# NORM SHIFTING BY CONTRACT

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## INTRODUCTION

Norms are sometimes used as explanatory aids when it is otherwise difficult to interpret observed behaviors. They do their heaviest lifting when observed behaviors are inconsistent with what we expect from consistent, rationally self-interested actors. Norms could be described in quantitative terms as the unexplained portion of the variation in the outcome behavior of interest when other explanatory variables have finished doing their work. Norms and wrap contracts are best friends. Because traditional doctrine is so very mismatched with wrap contracts for all the reasons Professor Nancy Kim identifies, there is much space left for norms to describe how people behave. It is a norm not to read adhesive contracts before signing them, even though understanding important rights contained in those contracts might seem like a wise choice, particularly for financial transactions. It is a norm to expect certain terms to be included and some to be excluded from form-contracts. As data recently gathered by Professor Florencia Marotta-Wurgler and I demonstrate, there is substantial variation in individuals' expectations of these things,[1] and these expectations, not the terms of the contracts, dictate behaviors.[2] It is also a norm to expect drafters of form-contracts to sometimes wholly ignore clauses in contracts, or to waive certain provisions, or even to think that some clauses are unenforceable. As I have discussed elsewhere, these norms vary along socio-economic lines.[3] Those who are better off are more likely to think that terms in legally valid contracts would not be enforceable against them at a greater rate than those who are less well off socio-economically.

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1. Data on file with author.

2. Zev J. Eigen, *The Devil in the Details: The Interrelationship Among Citizenship, Rule of Law and Form-Adhesive Contracts*, 41 CONN. L. REV. 381, 401 (2008) [hereinafter Eigen, *Devil in the Details*].

3. *See id.* at 381, 404.

Most of my empirical work on contracts over the past seven years has been devoted to identifying circumstances under which norms associated with regular (e.g., non-form-adhesive) contracts align with the norms associated with form-adhesive contracts. For instance, framing a form-adhesive contract as a moral commitment increases the likelihood that individuals regard it as such.[4] It makes sense for moral commitments to come from a contract produced from negotiated bilateral exchange. It makes much less sense for these norms to be present or applicable when one clicks a button online that is supposed to signify that one has read and understood a bunch of legalese that is required as a condition of receipt of the underlying good or service that the individual desires. Yet, we observe that these norms of behavior are present under certain conditions.

## I. THE RELATIONSHIP BETWEEN CONTRACTS AND NORMS

Aside from chalking up unexplained behavior to norms, and leaving it at that, it is important to attempt to predict and explicate sources of norms, and their evolutionary arc. This is especially important for norms associated with the fundamental relationship between individuals and the State. The better we understand how norms of behavior impact the law, the better we can efficiently and justly craft policies and laws that accord the right constellation of norms, without doing too much harm to norms that are orthogonal to socially desirable outcomes. Work by sociologists and law and society scholars has repeatedly demonstrated the critical connection between identifying norms of behavior that are consistent with the law and inconsistent with the law, in order to significantly advance our collective knowledge and understanding of legal citizenship in the State.[5] With respect

4. *See, e.g.*, Zev J. Eigen, *When and Why Individuals Obey Contracts: Experimental Evidence of Consent, Compliance, Promise, and Performance*, 41 J. LEGAL STUD. 67, 87 (2012) [hereinafter Eigen, *When and Why Individuals Obey Contracts*] (suggesting, for example, that "individuals' participation in the formation of contracts may impact their post-agreement behavior" and thus increase the promissory pull of contract. "When subjects saw and actively selected the term obligating them to perform the undesirable task, they were significantly more likely to perform that task than when they had no such choice . . . ."); Zev Eigen, An Experimental Test of the Effectiveness of Terms & Conditions (under review) (manuscript on file with author); *see also* Lisa L. Shu, Francesca Gino & Max Bazerman, *Dishonest Deed, Clear Conscience: When Cheating Leads to Moral Disengagement and Forgetting*, 37(3) PERSONALITY & SOC. PSYCH. BULL. 330, 343-44 (2011) (showing that reading an honor code reduces cheating in an unrelated task).

5. *See generally* PATRICIA EWICK & SUSAN S. SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998) (examining anecdotally ways in which Americans' lives are influenced by the way they think about and use the law); Patricia Ewick & Susan S. Silbey, *Narrating Social Structure: Stories of Resistance to Legal Authority*, 108(6) AM. J. SOC. 1328, 1329 (2003) (arguing that "resistance [to law] is enabled and collectivized . . . by the circulation of

to form contracts, drafters are like de facto quasi-state actors. They promulgate the outer limits of private laws and regulate the vast terrain of economic exchange.

