

PRESERVING SUBSTANTIVE UNCONSCIONABILITY

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INTRODUCTION

In *Wrap Contracts*, Nancy Kim offers both a withering critique of contracting practices in the digital world and a blunt indictment of U.S. courts' failure to rein those practices in. In her portrayal of the current online contracting environment, Kim describes what might be described as a sort of socioeconomic duress. Firms have implicitly threatened to freeze out consumers from meaningful internet activity—with all the social isolation and economic deprivation that would entail—should they refuse to assent to the one-sided terms common to most wrap contracts, leaving the consumer with no reasonable alternative but to click “I accept” and hope for the best. Kim observes:

It is not a viable option for the consumer to decline the terms of any particular agreement if the consumer wishes to engage in online activity. The party's ‘assent’ is void of volition and merely reflects a refusal on the part of the consumer to resist market forces through self-deprivation that would have profound social and economic consequences.¹

Assuming this bleak portrayal of the current online contracting environment is an accurate one—and Kim makes a strong case that it is—what is to be done? In the book's final chapter, Kim addresses this question with a series of bold proposals for doctrinal reform. Perhaps the most radical of these is her proposal to fundamentally change the structure of the unconscionability defense in the case of wrap contracts. Kim would do away with the dual requirements of substantive and procedural unconscionability² in favor of a more “holistic”³ approach in which—in a

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1. NANCY S. KIM, *WRAP CONTRACTS* 207 (2013).

2. Procedural unconscionability refers generally to the “absence of meaningful choice on the part of one of the parties,” which can result from any of a number of factors, including “sharp bargaining practices, the use of fine print and convoluted language, a lack of understanding, and an inequality of bargaining power.” See E. ALLAN FARNSWORTH, *FARNSWORTH ON CONTRACTS*

dramatic reversal of current doctrine—the party wishing to enforce a wrap contract would have the burden of proving the contract “conscionable.”⁴ Under Kim’s proposal, this burden could be carried in only two circumstances: where the term at issue is expressly permitted by existing legislation or where an alternative term was available to the party seeking to avoid enforcement.⁵

In this very short essay, I explain why I find Kim’s diagnosis of the problem with the doctrine of unconscionability persuasive, but her proposed solution wanting in important respects. Reacting to courts’ willingness to enforce one-sided terms in wrap contracts provided bare procedural requirements have been satisfied, Kim proposes to eliminate unconscionability’s substantive prong altogether, while tightening its procedural one.⁶ In my view, this represents something of an overcorrection, one which may ultimately make it *easier* for firms to insulate one-sided terms from being invalidated by courts. If the backstop of judicial review of the substance of wrap contract terms has become unacceptably porous, it seems that at least part of the solution should be to fill the pores, rather than simply remove the backstop.

I. THE PROBLEM WITH WRAP CONTRACT UNCONSCIONABILITY DOCTRINE

Kim traces the source of the unconscionability doctrine’s anemia to the approach courts have taken to substantive unconscionability. Kim identifies three particular problems. First, courts have tended to treat procedural unconscionability as a threshold requirement, declining to engage in substantive review of terms provided “there was notice and an

§ 4.28, at 582-84 (3d. ed. 2004) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Substantive unconscionability refers generally to contract terms which are “unreasonably favorable” to one of the parties (typically the drafting party). *See id.* “[S]ubstantive unconscionability,” explains Margaret Jane Radin, “refers to defects in the bargain itself: the notion that some contracts may look so one-sided or unequal or oppressive that the court in good conscience simply should not tolerate enforcing them.” MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 125 (2013).

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

4. *See id.* at 209.

5. *See id.*

6. Kim’s proposal lacks a substantive component in the sense that, were her proposal adopted, the unconscionability determination would no longer depend to any extent on the *court’s own determination* of whether the term at issue (or the bargain as a whole) was unreasonably favorable to one party. In this Essay, when I claim that Kim’s unconscionability proposal lacks a substantive prong, this is the sense I have in mind.

opportunity to read the contract terms.”⁷ Second, when courts *have* reached the substance of the term at issue, they have tended to rely too heavily on existing industry norms in deciding whether to enforce it.⁸ As Kim persuasively observes, this is problematic “where the norms are set by an industry player with greater bargaining power.”⁹ Finally, courts have been notoriously unpredictable and inconsistent in determining whether terms are substantively unconscionable, leaving private actors with little reliable guidance in attempting to craft enforceable contracts.¹⁰

