Consumer Law as Work Law

Jonathan F. Harris*

In recent decades, the U.S. labor market has shifted from a prevalence of long-term, single-employer careers to more contingent work or work disguised as entrepreneurship. These attenuated relations between worker and firm reflect the "fissuring" of work, in which firms have utilized laws that permit them to offload costs and risks though outsourcing, subcontracting, and franchising out their labor needs. Some firms now go beyond fissuring work: they treat the workers themselves as consumers by offering them services and credit products. Workers, in short, are also consumers in some contexts. And when firms expand employment contracts to extend services and credit products to workers, workers are entitled to consumer law protections.

DOI: https://doi.org/10.15779/Z38JH3D38F

* Associate Professor of Law, LMU Loyola Law School, Los Angeles. Senior Fellow, Student Borrower Protection Center, and grantee, University of California Student Loan Law Initiative. I thank the following for their conversations and feedback: Abbye Atkinson, Ian Ayres, Andrea Boyack, Juan Caballero, Richard Carlson, Miriam Cherry, Hugh Collins, Scott Cummings, Nakita Cuttino, Sarah Dadush, Dave DeSario, Andrew Elmore, Harris Freeman, Martha Albertson Fineman, Jane Flanagan, Larry Garvin, Terri Gerstein, Clayton Gillette, Jonathan Glater, George Gonos, Tristin Green, Hiba Hafiz, Luke Herrine, Chris Hicks, Alan Hyde, Christine Jolls, Tal Kastner, Pauline Kim, Andrew Koppelman, Stephen Lee, Orly Lobel, Florencia Marotta-Wurgler, Ryan Nelson, Douglas NeJaime, Michael Oswalt, Sachin Pandya, Christopher Peterson, Alexi Pfeffer-Gillett, Donald Polden, Ediberto Roman, César Rosado Marzán, Leticia Saucedo, Chris Schwartz, Joseph Seiner, David Seligman, Katherine Stone, Lauren Willis, Noah Zatz, and Adam Zimmerman. I also thank the faculties of Santa Clara University School of Law and Touro Law Center and participants in the Harvard/Stanford/Yale Junior Faculty Forum, AALS Contracts Section Works-in-Progress Panel, Berkeley Consumer Law Scholars Conference, Equality Law Scholars' Forum, NYU Lawyering Scholarship Colloquium, Colloquium on Scholarship in Employment & Labor Law, Southeastern Association of Law Schools New Scholars Workshop, Law & Society Annual Meeting, Labor & Employment Relations Association Best Papers Series, University of Richmond Law School Junior Faculty Forum, and Michael A. Olivas Writing Institute. The following provided stellar research assistance: Hugo Garcia, Jessica Hammond, Dylan Holmes, and Shannon Skrzynski. Lastly, many thanks to the *California Law Review* staff for excellent editing, especially Articles and Essays Editor Krithi Basu. This Article is dedicated to the memory of Michael A. Olivas.

This Article calls for an integrated work law that includes consumer law to more adequately counter worker exploitation. Some favor a return to earlier industrial relations through traditional employment law, by fortifying the statuses of employer and employee and the principle of compensation for work. But those laws have proved inadequate, and as the conventional relations break down, so too will law have to re-situate to provide adequate worker protections. By using consumer law, such as unfair or deceptive acts or practices laws, along with established employment law, workers can gain leverage. Combining consumer law and employment law approaches would also allow the doctrines to inform and strengthen one another. Ultimately, this paired doctrinal evolution could support workers' collective action to resolve asymmetries in bargaining power.

INTRODUCTION

The traditional employment relationship assumes a fee-for-service exchange: workers provide, and receive compensation for, their labor services. That exchange is governed by work law, which purports to provide an array of contractual, constitutional, and statutory protections to workers that obviates the need for protections against unfairness and deceit typically extended to

consumers.[1] But firms have increasingly exploited this implied waiver of consumer protections for workers by making their own offers to provide services and credit products to captive workers as part of the labor contract.[2] 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.[3] These policies have caused 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.[4] Cost cutting also involves 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).[5] Firms disseminate "American exceptionalist" narratives of rugged individualism, autonomy, and freedom of contract to reframe those costs as opportunities for workers' personal betterment.[6]

---

1. I use the term "work law" to describe the panoply of laws that regulate work.

2. For the purposes of this Article, the term "firm" is meant to describe both formal employers and entities that utilize workers' labor but do not consider themselves formal employers. Some of the latter entities are genuinely nonemployers—for example, firms that occasionally hire plumbers to repair their facilities. But many of those entities engage in regulatory arbitrage to avoid classification as formal employers, allowing them to avoid statutory and common law duties that employers owe employees and the state.

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

4. *See* KATHERINE V.W. STONE, FROM WIDGETS TO DIGITS 5–6 (2004). In using more contingent work models such as temporary staffing and more entrepreneurial work models such as franchising, firms have arranged their labor systems to offload risk and liabilities while maximizing profits. These models sharply contrast with past practices, when firms more often internalized labor-related risks, liabilities, and costs.

5. *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: paying a lower "training" pay, requiring applicants to hold post-secondary degrees, and providing workers with training as a credit product with back-end repayment obligations).

6. *See generally* Martha Albertson Fineman, *Reasoning from the Body: Universal Vulnerability and Social Justice*, *in* A JURISPRUDENCE OF THE BODY 17, 33 (Chris Dietz, Mitchell Travis & Michael Thomson 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/ [https://perma.cc/JL6P-K4G8] (transcription of interview with William Novak) (quoting Novak calling the "American exceptionalist narrative" a "secular theology" that is "about individual rights, self-

This contractual cost shifting also enables the further "fissuring" of work, through which firms outsource, subcontract, and franchise previously internalized labor markets.[7] Fissuring allows upstream firms more flexibility while disinvesting from training the workers who labor in their facilities but are not directly employed by the firms. A growing number of firms also use the lure of small business ownership—in keeping with the narrative of individualism and autonomy—to attract workers to labor as nonemployee entrepreneurs. The rideshare economy is one such example, with firms such as Uber and Lyft claiming that they merely provide a platform service on which independent contractor drivers bargain directly with customers for rides.[8] Drivers become the firms' consumers, stacked on top of their identities as workers.[9]

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.[10] Drawing on several recent studies and on primary data, including a dataset of employment firms' contracts with temporary staffing agencies and an overview of existing state consumer and worker protection agencies, the Article develops a detailed descriptive account of several ways that firms harm workers and, in doing so, treat workers as consumers. Second, the Article advances consumer law as work law, bridging the fields and arguing that, as firms treat workers as consumers, consumer law should become work law. Third, turning to theories of work law

---

reliance, voluntarism, entrepreneurship, anti-statism, private property, liberty of contract, and free markets").

7. *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").

8. *See, e.g.*, *Working Together: 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/ [https://perma.cc/V3VW-DESW].

9. Courts have also described these stacked identities of worker and consumer. *See, e.g.*, Transcript of Oral Argument, Alvarado v. Pac. Motor Trucking Co., 2016 WL 7245598 (9th Cir. Nov. 16, 2016) (No. 14-56823) (recording of trucking firm's attorney arguing that the firm's drivers were both its employees and lessees or purchasers of its trucks).

10. *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 n.41 (2017) (citing LUC BOLTANSKI & EVE CHIAPELLO, THE NEW SPIRIT OF CAPITALISM 80–81, 217–18 (Gregory Elliott trans., 2005)) (recounting the shift in the 1970s of firm ideology toward that of "individual responsibilization of work," supported by themes of individual performance and autonomy and leading to the contemporary gig work economy); 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 this 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 5, at 280–83; Orly Lobel, *The Gig Economy & the Future of Employment and Labor Law*, 51 U.S.F. L. REV. 51, 51–57 (2017).

and worker protection more broadly, the Article considers what it means to embrace an integrated work law.[11]

This Article illustrates in three concrete ways how firms turn their workers into worker-consumers and, in the process, engage 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 or is fired within a set period of time.[12] Another training financing model uses Income Share Agreements (ISAs), lending a certain amount of training on the condition that trainees repay a percentage of their future income, rather than a fixed sum.[13] Firms frequently bundle ISAs with TRAPs by 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."[14] The ISA repayment amount often exceeds the price of a comparable training program with an upfront payment scheme. Moreover, with both TRAPs and ISAs, the advertised training is often of little use to the workers.[15]

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 business development plans and operating outreach systems to mostly immigrant workers, sometimes indebting those workers-turned-franchisees in inescapable ways.[16] Franchisors frequently deceive the often-misclassified independent contractors about the potential for high earnings in the franchise.

---

11. *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, 37 (Guy Davidov & Brian Langille eds., 2006).

12. Harris, *supra* note 5, at 724; JONATHAN F. HARRIS & CHRIS HICKS, TRAPPED AT WORK: HOW BIG BUSINESS USES STUDENT DEBT TO RESTRICT WORKER MOBILITY 3 (2022), https://ssrn.com/abstract=4177496 [https://perma.cc/34FA-VYSJ]. The Student Borrower Protection Center, a nonprofit organization focused on alleviating the burden of student debt, coined the acronym TRAP to signal the effects of the contracts on workers.

13. *See* Harris, *supra* note 5, at 766–77; JOANNA PEARL & BRIAN SHEARER, CREDIT BY ANY OTHER NAME: HOW FEDERAL CONSUMER FINANCIAL LAW GOVERNS INCOME SHARE AGREEMENTS 4 (2020), https://protectborrowers.org/wp-content/uploads/2020/07/Pearl.Shearer_Credit-By-Any-Other-Name.pdf [https://perma.cc/V45C-64RW].

14. *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 [https://perma.cc/EGL7-LNZC].

15. *See* Harris, *supra* note 5, at 726, 745, 755 (asserting that TRAP-funded training is often not useful to workers, providing examples of police officers and nurses).

16. *See* Press Release, Wash. State Off. of the Att'y Gen., AG Ferguson Files Lawsuit Against Janitorial Services Company for Exploiting Mostly Immigrant Workers (Apr. 6, 2021) [hereinafter Wash. Press Release], https://www.atg.wa.gov/news/news-releases/ag-ferguson-files-lawsuit-against-janitorial-services-company-exploiting-mostly [https://perma.cc/8GFZ-H7MK].

Finally, some temporary staffing agencies deploy unfair and deceptive terms in offering workers job matching and placement services that conceal the agencies' collusion with client firms to restrict workers' future employment options. Temporary staffing agencies, which employ thirteen to sixteen million workers in the U.S. economy each year,[17] commonly advertise their matching and placement services to workers as "temp to perm" or "temp to hire," implicating an eventual opportunity to work directly for the client firm.[18] Many of these staffing agencies, however, conceal contracts with client firms that make it practically impossible for most temporary workers to work directly for the client firm, its affiliates, or, in many cases, competitor staffing agencies.

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. Accordingly, consumer law should become part of work law.

Consumer law protects transactions "for personal, family, or household purposes."[19] The field developed in the wake of monopolization of sectors of the U.S. economy in the late nineteenth and early twentieth centuries. During this period, firms' diminished contact with and accountability to consumers led to

17. *See Staffing Industry Statistics*, AM. STAFFING ASS'N, https://americanstaffing.net/research/fact-sheets-analysis-staffing-industry-trends/staffing-industry-statistics/ [https://perma.cc/8CSJ-YPEG].

18. *See* TEMP WORKER JUST., CHI. WORKERS COLLABORATIVE, MISS. WORKERS' CTR. FOR HUM. RTS., NAT'L EMP. L. PROJECT, NEW LAB., N.C. JUST. CTR. & WAREHOUSE WORKERS FOR JUST., TEMP WORKERS DEMAND GOOD JOBS: SURVEY REVEALS POVERTY PAY, PERMATEMPING, DECEPTIVE RECRUITMENT PRACTICES, AND OTHER JOB QUALITY ISSUES 18 (2022), https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf [https://perma.cc/ER2P-97W9]; 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. The terms are used interchangeably and reflect the standard terminology in the industry. Others use the term "worksite employer."

19. *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. § 1692(a)(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) (AM. L. INST. & UNIF. L. COMM'N 1977) (regarding secured consumer finance); U.C.C. § 2A-103(e) (AM. L. INST. & UNIF. L. COMM'N 1977) (regarding consumer leases). Antitrust law, a doctrine experiencing a renaissance on behalf of workers, is sometimes seen as encompassed within consumer 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). More recently, some have argued for an even broader definition of "consumer." *See, e.g.*, Andrea Boyack, *The Shape of Consumer Contracts*, 101 DENV. L. REV. (forthcoming 2023) (manuscript at 3 n.1), https://ssrn.com/abstract=4527434 [https://perma.cc/E4S7-BRJR] (using the term "consumer" to describe "any individual who engages in economic relationships with commercial parties, including but not limited to buyers, debtors, subscribers, *employees, workers (in the gig economy and elsewhere)*, and anyone else who is bound by terms authored exclusively by commercial parties with whom they engage" (emphasis added)).

increased sales of dangerous and defective goods at inflated prices with little regard for health and safety in the conditions of production.[20]

Consumer law later expanded to prohibit broader unfair practices, with substantial litigation under the Federal Trade Commission (FTC) Act of 1914.[21] 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.[22] Consumer protection laws are voluminous, but this Article focuses on one major subset: UDAP laws.[23]

A handful of scholars and policy-makers have recently turned to consumer law protections as an avenue to protect workers from firms' UDAPs.[24] This Article, however, uniquely 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 payment for labor through a consumer lens, paying workers in scrip that could be redeemed only at company stores.[25] Therefore, employees became captive customers of their employers. Employment laws were passed, in part, to separate compensation from these

---

20. *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. UNIF. WEIGHTS & MEASURES L. (NAT'L CONF. ON WEIGHTS & MEASURES 1906), https://www.nist.gov/system/files/documents/2017/05/09/09-section-IIIa-14-h130-final.pdf [https://perma.cc/P9GK-WDJZ]. 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. These concerns eventually led to congressional passage of the Food, Drug and Cosmetic Act of 1938, requiring, among other things, 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. §§ 301–399i).

21. 15 U.S.C. §§ 41–58.

22. *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 (2017).

23. *See id.* at 911.

24. *See* Christopher L. Peterson & Marshall Steinbaum, *Coercive Rideshare Practices: At the Intersection of Antitrust and Consumer Protection Law in the Gig Economy*, 90 U. CHI. L. REV. 623, 642–57 (2023) (arguing for use of UDAP 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, Lorelei Salas & David Seligman, *When Corporations Deceive and Cheat Workers, Consumer Laws Should Be Used to Protect Workers*, ECON. POL'Y INST.: WORKING ECON. BLOG (May 5, 2021), https://www.epi.org/blog/when-corporations-deceive-and-cheat-workers-consumer-laws-should-be-used-to-protect-workers [https://perma.cc/TL9D-NN2V] (collecting cases where regulators have used consumer law to protect workers); Sharon Block, *Employing Lots of Law to Do "Employment Law,"* ONLABOR (Sept. 27, 2022), https://onlabor.org/employing-lots-of-law-to-do-employment-law/ [https://perma.cc/W3P6-ELYF] (asserting that the FTC should use its consumer protection tools to protect gig workers, since traditional employment law cannot).

