Richmond Journal of Law & Technology Volume XXVIII, Issue 4

DO YOU AGREE?: THE PSYCHOLOGY AND LEGALITIES OF ASSENT TO CLICKWRAP AGREEMENTS

Daniel D. Haun[*] & Eric P. Robinson[**]

Cite as: Daniel D. Haun & Eric P. Robinson, *Do You Agree?: The Psychology and Legalities of Assent to Clickwrap Agreements*, 28 RICH. J.L. & TECH. 623 (2022).

[*] Daniel D. Haun, M.F.A., Ph.D. is Assistant Professor of Journalism and Mass Communication in the Howard College of Arts and Sciences at Samford University. Prior to his academic career, Haun spent six years in the United States Army as a photographer and public affairs specialist with the 300th Mobile Public Affairs Detachment. He deployed to the Logar and Wardak provinces of Afghanistan in 2010 with the 173rd Airborne Brigade Combat Team for Operation Enduring Freedom.

[**] Eric P. Robinson, J.D., Ph.D. is Associate Professor at the School of Journalism and Mass Communications in the College of Information and Communications at the University of South Carolina. He has worked in media and internet law for more than 25 years and is currently Of Counsel to Fenno Law in Charleston/Mount Pleasant, South Carolina.

ABSTRACT

When first accessing a website or online service, users are confronted with terms of service and privacy policies. These terms and policies are adhesion contracts which the user must accept to use the website or service. Virtually all users simply click "I agree" without reading the terms of these contracts. The law construes this as consent based on whether a "reasonable person" would understand that the click constitutes assent to those terms and policies. But studies show that various psychological factors such as obedience of authority can play a role in ill-informed acceptance of such contracts. This article argues that the law should take such psychological factors into account and suggests a framework for doing so.

I. INTRODUCTION

[1] When first accessing a website or web-based service, a new user is usually confronted with "terms of service" and a "privacy policy" to which they must agree to access or use the website or service. The user's acceptance of these agreements is often indicated by electronically checking a box, clicking a link, or by simply proceeding to use the site or service.

[2] By accepting, the user enters into legally binding contracts and agrees to be bound by the terms of those contracts.[1] Yet the conventional wisdom—supported by empirical evidence—is that users do not actually read web agreements before clicking "I agree," or otherwise indicating their acceptance of the terms of these contracts.[2] Why do users agree to online contracts which they have not read? Several theories of human psychology have posited explanations for individuals' passive acceptance to things such as online agreements. Yet courts routinely enforce these contracts without taking these psychological aspects into account.[3]

[3] This paper first examines the existing legal framework for online consent, including the criteria that courts use to determine the validity and

[1] *See* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1–2 (2014).

[2] *E.g., Id.*; Rainer Böhme & Stefan Köpsell, Trained to Accept? A Field Experiment on Consent Dialogs 2403 (Apr. 2010) (Proceedings of the SIGCHI Conf. on Human Factors in Computing Sys.); Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, 4 I/S: J.L. & POL'Y 543, 549–50 (2008); Jeff Sauro, *Do Users Read License Agreements?*, MEASURINGU (Jan. 11, 2011), https://measuringu.com/eula/ [https://perma.cc/KS67-45VQ]; Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JERUSALEM REV. LEGAL STUD. 137, 145–46 (2015).

[3] *See* Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 722–27 (2013) (arguing that in addition to failing to account for the psychological factors discussed here when evaluating contracts, the law also does not consider psychological stress as a factor in an individual's consent to a contract); Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 276 (2014).

enforceability of an online contract. It then examines the psychological forces at work in users agreeing to such contracts. Finally, by merging these analyses, this paper seeks to answer questions regarding how courts can use psychological understanding of acceptance of online contracts in order to rule on the validity and enforcement of the provisions of such contracts.

II. ASSENT AS AN ELEMENT OF A VALID CONTRACT

[4] One of the fundamental requirements for a valid legal contract is mutual assent of the parties to the terms of the contract.[4] Assent is the expression of agreement to be bound by a contract and may be shown by the parties' actions.[5]

[5] Upon opening most websites and services, new users are confronted with electronic boilerplate contracts requiring the user's electronic consent to the agreements in order to access or use the online website or service. These contracts, labeled "terms of service" (or other monikers such as "terms of use," or "user agreement") and "privacy policy" agreements, are presented to the user in a number of ways, including via text on the homepage of the website, by a hyperlink to a separate webpage that provides the complete terms, or by a pop-up window that displays the text of the agreement.[6] The agreements usually specify one of various methods for users to manifest assent to the terms of use, such as by electronically checking a box, clicking a link,

[4] RESTATEMENT (SECOND) OF CONTRACTS § 17(1) (Am. L. Inst. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

[5] *Id.* § 19(1) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.").

[6] Jennifer Laird, *How to Write a Terms and Conditions Agreement*, PRIV. POL'YS: BLOG (July. 1, 2022), https://www.privacypolicies.com/blog/how-to-write-terms-conditions/ [https://perma.cc/JQY4-8W3Y].

or even by simply using the website or service.[7]

[6] Whichever way assent is made, the user has no bargaining power to define the terms they must agree to in order to access the website or services. Yet these agreements, which contain "a variety of clauses, some of which restrict the actions and rights of the service provider while others place limits on the customer,"[8] set forth the legal rights and obligations of the users and the provider of the website or service,[9] and provide a legal framework for their entire interaction.[10] Such agreements are, in short, legally binding contracts.

III. THE "REASONABLE PERSON" AND CONTRACTUAL ASSENT

[7] The "reasonable person" standard "inhabit[s] every nook and cranny of the common law,"[11] and has "played a critical role in many different aspects of private law, criminal law, and . . . public law."[12] This includes

[7] Sara Pegarella, *Examples of "I Agree to" Checkboxes*, TERMSFEED (Feb. 15, 2022), https://www.termsfeed.com/blog/examples-i-agree-to/ [https://perma.cc/HRJ5-GZZ4]; *see e.g.*, *By Using Our Site You Agree To The Following Terms Of Service*, LAT & LO, https://www.latandlo.com/pages/by-using-our-site-you-agree-to-the-following-terms-of-service [https://perma.cc/9XC9-5NHX].

[8] Timothy J. Calloway, *Cloud Computing, Clickwrap Agreements, and Limitation on Liability Clauses: A Perfect Storm*, 11 DUKE L. & TECH. REV. 163, 168 (2012).

[9] *See* Francis M. Buono & Jonathan A. Friedman, *Maximizing the Enforceability of a Click-Wrap Agreements*, 4 J. TECH. L. & POL'Y 245, 245–46 (1999).

[10] *See* Garry L. Founds, *Shrinkwrap and Clickwrap Agreements: 2B or Not 2B?*, 52 FED. COMMC'NS L.J. 99, 100 (1999).

[11] John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO J.L. 273, 273 (2001).

