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Contract Law—Conspicuous Arbitration Agreements in Online Contracts: Contradictions and Challenges in the Uber Cases

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CONTRACT LAW—CONSPICUOUS ARBITRATION AGREEMENTS IN ONLINE CONTRACTS: CONTRADICTIONS AND CHALLENGES IN THE UBER CASES

I. INTRODUCTION

Rachel Cullinane and Spencer Meyer were ordinary consumers who downloaded and used the popular ride-sharing application ("app") Uber on their smartphones.[1] When they did so, they agreed (or, at least, Uber believed that they had agreed) to be bound by a set of terms and conditions.[2] Like many online customers, Cullinane and Meyer had clicked away their right to have their grievances heard by a court of law; instead, they agreed—perhaps without even knowing it—to a binding arbitration agreement.[3] Yet, despite the potential to be denied one's day in court, as experienced by Cullinane and Meyer, most people will never read the terms to which they agree.

Courts, both state and federal, have wrestled with what "mutual assent" means in a world where contracts are not negotiated, and the parties never see each other.[4] The case law surrounding such agreements is muddled and often contradictory. Just ask Uber: in 2018, the United States Court of Appeals for the Second Circuit held that the arbitration provisions in its Terms and Conditions were binding on Meyer.[5] The next year, the First Circuit held that notice of assent to Uber's terms and conditions was insufficiently "conspicuous" to make the terms enforceable against Cullinane.[6] These conflicting decisions are far from ideal for Uber and other companies that are left to guess when the terms of their contracts will be enforced, but the situation is arguably even worse for consumers. The current standards that courts apply have little relation to the reality of online contracting in the modern era.[7]

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1. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 55 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 70 (2d Cir. 2017).

2. *Cullinane*, 893 F.3d at 57–58; *Meyer*, 868 F.3d at 71.

3. *Cullinane*, 893 F.3d at 59; *Meyer*, 868 F.3d at 71–72.

4. *See* 15 ARTHUR L. CORBIN & TIMOTHY MURRAY, CORBIN ON CONTRACTS § 83.5 (Matthew Bender & Co. rev. ed. 2019).

5. *Meyer*, 868 F.3d at 79–80.

6. *Cullinane*, 893 F.3d at 63–64.

7. *See generally* Cheryl B. Preston, "*Please Note: You Have Waived Everything": Can Notice Redeem Online Contracting?*, 64 AM. U. L. REV. 535 (2014) (arguing that the law of online contracts assumes behavior by consumers that is not only impracticable, but also counter-intuitive).

This note discusses the law surrounding the enforceability of mandatory arbitration provisions in online contracts and argues for the adoption of clear, policy-based rules that will either protect the expectations of businesses or the rights of vulnerable consumers. Part II of this note gives a brief history of American arbitration law.[8] Part III surveys the current state of the law of online contracting.[9] Part IV discusses *Cullinane v. Uber Techs, Inc.* and *Meyer v. Uber Techs, Inc.* (hereinafter "The Uber Cases"), wherein different courts came to different conclusions about essentially the same contract.[10] Part V discusses the difficulties and consequences that arise from such contradictions.[11] Finally, Part VI explores which new, or perhaps old, rules courts and legislatures can adopt to advance the arbitration policies they desire.[12]

II. HISTORICAL ENFORCEMENT OF ARBITRATION PROVISIONS

While arbitration has long been a part of contracting, the approach of Anglo-American courts has varied greatly over the years.[13] Modern arbitration law is a mix of federal statutory law and the case law interpreting it, as well as state common law.[14] This section will give a brief overview of the history of arbitration provisions in American contract law.

A. Common Law History

Early English courts held that arbitration contracts were contrary to public policy.[15] These courts considered arbitration a threat to their exercise of jurisdiction.[16] After the Revolution, American courts consistently followed the English rule, continuing into the twentieth century.[17] Courts often

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8. *See infra* Part II.
9. *See infra* Part III.
10. *See infra* Part IV.
11. *See infra* Part V.
12. *See infra* Part VI.
13. *See generally* CORBIN & MURRAY, *supra* note 4, § 83.5.
14. *See generally* Henry K. Strickland, *The Federal Arbitration Act's Interstate Commerce Requirement: What's Left for State Arbitration Law?*, 21 HOFSTRA L. REV. 385 (1992) (discussing the intersection of state and federal law in the arbitration context).
15. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995) (quoting Bernhart v. Polygraphic Co. of Am., Inc., 350 U.S. 198, 211 n.5 (1956)) ("The origins of [the rule against arbitration] apparently lie in 'ancient times,' when the English courts fought 'for extension of jurisdiction—all of them being opposed to anything that would altogether deprive them of jurisdiction.'").
16. *Id.*
17. *E.g.*, Meacham v. Jamestown, Franklin & Clearfield R.R. Co., 105 N.E. 653, 655 (N.Y. 1914) (holding that courts are not required to hold arbitration provisions as enforceable if they are "contrary to a declared policy of our courts."); Mead's Adm'x v. Owen, 74 A.

treated the rule against arbitration as a matter of precedent with little discussion of the reasoning behind it.[18]

By the early twentieth century, the consensus on arbitration had begun to unravel.[19] England led the way, passing the Arbitration Act of 1889, which abolished the common law rule against arbitration.[20] Some American courts also began to question the validity of the English rule.[21] However, most courts continued to follow the traditional rule and invalidate arbitration provisions.[22] As Judge Cardozo said, "It is true that some judges have expressed the belief that parties ought to be free to contract about such matters as they please. In this state the law has long been settled to the contrary."[23]

B. The Federal Arbitration Act

In 1925, Congress enacted the Federal Arbitration Act (FAA).[24] Congress believed that arbitration agreements should be enforceable and enacted a law to place such agreements "upon the same footing as other contracts, where [they] belong."[25] However, for years federal courts understood the legislative history of the FAA to suggest that Congress expected arbitration agreements to be employed primarily in cases where both parties to a contract were experienced merchants.[26] At the very least, these courts recog-

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1058, 1059–60 (1910) (holding that agreements to arbitrate were revocable by either party at any time before the publication of an award).

