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**Re: FTC's Proposed Rule on Non-Compete Clauses (Docket FTC-2023-0007)**

Dear Chair Khan and Commissioners,

I am an associate professor of law at LMU Loyola Law School Los Angeles with a specialization in work law and contracts and write on behalf of myself and the undersigned academics regarding the Federal Trade Commission's (FTC's) generous invitation to comment on its Notice of Proposed Rulemaking on non-compete clauses. We research student debt, including "shadow student debt" like Training Repayment Agreement Provisions (TRAPs), where the employer becomes a worker's creditor by requiring repayment of putative "training" costs if a worker's employment prematurely terminates. We enthusiastically support the Commission's proposed rule on non-compete clauses and offer suggestions for ensuring that the spirit of the rule is fully realized.

The FTC has a century-long history of protecting workers and job trainees, and we applaud the Commission's initiative in recent years on behalf of workers, including its policy statement last year in support of gig workers.<sup>1</sup> The intention of this comment is both to elucidate that history and to encourage the FTC to fill in gaps in the existing proposed rule and act even more boldly and expansively in its intervention in labor markets under both its competition and consumer protection authorities.

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<sup>1</sup> FTC, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK, 7 n.28 (Sept. 15, 2022) [hereinafter FTC POLICY STATEMENT], [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf) (elaborating that "[t]he use of the word 'consumer'" in the FTC Act "is to be read in its broadest sense" (quoting S. REP. NO. 93-151, at 27 (1973))).

Regarding the proposed rule on non-competes specifically, we encourage the FTC to strengthen and broaden the rule’s deterrence of “de facto” non-competes. Otherwise, we fear that employers will simply switch from traditional non-competes to de facto non-competes to avoid the intention of the rule: to enhance worker mobility. This is also in line with the Administration’s order to “promote equality of bargaining power between employers and employees”<sup>2</sup> and “more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage.”<sup>3</sup>

This comment first offers its support of the FTC’s intention to end not only traditional non-competes but also de facto non-competes. It then offers suggestions for how the FTC can improve the proposed rule to ensure that firms do not simply use workarounds to traditional non-competes to accomplish the same end of preventing worker mobility. Specifically, the FTC should remove a loophole in its TRAP example that would inadvertently harm workers and also expand the examples of de facto non-competes to cover other novel contractual restraints on worker mobility that employers are more frequently turning to, like contracts that require payment of liquidated damages or putative lost profits. Last, the comment encourages the FTC to use both its authority under the FTC Act to protect competition *and* its authority to protect worker-consumers from unfair, deceptive, or abusive acts or practices (UDAPs). In so doing, the comment traces the FTC’s century-long history of intervention in labor markets under its UDAP authority, specifically on behalf of job trainees. In addition, see appended the law review article that sparked the discussion on the dangers of TRAPs, *Unconscionability in Contracting for Worker Training*,<sup>4</sup> and the most recent draft of a forthcoming article on consumer law’s potential—including the FTC Act’s potential—to protect workers, *Consumer Law as Work Law*.<sup>5</sup>

## I. The FTC’s Proposed Rule on Non-Competes Correctly Encompasses De Facto Non-Competes

Non-compete agreements have done extensive harm to workers, and markets and the FTC is correct in proposing to ban them outright.<sup>6</sup> Experience has shown, however, that employers switch to functionally equivalent restraints when specific restrictions on labor mobility are banned. This is why the FTC should be commended for including de facto non-competes in its prohibition.<sup>7</sup> According to the proposed rule, a de facto non-compete is a contractual term that “has the effect of prohibiting the worker from seeking or accepting employment with a person or operating a business after the conclusion of the worker’s employment with the employer.”<sup>8</sup> The proposed rule then provides two examples of de facto non-competes: a non-disclosure agreement that effectively precludes a worker from working in the same field, and a TRAP “where the

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<sup>2</sup> Exec. Order No. 14,025, 86 Fed. Reg. 22829 (Apr. 29, 2021) (citing NLRA § 1, 29 U.S.C. § 151).

<sup>3</sup> Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 14, 2021).

<sup>4</sup> Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723 (2021).

<sup>5</sup> Jonathan F. Harris, *Consumer Law as Work Law*, 112 CALIF. L. REV. (forthcoming 2024), <https://ssrn.com/abstract=4172535>.

<sup>6</sup> See generally Alan Hyde & Emanuele Menegatti, *Legal Protection for Employee Mobility*, in COMPARATIVE LABOR LAW 195, 195-219 (Matthew W. Finkin & Guy Mundlak eds., 2015); Evan P. Starr, et al., *Noncompete Agreements in the U.S. Labor Force*, 64 J. L. & ECON. 53 (2021).

<sup>7</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910.1(b)(2)).

<sup>8</sup> *Id.*

required payment is not reasonably related to the costs the employer incurred for training the worker.”<sup>9</sup>

Examples of TRAPs are rampant: major employers rely upon TRAPs in segments of the United States labor market that collectively employ more than one-in-three private-sector workers.<sup>10</sup> Employers have most recently expanded TRAPs among entry-level workers, including those in the transportation, cosmetology, health care, retail, technology, and finance sectors.<sup>11</sup> As explained in a forthcoming article,<sup>12</sup>

[i]n transportation, for example, large trucking companies such as CRST and CR England run commercial drivers’ license schools using TRAPs that have repayment amounts of over \$6,000 with up to two-year repayment windows.<sup>13</sup> But the trucking sector has high worker turnover—nine out of ten truckers leave their jobs within a year due to grueling working conditions—meaning that TRAP repayments can be great sources of revenue for trucking firms.<sup>14</sup> This is why sociologist Steve Viscelli has called the system “debt peonage.”<sup>15</sup>

Cosmetology is another sector that relies on TRAPs. In one case, Simran Bal’s former employer sued her to enforce a TRAP for training in “Sugaring, Dermaplaning, Lash & Brow Tint, Lash & Brow Lift, Henna, Chemical Peels, Hydrafacials, Microneedling, [and] Facials.”<sup>16</sup> The TRAP repayment amount was \$5,000 and had a two-year work requirement to avoid repayment.<sup>17</sup> Bal reported only receiving three training sessions, usually with the supervisor running late.<sup>18</sup> Bal successfully defended herself and avoided paying the \$2,244.20 demanded, but only because she was able to prove that the so-called “training” was never completed.<sup>19</sup>

In health care, hospitals facing major staffing shortages are turning to TRAPs to retain new employees. A 2022 national survey of 1,698 nurses found that, while 24.3% of the nurses with 11-20 years’ experience reported having been bound by a TRAP at some point, 44.8% of the nurses with 1-5 years’ experience were bound

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<sup>9</sup> *Id.* at § 910.1(b)(2)(i)–(ii).

<sup>10</sup> JONATHAN F. HARRIS & CHRIS HICKS, STUDENT BORROWER PROTECTION CENTER, TRAPPED AT WORK: HOW BIG BUSINESS USES STUDENT DEBT TO RESTRICT WORKER MOBILITY, 3 (July 2022), <https://ssrn.com/abstract=4177496>.

<sup>11</sup> *Id.* at 14–26, 30 n.11.

<sup>12</sup> Harris, *Consumer Law as Work Law*, *supra* note 5, at 15–16.

<sup>13</sup> Letter from Willie Burden Jr. & Stuart Karaffa, to Consumer Financial Protection Bureau 6 (Sept. 23, 2022), [https://downloads.regulations.gov/CFPB-2022-0038-0055/attachment\\_1.pdf](https://downloads.regulations.gov/CFPB-2022-0038-0055/attachment_1.pdf).

<sup>14</sup> *See id.*

<sup>15</sup> Erin McCormick, ‘Indentured servitude’: low pay and grueling conditions fueling US truck driver shortage, GUARDIAN (Nov. 22, 2021, 6:00 AM), <https://www.theguardian.com/business/2021/nov/22/indentured-servitude-low-pay-and-grueling-conditions-fueling-us-truck-driver-shortage>.

<sup>16</sup> *Oh Sweet, LLC v. Simran Bal*, No. 22-CIV-05745-KCX (Kings Co. Dist. Ct. Sept. 6, 2022) (complaint on file with author).

<sup>17</sup> *Id.* (defendant’s opening statement and exhibits on file with author).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (verdict on file with author).

by TRAPs.<sup>20</sup> This demonstrates the rapid growth of TRAPs in recent years. In total, over half of the responding nurses reported being bound by a TRAP when required to enter into a training program as a condition of employment.<sup>21</sup> And only half of those knew they were taking on a debt before accepting or continuing employment with their employer.<sup>22</sup> Almost 40% of the surveyed nurses under TRAPs reported their TRAP debt was above \$10,000 and close to 20% reported that it was \$15,000 or more.<sup>23</sup>

Some employers have accelerated this trend of expanding TRAPs by going even further by using TRAPs as part of their for-profit training centers and academies for potential and current employees.<sup>24</sup> For example, according to a recent lawsuit against tech-training and employee staffing agency Smoothstack, Inc. (Smoothstack), the company “relies on TRAPs to compel its employees to spend ‘4,000 hours’ performing work that Smoothstack can bill to its ‘Fortune 500’ [clients], which do not employ Smoothstack employees directly but instead contract out projects to Smoothstack.”<sup>25</sup> “To get new workers to sign up, Smoothstack allegedly sold the ‘false hope’ of a permanent career at one of these firms—a tactic reminiscent of the recruiting practices used by failed for-profit colleges like Corinthian Colleges, Devry University, and ITT Technical Institute.”<sup>26</sup> The TRAP required entry-level workers earning minimum wage or even no pay at all during their training periods to pay over \$20,000 if they failed to complete a certain number of billable hours.<sup>27</sup>

Employers do not hide the fact that they use TRAPs primarily to keep workers from leaving their jobs rather than to recover costs for providing useful general skills training to workers.<sup>28</sup> In fact, employers and trade groups have openly recommended TRAPs as workarounds to traditional non-competes to accomplish the same goal of forced employee retention, but through a mechanism that will face less scrutiny than a traditional non-compete.<sup>29</sup> One roofing trade association publication has advised the following to its members:

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<sup>20</sup> Letter from Carmen Comsti, to CFPB Director Rohit Chopra 9–11 (Sept. 23, 2022), [https://downloads.regulations.gov/CFPB-2022-0038-0048/attachment\\_1.pdf](https://downloads.regulations.gov/CFPB-2022-0038-0048/attachment_1.pdf). Large for-profit health care chains have led the way in expanding the use of TRAPs. In the survey, over 13% of respondents bound by TRAPs were employees of a single employer: HCA Healthcare, the globe’s largest for-profit health care employer. *Id.* at 7.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> *Id.* at 11.

<sup>24</sup> See Harris, *Consumer Law as Work Law*, *supra* note 5, at 17–18.

<sup>25</sup> Student Borrower Protection Center, “Unconscionable” Debt-for-Training Scheme Funnels Low-Wage Tech Workers to Fortune 500 Companies; Groundbreaking Class-Action Lawsuit Seeks to Void Predatory Training Repayment Agreement Provisions (Apr. 14, 2023), <https://protectborrowers.org/unconscionable-debt-for-training-scheme-funnels-low-wage-tech-workers-to-fortune-500-companies-groundbreaking-class-action-lawsuit-seeks-to-void-predatory-training-repayment-agreement-provisions/> (internal citations omitted).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See Mitchell Hoffman & Stephen V. Burks, *Training Contracts, Employee Turnover, and the Returns from Firm-Sponsored General Training* 19–20 (Nat’l Bureau of Econ. Rsch, Working Paper No. 23247, Mar. 2017).

<sup>29</sup> See, e.g., Philip Siegel, *Protect Your Investment*, PROFESSIONAL ROOFING (Nov. 2019), <https://www.professionalroofing.net/Articles/Protect-your-investment—11-01-2019/4566> [<https://perma.cc/NA32-WGZY>].

Notably, in California, noncompete agreements are unenforceable. In other states, such as Georgia, . . . courts may refuse to enforce a noncompete agreement against a field employee. But roofing contractors in these states are not without hope. Another potential solution is a reimbursement agreement. If properly drafted, you can require a field employee who is achieving . . . [an industry certification] . . . to repay or reimburse your company the expenses incurred if the employee leaves the company within a certain time after achieving [that certification] . . . .<sup>30</sup>

TRAPs, however, can be worse for workers than traditional non-competes 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.”<sup>31</sup> This is why it is encouraging to hear Chair Khan recently reiterate that the proposed rule would ban repayments for training.<sup>32</sup> Moreover, as discussed next, other types of de facto non-competes can also be worse than traditional non-competes—both for workers and for markets—in trapping workers in jobs.

## II. The Proposed Rule Should Eliminate a Potential Loophole in Its Description of De Facto Non-Competes and Provide Additional Examples of De Facto Non-Competes

### a. Eliminate the TRAP Loophole

The proposed rule is encouraging but, as written, provides a roadmap for how firms can avoid the spirit of the rule—eliminating restraints on worker mobility—by pivoting from traditional non-competes to other contractual terms like TRAPs “where the required payment is [ ] reasonably related to the costs the employer incurred for training the worker.”<sup>33</sup> Such a caveat permitting certain TRAPs but not others will create instant confusion for workers and employers alike. As with all “reasonableness” standards—including those that currently apply to traditional non-competes in most states—years of litigation would be necessary to clarify the standard for whether a payment is “reasonably related” to an employer’s cost. And, even then, case law would likely be quite case-specific. More importantly, such confusion would allow TRAPs to have their desired *in terrorem* effect<sup>34</sup> as most workers would likely assume the TRAP is enforceable and thus decline to depart their jobs if they could not afford to pay the TRAP debt.

This confusion, presumably, is one reason why the FTC chose to categorically ban traditional non-competes. This logic applies equally to de facto non-competes like TRAPs and other contracts meant to restrict worker mobility.

As for the substance of the proposed rule’s TRAP example and its “reasonably related cost” caveat, an employers’ failure to justify repayment amounts is only one of the many concerns

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<sup>30</sup> *Id.*

<sup>31</sup> Harris, *Unconscionability in Contracting for Worker Training*, *supra* note 4, at 726.

<sup>32</sup> Leah Nylen, *FTC Noncompete Rule Could Bar Training Repayments, Khan Says*, BLOOMBERG L. (Apr. 14, 2023), [https://www.bloomberglaw.com/bloomberglawnews/antitrust/X5RU1E78000000?bna\\_news\\_filter=antitrust#jcite](https://www.bloomberglaw.com/bloomberglawnews/antitrust/X5RU1E78000000?bna_news_filter=antitrust#jcite).

<sup>33</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 19, 2023) (to be codified at 16 C.F.R. pt. 910.1(b)(2)(i)).

<sup>34</sup> See Hoffman & Burks, *supra* note 28, at 19–20 (noting that the primary reason a trucking firm used TRAPs with its drivers was to prevent worker “quits”).

with TRAPs. Other problems include, *inter alia*, that TRAPs: have unreasonably long repayment periods and high repayment amounts relative to a worker's pay; give training of little value to workers; are mandatory conditions of work; and ultimately have the effect of economically trapping workers in their jobs. Instead of adding all these additional caveats, as well as others, the FTC should consider simply removing the one it has included in the proposed rule.

A case study can elucidate how the proposed rule's TRAP caveat could still allow many harmful TRAPs. Centinela Hospital in Southern California hired nurse Jessica Van Briggles through a staffing agency, Pioneer Staffing, the latter of which was Jessica's employer of record.<sup>35</sup> The hospital and staffing agency had contracted that the hospital's cost for providing eight weeks of training to Jessica was \$15,000. The staffing agency thus had Jessica sign a TRAP with a \$15,000 repayment amount—the cost incurred for training, as per the contract with the hospital. Jessica soon found the conditions at the hospital unsafe, making her question whether she could meet her ethical obligations to her patients. But she could not afford to leave because of the TRAP. This TRAP would likely survive the proposed rule's test because the staffing agency, Jessica's employer, was likely obligated to pay the hospital \$15,000 for the training under the two companies' contract. The training, however, did not provide \$15,000 worth of skills to Jessica, and the TRAP still had the effect of making her feel trapped in her job and unable to improve working conditions. If this caveat is not closed, we fear that we will continue hearing stories like Jessica's, as employers devise schemes to satisfy the "reasonably related cost" test for TRAPs under the proposed rule.

#### b. Add Additional Examples of De Facto Non-Competes

Other novel contracts restricting worker mobility are proliferating, likely in anticipation of state and FTC action banning or severely limiting traditional non-competes. The FTC's final rule on non-competes, therefore, should thus add additional examples of de facto non-competes. Otherwise, courts may treat the current two examples of de facto non-competes—non-disclosure agreements and TRAPs—as exhaustive. Other functionally equivalent restraints on worker mobility include employer-driven debt contracts, also known as "stay-or-pay" contracts, that require departing employees to pay liquidated damages as "quit fees" or even non-liquidated damages for sums equating to a company's cost of hiring a replacement employee or lost profits from the employee's departure. For example, health care workers at Concentra Inc. have felt trapped in their jobs by a contract provision that requires employees to give four months' notice before quitting or pay a fee that is the *equivalent to their salary* for the remainder of that window.<sup>36</sup> Meanwhile, the employer need give only two weeks' notice to terminate under the contract and has no reciprocal payment obligation to the terminated employee, such as severance pay.<sup>37</sup>

In another example of employer-driven debt through stay-or-pay contracts, a lawsuit alleges that Advanced Care Staffing, LLC (ACS), a health care staffing agency that recruits workers from

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<sup>35</sup> See Letter from Carmen Comsti, *supra* note 20, at 58–63.

<sup>36</sup> See Josh Eidelson and Zachary Mider, *Giving Four Months' Notice or Paying to Quit Has These Workers Feeling Trapped*, BLOOMBERG (Jan. 26, 2023, 2:00 AM), <https://www.bloomberg.com/news/articles/2023-01-26/concentra-health-employees-feel-trapped-at-work#xj4y7vzkg>.

<sup>37</sup> See *id.*

overseas, has had foreign nurses sign contracts requiring a three-year commitment or else repayment of all that the worker had earned—plus paying the company’s *future profits*, attorneys’ fees, and arbitration costs.<sup>38</sup>

Indeed, many stay-or-pay contracts exploit immigrant workers and their often job-dependent visa statuses to trap workers in bad jobs. One major hospital system, UPMC, has allegedly obtained foreign nurses through Health Carousel LLC, a staffing agency whose contract with nurses included liquidated damages of \$20,000 if the nurse did not complete 6,240 hours of service.<sup>39</sup> Unfortunately, the nurses soon found out, it would be practically impossible to reach that 6,240 hour threshold because the abundant mandatory overtime they worked did not count toward the threshold, nor did the first three months of shifts. Meanwhile, the nurses faced grueling working conditions at well-below-market wages. One worker became depressed and felt “basically trapped,” especially because her United States visa status depended on the staffing agency.<sup>40</sup>

In addition to traditional non-competes, some temporary staffing firms include no-poach and no-hire provisions, as well as “conversion fees,” in their contracts with client firms.<sup>41</sup> Conversion fees require that the client firm pay a fixed percentage of the temporary worker’s annual salary—often 35%—to “convert” the worker from a temporary to a direct hire.<sup>42</sup> These contractual provisions, which do not include the workers as parties and are typically written without the workers’ knowledge, have the effect of restricting worker mobility.<sup>43</sup> For instance, a pending FTC complaint claims that workers at Planned Companies, a New Jersey staffing firm, uses these contractual provisions to maintain monopolistic control over the building maintenance industry in northern New Jersey.<sup>44</sup>

If anything, the COVID-19 pandemic has accelerated employers’ use of de facto non-competes to retain workers. It is true that employers are more desperate for qualified workers at the moment, but this is no excuse to lock workers into their jobs through contract measures. Rather, employers can look to successful models of employee retention through improved work cultures and hours—as well as other incentives to stay—in lieu of punishments for departing.<sup>45</sup> The default at-will employment rule in the United States already harms workers more than employers

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<sup>38</sup> See Complaint, *Su v. Advanced Care Staffing, LLC*, No. 23-cv-2119 (E.D.N.Y. Mar. 20, 2023); Complaint, *Vidal v. Advanced Care Staffing, LLC*, No. 1:22-cv-05535 (E.D.N.Y. Sept. 16, 2022).

<sup>39</sup> See Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, BLOOMBERG BUSINESSWEEK (Feb. 2, 2022, 2:00 AM), <https://www.bloomberg.com/news/features/2022-02-02/underpaid-contract-nurses-who-faced-fines-lawsuits-for-quitting-fight-back>.

<sup>40</sup> *Id.*

<sup>41</sup> See Harris, *Consumer Law as Work Law*, *supra* note 5, at 22–25. See generally Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers “Temp,”* 20 J. L. SOC’Y 247, 253, 257 (2020).

<sup>42</sup> Contracts on file with author.

<sup>43</sup> See TEMP WORKER JUSTICE, ET AL., TEMP WORKERS DEMAND GOOD JOBS: SURVEY REVEALS POVERTY PAY, PERMATEMP, DECEPTIVE RECRUITMENT PRACTICES, AND OTHER JOB QUALITY ISSUES 12–13, 18 (Feb. 2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

<sup>44</sup> See Complaint and Request for Investigation, Injunction, and Other Relief Submitted by Local 32BJ, Service Employees International Union, *In re Planned Companies*, No. 22-CB-297332 (Fed. Trade Comm’n Apr. 6, 2022), <https://www.seiu32bj.org/wp-content/uploads/2022/04/32BJ-Complaint-Regarding-Planned-Companies.pdf>.

<sup>45</sup> See, e.g., Annabelle Timsit, *A four-day workweek pilot was so successful most firms say they won’t go back*, WASH. POST (Feb. 21, 2023, 11:03 AM), <https://www.washingtonpost.com/wellness/2023/02/21/four-day-work-week-results-uk/>.

because of workers’ dependence on employers for their livelihood, but with de facto non-competes, employers are trying to make that rule operate in one direction only. In other words, de facto non-competes make it such that employers may still terminate workers at will, but employees cannot afford to exercise their reciprocal right to quit at will. This can also implicate 13th Amendment concerns of forced labor through indentured servitude, debt peonage, and debt servitude.

Now is the chance for the FTC to send a clear message that such schemes are not to be tolerated. Indeed, states are already going in that direction, with California,<sup>46</sup> New York,<sup>47</sup> and Pennsylvania<sup>48</sup> contemplating bans on TRAPs. Connecticut has already had a TRAP ban on the books for many years, and California recently enacted a TRAP ban for health care workers providing direct patient care in acute care hospitals.<sup>49</sup> In addition to unequivocally prohibiting TRAPs in its final rule, the FTC should also take this opportunity to add additional examples of de facto non-competes that will help preempt a game of Whack-A-Mole with employers that continue devising new contractual provisions to trap workers in jobs.

### III. The FTC’s Lengthy History of Intervening in Labor Markets Under its UDAP Authority

The proposed rule on non-competes is based in the FTC’s unfair methods of competition (UMC) authority, but there is nothing precluding the FTC from also acting under its UDAP authority. In her keynote remarks given to the March 30, 2023 “Antitrust Policy and Workers” conference convened by the Schwartz Center for Economic Policy Analysis and the Communication Workers of America, FTC Director of the Office of Policy and Planning Elizabeth Wilkins remarked that the Commission is “looking at [UDAPs] against workers” and has “made clear that workers are consumers too, and can be protected under a wide range of our consumer protection authorities.”<sup>50</sup> Accordingly, we strongly encourage the FTC to exercise its UDAP authority for workers beyond the gig workers that its Fall 2022 policy statement focused on.<sup>51</sup> This part provides a historical accounting of the FTC’s actions to use its UDAP authority to rebalance power relations between workers and firms, specifically by focusing on firms that purport to provide job training and placement services.

Since the 1930s, the FTC has exercised its authority under Section 5 of the FTC Act to pursue firms that deceive workers and trainees.<sup>52</sup> Correspondence schools falsely promising robust training, jobs, or affiliations with government agencies were frequent targets of the FTC through

<sup>46</sup> A.B. 747, 2023-2024 Leg., Reg. Sess. (Cal. 2023), [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=202320240AB747](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202320240AB747).

<sup>47</sup> Amal Tlaige, *Proposed legislation could change new hire contract*, MYTWINTIERS.COM (Feb. 10, 2023, 9:18 PM), <https://www.mytwintiers.com/news-cat/top-stories/proposed-legislation-could-change-new-hire-contract/> (describing proposed New York State legislation prohibiting TRAPs).

<sup>48</sup> H.B. 608, 2023-2024 Gen. Assemb., Reg. Sess. (Pa. 2023), <https://www.legis.state.pa.us/cfdocs/billinfo/billinfo.cfm?syar=2023&sind=0&body=H&type=B&bn=0608>.

<sup>49</sup> Conn. Gen. Stat. § 31-51r(b); Cal. Lab. Code § 2802.1.

<sup>50</sup> Elizabeth Wilkins, Dir., Office Pol’y & Plan., Keynote Remarks of Director Elizabeth Wilkins: Rethinking Antitrust 7–8 (Mar. 30, 2023), <https://www.ftc.gov/news-events/news/speeches/keynote-remarks-director-elizabeth-wilkins-rethinking-antitrust-schwartz-center-economic-policy>.

