THE CONSUMER AS SISYPHUS: SHOULD WE BE HAPPY WITH 'WHY BOTHER' CONSENT?

Anjanette H. Raymond[*]

INTRODUCTION

The struggle itself [...] is enough to fill a man's heart. One must imagine Sisyphus happy.

The Myth of Sisyphus, Albert Camus

In the *Myth of Sisyphus*, Albert Camus introduces his philosophy of the absurd, which encompasses man's futile search for meaning, unity, and clarity in the face of an unintelligible world devoid of God and eternal truths or values. In the book's final chapter, Camus compares the absurdity of man's life with the situation of Sisyphus, a figure of Greek mythology who was condemned to repeat forever the same meaningless task of pushing a boulder up a mountain, only to see it roll down again. In considering the absurdity of Sisyphus, Camus argues that while Sisyphus acknowledges the futility of his task and the certainty of his fate, he is nonetheless freed by realizing the absurdity of his situation, enabling him to ultimately reach a state of contented acceptance. In the end, Camus argues that "The struggle itself [...] is enough to fill a man's heart. One must imagine Sisyphus happy." [1]

Much like Sisyphus pushing that bolder up a mountain for eternity, modern consumers face what they believe to be an absurd task: slogging through endless reams of boiler plate terms he/she will have no opportunity to negotiate or influence in any real meaningful way. As the consumer stands helpless to stop the boulder from rolling back down the mountain, he faces yet another onslaught of change of service terms, some of which impact highly personal information and/or his personal finances. Yet, the consumer knows his fate is sealed. It seems consumers, like Sisyphus, have reached a state of contented acceptance. But must we imagine consumers as happy?

Unlike Sisyphus, consumers have grown restless and many have begun to refuse to accept their fate. Instead, some consumers are becoming more powerful through the increasing use of technology, analytics, and interactive digital communications. Much of this technology pushes businesses to begin to recognize consumers as active participants in the creation of rights and the commentary of

---

[*] Assistant Professor of Business Law and Ethics, Indiana University; Adjunct Assistant Professor of Law, Maurer School of Law, Indiana University; Visiting Fellow in International Commercial Law, Centre for Commercial Law Studies, Queen Mary, University of London.

[1] Albert Camus, THE MYTH OF SISYPHUS AND OTHER ESSAYS, Vintage (1991).

business activities, in many ways businesses are beginning to think of consumers as a powerful entity. Consequently, it is time that we rethink the legal doctrine that underlies contracting. Legal concepts such as consent must be reconsidered to reflect the ubiquitous use of technology. Entire areas of law, such as contracts of adhesion and consumer protections, meanwhile, must be refashioned to more accurately capture the shrinking power imbalance the law currently seeks to overcome.

To tackle these issues, this paper will explore the history and importance of consent throughout the digital age. The paper will then explore commentators' reactions to the newest controversies that arise when the law stretches to absurd lengths, suggesting that much of these growing pains occur from the use of new technology and a paternalistic need to protect consumers. The paper concludes by asking readers to consider the use of technology to shift the balance of power to the consumer, thereby eliminating—or at least reducing—the need to heavily protect consumers. The use of smart contracts and technology-assisted consent should be employed to accomplish the goals of existing case law without the need to stretch the law out of shape.

I. THE IMPORTANCE OF CONSENT

In the January 2012 case of *United States v. Jones*,[2] the U.S. Supreme Court considered a novel Fourth Amendment case that questioned whether attaching a GPS device to a car without the owner's knowledge constituted a "search" according to the Fourth Amendment.[3] An often overlooked passage from Justice Sotomayor's separate concurrence states:

> [I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.[4] This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. [5]

---

[2] 132 S. Ct. 945 (2012).

[3] The Court unanimously concluded that it did but split 5-4 as to why. Five Justices (Scalia, joined by Roberts, Kennedy, Thomas, and Sotomayor) decided the case based on the "original understanding" that a physical intrusion on property was enough to trigger the Fourth Amendment; four Justices (Alito, joined by Ginsburg, Breyer, and Kagan) would have preferred to decide the case on the more modern "reasonable expectation of privacy" test.

[4] E.g., Smith, 442 U.S. at 742; United States v. Miller, 425 U.S. 435, 443 (1976).

[5] Jones, 132 S. Ct. at 957 (Sotomayor, J., concurring). Justice Sotomayor goes on: "Perhaps, as Justice Alito notes, some people may find the "tradeoff " of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," post, at 10, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year." *Id.*

One can argue that Justice Sotomayor is demanding that constitutional doctrine relating to privacy must remain current with the realities of an evolving technology and digitally based world. For the purposes of this paper, however, the quote can be seen to make a larger demand, suggesting that *all law* must keep abreast and current with the realities of an evolving technology and digitally based world. There is no reason to suggest that quotes such as this should be limited to constitutional scholar-based scrutiny. Instead, I suggest, this quote should resonate well beyond our constitutional walls and should ask all legal scholars to consider areas of the law that have failed to remain current in light of the digital world. Justice Sotomayor points to one doctrine that has long needed review: the meaning of "voluntary" in light of our information-based digital lives. I suggest that this examination should focus more broadly on the legal concept of "voluntary consent." As Justice Sotomayor rightly notes, in the course of carrying out mundane tasks we often enter and click away our rights without thinking beyond our immediate situation.

Also of note is Justice Sotomayor's clear call to reconsider fundamental terminology in light of the digital world, noting:

> But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection.[6]

Justice Sotomayor appropriately notes the need to cease treating "secrecy as a prerequisite for privacy," especially in situations where the information voluntarily disclosed has been used beyond the scope of the original limited purpose and often beyond the original circle of approved information possessors. While constitutional scholars focus on the Fourth Amendment issues,[7] I would like to instead focus on a much larger issue within our jurisprudence: the ability of individuals to click away rights when sharing information, only to be subject to an additional set of terms that

---

[6] *Id.*

[7] Stephen E. Henderson, *After* United States v. Jones*, After the Fourth Amendment Third Party Doctrine*, 14 N.C. J. L. & TECH. 431 (2013); Christopher Slobogin, *Making the Most of* United States v. Jones *in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POL. 1 (2012), *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1056&context=djclpp; Stephen E. Henderson, *Real-Time and Historic Location Surveillance After* United States v. Jones*: An Administrable, Mildly Mosaic Approach*, 103 J. Crim. L. & Criminology 803 (2013), *available at* http://scholarlycommons.law.northwestern.edu/jclc/vol103/iss3/5; David C. Gray & Danielle Keats Citron, *A Technology-Centered Approach to Quantitative Privacy* (2012), *available at* http://ssrn.com/abstract=2129439.

substantively alters rights without truly providing a meaningful way to withdraw the information.[8]

Finally, I would like to suggest that under no understanding of consent anywhere in the world, barring cases of agency, guardianship and similar relationships, can a friend grant consent for me, especially in situations where the original consent to share information is tenuous at best. It is this situation, not a hypothetical but a current existing use of technology, that should prompt the most outrage and demand that we rethink the parameters of consent in the digital world.

Unlike Sisyphus, consumers are not yet condemned for all eternity to struggle mightily as the weaker party in an unending tedious task of keeping an eye on terms of service. Instead, we can change our fate and reclaim some power to determine at least part of our digital existence. To explore three current over-extensions of consent and the misuse of information, this section will explore the concept of consent, change of terms, and attempts to protect consumers in the digital world.

A. THE NEVER ENDING BOULDER: ROLLING CONTRACT

Contracting in the digital world has launched case law that proves to be interesting reading, especially for those who appreciate creative new interpretations and extensions of legal doctrine into new areas. One theory, labeled the "rolling" or "layered" theory of contract formation, has garnered much attention as an example of the application of dubious legal theory. While the theory itself, and the case from which it originates, has been widely criticized by legal scholars, the theory has found a following in some states.[9] The theory is, of course, simply a very bad, illogical and almost silly attempt to force prior existing legal doctrine into the digital world.

