FORM & SUBSTANCE IN NANCY KIM'S *WRAP CONTRACTS*

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INTRODUCTION

In this very brief essay, I plan to do three things. I will start by making the case that everyone should read Nancy Kim's book, *Wrap Contracts.*[1] I will then provide a summary of Professor Kim's book, focusing on the contract doctrine of blanket assent that she spotlights as both the source of the problems posed by "wrap contracts" and the solutions she proposes to them. Finally, I will argue that the solutions she suggests (i.e., the duty to draft reasonably and specific assent) elevate form over substance.

I. THE PROBLEM WITH WRAP CONTRACTS

To begin, then, there is a lot to like about *Wrap Contracts*. Kim coins the term "wrap contracts" to expose, explain, and demystify the world of

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1. NANCY S. KIM, WRAP CONTRACTS (2013).

mostly online contracting. While wrap contracts take many forms,[2] at their core they "refer to a unilaterally imposed set of terms which the drafter purports to be legally binding and which is presented to the non-drafting party in a nontraditional format[,]"[3] i.e., in various forms online. By revealing the ubiquity (and audacity) of wrap contracts, Kim also skillfully demonstrates that just about everything we do or want to do in modern society now involves a contract. Hence, the central claim of *Wrap Contracts*, namely, that "businesses, courts and technology create a coercive contracting environment where one-sided legal terms are imposed upon non-drafting parties who literally have no choice but to accept them if they wish to participate in modern society[,]"[4] is insightful, powerful and makes the entire book well worth reading.

Kim's central claim hinges on her ability to convince readers that wrap contracts are fundamentally different from the paper contracts that people encounter in the offline world. She starts with the proposition that contracts serve different but specific functions. Thus, for example, contracts can be instructive, meaning that they can be used as reference or source material; they can serve a channeling function, that is, they can signal to the parties that *this* transaction or interaction with a website should be taken seriously; and they can (and often do) operate as planning tools for the businesses that draft them.[5]

The functions of a contract, in turn, are related to the contract's form. Kim identifies several forms that contracts take, such as digital, paper, adhesive, and negotiated.[6] According to Kim, "the form of a contract affects the way it is perceived by the consumer. It also affects the volume and nature of legal terms capable of being compressed into the form."[7]

Wrap contracts are adhesive in form and are both similar and different from offline adhesion contracts. They are similar to offline adhesion contracts in that they typically consist of a standard form drafted by one of the parties who routinely enters into many similar transactions (i.e., that

2. For example, a "shrinkwap" is a piece "of paper wrapped in plastic wrap that come[s] with software compact discs." *Id.* at 3. A "clickwrap" agreement is one that does "not permit a user to progress [on a particular website] until and unless the user clicks on a box containing the words 'I agree' or some similar expression of agreement[;]"and a "browsewrap" agreement is one containing "terms and conditions that are posted on a website or web page (or other means by which terms are digitally accessible to the user)[,]" usually via a hyperlink on the website. *Id.* at 3, 39, 41.

3. *Id.* at 2.

4. *Id.* at 4.

5. *See id.* at 31, 17-20, 71-72.

6. *Id.* at 31.

7. *Id.* at 58.

party is a repeat player and is therefore considered to have expertise), include non-negotiated terms that go unread by the party against whom the contract would be applied, what Kim calls the "adhering party," and is presented on a take it or leave it basis.[8]

The main difference between wrap contracts and their traditional offline counterpart, however, is the way in which wrap contracts are *presented* to the adhering party. Instead of a standard form in paper that can be signed by the adhering party, the wrap contract is presented in an untraditional way, meaning usually in a digital format.[9] The digital presentation of a wrap contract permits two related and significant things to happen both, of which are adverse to non-drafting parties. First, because of its digital form, it is practically costless to the drafters of wrap contracts to include more and more one-sided terms in the agreements;[10] and, in fact, drafters of wrap contracts consistently do so because the practice also imposes almost no reputational costs.[11] Second, as a specific result of their untraditional presentation, many people using the Internet are not even aware that they are entering into a wrap contract.[12]