<sup>51</sup> FTC POLICY STATEMENT, *supra* note 1.

<sup>52</sup> See *Fed. Trade Comm’n v. Civ. Serv. Training Bureau, Inc.*, 79 F.2d 113, 114 (6th Cir. 1935).



the 1960s. In 1935, the Sixth Circuit in *Federal Trade Commission v. Civil Service Training Bureau, Inc.* upheld an FTC order against a correspondence school for unfair or deceptive business practices.<sup>53</sup> The court agreed with the FTC that the correspondence school was using unfair or deceptive business practices by using the words “Civil Service” and “Bureau” in its name which had “a tendency to create, and actually created, the belief that the correspondence school represented or had an official connection with the United States Civil Service Commission, or that it [wa]s a bureau or agency of the United States government.”<sup>54</sup> Additionally, few if any of the positions the correspondence school supposedly trained applicants for actually had a required examination.<sup>55</sup> Likewise, the private correspondence school implied that there were government jobs available and that it was an agent of the government.<sup>56</sup> The Seventh Circuit in 1943 affirmed an FTC order against an electronics training provider that operated both correspondence and in-residence classes based on the school’s assurances that its graduates would obtain jobs in the television field.<sup>57</sup> At that point, the commercial development of televisions was not sufficiently advanced to assure immediate employment despite the school’s advertising.<sup>58</sup>

A year later, the Seventh Circuit declared that the FTC had jurisdiction to pursue another correspondence school, the “Joseph G. Branch Institute of Engineering and Science,” which targeted trainees in Latin America.<sup>59</sup> The Commission found that the private company mailed textbooks, instructions, and written examinations to trainees and deceptively used the name “Institute” to imply that it was a university or other higher education institution recognized by a United States governmental entity.<sup>60</sup> Moreover, the correspondence school had “no entrance requirements, no resident students, no library, no laboratory, and no faculty.”<sup>61</sup> Therefore, the court found that the correspondence school was engaged in commerce and that its “unfair, fraudulent, and deceptive practices harmed competitors also marketing training to individuals in Latin America.”<sup>62</sup>

In 1955, the Ninth Circuit upheld an FTC cease and desist order against Tractor Training Service for falsifying job prospects for trainees enrolled in its correspondence school.<sup>63</sup> The training involved forty-six home study assignments on diesel engines and tractor equipment. Company officials falsely represented that employers in the diesel and tractor industries were backing the training program and that graduates of the program were in demand.<sup>64</sup> Moreover, the company deceptively claimed it had a job placement service, that applicants to the program were screened based on qualifications, that on-the-job training was available, and that refunds were available to those who failed examinations or did not finish the course or secure employment.<sup>65</sup> According to

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<sup>53</sup> *Id.* at 114.

<sup>54</sup> *Id.* at 115.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *De Forest’s Training, Inc. v. Fed. Trade Comm’n*, 134 F.2d 819, 820-21 (7th Cir. 1943).

<sup>58</sup> *Id.* at 821.

<sup>59</sup> *Branch v. Fed. Trade Comm’n*, 141 F.2d 31, 36 (7th Cir. 1944).

<sup>60</sup> *Id.* at 33-34.

<sup>61</sup> *Id.* at 33.

<sup>62</sup> *Id.* at 34.

<sup>63</sup> *Tractor Training Serv. v. Fed. Trade Comm’n*, 227 F.2d 420, 422, 425 (9th Cir. 1955).

<sup>64</sup> *Id.* at 422.

<sup>65</sup> *Id.*

those in the industry, the correspondence school did not provide the qualifications necessary to obtain employment.<sup>66</sup>

Likewise, the Ninth Circuit in 1957 upheld an FTC order restraining the operator of a correspondence school from representing that it had been approved for training by the Bureau of Education of California and the United States Veterans' Administration.<sup>67</sup> In this case, the operator had its salespeople show prospects photos of those agencies' approvals of the operator's former in-residence course, thereby deceptively implying that the correspondence course was also approved.<sup>68</sup>

And, in 1963, the Fifth Circuit sustained an FTC order that a correspondence school targeting trainees preparing for civil service examinations cease and desist from claiming that examinations for specific positions were upcoming and that one would pass the examination by completing the training, that applicants were screened for qualifications prior to purchasing the course, that the school would continue training individuals until they passed an examination and obtained jobs, or that the school was affiliated with a government agency.<sup>69</sup>

#### IV. Conclusion

We applaud the FTC's recognition that the anticompetitive effects of non-compete clauses can exist even where contract terms use other language—so-called *de facto* non-competes. Specifically, we are pleased to see the FTC identify the coercive use of employer-driven debt in its description of the sort of non-competes prohibited under its proposed rule. We hope our comment is taken in the spirit of supporting the proposed rule and the realization of a final rule that will truly reflect the intentions of the Commission and the charge from the Administration to “promote equality of bargaining power between employers and employees”<sup>70</sup> and “more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage.”<sup>71</sup>

Sincerely,

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<sup>66</sup> *Id.* at 425.

<sup>67</sup> *Goodman v. Fed. Trade Comm'n*, 244 F.2d 584, 592-93 (9th Cir. 1957).

<sup>68</sup> *Id.* at 601-02.

<sup>69</sup> *Rushing v. Fed. Trade Comm'n*, 320 F.2d 280, 281 (5th Cir. 1963).

<sup>70</sup> Exec. Order No. 14,025, *supra* note 2.

<sup>71</sup> Exec. Order No. 14,036, *supra* note 3.

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## 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.<sup>1</sup> 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.<sup>2</sup>

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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,<sup>3</sup> and workers, especially workers of color, fear the elimination of their jobs through automation with little hope of retraining for quality jobs.<sup>4</sup>

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.<sup>5</sup> 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.<sup>6</sup> Second, firms expect more job applicants to arrive bearing degrees from higher education institutions.<sup>7</sup> 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

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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.<sup>8</sup> 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.<sup>9</sup>

Courts have usually, but not always, enforced TRAs since the contracts began appearing in the 1990s.<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup> 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.<sup>14</sup> The risk of procedural unconscionability in the formation

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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.<sup>15</sup> 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.<sup>16</sup>

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)<sup>17</sup> anti-kickback provision and similar state statutes or on doctrines governing noncompetes.<sup>18</sup> Though some plaintiffs have found success, courts have rejected most of those challenges.<sup>19</sup> 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.<sup>20</sup> 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."<sup>21</sup> 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.

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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 Quoc Trung 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,<sup>22</sup> 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,<sup>23</sup> outsourcing and other "fissuring,"<sup>24</sup> a rise in precarious gig work,<sup>25</sup> labor monopsony,<sup>26</sup> and automation.<sup>27</sup> 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.<sup>28</sup>

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](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. DEPT 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.<sup>29</sup> 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.<sup>30</sup> For example, the Southern District of New York compared one TRA with a \$200,000 repayment scheme to indentured servitude.<sup>31</sup> The court found that the employer’s primary incentive in requiring the TRA was employee immobility, not recoupment of training costs.<sup>32</sup>

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.<sup>33</sup> These contracts became popular as financing products for computer coding bootcamps and have since expanded to higher education and other areas of workforce development.<sup>34</sup> 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.<sup>35</sup> 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.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup>

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.<sup>39</sup> Tripartite training partnerships revive Stone’s “old psychological contract,”<sup>40</sup> except with multi-employer career ladders and lifetime training replacing internal career ladders and lifetime employment at a single firm.<sup>41</sup> 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.<sup>42</sup> This would make workers less dependent on a single employer for training and is in line

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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.<sup>43</sup>

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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup> One can blame this inertia on a collective-action concern that competitors will freeride on an employer’s training undertaking.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup>

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.<sup>54</sup> The National Advisory Committee on Civil Disorders issued its *Kerner Report* in 1968, highlighting the need for robust

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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.<sup>55</sup> The threat of government-mandated affirmative action in private workplaces also encouraged voluntary affirmative action programs for training, especially in unionized settings.<sup>56</sup>

But since at least the early 2000s, employers have reduced direct investment in training their own employees.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.<sup>60</sup> Stone decried employers that breach this psychological contract through limitations on employee mobility.<sup>61</sup>

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.<sup>62</sup>

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.<sup>63</sup> Indeed, collective action via a union is a proven way for workers to increase their leverage with employers on all sorts of issues.<sup>64</sup> Due to globalization and other forces, however, union membership is now almost half of what it was in the early 1980s.<sup>65</sup> 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.<sup>66</sup> 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."<sup>67</sup> 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.<sup>68</sup> 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.<sup>69</sup> 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 NLR'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. COMM'C'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.<sup>70</sup>

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.<sup>71</sup> Monopsony also reduces worker power—employers cartelizing labor markets impedes worker mobility, especially as unions shrink.<sup>72</sup> 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.<sup>73</sup> 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.”<sup>74</sup> Specific training, on the other hand, “has no effect on the productivity of trainees that would be useful in other firms.”<sup>75</sup> Scholars have described this training cost-shifting through lower wages as an “implicit contract.”<sup>76</sup>

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.<sup>77</sup> 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.”<sup>78</sup> FLSA also authorizes a youth minimum wage of \$4.25 per hour for workers under twenty years of age.<sup>79</sup> Given that it is only permitted for the first ninety days of employment,<sup>80</sup> the youth minimum wage can be described as a subminimum wage for young trainees. In addition, FLSA allows subminimum wages for disabled workers.<sup>81</sup> 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.<sup>82</sup>

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.<sup>83</sup> 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.<sup>84</sup> 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.<sup>85</sup>

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. DEPT 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. Laurelbroom 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%.<sup>86</sup> These grants are the backbone of the workforce development system.<sup>87</sup> The Department of Labor ended its Survey of Employer-Provided Training in 1995, so reliable figures on firm investment in training are scarce.<sup>88</sup> But a study by Jeffrey Waddoups revealed a 28% decline in private employer-paid training across almost all sectors between 2001 and 2009.<sup>89</sup> 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.”<sup>90</sup> In other words, “the workers in 2009 were more trainable than their counterparts in 2001 even though they were receiving less training.”<sup>91</sup> Paradoxically, though, employers were less likely than before to reward higher education attainment with on-the-job training.<sup>92</sup>

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.<sup>93</sup> An overwhelming portion of those apprenticeships are run in conjunction with unions through the Registered Apprenticeship Program.<sup>94</sup> 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.<sup>95</sup> Making matters worse, a 2019 corruption scandal involving officials from the

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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.<sup>96</sup>

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.<sup>97</sup> Fortunately for employers, today's young people are the most formally educated in the nation's history.<sup>98</sup> In 2017, 59% of eighteen- to twenty-year-olds were enrolled in college, compared to 44% in 1986.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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."<sup>102</sup>

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.<sup>103</sup>

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.craindetroit.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<sup>104</sup> 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.<sup>105</sup> But she has \$29,000 in student loan debt,<sup>106</sup> and she only has \$400 in her savings account.<sup>107</sup> 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."<sup>108</sup>

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

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.<sup>114</sup> 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."<sup>115</sup> 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."<sup>116</sup> Aside from this study and two short articles accumulating select cases on TRAs, there is little empirical research on TRAs.<sup>117</sup>

## 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)<sup>118</sup> 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.<sup>119</sup> 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*,<sup>120</sup> 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.”<sup>121</sup>

The court rejected the plaintiff's challenge that the TRA was an invalid noncompete under state law.<sup>122</sup> 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.”<sup>123</sup> 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.”<sup>124</sup>

In another federal appellate decision, the Ninth Circuit upheld a TRA in the face of a FLSA-based challenge.<sup>125</sup> 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.<sup>126</sup> 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.<sup>127</sup> 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.<sup>128</sup> 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.<sup>129</sup> The court ruled that the TRA was “a voluntarily accepted loan, not a [FLSA] kick-back.”<sup>130</sup>

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.<sup>131</sup> 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.<sup>132</sup> 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.<sup>133</sup> 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.<sup>134</sup> 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.<sup>135</sup>

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.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> 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.”<sup>139</sup>

The *Bland* court took its cues from another decision in a case from the financial services sector, *Park v. FDM Group (Holdings) PLC*.<sup>140</sup> 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.<sup>141</sup> 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.<sup>142</sup> Like in *Bland*, the plaintiff’s starting annual salary, after completing the unpaid six-month training period, was only \$23,000.<sup>143</sup>

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.<sup>144</sup> 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*.<sup>145</sup> 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.”<sup>146</sup>

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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.<sup>147</sup>

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.<sup>148</sup> 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.”<sup>149</sup> In *In re Acknowledgment Cases*,<sup>150</sup> 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 officer training certification would not, by itself, violate § 2802 because the training was mandated by law for all police officers.<sup>151</sup> 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.<sup>152</sup>

The following year, a California Court of Appeal upheld a different TRA against a Labor Code § 2802 challenge. In *USS-Posco Industries v. Case*,<sup>153</sup> 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.<sup>154</sup> The trainee quit two months after completing the training, and the employer sued to enforce the TRA.<sup>155</sup> In upholding the TRA, the court distinguished *In Re Acknowledgment 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.<sup>156</sup>

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 *Parke* 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.”<sup>157</sup> 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.<sup>158</sup> 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.”<sup>159</sup>

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.<sup>160</sup> 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.<sup>161</sup> The employer attempted to justify the liquidated damages amount as the cost of training.<sup>162</sup> 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.”<sup>163</sup> 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.”<sup>164</sup> 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.”<sup>165</sup>

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.”<sup>166</sup> 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.

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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.<sup>167</sup> 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.<sup>168</sup> 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.”<sup>169</sup> 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.”<sup>170</sup>

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.<sup>171</sup> 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.”<sup>172</sup> 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.<sup>173</sup> 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.<sup>174</sup> 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.<sup>175</sup>

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.<sup>176</sup> 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.<sup>177</sup>

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.<sup>178</sup> 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.<sup>179</sup> 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.<sup>180</sup> This is quite remarkable, as it provides legal rights to those that have not formally entered into the employer–employee relationship.<sup>181</sup>

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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](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,<sup>182</sup> some hospitals were exploiting a loophole in that law and requiring applicants to sign TRAs.<sup>183</sup> The union asserted that trainings did not confer any benefits to the employees and could cost up to \$15,000.<sup>184</sup> 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.<sup>185</sup>

On the other hand, Colorado expressly permits TRAs with repayment periods of less than two years.<sup>186</sup> 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.<sup>187</sup> 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.<sup>188</sup> 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.<sup>189</sup> 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.ca.gov/faces/billAnalysisClient.xhtml?bill\\_id=201920200AB2588](https://leginfo.ca.gov/faces/billAnalysisClient.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.<sup>190</sup> 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.<sup>191</sup> Such a mindset, however, ignores

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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.<sup>192</sup>

For decades, legal scholars have debated the merits of the noncompete as an employee retention mechanism.<sup>193</sup> The *Restatement of Employment Law* reflects a scholarly consensus that has long frowned on the use of noncompetes to recoup training costs.<sup>194</sup> The most recent literature on the topic decries the anticompetitive and labor-monopsony-promoting characteristics of noncompetes and other restrictive covenants in employment.<sup>195</sup> Yet comparatively little scholarship focuses on TRAs. The references to TRAs are often indirect and,<sup>196</sup> 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.<sup>197</sup>

Many TRAs could be described as noncompetes in sheep's clothing and could even be more harmful to low-wage workers than traditional noncompetes.<sup>198</sup> 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."<sup>199</sup> 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 Market*, 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.<sup>200</sup> 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.<sup>201</sup> 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."<sup>202</sup>

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.<sup>203</sup>

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.<sup>204</sup> Many workers likely feel compelled to stay in their jobs through the entire TRA repayment period or unquestioningly pay the employer the repayment

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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. RESRV. 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.<sup>205</sup> 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.”<sup>206</sup> 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.<sup>207</sup> 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.<sup>208</sup> 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.”<sup>209</sup> 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.”<sup>210</sup>

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.”<sup>211</sup> 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

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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](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.”<sup>212</sup>

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.<sup>213</sup> 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.<sup>214</sup> 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).”<sup>215</sup> 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.<sup>216</sup>

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.<sup>217</sup>

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.<sup>218</sup> It is understandable, of course, that Long did not address this because he wrote his article many years prior to the study.<sup>219</sup>

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.<sup>220</sup> 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.<sup>221</sup> 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.<sup>222</sup> 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."<sup>223</sup> The doctrine is a defense against the bargain's formation,<sup>224</sup> 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.<sup>225</sup>

Unconscionability case law has developed into a two-element test—procedural and substantive unconscionability.<sup>226</sup> 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.”<sup>227</sup> Substantive unconscionability requires that the bargain contain terms unreasonably favorable to the more powerful party.<sup>228</sup> 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.”<sup>229</sup>

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.”<sup>230</sup> *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.”<sup>231</sup> 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.”<sup>232</sup>

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.<sup>233</sup>

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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."<sup>234</sup> 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."<sup>235</sup>

Notably, the Supreme Court of Canada recently refused to enforce a mandatory arbitration agreement binding Uber drivers in Ontario, declaring the contract unconscionable.<sup>236</sup> 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.<sup>237</sup> 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."<sup>238</sup> Moreover, the contract required mediation and arbitration in the Netherlands, with the driver assuming travel expenses.<sup>239</sup> 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.<sup>240</sup>

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.<sup>241</sup> 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.”<sup>242</sup> 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.<sup>243</sup> 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.”<sup>244</sup> 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.”<sup>245</sup> 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.<sup>246</sup> 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.<sup>247</sup> 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

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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.<sup>248</sup> 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.<sup>249</sup>

Indeed, Gillian Lester has asserted that unconscionability could be an appropriate doctrine governing TRAs.<sup>250</sup> 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,<sup>251</sup> Lester noted that “the court might have concluded that the price charged for the training was unreasonable, and if accompanied by

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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.”<sup>252</sup> 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.<sup>253</sup> 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.”<sup>254</sup> 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.<sup>255</sup> 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*<sup>256</sup> and the Ninth Circuit in *Gordon v. City of Oakland*<sup>257</sup> 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.<sup>258</sup> Indeed, Judge Easterbrook in *Heder* touched on the portability of the paramedic credential in support of his decision to uphold the TRA;<sup>259</sup> 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.<sup>260</sup>

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.<sup>261</sup> 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";<sup>262</sup> (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";<sup>263</sup> and (3) the employer "did not adjust the cost of the training despite some training programs allegedly lasting six months while others ten months."<sup>264</sup> And procedural unconscionability was present, as the TRA was a mandatory condition of employment<sup>265</sup> 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,<sup>266</sup> the *Ketner* decision could have been ripe for reversal on appeal, had the employer decided to pursue one.<sup>267</sup> 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.*,<sup>268</sup> 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,<sup>269</sup> 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.<sup>270</sup> 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.’”<sup>271</sup>

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.<sup>272</sup> 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.<sup>273</sup> 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.<sup>274</sup> Had they failed out of the training, as many trainees apparently did,<sup>275</sup> 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.<sup>276</sup>

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

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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.”<sup>277</sup> 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.”<sup>278</sup> 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.*”<sup>279</sup>—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*,<sup>280</sup> 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.<sup>281</sup> Under such an approach, the plaintiffs probably could have established procedural unconscionability because the TRAs were mandatory conditions of the job,<sup>282</sup> 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,<sup>283</sup> 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

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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.<sup>284</sup> While the repayment amounts were discounted from \$30,000 to \$20,000 in the second year<sup>285</sup>—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.<sup>286</sup> 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,<sup>287</sup> 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*<sup>288</sup> and *USS-Posco Industries v. Case*,<sup>289</sup> 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.

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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,<sup>290</sup> and the court in *Heartland Sec. Corp. v. Gerstenblatt* likened the \$200,000 TRA repayment amount to indentured servitude.<sup>291</sup> Section 2 of the Thirteenth Amendment to the U.S. Constitution allows Congress to pass legislation to prohibit slavery and involuntary servitude.<sup>292</sup> 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*<sup>293</sup> is oft-cited for the proposition that the Thirteenth Amendment unquestionably prohibits involuntary servitude, in addition to slavery.<sup>294</sup> In that case, Mr. Bailey, a Black farm laborer, contracted with the Riverside Company for a salary of \$12 per month.<sup>295</sup> 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.<sup>296</sup> He was sentenced to 136 days of hard labor for violating an Alabama false pretenses statute.<sup>297</sup> The U.S. Supreme Court ultimately reversed the conviction, finding that the statute violated the Thirteenth Amendment’s prohibition against involuntary servitude.<sup>298</sup>

Legal scholars have detailed arrangements that could constitute debt peonage or involuntary servitude.<sup>299</sup> 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. Birkhead, *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.<sup>300</sup>

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.”<sup>301</sup>

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.<sup>302</sup> 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.<sup>303</sup> According to reports, she could be prohibited from leaving the country and could face imprisonment if she does not pay the debt.<sup>304</sup> 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.<sup>305</sup> ISAs have

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

301. *Id.*

302. Mateusz Maszczyński, *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.<sup>306</sup> These bootcamps typically offer three- to twelve-month courses but do not offer degrees in computer science.<sup>307</sup> Many programs target lower income populations and youth of color,<sup>308</sup> which is consistent with a longer history of saturating those communities with financial products like subprime housing loans, payday loans, and prepaid cards.<sup>309</sup> ISAs are so new that no court has decided the merits of an ISA.<sup>310</sup> 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

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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.<sup>311</sup> 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.<sup>312</sup> 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.<sup>313</sup> 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.<sup>314</sup> Lenders outsource payment collection, income and employment verification, and other tasks to third-party loan servicers.<sup>315</sup>

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].”<sup>316</sup> 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.<sup>317</sup> Pursuit boasted a 2019 cohort of 144 students.<sup>318</sup>

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.<sup>319</sup> Pursuit claims that its graduates earn on average \$85,000.<sup>320</sup> 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.<sup>321</sup> 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.<sup>322</sup> 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.<sup>323</sup> 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.<sup>324</sup> 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](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/publicvalues/publicvalues-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 C.A. 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.<sup>325</sup> 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.<sup>326</sup> 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.”<sup>327</sup> 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.<sup>328</sup> 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.<sup>329</sup> Edly’s data showed a historical return to investors of 16.57%.<sup>330</sup> Compared to the Avenify ISA, the Lambda ISA includes a 17% income share for twenty-four months on a \$30,000 loan.<sup>331</sup>

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.<sup>332</sup> 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.<sup>333</sup> 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.”<sup>334</sup> 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”<sup>335</sup> “is unlikely to help students pass even a first-round programming interview,” causing students to organize “to negotiate the cancellation of their ISAs.”<sup>336</sup>

#### 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.<sup>337</sup> 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.<sup>338</sup> Most disturbingly, the 2017 bill would have made ISAs non-dischargeable in bankruptcy.<sup>339</sup>

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.<sup>340</sup> 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*.<sup>341</sup>

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.<sup>342</sup> For example, one ISA lender, Avenify, targets its ISAs at nursing students, promising “interest-free funding.”<sup>343</sup> Other ISA providers boast messages like, “[P]ay no tuition until you’re hired”<sup>344</sup> and “Pay nothing until you’re earning \$30,000 or more.”<sup>345</sup> But ISAs are, at base, loans for training with repayment amounts determined by one’s future income.<sup>346</sup>

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.<sup>347</sup> 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.<sup>348</sup> 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.<sup>349</sup> But there would be no cap on the number of deferral months, meaning that a borrower could be bound for life.<sup>350</sup> 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.<sup>351</sup> 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.<sup>352</sup> 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.”<sup>353</sup> In so doing, this experimental program would have allowed the Department of Education to bypass laws governing student lending.<sup>354</sup>

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.<sup>355</sup> 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.”<sup>356</sup> 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.”<sup>357</sup> 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.<sup>358</sup> And while it is clear that ISAs shift more

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U.S. DEP’T OF EDUC., A NEW EXPERIMENTAL SITE: INSTITUTIONAL INVESTMENT IN STUDENT SUCCESS (Dec. 2019), <https://fsaconferences.ed.gov/conferences/library/2019/2019FSACConfSession32.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 Scariest 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.<sup>359</sup> One commentator has described a computer coding bootcamp bubble and noted that employers may prefer computer science degree holders over coding bootcamp graduates.<sup>360</sup> 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.<sup>361</sup>

In addition, computer coding bootcamps and other ISA lenders target ISAs at people of color and low-income communities.<sup>362</sup> But students of color are already more dependent on education loans than white students, making them particularly vulnerable to abusive terms in an ISA.<sup>363</sup> Also, ISAs can encourage discrimination against people of color because ISA lenders sometimes offer varied repayment terms based on secret proprietary algorithms.<sup>364</sup> 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.<sup>365</sup>

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

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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.”<sup>366</sup> 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.<sup>367</sup>

“I have been this close to buying a nursing school.”<sup>368</sup> 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.<sup>369</sup> One of its executives speculated that the company could be worth \$100 billion.<sup>370</sup>

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.”<sup>371</sup> 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.”<sup>372</sup> 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.<sup>373</sup>

Indeed, Gary Becker, Friedman’s University of Chicago mentee,<sup>374</sup> 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.”<sup>375</sup> 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.<sup>376</sup> 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.<sup>377</sup> 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.