The result has been to render the doctrine of unconscionability a toothless mechanism for promoting fairness and voluntariness in the world of online contracting. This is true both from an *ex ante* perspective, insofar as courts’ unpredictability has created an incentive for firms to overreach,¹¹ and from an *ex post* perspective, insofar as courts’ anemic, deferential approach to substantive unconscionability has insulated patently one-sided terms in wrap contracts from judicial scrutiny. As a result, one-sided terms have proliferated in wrap contracts. Such terms range from (using Kim’s helpful taxonomy) relatively innocuous “shield” terms (e.g., warranty disclaimers and other limitations of the drafting party’s liability) to more aggressive “sword” terms (e.g., forum selection clauses, mandatory arbitration clauses, and other limitations of the non-drafting party’s rights)

7. See *id.* at 88; see also RADIN, *supra* note 2, at 125 (“Contemporary adherents to classical contract doctrine interpret unconscionability narrowly, focusing on the procedural aspect and discounting the substantive.”).

8. Arthur Corbin’s test for substantive unconscionability—which asks whether the terms at issue are “so extreme as to appear unconscionable according to the mores and business practices of the time and place”—has been widely influential with courts. See Nancy Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 551 (2005) (quoting ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 128 (1952)).

9. See KIM, *supra* note 1, at 88; see also *id.* at 72-73 (“[W]here there is a pronounced unevenness in the bargaining power within an industry, industry standards or norms may be established that reflect the interests of only one side. Using industry standards as a guideline where contracts of adhesion are involved merely reinforces overreaching by the party with greater market power.” (footnotes omitted)).

10. See *id.* at 87; see also RADIN, *supra* note 2, at 129 (“Application of the doctrine of unconscionability is a process of relentless case-by-case adjudication, with many discretionary judgment calls in each case. Perhaps with the exception of truly egregious cases, outcomes are extremely unpredictable.”).

11. See, e.g., Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041, 1061 (2005) (noting U.S. courts’ *ad hoc* approach to unconscionability “makes it hard to know ahead of time which terms will be found fair and which will be deemed unfair” and “encourages contract drafters to take advantage of ambiguities”).

to clearly oppressive “crook” terms (e.g., mandatory personal information-sharing provisions).¹²

Kim is not the first to identify these problems with the doctrine of unconscionability,¹³ but she seems to be one of the first scholars to make these criticisms in a powerful, focused way with respect to online wrap contracts. In my view, Kim has made a persuasive case that one of the most potentially powerful tools available to courts in policing wrap contracts—the unconscionability doctrine—has been effectively nullified.

II. KIM’S PROPOSED SOLUTION

Kim proposes to “reinvigorate”¹⁴ the doctrine of unconscionability by making a radical change to its structure. Kim would do away with the dual requirement of procedural and substantive unconscionability in favor of what she calls a more “holistic”¹⁵ approach. To begin with, she proposes that all wrap contracts be presumed unconscionable.¹⁶ Once the defendant in a breach of a contract action shows the contracting form at issue was “coercive” in the relevant sense,¹⁷ the term at issue is rebuttably presumed to be unconscionable. The burden shifts to the plaintiff to prove the relevant term “conscionable.”¹⁸

Next, Kim proposes that the presumption of unconscionability be rebuttable in just two circumstances: (i) where the term in question is one “expressly permitted by legislative action or by a regulatory agency” or (ii) where “alternative terms” were made available.¹⁹ The ultimate effect of Kim’s proposal, then, is to render any wrap contract unconscionable unless

12. See KIM, *supra* note 1, at 44-52. It is worth noting that many of these terms relate to the limitation of legal rights or remedies, and so may be difficult for the average consumer to understand. For example, it seems likely that many if not most consumers without legal training would need a forum selection, mandatory arbitration, or class action waiver clause explained to them in concrete, lay terms, and would not necessarily be able to understand the rights they are giving up just from reading the language of the clause itself.

13. See, e.g., RADIN, *supra* note 2, at 124-30; Russell Korobkin, *Bounded Rationality and Form Contracts*, 70 U. CHI. L. REV. 1203, 1255-78 (2003); Oakley, *supra* note 11, at 1061-65.

14. The term is Kim’s. See KIM, *supra* note 1, at 203.

15. *Id.* at 208.

