ESCAPING TOXIC CONTRACTS: HOW WE HAVE LOST THE WAR ON ASSENT IN WRAP CONTRACTS

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I. INTRODUCTION

Consumers (and by extension contract scholars who make their living worrying about wrap contracts, adhesion, the duty to read, unconscionability, reasonable expectations, and the like) have lost the war on clickwrap, browsewrap, boilerplate, disclosure, and thus on adhesion contracts altogether.

Wait. No. That's not right. In reality, consumers don't even know there is a war on boilerplate and wrap contracts. Consumers as a class don't know much at all. They just want "stuff," and they want that stuff cheap. They are, in fact, generally little more than appetitive identities wrapped around a credit card and a paycheck. Expecting them to engage in anything like rational behavior, Chicago-school, boundedly rational, or otherwise, often seems unrealistic.

As Nancy Kim's *Wrap Contracts*[1] suggests, there is no meaningful way to prevent producers from using adhesive contracts to extract whatever set of terms they choose from consumers, employees, franchisees, and other adherents. We, as adherents, assent blindly to every indignity that paper and wrap form contract drafters can pile on us. We routinely provide personal financial information for five percent discounts or free shipping, divulge our images and pictures in exchange for convenient online file storage and the chance to tell our friends of our latest imbroglios, and yield our psychological security to firms who experiment on us for profit.[2] There is, it

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

2. *See* Vindu Goel, *As Data Overflows Online, Researchers Grapple with Ethics*, N.Y. TIMES (Aug. 12, 2014), http://www.nytimes.com/2014/08/13/technology/the-boon-of-online-data-

seems, literally nothing that we will not give up for the chance to participate in the modern, technological marketplace. In the wrap contract context, we are our own worst enemies.

The problem is that much of contracts scholarship regarding adhesive contracts generally, and wrap contracts specifically, focuses on a symptom of the problem – lack of assent to the terms of the wrap contract – and consequent attempts to cure that symptom. But policing the quality of assent in the wrap context is a low value strategy unlikely to yield better results than adherents already get from drafters. This Essay proposes that the problem of abusive terms in wrap contracts requires strategic attention to three phases of the contracting process, not just formation. Instead of focusing primarily on the obvious problems of assent, notice, commercial reasonableness, and other factors relevant to the moment of formation, contract law responses to wrap contracts must address power imbalances before, at, and after contract formation and enforcement.

Specifically, in terms of improving consumer bargaining power, legal tools such as judging the quality of assent at the formation stage and examining the unconscionability of terms at the enforcement stage are inefficient and ineffective. By the time the adherent has made a purchase decision, as Kim observes, that transaction will likely occur regardless of the presence or absence of abusive terms in the proposed wrap agreement. Likewise, the inefficiencies of policing contracts *post hoc* through unconscionability or regulatory and legislative interventions are inefficient, particularly in light of strong jurisprudence favoring mandatory binding arbitration. But it is possible that the time of contracting is not the best moment for promoting the ability of adherents to affect the terms of their transactions or to protect themselves against predatory or pathological contract terms.

II. CONSUMER ASSENT AND THE PROBLEM OF WRAP CONTRACTS

When I say that adherents in the wrap contract context have lost the boilerplate contest, I mean that only in a narrow sense. Adherents—generally consumers—have no ability to change the outcome of the wrap contracting process. Adherent assent merely indicates that a deal has been made. Outside of the most basic terms of the agreement, such as price,

puts-social-science-in-a-quandary.html (describing a study in which Facebook "quietly manipulated the news feeds of nearly 700,000 people to learn how the changes affected their emotions."); Molly Woodjuly, *OKCupid Plays with Love in User Experiments*, N.Y. TIMES (July 28, 2014), http://www.nytimes.com/2014/07/29/technology/okcupid-publishes-findings-of-user-experiments.html#story-continues-6.

attributes of the good or service, warranty, and shipping, every other term has been predetermined and predestined by the drafter. Whether the adherent consents to these contract terms is an irrelevant and fictional convenience to the dominant contracting party. As Kim suggests, assent in adhesive contracts now really means "acquiescence rather than active agreement."[3]