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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,<sup>378</sup> but also for professional athletes<sup>379</sup> and celebrities.<sup>380</sup> While no consensus has emerged, some have called for regulating the ISA market.<sup>381</sup> Others argue that, instead of enacting new ISA-specific regulations, ISAs should be governed by analogy to other sorts of financial products.<sup>382</sup> This latter approach could be more practical because it requires no new legislation.<sup>383</sup>

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.<sup>384</sup> 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.<sup>385</sup>

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.<sup>386</sup> The retail giant hired 97,000 employees over the summer of 2019 alone—close to the total employment of Google<sup>387</sup>—and ended the third quarter of 2019 with 750,000 workers.<sup>388</sup> 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.<sup>389</sup>

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://hrxecutive.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](https://www.aboutamazon.com/working-at-amazon/upskilling-2025?utm_source=sem&utm_medium=g&utm_term=g07112019).

sectors due to automation-induced displacement.<sup>390</sup> 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.<sup>391</sup>

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.<sup>392</sup>

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.<sup>393</sup>

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.<sup>394</sup>—the existing infrastructure need only be expanded to other parts of the country.<sup>395</sup>

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.<sup>396</sup> 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.<sup>397</sup> 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.<sup>398</sup> That advantage has grown in the intervening decades as private U.S. workforce training investment has declined.<sup>399</sup>

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."<sup>400</sup>

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.<sup>401</sup> 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,<sup>402</sup> 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.<sup>403</sup> 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.<sup>404</sup> 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.<sup>405</sup> 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.<sup>406</sup> 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.”<sup>407</sup> Tripartite training partnerships provide a worker the “meta skills”<sup>408</sup> 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.<sup>409</sup>

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.<sup>410</sup> Black and Latinx workers are especially eager for training for quality employment, with one-third of them currently working in highly automatable jobs.<sup>411</sup> 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.<sup>412</sup> 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

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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).

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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,<sup>413</sup> 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.

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



## CONSUMER LAW AS WORK LAW

Jonathan F. Harris\*

*In recent decades, firms have radically transformed labor markets—from a world of long-term jobs with a single employer to one that offers contingent work or work disguised as entrepreneurship with multiple levels of labor intermediaries controlling the workers. These attenuated relations between worker and firm reflect the “fissuring” of work, in which firms have changed law to permit them to outsource, subcontract, and franchise out their labor needs, all in the name of profit. Firms today are taking an additional step beyond fissuring work: they are treating the workers themselves as consumers by offering them services and credit products. Workers, in short, are also consumers in some contexts.*

*Legal protections in the workplace should adapt by taking a lesson from the early 20th century when the fissuring of relations between manufacturers and consumers led to the emergence of consumer law. When firms expand employment contracts to extend services and credit products to workers, workers are entitled to consumer law protections.*

*This Article calls for an integrated work law, which includes consumer law, to more adequately counter firms’ exploitation of workers. Some favor turning only to traditional employment law to revive earlier industrial relations, including fortifying the statuses of employer/employee and the principle of compensation for work. But those laws have proved inadequate*

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*and, as the conventional relations break down, so too will law have to re-situate to provide robust worker protections. By using consumer law such as unfair or deceptive acts or practices law—along with established employment law—workers can gain leverage. Such a paired evolution of the doctrines will allow them to learn from and contribute to the strengthening of one another by enhancing collective action that could begin to resolve the asymmetries in bargaining power between firms and workers.*

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## INTRODUCTION

The traditional employment relationship assumes a fee-for-service exchange: workers provide their labor services and receive compensation for such services. That exchange is governed by work law, which purports to provide an array of contractual and statutory protections to workers that obviates the need for protections against fraud and deceit extended to consumers.<sup>1</sup> But firms have increasingly exploited this implied waiver of consumer protections to workers by smuggling into the relationship their own offers to provide services and credit products to captive workers as part of the labor contract. In other words, firms have immunized themselves from liability for otherwise unfair and deceptive acts and practices (“UDAPs”) by cloaking their transactions as contractual terms of work. This Article identifies that arbitrage, arguing that, when firms provide services to workers through contract, workers are entitled to the full protections of consumer law as consumers of the firms’ services and credit products.

Since the 1970s, pro-business economic policies have allowed firms to maximize their profits, in part by deregulating labor markets to reduce labor costs.<sup>2</sup> This has resulted in a change from a prevalence of stable jobs with a single employer to contingent work with multiple levels of firms or work disguised as entrepreneurship.<sup>3</sup> Another part of this cost-cutting is shifting onto workers the once-internalized costs of the risk of enterprise failure; marketing; job matching and placement; and job training (and the risks associated with assuming job training costs).<sup>4</sup> Firms disseminate “American exceptionalist” narratives of rugged individualism, autonomy, and freedom of contract to reframe those costs as opportunities and personal betterment for workers.<sup>5</sup>

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<sup>1</sup> I define “work law” as the panoply of laws that regulate work.

<sup>2</sup> See Suresh Naidu, Eric A. Posner, & E. Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 552–53 (2018).

<sup>3</sup> See KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS* 4 (2004).

<sup>4</sup> See Andrew Elmore & Kati L. Griffith, *Franchisor Power As Employment Control*, 109 CALIF. L. REV. 1317, 1348 (2021) (noting that franchisees who disregard franchisor instructions run the risk of losing their investments in the franchise); Noah D. Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem Without Redefining Employment*, 26 ABA J. LAB. & EMP. L. 279, 282–83 (2011) (asserting that firms often cast their power to shift risks and costs onto workers as entrepreneurial opportunity); Jonathan F. Harris, *Unconscionability in Contracting for Worker Training*, 72 ALA. L. REV. 723, 724–25 (2021) (explaining that firms have shifted job training costs onto workers in three ways: reduced “training” pay; requiring applicants to hold post-secondary degrees; and providing workers with training as a credit product with back-end repayment obligations).

<sup>5</sup> See generally WILLIAM J. NOVAK, *NEW DEMOCRACY: THE CREATION OF THE MODERN AMERICAN STATE* (2022); Martha Albertson Fineman, *Reasoning from the Body: Universal*

Firms shifting these costs onto workers through contract also enables the further “fissuring” of work, in which firms have outsourced, subcontracted, and franchised once internalized labor markets.<sup>6</sup> Fissuring allows upstream firms more flexibility while disinvesting from training the workers who labor in their facilities but whom the firm does not retain as its direct employees. In line with the narrative of individualism and autonomy, a growing number of firms use the lure of small business ownership to attract workers to labor as non-employee entrepreneurs. The rideshare economy is one example of this, with firms such as Uber and Lyft claiming that they merely provide a platform service on which independent contractor drivers contract directly with customers for rides.<sup>7</sup> Drivers become the firms’ consumers, stacked on top of their identities as workers.

This Article contributes to existing scholarship on work and emerging work law in three distinct ways. First, it builds substantially on the rich scholarship about the shifting relationship between firms and workers.<sup>8</sup> Drawing on several recent studies and on primary data, including a dataset of employment firms’ contracts with temporary staffing agencies, the Article develops a detailed descriptive account of several ways that firms are

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*Vulnerability and Social Justice*, in A JURISPRUDENCE OF THE BODY 17, 33 (Chris Dietz et al. eds., 2020); Rachel Petroziello, *The Author’s Corner with William Novak*, CURRENT (Mar. 23, 2022), <https://currentpub.com/2022/03/23/the-authors-corner-with-william-novak/> (transcription of interview with William Novak) (quoting Novak calling the “American exceptionalist narrative” a “secular theology” that is “about individual rights, self-reliance, voluntarism, entrepreneurship, anti-statism, private property, liberty of contract, and free markets.”).

<sup>6</sup> See DAVID WEIL, THE FISSURED WORKPLACE 38, 95, 98, 167–68 (2014) (citing PETER DOERINGER & MICHAEL PIORE, INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS 8–9 (1971)) (defining “internal labor markets” as “the system created inside major businesses that set policies for wages, employment practices, and other features of the workplace.”)

<sup>7</sup> See, e.g., Uber, *Priorities to enhance the quality and security of independent work in the United States*, UBER NEWSROOM (Aug. 10, 2020), <https://www.uber.com/newsroom/working-together-priorities/>.

<sup>8</sup> See, e.g., Veena B. Dubal, *Winning the Battle, Losing the War?: Assessing the Impact of Misclassification Litigation on Workers in the Gig Economy*, 2017 WIS. L. REV. 739, 750–51, 750 at n. 41 (2017) (recounting the shift in the 1970s of firm ideology toward that of “individual responsabilization of work,” supported by themes of individual performance and autonomy and leading to the contemporary gig work economy (citing LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM 80–81, 217–18 (Gregory Elliott trans., 2005))); Noah D. Zatz, *Does Work Law Have A Future If the Labor Market Does Not?*, 91 CHI.-KENT L. REV. 1081, 1082, 1091–92 (2016) (asserting that recent developments blur the boundaries between the labor market and “sharing,” religion, criminal law, and politics, and identifying the conundrum the blurring presents for traditional labor and employment law); 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); Zatz, *supra* note 4; Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U. S.F. L. REV. 51, 51–57 (2017).

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harming workers, and in doing so are also treating workers as consumers. Second, the Article advances consumer law as work law, bridging the fields and arguing that as firms treat workers as consumers, so, too, should consumer law become work law. Third, turning from practical recommendations involving the use of consumer law to protect workers to theories of work law and worker protection more broadly, the Article takes the next step to consider what it means to embrace an integrated work law.<sup>9</sup>

I illustrate in three concrete ways how firms are turning their workers into worker-consumers, and in the process are engaging in UDAPs while avoiding liability for doing so. First, a growing number of firms offer training services to workers through unfair and deceptive financing instruments to lock workers into unpayable debts. Foremost among these are Training Repayment Agreement Provisions (“TRAPs”), which require an employee or trainee 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.<sup>10</sup> Another training financing model are Income Share Agreements (“ISAs”), which lend a certain amount of training on the condition that trainees repay a percentage of their future income, rather than a fixed sum.<sup>11</sup> Firms frequently bundle ISAs with TRAPs by both training and then hiring the trainee to work for one of the firm’s chosen client companies for a minimum set time period or face a high “quit fee.”<sup>12</sup> The ISA repayment amount often exceeds the price of a comparable training program with an up-front payment scheme. Moreover, with both TRAPs and ISAs, the advertised training many receive is often of little use to the workers.

Second, firms offer marketing and operations management services to workers under the mantle of small business ownership through franchising. This Article focuses on commercial janitorial franchisors that frequently sell

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<sup>9</sup> See Harry Arthurs, *Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment*, 34 COMPAR. LAB. L. & POL’Y J. 585, 585–89 (2013); Alan Hyde, *What is Labor Law?*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 37 (Guy Davidov & Brian Langille eds., 2006).

<sup>10</sup> Harris, *supra* note 4; JONATHAN F. HARRIS & CHRIS HICKS, TRAPPED AT WORK: HOW BIG BUSINESS USES STUDENT DEBT TO RESTRICT WORKER MOBILITY 3 (July 28, 2022), <https://ssrn.com/abstract=4177496>. The Student Borrower Protection Center (“SBPC”), a nonprofit organization focused on alleviating the burden of student debt, coined the acronym “TRAP” to signal the effects of the contracts on workers. I am a Student Loan Justice Fellow of the SBPC.

<sup>11</sup> See Harris, *supra* note 4, at 766–77 (2021); JOANNA PEARL & BRIAN SHEARER, CREDIT BY ANY OTHER NAME: HOW FEDERAL CONSUMER FINANCIAL LAW GOVERNS INCOME SHARE AGREEMENTS (July 2020), [https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer\\_Credit-By-Any-Other-Name.pdf](https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf).

<sup>12</sup> See Emma Rindlisbacher, *The Coding Bootcamp Trap*, ONEZERO (Jan. 25, 2021), <https://onezero.medium.com/recent-grads-are-being-lured-into-indentured-servitude-by-a-coding-bootcamp-8a3b2b8e87e8>.

business development plans and operating outreach systems to mostly immigrant workers, indebting those workers-turned-“franchisees” in ways that can be inescapable.<sup>13</sup> Franchisors frequently deceive the (often misclassified) “independent contractors” about the potential for high earnings in the franchise.

Finally, temporary staffing agencies—employing 13 to 16 million workers in the U.S. economy each year<sup>14</sup>—deploy unfair and deceptive terms in offering workers job matching and placement services that conceal the agencies’ collusion with client firms to artificially suppress wages and restrict where the worker can work in the future. Temporary staffing agencies commonly advertise their matching and placement services to workers as “temp to perm” or “temp to hire,” meaning that the worker will have the eventual opportunity to work directly for the user firm.<sup>15</sup> What many of these staffing agencies conceal, however, are their contracts with user firms that make it practically impossible for most temporary workers to work directly for the user firm or its affiliates, or for competitor staffing agencies in many cases.

As employer-driven and other changes in work have created fissures in the employer-employee relationship, and as firms turn to service and credit-related techniques that harm workers, workers become worker-consumers—and consumer law should therefore become part of work law.

Consumer law protects consumer transactions entered into “for personal, family, or household purposes.”<sup>16</sup> Consumer law developed in the wake of

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<sup>13</sup> See Press Release, Wash. State Office of the Att’y Gen., Att’y Gen. Ferguson files lawsuit against janitorial servs. co. for exploiting mostly immigrant workers (Apr. 6, 2021), <https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-janitorial-services-company-exploiting-mostly> [hereinafter Wash. Press Release].

<sup>14</sup> See *Staffing Industry Statistics*, AMERICAN STAFFING ASSOCIATION, <https://americanstaffing.net/research/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/> [https://perma.cc/8CSJ-YPEG] (last visited Dec. 21, 2022).

<sup>15</sup> See TEMP WORKER JUSTICE, ET AL., TEMP WORKERS DEMAND GOOD JOBS: SURVEY REVEALS POVERTY PAY, PERMATEMPING, DECEPTIVE RECRUITMENT PRACTICES, AND OTHER JOB QUALITY ISSUES 18 (Feb. 2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>; Jane R. Flanagan, *Fissured Opportunity: How Staffing Agencies Stifle Labor Market Competition and Keep Workers “Temp,”* 20 J. L. SOC’Y 247, 253, 257 (2020). The terms “user firm” or “client firm” in this Article refer to the client of the staffing agency; that is, the firm that uses the labor supplied by the staffing agency. They are used interchangeably and reflect the standard terminology in the industry. Others use the term “worksites employer.”

<sup>16</sup> *Consumer Law*, BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “consumer law” as “[t]he area of law dealing with consumer transactions—that is, a person’s obtaining credit, goods, real property, or services for personal, family, or household purposes.”). See also 15 U.S.C. § 1692a(5) (Fair Debt Collection Practices Act); 15 U.S.C. § 2301 (Magnuson Moss Warranty Act); 15 U.S.C. § 1602(i) (Truth in Lending Act); U.C.C. § 9-102(a)(22)-(24)



monopolization of sectors in the U.S. economy in the late 19th and early 20th centuries, in which firms' diminished contact with and accountability to consumers led to increased sales of dangerous and defective goods at inflated prices with little regard for health and safety in the conditions of production.<sup>17</sup>

Consumer law later expanded to prohibit broader unfair practices, with substantial litigation under the Federal Trade Commission ("FTC") Act of 1914.<sup>18</sup> Beginning in the 1960s, almost every U.S. state enacted its version of a "little FTC Act" that provides consumers a private right of action.<sup>19</sup> Consumer protection laws are voluminous, but this Article focuses on one major subset: UDAP laws.<sup>20</sup>

A handful of scholars and policymakers have recently turned to consumer law protections as an avenue to protect workers from firms' UDAPs.<sup>21</sup> This

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(regarding secured consumer finance); U.C.C. § 2A-103(e) (regarding consumer leases). Antitrust law—a doctrine experiencing a renaissance on behalf of workers—is commonly seen as encompassed within UDAP law. *See generally* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L. J. 713, 713–14 (1997).

<sup>17</sup> *See, e.g.*, Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-38 (first major federal legislation to address monopolization). In 1906, uniform weights and measures laws were passed, in response to consumer concerns. UNIFORM WEIGHTS AND MEASURES LAW, <https://www.nist.gov/system/files/documents/2017/05/09/09-section-IIIa-14-h130-final.pdf> (last visited Aug. 18, 2022). Also in response to Upton Sinclair's 1906 book, *The Jungle*, consumers became more concerned with the conditions of food production in large packing plants owned by monopolistic firms. Food purity laws were passed in response. This eventually led to Congressional passage of the Food, Drug and Cosmetic Act of 1938, requiring, *inter alia*, manufacturers to show that new drugs were safe to consumers before introducing them to the market. Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified at 21 U.S.C. § 301 *et seq.*).

<sup>18</sup> 15 U.S.C. § 41 *et seq.*

<sup>19</sup> *See* Dee Pridgen, *The Dynamic Duo of Consumer Protection: State and Private Enforcement of Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L. J. 911, 912 (2018).

<sup>20</sup> *See id.* at 911.

<sup>21</sup> *See* Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, \_ U. CHI. L. REV. \_, 22–32 (forthcoming 2022), <https://ssrn.com/abstract=4196215> (arguing for use of antitrust and consumer law to protect the rights of rideshare drivers); Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1634, 1660 (2017) (arguing for application of consumer law to the sharing and "taking" economy); Terri Gerstein et al., *When Corporations Deceive and Cheat Workers, Consumer Laws Should be Used to Protect Workers*, WORKING ECON. BLOG (May 5, 2021, 11:00 AM), <https://www.epi.org/blog/when-corporations-deceive-and-cheat-workers-consumer-laws-should-be-used-to-protect-workers/#:~:text=Using%20consumer%20laws%20to%20protect,more%20traditional%20labor%20standards%20laws> (collecting cases where regulators have used consumer law to protect workers); Sharon Block, *Employing Lots of Law to Do "Employment Law,"*

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Article, however, is unique in that it provides a robust analysis of not only the benefits but also the challenges of using consumer law as work law, in practice and in theory as part of an integrated work law.

Viewing workers and trainees as consumers is not new—a century ago, firms frequently attempted to describe the payment of money through a consumer lens, paying workers in scrip that could be redeemed only at company stores.<sup>22</sup> Employment laws were passed, in part, to separate compensation from consumer relationships, requiring wages be paid “free and clear.”<sup>23</sup> Similarly, a century ago, employers began offering employees fringe benefits like life insurance, which then expanded to other benefits such as health insurance, retirement plans, and tuition programs.<sup>24</sup> This led to the employer welfare model that we now know in the U.S. but that is intentionally conceptualized as “employee benefits” rather than consumer relationships.<sup>25</sup>

Even today, companies like Uber harken back to those older days by calling its drivers “customers” and consumers of its software, rather than employees, so as to avoid application of employment law protections.<sup>26</sup> Today, however, consumer law enforcers are catching on and using firms’ own nomenclatural sleight of hand against them.<sup>27</sup> The idea of using consumer law in the workplace has garnered renewed attention, largely due to the voids in workplace protections created when firms shaped industrial relations—and, in turn, labor regulation—to better suit their interests.<sup>28</sup> Agencies such as the FTC, the Consumer Financial Protection Bureau (“CFPB”), state attorneys general, and local governments have applied consumer law in the workplace in the past decade to attempt to balance

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ONLABOR (Sept. 27, 2022), <https://onlabor.org/employing-lots-of-law-to-do-employment-law/> (asserting that the FTC should use its consumer protection and fair competition tools to protect gig workers, since traditional employment law cannot).

<sup>22</sup> See ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 311–12 (2001).

<sup>23</sup> 29 C.F.R. § 531.35 (2019). See also *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 24–25 (1901) (upholding Tennessee law banning payment of wages in scrip); *id.*

<sup>24</sup> See JENNIFER KLEIN, *FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA’S PUBLIC-PRIVATE WELFARE STATE* 9–15 (2006).

<sup>25</sup> See *id.* at 258–76.

<sup>26</sup> See Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1634, 1660 (2017) (noting that Uber calls drivers in the U.K. “customers” in its terms of service and argued in the U.S. that its drivers are consumers of the platform software because they pay a “licensing fee” to Uber).

<sup>27</sup> See, e.g., *id.* at 1660, 1660 n.194 (citing FTC enforcement action against Uber for deceptively promoting potential earnings by drivers, calling drivers “entrepreneurial consumers”).

<sup>28</sup> Cf. Naidu, Posner, & Weyl, *supra* note 2.

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asymmetries in bargaining power between firms and individual workers.<sup>29</sup> For instance, in early 2023, the FTC proposed a rule to ban all noncompete agreements (“noncompetes”) and certain TRAPs.<sup>30</sup>

Traditional employment law regulates training and other services received by workers *for the benefit of the employer*. That is, federal and state laws prevent kickbacks of wages for costs incurred by workers that are primarily for the benefit of the employer.<sup>31</sup> But when firms employ maneuvers to escape liability for one-sided contracts with workers under traditional employment law—as they do with frequent success—that should not be the end of the story. If firms purport that those contracts with workers instead involve services primarily for the *worker’s personal use*, then consumer law should regulate the transaction. Consumer law steps in to enhance existing employment law regimes. Otherwise, firms would be able to skirt regulation entirely, further concentrating their economic power vis-à-vis workers.

Due to the COVID-19 pandemic, many workers have been rethinking their relationships to work, and firms have been rethinking how many workers they need and how they need workers to work. It is time to also reconsider work law doctrines and the firm-worker relationship itself. Modern employment laws have failed to keep up with firms’ fissuring of the workplace, based on a recognition of only a formal employer-employee relationship.<sup>32</sup> Unless workers are able to prove misclassification as non-employees—an unlikely feat in many jurisdictions—they cannot benefit from traditional employment law and must turn to other laws for protections in the

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<sup>29</sup> See, e.g., *CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers*, CONSUMER FIN. PROT. BUREAU (Jun. 9, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/>; FTC, FTC Policy Statement on Enforcement Related to Gig Work 8 (Sept. 15, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf) (internal citations omitted).

<sup>30</sup> Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910).

<sup>31</sup> See, e.g., 29 C.F.R. § 531.35 (2019) (preventing “kickbacks” under Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.*); CAL. LAB. CODE § 2802. Certain wage payment laws also govern, such as requirements for timely payment after work is performed. See, e.g., N.Y. LAB. L. § 191.

<sup>32</sup> Many of those workers misclassified as non-employees should be reclassified as employees, and employers that misclassify their workers should be held accountable. There are woefully insufficient resources, however, for agencies to pursue the rampant misclassification occurring today. See Block, *supra* note 21 (describing how firms have largely won the battle over misclassification and that federal law does not make misclassification unlawful, per se).

workplace.<sup>33</sup>

Consumer law developed in the wake of fissuring of relations between the providers of goods and services and the consumers using them.<sup>34</sup> Consumer law—particularly UDAP law—is ripe for application in the workplace, as more firms become providers of services and credit products to workers. Moreover, workers need not use consumer law to the exclusion of employment law, as workers can stack identities as both employees and consumers. Workers and their advocates recognize this and have launched new legal challenges containing a hybrid of employment law, consumer law, and contract law causes of action. This is especially encouraging because, whereas relatively few U.S. states have dedicated labor standards offices, every state and territory has at least one consumer protection agency.<sup>35</sup>

Of course, there are challenges to developing a legal regime that seeks to cover an array of worker concerns by drawing from multiple areas of law, and this Article considers some of those challenges, as well as challenges to using consumer law specifically. The Article’s starting point, however, is that consumer law does apply once workers become worker-consumers, providing some immediate protection for workers who otherwise may be unprotected. Consumer law, in other words, becomes work law and should be understood and utilized accordingly.

The Article proceeds as follows. Part I shows how firms are restructuring work relationships, often through fissuring, to turn workers into worker-consumers. Part II shows how contract and employment law have revealed their inability to fully protect many of today’s workers and asserts that worker advocates and regulators have used, and should continue to use, consumer law as work law when firms engage in UDAPs. Part III tackles concerns raised when consumer law becomes work law and discusses the doctrinal implications when firms unilaterally shape industrial relations through narratives of individualism, autonomy, freedom of contract, and personal betterment that depict workers as consumers.

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<sup>33</sup> *See id.*

<sup>34</sup> In earlier times, vendors were quite localized and were known by their clientele, thus discouraging unfair or deceptive practices. *See, e.g.,* Czech Trade Inspection Authority, *History of Consumer Rights Protection*, COI (2003), <https://www.coi.cz/en/about-ctia/history-of-consumer-rights-protection/> (last visited Dec. 21, 2022). Even Roman laws provided buyers the right to file claims against defective goods. *See id.*

<sup>35</sup> *See State Consumer Protection Offices*, USA Gov, <https://www.usa.gov/state-consumer> (last visited Dec. 21, 2022); author conversation with Terri Gerstein (notes on file with author).