18. *See* U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007–08 (S.D.N.Y. 1915) ("Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon the antiquity of the rule, than upon its excellence or reason.").

19. *See, e.g.*, *id.* at 1007–08 (discussing criticisms that the English rule against arbitration agreements was arguably not rooted in sound policy, but ultimately applying it as a matter of precedent).

20. The Arbitration Act, 52 & 53 Vict. c. 49 (1889), *reprinted in* W. OUTRAM CREWE, LAW OF ARBITRATION; BEING THE ARBITRATION ACT, 1889, WITH NOTES OF STATUTES, RULES OF COURT, FORMS AND CASES, AND AN INDEX (1890).

21. *See U.S. Asphalt Ref. Co.*, 222 F. at 1007–08.

22. *E.g.*, *id.*; *Meacham*, 105 N.E. at 655; *Mead's Adm'x*, 74 A. at 1059–60.

23. *Meacham*, 105 N.E. at 656 (Cardozo, J., concurring).

24. Federal Arbitration Act, ch. 213, 68 P.L. 401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–307 (2020)); *see generally* CORBIN & MURRAY, *supra* note 4, § 83.5 (for historical background).

25. Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 1 (1924)).

26. *E.g.*, Craft v. Campbell Soup Co., 177 F.3d 1083, 1089 (9th Cir. 1998) ("[T]he legislative history demonstrates that the Act's purpose was solely to bind merchants who were involved in commercial dealings."); Local 205, United Elec., Radio and Mach. Workers v. Gen. Elec. Co., 233 F.2d 85, 99 (1st Cir. 1956) ("The whole tenor of [the committee reports and hearings], however, demonstrates that congressional action was being directed at that time solely toward the field of commercial arbitration."); *see also* Christopher R. Leslie, *Conspiracy to Arbitrate*, 96 N.C. L. REV. 381, 388 (2018).

nized that Congress likely did not anticipate the use of binding arbitration agreements involving consumers or employees.[27] Regardless of Congress's intent, the FAA would ultimately change the nature of arbitration throughout the country.

The FAA states that arbitration provisions in contracts "evidencing a transaction involving commerce" are "valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[28] "Commerce" is simply defined as follows:

> [C]ommerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.[29]

The federal courts initially interpreted the FAA narrowly and remained willing to consider the policy ramifications of arbitration in individual contexts.[30] For example, the Second Circuit held that antitrust cases that do not involve parties who "are willing to accept less certainty of legally correct adjustment" should not be sent to arbitration based on "the pervasive public interest in the enforcement of the antitrust laws."[31] This decision was well-regarded and was adopted by other circuits.[32] The Supreme Court also remained wary of arbitration in the decades following the FAA's passage.[33]

Since the 1980s, however, the Supreme Court has interpreted the FAA as having a very broad reach.[34] In *Southland Corp, v. Keating*, the Court held that the FAA is fully applicable in state courts to all contracts to which it applies and preempts any state arbitration law.[35] As a result of this decision and its progeny, federal courts' interpretations of the FAA now govern arbitration law as much or more than state contract law does.[36] In addition to the text of the FAA itself, a vast body of case law has developed that in-

27. *See* Leslie, *supra* note 26, at 388.
28. 9 U.S.C. § 2 (2018).
29. *Id.* § 1.
30. *See* Leslie, *supra* note 26, at 389.
31. Am. Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827–28 (2d Cir. 1968).
32. *See* Cobb v. Lewis, 488 F.2d 41 (5th Cir. 1974); Power Replacements, Inc. v. Air Preheater Co., 426 F.2d 980 (9th Cir. 1970).
33. *See* Wilko v. Swan, 346 U.S. 427, 435–38 (1953); *see also* Michael A. Helfand, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994, 3000–01 (2015).
34. *See generally* Strickland, *supra* note 14.
35. Southland Corp. v. Keating, 465 U.S. 1, 14 (1984).
36. Strickland, *supra* note 14, at 400.

forms the enforceability of arbitration provisions.[37] However, neither the Supreme Court nor lower federal courts have developed a comprehensive standard regarding the reach of the FAA's interstate commerce requirement, instead preferring to reach decisions on a case-by-case basis.[38] Regardless, where the FAA does apply, an arbitration agreement is presumptively valid and may be voided only on state law grounds that would apply to any contract,[39] such as a lack of mutual assent.[40]

III. MODERN INTERNET CONTRACTING

The advent of the internet and other consumer electronics has presented new issues to the old rules of contracting.[41] Courts have taken numerous, often conflicting, approaches and have devised several new terms to attempt to explain modern internet consumer contracts.[42] This section will attempt to untangle this area of the law.