1. THE MISHANDLING OF A SIMPLE BATTLE OF THE FORMS CASE

The case of *ProCD, Inc. v. Zeidenberg*[10] is almost unremarkable in its facts.

---

[8] Privacy will be an ongoing concern in this particular area as privacy is both a social and economic issue. For example, one study calculated that if consumers took the time simply to read online privacy policies, the time to do that would cost the economy $781 billion in lost productivity. Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL. INFO. SOC'Y 543, 565 (2009).

[9] The theory was created and affirmed in two opinions, both written by the Hon. Frank Easterbrook of the U.S. Court of Appeals for the Seventh Circuit: ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996); Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997).

[10] 86 F.3d 1447 (7th Cir. 1996). *ProCD* was the first decision to enforce a shrinkwrap license. *Id.* at 1448–49. A number of courts before that time had refused to enforce them. *See* Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 102–03 (3d Cir. 1991); Vault Corp. v. Quaid Software Ltd., 847 F.2d 255, 268–70 (5th Cir. 1988); Ariz. Retail Sys., Inc. v. Software Link, Inc., 831 F. Supp. 759, 763–66 (D. Ariz. 1993) *cf.* Foresight Res. Corp. v. Pfortmiller, 719

Matthew Zeidenberg, a computer science student, purchased an off-the-shelf package containing software discs produced by the ProCD corporation.[11] The discs provided access to 95 million residential and commercial listings taken from 3000 public telephone books.[12] A "user guide" inside the package included license terms that stated a restriction limiting use of the software to a single user for individual or personal use.[13] A small notice printed on the outside of the CD box stated that there were license terms inside the package.[14] Maybe more concerning to some, the single user restriction appeared on the computer screen when the software was actually used.[15] Mr. Zeidenberg copied the ProCD software containing the public phone book material and established a corporation to compete with ProCD.[16] ProCD sought the assistance of the Wisconsin courts to enjoin Mr. Zeidenberg from the use of its information in such a manner.[17] This bit is a little confusing. It's not clear what the CDs contained and why this guy copied them.

In making its determination, the Seventh Circuit followed the dominant case law at the time that construed agreements to buy software as contracts for the sale of goods requiring an analysis of contract formation under Article 2 of the Uniform Commercial Code. The court, relying heavily on a similar and recently decided Third Circuit case of *Step-Saver Data Systems v. Wyse Technology*,[18] determined that the

---

F. Supp. 1006, 1009−10 (D. Kan. 1989) (dictum). Since *ProCD*, a majority of courts have enforced shrinkwrap licenses. *See* Davidson & Assocs. v. Jung, 422 F.3d 630, 638−39 (8th Cir. 2005); Bowers v. Baystate Techs., Inc., 320 F.3d 1317, 1323−25 (Fed. Cir. 2003); Meridian Project Sys., Inc. v. Hardin Constr. Co. LLC, 426 F. Supp. 2d 1101, 1106−07 (E.D. Cal. 2006); Adobe Sys., Inc. v. One Stop Micro, Inc., 84 F. Supp. 2d 1086, 1090−91 (N.D. Cal. 2000); Info. Handling Servs., Inc. v. LRP Publ'ns, Inc., No. Civ.A. 00-1859, 2000 WL 1468535, at *2 (E.D. Pa. Sept. 20, 2000); M.A. Mortenson Co. v. Timberline Software Corp., 998 P.2d 305, 311−13 (Wash. 2000) (en banc); Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc., 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000) ; *cf.* Ariz. Cartridge Remanufacturers Ass'n v. Lexmark Int'l, Inc., 421 F.3d 981, 986−88 (9th Cir. 2005) (enforcing a notice of terms printed on the outside of a box and read before purchase, but distinguishing cases in which the terms weren't available until after purchase). Nonetheless, a significant number of courts continue to refuse to enforce shrinkwrap licenses. *See* Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1340−41 (D. Kan. 2000); Novell, Inc. v. Network Trade Ctr., Inc., 25 F. Supp. 2d 1218, 1230−31 (D. Utah 1997), *vacated in part*, 187 F.R.D. 657 (D. Utah 1999); *cf.* Morgan Labs., Inc. v. Micro Data Base Sys., Inc., No. C96-3998TEH, 1997 WL 258886, at *4 (N.D. Cal. Jan 22, 1997) (refusing to allow a shrinkwrap license to modify a prior signed contract).

[11] *See* ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 644 (W.D. Wis. 1996).

[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.* at 645.

[17] *Id.* at 645.

[18] 939 F.2d 91 (3d Cir. 1991). The Step Saver case was slightly different from the case at hand. Step Saver involved a telephone sale in which the buyer followed the oral agreement with

contract had been formed prior to the sending of the package. As such, the terms printed on the package were to be considered additional terms within a confirmation of the previously formed contract. The court then considered two possible analyses, UCC § 2-207 or § 2-209. Turning to the application of UCC § 2-207(1), a contract was formed notwithstanding such additional terms in the confirmation. The single user license was deemed an additional term that did not become part of the contract since it was a material alteration of the contract under § 2-207(2)(a). The license restriction thus was not a term of the contract. Alternately, the district court considered the application of UCC § 2-209. Under § 2-209 the license terms inside the package would be viewed as an attempted modification of the already formed contract. In this instance, Zeidenberg never assented to the modifications and thus the term did not form part of the contract. The district court concluded that either analysis led to the same conclusion: Zeidenberg was not bound by the license terms.

On appeal, the opinion of Judge Easterbrook rejected the application of UCC § 2-207, arguing that "[o]ur case has only one form; UCC § 2-207 is irrelevant."[19] As noted contract scholar John E. Murray Jr. has explained, "[t]he Easterbrook conclusion that §2-207 applies only where there are two forms is presented as fiat in the face of the statute."[20] Professor Murray goes on to point out that while "confirmation is not a traditional acceptance of an offer, but §2-207(1) accords it the operative effect of an acceptance."[21] Judge Easterbrook failed to recognize or acknowledge UCC § 2-207 Comment 2 which lends considerable credibility to Professor Murray's critique:

> Under this Article, a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained in the confirmation or in the acceptance falls within subsection (2) and

---

a purchase order. The seller shipped software with an invoice repeating the terms the parties had discussed. However, the product arrived in a package that contained a "box-top" license. The terms included:

> Opening this package indicates your acceptance of these terms and conditions. If you do not agree with them, you should promptly return the package unopened to the person from whom you purchased it within fifteen days from date of purchase and your money will be refunded to you by that person.

Id. at 97.

[19] ProCD, Inc., 86 F.3d at 1452.

[20] JOHN E. MURRAY, JR., THE DUBIOUS STATUS OF THE ROLLING CONTRACT THEORY OF CONTRACT FORMATION 8 (Duquesne University, Selected Works Series 2011), *available at* http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=john_murray. The statute language is "[a] definite and seasonable expression of acceptance or a written confirmation sent within a reasonable time operates as an acceptance." *Id. quoting* UCC § 2-207(1) (emphasis omitted).

[21] MURRAY, JR., *supra* note 20, at 8.

> must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional or different term.[22]

The rejection of the application of §2-207 leaves the court free to craft a new theory of contract formation, the "rolling contract." In doing so, Judge Easterbrook does not reject the application of the UCC to a sale of software;[23] instead, Judge Easterbrook takes language from the UCC to justify the creation of new contract formation theory because newly introduced terms could be viewed by the consumer prior to use of the software. Easterbrook's new theory of contract formation was criticized as being "plainly wrong"[24] almost immediately after the release of the *ProCD* decision.

Judge Easterbrook would not remain silent in advancing his rolling contract theory for long. In *Hill v. Gateway 2000, Inc*.[25] he explained his rational for the rolling contract theory:

> If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten potential buyers. Others would hang up in rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.[26]

---

[22] UCC § 2-207 cmt. 2.

[23] An issue that remains contentious.

