2014

Wrap Contract Morass

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THE WRAP CONTRACT MORASS

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It is an honor to have the opportunity to address the thoughtful essays of the contributors on the subject of my book, *Wrap Contracts: Foundations and Ramifications*.[1] I use the term "wrap contracts" to refer to non-traditional adhesive contracting forms that are not signed by the adherent. Courts have referred to "clickwraps," "browsewraps," and "shrinkwraps," but contracting forms have broken out of these neat categories, muddying judicial analysis. The term "wrap contracts" sweeps them under one broad category which both eliminates the distinctions between these forms and maintains their distinctiveness from signed paper contracts. Categorizing these contracts as "wrap contracts" underscores the central theme of my book, which is that contracting form matters.

Form affects process but it also affects substance. Form affects the costs of contracting. Paper contracting has costs associated with physicality. Each page costs money to reproduce, serving as a natural deterrent to the creation of dense mass consumer paper contracts. Each paper contract slows down the transacting process by requiring a signature, thus imposing an incremental cost in terms of goodwill and time. Digital contracts are not constrained in the same way. A fifty page digital contract weighs the same as one that is two pages and costs about the same to produce.[2] There is no incremental cost to reproducing digital contracts or

* ProFlowers Distinguished Professor of Internet Studies and Professor of Law, California Western School of Law. It is a tremendous honor to have the Southwestern Law Review host a symposium issue on my book, *Wrap Contracts: Foundations and Ramifications* (Oxford University Press, 2013). I offer my sincere thanks to the distinguished contributors for the careful thought and attention they have given to my work. My special thanks to Danielle Kie Hart for conceiving of and organizing this symposium issue, and to Mark Talise and the members of the Southwestern Law Review for their hard work.

1. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

2. A business may spend slightly more on legal fees for the initial drafting of a much longer agreement or to add more terms; however, many wrap contracts are drafted or revised by in-house lawyers which may contain the cost of drafting or revising the agreements. Anecdotal evidence suggests that start-ups and small firms may simply cut and paste contracts from other websites with few changes.

increasing their terms, and the process of digital contracting—which requires neither a signature on paper or human contact—is essentially frictionless. Form affects what adherents notice. Adherents fail to notice wrap contracts because of their stealth forms. When adherents fail to notice contracts and when contracting costs are low, drafting parties are tempted to use contracts more frequently and to include more onerous terms in them.[3] This is why form cannot be so easily divorced from substance when it comes to contracts.

Professor Moringiello understands well the significance of form and the way that contracting form, whether digital or paper, affects and shapes doctrine.[4] The wrap contract cases, beginning with *ProCD v. Zeidenberg*, stacked the deck in favor of drafting businesses and reshaped the meaning of foundational doctrinal concepts. Moringiello discusses a recent case[5] that hints that rather than retreating from wrap contract doctrine's divergence from traditional contract law principles, courts may be entrenching themselves deeper in fictional notions of consent. *Tompkins v. 23andMe, Inc.*[6] moves further down wrap contract doctrine's wayward path than even the two seminal cases which paved the way. Those cases, *ProCD v. Zeidenberg*[7] and *Hill v. Gateway*[8] recognized post-purchase contract formation as long as there was notice and an opportunity to reject terms.[9] 23andMe's refund policy appears to preclude any penalty-free opportunity

3. One study found that end user license agreements from the period between 2003 and 2010 became longer, though no simpler to read, with more pro-seller terms. Florencia Marotta-Wurlger & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts,* 88 N. Y. U. L. REV. 241, 243-44 (2013).

4. This comes as no surprise given that Moringiello has written one of the earliest and most insightful articles contemplating the role of form in contract law. *See generally* Juliet Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L.J. 1307 (2005). That article, written when wrap forms were still relatively novel, examined how courts accommodated changes in contracting form over the years and suggested that courts continue their dynamic integration of form into doctrinal analysis.

5. *See* Juliet M. Moringiello, *Notice, Assent, and Form in a 140 Character World*, 44 SW. L. REV. 275, 281 (2015).

6. No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014).

7. 86 F.3d 1447 (7th Cir. 1996).

8. 105 F.3d 1147 (7th Cir. 1997).