Courts apply to the wrap context contracting norms that were developed for a traditional paper-contracting paradigm. These norms likely did not reflect the reality of contracting even in that slower and "gentler" golden age of standard form contracts of adhesion. These norms include an objective presumption that adherents signing a written agreement are at least on notice that they are engaging in a legally meaningful interaction with the drafter.[4] In the paper world, multi-page contracts in fine print not only alert the adherent that something legally significant is happening, but the amount of paper involved – especially in low value transactions – may make the adherent skittish about entering the transaction at all.[5] In the online world, adherents barely even register that they are engaging in a contract.[6] The judicial model of the reasonable party who has the opportunity to read the contract terms breaks down completely in that electronic context. As Kim notes:

> Courts have imposed a duty to read on contracts of adhesion of all kinds, without distinguishing that these contracts may have different functions—and that in many cases it is *not reasonable* for a party to actually read the terms. This fiction that all contracts are the same derived from the notion of blanket assent, which itself developed out of the objective theory of contracts.[7]

Contract scholarship for the last seventy-plus years has recognized this disconnect between the subjective reality of actual assent to contract, and the objective manifestation of assent necessary to form a contract. The idea that an adherent objectively manifests assent to the substantive terms of the contract is a fiction piled upon fiction.

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3. *See* KIM, *supra* note 1, at 27.

4. *Cf.* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 303 (1986). Barnett's consent theory of contract represents a coherent, albeit minimalist, justification of the moral basis of contract, particularly with respect to whether courts may legitimately enforce adhesive contracts containing terms to which the adhering party did not actually agree (and with which that party might not have agreed if it had been made salient).

5. *See* KIM, *supra* note 1, at 58 ("An unusually hefty document for a minor transaction is likely to arouse the customer's suspicion.").

6. *See id.* at 134.

7. *Id.* at 194 (emphasis in original).

Perhaps as a consequence of the glaringly obvious conclusion that adherents do not actually assent to the terms of their adhesive contracts, much of contracts scholarship on the issue (my own included[8]) fixates on improving the quality of assent in both paper and wrap contracts of adhesion. Although variations, combinations, and radically novel solutions exist, most commonly, assent-based arguments suggest requiring an increased level of consent by the adherent, or an increased level of disclosure by the drafter.

In the former instance, some may suggest only enforcing contract terms for which the adherent makes some additional manifestation of assent beyond mere clicking or signing. This might be accomplished by requiring certain terms to be in a separate writing executed by the parties concurrently with the main contract. Alternatively, paragraphs requiring additional indicia of assent might require that the parties initial next to those terms in order to make those terms enforceable. Kim's concept of "specific assent" fits within this model by requiring drafters to obtain an affirmative click or other indicia of consent from the consumer for each term in the wrap contract.[9]

In the latter case, improving the quality of assent means improving the quality of disclosures given adherents before formation. Rather than the "notice of terms equals disclosure of terms" logic that Kim describes as the starting point for much judicial reasoning on wrap contracts,[10] disclosure based solutions to the problem of assent require some effort to make the adhesive terms actually salient to the adherent.[11] Disclosure mechanisms may be legislatively required, such as with form disclosures in the lending and automobile purchasing contexts. Alternatively, some scholars propose that adhesive contract terms should not be enforceable absent some extra

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8. *See generally*, Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 141 (2005).

9. *See* KIM, *supra* note 1, at 195-99 (suggesting multiple models for obtaining specific consent to individual contract terms, such as individualized click boxes nested within each contract provision, emailed consent typed by the adherent and sent to the drafter, or "facsimile" contracting software requiring the adherent to type their name at the bottom of an electronic form rather than simply clicking "I accept").

10. *See id.* at 93-109; *see also* Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-For Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 472 (2008).

11. *But see* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 33-54 (2014) (reviewing empirical evidence regarding the inefficacy of disclosure mandates).