25. *See* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY 311–12 (2001) (describing a crackdown by various state legislatures on unscrupulous employer behavior, including the use of company scrip).

sorts of consumer relationships, requiring that wages be paid "free and clear."[26] Similarly, a century ago, employers began selling employees fringe benefits like life insurance, which then expanded to other benefits such as health insurance, retirement plans, and tuition programs.[27] These practices led to the modern employer welfare model that is intentionally conceptualized as "employee benefits" rather than consumer relationships due to the dearth of existing protections—consumer based or otherwise.[28]

Even today, companies like Uber harken back to those older days by calling their drivers "customers" and "consumers" of their software, rather than employees, to avoid the application of employment law protections.[29] Today, however, consumer law enforcers are catching on and using firms' own nomenclatural sleight of hand against them.[30] 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.[31] 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 asymmetries in bargaining power between firms and individual workers.[32] For instance, in early 2023, the FTC proposed a rule to ban all noncompete agreements (noncompetes) and certain TRAPs.[33]

Traditional employment law regulates training and other services provided to workers for the benefit of the employer. Both federal and state laws prevent kickbacks of wages for costs incurred by workers that are primarily for the

26. 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).

27. *See* JENNIFER KLEIN, FOR ALL THESE RIGHTS: BUSINESS, LABOR, AND THE SHAPING OF AMERICA'S PUBLIC-PRIVATE WELFARE STATE 9–15 (2006) (describing these benefits).

28. *See id.* at 258–76.

29. *See* Calo & Rosenblat, *supra* note 24, at 1634, 1660 (noting that Uber calls drivers in the United Kingdom "customers" in its terms of service and argued in the United States that its drivers are consumers of the platform software because they pay a "licensing fee" to Uber).

30. *See, e.g.*, *id.* at 1660 & n.194 (citing FTC enforcement action against Uber for deceptively promoting potential earnings by drivers, calling drivers "entrepreneurial consumers").

31. *See id.* at 1634, 1653, 1670–71 (describing how firms like Uber influence lawmakers and proposing consumer law to regulate the "sharing and taking economy"); Gerstein, Salas & Seligman, *supra* note 24 (proposing consumer law remedies for exploited workers).

32. *See, e.g.*, Press Release, Consumer Fin. Prot. Bureau, CFPB Launches Inquiry into Practices that Leave Workers Indebted to Employers (June 9, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-inquiry-into-practices-that-leave-workers-indebted-to-employers/ [https://perma.cc/6VXC-UXU8]; FED. TRADE COMM'N, FTC POLICY STATEMENT ON ENFORCEMENT RELATED TO GIG WORK 8 (2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf [https://perma.cc/C5YN-E3CA] (internal citations omitted).

33. Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910). The FTC had not issued a final rule as of this Article's publication.

employer's benefit.[34] But when firms evade 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, stepping 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 rethought their relationships to work, and firms have rethought how many workers they need and how they should utilize these workers. It is also time to reconsider work law doctrines and the firm-worker relationship itself. Traditional employment law remains essential to workers' wellbeing. But some employment laws have failed to keep up with firms' fissuring of the workplace based, for example, on a recognition of only a formal employer-employee relationship.[35] Unless worker advocates and worker protection agencies are able to prove misclassification as nonemployees—an unlikely feat in many jurisdictions—the workers cannot benefit from traditional employment law and must turn to other laws for workplace protections.[36]

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 and worker protection agencies 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 duality and have launched new legal challenges containing a hybrid of employment law, consumer law, and contract law causes of action. These hybrid challenges are 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.[37]

Of course, there are challenges to developing a legal regime that covers an array of worker concerns by drawing from multiple areas of law. This Article

34. *See, e.g.*, 29 C.F.R. § 531.35 (2019) (preventing "kickbacks" under Fair Labor Standards Act, 29 U.S.C. §§ 201–219); 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. LAW § 191.

35. Many of those workers misclassified as nonemployees 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 24 (describing how firms have largely won the battle over misclassification and that federal law does not make misclassification unlawful per se).

36. *See id.*

37. *See State Consumer Protection Offices*, USAGOV, https://www.usa.gov/state-consumer [https://perma.cc/A66C-25WG]; Telephone Conversation with Terri Gerstein, Dir. of the State & Loc. Enf't Project, Harv. L. Sch. Ctr. for Lab. & a Just Econ. (Nov. 15, 2022) (notes on file with author). I have compiled a fifty-state survey of state attorneys general offices with dedicated consumer protection divisions and dedicated employee, labor, and worker protection divisions; the former far outnumber the latter.

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 may otherwise be underprotected. Consumer law, in other words, becomes work law and should be understood and utilized accordingly. To this end, "consumer law as work law" is meant to be both (1) an empirical descriptor of one part of the collage of laws that regulate work and (2) a claim that consumer law can stand in the place of employment and contract law when those laws are absent, at least in some cases.

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.

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.[38] 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.[39] Previously, 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.[40] The unraveling of those internal labor markets coincided with the decline of U.S. unionization rates from one in three workers in 1965 to one in ten workers in 2015.[41] Katherine V.W. Stone has described this unraveling as a move from an "old psychological contract" characterized by long-term

38. WEIL, *supra* note 7, at 20; *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 "outsourc[ing] services and production").

39. WEIL, *supra* note 7, at 3.

40. *Id.* at 37–41.

41. *See id.* at 41–42; Quoctrung 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 [https://perma.cc/EN32-WEZ5].

employment and internal career ladders to a "new psychological contract" characterized by mutual decommitment to long-term employment with a single firm.[42]

Fissuring did not happen by force of nature; firms orchestrated the process to maximize profits and minimize 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.[43] In other words, firms used narratives of self-betterment, self-determination, and entrepreneurship to convince the public that fissuring could be good for workers. This was largely false, however, as the resulting breakdown of the employer-employee partnership and the concentration and asymmetry of economic power in those firms' hands has harmed workers.[44]

Specifically, firms shifted costs and risks onto workers. For example, firms externalized training costs 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.[45] Firms also 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.[46] Yet what resulted was an abusive system of exploitation and debt that, according to David Weil, "can be traced to the structure of markets and

---

42. Stone, *supra* note 10, 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).

43. *Cf.* William J. Novak, *A Modern Democratic State, if We Can Keep It*, YALE J. ON REGUL. (Aug. 11, 2022), https://www.yalejreg.com/nc/symposium-novak-new-democracy-12/ [https://perma.cc/3BDU-TSVE] (noting how American political and legal regimes have been shaped by "an almost sacred freedom narrative in which private rights, individual freedoms, herculean judges, and a distinctive and original written constitutional inheritance figured especially prominently"); Fineman, *supra* note 6, at 33 (proposing a response based on "vulnerability theory" in lieu of the dominant "legal subjectivity" framework).

44. *See* WEIL, *supra* note 7, at 132, 140.

45. *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), https://www.wsj.com/articles/american-factories-demand-white-collar-education-for-blue-collar-work-11575907185 [https://perma.cc/2NKK-BDDM]; Harris, *supra* note 5, at 725. Though cost shifting also occurs in manufacturing, this Article focuses primarily on the service sector because it employs the bulk of U.S. workers. *See, e.g.*, Dion Rabouin, *Why U.S. Manufacturing and Services Are Moving Further Apart*, AXIOS (Jan. 8, 2020), https://www.axios.com/2020/01/08/us-manufacturing-services-sectors-economy [https://perma.cc/Q77F-ZDVB].

46. *See* STEWART MACAULAY, CONTRACTS: LAW IN ACTION 402 (1st ed. 1995) ("[O]ften the franchisor sees both the control which an employer has over employees and the image of 'running your own business' to provide incentives for hard work . . . . [Therefore,] franchisees may have greater incentives than most employees to work hard, and many statutes regulating . . . employment do not apply to their efforts.").

competition arising from the widespread outsourcing."[47] Meanwhile, unstable and low-paying contingent work exploded, and staffing agencies became many workers' first point of contact with the labor market.

B. Workers as Consumers

In addition to fissuring, firms now treat workers as consumers by selling them 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 instance, employers began selling employees life insurance plans over a century ago. These plans were the genesis of the modern employer welfare system that includes health insurance and pensions.[48] This Part I.B provides three case studies of how firms offer services to workers as consumers, using unfair and deceptive contracts that harm them. Workers, in effect, take on an overlapping identity of consumers vis-à-vis the firm.

1. Training Services

Many firms offer training services to employees 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.[49] 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.[50] 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; and (4) declining to fully disclose what termination conditions would trigger repayment.[51] These UDAPs make workers particularly vulnerable because they turn employers into creditors as well as sources of income.

Employers have most recently expanded TRAPs among entry-level workers, including those in the transportation, cosmetology and aesthetics, healthcare, retail, technology, and finance sectors.[52] In 2022, it was estimated that major employers rely on TRAPs in sectors that collectively employ over a

47. WEIL, *supra* note 7, at 132, 140.

48. *See* KLEIN, *supra* note 27, at 16–52.

49. *See* Harris, *supra* note 5, at 724.

50. 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* BECKER, *supra* note 45, at 33, 35, 40.

51. *See* Harris, *supra* note 5, at 754 ("[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.").

52. HARRIS & HICKS, *supra* note 12, at 14–26, 30 n.11.

third of all private-sector workers in the United States.[53] TRAPs have become particularly common among firms owned by private equity, including retail chains like PetSmart.[54]

In transportation, for example, large trucking companies such as CRST and CR England run commercial driver's license schools using TRAPs that have repayment amounts of over $6,000 with up to two-year repayment windows.[55] But the trucking sector has high worker turnover—nine out of ten truckers leave their jobs within a year due to grueling working conditions—which means that TRAP repayments can be great sources of revenue for trucking firms.[56] Sociologist Steve Viscelli has, accordingly, called the system "debt peonage."[57]

The cosmetology and aesthetics sectors similarly rely on TRAPs.[58] 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."[59] The TRAP had a two-year work requirement to avoid a $5,000 repayment.[60] Bal reported receiving only three training sessions, usually with the supervisor running late.[61] 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.[62]

In healthcare, 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 eleven to twenty years' experience

53. *Id.* at 14.

54. *See* UNITED FOR RESPECT, GREED UNLEASHED: PETSMART, BC PARTNERS, AND WHAT HAPPENS WHEN PRIVATE EQUITY PREYS ON WORKERS AND PETS 2 (2021), https://united4respect.org/wp-content/uploads/2021/09/Greed-Unleashed-Report.pdf [https://perma.cc/KBY8-ER6T] (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), https://www.wsj.com/articles/petsmart-workers-ask-retailers-private-equity-owner-for-coronavirus-protections-11594235984 [https://perma.cc/U36Y-Z3RZ].

55. Int'l Bhd. of Teamsters, Comment Letter on Request for Information Regarding Employer-Driven Debt 6 (Sept. 23, 2022) [hereinafter Teamsters Comment], https://www.regulations.gov/comment/CFPB-2022-0038-0055 [https://perma.cc/2VPK-UUFK].

56. *See id.*

57. Erin McCormick, *"Indentured Servitude": Low Pay and Grueling Conditions Fueling US Truck Driver Shortage*, GUARDIAN (Nov. 22, 2021), https://www.theguardian.com/business/2021/nov/22/indentured-servitude-low-pay-and-grueling-conditions-fueling-us-truck-driver-shortage [https://perma.cc/SX54-SRFF].

58. *See, e.g.*, Press Release, Nat'l Lab. Rels. Bd., Region 9—Cincinnati Issues Complaint Alleging Unlawful Non-Compete and Training Repayment Agreement Provisions (TRAPs) (Sept. 7, 2023), https://www.nlrb.gov/news-outreach/region-09-cincinnati/region-9-cincinnati-issues-complaint-alleging-unlawful-non [https://perma.cc/4XQV-HRHZ] (alleging aesthetics employer used TRAPs requiring repayments up to $60,000 in violation of federal labor law).

59. Oh Sweet, LLC v. Bal, No. 22-CIV-05745-KCX (Kings Cnty. Dist. Ct. Sept. 6, 2022) (complaint and defendant's exhibits on file with author).

60. *Id.* (defendant's opening statement and exhibits on file with author).

61. *Id.*

62. *Id.* (verdict on file with author).

reported being bound by a TRAP at some point, 44.8 percent of the nurses with between one and five years' experience were bound by TRAPs.[63] These statistics demonstrate the rapid growth of TRAPs in recent years. In total, over half of the responding nurses reported becoming bound by a TRAP when required to enter into a training program as a condition of employment.[64] Only half of those nurses knew they were taking on debt before accepting or continuing employment with their employer.[65] 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.[66]

One nurse's narrative demonstrates the locking effects of TRAPs in a highly desired sector, with the TRAP both harming the worker and distorting the regional and sectoral labor market. Cassie Pennings, a new graduate nurse at UCHealth 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 the first 12 weeks."[67] But during the COVID-19 pandemic, her mentor was preoccupied with other emergencies, leaving Pennings alone to care for five ICU patients in only her eleventh week as a nurse.[68] The burnout-inducing conditions persisted, causing Pennings to resign. "[L]eaving my job felt like exiting an abusive relationship," Pennings commented.[69] UCHealth's TRAP required Pennings to pay $7,500—two months' salary—if her employment ended within two years.[70] UCHealth withheld half of her final paycheck as a first payment toward the TRAP debt, which she continues to owe.[71] But, Pennings noted, "we certainly did not receive $7,500 worth of benefits in the program."[72]

TRAPs disproportionately impact women like Cassie Pennings and people of color, especially in the context of a debt crisis among Black and Latinx families. Many TRAP-dependent sectors 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 has on women in

63. Nat'l Nurses United, Comment Letter on Request for Information Regarding Employer-Driven Debt 9–11 (Sept. 23, 2022), https://www.regulations.gov/comment/CFPB-2022-0038-0048 [https://perma.cc/N6SB-WXXP]. Large for-profit healthcare 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 world's largest for-profit healthcare employer. *Id.* at 7.

64. *Id.* at 8.

65. *Id.* at 9.

66. *Id.* at 11.

67. *Brown Hosts Consumers for Listening Session on New Financial Products Testimony*, U.S. SENATE COMM. ON BANKING, HOUS. & URB. AFFS. (Sept. 7, 2022), https://www.banking.senate.gov/imo/media/video/Cassie%20Pennings.mp4 [https://perma.cc/6HAP-WQ36] (testimony of Cassie Pennings).

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

those sectors.[73] In addition, close to half of all truck drivers in the United States are Black or Latinx.[74] Black and Latinx families already face mounting debt. For example, education debt and interest rates are greater among communities of color than White communities.[75] Moreover, 18.9 percent of Black families and 11.3 percent of Latinx families experience net debt—having more household debt than assets—while only 10.8 percent of all U.S. households have zero or negative wealth.[76] TRAPs and other work-based debt products are a component of this net debt.