9. *See ProCD*, 86 F.3d at 1451 ("Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable" is a valuable means of doing business for both buyers and sellers); *Hill*, 105 F.3d at 1148 (citing *ProCD* for the proposition that "terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product."). *Hill v. Gateway* extends the rationale in *ProCD v. Zeidenberg* to all contracts. *Id.* at 1149 ("Plaintiffs ask us to limit *ProCD* to software, but what's the sense in that? *ProCD* is about the law of contract, not the law of software.").

to reject unacceptable contracts terms.[10] The court ignored the effect of 23andMe's refund policy on the user's opportunity to reject terms.[11] It stated that in "typical shrinkwrap cases, the customer tacitly accepts contractual terms by not returning the product within a specified time."[12] From there, the court's convoluted analysis seemed to make several unfounded and unfortunate extrapolations. The first was that the opportunity to reject contract terms was relevant *only* to shrinkwraps. Then it conflated shrinkwrap with all post-purchase or "rolling" contracts. It found that because 23andMe customers affirmatively agreed to the terms of service, the contract was not a shrinkwrap by which it apparently meant that it was not a rolling contract at all. In other words, the court seemed to say that the requirement that the customer have the opportunity to reject did not apply to the sale of the 23andMe kits because the agreement was not a shrinkwrap. Instead, the court concluded that the multi-wrap was a new contract governing the testing of the kits because the customer had clicked "I ACCEPT THE TERMS OF SERVICE."[13] It also found that the agreement to arbitrate on the part of 23andMe constituted consideration, even though the customer was claiming that he never agreed to it.[14]

The court's analysis strains the definition of a bargain. It also ignores existing law on rolling contracts and overlooks the reality of how the kits were sold—as a unit, the product with the service. The customer was only presented with the multi-wrap after purchasing the kit, upon account creation and/or registration. In other words, it was a rolling contract despite the fact that the form of the contract was digital and not paper. Thus, the customer should have had an opportunity to reject terms after being presented with them. If a customer had attempted to register within thirty

10. The company's replacement policy states that customers may cancel an order "60 minutes after you place your order from both the order confirmation page and the order confirmation email." Partial refunds are permitted provided that requests are made within 30 days of the order and the company will deduct $25 per kit and shipping and handling charges. Furthermore, the company would not issue refunds if more than 30 days have passed since the order was placed although samples may be submitted, and registration delayed, until up to 12 months from the date of purchase. *23andMe Refund and Replacement Policy*, 23ANDME CUSTOMER CARE, https://customercare.23andme.com/hc/en-us/articles/202907780-23andMe-Refund-and-Replacement-Policy (last updated Feb. 18, 2014).

11. The court acknowledged that "23andMe's Refund Policy was restrictive: customers could 'cancel' (receive a full refund) only within 60 minutes of purchasing a DNA kit and could obtain a partial refund 'subtracting a) $25 per kit and b) your original shipping and handling charges' only within 30 days of purchase and before the laboratory received a DNA sample." *23andMe*, 2014 WL 2903752, at *8.

12. *Id.*

13. *See id.* at *5-6.

14. *Id.* at *8 ("23andMe's agreement to accept arbitration provided acceptable consideration to its customers.").

days of purchasing the kits, she would have faced two options – accept the terms, or return the testing kit for a partial refund, minus $25 and charges for shipping and handling, which was typically $9.95.[15] Thus, the equivalent of a penalty of approximately 35% of the purchase price of the kits would be levied against customers if they declined the terms of the post-purchase multi-wrap. If a customer registered more than thirty days after purchase and declined the terms, she would not receive a refund on the kits at all. The presentation of a contract at that stage does not give customers a reasonable opportunity to reject the terms; instead it leaves them with no real alternative but to click "accept."[16]

Perhaps the court was merely ceding to the reality that consumers don't read contracts. It might have thought that it didn't really matter that there was no opportunity to reject terms after contract presentment because few consumers would have read the terms to reject them anyway. This recognition of contracting realities, however, reflects judicial bias since it only works in favor of businesses. If judges know consumers don't read wrap contracts, why should these forms be enforceable as contracts at all?

The proliferation of wrap contracts has several causes – the rise of ecommerce, the nature of digital terms and their no-or-low cost duplication, and, as Professor Ghosh notes, the "emergence of market authoritarianism" accompanied by "contractual authoritarianism" where courts permit "one side of a transaction" to "determine its scope and parameters."[17] Viewed as a whole, wrap contract cases reflect a favoring of business over individual interests, a moving away from autonomy justifications for contract enforcement in favor of efficiency-and-marketplace rationales. The *23andMe* decision illustrates a weighting of the balance further in favor of business than even *ProCD v. Zeidenberg*[18] and *Hill v. Gateway*.[19]

If judges know that clicking doesn't mean the adherent has read the terms, why do they construe clicking as a manifestation of consent? Because of another concession granted to businesses—applying the duty to read to wrap contracts. Courts continue to impose a "duty to read" upon

15. The kits were $99 each. Shipping and handling is typically $9.95. *See Shipping Rates and Information*, 23ANDME CUSTOMER CARE, https://customercare.23andme.com/hc/en-us/articles/202907920-Shipping-rates-and-information (last visited Oct. 20, 2014). In addition, the company would have charged $25 for each return, totaling roughly $35 off a $99 purchase.

16. I argue elsewhere that the acceptance of the contract in this type of case is an example of "situational duress" and should be void. Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 278-79 (2014).