[24] *See* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 752 (2002) ("Easterbrook was plainly wrong about section 2-207's applicability."); James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 LOY. L. REV. 53, 81 (2002) ("When, Judge Easterbrook in ProCD states that Section 2-207 does not apply to transactions that involve only one document, he is wrong. "). *See also* Colin P. Marks, *Not What, But When is an Offer: Rehabilitating the Rolling Contract*, 46 CONN. L. REV. 73 (2013); Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181 (2010); William H. Lawrence, *Rolling Contracts Rolling Over Contract Law*, 41 SAN DIEGO L. REV. 1099 (2004).

[25] 105 F.3d 1147 (7th Cir. 1997) *cert. den*. 522 U. S. 808 (1997).

[26] *Id.* at 1149.

It is important to recognize the logic of Judge Easterbrook's rationale as that which is now prevalent in the lives of many consumers inundated with pages and pages of scroll-through text. It is in fact the basis of the so-called economic efficiency that will be explored later in this paper to justify the use of contracts of adhesion.[27] However, the argument is flawed[28] and, more importantly, leads to serious long term contract formation issues in the digital world.

Underlying the rolling contract theory is the assertion that the "duty to read" (people who accept an offer assume the risk of unread terms that may prove unwelcome) is boundless in terms of expectations and availability. The "duty to read," however, rests upon the premise that all relevant terms are available to the individual when she expects the negotiation process to have been legally concluded.[29] In general,

---

[27] *See infra* notes XX-XX and corresponding text.

[28] For criticism of *ProCD* on contract law grounds, see, for example, Michael J. Madison, *Legal Ware: Contract and Copyright in the Digital Age*, 200 FORDHAM L. REV. 1025, 1049–54 (1998); Jason Kuchmay, Note, ProCD, Inc. v. Zeidenberg*: Section 301 Copyright Preemption of Shrinkwrap Licenses—A Real Bargain for Consumers?*, 29 U. TOL. L. REV. 117, 137–46 (1997); Kell Corrigan Mercer, Note, *Consumer Shrink-Wrap Licenses and Public Domain Materials; Copyright Preemption and Uniform Commercial Code Validity in* ProCD v. Zeidenberg, 30 CREIGHTON L. REV. 1287, 1296–97 (1997); Apik Minassian, Note, *The Death of Copyright: Enforceability of Shrinkwrap Licensing Agreements*, 45 UCLA L. REV. 569, 583–86 (1997); Robert J. Morrill, Comment, *Contract Formation and the Shrink Wrap License: A Case Comment on* ProCD, Inc. v. Zeidenberg, 32 NEW ENG. L. REV. 513, 537–50 (1998); Christopher L. Pitet, Comment, *The Problem With "Money Now, Terms Later":* ProCD, Inc. v. Zeidenberg *and the Enforceability of "Shrinkwrap" Software Licenses*, 31 LOY. L.A. L. REV. 325, 345–47 (1997); Stephen P. Tarolli, Comment, *The Future of Information Commerce Under Contemporary Contract and Copyright Principles*, 46 AM. U. L. REV. 1639, 1647–48 (1997). For arguments endorsing the result in *ProCD*, see Darren C. Baker, Note, ProCD v. Zeidenberg*: Commercial Reality, Flexibility in Contract Formation, and Notions of Manifested Assent in the Arena of Shrinkwrap Licenses*, 92 NW. U. L. REV. 379, 400–06 (1997); Brandon L. Grusd, Note, *Contracting Beyond Copyright:* ProCD, Inc. v. Zeidenberg, 10 HARV. J. L. & TECH. 353, 361–66 (1997); Michael A. Jaccard, Note, *Securing Copyright in Transnational Cyberspace: The Case for Contracting with Potential Infringers*, 35 COLUM. J. TRANSNAT'L. L. 619, 645–48 (1997); Jerry David Monroe, Comment, ProCD, Inc. v. Zeidenberg*: An Emerging Trend in Shrinkwrap Licensing?*, 1 MARQ. INTELL. PROP. L. REV. 143, 159–64 (1997); Joseph C. Wang, Casenote, ProCD, Inc. v. Zeidenberg *and Article 2B: Finally, the Validation of Shrink-Wrap Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 439, 442 (1997).

[29] Moreover, the rolling contract theory fails to consider an alternative that is much simpler and time effective than the above description. The business could simply place the consumer on notice of important information contained within the box and include a statement that a full refund is available should the consumer reject any of the included terms. In essence the business places the consumer under a duty that is conditional on their satisfaction with the terms to be delivered with the computer. *See* MURRAY, JR., *supra* note 20, at 13. This alternative complies with the doctrine of the "duty to read" and that respects the unenviable position of an individual facing in-the-box terms.

terms are not available—or even easily accessible—in many instances of digital contracting, thereby throwing the entire premise into question.

2. WHY THE THEORY SIMPLY WILL NOT DIE

The duty to read premised on an individual having all available information at the time of agreement has not stopped courts from continuing to allow the "rolling contract" theory of formation to batter basic logic and legal principles. In recent years, several prominent cases, most notably *Brower v. Gateway 2000, Inc.*,[30] have supported the perpetuation of the rolling contract delusion, almost always within software and similar types of agreements. The *Gateway* case involved an additional term (arbitration) being added to the standard terms delivered with the computer.[31] However, in the digitally based world, it is far more common for courts to use the theory in cases of shrinkwrap agreements.[32]

A shrinkwrap license refers to an agreement that is wrapped in plastic and included with a disc containing software.[33] In these situations, the user manifests assent to the terms of the shrinkwrap agreement either by tearing open the plastic wrap containing the software or by installing the software.[34] While including the terms inside packaging wrap and ascribing assent for merely opening the package may seem to be a stretch of legal logic, many courts are in fact comfortable with such a conclusion.[35] The determinations within each of these cases almost always rely on the "rolling contract" theory of contract formation despite *dicta* in *ProCD* that cautions

---

[30] 676 N.Y.S.2d 569 (1998) (embracing "rolling contracts," but concluding that the arbitration clause was substantively unconscionable under UCC § 2-302).

[31] The court held that the contract was not formed with the plaintiff's placement of the telephone order or the delivery of the goods. "Instead, an enforceable contract was formed only with the consumer's decision to retain the merchandise beyond the 30-day period specified in the agreement." *Id.* at 676.

[32] DeFontes v. Dell, Inc, 984 A.2d 1061, 1068 (R.I. 2009) (holding "that U.C.C. § 2–207 was inapplicable because in cases involving only one form, the "battle-of-the-forms" provision was irrelevant."). M. A. Mortenson Co., Inc. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000) (using the reasoning in *ProCD*, *Hill*, and *Brower* to be persuasive and then misinterpreting the definition of merchant). *Cf.* Wachter Mgmt. Co. v. Dexter & Chaney, Inc., 144 P.3d 747 (Kan. 2006); *Klocek v. Gateway, Inc.,* 104 F.Supp. 2d 1332 (D. Kan. 2000).

[33] See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459 (2006).

[34] *See* Christina L. Kunz, John E. Ottaviani, Elaine D. Ziff, Juliet M. Moringiello, Kathleen M. Porter & Jennifer C. Debrow, *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW 279 (2003).

[35] *See, e.g.*, Rinaldi v. Iomega Corp., No. 98C-09-064 RRC, 1999 Del. Super. LEXIS 563 (Del. Super. Ct. Sept. 3, 1999) (upholding a warranty disclaimer as "conspicuous" even though it was contained within product packaging). In reaching its conclusion, the Rinaldi court relied upon the reasoning of ProCD, Inc. v. Zeidenberg, which also upheld a rolling contract, although the disputed terms pertained to the license grant. *Id.*

against over-extending the theory beyond the "money now, terms later" e-commerce based world.[36]

3. THE SIGNAL OF THE DISASTER TO COME

For consumers, *ProCD* and its related cases should be viewed as signals of impending difficulties, much like Sisyphus's boulder gathering steam as it rolls back down the mountain. The decisions demonstrate the beginning of a true struggle with accommodating the digital world under existing law.

