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The Judicial Vision of Contract: The Constructed Circle of Assent and Unconscionability

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A recent article with a similar title¹ focused on one of two radical sections of Article 2 of the Uniform Commercial Code, Section 2-207, popularly but mistakenly identified as the “battle of the forms.”² Neither that section nor the other radical UCC departure from classical contract law known as “unconscionability” have been assimilated by courts on the same level as other contracts doctrines. For more than six decades, their use has been attended by conclusory terms parading as analyses on a judicial tapestry of discomfort that is palatable. The despair of Section 2-207 is aptly stated in the classic confession one court: “Section 2-207 is a defiant, lurking demon patiently waiting to condemn its interpreters to the depths of despair.”³

The other radical section was first revealed in Section 2-302 of the Code as a modern version of “unconscionability,” the quintessential equitable concept, now to be pursued in some fashion in courts of law. Exactly how that would occur has always been the problem. Notwithstanding the hope that it would become “perhaps the most valuable section of the entire Code,”⁴ an early criti-

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2. Among many other misconceptions about this section, the popular title may be read to suggest that it is limited to situations involving two forms with “battling” boilerplate terms. See Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996). Such a misconception contradicts the statutory language, precedent and purpose of the statute as it creates unnecessary confusion concerning even the basic chronology of contract making. An oral contract followed by one confirmation with additional terms was not only intended to be covered under Section 2-207; it was the first illustration of its application under a comment to that section. See John E. Murray, Jr., The Dubious Status of the Rolling Contract Formation Theory, 50 DUQ. L. REV. 35 (2012) as cited in Howard v. Fellergas Partners, LP, 2014 U.S. App. LEXIS 6416 (10th Cir. 2014); Schnabel v. Trilegiant, 2012 U.S. App. LEXIS 18875 (2d Cir. 2012).


cism viewed it as "nothing more than an emotionally satisfying incantation, proving it is easy to say nothing with words."\(^5\) In terms of the development of a cogent analysis, that prophecy has turned out to be largely true. Neither the enacted language of 2-302 nor the unenacted Comment language provides anything resembling a definition of "unconscionability."\(^6\) Courts are now in general agreement that no "precise" definition of the new "unconscionability" concept is possible.\(^7\)

Sections 2-207 and 2-302 share a common intellectual provenance. They were Karl Llewellyn's responses to procrustean rules of classical contract law where "technical" analyses produced results that undermined the apparent bargain of reasonable parties unless courts deviated from the rules through the use of "covert tools."\(^8\) The sections were designed to avoid the necessity to use unreliable covert tools by enabling and empowering courts to create new designs for the agreement process that would more precisely identify the apparent bargain-in-fact of the parties. Since its birth, however, 2-207 became encrusted with new technical obstacles, diametrically opposed to the anti-technical philosophy of

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6. “Different proposals were considered by the Article 2 Drafting Committee during the 1940’s [but] the doctrine of unconscionability was left undefined.” Caroline Edwards, Article 2 of the Uniform Commercial Code and Consumer Protection: The Refusal to Experiment, 78 ST. JOHN’S L. REV. 663, 698 (2004). The subsequent Restatement (Second) of Contracts version in Section 208 (appearing sixteen years later) simply replicates the language of UCC § 2-302.

7. Lucier v. Williams, 841 A.2d 907, 911 (N. J. Super. 2004) (“There is no hard and fast definition of unconscionability.”); Ruppelt v. Laurel Healthcare Providers, LLC, 293 P.3d 902, 908 (N. M. App. 2012) (“[N]o single, precise definition of substantive unconscionability can be articulated . . . .”); Original Talk Radio Newtwork v. Alioto, 2013 U. S. Dist. LEXIS 113788 (D. Ore. 2013) (“Courts in Oregon have recognized that unconscionability defies precise definition.”); Saenz v. Martinez, 2008 Tex. App. LEXIS 8297 at *26 (“Unconscionability has no precise definition because it is a determination to be made in light of the entire atmosphere in which the agreement was made, the alternatives, if any, available to the parties at the time the contract was made, the nonbargaining ability of one party, whether the contract was illegal or against public policy, and whether the contract is oppressive or unreasonable.”); Commercial Real Estate Inv. v. Comcast of Utah II, Inc., 285 P.3d 1193, 1208 n. 9 (Utah 2012) (Lee, J. concurring opinion) (“Common law definitions of unconscionability are . . . so unclear and inconsistent that they provide little, if any, guidance as to what unconscionability really means.”) (quoting Evelyn L. Brown, The Uncertainty of UCC Section 2-305: Why Unconscionability Has Become a Relic, 105 COM. L. J. 287, 291 (2000)).

