1980

Contractual Interactions and the Uniform Commercial Code

Follow this and additional works at: http://digitalcommons.law.yale.edu/ylj

Recommended Citation
Contractual Interactions and the Uniform Commercial Code, 89 Yale L.J. (1980).
Available at: http://digitalcommons.law.yale.edu/ylj/vol89/iss7/4

This Article is brought to you for free and open access by Yale Law School Legal Scholarship Repository. It has been accepted for inclusion in Yale Law Journal by an authorized editor of Yale Law School Legal Scholarship Repository. For more information, please contact julian.aiken@yale.edu.
Notes

Contractual Interactions and the Uniform Commercial Code

The Uniform Commercial Code has two basic purposes: to respond fairly and flexibly to commercial realities,¹ and to serve as a uniform body of rules that clearly governs commercial transactions.² This Note contends that these two purposes are incompatible and argues that the conflict between them can only be mitigated by abandoning the attempt of modern contract law to establish a single system of law applicable to all contracts.

The Note establishes a framework for analyzing the categories of human interaction that result in contract formation. Having demonstrated the wide variety of interactions by which contracts may be formed, the Note examines the traditional judicial approaches to the contracts created in these interactions. It focuses upon the unitary approach inherent in the doctrine of consideration and the Uniform Commercial Code and finds that approach inadequate. The Note then proposes a new approach that would permit judicial standards and methods to vary according to the nature of the interaction that resulted in the contract's formation.

I. Contractual Interactions and the Courts

All contracts for the sale of goods derive from an interaction between two or more persons.³ Different forms of interaction result in different kinds of contracts, each of which calls for a different judicial ap-

---

² U.C.C. § 1-102(2)(c); In re Automated Bookbinding Servs., Inc., 471 F.2d 546, 552 (4th Cir. 1972) (U.C.C.'s general purpose to create precise guide so businessmen may predict results of their dealings).
³ An analysis of interpersonal interactions in a variety of contexts can be found in the works of Erving Goffman. See E. GOFFMAN, FRAME ANALYSIS (1974) [hereinafter cited as FRAME ANALYSIS]; E. GOFFMAN, ENCOUNTERS (1961) [hereinafter cited as ENCOUNTERS]; E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959) [hereinafter cited as PRESENTATION OF SELF]. Although Goffman’s works concentrate on face-to-face interactions, there is no reason why his theories cannot be extended to include interactions that take place at a distance.
Contractual Interactions

approach: interactions in which all parties are aware of the legal implications of their actions require a "narrow" approach, in which a court focuses upon the elements that the parties deliberately used to signal their intentions; interactions in which the parties were not concentrating on the law require a "wide" judicial approach, in which a court deduces the parties' intentions from all the circumstances of an interaction.

A. The Categories of Interaction

Interactions that lead to contracts, like all human interactions, can only be meaningful and maintained for a significant period of time if the participants tacitly agree upon the interaction's characterization. There must be agreement on two kinds of rules: rules of irrelevance, which indicate which of the elements in the interaction are to be ignored; and transformation rules, which indicate the weight and significance of those elements deemed relevant to the transaction. The system of rules that applies to an interaction is called its frame.

In American society, three basic kinds of frames are available to the participants in contractual interactions: status, trade, and legal. In the status frame, contractual interactions are defined by each participant's position or "status" in the community; participants expect that each party will live up to the duties implicit in his status. In the trade frame, the interaction is defined by the commercial transaction that provides the impetus for the interaction; participants expect that the special rules associated with commerce—and not with their personal characteristics—will apply. In the legal frame, the interaction is defined by the use of society's formal mechanisms for the creation of obligations enforceable by the state; the rules for the interaction are thus governed by contract law.

4. See ENCOUNTERS, supra note 3, at 19-34. The participants agree upon these rules by exchanging socially provided cues. PRESENTATION OF SELF, supra note 3, at 9-10, 65.
5. ENCOUNTERS, supra note 3, at 20; FRAME ANALYSIS, supra note 3, at 10-11. The frame defines each interaction as a separate, internally coherent world; it supplies the spatial and temporal limits of that world and provides the rules under which the elements of the world interact. ENCOUNTERS, supra note 3, at 31-34.
8. The three frames form a continuum. The status frame is the most basic and sets minimum requirements for all interactions in a society. The trade frame focuses upon
The existence of these three different frames for contractual interactions complicates the function of courts. First, it makes a court's determination of the legal consequences of a past interaction more difficult. To discover the intentions of the participants and then protect their legitimate expectations, the court must consider how the interaction was framed. The elements of the interaction by themselves do not define the frame, because identical elements can appear in interactions that have different frames. Furthermore, parties may attempt to mislead the court. They may deliberately misframe an interaction by leading others to believe that one frame is operative, while manipulating key elements in order to be able to assert later that another frame had been agreed upon.

Second, a court must remain aware of a special prospective relation to the legal frame. In evaluating a past interaction, the court reframes it by imposing its own irrelevance and transformation rules. The rules that it chooses define the legal frame for participants in similar interactions in the future.

B. Judicial Approaches to Contractual Interactions

These two functions of a court—discovering the intentions and expectations of the parties retrospectively and determining the legal frame for similar situations prospectively—result in conflicting approaches to contractual interactions. The court will define a more useful legal commercial interactions between participants. The legal frame is the most specialized, for it focuses upon the legal implications, rather than the social setting or the commercial function, of the contractual interaction. The distinction among the three frames is largely one of emphasis.