Fortunately, for a while, "clickwrap"[37] agreements allowed the law to return to the ways of old, allowing the application of well-trodden contract law. For example, clickwrap agreements generally allow the individual to review terms prior to installation or use of the product. Consequently, every court asked to consider basic clickwrap licenses has held the agreements enforceable.[38] Moreover, in cases that ask for a torturing of basic contract principles, the courts have found mechanisms to refuse enforcement. For example, in *Specht v. Netscape Communications Corp*.[39] then Judge Sotomayor held that because Netscape did not show the terms of use to the individuals downloading the software, much less require them to agree, the terms did not constitute an enforceable agreement.[40] The reasoning is legally sound, as a consumer clicking on a download button does not equate to assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify

---

[36] Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677, 693 (2004).

[37] In general, clickwrap agreements require the end-user to manifest his or her assent by clicking an "ok" or "agree" button on a dialog box or pop-up window. A user indicates rejection by clicking cancel or closing the window. Upon rejection, the user cannot use or purchase the product or service. This type of agreement should be contrasted with a shrinkwrap and similar agreements—in which the terms are enclosed or only available after download or opening of the box.

[38] *See, e.g.*, Davidson & Assocs. v. Jung, 422 F.3d 630, 632 (8th Cir. 2005); Novak v. Overture Servs., Inc., 309 F.Supp. 2d 446, 452 (E.D.N.Y. 2004) (enforcing a forum selection clause not initially visible in a clickwrap agreement); i-Sys., Inc. v. Softwares, Inc., No. Civ. 02-1951(JRT/FLN), 2004 WL 742082, at *7 (D. Minn. Mar. 29, 2004); i.LAN Sys., Inc. v. Netscout Serv. Level Corp., 183F. Supp. 2d 328, 329 (D. Mass. 2002); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 529 (N.J. Super. Ct. App. Div. 1999); *cf.* Hotmail Corp. v. Van$ Money Pie, Inc., No. C-98-20064JW, 1998 WL 388389, at *1−9 (N.D. Cal. Apr. 16, 1998) (assuming such an agreement was enforceable without discussing the issue).

[39] 306 F. 3d 17, 32 (2d Cir. 2001) (distinguishing the ProCD and Hill cases). Specht v. Netscape Communications Corp. is a well-known case also for the courts unwillingness to determine that downloaded software was a good under UCC Article 2.

[40] *Id.* at 35.

assent.[41] Regrettably, the sanity espoused by the courts in these cases was somewhat short lived as the terminology and concepts became entwined.

In many ways, as highlighted by Professor Lemley "once we have expanded agreement to include clicking on a Web site or engaging in conduct that we would expect the buyer to engage in anyway, it seems only a small step to enforce a unilateral statement of terms."[42] Consequently, the willingness to reduce the requirement of effective assent in clickwrap and shrinkwrap cases seems to have allowed courts to completely abandon the idea of assent when it comes to browsewrap agreements.[43] In most instances today, merely browsing a website is assent to some terms of service—the use itself is considered by some courts to be enforceable because a reasonable consumer understands the use of a website subjects users to the terms of service.

B. CONTRACTS 101: REVISIONS AND OFFERS

The Catch-22 that often exists in browsewrap agreements is yet another example of logic being abandoned in laws governing the digital world. In these "agreements," you agree that by coming to the site you agree to terms that you cannot possibly read without coming to the site. The argument for the enforcement of such agreements is based on efficiency as the user may simply leave the sight if they do not agree to the terms of the website.

As odd as this argumentation may seem, it is in fact a widely enforceable tenant in the current digital world. Keep in mind that visiting a website, even only for a moment while the user decides if she wishes to be subject to the terms of the website, allows the website to gather a significant amount of information and to place a cookie (and similar behavioral targeting devices) on the user's computer. While such placement might be assumed to require consent, the fact is that in the United States such consent is not required.[44] That particular debate is well past lost.

---

[41] "An offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious." *Id.* at 36 *citing* Windsor Mills, Inc. v. Collins & Aikman Corp., 101 Cal. Rptr. 347, 351 (Cal. Ct. App. 1972).

[42] Lemley, *supra* note 33, at 469.

[43] Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 428−30 (2d Cir. 2004); Ticketmaster Corp. v. Tickets.com, Inc., No. CV997654HLHVBKX, 2003 WL 21406289, at *1−2 (C.D. Cal. Mar. 7, 2003); Pollstar v. Gigmania, Ltd., 170 F.Supp. 2d 974 (E.D. Cal. 2000); *cf.* Cairo, Inc. v. Crossmedia Servs., Inc., No. C04-04825JW, 2005 WL 756610, at *5 (N.D. Cal. Apr. 1, 2005) (enforcing a forum selection clause in a browsewrap while purporting not to rule on the enforceability of the browsewrap itself).

[44] The European Union takes a significantly different approach to such activity. Since 2009, this e-Privacy Directive requires companies to obtain consent of the internet user before they store or access cookies on a device. *See* Article 5.3 and recital 17 of the e-Privacy Directive 2002/58, amended by Directive 2009/136; recital 66 of Directive 2009/136. For a full discussion, see Frederik Zuiderveen Borgesius, *Behavioral Targeting: A European Legal*

Recall that Justice Sotomayor highlighted the reality of the digital age in which "people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[45] The issue becomes even more noteworthy when continued use of a website places an obligation on the user to stay up-to-date on the current version of the terms of use. Fortunately, some courts have recognized the logic highlighted by Justice Sotomayor. As the Ninth Circuit in *Douglas v. US District Court ex rel Talk America*[46] points out:

> Parties to a contract have no obligation to check the terms on a periodic basis to learn whether they have been changed by the other side.[47] Indeed, a party can't unilaterally change the terms of a contract; it must obtain the other party's consent before doing so.[48] This is because a revised contract is merely an offer and does not bind the parties until it is accepted.[49] And generally "an offeree cannot actually assent to an offer unless he knows of its existence."[50]

As the Ninth Circuit explains, one simply cannot fall into consent even if the website suggests otherwise. Yet as our interactions with the digital world began to demand reconsideration of the doctrine, we failed to demand a proper examination. Instead, terms such as "know" and "consent" have stretched to their outmost limits, allowing the technically correct but *questionable* imposition of consent on non-interested parties, even allowing the continued use of a service to be sufficient to justify the existence of consent to the newly presented terms, so long as proper notice has been given and a reasonable amount of time allowed to react to the new terms.[51] This legal

---

Perspective, 11 IEEE SEC. & PRIVACY 82 (2013), *available at* http://www.computer.org.proxyiub.uits.iu.edu/csdl/mags/sp/2013/01/msp2013010082.pdf.

[45] *See supra* note 5 and accompanying text.

[46] 495 F.3d 1062 (9th Cir. 2007).

[47] Nor would a party know *when* to check the website for possible changes to the contract terms without being notified that the contract has been changed and how. Douglas would have had to check the contract every day for possible changes. Without notice, an examination would be fairly cumbersome, as Douglas would have had to compare every word of the posted contract with his existing contract in order to detect whether it had changed.

[48] Union Pac. R.R. v. Chi., Milwaukee, St. Paul & Pac. R.R., 549 F.2d 114, 118 (9th Cir. 1976).

[49] Matanuska Valley Farmers Cooperating Ass'n v. Monaghan, 188 F.2d 906, 909 (9th Cir. 1951).

[50] Douglas, 495 F.3d at 1066 *quoting* 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 4:13, at 365 (4th ed. 1990); *see also* Trimble v. N.Y. Life Ins. Co., 255 N.Y.S. 292, 297 (App. Div. 1932) ("An offer may not be accepted until it is made and brought to the attention of the one accepting.").

[51] See id.

fiction, which some scholars have called the "duty to read" proverb,[52] is now a prevalent part of our interpretation of contracting, especially those involving terms of service agreements.

