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.

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 t
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. eflects 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

with a series of bolcg-4(c/MCIsaAposa05.31 58-75(t)02 3136f890055>3u4890055>30)-75(t)0

dramatic reversal of current doctrine the party wishing to enforce a wrap[4]

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]

problem with the doctrine of unconscionability persuasive, but her proposed solution wanting in importan
enforce one-sided terms in wrap contracts provided bare procedural requirements have been satisfied, Kim proposes to eliminate

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 doc
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 re

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§ 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.*

[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

[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 [11]

approach to substantive unconscionability has insulated patently one-sided terms in wrap contracts from judicial scrutiny. As a result, one-sided terms

warranty

arbitration clauses, and other limitations of the non-

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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 haoues itmakabili a77(s)-4( )-101BT/ Tf1 0 0 14142C9 77(s)61 263.33 3(o)7(n8.5

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

forces and lobbying their legislators to pass bills permitting those terms,

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]

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.

full text of the contract on their computer screen.[39] Moreover, wrap
igh 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 ap

to the non-drafting party.

B. Kimôs 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 l safeguards Kim proposes are sensible but, in my view, they will not come close to ensuring - 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

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 wit 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- drafters and nondrafters are likely

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 alterna
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

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
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CONCLUSION

I want to conclude by offering a possible alternative solution to the unconscionabil
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

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

not, a 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 hel
be established with a showing of substantive unconscionability alone,