17. Shubha Ghosh, *Against Contractual Authoritarianism*, 44 SW. L. REV. 239, 241, 248 (2015).

18. 86 F.3d 1447 (7th Cir. 1996).

19. 105 F.3d 1147 (7th Cir. 1997).

consumers despite the reality that consumers don't read the form contracts they sign. Yet, rather than recognize the reality that consumers don't read form contracts, courts pretend that they do. While this assumption may be understandable, even if not reasonable, where the consumer has physically signed a document, it weakens considerably when the prompt that triggers the duty to read is a mere click of a mouse or a tap of a finger on a smartphone. It dissipates entirely when one realizes that one click typically incorporates by reference terms on hyperlinked pages, which in turn, incorporate by reference terms on other hyperlinked pages. And why should this be? It is because the courts have given judicial assists to drafting businesses by finding that, despite all evidence to the contrary, a click is the same as a signature on a page, digital terms *appear* to the user in the same way as terms on paper, and drafting businesses use digital contracts the same way they do paper contracts. These judicially constructed fictions perpetuate the myth of wrap contracts as agreements and justify their enforcement.

An often-overlooked problem with wrap contracts is how they attempt to legitimize and normalize dubious business practices.[20] In my book, I mention how companies used wrap contracts to legitimize privacy invasive online tracking and to eliminate first sale rights, justifying their practices by claiming that users had consented to them by "agreeing" to their terms. Professor Tussey explains how wrap contracts can alter the balance of rights granted under copyright law.[21] Tussey offers a fine-tuned analysis of how wrap contract doctrine shapes copyright law, innovation and the marketplace. The convergence of wrap contract doctrine, emerging case law in the area of copyright that allocates power to copyright owners, and technological advances such as tracking technologies, grant "preferential treatment to corporate copyright owners to the detriment of the public, particularly in the context of mass online consumer transactions."[22]

In addressing my specific assent proposal, Tussey notes that categorizing first sale and fair use as "rights or entitlements" that require specific assent does not accord with copyright law that views them as neither rights nor entitlements but as defenses in infringement actions.[23] I thank Professor Tussey for providing me with the opportunity to clarify

20. Barnhizer and Eigen address this issue more substantively in their essays. *See* Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215 (2015); Zev Eigen, *Norm Shifting by Contract*, 44 SW. L. REV. 231 (2015); *see also infra* pp. 314-15.

21. *See* Deborah Tussey, *Wraps and Copyrights*, 44 SW. L. REV. 285, 285 (2015).

22. *Id.* at 288.

23. *See id.* at 290.

what I meant by "rights and entitlements." I meant the term very broadly, to reflect what must be bargained for in situations where a bargain is required. In other words, my proposal requires specific assent for any action (or inaction) that requires from the adherent a promise or consent. Shield provisions do not require specific assent because they are tied to the drafter's ownership or proprietorship rights and are terms that the drafter may unilaterally impose. The drafting owner does not need to bargain in order to impose certain restrictions upon the other party. A property owner can unilaterally impose certain restrictions on another party's ability to use the property. A store owner, for example, can impose a "no food or drinks" policy in his or her store. A failure to abide by the policy may result in the store owner's exercise of his or her property right to kick the transgressor out of the store. Similarly, a user's consent to a website's prohibition on making copies of website content is not required. An adherent that makes copies in violation of this prohibition is subject to the exercise of the website owner's rights under copyright law. A business does not need the adherent's consent to provisions that concern only the scope of permission granted by the business if the adherent would not have the right to engage in the activity without such permission.

Consent, however, is required for provisions that affect the adherent's property or which seek to limit the adherent's activities which are not contingent upon the drafter's permission. The store owner in the above example could not prevent someone from eating or drinking outside the store, nor could the store owner impose a fine upon a customer for eating and drinking inside the store although the owner could eject the customer from the store premises. Ejection involves the exercise of the owner's property rights (and so doesn't require consent) while the imposition of a fine involves taking property from the customer and could only be imposed by contract. Accordingly, under my proposal, the term imposing the fine would require the adherent's specific assent. Similarly, if the terms stated that copying website content would result in a fine of $5,000, under my proposal, the terms would not be enforceable without specific assent because they go beyond what the website can do as an owner of content. It can sue for copyright infringement but without consent, it cannot set the damages for infringement. Similarly, a promise *not* to raise a fair use or first sale defense in an infringement action would require specific assent because it involves a concession by the adherent and is not a term that the drafter may unilaterally impose by virtue of its ownership of the content.

