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Relationalism & Consent: Revising U.C.C. § 2-207

Lawrence Kalevitch

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RELATIONALISM & CONSENT: REVISING U.C.C. § 2-207

Lawrence Kalevitch*

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*"The belief that some single formula can in principle be found whereby all the diverse ends of people can be harmoniously realized is demonstrably false."***

I. INTRODUCTION

A *substantive* law of contracts cannot meet party expectation and does not foreclose the aim of contract law as party expectation.¹ A fact-oriented and

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** Sir Isaiah Berlin, *Four Essays on Liberty* 169 (1969).

¹ For example, a substantive law of contracts prescribes what parties intend by stating rules identifying particular conduct as having a particular consequence. Thus, in the law of offer and acceptance, both common law and the Uniform Commercial Code (hereinafter U.C.C.) differently prescribed, but nevertheless, provided legal rules which determine whether a reply to an offer forms a contract or not. Both proved unsatisfactory as a means to determine what the parties intended. Both contribute heavily to the widespread idea that the law cannot effectively use mentalist concepts and must turn to behaviorism. The current revision of the U.C.C. described below repudiates the latter conclusion and builds on that part of the code's approach to offer and acceptance that forsook legal behaviorism.

merely procedural law of contracts, that is, an approach to contracts which liberally uses social practice, may vindicate party expectations.

The ongoing revision of Article 2 of the U.C.C. provides the particular context for this article. The revision contemplates adopting what Ian Macneil has called a relational test² which consists of a social practice approach to contractual intent.

From the widespread belief that no rule-oriented, or formal, theory of contract law can meet party expectations, some would have contract law abandon party expectation and inquire only about the fairness of a bargain. Nevertheless, despite the failure of rules to provide party expectation, contract law may still pursue the aim of party expectations. By rooting dispute-resolution in the facts or evidence, contract law resting on relationalism and general principles and procedures succeeds where contract rules fail.

A. Revision of § 2-207

The ongoing U.C.C. revision process has produced a discussion draft which would reform the problem of the "battle of the forms" in the law of sales of goods. The contemplated revision would substitute a factual or social practice basis to the issue of whether a contract for sale has been concluded by displacing 2-207(1) & (2).³

² See discussion *infra* Parts III, IV.

³ The proposed revision to U.C.C. § 2-207(1993), "When Varying Terms Are Part of Contract," provides:

- (a) In this article, "varying terms" means terms prepared by one party and contained in a standard form writing or record.
- (b) If an agreement of the parties contains varying terms, a contract results if Sections 2-204 and 2-206 are satisfied.
- (c) Varying terms contained in the writings or other records of the parties do not become part of a contract unless the party claiming inclusion proves that the party against whom they operate expressly agreed to them, or knew or assented to and had notice of the terms from trade usage previous course of dealing or, course of performance. Between merchants, the burden of proof is by a preponderance of the evidence. Otherwise, it is by clear and convincing evidence.
- (d) If a contract with varying terms is formed under section (a), the terms are:
 - (1) terms upon which the writings or records agree;
 - (2) terms[sic] varying terms included under subsection (c);
 - (3) terms to which the parties have otherwise agreed; and
 - (4) any supplementary terms incorporated under any other provisions of this [Act].

The current draft revision of section 2-207 sensibly adopts a will and a relational test⁴ as to whether a sales contract is formed under the present section 2-207(1) rules.⁵ Such good sense continues with a concept of varying terms under which either party may claim and subsequently prove that assent was given to another's varying term(s). Hence, the revision splendidly moves in the direction of enforcing the actual bargain of the parties. That is, evidence will displace legal imperatives. Nevertheless, the fashionable theory of contract default rules, or "gapfillers," seems to continue since revised section 2-207 incorporates the code's supplementary terms as has present section 2-207(3).⁶ What these supplementary terms have to do with enforcing the actual bargain of the parties is problematical. Parts V and VI *infra* offer an explanation or defense of the supplementary terms or gapfillers under the criterion of the intentions of the parties.

Traditionally, rules of assent and consideration ignored unfairness in the making of bargains. Contract law often imposed bargains on those unlikely to be able to afford the burden of disproving assent. Generally, the doctrine of unconscionability focused on this problem. Richard Speidel recently suggested that

section 2-207, as a particularized application of the general unconscionability doctrine, was designed to fight unfair surprise

(d) Between merchants, the burden of proof under this section is satisfied by a preponderance of the evidence. Otherwise, it is satisfied by clear and convincing evidence.

Uniform Commercial Code Revised Article 2 Sales (Discussion Draft No. 13, 1994) [hereinafter *Discussion Draft* or R. 2-207] R4.2, p. 40.

⁴ This will or relational test requires for evidence that the parties "intended to contract" by requiring "conduct by both parties which recognizes the existence of a contract." R. § 2-207(a). Ian Macneil, the seminal relationist, dubbed this test relational when commenting on present § 2-207. IAN MACNIEL, *THE NEW SOCIAL CONTRACT* 74 (1980)(hereinafter MACNIEL, *SOCIAL CONTRACT*). Macneil also rejects as relationalism the gapfilling rules of the U.C.C.:

"[t]he gap-filling rules of the U.C.C., the common law, and equity are far more rigid than the principles businessmen normally apply to each other when difficulties arise." *Id.* at 73-74. This likewise rests in will theory because it asks for the best evidence of what parties intend. *See also* Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169 (1993)(hereinafter Kalevitch, *Gaps*); as to § 2-207 specifically, Kalevitch, *Gaps* at n.39.

⁵ MACNIEL, *supra* note 5, at 74-75. Macneil likewise regards present § 2-207 as unrelational in contrast to part of § 2-207(3).

⁶ Default rules of contract law refer to both the law of contract which applies regardless of the intentions of the parties, immutable rules of law, and the rules of contract law which apply unless the parties indicate otherwise, mutable rules of law. *Symposium on Default Rules and Contractual Consent*, 3 S. CAL. INTERDISC. L. J. 1-444 (1994).

through the misuse of standard forms in commercial transactions. But the route to this result was tortuous, and nothing gave clear guidance on when, if ever, the terms could be included without unfair surprise.⁷

The contemplated new evidentiary rules in the section 2-207 revision process represent a watershed of contractual assent. Furthermore, they offer new protection in both commercial and noncommercial sales.⁸ Even if the battle of the forms in merchant dealings has become a thing of the past,⁹ and regardless of the exact final form of revised section 2-207, the overthrow of old and misplaced values may well become complete in this process. The traditional contract law had been too conventional about the requirements needed to bind someone to a contractual obligation and, at the same time, would unconventionally ignore the prime evidentiary basis from believing someone's excuse regarding contractual obligation. Thus, the contemplation for the fairness of a bargain sought to be enforced has gradually reentered the discourse of contract law. The slow return of the idea that the fairness of a bargain is a result of the courts' gradual adoption of reasonableness notions in an effort to expand the scope of the idea of contractual obligation.

The U.C.C. abolished much of the law of contractual invalidity and provided the reasonableness heuristic for incomplete expressions of agreements. These great advances are blemished by neither the trouble over section 2-207 in the so-called "battle of the forms," nor the misunderstanding on which the default school rests: that the law has a substantive role in filling out the terms of apparently incomplete agreements.

B. Problems in Revising Section 2-207

Related grounds have contributed to the widespread call for revision of section 2-207 of the Uniform Commercial Code¹⁰. The law of section 2-

⁷ Richard Speidel, *Contract Formation and Modification under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1323-24 (1994). Speidel also points out that "section 2-207(3) leaves unstated when, if ever, terms excluded because the writings do not agree can be included subsequently. Presumably, they are included only when the parties have agreed to them expressly, thereby neutralizing the risk of unfair surprise." *Id.* at 1325.

⁸ See *supra* note 3, Revised § 2-207(d).

⁹ Thomas J. McCarthy, *An Introduction: The Commercial Irrelevancy of the "Battle of the Forms,"* 49 BUS. LAW. 1019, 1024 (1994).

¹⁰ A recent issue of *The Business Lawyer* provides an optimistically entitled symposium on the revision process, *Ending the "Battle of the Forms": A Symposium On the Revision Of Section 2-207 Of The Uniform Commercial Code*, 49 BUS. LAW. 1019 (1994).

207 for the last generation failed because it seemed to propound agreements which lacked the consent of the parties.¹¹ The tentative proposal for revision of section 2-207 may likewise seem flawed. The code gapfillers¹² should play a considerable role under the current revision draft¹³ as such provisions have figured prominently throughout the code period. A leading commentator goes so far as to conceive the "standard" sales contract as the code provisions which parties may negotiate away.¹⁴ The "battle of the forms" concerns contracts formed by conduct and not negotiation. From such conduct it is problematic to assert that parties consented to any "standard" sales contract. The code gapfillers may be justified only by consent and only to the extent that they

The *William & Mary Law Review* recently published a broader-based symposium, *The Revision of Article 2 of the Uniform Commercial Code*, 35 WM. & MARY L. REV. 1305 (1994). Specifically, section 2-207 receives extensive discussion in Richard Speidel, *Contract Formation and Modification under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1321-1332 (1994); John E. Murray, Jr., *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447 (1994). As Professor, Dean and President, John E. Murray has provided perhaps more commentary encouraging reform of section 2-207 than anyone else. John E. Murray, Jr., *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1173 (1986)(hereinafter Murray, *Chaos*); See also John E. Murray, Jr., *A Proposed Revision of Section 2-207 of the Uniform Commercial Code*, 6 J.L. & COM. 337 (1986); *The Article 2 Prism: The Underlying Philosophy of Article 2 of the Uniform Commercial Code*, 21 WASHBURN L. J. 1 (1981); *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982). Murray's perceptive analyses of the judicial treatment of that section of the code memorialize only a small portion of his longstanding contribution to contract and commercial law. Indeed, his clarion call for the "factual bargain of the parties" has provided the inspiration for reform of section 2-207.

¹¹ One aim in the enactment of section 2-207 was the reversal of the so-called "last shot" doctrine. An early decision frustrated that aim. See *Roto-Lith, Ltd. v. F.P. Bartlett & Co.*, 297 F.2d 497 (1st Cir. 1962)(holding that a response stating a condition materially altering the obligation solely to the disadvantage of the offeror is an acceptance expressly conditional on assent to the additional terms; offeror accepted delivery of the goods and thereby agreed to the conditional acceptance). In 1966 the Permanent Editorial Board adopted Comment 7 of §2-207 which advised that in such cases: "The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule." U.C.C. § 2-207 cmt. 7 (1994).

The ground for removing the last-shot doctrine was the belief that it misstated the intention of the recipient of a counter-offer and the reasonable expectation of the sender of a counter-offer in a sale of goods. Traditional contract law had not necessarily based the doctrine on the belief that it correctly interpreted the intentions and expectations of the parties. As elsewhere traditional contract law found consent in an offeree's capacity to manifest dissent and failure to do so. Behind the last shot doctrine and almost all of the law of traditional contractual consent lies the ethic of opportunity and negligence. Counter-offerees could make their intentions clear and were responsible for their failure to do so regardless of the effects of that negligence. Thus, a counter-offeror under the last-shot doctrine need not have understood its counter-offer to have been accepted by accepting of delivery to bind its offeree to the terms of the counter-offer. The doctrine presumed that to be true.

¹² Most of Part 3 of Article 2 states supplementary terms frequently labeled "gapfillers."

¹³ R. 207(d)(4), *supra* note 3.

¹⁴ Murray, *Chaos*, *supra* note 10, at 1374 ("In effect, Article 2 provides the normal, standardized agreement between the parties.").

enable parties to prove their understandings. The gapfillers should all, therefore, provide for reasonable terms in the particular circumstances.¹⁵ Some do; others, and perhaps fewer than one might expect, go too far into the substantive misleading courts to understand their role as giving legal substance to the gapfillers.

Additionally, the present revision draft continues, but includes a new twist, on the offer/acceptance basis of existing section 2-207. The conceptualism of offer and acceptance has fueled the problem of the common law "mirror-image" rule¹⁶ and its ambiguous conduct as consent and the notorious "last shot" rule¹⁷; offer and acceptance fuels and misleads current law and must be abandoned. As well, the conceptual twin to offer and acceptance, termism, likewise wrongly envisions the problem of the battle of the forms. The conceptions of offer, acceptance and termism reproduce a legal vision of the problem of the "battle of the forms" which wrongly describes the problem as having terms the parties initially agreed on to create the documentary agreement which contain the terms agreed on. The problem is that the parties to such

¹⁵ I have urged a will theory using the contract parties' intentions to resolve contractual disputes. Will theory is entirely unsatisfactory from the point of view of contractual imperialism which would provide a priori backup and baseline rules of contract law. I have elsewhere argued this presumes that contract parties cannot speak for themselves and that contract gaps of intention do exist for the law to fill. Kalevitch, *Gaps*, supra note 5. I can no more prove wrong the presuppositions of imperialism than imperialists can prove wrong the presuppositions of a liberal will theory of contract. Whether there are in general gaps in contracts for the law to fill is not a general factual question to be decided by empirical investigation; it is a question of theory and philosophy and not a neutral and objective conclusion which is either valid or invalid. Both traditional and relational commentary on contracts accepts the validity of the perception of gaps in party intention as though this were a foundational truth. *E.g.*, Randy Barnett, ...and *Contractual Consent*, 3 S.CAL. INTERDISC. L. J. 421 (1994); Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 after n. 138(1990)("The language of consent should not be used to describe the practice of supplying terms based upon general assumptions about human nature...To supply terms, a legal decisionmaker must make policy choices, not merely follow the directives of the parties. The law should make policy choices explicitly and not mask the choices as 'consent'.")

In particular contract disputes, courts may choose between filling gaps in the documentary evidence of the parties by legal rules or by evidence of the parties' otherwise expressed intentions. Liberalism favors the latter which includes standard form terms of reasonableness under which a court must treat as fact subject to proof the substance of the code's standard terms. *See* discussion *infra* Parts V, VI.

¹⁶ Classical contract theory asserts that the terms of the offer and acceptance must match. In real life, it happens all too frequently that both parties use their own conflicting standard forms. When the classical concept of offer and acceptance is applied to this recurrent situation, problems arise and the legal status of many a deal may be questioned. This is a most undesirable result since businessmen, believing on the authenticity of a deal, frequently ignore discrepancies between offer and acceptance or settle them in the course of performance.

FRIEDRICH KESSLER ET. AL., *CONTRACTS, CASES AND MATERIALS* 258-59 (3d ed. 1986).

¹⁷ "Section 2-207 attempts to abolish the traditional "Last Shot" doctrine." *Id.* at 264.

battles, if they persist¹⁸, produce a soft version of what we call contract. The code remedies envision a hard version of contract. To a great extent past and current solutions proceed on an anachronistic vision of a unitary theory of contracts.

Although much in the current revision process admirably and distinctly improves present law, more needs to be done. Of course, the revision process is on-going and may render these remarks premature. More attention to the roots of the problem of section 2-207 is necessary. If the parties' actual agreement is the goal of revision and reform, then modest but pervasive reconceptualization of much of the sales article is necessary. To the extent that code supplementary terms will continue to have the pervasive role of establishing the terms of agreements under section 2-207, as seems assured and explained below, these so-called gap-fillers must aim at evidentiary rather than substantive bases. Otherwise, claiming to revise section 2-207 to achieve the actual agreement of the parties while effectively swelling the importance of substantive gap-fillers, produces a half-right message.¹⁹ Abandonment of the somewhat mechanical and intention-ambivalent rules of the present section 2-207 is the good news. Whether the cost of an even greater role for the gapfillers, the bad news, outweighs the good is uncertain. However, another view of the gapfillers conforms to the intention-seeking, expectation-honoring goal of the revision.