(or even extraordinary) effort by drafters to inform adherents of those terms.[12]

The problem with attempting to resolve problems relating to wrap contracts through "better" forms of assent is that even the best quality assent likely will not improve the quality of the resulting contract. Especially in the online context, adherents typically receive contract terms after they have invested time, effort, and emotions in researching, shopping, selecting, and committing to the purchase. In many contracting contexts, producers structure the transaction to minimize opportunities for the consumer to reject the transaction. As Kim observes, in many clickwrap situations users are presented with the precarious option of either clicking the "I Accept" button or clicking on the hyperlink to the contract terms and risking the loss of their shopping cart.

In most contracting situations—even many dickered bargains—assent does not actually serve a significant filtering function over the terms of the parties' agreement. First, producers have far more information about the likelihood that risks contracted for in the agreement will materialize. Thus, in a typical online transaction, only the producer will know the actual rate of dissatisfied customers and disputes requiring application of a choice of forum, choice of law, or arbitration clause. Adherents cannot determine whether those terms have any value. Asking for their specific assent to those terms will not in itself improve the quality of the bargain.

Second, producers have complete information about how they might exercise discretion in their contracts. Recent news stories disclosed that at least two social networking firms—Facebook and OKCupid—conducted human subject experiments on their users, allegedly justified by the providers' Terms of Service ("TOS"). I submit that no reasonable user—again assuming they reviewed the TOS carefully before clicking assent—would have foreseen the likelihood that either provider would intentionally manipulate their users' emotional and psychological state for science and profit.

Third, as I have argued elsewhere,[13] in the wrap context producers could still control the final terms even if they provided users with the opportunity to select between competing alternative contract terms for every term in the contract. Specifically, assume that a clickwrap agreement abandons the traditional all-or-nothing approach and instead offers

12. *See, e.g.*, Juliet M. Moringiello, *Signals, Assent and Internet Contracting*, 57 RUTGERS L. REV. 1307, 1337-38 (2005).

13. *See* Daniel D. Barnhizer, *Reassessing Assent-Based Critiques in Adhesion Contracts*, *in* COMPARATIVE CONTRACT LAW: BRITISH AND AMERICAN PERSPECTIVES (Larry A. DiMatteo & Martin Hogg eds.) (forthcoming 2015).

customers the ability to select arbitration versus litigation, home forum versus producer forum, choice of law, presence or absence of exculpatory clauses, insurance, type of shipping, length of warranty, color, and other alternatives. As Kim suggests, this selective assent process could take the form of consumers having to click "accept/reject" or a similar indication of assent next to each term,[14] with the producer free to determine whether to accept the consumer's preferred terms upon presentation. Alternatively, as Margaret Radin proposes, consumers could customize their contract terms, choosing between a free arbitration clause and an additional $2 for the right to litigate.[15]

But the reality is that so long as producers control the prices at which they offer goods or services or boilerplate contract terms, the price effects induced by such control will permit producers to determine the final outcome of the parties' agreement. Instead of offering the choice between arbitration and litigation at or near cost, for example, a producer who favors arbitration may price the litigation alternative beyond the value that all but a few consumers would place upon that term. Likewise with class action waivers—if the producer prices the right to participate in class actions appropriately it would be irrelevant if a few oddball customers and plaintiffs' lawyers paid for that right. Class actions involving only an extremely small percentage of the total customer base are unlikely to yield the jackpot payoff potential that could attract and maintain effective class action litigation.[16]

The possible examples are legion, but the ultimate point is that, even assuming such pricing strategies, this type of selective assent is real assent. With a sufficiently large number of possible choices, consumers could selectively develop a contract that looks like clickwrap but nonetheless has a quality of assent associated with the final agreement that is indistinguishable from—or may even be superior to—a fully dickered agreement.[17]

Importantly, the availability of finely grained selections in a clickwrap contract may be counterproductive in much the same way as Robert Hillman argues with respect to improving the quality and types of

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14. *See* KIM, *supra* note 1, at 196-97.

15. Margaret Jane Radin, *Online Standardization and the Integration of Text and Machine*, 70 FORDHAM L. REV. 1125, 1144 (2002).

16. *See* BARNHIZER, *supra* note 13.