Notwithstanding the ease with which drafters include onerous terms and non-drafters click, "I agree," wrap contracts would present fewer problems for Kim to consider if they were not deemed valid and therefore enforceable by the courts. That is, each of the contracting forms that Kim identifies, i.e., digital, paper, adhesive and negotiated, may be valid ways of *presenting* a contract. But the existence of a valid contracting form does not automatically mean that a valid contract exists.[13] Instead, as Kim clearly acknowledges, a valid contract still requires that the contract be properly created via mutual assent and consideration,[14] regardless of the form it takes. In the case of wrap contracts, the courts have routinely upheld their validity.[15]

In the context of most standard form contracts and certainly in the case of wrap contracts, Kim claims that mutual assent has generally taken the form of "blanket assent," a concept created by Karl Llewellyn. According to Kim, in the offline world, blanket assent is not too outrageous because the party assenting to a standard form contract is deemed to understand that

8. *Id.* at 53-54.
9. *See id.* at 53-55.
10. *See id.* at 58.
11. *Id.* at 51.
12. *Id.* at 54.
13. *See id.* at 93.
14. *Id.* at 7.
15. *See id.* at 35-43, 62-69.

there is no specific assent to any particular contract provision; instead there is actual assent to all bargained-for terms and blanket assent to any terms that are not unreasonable or indecent.[16]

In the online world of wrap contracts, however, blanket assent is satisfied as long as there is a manifestation of consent and reasonable notice.[17] A non-drafting party can satisfy the "manifestations of consent" requirement, for example, by affirmatively clicking on an icon that indicates she has accepted the terms of the contract.[18] The "reasonable notice" requirement can be either actual or constructive. Constructive notice "means that a reasonably prudent [non-drafting party] would have known about the terms."[19]

Despite the fact that there are two requirements to satisfy blanket assent in the wrap contract context, Kim argues that courts have conflated the manifestation of consent requirement with the reasonable notice requirement.[20] As a result, the mere "notice of notice," (i.e., where a non-drafting party is shown a hyperlink that would take her to the terms of the contract), has come to signify that consent is also present and, hence, a wrap contract is validly formed through the online version of blanket assent.[21] Consequently, satisfying online blanket assent means that the non-drafting party has assented to *all* of the terms of the wrap contract.[22]

Online blanket assent is a problem for non-drafting parties in and of itself, given the untraditional way in which the terms associated with wrap contracts are presented, i.e., usually in digital form. More specifically, non-drafting parties are usually presented with the wrap contract terms in scrollable text boxes ranging in length from several paragraphs to several pages long,[23] or as one or more hyperlinks that indicate the existence of terms and conditions. Often the terms and conditions are not actually visible on the webpage containing the original hyperlink(s).[24]

In addition, unlike traditional offline paper contracts where the terms are often presented in the document to the non-drafting party, online blanket assent places the burden on non-drafting parties to track down the fine print

16. *Id.* at 62-63.
17. *Id.* at 63.
18. *Id.* at 127.
19. *Id.*
20. *Id.* at 128-30.
21. *Id.* at 130, 134.
22. *See id.* at 48.
23. *See id.* at 63.
24. *Id.*

and read it.[25] Unfortunately, non-drafting parties are often unaware that terms exist, have trouble finding them because of the need to click on a hyperlink, do not read the terms even if they are aware of them,[26] and ultimately do not even know that they have entered into a contract.[27] Kim explains the situation as follows:

> A drafter can send [a non-drafting party] written notice of terms on a card sent in the mail, which references the terms which can be found on a website. That website may contain a clickwrap that contains several hyperlinks. Under wrap contract doctrine, the card provides notice, and the clickwrap provides both notice and manifestation of consent. As a practical matter, however, the hyperlink acts as a barrier, concealing the actual terms. But in the judicially constructed alternative universe [of wrap contracts], the use of a hyperlink is viewed—not as the obstruction that it is—but as notice. Under wrap contract doctrine, since 'notice' and 'manifestation of consent' equals 'assent,' the [non-drafting party] has assented, and so is bound by the so-called contract.[28]

