel, NAACP Legal Def. & Educ. Fund, Inc. et al., to Tess Michaels, CEO, Stride Funding, Inc. 1, 3–5 (Mar. 25, 2021), https://protectborrowers.org/wp-content/uploads/2021/03/2021-03-25-FINAL-Demand-Letter_Stride.pdf (expressing concerns in a demand letter that Stride Funding's ISA pricing algorithm violates the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f, because it potentially discriminates against people attending HBCUs).

383. This, of course, raises the issue of treating human capital like a nonhuman financial product. Such a valid concern is ripe for further research.

contracts like ISAs should be regulated under existing law to prevent harmful outcomes to current and future trainees.

CONCLUSION: GROWING TRIPARTITE TRAINING PARTNERSHIPS

All seem to agree on the need for massive undertakings in training and retraining today's and tomorrow's workers to adapt to working alongside robots, artificial intelligence, and machine-learning programs, or to transition to growing sectors less prone to job loss.[384] Reversing four decades of declining funding for worker training and applying existing contract law doctrine like unconscionability to one-sided conditional training contracts will help, but the system requires a more robust overhaul to accommodate the needs of workers and employers. That robust overhaul could manifest through the expansion of tripartite training partnerships. This, in turn, could alleviate some of the shortcomings identified with attempts to curtail overly one-sided conditional training contracts, such as the common perception that the law of unconscionability sets a high bar for plaintiffs.[385]

Even before the COVID-19 pandemic, job displacement predictions due to automation looked grim. Amazon, for example, has projected that it will fully automate its Fulfillment Center warehouses by 2029.[386] The retail giant hired 97,000 employees over the summer of 2019 alone—close to the total employment of Google[387]—and ended the third quarter of 2019 with 750,000 workers.[388] Yet the company says very little about what will happen to those workers once robots and A.I. fully operate the warehouses, other than vague commitments of "upskilling" its workforce so employees can find jobs elsewhere.[389]

Other sectors like trucking, logistics, retail, and food service have also predicted massive automation, with one report suggesting that "up to one-third of the 2030 workforce in the United States" may need to switch occupational

384. *See, e.g.*, Estlund, *supra* note 43, at 322–23; Michael J. O'Brien, *What's Driving Workers' Demand for Education Benefits?*, HUM. RES. EXEC. (Oct. 24, 2019), https://hrexecutive.com/whats-driving-workers-demand-for-education-benefits (noting that, in survey of 30,000 U.S. workers, desire for education and training outranked paid leave and retirement benefits among the youngest workers, likely due to automation-induced anxiety).

385. *But see* Russell, *supra* note 241, at 965 (noting that the difficulty in proving unconscionability has been greatly exaggerated).

386. *See* Brian Merchant, *Amazon Says It Will Retrain Workers It's Automating out of Jobs. But Does 'Upskilling' Even Work?*, GIZMODO (July 15, 2019), https://gizmodo.com/amazon-says-it-will-retrain-workers-it-s-automating-out-1836388342.

387. David Streitfeld, *Activists Build a Grass-Roots Alliance Against Amazon*, N.Y. TIMES (Nov. 26, 2019), https://www.nytimes.com/2019/11/26/technology/amazon-grass-roots-activists.html.

388. *See* Nat Levy, *Amazon Tops 750,000 Employees for the First Time, Adding Nearly 100,000 People in Three Months*, GEEKWIRE (Oct. 24, 2019), https://www.geekwire.com/2019/amazon-tops-750000-employees-first-time-adding-nearly-100000-people-three-months.