Firms also offer training services to workers through ISAs, a credit product. With ISAs, workers receive training and are then expected to repay the training cost as a percentage of their future salary, rather than as a fixed sum.[77] 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.[78] ISA providers that also operate as staffing agencies have recently introduced hybrid ISAs-TRAPs. Under the hybrid model, ISA providers hire and channel their 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.[79] 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.[80] Revature also requires

73. Teamsters Comment, *supra* note 55, at 4–5 (collecting U.S. Department of Labor (DOL) statistics).

74. *Id.*

75. *See* 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/ [https://perma.cc/YBQ5-6DBS].

76. KATHERINE LUCAS MCKAY, JOANNA SMITH-RAMANI & TASHFIA HASAN, ASPEN INST. FIN. SEC. PROGRAM, DISPARITIES IN DEBT: WHY DEBT IS A DRIVER IN THE RACIAL WEALTH GAP 2 (2022), https://www.aspeninstitute.org/wp-content/uploads/2022/02/FINAL-ASP-FSW_Disparities-in-Debt_020722-3.pdf [https://perma.cc/USC5-K2NW].

77. I wrote extensively about ISAs in a previous article. *See* Harris, *supra* note 5, at 766–78.

78. *See* Steven Yoder, *Colleges Are Already Ditching Income-Share Agreements*, WIRED (Aug. 12, 2022), https://www.wired.com/story/income-share-agreements-hechinger-report/ [https://perma.cc/SM8S-TXN9]; Pyramid Consulting, Inc., *Pyramid Academy is NOT a coding Bootcamp - We're so much more!*, FACEBOOK (Jan. 19, 2021), https://www.facebook.com/PyramidConsultingInc/photos/a.186575324721135/3997489350296361/ [https://perma.cc/9MAW-V3K7].

79. *See, e.g.*, Natasha Mascarenhas, *Edtech's Brightest Are Struggling to Pass*, TECHCRUNCH (Dec. 10, 2022), https://techcrunch.com/2022/12/10/some-of-edtech-boldest-are-struggling/ [https://perma.cc/PK25-N22B].

80. *See* Rindlisbacher, *supra* note 14; *How Much Does an Entry Level Programmer Make?*, GLASSDOOR (Dec. 13, 2021), https://www.glassdoor.com/Salaries/entry-level-programmer-salary-

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 "quit fee"—a TRAP.[81] One worker advocate labeled this "quit fee" as indentured servitude.[82] Revature hires recent former trainees as instructors, raising concerns that promises of quality training are deceptive.[83]

Other firms followed Revature's lead in binding workers and trainees to similar multilayered contracts. A coding bootcamp with the coincidental name "Pyramid Academy" has coders commit to working for at least twelve to eighteen months with a client company while deceptively advertising that the training is "#freetoyou" and costs "$0."[84] If the worker quits during the commitment period, the trainee must pay the cost of the putative training. Moreover, the contract requires the trainee's willingness to relocate to the assigned job.[85] This hybrid contract combines characteristics of TRAPs and ISAs with those of staffing agencies. For example, Pyramid Academy's parent company, Pyramid Consulting, markets itself as an IT staffing agency that prioritizes training for people of color.[86]

Revature's and Pyramid's stacking of TRAPs and ISAs with other contract clauses constitute what Orly Lobel calls a "contract thicket."[87] Contract thickets are multiple contracts and contract clauses that, taken together, are unfair and harm workers in numerous ways.[88]

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 nonemployee franchisees, altogether shedding their employment obligations. This Article focuses on janitorial franchisors that sell marketing and operations

SRCH_KO0,22.htm [https://perma.cc/8EXB-S9KQ] (noting that the average market-rate salary for entry-level programmers was $72,299 in 2021).

81. *See* Rindlisbacher, *supra* note 14.

82. *Id.*

83. *See id.*

84. Pyramid Consulting, Inc., *supra* note 78 ("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 [https://perma.cc/EGL9-HKNJ]. 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].

85. *See GenSpark FAQs*, *supra* note 84.

86. *See Why Pyramid Consulting*, PYRAMID CONSULTING, https://pyramidci.com/corporate-about-us/ [https://perma.cc/V6MQ-CEJQ]; PYRAMID CONSULTING, DIVERSITY, EQUITY, & INCLUSION: 2022 IMPACT REPORT 4 (2022) [hereinafter 2022 IMPACT REPORT], https://pyramidci.com/resources/ebooks/Pyramid_DEI_ImpactReport.pdf [https://perma.cc/Y5VX-L5WF] (noting that "75% of GenSparkers are from underrepresented groups," with 55 percent being Black or African American).

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

88. *See id.*

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.[89]

The rise of janitorial franchises is roughly coterminous with the rise of the modern franchise system in the 1960s and 1970s, with janitorial companies increasingly looking for ways to reduce costs and avoid liability in the mid-1970s.[90] For example, Jani-King International, one of the largest janitorial franchising companies, started in the 1960s by hiring janitors directly as employees.[91] In the 1970s, however, Jani-King switched its business model to selling franchises.[92] Contemporaneous U.S. Supreme Court rulings supported the switch to franchising by dismantling antitrust barriers to vertical restraints—that is, restraints on competition among firms at different levels of the production or supply chain.[93] This freed 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."[94] The franchisor owns the trademark, branding, and business model.[95] It grants territory to the master franchisee.[96] The master franchisee then holds the right to grant franchises in that territory to "unit franchisees"; the unit franchisees perform the cleaning labor.[97] Master franchisees are typically separate corporate entities with their own staff.[98]

89. *See* WEIL, *supra* note 7, at 132–42.

90. *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*, MAINTENANCE COOP. TR. FUND, http://www.janitorialwatch.org/history/ [https://perma.cc/7G7N-J93E]; Brian Callaci, *Control Without Responsibility: The Legal Creation of Franchising, 1960–1980*, 22 ENTER. & SOC'Y 156, 167–69 (2020); Brian Callaci & Sandeep Vaheesan, *Antitrust Remedies for Fissured Work*, 108 CORNELL L. REV. ONLINE 27, 29, 37 (2023).

91. *See* Mouanda v. Jani-King Int'l, 653 S.W.3d 65, 68 (Ky. 2022).

92. *See id.*

93. *See* Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54 (1977); Elmore & Griffith, *supra* note 5, at 1358–59 (noting that the U.S. Supreme Court was influenced by a Chicago School-initiated intellectual shift toward seeing antitrust law's primary goal as one of protecting efficiency).

94. *See* Dunne, *supra* note 90, at 834.

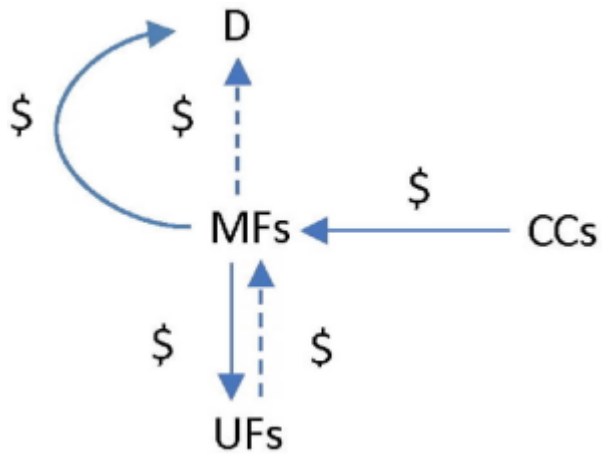
95. *See The Franchise Business Model 101—An Introduction*, FRANCHISE BUS. REV. (Nov. 30, 2018), https://franchisebusinessreview.com/post/franchise-business-model/ [https://perma.cc/CP36-PQUU].

96. *See* Dunne, *supra* note 90, at 834–35.

97. *See id.* at 835.

98. *See* Roman v. Jan-Pro Franchising Int'l, Inc., 342 F.R.D. 274, 287 (N.D. Cal. 2022).

This is a visual depiction of the flow of money and fees in these arrangements:[99]



"CCs" represents cleaning customers, "UFs" represents unit franchisees, "MFs" represents master franchisees, and "D" refers to the defendant franchisor in the case.[100] The solid arrows designate the flow of money from cleaning services, while the dotted lines designate the flow of revenue from franchise fees.[101]

Unit franchisees become consumers of master franchisees, as the latter sell an initial roster of customers, customer service assistance, and billing and invoicing services.[102] Some franchises, like Jani-King, have unit franchisees purchase or lease products from master franchisees.[103] The master franchisees then pay the unit franchisees through that revenue, minus a deduction to be paid to the franchisor.[104] Master franchisees profit by collecting additional fees from unit franchisees, including "management fees" and "sales and marketing fees" for providing operations and marketing management services to unit franchisee consumers.[105] Also, unit franchisees pay the master franchisee a "franchise fee" in order to secure the rights to operate using the franchisor's trademark.[106] As a result of service fees paid to master franchisees, a so-called "entrepreneur" unit

99. *Id.* at 288.
100. *Id.*
101. *Id.*
102. *See id.* at 287–88 (citing Depianti v. Jan-Pro Franchising Int'l, Inc., 873 F.3d 21, 23–24 (1st Cir. 2017)).
103. *See* Mouanda v. Jani-King Int'l, 653 S.W.3d 65, 68 (Ky. 2022).
104. *See Roman*, 342 F.R.D. at 288.
105. *See id.*
106. *See id.*

franchisee may not even break even if the gross hourly price for services falls below $15, which occurs frequently.[107]

One unit franchisee's story illuminates how unit franchisees can accumulate crippling debt. A.J. Simmons, who worked as a unit franchisee among various janitorial franchisors for six and a half years, released several videos on YouTube advising people against becoming unit franchisees because of the UDAPs they would experience.[108] He explained that the fees collected by the master franchisee alone almost completely erase the profit a unit franchisee could expect.[109] Moreover, the franchise fee that a unit franchisee pays to engage a master franchisee and receive a customer roster is typically three to four times the unit franchisee's projected monthly gross revenue.[110] For example, a unit franchisee seeking earnings of $2,000 per month can expect to pay a franchise fee of $6,000 to $8,000. Because many low-wage workers do not have that amount of money up front, most janitorial franchisors and master franchisees offer unit franchisees credit products to finance the upfront cost with interest-bearing loans.[111] The debt makes it even harder for unit franchisees to profit. Simmons regarded the system as exploitative and pointed out the racial disparity between the majority-Black and majority-Latinx unit franchisees and the majority-White master franchisees.[112]

These franchising arrangements are frequently unfair and deceptive to unit franchisees because they are pitched according to "American exceptionalist" narratives of autonomy, self-determination, and self-betterment.[113] Indeed, franchises are typically marketed to low-wage earners, often immigrants, as an opportunity to run their own business with the added assurance of guaranteed customers, support, and financing.[114] 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 earn

107. *See* WEIL, *supra* note 7, 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. REL. REV. 287, 287–306 (2010).

108. 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://perma.cc/42MK-AR58].

109. *Id.* at 3:30–4:00.

110. *Id.*

111. *Id.* at 4:15–4:45.

112. *Id.*

113. Petroziello, *supra* note 6; *see also* MACAULAY, *supra* note 46.

114. *See* DAVID H. SELIGMAN, TESTIMONY BEFORE THE UNITED STATES SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS ON EMPLOYER-DRIVEN DEBT 3–4, 8–9 (2022), https://www.banking.senate.gov/imo/media/doc/Seligman%20Testimony%209-13-22.pdf [https://perma.cc/C9ZN-HGGX].

$5,000 to $200,000 annually in profits.[115] 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.[116] Such a plan promised an annual income of $20,000.[117] Vazquez borrowed the $5,000 from his parents, who moved from Mexico to the United States to escape poverty.[118] The master franchisee representative told Vazquez he would earn about $25 per hour.[119] When Vazquez started working, however, he realized he was making about $5 per hour.[120] At the time, the federal minimum wage was $5.85 per hour and the state minimum wage was $7.50 per hour.[121]

Karen Miller, a former master franchisee in Michigan, provided a view into the recruitment process from a master franchisee's perspective.[122] She explained how, when potential recruits like Vazquez came into her office, she spoke from a basic script mandated by the franchisor.[123] Miller confirmed that oftentimes, the fact that many fees will be deducted from a unit franchisee's "gross income" goes unmentioned in these meetings.[124] 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."[125]

3. Job Matching and Placement Services

Staffing agencies frequently deploy unfair and deceptive tactics when offering job matching and placement services to temporary workers. Firms coordinate to offload job matching and placement costs onto workers through 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 seventy contracts between staffing agencies and user firms.[126] Conversion fees often hover between 30 and 35 percent of a worker's annual pay but sometimes reach as high as 50 percent.[127] The fees, however, are contained

115. The Uncertain Hour, *Congratulations! You're an Entrepreneur Now*, MARKETPLACE, at 16:32 (Feb. 3, 2021), https://www.marketplace.org/shows/the-uncertain-hour/congratulations-youre-an-entrepreneur-now/ [https://perma.cc/VB7V-BV7R].

116. *Id.* at 21:49.

117. *Id.* at 16:58.

118. *Id.* at 21:23.

119. *Id.* at 18:25.

120. *Id.* at 3:34.

121. *Id.* at 3:47.

122. *Id.* at 11:44.

123. *Id.* at 12:51.

124. *Id.* at 17:25.

125. *See id.* at 12:51.

126. Contracts on file with author. Most of these contracts were compiled by Jane Flanagan and Chris Schwartz. *See generally* Flanagan, *supra* note 18, at 253–60 (providing more detailed analysis of temporary staffing agency contracts).

127. Contracts on file with author.

in hidden contracts that the worker never sees and, critically, are often set at levels that make it economically impracticable for the client firm to hire the worker directly.[128] This often leave workers in "permatemp" status.[129] Meanwhile, staffing agencies tell the workers that their job placement services are "temp to perm" and that the client firm will eventually hire the worker directly.[130] In other words, many temps stay temps much longer than they otherwise would because of unfulfilled 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 United States since the 1970s.[131] Scholars have extensively documented this rise.[132] In some sectors like logistics and warehousing, contingent work now predominates, with staffing agencies acting as intermediaries between workers and firms.[133] Entire "temp towns" have risen out of deserts and industrial zones, staffed by temporary employees who are predominantly immigrants and people

128. *See id.*; TEMP WORKER JUST. ET AL., *supra* note 18, at 13 (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).

129. *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).

130. *See generally* TEMP WORKER JUST. ET AL., *supra* note 18, at 7, 18 (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: The Case for Regulating Profit-Driven Labor Market Intermediaries in High Mobility Labor Markets*, 13 EMP. RTS. & EMP. POL'Y J. 285, 298–99 (2009) (discussing how staffing agencies control temp workers' access to labor markets via contractual means, e.g., by restricting their transition to "permanent" employment relationships, and via disingenuous marketing and recruitment, e.g., by dubiously claiming that temp positions "lead to permanent, standard jobs"). *Cf. Choosing a Nurse Staffing Agency in 2021*, HEALTH CAROUSEL (June 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 United States, of course, most jobs are not "permanent," or indefinite, unless the parties have contracted to such an arrangement.

