AGAINST CONTRACTUAL AUTHORITARIANISM

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Nancy Kim's *Wrap Contracts* was published in 2013,[1] a little over one year after Margaret Jane Radin's *Boilerplate*.[2] Both deal with modern versions of the contract of adhesion that purport to bind consumers who have clicked onto or, in rarer situations, browsed at contract terms. Both authors offer excellent exposes of the business practice purportedly sanctioned by judicial decisions and statutes. Professors Kim and Radin also offer political and policy responses to the problems of online contracting. But one point reverberates through both books: Contracts is dead. The quandary is whether contract law as we know it should be revived or replaced. The two scholars disagree on this question.

According to Professor Radin, the prevalence of boilerplates marks the end of deliberation. Consumers mechanically assent to proffered terms and an agreement is formed.[3] There is no bargained-for exchange. There is no negotiation except for the take it or leave it offer. Such lack of communication is symptomatic of broader concerns over the breakdown of democracy and the legislative process. In many ways, the democratic breakdown aligns with what I describe below as contractual authoritarianism. But Professor Radin's book offers a manifesto for how to cure the break down of deliberation through focused regulation that protects consumers against corporate overreach. The narrative is a compelling, but conventional one: contractual market failure corrected through regulation.

Professor Kim, by contrast, presents a more disruptive portrait of online contracting. As the title of her book suggests, "wrap contracts"

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

2. MARGARET RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2012).

3. *Id.* at 33-34.

constitute a new class of contracting.[4] This new class includes shrinkwraps, clickwraps, browsewraps, and variants. While related to the classic contract of adhesion in the sense that consumers are bound by standard form terms, wrap contracts have distinguishing characteristics associated with the context of the Internet. Users move quickly through websites. Companies advertise and sell to mass markets of consumers, undifferentiated, innumerous, and largely anonymous. Attention is short, and exchanges are fast and furious. Wrap contracts are adhesion contracts in a vastly different environment than that of nineteenth century retail sale, mail order catalogues, and telephonic transactions. The implication is contract law needs to be reconceptualized, and regulation of contract has to take on more creative and contemporary dimensions.

What solutions does Professor Kim recommend? The book is not always clear on positive proposals, but is quite helpful in explaining why doctrines like unconscionability may not resolve the problems with wrap contracts. Part of the problem is that unconscionability as applied tends to be procedural in application with courts often eschewing the inherent unfairness of terms. Fundamentally, take it or leave it offers alter the nature of transacting. Consumers do receive what they want—cell phones, credit, or cruise ship tickets—conditional on the terms set by the company. As long as consumers have proper notice, wrap contracts would very likely not be procedurally unconscionable. Policing wrap contracts is a matter of ensuring proper notice to consumers. The difficult, and unanswered question is what policies can properly limit the types of terms that companies impose on consumers. Arbitration requirements, excessive fees, limitations on speech, restrictions on use, waiver of legal claims—each is potentially problematic for consumers but requiring only notice and assent may allow companies to cabin the freedom of consumers in a transaction.[5]

What I gathered from Professor Kim's stimulating book is a need to think beyond standard regulation of contract in limiting the potential harms from wrap contracts. Even if a federal or state agency could police the minute details of every standard contract, companies can always find ways around most regulations. Theoretically, regulators could micromanage the formation of and acceptable terms in contracts. But one has to wonder how far such contractual review can extend. Without understanding the underlying factors that permit and perpetuate wrap contracts, the appropriate institutional response is elusive. Professor Kim's analysis of

4. *See* KIM, *supra* note 2, at 109-11 (detailing differences between wrap contract doctrine and traditional contract doctrine).

5. *Id.* at 203-04 (proposing how to reinvigorate unconscionability).

wrap contracts suggests three possible explanations for their ascendance. I elaborate on these explanations in the next several paragraphs drawing largely on my own interpretation of Professor Kim's exegesis.

