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WRAP CONTRACTS: HOW THEY CAN WORK BETTER FOR BUSINESSES AND CONSUMERS

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WRAP CONTRACTS: HOW THEY CAN WORK BETTER FOR BUSINESSES AND CONSUMERS

ABSTRACT

In most online transactions, consumers enter into contracts without understanding or knowing the terms of the contract. Although technology has improved economic efficiency, and convenient access to low-cost or free products and services is now expected by consumers, the cost of conducting business is still high. The tradeoff for such convenience is forfeiting important rights and exchanging valuable consideration such as proprietary data. Consumers have a duty to read contracts, but studies overwhelmingly demonstrate that consumers are not reading; and, if they are reading these contracts, they do not understand them. Traditional elements of contract formation have essentially morphed into one general issue: whether there was sufficient notice that a contract exists. As a result of the gap between consumer contracts (or “wrap contracts”) and contract law, consumer contracts are predominantly one-sided and esoterically unreadable, unnoticeable, and more favorable to the businesses. When consumers wish to challenge the transaction and contract terms after being dissatisfied with the product or service, consumers learn that in most circumstances, there are limited remedies available. The result is the courts’ engagement in reactive legal analysis that varies from jurisdiction to jurisdiction—and this negatively impacts both consumers and businesses. Despite the advantage businesses have over consumers, some businesses have attempted to impose terms that later turn out to be unenforceable, which is not favorable to the business either. So, businesses would also benefit from clear standards regarding contract presentation and what is considered unconscionable. The least that should be required to establish fairness and transparency is to legally specify the manner in which consumer contracts are being presented to consumers. In addition to modifying the presentation of these consumer contracts, there should be graylisted terms in non-negotiated contracts so that there is less confusion as to what type of terms are enforceable. California, being on the forefront

of much of the contract law reform, can set an example for other jurisdictions to further protect consumers and businesses and provide fair, simple, and clear standards. The end goal would be for federal law to enact a similar statute that would apply to all states.

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I. INTRODUCTION

According to Internet World Stats, in 2017, there were approximately 287 million Internet users in the United States.¹ Most websites, particularly those that feature application (“App”) platforms and other related software programs, contain online contracts that bind users to certain contractual terms and conditions. In many cases, users (1) are unaware of these contracts, which are non-negotiable (meaning that the business drafts the contract and the consumer must either agree to the terms or not use the product/service), and (2) lack the fundamental understanding and comprehension of what they are authorizing when using the product or service.²

The tradeoff for increased efficiency in these contracts is forfeiting valuable rights and potentially increasing the user’s vulnerability to cybercrime or fraud.³ Online transactions are highly efficient and necessary; however, businesses have indulged in online technology practices where they craft and mandate rules that protect their business models and usurp users’ rights, including privacy rights.⁴ While technological advancements have resulted in contract laws being generally favorable to the businesses, they are not at any fault for utilizing such favorable bargaining power to their advantage, especially because many products and services are free or low-cost. Courts and

1. *Internet Usage and 2017 Population Statistics for North America*, INTERNET WORLD STATS, <http://www.internetworldstats.com/stats14.htm#north> (last updated June 30, 2017) (providing documented analytical information regarding worldwide Internet usage, among other statistical analysis).

2. Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 456 (2002); Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 316 (2011) (“As a matter of contract doctrine, a nonnegotiable standard form consumer contract is viewed as a ‘contract of adhesion,’ and its terms are subject to a substantive judicial review for fairness.”).

3. Mark Sullivan, *Data Snatchers! The Booming Market for Your Online Identity*, PCWORLD (June 26, 2012, 8:01 AM), http://www.pcworld.com/article/258034/data_snatchers_the_booming_market_for_your_online_identity.html (explaining that, to make money, Facebook collects personal data from its users that is valuable to marketers and advertisers).

4. NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 112 (2013) [hereinafter WRAP CONTRACTS] (analyzing the emergence of wrap contracts and how technology has advanced ahead of legislation that would regulate oppressive contracting).

Congress are generally reactive rather than proactive, leaving businesses to operate in a vacuum, generating uncertainty, confusion, and increased risk exposure that is inherently detrimental to consumers and to businesses themselves.⁵ United States consumer law has not kept up with the high-velocity technology platforms that businesses are inventing and rolling out to the market.

In response to this market imbalance and lack of clarity in consumer contracts (especially online contracts), this comment proposes that California enact legislation to address these deficiencies in consumer contracts. A task force of concerned citizens, government officials, attorneys, economic experts, business professionals from different industries, and members of the Federal Trade Commission (“FTC”) and California Department of Consumer Affairs (“CCA”) should be formed. The task force would assist the legislature in the process of adopting legislation to resolve issues of notice, readability, consent, and unconscionability in non-negotiated consumer contracts. Enacting such legislation requires a concerted effort of enforcement by the courts and regulatory agencies, such as the FTC and CCA. Non-negotiated consumer contracts should be: in plain English; unambiguous; easy to skim; contain clear headings that describe each term; and (for online contracts) require clickwrap for consent purposes. To address the issue of bargaining imbalances, this legislation should also graylist substantively unconscionable terms that foreclose various substantive rights (for example, choice of law) to a more heightened level of judicial scrutiny that is clearly delineated.

To demonstrate the need for these procedural and substantive reforms, Part II of this comment provides statistical analysis demonstrating that consumers do not read the contracts they enter into, despite their corresponding duty to read. Part III provides background information contrasting traditional contract doctrine with the evolving law surrounding wrap contracts (modern consumer contracts). Part IV discusses laws implemented in other countries and proposals made by scholars to reform United States contract law addressing underlying consumer contractual deficiencies, while also explaining unconscionability in practice and how it should play a stronger role in

5. Nancy S. Kim & D.A. Jeremy Telman, *Internet Giants as Quasi-Governmental Actors and the Limits of Contractual Consent*, 80 MO. L. REV. 723, 745, 748 (2015) (discussing government datamining in private companies and the myth of contractual consent).

consumer contracts. Finally, Part V outlines and describes the legislation this comment proposes as a means to assist consumers and create a contracting environment that is fair for all parties. The proposed legislation is entitled, The Simplified Consumer Contracts Act (“SCCA”).

II. LACK OF READABILITY AND ITS COERCIVE POWER

Studies reveal consumers fail to read online contracts, which leads to the conclusion that most consumers are uninformed about the transactions they agree to. However, failing to read an online contract is somewhat understandable, especially considering the number of contracts consumers enter into and the time it would take to read all the terms included. This leads to troubling results, given that consumers have a legal “duty to read” contracts they enter into, whether online or not.

A. *Studies on Consent and Readability of Contracts*

According to a New York University Law School study, only 1 or 2 consumers out of 1000 read an online consumer license agreement; of that, the average reader spent only twenty-nine seconds reading.⁶ The study compared social media terms of use (“TOU”) with consumer license agreements (“CLA”)—which are licenses that grant users permission to use the software—and found that the average social media TOU was more than twice the length of the CLA.⁷ The study’s data was obtained from monitoring one month of Internet use from 48,154 website users.⁸ In tracking all Internet usage from these 48,154

6. Thomas H. Koenig & Michael L. Rustad, *Wolves of the World Wide Web: Reforming Social Networks’ Contracting Practices*, 49 WAKE FOREST L. REV. 1431, 1432–34 (2014) [hereinafter *Contracting Practices*] (citing *Aggressive Sales Tactics on the Internet and Their Impact on American Consumers: Hearing Before the S. Comm. on Commerce, Sci., & Transp.*, 111th Cong. 27 (2009) (statement of Florencia Marotta-Wurgler, Professor of Law, N.Y.U.)).

7. *Id.*

8. Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 19 (2014) (addressing concerns of the uninformed consumers and the statistics that demonstrate the businesses’ advantage).

users, only 1 in 200 even clicked on the page that contained the TOU.⁹ Of about 29,000 visits to websites that contained free software, only 43 users even visited the page that contained the CLA.¹⁰

In a recent University of Connecticut and York University integrated study, researchers created a fake social networking site called “Name Drop.”¹¹ The survey selected 543 students, and Name Drop’s two agreements for use of service were the privacy policy and TOU, containing 7977 and 4316 words, respectively.¹² On average, the privacy policy would have taken thirty minutes to read, and the TOU would have taken sixteen minutes.¹³ The TOU granted Name Drop the right to pass along anything users shared on Name Drop to the United States National Security Agency (“NSA”).¹⁴ Only 1 of 500 users voiced a concern about this term to Name Drop.¹⁵ The right to privacy under the Fourth Amendment is sacrosanct, as it protects people from unreasonable government intrusion of their person and property.¹⁶ Yet, all but one user noticed the term and understood its repercussions in a way that caused him or her to express concern.¹⁷

9. *Id.* at 24.

10. *Id.*

11. Shankar Vedantam, *Do You Read Terms of Service Contracts? Not Many Do, Research Shows*, NAT’L PUB. RADIO (Aug. 23, 2016, 5:06 AM ET) [hereinafter NPR], <http://www.npr.org/2016/08/23/491024846/do-you-read-terms-of-service-contracts-not-many-do-research-shows>.

12. David Kravets, *TOS Agreements Require Giving Up First Born—And Users Gladly Consent*, ARS TECHNICA (July 12, 2016, 3:20 PM), <https://arstechnica.com/tech-policy/2016/07/nobody-reads-tos-agreements-even-ones-that-demand-first-born-as-payment/>.

13. *Id.*

14. NPR, *supra* note 11.

15. *Id.*

16. *Katz v. United States*, 389 U.S. 347, 350 (1967) (“[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further . . .”).

17. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013); *United States v. Jones*, 565 U.S. 400, 405 (2012).