The "rebuttable presumption of knowing assent"[53] has been crafted at a time when consumers are increasingly inundated with information and demonstrating a clear unwillingness to read boilerplate terms.[54] While some attempts have been made to increase awareness—or at least to force consumers to feign attention to terminology—by imposing regulations requiring initials and double clicks.[55] Yet, no measure has truly impacted consumers belief that she "must have the item or the information she is seeking, she is in a rush to obtain it, and she trusts the website or regulators to protect her if agreement terms are outside the bounds of the law."[56] This phenomenon has produced a new legal by-product, the "Why Bother" consent in which the consumer is completely apathetic concerning the transaction. The consumer knows he has no bargaining power,[57] has already decided to purchase the item,[58] and because of these two perceptions, believes his time is wasted in reading terms.[59] In fact, it

---

[52] *See* MURRAY, JR., *supra* note 20, at 12 *citing* ProCD v. Zeidenberg, 105 F. 3d 1147, 1149 (7th Cir. 1997).

[53] Charles L. Knapp, *Is There A "Duty to Read"?*, 66 HASTINGS L.J. 1083 (2015).

[54] *See* Anjanette H Raymond, *Yeah, But Did You See the Gorilla? Creating and Protecting an 'Informed' Consumer In Cross Border Online Dispute Resolution*, 19 HARV. NEGOT. L. REV. 129, 143 (2014) [hereinafter Raymond, *Gorilla*].

[55] For example, Canada's 2014 Anti-Spam Law specifically envisions the need to clearly delineate the issue within the digital world by requiring that "express consent be evidenced by a positive action, such as checking an unchecked box or entering an e-mail address specifically to receive commercial electronic messages." *Electronic Commerce Protection Regulations*, 81000-2-175 (SOR/DORS) (2014). *See also*, Shawn Hessinger, *New Canadian Anti-Spam Law Requires Permission from Email Recipients*, SMALL BUS. TRENDS (May 23, 2014), http://smallbiztrends.com/2014/05/new-anti-spam-law-canada.html. *See e.g.*, Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI's "Principles of the Law of Software Contracts,"* 78 U. CHI. L. REV. 165, 183–84 (2011); Omri Ben Shahir & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 746 (2011) (arguing that "[mandated disclosure] place[s] choice, and thus risk and responsibility, onto the ill-informed and inexpert person facing a novel and complex decision.").

[56] *See* Raymond, *Gorilla*, *supra* note 56. *See also*, Corey Ciocchetti, *Just Click Submit: The Collection, Dissemination and Tagging of Personally Identifying Information,* 10 VAND. J. ENT. & TECH. L. 553, 561 (2008).

[57] *See* Raymond, *Gorilla*, *supra* note 56 at 144.

[58] *Id.* See also, Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms,* 15 HARV. NEGOT. L. REV. 115, 129 (2010) (citing Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study,* 28 AM. SOC. REV. 55, 55 –56, 60 –62 (1963)) [hereinafter Schmitz, *Legislating in the Light]*.

[59] *See* Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements,* 36 LAW & HUM. BEHAV., 293, 297–98 (2012); Amy Schmitz, *Pizza-Box Contracts: True Tales of Consumer Contracting*

could be argued that consumers' apathy to reading terms is a well-established fact upon which businesses seek to bury incredibly disadvantageous terms.[60] These perceptions are coupled with a belief that the "system" will protect them should something fail.[61] Consumers' trust is misplaced, however, as unsavory businesses within the community can seize upon this misplaced trust.[62]

The notion of "Why Bother" consent has led some states to attack contract terms under the doctrine of unconscionability. Yet this doctrine is slippery and has caused a significant split in state case law. For example, in New York and California, a contract is unconscionable only if it is both procedurally *and* substantively unconscionable.[63] However, in some states unconscionability is defined through the examination of a single test, such as the "inequality of bargaining power"[64] that some states overcome by the existence of an opt-out option.[65]

Further complicating the issue is a split in opinion concerning the weight that should be given to the power imbalance in the relationship and the absence of choice in the market. For example, under New York law, meaningful alternative choices in providers of services forecloses any procedural unconscionability claim.[66] While in California, a contract can be procedurally unconscionable if a service provider has

---

Culture, 45 WAKE FOREST L. REV., 863, 863–65 (2010); David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 609 (2010) (arguing that where vendors can change terms at will, it will make no sense for customers to read the terms even the first time).

[60] It certainly exists in other areas. For example vendors take advantage of their knowledge of consumer behavior in their marketing. *See* Jon Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630 (1999).

[61] *See* Raymond, *Gorilla*, *supra* note 56 at 146.

[62] See Laura Brothers, 3 Kickstarter Campaigns That Went Horribly Wrong, Business Insider, (June 25, 2013) available at http://www.businessinsider.com/3-kickstarter-campaigns-gone-bad-2013-6?op=1

[63] *See* Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 114 (2000); Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10 (1988).

[64] *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965). For a further discussion, see Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005).

[65] In Mohamed v. Uber Techs., Inc., No. C-14-5200 EMC, 2015 WL 3749716 (N.D. Cal. June 9, 2015), the U.S. District Court for the Northern District of California said an opt out clause that failed to be set off from the "small and densely packed text surrounding it" was illusory. *Id.* at *13. For further discussion see, Jeff Sovern, *Do Opt-Out Clauses Save Arbitration Agreements from Being Unconscionable?,* CONSUMER LAW & POL'Y BLOG (June 12, 2015), http://pubcit.typepad.com/clpblog/2015/06/do-opt-out-clauses-save-arbitration-agreements-from-being-unconscionable.html.

[66] *See* Ranieri v. Bell Atl. Mobile, 759 N.Y.S.2d 448, 449 (App. Div. 2003).

overwhelming bargaining power and presents a "take-it-or-leave-it" contract to a customer-even if the customer has a meaningful choice as to service providers.[67]

Possibly most troubling is the growth of "relationship" based consumer contracts. No longer are consumers subject to disadvantageous terms in a single purchase agreement. Consumers are now faced with contract clauses that envisage a continuing relationship (such as social media site access) that significantly increase the length of the contract and the number and complexity of the terms included to cover an ongoing relationship. Of course, to some commentators this change to relationship contracts demands a fundamental re-examination of how consumers are protected,[68] an issue that will be addressed later in this paper.[69]

Yet the simple examples above do not fully capture the newest realities of our digital lives. Today, millions of people share highly personal information online. At the time of sharing, few give thought to the ability to remove the information at a later time, a feat that is next to impossible.[70] In situations such as this, should a website owner be allowed to stand behind the "who could care" consent doctrine while demanding users read new terms, keep abreast of new policy, and have no ability to remove information should they desire to "stop" using the service? Certainly, websites that serve a social function and that gather a large amount of highly personal data should be examined within a fundamentally different legal orientation_than those websites that serve solely as e-commerce providers. The dichotomy between websites that serve as information gatherers and those that function as nothing other than providers of commercial services is a perfect example of needing to attend to the issue briefly explored in *ProCD* in which the court cautions against over-extensions of the rolling contract theory beyond the e-commerce based world.[71]

C. THE FCC STEPS IN TO SAVE CONSUMERS?

One of the more troubling examples of businesses attempting to use "why bother" consent as a means to disadvantage and inconvenience individuals exists in the area of contract skimming. Contact skimming occurs when a business or other entity accesses your address book or contact list and takes the information located within the list.[72] Of course, when a person downloads the application or uses the offending

---

[67] Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1283, 1284 (9th Cir. 2006) (en banc).

[68] *See* William Woodward, *Contraps*, 66 HASTINGS L. J. 915 (2015).

[69] See infra notes 106-7.

[70] See Associated Press Author, *Ashley Madison hacked: You can never really delete anything online, say experts*, Associated Press, (Aug. 25, 2015)

[71] *See* Stephen E. Friedman, *Text and Circumstance: Warranty Disclaimers in a World of Rolling Contracts*, 46 ARIZ. L. REV. 677, 693 (2004).