This concern appears to be at the heart of much of Professor Kim's book. While much of the book focuses on the discord between contract law on the books and law in action, underlying this concern is the observation that:

> Users understand that social norms and laws apply to online conduct, even if they may not always abide by them. Wrap agreements, however, often do more than ensure adherence to social norms and laws. They create their own laws that are contrary to what a reasonable user expects. Furthermore, they may alter social norms or laws that would otherwise be applicable so that the expectation the consumer has about their applicability to a transaction is inaccurate.[6]

There are three critical components of this passage. First is the observation that wrap contracts create their own laws.[7] Yes, as all contracts do, wrap contracts are a form of private law making.[8] Second, they ensure adherence to norms. As Mark Suchman has observed, contracts are social artifacts.[9] Like an antique vase unearthed by archeologists, contracts preserve a record of social interactions and norms associated with economic exchange. Wrap contracts offer evidence of norms of social economic exchange at the limit of tolerable laws stomached by individuals, as do the norms associated with their promulgation. Repeatedly, in cultural references, contracts are considered forms of legal "gotchas." As Friedman notes, "the law of contract was the legal reflection of [the free] market and naturally took on its characteristics."[10] In a power-imbalanced marketplace,

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stories narrating moments when taken for granted social structure is exposed and the usual direction of constraint upended"); Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1, 2 (1985) (examining "natural duty" to explain why people "have a moral obligation or duty to obey the law"); Susan S. Silbey & Austin Sarat, *Critical Traditions in Law and Society Research*, 21 LAW & SOC'Y REV. 165, 165-67 (1987).

6. NANCY KIM, WRAP CONTRACTS 71 (2013).

7. Professor Kim opines that the laws they create run contrary to what users expect. *Id.* This is an empirical question, and existing nascent empirical evidence suggests that there is substantial variation in what users expect and do not expect to be included in wrap contracts. Some of my own empirical findings suggest that some over-estimate the one-sidedness of form-adhesive contracts, and others under-estimate them. There may also be significant gender and cohort effects at play in understanding what users expect along these lines. This is taken up in a paper with David Hoffman currently under review, entitled, *Testing Consideration and Form Online*.

8. *See* KIM, *supra* note 6.

9. Mark C. Suchman, *The Contract as Social Artifact*, 37 LAW & SOC'Y REV. 91 (2003).

10. LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA 16 (2011 Quid Pro Books).

contracts reflect the outer limit of what individuals will tolerate to receive the underlying benefits of the bargains they need to receive from drafters.

Third, and perhaps most importantly, Professor Kim expresses concern that wrap contracts may work to shift norms and expectations of enforceability. This essay focuses on this point by fleshing out this point in greater detail. This point aligns closely with the concern expressed in a 2008 paper in which I argued that a primary social cost associated with form-adhesive contracts is the erosion of our collective trust in the rule of law.[11] The more that we normalize to the experience of waiving rights as a necessary condition of taking part in economic exchange, the more cogent the legal argument is that the terms to which we acquiesce are actually enforceable. We have become so accustomed to giving everything up to the corporate entities with whom we contract, that it seems crazy to suggest anything in the alternative. As contract scholar Clayton Gillette writes, "Where potential losses to any given consumer are small, the likelihood of either reputational or legal redress may be so remote that sellers essentially face little downside risk from efforts to exploit."[12] Norms of contractual exchange that come from non-form-adhesive contracts are shored up by doctrinal reinforcement, and by academic and legislative hand-wringing over the need for free economic exchange. Consider Section 211 of Restatement (Second) of Contracts (entitled "Standardized Agreements"). Section 211(1) states:

> [W]here a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.[13]

Section 211(2) states that everyone "similarly situated" should be treated alike with respect to standardized contracts, without regard to their knowledge or understanding of the terms of the writing.[14] Section 211(3) states that drafters are limited in their creation of form-adhesive contracts only by the reasonable belief that "the party manifesting such assent would not do so if he knew that the writing contained a particular term."[15] In such a case, that term is not part of the agreement. In other words, so long as drafters standardize terms, they can expect them to be enforceable against all – with the very limited exception that they may not knowingly include

11. *See* Eigen, *Devil in the Details*, *supra* note 2, at 391-99.

12. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 978 (2005).

13. RESTATEMENT (SECOND) OF CONTRACTS § 211(1) (1982).

14. § 211(2).