I will turn my attention to three explanations for the rise of wrap contracts. The first is the expansion of mass marketing through the growth of the Internet as a platform for commerce. Related to this explanation, but of independent relevance, are the tools for digital contracting made possible by e-commerce. This review's title reveals the third and, in my opinion, the most compelling explanation: the emergence of market authoritarianism that has expression in the type of contracting Professor Kim describes. My goal is to assess each of these explanations in order to gauge how to combat the phenomenon of wrap contracts as the modern contract of adhesion.

MASS MARKETING AND WRAP CONTRACTS

Close attention to wrap contracts can be traced to the 1990s when the Internet took off as a forum for commercial activity. While the Internet as a network of computers can be traced back to the Arpanet as a means of communications within the security and national defense wings of the United States government and across government contractors, such as universities, diffusion of computer usage among the general population in the 1980s created a critical mass of users that permitted more wide scale communication and interactions.[6] User groups provided affiliation networks for computer users sharing a common interest, such as sports, politics, language, or other cultural focus. Consumer transactions became more feasible with the interface permitted by the World Wide Web, developed and implemented in the early 1990s. Developments of mechanisms for online payment and the creation of digital storefronts for established entities and start-ups, such as Amazon, cemented the Internet as a platform for commerce.

Effective commerce requires a means of establishing and enforcing legal rights. Digital contracts served as the way to do so for e-commerce. Discrete one-to-one contracting, however, would raise the transaction costs of exchange. Terms would have to be individually worked out and contracts would have to be executed on a customer basis for a one-to-one system of contracting to work. Instead, the model of one-to-many contracting permits stability in online market transactions without raising the costs of transacting. An individual consumer interacting with the website through

6. *See* JONATHAN ZITTRAIN, THE FUTURE OF THE INTERNET AND HOW TO STOP IT 256-57 (2008); JOHNNY RYAN, A HISTORY OF THE INTERNET AND THE DIGITAL FUTURE 65-67, 120-121 (2013).

the equivalent of window shopping and other forms of searching followed by an actual purchase engages in the fiction of negotiating and entering into a contractual relationship with the online merchant that determines the terms on which the transaction takes place. Of course, the terms are standardized for many of the thousand other customers that are interacting with the merchant in this way. Contracts are readily entered into, terms are secured, and transactions are made, facilitating the terms of commerce and its resultant social and economic benefits.[7]

Understood this way, wrap contracts are a matter of scale rather than a new kind of transaction. The expansion of bricks and mortar retailing in the twentieth century also entailed mass marketing with the concomitant need for form contracting along the lines described above. The same point could be made for mail order and phone order transactions. Stable, predictable terms allowed for the creation of these various forms of mass markets. Developments in platforms for large scale buying and selling necessitated the introduction of form contracts. Given the scale of e-commerce, it is not surprising that wrap contracts are ubiquitous and have developed their own form and logic. But the underlying phenomenon is no different now than at other stages of the development of mass commercialization.

This last point seemingly belies Professor Kim's conclusion that wrap contracts are different from other forms of standardized contracts.[8] She points to issues of contractual formation and notice as illustrating the difference in kind of contemporary wrap contracts. I do not think that the historical background to wrap contracts in mass marketing undermines Professor Kim's point. Her conclusion rests on judicial treatment of wrap contracts. It may be the case that courts do not see the historical continuity and, instead, distinguish past instances of standardized contract from the current practices of online contracting. In addition, the mechanisms of online contracting, such as the phenomenon of clicking on terms, may create a different set of practices that provide the basis for a different legal model than what would be used for standardized contracting in bricks and mortar retailing. Courts may view the act of clicking as more akin to notice and assent than terms in mail order catalogues or in telephonic communications.

Moreover, placing wrap contracts within the context of mass marketing highlights Professor Kim's concerns with wrap contracts as creating a new form of contracting that betrays traditional notions of negotiation,

7. *See, e.g.*, Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiations Between Businesses and Consumers*, 104 MICH. L. REV. 857, 860-64 (2005).

