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Online Disinhibited Contracts

Wayne R. Barnes

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ABSTRACT

There have been at least two dominant forces at work in the realm of consumer contracting over the past several decades. One has been the rise and domination of the standard form contract (whereby merchants contract with consumers via the use of standardized, boilerplate terms and conditions that consumers do not read or understand). The second force has been the rise of e-commerce and the purchase of goods and services via websites and other online platforms, and the use of "wrap" formation methodology (whereby merchants obtain consumer assent to the online terms and conditions via the consumer's informal click, scroll, or browse of the merchant's website through the use of "browsewrap," "clickwrap," and similar mechanisms). Moreover, it is apparent that most retail merchants impose numerous favorable terms in their online terms and conditions, but do not impose any terms on their in-person, or "offline," customers that purchase at their brick-and-mortar locations. Why? This Article utilizes John Suler's Online Disinhibition Effect to potentially explain this behavior. The Online Disinhibition Effect describes the phenomenon that people are less restrained in what they say and do online than when they are in the face-to-face world. We see this in the way people interact on social media—in messaging each other, and even in email. People are emboldened to act in the online context because the Internet lacks the traditional social checks that constrain in-person social interaction. Although Suler focused his observations on individuals' social activity online, this Article seeks to use them to partially explain consumers' and merchants' contract activity—that is, their ready and uninhibited willingness to enter into, and impose, online terms and conditions. Looking at Suler's factors such as dissociative anonymity, invisibility, and asynchronicity, the fact that no humans tend to interact or react to one another in the online formation process generally reduces any opportunity for inhibitions to the terms

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to be imposed. Given that merchants are even less inhibited in imposing robust and favorable terms in the online context than they are in the offline brick-and-mortar context, courts should give particular care when analyzing the fairness of such terms, whether under principles of unconscionability or otherwise.

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I. INTRODUCTION

There have been at least two major forces at work in the realm of consumer contracting for some period of time. One of those forces—at work for the better part of a century—is the standard form contract. Since at least 1917, when Nathan Isaacs published his article, *The Standardizing of Contracts,* in the *Yale Law Journal*, scholars and commentators have exhaustively observed the rise of the usage of the standard form contract by merchants in their dealings with consumers.[1] The paradigm of standard form contracting is well

1. Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917). In a previous article, I collected a sampling of articles treating standard form contracts throughout the 20th century. *See* Wayne Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 228 n.1 (2007) (citing Isaacs, *supra*) [hereinafter Barnes, *Toward a Fairer Model*]; Karl Llewellyn, *Book Reviews*, 52 HARV. L. REV. 700 (1939) (reviewing O. Prausnitz's THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW (Sweet & Maxwell 1937); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529 (1971) [hereinafter Slawson, *Standard Form Contracts*]; John D. Calamari, *Duty to Read—A Changing Concept*, 43 FORDHAM L. REV. 341 (1974); John E. Murray, Jr., *The Parol Evidence Process and Standardized Agreements Under the* Restatement (Second) of Contracts, 123 U. PA. L. REV. 1342 (1975); John E. Murray, Jr., *The Standardized Agreement Phenomena in the* Restatement (Second) of Contracts, 67 CORNELL L. REV. 735 (1981); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173 (1983); W. David Slawson, *The New Meaning of Contract: The Transformation of Contracts Law by Standard Forms*, 46 U. PITT. L. REV. 21 (1984) [hereinafter Slawson, *New Meaning*]; Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263 (1992); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211 (1995); James J. White, *Form Contracts Under Revised Article 2*, 75 WASH. U. L. Q. 315 (1997); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429 (2002); Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627 (2002); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconsionability*, 70 U. CHI. L. REV. 1203 (2003) [hereinafter Korobkin, *Bounded Rationality*]. *See generally "Boilerplate": Foundations of Market Contracts Symposium*, 104 MICH. L. REV. 821 (2006) (including articles by Omri Ben-Shahar, Lucian A. Bebchuk, Richard A. Posner, Robert A. Hillman, Jason Scott Johnston, Ronald J. Mann, Douglas G. Baird, James J. White, David Gilo, Ariel Porat, Robert B. Ahdieh, Kevin E. Davis, Michelle E. Boardman, Stephen J. Choi, G. Mitu Gulati, Henry E. Smith, Margaret Jane Radin, and Todd D. Rakoff).

Since the time I publishinged my 2007 article, of course, the trend has steadily continued. *See, e.g.*, Daniel Schwarcz*, The Role of Courts in the Evolution of Standard Form Contracts: An Insurance Case Study*, 46 B.Y.U. L. REV. 471, 479 (2020); Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 1–2 (2014); Steven W. Feldman, *Mutual Assent, Normative Degradation, and Mass Market Standard Form Contracts—*

known and has long been in use primarily as a matter of operational efficiency, supporting high volumes of largely identical transactions with consumers. Merchants routinely employ a number of standard, identical "boilerplate" terms in their contracts because the transactions are generally the exchange of goods or services for money and the consumer is mostly expected to assent to the contract terms on a "take-it-or-leave-it" basis (i.e., adhesion contract) and indicate their consent by signing (or, if online, browsing or clicking).[2] Standard form contracts, once adopted by merchants, quickly became the norm and have long been responsible for virtually all contracts entered into by merchants and consumers alike.[3]

A second major force in the realm of consumer contracting has been the rise of the internet generally, and more specifically, online consumer contracting. The amount of consumer commerce that is conducted online has grown steadily throughout the world.[4] Particularly in the United States, it has become a dominant way in which goods and services are purchased.[5] Online

A Two-Part Critique of Boilerplate: The Fine Print, Vanishing Rights and the Rule of Law *(Part I)*, 62 CLEV. ST. L. REV. 373, 377 (2014); Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 241 (2013); Russell Korobkin, *The* Borat *Problem in Negotiation: Fraud, Assent, and the Behavioral Law and Economics of Standard Form Contracts*, 101 CALIF. L. REV. 51, 54 (2013); Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 327–28 (2010); Nishanth V. Chari, *Disciplining Standard Form Contract Terms Through Online Information Flows: An Empirical Study*, 85 N.Y.U. L. REV. 1618, 1618–19 (2010); Wayne Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, 112 W. VA. L. REV. 839, 839 (2010) [hereinafter Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*]; Shmuel I. Becher & Esther Unger-Aviram, *The Law of Standard Form Contracts: Misguided Intuitions and Suggestions for Reconstruction*, 8 DEPAUL BUS. & COM. L.J. 199, 201 (2010); David Horton, *Flipping the Script:* Contra Proferentem *and Standard Form Contracts*, 80 U. COLO. L. REV. 431, 431 (2009).

2. *See* Rakoff, *supra* note 1, at 1177 (describing seven characteristics of a model "contract of adhesion").

3. *See* Slawson, *Standard Form Contracts*, *supra* note 1, at 529 ("Standard form contracts probably account for more than ninety-nine percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day."). Slawson's remarks were made in a 1971 article—doubtless the truth of his observations has only increased with time and the advent of online contracting. *See id.* at 529.

4. Wayne Barnes, *The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law After the Consumer Review Fairness Act*, 53 GA. L. REV. 549, 556 (2019) (citing *Digital Buyer Penetration Worldwide from 2016 to 2021*, STATISTICA, https://www.statista.com/statistics/261676/digital-buyer-penetration-worldwide/ (last visited Sept. 13, 2023)).

5. *Id.* at 557 (citing Leanna Kelly, *How Many People Shop Online?*, TINUITI (May 25, 2017), http://www.cpcstrategy.com/blog/2017/05/ecommerce-statistics-infographic/).

retail commerce in the United States now measures over $100 billion per quarter.[6] When merchants began to conduct business with consumers online, they engaged in a series of evolutionary efforts to appropriate apparent manifestations of assent to the contract terms from the consumer.[7] Whereas a physical signature on the "dotted line" has long been the paradigmatic indication of such assent in the paper contracting world, merchants subsequently sought to engage online-equivalents of the consumer signature—these have come primarily in the form of devices known as "browsewrap," "clickwrap," "scrollwrap," and "sign-in wrap" agreements.[8]

Most of the literature discussing this state of affairs of online consumer contracting has focused on the *how* of this—that is, the implementation of form contract terms in an increasingly online context—and the inherent fairness, *vel non,* of binding consumers to a host of online boilerplate that they have likely not read nor would they understand if they had.[9] Generally, there is no mention of the *why* from the merchants' perspective. At least, not beyond the immediately obvious: merchants desire to take all legally enforceable steps through their contract terms to minimize risk and enhance profitability as best they can, both through the specific terms that they use (so as to eliminate things like possible warranty liability or liability for certain types of

6. U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 2nd Quarter 2023*, U.S. CENSUS BUREAU NEWS (Aug. 17, 2023, 10:00 AM), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

7. *See* Hillman & Rachlinski, *supra* note 1, at 432–33 ("Businesses also use their knowledge and experience in both environments to exploit consumers, knowing that consumers reliably, predictably, and completely fail to read the terms employed in standard-form contracts.").

8. Wayne Barnes, *Social Media and the Rise in Consumer Bargaining Power*, 14 U. PA. J. BUS. L. 661, 663–64 (2012) (citations omitted) ("[In the last several decades] the use of form contracts has only increased, especially with online contract terms—such as website terms of use and software license agreements—to which consumers assent by use of 'clickwrap' or 'browsewrap.' . . . Thus, consumers are assenting to form contracts in ever-increasing amounts, especially online, with the ease of a mouse click (or tablet screen tap)."); *see* Colin P. Marks, *Online and "As Is"*, 45 PEPP. L. REV. 1, 6–12 (2018); *see also* NANCY S. KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS 35–43 (2013) (discussing the rise of the self-explanatory terminology used to describe online contracts).

9. *See, e.g.*, Marks, *supra* note 8, at 3 (citing Paul J. Morrow, *Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-wrap, Clickwrap, and Browse-wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 PITT. J. TECH. L. & POL'Y 1, 28 (2011)) ("Many commentators have criticized the use of such online terms, arguing that the terms impose undue burdens on consumers, who do not truly consent to them."); *see also* KIM, *supra* note 8 (describing online terminology); Daniel D. Barnhizer, *Escaping Toxic Contracts: How We Have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215, 215–16 (2014) (opining about how little consumers pay attention to wrap-contracts). Moreover, most of the articles cited in the note 1 above deal with these same issues. *See supra* note 1.

damages),[10] and through the use of standardization generally, which results in efficiencies and eliminates the need for interaction and negotiation with individual customers.[11]

This Article inquires as to the *why* of merchants' online contracting behavior, beyond the immediate commercial advantages outlined above. Why have merchants steadily increased the amount of boilerplate form contracts online?[12] Why is there such a disconnect between what consumers do (clicking on a box that says "I agree") and what they are actually legally binding themselves to (because all of the boilerplate terms are binding, whether they have read them or not)?[13] And, particularly, why have many merchants imposed boilerplate on consumers when buying online, when they never do it for consumers buying in-person at their brick-and-mortar store?[14]

Although the commercial advantages of merchants inserting these terms seem apparent, it may be that there is something else at work on a behavioral level—something about how the presence of the *internet itself* has affected human behavior. Most people are aware, on some level, that the internet (whether through websites, social media, app messaging, discussion forums, etc.) has fundamentally affected human behavior and interaction, and not

10. *See* Marks, *supra* note 8, at 2 ("[M]any online retailers are using these terms to limit implied warranties, selling the goods 'as is,' and limiting remedies, as well as adding a host of other limitations.").

11. *See* Rakoff, *supra* note 1, at 1176 ("The use of standard form contracts grows from the organization and practices of the large, hierarchical firms that set the tone of modern commerce.").

12. *See* Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, *supra* note 1, at 844 (citing Korobkin, *Bounded Rationality*, *supra* note 1, at 1203; Hillman & Rachlinski, *supra* note 1, at 431) ("[T]he use of boilerplate form contract language has proliferated, . . . especially with the advent of online terms of use and license agreements, assented to by the web user simply 'clicking' their consent or merely browsing the website. In fact, Robert Hillman and Jeffrey Rachlinski have aptly observed that '[t]he Internet is turning the process of contracting on its head.' Consumers are agreeing to form contracts in unprecedented numbers, all with a few easy clicks of the mouse."); Barnes, *Toward a Fairer Model*, *supra* note 1, at 229; *see also* Marotta-Wurgler & Taylor, *supra* note 1, at 240, 253–54 (noting that over a period of seven years, from 2003 to 2010, the average online contract became several hundred words longer).

13. *See* Barnes, *Consumer Assent to Standard Form Contracts and the Voting Analogy*, *supra* note 1, at 846 ("Thus, most of the terms are contained in boilerplate language which is not discussed or read by the consumer, let alone actively negotiated. Nevertheless, standard form contracts *are* contracts, and contracts are supposed to be formed by assent.").

14. *See* Marks, *supra* note 8, at 1 ("[R]etailers are taking advantage of online transactions by attaching additional terms and conditions that a consumer would not normally find in-store.").

always for the better.[15] In many instances people act more emboldened and less inhibited online compared to "real life."[16] A 2016 popular magazine article pithily titled "How Trolls Are Ruining the Internet" sought to capture and describe this evolving phenomenon.[17] Beyond simple pop culture observation and discussion of the trend, however, in 2004 psychologist John Suler described the actual psychological dynamic at work in online behavior—a dynamic he dubbed the "online disinhibition effect."[18] As Suler noted, "[e]veryday users on the Internet—as well as clinicians and researchers—have noted how people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world . . . . So pervasive is the phenomenon that a term has surfaced for it: *the online disinhibition effect*."[19]

Suler was primarily describing conduct of *individuals* engaging in *social* interactions online (such as messaging, participating in internet discussion forums, commenting, etc.).[20] But, could the online disinhibition effect, as described by Suler, help partly explain the *online consumer contracting* process as well? Are merchants similarly "disinhibited" by the manner and means by which they sell goods and services on the internet, as opposed to selling in a conventional brick-and-mortar context? Are consumers also disinhibited? This Article ruminates on these questions. Part II of this Article will briefly

15. *See* Janna Anderson & Lee Rainie, *Concerns About the Future of People's Well-Being*, PEW RES. CTR. (Apr. 17, 2018), https://www.pewresearch.org/internet/2018/04/17/concerns-about-the-future-of-peoples-well-being/ (interviewing respondents about the positive and negatives of digital technology).

16. *See, e.g.*, Team Coco, *Bill Burr Thinks Most People Online Are Evil, CONAN on TBS*, YOUTUBE (Feb. 13, 2013), https://www.youtube.com/watch?v=1PbP7oVHNyw (beginning at around 1:42, comedian Bill Burr states: "I wouldn't encourage going back and forth with fans. I would say 13% of people on the internet are cool. The rest of them—they're just a bunch of animals. Why would you wanna—why would you wanna talk to them? . . . 13% are cool, the other 87% are writing horrific stuff under YouTube videos. They're, they're—they're assholes." (audience laughter)); *see also* Raw Booty, *Dogs Illustrating Online vs. Real Life Conflict. (Part 2)*, YOUTUBE (Aug. 30, 2022), https://www.youtube.com/watch?v=2Kt5NANaHGU (showing dogs ferociously growling, barking, and baring their teeth at each other while separated by a glass door, and then immediately resorting to docile, friendly behavior as soon as the door opens and they join each other in the same room).