Professor Barnhizer and Professor Eigen's essays focus on the normative effect of stealth wrap contract terms. Companies will continue to use wrap contracts to limit their liability and reduce the risk and uncertainty

associated with new technology and untested business models. In doing so, businesses will attempt to normalize conduct that many users find offensive or alarming. There have been two recent examples of companies using terms of use to shift the norms concerning research on and testing of human subjects. In the first, Facebook revealed that it had manipulated its users' news feeds to test whether it affected the character of their posts. In response to user backlash, the company claimed that users consented to this type of testing when they agreed to Facebook's terms of use. Sheryl Sandberg, Facebook's Chief Operating Officer, issued what many commentators referred to as a "non-apology," meaning that she, on behalf of the company, apologized for upsetting its users, but did not admit that its actions were wrongful. A couple of weeks later, the online dating website OkCupid stated that it had also experimented on its users by, among other things, telling some bad matches that they were exceptionally good matches.[24] Unlike Facebook, OkCupid didn't even issue a non-apology—instead, the founder and President of the company shamed its users as naïve for not realizing "that's how websites work."[25] He later justified the company's actions as "diagnostic research" which was permitted by the site's terms of service.[26] Barnhizer, noting that "producers have significant incentives to manipulate commercial norms," cites OkCupid as an example of a company attempting to establish "new norms" regarding what is commercially reasonable and cautions that the company's nonchalant response has the potential to influence users in the future.[27] Professor Eigen focuses on other ways that wrap contracts shift norms, especially how they "increase our tolerance for oppressive terms," which in turn, paves the way for ever more oppressive terms.[28] He compares the effect of wrap contracts to termites gnawing away at a house, and observes that they not only slowly erode consumers' rights, they also erode trust in the rule of law and may lead to "extra-legal and sometimes anti-social behaviors."[29] Eigen argues that wrap contracts not only shape business norms, they shift norms regarding the role of contracts themselves.[30]

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24. Christian Rudder, *We Experiment on Human Beings!*, OK CUPID BLOG (July 28, 2014), http://blog.okcupid.com/index.php/we-experiment-on-human-beings/.

25. *Id.*

26. Casey Sullivan, *OkCupid's Experiment May Have Broken FTC Rules*, HUFFINGTON POST (July 29, 2014, 9:41 PM), http://www.huffingtonpost.com/2014/07/30/okcupid-experiment_n_5632351.html.

27. Barnhizer, *supra* note 20, at 223.

28. Eigen, *supra* note 20, at 236.

29. *Id.* at 236, 238.

30. I made a similar point in a recent essay, Nancy S. Kim, *Two Alternate Visions of Contract Law in 2015*, 52 DUQ. L. REV. 303 (2014).

This highlights one important reason why my proposals focused on doctrinal solutions. Contract law that fails to understand the perceptions and experiences of ordinary "reasonable" people (instead of judicially constructed, hyper-vigilant and entirely fictitious versions of "reasonable" people) is in danger of losing legitimacy. The legitimacy of the law matters and wrap contract doctrine is starting to look more like a good joke than good law. As I discussed elsewhere, there is a synergy that exists between the judiciary, legislature and regulatory agencies.[31] Judicial inaction or complicity in abusive contracting practices weakens the legitimacy of contract law and encourages action from other institutions, further diminishing contract law's power.

Professor Hart expressed dismay that my proposals do not ameliorate the bargaining imbalances in wrap contracts.[32] Social inequality and economic disparities are significant social problems and bargaining imbalances are reflected in the terms of both paper and digital contracts of adhesion. The goal of my book, however, was expressly not to focus on the problems of adhesive contracts *in general*. Although wrap contracts and paper adhesive contracts share many of the same problems pertaining to assent and bargaining power, wrap contracts are unique due to their form and the issues created by form. I wanted to focus on these unique issues, including the case law that has attempted—unsuccessfully—to grapple with form.

By focusing on form, I wanted to address a very specific argument in favor of wrap contracts—that they are no different from mass consumer contracts in general. The way businesses use them, and the way that courts have analyzed them, indicate that they are different. There remain larger issues surrounding choice and consent, power and justice which I left unresolved in this book, which may in fact be unresolvable. As Professor Ghosh recognizes, "authoritarianism that is consumer driven may potentially be as troublesome as firm-based authoritarianism" as it may "limit the cultural dynamism of market systems." My proposals were not intended to favor consumers over businesses but to call out contract authoritarianism and reallocate the burdens that courts have unfairly placed upon consumers to the advantage of businesses. In doing so, I hoped to stay true to the traditional objectives of contract law and show how far courts have strayed.

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31. *Id.* at 311.

32. *See* Danielle Kie Hart, *Form & Substance in Nancy Kim's* Wrap Contracts, 44 SW. L. REV. 251, 257-58 (2015).

Professors Barnhizer, Eigen and Hart all observed that increased disclosure may actually make it more difficult for consumers to escape unfair bargains. I agree that enhancing visibility would undermine claims of "unfair surprise," so it would seem paradoxical to make a duty to draft reasonably with its focus on increasing visibility a cornerstone of my proposals. However, given the state of wrap contract doctrine today, and the direction in which it seems to be headed, this concern is more theoretical than realistic. Very few reported wrap contract cases have allowed consumers to invalidate contracts on the basis of unfair surprise or substantive unconscionability. The reasons have to do with the difference between contract formation, contract enforcement and how they are affected by mandatory arbitration clauses.