Because wrap contracts operate in a context of legal uncertainty – that is under circumstances where technology has advanced but regulation has lagged behind[29] - the problems flowing from what Kim calls the "bastardized version of blanket assent"[30] are compounded. More specifically, wrap contracts end up creating business norms and ultimately law via the terms included in these contracts that are "contrary to what . . . reasonable user[s] [of the Internet] expect[]."[31]

For example, one of the terms that non-drafting parties ostensibly "consent" to is online data collection that enables the website or wrap contract drafter to track the user's online activity *and* sell it to third parties. When the practice of online data collection was first introduced, there were questions about its legality; the entire area was unregulated. Where, however, the legality of a term or practice is uncertain, contracts provided legitimacy by allowing companies to argue that their users consented to the term or practice. User consent to online data collection, therefore, created a business norm (i.e., most if not all websites started including the term/engaging in online data collection) that was then upheld by the courts.[32]

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25. *Id.* at 127.
26. *Id.* at 57.
27. *Id.* at 55.
28. *Id.* at 132.
29. *See id.* at 47, 72-73, 112.
30. *Id.* at 62.
31. *Id.* at 71; *see id.* at 112.
32. *Id.* at 74-81.

Here again, there would be fewer problems for Kim to consider if the kinds of terms being included by drafters of wrap contracts were benign. But as the online data collection example above shows, they are not. In fact, the terms in wrap contracts unreasonably favor the drafters.[33] Kim specifically warns about terms in wrap contracts that she calls "sword" and "crook" terms. Sword terms, like choice of forum and mandatory arbitration provisions, are terms that "may affect and terminate rights held by the other party."[34] Crook terms, like the right to collect online data, are terms in wrap contracts that enable a company to "stealth[ily] appropriat[e] (via a nonnegotiated agreement) . . . benefits ancillary or unrelated to the consideration that is the subject of the transaction."[35] Given that Kim also argues persuasively that drafters of wrap contracts consistently make more aggressive use of more one-sided terms, i.e., sword and crook terms, in their contracts than their offline counterparts,[36] Kim has effectively made the case that wrap contracts pose significant problems for non-drafting parties in particular and society in general.[37]

II. THE SOLUTIONS TO WRAP CONTRACTS

In light of the fact that Kim traces many of the problems produced by wrap contracts to the version of online blanket assent adopted by the courts, it is not surprising that the solutions Kim crafts focus on remedying online blanket assent. She specifically proposes a duty to draft reasonably on the drafters of wrap contracts (thus satisfying the reasonable notice requirement) and the requirement that non-drafting parties specifically assent to sword and crook terms (thus satisfying the manifestation of consent requirement).

According to Kim, "[c]ourts expect too much from consumers, and far too little from companies that draft these agreements."[38] Hence, Kim argues that the drafting party should make reasonable efforts to make the terms being offered *readable*.[39] The duty to draft reasonably standard thus

33. *Id.* at 60, 72-73, 111, 125.

34. *Id.* at 48.

35. *Id.* at 50.

36. *Id.* at 4, 48-52, 58, 65-69, 70, 81.

37. The example of online data collection is really about online privacy. But given the intervention of wrap contracts, the drafters of wrap contracts were able to "reframe[] the discussion, so that instead of one that focused on whether these practices *should* be permitted, it became one replete with the rhetoric of free will and choice." *Id.* at 81; *see also id.* at 155-73 (discussing how wrap contract doctrine affects the application of laws in other areas).

38. *Id.* at 181.