II. PARTY AUTONOMY IN CONTRACTS

A. *Social Practice As A Means To Party Autonomy*

If the revision of section 2-207 derives from the critique of current law that section 2-207 too often imposes a deal (or no deal) contrary to the parties' intention, then adoption of the very broad principle of "what the parties intended"²⁰ would create an evidentiary approach to the question of whether the

¹⁸ See McCarthy *supra* note 9.

¹⁹ Dean John E. Murray has made these antonymous if not contradictory points in his leading role as a critic and would-be reformer of section 2-207. First, section 2-207 should aspire to find the parties "bargain in fact." Second, section 2-207 should do so by incorporating substantively "fair" gap-fillers to the extent the parties bargain in fact is discrepant. See *supra* Murray, *Chaos*, note 10.

²⁰ See *infra* Part III and *supra* n. 2.

parties had formed a contract for the sale of goods.²¹ Such an evidentiary approach inevitably relies on social practice to provide instructive significance to evidence the action of the parties involved. The revelation of social practice through evidence of the parties' action would provide the basis for understanding party intention. That is the basis of the current draft of revised section 2-207 which aspires to understand the parties' intentions better than previous contractual approaches. Generally, this revised section implants party autonomy as the aim of enforcing sales contracts while providing in principle the same aim to other contracts. Social practice avoids extreme forms of party autonomy which might create self-destructive autonomy. Social practice does not accept as conclusive a promisor's claim of "that's not what I intended."

For generations party autonomy has seemed to constitute a small aim of contract law. Indeed, party autonomy appeared implicated in the problems of contract law. Were party autonomy or party intention unable to address the problems of contract law, or any particular problem of contract law, then paternalism, distributivism or another external standard would guide contract law. Substantive law may use party autonomy to deal with just those particular problems in contract law which led to the conventional view that contract law must transcend party autonomy.²²

²¹ In the alternative, courts might understand the new approach, if adopted, to mean they should rule based on personal knowledge of when parties intended to contract. One hopes this approach will not be adopted.

²² Hardly anyone seriously considers the alternative of will theory because first, the history of the will theory is interpreted as jeopardizing the security of contractual agreements by permitting a promisor to deny solemn promises because of mental reservations. Whether there is any truth to that charge is for present purposes irrelevant. By will theory, here I mean a law of contracts which has the purpose of giving effect to the parties' intention. Will or intention theory will no longer need an undisclosed contrary intention to generally upset an apparent agreement. Instead, the theoretical basis of contract enforcement is the will of the parties. Liberal political theory backs that view of contracts.

A second objection to the will theory seems to come from communitarians who believe the theory must return to social organization dominated by those with wealth making their will count more than others. These well-minded concerns extrapolate too much from the modest impact of contract law on the social organization. A different communitarian concern is that within the institution of contract, a will theory will permit the feast of the strong at the expense of the poor. Remedies, short of abolishing the purpose of contract, can and have provided imperfect protection for that concern. This is largely a matter of expanding legal analysis concerning what is an agreement. For example, contract law has only recently begun to inquire about the reasonableness of a promisor's expectation where the promisor has a large bargaining power advantage. Communitarians may understand such tests of agreements on their own terms. Liberal will theory may understand such tests differently. Under contractual relationalism, the long-supposed, sharp lines between reasonableness as a communitarian ideal and reasonableness as anathema to liberalism are not firmly established. The following text extends these ideas further.

The law of contracts is widely thought to have failed in giving effect to the will of the contracting parties in two distinct and inconsistent ways. First, giving effect to the will of the parties is thought to be the problem with contracts and not the solution. In a popular view, freedom of contract brings upon the weak the contractual tyranny of the strong. Second, giving effect to the will of the parties poses the insuperable legal task of identifying when or to what parties had actually agreed.

History shows that contract law has on some occasions permitted contractual tyranny while in others failed miserably in understanding the intentions of parties. Thus, modern contract literature often offers a law of contracts grounded in substantive principles, such as social justice or economics, which are outside party autonomy or the will of the parties. The widespread thought that a contract law based on party autonomy must err is unjustified.

The law of contracts did, of course, fail to deal appropriately with important questions. However, this failure is a direct result of contract law's abandonment of the guiding value of party autonomy. By the end of the last century, the rejection of the will theory of contracts had led to an adverse reaction in contract law against party autonomy and party expectation.²³ This

²³ What I think happened around the turn of the century was the defeat of a much tamer will theory than modern teachings suppose. That argument concerns the scope of evidence about contractual assent which was won by what we presently call the objective theory of contracts. Ironically, in light of the subsequent rise of estoppel in contract law, the losers in that argument centered their claims around the idea that contracts by estoppel, those without actual assent, differ from contracts in which actual assent appeared. See Samuel Williston, *Mutual Assent in the Formation of Informal Contracts*, 14 ILL. L. REV. 85 (1919), reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS 119 (1931)(rejecting estoppel as appropriate basis for liability; distinguishing the theory he favored, liability follows from what someone said or did, from another theory by which words and conduct evidence a necessary mental assent); see *infra* note 117; MORTON HOROWITZ, *TRANSFORMATION OF AMERICAN LAW 1870-1960*, ch. 2 (1992)[hereinafter TRANSFORMATION II]. Whether a stronger will theory antedates this controversy may run the risk of anachronistic distortion.

Explanations of the movement from will to objective contract theory, offered by Horwitz and others, include notice that sometimes legal rules apply regardless of party intent; that legal rules were adopted because when parties have not expressed an intent, only legal rules can fill the gap. No doubt both reasons played a part in the rise of objective theory. Neither provides a continuing reason for looking at contract law in such a manner. As to the first notion, that some rules apply even in contravention of shared party intent, note that the Article 2 revision committee would repeal the Statute of Frauds.

Secondly, it all depends on what one means by a gap. I address this in part elsewhere (see *supra* Kalevitch, *Gaps*, note 4) and again on the issue of gapfillers(*infra* at Parts V and VI). What it means to observe that parties have expressed no intent on something is more interesting than generally supposed. It may mean an observer has not looked or holds a view of how one might express an intention different than the observed. More meanings are no doubt buried in the accumulated conventional wisdom against intention perhaps because of a diet of instrumentalism. Like others, but uncharacteristically, Richard Posner accepts

reaction took the form of an objective theory of contracts which eschewed party autonomy in the following matter: Assent to a contract occurred when someone voluntarily manifested an intent to contract in an alternative legal conventional way. Even though analytically separate doctrines, such as duress, fraud and mistake, retained older and material grounds for the investigation of the voluntary nature of a contractual assent, a new minimalist theory of voluntarism infected contractual assent and other mentalist legal tests. Eventually this minimalist voluntarism became the modern enigma that assent between unpleasant alternatives is no less voluntary than assent between pleasant alternatives. In this new regime, older and putatively separate doctrines (i.e. duress), were no more than charming relics of an outmoded and failing will theory. Additionally, the liberal political philosophy which inspired party autonomy and the seriousness of voluntariness and intention, fell out of favor because, it was thought, liberalism failed to explain contract law which needed to look at the substance²⁴ of any bargain in order to make determinations of unconscionability.²⁵ By needing to look at and evaluate the substantive bargain in order to decide such cases, it was argued that liberalism had to adopt some non-liberal or "distributivist" principle.²⁶ So too, liberalism cannot offer a theory of contract which autonomously guides the distinction between voluntary and involuntary exchange.²⁷ In offering party autonomy, a will or

conventional skepticism about mentalist concepts like intent and seems too unskeptical on this. E.g. RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* ch. 5 *passim* (1990).

²⁴ Liberals have long and doubtfully accepted the thesis that contract law may not consider the substance of a bargain because analyzing from the bargain to decide whether it is invalid for duress or unconscionability intrudes on party autonomy. The substantive bargain is on that thesis out of bounds. However, this "outside" or external metaphor begs the question of freedom of contract, though this metaphor has traditionally been thought to follow from freedom of contract. Looking at the contract bargain as outside or external to the parties' agreement assumes the previous and correct decision that the parties had voluntarily agreed. Duress and unconscionability claimants do not concede there was a voluntary agreement. Instead, they place agreement at issue. See *infra* Parts V, VI.

²⁵ Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L. J.* 472 (1980).

²⁶ "[C]onsiderations of distributive justice not only *ought* to be taken into account in designing rules for exchange, but *must* be taken into account if the law of contracts is to have even minimum moral acceptability." *Id.* at 474 (emphasis in original). The truth of this thesis is both obvious and trivial. Contractual imperialists who would impose rules of exchange on others, must do so on the basis of distributive justice. Those who would desist from "designing" or imposing rules of exchange have different obligations. Most notably, liberals have to understand the social practice of exchange and contract so that the social practice may flourish.

²⁷ *Id.* at 475-478. Kronman here holds that the moral value of voluntarism preferred by liberalism collapses in the face of rationality in a choice of the sort exemplified by the robber's demand: "Your money or your life." A choice in such a situation, as in other choices bounded by unpleasant alternatives, is rational. Yet, Kronman correctly hypothesizes that liberals would not want to draw the voluntariness line at such

liberal theory is thus said to fail by turning to non-liberal principles. Duress or unconscionability or even fraud are perceived as resting necessarily on paternalistic values, unlike party autonomy which would validate everything but non-cognitive agreements.²⁸

Once the law of contractual assent marched into minimalism, these indictments of contract law could not help but come true and whether a minimalist voluntarism could be part of a liberal contract theory became quite doubtful. The rejection of voluntarism in contract law and elsewhere by the adoption of particularist *legal* tests of assent and intention had already left contract doctrine desperate for means to address apparent but counterintuitive assents. Here the law could employ further legal tests built upon extra-autonomous values and theory, such as distributivism, or it could return to a broader measure of voluntarism which could only be found in standards of social behavior. Further tests of assent did develop, most notably the doctrine of unconscionability which seemed to some as derived from outside party autonomy and to others as derived from party autonomy.

Here I do not address the historical question of what the code drafters intended among the various theories of unconscionability. One need not understand unconscionability as something external to autonomy. One might speak about unconscionability as policing the crimes of autonomy which is popular in contemporary contracts' texts. Yet, one might also conceive voluntarism as an important test of contractual assent. Once one does, unconscionability may operate as part of a legal program resting on party autonomy. The distinctions long seen as necessarily resting beyond party autonomy, for example in social justice or economics, may come from the relevant social practice. Only in social practice might there be any important distinctions between actions that are voluntary and those that are not. A liberal view may accept different lines of voluntariness and involuntariness in different areas of contractual activity.

Once contract law departed from the guidance of social practice, it could not distinguish duress from contractual assent, unconscionable advantage-taking from contractual assent, or criminal conspiracies from contractual behavior. Once the law of contracts took it upon itself to distinguish voluntary

rational choice. From which he infers that liberalism cannot draw *the* line at all. But, to draw *the* line is a preoccupation clear of legal imperialism and perhaps of distributivism. Liberalism chooses not to draw the *same* line for everyone. High risk-takers do not deserve *the* paternalistic line; nor do low risk-takers deserve *the* libertarian's line. Legal imperialism provides an outlook demanding a line *qua the* line for everyone. Recall Sir Isaiah Berlin's dictum, *supra* at 2

²⁸ MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* ch. 7 (1993).

from involuntary behavior, the failure of the law to make these theoretical distinctions led to the now conventional idea that duress, fraud, and unconscionability had to be reconstructed from outside party autonomy and from outside contractual intention.²⁹ "Policing the contract" became the organizing expression which identified the failure of party autonomy to provide a contractual regime to protect legitimate expectations.

Yet, it is wrong to appreciate the failure of a particular legalistic program of contracts as proof of the failure of party autonomy. Once contract law was removed from social practice which alone could provide party autonomy, classical contract doctrine was doomed. The divorce of contract law, here in the subject of contractual assent, from social practice left to contract law the creation of substantively legal tests of assent. Unless people and organizations share these legal tests, the assent of contract law cannot give effect to their intentions. Further, party autonomy is lost unless contract law takes into account social practice in some other way.

However, a will or liberal contract theory may no more endorse a prescriptive contract law telling parties what they have done than it may participate in traditional contract's incoherent preaching about what "as a matter of law" parties have in fact done.³⁰ Because liberalism cannot endorse

²⁹ Liberals have long and doubtfully accepted the thesis that contract law may not consider the substance of a bargain because reasoning from the bargain to decide whether it is invalid for duress or unconscionability intrudes on party autonomy. The substantive bargain is on that thesis out of bounds. However, this "outside" or external metaphor begs the question of freedom of contract though this metaphor has traditionally been thought to follow from freedom of contract. Looking at the contract bargain as outside or external to the parties' agreement, assumes the previous and correct decision that the parties had voluntarily agreed. Duress and unconscionability claimants do not concede that is what happened; they put agreement in issue.

³⁰ Cf. U.C.C. § 2-302(a) ("If the court as a matter of law finds the contract or any clause...to be unconscionable..."); R. 2-302(a) ("If a court finds as a matter of law that a contract or any clause thereof was unconscionable...").

Here is an example of a kind of law of contracts which cannot ever have a correct conclusion: It is widely thought that to agree, to make a contract, an offeree must have knowledge of an offer. A surprisingly large number of reward cases bothered Samuel Williston because they had missed the first principle stated above. WALD'S POLLACK ON CONTRACTS 14, n. 12 (Williston ed. 1906). See e.g., *Glover v. Jewish War Veterans of United States*, 68 A. 2d 233 (D.C. App. 1949); *Broadnax v. Ledbetter*, 100 Tex. 375, 99 S.W. 1111-12 (1907); RESTATEMENT (FIRST) CONTRACTS § 55 (1932); cf. RESTATEMENT (SECOND) CONTRACTS § 53 (1977); *Dawkins v. Sappington*, 26 Ind. 199 (1866).

Arthur Corbin and P.S. Atiyah eventually suggested that such cases might be properly decided. "It is probable, indeed, that the chief reason for enforcing a promise is that it has induced the promisee to act in reliance on it. One who has rendered a service without knowledge of an offered promise has not so acted. But the chief reason is not necessarily the only reason for enforcing a promise; and if it seems good to the Courts to enforce a promise when the promisor has received the desired equivalent, even though the one rendering it knew nothing of the promise and rendered

such law, for some, it fails.³¹ Of course, liberalism cannot tell anyone what may or may not be done. That is the success of liberalism and the fundamental error in divorcing doctrine from social practice or propounding doctrine in arrogant ignorance of social practice.

the service for other motives, there is no sufficient reason for refusing to call that enforceable promise a contract.”

1 CORBIN ON CONTRACTS § 59 (1963); P.S. ATIYAH, AN INTRODUCTION TO THE LAW OF CONTRACT 39-42 (2d ed. 1971).

If an offeror of a reward intended to pay anyone who performed the act requested regardless of that actor's knowledge of the reward, no first principle, as thought by Williston, is disappointed. If one insists there is no intention in a reward offeror for an unknowledgeable offeree, why is it that one limits oneself to conscious intent and yet will find Atiyah's "solution" so persuasive? Anyone who brings my dog home will get and should get my reward. That is just what I intended whatever went "through my mind."

