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## **“TERMS LATER” CONTRACTING: BAD ECONOMICS, BAD MORALS, AND A BAD IDEA FOR A UNIFORM LAW, JUDGE EASTERBROOK NOTWITHSTANDING**

*Roger C. Bern\**

### INTRODUCTION

“Terms later”<sup>1</sup> contracting is bad economics, bad morals, and a bad idea for a uniform law. The Uniform Computer Information Transactions Act (UCITA) expressly embraces it, as do the proposed revisions of sections 2-204 and 2-211 of Article 2 of the Uniform Commercial Code (UCC). The proposed revisions of section 2-207 of the UCC eliminate the existing statutory provisions that protect against imposition of adverse “terms later,” and introduce new provisions that invite courts to give effect to that contracting stratagem. Judge Frank Easterbrook’s opinion in *ProCD, Inc. v. Zeidenberg*<sup>2</sup> was the first judicial affirmation of the “terms later” principle that industry groups were vigorously pressing in the drafting process of UCC Article 2B and that ultimately came to be the free-standing UCITA. It, for the first time, gave the appearance of legal legitimacy to that method of transacting business, and thenceforth provided the “legal” authority

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<sup>1</sup> “Terms later” is the shorthand reference used in this article to describe those terms that a seller first discloses to the buyer *after* the buyer has ordered and paid for the goods, and typically *after* the buyer has been given possession of the goods by the seller.

<sup>2</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996).

argument for its proponents.<sup>3</sup> It and its initial progeny, *Hill v. Gateway 2000, Inc.*,<sup>4</sup> however, have been deservedly and widely criticized,<sup>5</sup> variously described as a “swashbuckling tour de force

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<sup>3</sup> See Andre R. Jaglom, *Internet Distribution and Other Computer Related Issues: Current Developments in Liability On-Line, Business Methods Patents and Software Distribution, Licensing and Copyright Protection Questions*, SF74 A.L.I.-A.B.A. 727, 752 (2001) (demonstrating “well-reasoned economic analysis”); Joseph C. Wang, Note, *ProCD, Inc. v. Zeidenberg and Article 2B: Finally, The Validation of Shrink-Wrap Licenses*, 16 J. MARSHALL J. COMPUTER & INFO. L. 439, 456 (1997) (as being a “sound decision”); Carey R. Ramos & Joseph P. Verdon, *Shrinkwrap and Click-On Licenses after ProCD v. Zeidenberg*, COMPUTER LAW., Sept. 1996 at 1 (reflecting a “healthy pragmatism and appreciation of the commercial realities”); Mary Jo Dively, *The Use of Standard Form Contracts in the Information Industry*, 697 PLI/PAT 573, 579 (2002) (as showing a depth of understanding of American commerce and reasoning that is “illuminating”). Similarly, proponents have been strong in their efforts to reflect that principle in UCC 2B and the UCITA. See discussion *infra* Parts V., VI.

<sup>4</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147 (7th Cir. 1997).

<sup>5</sup> See, e.g., Jean Braucher, *Delayed Disclosure In Consumer E-Commerce As An Unfair And Deceptive Practice*, 46 WAYNE L. REV. 1805 (2000); Michael H. Dessent, *Digital Handshakes in Cyberspace Under E-Sign: “There’s a New Sheriff in Town!”*, 35 U. RICH. L. REV. 943 (2002); Shubha Ghosh, *Where’s the Sense in Hill v. Gateway 2000: Reflections on the Visible Hand of Norm Creation*, 16 TOURO L. REV. 1125 (2000); Robert A. Hillman, “*Rolling Contracts*”, 71 FORDHAM L. REV. 743 (2002); Beverly Horsburgh & Andrew Cappel, *Cognition and Common Sense in Contract Law*, 16 TOURO L. REV. 1091 (2000); Lenora Ledwon, *Common Sense, Contracts, and Law and Literature: Why Lawyers Should Read Henry James*, 16 TOURO L. REV. 1065 (2000); David McGowan, *Legal Implications of Open-Source Software*, 2001 U. ILL. L. REV. 241 (2001); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002); Deborah W. Post, *Dismantling Democracy: Common Sense and the Contract Jurisprudence of Frank Easterbrook*, 16 TOURO L. REV. 1205 (2000); Lawrence M. Solan, *The Written Contract as Safe Harbor for Dishonest Conduct*, 77 CHI.-KENT L. REV. 87 (2001); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999); Mark A. French, Note, *Hill v. Gateway 2000, Inc.*, 12 OHIO ST. J. ON DISP. RESOL. 811, 813 (2000); Jody Storm Gale, Note, *Service Over the “Net”: Principles of Contract Law in Conflict*, 49 CASE W. RES. L. REV. 567 (1999); Batya Goodman, Note, *Honey, I Shrink-Wrapped the Consumer: The Shrink-Wrap Agreement as an Adhesion Contract*, 21 CARDOZO L. REV. 319 (1999); Kristin Johnson Hazelwood, Note, *Let The Buyer Beware: The Seventh Circuit’s*

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that dangerously misinterprets legislation and precedent,”<sup>6</sup> a “real howler” that is “dead wrong”<sup>7</sup> on its interpretation of section 2-207 of the UCC, a decision that “flies in the face of UCC policy and precedent,” a “detour from traditional U.C.C. analysis”<sup>8</sup> “contrary to public policy,”<sup>9</sup> with analysis that “gets an ‘F’ as a law exam.”<sup>10</sup> *ProCD* and *Hill* provided the foundational “legal” authority in support of “terms later” contracting in the revision process for Article 2 of the UCC. The purpose of this article is to demonstrate that Judge Easterbrook’s imposition of the “terms later” contracting rule in *ProCD* and *Hill* was itself devoid of legal, economic, and moral sanction. Thus his opinions in those cases provide no legitimate support for other court decisions or for any uniform law that would validate “terms later” contracting.

Following a brief introduction, Part I of this article critiques Easterbrook’s purported legal analysis in *ProCD* and *Hill*. It demonstrates that, notwithstanding the cleverness of his opinions designed to suggest legal support for his “terms later” rule, there is in fact none. It also explores some jurisprudential implications suggested by Easterbrook’s *ex ante* methodology. Part II demonstrates that notwithstanding Easterbrook’s window dressing of economics, a rule sanctioning “terms later” contracting increases information asymmetry, increases transaction costs, enhances hold-up and opportunistic behavior by vendors, and

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*Approach to Accept-or-Return Offers*, 55 WASH. & LEE L. REV. 1287 (1998); Jason Kuchmay, Note, *ProCD, Inc. v. Zeidenberg: Section 301 Copyright Preemption of Shrinkwrap Licenses—A Real Bargain for Consumers?*, 29 U. TOL. L. REV. 117 (1997); Christopher L. Pitet, Note, *The Problem With “Money Now, Terms Later”*: *ProCD, Inc. v. Zeidenberg and the Enforceability of “Shrinkwrap” Software Licenses*, 31 LOY. L.A. L. REV. 325 (1997).

<sup>6</sup> Murray, *supra* note 5, at 905.

<sup>7</sup> Listserve Comment by Professor Mark Gergen, University of Texas School of Law, *Common Sense and Contracts Symposium: The Gateway Thread AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1154 (2000).

<sup>8</sup> Gale, *supra* note 5, at 585.

<sup>9</sup> *Id.*

<sup>10</sup> Listserve Comment by Professor Stewart Macaulay, University of Wisconsin School of Law, *Common Sense and Contracts Symposium: The Gateway Thread - AALS Contracts Listserv*, 16 TOURO L. REV. 1147, 1148 (2000) [hereinafter Macaulay, *Common Sense*].

results in inefficiencies and distributional unfairness by systematically redistributing wealth from consumers to vendors. Part III demonstrates that a “terms later” contracting rule fails to protect the reasonable expectations of buyers while at the same time protecting the unreasonable expectations of vendors, thus abandoning the only moral justification for courts to enforce promises. Additionally, it demonstrates that Easterbrook’s “terms later” rule also abandons the principle of impartial treatment of the parties (vendors are favored) and abandons achieving justice between the parties in order to achieve some perceived greater societal good.