## I. FROM WORKERS TO WORKER-CONSUMERS

A. *Fissures in the Employment Relationship*

David Weil coined the term “fissuring” of labor, in which firms build more distance between themselves and those they rely on for labor.<sup>36</sup> Fissuring is accomplished through outsourcing, subcontracting, and franchising, among other means. Though fissuring has older roots, its widespread adoption began in the late 1980s and early 1990s.<sup>37</sup> Prior to that, internal labor markets—when firms promoted workers from within and jobs were relatively secure—and high unionization rates prevented employers from frequently looking outside their own ranks for labor.<sup>38</sup> The unraveling of those internal labor markets leading to fissuring coincided with the decline of U.S. unionization rates from one in three workers in 1965 to one in ten workers in 2015.<sup>39</sup> Katherine V.W. Stone has described this unraveling of internal labor markets as a move from an “old psychological contract”—characterized by long-term employment and internal career ladders—to a “new psychological contract”—characterized by mutual decommitment to long term employment with a single firm.<sup>40</sup>

Fissuring did not happen by force of nature—firms orchestrated the process for the purpose of maximizing profits and minimizing liability exposure. Those firms obtained buy-in from regulators to shape legal and policy regimes according to themes of individual autonomy and freedom of contract.<sup>41</sup> In other words, firms used narratives of self-betterment, self-

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<sup>36</sup> WEIL, *supra* note 6. Cf. Timothy P. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POL’Y J. 201, 203 (2011) (describing the “disaggregation of business enterprises into smaller, independent parts,” including “outsource[ing] services and production.”).

<sup>37</sup> WEIL, *supra* note 6, at 3.

<sup>38</sup> *Id.* at 37–41.

<sup>39</sup> See *id.* at 41–42; Quoc Trung Bui, *50 Years of Shrinking Union Membership, In One Map*, NPR (Feb. 23, 2015), <https://www.npr.org/sections/money/2015/02/23/385843576/50-years-of-shrinking-union-membership-in-one-map>.

<sup>40</sup> Stone, *supra* note 8 at 739 (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)); 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).

<sup>41</sup> See NOVAK, *supra* note 5 (noting how firms have shaped legal regimes through the narrative of individual autonomy and freedom of contract, raising a concern that some use the growing concentration and asymmetry of economic power to injure others); FINEMAN, *supra* note 5 (proposing a response based on “vulnerability theory” in lieu of the dominant “legal subjectivity” framework).

determination, and entrepreneurship to convince the public that fissuring could be good for workers. This was largely untrue, however, and the resulting breakdown of the employer-employee partnership and concentration and asymmetry of economic power in those firms' hands has harmed workers.<sup>42</sup>

In fact, what was happening was a shifting of costs and risks onto workers. For example, firms externalized once-internalized training costs onto workers by reducing pay during training periods, expecting more job applicants to have degrees, and forcing workers to absorb the costs of on-the-job training.<sup>43</sup> In addition, firms created new models such as franchising to convince would-be employees that it would be to their benefit—and congruent with narratives of self-determination—to be small business owners instead of employees. What resulted, however, was an abusive system of exploitation and debt that, according to David Weil, “can be traced to the structure of markets and competition arising from the widespread outsourcing.”<sup>44</sup> Meanwhile, unstable and low-paying contingent work exploded out of the unraveling of internalized labor markets, with staffing agencies becoming many workers' first point of contact with labor markets.

### B. Workers as Consumers

In furtherance of the fissuring of their labor sources, firms now treat workers as consumers by selling workers the services of job training, business marketing and operations, and job matching and placement. In earlier internalized labor markets, the firm bore those costs. Casting workers as consumers, however, is not completely new. For example, employers began selling employees life insurance plans over a century ago, which was the genesis of the modern employer welfare system that includes health insurance and pensions.<sup>45</sup> This Subpart provides three case studies of how firms offer services to workers as consumers, using unfair and deceptive contracts that harm workers. Workers, in effect, take on an overlapping identity of

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<sup>42</sup> See WEIL, *supra* note 6, at 132, 140.

<sup>43</sup> See GARY S. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, WITH SPECIAL REFERENCE TO EDUCATION 35 (3d ed. 1993); 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, 10:59 AM), <https://www.wsj.com/articles/american-factories-demand-white-collar-education-for-blue-collar-work-11575907185>; Harris, *supra* note 4, at 725.

<sup>44</sup> WEIL, *supra* note 6, at 132, 140.

<sup>45</sup> See JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 16–52 (2006).

consumer vis-à-vis the firm.

### 1. Training Services

Many firms offer training services to workers as credit products, in the form of TRAPs and ISAs. A TRAP provides employees on-the-job training services and requires an employee to pay the employer a fixed or pro rata sum if the employee quits work or is fired within a set period of time, usually two to five years.<sup>46</sup> According to their design, TRAPs should provide transferable general skills training, essentially paid for as part of the wage package over time with the employer.<sup>47</sup> In practice, however, many employers using TRAPs engage in UDAPs that shortchange workers by: (1) falsely promising that the training is free; (2) asserting that the training is useful general skills training, when it is in fact firm-specific training that is useless outside of that firm or is not skills-based training; (3) misrepresenting the exact repayment terms, interest rates, and other provisions; (4) declining to fully disclose what termination conditions would trigger repayment; and (5) failing to disclose length of service terms to avoid triggering repayment.<sup>48</sup> These UDAPs in turn make workers vulnerable to their employers because the employers have become their creditors.

Employers have most recently expanded TRAPs among entry-level workers, including those in the transportation, cosmetology, health care, retail, technology, and finance sectors.<sup>49</sup> In 2022, it was estimated that major employers rely on TRAPs in sectors that collectively employ over a third of all private-sector workers in the U.S.<sup>50</sup> TRAPs have become particularly common among firms owned by private equity, including retail chains like PetSmart.<sup>51</sup>

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<sup>46</sup> See Harris, *supra* note 4.

<sup>47</sup> Under Chicago School economist Gary Becker's human capital theory, "[g]eneral training is useful in many firms besides those providing it, whereas "specific training . . . has no effect on the productivity of trainees that would be useful in other firms." See GARY S. BECKER, *supra* note 43, at 33, 35, 40.

<sup>48</sup> See Harris, *supra* note 4, at 754 n. 217 ("[F]irms may be misrepresenting the value to the employee of the so-called training as a thin veil hiding the real purpose of the TRA[P]: worker immobility.").

<sup>49</sup> HARRIS & HICKS, *supra* note 10, at 14–26, 30 n.11.

<sup>50</sup> *Id.* at 14.

<sup>51</sup> See UNITED FOR RESPECT, GREED UNLEASHED: PETSMART, BC PARTNERS, AND WHAT HAPPENS WHEN PRIVATE EQUITY PREYS ON WORKERS AND PETS 2 (Sept. 2021), <https://united4respect.org/wp-content/uploads/2021/09/Greed-Unleashed-Report.pdf> (noting that private equity company BC Partners purchased PetSmart in 2015); William Louch, *PetSmart Workers Ask Retailer's Private-Equity Owner for Coronavirus Protections*, WALL ST. J. (July 8, 2020, 3:19 PM), <https://www.wsj.com/articles/petsmart-workers-ask-retailers-private-equity-owner-for-coronavirusprotections-11594235984>.

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In transportation, for example, large trucking companies such as CRST and CR England run commercial drivers' license schools using TRAPs that have repayment amounts of over \$6,000 with up to two year repayment windows.<sup>52</sup> But the trucking sector has high worker turnover—nine out of 10 truckers leave their jobs within a year due to grueling working conditions—meaning that TRAP repayments can be great sources of revenue for trucking firms.<sup>53</sup> This is why sociologist Steve Viscelli has called the system “debt peonage.”<sup>54</sup>

Cosmetology is another sector that relies on TRAPs. In one case, Simran Bal's former employer sued her to enforce a TRAP for training in “Sugaring, Dermaplaning, Lash & Brow Tint, Lash & Brow Lift, Henna, Chemical Peels, Hydrafacials, Microneedling, [and] Facials.”<sup>55</sup> The TRAP repayment amount was \$5,000 and had a two-year work requirement to avoid repayment.<sup>56</sup> Bal reported only receiving three training sessions, usually with the supervisor running late.<sup>57</sup> Bal successfully defended herself and avoided paying the \$2,244.20 demanded, but only because she was able to prove that the so-called “training” was never completed.<sup>58</sup>

In health care, hospitals facing major staffing shortages are turning to TRAPs to retain new employees. A 2022 national survey of 1,698 nurses found that, while 24.3 percent of the nurses with 11-20 years' experience reported having been bound by a TRAP at some point, 44.8 percent of the nurses with between one- and five-years' experience were bound by TRAPs.<sup>59</sup> This demonstrates the rapid growth of the use of TRAPs in recent years. In total, over half of the responding nurses reported being bound by a TRAP when required to enter into a training program as a condition of

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<sup>52</sup> Letter from Willie Burden Jr. & Stuart Karaffa, to Consumer Financial Protection Bureau 6 (Sept. 23, 2022), [https://downloads.regulations.gov/CFPB-2022-0038-0055/attachment\\_1.pdf](https://downloads.regulations.gov/CFPB-2022-0038-0055/attachment_1.pdf) [hereinafter Burden & Karaffa Letter].

<sup>53</sup> *See id.*

<sup>54</sup> Erin McCormick, ‘Indentured servitude’: low pay and grueling conditions fueling US truck driver shortage, GUARDIAN (Nov. 22, 2021, 6:00 AM), <https://www.theguardian.com/business/2021/nov/22/indentured-servitude-low-pay-and-grueling-conditions-fueling-us-truck-driver-shortage>.

<sup>55</sup> Oh Sweet, LLC v. Simran Bal, No. 22-CIV-05745-KCX (Kings Co. Dist. Ct. Sept. 6, 2022) (complaint on file with author).

<sup>56</sup> *Id.* (defendant's opening statement and exhibits on file with author).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* (verdict on file with author).

<sup>59</sup> Letter from Carmen Comsti, to CFPB Director Rohit Chopra 9–11 (Sept. 23, 2022), [https://downloads.regulations.gov/CFPB-2022-0038-0048/attachment\\_1.pdf](https://downloads.regulations.gov/CFPB-2022-0038-0048/attachment_1.pdf). Large for-profit health care chains have led the way in expanding the use of TRAPs. In the survey, over 13 percent of respondents bound by TRAPs were employees of a single employer: HCA Healthcare, the globe's largest for-profit health care employer. *Id.* at 7.

employment.<sup>60</sup> And only half of those knew they were taking on a debt before accepting or continuing employment with their employer.<sup>61</sup> Almost 40 percent of the surveyed nurses under TRAPs reported their TRAP debt was above \$10,000 and close to 20 percent reported that it was \$15,000 or more.<sup>62</sup>

One nurse's narrative demonstrates the locking effects of TRAPs in a highly desired sector, both harming the worker and distorting the regional and sectoral labor market. Cassie Pennings, a new graduate nurse at UCHHealth in Colorado was, pursuant to a TRAP, promised to be paired with a nurse mentor "who w[ould] stay elbow-to-elbow for at least 12 weeks."<sup>63</sup> But it was during the COVID-19 pandemic, and her mentor was preoccupied with other emergencies, leaving Pennings alone to care for five ICU patients in only her eleventh week as a nurse.<sup>64</sup> The burnout-inducing conditions persisted, causing Pennings to resign; "leaving my job felt like exiting an abusive relationship," Pennings commented.<sup>65</sup> UCHHealth's TRAP required Pennings to pay \$7,500—two months' salary—if her employment ended within two years.<sup>66</sup> UCHHealth withheld half of her final paycheck as a first payment toward the TRAP debt, which she continues to owe.<sup>67</sup> But, she noted, "we certainly did not receive \$7,500 worth of benefits in the program."<sup>68</sup>

TRAPs disproportionately impact women like Cassie Pennings and people of color, both as applied and in the context of more severe debt crises among Black and Latinx families. Many sectors depending on TRAPs also hire greater numbers of women, people of color, and immigrants. For example, 86.7 percent of nurses and 92.4 percent of hairdressers, hair stylists, and cosmetologists are women, demonstrating the disparate impact the proliferation of TRAPs have for women in those sectors.<sup>69</sup> In addition, over half of all truck drivers in the U.S. are Black or Latinx.<sup>70</sup> Black and Latinx families already face a crisis of debt—education debt is greater among

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<sup>60</sup> *Id.* at 8.

<sup>61</sup> *Id.* at 9.

<sup>62</sup> *Id.* at 11.

<sup>63</sup> Cassie Pennings, *Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs, Hearing on Employer-Driven Debt*, UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS (Sept. 7, 2022), <https://www.banking.senate.gov/imo/media/video/Cassie%20Pennings.mp4>.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> Burden & Karaffa Letter, *supra* note 52, at 4–5 (collecting U.S. Department of Labor ("DOL") statistics).

<sup>70</sup> Burden & Karaffa Letter, *supra* note 52, at 4–5.



communities of color than white communities, as are interest rates.<sup>71</sup> Moreover, 18.9 percent of Black families and 11.3 percent of Latinx families experience net debt, while only 10.8 percent of all U.S. households have a zero or negative level of wealth.<sup>72</sup> TRAPs and other work-based debt products are a component of the net debt.

An ISA is another example of firms offering training services to workers as credit products. With ISAs, workers receive training and are then expected to pay for it as a percentage of their future salary, rather than as a fixed sum.<sup>73</sup> Yet ISA providers deceptively pitch ISAs to trainees as “free” and “not loans” and frequently include unfair repayment terms in ISAs that exceed the upfront cost of a similar training, while offering minimal useful skills.<sup>74</sup> ISA providers that also operate as staffing agencies have recently introduced hybrid ISAs-TRAPs, where ISA providers hire and then channel trained workers into working for a particular client company whose function is framed as enabling debt repayment.

ISAs are especially common among for-profit computer coding “bootcamps,” many of which have been struggling amid public backlash for overselling the debt products.<sup>75</sup> One firm, Revature, offers six to twelve week computer coding “bootcamps” and then requires trainees to work for any client of Revature’s choosing, regardless of the job’s geographic location and at below-market wages of between \$45,000-\$55,000.<sup>76</sup> Revature also requires trainees to sign promissory notes agreeing that, if trainees do not complete two years with the assigned client firms, they must pay a \$36,500

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<sup>71</sup> Aissa Canchola & Seth Frotman, *The significant impact of student debt on communities of color*, CONSUMER FIN. PROT. BUREAU (Sept. 15, 2016), <https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color/>.

<sup>72</sup> TASHFIA HASAN, ET AL., *DISPARITIES IN DEBT: WHY DEBT IS A DRIVER IN THE RACIAL WEALTH GAP*, ASPEN INST. FIN. SEC. PROGRAM (Feb. 2022), [https://www.aspeninstitute.org/wp-content/uploads/2022/02/FINAL-ASP-FSW\\_Disparities-in-Debt\\_020722-3.pdf](https://www.aspeninstitute.org/wp-content/uploads/2022/02/FINAL-ASP-FSW_Disparities-in-Debt_020722-3.pdf).

<sup>73</sup> I wrote extensively about ISAs in a previous article. See Harris, *supra* note 4, at 766–78.

<sup>74</sup> See Steven Yoder, *Colleges Are Already Ditching Income-Share Agreements*, WIRED (Aug. 12, 2022, 6:00 AM), <https://www.wired.com/story/income-share-agreements-hechinger-report/>; Pyramid Consulting, Inc., FACEBOOK (Jan. 19, 2021), <https://m.facebook.com/PyramidConsultingInc/photos/a.186575324721135/3997489350296361/?type=3> [https://perma.cc/9MAW-V3K7].

<sup>75</sup> See, e.g. Natasha Mascarenhas, *Edtech’s Brightest are Struggling to Pass*, TECHCRUNCH (Dec. 10, 2022, 11:00 AM), <https://techcrunch.com/2022/12/10/some-of-edtech-boldest-are-struggling/>.

<sup>76</sup> See Rindlisbacher, *supra* note 12; How much does an Entry Level Programmer make?, GLASSDOOR, (Dec. 13, 2021), [https://www.glassdoor.com/Salaries/entry-level-programmer-salary-SRCH\\_KO0,22.htm](https://www.glassdoor.com/Salaries/entry-level-programmer-salary-SRCH_KO0,22.htm) (noting that the average market-rate salary for entry-level programmers was \$72,299 in 2021).

“quit fee”—a TRAP.<sup>77</sup> One worker advocate labeled this “quit fee” as indentured servitude.<sup>78</sup> Revature hires recent former trainees as instructors, raising concerns that their promises of quality training are deceptive.<sup>79</sup>

Other firms appear to be taking Revature’s lead in binding workers and trainees to similar multilayered contracts. A coding bootcamp with the coincidental name “Pyramid Academy” has coders contractually commit to at least twelve to eighteen months with a client company, while deceptively advertising that the training is “#freetoyou” and costs “\$0.”<sup>80</sup> If the worker leaves during the commitment period, the trainee must pay the cost of the putative training. Moreover, the contract requires the trainee to be willing to relocate to the assigned job.<sup>81</sup> This hybrid contract combines characteristics of TRAPs and ISAs with those of staffing agencies, as Pyramid Academy’s parent company, Pyramid Consulting, markets itself as an IT staffing agency that prioritizes training for people of color.<sup>82</sup>

Revature and Pyramid’s stacking of TRAPs and ISAs with other contract clauses constitute what Orly Lobel calls a “contract thicket”—multiple contracts and contract clauses that, taken together, are unfair and harm workers in numerous ways.<sup>83</sup>

## 2. Marketing and Operations Management Services

Some firms have decided to wholly avoid the employment model, determining that they can become more profitable by classifying workers as non-employee “franchisees,” altogether shedding their employment

<sup>77</sup> See Rindlisbacher, *supra* note 12.

<sup>78</sup> *Id.*

<sup>79</sup> See *id.*

<sup>80</sup> Pyramid Consulting, Inc., *supra* note 74 (“In order for us to get paid, you have to get paid. Most Bootcamps take your money upfront and don’t need to make you a better #programmer.”); *GenSpark FAQs*, PYRAMID CONSULTING, <https://genspark.net/faq/#1620607112146-1218c51a-a1061625869226245> [<https://perma.cc/EGL9-HKNJ>] (last visited Oct. 2, 2022). Pyramid Academy is in the process of rebranding as “GenSpark” but still operates under the parent company Pyramid Consulting, Inc. See *GenSpark*, PYRAMID CONSULTING, [https://genspark.net/\[https://perma.cc/KC2X-JMP7\]](https://genspark.net/[https://perma.cc/KC2X-JMP7]) (last visited Oct. 2, 2022).

<sup>81</sup> *GenSpark FAQs*, *supra* note 80.

<sup>82</sup> *Why Pyramid Consulting*, PYRAMID CONSULTING, <https://pyramidci.com/corporate-about-us/> [<https://perma.cc/V6MQ-CEJQ>] (last visited Oct. 2, 2022); PYRAMID CONSULTING, DIVERSITY, EQUITY, & INCLUSION: 2022 IMPACT REPORT, [https://pyramidci.com/resources/ebooks/Pyramid\\_DEI\\_ImpactReport.pdf](https://pyramidci.com/resources/ebooks/Pyramid_DEI_ImpactReport.pdf) [<https://perma.cc/Y5VX-L5WF>] (last visited Oct. 2, 2022) (noting that “75% of GenSparkers are from underrepresented groups,” with 55 percent being Black or African American).

<sup>83</sup> See Orly Lobel, *Boilerplate Collusion: Clause Aggregation, Antitrust Law & Contract Governance*, 106 MINN. L. REV. 877, 884–85 (2021).

For the latest draft, visit <https://ssrn.com/abstract=4172535>.

obligations. This Article focuses on the case study of janitorial franchisors that sell marketing and operations management services to those who start janitorial franchises, using debt to keep the worker bound to the franchise model while promising financial freedom through entrepreneurship.<sup>84</sup>

The rise of janitorial franchises is roughly coterminous with the rise of the modern franchise system in the 1960s, with janitorial companies increasingly looking for ways to reduce costs and avoid liability in the mid-1970s.<sup>85</sup> For example, Jani-King International (“Jani-King”), one of the largest janitorial franchising companies, started in the 1960s by hiring janitors directly as employees.<sup>86</sup> In the 1970s, however, Jani-King switched its business model to selling franchises.<sup>87</sup> This switch was supported by contemporaneous high court rulings dismantling antitrust barriers to vertical restraints among firms,<sup>88</sup> freeing the way for a rapid expansion of franchising.

Most janitorial franchises operate on the “master franchise” model, which involves at least three levels of fissuring: a “franchisor,” a “master franchisee,” and multiple “unit franchisees.”<sup>89</sup> The franchisor owns a certain trademark, branding, and business model.<sup>90</sup> It grants territory to the master franchisee.<sup>91</sup> The master franchisee then holds the right to grant franchises in that territory to “unit franchisees”—that is, the individuals who actually perform the cleaning labor.<sup>92</sup> Master franchisees are typically separate corporate entities with their own sets of staff.<sup>93</sup>

Unit franchisees become consumers of master franchisees, as the latter

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<sup>84</sup> See WEIL, *supra* note 6, at 132–42.

<sup>85</sup> See John Dunne, *Run through the Wringer: How Cleaning Industry Franchisors Exploit Franchisees’ Hope for an American Dream*, 47 J. MARSHALL L. REV. 827, 830 (2013). See also *Our History*, MCTF, <http://www.janitorialwatch.org/history/>; Brian Callaci, Control without Responsibility: The Legal Creation of Franchising 1960-1980 (Dec. 2018), <https://equitablegrowth.org/working-papers/control-without-responsibility-the-legal-creation-of-franchising-1960-1980/>; Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, CORNELL L. REV. ONLINE (forthcoming 2022), <https://ssrn.com/abstract=4076274>.

<sup>86</sup> See *Mouanda v. Jani-King Int’l*, No. 2021-SC-0089-DG, 2022 WL 3641175, at \*1 (Ky. Aug. 18, 2022).

<sup>87</sup> See *id.*

<sup>88</sup> See *Continental Television v. GTE Sylvania*, 433 U.S. 36, 54 (1977); Elmore & Griffith, *supra* note 4, at 1358–59 (noting that the U.S. Supreme Court was influenced by Chicago School-initiated intellectual shift toward seeing antitrust law’s primary goal as one of protecting efficiency).

<sup>89</sup> See Dunne, *supra* note 85, at 834.

<sup>90</sup> See *The Franchise Business Model 101 - An Introduction*, FRANCHISE BUS. REV. (Nov. 30, 2018), <https://franchisebusinessreview.com/post/franchise-business-model/>.

<sup>91</sup> See Dunne, *supra* note 85, at 834–35.

<sup>92</sup> See *id.* at 835.

<sup>93</sup> See *Roman v. Jan-Pro Franchising Int’l, Inc.*, No. C 16-05961 WHA, 2022 WL 3046758 at \*2 (N.D. Cal. Aug. 2, 2022).

sell an initial roster of customers, customer service assistance, and billing and invoicing services.<sup>94</sup> Some franchises, like Jani-King, have unit franchisees purchase or lease products from master franchisees.<sup>95</sup> The master franchisees then pay the unit franchisees through that revenue, minus a deduction to be paid to the franchisor.<sup>96</sup> Master franchisees profit by collecting additional fees from unit franchisees, including “management fees” and “sales and marketing fees” for providing marketing and operations management services to unit franchisee consumers.<sup>97</sup> Also, unit franchisees must pay the master franchisee a “franchise fee” in order to secure the rights to operate using the franchisor’s trademark.<sup>98</sup>

These franchising arrangements are frequently unfair and deceptive to unit franchisees because they are pitched according to the “American exceptionalist” narratives of autonomy, self-determination, and self-betterment,<sup>99</sup> but in fact place unit franchisees in crippling debt. Fees paid to master franchisees for services make it such that a so-called “entrepreneur” unit franchisee may not even break even if the gross hourly price for services falls below \$15, which occurs quite frequently.<sup>100</sup>

One unit franchisee’s story illuminates how this debt arises. A.J. Simmons, who worked as a unit franchisee among various janitorial franchisors for six-and-a-half years, has released several videos on YouTube advising people against becoming franchisees because of the UDAPs they will experience.<sup>101</sup> In one video, he explained that the fees collected by the master franchisee alone almost completely erase the profit a unit franchisee could expect.<sup>102</sup> Moreover, the “franchise fee” that janitors are charged to enter into a relationship with a master franchisee and receive a customer roster is typically three to four times the projected monthly gross revenue.<sup>103</sup> For example, for a unit franchisee who seeks a revenue of \$2,000 per month, they can expect to pay a franchise fee of \$6,000 to \$8,000. Because many

<sup>94</sup> See *id.* (citing *Depianti v. Jan-Pro Franchising Int’l, Inc.*, 873 F.3d 21, 23–24 (1st Cir. 2017)).

<sup>95</sup> See *Mouanda v. Jani-King Int’l*, No. 2021-SC-0089-DG, 2022 WL 3641175, at \*1 (Ky. Aug. 18, 2022).

<sup>96</sup> See *Roman*, at \*2.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at \*2 n.2.

<sup>99</sup> Petroziello, *supra* note 5.

<sup>100</sup> See WEIL, *supra* note 6, at 140. See generally Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-wage Service Occupations? Evidence from Janitors and Guards*, 63 INDUS. & LAB. RELS. REV. 287, 287–306 (2010).

<sup>101</sup> A.J. Simmons, *Exposing Jan-Pro, Jani-King, Coverall, Vanguard Cleaning, 360 Clean, Anago Cleaning Franchise*, YOUTUBE (Dec. 6, 2021), [https://www.youtube.com/watch?v=rfFDbB8jnhc&ab\\_channel=AJSIMMONS](https://www.youtube.com/watch?v=rfFDbB8jnhc&ab_channel=AJSIMMONS).