A. The Development of "Wrap" Contracting

Courts often divide internet contracts into various categories, with two of the most common being browsewrap and clickwrap.[43] In a browsewrap contract, a website will contain a notice that use of the website constitutes assent to the terms of service, which will usually be accessible through a hyperlink somewhere on the page.[44] In a clickwrap contract, a consumer assents to the terms of service by checking a box labeled "I agree" (or something similar), which is typically required in order to use the online service.[45] As in browsewrap, the terms are usually on another page, accessible through a hyperlink.[46]

Initially, most courts held that that clickwrap contracts were enforceable but browsewrap contracts were not, under the theory that requiring the consumer to physically click the checkbox gave clear notice of the terms,

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37. *See generally id.* at 397–400 for more information about modern federal arbitration jurisprudence.
38. *Id.* at 412.
39. 9 U.S.C. § 2.
40. *See* CORBIN & MURRAY, *supra* note 4, § 83.5A.
41. *Id.*
42. *See* Collin P. Marks, *Online Terms as In Terrorem Devices*, 78 MD. L. REV. 247, 253–58 (2019).
43. *E.g.*, Temple v. Best Rate Holdings LLC, 360 F. Supp. 3d 1289, 1302 (M.D. Fla. 2018).
44. *Id.*
45. *Id.*
46. *Id.*

while merely browsing a website did not.[47] However, many online contracts exist between the classical definitions of clickwrap and browsewrap.[48] For example, the apps in the Uber cases provided that signing up for the service constituted assent to the terms.[49] Unlike in a pure browsewrap case, the consumer does not assent merely by viewing the sign-up screen, but unlike a pure clickwrap case, there is no check box showing clear agreement.[50]

Some courts and scholars have created various other categorizations.[51] Terms used for such contracts include "sign-in wrap" and "scrollwrap."[52] Others refer to everything in between clickwrap and browsewrap as "hybridwrap" or simply "hybrid agreements."[53] The variety of terminology shows that the use of simple classifications is no longer sufficient to resolve issues of enforceability.[54] While familiarity with the history of browsewrap and clickwrap classifications is helpful in understanding the development of the law, this note will generally use the generic term "online contracting."

B. The Conspicuousness Standard

The primary issue in internet contracts today is mutual assent.[55] Because the terms are contained on another page, it is easy for consumers to agree without ever reading the contract.[56] However, it is a long-established rule of contract law that failure to read a contract does not void one's obligations under it.[57] Furthermore, internet contracts are an example of "contracts of adhesion," that is, contracts that are drafted entirely by one party and offered to the other on a "take it or leave it" basis.[58]

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47. Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumers' Reality*, 18 N.C. J.L. & TECH. ON. 180, 187 (2016).

48. *See* Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398–401 (E.D.N.Y. 2015) (discussing "scrollwrap" and "sign-in wrap" contracts).

49. Cullinane v. Uber Techs, Inc., 893 F. 3d 53, 61 n.10 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 75–76 (2d Cir. 2017).

50. *Meyer*, 868 F.3d 75 ("Of course, there are infinite ways to design a webpage or smartphone application, and not all interfaces fit neatly into the clickwrap and browsewrap categories."); *see also* Meinel, *supra* note 47, at 187.

51. *See, e.g.*, *Berkson*, 97 F. Supp. 3d at 398–401; *see also* Marks, *supra* note 42, at 253.

52. *E.g.*, *Berkson*, 97 F. Supp. 3d at 398–401.

53. *See, e.g.*, Temple v. Best Rate Holdings, LLC, 360 F. Supp. 3d 1289, 1303–04 (M.D. Fla. 2018); *see also* Meinel, *supra* note 47, at 182–83.

54. *Id.*

55. CORBIN & MURRAY, *supra* note 4, § 83.5A.

56. *Id.*

57. *E.g.*, Veeder v. NC Mach. Co., 720 F. Supp. 847, 852 (W.D. Wash. 1989) ("Failure to read contract terms when not brought about by fraud does not excuse the signing party from compliance with those terms.").

58. *See* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 232–33 (2d Cir. 2016); *see also* Klos v. Lotnicze, 133 F.3d 164, 168 (2nd Cir. 1997) ([c]ontracts of adhesion are standard form contracts offered . . . on a take-it-or-leave-it basis, with no opportunity to change the

Courts typically begin the analysis by asking whether the consumer had sufficient notice of the terms.[59] This is decided by determining whether the notice on the website or app is conspicuous enough to put a reasonable person on notice of the existence of the terms.[60] However, this is a legal fiction; the vast majority of consumers will never read the terms of service, and there is little evidence that the sorts of terms courts consider "conspicuous" are necessarily more likely to be read.[61]

There is no exhaustive list of factors to look at when examining the enforceability of internet contracts.[62] True clickwrap agreements where the consumer is required to check a box indicating agreement to the terms are still usually held to be enforceable.[63] However, that does not mean that the absence of such a box, by itself, makes a contract unenforceable.[64]

One case in which terms may be held to be inconspicuous is when the link is located lower on the page than the button that is said to manifest assent.[65] In such cases, a consumer can easily "agree" to the contract without ever seeing the link to the terms and conditions.[66] Courts also examine factors like size, font and color of the hyperlink.[67]

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contract's terms.") (quoting Avail, Inc. v. Rider Sys., Inc., 913 F. Supp. 826, 831 (S.D.N.Y. 1996).

59. Ty Tasker & Darren Pakcyk, *Cyber-Surfing on the High Seas of Legalese: Law and Technology of Internet Agreements*, 18 ALB. L. J. SCI. & TECH. 79, 90–91 (2008).

60. Specht v. Netscape Commc'n Corp., 306 F.3d 17, 36 (2d Cir. 2002) ("Reasonably conspicuous notice of the existence of contract terms . . . [is] essential if electronic bargaining is to have integrity and credibility.").

61. Preston, *supra* note 7, at 552.

62. CORBIN & MURRAY, *supra* note 4, § 83.5A.

63. *See, e.g.*, Klebba v. Netgear, Inc., No. 1:18-CV-438-RP, 2019 U.S. Dist. LEXIS 17833, at *12 (W.D. Tex. Feb. 5, 2019) ("Klebba formed an agreement to arbitrate when he checked the checkbox next to the words 'I agree to the Terms of Service.'"); Holl v. United Parcel Serv., Case No. 16-cv-05856-HSG, 2017 U.S. Dist. LEXIS 153317, at *11–12 (N.D. Cal. Sept. 18, 2017) (holding a clickwrap agreement enforceable even while acknowledging that UPS "did not make it particularly easy for users to access the . . . Terms and Conditions of Service.").