131. *See* STONE, *supra* note 4, at 3, 67, 86 (noting that firm managers' responsiveness to market pressures "involves just-in-time production, just-in-time product design, and just-in-time workers").

132. *See generally* HATTON, *supra* note 129; George Gonos, *"Never a Fee!:" The Miracle of the Postmodern Temporary Help and Staffing Agency*, 4 WORKINGUSA 9, 11–12, 20 (2000) [hereinafter Gonos, *"Never a Fee!"*]; Freeman & Gonos, *supra* note 130; George Gonos, *Fee-Splitting Revisited: Concealing Surplus Value in the Temporary Employment Relationship*, 29 POL. & SOC'Y 589 (2001); 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, Sheldon Friedman, Michelle Kaminski & Andy Levin eds., 2006).

133. *See* HATTON, *supra* note 129, at 115–16 (describing the rise of day labor agencies in the 1990s, which supplied workers to industrial and construction work sites); John Lippert & Stephen Franklin, *The Warehouse Archipelago*, AM. PROSPECT (Aug. 9, 2021), https://prospect.org/api/content/359da8ea-f6f6-11eb-bb77-1244d5f7c7c6/ [https://perma.cc/Z3C9-ES7Y] (describing temporary workers in U.S. logistics sector).

of color.[134] Higher-paying sectors like technology also use temporary labor extensively. Tech companies including Google hire more temporary workers through staffing agencies than direct employees.[135] Many workers labor for years as temporary employees of subcontracted staffing agencies, but client firms directly hire only about 7 percent of those workers.[136] 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.[137] That number rose to 44 percent for Latinx workers, showing the racially disparate effects of perma-temping.[138]

Worker advocates now call conversion fees "bondage fees" to more accurately reflect the ways that the fees keep workers trapped in perpetual temporary status.[139] 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.[140]

All of this happens in hidden contracts between the staffing agency and user firm. Meanwhile, the workers using the job matching services are unaware of the contracts.[141] Workers are only aware of the contracts they sign with the staffing agency. In fact, a survey of temporary workers showed that only 14 percent knew that their staffing agency erected a barrier to direct hiring by the client firm.[142]

It has been difficult to examine temporary staffing agency contracts with user firms because they are usually between private parties and thus hidden from

134. *See* Flanagan, *supra* note 18, at 259–60.

135. *See* TECHEQUITY COLLABORATIVE, CONTRACT WORKER DISPARITY PROJECT: SHINING A LIGHT ON TECH'S SHADOW WORKFORCE 3 (2022), https://techequitycollaborative.org/wp-content/uploads/2022/01/Summary-Report-Contract-Worker-Disparity-Project.pdf [https://perma.cc/5AUT-XG4E].

136. 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://perma.cc/T3GV-UFJ2].

137. TEMP WORKER JUST. ET AL., *supra* note 18, at 13.

138. *Id.*

139. *Id.* at 12–13.

140. *See* David H. Seligman, *Having Their Cake and Eating It Too: Antitrust Laws and the Fissured Workplace*, *in* INEQUALITY AND THE LABOR MARKET: THE CASE FOR GREATER COMPETITION 163, 167–68 (Sharon Block & Benjamin H. Harris eds., 2021).

141. TEMP WORKER JUST. ET AL., *supra* note 18, at 13. This Article does not argue 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, the Article highlights the problems of firms whose business models are based on fissured labor.

142. *Id.* 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 SOLS. (June 10, 2021), https://masisstaffing.com/consider-temp-to-perm [https://perma.cc/L8M5-8CQH].

public view.[143] What results, then, is speculation that the worst versions of these arrangements are yet to be discovered, absent a leak or whistleblower.

In contrast to the wage markups that staffing agencies charge client firms,[144] conversion fees are not merely passing along hiring costs from firms to workers through lower wages.[145] Instead, they are used to unfairly limit workers' mobility by effectively preventing them from working directly for a client firm or for other firms that contract with that staffing agency. In addition, conversion fees are deceptive when coupled with postings that advertise "temp to perm" jobs.

II.
CONSUMER LAW AS WORK LAW

Contract and employment law once presented fairly comprehensive legal regimes governing workplace relations. But several 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 employer-employee relationship breaks down in some sectors, so too do the legal regimes that govern it.[146] Worker advocates and regulators must continue to pursue claims under contract and employment law because those avenues are often a worker's best recourse. But they must also turn to additional legal regimes, some of which, like consumer law, already reflect many workers' overlapping identities as a hiring firm's consumers. As workers become worker-consumers, consumer law becomes work law.

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

For each of the above-discussed services and credit products with one-sided terms that firms offer workers, both contract and employment law reveal their limitations in offering legal recourse for workers.[147] Those doctrines fail workers

143. *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).

144. *See, e.g.*, Brief of Amicus Curiae Lab. Rels. & Rsch. Ctr., Univ. of Mass., Amherst, in Support of Petitioner Sanitary Drivers & Helpers Loc. 350, Int'l Bhd. of Teamsters at 15 n.44, Browning-Ferris Indus. of Cal. Inc. v. Sanitary Truck Drivers, N.L.R.B. No. 32-RC-109684 (2014) (describing 45 percent wage markup in contract between staffing agency and waste management company).

145. Conversion fees have a secondary effect of reducing pay for temporary workers compared to what they could earn on the open labor market without the conversion fee. But this secondary effect is not the primary harm to the worker.

146. This observation dates back decades. *See, e.g.*, Craig Becker, *Labor Law Outside the Employment Relation*, 74 TEX. L. REV. 1527, 1527, 1535 (1996) ("[C]urrent legal doctrine is not simply ineffective in regulating the new forms of work[;] . . . it decisively promotes their deployment. . . . By severing their direct contractual relationship with workers, firms escape much of the web of labor and employment law.").

147. Contract law does provide some recourse to workers under TRAPs, however, as discussed in my prior article on unconscionability as a doctrinal mechanism to preclude enforcement of overly one-sided TRAPs. *See* Harris, *supra* note 5, at 755–64.

because firms exploit formal distinctions in contract and employment law to evade liability for worker harm.

1. Contract Law's Limitations

Contract law starts with the assumption that parties are engaged in arms-length transactions with relatively equal access to information. This legal fiction has shown its inapplicability in work relationships, in which firms hold a tremendous amount of bargaining power over individual workers.[148] Therefore, work relationships present a greater risk of abuse than most commercial transactions.[149] In addition, a worker is generally dependent on their employer for their livelihood, which includes income, healthcare, old-age care, immigration status, and other needs.[150] This makes the worker more dependent on the firm than the firm is on any individual worker. Last, the firm is privy to more information than the worker, which gives the firm leverage in bargaining. The combination of information asymmetry and structural bargaining power asymmetry makes workers susceptible to firms' UDAPs.[151]

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.[152] In one of the earliest and most

148. *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).

149. *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 FLA. L. REV. 897, 901 (2023) ("[C]ontract law is an inherently limited tool because employers can dictate and draft the terms of the relationship unilaterally.").

150. *See* Aditi Bagchi, *Lowering the Stakes of the Employment Contract*, 102 B.U. L. REV. 1185, 1202–07 (2022) (explaining how employers in the United States wield extensive control over their employees' lives because of their provision of healthcare, making the United States different than most other industrialized countries); Lobel, *supra* note 10, at 69–71 (proposing delinking employment from social welfare benefits like healthcare, unemployment insurance, and worker compensation); Juliet P. Stumpf, *Getting to Work: Why Nobody Cares About E-Verify (and Why They Should)*, 2 U.C. 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 United States on an employment visa, the worker becomes unlawfully present and subject to deportation).

151. *Cf.* Alex Rosenblat & Luke Stark, *Algorithmic Labor and Information Asymmetries: A Case Study of Uber's Drivers*, 10 INT'L J. COMMC'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 its drivers they have "total control").

152. *See, e.g.*, Jonathan F. Harris, *Economic Duress in U.S. Employment*, COMPAR. LAB. L. & POL'Y J. (forthcoming) (manuscript at 2) (on file with author) (explaining that many U.S. courts reject employees' duress economic defenses because the at-will employment rule allows employers to demand contractual provisions under threat of termination). This is not to say, however, that contract law principles are wholly useless to workers. *See, e.g.*, Sabine Tsuruda, *Good Faith in Employment*, 24 THEORETICAL INQUIRIES L. 206, 207, 213 (2023) (arguing that implementing the common law duty of good faith in employment contracts would provide benefits to workers, including protections for speech

cited cases challenging a TRAP, Judge Frank Easterbrook upheld a firefighter's TRAP by equating the cost of training to a simple loan with a repayment term designated by the contract.[153] Nowhere, however, did he acknowledge that employment relationships are not mere one-off commercial transactions or that employer creditors hold substantially more leverage over employee debtors than the ordinary lender.

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.[154] "At-will" is the principle that either party in the employment contract is at liberty to end the contract "for a good reason, a bad reason, or no reason at all."[155] As Rachel Arnow-Richman and J.H. Verkerke have argued, however, the employment-at-will presumption does not comport with contract principles.[156] Therefore, they assert, contract principles are distorted when applied in the employment context.[157]

Contract realists like Robert Hale have even questioned the very nature of consent in contract when it comes to the work relationship.[158] And freedom of

and reasonable refusals to work). Additionally, 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, *Prosocial Contracts: Making Relational Contracts More Relational*, 85 LAW & CONTEMP. PROBS. 153, 158, 159 (2022) (asserting that contracts, especially those that "express and operationalize prosocial values," can improve workers' human rights in supply chains because they regulate private actors' conduct in international transactions). Scholars have also argued for tort law reforms that require contracting firms to internalize the negative externalities that they impose on third-party stakeholders. *See* Kish Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 877 (2022) (proposing a tort duty that "*[c]orporations, as contracting parties, [] take into account stakeholders' interests when performance of the contract creates a risk of harm to them*") (emphasis in original); Kish Parella, *Protecting Third Parties in Contracts*, 58 AM. BUS. L.J. 327, 336–37 (2021) (proposing a tort duty to remediate human rights abuses in supply chains). *See generally* Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1 (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).

153. Heder v. City of Two Rivers, 295 F.3d 777, 781–82 (7th Cir. 2002).

154. *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).

155. *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).

156. Arnow-Richman & Verkerke, *supra* note 149, at 61 (citing ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 96 (1960); Varney v. Ditmars, 111 N.E. 822 (N.Y. 1916)) (asserting that traditional contract principles view agreements terminable at will as illusory and that the promises in an employment relationship are frequently "too indefinite to warrant legal enforcement because they omit key terms or specify those terms imprecisely").

157. *See id.* at 32.

158. *See, e.g.*, Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 606 (1943).

contract principles enunciated in epoch-making cases like *Lochner v. New York* still resonate among courts in workplace contract disputes.[159]

Another shortcoming of contract law in the fissured workplace is that the doctrine takes a party-primacy approach. This means that nonparties to a contract who are affected by that contract generally have no right to intervene in the contract's creation, execution, or disputes. 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.[160] Otherwise, common law contract principles typically provide little leverage for nonparties to a contract.[161] For example, because 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.[162] Indeed, nothing in contract law requires that workers be notified of the very existence of such contracts that contain conversion fees or other harmful provisions.[163]

2. Employment Law's Limitations

Employment law has also failed to prevent firms from burying contract terms that harm workers, whereas consumer law commonly prohibits such practices. Moreover, most employment law provisions cover only formal employees, not independent contractors or franchisees, and misclassification of

159. 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-*Lochner*ian approaches).

160. Labor law, for example, provides an exception to the general principle, under joint employer approaches to collective bargaining. Once joint employment is established, access to these contracts is available in NLRA unfair labor practice adjudications 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), https://news.bloomberglaw.com/daily-labor-report/one-job-many-bosses-joint-employers-and-labor-law-explained [https://perma.cc/K399-4GWG].

161. *But see* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095, 1098 (2022) (arguing that certain "nonparty defaults" endogenous to contract law allow courts to consider interests external to those of the contracting parties).

162. 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.

163. 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 temporary workers. *See* Heyde Cos. v. Dove Healthcare, LLC, 654 N.W.2d 830, 831 (Wis. 2002) ("[N]o-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").

workers as nonemployees is rampant.[164] 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, their claims have largely failed because those laws generally were not designed with these sorts of harmful contractual arrangements in mind.[165]

For instance, historically, workers have challenged TRAPs under the Fair Labor Standards Act (FLSA).[166] 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.[167] The rule is meant to keep an employer from requiring workers to cover expenses that primarily benefit the employer.[168] Federal regulators enacted the rule, in part, to separate employment from consumer transactions like payments in scrip redeemable only at company stores.[169] Such arrangements had forced employees to become their employers' customers, having no other options to redeem their wages. FLSA does not ban employer loans or advances, however, and, as mentioned, some courts have characterized TRAPs as permissible loans or advances.[170] In the past, FLSA largely failed to protect workers challenging TRAPs because courts frequently found that TRAPs did not constitute unlawful kickbacks.[171] Instead, employers successfully framed a TRAP's so-called "training" as benefitting the employee rather than the employer, therefore not comprising a job-related expense reimbursable under FLSA. Nevertheless, more

164. *See* KATE ANDRIAS & ALEXANDER HERTEL-FERNANDEZ, ROOSEVELT INST., ENDING AT-WILL EMPLOYMENT: A GUIDE FOR JUST CAUSE REFORM 44 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf [https://perma.cc/4VJ9-6VFV].

165. *See* Harris, *supra* note 5, at 727, 741–46 (chronicling a series of decisions rejecting workers' statutory challenges to TRAPs, with courts largely characterizing them as permissible loans rather than unlawful "kickbacks" of wages).

166. 29 U.S.C. §§ 201–219.

167. 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 (Ct. App. 2008) (upholding a TRAP against a FLSA claim that wages were not paid "free and clear").

168. 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").

169. *Cf.* 29 C.F.R. § 531.34 (2019) (prohibiting payment in scrip).

170. *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").

171. *See, e.g.*, *id.*; Harris, *supra* note 5, at 742–50; 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").

recent decisions have found that FLSA anti-kickback claims could be viable challenges to TRAPs.[172]

Outside of TRAP litigation, firms have successfully exploited hard distinctions between employment law status classifications of "employee" and "independent contractor" that do not reflect many modern labor markets.[173] For instance, other than staffing agencies that use hybrid ISA-TRAPs, most ISA providers are not formal employers and are thus exempt from employment laws.[174] 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 reclassification efforts have been underway in a handful of jurisdictions.[175] But such endeavors are difficult in many jurisdictions because the tests used do not fully contemplate modern fissured workplaces. In any case, government agencies often lack capacity for labor standards enforcement.[176] Until employer misclassification remediation is achieved on a large scale, traditional employment law will generally be unavailable to statutory nonemployees like franchisees and other types of independent contractors.