39. *Id.* at 183.

proposed would require drafting parties to take certain measures to make their contracts noticeable, including: visibility (i.e., presenting the terms in a way that "attract[s] the attention of the non-drafting party");[40] readability (i.e., presenting the terms in a way that increases the likelihood that the non-drafting party will actually read the terms, not just see them);[41] and word choice (i.e., using words that convey to users that they are being asked to enter into a contract, words like "The Contract Between You and [Company]" or "Your Legal Obligations").[42]

Kim would also require drafting parties to get the specific assent of non-drafting parties to sword and crook terms.[43] Requiring specific assent to such terms would eliminate free-rider provisions[44] and force non-drafting parties to acknowledge the existence of those terms thereby enabling non-drafting parties to take these terms into consideration in their cost/benefit analysis of a given transaction.[45]

Needless to say, the duty to draft reasonably and the specific assent requirement work together. Thus, for example, the drafter could require non-drafting parties to click "I agree" after each sword or crook term in the agreement.[46] The fact that such an approach would make the contracting process burdensome to non-drafting parties and potentially disrupt their online experience is precisely the point. The goal, according to Kim, "is to introduce a transactional hurdle that signals the burdensome nature of the transaction."[47] The hope is that by imposing a duty to draft reasonably and a specific assent requirement, drafters of wrap contracts will include less problematic terms in their online contracts.[48]

III. THE CRITIQUE OF WRAP CONTRACTS

At the end of the day, Kim's proposed solutions are attempts to remedy and make more robust the online version of blanket assent, thereby making it more justifiable to use State power to enforce wrap contracts. The trouble with Kim's solutions, however, is that they elevate form over substance.

40. *Id.* at 186.

41. *Id.*

42. *Id.*

43. *Id.* at 195.

44. Free-rider provisions are non-negotiated terms included in the contract by the drafting party "even though their presence or absence would not affect the drafter's decision to offer the product or service." *Id.*

45. *Id.* at 196.

46. *Id.*

47. *Id.* at 197.

48. *See id.* at 199.

More specifically, they fail to effectively address the real problem with wrap (and most other) contracts, which is that wrap contracts are the result of the (mis)use of unequal bargaining power in the specific context of a modern contract law system that permits the (mis)use of unequal bargaining power to go unchecked and unimpeded.

A. Wrap Contracts & Bargaining Power

Given the space constraints of this essay, it is not possible to flesh out an entire analysis of bargaining power in the context of wrap contracts. Suffice it to say for now that power is the crucial term in "bargaining power." Needless to say, power comes from many sources,[49] some obvious, like wealth (i.e., money and property) and expertise, and some less obvious, like information and knowledge. Bargaining power, then, "consists of anything and everything that gives one party [whether an individual or group] the ability to obtain a greater share of the contract surplus vis-à-vis the other party in a contract setting."[50]

The drafters of wrap contracts start from and with several advantages—they draft the wrap contract to begin with and subsequently modify it as they see fit based on their experience or expertise,[51] include all of the one-sided and other terms that they want, and present the wrap contracts on a "take it or leave it basis." These contracts are drafted in ways that exploit information asymmetries and take advantage of the cognitive biases of non-drafting parties, particularly consumers. On top of that, wrap contracts are put into use in contexts that enable the drafters to rely on other cognitive biases that cause non-drafting parties to convince themselves that there is nothing wrong with the terms to which they are agreeing.

More specifically, the drafting parties have a lot more information both about which terms are included in the contracts and what the terms mean. It is well established that non-drafting parties, on the other hand, do not read the contract terms,[52] would not understand them if they did read them,[53] and

49. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 166 (2005).

50. Danielle Kie Hart, *Revealing Privilege—Why Bother?*, 42 WASH. U. J.L. & POL'Y 131, 142 (2013); *see also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 974-75 (1984).

51. KIM, *supra* note 1, at 65-67.

52. *Id.* at 57; Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law*, 5 EUR. REV. CONT. L. 1, 2-3 (2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 1162922.

53. *See, e.g.*, Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 29-30 (2008).

could not negotiate for different contract terms, even if they did understand them.[54]

In addition, according to Professor Eric Zacks, drafting parties can draft contracts to include specific features designed to exploit non-drafting parties' cognitive biases and induce particular emotions, like shame and self-blame.[55] Such features include arbitration and disclosure provisions, and the use of language to frame possible losses in specific ways. Significantly, these contract features influence post-formation behavior of non-drafting parties by encouraging them to not breach or even challenge contracts that would otherwise be unconscionable or illegal in the misplaced belief that contracts are sacred promises that must be performed.[56] Indeed, Professor Zacks argues that "[a]s profit-maximizers (and repeat players), contract [drafters] are compelled to engage in this type of [manipulative] behavior or risk losing to competitors in the marketplace."[57]