Does an offeree have to know of an offer? The right answer of course depends on whether we have to have a law of contracts which one way or another answers such questions. Looking at the reward claimant's knowledge of an offer of a reward means one has already affirmatively answered the question of contract legal logic: that the offeror sought to induce the reward conduct without which there is no intent to pay the reward. That is as much a will theory rendering of the reward promise as any other and is likely a bad will theory.

The reward offeree suffered a purely subjective view of what an offeree needs to know while the documentary offeree suffered a largely objective view of the same matter. Had the latter point been generalized to reward offerees, their ignorance should not have cost them the reward.

The mistreatment of reward offerees who were ignorant of the offer, only seems to follow from will theory and involves a misunderstanding of the apparent nature of reward offers. If reward offerees merely want an act to occur, as by returning my lost cat or giving the police information about a crime, whether the party who does the requested act knows of the offer in doing the act, is likely a matter of indifference to such an offeror. Thus, the offer may properly be understood to state an intention to pay the reward regardless of an offeree's motive or knowledge. For contract law to ignore that intention misconstrues the will theory that was thought to bar recovery. It may be that reward offerors do not so intend, but cross-examination not legal rule should settle such a claim.

³¹ Anthony T. Kronman stipulates a form of argument such that liberty theory cannot answer his challenge. By limiting the field in that way, he takes a small victory and surely not the trophy he sought. Tripping up a liberal in this way is as mean as denying a utilitarian his calculus of pain and pleasure. He says that the liberty theory must create a theory of rights independent of the rights people hold by

“nature or convention. But, rights cannot be ascertained in this way. Every claim concerning rights is necessarily embedded in a controversial theory: the only way to justify the claim that a person has a certain right is to argue that he does, and this means deploying a contestable theory that cannot itself be proven or disproven by simply looking to see what is the case. In order to apply the liberty principle, we must already have a theory of rights. Because it does not itself supply such a theory, the liberty principle, standing alone, provides no guidance in deciding which forms of advantage-taking ought to be allowed.”

Kronman, *supra* note 25, at 483-84. Kronman's claim is that liberal theory may not use conventions to derive rights. Though it is true that a liberal conception of duress could not be proved right for everyone under any particular bargaining convention, it is not true that a liberal conception of duress does propound a substantive conception of duress. A liberal may propound a theory of duress which uses conventions or social practices appropriate to particular disputes.

Seemingly paternalistic and protective³² doctrines, such as unconscionability, are said to impeach the liberal value of party autonomy.³³ In another view, however, putative policing doctrines, such as unconscionability, follow from liberal values such as party autonomy.³⁴ The inspiration for refusing to enforce contracts lies in rejecting a frequently fraudulent autonomy bred by traditional contract doctrine. Contract law went mad³⁵ about the meaning of agreement and the value of autonomy. A century-long infatuation with an objective theory which told people what they meant, degenerated autonomy in contract law.

Appreciating the substance and fairness of a bargain jeopardizes neither liberalism nor contract. Voluntariness may constructively reinvigorate the core of contract. Unconscionability, duress and fraud in this view do not stand outside the idea of contract awaiting the imports of distributivists or economists to justify invalidation of apparent agreements. A peculiar twentieth century idea of contractual assent or intent, a meaningless and legalistic idea of assent and intent, rather than liberalism fostered the outsider status of unconscionability and kindred doctrine in the traditional contract theory. As noted,³⁶ section 2-207 aimed to tame some of the beasts (mirror-image rule; last-shot rule) in the fraudulent foraging contract. Concurrently, the Janus-faced resolution of the battle of the forms forged at midcentury in the Uniform Commercial Code planted old and new ideas of assent. It may not be too much to view developments such as Ian Macneil's relationism as borne by the Corbin and Llewellyn-inspired Uniform Commercial Code.³⁷ As Macneil has pointed out,

³² Unconscionability protects the idea of contractual assent just as section 2-207 protected against the particular abuse of assent in standard forms. *See supra* Speidel, at note 6; "Section 2-207, therefore, may be viewed as addressing incipient unconscionability--its philosophy is identical to 2-302's." Murray, *Chaos*, *supra* note 10, at 1322.

³³ *Contra Id.*

³⁴ *Id.*

³⁵ The relational contract theorist, Ian Macneil, has also used the metaphor of madness to describe our intellectual-legal depiction of contract abstracted from society:

[Society] surely must be the most forgotten fact in the modern study of contracts, whether in law or in economics. This lapse of memory we deliberately impose upon ourselves in both disciplines by our heroin-like addiction to discrete transactions. And I use that simile advisedly, for surely it is some kind of madness—the image flashes to mind of the mad scientist of movie or television—to carve out the body of society its economic heart, yet expect to examine it as an independent and functioning organ.

MACNIEL, *supra* note 4 at 1.

³⁶ *Id.*

³⁷ Ian Macneil, *Relational Contract: What We Do And So Not Know*, 1985 WISC. L. REV. 483, 497 ("American promise-centered contracts scholarship has for many decades increasingly recognized Contracts'

section 2-207 has both traditional and relational aspects.³⁸ Successful revision of the code's treatment of the form battle only seems to require choices between different visions. A liberal theory makes room for both parties who prefer traditional and those who prefer relational treatment.

B. Autonomy As The Aim of Objective Theory

The rise and use of objective contract theory might be said to follow from a desire to match the intent and expectations of parties to a contract better than a direct factual investigation of intent and expectation in social practice. Thus, providing legal rules about what parties intend by their behavior may aim to permit parties to express their intent and expectation. Such an approach may choose as the rules or doctrine of contract law, any behavior for any intention or expectation. This approach may perhaps best succeed by choosing arbitrary behavior. Conventional behavior cannot succeed as the symbol of intention in such an approach because some people will act that way without holding the intention a rule assumes. Arbitrary symbolism like that of calculus holds little risk of miscommunication since those outside the calculus community rarely use such symbols.

To succeed, such a regulative regime needs either a well-informed populace or the fashionable community.³⁹ Moving to a substantive regime of rules or doctrine may thus fail if the regime regulates people who are not in privity to the legal conventions. Misunderstanding the intentions or expectations of parties is a legal failure. For example, one reason often suggested for the displacement of the common law rule known as the "mirror-image" by section 2-207(1) of the Uniform Commercial Code, is the former's misreading of the parties' intentions in sales of goods negotiations. That same reason weighs heavily in the section 2-207 revision movement and is the underlying theme of the

relational elements." See also Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 793 (1993) ("The broad definition of "agreement" in U.C.C. section 1-201(3) is, at first blush, consistent with relational contracting. The bargain in fact of the parties is found in "language or by implication from other circumstances including course of dealing or usage of trade or course of performance." [FN16] The sources from which agreement can be inferred are also defined. [FN17] The question is whether these definitions are broad enough to incorporate internal norms generated by the relationship, such as cooperation or risk sharing, into the agreement.")

³⁸ See *infra* text at n. 66.

³⁹ Or a homogeneous populace: "The law and the social practice of making contracts can never be perfectly synchronized, especially given our heterogeneous culture." Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697,724 (1990).

revision of the forms' battle. One may nevertheless reject any failure attributed to any objective theory by putting responsibility on the regulated to learn and use the legal conventions contract rules or doctrine. Contemporary legal culture seems, however, to reject the stronger form of such moral edicts including its contract twin, "the duty to read." Nevertheless, a defense of such an approach as more efficient than the standards of present § 2-207 has been asserted.⁴⁰ Such "efficient" theses about rules versus standards relate to formulation and adjudicative costs.⁴¹ Thus, one might accept a claim that a mirror-image rule is formatively and adjudicatively more efficient than the present or a revised section 2-207 along the lines of the Discussion Draft,⁴² yet one also might believe that the efficiency of either of the latter two overall, including the efficiency of deal-making under the latter, surpasses a mirror-image regime.

The limited claim of formulative or adjudicative efficiency may be enlarged and wrapped in party autonomy. One might argue that a small number of section 2-207 disputes signifies the lack of the code's need to provide anything more than an adjudicatively efficient approach. For if the small number of actual disputes means that parties are satisfying their goals without legal help, then party autonomy is flourishing and no prescription is needed in the code. Prescription only becomes necessary to reduce the cost of the rare dispute, such as the mirror-image rule or even the most arbitrary rule imaginable.

Most likely, arbitrary rules would stimulate parties to take care of disputes themselves. Perhaps, this result would accomplish a kind of autonomy. However, it is doubtful that mutual autonomy would develop since disputes would be left to their "state of nature" or worse. In this "state", the autonomy of the stronger party only would be vindicated. Yet, this effect is still adjudicatively efficient.

On this view, the efficiency thesis may collapse into the currently implausible thesis, and moral backbone of the objective theory, that parties should know what section 2-207 provides. If so, then the social practice approach taken in the revision of section 2-207 and presently in section 2-207 may accord best with the ideal of accommodating mutual autonomy. This

⁴⁰ Douglas Bairn & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217 (1982). See also *infra* n. 110.

⁴¹ See also Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 1992 DUKE L. J. 557.

⁴² *Supra* note 3.

relational approach to party autonomy has been the subject of Ian Macneil's distinct contribution to contract theory to which Part III turns.⁴³

III. Macneil's Relationalism & Consent

Since virtually any contract has far more complex consequences than anyone can possibly have in mind at once, one of two things must happen. Either the scope of the power created is beyond the realm of conscious consent, or important aspects of the contract remain subject to free exercise of further choice by the consenting party.⁴⁴

Both of Macneil's suggested alternatives routinely recur in the law and practice of contract. As he points out, traditional contract law has often extended the power created by a contracting party beyond her conscious consent. Traditional contract law and the practices of contracting often permit parties to exercise further choices both over matters of which they likely consciously agreed and those of which they never gave a thought. Some free exercise of choice over contractual matters even continues after the obligation of contract has arisen and uncertainty or dispute arises in the absence of any immediate coercive remedy.

Conscious consent has never been identical with contractual consent. The consensual element of contract law has seemed sometimes mysterious or fictitious. Liability for unconscious consent has long seemed spurious. Unconscious consent seems to lack legitimacy.⁴⁵ Perhaps, paradoxically, few doubt the legitimacy of quasi-contractual liability which may often mirror the relational basis of Macneil's theory of contract. This suggests some questions about Macneil's use of the expression "conscious consent."

A. *Conscious Consent*

Conscious (or conspicuous) consent evokes a theory of contract under which parties would have liability only for what they consciously agreed-to.

⁴³ That the revision of § 2-207 should take a relational approach under the guidance of Reporter and Professor Richard E. Speidel should not unfairly surprise anyone who has been watching the social practice of contractual and code commentary. *E.g.*, Richard E. Speidel, *Article 2 and Relational Sales Contracts*, *supra* note 10.

⁴⁴ MACNIEL, *supra* note 4, at 49.

⁴⁵ Randy Barnett, *supra* note 15.

Even a will theorist would not so limit the scope of contract law.⁴⁶ Some might follow Karl Llewellyn in limiting liability for terms to those terms which a party consciously consented and which were reasonable.⁴⁷ In that view, there may be conscious consent to "invisible" terms which are reasonable.⁴⁸ Others find legitimate accounts of contract which would bind parties to contract terms of which they were ignorant and which are unreasonable, so long as a party ought to have known of the contractual term.⁴⁹ Even this assumption of risk or consent is eschewed by still others for whom the knowledge or notice of contractual parties is largely immaterial because contract obligation rests on extra-consensual values.

Macneil perhaps overstates the limits of conscious consent to make his point. At any one moment, a party may only be conscious of a few of the matters a contract states or a few of the foreseeable consequences of that contract. But that party might, over several hours of negotiating or reviewing a single contract or over years of experience, have an understanding of its terms and consequences aptly pictured by the metaphor of conscious consent. Indeed, in large business organizations, it may be that a team of people may at a given contract-signing moment conjoin in their actual consciousness of the terms and the foreseeable consequences of a contract.

On the other hand, an organization is no more likely to have any foreknowledge of unintended or unforeseeable consequences in the imagery of conscious consent. As to these, Macneil must be correct in his view that a strong form of conscious consent does not only create obligation, but such conscious consent would leave parties free to exercise future choice. Something more must account for any legal obligation under a contract when such

⁴⁶ CHARLES FRIED, *CONTRACT AS PROMISE*, Ch. 1 & 2 (1981); Kalevitch, *Gaps*, *supra* note 4.

⁴⁷ "What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms."

KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370-71 (1960).

⁴⁸ One of the enduring myths in intention discussions is the assumption that "reasonable", but consciously unnoticed terms, cannot have been consented to in any important intention or will-based sense. For this chief reason, twentieth century discussions assume intention. For example, tacit assumptions are so distinct that legal recognition of reasonable but unnoticed express contract terms require justification outside of party autonomy or intention. Corbin's collapse of the distinction between express and implied-in-fact contracts is instructive. Moreover, the metaphor of a conversation doubts this distinction. Are we only talking about intention in what was expressly said in conversation, or in an order, principle or rule?

⁴⁹ Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 886 (1992)[hereinafter *Sound*]; Barnett, *supra* note 15.

conscious consent reaches its limits. Again, Llewellyn's notion of reasonable terms may, by logical extension, fill this theoretical need. Contractual parties may be subjected to reasonable terms and consequences, of which they were unconscious. But reasonable by what standard, as compared with the apparent integrity of conscious consent?

Similarly, Macneil's relational theory of contract helps to provide the answer by excluding enforcement of contract obligation under express terms. Unforeseeable events and implied terms are rendered unreasonable under the circumstances. Indeed, speaking of reasonableness seems to be removed from conscious consent and party autonomy. But writers such as Lon Fuller and Randy Barnett have laid a foundation for a wider appreciation of conscious consent than provided by the standard set under traditional contract theory.⁵⁰ People have a sense of their tacit assumptions which traditional contract has both managed to understate and equivocate under such doctrines as frustration, impossibility and impracticability. To be sure, one can speak about such doctrines as though they were immaterial to intent just as one may use such doctrine without reference to intent. What is a basic assumption under commercial impracticability if intent is immaterial? No more may one plausibly understand the "basis of the bargain" in express warranties⁵¹ to exclude both conscious and tacit assent. The true question is not whether intention is immaterial when express terms do not speak to a dispute. Rather, the question is whether in the absence of express terms, it is meaningful to speak about what the parties would have intended had they foreseen events that have come to pass. It is not meaningful if one prefers a sounder perhaps efficient legal basis by which to decide those questions express terms do not help answer. But that is a preference not a proof of the meaninglessness of such intentional discourse. That preference may depend on the assumption that intention has nothing instructive to say there. If one wants to know what the parties would have done had they thought about it, the traditional semantics of the courts, one cannot

⁵⁰ One may link the code's abandonment in principle of any moment when a contract is formed to the wider notion of conscious consent as including or supplemented by tacit assent. U.C.C. §2-204(2).

⁵¹ U.C.C. § 2-313.

"A cogent example of the emphasis upon the factual bargain is found in the new express warranty concept that eschews a reliance requirement [FN251] and assumes that the seller has the burden of showing that a particular statement did not become an express warranty. Comment 8 to 2-313 expresses this new concept. 'What statements of the seller have in the circumstances and in objective judgment become part of the *1378 basis of the bargain? As indicated above, all of the statements of the seller do so unless good reason is shown to the contrary.'"