Notice—disclosure of terms—is relevant to procedural unconscionability, but other factors, such as non-negotiability, are typically more important.[33] Thus, a contract with terms adequately disclosed may still be procedurally unconscionable if it is non-negotiable.[34] The tougher hurdle will likely be proving substantive unconscionability. Even when a court finds procedural unconscionability it may not find substantive unconscionability.[35] This is especially true where the provision at issue involves arbitration.

As Moringiello notes, "most litigation over online terms is focused on one type of clause, the choice of forum (including arbitration) clause."[36] Courts rarely find arbitration clauses to be substantively unconscionable.[37] Consequently, the issue of unconscionability regarding other terms would likely be decided by an arbitrator and not a court. Because arbitration hearings typically yield no public record, disputes resolved through

33. *See* Charles L. Knapp, *Unconscionability in American Contract Law: A Twenty-First Century Survey*, COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 322 (Larry A. DiMatteo, Qi Zhou, Severine Saintier & Keith Rowley eds.) (2013) (stating that "where there is truly an 'adhesion contract' . . . courts are increasingly willing to recognize that fact, and as a result to find the presence of 'procedural unconscionability.'").

34. *Id.*

35. *See* Tompkins v. 23andMe, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *15-16 (N.D. Cal. June 25, 2014) (finding arbitration clause procedurally but not substantively unconscionable); *see also* Moringiello, *supra* note 5, at 283.

36. Moringiello, *supra* note 5, at 284.

37. Knapp, *supra* note 33, at 315-19 (discussing how courts' ability to find mandatory arbitration clauses unconscionable has diminished after passage of the Federal Arbitration Act and recent U.S. Supreme Court cases). The Federal Arbitration Act permits parties to agree to privately resolve disputes through arbitration. 9 U.S.C. § 2 (2012). The agreements will be enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

arbitration have no precedential effect and provide no guidance for consumers or companies.[38]

The issue of assent, on the other hand, is typically decided by a court.[39] Thus, barriers to a finding of assent are critical to preserving an individual plaintiff's right to sue in court and avoid arbitration[40]—and to creating a public record of what practices are considered unconscionable. Currently, courts find that hyperlinks hiding terms constitute fair notice as long as a user clicked "agree." The standard of reasonable notice for purposes of finding assent and contract formation is simply too easy to meet. My proposals make finding reasonable notice—and therefore assent and contract formation—more difficult.

Professor Eigen raises another important concern, which is that enhanced disclosure would "further exacerbate the decline of pro-consumer terms" because it would speed up the rate at which consumers "normalize to intolerable contract terms."[41] Unfortunately, intolerable terms are already being normalized in contracts before consumers become aware of them. For example, many contracts contain mandatory arbitration clauses even though consumers may not understand what the term means,[42] and may be outraged or surprised when they learn of it. When General Mills tried to impose a mandatory arbitration clause on its website visitors, the consumer

38. MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 134 (2013) (noting that "arbitration has no precedential value. It leaves no written public record . . . . Arbitration is confidential; a firm that loses an arbitration because it has engaged in unfair or unethical business practices avoids having its reputation damaged by the publication of this fact.").

39. *See* Alan Scott Rau, *"Separability" in the United States Supreme Court*, 1 STOCKHOLM INT'L ARBITRATION REV. 1, 16-17 (2006) (stating that the Supreme Court decision in *Prima Paint* "preserves for the courts any claim at all that necessarily calls an agreement to arbitrate into question," even if, in addition to the claim to the arbitration clause itself, it also includes the entire agreement because the "only important question" is "the existence of a legally enforceable assent to submit to arbitration"); *see also* Nguyen v. Barnes & Noble, Inc., 763 F.3d 1171, 1180 (2014) (holding that because plaintiff had insufficient notice of Terms of Use, he did not enter into an agreement to arbitrate his claims); Knutson v. Sirius XM Radio, Inc., Case No. 12-56120 at 19 (finding that plaintiff "could not assent" to arbitration provision because he "did not know that he was entering into a contract").

40. Rau notes that "cases where an agreement to arbitrate is properly called into question" are limited but include "cases that raise issues of contract formation." Rau, *supra* note 39, at 28.

41. Eigen, *supra* note 20, at 235.

42. *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*, *in* 14-009 ST. JOHN'S SCHOOL OF LAW LEGAL STUDIES RESEARCH PAPER SERIES 7-8 (2014), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516432.*

backlash was so fierce, the company backed down with an apology.[43] But contrary to what the public response to General Mills' attempted change might indicate, mandatory arbitration is *already* standard in many mass consumer form contracts. Consumers just don't realize it. Raising the salience of a term might accelerate consumer acceptance or it might accelerate consumer response before businesses normalize the term in contracts.