B. The Rising Use of Consumer Law as Work Law

The resurgent use of consumer law, particularly UDAP law, to protect workers points toward a broader and immediate application of these existing laws to work relationships, without the need for new statutory protections. Under UDAP law, "consumers" include those who "obtain[] credit, goods, real

172. *See* McClain v. Cape Air, No. 22-CV-10649-DJC, 2023 WL 3587284, at *7 (D. Mass. May 22, 2023) (denying motion to dismiss FLSA claim that TRAP was unlawful kickback of wages, writing that prior decisions do not "stand for the proposition that all kickback claims involving a training repayment provision fail to state a plausible claim"); Palomar v. SMC Corp. of Am., No. 119CV04693RLYMJD, 2021 WL 5364149, at *1 (S.D. Ind. Sept. 27, 2021) (granting conditional certification of FLSA collective action for claim that TRAP was unlawful kickback); Ketner v. Branch Banking & Tr. Co., 143 F. Supp. 3d 370, 383–84 (M.D.N.C. 2015) (denying employer's motion to dismiss claim that TRAP with $46,000 repayment amount was unlawful kickback under FLSA).

173. *Cf.* Zatz, *supra* note 5, 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."); *see also* Kaiponanea T. Matsumura, *Unifying Status and Contract*, 56 U.C. DAVIS L. REV. 1571, 1575 (2023) (noting that gig workers have attempted to invoke the status of "employee" to obtain more rights, while contract law has more recently been used to subordinate the worker).

174. *See* Harris, *supra* note 5, at 766–78.

175. *See* Zatz, *supra* note 4, 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).

176. *See, e.g.*, 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/ [https://perma.cc/DD6F-B6G9] (describing how agency staffing challenges have resulted in limited enforcement of local licensing requirements meant to improve labor standards, thus lessening deterrence of labor abuses).

property, or services for personal, family, or household purposes."[177] In turn, workers are consumers when firms offer the sorts of services and credit products described in this Article. Consumer law should therefore regulate those transactions just as it would 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 consumer. If anything, the peculiar risk of coercion in work relationships merits protections for workers from multiple legal regimes. In addition, consumer law claims reap immediate benefits for workers whose firms classify them as nonemployees without requiring the workers to embark on the costly and uncertain endeavor of proving misclassification.[178]

For example, a growing number of firms that use labor, sometimes as formal employers, operate as both training providers and staffing agencies.[179] The potential for abuse in these contract thickets requires worker advocates to apply a hybrid doctrinal approach. Such an approach would utilize traditional employment and contract law where appropriate but complement those doctrines with consumer law.

Workers and trainees may turn to federal, state, and municipal UDAP laws to escape harmful contract terms, partially freeing themselves from economic subordination to the employer using a TRAP, the ISA training provider, the franchisor, or the staffing agency. Specifically, regulators concerned with worker rights can use the FTC Act[180] and Title X of the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (CFPA).[181] In addition, workers and their advocates can turn to the Fair Credit Reporting Act (FCRA),[182] the Truth in Lending Act (TILA),[183] the Equal Credit Opportunity Act (ECOA),[184] state and municipal UDAP laws,[185] and other consumer laws.

Viewing workers as consumers is not new.[186] A lengthy history of government agencies and workers using consumer law to curtail UDAPs among employers and job training providers offers ample precedent for the more recent agency actions and litigation described in this Part. Since the 1930s, the FTC has

177. *See, e.g.*, *Consumer Law*, *supra* note 19.
178. *See* Block, *supra* note 24.
179. *See supra* Part I.B.2.
180. 15 U.S.C. §§ 41–58.
181. 12 U.S.C. §§ 5301, 5481–5603.
182. 15 U.S.C. §§ 1681–1681x.
183. *Id.* §§ 1601–1667f.
184. *Id.* §§ 1691–1691f.
185. *See* Pridgen, *supra* note 22, at 914 (describing how the FTC disseminated among the states the "little FTC Act," adopted by twenty states, using the UDAP language of the FTC Act, but containing a private right of action and mechanisms for state enforcement); Adam Zimmerman, *Ghostwriting Federalism*, 133 YALE L.J. (forthcoming 2024) (manuscript at 16, 28–29) (on file with author).
186. *See, e.g.*, Dubal, *supra* note 10, at 750 n.41 (citing BOLTANSKI & CHIAPELLO, *supra* note 10, at 80–81) (explaining that, between the 1930s and 1960s, large industrial firms "accepted their social and economic responsibilities to workers, whose lives, because workers were understood also as consumers, were inextricably tied to that of the firm").

exercised its authority under Section 5 of the FTC Act to pursue firms that deceive workers and trainees. Through the 1960s, the FTC targeted correspondence schools that falsely promised robust training, jobs, or affiliations with government agencies and institutions of higher education.[187] After the 1960s, FTC action against UDAPs began to cool when pro-business policy-makers largely took over the agency.[188]

But over 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. Accordingly, these agencies have begun using their enforcement authority to regulate the workplace, particularly 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 and some federal statutes to directly challenge firms' harmful practices.

1. Federal Consumer Law

Several federal laws can be used to protect worker-consumers, especially the FTC Act[189] and CFPA,[190] but also the FCRA,[191] TILA,[192] and ECOA.[193]

First, the FTC holds tremendous authority to end UDAPs in the workplace. Under Section 5 of the FTC Act, 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."[194] Section 5's definition of "unfairness" and the FTC's authority to enforce Section 5 are both broader than policy-makers have previously understood, especially as related to UDAPs.[195] A practice is "deceptive" under Section 5 if it involves a material representation, omission, or practice that is likely to mislead.[196]

187. *See, e.g.*, Fed. Trade Comm'n v. Civ. Serv. Training Bureau, Inc., 79 F.2d 113, 115–16 (6th Cir. 1935) (upholding an FTC order against a correspondence school for UDAPs by 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 by 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).

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

189. 15 U.S.C. §§ 41–58.

190. 12 U.S.C. §§ 5301, 5481–5603.

191. 15 U.S.C. §§ 1681–1681x.

192. *Id.* §§ 1601–1667f.

193. *Id.* §§ 1691–1691f.

194. *Id.* § 45(n).

195. *See* Herrine, *supra* note 188, at 438–39.

196. *See, e.g.*, *In re* Cliffdale Assocs., Inc., 103 F.T.C. 110, 164–65 (1984).

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 proposed 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."[197] The caveat applying only to TRAPs—rather than a blanket ban of TRAPs—would still permit many overly one-sided TRAPs because employers' failure to justify repayment amounts is just one of many problems with the contracts.[198] Nonetheless, this proposed rule signals that the FTC may once again vigorously exercise its authority in labor markets.

Even before the 2023 proposed rule on noncompetes and TRAPs, the FTC made clear that Section 5's protections cover not only individual end-user consumers buying goods and services but also worker-consumers like franchisees and gig workers.[199] Moreover, the FTC declared that the FTC Act governs certain business-to-business transactions involving small- to medium-sized businesses.[200] 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.[201] But many of those attorneys may have 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.

In addition to rulemaking, the FTC has utilized its ex-post enforcement authority under Section 5 to safeguard worker-consumers. This approach circumvents complex issues like employee status that could complicate or even kill traditional employment law claims. In 2021, the FTC issued a complaint against Amazon and its subsidiary, Amazon Logistics, for retaining tips meant for its Amazon Flex drivers.[202] According to the complaint, the company regularly advertised that drivers participating in its Flex program would be paid

197. Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910). While this proposed rule was promulgated under Section 5's "unfair methods of competition" authority, as opposed to its "unfair or deceptive acts or practices" authority, it is still a notable development for workers.

198. Jonathan F. Harris, *The FTC's Proposed Noncompete Ban Still Lets Companies Trap Workers in Bad Jobs*, TRUTHOUT (June 12, 2023), https://truthout.org/articles/the-ftcs-proposed-noncompete-ban-still-lets-companies-trap-workers-in-bad-jobs/ [https://perma.cc/7U65-WKEF].

199. FED. TRADE COMM'N, *supra* note 32, at 8 ("[W]ithholding money owed to workers without consent can violate Section 5's prohibition against unfairness.").

200. *See* Christa Bieker & Christopher Leach, *The FTC Thinks B2B "Customers" Are "Consumers,"* BLOOMBERG L. (Oct. 3, 2022), https://news.bloomberglaw.com/us-law-week/the-ftc-thinks-b2b-customers-are-consumers [https://perma.cc/2CKN-F4MU].

201. *See id.*

202. Complaint at 2, *In re* Amazon.com, Inc., No. 17-35014 (9th Cir. filed Feb. 2, 2021).

$18 to $25 per hour for their work making deliveries to customers.[203] Additionally, the advertisements, along with numerous other documents provided to Flex drivers, included proclamations such as "You will receive 100% of the tips you earn while delivering with Amazon Flex."[204] Yet Amazon kept the money instead of sending the tip to the driver.[205] Both practices violated the FTC Act.[206] As a result, Amazon agreed to pay more than $61.7 million to settle the FTC's charges, with the money going to the drivers.[207]

Workers, trainees, and students have also sought assistance from 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.[208] 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.[209] This tool purported to allow trainees to compare the cost of an ISA with the costs of other financial products like federal student loans for parents of undergraduate students and traditional private student loans.[210] According to the complaint, however, Vemo's Comparison Tools made several misrepresentations that systematically made ISAs appear more favorable than traditional loans.[211]

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.[212] The complaint labeled the conversion fee a

203. 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 [https://perma.cc/8536-ZAHY].

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *See* Press Release, Nat'l Consumer L. Ctr., Advocates File Complaint with FTC; Urge Enforcement Action Against Vemo Education for Its Deceptive Marketing of Income-Share Agreements to Students (June 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 [https://perma.cc/CHP8-KDK7]. 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).

209. *See id.*

210. *See id.*

211. *See id.*

212. Complaint and Request for Investigation, Injunction, and Other Relief Submitted by Local 32BJ, Service Employees International Union at 3, *In re* Planned Companies, No. 22-CB-297332 (Fed. Trade Comm'n Apr. 6, 2022).

"bondage fee" and asserted that it violated Section 5 of the FTC Act's UDAP prohibitions.[213]

Second, the CFPA prohibits UDAPs by providers of consumer financial products or services.[214] The CFPB is an independent agency within the Federal Reserve System charged with enforcing the CFPA.[215] In 2022, the CFPB launched an initiative to "look[] into the consumer financial products or services that workers face in the workplace."[216] The initiative resulted in a 2023 report on employer-driven debt, specifically TRAPs.[217] Notably, the report remarked that the CFPB has "significant concerns regarding the use of TRAPs and the negative impacts of employer-driven debts. The CFPB is committed to . . . ensur[ing] that the workplace is not a source of potential consumer harm . . . [and will use] all its tools to address the[se] risks."[218] Agency enforcement actions may soon be on the horizon against employers that use TRAPs. To this end, in 2022, the U.S. Senate Banking Committee held hearings on TRAPs, and the committee chair urged the CFPB to act on TRAPs.[219]

---

213. *Id.*; *see also* Sarah Lazare, *How Secret "Bondage Fees" Trap Contracted Workers in Low-Wage Jobs*, AM. PROSPECT (Apr. 21, 2023), https://prospect.org/labor/2023-04-21-bondage-fees-trap-contracted-workers/ [https://perma.cc/DD39-SUMD].

214. CFPA §§ 1031(a), 1036(a)(1)(B); 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

215. 12 U.S.C. § 5491(a); *see also* BAIRD WEBEL, DAVID H. CARPENTER, RAJ GNANARAJAH, KATIE JONES, MARC LABONTE, RENA S. MILLER, DAVID W. PERKINS, GARY SHORTER & N. ERIC WEISS, 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 [https://perma.cc/3FJJ-HP3S].

216. 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/ [https://perma.cc/4JUS-GJJL]; *see* Press Release, Consumer Fin. Prot. Bureau, *supra* note 32 (announcing CFPB inquiry into employer-driven debt with request that members of the public share their stories through a request for information); *cf.* Jonathan F. Harris, Comment Letter on Request for Information Regarding Employer-Driven Debt (Sept. 23, 2022), https://www.regulations.gov/comment/CFPB-2022-0038-0060 [https://perma.cc/5QY2-5WJP] (responding to the CFPB request for information by detailing the nature of TRAPs and courts' treatment of them).

217. CONSUMER FIN. PROT. BUREAU, CONSUMER RISKS POSED BY EMPLOYER-DRIVEN DEBT (July 20, 2023), https://www.consumerfinance.gov/data-research/research-reports/issue-spotlight-consumer-risks-posed-by-employer-driven-debt/full-report/ [https://perma.cc/T66J-9S3H].

218. *Id.*

219. Press Release, U.S. Senate Comm. on Banking, Hous. & Urb. Affs., Brown Hosts Consumers for Listening Session on New Financial Products (Sept. 7, 2022), https://www.banking.senate.gov/newsroom/majority/brown-consumers-listening-session-financial-products [https://perma.cc/9JA5-E5Q8]; *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 [https://perma.cc/3P4Y-NGG9]; 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 [https://perma.cc/2D3X-P67W].

Likewise, the CFPB has begun acting against ISA providers that deceptively claim that ISAs are not loans.[220] The President of the Chicago Federal Reserve Board has also cautioned against the potential for ISA providers to commit UDAPs.[221]

Though less obvious, worker-consumers could also turn to other federal consumer laws, including the FCRA, TILA, and ECOA, for protection in limited instances. FCRA allows workers to challenge employers' hiring and retention practices that discriminate based on one's credit report.[222] FCRA provides procedural protections when a firm seeks an individual's credit report, 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 that may have dissuaded the employer from hiring the worker.[223]

TILA could also protect worker-consumers because the law requires transparency in consumer lending.[224] Since firms using TRAPs and ISAs are essentially selling training and post-secondary 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 its implementing regulations.[225] Similarly, franchisors and master franchisees who provide loans for unit franchisees' startup costs could be subject to TILA requirements. As elaborated further in Part III.A concerning disclosure obligations, the mandated disclosures stipulated by TILA could play a role in motivating workers to organize for enhanced terms and conditions of work. These disclosures could also aid in uncovering franchisors' UDAPs.

In addition, ECOA could assist 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,

---

220. *See, e.g.*, Consent Order at 9, *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://perma.cc/K6G2-T8NF] (finding that an ISA provider's application stating "THIS IS NOT A LOAN" was a deceptive act and practice in violation of Sections 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B)).

221. 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 [https://perma.cc/C6V9-HGZE] (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.").

222. *See, e.g.*, Charlotte S. Alexander & Elizabeth Tippett, *The Hacking of Employment Law*, 82 MO. L. REV. 973, 994 & n.115 (2017); *see also* 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).

223. *See* Elmore, *supra* note 222, at 1040; 15 U.S.C. § 1681m(a).

224. *See* HARRIS & HICKS, *supra* note 12, 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).