<sup>102</sup> *Id.* at 3:30–4:00.

<sup>103</sup> *Id.*

low-wage workers do not have that amount of money up front, most janitorial franchises offer credit products to finance the up-front cost with loans that have up to a 10 percent interest rate.<sup>104</sup> The debt makes it even harder for janitors to earn a profit from their franchise. Simmons regarded the system these franchises use as exploitative and pointed out the racial disparity between the majority Black and Latinx janitor franchisees and the majority white master franchisees.<sup>105</sup>

Indeed, franchises are typically marketed to low-wage earners—often immigrants—as an opportunity to run one’s own business with the added assurance of guaranteed customers, support and financing.<sup>106</sup> For example, Gerardo Vazquez described seeing an advertisement for Jan-Pro, another janitorial franchisor, proclaiming that franchisees could own a franchise for as low as \$950 per month, and receive \$5,000 to \$200,000 annually in business.<sup>107</sup> Vazquez contacted a Jan-Pro master franchisee representative to become a unit franchisee and agreed to pay \$5,000 up front, plus another \$4,000 he would pay back in monthly installments through financing, for a total investment of \$9,000.<sup>108</sup> Such a plan promised an annual income of \$20,000.<sup>109</sup> Vazquez borrowed the \$5,000 from his parents, both of whom were from Mexico and moved to the U.S. to escape poverty.<sup>110</sup> The master franchisee representative told Vazquez he would earn about \$25 per hour.<sup>111</sup> When Vazquez started working, however, he realized he was making about \$5.00 per hour.<sup>112</sup> At the time, the federal minimum wage was \$5.85 per hour, and the state minimum wage was \$7.50 per hour.<sup>113</sup>

Karen Miller, a former master franchisee in Michigan, provided a view into the unit franchisee recruitment process from a master franchisee’s perspective.<sup>114</sup> She explained how, when recruits like Vazquez came into her office, she spoke from a basic script handed down to her from the franchisor.<sup>115</sup> Miller confirmed that oftentimes, the fact that many fees will

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<sup>104</sup> *Id.* at 4:15-4:45.

<sup>105</sup> *Id.*

<sup>106</sup> See David H. Seligman, Testimony Before the United States Senate Committee on Banking, Housing, and Urban Affairs 3–4, 8–9 (Sept. 13, 2022), <https://www.banking.senate.gov/imo/media/doc/Seligman%20Testimony%209-13-22.pdf>.

<sup>107</sup> Marketplace, Congratulations! You’re an entrepreneur now 8–9 (Feb. 3, 2021) (transcript available at <https://www.marketplace.org/wp-content/uploads/2021/04/TIU-S5E1-Transcript.pdf>).

<sup>108</sup> *Id.* at 9.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 11.

<sup>111</sup> *Id.* at 9–10.

<sup>112</sup> *Id.* at 3.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 6-9.

<sup>115</sup> *Id.* at 7.

be deducted from a unit franchisee's "gross income" goes unmentioned in these meetings.<sup>116</sup> This script, however, included references to the above-described narrative that the recruit would enjoy freedom and stability as a franchisee, and that unit franchisees were "[going to] be business owners and . . . grow and thrive."<sup>117</sup>

### 3. Job Matching and Placement Services

Staffing agencies frequently deploy unfair and deceptive tactics when offering job matching and placement services to temporary workers. Some staffing agencies charge workers fees for their placement services, which are regulated by state law.<sup>118</sup> Other agencies do not directly charge workers fees for their job placement services but still treat workers as consumers of those services by indirectly charging workers through, for example, robust wage markups—often by 50 to 70 percent—that create large gaps between what a client firm pays the staffing agency and what the worker receives as pay.<sup>119</sup>

Today, another example of firms offloading job matching and placement costs onto workers are "conversion fees" that staffing agencies charge their client firms for "converting" a temporary worker to a direct hire. The contentions in this Article are based on a review of over 70 contracts between staffing agencies and user firms.<sup>120</sup> Conversion fees often hover between 30 and 35 percent of a worker's annual pay, but sometimes reach as high as 50 percent.<sup>121</sup> The fees, however, are contained in hidden contracts that the worker never sees and are often set at levels that make it economically impracticable for the client firm to hire the worker directly.<sup>122</sup> This often leave workers in, as Erin Hatton describes it, "permatemp" status.<sup>123</sup>

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<sup>116</sup> *Id.* at 9.

<sup>117</sup> *See id.* at 7.

<sup>118</sup> *See, e.g.,* CAL. CIV. CODE § 1812.505.

<sup>119</sup> Contracts on file with author. *See* George Gonos, "Never a Fee!:" *The Miracle of the Postmodern Temporary Help and Staffing Agency*, 4 WORKINGUSA 9, 11–12, 20 (2000) (noting that temp and contract workers see the difference between what they receive and what the staffing agency charges the client firm as a "hefty fee skimmed off by an intermediary . . .").

<sup>120</sup> Most of these contracts were compiled by Jane Flanagan and Chris Schwartz. *See generally* Flanagan, *supra* note 15, at 253–60 (providing more detailed analysis of temporary staffing agency contracts).

<sup>121</sup> Contracts on file with author.

<sup>122</sup> *See id.*; TEMP WORKER JUSTICE, ET AL., *supra* note 15, at 12 (noting that 72 percent of surveyed temporary workers reported that they were never directly hired to a permanent position after they began as a temporary worker).

<sup>123</sup> *See* ERIN HATTON, THE TEMP ECONOMY: FROM KELLY GIRLS TO PERMATEMPs IN POSTWAR AMERICA 120 (2011) (describing temporary workers at Microsoft who worked side-by-side with "real" employees for years).



Meanwhile, staffing agencies tell the workers that their job placement services are “temp to perm” or “temp to hire,” and that the client firm will eventually hire the worker directly.<sup>124</sup> In other words, many temps stay temps much longer than they otherwise would because of promises of direct hiring.

Labor intermediaries providing job matching and placement services are ubiquitous, as employers have massively expanded their use of contingent labor in the U.S. since the 1970s.<sup>125</sup> Scholars have extensively documented this rise.<sup>126</sup> In essence, the staffing agencies profit by marking up substantially the hourly rates for labor. Those “markups” are closely guarded secrets and workers rarely learn their own markup when receiving job placement services.<sup>127</sup>

In some sectors like logistics and warehousing, contingent work now predominates, with staffing agencies acting as intermediaries between workers and firms.<sup>128</sup> Entire “temp towns” have arisen out of deserts and industrial zones, staffed by temporary employees who are predominantly immigrants and people of color.<sup>129</sup> Higher paying sectors like technology also

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<sup>124</sup> See TEMP WORKER JUSTICE, ET AL., *supra* note 15, at 7 (remarking that 18 percent of surveyed temporary workers reported that their current temporary assignment had lasted over two years); Harris Freeman & George Gonos, *Taming the Employment Sharks*, 13 EMP. RTS. & EMP. POL’Y J. 285, 298–99 (2009). Cf. *Choosing a Nurse Staffing Agency in 2021*, HEALTH CAROUSEL (Jun. 21, 2021), <https://www.healthcarousel.com/post/nurse-staffing-agency> [<https://perma.cc/F5G6-2CKW>] (advertising staffing agency “temp-to-perm” nursing jobs). Under the at-will employment regime in the U.S., of course, most jobs are not “permanent,” or indefinite, unless the parties have contracted to such an arrangement.

<sup>125</sup> See STONE, *supra* note 3, at 4, 86 (noting that firm managers’ responsiveness to market pressures “involves just-in-time production, just-in-time product design, and just-in-time workers.”).

<sup>126</sup> See generally HATTON, *supra* note 123; Gonos *supra* note 119; Freeman & Gonos, *supra* note 124; George Gonos, *Fee-Splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship*, 29 POL. & SOC’Y 589 (2001) [hereinafter Gonos, *Fee-Splitting*]; George Gonos, *The Contest over “Employer” Status in the Postwar United States: The Case of Temporary Help Firms*, 31 L. & SOC’Y REV. 81 (1997); Harris Freeman & George Gonos, *The Commercial Temp Agency, the Union Hiring Hall, and the Contingent Workforce: Toward a Legal Reclassification of For-Profit Labor Market Intermediaries*, in JUSTICE ON THE JOB: PERSPECTIVES ON THE EROSION OF COLLECTIVE BARGAINING IN THE UNITED STATES, (Richard N. Block et al., eds., 2006).

<sup>127</sup> See generally Gonos, *Fee-Splitting*, *supra* note 126. See, e.g., Brief of Harris Freeman & George Gonos as Amici Curiae Supporting Petitioner, *Browning-Ferris Indus. of Cal. Inc. v. Sanitary Truck Drivers*, NLRB RC-109684, 15, n. 44 (2014) (describing 45 percent wage markup in contract between staffing agency and waste management company).

<sup>128</sup> See HATTON, *supra* note 123, at 115–16 (describing warehouses where temporary workers repackage Nike shoes); John Lippert & Stephen Franklin, *The Warehouse Archipelago*, AMERICAN PROSPECT (Aug. 9, 2021), <https://prospect.org/api/content/359da8ea-f6f6-11eb-bb77-1244d5f7c7c6/> (describing temporary workers in U.S. logistics sector).

<sup>129</sup> See Flanagan, *supra* note 15, at 259–60.

use temporary labor extensively, with companies like Google hiring more temporary workers through staffing agencies than direct employees.<sup>130</sup> Many workers labor for years as temporary employees of subcontracted staffing agencies and, according to one study, only about seven percent ever become directly hired by the client firm.<sup>131</sup> In a 2022 survey of 1,337 temporary workers, 35 percent of respondents reported that they remained temporary in their current position for over a year; that number rose to 44 percent for Latinx workers, showing the racially disparate effects of perma-temping.<sup>132</sup>

Worker advocates have thus taken to calling conversion fees “bondage fees,” to more accurately reflect the ways that the fees keep workers trapped in perpetual temporary status.<sup>133</sup> Conversion fee provisions are often bundled with other contractual clauses that extend the restrictions to affiliates of the user firm’s network and prohibit user firms from obtaining the same worker through a competing staffing agency.<sup>134</sup>

All of this happens in hidden contracts between the staffing agency and user firm, without the knowledge of the worker using the staffing agency’s job matching services.<sup>135</sup> The only contracts that workers are aware of are those they sign with the staffing agency for job placement services. In fact, a survey of temporary workers showed that only 14 percent knew that their staffing agency erected a barrier to being directly hired by the client firm.<sup>136</sup>

It has been difficult to examine temporary staffing agency contracts with user firms because they are usually included in contracts between private

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<sup>130</sup> See Lippert & Franklin, *supra* note 128; TEHEQUITY COLLABORATIVE, CONTRACT WORKER DISPARITY PROJECT: SHINING A LIGHT ON TECH’S SHADOW WORKFORCE (Jan. 2022), <https://tehequitycollaborative.org/wp-content/uploads/2022/01/Summary-Report-Contract-Worker-Disparity-Project.pdf>.

<sup>131</sup> Susan Houseman & Carolyn Heinrich, *The Nature and Role of Temporary Help Work in the U.S. Economy*, 23 EMP. RSCH. NEWSL. 1, 3 (2016), [https://research.upjohn.org/cgi/viewcontent.cgi?article=1241&context=empl\\_research](https://research.upjohn.org/cgi/viewcontent.cgi?article=1241&context=empl_research).

<sup>132</sup> TEMP WORKER JUSTICE, ET AL., *supra* note 15, at 13.

<sup>133</sup> *Id.* at 12–13.

<sup>134</sup> See David H. Seligman, *Having Their Cake and Eating it Too*, Harv. Labor and Worklife Program (June 2018), [https://lwp.law.harvard.edu/files/lwp/files/webpage\\_materials\\_papers\\_seligman\\_june\\_13\\_2018.pdf](https://lwp.law.harvard.edu/files/lwp/files/webpage_materials_papers_seligman_june_13_2018.pdf).

<sup>135</sup> I do not believe that staffing agencies should cease to exist. Labor intermediaries like staffing agencies play an important role in the economy, especially for firms that need immediate labor and intend to hire directly shortly thereafter. Instead, this Article highlights the problems of firms whose business models are based on fissured labor.

<sup>136</sup> TEMP WORKER JUSTICE, ET AL., *supra* note 15, at 13. As one staffing agency writes on its website, “[t]he best staffing agencies put a lot of time and effort into recruiting and keeping great talent, and there could be hefty ‘conversion fees’ that are designed to deter, not encourage, what they see as poaching their most important assets.” *Trial Period for Employees? Consider Temp to Perm*, MASIS STAFFING SOLUTIONS (Jun. 10, 2021), <https://masisstaffing.com/consider-temp-to-perm> [<https://perma.cc/L8M5-8CQH>].



parties and thus hidden from public view, including from the very workers using the agencies' job placement services.<sup>137</sup> What results, then, is speculation that the worst versions of these arrangements are yet to be discovered, absent a leak or whistleblower.

## II. CONSUMER LAW AS WORK LAW

Contract and employment law once presented relatively comprehensive legal regimes governing workplace relations. But over the past several decades, firms have successfully attenuated their relationships with, and responsibility for, workers in ways that track narratives of autonomy, freedom of contract, self-determination, and self-betterment. In so doing, firms have also begun to take on various service-providing roles as they seek ways to both control workers and reduce their liability for employment law violations. Meanwhile, the laws designed to regulate the older workplace model of internal labor markets and long-term jobs now leave gaps that many of today's workers fall through. As the old employer-employee relationship breaks down in many sectors, so too do the legal regimes that govern it. Workers must turn to additional legal regimes to fill those gaps, some of which, like consumer law, already reflect many workers' overlapping identity as that of a hiring firm's consumer. As workers become worker-consumers, in other words, consumer law becomes work law.

### A. *The Limits of Contract and Employment Law for Today's Workers*

For each the above-discussed services and credit products with one-sided terms that firms offer workers, both contract and employment law, respectively, reveal their limitations in offering legal recourse for workers.<sup>138</sup> This is often the case because firms exploit formal distinctions in contract and employment law to evade liability for arrangements that harm workers.

#### 1. Contract Law's Limitations

Contract law takes as its starting point the assumption that parties are engaged in arms-length transactions with relatively equal access to information. This legal fiction, however, has shown its inapplicability in

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<sup>137</sup> *But see* Orly Lobel, *The Law of AI for Good* 37 (Sept. 26, 2022) (manuscript on file with author) (noting that governments are using algorithms to uncover harmful consumer contract terms).

<sup>138</sup> Contract law does provide some recourse to workers under TRAPs, however, as discussed in my prior article on unconscionability as a triage approach to overly one-sided TRAPs. *See Harris, supra* note 4.

work relationships, in which the firm holds a tremendous amount of bargaining power vis-à-vis an individual worker.<sup>139</sup> Therefore, work relationships generally present a greater risk of abuse than most commercial transactions.<sup>140</sup> In addition, a worker is generally dependent on their employer for their livelihood: income, health care, old-age care, immigration status, and other needs.<sup>141</sup> This makes the worker more dependent on the firm than the firm is on any individual worker. Last, the firm is generally privy to more information than the worker, which gives the firm leverage in bargaining. This combination of information asymmetry and structural bargaining power asymmetry is what make workers particularly susceptible to firms' UDAPs.<sup>142</sup>

Yet, in workplace litigation, courts continue applying standard contract law principles and assumptions, predictably leading to greater losses for workers when challenging firm contracting practices.<sup>143</sup>

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<sup>139</sup> 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, 963–64 (2006).

<sup>140</sup> See *id.* (internal citations omitted) (“Workers are like consumers, the prototypical weaker party in commercial transactions, only more so . . . . For this reason, the law of employment contracts is replete with allusions to the risks of exploitation and overreaching by firms . . . .”); Cf. Rachel Arnow-Richman & J.H. Verkerke, *Deconstructing Employment Contract Law*, 75 U. FLA. L. REV. \_\_, 3 (forthcoming 2022), <https://ssrn.com/abstract=4246975> (“[C]ontract law is an inherently limited tool because employers have the power to unilaterally dictate and draft the terms of the relationship.”).

<sup>141</sup> See Aditi Bagchi, *Lowering the Stakes of the Employment Contract*, 102 BOS. U. L. REV. 1185, 1202–07 (2022) (explaining how employers in the U.S. wield extensive control over their employees’ lives because of their provision of health care, making the U.S. much different than most other industrialized countries); Lobel, *supra* note 8, at 69–71 (proposing delinking from employment social welfare benefits like health care, unemployment, and worker compensation); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U. CALIF. IRVINE L. REV. 381, 390 (2012) (citing 8 U.S.C. § 1182(a)(9)(B)) (explaining that, when an employer ends the employment of a noncitizen in the U.S. on an employment visa, the worker becomes unlawfully present and subject to deportation).

<sup>142</sup> Cf. Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber’s Drivers*, 10 INT’L J. OF COMM’N. 3758, 3759, 3761, 3775 (2016) (asserting that information asymmetries between Uber and its drivers, such as pricing and driving rating algorithms, allow Uber to unfairly exert significant indirect control over drivers, despite telling drivers they have “total control”).

<sup>143</sup> This is not to say, however, that contract law principles are wholly useless to workers. There is a growing body of legal scholarship examining the benefits of courts considering the negative externalities of contracts. See David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 988 (2021) (writing that “there is a relatively nascent literature on the externalities of contracts”); Sarah Dadush, *Making Relational Contracts More Relational*, 85 L. & CONTEMP. PROBS. 153, 153–75 (2022). Scholars have

The legal fictions that form the basis of contract law in the workplace start from the very foundation of the employment relationship: “at-will” employment.<sup>144</sup> This is the principle that either party in the employment contract is at liberty to end the contract for a good reason, bad reason, or no reason at all.<sup>145</sup>

As Rachel Arnow-Richman and J.H. Verkerke have argued, however, the employment at-will presumption does not comport with contract doctrinal principles: “an agreement terminable at will lacks consideration because the parties’ promises would, as a result, be illusory.”<sup>146</sup> Therefore, they assert, contract law principles are distorted when applied in the employment context.<sup>147</sup> This argument parallels Cynthia Estlund’s assertion that U.S. labor law—namely the National Labor Relations Act (“NLRA”)—is “ossified,” or frozen in time, and thus largely ineffectual.<sup>148</sup> Likewise, ossified contract law as applied in the workplace has also become ineffectual.

Contract realists like Robert Hale have even questioned the very nature of consent in contract law when it comes to the work relationship.<sup>149</sup> And freedom of contract principles enunciated in seminal cases like *Lochner v. New York* still resonate among courts in workplace contract disputes.<sup>150</sup>

Another shortcoming of contract law in the fissured workplace is that contract law takes a party-primacy approach. This means that nonparties to a

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also argued for tort law reforms that require contracting firms to internalize the negative externalities that they impose on third party stakeholders. *See generally* Kish Parella, *Contractual Stakeholderism*, 102 BOS. U. L. REV. 865 (2022); Kish Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L. J. 327 (2021); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 47–54 (2010) (proposing a tort theory of third-party liability for wage theft, when indirect employers set their rates well below market rate, knowing that subcontractors will make up the shortfall by paying their workers subminimum wages).

<sup>144</sup> *See* Matthew T. Bodie, *The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy*, 2017 U. ILL. L. REV. 223, 224–32 (2017).

<sup>145</sup> *See* William R. Corbett, *Finding A Better Way Around Employment at Will: Protecting Employees’ Autonomy Interests Through Tort Law*, 66 BUFFALO L. REV. 1071, 1074 (2018).

<sup>146</sup> Arnow-Richman & Verkerke, *supra* note 140, at 61 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 96 (1960)).

<sup>147</sup> *See id.* at 32.

<sup>148</sup> Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1530 (2002).

<sup>149</sup> *See, e.g.,* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943).

<sup>150</sup> *Lochner v. New York*, 198 U.S. 45 (1905). *See* JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION: RECONSTRUCTING THE ECONOMIC FOUNDATIONS OF AMERICAN DEMOCRACY* 18–21, 361–62 (2022) (noting that firms have been more successful of late in convincing courts to apply neo-*Lochnerian* approaches).

contract who are affected by that contract generally have no right to intervene in the contract's creation or execution, or in disputes over the contract. One exception to this party-primacy doctrine is if the contract provision can be shown to violate public policy or some legally protected interest external to contract law.<sup>151</sup> Otherwise, common law contract principles typically provide little leverage for nonparties to a contract.<sup>152</sup> For example, since temporary workers are not parties to contracts between staffing agencies and their client firms, they have no standing to challenge those agreements even though their fates are inextricably linked to them.<sup>153</sup> Indeed, nothing in contract law requires that workers be notified of the very existence of such contracts that contain conversion fees, large wage markups, and other provisions that may harm the workers.<sup>154</sup>

## 2. Employment Law's Limitations

Employment law also has not kept pace with firms burying terms in contracts with workers or with labor intermediaries that harm workers in ways not tolerated under other legal regimes like consumer law. Moreover, most employment law covers only formal employees, and misclassification

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<sup>151</sup> Labor law, for example, provides an exception to the general principal, under joint employer approaches to collective bargaining. Once joint employment is established, access to these contracts is available in NLRA unfair labor practice adjudication and in information requests as part of collective bargaining obligations. See Robert Iafolla, *One Job, Many Bosses: Joint Employers and Labor Law, Explained*, BLOOMBERG L. (Sept. 8, 2022, 2:30 AM), <https://news.bloomberglaw.com/daily-labor-report/one-job-many-bosses-joint-employers-and-labor-law-explained?context=article-related>.

<sup>152</sup> But see Omri Ben-Shahar et al., *Nonparty Interests in Contract Law*, U. PA. L. REV. (forthcoming 2022), <https://papers.ssrn.com/abstract=4038584> (arguing that certain “nonparty defaults” endogenous to contract law allow courts to consider interests external to those of the contracting parties).

<sup>153</sup> Third party beneficiary doctrine provides causes of action to enforce contracts only to “intended beneficiaries,” not “incidental beneficiaries.” RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. L. INST. 1981). And arrangements between staffing agencies and user firms often do not even incidentally benefit workers; instead, they can harm workers when deceptively advertised as “temp to perm” positions.

<sup>154</sup> This is true even though some state courts have recognized that staffing agency contracts with client firms that contain no-hire provisions function as noncompete agreements for temp workers. See *Heyde Companies, Inc. v. Dove Healthcare*, 654 N.W.2d 830, 834 (Wis. 2002) (“No-hire provision[s] agreed to by employers that restrict . . . the employment opportunities of employees without their knowledge and consent constitute . . . an unreasonable restraint of trade.”); *Pittsburgh Logistics Sys., Inc. v. Beemac Trucking, LLC*, 249 A.3d 918, 936 (Pa. 2021) (declining to enforce a no-hire agreement because, in part, “[t]he no-hire provision impairs the employment opportunities and job mobility of [the staffing agency’s] employees, who are not parties to the contract, without their knowledge or consent and without providing consideration in exchange for this impairment.”).

of workers as non-employees is rampant. While workers have challenged firms' UDAPs in TRAPs, ISAs, franchising, and permatemping under employment laws like state and federal wage and hour law and noncompete law, workers have largely failed because those laws were generally not designed with these sorts of harmful contractual arrangements in mind. Indeed, just as U.S. labor law has become ossified and largely ineffectual, so too has an ossified employment law shown its inability to protect some workers in fissured workplaces.<sup>155</sup>

For instance, historically, workers have primarily challenged TRAPs under the Fair Labor Standards Act ("FLSA").<sup>156</sup> 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.<sup>157</sup> The rule is meant to keep an employer from requiring workers to cover expenses that primarily benefit the employer.<sup>158</sup> Congress enacted it, in part, to separate employment from consumer transactions by banning paying workers in company store scrip.<sup>159</sup> FLSA does not ban employer loans or advances, however, and some courts have characterized TRAPs as permissible loans or advances.<sup>160</sup> In any case, FLSA has largely failed to protect workers challenging TRAPs because courts have more often found the TRAPs to not constitute unlawful kickbacks.<sup>161</sup> Instead, employers usually successfully frame a TRAP's so-called "training" as being for the benefit of the employee rather than the employer, therefore not comprising a job-related expense reimbursable under FLSA.

As for the rest of the fissured workplace, firms have successfully

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<sup>155</sup> See Estlund, *supra* at note 148.

<sup>156</sup> 29 U.S.C. §§ 201–219.

<sup>157</sup> 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."). See, e.g., *City of Oakland v. Hassey*, 78 Cal. Rptr. 3d 621, 631–34 (Cal. Ct. App. 2008) (upholding a TRAP against a FLSA challenge claiming that wages were not paid "free and clear").

<sup>158</sup> 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").

<sup>159</sup> See STEINFELD, *supra* note 22.

<sup>160</sup> See, e.g., *Gordon v. City of Oakland*, 627 F.3d 1092, 1096 (9th Cir. 2010) (ruling that the TRAP was "a voluntarily accepted loan, not a [FLSA] kick-back.>").