64. *See, e.g.*, DeVries v. Experian Info. Sols., Inc., Case No. 16-cv-02953-WHO, 2017 U.S. Dist. LEXIS 26471, at *14–15 (N.D. Cal. Feb. 24, 2017) (holding an arbitration agreement enforceable where notice of Terms and Conditions was located directly above the confirmation button, but the user was not required to click a check box).

65. *See, e.g.*, *Specht*, 306 F.3d at 31–32 (holding that a link to terms of service that could only be seen by scrolling well past the download button was inconspicuous).

66. *Id.* at 39 ("[T]here is no reason to assume users will scroll down to subsequent screens simply because screens are there.").

67. *E.g.*, Bernardino v. Barnes & Noble Booksellers, Inc., No. 17-CV-04570 (LAK) (KHP), 2017 U.S. Dist. LEXIS 192814, at *26–27 (S.D.N.Y. Nov. 20, 2017) ("The language . . . was clear and obvious by virtue of its black sans-serif font contrasted against a white background, with blue font indicating the hyperlink . . . [which was] also contrasted against a white background.").

Another way terms may be inconspicuous is if the page is too "cluttered."[68] If a page contains (for example) many different hyperlinks, then any given link, such as to the terms and conditions, becomes inconspicuous.[69] The leading case on this issue is *Nicosia v. Amazon.com, Inc.*[70]

Nicosia involved a typical mandatory arbitration provision that read, "Any dispute or claim relating in any way to your use of any Amazon Service, or to any products or services sold or distributed by Amazon or through Amazon.com will be resolved by binding arbitration, rather than in court . . . ."[71] Amazon moved to dismiss based on this arbitration provision.[72] The court was left to decide whether Nicosia had reasonable notice of the terms.[73]

The court noted that the link to the terms was set out at the top of the order page, which would generally support the enforceability of the terms.[74] However, the court held that "[p]roximity to the top of a webpage does not necessarily make something more likely to be read in the context of an elaborate webpage design."[75] The court reasoned that there were so many links and buttons on the page that no single one could be conspicuous.[76] For example, the page also contained multiple links advertising other Amazon products and services, as well as links to a customer service page and Amazon's return policy.[77] The court further noted that Amazon had not used a standard clickwrap agreement where the customer would be required to check a box indicating agreement.[78] Ultimately, the court held that the page was sufficiently cluttered as to create a jury question of whether Nicosia had notice of the terms.[79] *Nicosia* exemplifies the law in force at the time of the Uber cases.

IV. THE UBER CASES

Nicosia did not settle the law, and as a result more cases have arisen regarding the conspicuousness of terms in online contracts.[80] The Uber cases

68. *See* Nicosia v. Amazon.com, Inc., 834 F.3d 220, 235–38 (2d Cir. 2016).
69. *Id.* at 237.
70. *Id.*; *see generally* Meinel, *supra* note 47, for more discussion of this case.
71. *Nicosia*, 834 F.3d at 227.
72. *Id.*
73. *Id.* at 232.
74. *Id.* at 236.
75. *Id.* at 237.
76. *Id.*
77. *Nicosia*, 834 F.3d at 236–37.
78. *Id.* at 237–38.
79. *Id.* at 238.
80. *See generally, e.g.*, Meyer v. Uber Techs, Inc., 868 F.3d 66; Cullinane v. Uber Techs, Inc., 893 F. 3d 53.

provide an interesting case study because both cases involved the same company and were decided within two years of each other, yet came to different outcomes. Part IV will discuss the background of these cases and attempt to harmonize them.

A. *Meyer v. Uber Techs, Inc.*

In *Meyer*, a single plaintiff attempted to sue Uber for alleged price fixing and violation of antitrust statutes. Subsequently, Uber moved to compel arbitration.[81] The district court held that Meyer did not have reasonably conspicuous notice of the arbitration terms, and Uber appealed to the Second Circuit.[82] The court described the terms and conditions on Uber's app as follows:

> Below the input fields and buttons on the Payment Screen is black text advising users that "[b]y creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY." . . . The capitalized phrase, which is bright blue and underlined, was a hyperlink that, when clicked, took the user to a third screen containing a button that, in turn, when clicked, would then display the current version of both Uber's Terms of Service and Privacy Policy.[83]

The court also provided screenshots of the app in addenda.[84]

The appellate court reversed the judgment of the District Court, holding that the notice of the terms of service was reasonably conspicuous and that Meyer had unambiguously manifested assent.[85] According to the court, the screen was "uncluttered."[86] The notice of the terms of service was located directly beneath the button to create an account.[87] The entire screen was visible with no need to scroll further.[88] Though the text was small, the black text on the white background with a blue hyperlink made it stand out.[89] The court specifically distinguished this case from *Nicosia* on the grounds that there was significantly less information on the screen, and the notice of the terms was adjacent to the sign-up button.[90]

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81. *Meyer*, 868 F.3d at 70–71.
82. *Id.* at 70, 72.
83. *Id.* at 71.
84. *Id.* at 81–82, add. A, add. B.
85. *Id.* at 79–81.
86. *Id.* at 78.
87. *Meyer*, 868 F.3d at 78.
88. *Id.*
89. *Id.*
90. *Id.*

B. *Cullinane v. Uber Techs, Inc.*

In *Cullinane*, four named plaintiffs sought to represent a putative class of persons who had been incorrectly and unnecessarily charged surcharges when using Uber's app.[91] The District Court held the arbitration provision to be enforceable and dismissed the case; the plaintiffs appealed to the First Circuit.[92] The layout of Uber's app was similar to that described in *Meyer* with two major differences. First, the *Cullinane* app used a black background with white text instead of a white background with black text.[93] Second, the accept button was at the top right of the screen rather than in the center.[94] As in *Meyer*, the opinion provided screenshots of the app.[95]

The court held that the notice of the terms of service was "not reasonably communicated to the plaintiffs."[96] As in *Nicosia*, the court noted that this was not a traditional clickwrap contract where the consumer would have to check a box or otherwise clearly manifest agreement to continue.[97] The hyperlink was white, rather than the traditional blue, and not underlined.[98] The screen contained other links that looked similar to the terms of service link which cluttered the screen.[99] For example, the options to "scan your card" or "enter promo code" looked similar to the terms and conditions link.[100] Notably, such options were present in the *Meyer* app as well, but the court there did not consider them as significant.[101]

C. Can the Uber Cases be Harmonized?

The contradiction between the decisions in the Uber Cases evidences the uncertain and subjective nature of the current standards of notice in online contracting. However, it may be possible to synthesize a rule of law from these decisions, as there are some differences between the two cases that could allow a consistent reading.

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91. Cullinane v. Uber Techs, Inc., 893 F. 3d 53, 55–56 (1st Cir. 2018).
92. *Id.* at 55.
93. *Id.* at 57; *cf. Meyer*, 868 F.3d at 71.
94. *Cullinane*, 893 F.3d at 58; *cf. Meyer*, 868 F.3d at 71.
95. *Cullinane*, 893 F.3d at 57, 58.
96. *Id.* at 64.
97. *Id.* at 62.
98. *Id.* at 63.
99. *Id.* at 64.
100. *Id.* at 63.
101. Meyer v. Uber Techs, Inc., 868 F.3d 66, 81–82 (2d Cir. 2017) (*see* add. A and B).

1. The Difference in Jurisdiction

Contract law is state law, and the Uber Cases arose in different states; *Cullinane* was decided under Massachusetts law, while *Meyer* was a case from New York.[102] However, this is an unconvincing distinction. The general law of mutual assent in internet contracting is recognized in the Restatement of Contracts[103] and is substantially similar in most jurisdictions.[104] Furthermore, the descriptions of the laws in each case are very similar; both cases reference mutual assent, conspicuousness, and the reasonable-person test.[105] Finally, the FAA has created a heavy federal component to arbitration law.[106] Therefore, differences in jurisdiction cannot convincingly explain the disparate results.

2. The Differences in the Apps

The descriptions and images of the Uber app provided by the courts also show some differences. Most notably, the color of the apps is different. In *Meyer,* the background was white with black text and blue hyperlinks.[107] There was a large grey button labeled "NEXT" in the middle of each page; the text changed to "REGISTER" on the final page.[108] In *Cullinane*, by contrast, the background was black; the text was grey, and the hyperlinks were white.[109] The "NEXT" button appears at the top right-hand side of the screen and is faded until all required information has been entered on the page. On the final page the button reads "DONE."[110] Because of this, the "NEXT"/"DONE" button is farther away from the terms of service than it was in *Meyer*.

The reasons for the differences are unclear. It may be that Uber changed the design of its app in the time between the events leading to the cases. The named plaintiffs in *Cullinane* used the app between December

102. *Cullinane*, 893 F.3d at 60; *Meyer* 868 F.3d at 74.

103. RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981).

104. *See Meyer*, 868 F.3d at 74 (noting that the question of whether California or New York law governed was largely irrelevant because California applies "substantially similar" rules concerning mutual assent as New York).

105. *Compare id.* at 74–75 ("Whether a reasonably prudent user would be on inquiry notice [of the terms] turns on the '[c]larity and conspicuousness of the arbitration terms.'" (quoting Specht v. Netscape Commc'n Corp., 306 F.3d 17, 30 (2nd Cir. 2002))), *with Cullinane*, 893 F.3d at 62 ("'[C]onspicuous' means that a terms [sic] is 'so written, displayed or presented that a reasonable person against which it is to operate ought to have noticed it." (quoting MASS. GEN. LAWS ch. 106 § 1-201(b)(10))).

106. Strickland, *supra* note 14, at 400.

107. *Meyer*, 868 F.3d at 78; *see also id.* at 81–82 (providing screenshots).

108. *Id.* at 70–71.

109. *Cullinane*, 893 F.3d at 57–59 (including screenshots).

110. *Id.*

31, 2012, and January 10, 2014.[111] It appears that every named plaintiff encountered the same interface. Meyer used the app on October 18, 2014, more than nine months after the last of the *Cullinane* plaintiffs.[112] The difference might also be explained by a difference in operating systems. *Cullinane* involved the iPhone app, whereas *Meyer* involved the Android app.[113]

It is possible to distinguish the cases based on the design differences in the app. The *Meyer* court singled out the fact that the hyperlink was blue in its finding that the terms of service were conspicuous.[114] Traditionally, the proximity of the confirmation button to the terms of service link is a factor that courts consider.[115] And, in fact, the *Meyer* court noted this too.[116]

However, this distinction is ultimately unsatisfactory. First, the *Cullinane* court was not overly concerned with the font color or proximity of the buttons.[117] Rather, the court based its decision on the fact that the app had so many "conspicuous" elements that each one was easily lost in the mess.[118] The court also emphasized the fact that Uber did not use a traditional clickwrap setup with a checkbox to indicate assent.[119] However, the app in *Meyer* was not a traditional clickwrap setup either.[120] Second, to give such distinctions the force of law merely reinforces the absurdity of the conspicuousness doctrine as applied. In short, there is no satisfying way to read the two cases harmoniously without producing absurd results.

V. PROBLEMS OF CURRENT ARBITRATION LAW

The Uber Cases demonstrate the lack of clarity in this area of law. As tempting as it is to find a harmonized reading of the cases, doing so provides little clarity to the law. Before discussing solutions, however, it is necessary to clarify the difficulties arising from the current legal doctrine as exemplified in the Uber Cases.