225. HARRIS & HICKS, *supra* note 12, at 26 (citing 15 U.S.C. § 1638(e); 12 C.F.R. §§ 1026.46–.48).

national origin, sex, marital status, age, or status as a public assistance recipient.[226] Indebted worker-consumers under TRAPs, ISAs, and franchising agreements are disproportionately people of color, women, immigrants, and low-income individuals and are thus possibly receiving public assistance—all ECOA-protected categories.[227] Many of these categories mirror those protected under federal employment discrimination laws,[228] but those laws do not include receipt of public benefits or marital status as protected categories against discrimination. Moreover, those laws cover only formal employees, not franchisees or independent contractors. Therefore, ECOA could fill a gap for worker-consumers who are not formal employees but who receive credit in the form of TRAPs, ISAs, or franchising financing.

For example, many credit products like TRAPs and ISAs are openly and intentionally marketed directly to low-income people of color.[229] One New York City computer coding bootcamp and ISA creditor permits only applicants with annual incomes below $45,000 and boasts that over 50 percent of its ISA debtors receive public assistance, 70 percent are Black or Hispanic, and 40 percent are immigrants.[230] Therefore, firms may be in violation of ECOA by selectively issuing credit to individuals based on an ECOA-protected category, enforcing debt based on protected categories, or reporting such debts to credit bureaus.[231]

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.[232] 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.[233] In addition, as opposed to worker protection agencies, every state has a consumer protection agency with abundant resources, many of which are housed within a state's

226. *Id.* at 27; 15 U.S.C. §§ 1691–1691f.

227. Harris, *supra* note 5, at 767 n.308 (stating that computer coding "bootcamps" target ISAs at lower-income populations and youth of color); *see also* PYRAMID CONSULTING, 2022 IMPACT REPORT, *supra* note 86, at 4 (noting that "75% of GenSparkers are from underrepresented groups," with 55 percent being Black or African American).

228. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (race, color, religion, sex, or national origin); Civil Rights Act of 1866, § 1, 42 U.S.C § 1981 (race); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (age).

229. *See, e.g.*, *Why Pyramid Consulting*, *supra* note 86 (using diversity as a key corporate initiative for Pyramid Consulting).

230. *See How to Apply*, PURSUIT, https://www.pursuit.org/apply#eligibility [https://perma.cc/Z2AT-NEBF]; *Our Impact*, PURSUIT, https://www.pursuit.org/impact [https://perma.cc/C8Z5-42UK].

231. HARRIS & HICKS, *supra* note 12, at 27. *See generally* DEE PRIDGEN, JEFF SOVERN & CHRISTOPHER L. PETERSON, CONSUMER LAW, CASES AND MATERIALS 436–50 (5th ed. 2020) (describing ECOA protections).

232. *See* Pridgen, *supra* note 22, at 914.

233. *See, e.g.*, CAL. BUS. & PROF. CODE § 17200.

office of the attorney general.[234] I have compiled a list of all fifty states' attorneys general offices; almost all include a consumer protection division but fewer have a division dedicated to worker protection.[235]

One of those workers turning to state UDAP law was BreAnn Scally, a twenty-three-year-old Black woman and former PetSmart pet groomer from California.[236] PetSmart contracted a debt collector to pursue Scally for $5,500 that she owed under the company's TRAP.[237] PetSmart required pet groomers who lack previous experience to sign TRAPs agreeing to pay up to $5,000 for the company's "Grooming Academy" if their employment ended within two years of beginning the training.[238] PetSmart advertised its Grooming Academy as "FREE Paid Training" worth $6,000, but it provided no recognized degree or license.[239] Moreover, Petsmart promised "Support Right From the Start" and that, "[u]nder the guidance of the salon leader, [a new groomer would] begin training as a bather."[240] In fact, Scally received minimal attention from supervisors and was quickly sent to groom pets for paying customers.[241] The PetSmart TRAP took effect regardless of how the groomer's employment ended, even potentially if it ended due to employer-initiated layoffs.[242] The TRAP also required the debt to be paid within thirty days of the groomer's departure and permitted PetSmart to withhold money from wages and unpaid time off.[243] In addition, the TRAP allowed PetSmart to recoup attorneys' fees in connection with collection efforts and interest.[244]

Many PetSmart groomers earn close to their local minimum wage, and Scally left PetSmart because of unsustainable working conditions.[245] Adding insult to injury, PetSmart charged Scally an extra $500 for required grooming

234. *See* USAGOV, *supra* note 37; *see also* Gerstein & Gong, *supra* note 176.

235. List of relevant attorneys general offices divisions on file with author.

236. Devin Leonard, *"Free" Job Training Can Cost a Fortune for Employees Who Quit*, 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 [https://perma.cc/3CR5-HCSK]; *see also* Jonathan F. Harris, *The New Noncompete: The Training Repayment Agreement Provision (TRAP) as a Scheme to Retain Workers Through Debt*, NW. U. L. REV. OF NOTE (Nov. 9, 2022), https://blog.northwesternlaw.review/?p=2730 [https://perma.cc/7F9D-L9J3].

237. *Id.*

238. *See* Complaint at 3, Scally v. PetSmart LLC, No. 22-CIV-03057 (Cal. Super. Ct. July 28, 2022).

239. *See id.* at 2. Pet grooming requires no license in California.

240. *Salons Careers*, PETSMART, https://careers.petsmart.com/salons [https://perma.cc/7MDD-XUA8].

241. *See* Complaint, *supra* note 238, at 51–52.

242. HARRIS & HICKS, *supra* note 12, at 21.

243. *Id.*

244. *Id.* app. at 104 ex. 9 (copy of PetSmart TRAP).

245. *See, e.g.*, *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] (noting that the average PetSmart worker earns $14.83 per hour); *see also* Leonard, *supra* note 236 (noting that the store was understaffed and groomers were overwhelmed).

tools.[246] She learned about all of this from her credit report that noted that PetSmart had engaged a collection agency to collect the full $5,500; Scally was already trying to pay off her student loans and her credit cards.[247]

In 2022, Scally filed a class action lawsuit, claiming that the TRAP she was required to sign provided insufficient grooming training and violated multiple California state consumer protection and employment laws.[248] While suits against other employers have claimed violations of California's Unfair Competition Law (UCL)[249] in the workplace,[250] Scally's suit brought unique claims under both the UCL and California's Consumer Legal Remedies Act (CLRA).[251]

The eleven counts in the complaint against PetSmart presented a Catch-22 for PetSmart.[252] On the one hand, employment law prohibits employers from charging employees for training that benefits the employer.[253] So, if the Grooming Academy was primarily for PetSmart's benefit, then the TRAP would violate California employment law by imposing training costs onto workers.[254] On the other hand, California consumer law prohibits UDAPs in loans for personal use,[255] and California education law requires any post-secondary education provider to obtain state approval.[256] 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 and would violate California education law because the State had not approved the Grooming Academy. PetSmart could take its pick, but the suit's innovative

246. HARRIS & HICKS, *supra* note 12, at 21 n.1.

247. *See* Leonard, *supra* note 236 (noting that the additional $500 was for required tools that she purchased from PetSmart).

248. *See* Complaint, *supra* note 238, at 1, 4–6.

249. CAL. BUS. & PROF. CODE § 17200.

250. *See, e.g.*, Herr v. Nestlé U.S.A., Inc., 135 Cal. Rptr. 2d 477, 485 (Cal. Ct. App. 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., 999 P.2d 706, 715 (Cal. 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 Ct., 19 Cal. Rptr. 3d 29, 77 (Cal. Ct. App. 2004) (finding in an age discrimination class action by television writers that complaints alleging that the discriminatory policies or practices of the employers 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").

251. CAL. CIV. CODE §§ 1750–1784.

252. *See* Complaint, *supra* note 238, at 3.

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

254. Complaint, *supra* note 238, at 3.

255. CAL. BUS. & PROF. CODE § 17200.

256. CAL. EDUC. CODE § 94886 (prohibiting the opening of a private post-secondary education institution without state approval).

claims show that PetSmart was breaking the law either way.[257] 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 that consumer laws should rein in TRAPs and other debt-based contracts in the workplace.[258]

As for state agency action, several attorneys general have turned to various consumer laws on behalf of exploited worker-consumers.[259] 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.[260] 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.[261] When consumers responded to the ads, they were told that they would first need to enroll in 1st Security's training courses, typically at a cost of $449 to $667.[262] But after trainees completed the training courses, instead of offering them jobs, 1st Security's placement office distributed worthless referrals to other security companies.[263] Those companies would tell the trainees that they had never heard of 1st Security and typically did not hire applicants without experience.[264] The parties settled out of court with over $100,000 set aside for the unwitting trainees.[265]

The Illinois Office of the Attorney General has also actively pursued consumer law claims on behalf of workers. In 2017, for example, it sued a check-

257. The suit remained in active litigation as of October 2023.

258. *See supra* Part II.A. Additional California laws 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, 112 n.34 (1997); William C. Bunting, *Unlocking the Housing-Related Benefits of Telework: A Case for Government Intervention*, 46 REAL EST. L.J. 285, 335 n.176 (2017) (arguing that CAL. LAB. CODE § 970 should be extended to protect employees induced to relocate based on fraudulent promises of telework); Collins v. Rocha, 497 P.2d 225, 229 (Cal. 1972) (finding that Section 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. CAL. LAB. CODE § 970(d).

259. *See* Gerstein, Salas & Seligman, *supra* note 24 (collecting cases).

260. *See* Press Release, Off. of the N.Y. State Att'y Gen., 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 [https://perma.cc/E5UC-DMU4].

261. *See id.*

262. *See id.*

263. *See id.*

264. *See id.*

265. *See* Press Release, Off. of the N.Y. State Att'y Gen., 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 [https://perma.cc/BU5P-B66H].

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.[266] 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.[267] By continuing to use the unenforceable noncompetes, the employer also violated Illinois UDAP law.[268]

Likewise, in 2021, the Washington State Office of the Attorney General sued a large commercial janitorial franchisor, National Maintenance Contractors (National),[269] asserting several UDAP claims on behalf of franchisees, including under the state's Consumer Protection Act[270] and Franchise Investment Protection Act.[271] According to the suit, National provided cleaning services contracts to customers and then entered into franchise agreements with individual janitors, who were largely non-English-speaking immigrants, to do the work.[272] National did not provide enough accounts to its franchisees to meet the income level the parties had contracted for and therefore charged franchisees unreasonably excessive fees.[273] 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 2023, the California Office of the Attorney General issued a "legal alert" to "remind all employers of state-law restrictions on employer-driven debt," including TRAPs.[274] The alert cited California consumer law prohibiting UDAPs and noted that "[a]s a form of consumer debt, employer-driven debt may also expose workers to significant financial risk and predatory debt collection practices."[275]

---

266. 815 ILCS § 505; *see* Complaint at 1–2, Illinois v. Check Into Cash of Ill., LLC, No. 2017-CH-14224 (Cook Cnty. Ill. Cir. Ct. Oct. 25, 2017); *see also* Press Release, Office of the Ill. Att'y Gen., Attorney General Madigan Sues National Payday Lender for Unlawful Use of Non-Compete Agreements (Oct. 25, 2017), https://ag.state.il.us/pressroom/2017_10/20171025d.html [https://perma.cc/K4NL-FMP8].

267. Illinois Freedom to Work Act, 820 ILL. COMP. STAT. 90/10 (2017).

268. *See* Complaint at 16–19, *Check Into Cash of Ill., LLC*, No. 2017-CH-14224.

269. Washington v. Nat'l Maint. Contractors, LLC, No. 21-2-04554-1-SEA (King Cnty. Sup. Ct. Apr. 6, 2021); Wash. Press Release, *supra* note 16.

270. WASH. REV. CODE § 19.86.020 (2023).

271. *Id.* § 19.100.180 (2011).

272. Wash. Press Release, *supra* note 16.

273. *Id.*

274. CAL. DEP'T OF JUST., OFF. OF THE ATT'Y GEN., LEGAL ALERT: STATE LAW RESTRICTIONS ON EMPLOYER-DRIVEN DEBT 1 (2023), https://oag.ca.gov/system/files/media/legal-alert-oag-2023-01-employer-driven-debt.pdf [https://perma.cc/CX8B-877H].

275. *Id.* (citing California Rosenthal Fair Debt Collection Practices Act, CAL. CIV. CODE §§ 1788.1(b), 1788.11, 1788.13) ("prohibit[ing] an employer or its agent from engaging in unfair or deceptive acts or practices when attempting to collect on employer-driven debt"); California Consumer Financial Protection Law, CAL. FIN. CODE § 90003(a)(1), (2); 12 U.S.C. § 5531(d) (regarding "any abusive employer-driven debt practices, . . . such as if an employer takes advantage of a worker's lack of information or knowledge about the risks or costs of the debt").

Like states, municipalities have also begun acting on behalf of worker-consumers. One of the first municipal consumer rights agencies to 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).[276] 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."[277] 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.[278]

Governmental 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[279] by encouraging customers to tip for food deliveries and then retaining those tips instead of passing them along to the workers.[280] The delivery workers were called "gig economy" workers rather than employees.[281] Though the direct victims 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.[282] Most importantly, the Attorney General did not have to prove employee status, a requirement under traditional employment law, to recover the workers' pay. Similarly, in 2023, the New York City DCWP launched an investigation into

276. *See 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 [https://perma.cc/PBU9-WEFQ].

277. *Id.*

278. *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 [https://perma.cc/5K7K-R7RQ] (requiring temporary construction staffing agencies to provide workers with a notice of certifications needed for the job, a notice of rights like sick leave and workplace safety, and a notice about the job assignment and wages and benefits). New Jersey and Illinois are also enacting laws to more broadly protect temporary workers. *See* Sally Dworak-Fisher & Roberto Clack, *Temp Workers Score Another Victory in Illinois!*, NAT'L EMPL. L. PROJECT (July 26, 2023), https://www.nelp.org/blog/temp-workers-score-another-victory-in-illinois [https://perma.cc/C4GR-RRQV] (highlighting new state laws that mandate pay parity between temporary and permanent workers and require greater training and workplace safety provisions).

279. D.C. CODE §§ 28-3901 to 28-3913.

280. Press Release, Off. of the Att'y Gen. for the Dist. of Columbia, 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 [https://perma.cc/XJF6-FMLQ].

281. *Id.*

282. *See* Press Release, Off. of the Att'y Gen. for the Dist. of Columbia, 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 [https://perma.cc/Y3ER-AD3K].

DoorDash for violating a new law requiring weekly payments to app-based delivery workers.[283]

III.
AN INTEGRATED WORK LAW—CHALLENGES AND POSSIBILITIES

Consumer law should be a component of an integrated work law. This is in line with scholars who have argued on behalf of workers for the integration into work law of other doctrines, such as antitrust, social security, business, tax, and environmental law.[284] As labor and comparative law scholar Jean-Claude Javillier notes, "[i]n many situations, it seems that to obtain the result, the best incentives or sanctions have to be found with the help of another discipline. Linking disciplines is one of the most important tasks for lawyers, from a theoretical as well as from a practical point of view."[285]

Indeed, lawyers will need to determine how consumer, employment, and contract law may interact. The concept of "consumer law as work law" still needs definition to make it something more than a mere empirical descriptor or a simple claim that consumer law can occasionally stand in the place of employment or contract law. This Article does not attempt to predict how broadly consumer law will be applied in the workplace.