389. *Upskilling 2025*, AMAZON (Oct. 2, 2020), https://www.aboutamazon.com/working-at-amazon/upskilling-2025?utm_source=sem&utm_medium=g&utm_term=g07112019.

sectors due to automation-induced displacement.[390] And former 2020 Democratic presidential primary candidate Andrew Yang based his campaign on a universal basic income proposal to counter the projected effects of automation-induced workforce displacement.[391]

Though calls abound for enormous investment in retraining to counteract such job displacement, such investment has not manifested. To date, some of the most successful programs in retraining workers have been union- and Department of Labor-affiliated Registered Apprenticeships, which offer absolutely free training to workers while paying union-scale wages and do not bind workers to TRAs.[392]

Outside of the Registered Apprenticeship Program, unconditional employer-provided training is a rarity in today's workplaces. Even in manufacturing, long seen as a reliable pathway to the middle class for workers without college degrees, employers now expect pretrained workers. Within three years, college degree-holding manufacturing workers will outnumber those without degrees.[393]

Tripartite training partnerships could provide a partial answer to this dilemma. Regional tripartite training partnerships comprising employers, worker organizations, and governments have a proven track record in the U.S.[394]—the existing infrastructure need only be expanded to other parts of the country.[395]

Long popular in European countries like Denmark, France, and Germany, tripartite training partnerships have the potential to address both the excessive cost of higher education in the U.S. and the need for worker training and retraining as workplaces automate.[396] The European model begins with a recognition of the need for fulsome and long-term investment in workforce education and training. German workers, for example, are able to begin in formal apprenticeship programs at age fifteen, splitting their time between

390. JAMES MANYIKA ET AL., *Jobs Lost, Jobs Gained: Workforce Transitions in a Time of Automation*, MCKINSEY GLOB. INST. (Dec. 2017), https://www.mckinsey.com/featured-insights/future-of-work/jobs-lost-jobs-gained-what-the-future-of-work-will-mean-for-jobs-skills-and-wages.

391. *See The Freedom Dividend, Defined*, YANG2020, https://2020.yang2020.com/what-is-freedom-dividend-faq (last visited Feb. 13, 2021).

392. *See Registered Apprenticeship Program*, *supra* note 28.

393. Hufford, *supra* note 7.

394. *See, e.g.*, WIS. REG'L TRAINING P'SHIP, *supra* note 39; CULINARY ACAD. OF LAS VEGAS, *supra* note 39.

395. It is recognized that unions have small or no footprints in many parts of the country. This is why it is most feasible to initially expand tripartite training partnerships in regions and sectors that already have significant union representation. There are, however, union federations in every state that—with adequate funding—could serve as initial homes for regional tripartite training partnerships. Moreover, the growth of training partnerships could serve as a union-building project.

396. *See generally* Annette Bernhardt et al., *Taking the High Road in Milwaukee: The Wisconsin Regional Training Partnership*, 5 WORKINGUSA 109, 116 (2002).

on-the-job training and school.[397] This system, along with German firms' funding of training at a rate of almost seventeen times that of U.S. firms, is the reason some have argued that Germany enjoyed a competitive advantage over the U.S. in the early 1990s.[398] That advantage has grown in the intervening decades as private U.S. workforce training investment has declined.[399]

Legal commentators have recently placed renewed attention on expanding "heavy *state* investment in lifetime learning" programs, which "also requires heavy investments of private capital, which again becomes a far more plausible prospect if there is a new, more democratic workplace, or one that is guided by real worker voices and real worker participation."[400]

Scholars have more recently proposed disentangling certain benefits like health insurance from the employment relationship, which would reduce the costs of human labor and employers' incentives to rapidly automate.[401] Though certainly not as many employers offer on-the-job training as they do health insurance, tripartite training partnerships would assist in freeing a worker from reliance on a single employer for general training on whatever terms that employer chooses to offer it. Expanding tripartite training partnerships would also help to provide a portable benefit in the form of lifelong training for continually automating workplaces, while scaling up training to meet employers' needs for highly skilled workers.

Tripartite training partnerships are a new iteration of Katherine Stone's old psychological contract,[402] but one under which workers enjoy lifelong multiemployer trainings and career paths that are not bound to the whims of a single employer. Separating tripartite training partnerships by specific sectors and regions allows for training to follow a worker based on occupation and geography, thus creating a career ladder in that sector.[403] The sector-based

397. Samuel Estreicher, *Laws Promoting Worker Training, Productivity and Quality*, 9 LAB. LAW. 19, 20 (1993).

398. *See id.* at 22. The German apprenticeship model does seem to rely more heavily on firms to ensure that training leads to a job. This, however, does not necessarily reveal a downside of tripartite training partnerships. Firms are the job providers so it is logical that they would play a leading role in job placement.