A more outrageous term was that as a form of payment, users would forfeit their first-born child.¹⁸ Only 2 of 500 users noticed this term.¹⁹ Although forfeiting your first-born child as compensation is frightening, the NSA term is still unsettling, and is a slightly more extreme version of Twitter's privacy policy (and the policies of other social media services). The Twitter privacy policy in part states, "we may preserve or disclose your information if we believe that it is reasonably necessary to comply with a law, regulation, legal process, or governmental request"²⁰ Name Drop's NSA provision expands Twitter's narrower "we believe [] is reasonably necessary" disclosure criterion to "anything." However, reasonably necessary is not clearly delineated. Still, Twitter is a widely used platform (for example, by United States President Donald Trump) that has relatively broad discretionary authority to disclose private data to the government. Amid the current Facebook controversy regarding collection of data from its web site and from its mobile device App, Facebook allegedly had to scramble to rewrite its data policy, even though Facebook's presentation and content of its terms appear more consumer friendly than Twitter's.²¹

The next study examined whether consumers understand the terms of these contracts and specifically, privacy policies. According to a University of Pennsylvania study on consumer advertising, 62 percent of consumers believed privacy policies protected their privacy, meaning that they were unaware privacy policies more so limit

18. Ian Paul, *Goodbye, First Born Children: This Study Shows How Wordy Terms of Service Hurts Users*, PCWORLD (July 13, 2016, 7:44 AM), <http://www.pcworld.com/article/3094855/internet/goodbye-firstborn-children-this-study-shows-how-wordy-terms-of-service-hurt-users.html>.

19. NPR, *supra* note 11.

20. *Privacy Policy*, TWITTER, <https://twitter.com/privacy?lang=en> (last updated June 18, 2017); *But cf. Data Policy*, FACEBOOK, <https://www.facebook.com/about/privacy/> (last updated Sept. 29, 2016) ("Information we receive about you, including financial transaction data related to purchases made with Facebook, may be accessed, processed and retained for an extended period of time when it is the subject of a legal request or obligation, governmental investigation, or investigations concerning possible violations of our terms or policies, or otherwise to prevent harm.").

21. Josh Constine, *Facebook Rewrites Terms of Service, Clarifying Device Data Collection*, TECHCRUNCH (Apr. 4, 2018), <https://techcrunch.com/2018/04/04/facebook-terms-of-service/>.

privacy.²² In fact, 50 percent of consumers in the study agreed with the statement that “[e]xisting laws and organizational practices provide a reasonable level of protection for consumer privacy today.”²³ If most consumers are not even aware of what privacy policies entail, it is questionable that half of consumers are comfortable with how their privacy rights are curtailed. The results of this study are not surprising considering that online contracts surpass the ability of average adults to understand them, corroborating the notion that consent is conceptually flawed.²⁴ According to the same study, 97 percent of consumers do not know what they are reading.²⁵ For these reasons, the laws should change to at least provide consumers the opportunity to be informed by requiring such contracts be noticeable and understandable because then there would be no excuse for consumers not to read them.²⁶

Even when businesses provide sufficient notice of contracts and the consumer reads them, consumers frequently lack the capacity to read because of the theory of information overload.²⁷ In one study conducted by Michael Masson and Mary Anne Waldron, participants were presented with excerpts of four contracts: a mortgage, a property sale, a bank loan, and a lease renewal.²⁸ Then, each participant was measured on how long they took to read the four contracts.²⁹ The study explored

22. See JOSEPH TUROW ET AL., CONTRARY TO WHAT MARKETERS SAY, AMERICANS REJECT TAILORED ADVERTISING AND THREE ACTIVITIES THAT ENABLE IT 1, 21 (2009) [hereinafter TAILORED ADVERTISING SURVEY], http://graphics8.nytimes.com/packages/pdf/business/20090929-Tailored_Advertising.pdf; Nancy S. Kim, *Contract’s Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1360 (2011) [hereinafter *Contract’s Adaptation*] (explaining the contract practices of software companies).

23. TAILORED ADVERTISING SURVEY, *supra* note 22, at 21.

24. See generally Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL’Y REV. 233, 233–39 (2002) (explaining that consumer contracts must comport with the reading competence of the general population).

25. *Id.* at 237.

26. *Id.* at 235.

27. James Gibson, *Vertical Boilerplate*, 70 WASH. & LEE L. REV. 161, 197 (2013) (advocating for the reform of the unconscionability analysis by allowing sellers and buyers to work together to minimize boilerplate provisions if both parties can agree to adjust the cost).

28. *Id.* at 196.

29. See generally Michael E.J. Masson & Mary Anne Waldron, *Comprehension of Legal Contracts by Non-Experts: Effectiveness of Plain Language Redrafting*, 8

the use of plain English in contracts, testing four different versions of each contract with varying degrees of complexity in its wording.³⁰ The average contract contained 3016 words.³¹ The average consumer read contractual language at a rate of 177.5 words per minute.³² The total words each subject read was 74,897, which would take over seven hours to read without a moment's rest.³³ The information processing costs are so significant that an economically-rational consumer might focus that valuable time instead on understanding the features of the product or service, and focusing on material terms they can understand.³⁴ To translate the time spent reading these contracts into economic terms, the value of reading consumer contracts is converted to an average of ninety-three words to the dollar, which is not economically efficient compared to the number of contracts consumers enter into.³⁵

Schwartz and Wilde's informed minority theory counters the theory of information overload by explaining that the market adequately responds to consumer preferences, because the informed minority who takes the time to read and learn about the transaction will adequately advocate for consumer preferences.³⁶ While this argument sounds promising, it assumes that the informed minority have preferences similar to the majority, and that there is homogeneity.³⁷ In consumer law, homogeneity is questionable because the majority of consumers fail to read contractual terms, demonstrating the value they place on the time spent attempting to understand the terms.³⁸ Additionally, the informed minority is such so small that they do not have the numbers to adequately shape the market, nor can they vindicate the rights for

APPLIED COGNITIVE PSYCHOL. 67, 67–85 (1994) (measuring and comparing comprehension levels between plain English and legalese).

30. Gibson, *supra* note 27, at 198.

31. *Id.* at 195.

32. *Id.*

33. *Id.* at 196.

34. *Id.*

35. *Id.* at 197.

36. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 671 (1979) (describing how imperfect information to consumers prevents utility maximizing contract choice).

37. Gibson, *supra* note 27, at 201.

38. *Id.* at 202.

others without significant support. To put this theory into perspective, if the informed minority attempted to read on average all the privacy disclosures they received in 2008, it would have taken that person seventy-six work days to complete the task during that year.³⁹ The informed minority in Name Drop consisted of just one or two people who voiced a concern regarding the terms relating to the NSA and forfeiting an unborn child. To protect themselves, other users would have to use unconscionability as a shield to invalidate the terms.

B. *The Flesch Readability Ease Scale*

Many statistical formulas have been created to compute whether a writing is understandable to the average reader. The most commonly used readability formula in the United States is the Flesch Readability Ease Scale.⁴⁰ This formula analyzes total word length and total syllables per word.⁴¹ The scale ranges from zero (practically impossible to read) to one hundred (easy for any literate person).⁴² The standard of readability is a score of at least sixty, which is classified as high school level readable.⁴³ Using the Flesch Readability Ease Scale, a study conducted by University of Wake Forest revealed that of the 329 most common social media services in the market, the mean score of their TOU readability was 47.8, and 39 percent of the TOU were classified as fairly difficult to read.⁴⁴ The average rights-foreclosure term was scored 7.2 grade levels above the average reading grade level of the overall contract (i.e. graduate school level and above).⁴⁵ Rights-foreclosure terms essentially usurp important contractual and constitutional rights, and instead create benefits to the provider through “warranty disclaimers, limitation[s] of liability, and mandatory arbitration clauses.”⁴⁶ In addition, only 43 percent of rights-foreclosure

39. Kim & Telman, *supra* note 5, at 733.

40. *Contracting Practices*, *supra* note 6, at 1459.

41. *Id.* at 1458.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1466.

46. Thomas H. Koenig & Michael L. Rustad, *Digital Scarlet Letters: Social Media Stigmatization of the Poor and What Can Be Done*, 93 NEB. L. REV. 592, 628 (2015).

terms within these contracts were conspicuous (noticeable enough to catch the attention of readers as they went through the contract).⁴⁷ This means that even if the consumer attempts to read the contract, they will have difficulty understanding its terms or identifying rights-foreclosure terms.

C. *The Duty to Read*

Consumers generally have a duty to read contracts they enter into, regardless of whether they actually read it, or whether the contract is understandable to the average consumer.⁴⁸ The duty to read attaches when there is sufficient notice of the contract, which means the drafter directs the attention of the non-drafting party to the existence of a binding agreement.⁴⁹ Sufficient notice can be actual or constructive.⁵⁰ Constructive notice occurs when circumstances are sufficient to put a reasonably prudent person on inquiry notice of the terms.⁵¹ In practice, constructive notice of online contracts is based on the visibility and wording of the notice—whether it says “Click here for the Terms of Service,” or “You must Agree to our Terms of Use,” with a link provided in that same location.⁵² The Uniform Commercial Code (“UCC”) requires conspicuous writing for specific terms excluding or modifying warranties on products, but not on all rights-foreclosure terms, such as limitations on remedies, liabilities, jury trials, etc.⁵³

The duty to read can lead to “drafters [having] a free pass to sneak in one-sided terms”⁵⁴ When consumer contracts are functionally unreadable or terms are hidden, the duty to read becomes conceptually

47. *Contracting Practices*, *supra* note 6, at 1485.

48. SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1577 (rev. ed. 1937).

49. *Specht v. Netscape Commc’n Corp.*, 306 F.3d 17, 31 (2d Cir. 2002).

50. CAL. CIV. CODE § 18 (West 2007).

51. *Specht*, 306 F.3d at 31.