[72] *See* Sam Biddle, *How iPhone Apps Steal Your Contact Data and Why You Can't Stop It*, GIZMODO (Feb.15, 2012, 11:42 AM) http://gizmodo.com/5885321/how-iphone-apps-steal-your-contact-data-and-why-you-cant-stop-it.

business's programming, the person consents to this level of sharing. In fact, this has become such a widely accepted practice that Apple built into the iPhone's core software the ability for any app to access the address book at any time.[73] As U.S. Senator Charles Schumer explained, "[t]hese uses go well beyond what a reasonable user understands himself to be consenting to when he allows an app to access data on the phone for purposes of the app's functionality.[74] The late Steve Jobs himself tackled the issue in 2010 at the D8 Conference:

> Privacy means people know what they are signing up for. In plain English. And repeatedly. That's what it means. I'm an optimist. I believe people are smart and some people want to share more than other people do. Ask them. Ask them every time. Make them tell you to stop asking if they get tired of you asking. Let them know precisely what you are going to do with their data. [75]

Interestingly, while I agree with the above noted sentiments, the issue is much larger than the answers reflect. In the Internet of Things digitally connected world, an individual user of an application gives consent for the application owner to perform tasks and often to gather information. Consent—although tortured legal logic—is at least palatable. Yet the information shared is neither information owned by nor information only relating to the consenting user, it is often the information of a non-consenting innocent third party. For example, in 2012 it was discovered that the popular photo-sharing app Path uploads a user's entire address book without permission.[76] The information contained within an address book is information about others, not the party consenting to the sharing of the information and more importantly, can be very personal in nature. The information shared is about a third party that has no relationship with the information, gatherer has no means to stop the information transfer, has no notice of the gathering of his information, and thus, has no real mechanism to alter or change the information gathering. And while the plight of Sisyphus may seem unsuitable here, in fact it is not. Sisyphus, while not in control of his current situation, certainly contributed to the creation of such an awful fate—the

---

[73] *Id.*

[74] *U.S. Senator Demands Probe of Smartphone Apps That Steal Contacts, Photos,* THE GLOBE AND MAIL (March 5, 2012, 8:17 AM), http://www.theglobeandmail.com/technology/mobile/us-senator-demands-probe-of-smartphone-apps-that-steal-contacts-photos/article551109/.

[75] Interview with Steve Jobs, CEO, Apple Inc., at 2010 D8 Conference with Walter Mossberg (at the time the principal technology columnist for The Wall Street Journal), *available at* https://www.youtube.com/watch?v=KEQEV6r2l2c.

[76] *See* Jesus Diaz, *Any iPhone App Can Steal Your Contacts Now—Against Steve Jobs' Will*, GIZMODO (Feb. 15 2012, 2:27 AM), http://gizmodo.com/5885245/your-iphones-privacy-sucks-because-of-appleand-even-steve-jobs-agrees; Mark Hachman, *Path Uploads Your Entire iPhone Contact List By Default*, PC MAGAZINE (Feb. 7, 2012, 8:16 PM), http://www.pcmag.com/article2/0,2817,2399970,00.asp.

non-consenting innocent third party did no such thing. The non-consenting innocent third party is subjected to a future that was in no way of his doing.

Fortunately, in June of 2015, the Federal Communications Commission issued a ruling interpreting the Telephone Consumer Protection Act. Relevant to this paper, a particular ruling determined that, "[a] consumer whose name is in the contacts list of an acquaintance's phone does not consent to receive robocalls from third-party applications downloaded by the acquaintance."[77] Protections for the non-consenting, innocent third parties have been put in place, albeit in a very limited set of circumstances, such as in relation to marketing robocalls.[78]

However, the use of the phrase "*does not consent*" in the ruling needs further attention as it reflects the widespread misuse of the doctrine of consent. Needing to consider the presence of consent in situations where it is in no way even tangentially present shows the widespread misuse of the term. Americans should be dismayed and up in arms over the implication that someone, somewhere, thought consent was even possible in the situation as described. How have we gotten so far away from the meaning of consent?

In fact, as some commentators point out, the questions of consent is actually clear in the Act: "The Telephone Consumer Protection Act is straightforward: it requires a company to get a consumer's prior express consent before making robocalls to their number." [79] The language "prior expressed consent" is unambiguous and has a well-trodden definition.

The heightened standard in certain instances requiring consent has even come before the United States Supreme Court. In the 2015 case of *Wellness International Network, Ltd., v. Sharif*[80], the Court enumerated a standard that suggests a heightened standard of consent in cases that seek to displace traditional court processes. In the bankruptcy case, at issue was the ability of parties to consent to adjudication by a bankruptcy court. The Court determined that the consent:

> need not be express, but must be knowing and voluntary. Neither the Constitution nor the relevant statute—which requires "the consent

---

[77] Federal Communications Commission, *FCC Strengthens Consumer Protections Against Unwanted Calls and Texts*, FCC Press Release, (June 18, 2015), *available at* https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts.

[78] See id.

[79] Statement of Commissioner Jessica Rosenworcel, Approving In Part, Dissenting In Part, Re: In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278, WC Docket No. 07-135, *available at* https://apps.fcc.gov/edocs_public/attachmatch/DOC-333993A4.pdf.

[80] 135 S. Ct. 1932 (2015).

> of all parties to the proceeding" to hear a *Stern* claim, § 157(c)(2)—mandates express consent. Such a requirement would be in great tension with this Court's holding that substantially similar language in § 636(c)—which authorizes magistrate judges to conduct proceedings "[u]pon consent of the parties"—permits waiver based on "actions rather than words," *Roell v. Withrow*, 538 U. S. 580, 589. *Roell*'s implied consent standard supplies the appropriate rule for bankruptcy court adjudications and makes clear that a litigant's consent—whether express or implied—must be knowing and voluntary.[81]

In a five Justice majority (Sotomayor, Kennedy, Ginsburg, Breyer & Kagan), also joined by Justice Alito in substantial part, the Court held that litigants may "knowingly and voluntarily" allow a bankruptcy judge to hear claims that, absent such consent, Article III would bar the bankruptcy judge from deciding.[82] Interestingly, the Court has not called upon the "knowingly and voluntarily" standard to be applied when parties consent to displace a judicial forum. It is the "knowing and voluntary" standard enumerated by the Court that has left some commentators wondering in what other areas the Court may seek to heighten the standard to demonstrate the existence of consent.[83] One area that seems most ripe for comparison is arbitration clauses, as the presence of such a clause is also an election of an alternative forum. The Court seems to be drawing such a comparison itself, as the opinion directly uses arbitration as a comparison point on two occasions.[84]

II. USE TECHNOLOGY TO IMPROVE CONSENT

While the concept of consent within contract law, especially in consumer based contracts of adhesion, has continued to push legal boundaries and caused notable confusion, some commentators have called for a re-examination of the use of contracts of adhesion. One authority, Frédérique Kessler, has asked for the legal community to re-examine age old doctrine and to consider new opportunities to embrace contracts of adhesion while calling for the rejection of these contracts under certain circumstances. This section will explore Professor Kessler's arguments in relation to contracts of adhesion. The section will then consider the use of the newest technology to address issues related to consent and to implement Professor Kessler's suggested approach to contracts of adhesion.

---

[81] *Id.* at 1937.

[82] *Id.* at 1939.

[83] *Id.*

[84] *See* Wellness International Network, Ltd., 135 S. Ct. at 1942. *See also id.* at 1949 (Justice Alito, concurring in part and concurring in the judgment); *Id.* at 1949 (Justice Roberts, dissenting); *Id.* at 1968 fn. 6. (Justice Thomas, dissenting).