9. The significance of identical elements in different frames will depend upon the relevance and transformation rules that define a particular frame. See p. 1397 supra; FRAME ANALYSIS, supra note 3, at 201-300.

10. Examples of attempts at misframing contracts abound. For example, an interaction based upon status may for tax reasons try to pass as one based upon trade or law; a family gift may be characterized as a sale to avoid gift tax or as a legally enforceable loan to secure the donor a bad debt deduction when the loan is not repaid. See A. LEFF, SWINDLING AND SELLING (1976) (other examples); cf. FRAME ANALYSIS, supra note 3, at 83-123 (examples of "fabrications"—practical jokes, swindles, espionage—in which individuals induce false beliefs in others about what is occurring).

11. The particular relevance and transformation rules chosen by a court will depend upon the applicable law—precedential and statutory—by which it is bound.

12. Within its jurisdiction, a court's definition of the legal frame governing an interaction will influence the framing of future interactions by the participants and, to the extent that the court's decisions have precedential value, the interpretation of future interactions by other courts.

13. The characterization of narrow and wide judicial approaches that follows draws heavily on the work of Duncan Kennedy. See Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976). Kennedy describes two kinds of legal forms: one "favors the use of clearly defined, highly administrable, general rules"; the other supports "the use of equitable standards producing ad hoc decisions with relatively little precedential value." Id. at 1685.

1398
frame if it adopts a "narrow" approach, considering a minimum of elements in the interaction and clearly establishing the weight accorded each element. The clearer the prevailing legal frame, the more easily the participants in an interaction can use that frame to indicate their intentions and the more predictably courts will resolve the contractual conflicts before them.14 A narrow approach, however, limits the information available to the court, thus making it difficult for the court to ascertain any unusual aspects of a particular interaction.15 Moreover, the narrower the approach, the more readily elements of the legal frame can become "mere" formalities that are exploitable by legally astute parties.16

A court will evaluate a past contract more fairly and more accurately if it adopts a "wide" approach and thus examines the entire interaction and all aspects of the context in which it arose.17 Such an approach will allow the court to give effect to all the elements that influenced the parties, and thus to adjust its standards flexibly to the frame that the parties used and to police against deliberate misframings. But because a wide approach prevents courts from defining clear legal rules, the court's resolution of contractual disputes will be less predictable and participants will have less guidance in planning future interactions.

The advantages and disadvantages of the narrow and wide judicial approaches can be illustrated by an examination of two systems of contract law that coexisted in the United States in the seventeenth and eighteenth centuries: penal bonds under seal18 and fair price.19 In evaluating a contract set forth in a sealed penal bond, the court was limited to specific questions: had the document been sealed; had the conditions that it recited been met? Because the system narrowly circumscribed a court's review, judicial reactions were predictable, and freedom of contract was protected.20 That same narrowness, however, also led to abuses as the seal degenerated into a formality that stood

14. Cf. id. at 1697-98 (casting contract formalities as rules provides incentive to parties to learn rules and use them to communicate intentions precisely); id. at 1688-89 (use of rules restrains official arbitrariness and promotes certainty).
15. Cf. id. at 1689 (rules may sacrifice precision in achieving objectives behind rules).
16. Cf. id. at 1699-1700 (use of rules may intensify disparity in bargaining power between legally astute and legally inexperienced).
17. Cf. id. at 1688 (use of standard requires judge to assess facts of particular situation in terms of social values embodied in standards).
20. W. Nelson, supra note 18, at 61-62 (penal bonds made it possible to use non-customary measures of exchange); Horwitz, supra note 18, at 927-28 (penal bonds allowed businessmen to "conduct business transactions free from the equalizing tendencies of courts and juries").
between the court and the economic and social substance of a contract.\textsuperscript{21}

Most contracts that did not use a seal were analyzed within the system of fair price, a system that granted recognition to contractual provisions only if those provisions met local community standards of fairness.\textsuperscript{22} This system facilitated the policing of abuses, but only at the cost of making the enforcement of agreements uncertain.\textsuperscript{23}

Despite their opposing approaches, the systems of bond under seal and of fair price coexisted; each was applied to a different kind of contract in an area in which its advantages were maximized and its dangers limited. Commercial professionals, for whom the benefits of judicial predictability were greatest and the dangers of the abuse of formalities least, used the seal.\textsuperscript{24} Consumers and local trades people usually did not use the seal; their transactions were judged according to the system of fair price. This flexibility of contract law, which implicitly recognized the various categories of contractual interaction, became impossible with the adoption of unitary systems, which sought to apply the same law to all contracts\textsuperscript{25} and thus to render irrelevant the nature of the parties to a contract.

II. The Unitary Contract System

One important characteristic of modern contract law is its ongoing attempt to devise a single, unitary system that avoids the disadvantages of the wide and narrow judicial approaches without sacrificing their advantages. Both the doctrine of consideration and the Uniform Com-

\textsuperscript{21} F. Kessler & G. Gilmore, \textit{Contracts} 578-79 (2d ed. 1970). Courts, however, were unwilling to forfeit all supervision of contracts. \textit{See} Simpson, \textit{supra} note 18, at 415-21 (courts reluctant to enforce penal clauses in which penalties out of proportion to actual damages suffered). Courts of equity quickly devised doctrines that enabled them to provide relief for parties that were victims of the purely formal aspects of the seal. \textit{See} Horwitz, \textit{supra} note 18, at 928; Simpson, \textit{supra} note 18, at 415-18.