Part IV examines several cases that have followed in lemming-like fashion *ProCD/Hill*’s “terms later” rule in both sale of goods and services settings. Part V addresses the provisions of the UCITA that reflect the “terms later” contracting rule and traces some of the history of that uniform law, including the support it garnered from Easterbrook’s *ProCD* and *Hill* opinions and its ultimate demise. Part VI addresses the proposed revisions of Article 2 that embrace or invite courts to recognize “terms later” contracting and demonstrates the impact of Judge Easterbrook’s *ProCD* and *Hill* opinions in the revision process. Part VII describes the course of action the author proposes with respect to legislative responses to UCITA and the referenced proposed revisions of UCC Article 2. Part VIII is a brief jurisprudential assessment of Easterbrook’s *ProCD* and *Hill* opinions and their broader implications for society.

## I. BAD LAW

*ProCD* confirms the adage that bad seed produces bad fruit. Both *ProCD* and its initial bad fruit in the form of *Hill* continue to nurture and produce additional bad fruit with respect to contract formation and the enforcement of “terms later.” Its fruit includes several cases that follow the distorted legal analysis of UCC and common law principles exhibited in *ProCD/Hill*.<sup>11</sup>

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<sup>11</sup> *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071 (C.D. Cal. 2002); *I. Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328 (D. Mass

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*A. ProCD v. Zeidenberg*

ProCD spent millions of dollars creating in CD-ROM format a comprehensive national directory of residential and business listings in a product it sold as Select Phone<sup>TM</sup>.<sup>12</sup> That product included over 95,000,000 residential and commercial listings that ProCD had obtained from approximately 3,000 publicly available telephone books.<sup>13</sup> Such information (the data) was not copyrightable,<sup>14</sup> but copyright protection attached to the software component.<sup>15</sup> ProCD sought to block the competitive use of the data by purchasers of Select Phone<sup>TM</sup> through a restrictive use contract, which it styled a “license.”<sup>16</sup> It did not, however, describe the competitive restrictions to purchasers prior to their purchase of the product.<sup>17</sup> Rather, it encased the restrictions in shrink-wrapped boxes containing a user guide and the discs.<sup>18</sup> The user guide contained the terms of a Single User License Agreement, prohibiting copying of the data for other than personal use; and the discs were programmed so that upon installation the purchaser was alerted that the use of the product and the data was subject to the Single User License Agreement.<sup>19</sup> One of the terms of the agreement provided that by using the discs and the listings the

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2002); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097 (C.D. Cal. 2002); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519 (W.D. Pa. 2000); *Kaczmarek v. Microsoft Corp.*, 39 F. Supp. 2d 974 (N.D. Ill. 1999); *Westendorf v. Gateway 2000, Inc.*, 2000 Del. Ch. LEXIS 54 (2000); *1-A Equip. Co. v. Icode, Inc.*, 2003 Mass. App. Div. 30 (Mass. App. Div. 2003); *Scott v. Bell Atl. Corp.*, 282 A.D.2d 180 (N.Y. App. Div. 2001); *Brower v. Gateway 2000, Inc.* 246 A.D. 2d 246 (N.Y. App. Div. 1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. App. 1999).

<sup>12</sup> *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 644 (W.D. Wis. 1996).

<sup>13</sup> *Id.*

<sup>14</sup> *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991).

<sup>15</sup> *ProCD*, 908 F. Supp. at 647.

<sup>16</sup> *Id.* at 644.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 644-45.

purchaser agreed to be bound by the terms of the license.<sup>20</sup> If the purchaser did not agree to the terms, he was to promptly return the discs and the user guide, along with all copies of the software and listings that had been exported, to the place he had obtained the product.<sup>21</sup>

According to the district court's findings in *ProCD v. Zeidenberg*, "[t]he Select Phone™ box mentions the agreement in one place in small print . . . . The box does not detail the specific terms of the license."<sup>22</sup> Zeidenberg had purchased an earlier version of Select Phone at a local retail store and presumably had observed the screen warnings on that version.<sup>23</sup> Some months later he purchased an updated version with the purpose of downloading telephone listings from it for use in assembling his own larger telephone listings database to be marketed through his newly formed corporation.<sup>24</sup> He was aware from the computer screen warnings that Select Phone™ was subject to the agreement contained in the user guide, but disregarded them because he did not believe the license was binding.<sup>25</sup> ProCD sought to enjoin that competitive commercial use, asserting that such use constituted copyright infringement and breach of the license agreement.<sup>26</sup>

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<sup>20</sup> *Id.* at 644.

<sup>21</sup> *ProCD*, 908 F. Supp. at 644.

<sup>22</sup> *Id.* at 645. With respect to the size and placement of the notice, one commentator has stated:

When we look at a ProCD box, Judge Easterbrook's 'offer' becomes pure fantasy. The notice is printed on the bottom flap of the box, flanked by a statement in large type that there are 250 million telephone numbers on 11 CD-Roms and the bar code for the scanner. The notice is printed in 6-point type in a space 2 3/4th inches by 1 inch.

Stewart Macaulay, *Relational Contracts Floating On a Sea of Custom? Thoughts About the Ideas of Ian MacNeil and Lisa Bernstein*, 94 NW. L. REV. 775, 779 n.25 (2000) [hereinafter Macaulay, *Relational Contracts*].

<sup>23</sup> *ProCD*, 908 F. Supp. at 645.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 646.

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*1. The District Court’s Approach*

The district court rejected ProCD’s copyright challenge, finding use of the software to access the non-copyrighted listings and then subsequently making copies of the listings without further use of the ProCD software did not constitute a copyright infringement.<sup>27</sup> In a well-reasoned opinion resting upon established principles of statutory and common law, it rejected the breach of contract challenge, concluding that Zeidenberg and his wholly owned corporation were not bound by the terms of the license agreement, access to which they did not have until after purchase of the product.<sup>28</sup>

In particular, the district court, relying upon the express language of UCC section 2-206 (1),<sup>29</sup> found that Zeidenberg’s payment for the software constituted acceptance of the retailer’s offer to sell by placing the software on the shelf, thus forming a contract at that moment.<sup>30</sup> Further, it found that if the license terms first disclosed after the purchase were treated as a written confirmation of the contract, UCC section 2-207 precluded

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<sup>27</sup> *Id.* at 648-50.

<sup>28</sup> *Id.* at 650-56. The court refused to treat the knowledge Zeidenberg may have gained from his use of an earlier version of the program as knowledge of the restrictive terms for the updated version. It stated:

Like any other parties to a contract, computer users should be given the opportunity to review the terms to which they will be bound each and every time they contract. Although not all users will read the terms anew each time under such circumstances, it does not follow that they should not be given this opportunity. Defendants cannot be held to the user agreement included with the second and third copies of Select Phone™ they purchased merely because they were aware of the terms included with the initial version. Each software purchase creates a new contract. Computer users should be given a fresh opportunity to review any terms to which those contracts will bind them.

*Id.* at 654-55.

<sup>29</sup> U.C.C. § 2-206 (1995). Subsection (1)(a) of 2-206 provides: “Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances . . . .”

<sup>30</sup> *ProCD*, 908 F. Supp. at 651-52.

enforcement of such terms,<sup>31</sup> absent express agreement thereto by Zeidenberg.<sup>32</sup> Alternatively, if the subsequently disclosed license terms were treated as a proposal for modification of the contract, UCC section 2-209 precluded their enforcement,<sup>33</sup> absent express agreement thereto by Zeidenberg.<sup>34</sup>

The court was reinforced in its conclusion that existing law did not support ProCD's "terms later" argument by the fact that the "terms later" proposition was then being considered in the draft version of a proposed new UCC section.<sup>35</sup> It concluded that such proposal "is evidence that the American Law Institute views current law as insufficient to guarantee the enforcement of standard form contracts such as shrinkwrap licenses."<sup>36</sup> Aware of

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<sup>31</sup> U.C.C. § 2-207 (1995). That section provides:

(1) A definite and reasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this act.

*Id.*

<sup>32</sup> *ProCD*, 908 F. Supp. at 652-55.