8. *See* KIM, *supra* note 2.

agreement, and assent. Large scale expansions of marketing and commerce made possible by the technologies associated with the Internet may explain the rise of wrap contracts, but they do not justify them. The one-to-many model of commerce is a troubling one from the perspective of competition and market norms. Characterizing wrap contracts as one-to-many may be misleading since there is more than one merchant on the Internet. But to the extent consumers are locked into a particular retailer because of experience and reputation, wrap contracts may be perpetuating and difficult to alter. Furthermore, retailers may compete with each other over contractual terms. The result would likely be homogeneity in contract terms, creating contracts that are not only standardized within a firm but also across firms. Structurally, the mechanisms of mass marketing through the Internet create arrangements that are difficult to change and that become entrenched through market forces.

A challenge for scholars and policymakers is whether market forces in contracting create a race to the top or a race to the bottom. Professor Kim concludes that the net result is a race to the bottom, with consumers being hurt by the resulting standardized contract. Terms about choice of forum or means of adjudicating disputes disfavor consumer choice and favor merchants who may lose the incentive to provide valuable services and quality products to consumers. At the same time, notorious e-merchants like Gateway seem to have lost out in the marketplace with practices that have in the long run only hurt the company. Contracting is part of the business model of a merchant, and market forces ultimately determine how successful these business models are. While a laissez-faire system may ultimately punish some bad actors, that does not mean policymakers and scholars should defer to a system of laissez-faire to police questionable business practices, such as those that arise in wrap contracts. Professor Kim makes the case for some regulation of wrap contracts, and these regulations in turn, serve to police mass marketing on the Internet. While e-commerce may explain the phenomenon of wrap contracts, it does not by itself explain how wrap contracts should be regulated. For that, one needs to turn to other aspects of the contemporary Internet marketplace.

DIGITAL TECHNOLOGY AND WRAP CONTRACTS

A second explanation for the rise of wrap contracts is the ability of digital technologies to facilitate large scale contracting. By reducing the costs of creating and disseminating information, digital technologies and mechanisms of interface and communication make it easier for merchants to produce forms of one-way and two-way communication to users. Because

of the reduction in costs of communicating, wrap contracts readily proliferate and become a common practice in online retailing.

A causal explanation based on costs may seem to be a facile and overly deterministic explanation for the phenomenon of wrap contracts. But my point is to understand why we see the practices of online contracting in the realm of e-commerce. From this perspective, costs of creating and producing the contracts would logically be one possible explanation. At the same time, a cost-based explanation reflects a technological understanding of wrap contracts. Digital technologies make certain contracting practices easier, but the technology alone cannot explain why the practices arise. However, identifying how wrap contracts are a product of the technology may help to explain what drives the use of wrap contracts.

When understood in its technological context, wrap contracts reflect practices that predate the Internet. Mass marketing was the subject of the previous section, but wrap contracts have other parallels as well. For example, courts in the 1980s looked to an employee handbook as a source of terms and conditions that restricted the rights of employees.[9] The handbook was not digital and often was in the form of an analogue binder that was distributed or made available to the employee during the orientation process. Is a handbook part of the contract? Courts said yes, sanctifying the process of distributing a handbook as creating a contract with the same logic that we see in the 1990s in analyzing wrap contracts. Professor Kim's concerns with assent and notice in wrap contracts with apply equally, if not stronger, to the treatment of employee handbooks. Just as consumers are assumed to have read and understood terms on a webpage or on the plastic wrap of a piece of software, so employees are assumed to have assimilated the hundreds, if not thousands, of pages in a handbook. Thereby, the terms become part of the respective contracts.

Digital technologies only made easier these established and judicially recognized practices. The question for policymakers and scholars is why these practices were so readily accepted and easy to proliferate once digital handbooks replaced the three-ring binder kind. Employee handbooks were used to establish the expectations of the employer and the policies of the company. There were documents that created the environment in which the employee worked and interacted with supervisors and peers. By analogy,

9. *See* Hamby v. Genesco Inc., 627 S.W.2d 373, 375 (Tenn. Ct. App. 1981); Brown v. City of Niota, Tenn. 214 F.3d 718, 721 (6th Cir. 2000); Bonastia v. Berman Bros. Inc., 914 F. Supp. 1533, 1537 (W.D. Tenn. 1995); Bennett v. Steiner–Liff Iron & Metal Co., 826 S.W.2d 119, 121 (Tenn. 1992); England v. Andrews, No. 2:05-0008 2005 WL 2209542 (M.D. Tenn. Sept. 8, 2005); Hooks v. Gibson, 842 S.W.2d 625, 628 (Tenn. Ct. App. 1992); Williams v. Maremont Corp., 776 S.W.2d 78 (Tenn. Ct. App. 1988).