A. RETHINKING KESSLER

In 1943, Professor Frédérique Kessler, in a Colombia Law Review article entitled *Contracts of Adhesion-Some Thoughts About Freedom of Contract,* asked the legal community to reconsider the legal response to the use of contracts of adhesion.[85] To make such a sweeping request, Professor Kessler highlights the justification for the creation and enforcement of contracts that, in essence, lack informed consent. As Professor Kessler highlights:

> But the law cannot possibly anticipate the content of an infinite number of atypical transactions into which members of the community may need to enter. Society, therefore, has to give the parties freedom of contract; to accommodate the business community the ceremony necessary to vouch for the deliberate nature of a transaction has to be reduced to the absolute minimum. Furthermore, the rules of the common law of contract have to remain *Jus dispositivum--to* use the phrase of the Romans; that is, their application has to depend on the intention of the parties or on their neglect to rule otherwise.[86]

As Professor Kessler highlights, in a world that values freedom of contract, an individual's "neglect" in protecting his freedoms is a burden the individual—and not the justice system—should bear. Professor Kessler highlights the means in which the individual is ensured he is provided an opportunity to protect his interests:

Either party is supposed to look out for his own interests and his own protection. Oppressive bargains can be avoided by careful shopping around. Everyone has complete freedom of choice with regard to his partner in contract, and the privity-of-contract principle respects the exclusiveness of this choice. Since a contract is the result of the free bargaining of parties who are brought together by the play of the market and who meet each other on a footing of social and approximate economic equality, there is no danger that freedom of contract will be a threat to the social order as a whole.[87]

Historically, freedom of contract is essential to the economic functioning of a commercial marketplace and thus serves a purpose that should be protected and respected. Professor Kessler suggests that previously underemphasized aspects of contracting should draw more attention as the growth of small local merchants is replaced by large-scale enterprise.

---

[85] Friedrich Kessler, *Contracts of Adhesion-Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

[86] *Id.* at 629.

[87] *Id.* at 630.

In so far as the reduction of costs of production and distribution thus achieved is reflected in reduced prices, society as a whole ultimately benefits from the use of standard contracts. And there can be no doubt that this has been the case to a considerable extent. The use of standard contracts has, however, another aspect which has become increasingly important. Standard contracts are typically used by enterprises with strong bargaining power. The weaker party, in need of the goods or services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses.[88]

Professor Kessler argues that both the growth of large scale enterprise and the wide scale adoption of legally tested cut-and-paste boilerplate clauses has led to the need to re-consider the prior approach used by the justice system in enforcing contracts of adhesion as socially beneficial. Professor Kessler posits an interesting question that has remained in the forefront of legal minds since the time of his writing: "can the unity of the law of contracts be maintained in the face of the increasing use of contracts of adhesion?"[89] He then argues the answer must be a resounding "No":

> The prevailing dogma, on the other hand, insisting that contract is *only* a set of operative facts, helps to preserve the illusion that the "law" will protect the public against any abuse of freedom of contract. This will not be the case so long as we fail to realize that freedom of contract must mean different things for different types of contracts. Its meaning must change with the social importance of the type of contract and with the degree of monopoly enjoyed by the author of the standardized contract.[90]

Professor Kessler makes a well received, well considered, and well-cited argument for the need to reconsider freedom of contract in light of the contract of adhesion world. Professor Kessler also highlights the main issues that we must seek to address if we are to overcome the concerns arising from the conflict between freedom of contract and contracts of adhesion in the new contracting world. For example, (1) the presence of a contract of adhesion, including lack of negotiation;[91] (2) the social importance of the type of contract;[92] (3) the degree of monopoly enjoyed by the author of the standardized contract, and/or (4) the degree to which all competitors use the same clauses.[93]

---

[88] *Id.* at 632.
[89] *Id.* at 636.
[90] *Id.* at 641–42.
[91] *Id.* at 636.
[92] *Id.* at 642.
[93] *Id.* at 632.

B. SMART CONTRACTS

One of Professor Kessler's main concerns regarding the growth of contracts of adhesion is clauses that seek to regulate aspects of the relationship that society deems especially important. For example, companies such as Facebook and Google both hold a quasi-monopoly within their respective industries, yet include as standard terms an almost complete waiver of a growing socially important issue: personal privacy.[94] Can we ever truly stop quasi-monopolistic informational gathering businesses from continuing to take advantage of contracting doctrine formed without the existence of the digital world?

The answer likely depends on courts' willingness to consider Kessler's main suggestions for reform and societies' acceptance of smart contracts. Imagine if aspects of the process that allow individuals to customize products could be enhanced to allow individuals to tailor portions of their commercial agreements. Imagine if payment for services could occur after the completion of identified segments of performance and what if it could all be done automatically, without further intervention from the parties. This section will explore the possibility that technology and smart contracts may be able to address the long-standing issues of consent and Professor Kessler's concerns about contracts of adhesion.

In the most basic terms, smart contracts are computer programs that can automatically execute the terms of a contract. The technology is, of course, more complicated than a simple program, as the complexity of the transaction moves outside the payment realm. Nick Szabo, the man who coined the term smart contracts in 1994, envisioned a much wider use. "Smart property might be created by embedding smart contracts in physical objects."[95] At the time, he wrote of a process that is, in some ways, already occurring today. His example was a simple car loan, writing that if you miss a car payment, the smart contract could automatically revoke your digital keys to operate the car.[96] In 2008, he revised the thought and considered the newest technology, pointing to the use of starter-interrupt devices that perform the described function by disabling the vehicle remotely when payment is not received on time.[97] Imagine if the same function could be performed without the need for a person to activate a remote shut off device. Should it occur, this would be a simple example of a

---

[94] *See, e.g.*, Mark Weinstein, *Is Privacy Dead?*, HUFFINGTON POST (Apr. 24, 2013, 1:14 PM), http://www.huffingtonpost.com/mark-weinstein/internet-privacy_b_3140457.html.

[95] *See* NICK SZABO, SMART CONTRACTS (1994), *available at* http://szabo.best.vwh.net/smart.contracts.html.

[96] *Id.*

[97] *See* Nick Szabo, *Smart Contracts Expand Credit Opportunities*, UNENUMERATED BLOG (Aug. 24, 2008), http://unenumerated.blogspot.com/2006/06/smart-contracts-expand-credit.html.

smart contract. Even this modest smart contract demonstrates the true immediate potential of basic smart contracts. However, the possibilities are greater as our world becomes more digitally connected. Consider the first to launch a block chain technology smart contract known as BURST.[98] BURST claims to already be implementing smart contracts in five areas: atomic cross chain transactions, auctions, crowdfunding, dormant funds transfers, and lotteries.[99] While the parameters of each is beyond this paper, the basics of each transaction are simple: a program runs based on a series of pre-identified triggers and when a certain trigger occurs, payment occurs (and often prior payments are returned).[100] For example, in the area of Search Engine Optimization a smart contract can be created in which payment is automatically released when predesignated rankings are reached.[101] Within the larger area of smart contracts, BURST claims to be developing smart contracts in five areas. The area most relevant to this paper is the area of Smart Property which would allow the ownership of an object to be shared depending upon the state of the contract. As BURST explains, Smart Property can exist in something simple, such as a shared car in which you automatically pay for the car but only while driving it.[102]

The future of smart contracts is just beginning to be explored; yet one can imagine smart contracts assisting in repositioning the power dynamic in some commercial transactions. Consider one of the newer features of Facebook: the ability to reprogram the newsfeed algorithm.[103] The ability of industry to allow mass customization of algorithms, instead of merely designing the algorithm to perform a level of personalization, is a massive step toward removing some of the historic power imbalances that exist in certain settings. Consider the average consumer in a "must, rush and trust" online environment.[104] That consumer could be presented with a choice, spend time customizing aspects of the agreement or accept standard terms, and then the choice could be applied across settings in many instances based on simple existing identification/authentication technology. Consumers who wish to participate in an interactive process, wish to negotiate, and/or wish to have input on key terms would be allowed to customize and essentially reprogram the basic algorithm that

---

[98] *See* John Weru Maina, *Cryptocurrency BURST Makes Smart Contracts a Reality, What Happened to Ethereum?*, CCN.LA (Jan. 27, 2015), https://www.cryptocoinsnews.com/cryptocurrency-burst-makes-smart-contracts-reality-happened-ethereum/.

[99] See BURST PRESS RELEASE: FOR IMMEDIATE RELEASE 2015-1-22 (2015), *available at* http://www.burstcoin.info/pr/sc/SmartContracts.pdf.

[100] *See id.*

[101] *E.g.*, SEARCH ENGINE OPTIMIZATION CONTRACT, *available at* https://create.smartcontract.com/#/choose.

[102] *See* BURST *supra* note 101.