\textsuperscript{22} \textit{See} Horwitz, \textit{supra} note 18, at 920-32.

\textsuperscript{23} The system of fair price depended upon the existence of clear community standards and upon society's willingness to use these standards to limit freedom of contract. \textit{See id.} at 935-36. The existence of objective, intrinsic values that society could recognize was undermined by the development of a market economy in which prices fluctuated. \textit{See id.} at 946-47.

\textsuperscript{24} \textit{See id.} at 928.

\textsuperscript{25} \textit{See G. Gilmore, The Ages of American Law} 45-46 (1977). The courts' decision to subject the contracts of both professionals and nonprofessionals to the same law was probably influenced by the growing centrality of commerce within society and its impingement upon an increasing number of nonprofessionals. In addition, the movement to a unitary system paralleled a larger cultural movement. The medieval period and the Renaissance allowed for multiple truths—for example, truths of reason and of faith, of law and of equity. Later periods strove for a single truth, whether it be the rationalistic systems of the Enlightenment or the dynamic, historical systems of the nineteenth century. \textit{See} M. Foucault, \textit{The Order of Things} 54-63, 217-29, 236-49 (1973).
mercial Code represent unitary systems based upon simplifying assumptions about contractual interactions. Although these two systems differ in several important respects, they fail for analogous reasons, and their failures illustrate the misconceptions that underlie the attempt to unify contract law.

A. The Doctrine of Consideration

The unitary approach of the doctrine of consideration was based upon the simplifying assumption that all contracts represented commercial exchanges. As a result, an explicit agreement between the parties defining the exchange in which they were engaged became the legal requirement for the creation of a contract. In solving a contractual dispute, courts could thus take a narrow approach to contracts; they needed only to determine whether the exchange cited in the contract had taken place. Because an exchange—unlike a seal—was assumed to be not an arbitrary legal requirement, but rather the very essence of a contract, the dangers of a narrow approach presumably were avoided. Courts were free to adopt a wide approach for the limited purpose of ensuring that the contract represented an exchange intended by both parties. Once that was determined, however,

26. L. FRIEDMAN, supra note 7, at 20, 21 n.* (classical contract law roughly coextensive with free market; core concept underlying consideration is that enforceable contracts must be exchanges). The doctrine protected its assumption by decreeing that dealings among individuals whose relations could not be reduced to simple exchanges could not lead to contracts. See F. KESSLER & G. GILMORE, supra note 21, at 120-28 (citing cases in which actions for reimbursement for work done by relatives were denied on ground that work must have been done for love and not money); Marsh, Are Directors Trustees?: Conflicts of Interest and Corporate Morality, 22 Bus. Law. 35, 36 (1966) (fiduciary responsibility of director to corporation requires that any contract between them is voidable at insistence of corporation or its shareholders without regard to intrinsic fairness).

27. The validity of a contract depended upon the parties' explicit identification of an exchange of promise and consideration. [I]t is the essence of a consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise. O. HOLMES, THE COMMON LAW 293-94 (1881) (emphasis added).

28. If that exchange had not taken place, the exchange itself provided the proper measure of damages. The rules for calculating damages upon breach sought to recreate the original exchange without paying attention to the parties' actual situation. They therefore adopted an expectation, rather than a reliance or restitution, measure for damages. See Fuller & Perdue, The Reliance Interest in Contract Damages: 1, 46 YALE L.J. 52, 56-57 (1936).

29. See 1 S. WILLISTON, THE LAW OF CONTRACTS § 100 (1920) (doctrine of consideration relates, not to form, but rather to substance of contract).

30. See id. at § 115 (describing balance that doctrine of consideration sought between freedom of contract and court supervision).
an inquiry into details about the contractual interaction was not necessary; no matter how framed, all interactions were assumed to result in an enunciation of the transaction's single, core exchange.

This attempt at a grand synthesis failed.\textsuperscript{31} Business transactions do not always take the form of an explicit exchange,\textsuperscript{32} and therefore the doctrine's emphasis upon exchange was a legal requirement, not a reflection of commercial necessity. A court had no unproblematic way of knowing whether an exchange reflected commercial realities. If a court unquestioningly accepted the parties' formal statements, it was open to the dangers of the narrow judicial approach; without some inquiry into the details of the interaction that led to the contract, the court could not know whether the legal implications of the contractual provisions reflected the parties' intentions, were inadvertent, or were the result of unfair manipulation by the more legally astute party. If a contract failed to cite an exchange, the court's only option was to declare the contract invalid.\textsuperscript{33} This produced harsh results and promoted misframings, because exchanges that had a valid commercial basis could fail to meet the threshold of legal enforceability. If the court chose to verify the formal statements by making an independent determination of the parties' exchange, the decision was open to all the dangers of the wide judicial approach. Because the court had little information about the interaction that created the contract, the probability of unpredictable overruling of the parties' intentions was high.

Faced with such problems, the courts devised a number of techniques and supplementary doctrines that enabled them to protect the parties' legitimate commercial expectations and to police against abuses, while pretending to respect a contract's statement of its exchange.\textsuperscript{34} The resulting legal complexity deprived the basic premise of the doctrine of consideration—that all contracts can be reduced to a simple exchange—of all plausibility.

\textsuperscript{32} See F. Kessler & G. Gilmore, supra note 21, at 337-38 (difficulties in gaining recognition of requirement and output contracts because no clear exchange defined).
\textsuperscript{33} See id. at 155-65 (citing cases declaring contracts void for lack of definiteness).
\textsuperscript{34} See, e.g., G. Gilmore, supra note 31, at 71-72 (commercial reliance protected by doctrine of promissory estoppel); id. at 73-75 (person who confers unbargained-for benefit protected by doctrine of quasi-contract); Kennedy, supra note 13, at 1700 (courts professing adherence to clear contract rules adjust equities by exploiting ambiguities in rules and by developing contradictory rules and counterrules to govern same area); Kessler & Fine, Culp in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 HARV. L. REV. 401, 448 (1964) (such techniques as estoppel and implied subsidiary promises used to create equivalent of duty to bargain in good faith).
B. The Uniform Commercial Code

1. Llewellyn's Plan and Its Flaws

The Uniform Commercial Code also adopts a unitary approach, but attempts to avoid the weaknesses of the doctrine of consideration by recognizing the multiplicity of forms that commercial transactions can assume. The Code does not require that a transaction take any specific form, such as an exchange, because Karl Llewellyn, the chief architect of the Code, believed that a transaction in its natural commercial form possesses a single, immanent legal interpretation. In settling a contractual dispute, courts must make that interpretation explicit and can do so only by paying close attention to the transaction in its commercial context.\(^3\)

If Llewellyn's assumption—that a commercially sensitive court could find clear, precise solutions to all transactional legal problems—were valid, and if the Code fully embodied that assumption, the Code's unitary approach would succeed. Parties acting in good faith would be able to concentrate upon their commercial business, knowing that a court's interpretation of their contracts would be predictable and in accord with commercial expectations. Simultaneously, the courts, freed from the technicalities of the doctrine of consideration and directed to consider commercial reality, would be in an excellent position to police misframings and ensure general fairness.

Llewellyn's assumption, however, is not valid. First, defining the context within which a contract arose is not always a simple task.\(^3\) Second, even if a court can define that context, the context may not present a well-developed body of commercial practices upon which the court can draw for its interpretation.\(^3\) Finally, even if a court can associate a contract with a body of commercial practices, those practices may not speak to the problem facing the court because commercial and legal emphases often differ.\(^3\)

36. The major difficulty is that the parties to the contract often belong to different trades with different expectations and practices. See, e.g., Mieske v. Bartell Drug Co., 92 Wash. 2d 40, 49, 593 P.2d 1308, 1313 (1979) (trade-usage limits liability between film processors, but not between processors and retail customers).
37. Because most cases that reach the courts are not in highly developed areas of commerce, see L. Friedman, supra note 7, at 39-40, 57-58, 201 (Wisconsin cases reflect marginal transactions and litigants—small, novel businesses, amateur businessmen), it is unlikely that a significant body of trade practices will exist.
38. See Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 60 (1963) (businessmen attend more to describing performance than to planning for contingencies or defective performances, or to obtaining legal enforceability of their contracts).
The Code seems implicitly to recognize these problems, in that it does not refer courts solely to commercial practices, as Llewellyn's assumption would require. Instead, the Code both contains a multitude of provisions that detail the consequences of specified actions and permits parties to use formalities to indicate their intentions more precisely. This internal contradiction within the Code reopens the possibility of a clash between the commercial and legal implications of a contractual term, and hence between wide and narrow judicial approaches. If a Code provision contradicts commercial practices, courts must choose either a narrow approach that follows the Code but may unfairly deny commercial expectations, or a wide approach that follows commercial usage but may increase judicial unpredictability.

Both the doctrine of consideration and the Code assume that commercial contexts can provide answers to legal questions: the doctrine presumes that the parties will provide the answers; the Code hopes that courts will find them. This change of emphasis, however, is insignificant. By shifting the burden of translating a commercial understanding into a legal one from the parties to the courts, the Code has merely traded the dangers of the narrow approach for the difficulties of the wide approach. The major conceptual flaw—the assumption that all contracts can be treated alike—has survived.

2. The Flaws Illustrated: Section 2-207

The failure of the Uniform Commercial Code to devise a unitary system that avoids the dangers of both the narrow and wide judicial approaches is readily illustrated by an examination of the problems that beset specific Code sections. Section 2-207, the section governing the

40. The Code's major formality is the signed writing. Writing is required in certain situations, e.g., U.C.C. § 2-201 (Statute of Frauds), and judicial scrutiny of it is limited, e.g., U.C.C. § 2-202 (parol evidence rule).
41. For example, consider the position of a court in the following situation. The trade practice in a given industry is not to give implied warranties to the buyer. See, e.g., Barron & Dunfee, Two Decades of 2-207: Review and Revision, 24 CLEV. ST. L. REV. 171, 183 (1975) (sale of seeds). The contract governing a transaction in this industry therefore contains no provisions that deal with warranties. The Code, however, supplies implied warranties in the absence of specific disclaimers. See U.C.C. §§ 2-314, 2-315. If a contractual dispute over warranties arises, which governs: trade practices or the Code?
42. Similarly, if parties use formalities, the courts must accept the formalities unquestioningly and thus open the way to the abuses of the narrow judicial approach, or brave the dangers of the judicial arbitrariness of the wide approach and attempt to distinguish proper from manipulative uses of the formalities.
43. U.C.C. § 2-207.
"battle of the forms," is designed to bring the law into greater harmony with commercial practices by abrogating the "mirror-image" rule of contract formation. This rule, that a contract is invalid unless offer and acceptance contain only identical terms, results in judicial predictability, but only at the cost of preventing realization of legitimate commercial expectations.