Murray, *Chaos*, *supra* note 10, at 1377-78.

look to legal rules. One must look to what evidence the parties have to support their disputed contentions. That evidence restores meaningful intention by unfolding the tacit assumptions of the parties. One should not exclude what the code sought in its concepts of course of performance, course of dealing and trade usage, though they may often be too meager for the task.

The relationalism of Macneil follows these ideas and encourages a credible and sensible discussion of a modern will theory of contracts. Meaning, not fiction, may be restored to what the parties would have done by widening appreciation of the rest of the ancient formula: had they thought about the disputed point assumes that because they did not produce any express term on the point, they never had thought about it. As said, it may be true that they had not thought about it in the strong sense of conscious consent. Yet if one knows that as to a particular matter there is an ample regulative commercial custom, one's awareness focuses on sounder forms of conscious consent and eliminates the fictitious nature of the traditional test.

Relationalism overcomes simpleminded or efficient consensual accounts which trade on consent as assumption of risk or negligence. Relationalism brings a new account of consent into the conversation by both expanding and transcending one inherited account of conscious consent.

B. Relational Consent

Randy Barnett has challenged Macneil's relational view of consent.⁵² Barnett⁵³ (and both traditional contract law⁵⁴ and the default rule school⁵⁵) hold

⁵² "In sum, by acknowledging the importance of tacit assumptions in planning, Macneil opens the door to an expanded, more realistic notion of contractual consent that is not limited to matters about which parties consciously deliberated. Thus there exists an alternative to the stark contrast Macneil draws between "conscious consent" and no consent. When Macneil argues that "the 'great sea of custom' ... forms the main structure of contract" and explicit promise the exception, he does not realize that this argument against consent turns on itself. For, if custom is a reflection of our shared tacit assumptions and the reverse, then custom can be seen as the embodiment of what parties in the relevant community actually, not fictitiously, consent to when they manifest their intention to be legally bound."

Randy E. Barnett, *Conflicting Visions: A Critique of Ian Macneil's Relational Theory of Contract*, 78 VA. L. REV. 1175, 1189 (1992)[hereinafter *Conflicting Visions*].

⁵³ Randy Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 321 (1986); see also Barnett, *Sound*, *supra* note 49.

⁵⁴ A manifestation of mutual assent by the parties to an informal contract is essential to its formation and the acts by which assent is manifested must be done with the intent to do those acts;

that a manifestation of intention to contract is consent to the provisions of the law of contracts. Thus, default rules of contract law which apply absent agreement by the parties otherwise, receive contractual consent by virtue of one's consent to enter into a contract. In this view, there need be no correspondence between the default rules contract law might impose and the actual intentions or expectations of contract parties.⁵⁶

Barnett construes Macneil to follow this same reasoning in an important passage of Macneil's seminal *NEW SOCIAL CONTRACT*.⁵⁷ Barnett's reading leaves Macneil quite inconsistent about consent in that Macneil here seems to use the very consent theory he has also criticized; traditional contract's idea that consent to a contract is consent to the legal system's rules. Macneil offers as a contrast to this traditional consensualism an example of labor arbitration. There, according to Macneil and conventional labor law, a relational approach obtains unlike the common law paradigm of discrete episodes of contractualism.

Barnett's critique holds that the labor arbitrator's decision of a dispute concerning a collective bargaining agreement comes from the same consent source as a court's decision of a contractual dispute. According to Barnett, the intention to contract, symbolized by the collective bargaining agreement and its arbitration clause is the consent to the arbitrator's authority.⁵⁸ Furthermore, this is identical to a commercial contract by which the parties consent to the judicial authority to apply the rules of contract law. In this latter approach, the parties consent to the rules of contract law. In instances were the parties might consent to arbitral law, Barnett's critique succeeds.

Thus, in the above cited passage, Barnett concludes that the Macneil who has long labored against such a common law notion of contractual consent, has here adopted the 'conflicting vision' of that very view. Barnett concludes that Macneil's views on consent are therefore inconsistent and that Macneil's

but, except as qualified by §§ 55, 71 and 72, *neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential.* (emphasis added).

RESTATEMENT (FIRST) CONTRACTS, § 20 (1932); *Cf.*, RESTATEMENT (SECOND) CONTRACTS § 18 (1981) (This section is new; compare former § 20. *supra*, Reporter's Note.).

⁵⁵ *Supra* note 5.

⁵⁶ Nevertheless, Barnett has distinguished between the kind of contract law or default rules which his version of consent permits. Parties who are reasonably informed about what the law will do consent to whatever rules the legal system prescribes. Parties without such knowledge or opportunity may, under his consent theory, be subjected only to conventionalist default rules; those which do or are likely to correspond to the actual intentions of such parties. Barnett, *Sound*, *supra* note 49, at 894-95.

⁵⁷ MACNIEL, *supra* note 4, at 75-76.

⁵⁸ Barnett, *Conflicting Visions*, *supra* note 52, at 1184-85.

relationalism has not given a coherent account of consent. Some relationalists find this critique of Macneil and of relationalism incorrect as they view contractual consent as one of the relics of classical contract law which relationalism may best ignore.⁵⁹ Nevertheless, Barnett declares himself to be a relationalist because his consent theory "...assume[s] a social context."⁶⁰ Barnett is not always relationally minded on the question of how consent justifies a particular judicial or arbitral decision.⁶¹ He has missed the relational basis for the arbitrator's decision and looked only at the structure of how the labor arbitrator in Macneil's example obtained the authority to decide the case.

This bears very strongly on the revision of section 2-207. The revision follows a notion of relational consent and concerns the basis of decisions about what one might call obscure contract claims. Like a positivist, Barnett finds consent in a structural analysis of how a court or an arbitrator has the *legal* authority to decide a contract dispute: the parties agreed to contract. Like a natural lawist, Macneil might respond that unless the decision of a court or arbitrator succeeds in capturing the parties' consent as the ground of its decision, consent has nothing important to do with what happens to contract parties in a courtroom.

C. *Relational Consent & Will Theory*

From the point of view of consent, relationalism rests on what used to be called "will theory".⁶² The actual intentions of the parties should, under "will theory", determine the outcome of a dispute about obscure contract claims just as actual intentions should determine the outcome of plain or clear contract claims. When a court is asked to apply a rule of contract law to an obscure contract claim, it may have evidence to back such a judgment. On the other hand, one theory of contract rules has them apply regardless of any evidence that the parties had consented to such a rule. Thus, under the code, the several provisions as to which parties might agree otherwise apply in this view in spite of particular evidence of consent. Indeed, Barnett and traditional contract law see no need for evidence in such a case. By hypothesis, some believe such a case is one in which the parties have not agreed on the question. Thus, there is

⁵⁹ Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. OF AMERICAN LAW 139.

⁶⁰ Barnett, *Conflicting Visions*, *supra* note 52, at 1179-80.

⁶¹ Compare Barnett, *Sound*, *supra* note 49 with Barnett, *Conflicting Visions*, *supra* note 52.

⁶² Kalevitch, *Gaps*, *supra* note 4.

a gap, and it must be filled by the applicable default rule of the system.⁶³ One major problem with this view (and the code text which typically requires “an agreement otherwise”⁶⁴) is that it seems to expect parties to have agreed “otherwise” in a form sufficient to satisfy traditional notions of consent. Thus, gaps appear which need filling by code gapfillers. The “agreement otherwise” expected by the code might appear were relational consent sufficient.

Macneil’s labor arbitrator expects neither traditional consent (e.g., an express agreement) nor a shelf full of gapfilling default rules. The arbitrator proceeds to examine the relationship of the parties to the collective bargaining agreement. From that relationship, beginning to end, and from general norms drawn from the culture of the industry and the labor union, comes the arbitral decision. The process of arbitration will ideally provide the consensual basis for the arbitral decision. Successful arbitration, will produce the result the parties consented to- not because the parties agreed to arbitrate, but because the arbitration process will provide them an opportunity to show how particular and general aspects of the collective bargaining agreement and its performance support a consensual decision.

For Macneil, then, consent to a relational account of a contractual relationship provides the justification. A relational account will not focus on the writing the parties once signed as common law contract too often did. As a result, consent cannot be viewed as traditional like Barnett sometimes insist; as created at the initiation of a contractual relation. Some matters may be finally and permanently consented to at that moment. Others might be consented to later. Some express and others tacit. But these are matters of evidence from which the best inferences of consent may be made.

Prepackaged contracts may meet the intentions and expectations of contract parties when the latter correspond with the former. When they do not, and regardless that on some other criterion they might be useful in some way, consent becomes an Orwellian attribution.

D. Macneil on §2-207

Macneil divides the contract world into discrete and relational contracts. Discrete contracts are rather quickly performed while relational contracts persist over time. According to Macneil, the models of both classical (Restatement I) and neoclassical contract law (Restatement II) are discrete contracts, though the

⁶³ *Contra Id.*

⁶⁴ E.g., U.C.C. §§ 1-102(3)-(4); 2-303.

latter has "many a relational concession."⁶⁵ Macneil also describes the Uniform Commercial Code's approach to the law of acceptance in section 2-207 as modeled on the discrete and the relational. Section 2-207(1) replicates the "on-off" contract or not of classical contract offer/acceptance law.⁶⁶ Nevertheless, "subsection [2-207](3) supplies a relational base on which to rely when mutual consent fails."⁶⁷

Macneil posits that most business people will suppose they have a contract when an offer is met by the second and discrete rule of section 2-207(1). Under that rule, an "acceptance expressly conditional on [an offeror's] assent to the [offeree's] additional or different terms, does not operate as an acceptance." Macneil notes that this discrete contract rule leaves the legal relationship of offeror and offeree in limbo:

Now the neoclassical limitations of 2-207 become apparent; until sufficient *action* brings subsection (3) into play, no legally recognizable deal exists. This failure results from the absence in subsection (1) of any relational foundation upon which to retire when the discrete consensual mode fails. All the while, the parties go along merrily trusting each other and anticipating a deal, on the not unreasonable ground that in fact one occurs ninety-nine times out of a hundred.⁶⁸

Macneil succumbs to, or delights in, the verbal expropriation of classical contract law of the idea of mutual consent in observing that "subsection (3) provides a relational base when mutual consent fails." Similarly, Macneil accepts the well-precedented idea that nothing but action may qualify under subsection (3).⁶⁹ In this, he is differentiating between contractual obligation rooted in consent from relationalism. Perhaps this too exaggerates both the on-off-ism of subsection (1) and the relationalism of subsection (3). Nothing in subsection (1)⁷⁰ stops a court from finding a contract between the parties under

⁶⁵ MACNIEL, *supra* note 4, at 72.

⁶⁶ *Id.* at 74.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 136, n.4.

⁷⁰ The grammar of the unless clause merely means that one who in response to an offer sends a conditional acceptance, has not accepted the offer and created a contract merely by that act. Surely, if Macneil (and so many of us) rightly assumes that 99 out of 100 conditional acceptors and their offerors think a deal is on, the fact that the "discrete" rule of the unless clause does not find a contract (yet), says nothing important about whether the provable mutual beliefs of the parties may constitute § 2-204(1) or § 2-207(3) "conduct by

other principles of the code including the dramatic edict of section 2-204 in which one learns that a contract may be formed "though the moment of its making is undetermined."⁷¹ Indeed, none of section 2-207 is logically necessary⁷² in view of subsection 2-204(1) which permits the making of a contract for the sales of goods "in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of a contract." Finally, the status of additional or different terms or conditional acceptances under section 2-207 would not preclude a court from moving from that limbo into the apparent relationalism of subsection 2-204(3).

Of course, the critic and reformist Macneil may exaggerate the unkempt and incomplete quality of section 2-207; the advocate Macneil may know the harsh academic views of the section may lead others to his relational thinking. To venture how that section may conform to his relational thinking may win the battle and lose the war. Clearly, Macneil understands that section 2-207 is unimportant in itself if 99 out of 100 potential battle of the forms never draw conflict.⁷³

That section 2-207 provides a useful example of discrete and relational contract-thinking at play leaves one still to ponder on the difference between a purely discrete and a purely relational legal regime. The answer would seem to indicate that however marginal contract law may be in many contractual events, there will or may be some in which the law plays a significant role such that a rather poor theory of contract might have significant (and miserable) effect outside of traditional discrete contracts such as sales. Macneil's contrast between relationalism in labor law and the battle of forms implies this significance.

The labor law example is the significance of arbitration there. Macneil explains that the arbitration "trilogy" decided by the Supreme Court in 1960 adopted a relational view of the collective bargaining agreement.

both parties which recognizes the existence of a contract." The courts have not followed this thinking. One may believe, because lawyers continue to look for either offer/acceptance conduct or performance conduct so that the decisions go only that far.

⁷¹ § 2-204(2).

⁷² Here, however the code had to overcome the gravity of history to make rejection of the mirror-image rule clear. Ironically, though the perhaps unforeseen use of strategically drafted forms in the code period rendered subsection 2-207(1) inert because parties-offeree took advantage of the 'counter-offer' opportunity of the last clause of the subsection. This effectively pushed both the formation and terms issue into subsection 2-207(3) whose substance already appeared in the earlier section noted in the immediately following text.

⁷³ MACNIEL, *supra* note 4, at 74, n.7.

The Court decided that judicial review of labor arbitration awards is very limited...This relational principle [labor arbitration] aims at achieving industrial peace; the Supreme Court believed this could best be achieved by giving arbitrators a free hand. But the powers of the arbitrator are the creation of the consent of the parties...The Court was thus faced with the task of reconciling the discrete with the relational.⁷⁴

Macneil finds the reconciliation to include three principles: The courts shall determine the arbitrability of a dispute; the arbitrator is limited to interpretation and application of the collective bargaining agreement. Last, "the phrase "collective bargaining agreement" means the *whole* collective bargaining relation, not just the writing."⁷⁵

The Trilogy and its progeny [in contrast to section 2-207] have a relational base, namely the primacy of the arbitrator within a consensually limited jurisdiction. No gap remains. If the arbitrator is found to have operated within his authority, his award governs. If he is found to have exceeded his authority, then the relation is governed by mutual consent, since the only basis for finding abuse of arbitral authority is the court's finding a failure to abide by mutually agreed terms.⁷⁶

Perhaps "[n]o gap remains" but Macneil is unclear what gap might remain in a contractual relationship based on discrete as opposed to the relational base of the primacy of the arbitrator. When an issue is either not arbitrable or an arbitral award exceeds arbitral authority, Macneil indicates that whatever had been in dispute will fall under mutual consent. Without mutual consent the aggrieved party to such a dispute will have no remedy. This would replicate the result of the discrete basis of subsection 2-207 when an offeree responds with a conditional acceptance. For Macneil, such outlook would be rather strange since the parties almost always understand the deal is on. Thus, a gap remains under the discrete principle of subsection 2-207(1) in the sense that the legal result poorly measures the mutual expectations of the parties. Here the gap consists in the law's failure to recognize the presence of a binding relationship.

⁷⁴ *Id.* at 75.

⁷⁵ *Id.* at 76.

⁷⁶ *Id.*

However, the labor contract does not usually present the arbitrator the question of whether there is a contract. The gaps arbitrators there fill are the more common contractual issues about missing and obscure written contractual terms. In that aspect, the labor contract and the sales contract have seemingly far more similarities than in modern arbitral or judicial theory and practice. The code permits such gaps to be filled by reasonable terms drawn from (if they are to be reasonable) the context of any particular sales contract. Whether these are gaps at all or whether that expression merely reminds us of work to be done in understanding the parties, is a nice question.⁷⁷

Thus, as Macneil has noted there is much relational thinking in neoclassical contract law including the commercial code. The discrete event of the contract writing no longer limits contract duties. The urge to this wider approach includes matching contract expectation and contract law. Indeed, it would seem to have little other point. But sometimes contractual expectation however divined will exclude some right someone insists on. This may be the claim that there is a contract or that a conceded contract includes an implied term. Relational or discrete analysis may deny claims, of course. Which decisions “draw a blank or run about in circles”⁷⁸ under discrete analysis may nevertheless be justified by a legitimate expectation based on prior or current relationships.