Article 2. As to 2-302, lacking a generally accepted definition, the two essential themes running through the Llewellyn version of “unconscionability” were identified in a 1965 case in a jurisdiction that had yet to enact the UCC. Judge Skelly Wright’s opinion described unconscionable contracts or clauses as manifesting the absence of reasonable choice and terms unreasonably favorable to the other party. With or without attribution, Judge Wright’s description reappeared in many subsequent cases. In the somewhat embarrassing position of finding “unconscionable” indefinable, the current fashion inevitably describes unconscionability as “procedural” or “substantive.”

“Procedural” unconscionability is concerned with the circumstances under which the contract was negotiated and formed including the conspicuous or inconspicuous form in which the allegedly unconscionable term is found and, in particular, whether a genuine negotiation occurred, versus a take-it-or-leave-it demand that precluded any choice by the party with inferior bargaining power. Where only one party dictates the terms, the agreement is a “contract of adhesion” which is “procedurally” unconscionable. While genuine negotiation over contract terms could occur between commercial buyers and sellers of relatively equal bargaining power, virtually all consumer contracts are “contracts of adhesion.” “Adhesion” contracts, however, no longer carry the negative implications that were so often discussed a half-century ago as a major component of unconscionability. Currently, it would be more than rare for a court to determine that a contract or provision thereof was unconscionable on the basis of procedural un-

9. These developments are explored in some detail in the earlier article. See Judicial Vision, supra note 1.
11. Notwithstanding his disdain for the general concept, Professor Leff suggested this distinction. See Leff, supra note 5.
12. In AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011), the Court was unimpressed by the analysis of the California Supreme Court in Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), that arbitration agreements waiving class actions were unconscionable in consumer contracts of adhesion since “the time in which consumer contracts were anything other than adhesive are long past.”
Indeed, the current vogue suggests that there is nothing "wrong" where a contract is properly characterized as procedurally unconscionable. Substantive unconscionability is concerned with whether a contract, or a term of a contract, is overly harsh, one-sided, or manifests an outrageous degree of unfairness. Unlike procedural unconscionability, a court may deem a contract or a term of a contract unconscionable on the basis of substantive unconscionability alone. While the "procedural" versus "substantive" distinction appears in virtually any significant discussion of unconscionability, its analytical strength is greatly exaggerated. Unique insight is not required to demonstrate that procedural unconscionability deals with Skelly Wright's first element, the absence of reasonable choice, while substantive unconscionability manifests his second element, unreasonably favorable terms. Thus, the "procedural" and "substantive" descriptions are subject to the same criticism that Professor Leff provided for the original language of unconscionability in Section 2-302. They are nothing more than additional "emotionally satisfying incantations proving that it is easier to say nothing with words."

While the two radical UCC sections are not expressly limited to standardized (boilerplate) terms, the disputes giving rise to their application typically involve such repeatedly used printed terms. Thus, the two sections are embedded in the perennial problem of determining the enforceability of printed terms where no satisfactory analysis has been developed, though the problem has been visible for well over a century. The affinity between the two sections is easily apparent in the archetypical situation of a printed clause containing the inevitable terms favorable to a party, drafted to the edge of the possible by a lawyer who is doing her best to anticipate the last scintilla of potential loss to her client. The essential question for a court in such cases is no different from the

15. In United States v. Hare, 269 F.3d 859, 862 (7th Cir. 2001), Judge Frank Easterbrook's opinion for the court states, "But what's wrong with a contract of adhesion anyway?"
essential question that courts routinely face in contracts litigation generally, i.e., determining which terms will qualify as “operative,” thereby entering the judicially constructed circle of assent.

It has long been an open secret that the insistence of courts that they are simply discovering the intention of the parties in ascertaining the terms of a contract is not true and never was true. While there is universal agreement concerning the application of the objective test, very little attention is paid to the fact that an officially recognized “contract” is necessarily a judicial construct.