<sup>33</sup> U.C.C. § 2-209 (1995). That section provides in relevant part: "(1) An agreement modifying a contract within this title needs no consideration to be binding." *Id.*

<sup>34</sup> *ProCD*, 908 F. Supp. at 652-55.

<sup>35</sup> *Id.* at 655. The draft of proposed section 2-2203 would make shrink-wrap licenses with "terms later" enforceable, i.e., that the buyer would be bound by such "terms later" if it failed to reject them by returning the goods. *Id.*

<sup>36</sup> *Id.*

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industry efforts to obtain legislation making “terms later” binding on purchasers, the district court nevertheless thoughtfully and faithfully applied the existing statutory and common law rules precluding such imposition.

*2. Judge Easterbrook’s Approach on Appeal*

Enter Judge Easterbrook who, with a disingenuous and less than intellectually honest opinion, deftly discarded clear statutory language and foundational common law principles and created in their place, virtually out of whole cloth, a new doctrine of contract formation.<sup>37</sup> Writing for a panel of the Seventh Circuit, Judge Easterbrook concluded that no contract had been formed when Zeidenberg selected the box of software from the shelf of the retailer, paid for it, and left the store with it.<sup>38</sup> Rather, the contract was formed only after Zeidenberg used the software after seeing the screen message referencing the licensing agreement, signaling his agreement to ProCD’s restrictive terms.<sup>39</sup>

How could Easterbrook conclude that no contract was formed until then? Under UCC section 2-206(1)(a), adopted in Wisconsin,<sup>40</sup> the jurisdiction whose law governed the case, “[u]nless otherwise unambiguously indicated by the language or circumstances . . . an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.”<sup>41</sup> Pre-Code Wisconsin case authority cited by the district court held that a sales contract results when the customer pays the purchase price and departs the store with the item.<sup>42</sup> Just as other courts that dealt with contract formation issues

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<sup>37</sup> ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

<sup>38</sup> *Id.* at 1453-53.

<sup>39</sup> *Id.*

<sup>40</sup> WIS. STAT. § 402.206 (1)(a) (1977).

<sup>41</sup> U.C.C. § 2-206(1)(a) (1995). “Unless otherwise unambiguously indicated by the language or circumstances (a) an offer to make a contract shall be construed as inviting acceptance in any manner and by any medium reasonable in the circumstances.” *Id.*

<sup>42</sup> *See* Peeters v. State, 142 N.W. 181 (Wis. 1913).

in the context of retail store sales off the shelf,<sup>43</sup> the district court held that the retailer's placing the product on the store shelf constituted an offer.<sup>44</sup> It also found that Zeidenberg had accepted ProCD's offer to sell in a reasonable manner at the moment he purchased the product by exchanging money for the program.<sup>45</sup>

Yet, for Easterbrook, the answer was easy. As to the authorities upon which the district court relied, he patronizingly observed, "[i]n Wisconsin, as elsewhere, a contract includes only the terms on which the parties have agreed."<sup>46</sup> One cannot agree to hidden terms, the judge concluded.<sup>47</sup> So far, so good, except that one of the terms *to which Zeidenberg agreed by purchasing* the software was that the transaction was subject to a license.<sup>48</sup> Such a statement merely begs the legal question raised: whether Zeidenberg could have agreed to terms not available to him prior to his purchase. Easterbrook solved this question to his satisfaction with a rhetorical question of his own: but why would Wisconsin want to

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<sup>43</sup> See, e.g., *Barker v. Allied Supermarket*, 596 P.2d 870 (Okla. 1979), and cases cited therein. The "exploding bottle" cases presented a real dilemma if the purchaser were treated as the offeror in response to the retailer's invitation by placing the goods on display. That is because in the event the customer were injured by an exploding bottle prior to forming a contract based on his offer to buy and the retailer's acceptance by taking payment, the injured customer could have no breach of warranty claim. But for trying to avoid that dilemma, courts would probably continue to have applied the common law presumption that display of goods for sale was merely an invitation to the customer to make the offer by tendering payment. Had that common law presumption been applied here, Zeidenberg would have made the offer to purchase and the retailer would have accepted by taking his money and delivering the software. Viewed in that way, it is clear that Zeidenberg's offer was not one to purchase for only limited, noncommercial use.

<sup>44</sup> *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 652 (W.D. Wis. 1996).

<sup>45</sup> *Id.* Additionally, it found payment for the program constituted conduct sufficient to create a contract under UCC § 2-204(1) that provides "[a] contract for the sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." *Id.*

<sup>46</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1450 (7th Cir. 1996).

<sup>47</sup> *ProCD*, 908 F. Supp. at 645.

<sup>48</sup> *ProCD*, 86 F.3d at 1450 (emphasis added).

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“fetter the parties’ choice”<sup>49</sup> with respect to the way in which an offeror could bind the offeree to terms that the offeror wanted? For Easterbrook, the implicit self-evident answer is that surely Wisconsin would not want to insist that a seller actually disclose the terms of sale to the purchaser prior to payment. Interestingly, he phrases his question in terms of the “parties’ choice,” but one would be hard-pressed to assume that offerees would ever want to be bound by terms they could not know of until after they parted with their money.

*a. Purported Common Sense Argument*

Easterbrook purports to offer support, but not legal authority, for his assumed negative answer to his rhetorical question. His first rationale is the supposedly common sense one, that “[v]endors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both.”<sup>50</sup> Common sense, however, in fact suggests that the difficulty he describes is overstated, certainly with respect to the restrictive use term at issue in the case.<sup>51</sup> Short phrases conveying the restrictive use limitation such

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<sup>49</sup> *Id.* at 1450-51. Additionally, it is apparent that the court is not really interested in what Wisconsin courts would do in this setting. One commentator has observed:

Over the last two decades, the Seventh Circuit’s reading of Wisconsin statutes and cases has been funny or sad, depending on your point of view. As was true in the *ProCD* case, that court often embarks on a frolic of its own rather than attempting to do what a Wisconsin court would do.

Macaulay, *Relational Contracts*, *supra* note 22, at 781 n.36. (citation omitted).

<sup>50</sup> *ProCD*, 86 F.3d at 1451. Easterbrook elaborates on the assumed difficulty by noting, “The ‘Read Me’ file included with most software, describing system requirements and potential incompatibilities, may be equivalent to ten pages of type; warranties and license restrictions take still more space.” *Id.*

<sup>51</sup> Because of Judge Easterbrook’s commitment to a law and economics *ex ante* perspective, however, the facts that actually frame the issue of the case are of but limited significance. *See infra* notes 59-61 and accompanying text.

as “FOR NONCOMMERCIAL USE ONLY,” or “NO DUPLICATION PERMITTED” come to mind. Surely such a phrase could prominently be displayed in large type without difficulty.

*b. Purported Legal Authority*

Easterbrook attempts to create the impression that there is solid legal support for his common sense “terms later” position when in fact there is none. This is the first of a series of mischaracterizations and distortions of law by which he seeks to provide the appearance of legal legitimacy for his opinion. He states:

Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike. See E. Allan Farnsworth, 1 *Farnsworth on Contracts* § 4.26 (1990); *Restatement (2d) of Contracts* § 211 comment a (1981) (“Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than the details of individual transactions.”).<sup>52</sup>

The references to the Farnsworth treatise and Second Restatement do not support the proposition for which they are cited. It is true that section 4.26 of the Farnsworth treatise is entitled “Standardized Agreements,” and a sentence in that section does state, “[a]s with goods, standardization and mass production contracts may serve the interest of both parties.”<sup>53</sup> Note, however, that the proposition for which Judge Easterbrook cited the Farnsworth treatise was not merely that standard form contracts may be a means of doing business valuable to buyers and sellers

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<sup>52</sup> *ProCD*, 86 F.3d at 1451.

<sup>53</sup> E. ALLAN FARNSWORTH, 1 FARNSWORTH ON CONTRACTS § 4.26, at 479 (2d ed. 1990).