17. Joel Stein, *How Trolls Are Ruining the Internet*, TIME (Aug. 29, 2016), https://time.com/4457110/internet-trolls/.

18. John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004), https://doi.org/10.1089/1094931041291295.

19. *Id.*

20. *Id.* ("Sometimes people share very personal things about themselves. They reveal secret emotions, fears, wishes. They show unusual acts of kindness and generosity, sometimes going out of their way to help others.").

discuss the evolution of consumer contracting—from the use of standard form contracts, to the various means of online formation, to the tendency of merchants to impose contract terms and limitations on their online customers but *not* on their face-to-face "offline" brick-and-mortar customers. Part III will recount the online disinhibition effect as set forth by John Suler. Part IV will consider whether online consumer contracting demonstrates characteristics of, and whether it can be explained in part by, Suler's online disinhibition effect. Part V will conclude with some observations about potential implications for contract law and enforcement.

II. EVOLUTION OF ONLINE CONSUMER CONTRACTING

In this Part, I will briefly sketch the parameters and evolution of online contracting between merchants and consumers. The current state of affairs evolved from: (1) the normalization of standard form contracts, to (2) the development of form contracting in the online context (the rise of "wrap contracts"), to (3) the present-day, in which online terms are regularly imposed on consumers through the most discreet means possible, whereas offline customers remain relatively unconstrained by the imposition of any merchant-favorable terms and conditions. I will briefly discuss each phase of this development to situate the context for a subsequent discussion of whether this evolution can be explained, at least in part, by Suler's online disinhibition effect.

A. Standard Form Contracts and General Enforceability

Standard form contracting is now overwhelmingly the typical mode of contracting.[21] In fact, for some time now legal scholars have observed that virtually all contracts are likely standard form contracts.[22] As far back as 1971, David Slawson observed:

> Standard form contracts probably account for more than ninety-nine

21. Much of the following discussion in this Article's Section II.A on standard form contracting, including the sources cited, is adapted from part II of my previous article. *See* Barnes, *Toward a Fairer Model*, *supra* note 1.

22. Hillman & Rachlinski, *supra* note 1, at 431 (citing John J.A. Burke, *Contracts as a Commodity: A Nonfiction Approach*, 24 SETON HALL LEGIS. J. 285, 290 (2000) ("Likely ninety-nine percent of paper contracts consist of standard forms . . . ."); *see also* Rakoff, *supra* note 1, at 1188–89 ("Today, very likely the majority of signed documents are adhesive.").

> percent of all the contracts now made. Most persons have difficulty remembering the last time they contracted other than by standard form; except for casual oral agreements, they probably never have. But if they are active, they contract by standard form several times a day. Parking lot and theater tickets, package receipts, department store charge slips, and gas station credit card purchase slips are all standard form contracts.[23]

Since Slawson's comments in 1971, the use of standard form contracting has continued to predominate in the consumer context.[24]

Todd Rakoff explains the basic characteristics of standard form contracts as follows: (1) the contract forms are printed and contain numerous boilerplate terms common to most of the contracts the merchant enters into,[25] (2) the merchant is invariably the drafter of the contract (not the consumer),[26] (3) the merchant participates in a large volume of similar transactions on a habitual basis,[27] (4) the merchant is unwilling to negotiate with respect to most of the boilerplate—it is instead offered on a "take-it-or-leave-it" basis (i.e., an "adhesion" contract),[28] (5) the transaction formation is normally concluded when the consumer signs the form,[29] (6) the consumer does not engage in a large volume of like transactions, unlike the merchant,[30] and (7) typically the

23. Slawson, *Standard Form Contracts*, *supra* note 1, at 529. Professor Meyerson provides an early academic description of contracting via standard form: "No longer do individuals bargain for this or that provision in the contract . . . . The control of the wording of those contracts has passed into the hands of the concern, and the drafting into the hands of its legal advisor . . . . In the trades affected it is henceforth futile for an individual to attempt any modification, and incorrect for the economist and lawyer to classify or judge such arrangements as standing on an equal footing with individual agreements." Meyerson, *supra* note 1, at 1264 (quoting OTTO PRAUSNITZ, THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW 11 (1937)).

24. Korobkin, *Bounded Rationality*, *supra* note 1, at 1203 ("If anything, the dominance of form contracts over negotiated contracts has increased in the intervening decades [since Slawson's 1971 estimation].").

25. Rakoff, *supra* note 1, at 1177 (setting forth the characteristics of standard form contracts).

26. *Id.* at 1179 (explaining the form is typically drafted by the merchant, who knows the consumer will likely not read the contract).

27. *Id.* at 1177 (discussing merchants commonly partake in these sorts of contracts).

28. *Id.* (highlighting the drafter's unwillingness to enter into an agreement that strays from the exact terms listed in the contract).

29. *Id.* (accepting merchants reasonably taking the adherent's signature as a sign of assent to the terms).

30. *Id.* (emphasizing the small amount of contracts entered into by the adhering party small in comparison to the drafting party).

merchant is providing goods or services, whereas the consumer is simply agreeing to a monetary payment.[31]

The reasons standard forms appeal to contracting merchants are straightforward. In his 1984 article, David Slawson noted that the use of standardized forms increased profits and helped manage risk and greater complexity in a marketplace that has steadily grown more sophisticated over time.[32] The comments to § 211 of the *Restatement (Second) of Contracts* shed further light on the efficacy of standard forms for contracting merchants:

> *Utility of standardization.* Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions. Legal rules which would apply in the absence of agreement can be shaped to fit the particular type of transaction, and extra copies of the form can be used for purposes such as record-keeping, coordination and supervision. Forms can be tailored to office routines, the training of personnel, and the requirements of mechanical equipment. Sales personnel and customers are freed from attention to numberless variations and can focus on meaningful choice among a limited number of significant features: transaction-type, style, quantity, price, or the like. Operations are simplified and costs reduced, to the advantage of all concerned.[33]

The utility of standard form contracting quickly resulted in their use in basically all purchases of goods and services, given their customizability and usefulness in numerous contexts.[34] This is not to mention their profitability, as well as the need to accommodate a greater complexity than in prior, simpler times.[35]

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31. *Id.* (comparing the ideal position of a merchant who uses form contracts with the less beneficial position of the consumer).

32. Slawson, *New Meaning*, *supra* note 1, at 24–25.

33. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. a (AM. LAW INST. 1981).

34. Kessler, *supra* note 1, at 631 ("Once the usefulness of these contracts was discovered and perfected in the transportation, insurance, and banking business, their use spread into all other fields of large scale enterprise, into international as well as national trade, and into labor relations.").

35. Slawson, *New Meaning*, *supra* note 1, at 24–25 ("Businesses can draft their standard forms to

From the advent of the standard form contract, merchants have sought to obtain consumers' assent to these forms to make them binding and enforceable. The courts quickly established the legal precedent that, despite some protestations that the consumer had not actually mentally engaged and agreed to each and every term, a consumer who signed a standard form contract was generally bound by it.[36] Section 211 of the *Restatement* describes the prevailing view in this regard:

> "[W]here a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing."[37]

Thus, when consumers sign the form, they are generally bound by it, period (absent potentially applicable formation defenses such as fraud, duress, or unconscionability).[38] This is true *regardless* of the fact that they may have had no real choice—the contract was an adhesion contract (take-it-or-leave-it; i.e., adhere or else).[39] Early on, Friedrich Kessler observed that these contracts result from a disparity in bargaining power, and that consumers often run into the scenario that all or most of the merchant's competitors use the same basic set of boilerplate terms.[40] Nevertheless, courts have regularly enforced these contracts when it is perceived they have been assented to.[41] Although there has been much hand-wringing over consumers' lack of

create practically any legal implications they like, and since they draft their forms long before they use them, they can take all the time they need in order to understand what legal implications will best serve their interests.").

36. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211 (AM. LAW INST. 1981).

37. *Id.*

38. *See id.* at §§ 164 (fraud/misrepresentation), 175 (duress), 208 (unconscionability).

39. *See* KIM, *supra* note 8, at 26–30 (introducing the concept of contracts of adhesion and their implications for courts)..

40. *Id.* at 26 (quoting Kessler, *supra* note 1, at 632) ("The weaker party, in need of goods and services, is frequently not in a position to shop around for better terms, either because the author of the standard contract has a monopoly . . . or because all competitors use the same clauses. . . . Thus, standardized contracts are frequently contracts of adhesion . . . .").

41. *See, e.g.*, Feldman v. Google, Inc., 513 F. Supp. 2d 229, 238 (E.D. Pa. 2007) (finding that boilerplate language is enforceable provided there is some notion of consent, such as clicking the "I agree" button).

meaningful *actual* consent to such terms,[42] the necessities of business and commerce have led courts to focus "on the outward manifestations of the parties."[43] Thus, after observing that consumers had the opportunity to read the form contract in full if they liked and still proceeded to enact the symbolic action of affixing their signature to the bottom of the contract—the proverbial "signing on the dotted line"—courts hold that a merchant is entitled to treat such action as an indication of assent to be bound to the entirety of the terms of the contract.[44] From this also arose the oft-cited maxim that a consumer's failure to read the terms and actually understand and be aware of them is no excuse, as the consumer was said to have a "duty to read" the contract.[45]

Under this duty to read, stemming from an application of the objective theory of contracts, merchants are thereby held to be entitled to take the consumer's signature at face value, meaning that the consumer has legally indicated an intent to be bound by all the terms.[46] From the merchant perspective, if consumers could evade the enforceability of the contract by announcing *ex post facto* that they had not read it and assented, commercial practices would be thrown into chaos.[47] Thus, signing indicates assent, and this is generally held irrespective of *actual* reading and knowledge of what one has signed. Randy Barnett noted that this was appropriately denominated as a simple

42. *Id.* ("[M]any scholars have wrung their hands over the problem of contracts of adhesion.").

43. *Id.* at 26–27 n.33 ("Agreement consists of mutual expressions; it does not consist of harmonious intentions of states of mind . . . we observe for judicial purpose . . . the conduct of the parties. We observe this conduct and we describe it as the expression of a state of mind. It is by the conduct of two parties, by their bodily manifestations, that we must determine the existence of what is called agreement. This is what we meant by the anciently-honored term 'meeting of the minds.' This is what is meant by mutual assent.").

44. RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b (AM. LAW INST. 1981).

45. Calamari, *supra* note 1, at 342 ("The feeling is that no one could rely on a signed document if the other party could avoid the transaction by saying that he had not read or did not understand the writing.").

46. JOSEPH PERILLO, 7 CORBIN ON CONTRACTS § 29.8, at 402 (rev. ed. 2002); *see also* Rakoff, *supra* note 1, at 1185 (identifying that contract law's approach to standard form contracts included the following: "(1) The adherent's signature on a document clearly contractual in nature, which he had an opportunity to read, will be taken to signify his assent and thus will provide the basis for enforcing the contract. (2) It is legally irrelevant whether the adherent actually read the contents of the document, or understood them, or subjectively assented to them. (3) The adherent's assent covers all the terms of the document, and not just the custom-tailored ones or the ones that have been discussed.").

47. PERILLO, *supra* note 46, at 403–04 (citing Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards,* 19 VAND. L. REV. 1051, 1052–53 (1966)) (discussing important policy considerations behind enforcing the duty to read commcerial contracts).

"consent" theory to standard form contracts—that is, that the consumer (by signing) indicated a blanket consent to all the terms in the contract.[48] Or, as Robert Braucher once observed: "We all know that if you have a page of print, whether it's large or small, which nobody is really expected to read, and you expect to agree to it, and you sort of put your head in the lion's mouth and hope it will be a friendly lion . . . ."[49] Thus, the courts have held—and most commentators have conceded—that standard form contracts have risen to ubiquity in consumer contracting, and consumers need merely "sign on the dotted line" (whether having read the terms or not) to be legally bound to a fully enforceable contract.[50] This constituted a major victory for merchants in achieving their desired contract terms in the offline, paper world.[51]

B. From Signature to Click, Scroll, or Browse: Form Contracts Go Online

Long after standard form contracts came into commonplace use, the world evolved and the internet as we know it was born. And, it was not long before merchants seized upon the internet as a means of transacting with consumers online.[52] From the modest beginnings of the World Wide Web in the last decade of the 20th century,[53] in 2021 the amount of total e-commerce sales

48. Barnett, *supra* note 1, at 636 ("Suppose I say to my dearest friend, 'Whatever it is you want me to do, write it down and put it into a sealed envelope, and I will do it for you.' Is it categorically impossible to make such a promise? Is there something incoherent about committing oneself to perform an act the nature of which one does not know and will only learn later? To take another example, is there some reason why a soldier cannot commit himself to obey the commands of a superior (within limits perhaps) the nature of which he will only learn about some time in the future? Hardly. Are these promises *real*? I would say so and cannot think of any reason to conclude otherwise. What is true of the promises in these examples is true also of contractual consent in the case of form contracts.").

49. Robert Braucher, *The American Law Institute Forty-Seventh Annual Meeting*, 47 A.L.I. PROC. 485, 525 (1970).

50. See Hillman & Rachlinski, *supra* note 1, at 437 ("Although standard-form contracts seem suspect and fail to satisfy contract law's notions of bargained-for exchange, courts and theorists generally consider enforcement of such terms appropriate."); *see also* Larsen v. Johannes, 86 Cal. Rptr. 744, 749 (Ct. App. 1970) (explaining the "general rule" is that a party is bound to a legally enforceable contract even though they did not read the contract so long as they have had the capacity to read it).

51. *See, e.g.*, Anderson v. Savin Corp., 254 Cal. Rptr. 627, 630 n.1 (Ct. App. 1988) (quoting *Larsen*, 86 Cal. Rptr. 749) (demonstrating how the signing party is held to the terms of the contract, regardless of its knowledge of the terms).

52. Much of the following paragraph is adapted from section II.A of my previous article, *The Good, the Bad, and the Ugly of Online Reviews. See* Barnes, *supra* note 4, at 556–57.

53. *See id.* at 556 n.17 ("Two of the first e-commerce transactions were a Sting CD and a large

reached over $870 billion.[54] As recently as 2015, the amount of such sales had "only" been approximately $342 billion[55]—which shows that in just six short years the amount has more than doubled, and the trajectory will no doubt continue to rise. Unsurprisingly, aligning with these numbers, other reports indicate that 96% of Americans engage in online transactions.[56] As I previously concluded regarding this phenomenon:

> Suffice it to say, online shopping and e-commerce activity is taking place in greater volume than ever before. And the reasons are fairly well known. Online shopping offers many conveniences, such as being time-efficient, avoiding the logistics of crowded brick-and-mortar stores, and providing shoppers with a wider inventory than in physical stores. Beyond mere convenience, multiple factors influence shoppers to make their purchases online, including: price, available discounts, simplicity of web site design and navigation, brand reputation, and the availability of trustworthy reviews. As a result, the rise of e-commerce is unsurprising, and its presence is likely to grow in the future.[57]

As shown by the rise in the volume of e-commerce over the last several years, this trend shows no signs of slowing down.

Once merchants began interacting with consumers on the internet—and particularly once they began selling their goods and services online—they needed to solve the problem of how to translate the offline paper form of the standard form contract to the online world.[58] Online merchants solved this

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Pizza Hut pizza in 1994.") (citing Tucker Shreiber, *Proceed to Checkout: The Unexpected Story of How Ecommerce Started*, SHOPIFY (Nov. 25, 2016), https://www.shopify.co.uk/blog/69521733-proceed-to-checkout-the-unexpected-story-of-how-ecommerce-started.).

54. U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 4th Quarter 2021*, U.S. CENSUS BUREAU NEWS (Feb. 18, 2022, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/21q4.pdf.

55. U.S. Dep't of Commerce, *Quarterly Retail E-Commerce Sales, 4th Quarter 2015,* U.S. CENSUS BUREAU NEWS (Feb. 17, 2016, 10:00 AM), https://www2.census.gov/retail/releases/historical/ecomm/15q4.pdf.