[12] Mayo Moran, *The Reasonable Person: A Conceptual Biography in Comparative Perspective*, 14 LEWIS & CLARK L. REV. 1233, 1234 (2010).

contract law.[13] "In the law of contract as in the law of tort, men are expected to live up to the standard of the reasonably prudent man."[14] Thus "[a] contracting party [is assumed to] possess[] the intellect, sophistication, and good faith demeanor of the average reasonable person."[15] The application of the "reasonable person" standard "enables the court to complete the spaces of an incomplete contract."[16] And the use of the "reasonable person" in contracts law has become particularly common with the increasing use of form contracts.[17]

[8] Both the Restatement (Second) of Contracts and the Uniform Commercial Code (U.C.C.) contain several provisions regarding reasonableness and the expectations of a "reasonable person" in formation and enforcement of contracts.[18] The reasonable person characterization

[13] *See* Willi E. Joachin, *The "Reasonable Man" in United States and German Commercial Law*, 15 COMP. L. Y.B. INT'L BUS. 341, 347–51 (1992) (examples of the "reasonable person" standard in contract cases).

[14] Arthur L. Corbin, *Offer and Acceptance, and Some of the Resulting Legal Relations*, 26 YALE L.J. 169, 205 (1917).

[15] Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 301 (1997).

[16] *Id.* at 318.

[17] *Id.* at 338 ("The role of the reasonable person has expanded with the advent of form contracts."). *But see* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 141 n.35 (1970) ("Actually, I have no empirical evidence that the frequency of this type of transaction [a consumer standard form contract] has increased over, say, the last fifty years or so. But most people seem to assume so, and it seems certainly reasonable (given the increase in marketer concentration) to believe that it did." (citation omitted)).

[18] DiMatteo, *supra* note 15, at 327 ("The imprimatur of the reasonable person can be seen throughout the Restatement and the Uniform Commercial Code."). *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 16, 56, 57, 67, 87(2), 88(c), 90(1), 139(1), 169, 228, 241(a), 350(2) (AM. L. INST. 1981); U.C.C. §§ 1-201(b)(10), 9-602, cmt. 2 (AM. L. INST. & UNIF. L. COMM'N 2020) Only references to reasonable people are included here; numerous other provisions reference reasonable notice, conclusions, results, time periods, situations, expectations, etc., all of which implicate the "reasonable person" standard.

includes the presumption that parties to a contract act in "good faith."[19] For the buyer of goods and services, this means acting "without knowledge that the sale violates the rights of another person in the goods, and in the ordinary course from a person, other than a pawnbroker, in the business of selling goods of that kind."[20] For the offeror, this includes the "implicit assumption . . . that . . . [the] terms [of the boilerplate contract] are neither in the particular nor in the net manifestly unreasonable and unfair."[21]

[9] It also assumes that the parties to a contract have actually read, understood and agreed to the terms of that contract.[22] "[T]he Restatement [of Contracts] makes clear that its concern is only with outward manifestations of mutual assent."[23] But, since parties to online contracts are often not actually aware of the terms of the contracts,[24] the law has evolved so that it bases enforcement of many contracts, particularly adhesion contracts that are simply presented to an offeree with no means of negotiating the terms, "not [on] the written form but [on] what the signing party [actually] knew and what a reasonable consumer would have known."[25]

[10] Scholars have observed that there are actually two "reasonable person" standards that courts use to decide legal issues regarding contracts.[26] The "objective" standard—which is most common—is based

[19] U.C.C. §§ 1-201(b)(9), 1-201(b)(20) (AM. L. INST. & UNIF. L. COMM'N 2020).

[20] U.C.C. § 1-201(b)(9) (AM. L. INST. & UNIF. L. COMM'N 2020).

[21] KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 371 (1960).

[22] *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 211(1)–(2) (AM. L. INST. 1981).

[23] Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 354 (2007).

[24] *See* Bokos et. al., *supra* note 1, at 2.

[25] DiMatteo, *supra* note 15, at 339.

[26] R. George Wright, *Objective and Subjective Tests in the Law*, 16 U.N.H. L. REV. 121, 125–27 (2017).

on how a neutral, "reasonable" third party would understand the contract: "[t]he reasonable person is the personification of the objective theory of contracts."[27] In this formulation, "[t]he actual states of mind of the parties are not the subject of legally relevant inquiry."[28] In some decisions, however, courts have used a "subjective" standard based on how a "reasonable person" would understand the contract,[29] including how a reasonable person would understand their assent to the contract.[30] But this subjective analysis is still based on a theorical "reasonable person," not on the actually parties to a specific contract or contractual dispute.[31]

[27] DiMatteo, *supra* note 15, at 336 ("Once constructed, the reasonable person is used as an interpretive tool in determining the meaning to be given to the contracting parties' manifestations. The reasonable person must decide if the parties had an intent to create a contract and to give meaning to that intent. The reasonable person is used to imply a general intent to contract and specific intent as to the terms of the contract.").

[28] Solan, *supra* note 23, at 383 (citing RESTATEMENT (SECOND) OF CONTRACTS § 2(1) (AM. L. INST. 1981) ("A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.")).

[29] DiMatteo, *supra* note 15, at 351–52 (arguing that the "objective" and "subjective" approaches are not as distinct as they may appear); *id.* at 296–97 (pointing out that use of "subjective" criteria in evaluating contracts actually pre-dates the common law "objective" standard); *id.* at 309 ("In the twentieth century the subjective meeting of the minds was objectified into the reasonable person principle."); *see also* Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 397 (2004).

[30] DiMatteo, *supra* note 15, at 336–37 ("[T]he manifestation of intent is manipulated to conform not to what the reasonable person would interpret it as, but to conform to the court's notion of the parties' actual subjective intent.").

[31] *See generally Objective Theory of Contracts: Everything You Need to Know*, UPCOUNSEL, https://www.upcounsel.com/objective-theory-of-contracts [https://perma.cc/UV7L-G36R].

IV. ASSENT TO ONLINE CONTRACTS

[11] Since the emergence of electronic service contracts in the 1990s, online service providers have used various methods for users to assent to terms of service before collectively adopting the current "I agree" click methodology.[32] Each stage in the evolution of assent manifestation methods online has led to legal questions regarding the legal validity of such assent.[33] In many ways, this was simply the modern incarnation of the existing debate about adhesion contracts.[34]

[12] In the early days of the Internet, "shrinkwrap" and "browsewrap" contracts predominated.[35] These "click-free" agreements did not require an affirmative act by the user to manifest assent.[36] Instead, mere use of software, a website, or an online service was said to constitute assent to the terms and conditions of use.[37]

[32] 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 (2013).

[33] *Id.* at 454–55.

[34] *See* Nathan J. Davis, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 579 (2007) (providing examples of how clickwrap agreements could be contracts of adhesion by "sneaking onerous terms into agreements"); DiMatteo, *supra* note 15 (discussing DiMatteo's analysis of "objective" and "subjective" approaches).

[35] *See* Michelle Garcia, *Browsewrap: A Unique Solution to the Slippery Slope of the Clickwrap Conundrum*, 36 CAMPBELL L. REV. 31, 31, 33–35 (2013).

[36] Christina L. Kunz et al., *Browse-Wrap Agreements: Validity of Implied Assent in Electronic Form Agreements*, 59 BUS. LAW. 279, 279–80 (2003).

[37] *See* Garcia, *supra* note 35, at 39.