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alike. Rather, the proposition Easterbrook stated was, “[n]otice on the outside, terms on the inside, and the right to return . . . if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike.”<sup>54</sup> Patently, section 4.26 of the Farnsworth treatise does *not* directly state or clearly support Judge Easterbrook’s “terms later” proposition. Actually, the portion of section 4.26 of the Farnsworth treatise that addresses the effectiveness of terms of an offer of which the offeree had no actual awareness at the time he accepted supports a contrary proposition: that such terms are *not* part of the offer. It states:

A second judicial technique in dealing with standard forms is to refuse to hold a party to a term on the ground that, although the writing may plainly have been an offer, the term was not one that an uninitiated reader ought reasonably to have understood to be a part of that offer. This result is especially easy to reach if the term is on the reverse side of the form and the reference, if any, to terms on the reverse side is itself in fine print or otherwise inadequate. In the colorful language of the Supreme Court of Pennsylvania:

One of the most hateful acts of the ill-famed Roman tyrant Caligula was that of having the laws inscribed upon pillars so high that the people could not read them. Although the warrant of attorney [on the back of] the numerous sheets of the contract at bar was within the vision of the defendant, it was placed as to be completely beyond her contemplation of its purport. . . .

. . . .

The same reasoning has been used where the term was in a separate document, not attached to the signed writing but incorporated by a reference regarded by the court as insufficient. The size of the type and other factors affecting legibility of both the reference and the term itself play an important part in determining whether such a term is part of

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<sup>54</sup> *ProCD*, 86 F.3d at 1451 (emphasis added).

the contract.<sup>55</sup>

If the Farnsworth treatise concludes that terms physically, but not realistically, available to the offeree for his inspection prior to acceptance are not part of the offer, then *a fortiori* terms that are not available at all for inspection prior to acceptance cannot be part of the offer.

The same deficiencies infect Easterbrook's citation to Restatement (Second) of Contracts as though it supported the "terms later" proposition. The particular comment does address the utility of standardization, but does not at all address Easterbrook's novel "terms later" proposition. Furthermore, the entire thrust of section 211 of Restatement (Second) of Contracts is antithetical to the proposition.<sup>56</sup> That section addresses whether standardized terms of an offer that are actually available for inspection to the offeree prior to acceptance are part of the offer and thus part of the agreement resulting from the offeree's acceptance. Significantly, section 211(3) states, "[w]here the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is *not* part of the agreement."<sup>57</sup>

Section 211 stands for the proposition that a term that is physically, but not realistically, available to the offeree prior to his apparent manifestation of assent is not part of the agreement where

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<sup>55</sup> FARNSWORTH, *supra* note 53, § 4.26, at 483-84 (citations omitted).

<sup>56</sup> RESTATEMENT (SECOND) OF CONTRACTS § 211 (1981).

<sup>57</sup> *Id.* (emphasis added). Comment f. to section 211 explains:

Although customers typically adhere to standardized agreements and are bound by them without even appearing to know the standardized terms in detail, *they are not bound to unknown terms which are beyond the range of reasonable expectation . . . .* [A] party who adheres to the other party's standard terms *does not assent* to a term if the other party has reason to believe that the adhering party would not have accepted the agreement if he had known that it contained the particular term . . . . Reason to believe may be inferred from the fact that the term is bizarre or oppressive, from the fact that it eviscerates the non-standard terms explicitly agreed to, or from the fact that it eliminates the dominant purpose of the transaction. *The inference is reinforced if the adhering party never had an opportunity to read the term . . . .*

*Id.* at § 211(3) cmt. f (emphasis added).

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the offeror has reason to believe that the offeree would not have assented if he knew that the writing contained such a term. Thus, *a fortiori* it does *not* directly state or clearly support Judge Easterbrook’s “terms later” proposition under which a party who could have no knowledge of a term prior to his manifestation of assent is bound by it.

Judge Easterbrook’s intellectually dishonest citation to the Farnsworth treatise and Restatement (Second) Contracts as though each supported his “terms later” proposition brings to mind the rule regarding when non-disclosure is equivalent to an assertion, and thus a misrepresentation:

A person’s non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist . . . :  
(a) where the person knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.<sup>58</sup>

*c. Law and Economics and the ex ante Perspective*

Easterbrook’s next line of purported legal support for his “terms later” proposition illustrates the law and economics *ex ante* perspective of decision-making that he brings to his judicial process.<sup>59</sup> That perspective liberates him from the facts of the case,

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<sup>58</sup> RESTATEMENT (SECOND) OF CONTRACTS § 160 (a) (1981) Comment a. provides that “[a party] may not, of course, tell *half-truths* and his assertion of only some of the facts without the inclusion of such additional matters as he knows or believes to be necessary to prevent it from being misleading *is itself a misrepresentation.*” *Id.* at § 160 cmt. a (emphasis added).

<sup>59</sup> Anthony I. Ogus, *Law-and-Economics from the Perspective of Law*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 486-91 (Peter Newman ed. 1998). Therein the author notes:

Legal doctrine is shaped by judges resolving disputes in a selection of cases, in relation normally to events that have already occurred. The *ex post* appraisal will often lead them to search for ‘just’ outcomes to the individual dispute, subordinating to that any concern for the *ex ante* impact of the ruling on future behavior. In Anglo-Saxon legal systems this tendency is enhanced by the adversarial culture inherent in the judicial process. In contrast, law and economics adopts a predominantly *ex ante* perspective, predicting the impact of a ruling, or of some

which are little more than a springboard for his law and economics analysis.<sup>60</sup> Furthermore, it invites his speculation about the impact of his decision on possible future transactions by people other than the parties and even upon people who may not be in the affected business.<sup>61</sup> Easterbrook's framework of the case allows him to reference for support other contracting transactions in the purchase

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alternative to it, on aggregate social behavior. Moreover, because the data are not limited to those that relate to the legal claim brought in the individual case, the analysis can potentially take account of a broader range of economic variables.

*Id.* at 487. *See also* Frank H. Easterbrook, *The Court and the Economic System*, 98 HARV. L. REV. 4 (1984) Easterbrook praises the *ex ante* perspective, noting,

The first line of inquiry, then, is whether the Justices take an *ex ante* or an *ex post* perspective in analyzing issues. Which they take will depend, in part, on the extent to which they appreciate how the economic system creates new gains and losses; those who lack this appreciation will favor 'fair' treatment [or other *ex post* arguments] of the parties.

*Id.*

<sup>60</sup> For Easterbrook, one might more appropriately, but less graciously, describe them as "mere fodder," in light of his previously expressed view toward the significance of the parties to a case. *See* Easterbrook, *supra* note 59, at 10-12.

Fairness arguments are *ex post* arguments. . . . The degree to which fairness or other *ex post* arguments dominate in legal decisionmaking [sic] is directly related to the court's assumptions about the nature of the economic system. Judges who see economic transactions as zero-sum games are likely to favor 'fair' divisions of the gains and losses . . . . Yet if legal rules can create larger gains . . . the claim from fairness [or other *ex post* arguments] becomes weaker. *The judge will pay less attention to today's unfortunates and more attention to the effects of the rules.*

*Id.* at 11 (emphasis added).

<sup>61</sup> Easterbrook, *supra* note 59, at 12.

The people who might be affected by the rules are not before the court and may not even be in the affected business (yet). The interests of prospective consumers and producers are diffuse, too much so for any one person or group to participate in the litigation. The judge is the representative of these future interests.

*Id.*

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of insurance, airline tickets, theater tickets, radios, and drugs.<sup>62</sup> He states, “Transactions in which the exchange of money precedes the communication of detailed terms are common.”<sup>63</sup> Rather than citing legal authority confirming that purchasers in such other settings are bound by terms not disclosed or knowable to them prior to paying for the service or product, he merely invites the reader to “consider”<sup>64</sup> various hypothetical illustrative transactions, apparently assuming that the self-evident resolution in each illustration will confirm for the reader that Judge Easterbrook’s “terms later” proposition is a long-standing, accepted contract practice.

The particular illustrations that he invites the reader to consider raise other difficulties that undermine the appropriateness of any analogy he seeks to make. As has been noted elsewhere, insurance and airline tickets “are examples of regulated industries, not dependent on market discipline to prevent unfairness.”<sup>65</sup> In an apparent effort to cause the reader to believe that his airline ticket illustration reflects the existence of actual legal authority supporting his “terms later” proposition, Judge Easterbrook cites two cases,<sup>66</sup> neither of which dealt with the imposition of “terms

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<sup>62</sup> *ProCD v. Zeidenberg*, 86 F.3d 1447, 1451 (7th Cir. 1996).