"One-click" blanket assent makes frictionless contracting possible. So, too, does the notion that disclosure equals reasonable notice. Reasonable notice is not the same thing as disclosure. Reasonable notice means—or should mean—that the *meaning* of the notice was reasonably conveyed. Disclosure, hidden behind a hyperlink that is not required to be viewed, written in legalese and densely drafted, is not reasonably conveyed. Cases like *23andMe* whittle away at the doctrinal hurdles that served to slow down the consumer and hold back the drafter. As Moringiello notes, "like rolling contracts, a multi-wrap presentation sends no signal regarding the length and scope of terms, and thus poses similar timing and effort challenges."[44] Courts are oddly formalistic about clicking as a "manifestation of consent," yet disregard formalistic rules of offer and acceptance—and the signaling, cautionary and channeling function of formalities[45]—when it comes to rolling terms. Judges may view "clicking" as providing a signaling function but adherents typically do not. My proposals recognize contracting realities and suggest ways to accommodate them into existing doctrinal frameworks. My specific assent proposal, for example, does not seek to get adherents to read. Instead, it recognizes the importance of seamless transacting to companies, and aims to deter drafters from unilaterally imposing too many terms by introducing bumps in the contracting process. A requirement of specific assent for each promise or right taken from the adherent may diminish the number of promises or rights sought by the drafting company. Consumers may still not read their contract, but they will certainly be more annoyed by a website that requires multiple clicks than one that requires only one or two.

Courts expect too little from drafters, finding reasonable notice when companies provided only notice of notice and obscure disclosure. Companies should do more than present terms in stealth forms. They have the resources and savvy to make their contracts more noticeable. Very few

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43. Kirstie Foster, *We've listened – and we're changing our legal terms back*, GENERAL MILLS BLOG (April 19, 2014), http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/.

44. Moringiello, *supra* note 5, at 282.

45. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1949).

companies care enough about whether users read terms to bother tracking whether they even click on the "Terms" hyperlinks. My proposed duty to draft reasonably does not mean that companies simply disclose their practices or even re-write them in plain English. It means that they should *test* their notices to see whether users actually read, or at least notice, them. They should track how many users click on hyperlinks—and, if they find that few users do, they should find other ways to present the links to make them more clickable. The marketing prowess for which online companies are known—their ability to track and manipulate user behavior and their access to more data than ever about what their users pay attention to online—should enable them to attract the attention of their users with a little more effort.

In discussing my proposal to the unconscionability doctrine, Professor Waisman writes that "Kim proposes to eliminate unconscionability's substantive prong altogether while tightening its procedural one."[46] In fact, my proposal is to do away with the requirement of a bifurcated analysis, not to eliminate the substantive prong. In a footnote, Waisman explains that "Kim's proposal lacks a substantive component in the sense that, were her proposal adopted, the unconscionability determination would no longer depend to any extent on the *court's own determination* of whether the term at issue (or the bargain as a whole) was unreasonably favorable to one party." It is in this sense that he means that my proposal lacks a substantive prong. Waisman, however, misreads my proposal. I do not say that courts *cannot* assess the terms; rather, my proposal shifts the burden which the unconscionability defense currently places upon the adherent, and places it upon the drafter to prove the term is conscionable. There are two ways that the drafter can rebut this presumption—by demonstrating that the term is one that is expressly approved by the legislature or by showing the availability of alternative terms.[47] A rebuttal of a presumption does not, however, mean that the drafting party prevails; it means that the presumption of unconscionability no longer exists. In other words, a court could still find unconscionability despite a rebuttal of a presumption, which I had implied in my discussion about email service providers. I wrote that if an email provider allows the user to opt out of data collection by paying a fee, then the requirement would not be unconscionable "[a]ssuming that the

46. Dov Waisman, *Preserving Substantive Unconscionability*, 44 SW. L. REV. 297, 298 (2015).

47. To clarify something that was not express in my book, the unconscionability analysis would not pertain to terms that did not require consent. In other words, there would be no need to show the existence of alternative terms with respect to shield provisions, only with respect to sword and crook provisions.

fee itself is not shockingly excessive"[48] as the consumer then has a "real choice."[49] By this, I meant that a court could still determine that the alternative was itself unconscionable.