111. *Id.* at 55–56.
112. *Meyer*, 868 F.3d at 70.
113. *Cullinane*, 893 F.3d at 55; *Meyer*, 868 F.3d at 70.
114. *Id.* at 78.
115. *See* Specht v. Netscape Commc'n Corp., 306 F.3d 17, 31–32 (2d Cir. 2002).
116. *Meyer*, 868 F.3d at 78.
117. *See Cullinane* 893 F.3d at 63–64.
118. *Id.* at 64.
119. *Id.* at 62.
120. *Meyer*, 868 F.3d at 76 ("In the interface at issue in this case, a putative user is not required to assent explicitly to the contract terms").

A. The Requirement of Conspicuousness Fails to Advance the Interests of Either Party.

Notice is a legal fiction.[121] It is well understood and accepted that consumers do not usually read the "contracts" to which the law decides they agree.[122] Moreover, the corporations that write such contracts do not expect or want the consumers to read the terms.[123] Thus, the traditional rule that a person assumes the risk of a contract he does not read does not reflect the reality of the twenty-first century.

As previously discussed, consumers have no opportunity to negotiate or change the terms of these contracts.[124] Many of these contracts are now required to access services that are necessary to function in modern society. Most people require at least phone and internet service,[125] and social networking is becoming a larger and larger part of modern life.[126] The sheer number of contracts to which people "assent" makes reading each one functionally impossible.[127] Additionally, most online contracts are intentionally written to be near-impossible for the average consumer to comprehend.[128] Finally, consumers are punished for actually reading contracts; when the consumer has actual notice, the court is more likely to enforce the contract.[129]

The volume of internet contracts in itself contradicts the idea of constructive notice. When the terms-and-conditions link appears on every web-

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121. *See* Michael L. Rustad & Maria Vittoria Onufrio, *Reconceptualizing Terms of Use for a Globalized Knowledge Economy*, 14 U. PA. J. BUS. L. 1005, 1098 (2012).

122. *See* Amy J. Schmitz, *Legislating in the Light: Considering Empirical Data in Crafting Arbitration Reforms*, 15 HARV. NEGOT. L. REV. 115, 134 (2010).

123. *See* Marks, *supra* note 42, at 259 (noting that drafters intentionally use less conspicuous terms to aid in making more efficient sales).

124. *See, e.g.*, Cicle v. Chase Bank USA, 583 F.3d 549, 555 (8th Cir. 2009) ("[I]f individual negotiation were required to make [consumer contracts] enforceable, much of commerce would screech to a halt.").

125. In 2019, 96% of Americans owned a cellular phone of some kind, and 81% owned a smartphone. *Mobile Fact Sheet*, PEW RES. CTR.: INTERNET & TECH. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile [https://web.archive.org/web/20200131012854/https://www.pewresearch.org/internet/fact-sheet/mobile/]. Around 90% of American adults use the internet. *Internet/Broadband Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/internet-broadband [https://web.archive.org/web/20200212222417/https://www.pewresearch.org/internet/fact-sheet/internet-broadband/].

126. In 2019 around 72% of Americans used some type of social media. *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media [https://web.archive.org/web/20200210180143/https://www.pewresearch.org/internet/fact-sheet/social-media/].

127. Preston, *supra* note 7, at 553.

128. *Id.*

129. *Id.* at 570.

site and in every app, it naturally ceases to hold any meaning. Yet courts continue to hold that this generic link, which appears so constantly that it has naturally faded into the background of consumer experience, can be so "conspicuous," that a "reasonable person" would have read the terms.[130] The natural consequence is that almost no one is reasonable by these standards because no one actually reads these contracts.[131] The result is that the hypothetical reasonable person has become totally divorced from the experiences of actual consumers.

B. Consequences of Enforcement and Non-Enforcement of Arbitration Provisions

Because most arbitration proceedings are private and governed by non-disclosure agreements, it is difficult to know for sure whether arbitration favors one side or the other.[132] However, it is at least reasonable to draw the inference that, because corporations consistently draft contracts with such provisions, they must see them as beneficial to their interests.[133] There are several reasons for this. First, arbitration decisions are unreviewable.[134] While this may seem at first glance to be an equal advantage to either side, it actually provides an advantage to defendants.[135] A single motion to dismiss or motion for summary judgment may end the case, leaving the plaintiff with no recourse.[136] Limitations on discovery, as compared to litigation, also tends to favor defendants.[137] Corporations also make use of relief-limiting terms that arbitrators may be more likely to enforce than courts.[138]

There are also severe risks of bias among arbitrators.[139] Arbitrators are typically chosen by the corporate defendants and are usually drawn from the same industry.[140] Additionally, a corporate defendant will interact frequently with arbitrators across numerous controversies, while a given plaintiff will

130. *See, e.g.*, Meyer v. Uber Techs, Inc., 868 F.3d 66, 79 (2d Cir. 2017).
131. Preston, *supra* note 7, at 540.
132. *See* Schmitz, *supra* note 122, at 138–39.
133. Leslie, *supra* note 26, at 392–93.
134. *Id.* at 395 ("Although judicial review of arbitration decisions is theoretically possible, it is functionally non-existent.")
135. *Id.* at 394–95.
136. *Id.*
137. *Id.* at 392–93.
138. *Id.* at 395–400.
139. Mark A Lemley & Christopher R. Leslie, *Antitrust Arbitration and Merger Approval*, 110 NW. U. L. REV. 1, 17–20 (2015).
140. *Id.* at 17–18.

likely go to arbitration only once.[141] Unsurprisingly, many consumers assume that arbitrators will be biased against them.[142]