A. Shrinkwrap

[13] Shrinkwrap agreements, developed in the 1990s when software companies delivered their products on physical media—floppy discs at first, then compact discs—and contained their software in a physical box wrapped in plastic film.[38] The terms of service—or an abbreviated version of them—were either printed on the exterior of the box so that they were visible through the plastic, or printed on a sticker stating that opening the package constituted assent to the user agreement(s).[39]

[14] Courts were initially wary of shrinkwrap agreements.[40] In 1987, a federal trial judge held that federal copyright law preempted application of a shrinkwrap license provision that conflicted with federal law.[41] And in 1991, the Third Circuit held that a statement printed on the box could not materially alter an earlier agreement between the parties regarding purchase of the software in bulk.[42]

[15] This attitude changed with a seminal decision by the Seventh Circuit which validated shrinkwrap agreements.[43] The plaintiff (ProCD) sold two

[38] *See id.* at 34; Cardstack Team, *Software Through the Ages*, MEDIUM (June 30, 2020), https://medium.com/cardstack/software-through-the-ages-7ae7b3debfd7 [https://perma.cc/FJF8-2CVK].

[39] Garcia, *supra* note 35, at 34–35.

[40] *See* Thomas Finkelstein & Douglas C. Wyatt, *Shrinkwrap Licenses: Consequences of Breaking the Seal*, 71 ST. JOHN'S L. REV. 839, 841 (1997).

[41] Vault Corp. v. Quaid Software Ltd., 655 F. Supp. 750, 763 (E.D. La. 1987), *aff'd*, 847 F.2d 255 (5th Cir. 1988) (holding "shrink-wrap" agreement's choice-of-law provision making Louisiana law applicable was unenforceable because Louisiana law allowed adhesion contract, which federal copyright law disallowed).

[42] Step-Saver Data Sys. v. Wyse Tech., 939 F.2d 91, 105–06 (3d Cir. 1991).

[43] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452–53 (7th Cir. 1996) (distinguishing this case from *Step-Saver* in that there were multiple agreements in that case, while this case had only one agreement).

versions of the same software product consisting of detailed address directories: a higher-priced commercial version, and a second version for non-commercial users that was sold at a lower price.[44] Defendant Matthew Zeidenberg purchased the non-commercial version and sold the directory data to commercial users for less than the price of ProCD's commercial version.[45] ProCD sued on the grounds that by opening the package, Zeidenberg was bound by the licensing agreement for the software which included terms prohibiting the resale of the data.[46]

[16] The U.S. District Court for the Western District of Wisconsin initially held that the agreement was not enforceable because it was contained inside the box rather than on the outside.[47] On appeal, the Seventh Circuit reversed, citing traditional contract principles and U.C.C. section 2-204(1), which provides that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract."[48] The Seventh Circuit held that the contract was valid because the purchaser could return the CDs after receiving the terms of service document.[49] "Despite [several] problems [with the ruling], the *ProCD* opinion has proved influential. While a number of courts since 1996 have continued to reject shrinkwrap licenses, still more courts have followed *ProCD* and enforced those licenses."[50]

---

[44] *Id.* at 1449–50.

[45] *See id.* at 1450.

[46] *Id.* at 1450, 1452.

[47] ProCD, Inc. v. Zeidenberg, 908 F. Supp. 640, 654–55 (W.D. Wis. 1996) (explaining that the "defendants did not have the opportunity to bargain or object to the proposed user agreement or even review it before purchase" because the "potential incorporation of the terms can occur only after the purchaser opens the package").

[48] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (quoting U.C.C. § 2-204(1) (AM. L. INST. & UNIF. L. COMM'N 1990)).

[49] *Id.* at 1452–53.

[50] Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 469 (2006).

B. Browsewrap

[17] "Browsewrap" was the next development in electronic agreements. Browsewrap agreements are typically presented either in full or via a link on a website, and acceptance of browsewrap agreements is based on use of the website.[51] This use can consist of one or more activities that are deemed to manifest assent to the contract, including "merely browsing a website, using a website, or [] making a specific transaction which originated on the website."[52]

[18] The seminal case regarding the validity of browsewrap agreements is *Specht v. Netscape Communications Corp*.[53] In that case, "the court rejected a browse-wrap agreement relating to downloading free software because the agreement [was not presented to users until] after the invitation to download, and users could download the software without any indication that legal terms followed."[54] Courts have generally upheld this principle in subsequent cases involving browsewrap agreements, developing a general rule that "the enforceability of browsewrap agreements depends upon whether 'there is evidence that the user has actual or constructive notice of the site's terms.'"[55]

[51] Ian Rambarran & Robert Hunt, *Are Browse-Wrap Agreements All They Are Wrapped Up to Be?*, 9 TUL. J. TECH. & INTELL. PROP. 173, 176–77 (2007).

[52] Garcia, *supra* note 35, at 35.

[53] Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 20 (2d Cir. 2002).

[54] Rambarran & Hunt, *supra* note 51, at 176–77 (emphasis omitted).

[55] Stephen Y. Chow, *A Snapshot of Online Contracting Two Decades After* ProCD v. Zeidenberg, BUS. LAW., Winter 2017-2018, at 273 (quoting Mohammed v. Uber Techs., Inc., 237 F. Supp. 3d 719, 731 n.8 (N.D. Ill. 2017) (quoting Tompkins v. 23andMe, Inc., 2014 U.S. Dist. LEXIS 88068, at *22 (N.D. Cal. June 25, 2014)).

C. Clickwrap

[19] "Clickwrap," or "click-through," agreements developed from prior forms of online contracts. In these agreements, the offeree/user manifests assent by affirmatively taking some action, such as clicking on a button or link, to indicate agreement with and acceptance of the terms of service and privacy policy of the website or service.[56]

[20] In early cases, "courts used traditional contract doctrines to determine issues of enforceability without expressing much interest in the peculiarities of clickwrap."[57] In more recent cases, "courts have used largely the same analytical process and have enforced the vast majority of clickwrap cases that have come before them. Essentially, the courts determine whether the requisite click occurred, and, if so, presume that the user assented to the terms of the agreement."[58]

[21] An example of this is *Groff v. America Online, Inc*, in which the court held that an attorney should be held to the provisions of a terms of service agreement to which he assented by clicking "I agree," even though he never read the terms of service document.[59] The court concluded, "a party who signs an instrument manifests his assent to it and cannot later complain that he did not read the instrument or that he did not understand its contents."[60]

---

[56] Christina L. Kunz et al., *Click-Through Agreements: Strategies for Avoiding Disputes on Validity of Assent*, BUS. LAW., Nov. 2001, at 401; *see also* Rambarran & Hunt, *supra* note 51, at 174.

[57] Davis, *supra* note 36, at 582.

[58] *Id.*

[59] Groff v. Am. Online, Inc., 1998 R.I. Super. LEXIS 46, at *13 (R.I. Super. Ct. May 27, 1998).

[60] *Id.*

[22] Under this approach, when a user clicks on an "I agree" button, such action supposedly indicates that the user has read and understood the terms of service (or at least had the opportunity to do so), and that the user agrees to be legally bound by the provisions of the terms of service document.[61]

D. "I Agree" As Contractual Assent

[23] In cases involving online terms of service agreements and privacy policies, courts have generally held that clicking "I agree," or whatever the agreement provides as a manifestation of assent, is sufficient formation of a contract, regardless of whether the user actually read the language of the agreement.[62] In doing so, courts have used a mechanical approach: whether it can be proven that the agreement was available for the user to read, and whether the user's click can be proven.[63] Absent fraud or deception, the user's failure to read, carefully consider, or otherwise recognize the binding effect of clicking "I agree" will not preclude the court from finding that the user has assented to the terms.[64] "[C]ourts have unanimously found that clicking is a valid way to manifest assent since the first clickwrap agreement was litigated in 1998."[65]

[24] The Second Restatement of Contracts states that the "conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party

---

[61] *See* Rachel Cormier Anderson, *Enforcement of Contractual Terms in Clickwrap Agreements: Courts Refusing to Enforce Forum Selection and Binding Arbitration Clauses*, WASH. J.L. TECH. & ARTS, Feb. 14, 2007 (discussing a case which supports the notion that clicking "I agree" tends to be binding).