Macneil’s relational analysis would seem to differ and permit a broader analysis. Thus, one might be surprised by the seeming “on-offism” of Macneil’s discussion of labor arbitration as an example of relational thinking. Mutual consent, and indeed the strong form of conscious consent, creates the broad but incomplete authority of the labor arbitrator whose shoes are planted in the collective bargaining agreement though the rest of her outfit extends also to the collective bargaining relation. It is the parties expressed and conscious consent which endows the arbitral jurisdiction.

Recall Randy Barnett’s justification for judicial gap-filling:⁷⁹ The parties manifested consent to a contract confers consensual jurisdiction to a court’s filling the contract’s gaps. Barnett denies this consent must be actual and follows the classical view that a manifested consent suffices. This produces starkly different results between these two theories although license must be taken with each.

⁷⁷ Kalevitch, *Gaps*, *supra* note 4.

⁷⁸ MACNIEL, *supra* note 4, at 76.

⁷⁹ See *supra* at note 53.

Suppose that a labor agreement is under negotiation and thus far both sides assume that a standard arbitration clause will be included. The union sends the employer a draft agreement including such a clause. The employer responds with its own draft also including the same arbitration clause but with other additional or different terms as well as a conditional acceptance clause. Officials of each entity now believe the deal is done expecting to work out the differences without any foreseeable difficulty. In other words, contrary to the discrete classical analysis under offer and acceptance law, including section 2-207(1), the parties understand the deal is on.

Under traditional manifested consent theory there would seem to be no contract as yet. Under Macneil's view of the wrongness of the circling of section 2-207 when in fact both parties think the deal is on, there is a contract. The manifested consent theory could embrace this pre-final agreement as to the parties' differences but it would have to surrender the classical and to some extent neoclassical limitation on consent as complete.

But the labor negotiation puts forth concerns of another kind of incompleteness- the failure of each party to state clearly that the deal is on even when some matters are unsettled. Classical contract law required such a manifestation even as it slowly transformed itself into neoclassicism by permitting term incompleteness when consent completeness obtained. Expressive conduct has always provided classical theory with a solution to this form of incomplete consent and nonverbal conduct also permits Macneil, Barnett and section 2-207 to find contractual obligation. Though subsections 2-204(3) and -207(3) appear to look forward only from the moment of incomplete consent, other code sections may also permit a look backward to course of dealings and trade usage.⁸⁰ On one hand this is untroubling because

⁸⁰ The text of § 2-208 addresses the interpretation of the contract already made. Nevertheless, the courts may use this practical construction text as an aid to interpreting whether a contract was formed under § 2-207.

Discerning whether "commercial understanding" dictates the existence of a contract requires consideration of the objective manifestations of the parties' understanding of the bargain. It requires consideration of the parties' activities and interaction during the making of the bargain; and when available, relevant evidence of course of performance, Section 55-2-208; and course of dealing and usage of the trade, Section 55-1-205. The question guiding the inquiry should be whether the offeror could reasonably believe that in the context of the commercial setting in which the parties were acting, a contract had been formed. This determination requires a very fact specific inquiry. *Gardner Zemke Company, v. Dunham Bush, Inc.*, 850 P.2d 319, 115 N.M. 260, 20 UCC Rep.Serv.2d 842 (1993).

Controversy exists under current § 2-207 on whether § 2-207(3) includes the § 2-208 tests of course of performance, course of dealing or trade usage, when § 2-207(3) refers to "any supplementary terms incorporated under any other provisions of this Act." The most interesting manifestation of this issue arises when one party's writing contains a term and the other's does not. The Seventh Circuit recently held that

these “looks” may refine into intention to be bound what seemed less. Such evidence, and especially of past behavior of others, if believed may expand the ground for finding evidence of consent or intention to be bound. Such looks, if appropriate on the issue of whether there is a contract, transform the law of contracts on contract formation into a battle of evidence under the broad principle of consent or intention to be bound.⁸¹ Here parties may form contracts by reference to what others signify by certain conduct not because of any theory that the parties should know what others mean, but because from case-to-case evidence may support the finding that parties meant the same as others have.

The problem of consent in contracts has lately focused on the other locus of incompleteness, to what should parties be bound when a gap in their express agreement produces dispute. Only recently have those attracted to this term incompleteness been confronted with the issue of how such gap-filling may be justified. The discussion concerns consent. Barnett proposes tacit consensual assumptions and conventional default terms satisfy the consent criteria.⁸² Others dispute this as fabricated consent.⁸³

Yet, consent riddles not only incomplete terms, but also and more significantly the incompleteness in the ‘on-off’ view of whether there is a contract. Contract commentators may disagree about consent and default rules, but their fascination with incomplete terms will inevitably revert to what makes consent in the formation of the relation we call contract. The doctrinal progress of this century proceeded to eliminate the doctrine of indefiniteness of contractual terms and then to address indefiniteness in the formation of

“supplementary” includes § 2-208 even where a § 2-208 alleged term had been knocked out by another clause of § 2-207(3). *Dresser Industries, Inc. v. Gradall Co.*, 965 F.2d 1442 (7th Cir. 1992), *distinguishing* *C. Itoh & Co. v. Jordan International Co.*, 552 F.2d 1228 (7th Cir.1977); *Daitom, Inc. v. Pennwalt Corp.*, 741 F.2d 1569, 1579 (10th Cir.1984). *See also* 2 W. Hawklund, *Uniform Commercial Code Series*, s 2-207:04, at 109-110 (1990) (supplementary terms under § 2-207(3) include those established by § 2-208); 1 J. WHITE & R. SUMMERS, *UNIFORM COMMERCIAL CODE*, ss. 1-3, at 45 (3d ed. 1988) (supplementary terms limited to those expressly provided for in the Code’s gap-fillers).

R. 2-207 eliminates the latter controversy though it retains exactly the same language under which the controversy has been fought. R.2-207(d)(4). Instead, new subsection (c) permits proof of assent to a varying term by “trade usage[sic]previous course of dealing or, course of performance.” Thus, when one of the forms contains a varying term, R 2-207(c) would permit proof of assent to that term. *A fortiori*, one may prove a supplementary term by § 2-208 when neither form contains such a term per R. 2-207(d)(4).

⁸¹ *Id.*

⁸² Barnett, *Sound*, *supra* at 49.

⁸³ Kalevitch, *Gaps*, *supra* note 4; Steven J. Burton, *Comment on Professor Patterson’s Pseudo Debate Over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L. J. 303 (1994); Jules L. Coleman, Douglas D. Heckathorn, & Steven M. Maser, *A Bargaining Theory Approach to Default Rules in Contract Law*, 12 HARV. J.L. & PUB. POLY. 639, 641-649 (1989).

agreements. How this might be accomplished created the problem of consent to so-called missing terms. A structurally similar problem arises when parties have not documentarily manifested assent to the formation of a contract. Because the code used an evidentiary test of "conduct recognizing the existence of a contract" *and* because social practices existed to make that test meaningful in relation to the intentions of parties, the evidentiary approach has been a grand triumph of present section 2-207(3) on the formation issue. As with Macneil's arbitral model, this relational success should extend as well to the equally significant problem of what the terms of the contract are. The point of view of the common law which has been overcome as to formation issues needs to be overcome as to terms issues.

The inference that a manifestation of assent binds one to each and every term in the document, or "termism," chooses to ignore evidence to the contrary. Termism unveiled turns out to be just another argument presented as a fact the truth or falsity of which is deemed immaterial. Just as it is convenient to void offensive terms in a contract without evidentiary opportunities which might render terms inoffensive or less offensive, or "untermism," classical contract law bore the covert doctrine of termism as a logically necessary corollary of contractual obligation. Such logically necessary legal ideas inevitably turn out to have been unexamined or underexamined empirical claims.

The objective manifestations rule of contractual assent provided the doctrinal and theoretical fuel for contractual termism. That rule largely but incompletely barred evidence of subjective intentions, beliefs and understandings of the parties. The rule is incompetent and unfair whenever the evidence would convincingly show that neither party intended to assent to a contract or whenever a recipient of an objective manifestation knew or had reason to know what appeared was not the actual assent of another. Evidence of such lack of contractual intention may bar a finding of a valid contract. For there the legal principle of manifested assent yields to the older common law ideal of actual assent though at times the rhetoric of classical contract law muted the underlying ideal of the will of the parties.

Termism proceeds in the same incompetent and unfair manner as has false but apparent assent. Similar contractual moralism instills thinking the same about commitments to contractual terms as it had about thinking about apparent assents. The same objection limits termism as limits appearances of assent. Given evidence that the parties mutually did not intend to be obligated to a particular term in a contractual document as they had intended other terms, imposition not intrusion on party intent, autonomy or freedom of contract follows from the legal grip of termism.

Termism has, of course, already been calmed by judicial and statutory doctrine permitting courts to invalidate obnoxious contract terms.⁸⁴ Communitarian concerns may have driven modern doctrine to these ad hoc limitations on termism. So long as they have attacked episodes of termism which reveal inadequate consensual instances, liberal theory has had little incentive and opportunity to stand in opposition.

Unfortunately, different visions may lead to different judgments about when termism should bind parties, and when it should not. A liberal theory of contract, would support termism to ensure the proper concept of freedom of contract but only when parties have shown termism to be part of their contract, part of their relation. Parties who negotiate term-by-term agreements, do of course achieve and intend termism to rule their relation.⁸⁵ Parties to less bargained or formalized agreements do not mutually intend termism of that kind. To apply termism across the board under a model of negotiated term-by-term conscious assent propounds an impositional termism and subverts the idea of intention.

Macneil's work has moved the discussion of consensualism away from the parties' conscious consent at the time of contracting. The formative paradigm wraps discussion of consent into then and there conscious or appreciative intention. The parties' pasts and their futures may present credible information about their intentions. Indeed, though perhaps the point can be carried too far, without the joint pasts of the parties and courts, no mechanism of intention could rationally proceed. The revised section 2-207 liberally uses both the past and the future.

IV. SECTION 2-207

A. Current § 2-207

Under present section 2-207 a contract may form despite a discrepant response by an offeree in three ways. (1) A response to an offer may state additional or different terms and yet manifest a definite and seasonable acceptance of an offer. This acceptance forms a contract under the first clause of subsection 2-207(1). Additional or different terms may become part of the

⁸⁴ *E.g.*, § 2-302.

⁸⁵ What courts should do if and when the terms of such parties run out or are somehow frustrated by an unforeseeable future, should have no bearing on the regnant termism until such events do occur.

contract under either subsection 2-207(2) or 2-207(3).⁸⁶ (2) An offeree may decline to accept an offer but may send a conditional acceptance under the second clause of section 2-207(1). If the original offeror agrees to a conditional acceptance, a contract is formed. (3) Finally, if the parties' writings do not establish a contract under section 2-207(1), but their conduct recognize the existence of a contract, a contract is formed under section 2-207(3).

The problem of offer and acceptance in the sales of goods began with the premise that responses which did not mirror or nearly mirror offers could not be acceptances. The mirror image rule relied on a paradigm of conscious consent. This thinking seemed to the code drafters wrong. First, when an offeree states something additional or different in a response, that alone is not sufficient to conclude that she does not consider a deal to have been struck.⁸⁷ Second, even if this does reflect an offeree's preferential intention not to consider the deal to have been struck, an offeree who knows or has reason to know the offeror will not study her response with the care of a conveyancer may conclude the deal is done. The consequence of the mirror image rule unfairly advantaged offerees in this respect under the last shot doctrine by producing an erroneous understanding in offerors. Offerors might hold a intention under which they reasonably understood subsequent delivery, billing

⁸⁶ The second problem present § 2-207 addresses is the status of the terms of the bargain sought by each party in its offer or acceptance. Additional terms become part of the contract under § 2-207(2) depending first on whether the contract is between merchants or not. Where either party is not a merchant, additional terms are proposals for modification of the contract and will become part of the contract if accepted by the original offeror. Where both parties are merchants, additional terms become part of the contract unless (1) the original offeror had expressly limited acceptance to the terms of the offer (§ 2-207(2)(a)); (2) the additional terms materially alter the contract (§ 2-207(2)(b)); or notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Some courts apply these same rules to different terms even though subsection 2-207(2) expressly addresses only additional terms. Others have applied a so-called "knock-out" rule by which different terms in the parties' writings cancel each other out. In that event § 2-207(3) is usually identified as the source for applying whatever code rule the different terms would have addressed. *See also supra* note 80.

⁸⁷ Consider in this regard Langdell's account of the mirror image rule:

An offer can only be accepted in the terms in which it is made. An acceptance, therefore, which modifies the offer in any particular, will go for nothing. Otherwise a contract might be made without the assent of both parties to its terms. Thus, where an offer was made in writing to purchase a lease, possession to be given on the 25th of July, and the offeree answered in writing that he accepted the offer, and would give possession on the 1st of August, there was held to be no contract, though it appeared that the change of date was entirely unintentional. An acceptance must conform to the offer also in respect to the time and manner in which it is given or made. Therefore, if an offer requires the acceptance to be by letter sent to a particular place, a letter of acceptance sent to another place will be of no avail.

CHRISTOPHER COLUMBUS LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 22 (2nd Ed. 1880).

or payment to reflect a contract on the terms originally offered. Offerees might reasonably and contrarily hold the view that delivery or payment by the offeror manifested consent to their “counteroffers.”

The literature discloses precious little about what parties to such events in sales of goods actually had in mind. Thus, whose understanding might have been more reasonable and as such perhaps provided a fairer basis for allocating the risks of such misunderstandings, was not and cannot be the basis for drafting or supporting any purely legal approach. What was believed was that some business parties proceed to act as though they have a contract of sale after an exchange of discrepant forms. On that factual basis the code drafters appear to have decided they had sufficient information to adopt section 2-207 which probably ought to have excluded subsection 2-207(1). For, that clause succeeds only in reversing the intention characterization the mirror image rule had propounded and, absent empirical verification, is no more valid than the mirror image rule in identifying party agreement.

Clearly the inspiration for the original tinkering had been the pervasive business practice to proceed with a deal the law unfortunately said was not a contract. Although added later in the drafting process, subsection 2-207(3) captured the idea that deals which businesses thought binding by acts of performance are binding. Likely the drafters could not surrender their schooled faith in documentarily expressed intention, and they retained the special legal significance of the forms. But the lost opportunity subsection 2-207(3) presented was surrender of the offer/acceptance analytical approach which relied so heavily on frail inferences of intention. The solution lay in abandoning the hopeless task of a legal intent formula of offer and acceptance. Section 2-207(3) began the movement away from rules defining intention which, if adopted, R. 2-207 will complete.