52. WRAP CONTRACTS, *supra* note 4, at 127.

53. See U.C.C. § 2-316(2) (AM. LAW INST. & UNIF. LAW COMM’N 2002); *Contract’s Adaptation*, *supra* note 22, at 1338.

54. Omri Ben-Shahar, *The Myth of the ‘Opportunity to Read’ in Contract Law*, 5 EUR. REV. OF CONT. L. 1, 8 (2009) (proposing non-legal approaches to make contracts more transparent).

unfair.⁵⁵ Consumers generally do not read contracts because it is time-consuming, the terms are difficult to read, and the terms are often non-negotiable.⁵⁶ Their decision to read a contract is also affected by whether the terms are available before or after the transaction is complete, in small or large print, at the top of the page, in a unified agreement, in plain English, long or short in length, or whether they are paying for the service.⁵⁷ In effect, consumers invoke a cost-benefit analysis when deciding whether to read online contracts. The cost-benefit analysis shifts dramatically when the consumer has invested significant resources—for example, if the consumer obtains a license for an expensive software program and wants to understand what he or she can do with the license.⁵⁸ One aspect of this type of cost-benefit analysis that is sometimes overlooked is that consumers essentially purchase services by giving up private data, which has a marketable value.⁵⁹ Consumers' confidential information is a proprietary interest that they usually and unknowingly forfeit when using a product or service.⁶⁰ Considering contracts between businesses and consumers are symbiotic relationships, it would further both sides if the terms were clear and reasonable to both parties. Businesses can reinforce their style and brand by drafting a contract that is enforceable while simultaneously addressing consumers' interests in fairness and privacy concerns; so, if the consumer is not reading the contract, the consumer is still treated fairly.⁶¹

D. Examples and Comparisons of Online Consumer Contracts

For illustrative purposes, compare the characteristics of Tumblr's and Facebook's terms of service ("TOS") with that of Twitter's.

55. Tal Kastner, *How 'Bout Them Apples? The Power of Stories of Agreement in Consumer Contracts*, 7 DREXEL L. REV. 67, 68 (2014) (revealing how agreements have manipulated consumers in the past).

56. See Ben-Shahar, *supra* note 54, at 2.

57. See *id.* at 5.

58. See *id.* at 7.

59. WRAP CONTRACTS, *supra* note 4, at 127.

60. *Contract's Adaptation*, *supra* note 22, at 1357.

61. Adam Nyhan, *In Business Contracts, Plain English is Better than Legalese*, OPTICLIFF LAW (June 24, 2016, 12:10 PM), <http://opticliff.com/business-contracts-plain-english-better-legalese/>.

Despite Tumblr's TOS being more reasonable than many other social media services, Tumblr's TOS still contain boilerplate rights-foreclosure clauses such as: warranty disclaimers, limitations on liability, and choice of law.⁶² In its TOS, Tumblr encourages contacting the company before taking legal action in the event of a dispute, and surprisingly, there is no mandatory arbitration clause.⁶³ Overall, Tumbler drafted its TOS in plain English, and most of its terms contained headings that described what each term below meant. For example, the modifications provision, meaning that terms are subject to future amendments, reads: "[a]s Tumblr grows and improves, we might have to make changes to these Terms of Service. When we do, we'll let you know."⁶⁴ Additionally, Tumblr describes what type of data is collected in a more specific manner; for example, financial information is stored but not collected when a user makes a purchase.⁶⁵ This readable and efficient style is trending amongst social media platforms. Although there is a current Facebook controversy, Facebook's data policy appears interactive and friendly toward for users who can click on different terms that are written in plain English, thereby allowing them to understand the terms.⁶⁶ Facebook has broad discretionary authority to collect and sell data. Under the "What kind of information do we collect?" link, the company states "[w]e collect the content and other information you provide when you use our Services, including when you sign up for an account, create or share, and message or communicate with others."⁶⁷

Twitter's TOS has two forms, one for the United States and one for other countries.⁶⁸ The most important difference between the two is the limitations on liability clause. For the non-United States TOS, the limitations on liability clause applies to the maximum extent of the

62. *Terms of Service*, TUMBLR, <https://www.tumblr.com/policy/en/terms-of-service> (last updated Sept. 26, 2017).

63. *Id.*

64. *Id.*

65. *Privacy Policy*, TUMBLR, <https://www.tumblr.com/policy/en/privacy> (last updated June 13, 2017).

66. *Data Policy*, FACEBOOK, <https://www.facebook.com/policy.php> (last updated Sept. 29, 2016).

67. *Id.*

68. *Terms of Service*, TWITTER, <https://twitter.com/tos?lang=en> (last updated Oct. 2, 2017).

applicable law, depending on the country the consumer is located in.⁶⁹ Most of the limitations on liabilities and warranties in the United States would not be enforceable in the EU (to be discussed further). The United States TOS contains a forum selection, choice of law, and consent to jurisdiction clauses (all-inclusively in San Francisco, CA), whereas the non-United States terms do not contain such clauses.⁷⁰ Like Tumblr, however, this TOS does not contain a mandatory arbitration clause.⁷¹ The most recent trend is that consumer contracts, and specifically social media services, are transitioning towards becoming more consumer-friendly by becoming more visually appealing. Thus, some businesses recognize the benefits to this approach, despite the fact that plain-English consumer contracts are not legally required. Therefore, consumers and businesses both benefit from procedural and substantive reform.

III. WRAP CONTRACTS AND THE TRANSITION FROM TRADITIONAL CONTRACT DOCTRINE

United States contract law is based on traditional contract doctrine, and wrap contracts fail to meet the requirements of traditional contract formation. A contract is a promise or set of promises for which the law recognizes both a duty to perform and a remedy to protect the parties' expectations.⁷² A promise is a "manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promise in understanding that a commitment has been made."⁷³ Most contemporary consumer contracts are wrap contracts.⁷⁴

Wrap contracts are contracts that contain unilaterally imposed terms presented in a non-traditional form.⁷⁵ In other words, the seller did not hand you a contract that you signed and delivered back to the seller. Instead, the drafter requires the non-drafting party to forfeit certain rights or take certain actions in order to access the product or

69. *Id.*

70. *Id.*

71. *Id.*

72. RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW. INST. 1981).

73. *See id.* § 2(1).

74. WRAP CONTRACTS, *supra* note 4, at 2.

75. *Id.*

service.⁷⁶ Wrap contracts include, among other forms, shrinkwrap, clickwrap, tapwrap, and browsewrap.⁷⁷ Shrinkwraps are paper contracts that come with a product and the consumer accepts the contract after they purchased and opened the product (taking the plastic off, opening the box, etc.).⁷⁸ Clickwraps are digital contracts that require clicking “I agree” to the terms to access the product or service.⁷⁹ Tapwraps are the same as clickwraps, but the consumer taps to agree.⁸⁰ Browsewraps are contracts that provide notice of the terms that apply to the consumer’s website activity via a hyperlink on the website.⁸¹ Under the American Electronic Transactions Act, these online wrap contracts are enforceable even without an official electronic signature.⁸²

A. Comparing Traditional Contract Law with Wrap Contracts

The problem with wrap contracts is that consumers lack awareness of the terms in the contract, making it difficult to for consumer contracts to meet the elements of traditional contract doctrine.⁸³ Traditional contract formation requires offer, acceptance, mutual assent, and consideration.⁸⁴ An offer is an invitation of a promise or commitment

76. *Id.*

77. *See id.* at 3.

78. *Id.*

79. *Id.*

80. *See TradeComet.com L.L.C. v. Google, Inc.*, 693 F. Supp. 2d 370, 377 (S.D.N.Y. 2010) (noting that “‘clickwrap’ agreements that require a user to accept the agreement before proceeding are ‘reasonably communicated’ to the user”), *aff’d*, 647 F.3d 472 (2d Cir. 2011).

81. WRAP CONTRACTS, *supra* note 4, at 3.

82. 15 U.S.C. § 7001(a)(2) (2012) (“a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”).

83. Ryan J. Casamiquela, *Electronic Commerce: Contractual Assent and Enforceability in Cyberspace*, 17 BERKELEY TECH. L.J. 475, 495 (2002).

84. *See generally* Peter Benson, *Contract as a Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1708–19 (2007) (discussing how contracts should be interpreted as a transfer of ownership).

of future action or inaction.⁸⁵ Acceptance is the manifestation of assent to the offeree's terms in a manner requested or required by the offeror to accept the terms.⁸⁶ An offer essentially creates the power of acceptance in the offeree.⁸⁷ Determining the moment in time of acceptance is important because that is when the contract becomes effective.⁸⁸ Mutual assent, or a meeting of the minds, to the terms the parties set forth is an objective test, which can be created by action or inaction.⁸⁹ Assent requires an offeree's outward manifestation of the intent to engage in conduct, so that the offeror can infer that the offeree assents.⁹⁰ Consideration is the final element whereby an "action in reliance upon a promise is sufficient reason for enforcement only when the action is bargained for by the promisor and given in return by the promisee."⁹¹ Although sufficient notice of the offer is essential for obtaining acceptance in wrap contracts, notice itself is not an element of contract formation.⁹²

The differences between wrap contracts and traditional contract doctrine arise out of advancements in technology. Sufficient notice is virtually the only requirement for wrap contracts.⁹³ Sufficient notice requires consent, and consent cradles offer, acceptance and consideration into one blanket—foregoing the usual analysis of whether there was offer, acceptance, mutual assent, and consideration.⁹⁴ In the online context, consent essentially exists when there is no active rejection of the terms.⁹⁵ Thus, consent has become a superfluous concept.

85. See Carolyn M. Edwards, *Contract Formation Under Article 2 of the Uniform Commercial Code*, 61 MARQ. L. REV. 215, 218 (1977); see also U.C.C. § 2-206(1) (AM. LAW INST. & UNIF. LAW COMM'N 2014).