In retrospect, however, the reluctance of some courts to assess the substance of bargains may mean that they may be unlikely to find even excessive alternative terms unconscionable. Consequently, there is one significant adjustment that I would make to my unconscionability proposal—the default contract terms must be those which preserve the consumer's rights. For example, a company's standard form contract should not impose mandatory arbitration although it can offer a discount to those consumers who "opt-in" to mandatory arbitration. Setting the default terms to those which are consumer friendly is fair, addresses consumer inertia and loss aversion, and reflects society's values while preserving the parties' freedom to contract. It also reflects a better balancing of burdens as the company is in the better position to assess the value of the onerous alternative term. Furthermore, a default that requires a company to offer a discount to relinquish a right (rather than having the consumer pay more to retain a right) dramatically reduces the likelihood that a company will artificially inflate the value of that right. Finally, setting the default contract terms in this manner reduces the occasions when a court must evaluate the substance of a bargain.

The "hard question," as Professor Tussey noted, was figuring out how to implement my proposals. This *is* a hard question because my proposals are exclusively doctrinal and so depend upon the very institution that led us into this morass. My book focused on how wrap contracts differed from paper contracts—and how wrap contract doctrine diverged from traditional contract law including the law governing contracts of adhesion. As Professor Moringiello notes, contract law is "malleable enough to account for the factual differences between paper standard terms and online standard terms" but courts are ignoring these differences.[50] My proposals intentionally focused on doctrinal solutions because my primary objective was to expose and criticize this divergence—of both form and doctrine—and pull it back, or at least stall its progression. In our common law system, cases matter and as futile as it may sometimes seem, it is vitally important to continue to point out doctrinal flaws and offer constructive reasonable doctrinal solutions to marketplace quandaries. My proposals seek to appeal

48. KIM, *supra* note 1, at 208.

49. *Id.*

50. Moringiello, *supra* note 5, at 279. One of my proposals is to apply traditional contract law rules, such as good faith and reasonable expectations, to wrap contracts. *See* KIM, *supra* note 1, at 200-03.

to judges' sense of fairness and their own everyday experiences with wrap contracts.

There is another reason that I am optimistic about the judiciary's willingness to reconsider wrap contract principles. Wrap contract law reflects the judiciary's desire to encourage innovation and accommodate the vicissitudes of modern society, but the overuse of wrap contracts threatens to destabilize the modern economy. While companies may use wrap contracts, they must also adhere to them. All entities—businesses and consumers alike—which operate online and/or use digital products and services, are subject to wrap contracts' insidious and proliferating form. A company may have spent months negotiating the terms of a multi-million dollar enterprise wide software license only to find that during installation, an employee has clicked "Agree" to a wrap contract with different terms. The later terms may prevail given the courts' insistence that wrap contracts are "just like" paper contracts. Instead of streamlining and facilitating transactions, wrap contracts thus may undermine express understanding as a company agent may undo carefully negotiated contracts with a reflexive click. In response, companies may waste resources on procedures to safeguard against instances of accidental contracting. Courts, sympathetic to marketplace needs, will have to seriously reconsider how to shape wrap contract doctrine to avoid these inefficiencies and to encourage trust in transactions.

Professors Barnhizer, Ghosh and Stuart suggest that consumers may hold the solution to the problem of wrap contracts. Ghosh suggests that "[c]onsumer activism in the form of dissent and voice through Internet and other channels is the heart of the solution." Barnhizer's essay includes several examples of creative consumer and other non-institutional responses.[51] Stuart writes, "public opinion" could be used to "galvanize opposition to oppressive online terms."[52] She notes that consumer activism in several recent situations caused firms to back down from unfavorable terms.[53] Furthermore, without the press generated by consumer outcry, firms are unlikely to change of their own volition.

Yet, too often the outcry is too feeble to be heard. Stuart asks, "[w]here is the consumer firestorm" about online terms that disclaim warranties or impose mandatory arbitration and choice of forum clauses,

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51. *See* Barnhizer, *supra* note 20, at 223-28.

52. Allyson Haynes Stuart, *Challenging the Law Online*, 44 SW. L. REV. 265, 265 (2015).

53. *Id.* at 269; *see also* Caroline Moss, *Hotel That Fines Brides $500 for Negative Online Reviews is Furiously Backtracking*, BUS. INSIDER (Aug. 4, 2014), http://www.businessinsider.com/ hotel-fines-brides-as-a-joke-2014-8.

especially when these online terms affect offline purchases?[54] Adherents need to take the erosion of their rights seriously and conduct a cost benefit analysis that better reflects the reality of what they are giving up for the product or service they are engaging with online. Barnhizer observes that too often consumers are unaware of the relevance of boilerplate on their lives, "[t]hey just want 'stuff,' and they want that stuff cheap."[55] The calculation of costs too often leaves out non-monetary price. Has Facebook enhanced your life? Is it worth the long-term costs to your privacy and productivity? Is using Google—instead of a more privacy-respectful search engine like DuckDuckGo—worth having the company store your searches in their database? Most consumers don't even bother to ask, unaware that any bargain is being struck.