Finally, Kim herself notes that wrap contracts are put into use in a context where three different cognitive phenomena occur and redound to the benefit of the drafting parties, particularly where the drafting parties are the dominant players.[58] According to Kim, the "optimism, bandwagon, and bystander effect phenomena converge"[59] such that non-drafting parties get the false sense "that there is safety in numbers "and, [therefore], feel there is no need obligation "to object to egregious terms."[60] The end result, of course, is that the terms are included in wrap contracts and they stay in.

Kim's solutions do not address any of these deeply troubling realities. When looked at closely, the duty to draft reasonably and specific assent requirement are actually narrow in scope. Kim explicitly states that the "goal of a specific assent requirement is *not* to ensure that users read online contracts."[61] She also acknowledges that "[r]easonable drafting techniques should seek to enhance consumer *awareness,* even if the adhering party

54. *See, e.g.*, KIM *supra* note 1, at 147.

55. Eric Zacks, *Shame, Regret, and Contract Design*, 97 MARQ. L. REV. (forthcoming 2014) (manuscript at 104), *available at* http://ssrn.com/abstract=2231859.

56. *Id.*

57. *Id.* (manuscript at 103).

58. KIM, *supra* note 1, at 85-86.

59. *Id.* at 86. The "bandwagon effect" describes a phenomenon where large numbers of people adopt a trend or opinion because a large number of other people have done so. *Id.* at 85 & n.43. The "bystander effect" refers to the phenomenon where people interpret a situation as less serious as it may actually be because other people are present and are not acting. *Id.* at 85. With optimism bias, "users overestimate their abilities and underestimate the risks involved with activities they undertake." *Id.* at 85-86.

60. *Id.* at 86.

61. *Id.* at 197 (emphasis added).

does not have the ability to negotiate terms."[62] These solutions make sense, however, only when one takes into account that Kim does not think adhesion contracts are problematic because "they are nonnegotiable or that they are unlikely to be read."[63] "The real problem" with adhesion contracts like wrap contracts "is that their terms may be unexpected and unfair."[64]

So, instead of addressing the substance of wrap contracts, Kim's proposals focus on making wrap contracts *presentable*, meaning that non-drafting parties will be able to find the contract terms easily and will therefore know both that terms exist *and* that they have entered into a contract when they click "I agree" after each term. But, if requiring specific assent is not expected to increase the reading of the terms, then it seems safe to conclude that non-drafting parties will not even know that there are egregious terms in these contracts; and in that case they certainly will not be objecting to them. In this case, the terms would still be "unexpected" if they are later used against a non-drafting party.

Moreover, if the terms cannot be negotiated anyway, the only hope for non-drafters is that requiring specific assent to *all* the sword and crook terms of the contract will make the transaction so burdensome that drafters will include less terms or risk losing users to other websites where the transaction is less burdensome ostensibly because the drafters there included less egregious terms.[65] But if non-drafting parties are not reading the terms and are therefore not complaining about them either because they are unaware of them or because of the cognitive phenomena discussed above,[66] I fail to see the incentive that drafting parties will have to include less terms in wrap contracts, particularly of the sword and crook variety that Kim is so justifiably concerned about. In this case, the terms could and probably would still be "unfair" to non-drafting parties.

Even assuming that some drafting parties did include less sword and crook terms in their wrap contracts for the reasons suggested by Kim, which ones would or *should* be omitted? Kim takes no position on this question. But it seems to me that the answer to this question matters particularly with respect to Kim's fairness concern.[67] Moreover, how much shorter, for example, would Apple's 56-page terms of use[68] need to be to make it

62. *Id.* at 191 (emphasis added).

63. *Id.* at 125.

64. *Id.*

65. *See supra* text accompanying note 48.

66. *See supra* text accompanying notes 55-59.

67. *See supra* text accompanying note 64.