16. Although Kim says that “unconscionability should be presumed except in two situations,” her full discussion makes clear that she means to propose that unconscionability be presumed in *all* breach of contract actions involving an online wrap contract, with the presumption being *rebuttable* in two (and only two) situations. See *id.*

17. Kim defines a “coercive contracting form” as “an online wrap contract which [the avoiding party] was required to accept in order to proceed with the transaction.” *Id.*

18. See *id.* at 209 (describing her proposal as “shifting the burden of getting terms approved or proven ‘conscionable’”).

19. *Id.* at 208.

the party seeking enforcement can prove either that the term at issue is of a type expressly permitted by existing legislation or that there was an alternative term available to the party seeking to avoid enforcement.²⁰

As to the express legislation/regulation option, Kim observes that “[b]usinesses seeking to enforce certain terms could do so by mobilizing forces and lobbying their legislators to pass bills permitting those terms, essentially shifting the current system of unilaterally drafted private legislation to the realm of public legislation.”²¹ Kim argues that the burden of enacting legislation on wrap contract terms is better placed on companies—with their greater resources, greater experience with the political process, and greater commonality of interests—than on individuals.²² Companies, Kim observes, “are in a better position to effectuate legal change through the political process and often have substantial budgets that allow them to pay for well-connected lobbyists.”²³ Seemingly responding to the worry that this might unreasonably skew wrap contract legislation in favor of the interests of drafting parties, Kim notes that “[b]ecause legislators are appointed through a democratic process, the interests of both drafters and nondrafters are likely to be represented.”²⁴

With respect to the alternative terms option, Kim notes that a drafting party could satisfy it either by “presenting evidence that its competitors in the same or similar business offered different terms” or by itself “offer[ing] alternative terms and rebut[ting] the claim that there was an absence of meaningful choice.”²⁵ The example Kim offers concerns a term in an email provider’s wrap contract requiring consumers to consent to collection of

20. In *Wrap Contracts*, Kim does not specify whether the presumption involved in her unconscionability proposal would, once triggered, shift the burden of producing evidence only or both the burden of producing evidence and the burden of persuasion. Because a presumption that shifted only the burden of producing evidence would disappear upon rebuttal under the so-called “bursting bubble” theory of presumptions, interpreting Kim in this way would leave her unconscionability proposal radically incomplete. So interpreted, her account would be essentially silent on the critical question of how unconscionability is supposed to be determined once the presumption she proposes has been rebutted. For this reason, I think the best interpretation of Kim’s proposal as expressed in her book—and the interpretation I adopt here—is that the presumption of unconscionability she has in mind affects both the burden of producing evidence and the burden of persuasion. In other words, once triggered, the presumption places the burden on the drafter to both produce evidence and persuade the jury that the contract is “conscionable” by showing either the existence of express legislative action permitting the term at issue or the availability of alternative terms.

21. *Id.* at 209.

22. *See id.* at 210.

23. *Id.*

24. *Id.*

25. *Id.* at 208.

personal information for marketing purposes.²⁶ If the email provider allows the user to opt out of this data collection requirement by paying an annual fee, then the requirement would not be unconscionable.²⁷ “Assuming the fee itself is not shockingly excessive,” Kim says, “the consumer now has a real choice.”²⁸ In addition to creating meaningful choice, Kim argues the availability of alternative terms “raises their salience and makes it easier for customers to determine the value of the rights they are relinquishing.”²⁹

With this proposal, Kim moves in a direction one might not expect given her critique of the current doctrine of unconscionability and of wrap contract practices more broadly. The fundamental problem with wrap contracts, Kim asserts, is that they are unfair to consumers, containing one-sided terms that unreasonably favor the drafting party.³⁰ In applying the doctrine of unconscionability, Kim claims, courts have largely given firms a pass, declining to even reach the substance of the terms at issue provided bare procedural requirements have been met, and relying too heavily on existing norms when they do assess the substance of the terms.³¹

Given the gist of these claims, one might expect Kim’s proposal for reinvigorating the doctrine of unconscionability to focus on strengthening its substantive component. This seems like the natural response to a critique that, in the end, focuses on the prevalence of unfair and one-sided terms. But Kim instead goes the procedural route, specifying and tightening the procedural requirements of the doctrine of unconscionability, while eliminating the requirement that the term at issue be found unreasonably favorable to the party seeking enforcement. In the following section, I explain why I question the wisdom of this move.

