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

to reject unacceptable contracts terms.[10] The court ignored the effect of

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

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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

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]

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*

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.

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( )-87(t)-3(h)7(e)7(r)-4(e)7( )-87(i)/F1 8ar

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

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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

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

companies care enough about whether users read terms to bother tracking

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 serq / y' o] ˝ s t u Su ³ es ¡

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