<sup>63</sup> *Id.*

<sup>64</sup> “Consider the purchase of insurance. . . . Or consider the purchase of an airline ticket. . . . Just so with a ticket to a concert. . . . Consumer goods work the same way. . . .” *Id.*

<sup>65</sup> Braucher, *supra* note 5, at 1823-24.

Easterbrook claimed that delayed disclosure is a long-standing, accepted contract practice, citing insurance and airline tickets as examples. But these are examples of regulated industries, not dependent on market discipline to prevent unfairness. In the case of insurance, regulators typically have the responsibility of reviewing and approving policy terms. In addition, often state law provides for a required disclosure form setting forth key policy terms. In the case of airline tickets, most of the material in the ticket is dictated by U.S. Department of Transportation regulations requiring waivers of liability limits provided for in the Warsaw Convention, and by federal regulations dealing with overbooking and liability for baggage loss.

*Id.* (citations omitted).

<sup>66</sup> *ProCD*, 86 F.3d at 1451. “To use the ticket is to accept the terms, even

later.” In *Carnival Cruise*, the Court expressly noted:

[W]e do not address the question whether respondents had sufficient *notice* of the forum clause *before entering the contract* for passage. Respondents essentially have conceded that they had notice of the forum-selection provision . . . . Additionally, the Court of Appeals evaluated the enforceability of the forum clause under the *assumption*, although “doubtful,” that respondents could be deemed to have had knowledge of the clause.<sup>67</sup>

In *Vimar Seguros y Reaseguros*, the disputed clause appeared in a standard form bill of lading, and no suggestion was made in the opinion that the party opposing its enforceability was unaware of its terms prior to entering into the contract of carriage.<sup>68</sup> Thus neither case directly states or clearly supports Easterbrook’s “terms later” rule of law.

When it comes to his concert illustration,<sup>69</sup> his conclusion that what is written on the back of a theater ticket stub is a contractual term binding on the patron is contrary to hornbook law.<sup>70</sup> At this

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terms that in retrospect are disadvantageous. *See Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 . . . (1991); see also *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 . . . (1995) (bills of lading).” *Id.*

<sup>67</sup> *Carnival Cruise Lines, Inc.*, 499 U.S. at 590 (emphasis added).

<sup>68</sup> *Vimar Seguros y Reaseguros*, 515 U.S. at 528.

<sup>69</sup> *ProCD*, 86 F.3d at 1451.

Just so with a ticket to a concert. The back of the ticket states that the patron promises not to record the concert; to attend is to agree. A theater that detects a violation will confiscate the tape and escort the violator to the exit. One *could* arrange things so that every concertgoer signs this promise before forking over the money, but that cumbersome way of doing things not only would lengthen queues and raise prices but also would scotch the sale of tickets by phone or electronic data service.

*Id.*

<sup>70</sup> E. ALLAN FARNSWORTH, *CONTRACTS* § 4.26, at 298 (3rd ed. 1999).

One of these techniques [for dealing with standardized terms] is to refuse to hold a party to a writing on the ground that it was not of a type that would reasonably appear to the recipient to contain the terms of a proposed contract. Even under the objective theory, it can be reasoned that such a writing is not an offer at all. As a New York court said of a

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point in Easterbrook’s rationale one begins to sense that there is no legal support for his “terms later” conclusion, but only a pretense of legal support premised on speculation drawn from non-analogous illustrations.

The consumer goods illustrations that he suggests support his “terms later” proposition are likewise inapposite. In neither of his illustrations does a term on the inside of the box diminish the contractual rights of the purchaser that would normally flow from his purchase of the goods. In his radio illustration, the radio is purchased from a retailer and the term in the sealed box is a manufacturer’s warranty term.<sup>71</sup> In his packaged drugs illustration, the drugs are purchased from a retailer and the sealed box contains

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claim check given to a patron by a railroad’s parcel checking service, “In the mind of the bailor the little piece of cardboard . . . did not arise to the dignity of a contract by which he agreed that in the event of the loss of the parcel, even through the negligence of the bailee itself, he would accept therefore a sum which perhaps would be but a small fraction of its actual value.” . . . . *The argument that the writing is not an offer is particularly compelling with respect to tickets, passes, and stubs . . . .*

*Id.* (citations omitted) (emphasis added). See also RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. d (1981):

*Non-contractual documents.* The same document may serve both contractual and other purposes, and a party may assent to it for other purposes without understanding that it embodies contract terms. . . . [B]aggage checks or automobile parking lot tickets may appear to be mere identification tokens, and a party who without knowledge or reason to know that the token purports to be a contract is then not bound by terms printed on the token.

*Id.*

<sup>71</sup> *ProCD*, 86 F.3d at 1451.

Consumer goods work the same way. Someone who wants to buy a radio set visits a store, pays, and walks out with a box. Inside the box is a leaflet containing some terms, the most important of which usually is the warranty, read for the first time in the comfort of home. By Zeidenberg’s lights, the warranty in the box is irrelevant; every consumer gets the standard warranty implied by the UCC in the event the contract is silent; yet so far as we are aware no state disregards warranties furnished with consumer products.

*Id.*

information provided by the manufacturer that describes drug interactions, contraindications, and other vital information.<sup>72</sup> As noted elsewhere, “in . . . indirect marketing, the manufacturer is not in privity of contract with the buyer. A third-party *manufacturer’s warranty can only add to the deal offered by the seller, not take away*. Manufacturers’ warranties [required by governmental regulations regarding disclosure and substantive requirements] are not typically products of contract . . . .”<sup>73</sup> Likewise, in the drug illustration the manufacturer is not in privity with the consumer, and the manufacturer’s disclosure of drug interactions, contraindications, and other vital information is supplied because it is mandated by federal regulation for the protection of consumers.<sup>74</sup>

According to Easterbrook, unless his “terms later” proposition was adopted, the buyers in each instance could gain no benefit against the manufacturer from such terms because they would not be part of the contract, i.e., the contract between the consumer and the retailer. That invited conclusion is erroneous. Only by sheer force of assertion can illustrations of transactions in which consumers gain benefits as a result of governmentally mandated terms be analogized to a transaction in which a seller seeks to *reduce* the benefits to the consumer after making the purchase.

Easterbrook’s final analogies bear at least some resemblance to the facts in the case in that they at least deal with software sales. The resemblance, however, goes no further than that, and

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<sup>72</sup> *Id.*

Drugs come with a list of ingredients on the outside and an elaborate package insert on the inside. The package insert describes drug interactions, contraindications, and other vital information—but, if Zeidenberg is right, the purchaser need not read the package insert, because it is not part of the contract.

*Id.* The illustration noticeably understates the nature of the information typically found on the on the outside of the box, probably to make the contents on the inside appear to be more of a surprise. But even taking the unrealistic facts at face value, the illustration does not support Judge Easterbrook’s “terms later” proposition.

<sup>73</sup> Braucher, *supra* note 5, at 1824-25 (emphasis added).

<sup>74</sup> FDA Labeling Requirements for Over-the-Counter Drugs, 21 C.F.R. § 201.66, pt. 201, subpt. C (2003).

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apparently, his law and economics *ex ante* analysis requires no more.<sup>75</sup> Here, he analogizes hypothetical software sales transactions that bear little resemblance to the context of the case at hand, other than that they involve sales of software. His hypothetical sales transactions arise in the context of purchasers placing orders by phone or over the Internet,<sup>76</sup> even though such contexts are unhampered by physical box size limitation, the very limitation upon which his first rationale was based. His hypothetical software transactions do not explicitly state that the seller’s terms were not disclosed until after the purchaser had parted with his money and the goods were delivered.<sup>77</sup> For these terms to have relevance as an analogy he necessarily makes an additional assumption. Such supposition, however, would not be warranted by the actual practice of sellers selling software over the Internet.<sup>78</sup> But perhaps this supposition would not even be necessary for Easterbrook to think the analogy instructive or at least useful to support an additional rationale for “terms later.” Perhaps under an *ex ante* analysis, the larger context of software sales generally and the convenience for sellers in operating their businesses is the more significant consideration and is sufficient to make the hypotheticals relevant.