There are, of course, arguments in favor of arbitration as well. In theory, arbitration is faster and less expensive for both parties.[143] The supposed efficiency of arbitration has been cited by the Supreme Court as a justification for the federal policy favoring arbitration.[144] Additionally, while the data is mixed, some studies have cast doubt on the assumption that arbitration necessarily leads to adverse outcomes for consumers.[145]

However, there are also reasons to be skeptical of these arguments. Notably, studies have shown that businesses do not use arbitration in all of their dealings; rather, they favor arbitration specifically in disputes with customers.[146] Businesses are much less likely to use arbitration provisions when contracting with other businesses.[147] This casts doubt on the theory that arbitration is favored for its efficiency rather than its outcomes.[148] And while some studies may show favorable arbitration outcomes for consumers, others contradict that finding.[149]

Furthermore, even if arbitration is not in itself something to be avoided, the current law on enforceability of such provisions does no services to the businesses that draft the contracts. Businesses are left in the position of guessing what user interface designs will be upheld by courts and which will destroy their contracts. Even if we reconcile the Uber cases, the result leaves companies with no useful information to predict how courts will rule. Is the rule of the cases that all hyperlinks must be blue?[150] That white backgrounds make enforceable contracts while black backgrounds do not?[151] More likely, the Uber cases stand for the proposition that whether an internet contract is enforceable will vary unpredictably from court to court and case to case.

Businesses, like consumers, do not choose their contracting behavior based on an analysis of applicable legal theories. A company that wished to ensure enforceable contracts could likely achieve such a result by using true

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141. *Id.* at 18–20.
142. Schmitz, *supra* note 122, at 142–43.
143. Lemley & Leslie, *supra* note 139, at 5.
144. Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 633 (1985) ("[I]t is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes.").
145. Schmitz, *supra* note 122, at 139–40.
146. *Id.* at 138.
147. *Id.*
148. *Id.*
149. *Id.* at 139–43.
150. *See* Meyer v. Uber Techs, Inc., 868 F.3d 66, 78 (2d Cir, 2017).
151. *Compare id.* at 71, *with* Cullinane v. Uber Techs, Inc., 893 F.3d 53, 58 (1st Cir. 2018).

clickwrap agreements in all cases.[152] Courts consistently uphold online contracts where the consumer is required to click on a box manifesting assent before proceeding.[153] The fact that Uber, Amazon, and other companies do not do so shows that the enforceability of contracts is not the primary motivation in their design.[154] Companies wish to make transactions with consumers fast and efficient.[155] However, in continuing to apply unpredictable standards of notice, courts are failing to adapt to the way companies are doing business in the modern age. Clearly, the requirement of conspicuousness serves little function in the modern digital economy.

VI. POTENTIAL SOLUTIONS

A. Bite-Size Notice

The FAA limits solutions to arbitration provisions.[156] Even if a blanket refusal to enforce arbitration were desirable, the FAA forbids it.[157] Congress and the Supreme Court have decided that arbitration provisions should be enforceable.[158]

Professor Cheryl B. Preston has suggested requiring what she terms "bite-sized notice," a small chart covering the primary provisions of a contract, to be prominently displayed before a consumer has the opportunity to accept.[159] This proposal solves some of the problems with the fiction of notice. It is likely that more consumers would actually read a small chart rather than the long, legalistic terms of service most websites currently use. Charts do a much better job of communicating the essence of the contract to a consumer. On the whole, such a proposal is much closer to the classical idea of mutual assent than the current regime.

However, the logistics of this proposal are difficult. While Professor Preston provides an example of what might be sufficient, to impose such rigid and specific requirements seems well outside the traditional role of the judiciary. Such a rule might be advisable as legislation, but until such laws may be passed, it is of limited utility to the courts deciding these cases. Common law rules require more flexibility and adaptability.

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152. Marks, *supra* note 42, at 258.
153. Meinel, *supra* note 47, at 187.
154. Marks, *supra* note 42, at 258.
155. *Id.*
156. *See* 9 U.S.C. § 2 (2018).
157. *Id.*
158. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984) ("In creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.").
159. Preston, *supra* note 7, at 580–82.

While a requirement of a specific form of notice is likely too rigid for enforcement in the absence of statutory requirements, courts might require more specific language in the assent to the terms of service. The *Cullinane* court placed great weight on the lack of a checkbox that a customer was required to click indicating assent to the terms of service.[160] As discussed, such a checkbox probably does little to ensure that consumers actually read or understand the terms of the contract.[161] However, it is likely that the use of a checkbox does alert consumers to the existence of the terms.[162] Instead of generic language indicating assent to the terms of service, courts could require the text accompanying the checkbox to explicitly give notice of the arbitration provision.

It is hard to say whether such notice would change consumer behavior in any meaningful way. Empirical data on consumer behavior and the effects of contract provisions is mixed.[163] Much of it relies on the self-reporting of consumers regarding their own behavior.[164] This is not necessarily accurate for several reasons. It may well be that consumers intentionally over-report how much contract provisions influence their behavior.[165] It also may be that many people have difficulty accurately judging their behavior retrospectively.[166]

Still, even with these caveats, the data indicates that consumers do, at least sometimes, use contract provisions to inform their decisions when they are aware of them.[167] Therefore, rules calculated to provide actual, rather than constructive, notice, might be good for consumers. Conversely, clear and predictable rules benefit companies by promoting consistency.