B. Revised § 2-207

The revised section 2-207 abandons the first two of the above formation rules of present section 2-207, all of subsection (1). Instead, the revision promotes the “conduct” rule of present 2-207(3) from a residual provision for cases where the parties writings did not establish a contract, into the principal rule when the parties’ “writings and other records ... contain varying terms.” Revised section 2-207(a) expressly incorporates section 2-204 which permits

“a contract to be made in any manner, including conduct by both parties which recognizes the existence of a contract.”⁸⁸

When the parties' writings and other records show varying terms, a contract may form nevertheless by their conduct. When that is shown, the second problem addressed by revised section 2-207 (as in present section 2-207) is the terms of the contract. The revision substantively abandons the distinction between the merchant and nonmerchant contracts⁸⁹ and the material alteration.⁹⁰ Instead, the revision adopts an evidentiary assent test.

Varying terms may become part of the contract if the party so contending shows either that the other party “expressly agreed to them” or the other party “knew or assented to and had notice of the terms from trade usage previous course of dealing or, course of performance.”⁹¹ The substantive abandonment of any distinction between merchant and nonmerchant contracts becomes a procedural or evidentiary rule on inclusion in the contract of a varying term.⁹² Other terms may become part of the contract including those on which the parties' writings or records agree,⁹³ those to which the parties otherwise agreed,⁹⁴ and any supplementary terms incorporated under the code.⁹⁵

The proposed section 2-207 broadens liability in two important respects for either additional or different terms which are collapsed into “varying” terms in subsection (b). But, evidence replaces the legal rules of present subsection 2-207(2). The revision would require either party to show that the other either “expressly agreed” or “knew or had assented to and had notice of the terms from trade usage ...”⁹⁶ Second, the materiality of an additional or different term

⁸⁸ Revised subsection 2-207(a) also expressly incorporates present section 2-206.

⁸⁹ U.C.C. § 2-207(2).

⁹⁰ U.C.C. § 2-207(2)(b).

⁹¹ R. 2-207(c).

⁹² At the moment the drafters seem to have not concluded their discussions on whether the elevated standard of proof applies only to proof of assent to varying terms or to all evidentiary issues under R. 2-207. R. § 2-207(d) requires clear and convincing evidence when the contract is not between merchants, but the usual preponderance test for contracts between merchants. R. 2-207(c) requires the same.

When the choice is made as to where the burden of proof tests belong, the drafters might consider whether their desire is not more modest than presently stated: to place a clear and convincing evidentiary test on merchants who attempt to prove terms against nonmerchants but not otherwise. As presently stated, nonmerchants bear the clear and convincing test against merchants or nonmerchants. This serves no point and only more obviously in the latter instance.

⁹³ R. 2-207(d)(1).

⁹⁴ R. 2-207(d)(3). This also helps to conclude the controversy about whether current 2-207(3) incorporates supplementary terms such as those which § 2-208 might supply. See *supra* notes 80, 87.

⁹⁵ R. 2-207(d)(4).

⁹⁶ R. § 2-207(c).

will no longer mean automatic exclusion though one might expect materiality to affect the quality of proof necessary for a finding of inclusion. Thus in two respects the revision broadens liability for additional or different terms: First, under the prevailing “knockout” rule, different terms did not become part of the contract,⁹⁷ but as varying terms either party may succeed in establishing express or implied assent under proposed subsection (c); second, material additional terms in an acceptance or a confirmation may now not become part of the contract (unless identical to a code suppletive provision) in some jurisdictions,⁹⁸ but might under the proposal if express or implied assent is proved.

As well, offerees may receive equal treatment with offerors under the revision proposal because additional or different terms under the code has seemed to apply to terms in offeree’s acceptance. What is additional or different, that is varying,⁹⁹ has seemed a one-way street affecting terms in an acceptance¹⁰⁰ but not an offer. The revision eliminates the offeror-favoring baseline. The revision accepts neither party’s terms when they are varying, that is when additional or different, unless agreement or assent is proved.¹⁰¹

Subjecting the terms in the forms of each party to assent analysis likely reduces liability for additional or different terms. Thus, the revision overall reduces rule-liability for additional or different terms even though it abandons rule-immunity for material terms in an acceptance or confirmation.¹⁰²

⁹⁷ Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569 (10th Cir. 1984).

⁹⁸ See *supra* note 80.

⁹⁹ The revision does not define varying terms but the Reporter’s Notes so indicate. Discussion Draft, *supra* note 3, at 4.

¹⁰⁰ Rite Fabrics, Inc. v. Stafford-Higgins Co., Inc. 366 F. Supp. 1 (S.D.N.Y. 1973).

¹⁰¹ The revision draft of December 1993 stated the second part of the varying terms that may become part of the contract differently. There, an estoppel test was used such that one would become bound to a varying term in the other party’s form if one had notice of the term and failed to object. The July 1994 Discussion Draft and the Reporter’s Note says nothing on this. If the chief criterion of the revision process is to recapture the code’s goal of enforcing the parties’ factual bargain, see *infra* Parts V,VI, estoppel has no place in the discovery of the parties’ agreement.

¹⁰² One of the criticisms of current § 2-207 concerned its inclusion of both responses to offers as well as confirmations in § 2-207(1). The abandonment of the latter rule does not leave documentary confirmations of nondocumentary deals entirely out of the scope of R. 2-207. Although a confirmation is not addressed in that term, much of the revision uses the expression, “writings or records.” This would seem sufficient to cover documentary confirmations, *inter alia*. At the same time the confirmation problem would seem to disappear with the happy end of § 2-207(1).

C. Consent and Section 2-207

The chief dissatisfaction with the existing resolution of the battle of the forms came from its binding parties to contract terms to which parties perhaps had not actually or clearly agreed to according to conventional legal analysis. As enacted section 2-207 appeared to bind parties to terms to which they had not consented on the ground of negligent failure to take section 2-207 steps to avoid this imposed consent. Moreover, even those who took what steps section 2-207 provided to escape the other party's form terms, found themselves bound to code provisions which frequently conflicted with terms in their own forms. To say the least this dismissed any plausible and perhaps even possible rationale in consent. By continuing negligence as consent the revision will revive the objection that basic contract law erred in permitting a broad notion of negligence as consent. Negligence as consent follows from both versions of section 2-207 on the terms which the contract includes.

On the other hand, the prominent place of the code supplementary terms in section 2-207 may be explained as consensual insofar as these terms correctly correspond to the understandings and expectations of parties to sales contracts. Many of the code terms provide merely for a reasonableness standard. Key provisions define themselves in this purely descriptive manner. Price,¹⁰³ time of delivery¹⁰⁴ and even the quantity of goods in loose agreements¹⁰⁵ use reasonableness as the measure. Although courts can substitute their own judgments for evidence of what may be reasonable between the parties, the latter permits a consensual though less definite than expressly agreed-upon basis for finding the parties intention. The consent available under reasonableness gap-fillers is clearly not the focused or conscious consent often accompanying express terms. Yet this relational consent built upon evidence may nevertheless be as real as focused or conscious consent. The question is whether legal procedures permit parties to show their intentions and understandings. Reasonableness standards in the code permit that correspondence to be proved. Yet the code supplementary provisions too often appear to call for more than an open-ended reasonable term to be elaborated by evidence. The descriptive and normative power of these code supplementary provisions comes from the same source that the revision of section 2-207 seems

¹⁰³ U.C.C. 2-305(1).

¹⁰⁴ U.C.C. § 2-309(1).

¹⁰⁵ U.C.C. § 2-306.

to follow: Enforcement of the parties' factual bargain.¹⁰⁶ Yet, some confusion over this has surfaced and that subject preoccupies the remainder of this article.

V. THE FACTUAL BARGAIN: FAIR, NORMAL, & DEVIANT TERMS

"The ultimate question is whether the "gap fillers" and principles of liability and remedy in Article 2 should be revised to better respond to the realities of relational sales contracts."¹⁰⁷

Section 2-207 commentary frequently criticizes classical contract law and present section 2-207 for binding parties to contract terms to which no real assent was given.¹⁰⁸ The call for enforcement of the "factual bargain" under a revised section 2-207, worthy in itself under any notion of consent, however seems to collapse into nonconsensualism when the subject turns to gapfilling. Reformists, for example, deplore both the last shot doctrine of pre-code law and the first-shot doctrine of present law as imposing terms,¹⁰⁹ and call for revision to enforce the "factual bargain." Yet, to justify the gapfillers, they turn to a consent theory¹¹⁰ which would support either "shot" doctrine as well as the classical objective theory which underwrote present section 2-207(1).

The thesis that the code should enforce the "factual bargain of the parties" exemplifies the dissonant justification offered for discarding present section 2-207 yet retaining the present code gapfillers. As noted, Murray finds the

¹⁰⁶ See *infra* Part V.

¹⁰⁷ Richard E. Speidel, *Article 2 and Relational Sales Contracts*, 26 LOY. L.A. L. REV. 789, 790 (1993).

¹⁰⁸ E.g., Murray, *Chaos*, *supra* note 10.

¹⁰⁹ E.g., Before the promulgation of the U.C.C., courts often construed the seller's form as an offer or counter-offer and the buyer's conduct in accepting and paying for the goods as an acceptance of that offer (the "last shot" rule). This resulted in a contract on the seller's terms...Under present section 2-207(1), courts have sometimes construed as an acceptance a form sent in response to another form, even when the responding form contained boilerplate at variance with the boilerplate of the earlier form. This often results in a contract on the first forms terms, including the boilerplate (the "first shot" rule). *Both the last shot and the first shot rules are unfair. They stick one side with all of the other side's boilerplate.* (emphasis added). Roszkowski & Wladis, *Revised Section 2-207: Analysis and Recommendations*, 49 BUS. LAW. 1065, 1071 (1994).

Among the reasons these commentators stated on the facing page why sellers should be bound to the code gapfillers is that sellers may negotiate different terms than the gapfillers would supply, and those unwilling to do so should abide by the gapfillers. Query how this reason doesn't apply in kind to either the last shot or first shot rules which "stick one side..."

¹¹⁰ *Id.*

purpose of section 2-207, and a purpose of Article 2 in gross, is to enforce the "factual bargain" of the parties.¹¹¹ The standard of the factual bargain of the parties seems necessarily to call for a procedural enforcement approach resting on evidence of the factual bargain. Thus, the realists'¹¹² commercial code seems to know what is fair and seemingly prescribes standard contract terms via the gapfillers on the one hand; on the other, the same code invites and almost always validates party autonomy which likely extend per the revision into the new relational approach to whether there was a sales contract.¹¹³ Thus, the reformers of section 2-207 appear to be acknowledging dissonant goals in what may be taken as the code tradition. One of the original goals sought to displace legal-minded norms for those of the parties to dispute.¹¹⁴ The Uniform Commercial Code would eventually shape general contract law as it pushed function over form. Led by Karl Llewellyn and other notable realists such as Grant Gilmore, the code drafters rejected some and damned other paradigms of the objective theory of contracts.

The development of the code might have been a return to a will theory of contract had there been anything in the way of a plausible will theory alternative. As realists, the code drafters often tried to put the code and the marketplace in unison where the existing conceptualism of general contract law had departed from market norms. So long, however, as the will theory alternative was conceived as a return to welsher-welcoming subjectivism which would upset reasonable expectations, the code realists would turn elsewhere to articulate what was, nevertheless, a will theory.¹¹⁵ To have used such a label

¹¹¹ "It cannot be gainsaid that the new analysis, which seeks even greater fidelity to the factual bargain, will continue to require courts to decide some difficult questions of fact concerning the reasonable understanding of the party receiving a printed form. Judicial empathy for the particular surrounding circumstances is essential. There must be a continual progression of the understanding of the relational context between contracting merchants to which contract law is inexorably moving.

Murray, *Chaos*, *supra* note 10, at 1383.

¹¹² It was, and is, precisely this respect for private intentions and institutions that made a realist conundrum and Karl Llewellyn so perplexing. Morton Horwitz' amusing difficulties fitting Llewellyn into a broad "progressive" portrait testify to Llewellyn's taste for private autonomy in commercial law as well as likely differences among his cohorts. HOROWITZ, *supra* note 23, ch. 6.

¹¹³ *E.g.* U.C.C. § 1-102(3).

¹¹⁴ U.C.C. § 1-102(2)(b).

¹¹⁵ Although more needs to be said than the following (*see infra* Part VI), even the code implied warranties that seem supportable only by an objective, law-imposing philosophy of contract, fit neatly into an actual intention paradigm of contract. Most obvious is the implied warranty of fitness for a particular purpose which presents explicit factual predicates for its application resting on the buyer's actual understanding of the bargain in fact. That the seller may be charged with this warranty, despite an unrevealed

would have been politically counterproductive because of will theory's negative image. Moreover, connecting individual wills with the force behind contracts and commercial practices would have missed the aim of the code's relational proposals. That aim lay in the evidentiary rather than imputative theory of assent and meaning which Williston¹¹⁶ and other grand objectivists had rejected

contrary intent, by the reasonable contrary understanding of a buyer, assumes mindlessly a seller who behaves as § 2-315 states, actually has such a contrary intent. No seller who acts outwardly one way, may be supposed nevertheless to have a different intention.

So also a careful reading of the merchantability warranty will teach that no ideal market standard is there set but only the context of the parties' sale. And only that context could disclose the actual party expectations. Finally, merchantability, like the warranty of title, is disclaimed, or never existed in a bargain in fact, when the context shows it more likely that no such actual intention would accompany a deal. §§ 2-314; 2-312(2); 2-316(2)-(3). Some might object that using a reasonable person standard is objective theory by definition. Two short answers: (1) That's why the mythical battle between will and objective theory is a law school fable and didactic when told right which may be rare; (2) provisions such as those mentioned are heavily fact-dependent in one interpretation but are also easily treated as legal tests. Objectivists prefer the latter. Indeed, the whole default-rule movement, perhaps the largest part of law and economics, would be bankrupt without legal rules. If two readers will join me, as the bankruptcy code requires three creditors to file an involuntary petition...

¹¹⁶ See, e.g., Samuel Williston, *Mutual Assent in the Formation of Contracts*, 14 ILLINOIS L. REV. 85 (1919), reprinted in *SELECTED READINGS ON THE LAW OF CONTRACTS* 119 (1931)(hereinafter *SELECTED READINGS*). Williston's Mutual Assent supports the thesis that the issues were smaller and thus far more interesting to the shape of contract law which emerged in the 1932 *RESTATEMENT OF CONTRACTS*. No bold choice between a welsher-welcoming ("But, actually I didn't mean that") and a welsher-frustrating contract law was in question. Williston identifies the issue raised by mutual assent as

[W]hether actual mental assent of the parties is a legal requisite, or merely such an expression by them as would normally indicate assent, whatever may have been in the minds of the parties. Is the test objective or subjective?

SELECTED READINGS, supra at 119.

Professor Clark Whittier's critique on a draft of the first contracts Restatement remains fresh:

"To generalize from what contract law does about mental assent in selected instances does not ground general principles rendering actual mental assent immaterial to contractual disputes...It will probably be admitted by everybody that in the making of most contracts there is actual assent communicated by each party to the other. Professor Williston himself says:

"An outward manifestation of assent to the express terms of the contract almost invariably connotes mental assent." It is only in the very exceptional case, therefore, that any doctrine other than that of mutual assent communicated is made necessary by the decisions."

2 WILLISTON, *CONTRACTS* § 659 (1920).

Clark Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CAL. L. REV. 441, 442 (1932).

Instead, the question was whether contract law should adopt a schooled and general theory of what is contractual assent or whether assent should be determined in a fact-sensitive and case-by-case manner. Williston contrasted the theories this way:

"[T]he words and acts of the parties are themselves the basis of contractual liability, and not merely evidence of a mental attitude required by the law. In other words, that an expression of mutual assent, and not the assent itself, is the essential element of contractual liability.