[103] *See* Vindu Goel, *Facebook Gives Users More Control Over Their News Feeds*, N.Y. TIMES (July 9, 2015, 8:35 AM), http://bits.blogs.nytimes.com/2015/07/09/facebook-gives-users-more-control-over-their-news-feeds/?_r=0.

[104] *See* Raymond, *Gorilla*, *supra* note 56.

interacts, creates pages, and spits out a standard form contract based on actual choices, not implicit suppositions.[105] Now imagine the consumer who takes such an action. The consumer could also create a structured payment facility where partial payment occurs when the product is shipped, when it is left outside their door, and when it is actually examined for compliance/defect. Imagine a world where consumers were both informed of their contractual choices, able to research areas that they wanted to consider in more depth (such as the use of online arbitration), and then allowed to structure payment in a manner that reflects consumers as powerful entities.

Recent research is also beginning to explore the interaction between customization, personalization, and issues of high social importance. For example, in 2010, Professors Sundar and Marathe concluded that:

> privacy turns out to be a key predictor of user attitudes toward personalization and customization . . . Providing high privacy has tangible psychological benefits, by imbuing users with a greater sense of control and stronger attitudes toward SIP [system-initiated personalization] for power users and stronger attitudes toward UIC [user-initiated customization] for nonpower users.[106]

In theory, it could thus be argued that website architecture that allows customization, especially in areas identified as a socially important issue—in this case privacy—leads to individuals' realizing tangible psychological benefits arising from their increased sense of control.[107] One wonders what other important issues might produce the same benefits for users.

Equally important is the potential to identify those areas that produce an increased sense of control to begin to shift power imbalances. As emphasized by Professor Kessler, contracts of adhesion serve a social and economic purpose. But the increased power imbalances that occur either from "take it or leave it" clauses created by monopolistic businesses or market creation of boilerplate clauses that eliminate the

---

[105] Customization gives users control and asks for them to select and categorize things. Personalization uses preferences, interests and other online behaviors and learns (and makes assumptions) about what you would like had you been asked. *See e.g.*, S. Shyam Sundar & Sampada S. Marathe, *Personalization Versus Customization: The Importance of Agency, Privacy, and Power Usage*, 36 HUMAN COMM. RESEARCH 298 (2010), *available at* http://eds.a.ebscohost.com/eds/pdfviewer/pdfviewer?sid=185ef206-7c4f-40ce-b452-ffbb5e65698f%40sessionmgr4007&vid=2&hid=4210.

[106] Sundar and Marathe, *supra* note 107, at 319. It should be noted, in this case power describes level of knowledge and use of the web and does not equate to the concept of relational power used elsewhere in this paper.

[107] See Author, Social Networks May Inflate Self-Esteem, Reduce Self-Control, University of Pittsburg, News Service (Jan 14, 2013) http://www.news.pitt.edu/socialmedia_selfcontrol

ability to shop around for better terms greatly diminish the benefits of use of such contracts. Customizable smart contracts could reduce the impact of these characteristics upon contracts of adhesion if implemented in a manner to reduce the undesirable aspects listed. In turn, contracts of adhesion created through customizable smart contract mechanisms may be recognized as socially and economically advantageous to *all* parties.

C. TECHNOLOGY ASSISTED CONSENT

Smart contracts also address some of the concerns that led to the odd set of cases, such as *ProCD*[108] and *Hill v. Gateway 2000, Inc*,[109] noted earlier in this paper. Freedom of contract and consent are essential when discussing contracts, yet courts have needed to summon feats of great strength to move the several contracting concepts into the digital world. As a result, courts around the country are embattled in case-by-case unconscionability analysis that often focuses narrowly on particular terms and conditions in standard form contracts. As Professor Warkentine explains: left only with the public policy doctrine of unconscionability, courts "refuse to enforce only a limited number of provisions in a limited number of cases."[110] And this is as it should be; the doctrine of unconscionability was never intended to be widely used in the most mundane of contract cases. As noted by Professor Kessler, adhesion contracts are widely supportable because people are expected to be active in the contracting process or suffer the consequences of their inactivity.[111] Unfortunately, contracting realities changed and unconscionability will never be enough to overcome the newest issues created in mass use of standard contracts.

Sisyphus need not continue to toil alone in his task, however, as the use of customization and smart contracts may reduce the courts need to summon metaphysical feats to avoid enforcing contracts that are disadvantageous but not significantly prejudicial to weaker parties. As discussed above, smart contracts that implement a level of customization may greatly reduce the impact of power imbalances by allowing weaker parties to participate in selecting clauses that cover areas of social importance—like privacy. Smart contracts could also enforce a "black list" of prohibited terms and a list of terms that would receive heightened scrutiny by courts.[112]

---

[108] ProCD, Inc. v. Zeidenberg, 86 F. 3d 1447 (7th Cir. 1996).

[109] Hill v. Gateway 2000, Inc., 105 F. 3d 1147 (7th Cir. 1997) *cert. den*., 522 U. S. 808 (1997).

[110]Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 471 (2008).

[111] Kessler, *supra* note 87, at 630 (internal citations omitted).

[112] MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2013). Professor Nancy Kim has suggested that vendors obtain affirmative agreement to one-sided terms by requiring a mouse click for each of them. She hypothesizes that increased clicks would incentivize consumer to seek out locations that required fewer clicks.

In addition, the technology itself may better engage individuals in the entire process, thereby allowing courts to feel more confident in returning to enforcing the "duty to read" doctrine. As Professor Warkentine suggests:

> Courts should determine the enforceability of certain unbargained for terms based on a concept I call "knowing assent." Knowing assent means more than signing on the dotted line. Knowing assent requires the following: (1) that the unbargained-for term be conspicuous; (2) that the importance of that term be explained so that the adhering party understands its significance; and (3) that the adhering party objectively manifests its assent to that term separately from its manifestation of assent to undertaking a contractual obligation?[113]

Professor Warkentine does not ask that such a high standard be applied to all contract clauses; instead she greatly limits the application:

> Courts would impose the knowing assent requirement on contract provisions that unduly favor the form drafter or deprive the adhering party of a right or remedy that would otherwise be available to the adhering party in the absence of such a contract term or clause.[114]

Similar to Professor Kessler, Professor Warkentine argues for a higher level of scrutiny to be applied to those terms that she currently identifies as being of social significance. Each of these proscriptions could be built into the architecture of the customization process such that weaker parties could be presented with contract clauses linking to further information, live chat facilities and similar facilities. Of course, the individual could ignore the opportunity. But unlike prior instances of ignoring behavior, individuals in this instance will be actively engaged in a selection process, thus reducing their inattentiveness.

See generally NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013). Professor Woodward argues for the removal of the concept of consent as it relates to consumers. "The long term objective would be to change the popular perception that consumer forms are contracts as we commonly understand the idea." Woodward, *supra* note 70 at 935.

[113] Warkentine, *supra* note 112, at 473 (internal citations omitted). *See also* Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 800–02 (2008) (arguing that the language should be tailored to the specific product and to the specific market conditions).

[114] Warkentine, *Beyond Unconscionability,* supra note 112 at 473 (internal citations omitted).

III. CONCLUSION

Much like Sisyphus, consumers have historically felt helpless in the face of endless boilerplate contracts, change of terms agreements, and hidden contract clauses. Consumers have long known their fate is sealed, resulting in a state of contented acceptance. Courts have, for the most part, ignored, over-extended, and with bravado of overconfidence imposed upon consumers' unrealistic legal standards that in no way reflect current interaction with contracting realities. Fortunately, unlike Sisyphus, consumers have grown restless with their plight, resulting in a growth in power spurred by an increasing use of technology, analytics, and interactive digital communications. As a result, it is time that we incorporate the realities of the digital world into our legal philosophy and doctrines. The time has come to embrace the use of technology within the digital world to allow the technology to serve as an information delivery system that can engage consumers in more active, individualized, customized contracting process. As these technologies become more widespread, one can imagine a shift in the balance of power to the consumer, thereby eliminating—or at least reducing—the need to heavily protect consumers.