The Code attempts to remedy the harsh results of the doctrine of consideration. Abrogation of the mirror-image rule, however, creates an additional problem: once a court finds that a contract has been formed, all of the terms to which the parties have not explicitly agreed must be supplied. The section 2-207 solution to the problem combines the narrow and wide judicial approaches by directing courts to rely upon the parties' writings whenever possible, but permitting them to consider the parties' conduct if necessary.

Section 2-207 fails in its attempt to resolve the battle of the forms. First, although the decision to use either the parties' writing or their conduct as the operative set of facts will have a dramatic impact upon interpretation of the contract, judicial attempts to provide guidelines for that decision have failed. Second, the dangers of both the narrow

44. The "battle of the forms" occurs when buying and selling firms exchange discrepant forms and each form is designed to give its sender the more favorable legal position.
45. See Barron & Dunfee, supra note 41, at 175-77.
46. Under common law, if the forms differed in any aspect, however unimportant, no contract was formed. See, e.g., Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). If the forms differed, and then the market unexpectedly changed, this rule of law permitted the defeat of commercial expectations by enabling the party subject to an unfavorable contract to avoid fulfillment of his obligation. If the forms differed but performance followed, the last outstanding offer was deemed to be accepted as a binding contract, so that the party who sent in his form last achieved the terms that he desired. This "last shot" approach could be unfair, because the exact timing of the exchange of forms could be either accidental or manipulable, and because often neither party read the other's forms. See Macaulay, supra note 38, at 59.
47. The priority given writing is meant to minimize judicial arbitrariness: judges are to prefer terms composed by the parties themselves and to choose among those terms according to previously established rules. The ability to look behind inadequate writings to conduct allows the courts to take account of commercial realities. Cf. Taylor, U.C.C. Section 2-207: An Integration of Legal Abstractions and Transactional Reality, 46 U. Col. L. Rev. 419, 422 (1977) (Code combines a "bargain-oriented" and a "conduct-oriented" approach).
48. For example, assume that a seller offers its goods without warranties, the buyer responds with an order form specifying warranties, and the seller ships the goods. If the contract is deemed to be established by the parties' writings, the order form will be the acceptance. The buyer's warranty terms will then probably not be part of the contract, because they will be deemed material variants or terms objected to in advance. See U.C.C. § 2-207(2). If the contract is deemed to be established by the parties' conduct, the implied warranties of the Code enter as supplementary terms. See U.C.C. § 2-207(3).
49. Attempts to devise general rules have led to holdings that subvert the purpose of the sections. Compare Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962) (acceptance is conditional if it contains any material deviations from offer) with Dorton v.
and wide approaches exist under section 2-207. Emphasis upon writing may result in decisions based upon “mere” legal formalisms that have no counterparts in commercial practices and that can be manipulated by the legally astute. Yet reliance upon conduct may produce decisions that are unpredictable and to some extent arbitrary. 

Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972) (even if it includes materially different terms, reply is conditional acceptance only if expressly conditional). Roto-Lith subverts section 2-207 by permitting a return to the “last shot” doctrine and renders subsection (2)(b) meaningless. See Barron & Dunfee, supra note 41, at 181. Dorton subverts section 2-207 by focusing upon a specific “magic phrase” and thus making the validity of a contract depend, not upon commercially significant events, but rather upon the exact language in forms. See Murray, Section 2-207 of the Uniform Commercial Code: Another Word About Incipient Unconscionability, 39 U. Prrt. L. Rtv. 597, 637-38 (1978).

Attempts to make individual determinations in specific situations have led to analyses that are analytically incoherent. See, e.g., Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505, 509 (7th Cir. 1968), cert. denied, 395 U.S. 921 (1969) (holding that jury could find that reply, which was “predicated” upon certain modifications, did not create contract and that subsequent conduct created contract under § 2-207(3), but that warranty limitations in offeree’s reply were effective because offeror had not objected). Although the outcome in Construction Aggregates is correct, the decision is analytically incoherent; failure to object is relevant only to contracts formed under subsection (1), and the implied warranties of the Code govern in contracts under subsection (3) unless excluded by the parties’ writings. Cf. R. Duesenberg & L. King, Sales and Bulk Transfers Under the Uniform Commercial Code § 3.60(4) (1980) (criticizing Construction Aggregates for reviving “last shot” rule and binding offeror but not counter-offeror).

50. For example, by favoring the offeror’s form, section 2-207 gives significance to the exact sequence in which negotiations are conducted, see U.C.C. § 2-207(1), (2), a factor that may have no commercial meaning, see Taylor, supra note 47, at 447; Note, In Defense of the Battle of the Forms: Curing the “First Shot” Flaw in Section 2-207 of the Uniform Commercial Code, 49 Notre Dame Law. 384, 384, 389-90 (1975). Distinctions among offers, counter-offers, and acceptances are particularly arbitrary when more than two forms are exchanged. Compare CBS, Inc. v. Auburn Plastics, Inc., 67 A.D.2d 811, 812, 413 N.Y.S.2d 50, 51 (1979) (when forms exchanged in order of price quotation, purchase order, acknowledgment of order, contract is created by exchange of purchase order and acknowledgment; terms in price quotation not in contract) with Coast Trading Co. v. Farmac, Inc., 21 Wash. App. 896, 907-08, 587 P.2d 1071, 1077-78 (1978) (purchase order read in light of price quotation that inspired it; terms in price quotation part of contract).

51. The most blatant attempts at manipulation include the mechanical insertion into standard forms of clauses either limiting acceptance to the offeror’s terms or making the acceptance conditional upon assent to the offeree’s additional or different terms. Commentators advise the use of such clauses. See, e.g., Davenport, How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law, 19 Bus. Law. 75, 80, 88 (1965); Lipman, On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code, 24 Bus. Law. 789, 802-04 (1969). Courts give such clauses effect. See, e.g., C. Itoh & Co. (America) Inc. v. Jordan Int’l Co., 552 F.2d 1228, 1235-36 (7th Cir. 1977); Steiner v. Mobil Oil Corp., 20 Cal. 3d 90, 101-02, 569 P.2d 751, 759, 141 Cal. Rptr. 157, 165 (1977).

52. Emphasis upon conduct may lead to judicial unpredictability; although conduct can indicate whether a deal exists, it does not necessarily indicate the terms of the deal. Parties usually know whether they intend to perform, and their conduct will reflect this knowledge. They may not have thought, however, about the details of performance or the allocation of unexpected risks, or they may believe that the expected cost of the dangers of leaving such issues unresolved is less than the transaction costs of resolving them. See Lipman, supra note 51, at 790-91; Macaulay, supra note 38, at 64.
In sum, section 2-207 presents in microcosm the history and problems of the Uniform Commercial Code. The section and the Code were written because of dissatisfaction with the doctrine of consideration; both are committed to creating a simple and flexible legal doctrine based upon commercial reality. Yet both draw back from a full commitment. Because of the fear that commercial standards are too mutable, they provide detailed rules to guide judicial decision. These rules inevitably transform both Code and section from businessman's law to lawyer's law. This tension between purpose (reflection of commercial reality) and result (a complex legal system) is not fatal. Good judges can manipulate section 2-207 and the entire Code to achieve commercially correct results, just as good judges manipulated the complexities of the doctrine of consideration. But reliance upon judicial dexterity further complicates the law as judges make ever finer distinctions. Unless the Code alters its basic attitude toward contracts, it will ultimately suffer the same fate as the doctrine of consideration.

III. Toward a Nonunitary Theory of Contract

Current law fails in its quest for both predictability and responsiveness to commercial reality because it ignores the variety of contexts in which contracts may arise. An examination of the different forms of contractual interactions suggests that courts should tailor their approach of contracts established by conduct from the parties' writings and the provisions of the Code. If subsection (3) applies, the writings are incomplete or otherwise inadequate. Reliance upon the Code is likely to be arbitrary. Parties who left the very existence of their contract to be inferred from conduct are unlikely to have taken Code provisions into account. Potential arbitrariness can be mitigated by judges drawing on trade usage. See U.C.C. § 1-205. Resort to trade usage, however, can compound the uncertainty inherent in resort to conduct. The courts would have to define the relevant trades, deal with the problem of contracts between members of different trades, and determine the relation of trade usage to the express terms of contracts.

Problems in reconciling narrow and wide judicial approaches similar to those associated with U.C.C. § 2-207 beset other sections of the Code. For example, reconciliation generates problems in the interpretation of U.C.C. § 1-205, the section that directs courts to rely on "course of dealing and usage of trade" and that lies at the heart of the Code's shift of emphasis to a wide approach responsive to commercial realities. See Kirst, *Usage of Trade and Course of Dealing: Subversion of the UCC Theory*, 1977 U. Ill. L.F. 811 (conflict between "narrow" interpretation of § 1-205(4) as parol evidence rule to give primacy to writings, and "wide" interpretation allowing possible distortion of party intentions). Similar problems attend the Code's provisions on warranty obligations. See Note, *Legal Control on Warranty Liability Limitation Under the Uniform Commercial Code*, 63 Va. L. Rev. 791 (1977) (clash between "narrow" emphasis on writings of § 2-316(2) (requirements for excluding warranties), and "wide" concern with commercial realities of § 2-719(2) (requirements for limiting remedies)).

53. Cf. Kennedy, *supra* note 13, at 1700 (under doctrine of consideration, rule and counterrule allowed skillful judge to police equity, but source of confusion and bad law if judge not skillful).
approach according to the frame within which the contract was created.\textsuperscript{54} The failure of both the doctrine of consideration and the Uniform Commercial Code to utilize a unitary approach to all contracts successfully provides additional support for a nonunitary system.

A. The Proposal

A key step in formulating a nonunitary system is selection of a criterion for choosing the appropriate approach for a particular contract. No single judicial approach, however chosen, can both fully reflect commercial reality and yield totally predictable results. Instead, the criterion must satisfy two humbler requirements: (1) it must provide guidelines by which a court can associate any contract with the judicial approach that best respects the parties' own compromise between commercial flexibility and legal certainty; (2) it must provide a mechanism by which parties can indicate the approach that they wish a court to apply to their contract.

The best criterion for a court to use in choosing between the application of a wide or narrow approach is the frame of the contractual interaction by which the disputed contract was formed. It is not necessary, however, to distinguish between all three of the possible frames;\textsuperscript{55} the primary distinction for a court should be whether the contract was created within a legal or a nonlegal frame. If a contract was created within the legal frame, the parties by hypothesis were interested in determining in advance the legal implications of their contract. The law should assist them by providing clear formalities that the parties can use to specify their agreement precisely and by mandating a narrow judicial approach that focuses upon those formalities. If both parties were aware of the formalities' significance at the time the contract was formed, a court resolving a subsequent dispute needs little flexibility

\textsuperscript{54} The concept of alternative legal systems that mandate different rules for contracts created in different frames is not entirely new to the U.C.C.: the Code already distinguishes in certain situations between the contracts of merchants and those of nonmerchants. See U.C.C. § 2-104; Newell, \textit{The Merchant of Article 2}, \textit{7 Val. L. Rev.} 307 (1973) (listing sections of Code affected by merchant/nonmerchant distinction). Courts also apply identical formal doctrines differently to different parties. See Childress & Spitz, \textit{Status in the Law of Contract}, \textit{47 N.Y.U. L. Rev.} 1 (1972) (application of parol evidence rule). This proposal simply makes a more systematic and more extensive attempt to characterize contracts on the basis of the context in which they were created. Whereas the Code applies its distinction only in certain sections, the proposal would have the entire interpretation of a contract turn on its frame. Furthermore, whereas the Code implicitly recognizes the inappropriateness of imposing legal forms on nonprofessionals, the proposal would avoid imposition of legal forms on commercial professionals as well. It would allow all parties to structure their contractual interactions as they wished and would then adapt its legal analysis accordingly.

\textsuperscript{55} See p. 1397 \textit{supra}.
or additional information in order to reach a result that is both predictable and in accord with commercial reality.

If a contract was not created in a legal frame, the parties' intentions cannot be determined by a legal analysis of the formal aspects of the contract. Because the parties did not use legal formalities to specify their intentions, only a thorough understanding of the entire context of the contractual interaction will enable a court to reach an equitable decision. A wide judicial approach is required in order to provide access to all relevant information. The primary danger of a wide approach—unpredictable judicial holdings—could be mitigated by directing courts to continue to give considerable weight to the parties' writings. The court, however, would also consider other relevant information—for example, trade usage in the case of a contract arising in the trade frame, or expectational interest of the parties in the case of a contract arising in the status frame. From all this information, the court could determine the intentions of the parties and the expectational interests to which they have a legitimate claim.

B. The Proposal Applied

The characterization of a contract as legal or nonlegal should be based upon an objective, easily ascertainable fact: if each party to the interaction was represented by a lawyer, a strong, but rebuttable,

56. A legal analysis of any contract in which one of the parties was not aware of the law only encourages misframing. It is even easier for a legally astute party to manipulate results if he is aware that the contract will be subject to a highly formal legal analysis.

57. The danger of judicial unpredictability in interpreting contracts not written in a legal frame can only be mitigated, not fully avoided. Given that the parties did not plan their writings with a full understanding of their legal implications, a narrow approach focusing only upon the writings is even less likely to reach the results the parties intended. The precision of a narrow legal analysis creates a misleading aura of accuracy. The wide approach in this context provides all the certainty and predictability that the original contract allows. Cf. ARISTOTLE, NICOMACHEAN ETHICS 1094b12-28 (D. Ross trans. 1915) (necessary to look for precision only so far as nature of subject permits).

58. Determining whether a contract was created within a trade or status frame is not crucial. The trier of fact should use a wide approach to contracts created within either frame. Disputes about the frame in which a contract was created would generally involve questions of the relevance of some trade or commercial usage. In that situation, the party asserting the relevance of the usage should have the burden of showing that the parties would reasonably expect the disputed usage to apply.

59. The court's decision will have limited precedential value because it will depend almost entirely on the unique facts of particular contractual interaction. If the decision has any precedential value, then the court is defining a new legal frame for the future and all the problems of the narrow frame will recur.

60. Each party would have to be independently represented by a lawyer in the specific interaction that led to the contract: an exchange by laymen of forms drafted by lawyers would not suffice. Moreover, the provision by one party of lawyers for both sides would be inadequate; otherwise, the law would be reduced to a mere formality.
presumption should arise that the interaction took place within the legal frame.\textsuperscript{61} If each party was not represented by a lawyer, the party asserting that the contract should be interpreted under strict legal rules should bear the burden of establishing that it was the result of an interaction in the legal frame. Because of the expense of retaining lawyers,\textsuperscript{62} many, perhaps most, contracts are created in nonlegal frames. Courts will take a wide approach to such contracts, thereby subjecting them to the risk of judicial unpredictability. The proposal, however, subjects these contracts to fewer risks than the present Code. Currently, contracts created in nonlegal frames run not only the risks of the wide approach, but also the risks of inappropriate application of the narrow approach. Moreover, even courts that appropriately apply a wide approach may be reluctant to apply the approach wholeheartedly because of fear that they will set precedents that they will be forced to apply to contracts written in the legal frame.

Full implementation of the proposed system would require a new commercial code. Such a code would consist of three parts: an introductory part providing definitions and rules for determining the nature of the interaction that led to a contract, and two principal parts describing alternative legal systems to govern the two major kinds of contracts. The first system, designed for contracts created in the legal frame, would be technical and precise.\textsuperscript{63} The second system, designed for contracts created in the nonlegal frame, would set forth a short number of standards that triers of fact should apply.\textsuperscript{64}

\textsuperscript{61} The presumption would place both the burden of coming forward with evidence and the burden of persuasion on the party claiming that the interaction had not taken place in a legal frame.

\textsuperscript{62} The expense could be minimized by having parties who regularly dealt with each other negotiate overriding contracts covering entire classes of transactions. See Lipman, \textit{supra} note 51, at 791. The requirement that lawyers be involved in the interaction that led to the contract would be satisfied if lawyers negotiated the overriding contract and indicated its duration and the kind of goods it covered.

Some additional expense is inevitable in the creation of contracts in the legal frame, because becoming conscious of the legal implications of a transaction is a step not strictly required for the transaction to take place. The expense has the useful cautionary effect, however, of impressing upon the parties the legal importance of their agreement.

\textsuperscript{63} It might, for example, include a version of the mirror image rule of contract formation and a rigorous parol evidence rule.

\textsuperscript{64} These standards would consist of such general rules of interpretation as good faith and unconscionability. The proposed system can be illustrated by examining its application to the cases, decided under U.C.C. § 2-207, which were discussed above. See note 49 \textit{supra}. Because lawyers were not involved in the exchange of forms in either Roto-Lith, Ltd. v. F.P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962), or Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972), these cases, which were decided as matters of law, should be decided as matters of fact. \textit{Roto-Lith} involved the failure of an emulsion bought for use in the manufacture of cellophane adhesive. Which party will bear the cost of that failure should be determined on the basis of such facts as whether the buyer had relied upon
Even if commercial law were not altered so extensively as this proposal would require, courts could still use the analysis suggested by this Note in deciding cases under the existing Code. The Code includes both narrow and wide judicial approaches, without providing systematic guidance for selection of which approach to apply. This Note suggests a principled way in which a court can decide which element to emphasize in any given contract. For example, under section 2-207, a court may have to decide whether a given reply signified acceptance. This should be analyzed as a question of fact. If the parties were represented by lawyers, they should be deemed to have been aware of the contents of each other's writings, and their negotiation postures should be treated as meaningful. The court should therefore adopt a narrow approach and concentrate upon the parties' writings and the process of their negotiations. If the parties were not represented by lawyers, the court should not assume that they focused upon the precise contents of their writings. The court should therefore adopt a wide approach to determine how the parties, in their commercial and social

the expertise of, or upon representations by, the seller and upon customs of the trade.

*Dorton* involved a motion to stay pending arbitration. In that case, the relevant questions of fact would be whether arbitration was customary in the industry and whether there were any reasons to believe that the contracts at issue were not meant to follow ordinary industry practices.

In *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969), *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 460 F. Supp. 163 (E.D. Pa. 1978), and *Ebasco Servs., Inc. v. Pennsylvania Power & Light Co.*, 402 F. Supp. 421 (E.D. Pa 1975), lawyers were involved in the negotiations. These cases therefore should be subjected to strict legal analysis. In *Construction Aggregates*, some analogue of the mirror-image rule might well apply; if so, the offeror would be held to have accepted the counteroffer. In *Ebasco*, the parties entered into a written contract limiting the offeree's warranty obligations after an initial exchange of forms and after performance was almost complete. The court went to great lengths to avoid section 2-207 and thus to reach the correct result of honoring the parties' written agreement. The court should simply have held that by reaching their agreement, the parties, advised by their lawyers, indicated that they did not wish to rely on whatever rights had been conferred upon them by the initial exchange of forms and the project's near completion.

65. Compare U.C.C. § 2-207(1), (2) (narrow approach) with U.C.C. § 2-207(3) (wide approach); compare U.C.C. § 2-201 (narrow approach) and U.C.C. § 2-202 (same) with U.C.C. § 2-204 (wide approach) and U.C.C. § 2-206 (same).

66. See Murray, *supra* note 49, at 602 (arguing question should be matter of fact under present Code).

67. The application of this principle can be illustrated by considering the holding in *Construction Aggregates Corp. v. Hewitt-Robins, Inc.*, 404 F.2d 505 (7th Cir. 1968), *cert. denied*, 395 U.S. 921 (1969). See notes 49 & 64 *supra*. In *Construction Aggregates*, the corporations' legal departments were involved. Thus, the court should have decided that, in a situation in which lawyers were presumably reading replies carefully, a reply that proposed substantial modifications was a counteroffer. The telephone conversation that discussed the proposed modifications could be treated as an acceptance of the counteroffer as further modified in the conversation. This analysis would lead to the court's result, but would avoid the court's conceptual difficulties.
setting, likely understood the exchange of writings. If courts apply this kind of analysis systematically and openly on appropriate occasions, they can begin to achieve the more equitable and commercially realistic results made possible by the proposed system.

68. The court should decide whether an offeree viewed a written offer as a legal offer of a precise contract or as a commercial order involving the customary terms in its industry. The likelihood that an offer will be interpreted as a commercial order means that the courts should not enforce unusual terms in offers unless the offeror has made them the subject of specific negotiations. On the other hand, the offeror is entitled to presume that any version of customary terms is acceptable. Similarly, courts should not give effect to unusual terms in offeree's forms, either by enforcing them or by using them to prevent the formation of a contract, unless the offeree has made them the subject of specific negotiations. Cf. Taylor, supra note 47, at 436-38 (if exchanged forms conflict, use U.C.C. §§ 2-201(1), (2), 2-302 to obtain terms consistent with prior dealing and trade usage).

This analysis suggests that in a nonlegal frame, an offer that, except for explicitly negotiated terms, included only terms commonly used in the industry, would be deemed accepted if the offeree returned any writing—whatever its terms—that had the commercial appearance of an acceptance or if the offeree performed. If the offer contained terms that were not commonly used in the industry, a reply that did not specifically agree to such inclusion would not be an acceptance. Unless further negotiations took place in a timely fashion, the exchange of forms would be conduct that creates a contract under subsection (3). That contract would be composed of terms commonly used in that industry.