Furthermore, the software hypotheticals Easterbrook uses to suggest that precluding sellers from a “terms later” practice would

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<sup>75</sup> Easterbrook, *supra* note 59.

<sup>76</sup> *ProCD*, 86 F.3d at 1451-52.

[C]onsider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse. A customer may place an order by phone in response to a line item in a catalog or a review in a magazine. Much software is ordered over the Internet by purchasers who have never seen a box. Increasingly software arrives by wire. There is no box; there is only a stream of electrons, a collection of information that includes data, an application program, instructions, many limitations . . . .

*Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Jerry C. Liu, Robert J. O’Connell & W. Scott Petty, *Electronic Commerce: Using Clickwrap Agreements*, 15 NO. 12 COMPUTER LAWYER 10, 14 (1998); Jennifer Femminella, Note, *Online Terms and Conditions Agreements: Bound by the Web*, 2003 ST. JOHNS J. OF LEG. 87, 95-100.

“drive prices through the ceiling or return transactions to the horse-and-buggy age”<sup>79</sup> bear no resemblance to the issues in *ProCD* or to the reality of Internet selling. Certainly there is nothing inherent in the Internet sales transaction that precludes the seller’s disclosure of limited warranty or exclusion of consequential damages terms prior to taking the purchaser’s money. After all, this is the “information age” and Internet sellers can and do make such pre-purchase disclosure on a regular basis.<sup>80</sup>

When one sorts through all the verbiage, Easterbrook provides no legal authority for his conclusion that the express provisions of UCC section 2-206 governing offer-acceptance contract formation are not controlling in this case. He does not even suggest that the unusual manner of acceptance described in the sealed shrink-wrap, unknowable to the buyer prior to purchase, “unambiguously indicated” that the offer did not invite acceptance in any manner reasonable under the circumstances, i.e., as by paying the retail seller the purchase price. His refusal to abide by the statute conceivably reflects his understanding of the role of the judiciary described in his writings.<sup>81</sup> As he once observed, “[j]udges question the acts of the other branches and *on occasion do otherwise than these rules command. The judge refuses to abide by a statute because he believes that some higher law requires this.*”<sup>82</sup> The higher law in this instance appears to be his perception of the appropriate balance between optimal creation and optimal use of information based on his assessment from a policy-making *ex ante*

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<sup>79</sup> *ProCD*, 86 F.3d at 1452. The particular terms in his hypothetical transaction are those of a limited warranty and an exclusion of liability for consequential damages. The conclusion that Easterbrook invites the reader to draw is that an Internet seller would be unable to protect against exposure for breach of a broad implied warranty and consequential damages if he could not bind the purchaser to his limited warranty and preclusion of consequential damages that were not disclosed until after the purchase. But that is not true as the practice of Internet sellers is to disclose such terms prior to the purchase confirms.

<sup>80</sup> See Liu, O’Connell & Petty, *supra* note 78.

<sup>81</sup> Frank H. Easterbrook, *What’s So Special About Judges?*, 61 U. COL. L. REV. 773 (1990).

<sup>82</sup> *Id.* at 777 (emphasis added).

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perspective.<sup>83</sup>

*d. Purported Distinguishing of Statute and Precedent*

Easterbrook employs a different approach to the statutory prescriptions of UCC section 2-207,<sup>84</sup> a section that would appear to be an insurmountable hurdle to his “terms later” proposition. Rather than merely refusing to abide by the prescriptions of section 2-207 because they are not practical in this setting, Easterbrook

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<sup>83</sup> Easterbrook, *supra* note 59, at 23.

Problems involving intellectual property present the dichotomy between *ex post* and *ex ante* perspectives especially starkly. Once someone has created information, the cost of using the information is small. The information may be used without being used up . . . . Because the marginal cost of using information is small or even zero, there is a strong case for establishing a system of legal rules that makes the information freely available . . . . Yet from an *ex ante* perspective it is necessary to compensate the programmer. Even if a few people would write computer programs just for the challenge (or for their own use), they would not make those programs available to the rest of us without the promise of compensation. Without a doubt thousands of people write programs only because of the prospect of reward. Those who write increase their productivity as the prospect of reward increases. The lower the rewards, the fewer programs there will be and the poorer will be the quality of each existing program; it takes a lot of time to perfect a program, and again the prospect of reward will influence how much time the programmer invests. The problem is that if you allow the author to collect a royalty for the effort, you create a loss by discouraging use. Higher royalties (up to the monopoly level) yield more and better programs at the same time as they yield less effective use of programs once the programs exist. The incentives that yield optimal creation will prevent optimal use, and the reverse. There is no neat solution to this problem . . . . It is hard to understate the importance of the way the Supreme Court chooses to deal with the difficult choices that influence optimal creation versus optimal use of information. An *ex post* perspective that always favors free use of information inevitably leaves us with too little; an *ex ante* perspective that recognizes the difficulties of choice is more likely to be beneficial.

*Id.* at 21-23.

<sup>84</sup> U.C.C. § 2-207 (1995). *See supra* note 31 (setting forth the statute in full).

summarily disposes of them in another fashion.

He asserts that section 2-207 is “irrelevant,” because “[o]ur case has only one form,”<sup>85</sup> and he purports, in a transparently disingenuous fashion, to distinguish the relevant section 2-207 precedent which was directly contrary to his “terms later” proposition.<sup>86</sup>

As written and uniformly construed prior to Easterbrook’s *ProCD* opinion, section 2-207 provides the controlling law with respect to treatment of additional terms that are first disclosed after a contract has been formed.<sup>87</sup> Pursuant to that section additional written terms appearing in confirmation of a contract previously made are “to be construed as proposals for addition to the contract.”<sup>88</sup> In a contract “between merchants” such additional terms will become part of the contract unless either the offer had

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<sup>85</sup> *ProCD*, 86 F.3d at 1452. “Our case has only one form; UCC § 2-207 is irrelevant.” *Id.*

<sup>86</sup> *Id.* Easterbrook asserts:

[O]nly three cases (other than ours) touch on the subject, and none directly addresses it. *See* Step-Saver Data Systems, Inc. v. Wyse Technology; Vault Corp. v. Quaid Software Ltd.; Arizona Retail Systems, Inc. v. Software Link, Inc. As their titles suggest, these are not consumer transactions. *Step-Saver* is a battle-of-the-forms case, in which the parties exchange incompatible forms and a court must decide which prevails. . . . Our case has only one form; UCC § 2-207 is irrelevant. *Vault* holds that Louisiana’s special shrinkwrap-license statute is preempted by federal law, a question to which we return. And *Arizona Retail Systems* did not reach the question, because the court found that the buyer knew the terms of the license before purchasing the software.

*Id.* (citations omitted). *See infra* notes 104-17 and accompanying text (discussing those cases and rebutting Easterbrook’s effort to distinguish them).

<sup>87</sup> U.C.C. § 2-207(2) (1995). *See, e.g.,* Step-Saver Data Systems, Inc. v. Wyse Technology, 939 F.2d 91 (3d Cir. 1991); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972); Arizona Retail Systems, Inc. v. Software Link, Inc. 831 F. Supp. 759 (D. Ariz. 1993); Winter Panel Corp. v. Reichhold Chems., Inc., 823 F. Supp. 963 (D. Mass. 1993); Olefins Trading, Inc. v. Han Yang Chem. Corp., 813 F. Supp. 310 (D. N.J. 1993); Glyptal, Inc. v. Engelhard Corp., 801 F. Supp. 887(D. Mass. 1992). *See also* Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1249-52 (1995).

<sup>88</sup> U.C.C. § 2-207 (2) (1995).