68. *See* Umika Pidaparthy, *What You Should Know About iTunes' 56-page Legal Terms*, CNNTECH (May 6, 2011, 7:08 AM), http://www.cnn.com/2011/TECH/web/05/06/itunes.terms/.

unobjectionable? Both the length *and* the content of wrap contracts are problematic. Kim's solutions do not seem to address either concern effectively.

Thus, it is unclear to me how Kim's solutions end up assisting non-drafting parties in any meaningful way. Indeed, they appear to elevate form over substance. Given that Kim has shown that wrap contracts are ubiquitous and just about *everything* we do or want to do in modern society involves one, I do not see non-drafting parties fleeing the Internet in droves to avoid them. All of this strongly suggests that we are just stuck with wrap contracts.[69] All of the advantages thus remain with the drafting parties. This is bargaining power in action.

B. Wrap Contracts and the Modern Contract Law System

Here, again, the (mis)use of bargaining power during contract formation is less of a problem if there is a way to effectively mitigate improper uses of such power. Since wrap contracts exist at the pleasure of the modern contract law system,[70] the question becomes whether modern contract law is set up in a way that actually redresses misuses of bargaining power. The short answer to this question is no. This is specifically true because the vast majority of contracts—whether in virtual or actual reality—are enforceable and therefore binding on the parties. They are enforceable because of a structural feature of the modern contract law system, namely, that contracts are very easy to get into but extremely hard to get out of.

Only two elements are necessary to form a contract—mutual assent and consideration.[71] Neither element is difficult to satisfy. Consideration is presumed to be present in transactions taking place in the market[72] and is often irrelevant in a business context because the law will enforce a contract even in its absence.[73] Mutual assent, particularly under Kim's proposed solutions to the online version of blanket assent,[74] is even easier to establish. Non-drafting parties would simply click "I agree" after each

69. Kim seems to acknowledge this point. *See* KIM, *supra* note 1, at 76-80, 204-07.

70. *See id.* at 55-56.

71. RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (1981); *see also* KIM, *supra* note 1, at 7.

72. *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.2 (4th ed. 2004); *cf.* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 Hastings L.J. 1191, 1195 (1998).

73. *See, e.g.*, U.C.C. § 2-205 (2003) (firm offer); U.C.C. § 2-209(1) (modification); RESTATEMENT (SECOND) OF CONTRACTS §§ 89 (a), (c) (modification).

74. *See supra* Part II.

sword or crook term in a wrap contract demonstrating both that they had reasonable notice of the terms and manifested consent to them.

Upon formation of a contract via mutual assent and consideration, modern contract law presumes that a valid contract exists.[75] This presumption of contract validity is very difficult to rebut in practice because of what I have called elsewhere the "process problem."[76]

> To begin with, the process problem imposes the burden on the party challenging the contract or defending a breach of contract action to show that the contract is unenforceable [or should not be performed]. Moreover, *all* the other contract doctrines one might use to either challenge or defend against the contract (including but not limited to contract interpretation and defenses to performance) presume that a valid contract has already been formed. In addition, several practical realities exist, such as the costs of litigation, the ubiquity of certain contract boilerplate clauses (i.e., merger, arbitration, choice of law, choice of forum clauses), and the fact that courts are reluctant to allow parties out of their contracts, regardless of the legal excuse raised.[77]

I would also add to the process problem Zacks' insights into contract design[78] and Professor Tess Wilkinson-Ryan's work with the psychology of judgment and decision-making. Wilkinson-Ryan's work shows that despite evidence of procedural defects or even wrongdoing by contract drafters during the formation process, people (which would include judges) tend to support enforcement of the contract, that is, holding the non-drafting party to the terms of their agreements.[79] Together the work of Zacks and Wilkinson-Ryan support the proposition that is it very hard to get out of a contract.

Ultimately, Kim's proposed solutions—the duty to draft reasonably and the specific assent requirement—will make mutual assent in the form of online blanket assent *very* easy to satisfy, thereby making it much easier to show that wrap contracts are valid contracts. The problem is that Kim's proposed solutions do not actually increase the quality of a non-drafting

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75. Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 206 (2009) [hereinafter Hart, *Formation*].