15. *See* § 211(3).

terms they would reasonably expect to cause consumers *to reject the whole of the agreement*. The Restatement, by its terms, does not exclude any term the consumer would reject – but only those that would cause a consumer to reject the whole of the transaction.[16]

## II. HOW WRAP CONTRACTS SHIFT NORMS

The more unread wrap contracts slip by under our noses without resistance, the easier it is for drafting entities to assert that they hold a reasonable belief that individuals manifesting assent to terms would still do so, even in the face of more and more rights-encroaching terms. Essentially, our behavior – growing accustomed to respecting these contracts and expecting to get the short end of the deal – further fuels their legitimate legal authority, which in turn, creates a nice platform from which to launch further incursions on rights.[17] In fact, efforts to augment disclosure by the use of text boxes or other ways of improving the visibility of text of terms and conditions serves only to further exacerbate the decline of pro-consumer terms. This is because it speeds up the rate at which individuals normalize to intolerable contract terms. If a term that was obscured in tiny fonted boilerplate is displayed front and center in a text box, it only serves to bolster the assertion that reasonable signers know or should know of the existence of the term. Drafters only have to incrementally increase the one-sidedness of the terms, and over time, they will become "reasonable" and hence enforceable. Today, we tolerate many terms that encroach on individual privacy rights. In ten years, at the pace we are going, it would be reasonable for drafting entities to believe that individuals manifesting assent to terms would do so even if the terms

16. *See* § 211 cmt. f. This is notwithstanding comment f's suggestion that consumers "are not bound to unknown terms which are beyond the range of reasonable expectation." *Id.* Comment e also focuses on reasonable expectations: "[C]ourts in construing and applying a standardized contract seek to effectuate the reasonable expectations of the average member of the public who accepts it." § 211 cmt. e. Iowa and Arizona, to the extent that they formally embrace § 211 (and few states do) actually try to do more with the reasonable expectations focus of comments e and f than they do with the more restrictive text. *See* Roger C. Henderson, *The Doctrine of Reasonable Expectation in Insurance Law After Two Decades*, 51 OHIO ST. L.J. 823, 842-46 (1990). But in various applications of § 211, courts routinely treat reasonable expectations as a mere *exception* to the enforceability of a form contract, rather than a starting point, in which the form's terms are taken to be evidence of the actual expectations of a consumer. *See* Southwest Pet Prods. v. Koch Indus., 32 F.App'x 213 (9th Cir. 2002). For further elaboration of these points, see Ethan J. Leib, *What is the Relational Theory of Consumer Form Contract?*, *in* REVISITING THE CONTRACTS SCHOLARSHIP OF STEWART MACAULAY 259 (Jean Braucher, John Kidwell, & William C. Whitford eds., 2013).

17. Zev J. Eigen & Ethan J. Leib, After the Death of Contract (unpublished manuscript) (on file with author).

included provisions obligating consent to strip searches, to DNA sampling, and to genetic data mining. So, one way that wrap contracts act to shift norms is to increase our tolerance for oppressive terms, and thereby increasing the legal argument in favor of more oppressive terms' enforceability.

Form-adhesive contracts are like termites gnawing away at an old house. No single termite brings the house down. But the aggregate effect slowly reveals itself, perhaps at a rate too slowly to be noticed. So too, with erosion of trust in the rule of law. The riots following the Rodney King verdict were evidence of a deep reaction and have been pointed to as evidence of erosion of the rule of law in a more finite event.[18] The observed responses to the *Bush v. Gore* opinion is another example of a finite event evidencing erosion of trust in the rule of law.[19] There is growing distrust in legal institutions like the Supreme Court.[20] It would be foolish not to attend to the societal cost that is brewing on account of the chipping away that form contracts are effectuating. This is another way in which wrap contracts like those described by Professor Kim shift norms—from behaviors associated with trusting contracts as legally viable instruments constraining behavior to farcically extreme caricatures of such instruments, devoid of moral authority, but replete with authority.

Form contracts shift norms of contract compliance as well. Recent empirical evidence suggests that greater participation and negotiation at the formation stage are associated with greater compliance with undesirable contract terms at the performance stage.[21] More exposure to wrap contracts reduces compliance rates with contracts. This reduces market efficiency.

## III. THE COSTS OF NORM SHIFTING

Because wrap contracts are reminiscent of contracts produced by bilateral exchange,[22] dissonance is created between the perceived obligation to do as one promised to do when the terms are drawn to the attention of the

18. *See* Cedrick J. Robinson, *Race Capitalism and the Antidemocracy*, *in* READING RODNEY KING, READING URBAN UPRISING 73 (Robert Gooding-Williams ed., 1993); James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195 (2011).

19. *See generally* Kathryn Abrams, *Extraordinary Measures: Protesting Rule of Law Violations After* Bush v. Gore, 21 LAW & PHIL. 165 (2002).

20. *See generally* Dan M. Kahan, *Foreword: Neutral Principles, Motivated Cognition, and Some Problems for Constitutional Law*, 125 HARV. L. REV. 1 (2011).