399. *See, e.g.*, Waddoups, *supra* note 2, at 405.

400. Thomas Geoghegan, *Educated Fools*, NEW REPUBLIC (Jan. 20, 2020), https://newrepublic.com/amp/article/156000/educated-fools; *see also* Howard Wial, *The Emerging Organizational Structure of Unionism in Low-Wage Services*, 45 RUTGERS L. REV. 671, 705 (1993) (describing the German hotel workers' training model as one that promotes "independent judgment [that] can yield higher labor productivity than jobs organized according to 'scientific management' principles").

401. *See, e.g.*, Estlund, *supra* note 43, at 305–15.

402. Stone, *Knowledge at Work*, *supra* note 5, at 731 (quoting Marcie A. Cavanaugh & Raymond A. Noe, *Antecedents and Consequences of Relational Components of the New Psychological Contract*, 20 J. ORG. BEHAV. 323, 324 (1999)).

403. *See* Dau-Schmidt, *supra* note 41, at 19–20:

> Employers could be clustered in the training program according to the types of skills they need and can produce . . . [and] employees [would] undertake multiemployer career paths with benefits and logical promotions in skills and jobs in much the same way as they did under the old paradigm of lifetime employment.

model would also maximize the effectiveness of input from each of the parties, as employers know their hiring needs in their sector, worker organizations are best equipped to agglomerate knowledge from workers as to the skills needed, and regional governments are well-suited to work with groups of local employers in connecting training with local job openings. The tripartite training partnerships would also work with vocational schools and community colleges to create pipelines to high-quality career paths for new workers.

The participation of worker organizations in training partnerships is essential for three reasons. First, tripartite training partnerships position worker organizations as providers of essential benefits, permitting workers to engage in career-long and multiemployer training. Dorothy Sue Cobble called this "occupational unionism," offering the example of the waitresses' unions of the 1950s that managed training programs, industry standards, and career ladders that spanned employers.[404] Moreover, workers could opt for training via a tripartite training partnership instead of a conditional training contract like a TRA or ISA. Such a choice helps reduce the chance that such contracts would be unconscionable. To this end, scholars have proposed a U.S.-based version of the European Ghent system, in which workers may choose to receive benefits like unemployment services through either their union or the state.[405] Tripartite training partnerships would make an excellent vehicle to pilot the Ghent system, in turn expanding U.S. workers' options for training and, thus, worker mobility.

Second, the presence of workers' collective voices precludes the risk of regulatory capture inherent in public–private partnerships between only employers and governments.[406] Tripartite training partnerships would help to ensure that workers receive general training, not only firm-specific training. These partnerships could fit well into Joel Rogers's concept of "[h]igh road capitalism[, which] requires more lifetime training and retraining."[407] Tripartite training partnerships provide a worker the "meta skills"[408] needed for job mobility, while still incorporating the needs of local employers that have the

404. *See* Cobble, *supra* note 22, at 420–21.

405. *See* Dimick, *supra* note 42, at 319–20, 366–77; DAVID MADLAND & MALKIE WALL, CTR. FOR AM. PROGRESS, AMERICAN GHENT 1–3, 6–9 (Sept. 2019).

406. *See* David M. Malone, Book Review, 110 AM. J. INT'L L. 135, 137 (2016) (reviewing EYAL BENVENISTI, THE LAW OF GLOBAL GOVERNANCE (2014)) (describing the risk of regulatory capture by private interests in health care public–private partnerships); *Public-Private Partnerships (PPPs): A Tool of Corporate Capture of Public Policy*, DEV. ALTS. WITH WOMEN FOR NEW ERA (Mar. 5, 2018), https://dawnnet.org/2018/03/public-private-partnerships-ppps-a-tool-of-corporate-capture-of-public-policy (claiming public–private partnerships are "linked to deepening extractivism and intensifying corporate capture of the state").