86. RESTATEMENT (SECOND) OF CONTRACTS § 52(1) (AM. LAW. INST. 1973); U.C.C. § 2-206(2) cmt. 3.

87. RESTATEMENT (SECOND) OF CONTRACTS § 35 (AM. LAW. INST. 1932).

88. Edwards, *supra* note 85, at 234.

89. RESTATEMENT (SECOND) OF CONTRACTS § 19 (AM. LAW. INST. 1981).

90. *Id.*

91. *Wisconsin & Mich. Ry. v. Powers*, 191 U.S. 379, 386 (1903).

92. U.C.C. § 2-206, cmt. 3 (AM. LAW INST. & UNIF. LAW COMM'N 2014) ("[I]t is essential that notice follow in due course to constitute acceptance.").

93. WRAP CONTRACTS, *supra* note 4, at 93–94.

94. *Id.* at 109.

95. *Id.*

In traditional contract doctrine, silence does not constitute acceptance because it is not an active manifestation of intent, but in wrap contracts, silence is a form of acceptance.⁹⁶ If silence equates to acceptance, then the only question to consider is whether sufficient notice was provided. The standard for notice in traditional contract doctrine is whether a reasonably prudent person standing in the shoes of the offeree would accept the contract.⁹⁷ However, in wrap contracts, the reasonable person does not read the terms, nor do they have the legal background necessary to understand how rights-foreclosure terms operate.⁹⁸ Thus, an objective standard of the reasonably prudent offeree is somewhat superficial.

B. Case Law Timeline Regarding Wrap Contract Formation

To find sufficient notice in wrap contracts, courts look at the presentation of the agreement and website design.⁹⁹ Because notice is a fact-intensive analysis, inconsistent holdings among jurisdictions may encourage or discourage plaintiffs to test their specific set of facts.¹⁰⁰

In *ProCD Inc. v. Zeidenberg*, the first landmark wrap contracts case, the Seventh Circuit held a license shrinkwrap agreement as enforceable.¹⁰¹ The court relied on the UCC, concluding that if the buyer fails to effectively reject the goods received, the buyer accepts the goods.¹⁰² According to the court, Zeidenberg inspected the package, used the software, learned of the license agreement, did not return the software, and therefore accepted the terms of the license agreement based on actual notice.¹⁰³ The court also employed a public policy analysis and determined the license was extremely important to ProCD's business, as ProCD's software could be stolen if the contract

96. *Id.* at 110.

97. *Id.* at 111.

98. See MICHAEL L. RUSTAD & THOMAS H. KOENIG, SOFTWARE LICENSING, CLOUD COMPUTING AGREEMENTS, OPEN SOURCE, & INTERNET TERMS OF USE § 9.04 (2016) ("The chief purpose of a terms of use agreement is to use contract law to protect their rights while eliminating the remedies of the user community.").

99. Nancy Kim, *Online Contracting*, 72 THE BUS. LAW. 243, 247 (2016–2017).

100. WRAP CONTRACTS, *supra* note 4, at 114.

101. 86 F.3d 1447, 1448 (7th Cir. 1996).

102. *Id.* at 1452–53.

103. *Id.* at 1453.

was held to be unenforceable.¹⁰⁴ Because of the elasticity of the market at the time—software was a new concept—the only way to profit was to offer an attractive price, even though the cost of that type of business was especially high during this time period.¹⁰⁵ Thus, the court was concerned consumers would have to pay more for software programs because ProCD, and perhaps other software sellers, would increase its price to address these legal concerns.¹⁰⁶ The court held that Zeidenberg’s acceptance of ProCD’s software and the shrinkwrap license created an enforceable contract.¹⁰⁷

As more decisions are issued, specific nuances distinguish one case from another, making it difficult to know whether a given contract will be enforceable. For example, in *Register.com, Inc. v. Verio, Inc.*, the TOS appeared after the transaction was made, but because the plaintiff used the service daily and was aware the TOS existed, the contract was enforced.¹⁰⁸ Comparatively, in *Specht v. Netscape Communications Corp.*, a landmark browsewrap case decided in 2002, the Second Circuit held that requiring users to scroll down the website to find the hyperlink to the browsewrap license agreement rendered insufficient notice.¹⁰⁹ Recently, in *Nicosia v. Amazon.com*, the Second Circuit held that clicking a button to complete the transaction, with a hyperlink to the terms found immediately below the button, also rendered insufficient notice.¹¹⁰ The hyperlink to Amazon’s terms was located on the order page, below the “[r]eview your order” button, in small font that stated: “[b]y placing your order, you agree to Amazon.com’s privacy notice and conditions of use.”¹¹¹ “Privacy notice” and “conditions of use” appeared in blue font, indicating clickable links to separate pages.¹¹² Unlike a typical clickwrap agreement (where user must click, “I agree”), “[p]lace your order” did not put a reasonably

104. *Id.* at 1449.

105. *Id.*

106. *Id.* at 1451.

107. *Id.*

108. 356 F.3d 393, 401 (2d Cir. 2004).

109. 306 F.3d 17, 30–31 (2d Cir. 2002).

110. *See* 834 F.3d 220, 238 (2d Cir. 2016) (holding that reasonable minds could disagree on what constitutes reasonable notice when the terms are inconspicuous).

111. *Id.* at 236.

112. *Id.*

prudent user on notice that he or she was assenting to the term because it did not contain language that clicking the button meant accepting the terms.¹¹³

In *Fteja v. Facebook, Inc.*, the Southern District of New York upheld Facebook's clickwrap agreement based on the assumption that a reasonably prudent Facebook user would understand the consequences of clicking the "Sign Up" button.¹¹⁴ Even though in small print and located just below the "Sign Up" button, there was a statement that said clicking the button meant agreeing to Facebook's terms of service.¹¹⁵ Comparatively, in *Berkson v. Gogo, LLC*, the Eastern District of New York concluded that the hyperlink to the TOU was presented in a deceptively different way than the "sign in" hyperlink, where users could merely check mark the box "I agree to the Terms of Use," and/or "I would like to receive email offers and news from Gogo," rendering the TOU unenforceable.¹¹⁶ Unlike the "sign in" button, which was in all caps, large font, bold, and accessible from multiple locations on the website, the hyperlink to the TOU had none of those features, as it was in small font and only accessible from the one location on the website.¹¹⁷ Gogo's intent was likely to provide as much notice as possible for users to sign up, but little notice of the TOU. The essential difference between the notice provided by Facebook and Gogo was the language that Facebook expressly included, which was that clicking the "sign up" button meant accepting its TOU. Otherwise, both had small font that was somewhat inconspicuous, and both required users to click a separate link to read the TOU.

The Second Circuit in *Meyer v. Uber Techs, Inc.*, on August 17, 2017, held that clicking "Register" was sufficient clickwrap assent to Uber's terms and privacy policies that were located in hyperlinks below the "Register" button.¹¹⁸ After completing the Payment screen, the prospective user must click "Register" to access the App.¹¹⁹ Below the

113. *Id.* at 236–37.

114. *See* 841 F. Supp. 2d 829, 835, 840 (S.D.N.Y. 2012) (citing *Huber v. Dell Corp.*, 835 N.E.2d 113, 122 (Ill. App. 2005)).

115. *Id.* at 834.

116. 97 F. Supp. 3d 359, 370, 404 (E.D.N.Y. 2015).

117. *Id.*

118. 868 F.3d 66, 71 (2nd Cir. 2017).

119. *Id.*

input fields and buttons on that payment screen is black text that advises users, “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY.”¹²⁰ From here, a hyperlink directs users to Uber’s TOS and Privacy Policy.¹²¹ Because of the text advising users of the links to the TOS, the Second Circuit held that Uber provided users with sufficient notice.¹²² Notably, this case was factually similar to the *Fteja* holding, and the result was essentially the same. But, the *Meyer* holding in the Second Circuit reversed the Southern District of New York, where the Second Circuit held that there was sufficient notice of the TOS from the statement, “[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY,” disregarding the district court’s analysis that such statement was not highlighted and was barely legible.¹²³ *Meyer* also reversed the district court by holding that users did not need to affirmatively click to agree to the terms of service because a reasonable user was on notice that clicking meant agreeing to the terms.¹²⁴

In 2016, the Seventh Circuit in *Sgouros v. TransUnion, Corp.*, the same circuit as *ProCD*, held that TransUnion’s arbitration clause was unenforceable.¹²⁵ On the second page of the sign-up sheet, after filling out credit card information, was a button, “I Accept & Continue to Step 3.”¹²⁶ By clicking the button, the user was not required to click on the scroll box or scroll down to view the service agreement.¹²⁷ Instead, the scrollbox contained a hyperlink that led to the service agreement that the user would need to click to view and the arbitration clause was placed on page eight of a ten page agreement.¹²⁸

Comparatively, on February 24, 2017, a court of the Northern District of California, in *Devries v. Experian Info. Sols., Inc.*, granted a motion to compel arbitration, enforcing Experian’s online

120. *Id.* (internal quotations omitted).

121. *Id.*

122. *See id.* at 78–79.

123. *Meyer v. Kalanick*, 199 F. Supp. 3d 752, 759 (S.D.N.Y. 2016), *overruled by Meyer v. Uber Techs., Inc.*, 868 F.3d 66 (2nd Cir. 2017).

124. *Id.* at 760–62.

125. *See Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1030, 1036 (7th Cir. 2016).

126. *Id.* at 1033.