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expressly limited acceptance to the terms of the offer, the additional terms materially alter the contract previously made, or they are timely objected to or have previously been objected to.<sup>89</sup> If the contract is not one “between merchants,” the additional terms are mere proposals for addition and like any other offer to modify a contract, are not effective unless expressly agreed to by the other party.<sup>90</sup> Under a fair reading of the facts and law, which the district court adopted, the contract was formed when Zeidenberg purchased the software at the store.<sup>91</sup> The terms that were accessible only thereafter were merely proposals for addition to the contract previously formed and did not become a part of the contract unless they were expressly agreed to, which they were not.<sup>92</sup>

Easterbrook’s cavalier treatment of both the statute and precedent has been roundly and rightly criticized.<sup>93</sup> Professor Gergen states, “[t]here is one *real howler* in [*ProCD* and *Hill*]—they say that 2-207 applies only when there are two forms. This is *just dead wrong*.”<sup>94</sup> Professor Hillman is unequivocal in his condemnation of Easterbrook’s treatment of section 2-207, noting, “[he] was plainly wrong about section 2-207’s applicability. Nothing in the text of the section limits it to transactions involving more than one form.”<sup>95</sup> Likewise, Professor Braucher concurs that “[n]othing in the language of section 2-207 limits its application to two-form situations or even to forms at all,” further noting that, “[t]he Pro-CD analysis also is contrary to Comment 1 to Section 2-

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* See also Richard E. Speidel, *Symposium: The Revision of Article 2 of the Uniform Commercial Code: Contract Formation and Modification Under Revised Article 2*, 35 WM. & MARY L. REV. 1305, 1323 (1994); Christopher L. Pitet, Note and Comment, *The Problem With “Money Now, Terms Later”*: *ProCD, Inc. v. Zeidenberg and the Enforceability of “Shrinkwrap” Software Licenses*, 31 LOY. L.A. L. REV. 325, 338-39 (1997).

<sup>91</sup> *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 653-56 (W.D. Wis. 1996).

<sup>92</sup> *Id.*

<sup>93</sup> See sources cited *supra* note 5.

<sup>94</sup> Gergen, *supra* note 7, at 1154 (emphasis added).

<sup>95</sup> Hillman, *supra* note 5, at 753.

207, which refers to one-form transactions.”<sup>96</sup>

Judge Easterbrook displays the same intellectual dishonesty when “distinguishing” away relevant case authority that applied section 2-207 to preclude enforcement of terms a seller first disclosed after the buyer made the purchase.<sup>97</sup> Although none involved a purchase off a retail shelf, two of the three, *Step-Saver Data Systems, Inc. v. Wyse Technology*<sup>98</sup> and *Arizona Retail Systems, Inc. v. Software Link, Inc.*,<sup>99</sup> presented the very issue that was before the court in *ProCD*. In each the issue was whether a seller of software could bind the buyer to terms not disclosed to the buyer until after purchase by stating in those belatedly disclosed terms that opening the shrink-wrap package and using the software constituted agreement by the buyer.<sup>100</sup> In each case the respective court held that such terms were not enforceable, expressly relying upon the provisions of section 2-207.<sup>101</sup> Only *Vault Corp. v. Quaid Software Ltd.* did not directly address the matter of enforceability of “terms later.”<sup>102</sup> It did not need to address the issue because it

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<sup>96</sup> Jean Braucher, *UCITA and the Concept of Assent*, 673 PLI/PAT. 175, 184 (2001). UCC § 2-207 (1) expressly includes “a written confirmation which is sent within a reasonable time;” and comment 1 states, “This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and followed by one or more of the parties sending formal memoranda embodying terms not discussed.” U.C.C. § 2-207 (1) and cmt. 2 (1995); see also James J. White, *Default Rules in Sales and the Myth of Contracting Out*, 48 LOY. L. REV. 53, 80 n.121 (2002) (collecting cases applying section 2-207 to one-writing transactions); see also *Klocek v. Gateway 2000, Inc.*, 104 F. Supp. 2d 1332, 1339 (D. Kan. 2000) (expressly declining to follow *ProCD*’s reasoning, noting that court’s conclusion about the irrelevance of section 2-207 to one-form transactions had been asserted “without support;” and further that such conclusion was not supported by the statute or by Kansas or Missouri law construing the statute).

<sup>97</sup> See *ProCD*, 86 F.3d at 1452 (asserting that “only three cases (other than ours) touch on the subject, and none directly addresses it”) (emphasis added).

<sup>98</sup> *Step-Saver Data Sys., Inc. v. Wyse Tech.*, 939 F.2d 91 (3d Cir. 1991).

<sup>99</sup> *Arizona Retail Systems, Inc. v. Software Link, Inc.*, 831 F. Supp. 759 (D. Ariz. 1993).

<sup>100</sup> See *infra* notes 104-17 and accompanying text.

<sup>101</sup> *Id.*

<sup>102</sup> *Vault Corp. v. Quaid Software Ltd.*, 847 F.2d 255, 268-70 (5th Cir.

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found that the Copyright Act preempted the Louisiana statute that made shrink-wrap licenses enforceable, upon which the software seller premised its contract claim.<sup>103</sup>

Easterbrook attempts to distinguish *Step-Saver* and *Arizona Retail Systems* first because they did not involve “consumer transactions,”<sup>104</sup> suggesting that section 2-207 is inapplicable to

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1988).

<sup>103</sup> *Id.* at 270.

<sup>104</sup> *ProCD*, 86 F.3d at 1452. For Code purposes, and particularly for § 2-207 purposes, a consumer transaction is simply one in which at least one of the parties is a “non-merchant” under Code terminology. The typical consumer transaction is sale by a business entity (a “merchant”) to a person purchasing for personal use. UCC § 2-104 (1) defines “merchant;” UCC § 2-104 (3) defines transactions “between merchants;” and comment 2 elaborates on the matter, providing in pertinent part:

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. *For purposes of these sections almost every person in business would, therefore, be deemed to be a “merchant” under the language “who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .” since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be “merchants.”* But even these sections only apply to a merchant in his mercantile capacity; *a lawyer or bank president buying fishing tackle for his own use is not a merchant.*

U.C.C. §2-104 cmt. 2 (1995) (emphasis added).

Thus, the typical consumer transaction is one in which the purchaser buys for personal, as contrasted with business, use. In concluding that Zeidenberg’s purchase was a “consumer transaction,” Easterbrook overlooked the express findings that:

In late 1994, defendant Zeidenberg purchased a copy of Select Phone™ at a local retail store. In February or March 1995, defendant Zeidenberg decided he could download data from Select Phone™ and make it available to third parties over the Internet *for commercial purposes*. Zeidenberg purchased an updated version of Select Phone™ in March 1995 and in April 1995, incorporated Silken Mountain Web Services, Inc. *for the purpose of making a database of telephone listings available over the Internet.*

such transactions; however, that is a clear misinterpretation of the language of section 2-207(2)<sup>105</sup> and authority interpreting that section.<sup>106</sup> The first sentence of subsection (2) states the general rule with respect to treatment of additional terms in an acceptance or confirmation: that they “are to be construed as proposals for addition to the contract.”<sup>107</sup> Like any other proposal, they have no contractual import unless they are actually agreed to.<sup>108</sup> The second sentence makes an exception to that rule in the case of contracts between merchants, creating a presumption that additional terms that do not materially alter the contract become part of the contract

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*Id.* at 645 (emphasis added). Because Zeidenberg was purchasing the phone for use in his new business, it appears he could have appropriately been considered a merchant buyer under the definition of merchant in UCC § 2-104 cmt. 2. If Zeidenberg had been treated as a “merchant” for purposes of Easterbrook’s § 2-207 analysis, then Easterbrook would have had to recognize that he was dealing with exactly the same kind of “between merchants” setting that the courts had dealt with in *Step-Saver* and *Arizona Retail Systems*. In any event, as discussed *infra* text accompanying notes 108-09, treating Zeidenberg as a consumer rather than as a merchant should have resulted in even more protection against imposition of “terms later.”

<sup>105</sup> UCC § 2-207 (2) states:

The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

U.C.C. § 2-207(2).