III. REINVIGORATING UNCONSCIONABILITY?

Courts typically view the dual requirements of substantive and procedural unconscionability on a sliding scale, such that the more of one that is present, the less of the other that is required.³² In theory, this sliding scale approach allows the court to refuse to enforce a term it deems grossly

26. *Id.*

27. *See id.*

28. *Id.*

29. *Id.* at 209.

30. *Id.* at 125 (“The problem with adhesion contracts is not that they are nonnegotiable or that they are unlikely to be read; the real problem is that their terms may be unexpected and unfair. Wrap contracts, by their form, permit companies to impose more objectionable terms than paper contracts of adhesion.”).

31. *See supra*, notes 7-9, and accompanying text.

32. *See* FARNSWORTH, *supra* note 2, at 585.

unfair in substance, provided a minimal basis exists for deeming the contract procedurally unconscionable.³³ In the case of wrap contracts, as Kim points out, courts seem rarely to have reasoned in this manner, often declining to even reach the substantive inquiry provided bare procedural requirements have been met.³⁴

The question, though, is whether the right response to that judicial practice is to eliminate the substantive inquiry altogether. Kim seems to believe it is, but I am skeptical. Under Kim's proposal, substantive unconscionability is effectively presumed in all cases, and conclusively so. If the party seeking enforcement fails to show that either of the procedural options (express legislation or alternative terms) has been satisfied, the contract is deemed unconscionable. There is no further requirement that the substance of the term at issue be shown to be unreasonably one-sided.

At first blush, this might seem like a clear boon to non-drafting parties, as it relieves them of the obligation to prove substantive unconscionability at all. But consider the following: under Kim's proposal, a court that found a particular term in a wrap contract to be grossly unfair or one-sided would have *no choice* but to enforce the term if the party seeking enforcement had secured legislation permitting it or made an alternative term available. Is that an improvement on the current sliding scale approach, which allows the court to evaluate the procedural soundness of the bargaining process in the light of its own conclusions regarding the substantive fairness of the bargain? To put this question another way: in the case of a wrap contract, does the presence of express legislation permitting a term or the availability of an alternative term guarantee that a patently unfair or one-sided term in the contract was genuinely consented to by the non-drafting party?

I would answer these questions in the negative. For reasons Kim herself makes clear, online wrap contracts are inherently such that, no matter the procedural safeguards in place, there will *always* be grounds for skepticism as to whether the terms of a given wrap contract were the product of meaningful choice by the non-drafting party. That is why it seems necessary to me to preserve, and indeed strengthen, the substantive component of the unconscionability doctrine as applied to wrap contracts. Moreover, although I think the procedural safeguards Kim proposes are sensible and could marginally increase the extent to which non-drafting

33. See, e.g., RADIN, *supra* note 2, at 125-26 ("A judge . . . may reason from the substantive one-sidedness of the deal to an inference that the deal must have been procedurally improper. Some courts say that the worse the deal looks the less strong the evidence needs to be for a finding of procedural shortfall.").

34. See *supra* text accompanying notes 7-9.

parties' genuinely consent to wrap contract terms, I am skeptical that they would have a significant impact in that regard.

A. *The Necessity of Substantive Review*

Eliminating the substantive component of the unconscionability doctrine would only make sense in a world in which the rules governing the procedural aspects of contracting—i.e., rules relating to the form and presentment of contractual terms and rules relating to the bargaining process itself—were so well-designed that, provided the rules were followed in a particular case, one could be nearly certain that each and every term in the resulting contract was the product of meaningful choice by both parties, and particularly by the non-drafting party. In such a world, a court might reasonably be willing to enforce even a grossly one-sided term against a non-drafting party on the grounds that the party had made a knowing, fully informed, and deliberate choice to be bound by that term. That choice might, after all, have been a rational one, provided the non-drafting party received a compensating benefit as part of the larger bargain.