17. *Reassessing Assent-Based Critiques* explores a number of additional alternatives on this theme, up to and including a clickwrap contract providing two choices: "I Accept" and "I would like to negotiate this contract from scratch with [producer's] general counsel and agree to pay $250 per hour to producer for this privilege." *See id* at 13.

mandatory disclosures in standard form contracts. Hillman observes that "[m]andatory website disclosure [of adhesive contract terms] may backfire, however, because it may not increase reading or shopping for terms or motivate businesses to draft reasonable ones, but instead, may make heretofore suspect terms more likely enforceable."[18]

Improving the quality of assent, by itself, may similarly undermine *post hoc* attempts to overturn the bargain through common law doctrines such as unconscionability. Indeed, such particularized selective assent may interfere even with more stringent regulatory regimes such as EU consumer protection directives that prohibit enforcement of certain standard contract terms, unless those terms were "individually negotiated."[19] The ability of adherents to customize significant portions of the contract will likely make courts even more reluctant to overturn the resulting agreement. If adherents are still unlikely to read the contract, understand the contract, and foresee possible risks and discretionary actions under the contract, and are sensitive to producer pressure on pricing contract terms, they will not benefit from the chance to give high-quality assent.

There will, of course, always be marginal cases in which adherents manage to manipulate their end of the formation process to gain an advantage over a careless drafter. For example, Dmitry Agarkov carefully redrafted credit card terms he received from a Russian bank, Tinkoff Credit Systems, to provide for a 0% interest rate and multiple penalty clauses. Tinkoff approved the contract without reading it, and later sued Agarkov for an unpaid balance.[20] A Russian court held that Agarkov's terms controlled. The parties later settled, apparently on terms favorable to Agarkov.[21]

Similarly, a cadre of Linux operating system users have successfully rejected clickwrap and shrinkwrap agreements relating to the Windows

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18. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 839 (2006).

19. *See* Council Directive 93/13/EEC, of 5 April 1993 on Unfair Terms in Consumer Contracts, pmbl., 1993 O.J. (L 95/29) 2 ("Whereas, . . . only contractual terms which have not been individually negotiated are covered by this Directive. . ."); European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995 European Communities (Unfair Terms in Consumer Contracts) Regulation, 1995, § 3, § 3; OFFICE OF FAIR TRADING, UNFAIR CONTRACT TERMS GUIDANCE: GUIDANCE FOR THE UNFAIR TERMS IN CONSUMER CONTRACTS REGULATIONS 1999, 2008, at 9 (U.K.).

20. *$700k Windfall: Russian Man Outwits Bank with Handwritten Credit Contract*, RUSSIA TODAY (Aug. 8, 2013), http://rt.com/business/man-outsmarts-banks-wins-court-221.

21. *See Man Who Outwitted Bank Ends $700K Lawsuit*, THE MOSCOW TIMES (Aug. 15, 2013), http://www.themoscowtimes.com/news/article/man-who-outwitted-bank-ends-700klaw suit/484588.html.

operating system bundled with their computer hardware purchases.[22] The Microsoft Windows End-User Licensing Agreement ("EULA") provides that "[b]y using the software [the Microsoft Windows operating system], you accept these terms. If you do not accept them, do not use the software. Instead, return it to the retailer for a refund or credit."[23] Successful claimants of this "Windows Tax Refund" receive modest checks—ranging from $50 to $115—after days of effort.[24]

Ian Ayres has suggested another potential mechanism for consumers to fight back against wrap contract formation in the EULA context. With Barry Nalebuff, Ayres developed the "LiabiliT," which is a t-shirt bearing the legend, "NOTICE Management, by serving me, is responsible for any losses to my person or property that result from my use of this establishment."[25] The Small Print Project—a blog on user experiences with EULAs that originated out of a class at USC's Annenberg School for Communication—has taken Ayres' concept further, producing the "anti-EULA." This notice—available in t-shirt, bumper sticker, or simply cut-and-paste form—purports to bind all readers to release the presenter from all non-negotiated contracts of adhesion, including wrap contracts.[26]