Importantly, using consumer law to protect workers presents challenges and doctrinal contradictions. For instance, 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"[286] of individualism, autonomy, freedom of

283. Claudia Irizarry Aponte, *Delivery Workers File Wage Theft Complaints Against DoorDash*, CITY (Aug. 2, 2023), https://www.thecity.nyc/2023/8/2/23816655/delivery-workers-wage-theft-complaints-doordash [https://perma.cc/7HJD-4S44] (describing the New York City DCWP's investigation after over a dozen workers claimed DoorDash deactivated their accounts so that the workers could not access their payments).

284. *See, e.g.*, Hiba Hafiz, *Labor Antitrust's Paradox*, 86 U. CHI. L. REV. 381, 411 (2020) (discussing antitrust-based approaches to workplace regulation); Memorandum of Understanding Between the U.S. Dep't of Just. & U.S. Dep't of Lab. (Mar. 10, 2022) [hereinafter DOJ & DOL Memorandum], https://www.dol.gov/sites/dolgov/files/OPA/newsreleases/2022/03/OPA20220456.pdf [https://perma.cc/6TBT-4EBM] (announcing the DOL and Department of Justice (DOJ) Antitrust Division's joint initiative to protect workers by promoting labor market competition); *About the Worker Endangerment Initiative*, U.S. DEP'T LAB. & U.S. DEP'T JUST. (Apr. 30, 2021) [hereinafter *Initiative*], https://www.justice.gov/enrd/worker-endangerment/about [https://perma.cc/U2PJ-QWHV] (describing the DOL and DOJ Environmental Crimes Section's joint initiative to criminally prosecute worker safety violations).

This Article does not address antitrust law per se outside of its recognition through various consumer laws. Antitrust law in the service of workers, however, is a growing area of scholarship. *See generally* 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 90.

285. Jean-Claude Javillier, *The Employer and the Worker: The Need for a Comparative and International Perspective*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 11, at 355, 356 n.2.

286. Petroziello, *supra* note 6.

contract, and self-betterment.[287] This can detract from the collective identity of workers as working class.[288] Moreover, consumer law is no panacea, and its shortcomings are apparent even when applied to ordinary consumers.[289]

For these reasons, advocates should proceed with caution and especially consider the long-term implications of potentially adopting frameworks of workers as consumers.[290] Framing competition and consumer enhancement, rather than worker empowerment, as the end goals risks workers falling by the wayside whenever those interests conflict or acceptable competition is achieved.[291] Nevertheless, when looking through a lens of economic subordination, an integrated work law is necessary to provide additional resources to the weaker party—usually the worker—to balance bargaining power between a firm and its workers.[292] In addition to the immediate benefits to workers in treating consumer law as a complementary doctrine to employment law, the two doctrines can evolve together in a binary fashion.[293] Similar to a double helix, this binary evolution could create a virtuous cycle with each doctrine learning and applying lessons from the other. The process could even lead to consumer law adopting from labor law a collective rights framework: 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 between firm and worker in consumer rather than employment terms and (2) once the relationship is framed in consumer terms, the subsequent weakness of consumer protection law

287. *See* Harry W. Arthurs, *What Immortal Hand or Eye?—Who Will Redraw the Boundaries of Labour Law?*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 11, at 373, 389 (listing shifts in worker identities and consciousness from "[a] working class collective identity to essentialized, individualized identities" and "from producer constituencies to consumer constituencies").

288. *See id.*

289. *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 the 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 the shortcomings of TILA and CFPB authority to stop predatory earned-wage payment programs).

290. *See* Suresh Naidu, *Eight Reactions to the FTC's Proposed Ban on Non-Competes*, LAW & POL. ECON. PROJECT: BLOG (Jan. 19, 2023), https://lpeproject.org/blog/eight-reactions-to-the-ftcs-proposed-ban-on-non-competes/ [https://perma.cc/RB9J-4GGF] (claiming that in relying primarily on consumer-oriented and competition laws to protect workers, "we forgo other, deeper and more democratic, principles that could undergird an expansive notion of economic non-domination").

291. *See id.*

292. *See* Brian Langille, *Labour Law's Back Pages*, *in* BOUNDARIES AND FRONTIERS OF LABOUR LAW, *supra* note 11, at 13, 24.

293. *See* Arthurs, *supra* note 11, at 597–98 (describing the history of the National Industrial Recovery Act to "align labor law with other legal initiatives to protect a broad spectrum of economically subordinate people").

itself.[294] First, consumer law conceptualizes individuals as consumers of jobs, services, and goods rather than as producers of labor, which has been met with scholarly resistance.[295] For instance, workplace privacy scholars like Pauline Kim highlight the danger of protecting workers' data from employers' surveillance as consumers, not as workers.[296] This danger exists because "[u]nlike consumers, workers are embedded in a relationship that is explicitly hierarchical" and, thus, consumer law cannot sufficiently protect workers' data from employer abuse.[297]

Moreover, some scholars are not ready to give up on the promise of contract law to protect workers.[298] For example, Sarah Dadush argues for "prosocial contracts" that center workers' human rights by requiring contracting parties to take responsibility for harms to workers in the supply chain.[299] Central to this argument is that the workplace is a relational environment, rather than one constituting autonomous individuals engaged in arms-length solitary transactions with firms.[300] After all, while there is a clear trend toward fissuring of work, most U.S. workplaces are still based on traditional direct and indefinite employer-employee relationships.[301]

Historically, lawmakers have also attempted to change the framing of work from a consumer relationship to one of compensation for labor production. Congress and states required that wages be paid "free and clear" to, in part,

294. Additionally, mandatory arbitration and class waiver clauses in consumer contracts limit access to courts. This problem, however, is just as ubiquitous in employment law because employers also routinely insert these clauses. Mandatory arbitration with class waiver clauses, in fact, demonstrates another commonality between workers and consumers. *See* Jeremy Heisler, Andrew Melzer & Kate MacMullin, *States—The Final Frontier: How State Law and State Courts Can Provide Avenues for Justice and Resist the U.S. Supreme Court's "*Lochner *Lite" Anti-Employee and Anti-Consumer Agenda*, LAB. L.J., Fall 2021, at 125–26.

295. *See* Arthurs, *supra* note 11, at 589–90 (bemoaning "the way in which workers[] subjectively perceive themselves [in a manner that] no longer resembles . . . the objective reality of their situation," with the "objective reality" categorizing workers as "producers" and workers subjectively perceiving themselves as "consumers"); *cf.* Naidu, *supra* note 290 (arguing that the FTC's 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).

296. Pauline Kim & Rachel Leavitt, Data Rights Are Workers' Rights 1, 5, 26 (June 5, 2023) (unpublished manuscript) (on file with author).

297. *Id.* at 26.

298. *See, e.g.*, Dadush, *supra* note 152, at 158–59.

299. *See* Dadush, *supra* note 152, at 156.

300. Hugh Collins, *Relational and Associational Justice in Work*, 24 THEORETICAL INQUIRIES L. 26, 35 (2023) (commenting that employment contracts are characterized as "relational" because as opposed to discrete transactions like buying goods in a shop, "[employment contracts] rely for their successful performance on respect for a wide range o[f] norms and customs that are not mentioned or governed by the terms of the contract").

301. *Cf.* Robert Kuttner, *The Future of Real Jobs: A Prospect Roundtable*, AM. PROSPECT (May 14, 2019), https://prospect.org/economy/future-real-jobs-prospect-roundtable/ [https://perma.cc/824U-DYLZ] (acknowledging that according to DOL statistics, the "contingent workforce" is smaller than many would have thought and even "smaller as a share of the total workforce than in 2005," but warning that those statistics are taken out of context and that the "fissured workplace is a huge and growing problem for worker earnings and worker power").

prevent employers from treating their employees as consumers by paying in nonfungible company scrip.[302] Additionally, firms that began selling life insurance products to employees expanded their offerings to include other financial products, such as health insurance, retirement plans, and tuition programs.[303] The potential for discrimination in the terms of those financial products led regulators to intentionally reframe them as "employee benefits," parts of an employee's compensation package, rather than consumer financial products.[304] 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.[305] Furthermore, during the COVID-19 pandemic, Congress insisted that gig workers be treated as employees by allowing the workers to receive unemployment benefits.[306] This was done to assist workers at firms like Uber, which labels its drivers "customers" and "consumers" of its software rather than employees eligible for benefits like unemployment insurance.[307]

The second problem is that once within a consumer law framing, consumer law can be somewhat toothless. For example, one of consumer law's remedies, disclosure, does not overcome behavioral obstacles and other market failures like asymmetrical firm bargaining power.[308] One of consumer law's early goals was transparency, which remains a focus to this day.[309] Employment law, conversely, has from its nascency recognized that a worker's right to know is oftentimes insufficient and has thus incorporated substantive protections. Consumer law, however, has incorporated more robust substantive protections in recent years that go well beyond mandated disclosure.[310]

---

302. *See* STEINFELD, *supra* note 25; 29 C.F.R. § 531.35 (2019) (requiring under FLSA that wages be paid "free and clear" and prohibiting wage kickbacks to employers 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).

303. *See* KLEIN, *supra* note 27, at 5.

304. *See id.* at 258–76.

305. 29 U.S.C. §§ 1001–1461.

306. *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).

307. *See* Calo & Rosenblat, *supra* note 24, at 1646–47.

308. *But see* Gonos, *"Never a Fee!"*, *supra* note 132, 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.").

309. *See* 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).

310. *See generally* Dave Uejio, *Celebrating 10 Years of Consumer Protection*, CONSUMER FIN. PROT. BUREAU (July 21, 2021), https://www.consumerfinance.gov/about-us/blog/celebrating-10-years-consumer-protection/ [https://perma.cc/8DQC-QCYG] (describing CFPB's first decade of work in recovering consumers' funds).

Certainly, workers deserve knowledge of agreements that harm them, which, as previously discussed, is not always the case.[311] This lack of worker knowledge points to a core problem of harmful contract terms, such as those found within staffing agency-client firm contracts and 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 are also necessary.[312] 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 consumers' choices.[313] Some even assert that disclosure regimes can harm consumers through information overload, obfuscation of important information, and disclosure timing problems.[314] In addition, at least in theory, mandatory disclosure regimes could grant disclosing firms safe harbor from deception claims.[315]

311. *See supra* note 142 and accompanying text.

312. *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, 352–53, 355 (2011) (noting that relatively little scholarly attention has been dedicated to transparency in the workplace as a general matter).

313. *See* 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 [to contracts] 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, 114–15 (2012).

314. *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 & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 700 (2011) ("Disclosers can also overdisclose in order to exacerbate the overload of disclosees. 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, educational, and behavioral critiques). Similarly, environmental information-forcing regulations have been found not only ineffective in meeting their goals but also harmful to society and the environment. Annie Brett, *Rethinking Environmental Disclosure*, 112 CALIF. L. REV. (forthcoming 2024) (manuscript at 43) (on file with author).

315. *But see* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 846 (2005) ("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*

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.[316] 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.[317] Those reasons, according to Margaret Jane Radin, are that readers think that they would not understand, do not believe reading would make a difference, do not understand that they are agreeing to certain terms, trust the firm not to include anything harmful, believe that any harmful provisions would be unenforceable, believe that they would be stuck with whatever the terms say regardless of whether they read, or do not believe that anything would go wrong to require exercising legal rights.[318]

In addition, a plethora of behavioral empirical literature reveals workers' fundamental misunderstandings of their employment contract provisions and their rights.[319] Furthermore, 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 accept employment with the staffing agency. 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 for changes such as an end to TRAPs and ISAs, harmful franchising arrangements, and pay and

Law, 66 STAN. L. REV. 545, 554, 580–85 (2014) (recognizing the "no-reading problem" with consumer contracts but offering rules that would help consumers such as emphasizing unfavorable terms to consumers first instead of hiding them in the contract).

316. Contracts of adhesion are also known as take-it-or-leave-it contracts.

317. *See* Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements*, 75 MD. L. REV. 1, 47 (2015) (noting that less than 9 percent of surveyed consumers subject to arbitration clauses understood both that the contract provided for arbitration and that mandatory arbitration precluded court litigation).

318. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2014).

319. *See, e.g.*, J.J. Prescott & Evan Starr, *Subjective Beliefs About Contract Enforceability*, J. LEGAL STUD. (forthcoming 2023) (manuscript at 2), https://ssrn.com/abstract=3873638 [https://perma.cc/A3FK-DUL3] (showing that employees tend to believe their noncompetes are enforceable, even when they are not). *See generally* 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); 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) (same); 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 (2008); 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).

rights parity between temporary workers and direct hires.[320] As an example, a consumer-like website that allows Mexican migrant farmworkers to review U.S.-based staffing agencies and recruiters—a Yelp for farmworkers—has allowed workers to not only disclose the practices of bad staffing agencies but also organize for improved labor rights.[321] The platform, called Contratados.org ("Contractors.org" in English), simultaneously educates farmworkers about their rights and provides them outlets to engage in collective action with lasting results.[322] Contratados.org's sponsor, the Centro de los Derechos del Migrante (Center for Migrant Rights), has obtained large wins, including a U.S.-Mexico government agreement to protect migrant workers.[323] Likewise, a 2022 California law requiring pay scale disclosures in job advertisements may inspire workers to organize for more pay after seeing the disparities between job titles and among employers.[324]

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 estimated hourly pay rate, or staffing agency conversion fee provisions. This information might not cause a worker to quit, but it could encourage the worker to organize with others and talk openly about the extent to which the firm-worker relationship is exploitative.[325] Such concerted activity could, in and of itself,

320. *See* Gonos, *"Never a Fee!"*, *supra* note 132, at 10–13 (arguing for "markup" disclosures to temporary workers to encourage organizing and citing examples); Freeman & Gonos, *supra* note 130, 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. LEGIS. 431, 464 (1995) (asserting that requiring employers to inform workers about the right to organize would itself encourage more organizing); *see also* Dworak-Fisher & Clack, *supra* note 278 (highlighting new state laws that mandate pay parity between temporary and permanent workers).

321. CONTRATADOS, https://contratados.org/en [https://perma.cc/SVM8-HJY7]; *see also Campaigns + Targeted Initiatives*, CENTRO DE LOS DERECHOS DEL MIGRANTE, https://cdmigrante.org/special-initiatives/ [https://perma.cc/8TVV-ZH8C].

322. *See Campaigns + Targeted Initiatives*, *supra* note 321.

323. *Another Huge Win for Migrant Workers!*, CENTRO DE LOS DERECHOS DEL MIGRANTE, https://cdmigrante.org/another-huge-win-for-migrant-workers/ [https://perma.cc/7ASB-U9XG].