The process begins with evidence of an alleged agreement that will be subjected to numerous judicial sieves to determine which manifestations of assent the court deems ‘operative.’ If a ‘contract’ is discovered, it is a construct, a judicially conceived circle of assent, displaying what the court deems to be an objectively reasonable agreement between objectively reasonable parties colored by policy dimensions that reflect judicial favors and frowns. The distilled construct is the only agreement enforceable at law, regardless of the intention of the parties since the intention of the parties will remain unknowable.20

Courts are asked to consider whatever objective manifestations are available to determine what terms they deem appropriate for inclusion in the constructed circle of assent they create, regardless of the actual intention of the parties. Courts have engaged in this process from time immemorial, long before there was any mention of a new doctrine of unconscionability or the possibility of finding a contract where the printed form of a party contained terms different from or additional to the terms in the other party’s printed form.

Any manifestation of agreement is subject to interpretation and it will be interpreted according to a normative standard of reasonableness and good faith, though the actual parties may not have met either of those standards. The standards will be applied by judges with different experiential and linguistic backgrounds. Some judges may recognize the limitations of such backgrounds and admit evidence of reasonable, alternative meanings of words or conduct, while other judges may reject such proffers on the foot-

ing that the manifestations are unambiguous.\textsuperscript{21} Even the initial determination of whether a contract has been formed will depend upon whether a reasonable party would have understood a communication as an offer or whether the other party should have understood words or conduct as manifesting an acceptance of the offer. Whether the issue is formation or interpretation of a contract, the issue is always what a "reasonable party" would have understood as the judge places himself in the position of that reasonable party. The "reasonable" criteria that pervades interpretation contains the biting innuendo that "reasonable" is in the eye of the beholder.

Evidence of an agreement made prior to a writing may not be admitted if the judge determines that reasonable parties would have or "would certainly" have included such an agreement in the kind of writing that the parties finally executed.\textsuperscript{22} Strong evidence of an agreement will not prove a contract exists if it fails to meet the requirement of a writing under a statute that began in 1677 but remains part of contemporary contract law. Yet, some courts will be willing to discover a satisfaction of the statute of frauds through detrimental reliance on the oral contract. Such judicial activism is reminiscent of a "covert tool."

There are many other covert tools that Karl Llewellyn did not address. Language of condition—sometimes even including the use of the term "condition"—will be denied conditional effect because of the classic policy that the law abhors forfeitures. Breaching a contract by assigning a contract right in the teeth of language precluding assignments of such rights will be creatively construed to distinguish a duty not to assign from the surrender of the power to assign, thereby validating the assignment. Such an analysis reflects the favorable policy of freedom to assign contract rights.

Whether a breach of contract is important enough to discharge the duty of the aggrieved party will depend upon its "materiality." Again, the court will determine whether the breach is "material"

\textsuperscript{21} The notion that words have a "plain meaning" and interpretation is permitted only if a court decides that the language is ambiguous on its face continues, notwithstanding compelling arguments to the contrary. This illustration and others that follow are more fully developed in the earlier article, \textit{Judicial Vision}, supra note 1.

\textsuperscript{22} The "would certainly" test is the UCC § 2-202 modification of the original common law test which would admit more evidence since, to preclude evidence of a prior agreement, the court would have to determine that reasonable parties "would certainly" have included it in the writing before the court.
based essentially on whether the aggrieved party has or will receive the substantial performance that he expected to receive when the contract was formed.\textsuperscript{23}

The materiality standard is expressed in Section 2-207. The essential concern is the determination of the operative terms of a contract where a response to an offer contains "additional" terms.\textsuperscript{24} Additional terms contained in a boilerplate section of a response to an offer that otherwise appears to be a definite expression of acceptance is treated as an acceptance forming a contract rather than a common law counter offer. The application of the classic counter offer rule allowed for a substantively unfair "last shot principle" that the statute sought to eliminate. Section 2-207 empowers a court to interpret and construe a response to an offer as it would be understood by a reasonable party in the position of the offeror rather than its technical meaning that would require it to be characterized as a counter offer simply because it contained a boilerplate term that was not in the offer. The underlying assumption is that such a boilerplate term is ignored by reasonable parties. Section 2-207, therefore, was designed to allow courts to construct a more substantively fair circle of assent.