56. *See* Leanna Zeibak, *How Many People Shop Online?*, TINUITI (May 25, 2017), http://www.cpcstrategy.com/blog/2017/05/ecommerce-statistics-infographic/ (noting that 68% of American consumers are influenced by online reviews when deciding to purchase online).

57. Barnes, *supra* note 4, at 557 (citing Ziebak, *supra* note 56).

58. Erin Canino, *The Electronic "Sign-In Wrap" Contract: Issues of Notice and Assent, the*

problem by utilizing various "wrap" contract terms, notably, clickwraps and browsewraps,[59] although some observers add "scrollwrap" and "sign-in wrap" agreements to this list as well.[60] Basically, the merchants took all of their desired terms, conditions, and boilerplate, and placed them where consumers could (in theory) have viewed and read them prior to being found to have assented to the contract.[61] I will momentarily discuss each of these forms and their development as potentially valid means for securing binding enforcement of contract terms on consumers.

However, it first bears noting that the "wrap" terminology common to all of these forms of online terms derives from the older "shrinkwrap" cases (in which something was actually "wrapped!").[62] "Shrinkwrap," of course, is the term for physical plastic wrapping around a product box or container, which for many years was a common means of packaging computer software purchased in physical form (usually at a store).[63] Computer software vendors began to include terms of the software license (a contract) *inside* the shrinkwrap around the box.[64] What's more, they provided that removing the plastic

Average Internet User Standard, and Unconscionability, 50 U.C. DAVIS L. REV. 535, 548 (2016) (summarizing Judge Weinstein's decision in Berkson v. Gogo LLC, 97 F. Supp. 3d 359 (E.D.N.Y 2015) that suggests the rules for notice should be tailored to problems of online contracting).

59. *See* KIM, *supra* note 8, at 35–43 (discussing the rise of wrap contracts).

60. *See* Marks, *supra* note 8, at 10–11 ("A further variation of the clickwrap agreement is the scrollwrap agreement. While clickwrap agreements require that users click a box, scrollwrap agreements force users to view the terms and conditions as part of the website's construction and design."); Canino, *supra* note 58, at 539 ("In general, courts find clickwrap and scrollwrap contracts to be valid, while browsewrap contracts require courts to look more closely at individualized facts of the case."); Adam Ruttenberg et al., *New York District Court Articulates New Test for Assessing the Validity and Enforceability of Online Agreements,* LEXOLOGY (July 14, 2015), https://www.lexology.com/library/detail.aspx?g=60ab5224-0664-4418-a4ee-2084b95a4ddb (discussing the April 2015 decision the United States District Court for the Eastern District of New York to define a new category of online agreement, the "sign-in-wrap" agreement, which it distinguished from clickwrap agreements).

61. *See* Canino, *supra* note 58, at 541 (explaining that a court decides whether the terms and conditions were placed where a consumer could have read them for the contract to be enforceable).

62. *See* KIM, *supra* note 8, at 36–39 (discussing ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996) in which Judge Easterbrook upheld the validity of shrinkwrap licenses, which thus "paved the way for other nontraditional standard form agreements, such as clickwraps and browsewraps"); *see also* Robert Lee Dickens, *Finding Common Ground in the World of Electronic Contracts: The Consistency of Legal Reasoning in Clickwrap Cases*, 11 MARQ. INTELL. PROP. L. REV. 379, 381 (2007) (observing that "[t]he term 'clickwrap' evolved from the use of 'shrinkwrap' agreements . . . .").

63. KIM, *supra* note 8, at 36 ("A shrinkwrap refers to a contract that is wrapped in plastic with a compact disc containing a software program.").

64. *Id.* at 36 n.2 ("A shrinkwrap license is an example of a 'rolling contract.' In a rolling contract situation, the customerorders and pays for the goods before having an opportunity to review the contract terms, which are included with the product.").

wrap from the package, which usually happened once the purchaser got home, was an act that constituted contractual assent to the terms inside.[65] This was quite a norm-shifting step, given that: (1) the merchant wanted to provide that consumers were binding themselves to terms without even having had an opportunity to read them beforehand, and (2) the conventional wisdom up to that point was that, like all items purchased at a retail brick-and-mortar store, the contract was generally deemed to be assented to at the instant the consumer paid the merchant and walked out of the store with the (presumably still wrapped) software box.[66] Early cases refused to enforce terms presented in this manner (including the applicability of § 2–207 of the Uniform Commercial Code) because the contract was complete upon checkout and, therefore, it was too late for the merchant to simply unilaterally add such terms after the fact.[67] However, a highly influential case, *ProCD, Inc. v. Zeidenberg*, reversed this trend and held that the after-the-fact shrinkwrap licenses were enforceable "unless their terms are objectionable on grounds applicable to contracts in general (for example, if they violate a rule of positive law, or if they are unconscionable)."[68] The rationale of the opinion, written by Judge Frank Easterbrook, is steeped in concern for the practicalities of commerce, though it is not—quite controversially—particularly concerned about applying the seemingly plainly applicable provisions of the Uniform Commercial Code which would dictate a different outcome.[69] Though criticized by many

65. *Id.*

66. *See* Marks, *supra* note 8, at 5 (citing RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (AM. LAW INST. 1981) ("When a consumer walks into a brick-and-mortar retail store and buys a good, the law typically presumes that the advertised price is merely a solicitation. It is the consumer who makes the offer to buy the good at the advertised price when he or she brings the good to the checkout clerk. Once payment is tendered, the sale is complete."); ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 2.4 (Joseph M. Perillo ed., 1993) ("Usually, neither the advertiser nor the reader of the notice understands that the reader is empowered to close the deal without further expression by the advertiser. Such advertisements are understood to be mere requests to consider and examine and negotiate; and no one can reasonably regard them otherwise unless the circumstances are exceptional and the words used are very plain and clear."); Ford Motor Credit Co. v. Russell, 519 N.W.2d 460, 463 (Minn. Ct. App. 1994) ("Generally, if goods are advertised for sale at a certain price, it is not an offer and no contract is formed; such an advertisement is merely an invitation to bargain rather than an offer.").

67. KIM, *supra* note 8, at 36 (citing Step-Saver Data Sys., Inc. v. Wyse Tech., 939 F.2d 91, 99 (3d Cir. 1991)) ("In *Step-Saver Data Systems, Inc. v. Wyse Technology*, the Third Circuit held that a 'box-top' license was invalid under the Uniform Commercial Code (U.C.C.). The court stated that the contract for the sale of the software product was made when the product was purchased.").

68. ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1449 (7th Cir. 1996).

69. *See id.* at 1451–52 (discussing the common use of after-the-fact terms in the insurance industry,

academics and some courts,[70] this "rolling contract" theory became the majority established precedent for the enforceability of shrinkwrap licenses and contracts.[71]

As the first merchants began transacting with consumers online rather than selling in a physical brick-and-mortar store, the need arose to deliver terms electronically rather than in paper form. This meant, in theory at least, that the merchants could avoid some of the incoherence of the "rolling contract" model by instead making all of the contract terms known to consumers up front, i.e., before obtaining their consent to enter into a transaction.[72] That

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the airline industry, the retail industry, and the software industry); *see Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997) (following *ProCD* and stating the following: "Payment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors. Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time. And oral recitation would not avoid customers' assertions (whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.").

The *ProCD* and *Gateway* opinions have been followed by the majority of cases deciding on the enforceability of shrinkwrap. *See* KIM, *supra* note 8, at 39 ("[O]nly a minority of courts have rejected *ProCD*'s analysis, while the majority of courts have adopted it and upheld the validity of shrinkwrap licenses"). Nevertheless, these cases have been the subject of a multitude of criticism for ignoring the plain text of the Uniform Commercial Code, as well as the problematic nature of assent. *See id.* at 38 n.13 (citing Jean Braucher, *Delayed Disclosure in Consumer E-Commerce as an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1823–27 (2000); William Lawrence, *Rolling Contracts Rolling over Contract Law*, 41 SAN DIEGO L. REV. 1099, 1109 (2004); Stewart Macaulay, *Freedom from Contract: Solutions in Search of a Problem?*, 2004 WIS. L. REV. 777, 805 (2004); Deborah W. Post, *Dismantling Democrat Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205, 1226 (2000)).

70. *See, e.g.*, Marks, *supra* note 8, at 6 & n.23 (citing Klocek v. Gateway, Inc., 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (refusing to follow *Hill* and *ProCD*); Nancy S. Kim, *Situational Duress and the Aberrance of Electronic Contracts*, 89 CHI.-KENT L. REV. 265, 282 (2014) (criticizing the rationale of "rolling contract[s]" based on the consumer's expectation interests)).

71. KIM, *supra* note 8, at 36 n.2 ("A shrinkwrap license is an example of a 'rolling contract.' In a rolling contract situation, the customer orders and pays for the goods before having an opportunity to review the contract terms, which are included with the product"); *see also* Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 744 (2002) ("In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods.").

72. *See* Marks, *supra* note 8, at 6 n.24 (citing Provencher v. Dell, Inc., 409 F. Supp. 2d 1196, 1198–99 (C.D. Cal. 2006)). Marks notes that the court in *Provencher* "provid[ed] an example of an online

is to say, the duty to read lived on, albeit in online electronic form.[73] Whereas in the offline paper world, the duty to read—and the necessarily concomitant availability of the terms for consumers to read if they so chose—arises from the simple fact of the paper form being physically placed in front of the consumer before they are asked to sign by hand, in the online context the electronic terms must be made available for the consumer to view on a screen (whether it is a computer screen, tablet screen, or phone screen).[74] Whether merchants have given the consumer sufficient notice that such terms are being imposed has been the primary issue around the various online "wrap" contract forms of assent utilized by internet merchants.[75]

Browsewrap was one of the earlier methods by which merchants sought to impose binding terms on consumers interacting with the merchant's website.[76] Browsewrap is the commonly accepted term for a merchant's contract terms that are posted somewhere on the website for the consumer to read.[77] As Nancy Kim has pointed out,

> [b]rowsewraps do not require users to affirmatively manifest consent. In most cases, the browsewrap includes a statement that the user's continued use of the website or the downloaded software manifests assent to those terms. [Users are] deemed to have manifested consent

order from 2001 in which '[t]he Agreement was available for [the consumer's] review . . . before, while, and after' the purchase." *Id.*

73. *See id.* at 6.

74. *See id.* at 7 (explaining the main determinations to whether a consumer has inquiry notice of the terms and conditions of a contract on a website).

75. *See id.*

76. Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 466 (2013).

77. KIM, *supra* note 8, at 41 (defining browsewrap agreements); *see also* United States v. Drew, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009) (explaining browsewrap agreements typically provide that "by merely using the services of, obtaining information from, or initiating applications within the website—the user is agreeing to and is bound by the site's terms of services."). An example of browsewrap is provided on *The New York Times* website:

> If you choose to use certain NYT products or services displaying or otherwise governed by these Terms of Service, including NYTimes.com ("the Site"), NYT's mobile sites and applications, any of the features of the Site, including but not limited to RSS feeds, APIs, and Software (as defined below) and other downloads, and NYT's Home Delivery service (collectively, the "Services"), you will be agreeing to abide by all of the terms and conditions of these Terms of Service between you and NYT.

Terms of Service, N.Y. TIMES, https://help.nytimes.com/hc/en-us/articles/115014893428-Terms-of-service (last updated Dec. 27, 2023).

> if [they continue] on the website after having had notice of the terms.[78]

That is, the merchant makes a statement—readable, in theory, somewhere on the website where a consumer is reasonably likely to see it or see how to get to it—that by merely continuing to "browse" the website, they have become bound to the website terms and conditions.[79] Browsewrap agreements are passive in that they require no affirmative acknowledgment by the consumer, just that they continued looking at the website content (which they were already at the site to do and likely would have continued to do in any event).[80] Early cases involving browsewrap—including what is perhaps the most well-known case in this regard, *Specht v. Netscape Communications Corp.*[81]—held several instances of attempted browsewrap were unenforceable because the websites did not present the terms such that the consumers were reasonably aware they were present.[82] In the case of *Specht,* when consumers clicked the download button to obtain the Netscape browser software, the license agreement was so far down on the webpage that consumers would not necessarily even scroll far enough to see it.[83] Other courts have invalidated attempted browsewrap that was insufficiently conspicuous, or otherwise did not give the consumer sufficient notice that they were contemplating and agreeing to contract terms.[84] Subsequent cases have made clear, however, that browsewrap is not necessarily categorically unenforceable—rather, the issue is whether the consumer had a "reasonable opportunity to learn of the terms[.]"[85]

When merchants experienced difficulties getting their terms imposed via the stealthy browsewrap route, some turned to more overt mechanisms to signify to the consumer the exaction of contract terms—this is where "clickwrap"

78. KIM, *supra* note 8, at 41.

79. *See* Marks, *supra* note 8, at 7 (explaining how browsewrap agreements may bind users to the terms of the website if the user engages in the functions and services provided by the website).

80. *Id.*

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

82. *See* Marks, *supra* note 8, at 7 ("Links to the underlying terms and conditions are not always easy to find, however, and thus many such links have been attacked as not giving consumers fair notice of their existence.").

83. *Specht*, 306 F.3d at 23–25.

84. Marks, *supra* note 8, at 9–10 & nn.47–49 (citing Lee v. Intelius, 737 F.3d 1254, 1261–62 (9th Cir. 2013); Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 395 (E.D.N.Y. 2015)).

85. Moringiello & Reynolds, *supra* note 76, at 468–70.

came into play (along with its derivatives, "scrollwrap" and "sign-in wrap").[86] Merchants began to require a more overt act—clicking a button labeled "I agree," or something along those lines—when requesting assent to contract terms or conditions.[87] For instance, in one case an attorney argued that particular contract terms were not binding because he never saw them or assented to them.[88] The court disagreed, observing that the attorney could only obtain the services if he clicked the "I agree" button placed alongside the actual terms.[89] The court stressed that in these circumstances, just as in the offline world, the attorney had a duty to read.[90] "By clicking 'I agree,' the plaintiff effectively signed the terms of service, and 'a party who signs an instrument manifests his assent to it and cannot later complain that [they] did not read the instrument or that [they] did not understand its contents.'"[91] Although the courts did not initially use the term "clickwrap" for online terms where the consumer is requested to click a button to signify assent online, academic commentators quickly coined the term, and it stuck.[92]

Online merchants have also utilized variations such as scrollwrap and sign-in wrap.[93] The primary characteristic of the scrollwrap agreement is that the website requires consumers to actually view the proposed terms and conditions (or, at least physically scroll through them on their screen) before

86. Marks, *supra* note 8, at 9–10 (citing *Berkson*, 97 F. Supp. 3d at 394–99 (discussing the four types of wrap contracts and their methods of consumer notification); Canino, *supra* note 58, at 539; Ruttenberg et al., *supra* note 60.

87. Moringiello & Reynolds, *supra* note 76, at 461 (citing Forrest v. Verizon Commc'ns, Inc., 805 A.2d 1007, 1010 (D.C. 2002); Caspi v. Microsoft Network, L.L.C., 732 A.2d 528, 529–31 (N.J. Super. Ct. App. Div. 1999)) (both cases finding clickwrap agreements valid and binding).

88. Groff v. Am. Online, Inc., No. PC 97-0331, 1998 R.I. Super. Ct. LEXIS 46, at *10–14 (R.I. Super. Ct. May 27, 1998)).

89. *Id.* at *12–13.