324. *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/ [https://perma.cc/B2LW-QBEK]. *But see* Michael Oswalt, Jake Rosenfeld & Patrick Denice, *Power and Pay Secrecy*, 99 INDIANA L.J. (forthcoming 2023) (manuscript at 1), https://ssrn.com/abstract=4471187 [https://perma.cc/4C6B-HSL6] (finding in a study that state prohibitions on employers' pay secrecy rules are ineffective in stopping pay secrecy policies).

325. *See* TEMP WORKER JUST. ET AL., *supra* note 18, at 29; JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRATION RIGHTS 148–84 (2007) (discussing "rights-talk"—rights as a part of organizing—and how it enhanced member-led organizing at a workers' center for goals beyond winning a lawsuit). *But see* JOE BURNS, CLASS STRUGGLE UNIONISM 28–30 (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 1–2 (1994) (discussing the role of law and litigation in the pay equity movement of the 1970s, regarding how lawyers assisted or hurt the movement).

result in the formation of a union or another mechanism to rectify bargaining power asymmetries between firms and workers.

Therefore, in a roundabout way, using consumer law-based disclosure mandates could reinvigorate workers' collective consciousness, as the standardized policies disclosed would affect all workers equally and not simply any individual worker's unique terms of employment. The question remains, though, whether the use of consumer law toward this end outweighs the long-term risk of reifying an "atomistic" consumer consciousness.[326] This is one of the tensions that workers and their advocates will need to resolve in their quest to enhance their power in relation to the firms using their labor.

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.[327] Novak has described these themes as "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."[328] 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 United States.[329] 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 relationship?"[330]

These narratives are especially concerning for workers, many of whom have adopted the narratives as their own. For instance, one commercial janitorial franchisee explained that "[w]e wanted the freedom and flexibility to own and operate our own business. We wanted to get away from a 9-5 job and working for somebody else and we wanted to reap the rewards for it for building our own

326. *Cf.* Kim & Leavitt, *supra* note 296, at 29 ("[W]orkers' data interests are primarily collective in nature. . . . [whereas] [t]he consumer frame invokes the atomistic, transactional approach. . . . Thus, conceptualizing workers as consumers obscures the interdependence of their interests, undermining the possibility of solidarity and collective action.").

327. Petroziello, *supra* note 6.

328. Novak, *supra* note 43; *see also* Orly Lobel, *The (Re)New(ing) Democracy and Cyclical Forms and Substance of Regulatory Governance*, YALE J. ON REGUL. (Aug. 2, 2022), https://www.yalejreg.com/nc/symposium-novak-new-democracy-10/ [https://perma.cc/WHG9-5UBN].

329. Fineman, *supra* note 6, at 33.

330. *Id.* at 31 (citing MARTHA ALBERTSON FINEMAN & JONATHAN W. FINEMAN, VULNERABILITY AND THE LEGAL ORGANIZATION OF WORK (2018)).

company."[331] Harry Arthurs has described how the media, politicians, and workers themselves no longer perceive "labor" as a movement, all to the detriment of workers.[332] 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."[333] 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."[334]

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.[335] 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 state interference and lack of ambition.[336]

These narratives are dangerous to workers in at least two ways. First, workers are not autonomous but are in fact universally vulnerable to institutions, including the state and the firms that use their labor.[337] Second, these narratives can dissuade workers from engaging in collective action, which is often necessary to bolster an individual worker's bargaining power in relation to the firm using their labor.

---

331. *Franchisee Testimonials*, SERVICEMASTER CLEAN, https://franchise.servicemasterclean.com/franchisee-testimonials [https://perma.cc/Q7UC-GC2A].

332. *See* Arthurs, *supra* note 11, at 591.

333. *Id.*

334. *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").

335. A future project will discuss the rise of this sort of job credentialism, which plays into narratives of meritocracy and the American Dream but harms workers collectively. *See* Jonathan F. Harris, Credentialism at Work 1–3 (Jan. 28, 2024) (unpublished manuscript) (on file with author) (discussing the rise of this sort of job credentialism, which plays into narratives of meritocracy and the American Dream but harms workers and lets down employers). *See generally* 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").

336. *See* 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.").

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

C. The Promise of an Integrated Work Law

The shortcomings of consumer law and the possibility of acceding to the 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 influence and strengthen each other in a virtuous cycle for workers.

Integrating various doctrines in the service of workers has been fruitful, starting with the National Industrial Recovery Act of 1933 (NIRA).[338] 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 retail prices, created an unemployment program through public works, and guaranteed workers a minimum wage.[339] NIRA, according to Harry 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."[340] What I propose in an integrated work law is precisely a re-integration of 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."[341] He asserts that consumer law has been neglected for too long and that "[i]t does not undermine a field to show its breadth and overlap with clearly distinct fields."[342] The same analysis could equally apply to work law, likewise revealing its breadth.

In addition, a comparative approach to the law asks why some U.S. legal doctrines are separated in the first place. U.S. work law has a peculiar compartmentalization, which is not reflected in continental Europe's work law.[343] In the United States, "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.[344] Meanwhile, though it varies by country, much of continental Europe has preserved a unified

338. Pub. L. No. 73-67, 48 Stat. 195 (1933); *see* Arthurs, *supra* note 11, 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").

339. Arthurs, *supra* note 11, at 597–98.

340. *Id.* at 598.

341. Rory Van Loo, *The Public Stakes of Consumer Law: The Environment, the Economy, Health, Disinformation, and Beyond*, 107 MINN. L. REV. 2039, 2099 (2023) (citing Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 COLUM. L. REV. 583 (2014)).

342. *Id.* at 2100.

343. *See* Arthurs, *supra* note 11, at 587.

344. *See id.*

"social law" or a "law of the welfare state."[345] Perhaps by maintaining an integrated law, continental Europe has preserved many more substantive worker protections than the United States.[346]

An integrated work law would also encourage agencies to expand their regulatory and enforcement activities to protect workers, sparking an inter-agency race to rein in harmful practices. In recent years, the FTC, CFPB, Department of Justice Antitrust Division, and Department of Transportation have sought to protect workers as worker-consumers in ways that traditional employee protection agencies like the Department of Labor (DOL) and National Labor Relations Board (NLRB) cannot. The former agencies have also entered into memoranda of understanding with the DOL and NLRB to act where they can on issues including employer-driven debt and employer surveillance.[347] The consumer agencies' worker protection initiatives have in turn inspired the traditional employee rights agencies to intervene.[348] For instance, in fall 2023,

345. *Id.*

346. An integrated work law can also parallel firms' "integrated production of goods and services." *Cf.* Hugh Collins, *Fat Cats, Production Networks, and the Right to Fair Pay*, 85 MODERN L. REV. 1, 18–19 (2022) (arguing for the development of "the concept of a production network as a legal concept in which the core or hub business can be held responsible for wrongs committed by companies that it controls for the purpose of co-ordinating its production of goods and services," rather than treating the relationships as disparate contracts between independent businesses).

347. *See CFPB and NLRB Announce Information Sharing Agreement to Protect American Consumers and Workers from Illegal Practices*, CONSUMER FIN. PROT. BUREAU (Mar. 7, 2023), https://www.consumerfinance.gov/about-us/newsroom/cfpb-and-nlrb-announce-information-sharing-agreement-to-protect-american-consumers-and-workers-from-illegal-practices/ [https://perma.cc/6TXM-ZMDM] (announcing agreement to focus on employer-driven debt and employer surveillance); Oppenheim, *supra* note 216; DOJ & DOL Memorandum, *supra* note 284; *Initiative*, *supra* note 284; Memorandum of Understanding Between the Fed. Trade Comm'n (FTC) and the Nat'l Lab. Rels. Bd. (NLRB) Regarding Information Sharing, Cross-Agency Training, and Outreach in Areas of Common Regulatory Interest (July 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/ftcnlrb%20mou%2071922.pdf [https://perma.cc/H24A-2AHV]; Press Release, U.S. Dep't of Transp., DOT, DOL Announce Expansion of Trucking Apprenticeships, New Truck Driver Boards and Studies to Improve the Working Conditions of Truck Drivers (Jan. 13, 2022), https://www.transportation.gov/briefing-room/dot-dol-announce-expansion-trucking-apprenticeships-new-truck-driver-boards-and [https://perma.cc/9NP3-MXZ6] (describing the DOT Truck Leasing Task Force that will investigate TRAPs for truck drivers, in coordination with the CPFB and DOL).

348. In 2023, the NLRB General Counsel issued a memorandum asserting that most noncompetes violate the NLRA because restricting a worker's mobility chills protected concerted activity to improve working conditions. Memorandum GC 23-08 from Jennifer A. Abruzzo, Gen. Couns., to All Reg'l Dirs., Officers-in-Charge, and Resident Officers on Non-Compete Agreements that Violate the National Labor Relations Act 1 (May 30, 2023), https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-non-competes-violating-the-national [https://perma.cc/SUP8-Y7BY]. Presumably, the memorandum also includes TRAPs as a part of its definition of noncompetes, just as the FTC did in its proposed rule banning noncompetes. *See id.* at 5 ("[S]pecial investments in training employees are unlikely to ever justify an overbroad non-compete provision because U.S. law generally protects employee mobility, and employers may protect training investments by less restrictive means, for example, by offering a longevity bonus."); Non-Compete Clause Rule, 88 Fed. Reg. 3482, 3510 (proposed Jan. 8, 2023) (to be codified at 16 C.F.R. pt. 910).

the NLRB brought a complaint alleging that a TRAP violated employees' NLRA right to organize by foreclosing the threat to quit as leverage.[349]

In practice, an integrated work law could also encourage lawyers to consider a range of doctrines to advocate for workers most effectively.[350] In exchange, the application of various doctrines to the workplace encourages those doctrines to learn from each other. 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, consumer law could adapt to provide more robust minimum standards. Nonemployee consumers could even look to existing substantive employment laws. To this end, some argue that consumers who generate content for social media websites and data brokers should benefit from substantive employment laws when facing abuse and surveillance.[351]

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 United States is at its highest level since 1965.[352] 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.[353] During the

349. *See* Press Release, Nat'l Lab. Rels. Bd., *supra* note 58.

350. *See* Javillier, *supra* note 285, at 356 n.2 (noting importance of lawyers linking disciplines, both theoretically and practically); Hafiz, *supra* note 284, 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.").

351. Francesca Procaccini, Social Net Work 4–5 (Apr. 30, 2023) (unpublished manuscript) (on file with author) ("[T]he law governing the workplace provides an apt framework for how law should regulate social media to protect users and platforms from the comparable harms experienced in cyberspace that have long plagued the workplace."). Consumer reporting agency Equifax has developed a new consumer surveillance tool, "The Work Number," to provide clients substantial amounts of employment history on individuals and has then turned that tool against its own employees. Dan DeFrancesco, *Equifax Fired at Least Two Dozen Employees After It Used Its Own Tool to Suss Out if Workers Had a Second Job*, BUS. INSIDER (Oct. 14, 2022), https://www.businessinsider.com/equifax-uses-the-work-number-spy-on-workers [https://perma.cc/5K2S-L8MN]. This is an instance in which workers could seek protection as workers rather than consumers. *See* Kim & Leavitt, *supra* note 296, at 1, 5, 26.

352. 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. [https://perma.cc/5HHY-5N5B].

353. *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 [https://perma.cc/38MU-TRSN]; 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 [https://perma.cc/5555-XMCR]; 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 [https://perma.cc/4PWG-J5MD]; 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 [https://perma.cc/LE9E-ZC6D].

same period, consumer debtors organized for student and medical debt relief through groups like the Debt Collective.[354] Not coincidentally, many consumer organizing leaders were trained in the labor union movement.[355]

Currently, there is no collective rights regime for consumers in the way there is for employees through the NLRA. But consumer law could evolve by learning from labor law to adopt a similar collective rights regime for consumers.[356] Such a regime would also benefit worker-consumers excluded from the NLRA as nonemployees (like franchisees and independent contractors), without having to engage in cumbersome and uncertain litigation over their employment classification.[357]

Class action litigation is a different form of collective action from that contemplated under the NLRA. For both workplace and consumer claims, firms have used laws such as the Federal Arbitration Act to impose mandatory arbitration contract clauses with class waiver provisions.[358] Yet, conditions may be changing 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.[359] 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. Further, California's Private Attorneys General Act (PAGA) allows workers to avoid contract clauses mandating arbitration of class claims by bringing the claim in the shoes of the attorney general.[360]

I have previously advocated for the application of a hybrid of contract, employment, and antitrust law to balance the power dynamics in the workplace,

354. *See* DEBT COLLECTIVE, https://debtcollective.org/ [https://perma.cc/C3XJ-3ECL]; *Our History and Vision*, DEBT COLLECTIVE, https://debtcollective.org/about-us/history-and-victories/ [https://perma.cc/89R8-J7JD].

355. *See Our Team*, DEBT COLLECTIVE, https://debtcollective.org/about-us/our-team/ [https://perma.cc/8E4G-HHRX].

356. Conversely, consumers have also organized in support of workers with some success. *See, e.g.*, Stephen Lee, *The Food We Eat and the People Who Feed Us*, 94 WASH. U. L. REV. 1249, 1263–73 (2017) (describing the potential for consumers to advocate for workers' rights in the food supply chain); LIZA FEATHERSTONE, STUDENTS AGAINST SWEATSHOPS: THE MAKING OF A MOVEMENT 1–4 (2002) (chronicling the history of student consumers of university apparel organizing to improve conditions of garment workers producing the apparel).

357. This raises a larger question about the relevance of the employee versus nonemployee classification question, which some argue should be done away with entirely. *See, e.g.*, Lobel, *supra* note 10, at 63–64.

358. 9 U.S.C. §§ 1–16, 201–208, 301–307.

359. Pub. L. No. 117-90, 136 Stat. 26 (2022). *See generally* Imre S. Szalai, *#MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, 18 NW. J.L. & SOC. POL'Y 1, 1 (2023) (noting that the law is "the most important federal legislation to arise thus far from the #MeToo movement").

360. CAL. LAB. CODE §§ 2698–2699.8; *see also* Adolph v. Uber Techs., Inc., 532 P.3d 682, 692 (Cal. 2023) (affirming viability of non-individual PAGA claims).

starting with reining in mobility-restricting contracts for workers.[361] This Article adds consumer law to that hybrid approach.

CONCLUSION

Workers' lack of bargaining power gives them limited ability to resist firms' UDAPs. Expanding workers' power requires using all potential legal and policy mechanisms. Employers 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. When firms offer services and credit products to workers, consumer law offers a ready-made complement to employment law and other legal regimes. Thus, workers and their advocates should likewise shape and utilize consumer law to increase their own power.

A consumer law framing in the workplace does have shortcomings, including the potential to amplify narratives of autonomy, individualism, freedom of contract, and self-betterment, as well as the inherent weaknesses of consumer law itself. Despite this, through an integrated work law, consumer law and employment law could undergo a theoretical paired evolution, in which the doctrines continuously inform and improve each other. The end goal would be to shore up the bargaining power of subordinated workers vis-à-vis firms, primarily through collective action.

361. *See* Harris, *supra* note 5, at 778–83.