76. *Id.* at 210-15.

77. Danielle Kie Hart, *Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation*, 12 NEV. L.J. 54, 64 (2011) (emphasis added); *see generally*, Hart, *Formation*, *supra* note 75, at 200-02, 206.

78. *See supra* text accompanying notes 55-57.

79. *See generally* Tess Wilkinson-Ryan, *A Psychological Account of Consent to Fine Print*, 99 IOWA L. REV. 1745 (2014).

party's mutual assent, because, as argued previously, they elevate form over substance.[80]

Compliance with Kim's solutions, therefore, will actually produce two adverse outcomes both of which are detrimental to non-drafting parties. The obvious outcome is that compliance with Kim's solutions will make it look as if the quality of the non-drafting party's mutual assent has increased, when in fact it has not. In other words, compliance would improve the *image* but not the reality of the resulting contract—said contract "is ostensibly no longer a product of power and pressure of the [drafting party] but an act of a better-balanced and well-considered decision-making process."[81]

The more troubling outcome,[82] however, is that "such compliance would probably eliminate several contract policing doctrines that might otherwise be available to challenge the presumption of contract validity."[83] For example, an unconscionability[84] claim or defense would probably fail because of the duty to draft reasonably (which would make non-drafters *aware* of the terms) and the specific assent requirement (which would constitute a definite manifestation of consent).[85] Under these circumstances, there would be no "unfair surprise," which would make procedural unconscionability much harder to prove.[86] Without procedural unconscionability, the claim and/or defense would likely fail.[87]

The end result of all of this is that the (mis)use of unequal bargaining power at the contract formation stage will go unchecked and unimpeded by the modern contract law system. In other words, and despite Kim's best efforts, I fear that wrap contracts with the egregiously one-sided terms and

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80. *See supra* Part III.A.

81. Danielle Kie Hart, *Contract Law Now – Reality Meets Legal Fiction*, 41 U. BALT. L. REV. 1, 68 [hereinafter Hart, *Reality*]; *see generally id.* at 65-71 (leveling the same claims against disclosure statutes); *cf.* Florencia Marotta-Wurgler, *Does Disclosure Matter?* 7 (N.Y.U. Ctr. for Law, Econ. & Org., Working Paper No. 10-54, 2010), *available at* http://ssrn.com/abstract=1713860 ("[C]ourts might mistakenly be led to believe that sellers' terms are the product of well-functioning market mechanisms and be more lenient in policing abusive terms.").

82. *See* Omri Ben-Shahar & Carl. E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 738 (2011).

83. *See* Hart, *Reality*, *supra* note 81, at 69-71.

84. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981).

85. Kim proposes a reinvigorated unconscionability doctrine. KIM, *supra* note 1, at 203-10. Space does not permit me to address this issue. Suffice it to say that I do not think Kim's proposal will change the conclusion I reach in the text.

86. *Cf.* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 840, 853 (2006) (making the same argument regarding unconscionability in the context of online contracting).

87. *See, e.g.*, A & M Produce Co. v. FMC Corp., 186 Cal. Rptr. 114, 121–22 (Ct. App. 1982).

problematic presentation that Kim has so cogently warned us about will continue to exist in their present form.

CONCLUSION

I would like to conclude where I started by saying that everyone should read Kim's book, *Wrap Contracts*. It is truly an ambitious and eye-opening piece of work. I am completely convinced that wrap contracts are problematic, to say the least. And because I am so convinced, I sincerely hope I am wrong in my assessment of Kim's proposed solutions to the very real problems posed by wrap contracts.

It just seems to me that any solution to the problems confronting the modern contract law system, of which wrap contracts are simply one example, will have to effectively curb the (mis)use of bargaining power particularly during the contract formation stage. Possibilities that may well be worth considering in this regard include a duty to negotiate a contract in good faith and a more robust version of unconscionability that includes heightened scrutiny of the substance of the contract terms. As it now stands, Professor Kim demonstrates a faith in the market and the goodwill of the drafters of wrap contracts that I simply cannot muster on my own.