127. *Id.*

128. *Id.*

agreement.¹²⁹ The arbitration clause in the agreement waived the user's right to jury trial and class-wide arbitration.¹³⁰ In the class action lawsuit, Devries, on behalf of the class, claimed that he attempted to obtain a free credit report from www.annualcreditreport.experian.com by filling out personal information, when he got transferred to another website and was denied the credit report because his identity could not be confirmed.¹³¹ Devries then filled out personal information on the Experian website (www.experian.com), resulting in him having to purchase the credit report for ten dollars.¹³² The suit alleged violation of the Fair Credit Reporting Act, the California Consumer Legal Remedies Act, California's Unfair Competition, and other related violations.¹³³ To complete the transactions, he had to click "Submit my secure order," which contained this sentence underneath: "[c]lick 'Submit Secure Order' to accept the Terms and Conditions above, acknowledge receipt of our Privacy Notice and agree to its terms, confirm your authorization for ConsumerInfo.com, Inc., an Experian company, to obtain your credit report and submit your secure order."¹³⁴ In its holding, the court cited *Tompkins v. 23andMe, Inc.*, stating that Experian's notice was sufficient because clicking a button that appeared near a hyperlink to the TOS indicated acceptance of the TOS to a reasonable person.¹³⁵ This result was surprising because the users were transferred multiple times and then had to pay for what plaintiffs thought was a free credit report. It seems as if the *Devries* court may have had reservations about the *Nicosia* holding, even though the terms and conditions were also presented in a confusing manner, and instead seemed to align with the *Fteja* and *Meyer* holdings (though at the time of the holding, this case distinguished itself from *Meyer*, because the *Meyer* case was at the district level).¹³⁶

129. *Devries v. Experian Info. Sols., Inc.*, No. 16-cv-02953-WHO, 2017 WL 733096, at *7, *13 (N.D. Cal. Feb. 24, 2017).

130. *Id.* at *2.

131. *Id.* at *1.

132. *Id.*

133. *Id.* at *4.

134. *Id.* at *5 (internal quotations omitted).

135. *Id.* at *6–7 (citing *Tompkins v. 23andMe, Inc.*, No. 13-cv-05682-LHK, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016)).

136. *Id.* at *8–10.

IV. OTHER APPROACHES UTILIZED OR PROPOSED TO ADVANCE CONSUMER RIGHTS AND CONSISTENCY

Other nations have taken different approaches in an effort to curtail many of the problems described in this comment. Whether we need stricter consumer protection laws or oversight through administrative agencies, different approaches and theories should be analyzed to determine what practical protections best suit the United States.

A. *European Union Directive's Consumer Protection Laws*

The best example of consumer protection laws is the Unfair Contract Terms Directive of 1993 (“UCTD”) of the European Union. The UCTD was enacted in response to the prevalence of unfair practices with non-negotiated contracts amid the advancements in technology. The European Union Directive “acknowledges that standard-form contracting is efficient, but regulatory oversight is necessary so that ‘abuses can be prevented.’”¹³⁷ The UCTD and UCP (“Unfair Commercial Practices”), implemented in New Zealand, Canada and all twenty-eight Member States of the European Union, provide protection for achieving substantive consumer justice.¹³⁸

Under the UCTD, a term in a contract is unenforceable if the terms (1) are non-negotiable, (2) create significant imbalance between the rights of the parties, and (3) that imbalance is contrary to good faith.¹³⁹

137. Council Directive 93/13, of the Council of the European Economic Communities of Apr. 5, 1993, on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) [hereinafter UCTD].

138. *Contracting Practices*, *supra* note 6, at 1494–95; James P. Nehf, *Book Review: European Fair Trading Law: The Unfair Commercial Practices Directive*, 35 INT’L J. LEGAL INFO. 305, 306 (2007) (“The focus of [UCP] is almost entirely on prohibiting deceptive and ‘aggressive’ selling behavior that can influence consumer decisions.”); *see also* Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 454–56 (2013) [hereinafter *Lord Coke*] (discussing the evolving interpretation of internet and electronic contracts among United States courts).

139. *Contracting Practices*, *supra* note 6, at 1509–11 (explaining that the UCTD imposes a duty of readability, so “contracts must be drafted in plain and

The UCTD goes beyond disclosure and readability, and blacklists (or prohibits) certain clauses and graylists suspect clauses, meaning these terms are presumed to be unfair because they unreasonably shift risk to the consumer (under Annex I of the EU’s Unfair Commercial Practices Directive “UCP”).¹⁴⁰ The UCP blacklists the following clauses whenever they appear as non-negotiable: choice of forum; choice of law; disclaimer of warranties; browsewrap or clickwrap contract formation; rolling contracts (most of the terms come after the transaction has been consummated); pre-dispute mandatory arbitration; class action waivers; limitations of remedies or caps; and reduced statute of limitations.¹⁴¹ United States businesses that offer a product or service internationally must adjust their contracts for countries with stricter consumer protection laws than the United States (such as Japan, which does not enforce shrinkwrap license agreements).¹⁴² For example, Twitter has two different TOU; one for those in the United States, and one for those outside the United States.¹⁴³ The UCTD is considered a minimum standard, so member states have wide discretion regarding enforcing even more stringent requirements on businesses; thus, businesses that operate worldwide must comply with these nation-specific standards.¹⁴⁴

The UCTD requires “contract terms to be drafted in plain and intelligible language, and states that ambiguities shall be interpreted in

intelligible language,” and the UCTD grants Member states—through courts, consumer administrative agencies, or other proper authorities— the discretion to strike down terms or the agreement as a whole if terms are unreadable or oppressive).

140. *Id.* at 1503, 1509; *see* UCTD, *supra* note 137 (“The Directive on Consumer Rights (2011/83/EC) replaces, as of June, 13 2014, Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC “to protect consumer[s] in respect of contracts negotiated away from business premises.”).

141. Directive 2005/29/EC, of the European Parliament and of the Council of May 11, 2005 on Unfair Commercial Practices and Amending Council Directives 84/450/EEC, 97/7/EC, and 2002/65/EC, 2005 O.J. (L 149) 22 [hereinafter the UCP]; *Contracting Practices*, *supra* note 6, at 1510–11.

142. *Contracting Practices*, *supra* note 6, at 1494.

143. *See supra* Part II.D.

144. Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Consumer Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1085, 1134–36 (2012).

favor of consumers.”¹⁴⁵ The UCTD does, however, follow the basic United States duty to read doctrine.¹⁴⁶ Regarding enforcement and analysis of UCTD, member state courts and consumer agencies may review all non-negotiated contracts to determine fairness in the terms of the contracts, taking into account the market from the time of contract formation until contract conclusion.¹⁴⁷ When analyzing whether a term is enforceable, for example, the European Court of Justice, under the UCTD, can invoke a *sua sponte* assessment of whether a contract term is unfair.¹⁴⁸ Graylisted terms have a presumption of unfairness, but the unfairness can be overcome, depending on the surrounding circumstances.¹⁴⁹ This type of oversight, in addition to improving the balance between consumers and businesses, has provided clarity and confidence to both parties, because businesses are deterred from utilizing their superior bargaining power in a manner that oppresses parties who lack such power.¹⁵⁰

B. Administrative Agencies

Another approach that has been implemented is the use of an administrative agency (like the FTC) that evaluates and approves contracts, such as the Israeli Standard Contract Tribunal.¹⁵¹ The approval agency certifies that the contract does not contain terms unduly disadvantageous to buyers.¹⁵² Once approved, a contract cannot be judicially invalidated for a period of up to five years.¹⁵³ On its face, the pre-approval option appears attractive for buyers and sellers; for sellers, it provides legal certainty, and for buyers, a third party undertakes the burden of evaluating whether a reasonably prudent

145. *Id.* at 1135.

146. Bakos, Marrota-Wurgler & Trosson, *supra* note 8, at 2.

147. UCTD, *supra* note 137, at art. 4(1).

148. Maud Piers, *Spillovers of European Consumer Law: Validity of Arbitration Agreements . . . and Beyond*, 22 AM. REV. INT’L ARB. 625, 630–31 (2011).

149. Rustad & Onufrio, *supra* note 144, at 1136.

150. *Id.* at 1188–89.

151. Clayton P. Gillette, *Pre-Approved Contracts for Internet Commerce*, 42 HOUS. L. REV. 975, 984 (2005) (conceptualizing the idea of the Federal Trade Commission as a contract approval agency).

152. *Id.*

153. *Id.* at 984–85.

buyer would reject the terms.¹⁵⁴ This creates a safe harbor for sellers, as one seller's approved contract would presumably immunize other sellers in the same line of business from judicial evaluation and invalidation.¹⁵⁵ However, this system also enables competitors to save legal costs by "free-riding" off the approval procedures already undertaken by the competitor that received approval.¹⁵⁶ Additionally, the industry would become centralized because competing sellers would simply utilize the same contract.¹⁵⁷ It is no surprise that even in a smaller country like Israel, there is limited use of the pre-approval process.¹⁵⁸ However, this administrative agency would be a drastic institutional reform in the United States, complicating our contract law even further and curtailing our judicial system.

C. *Specific Assent*

One procedural reform suggested by Professor Nancy Kim is requiring specific assent to all material and rights-foreclosure clauses in clickwrap agreements.¹⁵⁹ Wrap contracts contain blanket assent, the all-or-nothing provision in which the contract is formed entirely if there is an opportunity to read.¹⁶⁰ However, in this proposal, for each rights-foreclosure provision, the non-drafting party must click "I agree."¹⁶¹ This would require consumers to at least look at the rights-foreclosure terms because they would have to click to consent to them.¹⁶² Moreover, businesses would be less inclined to sneak in unconscionable terms, knowing more users would see them. For businesses, this is beneficial because this would negate most arguments that the non-drafting party did not have an opportunity to read. It would create more uniformity and less uncertainty as part of a cost-effective solution. This

154. *Id.* at 986–87.

155. *Id.* at 988.

156. *Id.* at 989.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Contract's Adaptation*, *supra* note 22, at 1341 (deriving from Karl Llewellyn's theory of blanket assent that unreasonable contract terms should still be held unenforceable despite assent to those terms).

161. *Id.*

162. *Id.*

proposal acknowledges that clickwrap assent (as opposed to browsewrap assent) provides for an efficient opportunity to review, as it requires active participation by the consumer.

D. How Unconscionability Has Been Enforced

Unconscionability has two components, procedural and substantive. These two components provide courts with flexibility regarding how they enforce the doctrine. Unconscionability is a key aspect of consumer protection, especially in the context of wrap contracts.