the terms of wrap contracts define the relationship between merchant and consumer, between website and user, and between retail establishment and the public. Handbooks and wrap contracts set background parameters that establish the authority of the firm and the experience of the consumer. As with any other relationship or experience, the consumer is presumed to be free to leave, at least in theory, rejecting the offers and wares of the merchant and taking the business elsewhere. In fact, voting with one's feet may be impossible, constrained by the availability of alternatives and by the homogeneity imposed by the marketplace. Nonetheless, communications through handbooks or through wraps from the company, whether as employer or seller, present the consumer with the set of choices with which freedom can be exercised.

What the employee handbook analogy illustrates is that the phenomenon of standardized contracts, and wrap contracts in particular, operate beyond the realm of consumerism. There is a tendency in some instances to dismiss standard form contracts as the complaint of the well-heeled consumer. A cruise ship vacation is not something everyone can enjoy, and so the woes of a customer stuck with unattractive contractual terms do not engender empathy. Policy concerns appear minimal. But while there may be superficial appeal to anti-consumerist arguments, the practice of standardized contracting may lead to multi-tiered services as the rich purchase more desirable terms than the less well-off. Such tiered service tends to entrench differences in wealth and access to goods and services. Again, the counterargument is that there is no entitlement to the myriad of consumer goods that the modern market provides. But the employee handbook analogy shows that the policy issues extend beyond consumer contracts. Access to health care and other benefits may hinge upon what is in the handbook, whose language and contractual terms are largely in the control of the employer.

Of course, as with many documents, the employee handbook of yore is online. Therefore, they fall under the wrap contracts that are the subject of Professor Kim's book. But the current digital form should not distract from the underlying judicial decision to treat handbooks as contracts when they were in paper form. My point is that digitization only makes it easier for firms to turn communications into contracts. That move, however, is the product of judicial decision-making that granted contract status to documents that may not have been assented to in the conventional ways that Professor Kim describes. Wrap contracts may be a distinct type of contracting, but they are not new. Their antecedents may be in the mass retail or telephonic forms of transactions. Or they may be in the seemingly innocuous books handed out to eager and new employees. But they reflect

a decided policy turn towards allowing firms to determine the environment within which consumers and employers act.

Assessing wrap contracts and their precedents requires digging deeper into why firms have been given the power to shape the terms within which such fundamental interactions as work and consumption operate. The explanations in this and the previous section suggest that changes in technology and the sociology of markets may explain why phenomenon like wrap contracts arise and proliferate. But they do not explain the underlying normative choices that make wrap contracts take root. That question is the subject of the next section, which lays the basis for the final section that addresses responses to the practices of wrap contracts.

CONTRACTUAL AUTHORITARIANISM

In this section, I present the argument that the phenomenon of wrap contracts reflects a deeper normative and cultural development of what I call contractual authoritarianism. This terminology may sound grandiose, but I think it is important to recognize in formulating policy responses to wrap contracts. By contractual authoritarianism, I mean the delegation of how to determine contractual terms to one side of a transaction. Such delegation, determined through judicial decision-making, is deemed necessary in order to bring stability and order to market transactions. Stability and order is deemed desirable in order to satisfy the expectations of firms while allowing dissemination of products and services to consumers. The view is that stability and order in markets help both consumers and firms and that firms are in the best position to determine the way in which stability and order is to be determined and maintained.

Wrap contracts, and contracts of adhesion more broadly, are sometimes thought of as reflecting libertarian norms.[10] I think this view is incorrect. Contracts of adhesion do not reflect a form of contractual liberty or freedom of contract. The state's involvement in sanctifying contracts of adhesion through judicial decision-making is too obvious to support a libertarian understanding of wrap contracts and its variants. Judge Easterbrook in his ProCD and Hill opinions seemingly talks of the freedom to contract.[11] But his examples, ranging from insurance contracts to airline tickets, are ones in which transactions are regulated. While we may not all be realists now, there is a general recognition, tacit or explicit, that contracts are creatures of

10. *See* Llewllyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL'Y 475, 484 (1997).

11. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1451 (7th Cir. 1996).

the state and that contract law serves to regulate transactions of all varieties. Courts and other state actors are playing a larger role than the minimalist one envisioned by libertarians.

Instead, contract law embodies a notion not of freedom but of power to determine the terms of a transaction. From questions of formation to questions of remedies, contract law determines who in a relationship ultimately has the power to shape the terms of the agreement. Formation rules provide default situations against which parties can strategically shape communications of offer and acceptance to either ensure the application of contract law or to sometimes avoid its imposition. Remedies determine the value of contractual rights and the power of the breached party to secure enforcement and the promised conduct from the breaching party. To the extent there is contractual freedom, it is exercised within the confines of the transaction and in the parameters set forth by contract law and attendant legal institutions.

Some may be put off by the heavy-handed use of "authoritarianism." The term has political, economic, and cultural dimension. It contrasts with totalitarianism, which implies dictatorship and total control over law and the lives of others. Totalitarianism is the opposite of the rule of law, representing the rule of man rather than that of disinterested and transparent institutions. Authoritarianism, however, rests on certain voices being more heavily weighted or respected than others. Paternalism can be one example of authoritarianism under which an individual or group deems to know better about the interests of other people. But authoritarianism may reflect a superior position, perhaps a parent, perhaps a teacher, perhaps an administrator. In the contract context, the concept of authoritarianism belies the notion of bargained-for exchange or negotiation. Instead, terms are determined by one side because of some aspect of superiority, whether in the form of expertise or in the form of risk-bearing in entering into a transaction.

Authoritarianism is not inconsistent with economic notions of markets. Order and rules, of some variety, are needed for markets to operate and not just simply degenerate into anarchy. The difficult question is what form these orders and rules should take. Professor Bernard Harcourt has pointed out the role of criminal law, particularly with respect to property crimes, as an important condition for the development of market economies.[12] He makes the case that it is not a mere coincidence that market based reforms often are accompanied by strict criminal laws. Authoritarianism, however,

12. BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER 121-23 (2011).

can also entrench monopolies and other concentrated economic and political interests. Therefore, market economies also rest on challenges to authority, which can take the form of political voice and entry of new firms that attempt to limit overreaching by incumbents. What form such voice and entry take is reflected in the form that order and rules lay the foundation for a market economy. Defining order and rules is not simply a static notion. Instead, in market economies, order and rules are dynamic in nature, creating a tension between the need for stability and the desire for change.

Searching for the right mix of stability and change in the design of markets implicates how we understand authoritarianism culturally. As a matter of culture, authoritarianism suggests uniformity and homogeneity in literary and artistic expressions. Consistent with the search for stability, authoritarianism implies a single, unalloyed message that promotes conformity. But as a cultural matter, authoritarianism is not inconsistent with a diversity of opinion and viewpoint. Multiple, divergent authorities might seem paradoxical, but the contest among authorities can strengthen stability and order.[13] This notion of agon within authoritarianism is illustrated within copyright law (and perhaps other intellectual property systems), which promotes originality in distinctive authorial voices that vie with each other for the attention of the audience.[14] Originality may lead to cacophony just as markets may descend into anarchy. But the challenge is to organize institutions so as to channel discordant authorities into a stable and dynamic system of communication. Cultural norms and legal rules that define culture, which is a catch-all phrase for language, religion, social attitudes and practices, help to prevent authoritarianism from becoming an entrenched form of organization.

Wrap contracts reflect a notion of contractual authoritarianism. They reflect judicial choices that one side of a transaction should determine its scope and parameters. The purported goal is to have stability in the marketplace, a characteristic that might be desirable for an emerging set of institutions that we witness in e-commerce and the Internet. From this perspective, wrap contracts are arguably a historically contingent phenomenon, representative of the concerns arising in the 1990s from a new platform for commercial exchange. The current dilemma is how to

13. *See* CLAUDIO COLAGUORI, AGON CULTURE: COMPETITION, CONFLICT, AND THE PROBLEM OF DOMINATION 218-19 (2012) (describing a culture of competition setting the foundation for militarism and conflicts among authorities).