90. *Id.*

91. Moringiello & Reynolds, *supra* note 76, at 461–62 (quoting *Groff*, 1998 R.I. Super. Ct. LEXIS 46, at *13).

92. *Id.* at 462–64; *see also* Stomp v. NeatO, 61 F. Supp. 2d 1074, 1080 n.11 (C.D. Cal. 1999) ("The term 'clickwrap agreement' is borrowed from the idea of 'shrinkwrap agreements,' which are generally license agreements placed inside the cellophane 'shrinkwrap' of computer software boxes that, by their terms, become effective once the 'shrinkwrap' is opened.").

93. *See* Marks, *supra* note 8, at 10–12 (citing Berkson v. Gogo LLC, 97 F. Supp. 3d 359, 398 (E.D.N.Y. 2015) (noting that scrollwrap is set up to where "a user must view [the terms] because of the nature of the website's construction and design"); Selden v. Airbnb, Inc., 4 F.4th 148, 152 (D.C. Cir. 2021) (holding "Airbnb's sign-up screen put [defendant] on reasonable notice that by signing up to use the platform he agreed to Airbnb's Terms of Service.")).

allowing the transaction to proceed.[94] Sign-in wrap is another variant/combination of the methods previously discussed.[95] The primary characteristic of sign-in wrap is that consumers using the website are notified "of the existence and applicability of the site's 'terms of use' when proceeding through the website's sign-in or checkout process."[96] Some sign-in wraps include the terms at the initial sign-in or account-creation stage, whereas others "might simply have a notification next to the 'checkout' or 'submit' button informing users that, by proceeding, they bind themselves to the retailer's terms and conditions."[97] Whereas browsewrap has been the least favored form of online wrap agreement, generally courts are more likely to hold these other forms for obtaining online assent—clickwrap, scrollwrap, and sign-in wrap—binding and enforceable.[98] This is probably because of the more active, affirmative nature of the conduct required by the consumer to signify assent—at least compared to browsewrap.[99] Browsewrap does not require the consumer explicitly indicate that he/she is actively manifesting assent to the terms.[100]

As described above, merchants' use of standard form contracts—which most consumers do not read and would not understand if they did—was a crucial milestone in merchant-consumer contracting behavior.[101] Merchants

94. *Id.* at 11 (citing *Berkson,* 97 F. Supp. 3d at 398). That is to say, "you can lead a horse to water, but you can't make him drink." *You Can Lead a Horse to Water, but You Can't Make Him Drink*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/you-can-lead-a-horse-to-water-but-you-can-t-make-him-drink (last visited Sept. 22, 2023).

95. Marks, *supra* note 8, at 11 (citing *Berkson*, 97 F. Supp. 3d at 398) ("Sign-in wrap agreements are somewhat similar to browsewrap and clickwrap agreements.").

96. *Id.* at 11–12 (citing *Berkson,* 97 F. Supp. 3d at 399).

97. *Id.* at 12 (citing *Berkson,* 97 F. Supp. 3d at 401).

98. *Id.* at 11 (citing Cheryl B. Preston, *"Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?*, 64 AM. U. L. REV. 535, 544 (2015) ("Clickwrap agreements are the generally enforceable, standard form contracts that Internet users assent to merely by clicking an 'I agree' option.")).

99. *Id.*

100. *See* RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. LAW INST. 1981) ("Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer."); *see id.* § 69 (describing acceptance by silence as ineffective except in limited circumstances).

101. *Id.* § 211 cmt. b ("A party who makes regular use of a standardized form of agreement does not ordinarily expect his customers to understand or even to read the standard terms. One of the purposes of standardization is to eliminate bargaining over details of individual transactions, and that purpose would not be served if a substantial number of customers retained counsel and reviewed the standard terms. Employees regularly using a form often have only a limited understanding of its terms and limited authority to vary them. Customers do not in fact ordinarily understand or even read the standard terms.").

were able to extract exponentially more concessions and favorable terms using boilerplate by having consumers sign such form contracts.[102] At least in the offline world, though, the consumer was aware that a "contract moment" was happening when presented with the form and asked to physically sign at the bottom—such ceremony (signing documents) was long well-known and associated with contracting.[103]

However, with the advent of online contracting and the rise of the various "wrap" contract formation methods, what was once a fairly well-recognized "contract moment"—signing at the bottom of the page with a pen[104]—has turned into a mere browse, scroll, or click.[105] Online merchants (with assistance from the courts) have succeeded in making such clicks and scrolls possess all of the legal equivalence of the more solemn in-person contractual signature, notwithstanding the website scroll and the mouse click have *lots* of other usages. Just today—while on and off writing this Article—I have clicked my mouse or scrolled/browsed the screen probably dozens (oh, who am I kidding? hundreds) of times while: replying to email, clicking on text notifications, checking news stories, looking at Twitter and Facebook (yes, I am old), reading the latest Dallas Cowboys news (I am not building up a lot of hope for next season), installing a couple of new applications on my Mac, updating my checkbook, checking my bank account (pitifully low), reading some online article like "Check out these 50 celebrities' most embarrassing moments—you won't *believe* #32," checking on the status of my tax return, and of course clicking in my word processing program while formatting text, saving files, etc. All of these actions involve innumerable amounts of scrolling, browsing, and clicking. Once or twice, in downloading the new applications, I almost certainly clicked on a clickwrap type of agreement. However,

102. Barnes, *Toward a Fairer Model*, *supra* note 1, at 236 (citing Kessler, *supra* note 1, at 631). "Typical clauses include limitations or exclusions of liability, arbitration clauses, jury trial waivers, warranty exclusions, and the like." *Id.* at 236 n.48.

103. *See generally* Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469–70 (discussing the history of enforceability of contracts).

104. Moringiello & Reynolds, *supra* note 76, at 458 ("[T]raditional contract law was based on the assumption that parties negotiate and sign paper contracts in face-to-face transactions . . . .").

105. Barnes, *Toward a Fairer Model*, *supra* note 1, at 246 ("The question now is whether the duty to read has swung the pendulum too far in favor of businesses and against consumers, in light of the ever-increasing complexity of form contracts and the new manner in which such contracts are presented to consumers. This is especially true online, where a consumer may often click her assent without even having the forms in front of her to read.").

I have no conscious memory of it (I just had to do it to get the file to start downloading), and these two or three clicks were sandwiched in between, literally, hundreds of scrolls and clicks (not to mention the numerous taps and swipes on my phone happening concurrently).[106] The reality is that the law has elevated a click of a computer button to the legal level of the formal paper-contract signature, and the success of the online merchants in this regard is complete and thorough.[107]

C. Brick-and-Mortar Merchants Take It Further

As we have just seen, over the last several decades, merchants have successively improved the contractual terrain upon which they transact with consumers. First, they were successful in implementing the standard form contract as an accepted method to obtain a consumer's assent to all terms and conditions—the stroke of a pen completed a contract (whether or not the consumer read it).[108] This was already the state of affairs when the internet arose and came to prominence in the early-to-mid 1990s. Then, however, merchants were even more successful when, in beginning to transact in ever-increasing numbers with consumers online, they achieved legal acceptance for binding consumers to terms and conditions encoded on a website by the mere click of a mouse, scroll of a pop-up document, or even a passive browse of the merchant's website.[109] Given that, as described above, the mouse click or webpage browse is a behavior that is a far less socially constructed "contracting behavior"—not to mention it is a process that many of us repeat hundreds or thousands of times a day in performing non-contracting behavior—this surely and inarguably increased the likelihood of consumers inadvertently binding themselves to contractual terms and conditions of which they were unaware.[110] Thus, the rise of the legal acceptance of browsewrap, clickwrap,

106. *See* Moringiello & Reynolds, *supra* note 76, at 480–-81 (discussing contracts formed by smartphone).

107. *Id.* at 470–71 (describing general enforceability of clickwrap).

108. *See supra* Section II.A.

109. *See supra* Section II.B.

110. *See, e.g.*, Zsofia Zsakai, *How Attackers Bypass Two-factor Authentication (2FA)*, ZITADEL (Feb. 15, 2023), https://zitadel.com/blog/2fa-bypass-attacks ("For instance, when you use your pre-existing Google account to sign up for a third-party website or application, a consent screen will ask for your approval to access the specified data on your Google profile. Since consenting [sic] to this commonly seen prompt is necessary to utilize the platform, we tend to disregard it as a pointless reading exercise and routinely click 'Accept.'").

and all related types of online consent methods to terms and conditions, as described in Section II.B. above, was itself a development that greatly enhanced merchants' contractual position vis-à-vis their online consumers.

Recently, however, Colin Marks made several interesting observations indicating merchants are doing even more to gain advantage through the use of online contracting procedures.[111] The phenomenon relates to the observed behavior of merchants that operate brick-and-mortar stores, and the differences between their retail practices offline (i.e., in the "real world") and their practices when engaged in online transactions.[112] As Marks points out, it is now well-known that merchants have been using clickwrap and browsewrap for some time to obtain favorable terms that reduce costs and avoid exposure to liability—using such clauses as limitations of warranties and limitations of remedies, as well as "clauses that limit the statute of limitations, arbitration clauses, choice of law provisions, forum selection clauses, class action waivers, jury waivers, and nondisparagement clauses."[113] Many of these, of course, are well-known categories of clauses that are favorable to merchants and which were a component of offline standard-form contracts, well before the advent of the internet.[114]

In his article, *Online and "As Is*,*"* Marks describes as background the online contract formation process through the use of browsewrap, clickwrap, scrollwrap, and sign-in wrap.[115] He then describes the standard warranties and remedies available to consumers in the absence of limitation or exclusion by the contract.[116] Such provisions provide a broad array of recourses available to consumers in the face of a variety of failings of the merchant's goods or services.[117] Marks then describes the procedures by which merchants may

111. *See generally* Marks, *supra* note 8, at 1 (explaining how merchants are attaching implied warranties, selling goods "as is," and limiting remedies).

112. *See id.* at 29 ("One would not typically find [disclaimers of warranties, limitations on liabilities, and arbitration clauses] in a brick-and-mortar store, absent special conditions (such as with refurbished goods). Nonetheless, such terms are becoming a common part of the online retail industry.").

113. *See id.* at 18–28.

114. *See* Barnes, *Toward a Fairer Model*, *supra* note 1, at 236 ("Businesses use these forms to insert clauses which reduce or eliminate a myriad of risks."). "Typical clauses include limitations or exclusions of liability, arbitration clauses, jury trial waivers, warranty exclusions, and the like." *Id.* at 236 n.48.

115. Marks, *supra* note 8, at 5–12.

116. *Id.* at 12–25.

117. *Id.* at 16–18 ("Remedies for a seller's breach of contract come in two basic varieties: remedies for non-performance of the contract . . . and remedies for the products failure to perform as advertised. . . .").

legally limit or even eliminate/disclaim such consumer remedies, with the use of particular contract language.[118] This, of course, is generally accomplished either by standard form contracts in paper form in the "offline" world, or via clickwrap, browsewrap, or other wrap contractual formation methodology in the "online" world.[119]

Marks then undertook an empirical study of a number of large brick-and-mortar retailers—113 in total—that not only provided goods or services in their physical retail location to walk-in customers, but also provided goods or services via online transactions.[120] The study gathered several categories of data: (1) the manner of online contractual assent (whether browsewrap, clickwrap, scrollwrap, or sign-in wrap), (2) the presence of the following primary clauses in each retailer's online terms that benefit merchants: general disclaimer of implied warranties (like implied warranties of merchantability and also fitness for a particular purpose),[121] specific disclaimer of warranties arising from the consumer's use of the merchant's website, liability limitations, arbitration clauses, and return policies, (3) whether any implied warranty disclaimers were conspicuous, as required by the U.C.C.,[122] (4) whether any implied warranties disclaimers clearly applied to goods sold, and (5) whether each merchant's online terms had "clauses that limit the users' statute of limitations, choice of law provisions, forum selection clauses, class actions waivers, jury waivers, and nondisparagement clauses."[123] The study further broke the retailers down by industry group:

> [C]lothing (e.g., Ann Taylor), consumer electronics (e.g., Best Buy), food service (e.g., Pizza Hut), grocers (e.g., H-E-B), general

118. *Id.* at 18–28.

119. *Id.* at 3 ("It will come as no surprise to most lawyers that retailers are taking advantage of online transactions by attaching additional terms and conditions that consumers would not normally find in-store. Some of these conditions are logical limitations on the use of retailers' websites, but others go much further, limiting consumers' rights in a way that would surprise many shoppers. In particular, many online retailers use these terms to limit implied warranties, sell goods 'as is,' limit remedies, and add a host of other limitations.").

120. *Id.* at 29–30. As Marks notes in his article, "[t]he study group is limited to retailers that appear on the 2014, 2015, or 2016 list of top retailers, as ranked by the National Retail Federation based on domestic retail sales in dollars." *Id.* at 29. The resulting list of 154 retailers was then narrowed to 113, after excluding those retailers that did not sell goods or services online. *Id.* at 30.

121. *See* U.C.C. §§ 2-314, 2-315 (AM. LAW INST. & UNIF. LAW COMM'N 2011).

122. *See id.* § 2-316 (requiring certain warranty disclaimers to be conspicuous); *id.* § 1-201(b)(10) (defining conspicuous for purposes of the U.C.C.).

123. Marks, *supra* note 8, at 31.

> merchandise (e.g., Walmart), home and garden (e.g., Home Depot), office products (e.g., Office Max), and a general 'other' category for any retailer that did not fit into one of the previous seven categories.[124]

Marks also noted the extent to which the retailer was significantly involved in the manufacture of the goods sold (e.g., Apple, which is both a manufacturer and retailer of its products).[125]

After describing some difficulties in characterization and coding (which are not particularly critical for the conclusions I will reach shortly),[126] Marks reports his findings in a series of categories, and also includes several useful comparisons and observations.[127] Among these are that 85% of the merchants included some form of warranty disclaimer in their online boilerplate.[128] Marks also includes a table reporting the the percentage of retailers that used the various other clauses surveyed[129]:

Disclaimer/Clause	Number/113 (Percentage)
Use of Website	102/113 (90%)
Limitation of Liability	106/113 (94%)
Arbitration	40/113 (35%)
Return Policy	82/113 (73%)
Alteration of Statute of Limitations	16/113 (14%)
Choice of Law	91/113 (81%)
Forum Selection	64/113 (57%)
Jury Waiver	38/113 (34%)
Class Action Waiver	38/113 (34%)
Nondisparagement	2/113 (2%)

Marks goes on to make several other observations, including the possible reasons for the low percentage of arbitration clauses,[130] the rate of usage of various clauses by manufacturers versus non-manufacturers,[131] and a

124. *Id.*
125. *Id.*
126. *Id.* at 31–37. One issue Marks dealt with was whether online terms which related to disclaimers as to "materials" or "contents" in fact could be interpreted as disclaiming U.C.C. warranties on the goods sold themselves, as opposed to merely being related to operation of the website. *Id.*
127. *Id.* at 37–48.
128. *Id.* at 38–39.
129. *Id.* at 39 (showing Table 3.1).
130. *Id.* at 41–44.
131. *Id.* at 44–46.

breakdown by industry group.[132] The statistics and analysis that Marks has provided are incredibly useful, and provide fertile ground for subsequent research and scholarly treatment of a variety of contracts issues. Two additional insights he made, however, are of particular interest to me with respect to my observations in this Article.

First, one set of data that Marks reports addresses the forms of assent—or type of "wrap" contract—that merchants used in binding consumers to their online terms and conditions.[133] Perhaps surprisingly, 82% of the merchants used *browsewrap*; the next highest category was some form of sign-in wrap at 24%; only 4% used clickwrap; and 0% used scrollwrap.[134] Moreover, as Marks notes, "in a 2008 study of 500 online retailers, 88% were still using pure browsewrap as the means of manifesting assent."[135] Given that courts tend to more readily uphold the enforceability of clickwrap, a reasonable assumption might be that merchants would be more likely to use it instead of browsewrap.[136] As discussed above, ascribing a consumer's mere *browsing* of a website—without any clearer indication that manifestation of assent to contract terms is occurring—is clearly the weakest signifier of assent among the generally discussed forms of wrap contract formations.[137] Clicking a mouse on a button labeled "I Accept" is already a far cry from the more socially known ceremonial act of "signing on the bottom line," but mere passive browsing of a website is even less likely to be a clear outward indicator that a consumer is explicitly agreeing to the online boilerplate being proposed.[138] After all, the consumer was almost certainly going to scroll up or down, and click on different sections of the website, *whether or not* the notification of the presence of browsewrap formation terms was included or not. Simply put, the statistics reveal that retail merchants are emboldened online to use browsewrap in an effort to impose their desired boilerplate in the manner least likely

132. *Id.* at 46–48.

133. *Id.* at 37–38 ("As [the] [t]able . . . demonstrates, the vast majority of retailers rely on browsewrap agreements to bind customers, although sign-in wrap agreements are also somewhat prolific.").

134. *Id.*

135. *Id.* at 38 (citing Ronald J. Mann & Travis Siebeneicher, *Just One Click: The Reality of Internet Retail Contracting*, 108 COLUM. L. REV. 984, 998 (2008)).

136. *See id.* ("Given the deficiencies of browsewrap agreements, one would think that online vendors would use clickwrap agreements more often.").

137. *See supra* notes 76–107 and accompanying text.

138. *See supra* notes 76–107 and accompanying text.

to arouse any attention from the consumers.[139]

Second—and this is a point Marks mentions but does not turn out to be a significant part of his discussion for good reason—retail merchants are requiring consumers to agree to standard form contract terms in their online contracts, *but do not generally use them at all in their physical "brick-and-mortar" stores* (save for return policies and certain purchased product warranties/protection plans, which are typical).[140] That is to say, if the consumer walks into the store, the exact same retailer is willing to sell a consumer their goods free of *any* warranty disclaimers, liability, limitations, arbitration clauses, or any of the other typical types of favorable contract clauses discussed herein. But, once that very same consumer instead decides to transact with the merchant *on the internet*, then suddenly the use of online wrap methods invokes all of the typical clauses limiting the consumer's recourse.[141] Indeed, Marks notes that "*none* of the stores studied attempted to make in-store purchases subject to the same terms and conditions [as online purchases]."[142]

So, just to be clear, let's take an example. Say that I go to my local neighborhood Ace Hardware store, in person, to purchase a cordless drill. After browsing the aisles and talking to a salesperson, I decide on a DeWalt 20V Max Atomic half-inch drill, which (as of the time I wrote this Article) sells for a price of $169.99.[143] I take the drill, walk up to the front counter, pay for the drill with my credit card, and bring it home. The merchant did not impose terms and conditions on me as an in-person customer, as is typical for brick-and-mortar retailers.[144] At that moment, all of the implied warranties of merchantability would apply, warranting that the drill would be fit for its ordinary purpose.[145] Any express warranties made, even orally by the salesperson I

139. *See* Marks, *supra* note 8, at 48 ("[T]he vast majority of the websites studied used a form of assent—browsewrap—typically viewed as the least likely to make consumers aware of the terms and conditions, and thus the most susceptible to attack.").

140. *Id.* at 29.

141. *See supra* notes 120–129 and accompanying text.

142. Marks, *supra* note 8, at 48 (emphasis added).

143. *See DeWalt 20V MAX ATOMIC 20 V 1/2 in. Brushless Cordless Compact Drill Kit (Battery & Charger)*, ACE HARDWARE, https://www.acehardware.com/departments/tools/power-tools/cordless-drills/2493427 (last visited Feb. 19, 2023).

144. *See* Marks, *supra* note 8, at 48 ("This article has explored some of the most common terms and conditions, but it is worth noting that none of the stores studied attempted to make in-store purchases subject to the same terms and conditions.").

145. *See* U.C.C. § 2-314 (AM. LAW INST. & UNIF. LAW COMM'N 2011) ("[A] warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.").

talked to, would be fully applicable and not disclaimed or affected by the parol evidence rule.[146] Moreover, no arbitration clause applies, since there is no written agreement that provides for arbitration.[147] There is also no applicable limitation of liability, so if anything goes wrong with the drill, or injures me, or causes me any other damages—I have the full array of rights available to me under the U.C.C. and potentially the common law of torts and contracts, as well.[148] Ace Hardware has made the decision—one that retailers have basically made for as long as there has been in-person retail—that sales will be made with the backdrop of generally applicable law and remedial options, without any blanket of protection provided by boilerplate terms and conditions favorable to Ace Hardware. Ace *could*, in theory, go to the unusual trouble of posting signage somewhere or taking some other steps to apprise in-person customers that Ace will be disclaiming all warranties and limiting their liability, but they do not do so (as basically no retailers do).[149]

But what if I buy the exact same drill online through Ace's website?[150] After I add it to my online shopping cart and select delivery options (usually either pickup in-store, or delivery directly to my house), I am directed to click the checkout button. At that stage, I am required to enter my payment information. And also, below a red button labeled "Review Order," are two (fairly innocuous) links at the bottom—one labeled "Terms of Use" (the other is labeled "Privacy Policy.").[151] Clicking on "Terms of Use" brings up the Ace website terms and conditions.[152] Section 18 of the Ace Terms of Use contains

146. *See id.* § 2-313 (express warranties); *id.* § 2-316 (disclaimers of warranties); *id.* § 2-202 (parol evidence rule, which potentially precludes any prior oral agreements if the parties execute a final written contract intended as the final expression of the contract).

147. *See* Marks, *supra* note 8, at 29 ("One would not typically find [arbitration] clauses in a brick-and-mortar store . . . .").

148. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 347–56 (AM. LAW INST. 2020) (sections on remedies for damages).

149. Marks, *supra* note 8, at 29 n.174. As Marks points out, "[i]f a brick-and-mortar store uses any disclaimers or limitations, they must be conspicuous to the consumer." *Id.* (citing *Businessperson's Guide to Federal Warranty Law*, FED. TRADE COMMISSION, https://www.ftc.gov/tips-advice/business-center/guidance/businesspersons-guide-federal-warranty-law (last visited Oct. 16, 2023)).

150. These steps for purchasing the drill on the Ace website were accurate as of the time the author initially undertook them for demonstrative purposes in February 2023. They may have changed in nonmaterial ways since that date.

151. ACE HARDWARE, https://www.acehardware.com/departments/tools/power-tools/cordless-drills/2493427 (last visited Oct. 16, 2023) (showing the user process for checking out for the DeWalt 20V Max Atomic half inch drill on Ace Hardware's website).

152. *Terms of Use*, ACE HARDWARE, https://www.acehardware.com/customer-service?page=terms-of-use (last updated Oct. 31, 2023).

product disclaimers which provide in relevant part:

> TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW, (i) ACE HEREBY DISCLAIMS ALL WARRANTIES OF ANY KIND, EXPRESS, IMPLIED, OR STATUTORY, WITH RESPECT TO ONLINE SERVICES AND THE PRODUCTS AND SERVICES OFFERED OR SOLD ON THE ONLINE SERVICES, INCLUDING WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, AND NON-INFRINGEMENT OF INTELLECTUAL PROPERTY; . . . PRODUCTS AND SERVICES OFFERED ON THE ONLINE SERVICES ARE SUBJECT ONLY TO ANY APPLICABLE WARRANTIES OF THEIR RESPECTIVE MANUFACTURERS, IF ANY . . . .
>
> WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, ACE HEREBY EXPRESSLY DISCLAIMS ALL LIABILITY FOR PRODUCT DEFECT OR FAILURE, CLAIMS THAT ARE DUE TO NORMAL WEAR, PRODUCT MISUSE, PRODUCT ABUSE, PRODUCT MODIFICATION, IMPROPER PRODUCT SELECTION, NON-COMPLIANCE WITH ANY CODES, OR MISAPPROPRIATION . . . . ACE DOES NOT WARRANT THAT THE QUALITY OF ANY PRODUCTS PURCHASED OR OBTAINED BY YOU WILL MEET YOUR EXPECTATIONS.[153]

Additionally, Section 19 of the Terms of Use provides for limitations of liability as follows in relevant part:

> IN NO EVENT WILL ACE, ACE RETAILERS, ACE SUPPLIERS, AND/OR THEIR RESPECTIVE OFFICERS, DIRECTORS, EMPLOYEES, SHAREHOLDERS, AGENTS, SUCCESSORS, AND ASSIGNS BE LIABLE TO YOU OR ANY PARTY FOR ANY INDIRECT, SPECIAL, PUNITIVE, INCIDENTAL, OR CONSEQUENTIAL DAMAGES (INCLUDING THOSE RESULTING FROM LOST PROFITS, LOST DATA, OR BUSINESS INTERRUPTION) ARISING OUT OF THE USE, INABILITY TO USE, OR THE RESULTS OF THE USE OF THE ONLINE SERVICES,

153. *Id.* at Section 18. I have excluded the verbiage in the paragraph that also dealt with excluding warranties regarding the accuracy of the information on the website aka the "online services." *Id.*

> PRODUCTS AND SERVICES OFFERED ON THE ONLINE SERVICES, . . . WHETHER BASED ON WARRANTY, CONTRACT, TORT, OR ANY OTHER LEGAL THEORY AND WHETHER OR NOT ADVISED OF THE POSSIBILITY OF SUCH DAMAGES . . . .
>
> IN THE EVENT OF ANY PROBLEM WITH THE PRODUCTS THAT YOU HAVE PURCHASED ON THE ONLINE SERVICES, YOU AGREE THAT YOUR SOLE REMEDY, IF ANY, IS FROM THE MANUFACTURER OF SUCH PRODUCTS, IN ACCORDANCE WITH SUCH MANUFACTURER'S WARRANTY, OR TO SEEK A RETURN AND REFUND FOR SUCH PRODUCTS IN ACCORDANCE WITH OUR 30 DAY RETURN POLICY.[154]

Finally, Ace's Terms of Use also provide for arbitration in Section 20:

> YOU AND ACE AGREE THAT ANY CLAIM OR DISPUTE AT LAW OR EQUITY THAT HAS ARISEN OR MAY ARISE BETWEEN US IN CONNECTION WITH THE ONLINE SERVICES OR ANY PRODUCT OFFERED OR SOLD ON THE ONLINE SERVICES WILL BE RESOLVED IN ACCORDANCE WITH THE PROVISIONS SET FORTH IN THIS SECTION. PLEASE READ THIS SECTION CAREFULLY. IT AFFECTS YOUR RIGHTS AND WILL IMPACT HOW CLAIMS YOU AND ACE HAVE AGAINST EACH OTHER ARE RESOLVED. You and Ace agree that any and all disputes or claims that have arisen or may arise between you and Ace in connection with the Online Services, including any Products offered or sold on the Online Services and your use of the Online Services, shall be resolved exclusively through confidential, final, and binding arbitration; provided that either party may file suit in court seeking to enjoin infringement, misappropriation, or misuse of its intellectual property rights. YOU ARE GIVING UP THE RIGHT TO LITIGATE A DISPUTE IN COURT BEFORE A JUDGE OR JURY.[155]

No in-person customer is subjected to any of these terms if the customer

154. *Id.* at Section 19.
155. *Id.* at Section 20.

drives to the store and buys the drill at their local brick-and-mortar store. But every person that buys the exact same drill online—*from the exact same retailer*—is subjected to all of these terms, which significantly curtails their rights and remedies compared to their in-person consumer counterparts. Why does Ace (like many retailers) impose all of these terms and conditions—particularly disclaimer of warranties, limitation of liability, and arbitration—on online customers, but not impose them on in-person customers? Simply because they can? Because it is essentially costless to do so? Are there different concerns with online customers that do not exist with in-person customers? Perhaps some of these things are plausible explanations. However, in this Article, I am interested in turning to another possible explanation, which has to do with the very nature of the internet itself, and how people behave online.

III. THE ONLINE DISINHIBITION EFFECT

I ran across a short video on social media the other day that gave me a chuckle, but also that struck me as revealing a fundamental truth about the internet. Titled *Dogs Illustrating Online vs. Real Life Conflict. (Part 2)*, the video begins by showing two dogs separated by a glass door.[156] While they are separated, they instantly begin snarling, barking, and bearing their fangs towards each other — seemingly to communicate that, if it wasn't for the glass door separating them, a vicious conflict would erupt in which only one could be the victor. Within a few moments, the door opens, and the dog outside walks in to join the dog inside. They are now together, face-to-face, no longer separated by the glass door. The moment the glass door is removed as a barrier, and the dogs are in the same space without separation, their barking and snarling stops immediately, and they are docile and seemingly at complete peace with each other.[157] The dogs, it seems, had different behavioral patterns when they believed themselves to be separated versus when they were in each other's immediate presence.

The video is amusing, but also inadvertently communicates a message that, by now, I doubt I have to try very hard to convince anyone of its truth. People sometimes act badly (or, at least, more assertively) on the internet—and very often, they do so in a way that they wouldn't do if they were

156. Raw Booty, *supra* note 16.
157. *Id.*

interacting with the person in real time, in face-to-face human contact.[158] Anyone that has visited the comments on enough YouTube videos, online articles, or social media posts, knows this is true. As I mention in my introduction, Joel Stein describes this tendency in his *Time* article, *How Trolls Are Ruining the Internet*.[159] In the article, Stein bemoans that so-called trolls are turning the web into a haven for "monsters who hide in darkness and threaten people."[160] In dramatic fashion, Stein expounds on his premise by observing:

> [T]he Internet's personality has changed. Once it was a geek with lofty ideals about the free flow of information. Now, if you need help improving your upload speeds the web is eager to help with technical details, but if you tell it you're struggling with depression it will try to goad you into killing yourself. Psychologists call this the online disinhibition effect, in which factors like anonymity, invisibility, a lack of authority and not communicating in real time strip away the mores society spent millennia building. And it's seeping from our smartphones into every aspect of our lives.[161]

The internet and social media are therefore undoubtedly and observably affecting our interactions with each other. This has even had a detrimental effect on politics and the national civic discourse.[162] Certainly, it is a pervasive issue on multiple levels since the internet has become such a dominant part of our lives.[163]

In 2004, psychologist and academic John Suler published his article, *The Online Disinhibition Effect*, seeking to systematically describe why "[w]hile

158. Suler, *supra* note 18, at 321 (discussing how some individuals behave more aggressively online than they would behave when interacting with others in person).

159. Stein, *supra* note 17.

160. *Id.*

161. *Id.*

162. *See, e.g.*, Jay David Bolter, *Social Media Are Ruining Political Discourse,* THE ATLANTIC (May 19, 2019), https://www.theatlantic.com/technology/archive/2019/05/why-social-media-ruining-political-discourse/589108/ (describing how the structure of digial social media applications has a negative impact on the political process); Nicholas Carr, *How Social Media Is Ruining Politics,* POLITICO MAGAZINE (Sept. 2, 2015), https://www.politico.com/magazine/story/2015/09/2016-election-social-media-ruining-politics-213104/ ("Our political discourse is shrinking to fit our smartphone screens.").

163. Narelle L. Warden et al., *Internet Addiction*, 11 PSYCHIATRY, PSYCHOL. & L. 280, 280 (2004) (providing background on the internet, specifically noting that it had become a "mainstream communication vehicle by 1995").

online, some people self-disclose or act out more frequently or intensely than they would in person."[164] The opening sentence of his article states: "Everyday users on the Internet . . . have noted how people say and do things in cyberspace that they wouldn't ordinarily say and do in the face-to-face world."[165] Suler's article focuses on individual social behavior online, and he notes that the "online disinhibition effect" could work on an individual level by either: (1) causing the person to be unusually revealing with their emotions, or unusually kind (something he called "benign disinhibition"), or conversely (2) causing the person to exhibit "rude language, harsh criticisms, anger, hatred, even threats" (something he called "toxic disinhibition").[166] The primary question Suler poses is, "what causes this online disinhibition? What elements of cyberspace lead to this weakening of . . . psychological barriers . . . ?"[167] He identifies the following six factors that are implicated in producing the effect: (1) dissociative anonymity, (2) invisibility, (3) asynchronicity, (4) solipsistic introjection, (5) dissociative imagination, and (6) minimization of status and authority.[168] As Suler indicates, not all of the factors have to be present for the online disinhibition effect to occur—one or two of them may well be enough in many instances.[169] I will discuss each of Suler's factors in greater detail below.

A. Dissociative Anonymity

Suler notes that "[a]s people move around the Internet, others they encounter can't easily determine who they are."[170] In other words, unless your online account or username is particularly identifying, no one really knows who you are online—you are *anonymous*.[171] Suler observes:

> This anonymity is one of the principle factors that creates the disinhibition effect. When people have the opportunity to separate their actions on- line from their in-person lifestyle and identity, they feel

164. Suler, *supra* note 18, at 321.
165. *Id.*
166. *Id.*
167. *Id.* at 322.
168. *Id.* at 322–24.
169. *Id.* at 322.
170. *Id.*
171. *Id.*

> less vulnerable about self-disclosing and acting out. Whatever they say or do can't be directly linked to the rest of their lives.[172]

So, this anonymity allows online users to *dissociate*—that is, *separate* their online identity and behavior from their offline identity.[173] This enables a particularly bad-acting or assertive online actor (i.e., that flame-throwing troll in the YouTube comments or on Twitter) to keep from "owning" her behavior, thereby evading responsibility for any actions or behaviors committed online.[174] As Suler states, the "online self becomes a compartmentalized self."[175] It's easier for me to insult someone online (say, a user on a Reddit discussion who may not even be in the same country as me, let alone in my community), then to do so in a bar where I may immediately get smacked in the face. In a word, the anonymous actor can do things online that they would not do offline, since the anonymity allows for the avoidance of social, face-to-face consequences.[176]

B. Invisibility

Suler next points out that, quite obviously, "[i]n most online interactions, especially those that are text-driven, people cannot *see* each other."[177] Thus, online actors are often *invisible*.[178] Invisibility, like dissociative anonymity, "gives people the courage to go places and do things that they otherwise wouldn't."[179] Invisibility is often present simultaneously with anonymity online, but it is conceptually distinct and not all invisible interactions are anonymous.[180] For instance, e-mailing or texting someone in your contact list are examples of invisible online communications that are not anonymous.[181]

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172. *Id.*
173. *See id.* (explaining how individuals phychologically compartmentalize themselves by behaving differently online than they woud behave offline).
174. *Id.*
175. *Id.*
176. *See generally id.* (discussing how the internet provides users with both anonymity and invisibility so as to avoid face-to-face visibility during social interactions, thereby producing a disinhibiting effect on internet users).
177. *Id.* (emphasis added).
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

Suler observes:

> Even with everyone's identity known, the opportunity to be physically invisible amplifies the disinhibition effect. People don't have to worry about how they look or sound when they type a message. They don't have to worry about how others look or sound in response to what they say. Seeing a frown, a shaking head, a sigh, a bored expression, and many other subtle and not so subtle signs of disapproval or indifference can inhibit what people are willing to express.[182]

Moreover, people will often look away when discussing personal or difficult subjects; Suler explains that "[a]voiding eye contact and face-to-face visibility disinhibits people. Text communication offers a built-in opportunity to keep one's eyes averted."[183] So, it's one thing to trash talk your friend, or insult them, in a text message—it's quite another to do so when you are in the same room. Therefore, even if you *know* the identity of the person you are interacting with, not *seeing* them face-to-face emboldens you, and makes you more likely to act more aggressively or assertively action than you might if you were interacting face-to-face.[184]

C. Asynchronicity

"Asynchronicity" describes the lack of instantaneous back-and-forth of some online communication.[185] Suler explains, "In e-mail and message boards, communication is asynchronous. People don't interact with each other in real time. Others may take minutes, hours, days, or even months to reply. Not having to cope with someone's immediate reaction disinhibits people."[186] This is obviously not the case with in-person, face-to-face communication, where reactions are instant and words are exchanged back and forth in

182. *Id.* Suler, a psychologist, points out that "[a]ccording to traditional psycho-analytic theory, the analyst sits behind the patient in order to remain a physically ambiguous figure, revealing no body language or facial expression, so that the patient has free range to discuss whatever he or she wants without feeling inhibited by how the analyst is physically reacting." *Id.*

183. *Id.*

184. *Id.* at 321 (noting that the effects of online disinhibition may and often do spark such aggressive or assertive actions as "rude language, harsh criticisms, anger, hatred [and] even threats").

185. *See id.* at 322–23.

186. *Id.*

a flowing manner.[187] In such "normal" in-person communication, there is a "continuous feedback loop that reinforces some behaviors and extinguishes others," resulting in "moment-by-moment responses from others [that] powerfully shape[] the ongoing flow of self-disclosure and behavioral expression, usually in the direction of conforming to social norms."[188] That is, if two people are engaging in a real-time, synchronous conversation, any reactions to aggressive, assertive, or hurtful language or communications are instant—for instance, if I say something rude or threatening to someone in the same room with me, I am likely to get an immediate reaction. On the other hand, if I email someone, or leave an online comment in a discussion forum or social media post, I don't have to deal with any immediate reaction, because the person is not likely to receive the message immediately. This can make online communications sometimes have a "hit and run" effect to them, where the communicating party does not stay around to face the consequences of what has been said.[189]

D. Solipsistic Introjection

This is another factor which can come into play with online text communication when in-person reactions and cues are absent.[190] As Suler observes:

> [O]ne may not know what the other person's voice actually sounds like, so in one's mind a voice is assigned to that person. In fact, consciously or unconsciously, a person may even assign a visual image to what he or she thinks the person looks and behaves like. The online companion then becomes a character within one's intrapsychic world, a character shaped partly by how the person actually presents him or herself via text communication, but also by one's internal representational system based on personal expectations, wishes, and

187. *See id.*

188. *Id.* at 323.

189. *Id.* ("In e-mail and message boards, where there are delays in that feedback, people's train of thought may progress more steadily and quickly towards deeper expressions of benign and toxic disinhibition that avert social norms. Some people may even experience asynchronous communication as 'running away' after posting a message that is personal, emotional, or hostile. It feels safe putting it 'out there' where it can be left behind. In some cases, as Kali Munro, an online psychotherapist, aptly describes it, the person may be participating in an 'emotional hit and run.'").

190. *Id.*

needs.[191]

That is, people interacting with others online may often conjure up an idea or image in their head of what that person looks like, sounds like, and even what their personality is.[192] As a (made-up) example, say that you are interacting with a person on Reddit with the user ID "WarHunter789." In your interactions online, you may perceive that WarHunter789 writes texts or comments that lean towards assertiveness and even hostility. This may or may not be what is *actually* in WarHunter789's mind, but that is the way you perceive them and construct them in your imagination. As a result, your interactions are shaped to some degree by this image you have concocted in your own mind.[193] Suler observes that to the extent this all occurs in your "imagination, where it's safe, people feel free to say and do things they would not in reality," and therefore, they may act "with considerable disinhibition."[194]

E. Dissociative Imagination

Suler's fifth factor is dissociative imagination, which he believes produces disinhibition.[195] As he describes,

> Consciously or unconsciously, people may feel that the imaginary characters they "created" exist in a different space, that one's online persona along with the online others live in an [sic] make-believe dimension, separate and apart from the demands and responsibilities of the real world. They split or dissociate online fiction from offline fact. . . . [S]ome people see their online life as a kind of game with rules and norms that don't apply to everyday living.[196]

This causes some people acting online to feel like the online interaction is not "real," with the result that there is no real responsibility or consequence for any actions taken while online.[197] Although Suler explains that

191. *Id.*
192. *Id.*
193. *See id.*
194. *Id.*
195. *Id.* at 323–24.
196. *Id.* at 323.
197. *Id.* ("Once they turn off the computer and return to their daily routine, they believe they can

dissociative imagination arises most clearly in "fantasy game environments," it can infiltrate many other areas of online interaction as well—ultimately, this can cause lines between different spheres of interaction to become blurred.[198] Needless to say, if I am merely acting in an online "game" environment, I won't think anything necessarily of taking reckless or aggressive action, since there are likely no real-world consequences (this explains why I die a lot when playing Legend of Zelda with my daughter). But when lines are blurred, and online actors are disinhibited in other non-game online spheres, there can be actual real-world consequences.[199]

F. Minimization of Status and Authority

Suler's sixth primary factor contributing to disinhibited behavior in the online world is the "minimization of status and authority" online.[200] Suler points out that in the real (offline) world, "[a]uthority figures express their status and power in their dress, body language, and in the trappings of their environmental settings."[201] An obvious example would be a police officer patrolling the neighborhood in a police uniform and police car. But, Suler observes that "[t]he absence of those cues in the text environments of cyberspace reduces the impact of their authority."[202] In fact, everyone tends to be on a more level playing field online due to its decentralized, and often anonymous, nature.[203] Moreover, appearances of any online users with obvious legal authority do not frequently recur.[204] Thus, Suler notes, in the offline "real" world, "[p]eople are reluctant to say what they really think as they stand before an authority figure. A fear of disapproval and punishment from on

leave behind that game and their game-identity. They relinquish their responsible [sic] for what happens in a make-believe play world that has nothing to do with reality.").

198. *Id.* at 324.

199. *See, e.g.*, Ben Stegner, *7 Negative Effects of Social Media on People and Users*, MAKEUSEOF (July 29, 2022), https://www.makeuseof.com/tag/negative-effects-social-media/ (describing the negative physical and mental effects of social media use).

200. Suler, *supra* note 18, at 324.

201. *Id.*

202. *Id.*

203. *Id.* ("The traditional Internet philosophy holds that everyone is an equal, that the purpose of the net is to share ideas and resources among peers. The net itself is designed with no centralized control, and as it grows, with seemingly no end to its potential for creating new environments, many of its inhabitants see themselves as innovative, independent- minded explorers and pioneers. This atmosphere and this philosophy contribute to the minimizing of authority.").

204. *See id.*

high dampens the spirit."[205] However, he contrasts this with the more egalitarian nature of the internet where "in what feels more like a peer relationship—with the appearances of authority minimized—people are much more willing to speak out and misbehave."[206]

IV. THE ONLINE DISINHIBITION EFFECT AS APPLIED TO ONLINE CONSUMER CONTRACTING

As discussed previously, merchants have obvious commercial incentives to impose as many favorable clauses in their consumer contracts as they can. Warranty disclaimers, liability limitations, arbitration clauses, and others, have obvious benefits to such merchants in the event of post-transactional disputes.[207] However, for purposes of this Article, I am interested in whether the behavior of merchants—in some manner similar to the behavior of individuals—is affected by the fact of transactions taking place *online*, especially when compared to their *offline* behavior. That is, is it possible that the behavior described thus far—particularly merchants utilizing wrap methods for contract formation, especially browsewrap, and imposing terms on their online customers but not their offline customers—is, at least in part, explicable by reference to Suler's online disinhibition effect? And, for that matter, what about the consumer's actions and motivations? This Part will look at each of Suler's six factors, with reference to how and whether they may be able to shed light on the behavior of online merchants and consumers as has been described. A conclusion on the implications of this analysis will follow.

A. Applicability of the Online Disinhibition Effect Factors in the Online Contracting Process

1. Dissociative Anonymity

As described above, Suler's first online disinhibition effect factor relates to the fact that much online behavior is *anonymous*, and therefore many online actors *dissociate*—or separate—their "online" lives from their "offline" (or real) lives.[208] At first glance, one might think that this factor is not at all

205. *Id.*
206. *Id.*
207. *See supra* notes 113–114 and accompanying text.
208. *See supra* Section III.A.

pertinent to the process of merchants contracting online with consumers through wrap contracting.[209] After all, the consumer knows what merchant they are dealing with—I know, when I go to Ace Hardware's website to buy the DeWalt drill, that I am dealing with Ace Hardware as an entity. And Ace Hardware, through some technological implementation, eventually knows (or can know) my identity (through email address, or other personally identifying information). Or, at least, they will know it eventually as it is coded into the database as the transaction is consummated.

And yet, perhaps there *is* some element of dissociative anonymity at work on some level. From the consumer's perspective, he/she is one human being interacting, at a particular moment in time, with a website—which is just code on a server somewhere.[210] The consumer is interacting with no other human (probably) on the merchant's side for most typical orders placed online.[211] So, the consumer doesn't "know" anyone she is dealing with, besides conceptually the merchant's code on a server. And from the merchant's perspective, there is very likely no human acting on its behalf at all at the time the order is placed. It is true that even in the offline world, an organization is not a "person" in the human sense,[212] but offline the organization is at least acting through the efforts of an employee or other agent, who is likely face-to-face (or least on a phone call) with the consumer. This is not the case with an online transaction entered into by the consumer on the merchant's website, where the merchant's side of the interaction is all through automated, computerized code.[213] There are simply not two humans aware of each other interacting at the instant of contract formation, and therefore, the potentially disinhibiting effect of dissociative anonymity is plausibly in operation.

209. *See* Nancy S. Kim, *Wrap Contracts: The Online Scourge*, OUPBLOG (Dec. 17, 2013), https://blog.oup.com/2013/12/wrap-contracts-privacy-control-consumers/ (describing the design and ubiquity of wrap contracts in e-commerce).

210. *What is a Website?*, GEEKS FOR GEEKS (Feb. 18, 2023), https://www.geeksforgeeks.org/what-is-a-website/ ("A website is a collection of many web pages, and web pages are digital files that are written using HTML (HyperText Markup Language). To make your website available to every person in the world, it must be stored or hosted on a computer connected to the Internet round a clock. Such computers are known as a Web Server.").

211. *See id.* (detailing how for e-commerce, server-side scripting language directs users' actions).

212. *Cf.* 3 AM. JUR. 2D *Agency* § 157 (2023) ("Where an agent has authority to exercise discretion, the agent's exercise thereof will bind the principal.").

213. *See What is a Website?, supra* note 210 (highlighting how server-side scripting language controls e-commerce consumers' behavior).

2. Invisibility

Suler's second factor is invisibility—"[i]n many online environments, especially those that are text-driven, people cannot *see* each other."[214] Without question, this factor clearly applies to virtually all online consumer transactions.[215] In a typical online transaction where the consumer is purchasing goods or services, they are sitting at their computer (or holding their tablet or smartphone), accessing the merchant's website online.[216] They cannot see anyone, as they are at their computer and the merchant website is elsewhere. As pointed above, on the merchant's side, in real time there may not even be anyone actively participating or monitoring the transaction. But even to the extent there was someone doing so, they would not see the consumer—nor would the consumer see them. So, clearly, the invisibility factor is completely applicable in the vast majority of online contracting scenarios, complete with its naturally disinhibiting effect.

3. Asynchronicity

Suler's third factor is asynchronicity.[217] This refers to the fact that most online communication does not occur synchronously, or in real time, with back-and-forth immediacy.[218] Rather, emails, text messages, and other online communications are often posted minutes, hours, or even days before receiving a response.[219] In one sense, one would think there is no asynchronicity present in online consumer contracting. After all, the consumer interacts with the merchant's website, and the consumer's click of the checkout button or similar mechanism concludes the contract instantly and immediately.[220] And yet, from another perspective, the engagement is quite asynchronous. As

214. *See* Suler, *supra* note 18, at 322 (emphasis added).