407. Joel Rogers, CHAPTER 9. HIGH ROAD CAPITALISM 6 (Aug. 2009) (unpublished manuscript), https://www.ssc.wisc.edu/~wright/ContemporaryAmericanSociety/Chapter%209%20—%20high%20road%20capitalism%20—%20Norton%20August.pdf.

408. *Id.* (internal quotation marks omitted).

jobs to offer. For this reason, too, training partnerships must also include employers.

Third, the participation of worker organizations in tripartite training partnerships balances out the costs of workforce training between employers, individual workers, and taxpayers.[409]

The unique demographics of the U.S. workforce—very different than those of Germany—and the nation's history of slavery and race and gender employment discrimination require a special focus on equity in workforce training for high-quality jobs with good wages and working conditions.[410] Black and Latinx workers are especially eager for training for quality employment, with one-third of them currently working in highly automatable jobs.[411] Instead of encouraging one-sided conditional training contracts like TRAs and ISAs that can perpetuate race and gender discrimination, policymakers should expand tripartite training partnerships to help ensure that quality employment awaits trainees.

Both public and private investment in workforce training are at multidecade lows and there is no indication this trend will reverse in the short term. Employers that once fully financed on-the-job training have shifted training costs onto workers. Conditional training contracts like TRAs and ISAs place additional burdens on trainees, yet often provide few portable skills to workers.

Meanwhile, some employers and training providers stand to recoup windfalls from conditional training contracts. Many employers offering TRAs are motivated at least as much by worker immobility as by upskilling their workforce or recouping training costs. TRAs allow employers to guarantee that workers will stay in the job or pay for the opportunity to leave, moving much of an employers' risk in training investment from the employer to the trainee. And this risk reallocation does not account for the savings that employers generate through paying reduced salaries during the training period or through requiring that job applicants bear postsecondary degrees. Tax deductions for employer investment in training further enhance this windfall.[412] Likewise, some ISA providers stand to reap exponential returns on their speculation in human capital through exorbitant repayment amounts. Meanwhile, workers face the possibility of a cloud of long-term conditional indebtedness and potentially dismal job prospects post-training in oversaturated sectors.

The doctrine of unconscionability is a suitable approach to adjudicate the enforceability of conditional training contracts. But to ensure workers have real

409. *Cf.* KARLA WALTER, CTR. FOR AM. PROGRESS, PUBLIC SECTOR TRAINING PARTNERSHIPS BUILD POWER 1–4 (Oct. 2019) (advocating for public sector training partnerships as a union-building project that raises standards for workers and taxpayers).

410. *See* LAM, *supra* note 48, at 1–5.

411. *See* JOHNSON ET AL., *supra* note 4, at 43.

412. *See* ERICA YORK, TAX FOUND.: FISCAL FACT NO. 644, TAX TREATMENT OF WORKER TRAINING 5–6 (Mar. 2019) (explaining how employers qualify for tax deductions for qualified educational assistance programs).

options for training for high-quality jobs, policymakers must expand training investment. Tripartite training partnerships promote employer–employee cooperation in helping to ensure that employees receive lifelong training and employers can find highly trained workers without resorting to ad-hoc training schemes like conditional training contracts.

These prescriptions are offered in acknowledgement that, almost twenty years after Katherine Stone described the new psychological contract,[413] a more disturbing psychological contract has manifested under which workers must pay for their training—and more frequently, commit to a conditional training contract—and, in exchange, employers employ the workers until it no longer suits them. This psychological contract is closely tied to a diminution in workers' leverage because of the reduction in union strength, outsourcing, gig work, and other forms of contingent labor, monopsony in labor markets, and automation. But it is not too late to reverse these trends. The fate of workers amidst the evolution of workplaces requires nothing less.

413. Stone, *New Psychological Contract*, *supra* note 5, at 519.