But these examples and others, like Omri Ben-Shahar's anecdote of a website offering in its TOS $100 to any reader who claimed it,[27] or my own quixotic attempt to reject KlearGear.com's TOS without "using" their website, are themselves pathological. The people who can spend six months rewriting standard credit card terms, the people who hate Microsoft so much that they are willing to spend weeks of their lives to claw back $100 worth of refunds, the people who pay for an EULA t-shirt that will at best

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22. *See, e.g.*, Chris Clay, *Linux Users, Get Your Windows Refund Today*, ZDNET (Feb. 10, 2010), http://www.zdnet.com/linux-users-get-your-windows-refund-today-4010015089/; *Microsoft Windows Refund*, SCRATCHPAD, http://scratchpad.wikia.com/wiki/Microsoft_Windows_refund.

23. Gavin Clarke, *Dell Refunds PC User for Rejecting Windows*, THE REGISTER (Oct. 19, 2009), http://www.theregister.co.uk/2009/10/19/windows_dell_linux_refund. Other permutations of the Microsoft Windows EULA exist, but generally follow this pattern.

24. *See id.* ($115 refund) (citing Graeme Cobbett, *Get a Refund for Your Microsoft Windows License*, GWA.TUMBLR.COM (Oct. 15, 2009), ; http://gwa.tumblr.com (detailing refund request entailing two months of effort and fourteen email exchanges); Serge Wroclawski, *How to Get a Windows Tax refund*, LINUX.COM (Jan. 5, 2007), http://archive09.linux.com/articles/59381 ($52.50 refund and detailing steps for seeking refunds).

25. Ian Ayres, *EULA Wars: The Customer Is Always Right . . . to Lodge a Protest*, FREAKANOMICS (Nov. 21, 2007), http://freakonomics.com/2007/11/21/eula-wars-the-customer-is-always-right-to-lodge-a-protest.

26. *ReasonableAgreement.org*, THE SMALL PRINT PROJECT, http://smallprint.netzoo.net/reag/ (last visited Aug. 22, 2014).

27. *See* BEN-SHAHAR & SCHNEIDER, *supra* note 11, at 11.

start a battle of the forms, are nerds or freaks. Such acts are almost heroic, but normal people don't do this.

Moreover, these examples also suffer from being entirely too cute. Not only are they time-consuming and difficult to achieve, but they also alert repeat players to protect against such shenanigans. Such protections may involve internal changes in procedure or contract forms. Alternatively, repeat players have incentives to invest in higher-quality legislative and regulatory representation than do one-shot contracting parties.

Finally, and potentially more worrisome from a contract law perspective, producers have significant incentives to manipulate commercial norms. For example, the recent announcement by OKCupid, in response to complaints about the site deliberately matching incompatible users to see what would happen, is not just an exercise in gross hubris, but also an attempt to establish new norms regarding commercially reasonable applications of social media TOS. OKCupid was unapologetic for engaging in potentially unethical research designed to manipulate the emotional states of its users for fun and profit—"But guess what, everybody: if you use the Internet, you're the subject of hundreds of experiments at any given time, on every site. That's how websites work."[28] Although possibly not intentional, this response nonetheless has the potential to influence future determinations of commercial reasonableness with regard to use of adherent information—it is not difficult to imagine future users having no qualms whatsoever about social media websites deliberately manipulating their emotions and mental states to improve profitability. The majority of comments following OKCupid's un-apology already show that is the case for that set of users.

III. AN INTEGRATED RESPONSE TO WRAP CONTRACT ABUSES

If focusing on the assent stage of a contract provides a low return in terms of preventing predatory activity by wrap contract drafters, what is left? The assent process is attractive because it is the point at which adherents *theoretically* could get better terms or deprive the producer of a deal by walking away. If strengthening that process will not yield significant benefits, what will?