215. *See generally* Ardion Beldad et al., *How Shall I Trust the Faceless and the Intangible? A Literature Review on the Antecedents of Online Trust*, 26 COMPUTERS HUM. BEHAV. 857 (Sept. 2010) (describing how the facelessness of online transactions potentially erodes consumer trust).

216. *See* Tabitha Cassidy, *Consumers Order More on Desktop than Mobile from Online Retailers*, DIGITAL COM. 360 (July 24, 2019), https://www.digitalcommerce360.com/2019/07/24/consumers-order-more-on-desktop-than-mobile-for-online-retailers/ ("[U]nits per order . . . are 24% higher on a desktop than a smartphone and 14% higher on tablets than smartphones . . . .").

217. Suler, *supra* note 18, at 322.

218. *See supra* Section III.C.

219. *See supra* Section III.C.

220. *See* Kim, *supra* note 209 ("'Wrap contracts' are contracts that can be entered into by clicking on a link or on an "accept" icon and they govern nearly all online activity.").

noted above, a merchant's website is just a set of code sitting on web servers.[221] The terms and conditions were likely written months or years prior and placed on the web server.[222] Further still, the consumer does not get any immediate response from any human acting on behalf of the merchant, but usually just a confirmation of the order, often sent by an automated email.[223] Another factor again at play here is that there simply is no human being on behalf of the merchant acting *at all* in real time, with respect to the consumer's transaction.[224] From the merchant's perspective, it is all automated.[225] Therefore, many of the same dynamics may be at play in the transaction formation process as are present in the asynchronous interaction between two or more individuals online. In both cases, the consumer and merchant act somewhat in isolation with no immediate human feedback or reaction to the other's behaviors.[226] As such, much of the same disinhibiting work borne by asynchronous online activity may similarly be at work in online contracting.[227]

4. Solipsistic Introjection

Suler's solipsistic introjection factor relates to the tendency of people acting online to construct an image, sound, or personality of the actor in their imaginations as they are interacting with the other person.[228] Thus, we may picture what a person looks like, sounds like, or even what their personality or motivations are like, absent any directly-observable data on these

221. *See What is a Website?*, *supra* note 210.

222. Francesca Nicasio, *Generate Economic Terms and Conditions*, ECOMMERCE GUIDE (July 18, 2019), https://ecommerceguide.com/guides/ecommerce-terms-conditions/ (describing what terms and conditions to code into an ecommerce website).

223. Richard White, *Order Confirmation Emails: Best Practices and Examples* (June 3, 2022), https://www.omnisend.com/blog/order-confirmation-email-automation-conversions/#:~:text=An%20order%20confirmation%20email%20is,and%20the%20estimated%20delivery%20date.

224. *See What is a Website?*, *supra* note 210 (explaining that it is server-side scripting language, rather than human interaction, that directs consumers actions in online e-commerce).

225. *See id.* (delineating how e-commerce sites are dynamic websites that are automated to update during runtime according to user demand).

226. Suler, *supra* note 18, at 322–23 ("People don't interact with each other in real time. Others may take minutes, hours, days, or even months to reply. Not having to cope with someone's immediate reaction disinhibits people.").

227. *Id.* at 323 (asserting that people interacting online are disinhibited by not having to cope with someone's immediate reaction in real time).

228. *Id.*

characteristics.[229] This factor would not seem applicable from the merchant's perspective at all, at least at the instance of contract formation. Again, at such a moment the merchant's only interaction is through the operation of automated website code; no merchant employee necessarily acts or reacts in response to to the merchant's actions in real time at all.[230] From the consumer's perspective, however, this phenomenon may be more potent. How might the consumer "picture" the merchant in her head? This may widely differ from consumer to consumer. On the one hand, it is possible that the consumer perceives the merchant (correctly) as a large, commercially powerful entity.[231] On the other hand, the consumer may not think of the merchant that way at all; instead, the consumer may well be inclined to underestimate the merchant's commercial power—frankly, given that probably most consumers are not even aware that they are agreeing to terms and conditions when they buy goods or services online, they may not even think in serious commercial terms.[232] To the extent the latter is what more commonly occurs, it is likely to have a disinhibiting effect from the consumer's perspective, at least (i.e., having them not otherwise be "on their guard" to watch out for what terms they are binding themselves to).

5. Dissociative Imagination

Suler's fifth online disinhibition factor is dissociative imagination, which describes the phenomenon of actors treating the online space as separate and apart from their "real" lives and space.[233] That is, many online actors may act in a more assertive or aggressive manner online, because they almost feel that engaging in online discourse is "gamelike" without any real consequences,

229. *Id.* ("As the introjected character becomes more elaborate and subjectively 'real,' a person may start to experience the typed-text conversation as taking place inside one's mind, within the imagination, within one's intrapsychic world—not unlike authors typing out a play or novel.").

230. *See What is a Website?*, *supra* note 210 (describing a website as a digital environment capable of "delivering information and solutions" on behalf of an organization).

231. See Joseph Fishkin & William E. Forbath, *The Anti-Oligarcgy Constitution*, 94 B.U. L. REV. 669, 677–87 (2014) (elaborating on the rise of large corporations and their control of the American political and economic systems, and providing a historical discussion on perception of large corporations at the end of the nineteenth century).

232. *See supra* notes 104–107 and accompanying text.

233. Suler, *supra* note 18, at 323–24.

whereas their offline "real" life must be treated more carefully.[234] Again, given that organizational merchants are operating their e-commerce websites for profit, it stands to reason they are not reasonably susceptible to blurring the lines between "online" and "offline."[235] But consumers may well often be a different story. A consumer who is sitting at their computer in their living room at 11:00 PM surfing the internet, reading email, browsing social media, etc.—who then briefly in the middle of this leisure activity purchases a good or service from a website by merely scrolling, browsing, and clicking (just as they had been doing for an hour or two beforehand)—may well not as readily perceive they are entering into a serious and binding commitment by having the merchant's terms and conditions enforceably imposed upon them. They may not see it as "real" in that sense, just as those online actors commenting on websites and social media don't seem as "real" to their actual lives.[236] While these same individuals would likely have no problem perceiving that they were undertaking a "real obligation" when signing a mortgage contract in-person at a closing in a title company office, they simply would not be as likely to perceive the same thing occurring in a browsewrap or even clickwrap transaction.[237] To this extent, the dissociative imagination effect Suler described may well have a disinhibiting effect on consumers. And although merchants do not similarly blur the lines between what is occurring online versus offline, there is little doubt they know that many consumers likely do.[238]

6. Minimization of Status and Authority

Suler's sixth factor contributing to the online disinhibition effect is

234. *See id.* at 323 ("[P]eople may feel that the imaginary characters they 'created' exist in a different space, that one's online persona along with the online others live in a make-believe dimension, separate and apart from the demands and responsibilities of the real world.").

235. *See, e.g.*, AMAZON.COM, INC., 2022 ANNUAL REPORT (FORM 10-K) (2023) (showing that with a consolidated operating income of $12.2 billion in 2022, online merchants such as Amazon are not reasonably susceptible to blurring the lines between online and offline).

236. *See supra* Section III.E.

237. *Cf.* Michelle Cortes, *We're All Shopping Addicts Now*, N.Y. MAGAZINE: THE CUT (May 24, 2023), https://www.thecut.com/2023/05/shopping-addiction-online-consumption.html (acknowledging that online shopping and social media give "people the opportunity to . . . create an identity for themselves online that they may not be able to otherwise.").

238. *Id.* (discussing that retailers have been using the online world to manipulate consumers for years).

"minimization of status and authority."[239] This concerns the reality that whereas in the offline world we can visibly see authority figures (such as police) by their dress and other characteristics with a concomitant inhibiting effect (we are probably less likely to act out in a criminal or bad way when visible authority is present), in the online world there is a general absence of such authority being visible and present at any time.[240] As a result, online actors may be more disinhibited by this lack of visible constraining authority on the internet.[241] It is hard to mount any case that this factor is germane to the online contracting context. Given that contracting is a civil process that does not, by and large, implicate the criminal laws or authorities, there generally are no visible authorities in the offline context that loom over the "real-world" contracting process in the moment.[242] There are, of course, the courts where any subsequent contract disputes will be adjudicated, but they do not make their presence known in the factual moment of contracting (the way, say, that a police officer pulled over on the side of a highway may likely prevent you from exceeding the speed limit). And, since there is no real visible authority in the offline world that inhibits the transactional process, the similar lack thereof online does not seem—at least in the online contracting process—to work any additional disinhibiting effects. Therefore, I will not consider this factor further.

B. Does the Presence of the Factors Potentially Cause Disinhibition During the Contracting Process? A Plausible Account

Having just examined the extent to which at least some of Suler's online disinhibition factors may be present in the online contracting environment, I now turn to a brief rumination on the extent to which those factors may actually be likely to produce a disinhibiting effect insofar as contracting online is concerned. Realizing that correlation is not causation,[243] it nevertheless may prove insightful to contemplate whether and to what extent some amount of

239. Suler, *supra* note 18, at 324.

240. *See supra* Section III.F.

241. Suler, *supra* note 18, at 324 ("But online, in what feels more like a peer relationship—with the appearances of authority minimized—people are much more willing to speak out and misbehave.").

242. *Civil Action*, CORNELL L. SCH.: LEGAL INFO. INST., https://www.law.cornell.edu/wex/civil_action (last updated July 2020) ("Typical civil causes of action include breach of contract . . . .").

243. *See, e.g.*, Anthony Figueroa, *Correlation is not Causation*, TOWARDS DATA SCI. (Aug. 13, 2019), https://towardsdatascience.com/correlation-is-not-causation-ae05d03c1f53.

disinhibiting effect may be occurring in the binding of consumers to the merchant's online terms and conditions through wrap formation methodology. Because there are generally two parties to an online wrap contract—the consumer and the merchant—I will briefly consider each of their perspectives before concluding.

1. The Consumer

From the consumer's perspective, I think it is quite plausible that the entire online structure of the judicially-approved wrap formation process likely leads to significant disinhibition. In fact, perhaps disinhibition is a misnomer in many cases, because I think it is fair to suppose that in a substantial percentage of cases the consumer is not even *aware at all* that terms and conditions are being imposed in the first place.[244] Whether one characterizes this as being "disinhibited" or simply "unaware," in either event the fact remains that the often-surreptitious manner in which the terms are nested within the website makes it much more likely that the consumer will take action that is legally recognized as being sufficient to bind her to the merchant's terms and conditions.[245] Of course, this is not a case of being disinhibited so much as being oblivious.

However, even to the extent that the consumer is aware on some level during the online purchasing process that wrap terms and conditions are being proposed as a set of contract terms which will be binding on the consumer, I believe one or more of Suler's factors may potentially be at work to effect disinhibition on the part of the consumer.[246] "Dissociative anonymity" is at work, insofar as the consumer is not aware of any person in the merchant organization at the time she transacts on the website—in fact, the consumer is dealing with a website, or automated code on a server.[247] This may likely cause the consumer to not be as "on guard" as they would be if, on the other

244. Nancy S. Kim, *Contract's Adaptation and the Online Bargain*, 79 U. CIN. L. REV. 1327, 1343 (2011) ("An online consumer . . . may not even be cognizant of having entered into a contract.").

245. *See* Kim, *supra* note 70, at 272 ("Users manifest assent to a browsewrap simply by continuing to use the website after the judicially constructed notice.").

246. *See* Suler, *supra* note 18, at 323 (describing how factors often intersect to amplify the disinhibition effect).

247. *See id.* at 322 (noting how individuals may behave different online when their idenitity is concealed and they do not have to deal with the reaction of another person in real time).

hand, a bank officer was present when signing a mortgage contract.[248] In this same vein, even if there *were* a merchant representative interacting in real time at the time of the transaction (such as on an online customer service chat), "invisibility" would possibly effect a similar disinhibiting effect.[249] The context of contracting from the comfort of home on a website carries with it a lesser formality and lack of imposing presence that may well make consumer less inhibited in proceeding with the purchase.[250] "Solipsistic introjection" may also be in play, insofar as the consumer does not think of the benign website like they think of the real-life bank officer at the mortgage closing—they may well instead just think of the website as a helpful portal to obtain consumer goods or services, thereby minimizing what is at stake insofar as the imminent subjection to the merchant's terms and conditions.[251]

Finally, "dissociative imagination" is likely in play as well.[252] Consumers frequently separate their "online" interaction from their "offline" interaction.[253] Online space is "virtual" space or "cyber" space.[254] It's not "real" or corporeal like the offline world.[255] Clicking and browsing social media, or websites, or blogs, or playing online games, or for that matter using apps on their computer—none of this is like taking steps in the "real" world. And so when, buried in the midst of all of this other online leisure activity, actual real terms and conditions are imposed, it is easy to see how many consumers may minimize the significance. When it takes more scrolls, taps, and clicks to scroll through the clickbait article, *Celebrities Who've Done Prison Time*,[256]

248. *See* Nancy S. Kim, *ProFlowers Distinguished Professor of Internet Studies: Acceptance by Nancy S. Kim*, 51 CAL. W. L. REV. 3, 5 (2014) ("Clicking to proceed on a website is not the same thing as signing on a dotted line. A hyperlink to a webpage lacks the signaling effect of a stack of legal documents handed to a consumer for signature.").

249. Suler, *supra* note 18, at 322 (suggesting that *physical* invisibility can amplify the disinhibition effect even when identities are known).

250. *See* Kim, *supra* note 248, at 5 (highlighting how clicking on a website does not signal the same weight of significance as signing a paper contract).

251. *See* Suler, *supra* note 18, at 323 (describing how self-boundaries can be altered due to a lack of face-to-face interaction).

252. *See generally id.* at 323–24 (defining "dissociative imagination" as a combination of dissociating from what happens online and creating imaginary characters).

253. *Id.* at 323.

254. *Id.* (explaining that dissociative imagination entails individuals viewing online environments and interactions as taking place in a "different space" or a "make-believe dimension").

255. *Id.* ("[Online actors] split or disscociate online fiction from offline fact.")

256. *Celebrities Who've Done Prison Time,* STARS INSIDER (Mar. 11, 2023), https://www.starsinsider.com/celebrity/461980/celebrities-whove-done-prison-time.

than it does to bind yourself quickly in a click or two to Ace Hardware's terms and conditions when buying that DeWalt drill online, it is easy to see how online consumers become anesthetized and desensitized, and thereby minimize the prospect of legally binding themselves to binding contract terms via wrap contracting. It seems plausible that the online process and the way contract terms are presented likely disinhibit consumers from any reluctance to bind themselves accordingly.[257]

2. The Merchant

As shown above, there is little question that consumers are likely disinhibited from binding themselves to a merchant's online terms and conditions, given initially that they may not often even be aware of the fact that the website is proposing binding terms in first place;[258] this is coupled with the fact that several of Suler's online disinhibition effect factors help minimize the average consumer's perception of the seriousness and magnitude of the specter of enforceable terms and conditions that are in the balance—such consequence being part of their separate "online" life with unseen, unknown individuals that does not necessarily seem to affect their "real" life conducted offline.[259] In short, the online process of judicially-approved wrap contract formation is designed to make the consumer-binding process as frictionless as possible.[260] Everything about it makes it exceedingly likely that consumers will simply click or browse their way to assent, without any significant amount of critical reflection.[261]

Are these same factors at play, in the same way, from the merchant's perspective? At first glance, there are critically important differences between the merchant's organizational perspective versus the individual consumer's

257. *See* Kim, *supra* note 244, at 1368 (asserting that consumers become conditioned to signing online contracts without reading).