<sup>161</sup> See, e.g., *id.*; *Harris*, *supra* note 4, at 732–50; *Park v. FDM Group (Holdings) PLC*, 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) (under FLSA anti-kickback challenge, ruling that TRAP repayment amount was not "a deduction . . . for tools used or costs incurred in the course of Plaintiff's performance of her job").

exploited hard distinctions in employment law status classifications of “employee” versus “independent contractor” or “franchisee” that do not reflect many modern labor markets.<sup>162</sup> For instance, other than the staffing agencies that use the hybrid ISA-TRAPs, most ISA providers are not employers per-se.<sup>163</sup> Employment laws thus do not apply to the trainee-ISA provider relationship in most instances. Likewise, federal and most state employment laws do not protect franchisees or independent contractors. To be clear, many so-called franchisees and independent contractors should be reclassified as employees and efforts are underway in many jurisdictions to do so.<sup>164</sup> But those challenges are difficult in many jurisdictions because the tests used do not fully contemplate modern fissured workplaces and, in any case, the cases are rare and government agencies lack capacity for robust enforcement against misclassification.<sup>165</sup> Until employer misclassification remediation is achieved on a large scale, traditional employment law will generally be unavailable to statutory nonemployees like franchisees and independent contractors.

### *B. The Rising Use of Consumer Law as Work Law*

The recent resurgence of using consumer law, particularly UDAP law, to protect workers points the way for a broader application of such laws to work relationships. Under UDAP law, “consumers” include those who “obtain[] credit, goods, real property, or services for personal, family, or household purposes.”<sup>166</sup> In turn, workers are “consumers” under this definition when firms offer the sorts of services and credit products described in this Article. Consumer law should thus regulate those transactions in the way that it would in ordinary arms-length transactions. In other words, there is no reason to deny workers access to an additional legal regime—consumer law—just because they happen to be at risk of more coercive tactics than the ordinary

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<sup>162</sup> Cf. Zatz, *supra* note 4, at 280–82 (“The root of the problem is that refinements to the employee/independent contractor distinction fail to confront employers’ power to shape their business practices to substitute contracting for employment and thereby reduce the threat of unionization.”).

<sup>163</sup> See Harris, *supra* note 4, at 766–78.

<sup>164</sup> See *id.* at 280 (“Simply policing employers’ post hoc misclassification of employees as independent contractors misses th[e] dynamic” of employers shaping their business practices to avoid unionization).

<sup>165</sup> See generally Terri Gerstein & LiJia Gong, *The Role of Local Government in Protecting Workers’ Rights*, ECON. POL’Y INST., (June 13, 2022), <https://www.epi.org/publication/the-role-of-local-government-in-protecting-workers-rights-a-comprehensive-overview-of-the-ways-that-cities-counties-and-other-localities-are-taking-action-on-behalf-of-working-people/>.

<sup>166</sup> See, e.g., *Consumer Law*, *supra* note 16.

For the latest draft, visit <https://ssrn.com/abstract=4172535>.



consumer. If anything, the peculiar risk of coercion in work relationships merits protections for workers from multiple legal regimes. In addition, consumer law causes of action reap immediate benefits for workers whose firms classify them as nonemployees, without having to embark on the costly and uncertain endeavor of proving misclassification.<sup>167</sup>

Workers and consumers share many traits and have witnessed similar fissuring in their relations with firms that use workers' labor and produce consumer goods and services, respectively. Fissuring involves efforts by firms to absolve themselves of liability for wrongs committed against workers and consumers; mandatory arbitration with class waivers is one example of this. In recent years, U.S. courts have determined that rules of federalism require that both workers and consumers resolve disputes with firms through individual arbitration if they are parties to mandatory arbitration agreements with class waivers.<sup>168</sup> But there are many other ways that firms are fissuring work.<sup>169</sup> When industrial production caused fissuring of relations between consumers and producers a century ago, governments stepped in to regulate those relations.<sup>170</sup>

The more recent movement of firms fissuring their relations with workers—from reclassifying employees as independent contractors and franchisees to “temping” out work—requires a similar approach in work law to that taken in consumer law. At the same time that firms are pulling back from committing to workers through internal labor markets and long-term employment, they are also looking for ways to contractually shift more costs onto workers and even frame those workers as customers themselves. For example, more firms using labor—sometimes as formal employers—are both training providers and staffing agencies.<sup>171</sup> The potential for abuse in these new contracting schemes with workers requires the application of a hybrid doctrinal approach. Such an approach would utilize traditional employment and contract law where appropriate, but also compliment those doctrines with consumer law, which was enacted, in part, to address firms' disregard of consumer safety through fissuring of consumer supply chains.

Workers and trainees may turn to federal, state, and municipal UDAP laws to escape harmful contract terms, freeing themselves from economic subordination to the employer using a TRAP, the ISA training provider, the

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<sup>167</sup> See Block, *supra* note 21.

<sup>168</sup> See Lucas Clover Alcolea, *Federalism and the Arbitration of Consumer and Employment Disputes in the US and Canada: The Road Not Taken?*, 60 ALTA. L. REV. (forthcoming 2023) (noting that Canadian law has taken the opposite approach, rejecting firms' attempts to enforce mandatory arbitration contracts against workers and consumers).

<sup>169</sup> See *supra* Part I.

<sup>170</sup> See *supra* note 17 and accompanying text.

<sup>171</sup> See *supra* Part I.B.2.

franchisor, and the staffing agency. Specifically, workers and their advocates can use the FTC Act,<sup>172</sup> Title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (“CFPA”),<sup>173</sup> the Fair Credit Reporting Act (“FCRA”),<sup>174</sup> the Truth in Lending Act (“TILA”),<sup>175</sup> the Equal Credit Opportunity Act (“ECOA”),<sup>176</sup> and state and municipal UDAP laws,<sup>177</sup> among other consumer laws.

Viewing workers as consumers is not new.<sup>178</sup> Likewise, a lengthy history of government agencies and workers using consumer law to curtail UDAPs among employers and job training providers exhibits ample precedent to support the more recent agency actions and litigation described in this Part. Since the 1930s, the FTC has exercised its authority under Section 5 of the FTC Act to pursue firms that deceive workers and trainees. Correspondence schools falsely promising robust training, jobs, or affiliations with government agencies and institutions of higher education were frequent FTC targets through the 1960s.<sup>179</sup> Moreover, workforce development boards—quasi-governmental agencies that provide publicly-funded job training and job placement services—have long called individuals they serve “consumers” and “customers.”<sup>180</sup> After the 1960s, FTC action against

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<sup>172</sup> 15 U.S.C. §§ 41–58.

<sup>173</sup> 12 U.S.C. § 5301, §§ 5481–5603.

<sup>174</sup> 15 U.S.C. § 1681 *et seq.*

<sup>175</sup> 15 U.S.C. §1601–1667f.

<sup>176</sup> 15 U.S.C. 1691 *et seq.*

<sup>177</sup> See Pridgen, *supra* note 19, at 914 (describing how the FTC disseminated among the states “little FTC Act,” adopted by 20 states, using the UDAP language of the FTC Act, but containing a private right of action and mechanisms for state enforcement); Adam Zimmerman, *Federal Agencies in the Statehouse*, 18, 36 (manuscript on file with author).

<sup>178</sup> See, e.g., Dubal, *supra* note 8 (citing BOLTANSKI & CHIAPELLO, *supra* note 8 at 80–81) (explaining that, between the 1930s and 1960s, large, industrial firms “accepted their social and economic responsibility to workers, whose lives, because workers were understood also as consumers, were inextricably tied to that of the firm.”).

<sup>179</sup> See, e.g., Fed. Trade Comm’n v. Civil Serv. Training Bureau, Inc., 79 F.2d 113 (6th Cir. 1935) (upholding an FTC order against a correspondence school for UDAPs by, *inter alia*, posing as a government agency and implying it could obtain government jobs for trainees); De Forest’s Training, Inc. v. Fed. Trade Comm’n, 134 F.2d 819, 820-21 (7th Cir. 1943) (declaring FTC had jurisdiction to pursue correspondence school using UDAPs to target trainees in Latin America, including misleading trainees that it was an accredited university); Tractor Training Serv. v. Fed. Trade Comm’n, 227 F.2d 420, 422, 425 (9th Cir. 1955) (upholding FTC cease and desist order for falsifying job prospects for trainees enrolled in correspondence school); Goodman v. Fed. Trade Comm’n, 244 F.2d 584, 592-93 (9th Cir. 1957) (same); Rushing v. Fed. Trade Comm’n, 320 F.2d 280, 281 (5th Cir. 1963) (same).

<sup>180</sup> See 20 C.F.R. § 679.380 (2021) (“How does the Local Workforce Development Board satisfy the consumer choice requirements for career services and training services?”); Rachel Tropp, *What is Workforce Development?*, WORK FIRST (Oct. 22, 2020), <https://www.theworkfirstfoundation.org/blog/2020/10/22/what-is-workforce-development>



UDAPs began to cool when pro-business policymakers largely took over the agency.<sup>181</sup> Those policymakers adopted the “consumer welfare” standard and focused exclusively on whether end-user consumers were harmed through higher prices.<sup>182</sup>

But in the past decade, federal, state, and municipal agencies charged with protecting consumers have begun recognizing the absence of workplace regulation created by firms’ modern employment practices and using their enforcement authority to regulate the workplace when firms offer services and credit products to workers. Workers themselves have done the same, using their private right of action under state UDAP laws to directly challenge firms’ harmful practices.

### 1. Federal Consumer Law

Several federal laws can be used to protect worker-consumers, including the FTC Act,<sup>183</sup> CFPA,<sup>184</sup> FCRA,<sup>185</sup> TILA,<sup>186</sup> and ECOA.<sup>187</sup> First, the FTC holds tremendous authority to end UDAPs in the workplace. Section 5 of the FTC Act prohibits “unfair methods of competition in or affecting commerce.”<sup>188</sup> A trade practice is “unfair” if it “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”<sup>189</sup> According to Luke Herrine, Section 5’s

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<https://perma.cc/DEZ2-3DSW> (“[W]orkforce development intermediaries . . . use a *dual customer approach*, in which we simultaneously work with clients to improve job search and employment skills, provide support services, and create connections to employment, while also working with employers and businesses . . . .”) (emphasis in original).

<sup>181</sup> See Luke Herrine, *The Folklore of Unfairness*, 96 N.Y. U. L. REV. 431, 491–502, 515 (2021).

<sup>182</sup> See Hiba Hafiz, *Labor Antitrust’s Paradox*, 86 U. CHI. L. REV. 381, 382–84 (2020); Douglas H. Ginsburg, *Judge Bork, Consumer Welfare, and Antitrust Law*, 31 HARV. J. L. & PUB. POL’Y 449, 450–52 (2008); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

<sup>183</sup> 15 U.S.C. §§ 41–58.

<sup>184</sup> 12 U.S.C. § 5301, §§ 5481–5603.

<sup>185</sup> 15 U.S.C. § 1681 *et seq.*

<sup>186</sup> 15 U.S.C. § 1601–1667f.

<sup>187</sup> 15 U.S.C. 1691 *et seq.*

<sup>188</sup> 15 U.S.C. § 45(a)(1). The FTC has recently clarified that Section 5 extends past the Sherman Act, 15 U.S.C. § 1, *et seq.*, and the Clayton Act, 15 U.S.C. § 12, *et seq.*, “to encompass various types of unfair conduct that tend to negatively affect competitive conditions.” FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 1 (Nov. 10, 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/p221202sec5enforcementpolicystatement\\_002.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/p221202sec5enforcementpolicystatement_002.pdf) (internal citations omitted).

<sup>189</sup> 15 U.S.C. § 45(n).

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definition of “unfairness,” and the FTC’s authority to enforce Section 5, are much broader than previously understood, especially as related to UDAPs.<sup>190</sup> A practice is “deceptive” under Section 5 if it involves a material representation, omission, or practice that is likely to mislead.<sup>191</sup>

Specifically, the FTC could enforce Section 5’s expansive definitions of “unfair” and “deceptive” to rein in contract terms that harm worker-consumers, like TRAPs and ISAs, predatory franchising, and staffing arrangements with onerous and hidden conversion fees. The FTC has already begun doing so, proposing a rule that would ban all noncompetes and “de facto” noncompetes like TRAPs “where the required payment is not reasonably related to the costs the employer incurred for training the worker.”<sup>192</sup> The caveat applying only to TRAPs—rather than a blanket ban of TRAPs—will still permit many overly one-sided TRAPs because employers’ failure to justify repayment amounts is just one of many problems with the contracts. Nonetheless, this proposed rule is a clear signal that the FTC will once again vigorously exercise its authority in labor markets.

Even before the 2023 proposed rule on noncompetes and TRAPs, the FTC made clear that the Section 5’s protections cover not only individual consumers buying goods and services but also worker-consumers like franchisees and gig workers.<sup>193</sup> Moreover, the FTC declared that the FTC Act governs certain business-to-business transactions involving small- to medium-sized businesses.<sup>194</sup> This is particularly important for franchisees whose franchisors label them as “small businesses” rather than employees. Paradoxically, attorneys representing large firms have decried what they call the FTC’s “expansion” into business-to-business transactions,<sup>195</sup> but many of those attorneys may have also guided employers in reclassifying their employees as independent contractors and franchisees to escape liability under traditional employment laws. Consequently, the FTC is simply responding to the modern labor market created by those firms’ own choices.

Aside from rulemaking, the FTC has also used its UDAP enforcement authority under Section 5 to protect worker-consumers, while avoiding sticky issues like employee status that could bog down or even kill litigation under

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<sup>190</sup> See Herrine, *supra* note 181, at 438–39.

<sup>191</sup> See e.g., *In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110 (1984).

<sup>192</sup> Non-Compete Clause Rule, *supra* note 30.

<sup>193</sup> FTC, *supra* note 29 (“[W]ithholding money owed to workers without consent can violate Section 5’s prohibition against unfairness.”).

<sup>194</sup> See Christa Bieker & Christopher Leach, *The FTC Thinks B2B ‘Customers’ Are ‘Consumers’*, BLOOMBERG L. (Oct. 3, 2022, 1:00 AM), <https://news.bloomberglaw.com/us-law-week/the-ftc-thinks-b2b-customers-are-consumers>.

<sup>195</sup> *Id.*

traditional employment law.<sup>196</sup> In 2021, the FTC issued a complaint against Amazon and its subsidiary, Amazon Logistics, for retaining tips meant for its Amazon Flex drivers. According to the complaint, the company regularly advertised that drivers participating in its Flex program would be paid \$18 to \$25 per hour for their work making deliveries to customers.<sup>197</sup> Additionally, the advertisements, along with numerous other documents provided to Flex drivers, prominently featured statements such as: “You will receive 100% of the tips you earn while delivering with Amazon Flex.”<sup>198</sup> Rather than passing along 100 percent of customers’ tips to drivers, however, Amazon retained the money.<sup>199</sup> Both practices violated the FTC Act.<sup>200</sup> As a result, Amazon agreed to pay more than \$61.7 million to settle the FTC’s charges.<sup>201</sup>

Workers, trainees, and students have also begun turning to the FTC for relief from ISAs and temporary staffing agencies with onerous conversion fees. In 2020, a consumer rights group filed an FTC complaint against Vemo Education, Inc. (“Vemo”) for using UDAPs in the marketing and promotion of ISAs.<sup>202</sup> To encourage trainees to choose ISAs to finance their education, Vemo created “Comparison Tools” that it made available through the financial aid offices of its client institutions.<sup>203</sup> This tool purported to allow trainees to compare the cost of an ISA to the costs of other financial products like federal student loans for parents of undergraduate students and traditional private student loans.<sup>204</sup> According to the complaint, however, Vemo’s Comparison Tools made several misrepresentations that systematically made

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<sup>196</sup> Complaint, *In re Amazon.com, Inc.*, No. 17-35014 (9th Cir. Feb. 2, 2021), [https://www.ftc.gov/system/files/documents/cases/amazon\\_flex\\_complaint.pdf](https://www.ftc.gov/system/files/documents/cases/amazon_flex_complaint.pdf).

<sup>197</sup> Press Release, Fed. Trade Comm’n, Amazon To Pay \$61.7 Million to Settle FTC Charges It Withheld Some Customer Tips from Amazon Flex Drivers (Feb. 2, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/02/amazon-pay-617-million-settle-ftc-charges-it-withheld-some-customer-tips-amazon-flex-drivers>.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> See Press Release, Advocates File Complaint with FTC; Urge Enforcement Action Against Vemo Education for Its Deceptive Marketing of Income-Share Agreements to Students (Jun. 1, 2020), <https://www.nclc.org/media-center/advocates-file-complaint-with-ftc-urge-enforcement-action-against-vemo-education-for-its-deceptive-marketing-of-income-share-agreements-to-students.html>.

Of note, the FTC Act has a unique authority—the “Penalty Offense Authority”—to sue firms that have been put on notice by prior warnings issued to other firms in the same sector, with a particular focus on for-profit college fraud and false earnings claims targeting workers. See Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*, 170 U. PA. L. REV. 71, 104 (2021).

<sup>203</sup> See *id.*

<sup>204</sup> See *id.*

ISAs appear to be more favorable relative to traditional loans.<sup>205</sup> Then, in 2022, a union representing building services workers filed a complaint with the FTC, claiming that a staffing agency's conversion fee violated Section 5 of the Act.<sup>206</sup> The complaint labeled the fee a "bondage fee" and asserted that it violated Section 5 of the FTC Act's UDAP prohibitions.<sup>207</sup>

Second, the CFPB prohibits UDAPs by providers of consumer financial products or services.<sup>208</sup> Congress passed the CFPB in response to the 2008 financial crisis triggered by unscrupulous practices of lenders of subprime mortgages and other financial products and services. Congress recognized that the fragmented landscape of consumer protection agencies, including the FTC, had failed to adequately protect consumers.<sup>209</sup> It thus centralized many of the FTC's powers, and the powers of a half dozen other agencies, into a newly-formed CFPB as an independent agency within the Federal Reserve System.<sup>210</sup>

In 2022, the CFPB launched an initiative to "look[] into the consumer financial products or services that workers face in the workplace."<sup>211</sup> The initiative is specifically focused on employer-driven debt and the CFPB is considering exercising its jurisdiction over consumer financial products and services to rein in TRAPs and other worker-harming contracts as financial products that provide dubious value to the worker.<sup>212</sup> Likewise, the CFPB has

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<sup>205</sup> See *id.*

<sup>206</sup> Complaint and Request for Investigation, Injunction, and Other Relief Submitted by Local 32BJ, Service Employees International Union, *In re Planned Companies*, No. 22-CB-297332 (Fed. Trade Comm'n Apr. 6, 2022), <https://www.seiu32bj.org/wp-content/uploads/2022/04/32BJ-Complaint-Regarding-Planned-Companies.pdf>.

<sup>207</sup> *Id.*

<sup>208</sup> CFPB §§ 1031(a), 1036(a)(1)(B); 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

<sup>209</sup> See, e.g., Heidi Mandanis Schooner, *Consuming Debt: Structuring the Federal Response to Abuses in Consumer Credit*, 18 LOY. CONSUMER L. REV. 43, 43, 82 (2006); Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 98–100 (2008).

<sup>210</sup> 12 U.S.C. §5491(a). See also BAIRD WEBEL ET AL., CONG. RSCH. SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: BACKGROUND AND SUMMARY 14-16 (2017), <https://crsreports.congress.gov/product/pdf/R/R41350/10>.

<sup>211</sup> Emma Oppenheim, "Shining a Spotlight on Workers' Financial Experiences," CONSUMER FIN. PROT. BUREAU (Mar. 9, 2022), <https://www.consumerfinance.gov/about-us/blog/shining-a-spotlight-on-workers-financial-experiences/>; CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers, *supra* note 29 (announcing CFPB inquiry into employer-driven debt with request that members of the public share their stories through request for information). Cf. Letter from Jonathan F. Harris to CFPB Director Rohit Chopra (Sept. 23, 2022), <https://www.regulations.gov/comment/CFPB-2022-0038-0060>.

<sup>212</sup> Oppenheim, *supra* note 211 ("Organizations reported that workers increasingly must personally shoulder the expense of employer-mandated training and buying equipment. As

begun taking action against ISA providers that deceptively claim that ISAs are not loans.<sup>213</sup> The President of the Chicago Federal Reserve Board has also cautioned against the potential for ISA providers to commit UDAPs.<sup>214</sup> The CFPB has rulemaking authority to limit or ban TRAPs and ISAs and exercising the power on behalf of workers here would be both prudent and powerful.<sup>215</sup> To this end, in 2022, the U.S. Senate Banking Committee held hearings on TRAPs and the Chair of the Committee authored a letter to the CFPB urging the agency to take action on TRAPs.<sup>216</sup>

Third, worker-consumers have been turning to FCRA to challenge employers' hiring and retention practices that discriminate based on one's consumer report, also known as a "credit report."<sup>217</sup> FCRA provides procedural protections when a firm seeks an individual's consumer report,

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a result, workers are often saddled with significant debt to their employer or third-party debt collectors that leaves them unable to change employers for better wages or work conditions.").

<sup>213</sup> See, e.g., *In re Better Future Forward, Inc.*, No. 2021-CFPB- 0005 (Sept. 7, 2021), [https://files.consumerfinance.gov/f/documents/cfpb\\_better-future-forward-inc\\_consent-order\\_2021-09.pdf](https://files.consumerfinance.gov/f/documents/cfpb_better-future-forward-inc_consent-order_2021-09.pdf) (finding that an ISA provider's application stating "THIS IS NOT A LOAN" was a deceptive act and practice in violation of §§ 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)).

<sup>214</sup> 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 Evans in describing ISAs: "[A]s with all new loan products, limiting the scope for unfair, deceptive, and abusive practices will be important.")

<sup>215</sup> See MICK MULVANEY, REQUEST FOR INFORMATION REGARDING THE BUREAU'S ADOPTED REGULATIONS AND NEW RULEMAKING AUTHORITIES (Mar. 14, 2018), [https://files.consumerfinance.gov/f/documents/cfpb\\_rfi\\_adopted-regulations\\_032018.pdf](https://files.consumerfinance.gov/f/documents/cfpb_rfi_adopted-regulations_032018.pdf) ("Congress generally transferred to the Bureau rulemaking authority for Federal consumer financial laws previously vested in certain other Federal agencies . . . . The Dodd-Frank Act also provided new rulemaking authorities to the Bureau under the Federal consumer financial laws.").

<sup>216</sup> Press Release, U.S. Senate Comm. on Banking, Hous., & Urb. Affs., Brown Hosts Consumers for Listening Session on New Fin. Prods. (Sept. 7, 2022), <https://www.banking.senate.gov/newsroom/majority/brown-consumers-listening-session-financial-products>; *New Consumer Financial Products and the Impacts to Workers: Hearing Before the U.S. Senate Comm. on Banking, Hous., & Urb. Affs.*, (Sept. 13, 2022), <https://www.banking.senate.gov/hearings/new-consumer-financial-products-and-the-impacts-to-workers>; Press Release, Sherrod Brown U.S. Sen. For Ohio, Brown, Murray, Colleagues, Urge Investigation of Training Repayment Agreements Saddling Workers with Debt (Apr. 21, 2022), <https://www.brown.senate.gov/newsroom/press/release/sherrod-brown-investigation-training-repayment-agreements-workers-debt>.

<sup>217</sup> See Andrew Elmore, *Civil Disabilities in an Era of Diminishing Privacy: A Disability Approach for the Use of Criminal Records in Hiring*, 64 DEPAUL L. REV. 991, 1040 (2015); Charlotte S. Alexander & Elizabeth Tippet, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 1021, n.115 (2017).

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which is often the case during hiring decisions. For instance, employers can be held liable for failing to properly notify employees or applicants regarding background checks, including criminal background checks, that may have dissuaded the employer from hiring the worker.<sup>218</sup>

Fourth, TILA could also protect worker-consumers because TILA requires transparency in consumer lending.<sup>219</sup> Since firms using TRAP and ISAs are essentially selling training and postsecondary education to workers as credit products, firms may be acting as private educational lenders issuing private education loans. As a result, these firms could be subject to TILA and implementing regulations.<sup>220</sup> Likewise, franchisors and master franchisees financing unit franchisees' startup costs through loans could also be bound by TILA requirements.

Last, ECOA could help worker-consumers when firms' services and financial products target workers in protected categories. ECOA protects consumers from discriminatory lending terms based on race, color, religion, national origin, sex, marital status, age, or because the borrower receives public assistance.<sup>221</sup> Indebted worker-consumers under TRAPs, ISAs, and franchising agreements, are disproportionately people of color, women, immigrants, and low-income and thus possibly receiving public assistance—all ECOA protected categories.<sup>222</sup> In fact, many products like hybrid TRAP-ISAs are openly marketed directly to low-income people of color.<sup>223</sup> Those firms may be in violation of ECOA by selectively issuing credit or enforcing debt based on protected characteristics, or reporting on such debts to consumer reporting agencies.<sup>224</sup>

## 2. State and Local Consumer Law

Workers and government agencies turn to state and municipal UDAP laws, including “little FTC Acts,” to invalidate unfair contract terms involving worker-consumers.<sup>225</sup> Indeed, every state has a consumer protection agency with abundant resources, many of which are housed within

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<sup>218</sup> See *id.*; 15 U.S.C. § 1681m(a).

<sup>219</sup> See HARRIS & HICKS, *supra* note 10, at 26–27; Yonathan A. Arbel, *Payday*, 98 WASH. U.L. REV. 1, 54–55 (2020) (arguing for the application of TILA to protect worker-consumers from harmful payday lending schemes).