[62] *Terms and Conditions*, ABA, https://www.americanbar.org/groups/business_law/safeselling/terms/ [https://perma.cc/T7V7-A9YC].

[63] Davis, *supra* note 34, at 579.

[64] *Id.*

[65] *Id.*

may infer from his conduct that he assents."[66] Thus, the notions of intent and inference are critical to determine whether the user assents to a terms of service agreement. This is consistent with Section 211 of the Restatement, which seeks to ensure the benefits of standardized contracts by presuming assent to all terms when a contract is signed.[67]

[25] Section 211(c) provides that even a signed contract is invalid if the offeree was not aware of all the terms of the contract, and the offeror knew or should have known that the offeree would not have assented had the other been aware of the terms of the agreement.[68] This has led to the requirement that the terms of an online contract be readily available to users, but not necessarily that the terms are *actually* accessed and read.[69]

[26] Section 1-201(b)(10) of the U.C.C. provides that terms are conspicuous when they are "written, displayed, or presented that *a reasonable person* against which it is to operate ought to have noticed it."[70] The section details the characteristics of conspicuous terms, such as contrasting type fonts, colors, headings in capitals, and surrounding text.[71] Thus, for an online contract such as a website terms of service or privacy

[66] RESTATEMENT (SECOND) OF CONTRACTS § 19(2) (AM. L. INST. 1981).

[67] Eric A. Zacks, *The Restatement (Second) of Contracts § 211: Unfulfilled Expectations and the Future of Modern Standardized Consumer Contracts*, 7 WM. & MARY BUS. L. REV. 733, 753 n.64 (2016) ("Section 211 provides: (1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.").

[68] Zacks, *supra* note 67, at 739.

[69] U.C.C. § 1-201(b)(10) (AM. L. INST. & UNIF. L. COMM'N 2020) (requiring contracts' terms to be conspicuous).

[70] *Id.* (emphasis added).

[71] *Id.*

policy, the "reasonable person" standard assumes that users who click "I agree" to accept online agreements actually understand the implications of such an action, as long as the terms of the contract are "conspicuous" to the user—based on the characteristics of the typefaces and fonts used—before she clicks "I agree."

[27] While this "reasonable person" may be a useful legal construct, it does not account for the reality that a party to a contract may not, in fact, be reasonable at all. This is a particular problem with agreements that are presented to users as *fait accompli*: entire documents that are standard, complete, and non-negotiable. The "reasonable person" standard does not differentiate among the varying levels of computer knowledge or legal knowledge among Internet users.[72] The law assumes that a reasonable person actually notices the terms of service, and actually reads and understands them, even if that is not true.[73] The "reasonable person" standard makes many presumptions, but in the end is only concerned with the "I agree" click, not what the user actually understands the click to mean.

[28] For this reason, the psychology of the "reasonable person" is worth exploring to answer these questions and understand the true meaning of one's assent, and what may lead a person to assent without knowing—or caring—about the possible consequences, other than access to the garden beyond the gate of the "I agree" button.

[72] *See* J.W. Looney & Anita K. Poole, *Adhesion Contracts, Bad Faith, and Economically Faulty Contracts*, 4 DRAKE J. AGRIC. L. 177, 178–80 (1999); *see generally Fait accompli*, MERRIAM-WEBSTER'S DICTIONARY (11th ed. 2020) (defining "fait accompli").

[73] *See* David Berreby, *Click to agree with what? No one reads terms of service, studies confirm*, GUARDIAN (Mar. 3, 2017, 8:38 AM), https://www.theguardian.com/technology/2017/mar/03/terms-of-service-online-contracts-fine-print [https://perma.cc/WJS5-RHZM].

V. THE PSYCHOLOGY OF CLICKING "I AGREE"

[29] The legal standard for manifestation of assent[74]—that when terms of service are adequately displayed and the user takes some action to indicate acceptance, the user is presumed to have read and understood them—conflicts with psychology's understanding of such assent. Psychological research shows that "[p]eople often consent despite themselves, with different degrees of reluctance, for a variety of reasons that make consenting better than refusing."[75]

[30] Both law and psychology seek to explore and understand human behavior, but differ in their approaches: "law is deductive, psychology is inductive; law is doctrinal, psychology is empirical."[76] Psychology seeks to understand the reasons why people behave as they do, while law seeks to determine an actor's motivations only in order to determine the legal consequences of the actor's behavior.

[31] For example, the law provides that an intentional killing is murder, punishable by the harshest legal sanctions, while a killing that is caused by someone unintentionally often has a lesser legal penalty.[77] Psychology, on

[74] *Mutual Assent*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/mutual_assent [https://perma.cc/9D8M-XZ6T] (stating that the standard is objective and "often established by showing an offer and acceptance").

[75] Keren, *supra* note 3, at 724; *see e.g.*, Adam Remsen, *A Lawyer Digs Into Instagram's Terms of Use*, PETAPIXEL (Dec. 7, 2016), http://petapixel.com/2016/12/07/lawyer-digs-instagrams-terms-use/ [https://perma.cc/FS7S-P57G] ("1. I don't want to read this entire long, confusing legal document. 2. There are 500 million people using Instagram, so they all must have signed this thing already. 3. Everyone I know who's on Instagram likes it, and none seem to have suffered terrible consequences from signing this. 4. If the terms were really bad, people wouldn't be using the service.").

[76] DiMatteo, *supra* note 15, at 315–16.

[77] *See* Sara J. Berman, *What Is Manslaughter? What Is Murder vs. Manslaughter?*, NOLO, https://www.nolo.com/legal-encyclopedia/homicide-murder-manslaughter-32637-2.html [https://perma.cc/9U4E-A8JV].

the other hand, explores the mindset of the killer in taking the action(s) leading to the death, particularly the killer's motivation for taking such action, regardless of whether death was the intended result.

[32] Despite these differences, psychology can still provide some insights to the law, particularly regarding how law can understand and perhaps anticipate human behavior. With such an understanding, the law can use realistic models to focus on relevant evidence in formulating legal standards. This could include standards for determining a user's intentions when clicking "I agree" to an online contract.

A. Naïve Realism and Construal Level Theory

[33] In psychology, the ways in which individuals perceive the world around them are known as "construals."[78] A "construal" can be an individual's perception of him or herself ("self-construal") or an individual's perception of his or her surroundings.[79] These construals are based on either direct experience or abstract thought and can involve either short- or long-term thought processes. "[The] basic premise is that the more psychologically distant an event is, the more it will be represented at higher levels of abstraction. An event is in some manner psychologically distant whenever it is not part of one's direct experience."[80]

[34] "[T]emporal construal is a generalized heuristic that evolves as a result of differences in what people typically know and do about near- and

[78] Elisabeth Norman et. al., *The Distance between Us: Using Construal Level Theory to Understand Interpersonal Distance in a Digital Age*, 3 FRONTIERS DIGIT. HUMAN. 1, 1 (2016).

[79] Keila C. Brockveld et al., *Social Anxiety and Social Anxiety Disorder Across Cultures*, in SOCIAL ANXIETY 141, 149 (Stefan G. Hofmann & Patricia M DiBartolo eds., 3d ed., 2014).

[80] Yaacov Trope et. al., *Construal Levels and Psychological Distance: Effects on Representation, Prediction, Evaluation, and Behavior*, 17 J. CONSUMER PSYCHOL. 83, 84 (2007).

distant-future situations."[81] In other words, people see the world through different lenses, and emphasize factors that differ from individual to individual. And while several theories of psychology offer different ways of explaining how these construals develop and are maintained, psychologists generally agree that the amount of spatial, temporal, hypothetical, and social distance between an individual and the objects of their construals can create disparate notions of reality, levels of understanding, and construal levels that differ from person to person.[82]

[35] This notion of individualized perception of one's self and of the world around us differs from the "reasonable person" test used in law, which suggests there is a general threshold of knowledge and understanding that *any* reasonable, average person possesses.

[36] In the context of manifesting assent to online contracts, individuals' different construals will lead them to perceive online terms of service—particularly whether the terms of service are conspicuous and understandable—based on their disparate notions of reality. But the law's use of the "reasonable person" standard for the determination of whether terms of service are visible and knowable does not account for the individual differences in construal: "The [legal] standard which the community demands must be an objective and external one, rather than that of the individual judgment, good or bad, of the particular individual."[83] Thus, an individual's disparate level of understanding is simply not considered by the courts when evaluating the nature and intent of an individual user's

[81] Yaacov Trope & Nira Liberman, *Temporal Construal*, 110 PSYCHOL. REV. 403, 406 (2003).

[82] Norman et. al., *supra* note 78, at 2.

[83] RESTATEMENT (SECOND) OF TORTS § 283 cmt. c (1965).

manifestation of intent to be bound by an online agreement.[84]

B. Obedience to Authority and the Manifestation of Assent

[37] Another psychological characteristic of individuals that may play a role in acceptance of online contracts is the propensity to acquiesce to authority.

[38] Authority is an individual's perception that a leader is endowed with "supernatural, superhuman, or at least specifically exceptional powers or qualities,"[85] which give the authority figure "the power to make decisions which guide the actions of another,"[86] or the right to command others, including commanding them to commit atrocious acts.[87] Subordinates obey figures of authority, in large part because authority figures define reality for their subordinates. "There is a propensity for people to accept definitions of action provided by legitimate authority."[88] "That is, although the subject performs the action, he allows authority to define its meaning."[89]

---

[84] *Cf.* Lawrence S. Wrightsman, *The Jury on Trial: Comparing Legal Assumptions with Psychological Evidence*, *in* A DISTINCTIVE APPROACH TO PSYCHOLOGICAL RESEARCH: THE INFLUENCE OF STANLEY SCHACHTER 27, 28, 43 (Neil E. Grunberg et. al. eds., 1987) (explaining that the law also makes assumptions about other players in legal processes such as "the psychological nature and behavior of jurors[,]" but the results of various psychological studies should "lead us to question some of the assumptions and procedures that have evolved for the jury").

[85] MAX WEBER, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 358 (Talcott Parsons ed., A. M. Henderson & Talcott Parsons trans., 1947).

[86] HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR 125 (2d ed. 1957).

[87] *See* HERBERT C. KELMAN & V. LEE HAMILTON, CRIMES OF OBEDIENCE: TOWARD A SOCIAL PSYCHOLOGY OF AUTHORITY AND RESPONSIBILITY 53 (1989).

[88] STANLEY MILGRAM, OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW 145 (1974).

[89] *Id.*

[39] Obeying authority can lead to either good or bad consequences. As an example of the latter, obedience to authority may result in subordinate actions that are illegal or unethical, which researchers describe as "crimes of obedience."[90] Stanley Milgram, a Yale University psychologist, conducted an infamous series of obedience experiments in which subjects were instructed to obey an authority figure who commanded that the subjects perform acts conflicting with the subjects' personal consciences.[91] A majority of subjects complied, leading Milgram to conclude that, "ordinary people, simply doing their jobs, and without any particular hostility on their part, can become agents in a terrible destructive process."[92]

[40] These results stem from contextual factors that lead subordinates not to "see the situation as one of choice, but as one of role requirements and obligations."[93] Milgram concluded that people tend to construct social structures in which individuals with power come to view themselves as instruments for carrying out organizational interests, and that people legitimize the power of authority due to perceived positions of power.[94] "The power of an authority stems not from personal characteristics but from his perceived position in a social structure."[95]

[41] This is directly at odds with the legal notion of the "reasonable person" who makes rational decisions without regard to outside persuasive influences.

[90] *See, e.g.*, KELMAN & HAMILTON, *supra* note 87, at xi.

[91] Stanley Milgram, *The Perils of Obedience*, HARPER'S MAG., Dec. 1973, at 62.

[92] *Id.* at 76.

[93] V. Lee Hamilton & Joseph Sanders, *Responsibility and Risk in Organizational Crimes of Obedience*, 14 RSCH. ORG. BEHAV. 49, 49 (1992).

[94] *See* Milgram, *supra* note 91, at 76–77.

[95] MILGRAM, *supra* note 88, at 139.

[42] Under this authority paradigm, agreeing to something—manifesting assent—is essentially a submission to an authority that sets the parameters for the interaction. This extends to agreement to online terms of service, since agreement to the terms of use in an online contract inherently recognizes the offeror's legitimacy as an authority figure. In shrinkwrap, browsewrap, and clickwrap licenses, the user has no option but to agree to the terms if he wants to use the website or service. Thus, when confronted with a clickwrap agreement as a barrier to entry, the user may feel compelled to click the "I agree" button due to an ingrained obedience to authority and perceived legitimacy of the provider of the website or service that lies beyond the threshold of the "I agree" button.

[43] There is empirical evidence to support this contention. In one study, nearly one-fifth of respondents who did not read a terms of service document presented to them justified their failure to read the document by saying that they had no choice but to agree to the terms.[96] Another study found that "younger subjects who have entered into more online contracts are likelier than older ones to think that contracts can be formed online, that digital contracts are legitimate while oral contracts are not, and that contract law is unforgiving of breach."[97] In other words, "[d]ue to the ubiquitous nature of wrap agreements, consumers may become habituated to them and take less notice or care of their terms."[98]

[96] Victoria C. Plaut & Robert P. Bartlett, III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 298 (2012).

[97] David A. Hoffman, *From Promise to Form: How Contracting Online Changes Consumers*, 91 N.Y.U. L. REV. 1595, 1595 (2016).

[98] NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 59 (2013); *see also* Böhme & Köpsell, *supra* note 2, at 2403 (finding that "[p]articipants seem to be habituated to coercive interception dialogs—presumably due to ubiquitous EULAs—and blindly accept terms the more their presentation resembles a EULA").

C. The Just-World Phenomenon

[44] Another psychological model that likely plays a role in users' unhesitating acceptance of online terms of service is the "just world" hypothesis: the belief that people get what they deserve in this world.[99] The individual believes that the world we live in is just and fair,[100] and that negative things will only happen to "bad people" due to their actions and behavior.[101]

[45] This conception is derived from the belief that individuals can create a better life for themselves by working hard to earn long-term positive outcomes. Psychologist Melvin Lerner and his colleagues describe an adherent to this attitude: "He learns and trusts that his world is a place where additional investments often entitle him to better outcomes, and that 'earning' or 'deserving' is an effective way of obtaining what he desires."[102] Carolyn Hafer argues that just-world beliefs lead adherents to invest in long-term goals by submitting to society's rules so as to be deserving of these objectives.[103]

[46] While it seeks to explain attitudes towards the suffering of others, just-world ideology may lead to victim blaming as a rationalization of

[99] MELVIN J. LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION 11 (1980).

[100] *See* Melvin J. Lerner, *Evaluation of Performance as a Function of Performer's Reward and Attractiveness*, 1 J. PERSONALITY & SOC. PSYCH. 355, 360 (1965) (alluding to how individuals' world beliefs suggest their belief in a fair world).

[101] Hein F. M. Lodewijkx et al., *In a Violent World a Just World Make Sense: The Case of "Senseless Violence" in the Netherlands*, 14 SOC. JUST. RES. 79, 82 (2001).

[102] THE JUSTICE MOTIVE IN SOCIAL BEHAVIOR 135 (Melvin J. Lerner et al. eds., 1981).

[103] Carolyn L. Hafer, *Investment in Long-Term Goals and Commitment to Just Means Drive the Need to Believe in a Just World*, 26 PERSONALITY & SOC. PSYCH. BULL. 1059, 1068 (2000).

injustice, by perceiving the victim's fate as deserved.[104] For example, Lerner found a tendency for health care professionals to blame mentally ill patients for their own suffering.[105] Similarly, Lerner and Leo Montada observed students disparaging and blaming the poor for their own impoverishment.[106]

[47] When presented with an adhesion agreement such as an online terms of service or privacy policy to which they must agree in order to use a website or service, users with a just-world belief may rationalize the binary "take-it-or-leave-it" choice by believing that they are getting what they deserve: that the world is a fair place, and, because they are "good" people, that the contract to which they are agreeing must also be fair.

[48] This approach towards online contracts is expressed by legal scholar Todd Rakoff:

> [T]he category "boilerplate" has itself taken on a cultural meaning, and [] that fact is of practical significance. A set of contractual words represented to be, and accepted as, boilerplate—accompanied by the meaning (articulated or implied) that "this is boilerplate" or "these are standard terms" or "we always use terms like these" or "everyone uses terms like these"—is different in important ways from the same set of words absent those assertions.[107]

---

[104] *See* Kristen Wezel et al., *General Belief in a Just World is Positively Associated with Dishonest Behavior*, 8 FRONT PSYCHOL., no. 1770, 2017, at 1.

[105] *Just-world phenomenon – definition and meaning*, MKT. BUS. NEWS, https://marketbusinessnews.com/financial-glossary/just-world-phenomenon/ [https://perma.cc/BK2Q-AVS7].

[106] *Id.; see also* David J. Harper et al., *Lay Causal Perceptions of Third World Poverty and the Just World Theory*, 18 SOC. BEHAV. & PERSONALITY 235, 236–37 (1990); David J. Harper & Paul R. Manasse, *The Just World and the Third World: British Explanations for Poverty Abroad*, 132 J. SOC. PSYCH. 783 (1992).

[107] *See* Todd D. Rakoff, *The Law and Sociology of Boilerplate*, 104 MICH. L. REV. 1235, 1240 (2006) (surveying several research articles regarding boiler-plate contracts).

VI. The Psychological Problem with Legal Clickwrap

[49] Courts have held in some cases that contractual provisions—including clauses of terms of service and privacy policies—can be held "unconscionable," and thus unenforceable, based on an assessment of two factors: "(1) unfairness in the formation of the contract, and (2) excessively disproportionate terms."[108] These are referred to, respectively, as procedural and substantive unconscionability.[109] "Procedural unconscionability refers to some aspect of unfairness in the contract formation process," while "[s]ubstantive unconscionability refers to the unfairness of the terms of the contract itself regardless of the process for forming the contract."[110]

[50] "The general consensus is that at least some finding of both types of unconscionability must exist to [declare that a contractual provision is unconscionable], although courts may apply a sliding scale or balancing test that would require less evidence of one type if proof of the other type is overwhelming."[111] But a recent empirical study found that courts ruling on the unconscionability of contractual terms primarily focus on the substantive unconscionability of the provision at issue, and many do not consider procedural unconscionability.[112]

[51] Courts have generally concluded that clickwrap agreements, which require an affirmative action to indicate assent, are valid.[113] But the legal

[108] Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 921 (N.J. Super. Ct. Ch. Div. 2002).

[109] Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 787 (2020).

[110] *Id.*

[111] *Id.*

[112] *Id.* at 813, 827 ("In practice, some contract terms are simply too unfair to be enforced even if freely and autonomously accepted (without bargaining naughtiness), even when courts feel compelled to recite the incantation that proof of both procedural and substantive unconscionability will be necessary.").

[113] Davis, *supra* note 34, at 579.

formulation underlying clickwrap agreements is problematic for a number of reasons. These issues include the unequal bargaining positions of the offeror and the offeree, the question of whether the terms really are conspicuous, and whether the tick box or "I agree" button clearly relates to the terms. There is also growing recognition that website design—so-called "dark patterns"—is used as a way of enticing users to click "I agree" without much thought or analysis.[114]

[52] A more fundamental issue is whether users actually read the terms of service, and whether they understand the provisions that they are agreeing to be legally bound by.[115] A user's failure to read the terms to which she has agreed by a click is generally not sufficient reason to invalidate an agreement.[116] Indeed, "[o]ver time, courts have made it clear that absent fraud or deception, the user's failure to read, carefully consider, or otherwise recognize the binding effect of clicking 'I Agree' will not preclude the court from finding assent to the terms."[117] This makes it important for the law to examine the psychological processes by which a user will decide to click "I agree," even if they do not know what they are agreeing to.

[114] *See* Kelsey Campbell-Dollaghan, *The Year Dark Patterns Won*, FAST CO. (Dec. 21, 2016), https://www.fastcompany.com/3066586/the-year-dark-patterns-won [https://perma.cc/DU4Q-UEDY]; Robin West, *Disciplines, Subjectivity, and Law*, *in* THE FATE OF LAW 119, 154–55 (Austin Sarat & Thomas R. Keams eds., 1st ed. 1993) (observing that a finding of unconscionability is an inherently subjective determination).

[115] *See* Casey Fiesler et al., *Reality and Perception of Copyright Terms of Service for Online Content Creation*, COMPUTER-SUPPORTED COOP. WORK, Feb.–Mar. 2016, at 1450, 1451.

[116] *See*, *e.g.*, Emmanuel v. Handy Techs., Inc., 992 F.3d 1, 9 (1st Cir. 2021); Treiber & Straub, Inc. v. UPS, 474 F.3d 379, 385 (7th Cir. 2007); Babcock v. Neutron Holdings, Inc., 454 F. Supp. 3d 1222, 1231 (S.D. Fla. 2020).

[117] Davis, *supra* note 34, at 579.

VII. PSYCHOLOGY, ASSENT, AND THE LAW

[53] When presented with a terms of service or privacy policy, users of a website or service may employ one or more of the predispositions discussed above to manifest assent by clicking "I agree," even though the user's consent is actually ill-informed and not well considered. But the law ignores this reality, recognizing and accepting the user's manifestation of assent so long as a "reasonable person" could theoretically be expected to have actual or constructive knowledge of the terms offered, and to have reasonably agreed to such terms. The law generally does not recognize the individual, subjective differences in construal, nor does it consider users' disparate notions of legal context and meaning, even though these factors can influence whether terms of a clickwrap agreement are actually seen and understood by a particular individual.[118]

[54] Instead of recognizing that users may assent to clickwrap terms due to a number of psychological phenomena, courts applying "subjective" considerations determine the validity of such consent, and in turn the validity of these contracts, on non-psychological factors, such as: the opportunity to read terms "at leisure;"[119] the characteristics of the text format of the terms themselves;[120] the relative power of the parties;[121] and

[118] *See generally supra* text accompanying notes 26–31.

[119] ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 at 1452 (7th Cir. 1996); *see, e.g.*, Moore v. Microsoft Corp., 741 N.Y.S.2d 91 (N.Y. App. Div. 2002); Swift v. Zynga Game Network, Inc., 805 F. Supp. 2d 904, 911–12 (N.D. Cal. 2011).

[120] *See, e.g.*, Caspi v. Microsoft Network, 732 A.2d 528, 532 (N.J. Super. Ct. App. Div. 1999); Pollstar v. Gigmania, Ltd., 170 F. Supp. 2d 974, 980–81 (E.D. Cal. 2000); Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010 (D.C. 2002); Novak v. Overture Servs., Inc., 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004).

[121] *See, e.g.*, Koch v. Am. Online, Inc., 139 F. Supp. 2d 690, 694 (D. Md. 2000); State ex rel. Stovall v. DVM Enters., Inc., 62 P.3d 653, 658–59 (Kan. 2003); Davidson & Assocs., Inc. v. Internet Gateway, Inc., 334 F. Supp. 2d 1164, 1179 (E.D. Mo. 2004), *aff'd sub nom*. Davidson & Assocs. v. Jung, 422 F.3d 630 (8th Cir. 2005).

the availability—or lack thereof—of viable alternatives.[122] For example, when upholding the terms of service in one case, the appeals court paid special attention to the notion that "the defendant offered a contract that the plaintiff accepted by using the software after having an opportunity to read the license at leisure," and that the user was forced to scroll to the bottom of the terms of service in order to accept the terms of service.[123] But if the user is predisposed to obey authority and legitimizes the offeror's terms subconsciously, he will be less likely to contest the terms, no matter how much time he has to read and absorb them.

[55] Similarly, a New Jersey appeals court focused on the inclusion of a particular clause of an online contract containing three pages of "fine print," and whether it was presented adequately so that customers would have notice of the provision.[124] Because "[t]he plaintiffs in this case were free to scroll through the various computer screens that presented the terms of their contracts before clicking their agreement," and "the clause was presented in exactly the same format as most other provisions of the contract," the court held that there was no basis for holding that the plaintiffs did not see and assent to that particular provision.[125] Other courts have upheld terms of service provisions on similar bases.[126]

---

[122] *See, e.g.*, Bragg v. Linden Rsch., Inc., 487 F. Supp. 2d 593, 606 (E.D. Pa. 2007); Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172–73 (N.D. Cal. 2002); Evans v. Linden Rsch., Inc., 763 F. Supp. 2d 735, 740 (E.D. Pa. 2011).

[123] *Moore*, 741 N.Y.S.2d at 92.

[124] *See Caspi*, 732 A.2d at 532.

[125] *Id.* at 125–26.

[126] *See* Barnett v. Network Sols., Inc., 38 S.W.3d 200, 204 (Tex. App. 2001) (finding the plaintiff was given an opportunity to scroll through the agreement terms and was on notice of the forum selection clause); Mortg. Plus, Inc. v. DocMagic, Inc., No. 03-2582-GTV-DJW, 2004 WL 2331918, at *5 (D. Kan. Aug. 23, 2004) (holding the plaintiff assented to the terms of the clickwrap agreement by selecting the "agree" button,); Recursion Software, Inc. v. Interactive Intelligence, Inc., 425 F. Supp. 2d 756, 783 (N.D. Tex. 2006) (upholding clickwrap agreement because the user chose to agree to the terms rather than opting not to download the product).

[56] A few courts have attempted to look beyond the mere clicking of an "I agree" button to determine the user's rationale and thinking in taking such an action.[127] But even in these cases courts have not fully examined the psychological state of the user in order to evaluate the legal validity of the contract.[128]

[57] In one case, a player of the online game Second Life sued the company that operated the game for seizing a parcel of the player's virtual land and for freezing the player's account.[129] The operator alleged that the plaintiff had improperly purchased the virtual land in violation of the website's terms of service.[130] The company sought to dismiss the lawsuit on the grounds that the terms of service required arbitration for disputes.[131]

[58] The federal trial court found that Second Life's clickwrap terms of service constituted an adhesion contract in which the provider held superior bargaining strength.[132] Applying California contract law, the court then held that because of this inherent imbalance, the mandatory arbitration provision was unconscionable because there were no alternative competitive providers to Second Life in the market for online virtual world games, holding that "[a] contract or clause is procedurally unconscionable if it is a contract of adhesion . . . 'When the weaker party is presented the clause and told to "take it or leave it" without the opportunity for meaningful

[127] *See* Bragg, 487 F. Supp. 2d at 606; Aral v. Earthlink, Inc., 36 Cal. Rptr. 3d 229, 238 (Cal. Ct. App. 2005) (holding clickwraps that create unconscionable adhesion contracts are unenforceable).

[128] *Bragg*, 487 F. Supp. 2d at 593, 606.

[129] *Id.* at 595.

[130] *Id.* at 597.

[131] *Id.* at 603.

[132] *Id.* at 606.

negotiation, oppression, and therefore procedural unconscionability, are present.'"[133]

[59] Another judge of the same court applied this principle in another case involving Second Life's terms of service.[134] Other courts have applied this principle to invalidate terms of service provisions for an online service provider[135] and inflight Internet access.[136] However, the United States Supreme Court later held that the California common law rule that was the basis of these rulings was preempted by the Federal Arbitration Act.[137]

[60] These rulings, however, do not take the user's possible psychological disposition towards agreeing to "authoritarian" demands into account. If the offeree is content to legitimize a website's terms of service as coming from a figure of authority, or being what she deserves, she will not be affected by the style or presentation of the text of an online agreement.

[61] Courts have yet to fully acknowledge and account for the differences associated with manifesting assent to online contracts. Instead, they have

[133] *Bragg*, 487 F. Supp. 2d at 606 (quoting Comb v. PayPal, Inc., 218 F. Supp. 2d 1165, 1172 (N.D. Cal. 2002)).

[134] Evans v. Linden Research, Inc., 763 F. Supp. 2d 735, 740 (E.D. Pa. 2011).

[135] Aral v. Earthlink, Inc., 134 Cal. App. 4th 544, 557 (2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); *supra* text accompanying note 113.

[136] Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 391 (E.D.N.Y. 2015).

[137] *AT&T Mobility LLC*, 563 U.S. at 352.

applied the concepts in the U.C.C. and its "reasonable person" standard,[138] which does not recognize the individual differences in understanding that psychology has shown to factor significantly into the decision to click "I agree."

[62] But recognition of these psychological influences would not require a major revision of the existing legal standards. An existing U.C.C. provision already provides a means for courts to consider psychological phenomena that may predispose a user to manifest assent, knowingly or otherwise.

[63] U.C.C. section 1-201(b)(10), which provides the typeface and font guidelines for courts to determine whether terms of an agreement are conspicuous, lays out a framework for examining how an individual offeree's psychological disposition affects the "conspicuousness" of the terms of a clickwrap contract.[139] In addition to the typeface and font

[138] *See*, *e.g.*, Specht v. Netscape Commc'ns Corp., 306 F.3d 17, 30 (2d Cir. 2002); Defontes v. Dell Computers Corp., No. C.A. PC 03-2636, 2004 WL 253560, at *7 (R.I. Super. Jan. 29, 2004), *aff'd sub nom.* DeFontes v. Dell, Inc., 984 A.2d 1061 (R.I. 2009); Koch Indus., Inc. v. Does, No. 2:10CV1275DAK, 2011 WL 1775765, at *9 (D. Utah May 9, 2011); Schnabel v. Trilegiant Corp., 697 F.3d 110, 120 (2d Cir. 2012); Nguyen v. Barnes & Noble Inc., 763 F.3d 1171, 1177 (9th Cir. 2014); Nicosia v. Amazon.com, Inc., 834 F.3d 220, 233 (2d Cir. 2016); Meyer v. Uber Techs., Inc., 868 F.3d 66, 75 (2d Cir. 2017).

[139] U.C.C. § 1-201(b)(10) (AM. L. INST. & UNIF. L. COMM'N 2020) ("'Conspicuous', with reference to a term, means so written, displayed, or presented that a reasonable person against which it is to operate ought to have noticed it. Whether a term is 'conspicuous' or not is a decision for the court. Conspicuous terms include the following: (A) a heading in capitals equal to or greater in size than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same or lesser size; and (B) language in the body of a record or display in larger type than the surrounding text, or in contrasting type, font, or color to the surrounding text of the same size, or set off from surrounding text of the same size by symbols or other marks that call attention to the language[.]"); *see also* 16 C.F.R. § 313.3(b) (2021) (Federal Trade Commission "conspicuous notice" requirements regarding formation of online contracts); *see* Cal. Bus. & Prof. Code § 22577(b); U.C.I.T.A. § 102(a)(14) (1999); 11 U.S.C. § 524(c)(2)(A) (2004); In re Bassett, 285 F.3d 882, 884 (9th Cir. 2002).

guidelines, this section could also be interpreted to provide that the overall design and language of the agreement must lend itself towards easy understanding of and knowledgeable agreement to the terms.

[64] Aspects of the European Union's (E.U.) implementation of its General Data Privacy Regulation (GDPR) regarding consent may be instructive. Unlike American courts' approaches, these E.U. policies do take psychological factors into account when assessing a user's consent to online contracts. In order to be compliant with the GDPR, consent to collection and use of personal information must be given freely, and must also be specific, informed, and unambiguous.[140] In order to be deemed freely given, the consent must be "provided in an intelligible and easily accessible form, using clear and plain language;" "it should not contain unfair terms;" "the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended," and "[c]onsent should not be regarded as freely given if the data subject has no genuine or free choice or is unable to refuse or withdraw consent without detriment."[141] Consent is not considered freely given if there is a "clear imbalance" between the parties; if the consent "does not allow separate consent to be given to different personal data processing operations despite it being appropriate in the individual case;" or if "the performance of a contract, including the provision of a service, is dependent on the consent despite such consent not being necessary for such performance."[142]

[65] These E.U. standards account for the specific circumstances of the agreement and the consent to that agreement, conceptualizing the transaction within the real situation in which it occurs rather than imposing the theoretical "reasonable person" standard embodied in the U.C.C. In the

[140] Ben Wolford, *What are the GDPR consent requirements?*, GENERAL DATA PROTECTION REGULATION : EU, https://gdpr.eu/gdpr-consent-requirements/ [https://perma.cc/DE9K-JU9P].

[141] Commission Regulation 2016/679, 2016 O.J. (L 119) 1, 8.

[142] *Id.*

United States, the "reasonable person" standard could be replaced with such a standard, which would shift any examination of the validity of assent to terms of service from an abstract concept to a specific examination of the circumstances in which the assent was given. In order to determine the legal effectiveness and validity of a user's assent, courts would be required to consider the totality of the circumstances in which the assent was given, including the "reasonable user's" psychological predispositions and circumstances.

[66] This is similar to the "subjective" approach that already has a history of use by courts in contractual disputes.[143] But it goes much further: instead of applying the standard of a theoretical "reasonable person," this proposal would instead apply the reasonable interpretation and understanding of the specific people involved in a case, based on their personal psychological experiences and predilections.

[67] Others have argued that the "reasonable person" concept must account for an individual's characteristics and attitudes to understand and evaluate their behavior. For example, Professor Amy J. Schmitz suggests that "a continuum of contracting cultures ranging from 'intra communal' to 'extra communal' [be used] in order to highlight how parties' relations, understandings, and values may have the greatest impact on the fairness of form arbitration provisions [in contracts]."[144] Professor Nancy S. Kim concludes that "courts should consider contextual factors, including the background and identity of the parties, in order to better achieve the goal of contract law—to protect the reasonable expectations of the parties."[145] And Professor Lu-in Wang argues that "our understanding of the reasonable person in economic transactions should take into account an individual's race, gender, or other group-based identity characteristics—not necessarily

[143] *See supra* notes 29–31 and accompanying text.

[144] Amy J. Schmitz, *Consideration of "Contracting Culture" in Enforcing Arbitration Provisions*, 81 ST. JOHN'S L. REV. 123, 125–26 (2007).

[145] Nancy S. Kim, *Reasonable Expectations in Sociocultural Context*, 45 WAKE FOREST L. REV. 641, 645 (2010).

because persons differ on account of those characteristics, but because of how those characteristics influence the situations a person must negotiate.[146]

[68] As Professor Larry A. DiMatteo observed, "[i]n essence, the reasonable person [in contract law] is constructed from the *background* of the transaction or relationship."[147] In the context of online contracts, the law should construe and apply assent to online contracts by considering the contexts and conceptions that psychology shows are in play when a "reasonable user" clicks "I agree."

VIII. CONCLUSION

[69] In applying the "reasonable person" standards of the U.C.C. in the context of online contracts, American courts should consider psychological research which shows how people may act when confronted with a terms of service agreement that must be accepted in order to utilize the website or online service they wish to access. Research has shown that how individual users act, and their agreeability to the terms and conditions of websites and services, may depend on the circumstances in which the agreement is presented, rather than any reasoned decision by the users. Based on what psychologists know about the psychological aspects of assent, the law's continued reliance on the existing "reasonable person" standard to enforce online contracts may itself be unreasonable.

[146] Lu-in Wang, *Negotiating the Situation: The Reasonable Person in Context*, 14 LEWIS & CLARK L. REV. 1285, 1285 (2010).

[147] DiMatteo, *supra* note 15, at 318 (emphasis in original).