1. The Sliding Scale Approach

Another suggested reform is for all state jurisdictions to engage in a less stringent analysis of unconscionability. Twelve state supreme courts have already diluted the standard of unconscionability into a sliding scale approach.¹⁶³ Applying the sliding scale, unconscionability is analyzed in tandem, meaning that the more oppressive the procedural or substantive prong appears, the less evidence of the other prong one needs to meet the unconscionability standard.¹⁶⁴ Both prongs are still required, but the analysis is less rigorous if one prong does not meet the same level of unconscionability as the other prong.¹⁶⁵

There are a minority of jurisdictions that do away with dual requirements of procedural and substantive unconscionability, requiring only one of the two.¹⁶⁶ The majority view is still that procedural and substantive unconscionability must both be present; however, the recent sliding scale trend is the more flexible standard that etches closer to the minority approach, requiring only one prong.¹⁶⁷ The

163. Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 6, 11 (2012).

164. *Id.* at 12.

165. *Id.* at 18, 57–58.

166. Stacy-Ann Elvy, *Contracting in the Age of the Internet of Things: Article 2 of the UCC and Beyond*, 44 HOFSTRA L. REV. 839, 843 (2016) (suggesting important amendments to U.C.C. Article 2, such as disclosures and unconscionability asymmetry).

167. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000) (holding that a non-negotiated and mandatory arbitration term in an

sliding scale approach, while less stringent than the majority, still remains difficult to meet, because it is challenging to include both substantive and procedural unconscionability, even if one is more severe than the other.¹⁶⁸

Under the minority approach, courts have used procedural unconscionability as a mechanism to invalidate many consumer contracts for their adhesive nature, which is why the trend seems to prefer the sliding scale approach.¹⁶⁹ Under the sliding scale approach, such as under California law, the court may engage first a procedural, then substantive analysis, so as to make it a bit easier to find unconscionability.¹⁷⁰ Because substantive unconscionability is a very high standard, defined as whether the terms would “shock the conscience” (the contract or specific clause provides for unreasonable risk allocation that is too harsh or one-sided, i.e. no reasonable person would agree to such a term), making it difficult to meet.¹⁷¹ Procedural unconscionability touches on contract readability concerns and assesses the bargaining strength of the drafting party (including whether it is a contract of adhesion).¹⁷² Thus, procedural unconscionability may be

employment contract was unenforceable, while citing to the sliding scale approach to unconscionability in 15 WILLISTON ON CONTRACTS § 1763A 226–27 (3d ed. 1972)).

168. *Pendergast v. Sprint Nextel Corp.*, 592 F.3d 1119, 1135 (11th Cir. 2010) (“To determine whether a contract is procedurally unconscionable under Florida law, courts must look to: (1) the manner in which the contract was entered into; (2) the relative bargaining power of the parties and whether the complaining party had a meaningful choice at the time the contract was entered into; (3) whether the terms were merely presented on a ‘take-it-or-leave-it’ basis; and (4) the complaining party’s ability and opportunity to understand the disputed terms of the contract.”) (citing *Powertel, Inc. v. Bexley*, 743 So. 2d 570, 574 (Fla. Dist. Ct. App. 1999)).

169. *See generally* Juliet M. Moringiello & William L. Reynolds, *Survey of the Law of Cyberspace: Electronic Contracting Cases 2006–2007*, 63 BUS. LAW. 219, 224–30 (2007) (discussing how courts applied the concept of procedural unconscionability).

170. *See* CAL. CIV. CODE § 1670.5 (West 2011) (providing for the flexible enforcement of unconscionability so “as to avoid an unconscionable result.”); *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 983 (Cal. 2003); *Lonegrass*, *supra* note 163, at 12.

171. *Wayne v. Staples, Inc.*, 37 Cal. Rptr. 3d 544, 556–57 (Cal. Ct. App. 2006) (holding that there was no procedural or substantive unconscionability, because the price was disclosed, buyers had a meaningful choice in the marketplace, and the price did not shock the conscience).

172. *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015); *Gentry v. Super. Ct.*, 165 P.3d 556, 572 (Cal. 2007).

found in analyzing the fine print, convoluted and unclear language, or through a lack of sufficient notice.¹⁷³ As earlier demonstrated, most cases focus on whether there was sufficient notice of the contract (engaging in a procedural analysis first), and if disputes arise, consumers must use unconscionability as a shield as an attempt to render the term(s) unenforceable.

Sliding scale unconscionability, while helpful in some circumstances, is a defense to invalidate a contract. Conscionability is not an affirmative duty, so businesses need only concern themselves of the possibilities of litigation and may bend the rules, hoping that no one will challenge the enforceability of the contract. Moreover, unconscionability is confusing because there are not clear guidelines to businesses regarding what is acceptable or not, except for the rare circumstances when courts have already held certain consumer contracts or terms unenforceable. When a court finds procedural and/or substantive unconscionability, the court may (1) refuse to enforce the entire contract, (2) enforce the remainder of the contract without the unconscionable clause or clauses, or (3) limit the application of the unconscionable clause so as to avoid the unconscionable results.¹⁷⁴

Overall, unconscionability generally assumes the contract has already been formed and then questions the practices of the business.¹⁷⁵ Instead, courts should be more proactive and apply unconscionability as a bar to contract formation at the outset. In contract formation, a duty to read is imposed on the consumer, and a duty to provide sufficient notice is imposed on the business. If we consider unconscionability after the fact, then this is a dispute that could have been addressed prior to contract formation. Unconscionability in practice is invoked by the consumer by arguing that although the consumer is now aware of the contract terms, the court should not enforce such term(s). The SCCA will expand on how courts can invoke unconscionability in a more proactive sense, graylisting certain unconscionable terms and shifting

173. *See Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (holding an arbitration clause was not unconscionable despite the fact that it was on the reverse page of the agreement and the parties had unequal bargaining power) (citing *Germantown Mfg. Co. v. Rawlinson*, 491 A.2d 138, 145 (Pa. 1985)).

174. *See* U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM'N 1952) (principles of federal unconscionability); CAL. CIV. CODE § 1670.5 (West 2011) (principles of unconscionability in California).

175. WRAP CONTRACTS, *supra* note 4, at 113.

the burden on the business to prove the term is conscionable, and by imposing a duty on businesses to draft readable, noticeable, and fair contracts, which will otherwise be unenforceable if not followed.

2. *United States Supreme Court and California Courts' on Unconscionability*

California courts have applied the sliding scale standard for unconscionability for over twenty years.¹⁷⁶ In an important case that invoked unconscionability and was later overruled, in *Gatton v. T-Mobile USA, Inc.*, the Court emphasized the “important role of class action remedies in California law” and the importance of the class action device for vindicating rights asserted by large groups of persons, which is what many consumer contracts entail.¹⁷⁷ *Gatton*, following the *Discover Bank* rule, held that class action waivers in non-negotiable consumer contracts are unenforceable when small damages renders individual arbitration to be an impractical mechanism for relief.¹⁷⁸

In response to the holding above, *AT&T Mobility LLC v. Concepcion*, a 2011 United States Supreme Court case, held that the Federal Arbitration Act (“FAA”) preempted the holdings of *Discover Bank* and *Armendariz*, stating they conflicted with the FAA’s purpose of ensuring the option of private arbitration regardless of whether the contract was negotiable or not.¹⁷⁹ The Supreme Court emphasized that despite FAA’s preemption, contractual defenses such as fraud, duress, undue influence, and unconscionability must still be available to

176. *See* *West v. Henderson*, 278 Cal. Rptr. 570, 575–76 (Cal. Ct. App. 1991); *Dean Witter Reynolds, Inc. v. Super. Ct.*, 295 Cal. Rptr. 789, 795 (Cal. Ct. App. 1989); *Carboni v. Arrospide*, 2 Cal. Rptr. 2d 845, 849 (Cal. Ct. App. 1991).

177. *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 350–51 (Cal. Ct. App. 2007) (agreeing that class action waivers in consumer contracts for small damage claims are both procedurally and substantively unconscionable) (quoting *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1108 (Cal. 2005)). In 2005, the Supreme Court of California, in *Discover Bank*, held consumer contracts cannot require class action waivers because such waivers are inherently unconscionable, as the consumer is not provided a reasonable opportunity to seek relief.

178. *Id.* at 580–81 (holding there was substantive unconscionability because T-Mobile hid termination fees imposed on consumers and then tried to enforce class action waiver; but, the small amount of damages rendered individual claims untenable).

179. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

invalidate certain mandatory arbitration agreements.¹⁸⁰ The Supreme Court upheld this decision in *American Express Co. v. Italian Colors Restaurant*, stating that the economic hardship for an individual to vindicate his or her claim in individual arbitration does not mean class action waivers in totality violate public policy.¹⁸¹

On April 6, 2017, the California Supreme Court in *McGill v. Citibank, N.A.*, held that an arbitration clause waiving the right to seek a statutory remedy was unenforceable.¹⁸² The arbitration clause contained a waiver of the right to seek public injunctive relief (public injunctive relief is not a class action but has the underlying result of benefitting the general welfare), which violated California's laws on Unfair Competition, False Advertising, and the Consumers Legal Remedies Act.¹⁸³ The California Supreme Court distinguished the facts from *Concepcion*. It is true that a class action does not alter substantive law; instead, it is a procedural device that simply aggregates claims, but public injunctive relief is a substantive right that cannot be waived unless negotiated for.¹⁸⁴ While the FAA does not prevent parties who have agreed to arbitrate from also agreeing to exclude certain claims from arbitration, the parties cannot agree to exclude public injunctive relief premised on the faulty argument that it is class relief; thus, the California Supreme Court distinguishes between the two.¹⁸⁵

All states are required to follow FAA, but state laws can still invalidate mandatory arbitration in certain circumstances, such as in the case of *DirectTV, Inc. v. Imburgia*, where the mandatory arbitration clause did not waive class actions when at the time the contract was formed, the *Discover Bank* rule was still in effect.¹⁸⁶ It is also notable

180. *Id.* at 350.

181. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 251–52 (2013).

182. *McGill v. Citibank, N.A.*, 393 P.3d 85, 86 (Cal. 2017).

183. *Id.* at 87; *see also* CAL. BUS. & PROF. CODE § 17200 et seq. (West 2017) (California Unfair Competition Law); CAL. CIV. CODE § 1750 et seq. (West 2009 & Supp. 2018) (California Consumers Legal Remedies Act); BUS. & PROF. CODE § 17500 et seq. (West 2017) (California False Advertising Law).

184. *McGill*, 393 P.3d at 97.

185. *Id.*

186. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 467–68 (2015) (“Congress in 1925 could not have anticipated that the Court would apply the FAA to render consumer adhesion contracts invulnerable to attack by parties who never meaningfully agreed to arbitration in the first place.”)

that on May 21, 2018, the Supreme Court held the interpretation of employees able to be engaged in “concerted activity” under the National Labor Relations Act (“NLRA”) as preempted by the FAA, when employees waive their rights to class actions in their employment contract.¹⁸⁷ The FAA savings clause, which can remove mandatory arbitration obligations when arbitration conflicts with federal law, does not salvage alleged class actions alleged to be included in NLRA. Because arbitration and class actions have been actively litigated, especially by the Supreme Court, SCCA defers to the Supreme Court on these two major issues.¹⁸⁸

E. Current United States Consumer Rights Legislation

In 1975, Congress enacted the Magnuson-Moss Consumer Warranty Act (“MMWA”) to “improve the adequacy of information available to consumers, prevent deception, and improve competition in the marketing of consumer products”¹⁸⁹ This federal law imposes a duty on all warrantors of consumer products to “fully and conspicuously disclose in simple and readily understood language the terms and conditions of such warranty.”¹⁹⁰ However, MMCWA is not enough to protect consumers’ substantive rights, as it only focuses on the warranty of products being conspicuous and readable. There have been other attempts to improve consumer laws, such the Uniform Computer Information Transactions Act (“UCITA”), which requires licensors to provide the consumer the opportunity to review the license

187. *See Epic Sys. Corp. v. Lewis*, No. 16–285, 2018 WL 2292444, at *10–11, 17 (U.S. May 21, 2018).

188. The Supreme Court is rendering a major decision, one that—like the FAA—will likely preempt state law just as arbitration did under the FAA in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013). Section 7 of the NLRA states: “Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).” 29 U.S.C. § 157 (2012).

189. 15 U.S.C. § 2302 (2012).

190. *Id.*; *see also Contracting Practices*, *supra* note 6, at 1467.

agreement prior to consenting (as opposed to shrinkwraps, which allow for an agreement after the consumer has accepted the product).¹⁹¹ Only two states enacted UCITA.¹⁹² There was also an attempt to reform software contracts by the American Legal Institute, called the Principles of the Law of Software Contracts (“Principles”).¹⁹³ The goal was to “clarify and unify the laws of software transactions.”¹⁹⁴ The Principles are helpful factors in analyzing the enforceability of a software license, but procedurally, the Principles will not become law unless jurisdictions adopt it and use its analysis in their holdings.¹⁹⁵

Legislative routes have had some success in protecting consumers. The Consumer Review Fairness Act of 2016 (“CRFA”) is a federal statute that voids any consumer contract that disallows performance assessments by imposing penalties against individuals who engage in such communications.¹⁹⁶ Thus, consumers may engage in written, oral, pictorial, or other similar performance assessments of goods, services, or conduct of a person or business without waiving such right.¹⁹⁷ The statute was inspired by California’s no non-disparagement statute.¹⁹⁸ The California statute, enacted September 9, 2014, imposes civil

191. See generally David A. Szwak, *Uniform Computer Information Transactions ACT [U.C.I.T.A.]: The Consumer’s Perspective*, 63 LA. L. REV. 27, 28–32 (2002); *Lord Coke*, *supra* note 138, at 463–65.

192. *Lord Coke*, *supra* note 138, at 489 (only Virginia and Maryland adopted the UCITA into law).

193. Robert A. Hillman & Maureen O’Rourke, *Principles of the Law of Software Contracts: Some Highlights*, 84 TUL. L. REV. 1519, 1531 (2010); PRINCIPLES OF THE LAW OF SOFTWARE CONTRACTS § 1.09 cmt. a (AM. LAW. INST. 2010) [hereinafter ALI PRINCIPLES] (“Factors a court should consider in deciding whether to hold a term of an agreement unenforceable include: (1) whether the agreement effectively expands the scope of the transferor’s rights or contracts the scope of the transferee’s rights to its own creations under federal law; (2) whether the agreement was negotiated and the parties’ relative bargaining power; (3) whether and to what degree enforcement of the provision is likely to affect competition adversely; (4) whether and to what degree enforcement of the provision is likely to affect innovation adversely; and (5) whether the transferee has the opportunity to obtain the software free of the restriction at a reasonable price.”).

194. ALI PRINCIPLES, *supra* note 193, at introductory cmt.

195. Hillman & O’Rourke, *supra* note 193, at 1520.

196. Consumer Review Fairness Act of 2016, H.R. 5111, 114th Cong. (2015–2016) (enacted).

197. *Id.*

198. See CAL. CIV. CODE § 1670.8 (West Supp. 2018).

penalties for consumer contracts that contain provisions waiving the “consumer’s right to make any statement regarding the seller or lessor or its employees or agents, or concerning the goods or services.”¹⁹⁹ The goal of this comment’s proposal, which is influenced by the UCTD and UCP, is to mirror the same institutional process as California’s no non-disparagement statute and the CRFA.

V. THE PROPOSAL OF “THE SIMPLIFIED CONSUMER CONTRACTS ACT”

As referenced by the UCC, CRFA, and the MMWA, the legislative route has been a successful institutional reform mechanism. A contract should be clear, noticeable, and reflect the drafter’s intent. A contract should also have reasonable terms that: (1) provide businesses with clear guidelines on what they can and cannot do, and (2) provide more balance between the contracting parties. This comment proposes substantive and procedural reform of consumer contracts as well as modifications to how these contracts are presented. The proposal is titled, The Simplified Consumer Contracts Act (“SCCA”).

A. *The Procedural Reform*

All non-negotiated consumer contracts in non-paper form (or online contracts) will require: (1) plain English, meaning the standard for an entire agreement is scored at approximately sixty on the Flesch Readability Ease Scale;²⁰⁰ (2) all terms and conditions must be contained either on one website location, or in one scrollbox;²⁰¹ (3) each

199. *Id.*

200. A score of sixty is reasonable as it is the approximate reading comprehension level of an individual in high school. There would be some margin of error to allow for less than a standard of sixty to avoid being hyper-technical, but it is important to have a standard that is mathematical. Otherwise, what is reasonable will be too open to interpretation. The margin of error is not a brightline rule but should be generally not less than fifty-seven.

201. Users will no longer be required to click several links or read through a number of different contracts located on separate pages. For example, a Terms and Conditions, Privacy Policy, and Data Policy total too many agreements for an average user to click through and expect to be bound to. Consumers are set up for failure because multiple binding contracts are overwhelming and difficult to digest. This is especially concerning when consumers use a product or service only once. With identity theft being a prevalent concern in all industries, it is important that consumers

clause or term must contain a heading, with a sentence, sentences, or phrase below that summarizes that term, making the terms easy to skim;²⁰² (4) that clickwrap assent be required and be located on the webpage or box where the terms are contained;²⁰³ (5) should the business modify any terms of the agreement, there must be new clickwrap assent for those updated terms;²⁰⁴ (6) the font-size of the

have quick and easy access to the contract that will govern their dispute, in the event one arises.

202. Plain English is easier to skim than legalese. Headings and the summary below, worded in concise language, will also contribute to the readability of online contracts. First, the agreements would state that the webpage or scrollbox consists of binding and irrevocable contract. Second, there would be a description of the rights and limitations of the parties when using the product or service. For example, if software includes a license to use, the contract would first describe the grant to use the license and the exclusivity regarding distribution of the license. Third, rights-foreclosure provisions such as: mandatory arbitration clauses, jury trial waivers, class action waivers, limitations on liability, limitations on remedies, and choice of law/forum clauses would be included after. It would be helpful to include a heading that clearly states, “Rights that You Are Giving Up,” and then name each rights-foreclosure clause. For example, under the “Rights that You Are Giving Up” heading, a sub-heading below could state “Class Action Waiver.” The sentence below could read: “You waive your right to join any actions you may have against [insert company here] for any circumstances. This means you can only file a claim individually and this applies to any action arising out of this agreement.” The full clause would be located directly below the heading summary. Other boilerplate provisions that are less oppressive, such as severability, modifications, notices, recitals, terminations, integrations, counterparts, etc., should be listed at the end of the agreement.

203. The user must click to agree to the terms. The language should be clear, such as “I agree to the terms and conditions,” or “By clicking here, I agree to the terms and conditions.” This would eliminate browserwrap entirely. Thus, online (or non-paper) contracts would be solely clickwrap or tapwrap.

204. This means that any modification would require new assent by the consumer, and therefore, would require the consumer to click to agree to the modifications. Without new assent, the user is not bound to new modifications. The user would be bound the contract the consumer agreed to. If a consumer does not agree to the new terms, the business can block access to any updates. For example, just recently, Snapchat updated its terms of service and privacy policy. Users were required to click “I agree” to use Snapchat. Without agreeing, the user did not have access to the new Snapchat update. Not all businesses need to or should block access, but this is one strategy that follows the requirements stated here. However, the concern here is that consumers would lose access unless they agree to the terms, which essentially forces them to be bound to the modification. While we prefer businesses do not block access, it is their right to bind users into contracts (so long as they are not blocking access that has been paid for through a certain date and on different

words should be in either 12-point font or a comparably similarly sized font;²⁰⁵ and, (7) the total word length of the content must be proportional to the type of the agreement being entered into.²⁰⁶ All non-negotiated contracts in paper form would have the same requirements, with the exception of clickwrap assent. For those non-online form, such as with shrinkwraps, the agreements would be enforceable so long as there is some method to accept the terms (such as a signature).