<sup>220</sup> HARRIS & HICKS, *supra* note 10, at 26 (citing 15 U.S.C. § 1638(e); 12 C.F.R. §§ 1026.46–1026.48).

<sup>221</sup> *Id.* at 27; 15 U.S.C. § 1691 *et seq.*

<sup>222</sup> See *supra* Part I.B.

<sup>223</sup> See, e.g., *Why Pyramid Consulting*, *supra* note 82.

<sup>224</sup> HARRIS & HICKS, *supra* note 10, at 27.

<sup>225</sup> See Pridgen, *supra* note 19, at 914.



a state's office of the attorney general.<sup>226</sup> Workers, in particular, have taken advantage of the private right of action and attorneys' fees permitted under state and local UDAP law, especially in states like California with robust UDAP prohibitions.<sup>227</sup>

One of those workers was BreAnn Scally, a 23-year-old Black woman from California.<sup>228</sup> Scally was a former PetSmart pet groomer who PetSmart pursued for \$5,500 that she owed under the company's TRAP.<sup>229</sup> PetSmart required pet groomers who lack previous experience to sign TRAPs agreeing to pay it up to \$5,000 for the company's "Grooming Academy" if their employment ended within two years of beginning the training.<sup>230</sup> PetSmart advertised its Grooming Academy as "FREE Paid Training" that is "[v]alued at \$6,000," but it provided no recognized degree or license.<sup>231</sup> In fact, Scally received minimal attention from supervisors and was quickly sent out to groom pets for paying customers.<sup>232</sup> The PetSmart TRAP took effect regardless of how the worker's employment ended, even potentially due to employer-initiated layoffs.<sup>233</sup> It also required the debt to be paid within 30 days of the worker departing and permitted PetSmart to withhold money from wages and unpaid time off.<sup>234</sup> In addition, the TRAP allowed PetSmart to recoup attorneys' fees in connection with collection efforts and interest.<sup>235</sup>

Many PetSmart groomers earn close to their local minimum wage and, in Scally's case, she left PetSmart because of unsustainable working conditions.<sup>236</sup> Adding insult to injury, PetSmart charged Scally an extra \$500

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<sup>226</sup> See *State Consumer Protection Offices*, *supra* note 35; Gerstein & Gong, *supra* note 165.

<sup>227</sup> See, e.g., CAL. BUS. & PROF. CODE § 17200.

<sup>228</sup> Devin Leonard, *Quitting Your Job Can Cost a Fortune If You Got 'Free' Training*, BLOOMBERG MKTS. (Aug. 11, 2022), <https://www.bloomberg.com/news/features/2022-08-11/quitting-your-job-can-cost-a-fortune-if-you-got-free-training?leadSource=uverify%20wall>. See also, Jonathan F. Harris, *The New Noncompete: Training Repayment Agreement Provisions as a Scheme to Retain Workers through Debt*, NW. U. L. REV. OF NOTE (Nov. 9, 2022), <https://blog.northwesternlaw.review/?p=2730>.

<sup>229</sup> *Id.*

<sup>230</sup> See Complaint at 4, *Scally v. PetSmart LLC*, No. 22-CIV-03057 (Cal. Sup. Ct., July 28, 2022).

<sup>231</sup> See *id.*; *Salons Careers*, PETSMART, <https://careers.petsmart.com/salons> [<https://perma.cc/7MDD-XUA8>] (last visited July 19, 2022). Pet grooming requires no license in California.

<sup>232</sup> See Complaint, *supra* note 230, at 2.

<sup>233</sup> HARRIS & HICKS, *supra* note 10, at 21.

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at Appendix, Exhibit 9 (copy of PetSmart TRAP).

<sup>236</sup> *Pet Groomer hourly salaries in the United States at PetSmart*, INDEED, <https://www.indeed.com/cmp/Petsmart/salaries/Pet-Groomer/United%20States> [<https://perma.cc/8A2L-PE5E>] (last visited July 20, 2022) (noting that the average PetSmart

for required grooming tools.<sup>237</sup> She learned about all of this from her credit report that noted that PetSmart had engaged a collection agency from Minnesota to collect the full \$5,500; Scally was already trying to pay off her student loans and her credit cards.<sup>238</sup>

Ultimately, Scally filed a class action lawsuit in 2022, claiming that the TRAP she was required to sign provided insufficient grooming training and violated multiple California State consumer protection laws.<sup>239</sup> While several previous suits included claimed violations of California's Unfair Competition Law ("UCL")<sup>240</sup> in the workplace,<sup>241</sup> Scally's suit brought several unique claims under not only the UCL but also California's Consumer Legal Remedies Act ("CLRA").<sup>242</sup>

The collection of eleven counts in the complaint against PetSmart openly presented a Catch-22 for PetSmart.<sup>243</sup> On the one hand, employment law prohibits employers from charging employees for training that benefits the employer. So, if the Grooming Academy was *primarily for PetSmart's benefit*, then the TRAP would violate California employment law by requiring workers to pay for their training.<sup>244</sup> On the other hand, California consumer law prohibits UDAPs in loans for personal use,<sup>245</sup> and California education law requires that any post-secondary education provider obtain

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worker earns \$14.80 per hour). *See also* Leonard, *supra* note 228 (noting that the store was understaffed, and groomers were overwhelmed).

<sup>237</sup> HARRIS & HICKS, *supra* note 10, at 21 n.1.

<sup>238</sup> *See* Leonard, *supra* note 228 (noting that the additional \$500 was for required tools that she purchased from PetSmart).

<sup>239</sup> *See* Complaint *supra* note 230, at 4.

<sup>240</sup> CAL. BUS. & PROF. CODE § 17200.

<sup>241</sup> *See, e.g.,* Herr v. Nestle U.S.A., Inc., 109 Cal. App. 4th 779 (2003) (finding that the UCL has been used in the employment context and that actual injury to competition is not a required element of proof for a UCL violation); Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163 (2000) (holding that unlawfully withheld overtime wages may be recovered as restitution in a UCL action because the failure to pay statutorily mandated overtime wages constituted unfair competition, since an employer that fails to pay overtime wages gains an unfair advantage over its competitors); Alch v. Superior Court, 122 Cal. App. 4th 339, 400-01 (2004) (finding in an age discrimination class action by television writers against studios, networks, and talent agencies, that complaints alleging that the discriminatory policies or practices of the employers and the talent agencies constituted unfair business practices within the meaning of the UCL because they deny equal employment opportunities to the writers on account of their age; noting that the UCL's "sweeping language" permits a court to enjoin ongoing wrongful business conduct "in whatever context such activity might occur.").

<sup>242</sup> CAL. CIV. CODE § 1750 *et seq.*

<sup>243</sup> *See* Complaint *supra* note 230, at 3.

<sup>244</sup> *See* CAL. LAB. CODE § 2802 (requiring employers to reimburse employees for expenditures incurred "in direct consequence of the discharge of his or her duties").

<sup>245</sup> CAL. BUS. & PROF. CODE § 17200; CAL CIV. CODE § 1750 *et seq.*

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State approval.<sup>246</sup> Therefore, if the Grooming Academy was *primarily for the workers' benefit*, then the TRAP terms would violate California consumer law by unfairly and deceptively indebting workers, as well as California education law because the State had not approved the Grooming Academy. PetSmart could take its pick, but the suit's innovative claims show that PetSmart was breaking the law either way.<sup>247</sup> Since it can be difficult to establish an employer's liability for a one-sided TRAP based on traditional employment law, the PetSmart case offers a compelling argument for why consumer laws should apply to rein in TRAPs and other debt-based contracts in the workplace.<sup>248</sup>

As for state agency action, several attorneys general have turned to various consumer laws on behalf of exploited worker-consumers.<sup>249</sup> The New York State Office of the Attorney General was one of the first. In 2013, it brought suit against a firm selling job training with false promises of jobs as security guards.<sup>250</sup> The suit claimed that 1st Security Preparation & Placement, Inc. ("1st Security") posted on Craigslist and in newspapers hundreds of fake security guard job listings to give the impression that the company was hiring employees at high hourly wages.<sup>251</sup> When consumers responded to the ads, they were told that they would need to first enroll in 1st Security's training courses, typically at a cost of \$449 to \$667.<sup>252</sup> But after completing the training courses, instead of offering the trainees jobs, 1st Security's placement office distributed worthless referrals to other security companies.<sup>253</sup> Those companies would tell the trainees that they had never

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<sup>246</sup> CAL. EDUC. CODE § 94886 (prohibiting the opening of a private postsecondary educational institution without State approval).

<sup>247</sup> The suit remains in active litigation as of January 2023.

<sup>248</sup> See *supra* Part II.A. Additional California laws also could be useful for workers facing UDAPs. For example, California prohibits any entity from encouraging a worker to change jobs by means of knowingly false representations including, *inter alia*, "the kind, character, or existence of such work" and the salary or length of time such work will last. CAL. LAB. CODE § 970. See also Sandra J. Mullings, *Truth-in-Hiring Claims and the at-Will Rule: Should an Employer Have A License to Lie?*, 1997 COLUM. BUS. L. REV. 105, n.34 (1997); William C. Bunting, *Unlocking the Housing-Related Benefits of Telework: A Case for Government Intervention*, 46 REAL EST. L. J. 285, n.176 (2017); *Collins v. Rocha*, 7 Cal. 3d 232, 239 (1972) (finding that § 970 applied to farmworkers induced to relocate for a two-week position). This law also prohibits employers from failing to reveal to prospective workers that they may be used to break a strike. *Id.* at § 970(d).

<sup>249</sup> See Gerstein et al., *supra* note 21 (collecting cases).

<sup>250</sup> See Press Release, A.G. Schneiderman Sues NYC Security Guard Training Company That Scammed Unemployed Consumers (Apr. 10, 2013), <https://ag.ny.gov/press-release/2013/ag-schneiderman-sues-nyc-security-guard-training-company-scammed-unemployed>.

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

heard of 1st Security and typically did not hire applicants without experience.<sup>254</sup> The parties settled out of court with over \$100,000 set aside for the unwitting trainees.<sup>255</sup>

The Illinois Office of the Attorney General has also been quite active in pursuing consumer law claims on behalf of workers. In 2017, for example, it sued a check-cashing business, asserting claims of unlawful use of noncompete agreements in violation of, *inter alia*, the state's Consumer Fraud and Deceptive Business Practices Act.<sup>256</sup> These noncompete agreements, binding workers who earned as little as \$12 per hour, violated the state's new ban on noncompetes for low-wage workers<sup>257</sup> and, by continuing to use the unenforceable noncompetes, the employer also violated Illinois UDAP law.<sup>258</sup>

Likewise, in 2021, the Washington State Office of the Attorney General sued a large commercial janitorial franchisor, National Maintenance Contractors ("National"),<sup>259</sup> asserting several UDAP claims on behalf of franchisees, including the state's Consumer Protection Act<sup>260</sup> and Franchise Investment Protection Act.<sup>261</sup> According to the suit, National provided cleaning services contracts to customers and then entered into franchise agreements with individual janitors, largely non-English-speaking immigrants, to do the work.<sup>262</sup> National, however, did not provide enough accounts to its franchisees to meet the income level the parties had contracted for, and charged franchisees unreasonably excessive fees.<sup>263</sup> Moreover, many franchisees were not aware that, under National's fee structure, the workers would end up earning less than minimum wage in net pay.

In addition to states, municipalities have begun acting on behalf of worker-consumers. One of the first municipal consumer rights agencies to

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<sup>254</sup> *See id.*

<sup>255</sup> *See* Press Release, A.G. Schneiderman Reaches Settlement With NYC Security Guard Training Company That Scammed Unemployed Consumers (Dec. 18, 2013), <https://ag.ny.gov/press-release/2013/ag-schneiderman-reaches-settlement-nyc-security-guard-training-company-scammed>.

<sup>256</sup> 815 ILCS § 505. Complaint, *Ill. v. Check Into Cash of Ill., LLC*, No. 2017-CH-14224 (Cook Cnty. Ill. Cir. Ct. Oct. 25, 2017). *See also* Press Release, Attorney General Madigan Sues National Payday Lender For Unlawful Use Of Non-Compete Agreements (Oct. 25, 2017), [https://illinoisattorneygeneral.gov/pressroom/2017\\_10/20171025d.html](https://illinoisattorneygeneral.gov/pressroom/2017_10/20171025d.html).

<sup>257</sup> Illinois Freedom to Work Act, 820 ILCS § 90.

<sup>258</sup> *See* Complaint, *Ill. v. Check Into Cash of Ill., LLC*, No. 2017-CH-14224 (Cook Cnty. Ill. Cir. Ct. Oct. 25, 2017).

<sup>259</sup> *Wa. v. National Maintenance Contractors, LLC*, 21-2-04554-1-SEA (King Cnty. Sup. Ct. Apr. 6, 2021); Wash. Press Release, *supra* note 13.

<sup>260</sup> RCW 19.86.

<sup>261</sup> RCW 19.100.

<sup>262</sup> Wash. Press Release, *supra* note 13.

<sup>263</sup> *Id.*

enforce its laws in the workplace in recent years was the New York City Department of Consumer Affairs, which rebranded itself as the Department of Consumer and Worker Protection (“DCWP”).<sup>264</sup> The DCWP “enforces key municipal workplace laws, conducts original research, and develops policies that are responsive to an evolving economy and issues affecting workers in New York City, particularly people of color, women, and immigrants.”<sup>265</sup> In 2017, the DCWP settled a consumer law claim on behalf of worker-consumers against a parking garage company that charged monthly customers a misleading “NYC Living Wage Assessment” to disguise an ordinary price hike.<sup>266</sup> In addition, in 2022, the DCWP began enforcing a new City law requiring staffing agencies in the construction industry to provide certain consumer-like disclosures to temporary workers.<sup>267</sup>

Agencies have employed other creative tactics with consumer law to protect workers indirectly, while avoiding difficult-to-prove litigation about misclassification of employees as independent contractors. For example, in 2019, the District of Columbia Attorney General sued DoorDash, Inc. for violating the District’s Consumer Protection Procedures Act<sup>268</sup> by encouraging consumers to tip for food deliveries and then pocketing those tips instead of passing them along to the so-called “independent contractor” delivery workers.<sup>269</sup> Though the direct victim of DoorDash’s misleading acts were customers who unknowingly had their tips diverted to the company, the Attorney General assured that \$1.5 million of the \$2.5 million settlement went to the workers who did not receive the tips.<sup>270</sup> Most importantly, the Attorney General did not have to prove employee status—a requirement under traditional employment law—in order to assist the workers in

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<sup>264</sup> *Office of Labor Policy & Standards*, N.Y.C. DEP’T OF CONSUMER & WORKER PROT., <https://www1.nyc.gov/site/dca/about/office-of-labor-policy-standards.page> (last visited Mar. 24, 2022).

<sup>265</sup> *Id.*

<sup>266</sup> *Department of Consumer Affairs Settles Charges with Icon Quik Park for Charging Customers “NYC Living Wage Assessment” Fee*, N.Y.C. DEP’T OF CONSUMER & WORKER PROT., (June 28, 2017), <https://www.nyc.gov/site/dca/media/pr062817.page>.

<sup>267</sup> *See Are you a temporary construction worker? You have rights*, N.Y.C. DEP’T OF CONSUMER & WORKER PROT., <https://www.nyc.gov/site/dca/workers/workersrights/Temporary-Construction-Workers.page> (last visited Dec. 25, 2022).

<sup>268</sup> DC OFFICIAL CODE §§ 28-3901–28-3913.

<sup>269</sup> Press Release, AG Racine Sues DoorDash For Deceiving District Consumers By Taking Tips From Food Delivery Workers (Nov. 19, 2019), <https://oag.dc.gov/release/ag-racine-sues-doordash-deceiving-district>.

<sup>270</sup> *See* Press Release, AG Racine Reaches \$2.5 Million Agreement with DoorDash for Misrepresenting that Consumer Tips Would Go to Food Delivery Drivers (Nov. 24, 2020), <https://oag.dc.gov/release/ag-racine-reaches-25-million-agreement-doordash>.

recovering their pay.

### III. AN INTEGRATED WORK LAW—CHALLENGES AND POSSIBILITIES

Consumer law should make up one part of an integrated work law. This is in line with scholars who have argued for integration of other doctrines into work law on behalf of workers, such as antitrust, social security, business, tax, and environmental law.<sup>271</sup> An integrated work law is necessary when looking through a lens of economic subordination to use the law to provide additional resources to the weaker party, usually the worker, to balance bargaining power between a firm and its workers.<sup>272</sup>

Using consumer law to protect workers does not come without challenges and doctrinal contradictions, however. Foremost among them is that a worker's consciousness as a consumer of the firm rather than as a producer of labor for the firm feeds into an "American exceptionalist narrative"<sup>273</sup> of individualism, autonomy, freedom of contract, and self-betterment.<sup>274</sup> This can inherently detract from the collective identity of workers as working-class.<sup>275</sup> Moreover, consumer law is no panacea and its shortcomings—namely the remedy of disclosure—are apparent even when applied to

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<sup>271</sup> See Jean-Claude Javillier, *The Employer and the Worker: The Need for a Comparative and International Perspective*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 356 (Guy Davidov & Brian Langille eds., 2006); Hafiz, *supra* note 182, at 411; Memorandum of Understanding Between the U.S. Dep't of Just. & U.S. Dep't of Lab. (Mar. 10, 2022), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/03/OPA20220456.pdf> [hereinafter Memorandum] (announcing DOL and Department of Justice ("DOJ") Antitrust Division joint initiative to protect workers by promoting labor market competition); *About the Worker Endangerment Initiative*, U.S. DEP'T OF LAB. & U.S. DEP'T OF JUST., (Apr. 30, 2021), <https://www.justice.gov/enrd/worker-endangerment/about> [hereinafter *Initiative*] (describing DOL and DOJ Environmental Crimes Section joint initiative to criminally prosecute worker safety violations).

This Article does not address antitrust law per se, outside of its recognition through various UDAP laws. Antitrust law in the service of workers is a growing area of scholarship, however. See, e.g., Sanjukta Paul, *Antitrust as Allocator of Coordination Rights*, 67 UCLA L. REV. 378 (2020); Marshall Steinbaum, *Antitrust, the Gig Economy, and Labor Market Power*, 82 L. & CONTEMP. PROBS. 45 (2019); Callaci & Vaheesan, *supra* note 85.

<sup>272</sup> See Brian Langille, *Labour Law's Back Pages*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 24 (Guy Davidov & Brian Langille eds., 2006).

<sup>273</sup> Petroziello, *supra* note 5.

<sup>274</sup> See Harry W. Arthurs, *What Immortal Hand or Eye?—Who will Redraw the Boundaries of Labour Law?*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW: GOALS AND MEANS IN THE REGULATION OF WORK 389 (Guy Davidov & Brian Langille eds., 2006).

<sup>275</sup> See *id.*

ordinary consumers.<sup>276</sup>

For these reasons, advocates should proceed with caution, especially regarding the long-term implications of potentially adopting frameworks of workers as consumers.<sup>277</sup> Nevertheless, the immediate benefits to workers are worth the activation of consumer law as a complimentary doctrine to employment law. Moreover, the two doctrines can evolve together in a binary fashion, similar to a double helix, creating a virtuous cycle with each learning from the other and applying lessons from the other.<sup>278</sup> This could even lead to consumer law adopting from labor law a collective rights regime: an NLRA for consumers.

### A. Consumer Law Framing's Shortcomings

There are two categories of problems with framing consumer law as work law: 1) the very act of conceptualizing the relationship in consumer rather than employment terms; and (2) once the relationship is framed in consumer terms, the weakness of consumer protection law itself.<sup>279</sup> First, turning to consumer law conceptualizes individuals as consumers of jobs, services, and goods rather than as producers of labor. And there has been scholarly resistance to this.<sup>280</sup> Moreover, some scholars are not ready to give up on the

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<sup>276</sup> See, e.g., Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 MD. L. REV. 707, 832–33 (2006) (discussing shortcomings of consumer law disclosure requirements for home loan borrowers); Nakita Cuttino, *The Rise of 'Fringetech': Regulatory Risks in Earned Wage Access*, 115 NW. U. L. REV. 1505, 1564–65 (describing shortcomings of TILA and CFPB authority to stop predatory earned-wage payment programs).

<sup>277</sup> See Suresh Naidu, *Eight Reactions to the FTC's Proposed Ban on Non-Competes*, L. & POL. ECON. BLOG (Jan. 19, 2023, 8:00 AM), <https://lpeproject.org/blog/eight-reactions-to-the-ftcs-proposed-ban-on-non-competes/> (claiming that, by relying too much on consumer-oriented laws to protect workers by merely promoting competition in labor markets, “we forgo other, deeper and more democratic, principles that could undergird an expansive notion of economic non-domination.”).

<sup>278</sup> See generally Arthurs, *supra* note 9, at 597–98 (describing history of National Industrial Recovery Act to “align labor law with other legal initiatives to protect a broad spectrum of economically subordinate people”).

<sup>279</sup> Additionally, mandatory arbitration with class waiver provisions in consumer contracts limit access to courts. This problem, however, is just as ubiquitous in employment law because employers, too, frequently insert these clauses. This, in fact, demonstrates another commonality between workers and consumers. See generally Jeremy Heisler, et al., *States – The Final Frontier: How State Law and State Courts Can Provide Avenues for Justice and Resist the US Supreme Court's “LochnerLite” Anti-Employee and Anti-Consumer Agenda*, LAB. L. J. 125 (2021), <https://www.sanfordheisler.com/documents/Melzer-LLJ-72-3.pdf>.

<sup>280</sup> See Arthurs, *supra* note 9, at 591. Cf. Naidu, *supra* note 277 (arguing that the FTC's

promise of contract law to protect workers.<sup>281</sup> They argue for the application of a human rights lens to contract interpretation that requires parties to take responsibility for the negative externalities of their contracts on workers.<sup>282</sup> Central to this argument is that the workplace is more of a relational environment than one of autonomous individuals in arms-length solitary transactions with firms.

Historically, lawmakers have also attempted to change the framing from that of a consumer relationship to that of compensation for production of labor. For instance, Congress and states have required that wages be paid “free and clear” to, in part, eliminate the harmful practice of employers treating their employees as consumers by paying in scrip redeemable only at company stores.<sup>283</sup> In another example, firms that began offering life insurance products to employees in the early 20th century expanded to offering other financial products to employees as consumers, such as health insurance, retirement plans, and tuition programs.<sup>284</sup> The potential for discrimination in the terms of those financial products led to regulators intentionally reframing them as “employee benefits,” parts of an employee’s compensation package, rather than consumer financial products.<sup>285</sup> Such a compensation-oriented reframing allowed for the substantive regulation of the financial products under laws like the Employee Retirement Income Security Act of 1974, all for the benefit of workers.<sup>286</sup> Furthermore, during the COVID-19 pandemic, Congress insisted that gig workers be treated as employees by being eligible for unemployment benefits.<sup>287</sup> This was done to assist workers at firms like Uber, which labels its drivers “customers” and consumers of its software—rather than employees—to deprive workers of employment benefits like unemployment insurance.<sup>288</sup>

The second problem is that, once within a consumer law framing,

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2023 proposed rule banning noncompetes and some TRAPs is based on neoclassical economics extolling the virtues of “perfect competition,” rather than reflecting a particular desire to improve the lot of workers).

<sup>281</sup> See, e.g., Dadush, *supra* note 143; Parella, *supra* note 143.

<sup>282</sup> See *id.*

<sup>283</sup> See STEINFELD, *supra* note 22; 29 C.F.R. § 531.35 (2019) (requiring under FLSA that wages be paid “free and clear” without kickbacks to employer for job-related expenses). Well before the passage of FLSA in 1938, the U.S. Supreme Court upheld a Tennessee law banning payment of wages in scrip. *Dayton Coal & Iron Co. v. Barton*, 183 U.S. 23, 24–25 (1901).

<sup>284</sup> See KLEIN, *supra* note 24.

<sup>285</sup> See *id.* at 258–76.

<sup>286</sup> 29 U.S.C. §§ 1001–1461.

<sup>287</sup> See Orly Lobel, *We Are All Gig Workers Now: Online Platforms, Freelancers & the Battles over Employment Status & Rights During the Covid-19 Pandemic*, 57 SAN DIEGO L. REV. 919, 922–31 (2020).

<sup>288</sup> See Calo & Rosenblat, *supra* note 26.

For the latest draft, visit <https://ssrn.com/abstract=4172535>.



consumer law can be somewhat toothless because one of its remedies—disclosure—does not overcome behavioral obstacles and other market failures like asymmetrical firm bargaining power.<sup>289</sup> One of consumer law's early goals was transparency and the focus still frequently remains on informed consent among all parties.<sup>290</sup> Employment law, on the other hand, has from its nascency recognized that a worker's right-to-know is oftentimes insufficient and thus incorporated substantive protections early on. Consumer law, however, has incorporated more robust substantive protections in recent years that go well beyond mandated disclosure.

Certainly, workers need to have knowledge of agreements that harm them, which, as discussed, is not always the case.<sup>291</sup> This lack of worker knowledge points to a core problem with harmful contract terms, such as those found within staffing agency-client firm contracts, as well as TRAPs that are tucked in a pile of paperwork to be signed when a worker onboards.