Similarly, Section 2-302 is designed to allow courts to achieve a higher quality of substantive fairness. Courts were aware of this challenge. As suggested by a particularly insightful opinion:

Unconscionability is not defined in Section 2-302 of the Uniform Commercial Code . . . . It is an amorphous concept obviously designed to establish a broad business ethic. The framers of the Code naturally expected the courts to interpret it literally so as to effectuate the public purpose and to pour content into it on a case-by-case basis. In that way, a substantial measure of predictability will be achieved . . . .\textsuperscript{25}

The challenge of "pouring content" into the "amorphous concept" over the four decades since that opinion has proven to be formidable. No bright line test has appeared because, as Llewellyn himself discovered, there was no possibility of such a test. There was, however, no question that he expected courts to do the "pouring" in the mode of common law development, which he appreciated so

\textsuperscript{23} RESTATEMENT (SECOND) OF CONTRACTS, § 241 (1981).

\textsuperscript{24} The "different" versus "additional" terminology in § 2-207(1) and (2), as well as other pathologies of the 2-207 case law, is addressed in Judicial Vision, supra note 1.

\textsuperscript{25} Kugler v. Romain, 279 A.2d 640, 651-52 (N.J. 1971).
much while recognizing that an approach by statute was dubious and awkward at best. The only way to achieve the purpose of this iconoclastic section that imported the underlying concept of equity into the law was to enable courts to achieve substantive fairness openly. His expectations for this splendid development began with his belief that courts would be eager to exert this power in appropriate cases. He believed that, “[w]hen it gets too stiff to make sense, the court may knock it over.” The unconscionability section would provide an official imprimatur to allow courts to “knock it over” without stealth. The challenge was considerable. How does a court explain its use of such an amorphous concept?

Traditional doctrines of contract law, with which courts have become reasonably comfortable on a regular basis, were often viewed as amorphous or mysterious. The “mystery” of the parol evidence rule was often viewed as familiar to many but fathomed by few.26 The symmetry between the doctrines of material breach and substantial performance were revealed to many for the first time in the *Restatement (Second) of Contracts.*27 The history of doctrines such as anticipatory repudiation, third party beneficiaries and many others, reveal the necessity for exactly the kind of common law development of an unconscionability doctrine that Llewellyn expected. Indeed, among the current “doctrines” of contract law, which one has remained unchanged by courts since its inception?

What may be the greatest obstacle to this development is the sacred rubric of contract law that one is bound by the terms to which he apparently agreed, regardless of whether he read or understood such terms. The “duty to read” doctrine is quintessential to any system of contract law to emasculate the absurd defense that one is not bound because he failed to read the document he understood as the contract document. If there is a record on paper or perceivable on a screen that a party should have understood as constituting the terms of her contract, she must be bound by the contents of that record, absent fraud, misrepresentation, mistake, or unconscionability. The whole notion of courts “policing” contracts for egregiously unfair (though not fraudulent or mistaken) terms was difficult to assimilate in light of the fundamental duty.

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26. In his *Preliminary Treatise on Evidence at the Common Law*, 390 (1898), James Bradley Thayer began his discussion of the parol evidence rule as follows: “Few things are darker than this, or fuller of subtler difficulties.”

27. *Restatement (Second) of Contracts*, § 237, cmt. d.
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to read rubric. That duty is so embedded that an unconscionability defense for a merchant is virtually impossible. This is so, notwithstanding the fact that, in a clash of forms between multinational corporations, the standard terms of the corporation with superior bargaining power will become the terms of the contract just as the standard terms of a large seller will be the “my way or the highway” form binding a consumer.

Unconscionability, therefore, was relegated essentially to consumer transactions. The successful use of the unconscionability defense was dangerously low until it was resuscitated to defending against boilerplate arbitration contracts of adhesion, which began appearing pervasively in myriad transactions, strongly supported by interpretations of the Federal Arbitration Act. Courts were required to address arbitration agreements containing cost-splitting provisions, limitations on time to assert claims, “loser pays” the cost of arbitration clauses, the waiver of rights under various statutes, and preclusion of class representative actions. Notwithstanding the absence of a generally accepted unconscionability analysis, the arbitration/unconscionability cases augur the capacity of courts to deal effectively with claims of substantive unfairness.

There is no question that parties, particularly consumers, do not read the boilerplate that invariably attaches to standardized transactions. Statutes requiring conspicuous print and other disclosure encouragements to make terms more accessible have not induced their reading and assimilation. Karl Llewellyn found the “true answer” to the problem was to “delegate to courts the tasks of assessing as a substantive matter whether particular terms are unreasonable or indecent.” While several other “an-

29. Id.
30. The evidence is compelling that on-line transactions manifest the same clear deficiency. A recent article reports a series of empirical studies by Florencia Marotta-Wurgler noting the minuscule proportion of retail shoppers (one or two per thousand) who chose access to license agreements and, of those who did access the terms, they typically spent too little time to read anything more than a small portion of the text. Ian Ayres & Alan Schwartz, The No-Reading Problem in Consumer Contract Law, 66 STAN. L. REV. 545, 547-48 (2014).