SELECTED READINGS, supra at 120-21.

and which Arthur Corbin had been championing as an inspirational if undeclared realist.

The politically or constitutionally powerful will theory, which Morton Horowitz brilliantly expounds,¹¹⁷ faded from the scene in part because the objective theory supposedly exposed freedom of contract as resting as much or more on judicial policy rather than individual will.¹¹⁸ Whether or not any serious contractual will theory predated the rise of the objective theory, Horowitz' constitutional thesis is powerful. The purely political or constitutional images (which Horowitz termed "evocative power") of a presumed individualistic law of contracts carried great weight. The exposure of contracts as dependent on the will of the parties, whether the will of the parties ever mattered as politically presumed, could not but help the progressives win the constitutional battle.

One view which Horowitz supposes, however, cannot so easily be countenanced despite its continuing popularity. The freeing of contract law from the tyranny of obnoxious wills, the overbearing subjugation of weaker parties to stronger parties, never succeeded under the objective theory. The objective theory which emerged in the late nineteenth and early twentieth century brought no fairness to contract law. If the constitutional conflict was the war, it was won; in that perspective, the battle over contract was sadly lost. Progressives could not abide the objective theory in contract law any more than they could abide will theory as constitutional law in cases such as *Lochner v.*

Some conceive the standards and broad principles approach of the RESTATEMENT (SECOND) OF CONTRACTS, almost fifty years later, to adopt the latter approach. If so, that road was not taken fifty years earlier, that road was in fact available fifty years earlier, comes as something of a surprise against the mythic issues of these earlier days.

Professor Morton Horowitz discusses will theory, however his focus on constitutionalism is as different as merging apples and oranges:

[T]he Progressive critique of freedom of contract as a constitutional doctrine began with an elaborate assault on the intellectual premises of the private law of contract. After the *Lochner* decision, most technical internal disputes within the law of contract were often displaced struggles over whether contract law could be justly characterized as a neutral and voluntary in which the judge simple carried out the will of the contracting parties. It was this "will theory" that Progressive legal thinkers began to criticize immediately after *Lochner*.

HOROWITZ, *supra* note 23, at 34-35. But as Horowitz also points out, any "will theory" internal to contract law had already by the last quarter of the nineteenth century become an objective theory. Horowitz' constitutional "will theory" may have had some relation to the premises of contract law but clearly not during the *Lochner* period by his own findings and by the writings of Holmes, Hand and Williston which had already popularized the objective theory of the late century.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

New York. Just as Williston's finished the contract temple, realists began to throw out the ministry and catechism. The commercial code was the project and product. In the popular and Horowitz view, the realists would inspire a contract as fairness regime.

Here the realists and their successors would fall apart on the critical issue of how one might determine fairness. The benevolent social engineers of the fifties and sixties would turn up in the seventies with Richard Posner as Adam Smith and a merry band of market engineers who would define fairness as efficiency. Counterpoised were the critical legal studies who may have united only in their distrust of economics as fairness.

More diversity came with the reemergence of the value of autonomy in the commercial code which was spreading into general contract law. The schools of law and economics took that as a sure sign that their fire was lit and have purported to transform contract and nearly all legal subjects into legal rules which would mirror the ideal economic result under the will-ist postulate that everyone would prefer such wealth-maximization. With Williston, such an approach is taken almost for granted as the best way to maximize the true, if hypothetical, intentions of individuals in the market. Williston's objective theory continues to be in the hands of schools of law and economics.

Another view of the commercial code holds that the autonomy it promoted sought to free the market from the tyranny of the law and particularly an objective theory. By rejecting the plain meaning rule,¹¹⁹ by all-but-rejecting the parol evidence rule,¹²⁰ by liberalizing the significance of prior dealings and usages of trade, as well as course of performance¹²¹ by emphasizing function and context over rules,¹²² the code participated in the death of the objective theory and returned to the evidentiary expressionism¹²³ which if weakly had rivalled the objective theory a generation earlier.

It cannot be gainsaid that the new analysis, which seeks even greater fidelity to the factual bargain, will continue to require courts to decide some difficult questions of fact concerning the reasonable understanding of the party receiving a printed form. Judicial empathy for the particular surrounding circumstances is essential. There must

¹¹⁹ U.C.C. § 2-202, Comment 1.

¹²⁰ *Id.*

¹²¹ U.C.C. §§ 1-205; 2-208.

¹²² U.C.C. § 1-102(1)-(2).

¹²³ *See supra* note 116.

be a continual progression of the understanding of the relational context between contracting merchants to which contract law is inexorably moving. Courts must observe these standards not only because of the overriding importance of fairness, but because the governing statute, Article 2, commands it.¹²⁴

The Llewellyn who apparently gave us the fairness of unconscionability section could, however, reconcile the test of the factual bargain with empowering the courts as unconscionability "police." He believed that much of what might find its way into contract or offer or acceptance forms or documents was not actually agreed upon. In his view what there might be reasonable, the courts should enforce.¹²⁵ Otherwise, that is unreasonable terms, should be found invalid either because unconscionable or not agreed-upon. It seems likely as well that this approach is nicely captured by the comments on unconscionability which include "unfair surprise" as a condition for unconscionability.¹²⁶ A contract term which unfairly surprises a party, would enjoy neither that party's conscious consent nor any form of relational consent.

¹²⁴ Murray, *Chaos*, *supra* note 10, at 1383-84.

¹²⁵ Karl Llewellyn's thoughts about unconscionability are well-known and perhaps suffice to show that a philosophy behind unconscionability follows from the liberal value of party autonomy. Llewellyn distinguished the dickered terms of a contract from the undickered terms which appeared in a written document furnished by one party. As to these latter terms, Llewellyn suggested that the blanket assent a party gives to these undickered terms often extends only to those terms which are reasonable.

"What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket assent (not a specific assent) to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms."

KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 370-71 (1960).

An immutable duty to read contracts one signs would contradict Llewellyn's statement of unconscionability as lack of assent. An objective test of intention forces a choice between the two views which remains controversial. Will theory chooses neither but would ask for evidence in contested cases on the allegations of each party that her expectation better corresponded to the parties' conduct. In this respect the adoption of unconscionability, as so much of the Uniform Commercial Code, reformed legal meaning and not social practice. Llewellyn's account of unconscionability as part of social practice may be wrong. Perhaps people do sign contracts intending to assent to everything in a contract document regardless of whether they might have agreed to the contract had they known of terms they hadn't read. No doubt some people do so and should receive legal treatment under the practice of blanket assent. The Uniform Commercial Code calls for a factual hearing on claims of unconscionability to locate the applicable social practice, be it "dickered" or "blanket" assent.

"Notwithstanding criticisms of Llewellyn's views on conscious assent to 'dickered' terms and 'blanket' assent to 'decent' undickered terms, the underlying concept appears clearly throughout Article 2." Murray, *Chaos*, *supra* note 10, at 1376.

¹²⁶ U.C.C. § 2-302, Official Comment 1.

Not surprisingly, and not unfairly, Richard Speidel has recently used unconscionability as a theme of the revision of section 2-207 as had Murray often previously.¹²⁷

Yet, Llewellyn might also have simultaneously believed what so many today believe, that protecting private autonomy sometimes, even perhaps oftentimes, opportunes contractual abuse. So, he may have been fighting himself and not merely others in the formation of the code. Like us, Llewellyn might have believed both in private autonomy, despaired of its unpleasant tendencies¹²⁸ and settled for a limited reign of will theory in the code. So, too, Murray states:

The normal contract or deal under Article 2 includes express and implied warranties and all judicial remedies to protect the fundamental expectation interests of the parties. In effect, Article 2 provides the normal, standardized agreement between the parties. Article 2 'is in large part a catalogue of the implied terms of contracts of sale.' The parties need only manifest an intent to be bound and include sufficient detail to permit a court to afford a remedy in the event of a breach. With an intent to be bound, if the parties can be identified and a quantity term found, all other terms will be the standardized terms of Article 2.¹²⁹

The code would set forth standard terms applicable unless the parties agreed otherwise and sometimes even when they appeared to agree otherwise. The latter bequeaths a code of significant ambiguity and thus serious complexity just as befits the personality and philosophy of its architect Llewellyn who defies narrow categorization. When Murray constructs the purpose of Article 2 or section 2-207 as enforcing the factual bargain of the parties, he thus overlooks huge tracts of Article 2 which, in *some* views, *impose* a legal not a factual bargain on parties, though the legal bargain may better correspond to the intentions of the parties than the parties' documents. For example, merchant sellers may indeed intend, when silent, to give buyers a merchantability warranty, as the code rebuttably presumes.¹³⁰ If sellers so

¹²⁷ Richard Speidel, *Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1323-1324 (1994). "Section 2-207, therefore, may be viewed as addressing incipient unconscionability--its philosophy is identical to 2-302's." Murray, *Chaos*, *supra* note 10, at 1322.

¹²⁸ Indeed, he nearly begged drafters to refrain from drafting to the edge of unconscionability.

¹²⁹ Murray, *Chaos*, *supra* note 10, at 1373.

¹³⁰ U.C.C. § 2-314.

intend, the so-called "implied" warranty of merchantability corresponds to the factual bargain. When true, a factual test of whether the goods were of "average fair quality in the trade"¹³¹ would follow. However, if the merchantability intention were a myth, so also would any factual test of whether the goods would have "passed without objection."¹³² Whether the so-called implied warranty of merchantability, when applicable because a seller ineffectively tries to disclaim,¹³³ results in a legal bargain closer to the parties' intentions than would effectuating the disclaimer, is unknown.

Absent contrary trade usage or prior course of dealing, which both necessarily affect the factual bargain of the parties, the normal deal between merchants must be based on the assumptions of Article 2--express and implied warranties, buyer and seller remedies, statute of limitations, reasonable time, place, and manner of performance, and other normative assumptions. The resulting contract is the normal factual bargain.¹³⁴

Perhaps this is so.¹³⁵ The code standard terms straddle the ideals of a factual

¹³¹ U.C.C. § 2-314(2)(a).

¹³² *Id.*

¹³³ To disclaim this warranty a seller must conspicuously state a disclaimer and mention the word merchantability, or seller must show designated contexts from which the code hypothesizes no merchantability warranty will have been part of the deal. U.C.C. Section 2-316(1); (2); *see also* Section 2-314.

¹³⁴ Murray, *Chaos*, *supra* note 10, at 1377.

¹³⁵ Different voices doubt Murray's assertions. Some believe the code supplementary terms are unfair to sellers. Under the present subdivision 2-207(3) formula, a conduct-based contract consists of terms on which the parties' writings agree plus standard Code gap-fillers. The problem with this approach is that the standard Code gap-fillers usually favor the buyer. This problem could be ameliorated if courts were willing to employ trade usage and course of dealing to modify the standard Code gap-fillers. There is no doubt that relevant trade usage and course of dealing do displace standard Code gap-fillers. However, as the Study Group report recognizes, courts have been rather timid here. Perhaps the answer is to reconsider Llewellyn's proposals for advisory merchants' panels on questions of trade usage...

Alternatively, the Study Group might consider recommending more neutral gap filler terms to be used in battle of the forms situations. Standard gap fillers, appropriate where neither party has attempted to negotiate a term, not be appropriate where one or both parties have conspicuously insisted on a term but did not reach agreement on the term.

Thus, for example, where the parties' negotiations and forms have been silent on the question of remedies for breach of contract, it is fair to give the buyer full remedies to effect his expectation interest. However, where the seller has in his forms attempted to limit the buyer's remedy to repair or replacement of the goods, that remedy may be reasonable and fair in some circumstances and so should be part of the contract. Task Force of the A.B.A. Subcommittee on General Provisions, Sales, Bulk Transfers, and Documents of Title, Committee on the Uniform Commercial Code, *An Appraisal of the March 1, 1990*,

“is” and a normative buyer’s “ought.” A pervasive mystery dissolves the code’s apparent clarity in supplementation of incomplete or incompletely expressed goods contracts. Buyers are favored¹³⁶ and never has one any purchase on whether that is because the true factual bargain of any sale of goods is buyer-favoring or because buyers had historically suffered so on the principle of *caveat emptor* or because buyers had won the political hearts of the code drafters or because “buyerdom” would be more efficient or socially just.

Without answering why buyerdom exists in fact or deserves to exist, Murray, like the typical discussant of section 2-207, claims that the present code as “judicially constructed” reaches the right result in the “typical case.”¹³⁷ His conclusion rests on the contract terms arising largely from the code’s “standard terms” or “gap-fillers” which favor buyers. In Murray’s view, this is correct because the code terms are “normal”¹³⁸ and thus “fair.”¹³⁹

Preliminary Report of the Uniform Commercial Code Article 2 Study Group, 16 DEL. J. CORP. L. 981, 1066-1077 (1991).

One may disagree with both Murray and the Task Force. If the code’s supplementary terms are understood as procedural shells calling for evidence on the terms the parties are disputing. Nevertheless, this has not been the obvious or even visible approach of this part of the code in the courts.

¹³⁶ This Murray and most commentary accepts uncritically. *E.g.*, *Id.* at 1377; *The Revision of Article 2: Romancing the Prism*, 35 WM. & MARY L. REV. 1447, 1471 (1994)[hereafter *Romancing*](“The gaps are filled with the “supplementary” terms of Article 2, all of which favor the buyer (warranties, consequential damages, etc.). In the view later set forth here, the code so-called gapfillers favor neither party as should a code which seeks to enforce the factual bargain. *Infra* at Part VI.

¹³⁷ *Id.* at 1469-1472.

¹³⁸ “Article 2 specifies certain formalistic requirements for deviations that are especially dangerous because they may result in unfair surprise or oppression. A formal method of disclaiming the implied warranty of merchantability requires that the written disclaimer use the term ‘merchantability’ and be conspicuous. This threshold safeguard helps insure against a court providing operative effect to a surprising and oppressive term. In keeping with the spirit of Article 2, some courts have required clauses excluding consequential damages to be conspicuous. The norm is a contract containing all the implied terms of Article 2. If a party seeks to deviate from these normative assumptions because that party views the ‘general’ rules as unsatisfactory, that party should have the burden of showing that the other party to the contract had a reasonable opportunity to understand that any deviant term was proffered as a part of the factual bargain.” A disclaimer is a deviation from the normative assumption of Article 2 that buyers are entitled to implied warranty protection.

Murray, *Chaos*, *supra* note 10, at 1375-76.

¹³⁹ “If a disclaimer of warranty or exclusion of remedy clause is not part of the factual bargain, giving the clause operative effect is ‘indecent’ because it oppresses and unfairly surprises the party against whom it operates.” Murray, *Chaos*, *supra* note 10, at 1376. Why isn’t the same true for a warranty against a seller which a fact-finder would find was not part of the factual bargain? The typical answer given in the literature replies that the code permits seller to disclaim a warranty and therefore there is nothing indecent in holding a seller to a warranty whose existence the seller knew or had reason to know. But if “had reason to

But this is the same kind of reasoning which led Llewellyn's band to repudiate the mirror image and last shot rules of the common law. The first Restatement had swallowed these common law ideas as truths; they were the normal and the fair interpretation of certain behaviors. Even today, some claim that Williston's views were better than section 2-207 as judicially constructed.¹⁴⁰ Murray scorns the judicial rule that rubs out the last shot rule from section 2-207 analysis.¹⁴¹

know" is the test of the factual bargain, then the present section 2-207, or any possible version of section 2-207 which is published, satisfies this kind of hypocritical factual bargain test.