Parties have the ability to affect the outcome of a transaction—i.e., improve their bargaining power—at three stages in the transaction: *ex ante*, at the time of formation, and *post hoc*. After the assent stage, *post hoc* solutions have likely received the most attention. These include common

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

law responses, such as unconscionability and the reasonable expectations doctrines and public law statutory and regulatory regimes, that purport to undo or reform abusive contract terms. In both situations, the parties form a contract, a dispute arises, and the adherent later seeks to have the contract or a term declared unenforceable because of a defect in the term or the drafter's exercise of discretion in interpreting and applying that term. These doctrines differ from formation doctrines such as notice and assent in that doctrines relating to formation affect the volition of the parties to enter a contract. Theoretically, the formation stage is the least costly point at which parties could avoid the dispute, simply by adjusting problematic terms or refusing to enter the deal altogether. In contrast, *post hoc* policing is necessarily expensive and inefficient. Changes to abusive contracting behavior happen, if at all, only through deterrence and related reputational mechanisms. Similarly, *post hoc* policing requires involvement of third parties in the transaction, also increasing costs of regulating abusive wrap contracting.

Private *post hoc* policing mechanisms also regulate abusive contract terms or behavior by drafters. Information era contracting involves radically increased bargaining power on the part of consumers as a group. Consumers quickly disseminate reputational information about abusive firms through social media. In some industries, third party aggregators, such as TripAdvisor.com, AngiesList.com, and even seller ratings on sites like eBay and Amazon, facilitate the development and evaluation of reputation information regarding seller performance under their contracts. In some cases, consumers successfully utilize social media on their own to damage the reputations of firms that behave abusively. One famous example of a consumer complaint posted on YouTube.com—Dave Carroll's "United Breaks Guitars" music video—may have caused $180 million in lost share value from the negative publicity.[29]

But both public and private *post hoc* policing mechanisms are subject to later limitation by the producer. As noted above, producers, as repeat players, have strong incentives to limit the ability of one-shot players to damage their reputation. Oliver Wendell Holmes, in discussing the bargaining power of management and workers in labor contracts and disputes, emphasized that the proper and natural response to any position of power is for the weaker party to seek to create a competing position: "Combination on the one side is patent and powerful. Combination on the

29. Sons of Maxwell, *United Breaks Guitars*, YOUTUBE (July 6, 2009), https://www.youtube.com/watch?v=5YGc4zOqozo; *see* Kevin Hunt, *'United Breaks Guitars' Viral Video Maker on a New Mission*, HARTFORD COURANT (Mar. 9, 2012) ("Within days [of Carroll posting the video], fallout from nationwide publicity cost United shareholders $180 million.").

other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way."[30] For example, in May 2014 the European Union recognized individuals' "right to be forgotten" that requires Internet search engines such as Google to delete certain types of personal information. Since then, Google has been working to undermine, block, and change EU law regarding privacy of personal information.[31]

In the private ordering context, at least some producers have incorporated non-disparagement and liquidated damages terms in their wrap contracts to reduce consumers' power to disseminate negative reviews. The now Internet-infamous firm KlearGear.com apparently submerged a non-disparagement and $3,500 liquidated damages clause three hyperlinks deep in their browsewrap TOS when they purported to contract with John Palmer in late 2008 for a $20 keychain.[32] Three years after John's wife, Jen Kulas, wrote a negative review of the company on RipOffReport.com, a consumer complaints aggregation website, KlearGear claimed that John had breached the non-disparagement term and, when the Palmers refused to pay the demanded $3,500, referred them to a collection agency.[33] In June 2014, the Palmers received a $306,750 default judgment against KlearGear for their federal claims asserting, among others, violations of the Fair Credit Reporting Act, defamation, intentional interference with prospective economic relations, and intentional infliction of emotional distress.[34]

While KlearGear never responded to the court, the company did send a public statement to the media. In justifying its browsewrap terms, KlearGear claimed such actions were necessary to counteract consumer power in social media:

> [Rude] customer behavior is rare but it has become a [sic] increasing problem for many companies today. DBS's [the alleged parent company of KlearGear.com] head of retail for North America . . . cites this problem

30. Vegelahn v. Guntner, 44 N.E. 1077, 1081 (Mass. 1896) (Holmes, J., dissenting).

31. Benjamin Fox, *EU Justice Chief Criticizes Google on 'Right to be Forgotten'*, EUOBSERVER.COM (Aug. 19, 2014), http://euobserver.com/news/125290.