Thus, one may consider whether disclosure of such provisions to workers would be a sufficient response or whether substantive limitations on, for example, conversion fees for temporary laborers would be necessary.<sup>292</sup> This question recalls a long-running debate *within* consumer law regarding the adequacy of disclosure regimes. Scholars like Florencia Marotta-Wurgler have found that firm disclosure of contract terms to consumers has little to no effect on those consumers' choices.<sup>293</sup> Some even assert that disclosure

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<sup>289</sup> But see Gonos, *supra* note 119, at 9 (“Historical and legal research . . . provides scholarly support for the spreading ‘right-to-know’ movement among temps and contract workers for the disclosure of hidden, and often exorbitant, agency markups.”)

<sup>290</sup> See generally, David E. Pozen, *Transparency's Ideological Drift*, 128 YALE L.J. 100, 135–39 (2018) (writing that demands for transparency stretch back at least to the Progressive Era, when reformers pushed for disclosures regarding product safety, environmental pollutants, and banking practices, but that transparency demands have drifted from a progressive to a more neoliberal orientation over time).

<sup>291</sup> See *supra* note 136 and accompanying text.

<sup>292</sup> See, e.g., Lisa Bernt, *Workplace Transparency Beyond Disclosure: What's Blocking the View?*, 105 MARQ. L. REV. 73, 77, 79 (2021) (arguing that disclosure mandates are insufficient to protect workers but that, currently, “[t]here is no unified, comprehensive scheme that requires employers to provide information to workers. Instead, there is a hodgepodge of disclosure requirements that might allow workers to glimpse bits of information in limited situations.”); cf. Cynthia Estlund, *Just the Facts: The Case for Workplace Transparency*, 63 STAN. L. REV. 351 (2011) (noting that, until recently, relatively little scholarly attention has been dedicated to transparency in the workplace as a general matter).

<sup>293</sup> Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 168 (2011) (“Mandating assent by requiring consumers to agree to terms by clicking on an ‘I agree’ box next to the terms increases contract readership by at best on the order of 1 percent.”); Florencia Marotta-Wurgler, *Does Contract Disclosure Matter?*, 168 J. INST. & THEORETICAL ECON. 94, 114 (2012).

regimes can harm consumers through information overload, obfuscation of important information, and disclosure timing problems, among others.<sup>294</sup> In addition, at least in theory, mandatory disclosure regimes could grant safe harbor to disclosing firms against claims of deception.<sup>295</sup>

The question here, perhaps, is whether such valid concerns transfer from the consumer context to the employment context. At first glance, they do, at least when the provisions are disclosed to individual workers as part of contracts of adhesion. In those cases, which are typical among most workers, the worker would likely fail to read—or be unable to read or understand—the entire provision for the same reasons that consumers do not read boilerplate terms in contracts of adhesion.<sup>296</sup> Those reasons, according to Margaret Jane Radin, are that the typical reader: thinks they would not understand; does not believe reading would make a difference; does not understand that they are agreeing to certain terms; trusts the firm not to include anything harmful; believes that any harmful provisions would be unenforceable; believes they would be stuck with whatever the terms say regardless of whether they read; and does not believe that anything would go

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<sup>294</sup> See Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 165 (2017) (“The focus on disclosure is obfuscating, though; it clouds both the legal and the cultural discourse around fairness in consumer contracting. The focus on procedural fairness via disclosure, to the exclusion of substantive fairness, creates affirmative incentives for firms to keep disclosing.”); Omri Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647 (2011) (“Disclosers can also overdisclose in order to exacerbate the overload of discloses. These padded disclosures are intended to overwhelm and distract consumers.”); Matthew A. Edwards, *Empirical and Behavioral Critiques of Mandatory Disclosure: Socio-Economics and the Quest for Truth in Lending*, 14 CORNELL J. L. & PUB. POL’Y 199, 219-35 (2005) (recounting the critiques of mandatory disclosure regimes included in, for example, TILA such as: overload; definition issues; timing of disclosures; and psychological, cognitive, education, and behavioral critiques).

<sup>295</sup> But see Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 853 (2006) (“Even if mandatory website disclosure did not increase consumer reading very much, in theory it still might motivate businesses to write fair terms. Businesses would worry, for example, that disclosure would facilitate watchdog-group exposure of unsavory terms.”); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 554, 580-85 (2014) (recognizing the “no-reading problem” with consumer contracts but offering rules such as emphasizing unfavorable terms first to consumers instead of hiding them in the contract which would help consumers).

<sup>296</sup> See Jeff Sovern, et al., “*Whimsy Little Contracts*” With Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 47 (2015) (noting that only nine percent of surveyed consumers subject to arbitration clauses understood both that the contract provided for arbitration and that it precluded court litigation).



wrong to require exercising legal rights.<sup>297</sup>

In addition, a plethora of behavioral empirical literature reveals workers' fundamental misunderstandings of their employment contract provisions and their rights.<sup>298</sup> Additionally, in the case of a temporary worker whose staffing agency has a conversion fee, even if the worker read and understood the conversion fee provision, the worker would probably continue to work for the staffing agency because temporary workers' top priority is to find employment as soon as possible; becoming a direct hire of the client firm is an important but secondary concern.

On deeper inspection, however, the information obtained through forced disclosure of harmful terms may inspire workers to organize collectively for things like an end to TRAPs and ISAs, harmful franchising arrangements, and pay and rights parity between temporary workers and direct hires.<sup>299</sup> As an analogy, a 2022 California law requiring pay scale disclosures in job advertisements may inspire workers to organize collectively for more pay after seeing the disparities between job titles and between employers.<sup>300</sup> Indeed, though it may be diminished from what it once was, there is still more of a collective consciousness among workers than among consumers. Consider, for example, the forced disclosure to workers of the true cost and value of TRAP and ISA-associated job training, a janitorial franchisee's

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<sup>297</sup> MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 12 (2014). See also Marotta-Wurgler, *supra* note 293.

<sup>298</sup> See, e.g., J.J. Prescott & Evan Starr, *Subjective Beliefs about Contract Enforceability*, J. LEGAL STUDIES (forthcoming 2022), <https://ssrn.com/abstract=3873638> (showing that employees tend to believe their noncompetes are enforceable, even when they are not). See also Pauline T. Kim, *Norms, Learning, and Law: Exploring the Influences on Workers' Legal Knowledge*, 1999 U. ILL. L. REV. 447 (1999) (documenting widespread worker misunderstanding of the at-will employment default rule, with workers systematically overestimating their legal rights); accord Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 CORNELL L. REV. 105 (1997); Ian H. Eliasoph, *Know Your (Lack of) Rights: Reexamining the Causes and Effects of Phantom Employment Rights*, 12 EMP. RTS. & EMP. POL'Y J. 197 (2009); Jesse Rudy, *What They Don't Know Won't Hurt Them: Defending Employment-At-Will in Light of Findings that Employees Believe They Possess Just Cause Protection*, 23 BERKELEY J. EMP. & LAB. L. 307 (2002).

<sup>299</sup> See Gonos, *supra* note 119, at 10–13 (arguing for “markup” disclosures to temporary workers to encourage organizing, citing examples); accord Freeman & Gonos, *supra* note 124, at 358–59. Cf. Peter DeChiara, *The Right to Know: An Argument For Informing Employees of their Rights Under the National Labor Relations Act*, 32 HARV. J. ON LEGIS. 431, 464 (1995) (asserting that requiring employers to inform to workers about the right to organize would itself encourage more organizing).

<sup>300</sup> See Taylor Telford, *California Law Forces Most Companies to Provide Salary Info in Job Ads*, WASH. POST (Oct. 3, 2022), <https://www.washingtonpost.com/business/2022/10/03/faq-california-pay-transparency-law/>.

estimated hourly pay rate, or staffing agency conversion fee provisions. This information might not cause a worker to quit, but it might encourage the worker to organize with others and talk openly about the extent to which the relationship is exploitive.<sup>301</sup> Such concerted activity could, in and of itself, result in the formation of a union or some other mechanism to rectify bargaining power asymmetries between firms and workers.

### B. Dangers of Accepting the “American Exceptionalist Narrative”

Themes of individualism, autonomy, freedom of contract, and self-betterment—what William Novak calls the “American exceptionalist narrative”—often treat workers as consumers of firms’ services and credit products.<sup>302</sup> Indeed, Novak has discussed how asymmetries in bargaining power have resulted from “persistent and dangerous myths about an original and continuous American historical tradition defined primarily by transcendent precommitments to private individual rights, formalistic constitutional limitations, and laissez-faire political economy.”<sup>303</sup> Likewise, Martha Albertson Fineman has criticized the “limited and disingenuous vision of legal subjectivity” that permits a “fixation on autonomy, rationality, and liberty” in the U.S.<sup>304</sup> As Fineman rhetorically asks, “[w]hy are policymakers more attentive to the economic risks and needs of the employer vis-à-vis employee? How might law and policy more justly balance the corresponding vulnerabilities of these partners in the employment

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<sup>301</sup> A future article will explore the transparency issue under both consumer law and law-and-organizing frameworks. See TEMP WORKER JUSTICE, ET AL., *supra* note 15, at 29; JENNIFER GORDON, SUBURBAN SWEATSHOPS 148–84 (2007) (discussing “rights-talk” and how it affected the infrastructure of organizing at a worker center for the benefit of a right in relation to organizing). See generally Scott L. Cummings, *Preemptive Strike: Law in the Campaign for Clean Trucks*, 4 U.C. IRVINE L. REV. 939 (2014); SCOTT L. CUMMINGS, BLUE AND GREEN: THE DRIVE FOR JUSTICE AT AMERICA’S PORT (2018). But see, JANE MCALEVEY, NO SHORTCUTS (2016) (arguing for a “let the workers take control” approach to advocacy); JOE BURNS, CLASS STRUGGLE UNIONISM (2022) (asserting that workers’ centers are generally top-down and staff-driven, focusing primarily on legislative campaigns). Cf. MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) (discussing the role of law and litigation in the pay equity movement of the 1970s, regarding how lawyers assisted or hurt the movement); AUSTIN SARAT, HOW DOES LAW MATTER? (1998) (theory on law and organizing).

<sup>302</sup> Petroziello, *supra* note 5.

<sup>303</sup> William J. Novak, *A Modern Democratic State, If We Can Keep It*, YALE J. ON REG. (Aug. 11, 2022), <https://www.yalejreg.com/nc/symposium-novak-new-democracy-12/>, accord Orly Lobel, *The (Re)New(ing) Democracy and Cyclical Forms and Substance of Regulatory Governance*, YALE J. ON REG. (Aug. 2, 2022), <https://www.yalejreg.com/nc/symposium-novak-new-democracy-10/> (internal quotation omitted) (calling the narrative an “anomaly of the American legal system”).

<sup>304</sup> Fineman, *supra* note 5.

For the latest draft, visit <https://ssrn.com/abstract=4172535>.

relationship?”<sup>305</sup>

These narratives are concerning for workers especially, many of whom have adopted the narratives as their own. For instance, Harry Arthurs has described how the media, politicians, and workers themselves no longer perceive “labor” as a movement, all to the detriment of workers.<sup>306</sup> Instead, according to Arthurs, “[w]orkers now seem to prefer alternative identities: as consumers and investors rather than as producers;” identity-based affinity group members rather than labor union members; and “middle class” rather than “working class.”<sup>307</sup> The perceptual shift, Arthurs argued, left only “employment law—labor law minus its collective dimension—” but that “is not the continuation of labor law by other means.”<sup>308</sup>

Likewise, these narratives lead workers to believe that they will become more valuable and worthy of societal and familial praise with more training and credentials, and that self-betterment in these ways is itself a virtue.<sup>309</sup> Purchasing work-related credentials as consumers is one way in which this narrative of self-betterment manifests. Only through individual attainment, according to the narrative, will one be rewarded with greater job security, salaries and benefits, recognition, and career satisfaction. Similarly, the narrative preaches that autonomous individuals are limited only by their lack of ambition.<sup>310</sup>

These narratives are dangerous to workers in at least two ways. First, workers are not autonomous but are in fact universally vulnerable to

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<sup>305</sup> *Id.* at 31 (citing MARTHA ALBERTSON FINEMAN & JONATHAN W. FINEMAN, VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (2018)).

<sup>306</sup> See Arthurs, *supra* note 9, at 591.

<sup>307</sup> *Id.*

<sup>308</sup> *Id.* (citing Harry Arthurs, *Changing the Boundaries of Labour Law: Innis Christie and the Search for an Integrated Law of Labour Market Regulation*, 34 DALHOUSIE L. J. 1 (2011). *But see* Benjamin I. Sachs, *Employment Law As Labor Law*, 29 CARDOZO L. REV. 2685, 2686, 2689 (2008) (asserting that labor law has become too weak and rigid to support workers’ collective action and that “the view of employment law as providing no support for collective action—or as being inimical to collective action—is wrong as a matter of theory.”).

<sup>309</sup> A future project will address the rise of so-called “credentialism” as a manifestation of the meritocracy master narrative. See generally DANIEL MARKOVITS, THE MERITOCRACY TRAP: HOW AMERICA’S FOUNDATIONAL MYTH FEEDS INEQUALITY, DISMANTLES THE MIDDLE CLASS, AND DEVOURS THE ELITE (2019); STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH (2d ed. 2009) (exposing “the deceptive American rhetoric that hard work, talent and virtue are all that is necessary to make it to the top”).

<sup>310</sup> See generally Martha Albertson Fineman, *Beyond Equality and Discrimination*, 73 SMU L. REV. F. 51, 53 (2020) (“Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference.”)

institutions including the state and the firms that use their labor.<sup>311</sup> Second, these narratives can dissuade workers from engaging in collective action, which, in many cases, is necessary to bolster an individual worker's bargaining power vis-à-vis the firm using their labor.

### C. *The Promise of an Integrated Work Law*

The shortcomings of consumer law and the possibility of acceding to an American exceptionalist narrative should not shadow the benefits to workers of using consumer law as part of an integrated work law. Through integration, the doctrines of employment law and consumer law could, in fact, evolve together to adapt from—and strengthen—each other in a virtuous cycle for workers.

History has shown that integrating various doctrines in the service of workers has been fruitful, starting with the National Industrial Recovery Act of 1933 (“NIRA”).<sup>312</sup> According to Harry Arthurs, NIRA, though struck down by the U.S. Supreme Court in 1935 for violating the separation of powers doctrine, established fair competition laws, protected consumers, regulated consumer prices, created an unemployment program through public works, and guaranteed workers a minimum wage.<sup>313</sup> NIRA, according to Arthurs, “attempt[ed] to comprehensively address the disparate concerns of economically subordinate victims of a capitalist economy in deep moral, structural, and operational crisis and . . . many of its features were subsequently enacted as separate statutes.”<sup>314</sup> What I propose in an integrated work law is precisely a re-integration of artificially separated doctrines that were meant to, taken together, assist subordinated workers by enhancing their bargaining power.

An integrated work law also parallels arguments for an integrated consumer law. For instance, Rory Van Loo writes that “consumer laws play a significant role in many fields that have independent identities, such as food law, financial regulation, and privacy.”<sup>315</sup> He asserts that consumer law has

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<sup>311</sup> Cf. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008) ([V]ulnerability is—and should be understood to be—universal and constant, inherent in the human condition.”).

<sup>312</sup> Ch. 90, 48 Stat. 195 (1933). See Arthurs, *supra* note 9, at 597–98 (describing NIRA as “[t]he most ambitious and successful attempt to align labor law with other legal initiatives to protect a broad spectrum of economically subordinate people”).

<sup>313</sup> Arthurs, *supra* note 9, at 597–98.

<sup>314</sup> *Id.*

<sup>315</sup> Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, The Economy, Health, Disinformation, and Beyond*, \_ MINN. L. REV. \_, 43 (forthcoming 2023), <https://ssrn.com/abstract=4308960> (citing Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014)).

been neglected for too long and that “[i]t does not undermine a field to show its breadth and overlap with clearly distinct fields.”<sup>316</sup> The same analysis could equally apply to work law, likewise revealing its breadth.

In addition, a comparative approach to the law questions why some U.S. legal doctrines are separated in the first place. U.S. work law has a peculiar sort of compartmentalization, which is not reflected in continental Europe’s work law.<sup>317</sup> In the U.S., “employment law”—the law of workers’ individual rights—broke away from “labor law”—the law of workers’ collective rights—and then further dissolved into subspecialties like “employment discrimination,” “wage-and-hour,” “employee benefits,” and “health and safety” law.<sup>318</sup> Meanwhile, continental Europe has preserved a unified “social law” or a “law of the welfare state” that is embedded in the European Union constitution.<sup>319</sup> Perhaps, by maintaining an integrated law, continental Europe has also preserved many more substantive worker protections than the U.S.

An integrated work law also encourages agencies to push each other to expand their regulatory and enforcement activities to protect workers. In recent years, the FTC, CFPB, DOJ, and even Department of Transportation (“DOT”) have launched initiatives to protect workers as worker-consumers in ways that the DOL and National Labor Relations Board (“NLRB”) cannot, while also entering into memoranda of understanding with the DOL and NLRB to act where they can.<sup>320</sup>

In practice, an integrated work law encourages lawyers to consider a range of doctrines to advocate for workers most effectively.<sup>321</sup> In exchange,

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<sup>316</sup> *Id.* at 42–43.

<sup>317</sup> See Arthurs, *supra* note 9, at 587.

<sup>318</sup> See *id.*

<sup>319</sup> *Id.*

<sup>320</sup> See CONSUMER FIN. PROT. BUREAU, *supra* note 211; Memorandum, *supra* note 271; Initiative, *supra* note 271; Memorandum of Understanding Between the U.S. Dep’t of Just. & U.S. Dep’t of Lab. (Mar. 10, 2022), <https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/03/OPA20220456.pdf>; Memorandum of Understanding Between the Fed. Trade Comm’n (FTC) and the Nat’l Lab. Rels. Bd. (NLRB) Regarding Info. Sharing, Cross-Agency Training, and Outreach in Areas of Common Regul. Int., (Jul. 2022), [https://www.ftc.gov/system/files/ftc\\_gov/pdf/ftcnlrb%20mou%2071922.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf); DOT, DOL Announce Expansion of Trucking Apprenticeships, New Truck Driver Boards and Studies to Improve the Working Conditions of Truck Drivers, U.S. DEP’T OF TRANSP. (Jan. 13, 2022), <https://www.transportation.gov/briefing-room/dot-dol-announce-expansion-trucking-apprenticeships-new-truck-driver-boards-and> (describing DOT Truck Leasing Task Force that will investigate TRAPs for truck drivers, in coordination with CFPB and DOL).

<sup>321</sup> See Javillier, *supra* note 271, at 356 n.2 (“[T]he best incentives or sanctions have to be found with the help of another discipline. Linking disciplines is one of the most important



the application of various doctrines to the workplace encourages those doctrines to learn from each other. Just as employment law can adapt to fissured labor markets in the way that consumer law addressed fissured consumer goods markets, so too can consumer law evolve in the way that employment law has evolved by providing substantive protections that workers cannot waive. For example, statutory employees cannot contractually agree to work for less than the minimum wage and cannot contract away their right to be free from unlawful harassment in the workplace. Here, too, consumer law could adapt to provide greater substantive protections that extend beyond disclosure requirements.<sup>322</sup>

In addition, collective organizing is expanding among economically subordinated groups whose members have stacked identities of both worker and consumer. Public support for labor unions in the U.S. is at its highest level since 1965.<sup>323</sup> During the COVID-19 pandemic, union organizing surged in sectors like retail, warehousing, and technology, with organizing at Starbucks, Amazon, Apple, and Google regularly making national headlines.<sup>324</sup> During the same period, consumer debtors also began organizing collectively for student and medical debt relief through groups like the Debt Collective.<sup>325</sup> Not coincidentally, many consumer organizing leaders came out of the labor union movement.<sup>326</sup>

Currently, however, there is no collective rights regime for consumers in the way there is for employees through the NLRA. Consumer law could

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tasks for lawyers, from a theoretical as well as from a practical point of view.”); Hafiz, *supra* note 182, at 411 (“Integrating labor antitrust into labor-law enforcement is a crucial supplement to both its protections and its administrative deployment, offering a key intervention in the right direction.”).

<sup>322</sup> For example, consumers who labor in generating content for social media websites and data brokers could look to employment law for sources of protection from exploitation.

<sup>323</sup> Justin McCarthy, *U.S. Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Aug. 30, 2022), <https://news.gallup.com/poll/398303/approval-labor-unions-highest-point-1965.aspx>.

<sup>324</sup> See, e.g., Noam Scheiber, *Starbucks Union Strikes at Dozens of Stores as Talks Stall*, N.Y. TIMES (Dec. 16, 2022), <https://www.nytimes.com/2022/12/16/business/starbucks-strike.html>; Karen Weise & Noam Scheiber, *Amazon Workers on Staten Island Vote to Unionize in Landmark Win for Labor*, N.Y. TIMES (Apr. 1, 2022), <https://www.nytimes.com/2022/04/01/technology/amazon-union-staten-island.html>; Noam Scheiber, *Apple Store in Oklahoma City Becomes Second to Unionize*, N.Y. TIMES (Oct. 14, 2022), <https://www.nytimes.com/2022/10/14/business/economy/apple-store-union-oklahoma-city.html>; Kate Conger, *Hundreds of Google Employees Unionize, Culminating Years of Activism*, N.Y. TIMES (Jan. 4, 2021), <https://www.nytimes.com/2021/01/04/technology/google-employees-union.html>.

<sup>325</sup> See DEBT COLLECTIVE, Home Page, <https://debtcollective.org/> (last visited Dec. 25, 2022).

<sup>326</sup> See *Our Team*, DEBT COLLECTIVE, <https://debtcollective.org/about-us/our-team/> (last visited Dec. 25, 2022).

For the latest draft, visit <https://ssrn.com/abstract=4172535>.

evolve by learning from labor law to adopt a similar collective rights regime for consumers. Such a regime would also benefit worker-consumers excluded from the NLRA as non-employees (like franchisees and independent contractors), without having to engage in cumbersome and uncertain litigation over their classification.<sup>327</sup>

Class action litigation is another form of collective action, different from that contemplated under the NLRA. For both workplace and consumer claims, firms have used laws such as the Federal Arbitration Act (“FAA”) to impose mandatory arbitration contract clauses with class waiver provisions.<sup>328</sup> Things may be changing, however, at least in certain workplace contexts. For instance, in 2022, President Biden signed into law the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, which prohibits the enforcement of arbitration agreements for claims of workplace sexual harassment or sexual assault.<sup>329</sup> Consumer law could learn from this evolution in employment law by, for instance, prohibiting mandatory arbitration of UDAP claims. Courts could even consider viewing workplace mandatory arbitration with class waiver provisions as themselves constituting UDAPs.<sup>330</sup> In any case, agencies that enforce consumer laws are not bound by arbitration agreements, so this would not be a problem for agency-initiated litigation.

I have previously advocated for the application of a hybrid of contract law, employment law, and antitrust law to rebalance the power dynamics in the workplace, starting with reining in mobility restricting contracts for workers.<sup>331</sup> This Article adds consumer law to that hybrid approach.

## CONCLUSION

At root, workers’ lack of bargaining power gives them limited ability to resist firm UDAPs. Expanding worker bargaining power requires the use of all potential legal and policy mechanisms at workers’ disposal. Employers

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<sup>327</sup> This raises a larger question about the relevance of the employee vs. non-employee classification question, which some argue should be done away with entirely. *See, e.g.,* Lobel, *supra* note 8, at 63–64.

<sup>328</sup> 9 U.S.C. §§ 1–16, 201–08,301–07.

<sup>329</sup> Pub. L. No. 117-90, 136 Stat. 26 (2022). *See generally* Imre Szalai, *#MeToo’s Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, NW. J. L. & SOC. POL’Y (forthcoming 2023), <https://ssrn.com/abstract=4147981>.

<sup>330</sup> Courts have voided mandatory arbitration provisions with more frequency, under, for example, the doctrine of unconscionability. *See, e.g.,* Nino v. Jewelry Exch., Inc., 609 F.3d 191, 203 (3d Cir. 2010) (citation and internal quotation marks omitted); Uber Technologies Inc. v. Heller, [2020] 447 D.L.R. 4th 179 (Can.).

<sup>331</sup> *See generally* Harris, *supra* note 4, at 778–83.

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have created the modern fissured workplace by successfully shaping and then utilizing a multitude of legal regimes to expand their power, from employment law to contract law. Consumer law offers a ready-made complement to employment law and other legal regimes when firms offer services and credit products to workers, and workers and their advocates should likewise shape and utilize consumer law to increase their own bargaining power.

A consumer law framing in the workplace does have its shortcomings, including the potential for it to amplify narratives of autonomy, individualism, freedom of contract, and self-betterment, as well as the inherent weaknesses of consumer law itself. Through an integrated work law, however, consumer law and employment law could undergo a theoretical paired evolution, in which the doctrines continuously learn from and improve each other. The end goal would be to shore up the bargaining power of subordinated constituencies vis-à-vis firms, primarily through collective action. In the meantime, workers and their advocates would have an additional doctrine to tap when firms treat their workers as consumers and engage in UDAPs.