The world of wrap contracts that Kim portrays is, of course, a *very* far cry from one in which the procedural integrity of form, presentment, and bargaining is so guaranteed. Kim ably demonstrates that one of the chief reasons one-sided terms have come to permeate wrap contracts is that the digital, online format militates strongly against non-drafting parties exercising meaningful choice. According to Kim, the defining feature of a wrap contract is its nontraditional format, i.e., that it is presented “in a way other than on paper requiring a signature.”³⁵ Most (though not all) wrap contracts come in digital form.³⁶ Kim makes a strong case that digital presentment alone makes wrap contracts resistant to being genuinely consented to by non-drafting parties. The absence of a signature and printed terms “deceives the nondrafting party who is conditioned to think of a legal undertaking as one requiring more ceremony and formality.”³⁷ As Kim persuasively notes, “[p]eople automatically click to accept terms of online agreements, if they are asked to click on anything at all.”³⁸ Additionally, owing to their digitality, wrap contracts' terms may be presented in scrollable text boxes or via hyperlinks, making it possible for the user to manifest assent without ever bringing up (much less reading) the

35. KIM, *supra* note 1, at 55.

36. *Id.*

37. *Id.* at 54.

38. *Id.* at 55.

full text of the contract on their computer screen.³⁹ Moreover, wrap contracts' digitality allows drafting parties to costlessly cram a high volume of terms into wrap contracts without suffering a loss in customer goodwill, thereby further increasing the likelihood that terms will not be read or understood.⁴⁰

These consent-defeating features appear to be inherent in the digital presentment of wrap contracts. For this reason, no matter the procedural safeguards in place, non-drafting parties—even when they realize that they are entering into a legally binding contract—are unlikely to have read or understood all of its terms. When it comes to wrap contracts, there will always be grounds for skepticism as to whether contract terms were genuinely consented to by non-drafting parties, simply because the online, digital format *inherently* poses formidable obstacles to consumers' awareness and comprehension of such terms.

If that is true, it seems unwise to make the unconscionability determination rest entirely on non-substantive considerations of the type embodied in Kim's proposal. Under Kim's approach, a court that found a particular wrap contract term to be unreasonably favorable to the drafting party would have no choice but to enforce the term, provided the drafting party (or one of its competitors) had made an alternative term available to consumers. But the overwhelming likelihood in such a case would be that the one-sided term became part of the contract not because the non-drafting party had made a conscious and informed decision to be bound by it, but rather because the non-drafting party had failed to notice, read, or understand the term at issue and the available alternative.

By contrast, under the current doctrine of unconscionability, the court, at least in theory, has the discretion to assess the procedural soundness of the bargain in the light of its conclusions concerning the substantive fairness of the bargain's terms. Under the sliding scale approach, a grossly one-sided or unfair term would weigh strongly in favor of a finding of unconscionability, provided a minimal basis existed for questioning the procedural soundness of the bargaining process, *as it almost always would in the case of a wrap contract*. Kim's proposal precludes the possibility of such a substance-driven finding of unconscionability.

Kim suggests that her ultimate goal in reinvigorating the doctrine of unconscionability is to reduce the incidence of one-sided, oppressive terms in wrap contracts. If that is true, then it seems clear to me that the unconscionability determination must continue to directly depend, at least

39. See *id.* at 62-65.

40. See *id.* at 58-59.

in part, on the court's assessment of whether the term at issue is, in fact, fair to the non-drafting party.

B. Kim's Procedural Safeguards

Although I doubt that *any* procedural safeguards could guarantee that wrap contracts are the result of genuine consent by non-drafting parties, it is worth asking whether the safeguards Kim proposes would help at all. I believe they might, but not nearly enough to justify removing unconscionability's substantive prong. The procedural safeguards Kim proposes are sensible but, in my view, they will not come close to ensuring that wrap contracts' terms are the product of meaningful choice by non-drafting parties.

Regarding the express legislation/regulation prong, I am generally skeptical that terms permitted by firm-sponsored legislation would adequately reflect the interests of non-drafting consumers. Under current law, in the absence of legislation regarding a particular type of term, courts at least have the discretion to decline to enforce the term under the flexible unconscionability doctrine. Kim's proposal would take this freedom away, at the same time establishing an incentive for firms to hijack the legislative process in their favor by leveraging their considerably greater resources. It is not fanciful to imagine the passage of an anti-consumer set of legislated terms in some jurisdictions, given the disparity between the political and economic resources of firms and those of consumers.