32. KlearGear.com currently buries these terms only two hyperlinks deep. *See* Email from Vic Mathieu, Dir. Corporate Comm'n, KlearGear.com to duboisl@dboutiques.fr, (May 19, 2014) ("The structure of your [John Palmer's] sales contract, referenced in your order check-out screens which we have on file from December 22, 2008, had three forks (today there are two)"); *see also* Cyrus Farivar, *KlearGear Must Pay $306,750 to Couple That Left Negative Review*, ARS TECHNICA (June 25, 2014), http://arstechnica.com/tech-policy/2014/06/kleargear-must-pay-306750-to-couple-that-left-negative-review. The supposed two-fork structure is still well enough hidden that several contracts scholars interested in the case believed that the abusive terms had been removed from the KlearGear.com contract.

33. *See* Farivar, *supra* note 32.

34. *See id*; Complaint ¶¶ 37-59 at 11-15, Palmer v. KlearGear.com Case No. 1:13-cv-00175 (D. Utah Dec. 18, 2013).

> as one of the reasons that we started to eliminate Kleargear.com's social media channels in 2012. While buySAFE protects our customers' interests on every transaction . . . this track record is not public and dissatisfied customers have a stronger voice.[35]

Similar to the OKCupid example above, the company also attempted to justify its non-disparagement and liquidated damages clauses as normal and commercially reasonable:

> The non-disparagement agreements are not new among employees, partners and customers across the globe. There is no contract of adhesion; Kleargear.com operates in the consumer discretionary sector . . . so that consumers are free to shop elsewhere.
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> * * * *
>
> If DBS is presented with an order for judgment on the above-mentioned civil action . . . we will not honor it. In addition, such an invalid judicial resolution will not serve to dissuade Kleargear or other retailers from binding their customers to non-disparagement terms.[36]

Even if unintentional, these statements and the attitudes behind them clearly represent an attempt to establish new commercial norms of behavior that recognize such non-disparagement terms as normal and not unfairly surprising or unfair and deceptive. If such terms do become widespread, both common law doctrines, such as unconscionability and reasonable expectations, and statutory consumer protection regulations that are informed by commercial norms will be affected in favor of the drafters of such terms.[37] Notably, the California legislature has responded to such attempts to control information in the market. California Civil Code §1670.8, enacted September 9, 2014, imposes civil penalties for any consumer contract that would waive "the consumer's right to make any statement regarding the seller or lessor or its employees or agents or concerning the goods or services."

Abusive wrap contracts may also be policed *ex ante*, before the parties even initiate the transaction. As Kim's research suggests, by the time consumers have reached the contracting stage, producers have stacked the deck so much that there is no realistic possibility that the adherent will read, understand, or react to the proffered terms. Efforts at increasing the quality of assent are unlikely to yield significant benefits, and *post hoc* policing is both inefficient and relatively expensive. Consumers could, for instance, research and shop both the products and reputation of producers before

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35. Email from Vic Mathieu, Dir. Corporate Comm'n, KlearGear.com, to duboisl@dboutiques.fr, (May 21, 2014).

36. *Id.*

37. *See* KIM, *supra* note 1, at 71-76.

initiating the transaction. Third party services such as complaint aggregation websites, automated reviews of EULA terms,[38] referral and preferred vendor services such as Angie's List, browser extensions, and even highly secure browsers such as the Tor or Puffin systems, all provide informational tools to consumers that allow them to either control to some extent the information they provide to producers or to avoid dealing with producers with poor reputations.

But all of these tools are relatively useless for the vast majority of wrap contracts and consumers, simply because the consumers do not value them enough to use those tools in their transactions. Moreover, producers have invested heavily in informational advantages over consumers that permit them to target individual consumer weaknesses. While consumers attempt to fulfill their appetites, the logic of delayed gratification, investigation, shopping, and bargaining is forgotten. Producers effectively manipulate adherents through information on their weaknesses and desires, using their informational advantage to develop an evil electronic twin with which to whisper sweet transactional temptations into unsuspecting ears. If OKCupid and Facebook are experimenting with manipulation of emotional and psychological states, the only certain conclusion is that they do those experiments for *both* science and profit. At the end of the day, the Internet will be won by those who can most successfully hijack consumers' minds and emotions to induce them to accept personal and financial obligations.

In response, consumers must have additional tools for avoiding the entrapment or for limiting their exposure to temptation by the next "bright shiny" dangled in front of them. But online, such tools must be in demand, inexpensive, and invisible. Ian Ayres suggests, for example, using third party consumer aggregators, such as Google, to develop technological limitations on the types of terms to which consumers who use Google as their contracting portal can agree.[39] Under this model, consumers would create a Google account that includes—besides all of the personal information they already give Google—a checklist of EULA terms to which they would and would not agree. Google would then match the competing EULAs, and the vendor would be free to accept or reject to proposed new terms. Consumers would only see the transaction in the event their terms were rejected, presumably also giving them a chance to accept the producer's counteroffer.

38. *See, e.g.*, LEGALSIFTER, www.legalsifter.com (automated contract analyzer for creative project contracts) (last visited Aug. 21, 2014); *EULAlyzer*, BRIGHTFORT, http://www.brightfort.com/eulalyzer.html#Overview (automated EULA analyzing software) (last visited Aug. 22, 2014).

39. *See* Ayres, *supra* note 25.

Another possibility is to develop mechanisms for consumers to make greater use of disposable identities to limit their exposure to transaction risk.[40] Tal Zarsky, for instance, argues persuasively for the use of "pseudonymous," traceable, virtual identities by consumers in online contexts. Similarly, consumers could incorporate or otherwise take advantage of existing or new corporate law mechanisms that would enable them to establish and fund multiple identities for use online. This model is attractive in terms of forcing consumers to consider *ex ante* the terms and extent of liability they are willing to accept from a transaction. Producers seeking to expand liability beyond the entity's limits would be forced to make the expansive terms salient to the consumer before formation. Many abusive terms are of limited use against an identity that can be discarded if it becomes too inconvenient. While unlikely to materialize any time soon, these types of *ex ante* responses are necessary to complete a strategic approach to regulating wrap contracting.

IV. CONCLUSION

Kim's WRAP CONTRACTS is a critically important work in the rapidly evolving area of online contracting. It will be a seminal work in the next phase of scholarship responding to the problem of balancing the need to police abusive wrap contracting practices while maintaining the positive social benefits from legitimate uses of wrap mechanisms. One clear lesson from Kim's work is that, without radical restructuring of the process for giving and obtaining manifestations of assent to contract, consumers have no meaningful tools for protecting themselves from abusive terms in wrap contracts.

Courts and legislatures must respond to new manifestations of bargaining power disparities, either by expanding existing tools or developing new ones. Ironically, the transactional phase during which abusive terms or behaviors may be avoided with the least cost, *ex ante* to the transaction, is also the phase in which contract law doctrinal responses are largely unresponsive except to preserve the capacity of consumers to access information about seller reputation. Nonetheless, third party solutions, such as promoting the ability of third parties to aggregate consumer bargaining power to demand better terms or developing the use of limited liability forms of disposable identities would permit consumers to

40. *See* Tal Z. Zarsky, *Thinking Outside the Box: Considering Transparency, Anonymity, and Pseudonymity as Overall Solutions to the Problems of Information Privacy in the Internet Society*, 58 U. MIAMI L. REV. 991, 1015-20, 1030-35 (2004) (recognizing the capacity for online producers to manipulate Internet users' appetites).

control their exposure to financial and personal obligations resulting from wrap contracts.

The final lesson, of course, is that none of these proposed solutions is permanent. As Holmes implies in his *Vegelahn* dissent, the competition for bargaining power between parties to a transaction is dynamic. Each development of a position of power by one party requires and causes the development of a countering position by the other. Producer and consumer developments in the wrap contracting context are rapid and often radical, and courts, regulators, and scholars often just need to get out of the way.