B. Presumption Against Assent

Professor Matt Meinel has suggested that courts apply a rebuttable presumption against assent in online contract cases.[168] Professor Meinel proposes that courts should presume both that a consumer had no notice of the terms of the contract and that consumers had no notice that their conduct would manifest assent to the contract.[169] According to Professor Meinel,

160. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 62 (1st Cir. 2018).
161. Schmitz, *supra* note 122, at 136.
162. *See Cullinane*, 893 F.3d at 62.
163. Amy J. Schmitz, *Pizza Box Contracts: True Tales of Consumer Contracting Culture*, 45 WAKE FOREST L. REV 863, 888 (2010).
164. *See id.* at 887.
165. *Id.*
166. *Id.*
167. *Id.*
168. Meinel, *supra* note 47, at 203.
169. *Id.*

such a presumption would be closer to the real experiences of consumers than the current law.[170]

While Professor Meinel aptly identifies many of the problems with the modern online contracting doctrine, his solution hews too closely to the status quo. It may well be that a rebuttable presumption would merely be rebutted by the same evidence that is currently used to show conspicuousness. Indeed, Professor Meinel suggests conspicuousness as a factor in rebutting the presumption.[171] Professor Meinel goes on to suggest that the defendant be required to show "evidence of clear and parallel wording between the written notice and the action taken."[172] However, many online contracts already do this—in both of the Uber cases, the notice of the terms provided that creating an account would constitute assent.[173] Thus, this requirement would not solve the problem.

C. Making Consumer Contracts Comprehensible

One of the most difficult issues in consumer contracts is the fact that most contracts are written in a way that is difficult for the average consumer to understand.[174] Ideally, courts should require that notice (if not the contract terms themselves) be in plain language which a consumer of average education might readily understand. The obvious difficulty here is that such a requirement would need to be adjudicated by judges with advanced degrees and extensive experience in the law. No doubt at least some of the problem with overly complex contracts is the result of lawyers writing contracts for judges, rather than for consumers.

But despite the obvious irony, it should be possible for a judge to apply such a standard. These issues go beyond arbitration agreements and internet contracting. The problem of consumer contracts being analyzed by highly educated judges exists throughout the field of consumer contracting.[175] Judges must account for this difficulty in order to make fair and just decisions for consumers. The current rules of constructive notice do almost nothing to account for the ability of a consumer to comprehend the contract terms.[176]

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170. *Id.* at 202–03.
171. *Id.* at 203–04.
172. *Id.* at 205.
173. Cullinane v. Uber Techs, Inc., 893 F.3d 53, 58 (1st Cir. 2018); Meyer v. Uber Techs, Inc., 868 F.3d 66, 80 (2d Cir. 2017).
174. Preston, *supra* note 7, at 553.
175. *See id.* at 546.
176. *See supra* Part V.A.

D. Objective or Subjective?

Another question raised by this issue is that of objective and subjective standards. Mutual assent has traditionally been based on an objective standard.[177] Objective standards are more predictable and provide consistency.[178] An objective standard of a reasonable consumer of average education would therefore have certain advantages. First, this standard would allow for easier development of common law, as every case would apply the same standard. A clear law provides benefits to both corporations and consumers. Both parties to a contract benefit from some predictability. On the other hand, a subjective standard could provide extra protection for some consumers. Applying a standard based on an average education level risks leaving behind those who fall below the average level.

On balance, however, an objective standard is the only workable metric. Trying to apply the law on a case-by-case basis would destroy any chance of predictability and consistency in the application of the law. Furthermore, safeguards already exist in the law for those who would fall below the level of the objective standard. For example, the doctrine of unconscionability considers a party's education level, in addition to other similar factors.[179] Therefore, even if a person were held to have manifested assent under an objective standard, a contract provision might still be held unconscionable in appropriate situations.

E. Putting it Together

When confronted with an online consumer contract of adhesion, courts should adopt the following analysis. First, the court should determine whether the app provided express notice of the arbitration terms on the relevant page. The fiction that a hyperlink to unspecified terms and services is sufficient should be abandoned. Second, the court should ensure that the app or page requires the consumer to positively manifest assent. A traditional clickwrap agreement with a clickable checkbox would suffice here. However, it is not the only possibility.

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177. *E.g.*, Kolodziej v. Mason, 774 F.3d 736, 741 (11th Cir. 2014) ("We use 'an objective test . . . to determine whether a contract is enforceable.'" (quoting Robbie v. City of Miami, 469 So. 2d 1384, 1385 (Fla. 1985))).

178. *E.g.*, OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214, 1221 (D. Haw. 2003) ("[C]ourts should apply an objective standard, which ensures predictability in contracting.").

179. *E.g.*, Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC, 832 F. Supp. 194, 201 (E.D.N.Y. 2010) (explaining that the factors of unconscionability include "the experience and education of the party claiming unconscionability.").

For example, an app might have a page dedicated to the terms that customers are required to click through. However, this page should be only for the purpose of giving the consumer notice and the opportunity to manifest assent. It should not be text elsewhere on a page that has another primary function. Finally, the court should ask whether the notice was written in such a way that a reasonable person of average education could have understood it.

VII. CONCLUSION

As the internet becomes more integrated into our daily lives, the process of contracting will continue to change. New circumstances and challenges will continue to arise. The proposed analysis laid out above will hardly solve every problem faced by internet consumers. However, it is clear that the current state of internet contracting requires reformation. The historical rules of arbitration and mutual assent developed in circumstances that were markedly different from the modern information economy.[180] The rules implemented by courts produce contradictory and unpredictable results.[181] Furthermore, they do not reflect the realities of modern consumers or businesses.[182] Courts should therefore require a showing that an online contract provided express notice of the arbitration provisions on the same page where acceptance was manifested, that the terms were written in language that the reasonable consumer of average education and intelligence would understand, and that the consumer manifested affirmative assent to the contract.[183] The proposed analysis laid out above will, at least, provide a step towards a new body of contract law adapted to the needs of today.

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180. *See supra* Parts II–III.
181. *See supra* Part IV.
182. *See supra* Part V.
183. *See supra* Part VI.

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