This proposal will also complement California's Consumers Legal Remedies Act ("CLRA"), which provides a laundry list of unfair or deceptive practices undertaken by a person in a transaction and the remedies available to that person.²⁰⁷ Because the purpose of the CLRA is for businesses to not engage in unfair and deceptive practices, the SCCA would fill in gaps left out by the CLRA because the remedies

terms). The substantive reform of this proposal addresses the concern of being forced to agree to unconscionable terms in case that issue arises.

205. Size 12-point font is not required. However, 12-point font, preferably in Times New Roman, would fulfill the requirement and thus lower the business's risk of liability. The font size should be readable and not considerably deviate from 12-point. The reason for this is important—if a user is accessing an App and notice to the Terms and Conditions are hidden at the bottom in unreasonably small font, a reasonable user is not prompted to read the terms. The purpose should not be to trap users into failing to read an agreement—we want users to read because they have a duty to—but to give them a fair opportunity to read. Not every user will think to zoom in to increase the font size, and they should not have to.

206. The taskforce that was recommended would include business and legal experts who can determine what a reasonable maximum word limit is in terms of the industry standard. The taskforce could work with United States administrative agencies, such as the Federal Trade Commission, Securities & Exchange Commission, Small Business Administration, etc. This would be part of the cost to enact and enforce this type of legislation (from administrative agency budgets and California state tax that is allocable to the courts and an agency such as the California Department of Consumer Affairs), which does not burden the businesses themselves. The word limit industry standard would incorporate factors such as the type of business, the type of product or service, the average word count amongst competitors in the same business, the length of a reasonably drafted agreement, etc.

207. CAL. CIV. CODE §§ 1770(a), 1780–81 (West 2009 & Supp. 2018). The remedies for violations of section 1770(a)—deceptive practices—are codified in sections 1780–81. The deceptive practices that are unlawful generally include misrepresentation of the seller, source, affiliation, license, approval, quantity, or quality, while also advertising with the intent not to sell as advertised. In addition, representations that a transaction contains rights, remedies, or refunds that are not true or available are also unlawful. The deceptive practices listed within section 1770(a).

provided under this statute may be limited by the consumer contracts. The enforceability of the contract or certain provisions will determine the remedies that remain available in the event of a dispute. And, the CLRA focuses on regulating representations made by businesses, and such representations partially derive from the consumer contracts.

B. The Substantive Reform

The SCCA would continue to follow the sliding scale approach of procedural and substantive unconscionability that California and other jurisdictions use for non-negotiated consumer contracts. Thus, even if the contract meets the sufficient notice requirements set forth above, it is still possible that there is procedural and/or substantive unconscionability because of the company's superior bargaining power to include oppressive terms. Because the business drafts the contract, the business ultimately determines what terms should be included. A business is bottom-line driven, as it should be. Nonetheless, the interests of both parties must be considered when there is a binding contract. There are certain provisions that are inherently unfair because of the company's superior bargaining power, which is why some terms are graylisted, which would shift the burden on the drafting party to avoid including unconscionable provisions.

Graylisted terms shall be presumed substantively and procedurally unconscionable, unless such terms can overcome this presumption. Abiding by SCCA's graylist of provisions does not immunize contracts from unconscionability scrutiny or interfere with other applicable contract defenses such as fraud or duress. The non-exhaustive list of these terms emulates that of the UCTD's list: choice of forum, choice of law, disclaimer of warranties, reduced statutes of limitations, rolling contracts, and limitations of remedies.²⁰⁸ The burden is on the drafting

208. See *supra* Part III Section A. Note that California's *Discover Bank* rule, classifying most mandatory arbitration and class action waivers unconscionable, was preempted by the FAA in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). Also note because "rolling contracts," or contracts that are modified without providing notice to the consumer of the new terms, would be unenforceable under the procedural component of the SCCA. Reduced statutes of limitations are already frowned upon by California law in non-negotiated contracts as substantively unconscionable. See *W. Filter Corp. v. Argan, Inc.*, 540 F.3d 947, 952 (9th Cir. 2008) ("It is a well-settled proposition of law [in California] that the parties to a contract may stipulate therein for a period of limitation, shorter than that fixed by the statute of limitations, and that

party to demonstrate that these provisions are not unconscionable (as opposed to the burden on the non-drafting party).²⁰⁹ An unconscionable term that appears unfair, but has not been graylisted, will be treated the same as a term that a California court finds unconscionable under the sliding scale doctrine. To resolve the unconscionability issues, the court may (1) remove the unconscionable term(s) out so the rest of the contract remains enforceable, (2) invalidate the entire contract, or (3) rewrite that specific term(s).

C. The Rationale Behind the Proposal

In balancing both business and consumer interests, we must prevent certain acts that substantially burden one party.²¹⁰ This proposal recognizes that this is not a complete solution, but it is a major step toward procedural consumer and business fairness, justice, and clarity. This proposal benefits both parties because “the formation stage is the least costly point at which parties could avoid the dispute, simply by adjusting problematic terms or refusing to enter the deal altogether.”²¹¹ The proposed legislation requires the contract to be understandable, noticeable, and reasonable, but requires businesses to incorporate only

such stipulation violates no principle of public policy, provided the period fixed be not so unreasonable as to show imposition or undue advantage in some way.”) (citing *Moreno v. Sanchez*, 131 Cal. Rptr. 2d 684, 695 (Cal. Ct. App. 2003)). *But see Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1172–73 (9th Cir. 2003) (holding the reduced statute of limitations was substantively unconscionable).

209. The purpose of providing a flexible mechanism for rendering terms unconscionable comes from a respect for the judicial system and its prior interpretations. Notwithstanding, these businesses will be forced to include terms that they feel confident could be shown as reasonable and fair to a judge. A brightline rule is too difficult to enforce, and each industry has its own unique set of challenges to be taken into account.

210. *See generally* Christopher Kelley, Note, *Old School “Wrap”: Exploring Traditional Contract Doctrine and Developing Law that can Serve to Prevent Websites from Exploiting Online Consumer Data*, 231 MICH. ST. L. REV. 1, 28–30 (2013) (explaining that courts have ignored fairness in one-sided contracts of adhesion).

211. Daniel Barnhizer, *Nancy Kim’s Wrap Contracts Symposium, Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215, 222 (2014) (explaining that in terms of improving consumer bargaining, policing contracts post-hoc is not the best moment for adherents to have an effect on transitioning).

modest resources to meet these standards. The SCCA acknowledges the transformation of contracts in a technologically advanced society and provides clear guidance as to when notice is sufficient.

Moreover, some provisions are inherently unfair, causing the consumer to be left with almost no recourse to right a wrong. In many cases, these products may appear to impose little to no cost on the consumer, but ultimately, the consumer is exchanging confidential proprietary data that has monetary value to the business. Furthermore, many of these products or services are still expensive and consumers have invested substantial amounts of money toward them. How unfair is it for a consumer, whose personal data was hacked, to later find out it would be far too expensive to file an arbitration claim, considering that the cost of Lifelock Protection is cheaper? The consumer cannot simply undo an event that caused his or her social security number to be compromised. A data breach or unenforceable contract can negatively impact businesses as well (especially their reputations). What about the business that spent hundreds of thousands in legal fees because its “Sign up” button did not expressly state that clicking “Sign up” meant acceptance of its TOU?

Our economic model values freedom in contracting but also recognizes that a laissez-faire, reactive approach in this technologically-advanced society can simultaneously curtail this freedom, cost parties substantial amounts of money, and cause confusion to the drafting and non-drafting party. This proposal, while recognizing that certain substantive provisions have a legitimate purpose, attempts to provide well-measured freedom that considers both parties. Thus, certain provisions are presumed unfair unless the business meets its burden of overcoming the presumption. And, although businesses are already heavily regulated, there currently is not much guidance for wrap contracts, except for often inconsistent holdings amongst multiple jurisdictions. The SCCA provides that necessary guidance and takes both parties into account.

VI. CONCLUSION

There is demonstrable evidence that consumers are not reading wrap contracts. When they see a non-negotiable contract, many consumers conduct a quick cost-benefit analysis to determine whether the time to read the contract is worth the effort, in light of the possible

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perceived benefits that they can obtain from the products or services. In many cases, however, consumers are not even aware that there is a contract associated with the particular product or service. Regardless of their choice or awareness level, consumers have a duty and interest to read consumer contracts, so the logical corollary of the duty to read should be the duty of businesses to make their contracts transparent and fair. There is a method to requiring these contracts be more readable and understandable in order to provide consumers a fair opportunity to review and assent to the terms of the contract.

The statistics overwhelmingly demonstrate that online agreements are presented in a manner that make consumers inherently ignorant to them. Wrap contract doctrine has diverged dramatically from traditional contract doctrine in that the elements of offer, acceptance, mutual assent, and consideration have less value. In current United States case law, courts analyze whether there is sufficient notice of the terms of non-negotiated contracts, which are contracts we enter into, intentionally or not. This comment recognizes effective legislation, such as UCTD and UCP, and mirrors this type of consumer protection model. In addition, the SCCA intends to complement California's CLRA regarding unfair and deceptive practices against consumers with certain targeted procedural and substantive requirements that will assist in vindicating such consumer rights the CLRA attempts to address. The goal is to balance the needs of consumers and businesses and provide a solution that benefits both parties. Therefore, I recommend the adoption of my proposed legislation in California, and federally thereafter.

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