¹⁴⁰ See, e.g., Douglas Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: a Reassessment of § 2-207*, 68 VAL L. REV. 1217 (1982). Most of the commentary would reform or abolish the section. Baird & Weisberg have suggested that the openness of § 2-207 came by design of the drafters. In overthrowing the mirror image rule, they suggest the drafters replaced that rule with the broad standards of § 2-207. But, Baird & Weisberg contest the drafters' favoring broad legal standards:

"[T]he formalist principles of offer and acceptance underlying the mirror-image rule are fundamentally sound." *Id.* at 1223. Their reasons are first that the problem of the welsher may be handled by the mirror-image rule contrary to the conventional supposition. Secondly, they suggest that the terms the parties would receive under a mirror-image rule may produce a better result than "off-the-rack" terms the code would supply where the parties have performed under § 2-207(3). For, a mirror-image rule would permit parties "to avoid the off-the-rack rules the Code supplies in the absence of express agreement; such ready-made terms may be poorly suited to the transaction and consequently advance the interest of neither party. Compared with 2-207, the mirror-image rule encourages parties to adapt the terms in their forms to the needs and abilities of buyers and sellers in their particular market."

How might a rule of contract law be sound? Baird & Weisberg concede that a clear showing of the parties' intent should govern. Because the problem in the battle of the forms is that party intent is not clearly shown, they reject factually oriented intent inquiries, as § 2-207 was in their view intended, which would be necessarily imprecise. *Id.* at 1219, n.4. Further, Baird & Weisberg assert,

In battles of the forms, one has no way of knowing if the parties have in fact intended to enter into a binding contract regardless of any asymmetry in particular terms. It is not only difficult to gather the facts needed to determine whether the parties intended to contract; it is impossible, because by the very nature of battles of forms the parties never reflected whether they were legally bound despite differences in terms. Indeed, the premise of a battle of the forms is that the parties are not aware that the terms conflict until a dispute arises, and the dispute may not arise until well after performance.

Id. at 1239-40. But "reflecting whether they were legally bound" is neither the traditional test of objective contract law nor the only evidence a will theory of intent (that is what Baird & Weisberg here endorse) need accept on the issue of mutual assent. As these commentators recognize, rare are the cases under the battle of forms in which mutual performance had not begun. The major question in battles of forms has not been whether parties consider themselves bound to a contract. The question is to what. Indeed, Baird & Weisberg contribute to the ongoing § 2-207 debate by pointing out the real question a liberal will theory sees there: whether the incorporation of the UCC supplementary terms, and especially a merchantability warranty, is conducted under a test in accord with what Professor Murray aptly labels, the bargain-in-fact. John E. Murray, *Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability*, 39 U. PITT. L. REV. 597, 601-02 (1978).

¹⁴¹ Murray, *Romancing*, *supra* note 136, at 1471.

A different conception of the so-called gapfillers of the code would be more compatible with the general will-based test the revision of section 2-207 proposes, whether the parties conduct shows they intended a contract. The same reason Murray and others have called on section 2-207 to enforce the parties factual bargain, supports this alternative to the conception of warranty provisions and the like as substantive gapfillers.¹⁴²

As revised, section 2-207 requires parties to prove the grounds for believing they intended a contract. As has been noticed, this provides an opportunity seemingly foreclosed in one paradigmatic setting. Where the parties have exchanged highly lawyered or strategic sales forms, no contract results from the documents. Courts have supposed the structure present section 2-207 to endorse or even require this result. The only subsection from which one might find a contract requires conduct evidencing contractual intent. The courts have supposed, and not unreasonably, that this subsection applies when there is post-documentary conduct in the nature of contract performance. Yet, it may be true that merchants may intend a contract despite merely an exchange of strategic forms. The revision aspires to open the opportunity for either party to show such was the mutual understanding.

Similarly, once facts support a finding of such contractual intent, the revision opens the question of assent to terms in either party's forms. The revision rules neither party's form out of bounds the way both present section 2-207(2)(b) or 2-207(3) does.

¹⁴² Contract commentary insists on the foundational premise that Llewelyn's "law job" must consist of preparing the best substantive law. Even writers who scorn the neutrality or objectivity of that task, nevertheless assume the importance of that task for contract:

The work of building and stating norms may not be easy, but before we can get back to this traditional job of the law, we need to clear away the suggestion that we can evade the task by simple resort to "freedom of contract."

Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 after n 164 (1990).

If the costs of a substantive evaluation are too high to make a liability rule attractive, but the costs of obtaining proper consent are too high to make a property rule attractive, the third possibility is to lower the requirements for obtaining "proper" consent. That is, the court could simply enforce the contract as written, by finding that Y's consent was properly obtained...However, the concepts of "voluntariness" and "adequate knowledge" are notoriously difficult to define.

Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U. CHI. L. REV. 1, 33-34 (1993). Why "rules" and what is not difficult to define?

There is another choice about the law job beside "building and stating norms" or defining the "notoriously difficult." Replacing one imperialistic contract regime with another promises very little other than "strategic bargaining" problems for which more rules will be needed.

Thus, the keynote to the revision is opportunity to prove the actual factual bargain reached by the parties. The same note would yield the alternative conception of the gapfillers: When revised section 2-207 incorporates the code's similar framework for supplementary terms, the revision presents parties the opportunity to prove the substantive understanding about contested matters.

Murray is not necessarily wrong in his belief that the code gapfillers are fair. They may indeed be fair, but that should not be above scrutiny. Murray is wrong to defend as fair a substantive gapfilling regime but promote a factual and necessarily case-by-case approach to contract formation in the revision. These are inconsistent¹⁴³ unless it is true that we know what contract terms are fair but we lack equivalent knowledge of when parties assent to a sales contract.

Substantive gapfilling does not fit the new message of revised section 2-207. In contrast, that concept fits present section 2-207(3). That section appeared to assume that parties who exchanged varying forms failed to agree to everything other than matching terms. The revision makes no such assumption and invites parties to prove "their" terms were agreed upon "outside" the forms. The structure of revised section 2-207 is enabling in this and other regards. The revision provides parties with the opportunity to show whether a factual bargain which meets the tests of section 2-204 occurred.¹⁴⁴ But so do the code's supplementary provisions. As enabling provisions, the code's gapfillers properly constructed and properly construed meet the applicable test of fairness by permitting the parties to show how their factual bargain fills the code's supplementary provisions. The following part of this essay explains this nonsubstantive conception of the code's supplementary provisions.

VI. PARTIES NOT CODE SECTIONS FILL THE GAPS

The UCC eschews the imposition of substantive default rules and instead welcomes the implications of will theory by freely inviting parties to show what their actual agreement was. In such a realm there is neither sense nor need to

¹⁴³ Murray's goal of getting to the parties factual bargain could distinguish between the factual question he clearly favors of whether the parties satisfied the intention to contract test despite varying forms and the separate question of what terms the parties agreed to. In this respect far less inconsistency would hold between his favoring gapfillers as fair regardless of agreement and whether there was a contract. He makes no such distinction. The following test doubts whether any such distinction might be made on the initial premise of a factually based test of whether any contract was intended by the parties.

¹⁴⁴ Section 2-204(1) states: "A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct which recognizes the existence of a contract."

expect parties to come to an actual and clearly expressed documentary agreement. Parties make their agreements in accordance with either conventional standards or their own standards. General contract law and sales law gain normative force by expecting the conventional and being prepared for the unconventional agreements.

For example, the UCC missing price term provision adopts neither a merchant's nor a consumer's standard. A merchant's standard could be that price on average of such goods in the applicable market. A consumer's standard could be the price which would induce a reasonable consumer, situated as this consumer, to contract.¹⁴⁵ The UCC provision neutrally observes only that the court shall impose a reasonable price that leaves open either test or any other uniquely suited to provide the most likely congruence between intent and result. Assuming a dispute between a merchant and a consumer, no substantive test can promise to reduce any discrepancy between the actual understandings of the parties. If the two parties actually agreed, the test most likely to reflect that agreement depends on whether these parties belong to the same or different communities. If they belong to the same community, then the conventional test of that community will likely persuade a court to find the price term the parties' community usually adopts. If they belong to a different community, then a court is likely to take the course least likely to burden either party. This may mean a Solomonic splitting of the difference or it may mean that the parties really didn't intend to have a contract in the absence of their further agreement. In general contract law, it would mean either the decision that there was a contract was mistaken due to the parties' failure to agree or that the parties had made a mutual mistake with regard to price. A court might, as noted, adjust the price term, or it might find a more satisfactory resolution in declining enforcement or another adjustment doctrine such as detrimental reliance or quasi-contract.¹⁴⁶

Thus, the presence of a gapfiller such as the code's "open price term" provision provides a structure for gathering the factual bargain of the parties. Section 2-305 ordains neither a particular price term nor does it presume the finding of a valid contract.¹⁴⁷ It is effective without being substantive as to price, and it draws its energy from the parties' bargain relationally

¹⁴⁵ Someone might object that, there is no difference between the relevant market price and that price that would induce the purchase by a reasonable buyer. Nevertheless, buyers who have regularly bought at below market values from sellers have a prima facie claim that sellers in a particular open-ended transaction consented to a below-market price. To believe otherwise, requires either better evidence of the intentions of the parties or rejection of the moral basis of contract as actual intention.

¹⁴⁶ U.C.C. § 2-305(4); R. 2-305(d).

¹⁴⁷ U.C.C. § 2-305(1),(4); R. § 2-305(a),(d).

comprehended. The document the parties signed, if any, by hypothesis lacks a price term. Filling that gap is a procedure, not a legislative or a judicial imposition.¹⁴⁸

A second example is the code's warranty of merchantability provision and the code's warranty disclaimer provision. A seller of goods who is a "merchant with respect to goods of that kind" warrants that the goods sold shall be merchantable.¹⁴⁹ This is a default rule within recent discussions because the merchant seller makes this warranty to buyers even though the express agreement of sale says nothing specific about warranties. Thus, this appears to conform to ideas of substantive, off the rack, default rules. But, it is very narrow if importantly substantive. The open question for this warranty is what obligation it imposes. That obligation is no more than that the goods conform to applicable trade practice.¹⁵⁰ For example, a sale of "second-hand goods involves only such obligation as is appropriate to such goods..."¹⁵¹ Even though a seller must take action to shrug off a warranty of merchantability, the warranty itself is tailored to the individual case by drawing in trade standards rather than promulgating the substance of those standards. Under the merchantability warranty, as with the other warranties in sales of goods, this specialized body of contract law refrains from imposing on parties what the law thinks they mean and leaves the parties to show what they meant. The parties are not confined in that showing by their express agreements.

Merchant sellers, as well, are free by appropriate express agreement or by the circumstances to show that the parties agreed to no warranties at all. The

¹⁴⁸ On this view, the apparent rules of U.C.C. § 305(1)(a)-(c), are merely indicative of instances in which parties might have intended to have concluded a contract without fixing a price term. Less amenable to my "procedural" thesis, is § 2-305(2) which states that "[a] price to be fixed by the seller or by the buyer means a price for him to fix in good faith."

Yet, the source of the information which will supply the good faith measure of reasonable price, as in other uses of good faith in the code, can come only from evidence about price. If so, a general good faith standard may conform to an evidentiary model of contract. The test is whether seller (or buyer) set the price honestly and in a commercially reasonable manner. U.C.C. § 2-103(1)(b). The real issue sets in on the plane of what evidence is material to whether a seller (or a buyer) set the price in good faith: Suppose the seller's evidence will show prior course of dealings in which seller was permitted to set the price at 20% above market. Suppose also that buyer's evidence shows a trade usage in which seller may only charge market price. Section 2-208(2) seems to rank course of dealing and usage of trade equally but § 1-205(4) favors course of dealing over trade usage. R. §2-208 does not address this. A legal ranking of these kinds or types of evidence seems absurd. A sophisticated fact-finder who thinks buyer's usage evidence is more credible than seller's course of dealing evidence, may evade the code's ranking by finding seller failed to prove a course of dealing.

¹⁴⁹ U.C.C. § 2-314(1).

¹⁵⁰ *Id.* 2-314(2)(a).

¹⁵¹ *Id.* Official Comment 3.

disclaimer right, given by the code,¹⁵² might be viewed as an informational or educational duty imposed on the more sophisticated contract party for the enlightenment of the other party to the transaction. Yet, the merchantability warranty disclaimers typically eliminate are by no means any sort of “penalty” for a merchant who deals in trades in which quality assurance is the norm.

What was said about the lack of substance in these UCC gapfillers, may be said also about the various other supplementary code provisions. Even the delivery terms, FOB and the like, begin with the caveat “unless otherwise agreed.” Thus, they do no more than provide a definition of what the parties actual agreement, FOB, means for cases in which the parties cannot show another meaning. But, even there, the parties are free to show by appropriate evidence a different understanding. A weakness of the present code may be its expectation or the courts’ expectation that an “agreement otherwise” must be expressed in traditional signed writing form. If the circumstances of a sale suffice to disclaim certain warranties, so also might convincing circumstances provide otherwise as to definitions of prosaic commercial terms the code defines.

Thus, one need not justify the code gapfillers by a different theory than one justifies the approach the revision takes on whether the parties formed a contract of sale. The code gapfillers are fair to the extent they reflect the parties’ actual bargain. Those gapfillers which permit investigation of the factual bargain are fair from this point of view. That is all the desideratum of factual bargain requires. Those that don’t might engage the revisers’ energy.

VII. CONCLUSION

Sir Isaiah Berlin’s dictum¹⁵³ means that a law of contracts should strive to help parties get what they sought without imposing any one vision of what parties should want. That is both a liberal and a will vision. A liberal vision leaves a law of contract to the task of formulating adequate procedures for the law’s look at contract disputes. That look may reveal communitarians or libertarians in dispute and may resolve the conflict on such bases. When parties of different stripes dispute, often a law of mistake and quasi-contract will provide a better resolution than the stripes of either.

¹⁵² *Id.* 2-316.

¹⁵³ *Supra* at 191.

A will vision supposes that parties do have intentions in their actions and in contract-like behavior, these intentions should be honored. Finding intention requires that one look. Both the cynic and the behaviorist doubt there is anything to find. As with love and honor and everything else worth seeking, the difficulty of finding intention does not prove it fanciful. The wonder of the current draft of a revised section 2-207 is that others are willing to look and in places so long ignored, especially relational bases. The "bad man" theory of law¹⁵⁴ noted by Holmes a century ago happily plays no role in the revision. Under that theory the "bad man" wanted to know what the law was so he might avoid liability. The relational approach to intention to contract, and so much else, frustrates Holmes' bad man.¹⁵⁵

The critical but constructively offered remarks made here regarding the justification for consent are importantly related to the enterprise of the code and the revision. As well, the conception of code gapfillers strikes deep into the concept of contracts. As there is no single formula, impositional contract justified by efficiency or game theory or the latest incarnation of Mr. Bentham's calculus of pain and pleasure always misses the contract mark.

¹⁵⁴ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.")

¹⁵⁵ Though often unacknowledged, Holmes' Bad Man theory was a heavy influence in the rise of objective theory. The move to standards in contract has been part of the modern rejection of that theory of law and the positivist theory on which it rests.