Instead of thinking about ‘assent’ to boiler-plate clauses, we can recognize that so far as concerns the specific, there is no assent at all. 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
answers" have been suggested, only one appears realistic at the moment.

The *Restatement (Second) of Contracts* bravely entered the murky waters of standardized agreements in Section 211. The section begins with a restatement of the "duty to read" rule: "[w]here a party ... signs or otherwise manifests assent to a writing and has reason to believe" he is signing a contract, and he is bound by the terms of the writing, including boilerplate clauses. The rule, however, is subject to an "exception" in Section 211(3):

Where the other party has reason to believe that the party manifesting assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

The language is curious and somewhat controversial by focusing on the "belief" of the party who will not be adversely affected by the clause—the drafter of the standardized record. If the drafter "had reason to believe" that the other party would not have agreed had he known of the clause, it would not enter the constructed circle of assent. A comment suggests that evidence of "reason to believe" may be inferred from a particularly "bizarre" or "oppressive" term, or because the term eviscerates non-standard terms explicitly agreed to or otherwise eliminates the dominant purpose of the transaction. The same comment, however, suggests a focus on the understanding of the adversely affected party:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standard terms in detail, *they are not bound by unknown terms which are beyond the range of reasonable expectation.*

This is a general statement of the "reasonable expectation" concept created by Professor (later Judge) Keeton who found it par-

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32. *RESTATEMENT (SECOND) OF CONTRACTS*, § 211(1).
33. See John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735 (1982); *MURRAY ON CONTRACTS*, § 98.
34. *RESTATEMENT (SECOND) OF CONTRACTS*, § 211, cmt. f.
35. *Id.* (emphasis added).
particularly applicable to insurance cases. If applied to contracts generally, it has an iconoclastic appearance. Literal reading and application of boilerplate provisions would no longer obtain. Rather, a court would be challenged to determine which of the boilerplate terms a reasonable party would have reasonably expected. Only terms which a reasonable party, regardless of background, experience or education, would reasonably expect to find in the boilerplate, would be granted entry into the constructed circle of assent as operative contract terms. Nothing could be more fundamental in contract doctrine than commanding courts to discover the reasonable expectations of the parties with respect to contract language that is generally ignored. The great mistake of the past was to recognize that such boilerplate language is ignored by reasonable parties, while insisting that it have the same significance as negotiated term language—all in obeisance to the "duty to read" rule. In certain situations, courts have rejected the notion that boilerplate terms must have equal status. Both printed time-is-of-the essence clauses and printed merger clauses have not always been credited with the same effects as negotiated clauses of the same type.

The solution to the printed clause dilemma that would encompass most of the unconscionability cases is a general recognition of the reasonable expectations concept. Objections would include the necessity of courts determining reasonable expectations. The notion that courts should not pursue questions of substantive fairness contradicts our entire legal history. Courts pursue the parties' reasonable expectations in virtually every contract case they decide. There is no empirical foundation on which to base a notion that courts are incapable of pursuing parties' reasonable expectations because the record of their contract includes boilerplate terms that reasonable parties ignore. The duty-to-read rubric should be modified to state the exception that the rule does not apply with respect to boilerplate terms that reasonable parties ignore.

37. Section 211(2) clearly states that all parties are to be treated equally in their determination of "reason to believe" or "reasonable expectations."
38. A suggestion of reasonable expectations for consumer contracts as an addition to § 2-302 of the UCC was greeted with alarm. James J. White, Form Contracts Under Revised Article 2, 75 WASH. U. L.Q. 315, 326-27 (1997).
The final development would be the adoption of a concept currently found in Article 2.1.20 of the International Institute for the Unification of Private Law ("UNIDROIT") Principles, which are designed to supplement the article of the United Nations Convention on Contracts for the International Sale of Goods: "No term contained in standard terms which is of such a character that the other party could not reasonably have expected it is effective unless it has been expressly accepted by the other party."

The time has come to eliminate the chaos of contract law with respect to printed terms and the unconscionability issues that attend such clauses. Karl Llewellyn believed that only courts were capable of providing the solution. He was right.