14. *See* ADRIAN JOHNS, PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES 20-22 (2009) (describing the invention of piracy as a way to define authority of creator).

move from this concept of contractual authoritarianism in a way that encourages the cultural and economic dynamism of market systems.

One option is to shift the terms of authoritarianism from the firm to the consumer. Doctrines like unconscionability are based on that goal. The problem is that authoritarianism that is consumer driven may potentially be as troublesome as firm-based authoritarianism. Professor Kim expresses some hesitation in using the unconscionability doctrine as a policy lever to limit wrap contracts. Her hesitation in part stems from the emphasis on process by courts applying the doctrine. At the same time, Professor Kim does not provide a more substantive alternative to breathe more life into unconscionability. This lack of a proposed alternative, I would argue, illustrates why the doctrine may not be very useful standing alone as a means of giving more voice to consumers. The broader concern is that consumer authoritarianism, as evinced through doctrines like unconscionability, may also limit the cultural dynamism of market systems. With these thoughts in mind, I turn in the next and concluding section to creative alternatives to the next phase of e-commerce and the response to wrap contracts.

LOOKING FORWARD

Wrap contracts as described by Professor Kim are a phenomenon of the 1990s, the implementation of an authoritarian notion of contracts in a time when mass markets expanded the seeming need for stability and order and the availability of digital technologies facilitated the costs of implementing standardized terms. Against this background, the final question is: Where do we go next? What are the responses to contractual authoritarianism?

Professors Kim and Radin offer irenic and ecumenical responses to the problem of standardized contracts, or what I would call contractual authoritarianism. Professor Radin would cure boilerplate through traditional consumer protection regulation tailored to the world of e-commerce. Professor Kim's solutions are more tentative, perhaps better attuned to the limits of traditional market regulation, but also focused on the problems of notice and assent. Her solutions are rooted in her diagnosis of the deracination of wrap contracts from traditional contract law. Consequently, a return to core concepts of contract law serves as her solution.

Both authors have done a tremendous job in synthesizing a wealth of case law and scholarship to document the problem with standardized contracts, whether described as wrap contracts or as boilerplate. What I glean from them, especially Professor Kim's book, is a marked shift in how contracts were construed for reasons of promoting market stability and

order. In calling this shift, contractual authoritarianism, my goal is to fashion a solution appropriate to my diagnosis of contractual failure.

The diagnosis is ultimately one of attitude and of culture. Wrap contracts reflect a need to vest decision-making authority in companies in order to cement their role as market creators and entrepreneurs. Arguably, this cultural move was deemed necessary in the 1990s in order to lay a stable foundation for e-commerce. What seems to be an affirmation of freedom of contract is actually a flight towards security. We can take comfort that the Internet is here to stay as part of the social, economic, political, and cultural infrastructure in which we interact, communicate, and conduct our business. Authoritarianism has its appeal as a cover for fear. It is time to confront our fears, understand their true scale, and retreat from authoritarianism.

How will this retreat occur? Traditional regulation may be one part of the answer. Appeals to traditional contract law may be another. But I see the response to a political and cultural move by courts as lying in politics and culture. Consumer activism in the form of dissent and voice through Internet and other channels is the heart of the solution. Such activism has channels in documenting attempts by companies to implement terms that limit consumer rights or constitute overreaching. User responses to attempts by Facebook to alter their terms of service on privacy are one example of how effective activism can be. Monitoring of terms and conditions on websites that police egregious contract provisions is another example of how consumer activism can counter authoritarianism by firms. Democratic in spirit and tone, activism can lead to the necessary transparency and pressure that leads to the dynamism stifled by contractual authoritarianism.

Professor Kim's book does a masterful job of showing us, as readers, how contractual authoritarianism (my term, not hers) permeates market transactions and law. The next step is to take her instruction and move to the future stage of contracting and e-commerce, one that utilizes the full power of the Internet to counter what courts have entrenched through legal doctrine.