21. *See* Eigen, *When and Why Individuals Obey Contracts*, *supra* note 4, at 87-88.

22. *See* Suchman, *supra* note 9, at 127 (noting that form contracts retain the "image of the 'binding commitment' that symbolizes efficiency, effectiveness, free choice, and legal protection for both sides").

consumer, and the desire to disregard wrap contract terms divorced from the primary benefit of the bargain motivating consumers' entrance into contract. This dissonance, and general feelings of being taken advantage of by drafting entities may produce undesirable costs, magnified by the scale at which these contracts are promulgated. Upset consumers' responses may be costly in a way more directly undermining of the rule of law. When a consumer of intellectual property perceives unfairness in the structure of their entitlements to the property, for example, they are inclined to resist legal parameters through civil disobedience.[23] There is a complicated story about why consumers resist contractual provisions that do not conform to social norms or their expectations of what the limits of contracting should be. However, the basic point is that one-sided pro-drafter terms can lead to illegal retaliation by signers. It matters less whether the terms are actually one-sided, and more whether they are perceived as such. Wrap contracts have shifted the norms from "reading" to "expecting" in terms of what the normal basis should be for understanding contractual obligations. This shift to reliance on expectations of provisions instead of the actual provisions themselves, has further piqued the imaginations of disgruntled consumers, and further contributes to the costs of form-contracts generally. As but one of many illustrations of the mismatch between what we think we have signed and what we have actually signed, one website lists the "*10 Ridiculous EULA Clauses That You May Have Already Agreed To*."[24] The site informs consumers of unfavorable and unusual clauses in common end user license agreements. For example, the article's heading regarding a clause in Google's EULA regarding use of its popular web-browser, "Chrome," is "Google Chrome—Google Owns You." The article highlights the clause in this agreement purporting to give Google a "perpetual, irrevocable, worldwide, royalty-free, and non-exclusive license" to do whatever it wants to do with content users submit, post, or display on or through the services. There are many examples of news stories and other attempts to both seriously alert consumers and to make fun of how bad form-adhesive contracts are, and how unaware we are of their alleged nefariousness.[25]

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23. Consider some of Ben Depoorter's work: Ben Depooter & Sven Vanneste, *Norms and Enforcement: The Case Against Copyright Litigation*, 84 OR. L. REV. 1127, 1139-40 (2006); Ben Depoorter et al., *Copyright Backlash*, 84 S. CALIF. L. REV. 1251 (2011); Ben Depoorter et al., *Problems with the Enforcement of Copyright Law: Is There a Social Norm Backlash?*, 12(3) INT'L. J. ECON. & BUS. 361 (2005).

24. Chris Hoffman, *10 Ridiculous EULA Clauses*, MAKEUSEOF (Apr. 23, 2012), http://www.makeuseof.com/tag/10-ridiculous-eula-clauses-agreed/.

25. *See, e.g.*, *South Park: The HUMANCENTiPad* (Comedy Central television broadcast Apr. 27, 2011) (poking fun at the terms of the iTunes user agreement). Recently, more serious

What sorts of illegal action do angry consumers undertake? Do they take actions more destructive of the rule of law than just waiting on hold and wasting people's time and money? Examples likely include illegal downloading and distribution of content, illegal reverse engineering, and illegal refusing to pay bills. These illegalities cost consumers and companies time, resources, and money. Fighting back to protect content, designing anti-circumvention techniques, and paying for collections are additional costs that are rarely tabulated in considering the costs associated with wrap contracts and other form-adhesive instruments.

Ultimately, the literature on obedience to the law and responses to apparently unjust procedures or outcomes in court cases[26] support the basic assertion of this essay: there is a connection and cost to negative experiences with ubiquitous form-contracts. These experiences lead to erosion of trust in the rule of law and a corresponding increased resort to extra-legal and sometimes antisocial behaviors. The larger the role that form-contracts play in the evolution of norms of economic exchange, the worse off the law of contracts will be. Hopefully, the added attention drawn to the precise measurement of costs associated with the proliferation of form-adhesive contracts will lead to optimal solutions and a return to norms of economic exchange that better promote efficiency and justice harmonious with contract doctrine and the rule of generally.

documentaries attempt to alert consumers about the dangers of blindly clicking "I Agree" on websites like Facebook and Google. *See* TERMS AND CONDITIONS MAY APPLY (Hyrax Films 2013).

26. *See generally* David Cole, *Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO L.J. 1059 (1999); E. ALAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988); Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399 (2005); JOHN W. THIBAUT & LAURENS WALKER, PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS (1975); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621 (1991).