Indeed, there seems to be a tension within Kim's argument here. On the one hand, she argues that it makes more sense to place the burden of enacting wrap contract legislation on firms than on consumers, since firms have greater resources, experience with the political process, connections with lobbyists, and commonality of interests. On the other hand, Kim suggests that firm-sponsored legislation permitting specific types of wrap contract terms would be fair to consumers because, in a democratically-elected legislature, "the interests of both drafters and nondrafters are likely to be represented."⁴¹ I worry that the very reasons Kim seems to think firms are better positioned to secure wrap contract legislation may actually undermine her claim that the interests of nondrafters will be adequately represented in the legislative process. If, as Kim claims, firms really "are in a better position to effectuate legal change through the political process and often have substantial budgets that allow them to pay for well-connected lobbyists,"⁴² then isn't this grounds for concern that resulting legislation

41. *Id.* at 210.

42. *Id.*

may not reflect a fair balance between the interests of firms and those of consumers?

With respect to the provision of alternative terms, I believe this would, to a limited extent, increase meaningful choice by consumers.⁴³ Moreover, it seems this would generally be the option of choice for profit-maximizing firms. Confronted with the two alternatives Kim proposes for rendering wrap contracts enforceable, rational firms would choose the less costly alternative. Given the significant costs associated with securing legislative or regulatory action (campaign contributions, lobbying fees, etc.), the cheaper option would almost certainly be to make available alternative terms for a fee.

It seems likely to me that, at the margin, the availability of alternative terms *would* have some of the effects Kim predicts, including making terms more salient and allowing consumers to know the value of the rights they are relinquishing. It does seem, though, that in order for alternative terms to have any positive effect on meaningful choice, they would need to be included as options within the contract at issue, as opposed to simply being offered by a competitor in the same business. Allowing firms to satisfy the alternative terms prong by pointing to the terms in a competitor's wrap contract presupposes a level of familiarity with industry offerings that few consumers are likely to possess.

In the end, though, most online consumers will likely fail to read and understand the default and alternative terms in online wrap contracts, particularly recondite terms relating to the limitation of legal rights and remedies. Given the formidable obstacles to consumers' awareness and understanding of wrap contract terms—obstacles inherent in the digital, online presentment of wrap contracts—even this sensible reform is in my view unlikely to have a significant impact on whether consumers genuinely consent to wrap contract terms. Given the inherent features of digital presentment, it is the rare online consumer who will be patient enough to read and well-informed enough to understand each set of alternative terms in an online wrap contract.

43. Although it is plausible to imagine a consumer paying slightly more for a contract without a mandatory personal information-sharing provision (the subject of the example Kim offers), it is harder to imagine that almost any consumer (even one with legal training) would pay even a small amount of money to opt out of a mandatory arbitration, forum selection, or class action waiver clause. Given the low likelihood of a legal dispute, this might well be a rational decision!

CONCLUSION

I want to conclude by offering a possible alternative solution to the unconscionability problem. I would start by borrowing Kim's idea that the use of a coercive contracting form (i.e., an online wrap contract) should trigger a rebuttable presumption that the term at issue is unconscionable, the burden lying on the drafting party to prove otherwise. But what if, instead of removing unconscionability's substantive prong and preserving its procedural one, we did the exact opposite? That is, what if wrap contracts were conclusively presumed to be procedurally unconscionable and rebuttably presumed to be substantively unconscionable? The burden would be on the drafting party to prove the term at issue substantively "conscionable." I would add to this a corollary that the drafting party could not, *à la Corbin*,⁴⁴ meet this burden *solely* by reference to existing industry norms and practices, but rather would have to convince the court, on broadly normative grounds, that the term at issue was not unreasonably favorable to its interests.

This proposal may not be as radical as it sounds. Although certainly not the norm, there are some courts that have been willing to deem a contract unconscionable based solely on a finding of substantive unconscionability. For example, in *Maxwell v. Fidelity Financial Services, Inc.*, the Arizona Supreme Court held that "a claim of unconscionability can be established with a showing of substantive unconscionability alone, especially in cases involving either price-cost disparity or limitation of remedies."⁴⁵ If the most serious problem with wrap contracts is one of substance—the prevalence of terms that unreasonably favor the drafting party—then arguably the most direct way to address that problem is by saddling drafters with the burden of proving that any wrap contract term they seek to enforce is substantively fair to the non-drafting party.

44. See KIM, *supra* note 8 and accompanying text.

45. 907 P.2d 51, 59 (Ariz. 1995); see also Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 829 (N.Y. 1988) (noting that "there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone").