

Adhesive Terms and Reasonable Notice

Nancy S. Kim*

This Article challenges the conceptualization of adhesive forms as contracts and introduces a taxonomy of adhesive terms. It argues that this classification system should be used to determine which adhesive terms are in fact contractual rather than depending upon the self-serving “contracts” label that businesses use to identify their terms. Even if contract law is not the proper framework, torts, property, and other legal and regulatory regimes may determine the enforceability and effect of adhesive terms.

Thus, this Article is both a deconstruction of standard form contracts and a reconstruction. Courts typically apply the standard of reasonable notice to assess the enforceability of adhesive online terms. This Article proposes that online “reasonable notices” be limited to three lines of text with five words each or five lines of text with three words each. The proposed requirements ensure that online reasonable notices are both conspicuous and comprehensible to the average consumer.

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* Michael Paul Galvin Chair in Entrepreneurship and Applied Legal Technology, Chicago-Kent College of Law, Illinois Institute of Technology. This Article benefitted greatly from the many helpful comments and suggestions received at the Workshop in Private Law & Emerging Technology, Information Society Project, Yale Law School and at a faculty workshop at the Chicago-Kent College of Law. Sincere thanks to Luca Provenzano and the members of the *Seton Hall Law Review* for their expert editing and diligent work on this Article.

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I. INTRODUCTION

The world's largest corporations have used the smallest instruments to help them establish and maintain their empires. Referred to by different names—terms of service, fine print, wrap contracts, boilerplate, legalese—it is their diminutive and unassuming nature that makes their power so easy to underestimate. Easily overlooked, never read, these terms bite hardest when least expected. The New York Times's editorial board lamented the power of big tech companies being made even more powerful through “lopsided consumer contracts.”¹ Big tech companies deploy terms of service or “TOS”² against businesses, too, and across the political spectrum. For example, when Amazon terminated Parler—a social media app popular with Trump supporters—from its cloud hosting services, it did so under the authority of its terms of service.³ It was a controversial

¹ N.Y. Times Ed. Bd., *What Happens When You Click ‘Agree’?*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html>.

² Companies may use variations, such as “Terms of Use” or “Conditions of Use.” For convenience, and because there does not seem to be any reason for the differing terminology or for the use of or non-use of capitalization, I will refer to all these variations as “terms of service” or “TOS” except where included as part of a quoted passage.

³ Tony Romm & Rachel Lerman, *Amazon Suspends Parler, Taking Pro-Trump Site Offline Indefinitely*, WASH. POST (Jan. 11, 2021, 5:12 AM), <https://www.washingtonpost.com/technology/2021/01/09/amazon-parler-suspension/>. Parler subsequently retained web hosting services from another company. Bobby Allyn & Rachel Treisman, *After Weeks of Being Offline, Parler Finds a New Web Host*, NPR (Feb. 15, 2021, 4:32 PM), <https://www.npr.org/2021/02/15/968116346/after-weeks-of-being-off-line-parler-finds-a-new-web-host>. The terms of service of that

move that sparked a discussion about the power of tech platforms over speech.⁴

Amazon is not alone in turning to its terms of service to protect and defend its business decisions. Facebook demanded that researchers at New York University stop collecting data about its practices involving targeted political ads, claiming that the research project violated the company's terms of service.⁵ Google tried to justify its data collection practices by claiming users "consented" to them when they agreed to its terms of service.⁶ When Robinhood shut down trading in Gamestop's volatile stock, its users lost a lot of money.⁷ They sued, but in January 2022, a federal judge dismissed a class action lawsuit against the company largely because its Customer Agreement expressly permits Robinhood to halt trading.⁸

These are only a representative sampling of the ways in which fine print controls our lives and, especially, our online activity. Firms impose a wide range of terms upon their customers. These terms are presented in a variety of forms and formats both online and offline.

company are similar to those provided by Amazon. See *SkySilk, Inc. Terms & Conditions*, SKYSILK, INC., <https://www.skysilk.com/terms> (last visited Sept. 15, 2022) ("SkySilk reserves the right to remove prohibited materials along with associated User accounts without warning or notification to the User"); *Acceptable Use Policy*, SKYSILK, INC., <https://www.skysilk.com/aup> (last visited Sept. 15, 2022) ("We reserve the right to take immediate action to suspend or terminate your account if, in our sole and exclusive discretion, you are engaging in activities that jeopardize our security, the security of other customers, or of the internet in general. You may not be provided with advance notice that we are taking such action.").

⁴ Parler sued Amazon but subsequently dropped the lawsuit and refiled in state court. Russell Brandom, *Parler Drops Federal Lawsuit Against Amazon—but Files Another in State Court*, VERGE (Mar. 3, 2021, 7:19 AM), <https://www.theverge.com/2021/3/3/22310873/parler-amazon-aws-lawsuit-antitrust-hosting-free-speech>.

⁵ Jeff Horwitz, *Facebook Seeks Shutdown of NYU Research Project into Political Ad Targeting; In Letter this Month, Facebook Says the Project Violates Provisions in its Terms of Service That Prohibit Bulk Data Collection*, WALL ST. J. (Oct. 23, 2020), <https://www.wsj.com/articles/facebook-seeks-shutdown-of-nyu-research-project-into-political-ad-targeting-11603488533>.

⁶ *Calhoun v. Google, LLC*, 526 F. Supp. 3d 605, 620 (N.D. Cal. 2021); see *id.* at 623 (rejecting Google's argument).

⁷ See Chris Dolmetsch, *Robinhood Users Suing Over Trade Limits Face High Legal Bar* (3), BLOOMBERG L. (Jan. 28, 2021, 10:02 PM), <https://news.bloomberglaw.com/us-law-week/robinhood-customers-sue-over-removal-of-gamestop>.

⁸ *In re Jan. 2021 Short Squeeze Trading*, 584 F. Supp. 3d 1161, 1186 (S.D. Fla. 2022) ("Every investor who uses Robinhood's platform agrees to enter a contract – the Customer Agreement. The Customer Agreement permits Robinhood Securities and Robinhood Financial to restrict trading....California law favors contract law over tort law as an avenue for allocating economic losses absent extraordinary circumstances.").

Some of them are signed, but many more are posted on walls, inserted in mailers and packages, and displayed on websites and smartphones. These terms are adhesive, meaning that they are offered on a take-it-or-leave-it basis, and the customer is unable to negotiate modifications. Should all these terms be legally binding? And are they *contracts*?

Courts once struggled with the concept of non-negotiated standard forms as contracts but eventually accepted them as valid contracting forms. They cobbled together rules and standards in an effort to balance fairness with efficiency and meet the needs of an evolving marketplace. They did so, however, without a clear picture of how the pieces might fit together. The result is doctrinal chaos, a hodgepodge of rules and standards governing adhesive form contracts that undermine both fairness and predictability.

The legal fiction that finds that the imposition of adhesive terms equals contractual assent ignores the centrality of consent to contract law. To put it plainly, to allow the stronger party to characterize the forced imposition of adhesive terms as a contract is akin to allowing a robber to call a mugging a donation because the victim has not resisted enough. This is not to suggest that *all* adhesive contracts are tantamount to state-sanctioned stealing; rather, it is to make a point that should be obvious but is too often simply overlooked—a contract is a creature of law and, as such, it must meet certain requirements. If it does not, it is not a contract despite what one party may call it.

The problem of adhesive terms is not just a matter of annoying fine print, but a pressing matter of social and economic equality. Oppressive terms harm most those who lack market power, media savvy, language fluency, or time to interact with or maneuver around legal departments and customer service representatives.⁹ They are more likely to be ignored or dismissed by companies who may know—by accessing their credit score, zip code, or income level—that a caller's options are limited. Furthermore, people may assume that a contract is enforceable even when it is not. Consequently, contract formation often means submission to the terms even if the terms could be successfully challenged.¹⁰

⁹ See Yonathan A. Arbel & Roy Shapira, *Theory of the Nudnik: The Future of Consumer Activism and What We Can Do to Stop It*, 73 VAND. L. REV. 929, 929–30 (2020) (identifying a small subset of consumers who may receive special treatment because of their willingness to complain).

¹⁰ See Meirav Furth-Matzkin, *The Harmful Effects of Unenforceable Contracts Terms: Experimental Evidence*, 70 ALA. L. REV. 1031, 1039 (2019) (finding that unenforceable terms in rental agreements have an adverse effect on tenants' decisions because they are often unaware of their rights); Meirav Furth-Matzkin & Roseanna Sommers,

This Article seeks to move beyond the debate regarding the desirability of “standard form contracts.” To refer to standard form contracts is to acknowledge their form as contracts. On the other hand, to reject standard form contracts entirely because of their adhesive nature is to ignore the advantages of adhesive terms.

Although many scholars have written about adhesive form contracts and terms of service,¹¹ this Article is the first to dissect the nature of adhesive terms. Thus, this Article is both a deconstruction of standard form contracts and a reconceptualization. Specifically, I make three novel contributions to the existing literature. First, I propose a cross-doctrinal regime that aligns more appropriately with underlying doctrinal objectives. I then introduce a taxonomy of adhesive terms that reflects this new regime. Finally, I propose minimum requirements for reasonable notices.

This Article is organized as follows: Part II critically examines the case law in the area of standard form contracts. It explains how courts have confused contracts with notices and conflated the law governing notices and disclosures with the law of contracts. Part III seeks to provide clarity regarding the nature of adhesive terms by introducing a taxonomy of adhesive terms. Adhesive terms fall into an array of different categories, which include notices, disclaimers, waivers, unilateral contracts, licenses, quasi-contracts, and implied-in-fact contracts. Courts have failed to distinguish these categories of adhesive terms and instead, have relied upon legal fictions to enforce adhesive terms as contracts. Adhesive terms are usually not contracts. Some adhesive terms, however, may still have legal effect even though they are not *contractually* binding. Instead of treating all adhesive terms

Consumer Psychology and the Problem of Fine-Print Fraud, 72 STAN. L. REV. 503, 508 (2020) (finding that laypeople, unlike lawyers, “strongly believe that fraudulent fine print is consented to and will be enforced”); Evan Starr, J.J. Prescott & Norman Bishara, *The Behavioral Effects of (Unenforceable) Contracts*, 36 J.L., ECON., AND ORG. 633 (2020) (finding that employees with non-competes even in states where they are unenforceable cite them as a reason for declining offers from competitors).

¹¹ See generally Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459 (2006); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2012); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983). Much of the recent scholarship focuses on specific terms given bargaining power disparities. See Mark A. Lemley, *The Benefit of the Bargain* (Stanford L. and Econ. Olin, Working Paper No. 575, 2022) (proposing that default contract rules cannot be varied in a standard form).

as “contracts” subject to contract law, the appropriate legal and doctrinal response should depend upon the nature of the term and the drafter’s authority to impose it. Part IV proposes specific requirements for *reasonable notice* that reflect common industry and design principles and align with the behavior of *actual* (not fictitious) reasonable online users. Part V concludes.

II. CONTRACT LAW IN A DYNAMIC MARKETPLACE

The form of contracts evolved with changes in the marketplace. With industrialization and the mass production of goods came mass produced standard form contracts. The alterations of the contractual form made transactions more efficient. Sellers did not have to negotiate each contract, and they could streamline the way they did business by standardizing processes and terms. But the standard form contract did not reflect the ideals of contract law. Rather, it reflected the unilateral exercise of market power. As the Supreme Court of New Jersey in *Henningsen v. Bloomfield Motors, Inc.* wrote:

The traditional contract is the result of free bargaining of parties who are brought together by the play of the market, and who meet each other on a footing of approximate economic equality. In such a society there is no danger that freedom of contract will be a threat to the social order as a whole. But in present-day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position . . . Such standardized contracts have been described as those in which one predominant party will dictate its law to an undetermined multiple rather than to an individual. They are said to resemble a law rather than a meeting of the minds.¹²

The most recent alteration to the form of a contract arrived with computers and the digital age. Contracts were no longer limited by their physical, tangible form. Terms could be presented in different formats and through different delivery mechanisms. Any digital device could be a tool for contracting. As a result, businesses started to impose terms upon consumers that they labeled as contractual and that they claimed were legally binding.¹³

¹² *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).

¹³ See Robin Bradley Kar & Margaret Jane Radin, *Pseudo-Contract and Shared Meaning Analysis*, 132 HARV. L. REV. 1135, 1140 (2019) (“At first slowly and imperceptibly, but now with mounting speed and generality, many courts and legal analysts have responded to the expanding uses of boilerplate text in the digital age by diminishing

Today, these online “contracts” are ubiquitous, and their terms are voluminous, onerous, and complex. Because they are practically costless to reproduce and update, businesses use them more frequently and alter them often.¹⁴ Digitization removed the barriers that formerly restrained businesses from making their contracts too lengthy and from using them too often. In order to justify enforcing these terms as contracts, courts resorted to the legal fiction of constructive assent, which in turn spawned its own fictions of constructive notice and the reasonable internet user¹⁵ that resembled no actual living person, as explained in the next Section.

A. *Adhesive Terms as Contracts and Other Legal Fictions*

Contract law adopts an objective theory of interpretation, which means that whether the parties have entered into a contract depends on their outward manifestations.¹⁶ These outward manifestations are usually spoken or written words, but they can also be deeds or conduct.¹⁷ The objective standard, however, only applies where the offeree knows that an offer has been made. If the offeree is unaware that any offer is made, then the objective standard does not apply to the offeree’s conduct.¹⁸ Accordingly, the recipient of adhesive terms is not bound by an act that may seem like a manifestation of consent if the recipient is unaware of contractual terms and the terms are inconspicuous and not obviously contractual.¹⁹

the type of agreement . . . required to produce ‘terms’ and ‘contracts.’”) Kar and Radin refer to modern day adhesive contracts as “pseudo contracts.” *Id.*

¹⁴ I have written about the impact of digitization on contract’s form elsewhere so will only briefly summarize them in this Article. See generally NANCY S. KIM, WRAP CONTRACTS (2013); Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797 (2007); Nancy S. Kim, *The Duty to Draft Reasonably and Online Contracts*, in COMMERCIAL CONTRACT LAW: TRANSATLANTIC PERSPECTIVES 181 (Larry Di Matteo et al. eds., 2013).

¹⁵ See *HomeAdvisor, Inc. v. Waddell*, No. 05-19-00669-CV, 2020 WL 2988565, at *4 (Tex. App. June 4, 2020) (applying the “reasonably prudent computer or smartphone user” standard to assess whether a contract was formed).

¹⁶ *Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal. App. 3d 987, 992 (Cal. Ct. App. 1972) (“It is true that the terms of a contract ordinarily are to be determined by an external, not an internal, standard; the outward manifestation or expression of assent is the controlling factor.”).

¹⁷ See *id.*

¹⁸ *Id.* at 993 (“[W]hen the offeree does not know that a proposal has been made to him this objective standard does not apply.”).

¹⁹ *Id.* (“[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious.”).

In other words, a court must decide *whether* an offer has been made *before* determining that the offeree accepted it. The inquiry thus requires two parts: First, the court must use an objective standard to assess the form of the adhesive terms to determine whether a reasonable offeree would think, given the presentation of the terms, that an offer had been made. Second, the court must use an objective standard to assess the conduct of the offeree to determine whether a reasonable person in the offeror's shoes would think that the offeree had manifested consent.

If the contract looks like a contract—meaning that it is printed on paper, identified textually as a contract, and formatted the way contracts are typically formatted—then the first issue is easily addressed. If the offeree then signs the contract, the second step of the inquiry is also resolved.

Courts skirt the issue of consent by applying an objective standard to the offeree's actions and imposing the duty to read. The *duty to read* charges a party who signed a contract with knowledge of its terms.²⁰ Notwithstanding the name, there is no real duty; rather, there is a presumption that someone who signs a contract has read the terms it contains.²¹

The duty to read may be appropriate where the agreement is negotiated but is incongruous in light of the no-reading problem.²² Imposing the duty to read on adherents to mass market adhesive form contracts is unfair because most adherents are consumers who are not

²⁰ See *Marin Storage & Trucking, Inc. v. Benco Contracting and Eng'g, Inc.*, 89 Cal. App. 4th 1042, 1049 (Cal. Ct. App. 2001) (“A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing.”).

²¹ The so-called “duty to read” refers to the understanding that someone who signs a contract is charged with knowing what the contracts says. See generally Charles L. Knapp, *Is There a “Duty to Read”?*, 66 HASTINGS L.J. 1083 (2015) (discussing the meaning of a duty to read).

²² See Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 546 (2014) (referring to consumers failure to read form contracts as the “no-reading problem”). As Tal Kastner and Ethan J. Leib note, the application of rules intended for one type of contract often “creep” over and are applied to other types of contracts for which they are ill-suited. Tal Kastner & Ethan J. Leib, *Contract Creep*, 107 GEO. L.J. 1277, 1279 (2019). They write that the doctrinal rules and distinctions “from commercial settings and highly negotiated contracts between sophisticated parties [have crept] into the realm of consumer contract.” *Id.* at 1303. The authors explain that each of “these ‘creeping’ doctrines . . . [emerge] with a rationale grounded in a particular transactional structure that creeps into applications in different transaction types.” *Id.*

represented by counsel, and most form contracts are lengthy and filled with legalese.²³

Courts, recognizing the potential for abuse by businesses, temper the power firms have to unilaterally draft terms by policing the terms with doctrines such as good faith, unconscionability, and reasonable expectations.²⁴ As the New Jersey Supreme Court stated, “[t]he task of the judiciary is to administer the spirit as well as the letter of the law [P]art of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.”²⁵

Courts apply rules differently depending on the type of contract. For example, some courts recognize an exception to the duty to read with insurance contracts where an insured has reasonably relied upon an agent’s representations.²⁶ The Arizona Supreme Court, in overriding an insured’s duty to read, stated that “the usual insurance policy is a special kind of contract” because it is “largely adhesive; some terms are bargained for, but most terms consist of boilerplate, not bargained for, neither read nor understood by the buyer, and often not even fully understood by the selling agent.”²⁷

Courts require that certain terms be drawn to the user’s attention. For example, the California Court of Appeal required that terms of a warranty disclaimer be “apparent,” which meant something more than simply “conspicuous.”²⁸ It further suggested that the drafter should

²³ Cf. Melvin Aron Eisenberg, *Text Anxiety*, 59 S. CALIF. L. REV. 305, 305 (1986). Most readers will have personal experience not reading contracts. Melvin Eisenberg writes that “it is reasonable” for “consumers who are faced with the dense text of form contracts” to “respond by refusing to read.” *Id.*

²⁴ Cf. Danielle Kie Hart, *In and Out—Contract Doctrines in Action*, 66 HASTINGS L.J. 1661, 1661 (2015) (finding, based on an analysis of cases from the Seventh and Ninth Circuits, that “it may not be so easy to get into a contract,” but that once in, “it is extremely difficult to get out” of a contract).

²⁵ *Henningsen*, 161 A.2d at 94.

²⁶ *Filip v. Block*, 879 N.E.2d 1076, 1084 (Ind. 2008) (noting that “reasonable reliance upon an agent’s representations can override an insured’s duty to read the policy.” (quoting *Vill. Furniture, Inc. v. Assoc. Ins. Managers, Inc.*, 541 N.E.2d 306, 308 (Ind. Ct. App. 1989))).

²⁷ *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 395 (Ariz. 1984).

²⁸ *See A & M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 490 (Cal. Ct. App. 1982) (“Although the printing used on the warranty disclaimer was conspicuous . . . , the terms of the consequential damage exclusion are not particularly apparent, being only slightly larger than most of the other contract text. Both provisions appear in the middle of the back page of a long, preprinted form contract . . . [i]t was never

advise the adherent to read the terms to avoid unfair surprise and that “[t]he burden should be on the party submitting [a standard contract] in printed form to show that the other party had knowledge of any unusual or unconscionable terms contained therein.”²⁹

Similarly, in *Sutton v. David Stanley Chevrolet*, the Oklahoma Supreme Court determined that a car dealership that did not point out a dispute resolution clause to a customer could not enforce that clause against the customer.³⁰ The clause was contained in a two-page purchase agreement right above a signature line; however, the circumstances gave rise to a “duty to disclose” on the part of the defendant.³¹ The court noted that unlike the other provisions, which contained information regarding either the vehicle or the customer, the dispute resolution provision was a “totally unrelated provision,” which was “tucked-in right before the apparent signature line for the trade-in vehicle section” and was in a “much smaller font size.”³² The Oklahoma Supreme Court stated that:

[T]he representations of the finance manager combined with the structure of the purchase agreement created a false impression that the purpose of Sutton’s signature was to only verify information concerning his trade-in vehicle. He surely was not under the impression he was agreeing to waive his right to a jury trial and obligating himself to pay a share of the costs of arbitration when he signed underneath the trade-in vehicle section of the purchase agreement. The DRC which provided for arbitration was a material provision of the purchase agreement. Because of the creation of the false impression which shrouded the existence of the DRC, a duty to disclose this material provision arose.³³

suggested to him, either verbally or in writing, that he read the back of the form . . . He certainly had the opportunity to read the back of the contract or to seek the advice of a lawyer. Yet as a factual matter, given the complexity of the terms and FMC’s failure to direct his attention to them, Abatti’s omission may not be totally unreasonable.”) (footnote omitted).

²⁹ *Id.* (quoting *Weaver v. American Oil Co.*, 276 N.E.2d 144, 147 (Ind. 1971)).

³⁰ 475 P.3d 847, 858 (Okla. 2020).

³¹ *Id.* at 850–861 (“Under the circumstances of the present case, a duty arose to inform Sutton of the DRC. This is due to the false impression created by both the finance manager and the structure of the purchase agreement itself.”).

³² *Id.* at 857.

³³ *Id.*

The Oklahoma Supreme Court held that the plaintiffs' failure to read the finely printed dispute resolution clause was "no defense" for the defendant and did not affect the defendant's duty to disclose.³⁴

1. "Reasonable Communicativeness" and the "Notice and Manifestation" Tests

The way that contract law treats adhesive terms depends upon both the form in which the terms are presented and the substance of the terms. The most important aspect of form is whether the adherent signed the adhesive terms and acknowledged them as legally binding. If the form is signed, then the analysis tends to focus on the substance of the terms and whether they should be enforceable. If the adherent does *not* sign the form, then courts must determine whether a contract was even formed. Typically, they resort to constructive assent approaches and a myriad of standards depending on the context. Not surprisingly, this is where doctrinal analysis tends to get murky.

Courts developed two different tests to assess assent to standard forms where the adherent did not sign and the adhesive terms were presented in a form that was not obviously contractual, such as tickets. The first was the "reasonable communicativeness" test.³⁵ This test has two prongs: First, the court will examine the "physical characteristics" of the ticket and whether the terms were conspicuous and readable.³⁶ Second, the court determines whether the recipient had the ability to be "meaningfully informed" and the opportunity to reject the terms.³⁷

In *Sgouros v. Transunion Corp.*, the Seventh Circuit stated that the two-part reasonable communicativeness test "(t)ranslated to the Internet" would require asking

whether the web pages presented to the consumer adequately communicate all the terms and conditions of the agreement, and whether the circumstances support the assumption that the purchaser receives reasonable notice of

³⁴ *Id.* at 857–58.

³⁵ *See* *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987) (noting that the "Second, Fifth, and Sixth Circuits have also adopted this 'reasonable communicativeness' test" for passenger tickets).

³⁶ *Baer v. Silversea Cruises Ltd.*, 752 Fed. App'x. 861, 864–65 (11th Cir. 2018) (noting that the "reasonable communicativeness" test has two prongs: "First, courts look to the physical characteristics of the limitations provision, including the size of the text, its conspicuousness, and its typeface. The second prong analyzes whether the passenger 'had the ability to become meaningfully informed of the clause and to reject its terms.'" (citations omitted)).

³⁷ *Id.*

those terms. This is a fact intensive inquiry: we cannot presume that a person who clicks on a box that appears on a computer screen has notice of all contents not only of that page but of other content that requires further action (scrolling, following a link, etc.) Indeed a person using the Internet may not realize that she is agreeing to a contract at all, whereas a reasonable person signing a physical contract will rarely be unaware of that fact.³⁸

Many courts have ignored the reasonable communicativeness test altogether with internet contracts and applied a different test.³⁹ I refer to this second test as the “notice-and-manifestation” test. Although there is no clear consensus on its precise articulation, this test includes some variant of “reasonable notice” or “conspicuous notice” and “manifestation of consent” or “manifestation of assent.” Many courts add the additional requirement of an “opportunity to reject.” The notice and manifestation test arose in the context of digital goods, such as prepackaged software, where terms were enclosed in plastic wrap. The standard became more prevalent with the internet. Online, where there is no option to sign, courts have determined that a “manifestation of consent” could be something other than a signature; it could be a click on an icon that expresses acceptance. Because people click for many different reasons online—including habit—the language that explains the effect of clicking as agreement to terms must be made explicit.

Traditionally, the recipient of documents is not bound by terms of which they are unaware, such as an arbitration clause printed on the back of a confirmation order.⁴⁰ As one New York State Appellate Division Court noted, “a party should not be bound by clauses printed on the reverse side of a document unless it is established that such matters were properly called to its attention and that it assented to the provisions there stated”⁴¹ A mere opportunity to review the terms was typically insufficient to bind the recipient of a paper form to terms that are not called to the recipient’s attention. For example, in a case

³⁸ 817 F.3d 1029, 1034–35 (7th Cir. 2016).

³⁹ *E.g.*, *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1049 (Mass. 2021); *Emmanuel v. Handy Techs., Inc.*, 992 F.3d 1, 8 (1st Cir. 2021).

⁴⁰ *See Windsor Mills*, 25 Cal. App. 3d at 994 (determining “no agreement by plaintiff to arbitrate, regardless of its outward manifestations of apparent assent as exhibited by its retention of the forms without objection and its initial acceptance of the yarn” where the plaintiff did not have actual knowledge of the provision).

⁴¹ *Arthur Philip Exp. Corp. v. Leathertone, Inc.*, 275 A.D. 102, 105 (N.Y. App. Div. 1949).

involving a bank's service fees, a California State Appellate Court wrote:

[Although] there can be no argument here that purchasers have been given an adequate opportunity to become aware of and consent to the service charge provision in the subject money orders . . . the provision in question is effectively hidden from the view of money order purchasers until after the transactions are completed. In addition, given the size of the print with which the service charge provision is set forth in the money order and the fact that the Bank's agents do not as a rule call the provision to the customer's attention, it would be reasonable to presume that most customers never, in fact, become aware of the provision's existence. Under these circumstances, it must be concluded that the Bank's money order purchasers are not chargeable with either actual or constructive notice of the service charge provision, and therefore cannot be deemed to have consented to the provision as part of their transaction with the Bank.⁴²

To the contrary is the notice and manifestation standard which requires accepting two different legal fictions. The first is that a certain action—i.e., clicking on an “accept” button—constitutes a “manifestation of consent.” Unlike with paper adhesive form contracts, consumers cannot sign adhesive electronic form contracts. Courts, however, determined that these digital clickwraps were just like paper contracts even if the manifestation of assent was different.⁴³ A click on an “accept” button was sufficient for that purpose.⁴⁴ Thus, the “manifestation of consent” is a legal fiction because it constructs meaning from an act which may have been done reflexively or

⁴² *Cory v. Golden State Bank*, 95 Cal. App. 3d 360, 367 (Cal. Ct. App. 1979).

⁴³ *Hubbert v. Dell Corp.*, 835 N.E. 2d 113, 121 (Ill. App. Ct. 2006) (stating that hyperlinks “should be treated the same as a multipage written paper contract. The blue hyperlink simply takes a person to another page of the contract, similar to turning the page of a written paper contract.”); *Scherillo v. Dun & Bradstreet, Inc.*, 684 F. Supp. 2d 313, at 322 (E.D.N.Y. 2010) (concluding that a person who “checks the box agreeing to the terms and conditions of a purchase on an internet site without scrolling down to read all of the terms and conditions is in the same position as a person who turns to the last page of a paper contract and signs it without reading the terms—namely, the clause is still valid.”).

⁴⁴ *Scherillo*, 684 F. Supp. 2d at 321–22; *see also Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 839 (S.D.N.Y. 2012) (“[C]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else.”); *Meyer v. Uber Techs.*, 868 F.3d 66, 79 (2d Cir. 2017) (finding notice and manifestation of assent despite assent not being express).

unintentionally. Even if people do not read their contracts, they are aware that they are signing them. By contrast, people are habituated to click “accept” online automatically without being aware that they are entering into a legally binding agreement.

The second fiction requires more of a leap of imagination because it finds notice is reasonable *even if most people would not notice it*. In other words, the *notice and manifestation* standard conflates two fictions—the fiction that most people would read or even notice online adhesive terms when, in fact, most people do not, and the fiction that most people would view a website visitor’s clicking on an icon as an intent to enter into a contract rather than simply a desire to proceed with online activity. The consequence is that constructive notice has morphed into constructive assent. Courts have held that the act of clicking on an “accept” icon both manifests assent and is evidence of reasonable notice, even if the adherent neither intended to accept nor saw the notice.⁴⁵

Some courts reason that the adherent had inquiry notice or a duty to read if there was reasonable (i.e., constructive) notice of legal terms.⁴⁶ But this is a misapplication of the doctrine. The duty to read should apply only *after* it has already been determined that the offeree has clearly manifested assent to legal terms.⁴⁷ The duty to read then determines whether the offeree is bound to all the terms in the

⁴⁵ See *Fleja*, 841 F. Supp. 2d at 837–40 (finding plaintiff assented by clicking even though plaintiff did not have actual notice and was not presented with the terms); cf. *Starke v. Square Trade*, 913 F.3d 279, 295 (2d Cir. 2019) (noting that offeree “had a duty to read the terms of the contract presented to him” but that “the duty-to-read principle still require that the offeree be put on notice of the existence of additional contract terms before it can be said that he has assented to them” and that “the duty to read does not morph into a duty to ferret out contract provisions when they are contained in inconspicuous hyperlinks”).

⁴⁶ *Meyer*, 868 F.3d at 74 (“Where there is no evidence that the offeree had actual notice of the terms of the agreement, the offeree will still be bound by the agreement if a reasonably prudent user would be on inquiry notice of the terms”); *Thorne v. Square*, No. 20CV5119NGGTAM, 2022 WL 542383, at *11 (E.D.N.Y. Feb. 23, 2022) (finding that a “reasonable smartphone user would be on inquiry notice as to the Cash App General Terms of Service and arbitration provision therein” because the hyperlink to the General Terms was clear and conspicuous).

⁴⁷ *In re Pacific Northwest Storage LLC v. Fields*, 386 B.R. 764, 774 (Bankr. W.D. Wash. 2007) (“Parties have a duty to read a document they sign”); *Edmundson v. City of Bridgeport Bd. of Educ.*, No. CV196083811S, 2019 WL 5066951, at *3 (Conn. Super. Ct. Sept. 18, 2019) (“The general rule is that where a person signs or accepts a formal written contract affecting his pecuniary interests, it is that person’s duty to read it and notice of its contents will be imputed to that person if that person negligently fails to do so.”).

contract. A website visitor should not have a duty to read everything that a company puts on its website. In other words, the duty to read *does not, and should not, apply to the question of contract formation*; it should only apply to determine *which terms are enforceable*. With online notices, the primary question is whether the offeree manifested assent and applying the duty to read at this stage would circumvent this inquiry.

The conflation of “reasonable notice” and “manifestation of consent” essentially ignores the important differences between notices and contracts. Constructive assent can waive rights and incur obligations. Accordingly, under the notice and manifestation standard, the consumer does not have to actually see the notice as long as the notice is objectively “reasonable” or “conspicuous.” Because notices are treated as contracts under this standard, they trigger the “duty to read,” which presumes that one has read the document that one has signed. Online notices, however, do not elicit signatures. Instead, the user clicks, which is an action that the user undertakes automatically and habitually multiple times on a variety of websites.

Applying the duty to read to the standard of reasonable notice poses a heavy and unrealistic burden with adhesive online terms. While it may be reasonable to presume that someone who signs a contract has read the terms, the same cannot be said where someone clicks on a mouse. In addition to being unrealistic, it is socially undesirable for consumers to actually read the voluminous terms that they encounter every day, as it would impede their ability to be productive and contribute to society in useful ways. One study estimated that it would take the average adult approximately twenty-nine to thirty-two minutes to read a website privacy policy and another fifteen to seventeen minutes to read a website’s terms of service.⁴⁸ Multiply that by the number of websites consumers encounter on a daily basis and the inefficiency of terms and their societal cost becomes clear. Not surprisingly, most users do not read terms of service.⁴⁹

The combination of *reasonable notice* and *a duty to read* seems to be borrowed from torts, and particularly, products liability.⁵⁰ Generally, a

⁴⁸ Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of Social Networking Services*, 23 INFO., COMM’N & SOC’Y 1, 128, 128–33 (2020).

⁴⁹ *Id.* (finding that 98 percent of 543 study participants did not read digital adhesive terms).

⁵⁰ See Curtis E.A. Karnow, *The Internet and Contract Formation*, 18 BERKELEY BUS. L.J. 135, 153 (2021) (stating that the rationale for the reasonable notice standard of online contract formation is that “users and consumers are at ‘fault’ if they do not review the

product is considered defective if foreseeable risks of harm could be reduced or avoided with reasonable warnings.⁵¹ The adequacy of a notice depends upon its “reasonableness in the circumstances,”⁵² and warnings must be “adequate to alert a reasonably prudent person” of the harm.⁵³ Moreover, a reasonably prudent person is expected to read a reasonable warning. The Restatement (Second) of Torts § 402A, cmt. j states: “Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.”⁵⁴ Many courts also adopt the reciprocal presumption that the buyer/plaintiff would have heeded the warning if one had been given, which benefits the buyer/plaintiff.⁵⁵

The transfer of a tort standard to contract is inappropriate given the different legal effect of a notice and a contract. A finding of reasonable notice in tort is a shield for the drafter. By contrast, a finding of reasonable notice in contract can be both a shield and a sword for the drafter. Furthermore, the determination of reasonableness in tort for purposes of warnings is typically a question

terms which are accessible to them” and that this “ascription of fault” is a “brand of negligence . . . measured by a reasonable person standard.”).

⁵¹ See RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (AM. L. INST. 1965); RESTATEMENT (THIRD) OF TORTS § 2 (c) (AM. L. INST. 1997).

⁵² RESTATEMENT (THIRD) OF TORTS § 2 cmt. i. (AM. L. INST. 1997).

⁵³ *Serna v. Roche Lab's, Div. of Hoffman-LaRoche, Inc.*, 684 P.2d 1187, 1189 (N.M. Ct. App. 1984) (stating five criteria to determine the adequacy of drug warnings); *Purdy v. Deere & Co.*, 492 P.3d 99, 112 (Or. Ct. App. 2021) (noting that warnings must be in a form that catches the attention of a “reasonably prudent person”).

⁵⁴ RESTATEMENT (SECOND) OF TORTS § 402A cmt. j (AM. L. INST. 1965).

⁵⁵ Benjamin J. Jones, Annotation, *Presumption or Inference, in Products Liability Action Based on Failure to Warn, That User Would Have Heeded an Adequate Warning Had One Been Given*, 38 A.L.R. 5th 683, 701–05 (2002).

of fact for the jury.⁵⁶ By contrast, courts typically assess reasonable notice for purposes of determining online contract formation.⁵⁷

Courts should not, however, decide the issue of reasonable notice because it is a fact-based inquiry that is within the everyday experience of consumers. Unfortunately, the result of judges making factual determinations better left to juries is that some courts have concluded that a *reasonably prudent offeree* should respond to adhesive digital terms in a way that no reasonable consumer does or should be expected to behave.⁵⁸

B. *The Role of Consent in Contract Law*

Consent is an amorphous concept, which means different things in different contexts. Generally, a person must communicate consent voluntarily and with an understanding of what the consented-to act entails.⁵⁹ The issue of consent to adhesive terms is a contentious and complicated one. Adhesive terms could be contracts, but they do not need to be and often are not. Physical notices (e.g., signs) typically communicate the consent of the *drafter*, not the adherent. No one has the right to enter onto the property of another without the owner's consent.⁶⁰ A notice may grant permission or a license. For example, a notice may permit the licensee's use of the licensor's tangible or intangible property (e.g., YOU MAY MAKE TWO COPIES OF THE SOFTWARE; YOU MAY SMOKE IN THIS AREA; YOU MAY HELP YOURSELF TO THE CANDY IN THE DISH). The consent of the *licensee* is not required for the license because the licensee has no rights to the property and no obligation to use the property. But a license

⁵⁶ *Kaiser v. Johnson & Johnson*, 947 F.3d 996, 1015 (7th Cir. 2020) (“[W]hether a warning is ‘reasonable’ is ‘generally a question of fact for the trier of fact to resolve It only becomes a ‘question of law when the facts are undisputed and only a single inference can be drawn from those facts.’”) (quoting *Cook v. Ford Motor Co.*, 913 N.E.2d 311, 319, 327 (Ind. Ct. App. 2009)); *Eghnayem v. Boston Sci. Corp.*, 873 F.3d 1304, 1321 (11th Cir. 2017) (holding under Florida law, “the adequacy of warnings . . . is a question of fact” but “can become a question of law where the warning is accurate, clear, and unambiguous”) (quoting *Felix v. Hoffmann-LaRoche, Inc.*, 540 So. 2d 102, 105 (Fla. 1989)).

⁵⁷ *Specht v. Netscape Commc’n Corp.*, 306 F.3d 17, 28 (2d Cir. 2002) (finding that court could find reasonable notice and objective manifestation of assent “as a matter of law on the record before it”).

⁵⁸ See Obar, *supra* note 48.

⁵⁹ See NANCY KIM, *CONSENTABILITY: CONSENT AND ITS LIMITS* 9–10 (Cambridge U. Press 2019) (discussing various conceptions of consent).

⁶⁰ W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* §58, at 393 (W. Publ’n Co. 5th ed. 1984).

agreement requires consent because it expresses a bargain where the licensee is also giving up something in exchange for the right to use the property.

A notice might express the drafter's consent, but it might also express clear non-consent. For example, the drafter might state clearly in the notice, **KEEP OFF—PRIVATE PROPERTY**, which indicates that the property owner / drafter is expressly not consenting to public uses of the property. In some cases, however, a notice may express conditions to the drafter's consent, and whether those conditions require the adherent's consent depends on what happens if the adherent does not comply with those conditions.

Adhesive terms imposed upon another party without consent are not a contract. For example, a sign that states that property owner *P* may eject all smokers from its premises may be enforced without visitor *V*'s consent; *V* has no right to be on *P*'s premises, so ejecting *V* does not diminish *V*'s rights. A sign that states that property owner *P* may collect a fee of five dollars from visitors requires *V*'s consent, meaning that *V* must have knowledge of the requirement, voluntarily entered onto *P*'s premises, and intended to accept by doing so.

Although a prerequisite to a contract, consent alone is inadequate to find assent; the parties must also intend to be bound by their actions.⁶¹ The objective standard is used to determine assent for practical reasons—it would be too difficult to hold anyone to a contract if they could later claim they never subjectively intended to be bound despite clear language in a written document stating otherwise. In some cases, the actions of the parties clearly manifest intent despite the absence of express words. In other cases, however, the actions may be ambiguous. In those cases, courts turn to the doctrine of implied-in-

⁶¹ *E.g.*, *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 730 (Tex. 2020) (citations omitted) (“[A] fundamentally ‘essential element of the contract,’ without which no contract can exist, is the parties’ intent to be legally bound to the contract’s terms.” (quoting *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 63 (Tex. 2014))); *Karns v. Jalapeno Tree Holdings, LLC*, 459 S.W.3d 683, 692 (Tex. App. 2015) (“Parties form a binding contract when the following elements are present: (i) an offer; (ii) an acceptance in strict compliance with the terms of the offer; (iii) a meeting of the minds; (iv) each party’s consent to the terms; and (v) execution and delivery of the contract with the intent that it be mutual and binding.” (quoting *Cavalry Invs., L.L.C. v. Sunstar Acceptance Corp.*, No. 05-00-00508-CV, 2001 WL 371545, at *3 (Tex. App. Apr. 16, 2001))). *Contra* RESTATEMENT (SECOND) OF CONTS. § 21 (AM. L. INST. 1979) (“Neither real nor apparent intention that a promise be legally binding is essential to the formation of a contract, but a manifestation of intention that a promise shall not affect legal relations may prevent the formation of a contract.”).

law contract which does not involve a contract at all but, to avoid injustice, allows enforcement of terms that were never mutually agreed upon.⁶²

Online contracting differs from physical world, paper-based contracting. The ubiquity and ease of digital mass contracting places onerous cognitive burdens on the adherent who may simply be browsing a website and not expecting to be thrust into a legal situation. The diluted version of consent may have unexpected consequences given that contractual consent often suffices to fulfill consent in other contexts. Many federal and state consumer protection and anti-discrimination laws adopt a disclosure and consent regime. Unfortunately, they often omit or leave vague what constitutes “consent.” A statute permitting electronic communications may not distinguish the ways that electronic forms affect the consumer’s consent and intentionality.⁶³ A DocuSign document which looks like a scanned copy of a printed standard form agreement and requires multiple clicks to manifest assent to specific provisions is perceived differently by the adherent than a single click to terms of service which the adherent never actually sees.

III. DIFFERENT TYPES OF ADHESIVE TERMS

A. *Digital Adhesive Terms Are Not (Usually) Contracts*

All consumer transactions are marked by a lack of bargaining power. Consumer contracts are offered on a take-it-or-leave-it basis which typically leaves consumers with little choice but to accept the company’s terms. Adhesive form contracts abound today, and the power imbalances and consent-related issues associated with them, plague both paper and digital forms. But digitization shapes and affects the ways adhesive terms are used (and abused) by businesses and how they are perceived (or ignored) by adherents.

⁶² *Karen Stavins Enter., Inc. v. Cmty. Coll. Dist. No. 508*, 36 N.E.3d 1015, 1018 (Ill. App. Ct. 2015) (“A contract implied in law is one in which no actual agreement exists between the parties, but a duty to pay a reasonable value is imposed upon the recipient of services or goods to prevent an unjust enrichment.”); *see Slick v. Reinecker*, 839 A.2d 784, 788 (Md. Ct. Spec. App. 2003) (“[W]hat is confusingly called a contract implied in law is actually no contract at all.”).

⁶³ *E.g.*, 15 U.S.C. § 1681(b)(2)(b)(ii)–(3)(B)(i) (permitting credit reporting agency to furnish consumer report for employment purposes for a consumer applying for employment by computer if the consumer consents “orally, in writing, or electronically to the procurement of the report by that person”).

Businesses took advantage of the digital form and, consequently, of their users who they knew would not—and *could not*—read the presented terms, which were voluminous and frequently updated. The early internet contracts were in the form of “clickwraps” where the user clicks the “agree” button, and “scrollwraps” which are a type of clickwrap where the user scrolls to the bottom of the contract before clicking “agree.”⁶⁴ When digital contracts were presented as clickwraps or scrollwraps, which they initially were, users understood that they were entering into a contract by clicking the “agree” button. Courts generally found clickwraps and scrollwraps enforceable.⁶⁵ The digital form did not make much difference in terms of user perception or substance. Businesses did not impose dozens of pages of terms because the user would resent having to scroll or click through dozens of pages. But courts typically found browsewraps were insufficient as contracting forms because the user did not manifest consent.⁶⁶

Businesses soon developed a new contracting form, referred to as a hybridwrap or a “sign-in wrap” which combines the hyperlink characteristic of browsewraps with the click button that characterizes clickwraps.⁶⁷ But the hybridwrap form also fails on both counts, and one federal court has referred to it as a “questionable form of internet contracting.”⁶⁸ It is ineffective as a notice, just as a browsewrap is, because the relevant information is not contained in the notice. The notice provides *no information* other than that legal terms are available if the user takes further action. The user then has the burden of seeking out terms behind links. Unlike tangible notices which convey important information, browsewraps and hybridwraps do not necessarily signal whether the hidden information is important or trivial.⁶⁹

⁶⁴ Berkson v. Gogo, 97 F. Supp. 3d 359, 394–95 (E.D.N.Y. 2015) (referring to “clickwraps” as agreements where a user affirmatively clicks to acknowledge agreements and “scrollwraps” as one where the user “must scroll through an internet agreement and click on a separate ‘I agree’ button in order to assent to the terms and conditions of the host website”).

⁶⁵ See Sarchi v. Uber Techs., Inc., 268 A.3d 258, 266–67 (Me. 2022).

⁶⁶ *Id.* at 397.

⁶⁷ *Id.* at 399.

⁶⁸ *Id.* But see *Fteja*, 841 F. Supp. 2d at 841 (enforcing sign-in wrap).

⁶⁹ See Sarchi, 268 A.3d at 268 (finding that the enforceability of scrollwraps depends “almost entirely” on “the features of the interfaces on which they appear” and concluding that Uber’s registration process for riders did not provide reasonable notice of the content of the terms and conditions). *Id.* at 269; Sellers v. Just Answer, LLC, 289 Cal. Rptr. 3d 1, 20–25 (Cal. Ct. App. 2021) (noting that generally scrollwrap

The *notice and manifestation of consent* standard erroneously combines contract law's duty to read and tort law's assumption of the risk. *X* assumes the risk if *X* is fully apprised of the potential dangers of an activity and chooses to proceed. Assumption of the risk may be express or implied.⁷⁰ Express assumption of the risk often involves a signed waiver by the party assuming the risk.⁷¹ Implied assumption of the risk involves conduct.⁷² But as previously discussed, the duty to read should not apply to notices because it is the drafter who must make the notice conspicuous.

The duty to read applies to contracts, and to apply them to online terms presumes what has yet to be proven. In other words, the duty to read a browserwrap or a hybridwrap presumes that a hyperlink is a contract and that notice of the hyperlink is enough to prompt a duty to read. But to make such a presumption where someone has not manifested an intent to enter into a contract reverses the order in which contracts are typically entered. A party must manifest intent to enter into a contract *before* a duty to read is imposed. In the tangible contract world, a party manifests intent to enter into a contract by signing it. Online, however, courts have confused this order and have presumed a contract by substituting constructive notice with actual notice.⁷³ Moreover, this constructive notice does not indicate what those terms say, only that they exist somewhere.

and clickwrap agreements are enforceable, browserwraps unenforceable and sign-in wraps to be in the middle depending upon the website design).

⁷⁰ *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 508 S.E.2d 565, 569 (1998) (noting that “many courts distinguish between ‘express’ assumption of the risk and ‘implied’ assumption of the risk”); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 226 (6th ed. 2018) (“Assumption of the risk is generally divided into two types: express and implied.”).

⁷¹ *Davenport*, 508 S.E.2d at 569–70 (“Express assumption of the risk applies when the parties expressly agree in advance, either in writing or orally, that the plaintiff will relieve the defendant of his or her legal duty toward the plaintiff.”); DIAMOND et. al., *supra* note 73, at 226 (“Express assumption of the risk exists when, by contract or otherwise, a plaintiff explicitly agrees to accept a risk.”).

⁷² *Davenport*, 508 S.E.2d at 570–571 (noting that “implied assumption of the risk...arises when the plaintiff implicitly, rather than expressly, assumes known risks”); DIAMOND et. al., *supra* note 73, at 227 (“Implied assumption of the risk is...implied by the plaintiff's conduct in relation to the risk.”).

⁷³ See, e.g., *Meyer v. Uber Tecs, Inc.*, 868 F.3d 66, 75 (2d Cir. 2017) (“When there is no evidence that the offeree had actual notice of the agreement, the offeree will still be bound by the agreement if a reasonably prudent offeree would be on inquiry notice of the terms”...only if the undisputed facts establish ‘reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms’ will we find that a contract has been formed.”). The court determined that

The purpose of a notice differs from the purpose of a contract. The purpose of a notice is to inform the viewer. If the notice is inconspicuous or overly complex, it will not have served its function. Accordingly, the notice must be *effective* in the way that it communicates its message. A notice may also be subject to regulation, meaning that there may be certain requirements that must be met in order for it to be effective.⁷⁴

A notice provides permission or fair warning to others. For example, a sign may inform visitors that they are on private property. The sign may welcome them, or it may notify them that they are trespassing. For the sign to be effective as notice, it must be conspicuous and comprehensible.⁷⁵

The validity of a notice that serves as a warning is often regulated by statute.⁷⁶ If there is no regulation governing the requirements of effective notice, the courts will determine whether notice was conspicuous.⁷⁷ Conspicuousness refers to whether it was obvious and noticeable given the context and surroundings. Even assuming that a court finds that a notice is sufficiently conspicuous or that it is in conformance with regulation, the authority of the drafter extends only as far as the drafter's property rights. Because the drafter's authority to post and enforce the notice derives from its property ownership, the consent of the adherent is not required for the notice to be effective.

Another function of a notice is that it may protect the drafter from liability by establishing that a property owner was not negligent or that a visitor assumes the risk. Tort law requires property owners to provide notice of hidden dangers.⁷⁸ If *X* enters onto *Y*'s property and there is a conspicuous notice warning of falling rock, *X*'s continuing onto the property is understood to mean that *X* has assumed the risk of being hit by falling rock. The condition (falling rock) is not one that *Y* can remedy and so *Y* does what *Y* can do to mitigate potential harm by posting the notice. It makes no difference whether *X* actually saw the

although Meyer was not on actual notice, he had "reasonably conspicuous notice"). *Id.* at 79; *see also* Fteja v. Facebook, 841 F.Supp. 2d 829 (2012) (although plaintiff did not remember agreeing to agreement, court found that contract was formed because a reasonably prudent offeree would have noticed the link).

⁷⁴ See discussion of notices *infra* Part II.B.1.

⁷⁵ See *e.g.*, 11 C.J.S. *Bridges* § 143 (2022) ("A warning sign which is obscured by vegetation and almost illegible affords no notice to the traveler and no defense to the bridge proprietor.").

⁷⁶ See *infra* Part III.B.1.

⁷⁷ See *infra* Part III.B.1.

⁷⁸ See *infra* Part III.B.1.

notice; what matters is that the notice was objectively conspicuous. The duty is one that belongs to *Y*—not *X*—and so it is *Y*'s posting an adequate notice and care of the premises that is relevant.

Thus, a notice warning of dangerous conditions must be conspicuous in order to be effective; however, it does not require consent. *X*'s willingness to accept the warning is irrelevant because *X* *must* accept the terms that *Y* establishes, as it is *Y*'s property and *Y* is granting permission to *X* to enter upon it *gratis* (i.e., *X*'s entry is not part of a bargained-for exchange). Because *Y*'s authority to post the notice derives from property law, and tort law determines the notice's effect, the notice may be unilaterally imposed by *Y* and does not require consent.

A notice is first and foremost information. Notices are typically used to provide warnings and to alert the recipient to potential danger. They play an important risk-allocation role in society. They may be used to limit the liability of the drafter, or to take away an argument or defense that the notice-recipient might otherwise have. But the notice does not have the power to serve a particular function simply because the drafter intends it to serve that function. The drafter may not use the notice to exercise authority that it does not have.

The authority of the drafter depends upon its underlying property rights. A proprietor may grant permissions to use the property, but it cannot deny or take away rights of others except under two circumstances: the other party consents, or the law expressly permits it. A notice imposes its terms without regard to the recipient's consent, but those terms are not necessarily effective or enforceable. Notices—unlike contracts—are regulated and limited in scope. Their enforceability depends upon their drafter's underlying property rights and entitlements. By contrast, the authority of a contract requires the consent of the parties to it because a contract does more than simply establish boundaries regarding existing rights; it *reallocates* them. In the absence of consent, the reallocation would amount to coercion or theft.

Constructive notice is two steps removed from a contract. It is not part of a bargained-for exchange, but it is also not an actual notice. A constructive or quasi-contract (i.e., one that is implied-in-law) is not, and should, not be enforceable according to its terms because the terms have not been agreed to by the adherent. Rather, the contract is enforceable to the extent equity requires. Given that a constructive contract is not enforceable as a bargain, it makes no sense for a constructive notice to be enforced as one. To the contrary, it also

should be recognized only to the extent it is fair and reasonable, as justice requires.

The form in which adhesive terms are presented has a different purpose and effect depending upon whether a notice or a contract is implicated. The form is a starting point for contracts; it determines whether the adhesive terms should be understood as contractual. Whether the contract *looks* like a contract is also relevant in assessing procedural unconscionability. Contractual form alone, however, is insufficient to make a contract. A contract requires assent, which is determined by assessing whether the offeree's conduct can be reasonably understood to mean assent.⁷⁹ Thus, if the adhesive terms look like a contract to a reasonable offeree, the offeree's conduct determines whether there is acceptance. On the other hand, if the presentation of adhesive terms is *not* contractual in form because they dictate terms and do not seek the other party's signature⁸⁰ (i.e., they look like a notice), the drafter must communicate that the adhesive terms are nonetheless binding; the *drafter's* conduct (i.e., effort to present the notice in a conspicuous manner so that it reasonably communicates its binding nature) should be the focal point of inquiry regarding enforceability. In other words, if the adhesive terms are presented in a manner that is not obviously contractual in form, they should not be contracts, but they may be effective as a notice, license, or under a quasi-contract theory.

B. *A Taxonomy of Adhesive Terms*

This Section proposes a taxonomy (Figure 1) that recognizes the varieties of adhesive terms. A taxonomy of adhesive terms provides guidance regarding how to assess the enforceability of terms in a given context. As this Article has explained, the conflation of adhesive terms with adhesive contracts undermines the predictability of doctrinal rules and perpetuates power imbalances. A taxonomy of adhesive terms may be helpful in correcting doctrinal transgressions that enforce oppressive terms and sanction abusive contracting practices.

⁷⁹ See discussion *infra* Part III.B.3.

⁸⁰ See Roseanna Sommers, *Contract Schemas*, 17 ANN. REV. L. SOC. SCI. 293, 295–96 (2021), <https://doi.org/10.1146/annurev-lawsocsci-040721-103558> (reviewing studies on contracts and finding that “[s]everal studies have confirmed that signatures loom large in the lay conception of contracts” leading to the conclusion that people are inclined to perceive a contract as containing a signature block and requiring a signature at the bottom of the document); *id.* at 295.

Figure 1: Taxonomy of Adhesive Terms

<u>TYPE OF ADHESIVE TERMS</u>	<u>LEGAL EFFECT</u>	<u>PURPOSE</u>	<u>ENFORCEABILITY DEPENDS UPON</u>	<u>AUTHORITY OF DRAFTER/SOURCE OF POWER TO IMPOSE ADHESIVE TERM</u>	<u>REQUIRED FORM or CHARACTERISTICS</u>
NOTICE	Provide information; Limit liability of drafter	Due process; fairness	Accuracy of information	Legislation; property ownership	Statute or regulation; must meet certain specified criteria (conspicuous; immediately viewable); “reasonable” notice subject to common law determinations
LICENSE	Grant permission/confer rights and privileges upon adhering party	Establish boundaries of use	Property and Intellectual property laws	Property ownership	Authorized by owner; based upon owner's words and deeds
QUASI-CONTRACT/IMPLIED IN LAW CONTRACT	Require one party to pay for benefits received at the other party's expense	Prevent injustice	Equity/Restitution	Equitable powers of court	Receiving benefits from the other party knowing the other party expects to be paid; fairness in light of circumstances
UNILATERAL CONTRACT (EXPRESS OR IMPLIED)	Establish terms of performance for each party; establish commitment of one party (offeror)	Promote autonomy	Performance by offeree	Consent; certain contracts subject to legislation/public	Unilaterally authorized; based upon words and/or deeds of one party (offeror); reverse unilateral contracts often regulated/prohibited (i.e., employment contracts; credit cards)
BILATERAL CONTRACT (EXPRESS OR IMPLIED)	Reallocate rights and duties/mutual exchange; establish commitment	Promote autonomy	Contract law and applicable contract defenses	Consent; certain contracts subject to legislation	Mutually authorized; based upon words and/or deeds of both parties; certain contracts regulated/prohibited
WAIVER	Relinquish rights of adherent	Protects drafter from liability	Tort and Property law	Consent; certain waivers subject to regulation	Authorized by adherent party who has the right to grant the waiver; certain waivers regulated/prohibited; waived right must be specifically enumerated

A taxonomy does not invalidate or ban the use of adhesive terms. On the contrary, a taxonomy may save them by leading to a better understanding of the socially useful role that adhesive terms can play in a fair and well-functioning marketplace. Some adhesive terms may be non-contractual, in which case their enforceability hinges upon their scope and the property rights of the drafter. Other adhesive terms may be contractual, but their enforceability depends upon consent.

The proposed taxonomy provides guidance regarding the legal effect of adhesive terms. Courts too often fail to distinguish adhesive terms and often conflate contracts and notices, express contracts with implied contracts, and unilateral (or reverse unilateral) implied contracts with bilateral express contracts. The result has been a lack of consistency and predictability in case law, especially the developing common law governing digital adhesive terms such as terms of service.

Courts should not use standards derived from tort and property law to enforce notices as contracts. For example, some courts will

erroneously discuss the adherent's duty to read as though it were actually a duty, rather than a presumption. They also refer to tort standards, claiming that reasonable notice would prompt a prudent or reasonable offeree to inquire about the terms. The misapplication of tort standards is especially glaring with digital adhesive terms where courts have applied the standard of a "reasonably prudent computer or smartphone user"⁸¹ in assessing contract formation. But there is no legal compulsion to read terms, and a failure to do so is not a breach of any duty which subjects one to liability. It should be the signature on the page (the "manifestation of consent") which opens a party up to contract liability. In the absence of a promise, adhesive terms are not contractual; nevertheless, they may be enforceable depending upon what they state and the context in which they are presented. They might, for example, convey a license which doesn't require the adherent's consent. They may limit the drafter's liability if they meet certain disclosure or conspicuousness requirements. They may reflect societal norms and expectations and may be enforceable under a quasi-contractual theory. The rest of this Section explains each type of adhesive term in greater detail.

1. Notices

A notice serves several functions. It may communicate interesting information, such as indicating that property has been placed on the national register of historic places or that a historic figure once lived in it. It may establish norms: *Please wear a mask when entering store. Please lower your voice in library.* It may also warn: *Caution: Beware of Dog.*

A notice may shift legal burdens and presumptions. A notice stating that a house has significant historical value has the function of providing interesting information, but it serves no legal purpose. It simply educates the notice-recipient. A notice that warns, however, has legal effects under both tort and criminal law and may shift presumptions and burdens, making it easier or harder to establish liability. For example, a landowner may be liable for failing to warn visitors of dangerous conditions on the property.

A notice that warns also serves a due process function so that the notice-recipient is not later able to claim ignorance of the violation. For example, a sign that states, "Private Property—Keep Off. Trespassers Will be Prosecuted," will undermine the notice-recipient's argument that the notice-recipient believed the property was a public

⁸¹ HomeAdvisor, Inc. v. Waddell, No. 05-19-00669-CV, 2020 WL 2988565, at *4 (Tex. App. June 4, 2020).

park. For example, under New York law, a person is guilty of criminal trespass when that person “knowingly enters” a building that is used as a public housing project “in violation of conspicuously posted rules or regulations governing entry.”⁸² The notice (in this case, the “conspicuously posted rules or regulations”) responds to the requirements of the statute and creates the frame through which the notice-recipient’s subsequent behavior can be characterized. A lack of notice (meaning no “conspicuously posted rules or regulations”) means that the person could not have “knowingly” entered the building.⁸³

Notices play an important risk allocative role in tort law which may have significant legal effects. A notice may limit the liability of the drafter in a products liability case by showing that the drafter was not negligent and included adequate warning or instruction, or that the notice-recipient assumed the risk of injury.⁸⁴ Section 402A of the Second Restatement of Torts states that directions or warnings may “prevent” a product from being found “unreasonably dangerous.”⁸⁵ Furthermore, it states: “Where a warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.”⁸⁶

⁸² N.Y. PENAL CODE § 140.10 (McKinney 2012). *Contra* RESTATEMENT (SECOND) OF TORTS, §§158, 164 (AM. L. INST. 1965) (stating a trespasser under tort law must only intend to enter onto land).

⁸³ *People v. Mackay*, 16 Misc. 3d 398, 400 (N.Y. Crim. Ct. 2007) (“Without any evidence of conspicuously posted no trespassing signs the essential element of knowledge that one’s presence is unlawful cannot be imputed to a defendant so as to find him guilty of trespass.”).

⁸⁴ *See Ellsworth v. Sherne Lingerie*, 303 Md. 581, n. 12 (1985) (“If a product otherwise unreasonably dangerous can be made safe for reasonably foreseeable uses by adequate warnings or instructions, liability will be avoided, and the focus in such cases is generally upon the adequacy of notice. If the warnings or instructions are adequate the product is not defective, and the plaintiff cannot recover under a theory of strict liability in tort. The cause of the injury in such cases is the failure to read or follow the adequate warnings or instructions, and not a defective product. One who reads the warning and then proceeds voluntarily and unreasonably to encounter the danger thereby made known to him will assume the risk of that danger.”).

⁸⁵ RESTATEMENT (SECOND) TORTS § 402A cmt. j (AM. L. INST. 1965).

⁸⁶ *Id.* *See also Simpson v. Standard Container Co.*, 72 Md. App. 199, 207 (1987) (finding that gasoline can that had warnings on two of the four sides was adequate and that product was not in defective condition and was not unreasonably dangerous).

In some jurisdictions, a defense to liability includes showing the injured party assumed the risk of injury.⁸⁷ A notice may also help prove the plaintiff was contributorily or comparatively negligent⁸⁸ or that the defendant exercised or did not exercise reasonable care.⁸⁹ It is the role of the courts—and not the drafter—to determine the legal purpose and effectiveness of the notice. While the drafter controls the notice, it does not control its power or determine its effectiveness.

The form of a notice is often regulated by statute or regulation.⁹⁰ The form requirements may include physical characteristics and wording. For example, in Florida, the definition of trespass requires that the property be “legally posted,” which is defined both in terms of physical requirements (such as placement of signage and height of letters) as well as the actual language or wording that must be employed:

(5) (a) “Posted land” is that land upon which:

1. Signs are placed not more than 500 feet apart along, and at each corner of, the boundaries of the land, upon which signs there appears prominently, in letters of not less than [two] inches in height, the words “no trespassing” and in addition thereto the name of the owner, lessee, or occupant of said land. Said signs shall be placed along the boundary line of posted land in a manner and in such position as to be clearly noticeable from outside the boundary line; or
- 2.a. Conspicuous no trespassing notice is painted on trees or posts on the property, provided that the notice is:

⁸⁷ See RESTATEMENT (SECOND) TORTS § 402A; see also RESTATEMENT (SECOND) TORTS §25 (“If the plaintiff has been contributorily negligent in failing to take reasonable precautions, the plaintiff’s recovery in a strict-liability claim . . . is reduced in accordance with the share of comparative responsibility assigned to the plaintiff.”).

⁸⁸ E.g., 65 N.Y. Jur.2d *Highways, Streets and Bridges* §548 (stating a traveler who has knowledge or notice of dangerous condition but voluntarily and unnecessarily proceeds “may be guilty of contributory negligence or may be held to have assumed the risk”); 11 C.J.S. *Bridges* §143 (“Absence of warning of the defective character of a bridge may be considered in determining whether or not a traveler exercised due care.”).

⁸⁹ RESTATEMENT (THIRD) TORTS § 18 (a) (“A defendant whose conduct creates a risk of physical or emotional harm can fail to exercise reasonable care by failing to warn of the danger if (1) the defendant knows or has reason to know: (a) of that risk; and (b) that those encountering the risk will be unaware of it; and (2) a warning might be effective in reducing the risk of harm.”).

⁹⁰ See CAL. PENAL CODE §602.8(a) (West 2004) (stating that entering upon land without the written permission of the landowner where “signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and all roads and trails entering the lands” is a “public offense”).

(I) Painted in an international orange color and displaying the stenciled words “No Trespassing” in letters no less than [two] inches high and [one] inch wide either vertically or horizontally;

(II) Placed so that the bottom of the painted notice is not less than [three] feet from the ground or more than [five] feet from the ground; and

(III) Placed at locations that are readily visible to any person approaching the property and no more than 500 feet apart on agricultural land.

2.b. Beginning October 1, 2007, when a landowner uses the painted no trespassing posting to identify a “no trespassing” area, those painted notices shall be accompanied by signs complying with subparagraph 1. and placed conspicuously at all places where entry to the property is normally expected or known to occur.⁹¹

The punishment for the type of trespass may depend, at least in part, upon the type of notice that was given. For example, in Florida, trespass is generally a misdemeanor;⁹² however, it is a felony if a notice was at a construction site which was “legally posted” and stated in “substantially the following manner”: THIS AREA IS A DESIGNATED CONSTRUCTION SITE, AND ANYONE WHO TRESPASSES ON THIS PROPERTY COMMITS A FELONY.⁹³ If the construction site notice does not identify the property as a construction site, a trespass would not be categorized as a felony.

The form of a notice is generally subject to strict rules and explicit requirements along with the more general standard that the notice be “conspicuous.” Under the Florida statute, for example, a sign must adhere to the express requirements (placed 500 feet or less on the boundaries of the land, in letters at least two inches in height, painted in “international orange”) or may be subject to a defense by the notice-recipient that the notice was ineffective—and so fails in its purpose to characterize the notice-recipient’s conduct as trespassing. As one

⁹¹ FLA. STAT. § 810.011(5)(a) (effective May 18, 2020).

⁹² *Id.* § 810.09(2)(a) (effective Oct.1, 2018). There are exceptions for aggravating circumstances, such as if the offender committed destructive or harmful acts. *Id.*

⁹³ *Id.* § 810.09(2)(d)1 (effective Oct.1, 2018). If the property is less than an acre, it must have letters “not less than [two] inches in height” with the same language and placed at a specific location. *Id.* §810.09(2)(d)2.

court noted, constructive notice under the statute requires “[s]trict compliance with the statutory requirements.”⁹⁴

In *D.T. v. State*, a Florida appellate court found that the appellant was not guilty of trespass because there was a lack of notice.⁹⁵ Under the relevant statute, notice could be given either by “actual communication” to the offender or by “posting” the property.⁹⁶ The court noted that the requirements for posting were “very specific, requiring signs placed at specific locations, at specific heights, and in type of a certain size.”⁹⁷ The court determined that because the property was not posted as required by statute, the officer had no probable cause to arrest the appellant for trespassing.⁹⁸

Conspicuousness allows for context so that a statute may require both strict compliance with certain provisions and conspicuousness. The Florida statute, for example, states that posted land must have a “conspicuous no trespassing notice” but does not state that meeting the requirements (specified wording, height, etc.) alone will always be deemed conspicuous. Furthermore, the signs must be placed “conspicuously” at places of property entry.

The Uniform Commercial Code (U.C.C.) provides another example of a requirement of conspicuousness along with explicit form requirements. U.C.C. §2-316 allows sellers to exclude or modify a warranty of merchantability as long as the exclusion or modification expressly mentions “merchantability” and, if in writing, the writing must be “conspicuous.”⁹⁹

The power of a notice depends upon its adherence to the requirements of form. For example, a notice that states “This is Private Property. Stay Off. Trespassers Will Be Prosecuted,” informs those who might not realize the property is private. The warning is not merely educative but characterizes the viewer’s subsequent conduct. For example, Florida defines trespass on property as:

⁹⁴ *C.B.S. v. State*, 184 So. 3d 611, 614 (Fla. Dist. Ct. App. 2016). The court further noted that the “case law is rife with examples of courts requiring strict compliance with section 810.011(5)(a)1.” *Id.* (citations omitted).

⁹⁵ *D.T. v. State*, 87 So. 3d 1235, 1242–43 (Fla. Dist. Ct. App. 2012) (reversing conviction for resisting arrest because officer had no reasonable suspicion of trespass as lot was not “posted” within the meaning of the trespass statutes).

⁹⁶ *Id.* at 1239 (citing FLA. STAT. § 810.09(1)(a)1 (effective Oct.1, 2018)).

⁹⁷ *Id.* at 1239 (citing FLA. STAT. § 810.011(5) (effective May 18, 2020)).

⁹⁸ *Id.* at 1240.

⁹⁹ U.C.C. § 2-316(2) (AM. L. INST. & UNIF. L. COMM’N 1977).

(1)(a) A person who, without being authorized, licensed, or invited, willfully enters upon or remains in any property other than a structure of conveyance:

1. As to which notice against entering or remaining is given, either by actual communication to the offender or by posting, fencing, or cultivation as described in s. 810.011.¹⁰⁰

Similarly, under California law, trespass requires “willfully” entering onto land “where signs forbidding trespass are displayed at intervals not less than three to the mile along all exterior boundaries and at all roads and trails entering the lands.”¹⁰¹

Thus, a notice identifying itself as “Private Property. Stay Off,” is intended to shape the law’s understanding of the viewer’s conduct subsequent to viewing the notice. Some state statutes define a criminal trespass be committed “knowingly.” A “conspicuous” notice typically suffices to establish knowledge.¹⁰²

The power of a notice also depends upon the accuracy of the conveyed information. A notice which states misinformation has no power. In the preceding example, a notice which states, “This is Private Property. Stay Off” has the power to characterize the notice-recipient’s behavior under the law only if the property is *in fact* private property. The effectiveness of the notice derives from the authority of the property owner.

The determination of whether a notice has adhered to the requirements of form is objectively and not subjectively determined. A notice which is poorly worded may be deemed legally ineffective. A vague warning label, for example, will not be effective as a defense in a product liability claim.¹⁰³ The Restatement (Third) of Torts states:

¹⁰⁰ FLA. STAT. § 810.09 (1)(a)(1) (effective Oct.1, 2018).

¹⁰¹ CAL. PENAL CODE §602.8(a) (West 2004).

¹⁰² See *United States v. Gomez*, No. 09 CR. 408, 2010 WL 431878, *1 (S.D.N.Y. Feb. 8, 2010) (stating that “New York Penal Law” requires that trespass be committed “knowingly” and that “[k]nowledge of the trespass is assumed if ‘notice [of the trespass] is given by posting in a conspicuous manner’”).

¹⁰³ *Lightolier, A Div. of Genlyte Thomas Grp., LLC v. Hoon*, 387 Md. App. Ct. 539, 558 (2005) (“[W]arnings on products that are vague or otherwise difficult to understand shall not generally have the effect of barring a product liability claim when those warnings go unheeded. For example, if the non-IC rated fixtures at issue here merely had a warning label affixed to them stating ‘Warning-Risk of Fire’ and nothing more, it might constitute such a generalized warning that in essence it might not warn at all.”).

Even if a warning is provided, a defendant still can be negligent if the warning is not adequate; if its content does not include the relevant information or if its form is not reasonably effective in expressing this information [M]any . . . warnings must be posted in public places and quickly responded to by potential victims. These warnings hence are properly simple and straightforward in the information they contain.¹⁰⁴

The power of the notice may not exceed the power of the property owner. The property owner may not, for example, conjure up a punishment for trespassing. The punishment for trespassing is established by the government, not the individual property owner. The notice must contain accurate descriptive information. It must also accurately explain the consequences of certain conduct. A property owner is not the master of the universe, so the property owner's power is limited to the exercise of property rights. A notice cannot state, "Private Property. Violators Will Be Subject to a \$10,000 Fine" if the law permits only a 100-dollar fine. The power to establish penalties belongs to the government and not private individuals—even if the violation occurs on an individual's private property.

2. Licenses

Although some notices are licenses, a notice and a license have distinct meanings. A license may be communicated in a form that is not a notice, such as an agreement or an oral statement.¹⁰⁵ A license may be limited, or it may be broad.¹⁰⁶ It may additionally be subject to conditions.¹⁰⁷ These conditions may be drafted in such a way that a failure by the licensee to abide by them means that the licensee's permission is revoked.¹⁰⁸ Thus, a license protects the *licensee* by providing a defense against a trespass or infringement claim. A license

¹⁰⁴ RESTATEMENT (THIRD) OF TORTS § 18 cmt. e (AM. L. INST. 2005).

¹⁰⁵ See ROBERT W. GOMULKIEWICZ, XUAN-THAO NGUYEN & DANIELLE CONWAY-JONES, *LICENSING INTELLECTUAL PROPERTY: LAW AND APPLICATION* 3 (2008) (Licenses come with many labels. Depending upon the setting, they may be called covenants not to sue, permissions, releases, waivers, clearances, assignments or sales. Not only do licenses come with many labels, they come in a variety of styles . . . The software industry tends to use written licenses . . . The movie industry often operates informally with oral permissions.").

¹⁰⁶ *Id.* ("A 'license' is a grant of permission. In everyday life, people encounter many types of licenses.").

¹⁰⁷ Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 LOY. L.A. L. REV. 101, 136–38 (2020) (discussing the interpretation and effect of conditions on licenses).

¹⁰⁸ *Id.*

may also give rise to an estoppel defense if it was reasonable for the licensee to rely upon the license.

A license may be granted relating to property that is tangible or intangible. In consumer transactions, the use of a license is common with intangible property. In a marketplace dominated by digital and digitally enhanced goods and services, licenses have become an integral part of transactions. Many products today, and likely even more in the future, bundle intangible licensed property, such as software or digital content, with a tangible product that is sold.¹⁰⁹ Just as a notice is distinct from a contract, however, a license is distinct from a license *agreement*.

A licensee who has been granted a license that was not part of a bargain (i.e., not part of a license agreement) has no rights against the licensor and cannot impose any obligations upon the licensor independent of the obligations the licensor already has under existing law.¹¹⁰ Accordingly, a license may be revoked at any time for any reason *unless* it is part of a contract, or it has been reasonably relied upon.¹¹¹ A licensor may condition the use of its property so that if the licensee fails to adhere to those conditions, the scope of the license is exceeded, and the licensor may invoke its rights of ownership (i.e., in a suit for infringement or trespass).¹¹² The licensor may, in most cases, also revoke the license at will, subject to equitable principles relating to due process and notice.¹¹³ The notable exception is where the license is part of a bargain.¹¹⁴ A license *agreement* differs from a license because it is part of an exchange of promises.¹¹⁵

A license grants permission to the licensee that may be as broad or as narrow as the licensor chooses. The licensor may impose conditions upon that permission and may revoke permission. A license, however, cannot limit or reallocate the licensee's rights unless

¹⁰⁹ See JOSHUA A.T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 1–3, 10 (2017); AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY 1–4 (Laura DeNardis & Michael Zimmer eds., 2016).

¹¹⁰ This is an observation I have made in a previous article. Kim, *supra* note 107, at 142–56.

¹¹¹ *Id.* at 138–144.

¹¹² *Id.*

¹¹³ *Id.* at 141–156.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

the licensee agrees.¹¹⁶ For example, a license can allow the licensee to make and distribute two copies of a copyrighted work. It cannot, however, take away the licensee's first-sale right if the licensee purchased that work *unless* the licensee has agreed to it as part of a bargained-for exchange.

Adhesive licensing terms can be particularly problematic if they purport to create a license agreement and are unsigned. The grant of the license may be conditioned upon acceptance to the agreement. Notwithstanding the language, the licensor does not, and *cannot*, unilaterally declare that a license agreement exists; rather, the existence of a license agreement depends upon two factors. The first is whether the *licensee* assented to the agreement.¹¹⁷ If the terms are unsigned, the licensor must present the license agreement in such a way that the licensee's conduct may be clearly and unambiguously interpreted as assent to the terms of the agreement.¹¹⁸ As with notices, the rolling contract or pay-first-terms-later model undermines certainty. Second, even if a contract is formed and accepted by the licensee, the scope and validity of the license depend upon the precise granting language and whether it expressly conditions the license grant upon agreement to other terms. If it does not, the license may be valid even if the licensee breaches other terms of the agreement.¹¹⁹ In other words, a breach of contract is not the same as an infringement of the license granted pursuant to the contract.¹²⁰

Unsigned adhesive licensing terms that identify as "agreements" involve two doctrinal issues; whether a contract has been formed, and the interpretation of a clause as a covenant or a condition. Thus, the validity of a license agreement depends upon doctrinal rules of formation (offer, acceptance, consideration, mutual assent, and no invalidating defenses) *and* those of contract interpretation and construction (including interpretive preferences against

¹¹⁶ *Id.* at 139–40 (noting that a party's "ownership rights determine the types of restrictions" that may be unilaterally placed on a transaction without the other party's consent).

¹¹⁷ *See id.* at 154–57 (discussing how to read and interpret adhesive licensing terms).

¹¹⁸ *Specht v. Netscape Comm'ns Corp.*, 306 F.3d 17, 35 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility.").

¹¹⁹ *See, e.g., United States Naval Inst. v. Charter Commc'ns*, 936 F.2d 692, 696 (2d Cir. 1991) (determining that licensee's premature publication of book did not infringe copyright but breached contract).

¹²⁰ *Id.*

forfeitures).¹²¹ A license agreement that fails as a contract because it is not properly formed may still be effective as a license, just as the licensee's failure to abide by a contractual provision may be a breach but not an infringement.

A license protects both the licensee and the licensor. A license grant protects the licensee from an infringement claim by the licensor where the licensee uses the underlying intellectual property without a preexisting right to do so. The license protects the licensor where the licensee exceeds the scope of the license by delineating the permissible boundaries of use. Because a license derives from the authority of the licensor, it may be effective regardless of its validity as a contract.

3. Express and Implied Contracts

A contract requires consent, which is typically expressed verbally or in a writing which leaves little doubt. But how can a court assess whether a party has consented where the party has not done so explicitly?

Consent may be manifested through conduct,¹²² which is interpreted through an objective lens by determining whether a reasonable person would have thought the offeree's conduct meant assent. Conduct constitutes acceptance only if the party engaging in conduct intends to accept the benefits on the terms offered.¹²³ The objective standard means that the assent is constructive because the offeree may not have *actually* intended to assent even though a reasonable person would have thought otherwise. When a party signs a document, even if it is an adhesive form, the duty to read applies and

¹²¹ RESTATEMENT (SECOND) OF CONTS. § 227(1) (AM. L. INST. 1981) (noting that with respect to conditions, "an interpretation is preferred that will reduce the obligee's risk of forfeiture, unless the event is within the obligee's control or the circumstances indicate that he has assumed the risk.").

¹²² See *id.* § 69(1)(a) (silence may constitute acceptance of an offer "[w]here an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation"); see also *id.* § 55 cmt. b ("Performance may be thus complete when the offer takes the form of a tender of money or other property; indeed, the acceptance of the offer may then be implied from the fact that the offeree takes the offered benefits, without more.") (citing RESTATEMENT (SECOND) OF CONTS. § 69).

¹²³ RESTATEMENT (SECOND) OF CONTS. § 19(2) (AM. L. INST. 1981) ("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 may infer from his conduct that he assents."); *Karlin v. Avis*, 457 F.2d 57, 62 (2d Cir. 1972) ("An offeror has no power to transform an offeree's silence into acceptance when the offeree does not intend to accept the offer.").

so the party is presumed to have read the terms and consented to them. Where, however, adhesive terms are not signed, courts must determine whether the adherent's conduct constituted assent to the terms. The court's assessment of conduct should include whether the adherent intended to accept the terms.¹²⁴ This does not mean that the adherent read the terms or even that the adherent intended to enter into a *contract*. It does mean, however, that the adherent intended to engage in the conduct and that a reasonable person, based on the adherent's conduct, believed the adherent meant to accept.¹²⁵

There are two types of implied contracts: implied-in-fact and implied-in-law. An implied-in-fact contract is an actual contract which is created where the parties intended to enter into a contract but did not expressly agree to the terms.¹²⁶ Because a finding of an implied-in-fact contract results in the imposition of affirmative contractual obligations, the parties must have intended to accept those obligations.¹²⁷ In accordance with an objective standard, it is sufficient if a reasonable person believed their conduct manifested consent.

By contrast, an implied-in-law contract is not an actual contract because the parties did not intend to enter into binding obligations, nor did they act in a way that a reasonable person would believe manifests assent; rather, the court imposes these obligations in the interest of equity.¹²⁸ For this reason, an implied-in-law contract may also be referred to as a *quasi-contract* because although it resembles a contract due to the imposition of legal obligations, it lacks the essential ingredient of intent. The rationale for the imposition of legal

¹²⁴ RESTATEMENT (SECOND) OF CONTS. § 19(2) (AM. L. INST. 1981).

¹²⁵ *Id.*

¹²⁶ See *Com. P'ship 8098 Ltd. v. Equity Contracting Co.*, 695 So. 2d 383, 385 (Fla. Dist. Ct. App. 1997) (describing implied in fact contract as an "enforceable contract" that is "based on a tacit promise, one that is inferred in whole or in part from the parties' conduct, not solely from the words").

¹²⁷ See, e.g., *Young v. Young*, 191 P.3d 1258, 1262–63 (Wash. 2008) (noting that an implied in fact contract arises from circumstances which "show a mutual intention on the part of the parties to contract with each other.") (citations omitted); *Doe v. Wash. & Lee Univ.*, 439 F. Supp. 3d 784, 791 (W.D. Va. 2020) ("A contract implied in fact is a true contract, differing from an express contract only in the lack of express terms and conditions. Without the intent to contract, a court cannot find a contract implied in fact.").

¹²⁸ See *Com. P'ship*, 695 So. 2d at 386 ("A contract implied in law is a legal fiction, an obligation created by the law without regard to the parties' expression of assent by their words or conduct. . . . The fiction was adopted to provide a remedy where one party was unjustly enriched, where that party received a benefit under circumstances that made it unjust to retain it without giving compensation.").

obligations is not objectively determined intent, but fairness and the avoidance of injustice.¹²⁹

Although readily distinguishable in theory, in practice, determining whether a case calls for a finding of an implied-in-fact or an implied-in-law contract is much more difficult, and courts have often confused the two.¹³⁰ Confusion is understandable given that the objective standard seems to correspond to the same circumstances that warrant equitable action. If *X* acts in a way that would lead a reasonable person to believe *X* had assented to the terms of a contract, then it also seems fair to hold *X* to the contract. But more importantly and problematically, it is not always clear *whether* a reasonable person would believe *X* had assented to the terms of the contract. If *X* is building a wall between *X*'s house and *Y*'s house, would a reasonable person think that *Y* had agreed to pay *X* for doing so? It likely depends upon the past interactions between *X* and *Y* and the norms that govern where their interaction occurs. It may be that *Y* wants the wall and believes that it will enhance the value of *Y*'s house. *Y* may compliment *X* on the work and express words of gratitude (e.g., "I'm so glad that you are building this wall for us!") or behavior (passing with a friendly smile and nod) that indicate an intent to pay for it even though terms have not been expressly discussed.

By contrast, if *Y* does not wish to pay for the wall, *Y* may not say anything about it. Instead, *Y* may pass the wall every day without comment while *X* is working on it. In the former case, there is an implied-in-fact contract because *Y*'s conduct would lead a reasonable person to believe that *Y* has assented to the contract even though terms were not expressly discussed. In the latter case, *Y* has not assented to the contract because *Y*'s conduct would not lead a reasonable person to believe that *Y* has consented. Yet, a court might require *Y* to pay for half of the wall in both scenarios. In the first scenario, because *Y* has impliedly agreed and in the second scenario, because it is fair to do so given that *Y* has received the benefit of the wall and under the circumstances, should have said something if *Y* did not intend to pay for it.

¹²⁹ *Id.* See also *Archon Constr. Co. v. U.S. Shelter, L.L.C.*, 78 N.E.3d 1067, 1074 (Ill. App. Ct. 2017) ("A quasi-contract, or contract implied in law, is one in which no actual agreement between the parties occurred, but a duty is imposed to prevent injustice.") (citations omitted).

¹³⁰ *Com. P'ship*, 695 So. 2d at 387 ("The blurring of the distinction between contract implied in fact and quasi contract has been exacerbated by the potential for both theories to apply to the same factual setting.").

4. Unilateral Contracts and Reverse Unilateral Contracts

A basic premise of contract law is that contracts must be supported by consideration, meaning that each party must make a promise in exchange for the promise or performance of the other party.¹³¹ Courts have long held that either both parties are bound to their promises or neither is bound.¹³² A promise that does not bind the promisor is illusory and lacks mutuality.¹³³ Contracts lacking mutuality are void for want of consideration.¹³⁴

Clauses which grant one party the discretion to unilaterally modify the contract raise the problem of mutuality because the party is not actually bound to its promise if it has the power to change the terms at any time. The court's interpretative approach is an important factor affecting whether a court is likely to enforce such a clause. A primarily textual approach focuses on the language of the clause. Courts that adopt this approach focus on whether the unilateral modification clause contains constraints on discretionary authority.¹³⁵ These courts tend to uphold unilateral modification clauses if they contain a notice period and only apply prospectively.¹³⁶ In the absence of a notice period, courts will find such clauses unenforceable.¹³⁷ On the other hand, a primarily contextual approach determines whether the party intended to enter into the contract and, if so, reads into the

¹³¹ RESTATEMENT (SECOND) OF CONTRS. § 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.”).

¹³² *Summers v. Serv. Vending Co.*, 102 S.W.3d 37, 41 (Mo. Ct. App. 2003) (“[N]either party is bound unless both are bound.”) (citations omitted); *DiCosola v. Ryan*, 44 N.E.3d 556, 562 (Ill. App. Ct. 2015) (“[P]romises must be binding on both parties or the contract fails for want of consideration That is to say, either both parties to the agreement are bound or neither is bound.”).

¹³³ *DiCosola*, 44 N.E.3d at 562 (“An illusory promise appears to be a promise, but in actuality the promisor has not agreed to do anything.”).

¹³⁴ *See Rosenberg v. Lawrence*, 541 So. 2d 1204, 1206 (Fla. Dist. Ct. App. 1988) (holding that “[t]he illusory nature of [the] promise made that promise void”).

¹³⁵ *See Quality Prods. & Concepts Co. v. Nagel Precision, Inc.*, 666 N.W.2d 251, 257–58 (Mich. 2003) (holding that “the freedom to contract does not authorize a party to *unilaterally* alter an existing bilateral agreement. Rather a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the original contract.”) (citations omitted).

¹³⁶ *Citizens Telecomms. Co. of W. Va. v. Sheridan*, 799 S.E.2d 144, 152 (W. Va. 2017) (holding that the company “provided reasonable notice to its customers of its changes to the unilateral contract” and that customers assented to the changes by continuing to subscribe to the service).

¹³⁷ *Id.* at 151.

clause an implied duty of good faith which constrains the discretionary authority of the drafter.¹³⁸

Perhaps the most important factor affecting whether a modification at-will clause is enforceable is the nature of the transaction governed by the clause. Modification at-will clauses in relational contracts are much more likely to be upheld than those in contracts governing discrete transactions because prior notice and continuation of services by the adherent is typically required.¹³⁹ Relational contracts are ongoing and govern future events over an extended period of time. Given the inability to predict future business needs, modification at-will clauses in long-term services contracts may be reasonable. If modifications apply only prospectively and subject to a notice period, the adherent may not suffer a forfeiture.¹⁴⁰ Often, however, the adherent has sunk costs and no alternative service. Even if there is an alternative service, the adherent may incur switching costs. Another important factor to consider is whether there are regulations or statutes that permit, either expressly or implicitly, at-will clauses in that type of transaction. For example, legislation expressly permits banks to modify the terms of credit card agreements but regulates the substance of those terms and the form in which they are presented.¹⁴¹

¹³⁸ *Gonzalez v. Interstate Cleaning Corp.*, No. 19-CV-07307, 2020 WL 1891789, at *6 (N.D. Cal. Apr. 16, 2020) (noting that “California courts have made clear that unilateral modification terms are not substantively unconscionable because the implied covenant of good faith and fair dealing” limits this discretion) (citations omitted).

¹³⁹ *See National Fed’n of the Blind v. The Container Store, Inc.*, 904 F.3d 70, 85 (1st Cir. 2018) (determining an arbitration provision to be an illusory promise because it contained a modification at will provision); *Quality Prods. and Concepts v. Nagel Precision, Inc.*, 469 Mich. 362, 365 (2003) (“the principle of freedom of contract does not permit a party *unilaterally* to alter the original contract.”). *Cf. Asmus v. Pacific Bell* 96 Cal. Rptr. 2d 179, 184 (June 1, 2000) (“The mutuality of obligation principle requiring new consideration for contract termination applies to bilateral contracts only.”).

¹⁴⁰ *See Vernon v. Qwest Commc’ns Int’l Inc.*, 857 F. Supp. 2d 1135, 1153–1156 (D. Colo. 2012) (upholding modification at will provisions); *In re Zappos.com, Inc.*, 893 F. Supp. 2d 1058, 1065 (D. Nev. 2012) (“Most federal courts that have considered this issue have held that if a party retains the unilateral, unrestricted right to terminate the arbitration agreement, it is illusory and unenforceable, especially where there is no obligation to receive consent from, or even notify the other parties to the contract.”).

¹⁴¹ *See, e.g.*, 12 C.F.R. §§ 1026.52–1026.61 (2022); Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111-24, §§101–02, 123 Stat. 1734, 1735–41.

Many contracts containing modification at-will clauses are more accurately characterized as unilateral contracts or reverse unilateral contracts. Unilateral contracts are promises made in return for performance. Reverse unilateral contracts are those where “the offeror’s performance is completed when the offeree’s promise is made.”¹⁴² Acceptance of the offer is “implied from the fact that the offeree takes the offered benefits, without more.”¹⁴³ Furthermore, as the Restatement makes clear, these types of contracts “often involve incidental promises by the performing offeror, and in that event the word ‘unilateral’ is not entirely appropriate.”¹⁴⁴

In the past, this type of contract was a “rare species of agreement”¹⁴⁵ and was typically used for insurance policies and offers to lend money.¹⁴⁶ But a more common digital age example is the ubiquitous TOS In *Register.com v. Verio*, for example—the leading case enforcing the browsewrap form—the court stated that “[i]t is standard contract doctrine that when a benefit is offered subject to stated conditions, and the offeree makes a decision to take the benefit with knowledge of the terms of the offer, the taking constitutes an acceptance of the terms, which accordingly become binding on the offeree.”¹⁴⁷ Reverse unilateral contracts combine aspects of both implied-in-fact and unilateral contracts, which may be what confounds courts when they evaluate TOS.

Instead of analyzing them as bilateral contracts, courts should analyze TOS as reverse unilateral contracts where the website is providing the service and stating the conditions regarding the provisions of those services. The offeree accepts those terms by using

¹⁴² RESTATEMENT (SECOND) OF CONTS. § 55 (AM. L. INST. 1981); *see also id.* § 55 cmt. a (“It is possible to offer a performance without making any promise. . . . [W]here a non-promissory offer is accepted by promise, there is a contract if the requirements other than manifestation of mutual assent are met. Since the contract formed by a performance in response to an offer of a promise such as an offer of reward is often called a ‘unilateral contract,’ the type of contract referred to in this Section is sometimes referred to as a ‘reverse unilateral contract.’ Contracts so referred to often involve incidental promises by the performing offeror, and in that event the word ‘unilateral’ is not entirely appropriate.”).

¹⁴³ *Id.* § 55 cmt. b.

¹⁴⁴ *Id.* § 55 cmt. a.

¹⁴⁵ E. ALAN FARNSWORTH, CONTRACTS 113 §3.3 n.4. (3d ed. 1999).

¹⁴⁶ *See* RESTATEMENT (SECOND) OF CONTS. §55, illus. 1 & 2.

¹⁴⁷ 356 F.3d 393, 403 (2d Cir. 2004) (using language that mirrors language in RESTATEMENT (SECOND) CONTS. §55 cmt. b).

the services. The contract then terminates after the offeree uses the services.

5. Waivers (Exculpatory Agreements and Limitations of Liability)

An exculpatory agreement is a particular type of contract which has a specific purpose: to relinquish a right possessed by the waiving party.¹⁴⁸ Although often referred to as a “waiver,” it should not be confused with the *act* of waiving one’s contractual rights, which is also referred to as a “waiver.” Unfortunately, the terms are used interchangeably which often causes confusion. One may unilaterally waive one’s rights and one may unilaterally retract a waiver of one’s rights under a contract, provided the other party has not detrimentally relied upon the waiver.¹⁴⁹

An exculpatory agreement involves a waiver of rights that the agreement does not explicitly create.¹⁵⁰ The rights are not the product of private ordering, but they are subject to private ordering.¹⁵¹ In other

¹⁴⁸ *McKinney v. Castleman*, 968 N.E. 2d 185, 188 (Ill. App. Ct. 2012) (“An exculpatory agreement constitutes an express assumption of risk wherein one party consents to relieve another party of a particular obligation.”); *Patterson v. Powder Monarch, LLC*, 926 F.3d 633, 636–37 (10th Cir. 2019) (exculpatory agreement released ski resort from tort liability and all claims by holder); *Stelluti v. Casapenn Enters.*, 1 A.3d 678, 688–9 (N.J. 2010) (exculpatory agreement waives “statutorily imposed duty”).

¹⁴⁹ *See RBC Nice Bearings, Inc. v. SKF USA, Inc.*, 123 A.3d 417, 425–26 (Conn. 2015) (stating that while a contractual modification is the result of bilateral action, “a waiver may be effectuated by one party” and relatedly “whereas the modification of a contract may not be revoked without the consent of both parties, the obligee may, under certain circumstances unilaterally retract its waiver of a contractual requirement”) (citations omitted); *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 247 P.3d 790, 796 (Wash. Ct. App. 2011) (“A waiver can be unilateral and without consideration. . . . When a waiver is given without consideration, the waiving party may reinstate the rights that have been waived upon reasonable notice that gives a reasonable opportunity to comply.”); U.C.C. §2-209(5) (AM. L. INST. & UNIF. L. COMM’N 1977) (“A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.”).

¹⁵⁰ *See supra* note 152. Although each party to a contract may waive its rights under that contract, as previously noted, the act of waiving is not the same thing as a promise to waive one’s rights in the future.

¹⁵¹ *See generally Zahra Takhshid, Assumption of Risk in Consumer Contracts and the Distraction of Unconscionability*, 42 CARDOZO L. REV. 2183 (2021) (explaining how courts focusing increasingly on an unconscionability analysis rather than public policy when

words, they are rights that the waiving party has under law other than contract law.¹⁵² Often, that is tort law.

As with many areas of the law, there are competing articulated objectives of tort law.¹⁵³ It is universally accepted, however, that tort law should compensate victims and deter harmful behavior. Exculpatory agreements typically involve waivers of the adherent's right to sue for negligent injury in exchange for the right to participate in the activity that risks causing the injury. Exculpatory agreements thus deprive the victim of compensation in the case of accidents and consequently, may also undermine the deterrent objective of tort law. Exculpatory agreements are typically one or two paragraphs and signed by the adhering party. For example, a participant in a risky activity, such as skydiving, may be asked to sign an exculpatory agreement waiving the participant's rights to sue the skydiving outfit for injuries as a condition to being permitted to participate in the activity.

While exculpatory *agreements* are typically short, standalone contracts and limited to participation in a single activity, exculpatory *clauses* may be contained in longer contracts governing the exchange of multiple promises. For example, a provision waiving a party's right to sue in a U.S. court may be buried at the end of a fifty-page distribution agreement between two global corporations, which includes many other provisions.

Courts pay special attention to exculpatory clauses and agreements because they extract rights which are not created by the parties even if they may be relinquished through the vehicle of a contract. Accordingly, the role of the contract—and the justification that is usually given for enforcing that contract—is more tenuous. The primary justification for enforcing contracts is that the parties have assessed their respective positions and have determined that they will acquire gains from the transaction. Each agrees to undertake certain duties and give up certain rights as part of that transaction.

By contrast, with an exculpatory agreement, one of the parties is not undertaking an obligation. Instead, that party is agreeing to

assessing exculpatory clauses has allowed defendants to avoid responsibility for negligence through the use of boilerplate releases).

¹⁵² Parties generally do not have the authority to agree to waive rights that fall under the domain of public law, such as crimes committed against them, although they may waive or decline to enforce their rights when the violation occurs.

¹⁵³ See, e.g., DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, HORNBOOK ON TORTS 15–25 (2d ed. 2016); MARK A. GEISTFELD, ESSENTIALS: TORT LAW 67–100 (2008).

relieve the other party of liability for failing to perform a duty that *society* has deemed should be owed. Because the rights being waived pertain to bodily injuries and property damages, the consent conditions must be robust. Generally, the law recognizes that one's interest in preserving bodily integrity is greater than one's interest in property.¹⁵⁴

Courts tend to determine that an exculpatory agreement violates public policy if there is a lack of bargaining power.¹⁵⁵ The California Supreme Court in *Tunkl v. Regents of University of California* explained that “no public policy opposes private, voluntary transactions in which one party, for a consideration, agrees to shoulder a risk which the law would otherwise have placed upon the other party.”¹⁵⁶ It added, however, that in certain situations,

the releasing party does not really acquiesce voluntarily in the contractual shifting of the risk, nor can he be reasonably certain that he receives an adequate consideration for the transfer. Since the service is one which each member of the public, presently or potentially, may find essential to him, he faces, despite his economic inability to do so, the prospect of a compulsory assumption of the risk of another's negligence. The public policy of this state has been, in substance, to posit the risk of negligence upon the actor; in instances in which this policy has been abandoned, it has generally been to allow or require that the risk shift to another party better or equally able to bear it, not to shift the risk to the weak bargainer.¹⁵⁷

In addition to entering into the exculpatory agreement voluntarily, the adherent must understand the meaning of doing so. As one court noted, exculpatory agreements must “expressly or unequivocally demonstrate[] on its face an unambiguous intention to

¹⁵⁴ See, e.g., *Katko v. Briney*, 183 N.W.2d 657, 660 (Iowa 1971) (“[T]he law has always placed a higher value upon human safety than upon mere rights in property[.]”) (citing WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 116–18 (3d ed. 1964)).

¹⁵⁵ See *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 446–47 (Cal. 1963); *Cumberland Valley Contractors, Inc. v. Bell Cnty. Coal Corp.*, 238 S.W.3d 644, 653 (Ky. 2007) (noting that courts have invalidated exculpatory clauses where there was a “major disparity in bargaining power between the parties”); Blake D. Morant, *Contracts Limiting Liability: A Paradox with Tacit Solutions*, 69 TUL. L. REV. 715, 719 (1995) (proposing a framework in contrast to the present one that emphasizes “public policy concerns related to paternalism”).

¹⁵⁶ *Tunkl*, 383 P.2d at 446.

¹⁵⁷ *Id.* at 446–47.

shield” the wrongdoer from their own alleged negligence.¹⁵⁸ Another court noted that exculpatory contracts, while not invalid per se, “are disfavored and are strictly construed against the party relying upon them” so that “[t]he wording of the release must be ‘so clear and understandable that an ordinarily prudent and knowledgeable party to it will know what he or she is contracting away; it must be unmistakable.’”¹⁵⁹

6. The Importance of Disentangling Terms

Adhesive consumer form contracts fall into an array of different categories. Sometimes adhesive terms are unilateral contract terms and not terms for bilateral contracts.¹⁶⁰ Often, adhesive terms are not “contracts” at all; nor are they always oppressive. A sign that says, “Visitors Are Welcome to Quench Their Thirst with the Drinking Fountain on My Property” is adhesive, but it is not oppressive because visitors do not *have* to use the drinking fountain. Adhesive terms may not be coercive either—they may simply provide information: “You Are Entering Private Property.” Even if the adherent’s actions are constrained because of the adhesive term, it may not be the adhesive term itself which is the source of the constraint. For example, a sign that states, “Stay Off Property. Trespassers Will Be Prosecuted” is not coercive because it is not eliminating a right that the adherent has; it is the underlying trespassing statute which establishes the constraint. The adhesive term merely provides information about it.

Furthermore, adhesive terms may grant rights which the adherent may not otherwise have. A simple grant of rights does not require consent. A license to make two copies of the licensor’s copyrighted work does not require consent because it is only bestowing a right; it is not taking one away. A license agreement, however, requires consent because it grants rights in exchange for something that the licensee is not otherwise obligated to give up.

A bailment illustrates the importance of disentangling adhesive terms given the legal implications. A bailment occurs where goods are delivered by one (the bailor) to another (the bailee) with the

¹⁵⁸ *Garvine v. Maryland*, No. 17-01013, 2019 U.S. Dist. LEXIS 45592, at *5 (D. Md. Mar. 20, 2019).

¹⁵⁹ *Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky. 2005) (citing *City of Hazard Mun. Hous. Comm’n v. Hinch*, 411 S.W.2d 686, 689 (Ky. 1967); *Cobb v. Gulf Refining Co.*, 145 S.W.2d 96, 99 (Ky. 1940)); *id.* (quoting 57A AM. JUR. 2D, *Negligence* § 52 (2004)).

¹⁶⁰ More precisely, many adhesive terms are “reverse unilateral contracts.” *See supra* Part III.B.4.

understanding that the goods will be returned to the bailor.¹⁶¹ The bailor must deliver exclusive possession and control—but not title—of the property to the bailee, and the bailee must voluntarily and knowingly accept the property with the understanding that it must be returned as directed by the bailor.¹⁶² For example, when *X* drops *X*'s clothing off at a dry cleaner, *X* creates a bailment. “A bailment gives rise to the duty of exercising ordinary care in keeping and safeguarding the property.”¹⁶³

Bailment contracts create the underlying duties of the bailee but typically also contain terms that limit the bailee's liability or exculpate the bailee.¹⁶⁴ Generally, courts have determined exculpatory clauses in bailment contracts to be void or unenforceable.¹⁶⁵ Even where exculpatory clauses are permissible in bailment contracts, they must be strictly construed against the party seeking to escape liability.¹⁶⁶

As the authors of a leading treatise on torts noted, “negligence /conversion/contract theories are often rolled up together” in bailment cases, but “[c]ontract, express or implied, . . . is the

¹⁶¹ *Bailment*, BLACK'S LAW DICTIONARY (5th ed. 1979) (“A delivery of goods or personal property, by one person to another, in trust for the execution of a special object upon or in relation to such goods, beneficial either to the bailor or bailee or both, and upon a contract, express or implied, to perform the trust and carry out such object, and thereupon either to redeliver the goods to the bailor or otherwise dispose of the same in conformity with the purpose of the trust.”). *See also* 8 C.J.S. *Bailments* § 1 (1962) (defining bailment as “an agreement, either express or implied, that one person will entrust personal property to another for a specific purpose and that, when the purpose is accomplished, the bailee will return the property to the bailor or otherwise deal with it according to the bailor's directions, or keep it until the bailor reclaims it, as the case may be.”).

¹⁶² *Weissman v. City of New York*, 860 N.Y.S.2d 393, 395–96 (N.Y. City Civ. Ct. 2008) (determining that a bailment was created “when defendant took custody of the kayaks by retaining the key and controlling access to the kayaks, notifying users that this was the new temporary policy, promising better security and urging claimant to keep his kayaks there because of the new security measures”); *Snyder v. Four Winds Sailboat Ctr., Ltd.*, 701 F.2d 251, 252–53 (2d Cir. 1983) (finding a bailment was created when the marina agreed to store boat and had the keys).

¹⁶³ *Weissman*, 860 N.Y.S.2d at 395.

¹⁶⁴ As with other adhesive form contracts, a bailment contract may also be regulated by state statute. *See, e.g.*, CAL. CIV. CODE § 1630.5 (1970) (“The provisions of any contract of bailment for the parking or storage of a motor vehicle shall not exempt the bailee from liability, either in whole or in part, for the theft of any motor vehicle, when such motor vehicle is parked or stored with such bailee, and the keys are required by such bailee to be left in the parked or stored vehicle.”).

¹⁶⁵ *See, e.g., id.*; *see also* DOBBS ET AL., *supra* note 153, at 120.

¹⁶⁶ *Weissman*, 860 N.Y.S.2d at 396 (“Although exculpatory clauses are enforceable, they are strictly construed against the party seeking exemption from liability.”).

foundation of the bailment.”¹⁶⁷ A conversion occurs where one makes an unauthorized transfer of the property of another or refuses to return goods as required.¹⁶⁸ Because a bailment contract establishes the boundaries of the bailee’s obligations, a bailee who performs in accordance with the contract is not liable in tort for conversion.¹⁶⁹ If, however, the bailee is in noncompliance with the terms of the bailment contract, the bailor may sue in contract or in tort, depending upon whether the facts support a claim for conversion.¹⁷⁰ In other words, the bailment contract establishes the bailee’s duties, which, in turn, determines whether the bailor has a tort claim. If so, the bailor may choose to sue in tort instead of under the contract.¹⁷¹ Furthermore, a notice may affect whether a bailment or a license is created. A notice in a parking garage may indicate whether the owner of a car must leave the keys with an attendant (creating a bailment) or take the keys (creating a license by the garage owner permitting the car owner to park in the garage).

A notice which seeks to exercise some control over the recipient’s behavior is only effective while the recipient is enjoying the benefits of the other party’s property. Its terms are enforceable only as far as they involve what the property owner can and cannot do while the recipient is using the property. If the property owner wishes to restrict the rights of the recipient after the recipient has stopped receiving the benefits of the property, then the property owner and the recipient must have entered into a contract.

A notice is a form of due process;¹⁷² it informs the recipient /viewer of the property owner’s rights and whether the property owner

¹⁶⁷ DOBBS ET AL., *supra* note 153, at 118–19.

¹⁶⁸ *Id.* at 116–17.

¹⁶⁹ *Id.* at 11621.

¹⁷⁰ *Id.* at 121 (noting that courts have repeatedly stated that a “bailee has the option of suing on the contract or in tort or for restitution”).

¹⁷¹ Generally, the economic loss doctrine does not apply to bailment cases. *Id.* As noted, however, “some courts have applied the rules for pure economic loss cases to ordinary conversions of tangible property” and, in doing so, “may have made overly broad statements . . . without considering the specific bailment situation where the plaintiff traditionally has the option to sue in tort and where exculpatory clauses are often rejected.” *Id.* at 121–22.

¹⁷² See *Stenger v. Dep’t of Motor Vehicles*, 743 N.W.2d 758, 762 (Neb. 2008) (“Procedural due process limits the ability of the government to deprive people of interests which constitute ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause and requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard.”).

intends to exercise the full extent of those rights.¹⁷³ A notice can grant permission and condition of that permission on adherence to certain terms. Such grants of permission are licenses.¹⁷⁴ If, however, the adherent assents to adhesive terms, the terms are binding as contracts. If the adherent does not assent to the adhesive terms, they are binding only if the drafter has authority to impose the terms and there is due process in the form of notice.¹⁷⁵ The drafter has authority to impose terms if they relate to the use of the drafter's property *provided that* they do not seek anything in return from the adherent (i.e., they do not involve an exchange) or penalize the adherent for infringement or trespass. In the latter case, due process requires reasonable notice of the condition.

In the online context, however, some courts have determined that *notice of notice* suffices.¹⁷⁶ The demure hyperlink that states Terms and Conditions is confused with the notice itself, which is not viewable at the time of acceptance and thus should *not* be considered contractual. This standard conflates contracts with notices and, in doing so, constructs a version of consent that is far removed from reality. Under this fantastical version of consent, adherents are expected to act the way no reasonable person would act *and* no reasonable drafter should expect them to act.

A taxonomy provides a classification system to understand adhesive terms. A taxonomy is definitional, however, and requires a process that incorporates it. The first step in the process involves determining the ostensible purpose that the adhesive terms serves. Do they provide information, grant permission, reallocate rights, or impose obligations on the adherent? The second step is to assess the authority of the drafter. Does the drafter—as a matter of property

¹⁷³ See *e.g.*, *State v. Pixley*, 200 A.3d 174, 177 (Vt. 2018) (noting that under Vermont law, a person commits trespass if “without legal authority or the consent of the person in lawful possession he or she enters or remains on land or in any place as to which notice against trespass is given”). The court further noted that the statute thus required two elements: “first, the license element – that the person is entering the land ‘without legal authority’ or consent, and second, the notice element – that notice against trespass is provided for the property in question.” *Id.*

¹⁷⁴ *Id.* at 177–179; see also *Joseph Bros. Co. v. Dunn Bros.*, 148 N.E.3d 1260, 1268 (Ohio Ct. App. 2019) (“A license ‘is a privilege given to an individual to do an act upon the land of another *without* possessing any interest therein and is usually terminable at the will of the licensor.”).

¹⁷⁵ See *Joseph Bros. Co.*, 148 N.E.3d at 1276 (noting that a property owner cannot sue for trespass “when the purported trespasser holds an easement to the property”).

¹⁷⁶ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449 (7th Cir. 1996) (upholding a shrinkwrap agreement).

rules—have the authority to unilaterally impose the term on the adherent? If not, did the drafter obtain the adherent’s consent to the disputed term so that it is fair to find contract formation? Consent is essential if the drafter did not have the authority to unilaterally impose the term. One party cannot simply insist that adhesive terms are a contract; *both* parties must agree. The adherent’s consent may be implied where the terms are immediately and unavoidably viewable and the adherent proceeds with an activity that the adherent was not otherwise privileged to do. On the other hand, terms that are not immediately visible should not be part of the contract unless the adherent has specifically assented to them.¹⁷⁷

In *Kemenosh v. Uber Technologies, Inc.*,¹⁷⁸ the court stated that “the deficiency in Uber’s registration process is not its inconspicuousness but rather its failure to adequately communicate an offer to arbitrate in a definite manner, so as to create a meeting of the minds.”¹⁷⁹ Shedding more light on the specific factors that may reflect adequate communication, the court stated:

It is generally understood that Uber offers transportation in exchange for money. . . . Therefore, the words “by creating an Uber account you are agreeing to the Terms of Service and Privacy Policy” convey that by creating an Uber account one is agreeing to pay money in exchange for transportation, and to the terms of a privacy policy. They do not convey an offer to arbitrate, or notify the user in any way that the offered Terms of Service contain a waiver of jury trial and an arbitration clause.¹⁸⁰

Of particular interest, the court noted that

“[w]hile Uber’s arbitration terms were accessible if the user clicked through the “Terms of Service and Privacy Policy” link, the hyperlink contained no indication that it contained further essential terms other than the implicit agreement of offering transportation in exchange for money and a privacy policy.”¹⁸¹

Furthermore, the court stated that it “cannot accept that a reasonably prudent cell phone user would know that the terms accessible by the hyperlink contained a jury trial waiver and an arbitration

¹⁷⁷ See *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1173 (9th Cir. 2014); *Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 366 (E.D.N.Y. 2015).

¹⁷⁸ No. 181102703, 2020 WL 254634 (Pa. Ct. Com. Pl. Jan. 3, 2020).

¹⁷⁹ *Id.* at *6.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

agreement.”¹⁸² Accordingly, the terms of Uber’s offer were “indefinite” and there was no agreement to arbitrate.¹⁸³

IV. A PROPOSAL FOR ONLINE NOTICE (AND ANTICIPATED OBJECTIONS)

Adhesive online terms, such as terms of service, are often identified or labeled as “contracts.” But, as this Article explains, online adhesive terms are usually not contracts. Courts have conflated the distinction between notices and contracts, perhaps swayed by the way companies have self-interestedly identified them.

The current standard of *notice and manifestation* lacks predictability and has plagued both consumers and businesses.¹⁸⁴ The problem can be traced to the multiple layers of fiction inherent in a notice and manifestation standard, which creates a funhouse mirror-like distortive effect on parties’ behavior. In the physical world, a notice is a sign; in the online world, a notice is a hyperlink. A tangible notice has physical constraints that a digital notice does not. Yet, many courts have ignored the differences between tangible notices and digital ones and have overlooked how the contracting environment affects the behavior and perception of the parties.

The criteria used to assess the reasonableness of physical notice do not readily transfer to the online context. Large font and bold lettering may be conspicuous on a sign placed near a physical entrance but can be rather inconspicuous if it is in the interior page of a document that requires clicking a hyperlink. Furthermore, the digital form enables companies to sneak contracts upon unsuspecting consumers as they are completing a transaction. Similar to drip pricing where additional fees and surcharges are imposed upon the consumer at various points in the transaction,¹⁸⁵ drip contracting

¹⁸² *Id.*

¹⁸³ *Id.* at *6–7.

¹⁸⁴ An industry white paper found that overall, the success rate for companies seeking to enforce their clickwrap agreements was only 60 percent. See PACTSAFE, CLICKWRAP LITIGATION TRENDS: 2021 REPORT 2 (2021).

¹⁸⁵ David Adam Friedman, *Regulating Drip Pricing*, 31 STAN. L. & POL’Y REV. 51, 53 (2020) (describing drip pricing as a situation where the “seller first appears to describe the full price of a defined expected offering, leaving the buyer to discover only later the nature of the full price and commitment.”); *see also* Luca v. Wyndham Worldwide Corp., No. 2:16-CV-00746, 2019 WL 211098, at n.1 (W.D. Pa. Jan. 16, 2019) (defining “drip pricing” as a practice where “the advertised price misleads consumers to believe that the additional resort fee is simple a ‘tax,’ which is a deceptive act that impacts consumers’ decision-making.”); Washinton v. Hyatt Hotels Corp., No. 1:19-CV-04724, 2020 WL 3058118, at *1 (N.D. Ill. June 9, 2020) (defining “drip pricing” as a “trade

imposes terms upon the consumer in bits and pieces so that the consumer has difficulty understanding the meaning of the legal terms in the aggregate. Typically, the website lures consumers with an attractive invitation and a seemingly simply way to accept that invitation, presenting the consumer with a form to fill with personal information and allowing them to select merchandise or services before providing notice that terms apply to the transaction. Unlike notices in the physical world, in the drip contracting scenario the company merely provides notice that terms of service govern the transaction. The notice itself does not provide any useful substantive information.

The standards and criteria used to assess a notice should reflect the differences between the online and physical environments. Physical notices are required to be conspicuous; what conspicuousness requires is often legislated or regulated and depends upon the substance of the notice. Physical notice regulation considers the context in which the notice is presented, including the surrounding elements. A green sign with green lettering will not be considered conspicuous if placed against a leafy green bush at the entrance to a golf course, regardless of the size of the lettering or that it is in all-caps.

Unfortunately, legislators have been slow to impose similar requirements for online notices.¹⁸⁶ Apart from recent legislation in several states governing privacy and data collection, online notice regulation is largely absent. This Section proposes standardizing online notices to make them more efficient, fairer, and more predictable.

A. *Default Rules for Reasonable Notices*

A *reasonable notice* standard is incongruous with a *duty to read* because it should be practically impossible to miss the information on a reasonable notice, thus rendering a duty to read superfluous. A reasonable notice should be one where seeing the notice is the same thing as reading it because the message is not only conspicuous but

practice...whereby Defendant initially excludes mandatory resort fees when it advertises room rates, but then includes those resort fees in the final charges it assesses customers.”).

¹⁸⁶ Woodrow Hartzog observed that “courts have focused almost entirely on the language in terms of use and privacy policies when analyzing online agreements.” WOODROW HARTZOG, *PRIVACY’S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 171 (Harv. Univ. Press 2018) (1978).

concise and understandable. It is incumbent upon the drafter to ensure that the notice is reasonable.

A notice that is reasonably presented is conspicuous *and* makes its meaning clear. In the online context, this is rarely the case. On the contrary, online adhesive terms are often obfuscatory, dense, and hard to find. They are typically much wordier than their paper counterparts, accessible only by clicking on a hyperlink, and scattered across multiple web pages that are often unilaterally and frequently updated. They are presented on websites where the primary purpose is often recreational, and the contracting environment lacks the formalities associated with serious, legal transactions. The terms are neither comprehensible nor readily viewable. In short, most online notices are not at all reasonable.¹⁸⁷

In order to be effective, a notice should be both (1) conspicuous *and* (2) easily comprehensible. Conspicuousness requires more than large font size, bold font, or all-caps letters.¹⁸⁸ Conspicuousness relates to visibility and prominence. Comprehensibility means both legibility and understandability. Text can be prominent without being comprehensible. All-cap letters may actually make text harder to read.¹⁸⁹

Conspicuous notices must be placed in a “can’t miss” location where the user would certainly see it *prior* to the user having engaged in any on-site activity or incurred any sunk costs. Often, websites will allow users to browse their website or fill out data fields *before* notifying them of relevant terms. Presenting terms only *after* the user has expended effort or engaged in on-site activity should be considered ineffective notice. In practice, this means that companies should place prominent notices in two places: at entry and at point of service. If the website wishes the notice to be effective to *all* website visitors, then it should place it at the point of entry. If the website wishes the notice to

¹⁸⁷ On the contrary, many companies employ what Jamie Luguri and Lior Strahilevitz refer to as “dark patterns” to manipulate and deceive consumers into engaging in conduct which they did not intend to do, including clicking to agree to online terms that they may not want. Jamie Luguri & Lior Jacob Strahilevitz, *Shining a Light on Dark Patterns*, 13 J. LEGAL ANALYSIS 43, 58 (2021) (noting that “there are a variety of dark patterns that are designed to nudge consumers into contractual arrangements that they presumably would not otherwise prefer, and these techniques appear to be employed by a variety of different e-commerce firms”).

¹⁸⁸ Some research suggests that all-caps may have the effect of discouraging, rather than encouraging, reading. See Yonathan A. Arbel & Andrew Toler, *All-Caps*, 17 J. EMPIRICAL LEGAL STUD. 862, 865 (2020).

¹⁸⁹ *Id.*

be effective to only *some* website visitors (e.g., those who want to make a purchase), it should be placed at the beginning of the transaction process.

Size and scale affect the conspicuousness of notices. In the physical world, a “No Trespassing” sign must be viewable at a distance and visible prior to entering the premises if the business intends to argue that the notice is effective against the visitor. A visitor who steps onto land belonging to another would not be held to have been notified by a “No Trespassing” sign viewable only by entering onto the land. Similarly, in the online environment, a website that wishes to notify all of its users must do so on the home page where the notice must be *immediately* viewable without requiring the user to scroll. Notices that only apply to certain users (such as those purchasing goods from that website) should appear *prior* to the customer inputting personal information in data fields.

An effective notice must also be in a recognizable form. In the physical world, notices are typically placed on signs and have a particular shape and color that communicates a message, even if the viewer is at a distance and unable to read the text. A notice indicating urgency and that the viewer must stop anticipated activity is typically bordered with red and white or black lettering, or it may contain a graphic with a red circle with a black line through it or a black circle with a red line through the graphic.

For example:



Signs which are primarily informative are typically yellow with black lettering, such as:



The presentation of the notices reflects cultural understandings. In the United States, red is associated with immediate cessation of activity and reinforced through stop signs and traffic lights. Yellow is associated with slowing down and acting prudently. Green signs typically indicate permission or provide information about where a viewer may engage in certain activity.



In addition, effective notices must be comprehensible. In both the physical and online environments, this means that the graphics and text must be simple, unambiguous, and limited. The use of script should be minimal as it can be hard to read. Font styles should be plain and limited to no more than two. The space limitations of signs constrain the volume of content in physical notice. In the online environment, however, digital text is not naturally constrained due to its malleability. Companies have abused this feature by updating terms frequently and incorporating, by reference, hyperlinked terms on multiple pages.

Given the varying sizes and formatting configurations, the appearance of a digital notice differs depending on the size and type of screen. A notice on an iPhone may look different from a notice on a desktop computer. Accordingly, specific size regulations for digital notices are inappropriate. One size does not fit all when it comes to digital notices due to differences in screens and operating configurations.

Symbols and punctuation marks play an important role in communicating notices effectively. An exclamation point signals importance and urgency, and it increases the saliency of the notice. Graphics communicate at a glance whether activity is permitted or prohibited. For example, an image in a circle with a red or black line through it indicates prohibition. Similarly, online notices should have a recognizable form to distinguish them from other content on a webpage. This Article proposes that they be in a shape that signals information, such as a rectangle or square. To signify the importance of the notice and to standardize the form, they should also have red borders and black or white text.

Of critical importance, effective notices must be comprehensible. In both the physical and online environments, this means that the graphics and text must be simple, unambiguous, and limited. The space limitations of tangible signs constrain their content. In the online environment, however, digital text is not naturally constrained. Websites have abused this feature by updating terms frequently and incorporating hyperlinked pages. Because of the lack of physical constraints, the visual presentation of digital notices should be regulated. Text often diminishes, rather than enhances, the effectiveness of a sign. Many safety signs, for example, use only images to increase comprehensibility. The industry standard for billboards is no more than seven words because viewers are often driving by at high speeds.¹⁹⁰ The industry standard for digital notices and signs is referred to as the “3 x 5” text rule—three lines of text with five words each or five lines of text with three words each.¹⁹¹ In the online environment, this standard should be a requirement.

I am not the only commentator to propose that adhesive terms be presented in a recognizable form. Professors Ian Ayres and Alan Schwartz proposed that certain unexpected terms be presented in a “warning box.”¹⁹² Their proposal is essentially an “enhanced disclosure” approach that seeks to increase the salience of unexpected terms to promote “informed consumer consent in a cost-effective manner.”¹⁹³ My proposal, on the other hand, discards the notion that an online notice is a contract. Furthermore, it considers the contextual realities that constrain genuine consent to online adhesive terms. It places the burden on the drafter to conform to specific drafting requirements rather than upon the adherent to read hidden

¹⁹⁰ See Paul Suggett, *Hints for a Great Billboard Advertisement*, THE BALANCE CAREERS (Jan. 20, 2020), <https://www.thebalancecareers.com/six-steps-to-making-a-great-billboard-ad-38479>; Leo Rondeau, *Top 10 Rules for Billboard Advertising*, COLLING MEDIA (Aug. 8, 2018), <https://collingmedia.com/outdoor-advertising/top-10-rules-for-billboard-advertising>.

¹⁹¹ See, e.g., TIPS FOR DESIGNING AND MANAGING DIGITAL SIGNAGE SYSTEMS, HB COMMC’N & BROWN UNIV. 2, 5 (2015), https://ithelp.brown.edu/custom-images/files/Brown_BestPractices_Final_7.22.15%20%20.pdf; *10 Rules for Designing Digital Signage Content*, SCREENCLOUD, <https://screencloud.com/blog/rules-designing-digital-signage> (last visited Sept. 17, 2022); *Top 8 Presentation Design Tips for Digital Signature*, PRESENTATIONPOINT, <https://www.presentationpoint.com/blog/presentation-design-tips-for-digital-signage> (last visited Sept. 27, 2022).

¹⁹² See Ayres & Schwartz, *supra* note 22, at 553.

¹⁹³ *Id.* at 580.

and incomprehensible terms. In other words, it imposes reasonableness standards on the drafter, rather than the adherent.

My proposal reflects the view that *reasonable notice* should not be confused for *reasonable notice of notice*. Notice of the fact that terms exist fails to communicate what those terms mean. A viewer who views the notice of notice (a.k.a. the terms of service hyperlink) will not know whether the substantive terms are objectionable or benign. Multiple clicks on an “accept” button next to a hyperlink that only states “Terms and Conditions” does not provide the same level of information as a click on an “accept” button next to language in bold that states “I HEREBY WAIVE MY RIGHT TO SUE IN A COURT OF LAW.” A notice must inform; it cannot simply direct the viewer to where the information may be found.

The combination of the duty to read with a reasonable notice standard is incongruous. People do not read signs; they *look* at them. Graphic designers and advertisers understand this and pay careful attention to signage location, contrast, lettering, and font. Judges, however, typically ignore or discount the way that people attend to signage and have conflated standards for notices with standards for contracts. They ignore the fact that professional practices, printing and reproduction costs, physical constraints, industry norms, legislative requirements, and regulatory guidelines all constrain the leeway that businesses have in drafting tangible terms.

The consequence is that digital adhesive terms overwhelm the user and make it impossible for users to read and understand them, especially when they are frequently updated. This contrast between the physical and online environments makes simply transporting the standard of “reasonable notice” to the online environment inappropriate. Instead, I propose clear and simple requirements for reasonable digital notices which are summarized in Figure 2.

Figure 2: Proposed Online Notice Requirements:

<u>CONSPICUOUSNESS</u>	<u>COMPREHENSIBILITY</u>
Red borders with white text and black background or black text and white background.	3 lines of text, each line 5 words maximum
No more than 2 font styles.	-or-
No or minimal script/cursive.	5 lines of text, each line 3 words maximum

If a notice fails to meet the proposed requirements, it should be presumed to be unreasonable and therefore, ineffective. Furthermore, the incorporation by reference doctrine should not

apply to *notices*. The drafter should not have the benefit of incorporating by reference lengthy provisions which interpret or elaborate upon the meaning of the notice terms. Rather, the court should interpret the terms in accordance with their ordinary meaning and applicable rules of interpretation.

B. *Anticipated Objections*

I anticipate several objections to my proposals. Some may argue that online adhesive terms should be viewed as contracts, not notices, because people should be able to exercise their freedom and structure their own agreements. This argument, however, assumes the conclusion (that these terms are contracts) and thus fails to address the actual proposal. The adhesive online terms scenario is an entirely different one than the bargaining scenario that the “freedom of contract” rhetoric conjures. Adhesive terms are a convenience, a concession to the marketplace; they do not embody the autonomy ideals of contract. Their very definition—*adhesive* terms—make that clear.

Digital contracts in an online environment should be enforceable, but not all digital adhesive terms are contracts. Adhesive terms should not be presumed to be contracts simply because businesses have self-servingly labeled them as such. The term “contract” is misapplied in most cases involving online adhesive terms. The online environment constrains user perception and attention. Unlike the physical environment, users are hijacked by terms when they least expect it. They visit a website to shop or read interesting content, not with the intent of entering into a legal relationship. Furthermore, certain terms such as mandatory arbitration and limitation of liability clauses are similar across websites. When those websites offer services that are necessary to thrive in modern society, users cannot be understood to have consented.

Moreover, to presume that adhesive terms in the online environment are notices instead of contracts is consistent with how courts have traditionally treated adhesive terms in non-traditional formats in the physical environment. For example, courts have found that receipts and shipping invoices merely provide data or other information, such as the quantity of purchased items or dates of shipment, and are not binding as contracts.¹⁹⁴ As one court noted,

¹⁹⁴ *India Paint & Lacquer Co. v. United Steel Prods. Corp.*, 267 P.2d 408, 415 (Cal. Dist. Ct. App. 1954) (finding that invoices were nothing more than “receipts attesting to the delivery of merchandise” which contained “only data as to the date of shipment

“[t]he prevailing rule is that an invoice, standing alone, is not a contract.”¹⁹⁵ Limitations of liability and warranty disclaimers should be brought to the adherent’s attention before a court will find them enforceable.¹⁹⁶ This does not mean that it is impossible to enter into an adhesive form contract online, but it does mean that there should be formal requirements before one is found.

Another anticipated objection to the general proposal is that mass consumer contracts of adhesion are efficient. This argument adopts a narrow and biased definition of efficiency which equates it solely with reduced transaction costs. I believe that my proposal better enhances efficiency because it reduces the time that users must take to review terms and that companies must take to both draft and update them. It also increases predictability and certainty.

Some might argue that the proposed notice requirements are too stringent and that it is difficult to communicate important terms within the proposed limitations. There are several responses to that argument. First, notices *should* be both comprehensible and conspicuous if they are to be enforceable. Research shows that consumers do not read disclosures and disclaimers.¹⁹⁷ My proposal requires online notices to be short and conspicuous so that reading them is unavoidable. Disclosures and disclaimers contained in fine print or within interior pages (i.e., that require clicking on hyperlinks) are ineffective and should not serve to protect the drafter from liability given that consumers do not read them.

This does not, however, mean that the drafter has no rights unless they are expressly stated in the notice. For example, assume X’s website contains original content but does not contain a notice that states, “No Copying Content.” Y may not copy X’s content because doing so

and the quantity of a particular item delivered to the purchaser. Their informality, incompleteness, and lack of contractual character show on the face of the documents”).

¹⁹⁵ *Id.* at 416 (citations omitted).

¹⁹⁶ *Id.* at 415 (stating that the lower court “properly refused to give effect to the disclaimer and liability provisions . . . in the absence of it being established that they were known by, or brought to the attention of,” the adherent); *see also* U.C.C. § 2-207 (AM. L. INST. & UNIF. L. COMM’N 1977) (outlining when terms are part of a contract where the transaction is governed by preprinted forms).

¹⁹⁷ Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL’Y & MKTG. 293, 301 (2012); OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 10–11 (2014).

violates *X*'s rights as the copyright owner.¹⁹⁸ The absence of a notice does not alter *X*'s rights or obligation to respect those rights.¹⁹⁹

Second, even if certain terms are not included in the notice, an implied-in-fact or implied-in-law contract may exist between a website visitor and a business. Contextual factors, such as communications exchanged between the website and the visitor, community standards, and business and social norms all play a role in determining whether parties acted fairly and reasonably.²⁰⁰ Existing law also constrains the conduct of website users and prohibits them from engaging in unfair business practices or opportunistic, bad faith, or illegal activity on the website.

Third, my proposal only applies *where a court applies a notice standard*. Digital contracts which are presented to the adherent in a traditional contract format and which the adherent e-signs would be subject to the same analysis as tangible contracts. Agreements sent via Docusign or other contract software management systems that are presented as traditional paper contracts (and not notices) and digitally signed would be subject to traditional contract rules. Thus, the determination of whether such a contract was validly formed requires analyzing whether there was offer and acceptance, mutual assent, and consideration²⁰¹ Electronic contracts would also be subject to the standard contract defenses to enforceability, such as mistake, fraud, and unconscionability.²⁰² In other words, the mere fact that contracts

¹⁹⁸ Presuming that *X* is the author of and owns the copyright to the content posted on *X*'s website.

¹⁹⁹ It may, however, affect whether *Y* can be found of intentional infringement.

²⁰⁰ See *Hercules Inc. v. United States*, 516 U.S. 417, 424 (1996) (noting that an agreement in fact is inferred "from conduct of the parties showing, the light of the surrounding circumstances, their tacit understanding" and an agreement implied in law is a "fiction of law" which is "imputed to perform a legal duty"); *In re Ambry Genetics Data Breach Litigation*, 567 F. Supp. 3d 1130, 1144 (2021) (finding an implied contract by defendants to protect personal information even though no explicit promises were made because "it is difficult to imagine how, in our day and age of data and identity theft, the mandatory receipt of Social Security numbers or other sensitive personal information would not imply the recipient's assent to protect the information sufficiently"); *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (2015) (noting that "when a plaintiff alleges unjust enrichment, a court may 'construe the cause of action as a quasi-contract claim seeking restitution'").

²⁰¹ By contrast, purchase orders submitted through electronic systems would be treated as forms under U.C.C. section 2-207.

²⁰² See e.g., 27 TENN. PRAC. CONTS. LAW § 1.10. Defenses to contract enforcement ("There are numerous defenses to contract enforcement" and including unilateral and mutual mistake, fraud, and unconscionability among others.").

are presented and signed electronically would not undermine their enforceability because their contractual nature is readily apparent. Accordingly, they would not be treated as online notices. Instead, they would be treated as paper contracts subject to the traditional doctrinal rules of formation and enforcement.

Finally, and most importantly, my proposals are *default* requirements, meaning that they are the rules that apply in the absence of regulation.²⁰³ Businesses can still marshal their considerable forces to lobby legislators for alternate and additional terms. My proposed regulations are intended to serve as a default in the absence of governmental regulation. They are not intended to override or supplant existing or future statutes or governmental regulations.

By providing guidance to courts in assessing whether “reasonable notice” or “conspicuousness” standards are met in the online environment, these proposals simplify the rules surrounding digital adhesive terms. They suggest a way to standardize and regulate adhesive online terms in the absence of regulation. Thus, my proposal encourages and accelerates the democratic process rather than supplanting it. Rather than allowing companies to privately legislate legal gaps, it requires them to obtain the buy-in of elected representatives and appointed regulators. As Professor James Gibson has argued, rather than accepting the validity of boilerplate terms, the issues they address “should be debated in courts and legislatures, not resolved through veiled, unilateral action by a self-interested party.”²⁰⁴ My proposal essentially forces companies to disclose their business practices in a public forum instead of in fine print that nobody reads.

Some may object that my proposal is actually too mild and does not do enough to remedy the scourge of adhesive contracting. I certainly agree that more can be done in this area. I also believe, however, that regulating the *form* of adhesive terms has important advantages over focusing simply on the substance of these terms.

New technologies will undoubtedly create new legal gaps and necessitate legislative attention to new adhesive terms. Just as soon as

²⁰³ As James Gibson has argued, rather than enforcing boilerplate terms such as class action waivers, the issue should be confronted “head-on.” See James Gibson, *Boilerplate’s False Dichotomy*, 106 GEO. L.J. 249, 276–77 (2018) (“Indeed, dragging the issue out of the shadow of boilerplate tees it up for a truly public vetting, which can solve the class action problem for all businesses, not just for those with the ability and foresight to promulgate boilerplate waivers.”).

²⁰⁴ *Id.* at 277.

a regulation is passed prohibiting one practice, technology enables another one to crop up. Fine print grants legal cover for the dubious new business practice (e.g., data collection) while bypassing public attention until that practice becomes entrenched and normalized. Legislators, consumer advocates, and regulators then play catch up to address the negative social and economic consequences from the dubious practice, which becomes much more difficult given the lobbying and economic power of private industry groups and large corporations which now depend upon it (this is essentially what has happened with online privacy and explains the years of stalled privacy legislation).²⁰⁵ Lather-rinse-repeat. Regulating the form of adhesive terms is one way to step out of this cycle. My proposal shifts the burden of seeking legislative action upon businesses who would have to fight for terms they want, rather than forcing consumers to fight to avoid terms they *do not* want.

The overarching objective of my proposals is to catalyze active public deliberation and motivate legislative action around dubious business practices. My proposal does not require companies to disclose all their business practices or notify users of every potential violation. The notice requirement applies only where businesses seek the protection or advantages that notices provide. Furthermore, as previously explained, even in the absence of a notice or express terms, businesses may be able to raise claims based on equity or implied contracts to defend their ownership rights or business practices from opportunistic or bad faith users.²⁰⁶

V. CONCLUSION

Adhesive contracts generate harms that do more than distort doctrine—they reverberate throughout society. Companies like Google and Facebook used them to justify privacy-eroding business practices such as email scanning and data collection.²⁰⁷ The proliferation of adhesive terms undermines rights and diminishes

²⁰⁵ Thorin Klosowski, *The State of Consumer Data Privacy Laws in the US (And Why It Matters)*, N.Y. TIMES (Sept. 6, 2021), <https://www.nytimes.com/wirecutter/blog/state-of-privacy-laws-in-us>.

²⁰⁶ See discussion *supra* Part IV.B.

²⁰⁷ *In re Google*, No. 13-MD-02430-LHK, 2013 WL 5423918, at *12 (“Google contends that by agreeing to its Terms of Service and Privacy Policies, all Gmail users have consented to Google reading their emails.”); *In re Facebook, Inc.*, 402 F. Supp. 3d 767, 777 (2019) (Facebook argued that lawsuit based on privacy invasion must be dismissed “because Facebook users consented, in fine print, to the wide dissemination of their sensitive information.”).

individual freedoms.²⁰⁸ Adhesive contracts containing forced arbitration clauses stifle constitutional rights to speech and to a jury trial.²⁰⁹ Uber and Lyft's use of adhesive contracts helped justify the recharacterization of employment in a way that provided fewer benefits for the worker.²¹⁰ Adhesive contracts also played a role in the gradual transformation of the nature of commercial exchanges from sales to licenses, a change which has important consequences for private property ownership and the future of innovation.²¹¹

Furthermore, to frame adhesive terms as "contracts" permits drafting businesses the power to enforce onerous provisions in an unequal manner, giving them cover when they discriminate. While some have argued that the allocation of power should be in favor of the drafter to guard against opportunistic consumers,²¹² the discretion accorded to drafters allows them to discriminate against adherents based on race, income, and other categories that are otherwise protected under the law. Professor Manisha Padi, for example, has observed that unlike other areas of law, contract law "traditionally authorized contracting parties to treat social groups differently[]" resulting in disparate impacts for which there is no legal recourse.²¹³ Similarly, Professor Danielle Kie Hart has noted that "[a]t the heart of

²⁰⁸ See RADIN, *supra* note 11, at 16.

²⁰⁹ *Id.*

²¹⁰ Section 19 of Lyft Terms of Service states that "[a]s a Driver on the Lyft Platform, you acknowledge and agree that . . . the relationship between the parties under this Agreement is solely that of independent contracting parties." *Terms of Service*, LYFT, https://www.lyft.com/terms?utm_medium=cpc&utm_source=bing&utm_campaign=PAID_DAX_SRCH_US_SAN_WEB_ALL_NBRND_UBER_ALL_202107 (last visited Sept. 16, 2022). The Uber Driver Agreement states that "this is not an employment agreement" *Uber Driver Agreement Updated Jan. 2022: Defines That Drivers Pay Uber*, UBERPEOPLE, <https://www.uberpeople.net/threads/uber-driver-agreement-updated-jan-2022-defines-that-drivers-pay-uber.458948> (last visited Sept. 16, 2022); *McGillis v. Dep't of Econ. Opportunity*, 210 So. 3d 220, 223–26 (Fla. Dist. Ct. App. 2017) (finding driver for Uber was not an employee based on several factors including the agreement which "unequivocally disclaims an employer-employee relationship"). *But see O'Connor v. Uber Techs., Inc.*, 82 F. Supp. 3d 1133, 1141 (2015) (finding that an Uber driver was presumptive employee because they provide a service to Uber).

²¹¹ See generally PERZANOWSKI, *supra* note 109; FAIRFIELD, *supra* note 109.

²¹² See e.g., Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827 (2006) ("[O]pportunistic buyers might try to use 'balanced' terms to press for benefits and advantages beyond those that the terms are actually intended to provide.").

²¹³ Manisha Padi, *Contractual Inequality*, 120 MICH. L. REV. 825, 828 (2022).

most of the systemic problems currently confronting individuals and businesses is quite literally a contract.”²¹⁴

The emphasis on the “efficiency” of standard contracts ignores the purpose of contracts.²¹⁵ Contracts are tools of the economy, and the sole function of the economy is not to improve efficiency. As the economist Jeffrey Sachs observed “[t]hough efficiency is a great virtue, it is not the only economic goal of interest to the society. Economic fairness is also crucial.”²¹⁶

Moreover, adhesive online contracts are actually *inefficient*. While the adhesiveness of paper standard form contracts may have resulted in cost savings, streamlined transactions, and consistent, predictable terms, these benefits are lacking with their digital versions. Digitization has made it easy to revise terms, increasing the time that drafters spend modifying them and that adherents are expected to spend reading them. For businesses, contract management has become an increasingly complex and expensive affair. Even the name “standard form” is misleading when drafters frequently update the formats and presentation of adhesive terms to accommodate different screens. In addition to being burdensome to the adherents, the enforceability of digital adhesive terms is highly unpredictable, and drafters are often unsuccessful when they seek to enforce their agreements.²¹⁷ The excessive use of digital terms may even have unintended consequences, ensnaring the drafter who may be unable to track and control all of them.²¹⁸

²¹⁴ Danielle Kie Hart, *If Past is Prologue, Then the Future is Bleak: Contracts, Covid-19 and the Changed Circumstances Doctrine*, (Sw. L. School, Working Paper No. 21-01, 2021).

²¹⁵ Furthermore, as other scholars have noted, it is doubtful that standardized terms enhance efficiency or are necessary to the functioning of the marketplace. Margaret Radin writes that “we cannot assume that enough consumers are knowledgeable” about boilerplate and that there may instead be a “lemons equilibrium” in which firms compete “by offering their worst contract, not their best.” RADIN, *supra* note 11, at 109. James Gibson has argued that the eradication of boilerplate will not result in “widespread, devastating economic consequences” as boilerplate’s proponents fear. Gibson, *supra* note 203, at 252.

²¹⁶ JEFFREY D. SACHS, *THE PRICE OF CIVILIZATION: REAWAKENING AMERICAN VIRTUE AND PROSPERITY* 35 (2011).

²¹⁷ See e.g., *Jim Schumacher, LLC v. Spireon, Inc.*, No. 3:12-CV-625, 2015 WL 3949349, at *5 (E.D. Tenn. June 29, 2015) (finding that the record was unclear that Plaintiff continued to use the portal after clicking accept to Defendant’s terms of service); see also *PACTSAFE*, *supra* note 184, at 2.

²¹⁸ See *Calhoun v. Google*, 526 F. Supp. 3d 605, 633 (N.D. Cal. 2021) (Google argued that its privacy notice was not contractual but merely “informational,” although the court disagreed, determining it was a binding contract).

Finally, my proposal recognizes the reality of the political process. Firms, especially those in the same industry, are better able than consumers to use the law to their advantage. They have the resources to organize around a unifying interest. They belong to industry specific trade groups and professional organizations that lobby politicians to protect and promote their interests. They do not suffer the same coordination and collective action problems that plague consumers. If businesses in a given industry are unhappy with standards governing how they must present notices, they are in a better position than consumers to lobby their legislators to provide more concrete guidelines and different regulations. They can push for legislation that expressly permits certain practices and exempts those practices from disclosure or consent requirements. Attorneys for large corporations and industry trade groups are typically well-paid and sophisticated, with an arsenal of legal arguments that makes them well-equipped to defend and promote their clients' interests. Consumers, by contrast, are not as well-resourced or organized to position and mobilize in the same way that businesses are.

Thus, the presumption that adhesive terms are notices and not contracts would enhance the benefits of standard form contracting in a more even-handed way. The proposed default notice standard with minimum requirements takes the legislative power of adhesive terms away from a private business and places it into the hands of those who should have it—not businesses *or* special interest groups, but the legislators and policymakers who represent and consider the needs of all members of society.