258. Kim, *supra* note 248, at 4 ("The judicial construction of assent expects too little from drafters. It fails to account for the aggregative nature of wrap contracts. It ignores that a click to acknowledge a hyperlink that discreetly states 'TERMS' fails to signalize to most consumers that important legal rights are being allocated or reallocated.").

259. *See supra* Section IV.B.1.

260. *See* Kim, *supra* note 248, at 5 ("[O]nline companies tout their services as 'free,' further misleading the consumer into thinking the transaction is trivial and without legal effect. The result is frictionless contracting where consumers agree to terms that they do not know exist.").

261. Nancy S. Kim, *Clicking and Cringing*, 86 OR. L. REV. 797, 821 (2007) (explaining that without ever reading the terms, "[i]f the consumer wants to to enter the transaction, the consumer will accept all of its terms.").

perspective. Unlike the consumer, the merchant is not likely to blur the lines of reality between the "online" world and the "offline" world. This is because, unlike the consumer, the merchant is not utilizing the internet for multiple reasons, both commercial and personal.[262] Rather, the merchant is online for a singular reason—to attract and sell to online consumers, and make a profit.[263] But this does not answer the question of whether merchants are nevertheless emboldened or disinhibited by transacting online versus offline. On the contrary, regarding the merchant's perspective, several of the Suler factors seem undoubtedly to be functioning in the online commercial sphere to produce a disinhibiting effect.[264]

Consider again the fact that the merchant has written the code for its website and placed it on its servers (like the person fishing who baits the hook and lays out the trotline and then waits hours for the fish to eventually bite).[265] It has done this several weeks, months, or perhaps even years in advance. From its perspective, acquiring online consumer purchasers becomes, after that point, almost frictionless.[266] There are no individual merchant employees directly interacting with any one consumer at the time of purchases—such interaction is typically automated.[267] Given that the process is literally

262. *See* Ashley Donohoe, *How Do Companies Use the Internet*, BIZFLUENT (Mar. 23, 2020), https://bizfluent.com/facts-5977213-role-information-technology-business.html (delineating the different, solely business purposes for which companies use the internet).

263. *See, e.g.*, Ashley Schoenjahn, *New Faces of Corporate Responsibility: Will New Entity Forms Allow Businesses to Do Good?*, 37 J. CORP. LAW 453, 454 (2012) ("Profit-maximization has been a cornerstone of American corporate law and legal education for many years.").

264. *See, e.g.*, Kim, *supra* note 248, at 4 ("The unique digital environment affects both how consumers perceive terms and how companies present them.").

265. *See Trotline Fishing: Building and Setting Trotlines*, MOSSY OAK (July 19, 2022), https://www.mossyoak.com/our-obsession/blogs/fishing/trotline-fishing-building-and-setting-trotlines.

266. *See* Kim, *supra* note 248, at 4 ("The unique digital environment affects both how consumers perceive terms and how companies present them. If consumers are online shopping, they are typically in a hurry to complete the transaction. If they are engaged in some form of entertainment or merely browsing a website, consumers generally are not expecting to be hijacked by a legal document. Image, rather than text, dominates the online environment. The intangibility of digital terms obscures the legal nature of online contracting. Companies take advantage of these strains on consumers' attention and the weightlessness of digital terms to present contract terms which are, paradoxically, excessive yet inconspicuous.").

267. Ichiro Kobayashi, *Private Contracting and Business Models of Electronic Commerce*, 13 U. MIAMI BUS. L. REV. 161, 184 (2005) ("A transaction in an electronic commerce business model is created in a conveyer-belt style of machine-made, automated contract-formation process, where 'electronic agents' are actually engaged in negotiating with consumers.") (citing Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1130 (2000)).

automatic from the merchant's perspective, there is similarly very little to inhibit the merchant's website code from operationally facilitating and permitting the transaction to take place.[268] Additionally, the fact that the merchant employees are, at each instant of the transacting process, functionally unaware of the existence of any one consumer purchaser, one might posit that Suler's "dissociative anonymity" and "invisibility" factors are both at work.[269] Moreover, the fact that the website code has been programmed and implemented far in advance of the consumer's actual purchase shows a form of the "asynchronicity" factor at work.[270]

Consider also the fact that merchants have taken advantage of the online locale of contracting to implement generally the wrap methodology of formation which has been resoundingly approved by the courts.[271] This step alone is likely indicative (in hindsight) of the disinhibition afforded by moving consumer contracting online.[272] Consider that in the offline world, the law typically required merchants to present the consumer with a lengthy form contract in paper form if they wanted to impose a number of terms and conditions on the consumer.[273] But the internet presented merchants with a challenge—how to accomplish the logistics of obtaining the consumer's assent through the online computer process? The merchants began implementing the variations of browsewrap, clickwrap, and other methods described above.[274] And, perhaps, initially held their breath. After all, would the courts accommodate this fairly audacious step—a mere click, or mouse wheel scroll, as carrying the same legal weight as signing on the dotted line? We know the answer now.[275] This step the merchants took, though, was likely aided by the fact that the online context removed the merchant's inhibitions because of the presence of several of the Suler factors at work—"dissociative anonymity" (no

268. *See* Kim, *supra* note 70, at 265 ("Companies intentionally minimize the disruptiveness of contract presentment in order to facilitate transactions and to create a smooth website experience for the consumer.").

269. *See* Suler, *supra* note 18, at 322 (defining how dissociative anonymity manifests when some of a user's identity is hidden and describing how invisibility exists in text-based online environments).

270. *See id.* (highlighting that asynchronicity occurs when people do not interact in real time).

271. *See supra* Section II.B.

272. *See* Kim, *supra* note 70, at 269 (noting that online contracts create differences in both "consumer perception and businesses' drating behavior").

273. *See supra* Section II.A.

274. *See supra* Section II.B.

275. *See* Kim, *supra* note 70, at 269 ("Courts declare that electronic contracts are 'just like' paper contracts and emphasize their similarities without also acknowledging their differences.").

individual merchant employee was aware of, or interacting with, any consumer purchasing on the website; rather, all processes were automated); "invisibility" (no individual merchant employee could "see" any purchasing consumer, nor their reaction to being presented with a lengthy list of terms and conditions); and "asynchronicity" (the merchant had programmed and coded the website likely months or even years before each individual consumer accessed the site and purchased goods or services from it).[276] All of these factors were plausibly at work in emboldening merchants to implement the unassuming wrap methodology for binding consumers to their terms. This is all the more so likely the reason why the vast majority of merchants even continue to use browsewrap[277]—easily the least likely of the wrap methods to alert the consumer of the presence of terms and conditions being assented to.[278]

Finally, consider the obvious fact, pointed out by Colin Marks and highlighted by my illustrative Ace Hardware/DeWalt drill example above, that merchants routinely impose lengthy terms and conditions via wrap contracting in their *online* contracts for goods or services, but impose virtually no terms and conditions on their brick-and-mortar "offline" consumers.[279] Here is perhaps the clearest and most inarguable sign of the disinhibition experienced by merchants making the consumer contracting process available online.[280] Consumers that walk into a brick-and-mortar store will be visible. Store employees will *see* them as they talk to them about their need for goods or services. They will *not* be anonymous; they will *not* be invisible. Moreover, the interaction will be completely *synchronous*. Merchants *could* theoretically seek to impose the same set of terms and conditions—warranty disclaimers, liability limitations, arbitration clauses, etc.—on their offline consumers as on their online consumers.[281] But they do not do so. Why not? While there may be reasons of cost and logistics, a very likely reason may well also be that merchants believe this would deter some consumers from purchasing from them.[282] If I am presented a form contract before being

276. *See supra* Section IV.A.

277. *See supra* notes 134–139 and accompanying text.

278. *See supra* notes 76–85 and accompanying text.

279. *See supra* notes 140–155 and accompanying text.

280. *See* discussion *supra* Part III, Section IV.A (describing the elements of online disinhibition and its applicability to online contracting).

281. *See supra* note 149 and accompanying text.

282. *Cf.* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) ("Cashiers cannot be

allowed to buy that DeWalt drill from an Ace Hardware storefront, I may just decline and go down the street and buy it from a competitor who does not impose the same terms on me in person. But once the transaction is taken online, with the wrap formation methodology validated by the courts, the inhibitions go away.[283] I now become *anonymous* to the merchant—no merchant employee knows who I am in that moment, and so no merchant employee has to deal with my reactions to being presented with online terms.[284] I am most certainly *invisible* to the merchant, and thus for similar reasons the merchant does not see or perceive any of my negative reactions to the online terms.[285]

Finally, again, note the *asynchronous* nature of the entire exchange—most merchant employee interaction occurred earlier with the website designers, coders, and perhaps marketing people months or years before the contract was consummated.[286] Therefore, the merchant employees are all the more separated in time and space from the instantaneous moment of consumer purchase, further removing them from any of the inhibiting factors that might otherwise be in play with *synchronous* interaction (such as would occur in person at a brick-and-mortar store).[287] All of this seems to indicate that merchants are likely disinhibited in imposing terms and conditions on their online consumers, versus their offline ones, showing that Suler's online disinhibition effect is operating in this context.

V. CONCLUSION

This Article posits that, in all likelihood, human nature regarding behavior on the internet has contributed to the disinhibition of both consumers and merchants when freely and frictionlessly entering into binding, enforceable agreements as to the merchant's stated terms and conditions with respect to

expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway's had to read the four-page statement of terms before taking the buyer's credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in a rage over the waste of their time.").

283. *See* discussion *supra* Part III (demonstrating the disinhibition effect of online contracting).

284. *See supra* Section IV.A.1.

285. *See supra* Section IV.A.2.

286. *See supra* Section IV.A.3.

287. *See supra* Section III.C.

the purchase of goods or services.[288] The natural evolution began with the rise and enforceability of standard form contracts in the "offline" paper world, notwithstanding that it was unlikely that the typical consumer would read or understand the terms.[289] At least, however, the typical consumer understood that *something* was being agreed to.[290] When consumer contracting moved online with the rise of the World Wide Web in the 1990s and beyond, merchants quickly adopted—and courts eventually embraced as enforceable[291]—a less formal "wrap" method of contract formation, where the consumer is less likely to even be *aware* of the existence of terms being agreed to (especially in the case of browsewrap).[292] Even to the extent consumers were aware of forms being proposed, however, Suler's online disinhibition factors are likely at play given the dissociative anonymity, invisibility, and synchronicity that operate in the online world versus the offline world.[293] Based on these factors, consumers are more likely to minimize this activity because it occurs in their "online" (less real) world versus their "offline" (more real) world.[294] These same factors—operating differently—are also likely to disinhibit merchants in seeking to impose these terms on often-unsuspecting consumers.[295] Given that the coding of the website happens months or years in advance, the later-transacting consumers arrive at the merchant's website months or years later, showing the interaction is *asynchronous*; it is also *invisible* and *anonymous* because there is literally no human-to-human interaction at the moment of consumer agreement (rather, it is all accomplished through automated means where no merchant employee is likely to intervene to interrupt the process).[296] This is demonstrated by merchants' use of various wrap formations generally, their use of browsewrap specifically (the type least likely to arouse consumer

288. *See supra* Sections IV.B.1–2 (applying disinhibition factors to online cosumers and merchants).

289. *See supra* Section II.A.

290. *See* Kim, *supra* note 70, at 269 ("Under the 'reasonable communicativeness' test, courts focus both on [a paper contract's] physical characteristics of the notice and extrinsic factors, such as the recipient's ability to become meaningfully informed of the contractual terms. . . . By contrast, with electronic contracts, courts typically fail to acknowledge the difference that digital form has on both consumer perception and businesses' drafting behavior.").

291. Moringiello & Reynolds, *supra* note 76, at 470–71.

292. *See supra* notes 135–136 and accompanying text.

293. *See supra* Part III, Section IV.A (explaining Suler's online disinhibition factors and applying them to online contracting).

294. *See supra* Section IV.B.1.

295. *See supra* Section IV.B.2.

296. *See supra* Section IV.B.2.

suspicion), and by the clear fact that merchants impose terms and conditions regularly against their *online* consumers while generally refraining from doing so against their *offline* customers.[297]

Given that it may now be clear, in hindsight, that the contract formation process is greatly streamlined and disinhibited by having been moved from a more formal process offline (signing with a signature), to a more informal process online (clicking or browsing), what consequences should this conclusion impel? To suggest a complete revamp of the nature of the rules of consumer assent to form contracts is well beyond the scope of this Article, nor do I think it is particularly realistic at this late juncture, although some have argued for such an approach.[298] Wrap contracts are likely here to stay for the time being. One likely approach for American law in the future may be one that moves away from hopelessly attacking the assent paradigm, and instead embraces a more regulatory approach where a host of specific terms are simply deemed unenforceable in various consumer contexts. This is not completely unknown to American law—for example, existing law in some jurisdictions prohibits usurious contracts[299] or covenants not to compete.[300] Moreover, a more comprehensive approach has been implemented to some degree in Europe.[301] In the meantime, a more modest approach may be for courts to simply be more vigilant in looking at fairness, formation, and enforceability when assessing consumer wrap contracts—being especially attuned to and

297. *See supra* Section IV.B.2.

298. *See, e.g.*, Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer's Reality*, 18 N.C. J. L. & TECH. 180, 203 (2016) (suggesting the courts move toward a presumption against mutual assent); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 482 (2006) (arguing for the application of contract law to the validity of browsewrap contracting).

299. *See, e.g.*, TEX. FIN. CODE § 302.001(b) (2001) (specifying maximum rate of interest of 10%).

300. *See, e.g.*, CAL. BUS. & PROF. CODE § 16600 ("[E]very contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void.").

As of the time this article is being first written, President Biden is also recently arguing for a new proposed "Junk Fee Prevention Act," designed to: (1) "[c]rack down on excessive online concert, sporting event, and other entertainment ticket fees;" (2) "[b]an airline fees for family members to sit with young children;" (3) "[e]liminate exorbitant early termination fees for TV, phone, and internet service;" and (4) "[b]an surprise resort and destination fees." *See FACT SHEET: President Biden Highlights New Progress on His Competition Agenda*, THE WHITE HOUSE (Feb. 1, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/02/01/fact-sheet-president-biden-highlights-new-progress-on-his-competition-agenda/.

301. *See* Larry Bates, *Administrative Regulation of Terms in Form Contracts: A Comparative Analysis of Consumer Protection*, 16 EMORY INT'L L. REV. 1 (2002); Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 1993 O.J. (L 95) 29 (EC), https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1429176294813&uri=CELEX:31993L0013.

taking "special care" to the potential for unconscionability or interpretations in favor of the consumer where possible.[302] Given the lack of actual robust consent, coupled with merchants being uninhibited in widely imposing a full range of terms and conditions on often-unsuspecting consumers in the online context, such care is at least as warranted as in the standard real-world form contract scenario in which it is already utilized.[303] Such an incremental step would be at least a modest effort towards assisting consumers currently navigating the online world of e-commerce, where they and merchants currently roam and contract in an uninhibited manner.

302. Meyer v. State Farm Fire & Cas. Co., 582 A.2d 275, 278 (Md. 1990) ("The fact that a contract is one of adhesion does not mean that either it or any of its terms are invalid or unenforceable. *A court will, to be sure, look at the contract and its terms with some special care. As in most cases, it will refuse to enforce terms that it finds unconscionable and will construe ambiguities against the draftsman;* but it will not simply excise or ignore terms merely because, in the given case, they may operate to the perceived detriment of the weaker party.") (emphasis added).

303. *See id.*

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