The lure of the Internet sirens seduces users with "free" temptations that stoke the emotional brain. Research has revealed the limits of free will,[56] but courts generally do not recognize heuristic biases and cognitive shortcomings as contract defenses. As much as most consumers want to pretend it doesn't matter, wrap contracts have and will continue to shift norms and extract and reallocate rights.

Consumer activism plays an important part in resolving the problem of wrap contracts. In other outlets, I have urged consumers to harness the power of the marketplace.[57] If consumers can't wean themselves from Facebook and Twitter, they can use them to publicize unfair terms. They can review a company's contract as part of their Yelp review. They can also join organizations like Ralph Nader's Citizen Works and its fair

54. Stuart, *supra* note 52, at 273.

55. Barnhizer, *supra* note 20, at 215.

56. *See* DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); *see also* Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract,* 47 STAN. L. REV. 211, 212-13 (1995); Joshua Greene & Jonathan Cohen, *For the law, neuroscience changes nothing and everything*, 359 PHIL. TRANS. R. SOC. LOND. B. 1659, 1775-85 (2004), *available at http://rstb.royalsocietypublishing.org/content/359/1451/1775.*

57. *See* Nancy S. Kim, *Sacrificing privacy to the Web gods*, SAN FRANCISCO CHRONICLE (Mar. 6, 2008), http://www.sfgate.com/cgibin/article.cgi?f=/c/a/2008/03/06/EDENVAIND.DTL; Nancy S. Kim, Op-ed., *Why do we sign away our Internet right to privacy?*, THE SACRAMENTO BEE (Aug. 14, 2013, 12:00 AM) http://www.sacbee.com/2013/08/04/5620462/why-do-we-sign-away-our-internet.html. I have also urged consumers to use social media to publicize unfair contract terms and to join consumer advocacy groups, such as Citizen Works' fair contract project, to stem the tide of oppressive contracts. *See Hidden contracts: do you know what you're signing?*, WRCBTV (July 29, 2014), http://www.wrcbtv.com/story/26144999/hidden-contracts-do-you-know-what-youre-signing); 90.9wbur, *What Are You Agreeing To In Online Contracts?*, HERE & NOW (Aug. 6, 2014), http://hereandnow.wbur.org/2014/08/06/wrap-contracts-privacy; *The Social Network Show on KDWN Presents Nancy Kim*, THE SOCIAL NETWORK STATION (May 4 2014), http://thesocialnetworkstation.com/the-social-network-show-on-kdwn-presents-nancy-kim/.

contracts project.[58] They should write letters—to state legislators, the Better Business Bureau, the Federal Trade Commission—to complain about unfair and overreaching terms. Consumers should be as discriminating online as offline. They should scrutinize online commitments as they would fresh produce at the grocery store and check for privacy bruises and non-disparagement clause worms. Occasionally, they should refuse to click "agree" and send a cranky email to the website explaining that its oppressive contract has scared away a customer.

But consumer action is not a panacea for wrap contracts. Given scarcity of resources and collective action and coordination problems, consumer activism cannot be expected to resolve all the ills generated by wrap contracts. Furthermore, the expectation that consumers will respond to oppressive terms assumes that enough adherents will have read and noticed the terms before they become standard in contracts. Adherents rationally choose not to read wrap contracts that confront them multiple times a day. Instead they rely upon the courts and the legislature to save them from the most egregious terms. Thus, the expectation that consumer activism will resolve the problem of wrap contracts assumes a different reality than the one that exists. Finally, to place the onus of ameliorating contract terms upon consumers does nothing to balance the burdens that wrap contract doctrine has placed upon consumers and may make these burdens even heavier. The expectation that consumer action *can* create positive changes may, perversely, transmogrify into an obligation imposed upon consumers to make those changes or a misconstruction of consumer inaction as approval.

Doctrinal solutions have the potential to be dynamic. In a swiftly evolving, technologically-driven marketplace, regulatory and legislative solutions may quickly become irrelevant or ineffective. This is not to say that such solutions are ill-advised or irrelevant.[59] The problems which wrap contracts seek to solve, and which they in turn create, are complex and diverse and derive from different sources. Consequently, their solutions must also come from diverse quarters and institutions.

The primary reason that I focused on doctrinal solutions was because the overarching question raised by wrap contracts is essentially a doctrinal one—why enforce these forms as contracts? The basis of contract is promise; the existence and enforceability of a contract is based upon the intent of the parties to make a commitment. Wrap contract doctrine in its

58. In the interests of full disclosure, I am on the Board of Fair Contracts.

59. Margaret Jane Radin proposes a variety of creative public and private solutions and strategies to address the ills of adhesive contract terms in her book, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS AND THE RULE OF LAW (2013).

current messy state betrays contract law objectives by finding intent to make a commitment where none exists. Courts have shifted various burdens to consumers in a way that deviates from contract law's traditional path. My proposals sought to allocate the burdens more evenly and guide contract law back to its roots.