<sup>106</sup> See, e.g., *McAfee v. Brewer*, 203 S.E.2d 129, 131 (Va. 1974); *Coastal Industries, Inc. v. Automatic Steam Products Corp.*, 654 F. 375, 378 n.2 (5th Cir. 1981). See also John E. Murray, Jr., *The Definitive “Battle of the Forms,” Chaos Revisited*, 20 J.L. & COM. 1, 7-8 (2000); John E. Murray, Jr. & Harry M. Flechtner, *The Summer, 1999 Draft of Revised Article 2 of the Uniform Commercial Code: What Hath NCCUSL Rejected?*, 19 J.L. & COM. 1, 27 (1999); Mark E. Roszkowski & John D. Wladis, *U.C.C. Section 2-207: The Drafting History*, 49 BUS. LAW. 1065, 1079 (1994); Mark Andrew Cerny, *Commentary, A Shield Against Arbitration: 2-20’s Role in the Enforceability of Arbitration Agreements Included With Delivery of Products*, 51 ALA. L. REV. 821, 833 (2000).

<sup>107</sup> U.C.C. § 2-207(2) (1998).

<sup>108</sup> See sources cited *supra* note 90.

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unless certain circumstances exist.<sup>109</sup> Thus, section 2-207(2) provides *more* protection, not less, against imposition of “terms later” in the case of consumer buyers than it does in transactions in which both sellers and buyers are merchants. Rather than being inapplicable because they did not involve consumer transactions, both *Step-Saver* and *Arizona Retail Systems*, which held that section 2-207(2) precluded imposition of “terms later” against merchant buyers, would *a fortiori* be applicable, powerful authority that section 2-207(2) precludes such imposition against a consumer buyer.

Easterbrook’s next purported basis for distinguishing *Step-Saver* is to dismiss it as a “battle of forms case, in which the parties exchange incompatible forms and a court must decide which prevails,” rendering it of no relevance to the decision in *ProCD*, which involved but one form.<sup>110</sup> *Step-Saver*, however, did not present an issue of incompatible forms. As cogently noted by one commentator,

[I]n *Step-Saver* there was a contract by telephone followed by a purchase order and invoice that manifested *no “battle of the forms.”* The *single document* that contained different or additional terms was the box-top license arriving after the contract was formed. The effort of the Seventh Circuit in this regard is, therefore, a *consummate illustration of a distinction without a difference.*<sup>111</sup>

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<sup>109</sup> See Murray & Flechtner, *supra* note 106, at 33.

[T]he general rule that applies to transactions involving one or more non-merchants requires *express assent* to any additional terms while the exception to that rule would allow immaterial additional terms to become part of the contract between merchants. Indeed, this is precisely how § 2-207(2) has been applied in a transaction between non-merchants.

*Id.* (emphasis added).

<sup>110</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996).

<sup>111</sup> Murray & Flechtner, *supra* note 106, at 33 (emphasis added). See also *Dorton v. Collins & Aikman Corp.*, 453 F.2d 1161, 1169-70 (6th Cir. 1972). The court in *Dorton* concluded in an alternative holding that if the contract had been formed during a telephone conversation, the single form sent thereafter by the seller with terms additional to or different from those in the prior oral

Easterbrook made it easy for himself to distinguish *Arizona Retail Systems* by merely ignoring part of the holding in that case. He asserted, “*Arizona Retail Systems* did not reach the question [of terms later], because the court found that the buyer knew the terms of the license before purchasing the software.”<sup>112</sup> The district court, however, described the issues and holdings of *Arizona Retail Systems* with great thoroughness.<sup>113</sup> The decision in *Arizona Retail Systems* addressed two separate categories of purchases: the initial one in which the buyer knew the terms of the license before purchasing; and the subsequent ones in which the buyer ordered software by phone, the seller accepted in the same conversation, and thereafter sent the software with the license agreement attached to the packaging.<sup>114</sup> As to the former, the court held the buyer bound by the license terms.<sup>115</sup> With respect to the subsequent transactions, however, the *Arizona Retail Systems* court stated:

[T]he court concludes that the terms of the license agreement are not applicable. In all material respects, the subsequent purchases in this case are equivalent to the purchases in *Step-Saver*. This court finds that regardless of whether the terms of the license agreement are treated as proposals for additional terms under U.C.C. § 2-207, or proposals for modification under U.C.C. § 2-209, the terms of the license agreement are not a part of the agreement between the parties. . . . *Having not expressly agreed to the terms of the agreement, [the buyer] was not bound by those*

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agreement, such form would be treated as a confirmation and a proposal for addition of terms to the contract. Under section 2-207(2) such terms would be added to the contract if they did not materially alter it since both parties were merchants. If they materially altered the oral agreement, however, the buyer “could not become bound thereby *absent an express agreement to that effect* (emphasis supplied).” *Id.* at 1170.

<sup>112</sup> *ProCD*, 86 F.3d at 1452.

<sup>113</sup> See *ProCD, Inc. v. Zeidenberg*, 908 F. Supp. 640, 653-54 (W.D. Wis. 1996).

<sup>114</sup> *Arizona Retail Systems, Inc. v. Software Link, Inc.* 831 F. Supp. 759, 760-62 (D. Ariz. 1993).

<sup>115</sup> *Id.* at 763-64.

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*terms.*<sup>116</sup>

If a first-year law student were to say that *Arizona Retail Systems* did not address the “terms later” issue because the court found that the buyer knew the terms of the license before purchasing the software, the student would be given an “F” for demonstrating such an utter lack of understanding or extreme carelessness in reading the case.<sup>117</sup> But when a brilliant federal judge makes such a statement with full knowledge of the case’s holdings, it appears to reflect something quite different and disturbing—a willingness to engage in intentional misrepresentations to advance a personal conviction.

With respect to the inference that the district court drew in support of its rejection of ProCD’s “terms later” position from the consideration by the American Law Institute of draft section 2-203 of a new UCC provision, Easterbrook purports to dispatch it with a methodology characteristic of that applied throughout the opinion. First, he misstates the more limited inference drawn by the district court that the proposed draft statute was “evidence that the *American Law Institute* views current law as *insufficient to guarantee the enforcement* of standard form contracts such as shrinkwrap licenses,”<sup>118</sup> into the larger inference that “the *American Law Institute and the National Conference of Commissioners on Uniform Laws have conceded the invalidity of shrinkwrap licenses under current law.*”<sup>119</sup> To some, making note of that misstatement of the district court’s rationale may seem to be much concern about so small a point. But that misstatement is characteristic of the methodology used throughout the opinion—so characteristic, in fact, that one cannot dismiss it as mere sloppiness. Rather, this is but another example of misstatement by design, one of the trademarks of the opinion.

Then, to dispatch the mis-described rationale he ascribes to the lower court, Easterbrook merely asserts that it “depends on a faulty

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<sup>116</sup> *Id.* at 766 (emphasis added).

<sup>117</sup> *Cf.* Macaulay, *Common Sense*, *supra* note 10, at 1148.

<sup>118</sup> *ProCD*, 908 F. Supp. at 655 (emphasis added).

<sup>119</sup> *ProCD*, 86 F.3d at 1452 (emphasis added).

inference.”<sup>120</sup> To borrow a phrase from Easterbrook, “So far, so good—but”<sup>121</sup> is there any evidence that there existed a “current rule,” albeit one that needed fortifying, that “terms later” are enforceable? And among the flux of law review articles discussing shrink-wrap licenses, did any state that such terms were currently legally enforceable? One would have thought that if there were any legal authority for such “current rule” that Easterbrook would have cited it. But none was cited, and none existed.<sup>122</sup> Likewise with respect to scholarly comment, if any actually supported the proposition that under then existing law “terms later” were legally enforceable, one would have expected that they would have been cited.<sup>123</sup> But none was cited. Apparently for Easterbrook, the mere

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<sup>120</sup> *Id.*

To propose a change in a law’s *text* is not necessarily to propose a change in the law’s *effect*. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty. To judge by the flux of law review articles discussing shrinkwrap licenses, uncertainty is much in need of reduction—although businesses seem to feel less uncertainty than do scholars, for only three cases (other than ours) touch on the subject, and none directly addresses it.

*Id.*

<sup>121</sup> *Id.* at 1450.

<sup>122</sup> The case authority that had addressed the enforceability of “terms later” in conjunction with sales of software had denied enforcement. See *supra* text accompanying notes 107-17 for discussion of the ways Easterbrook sought to distinguish such authority out of existence.

<sup>123</sup> The scholarly commentary to the contrary was voluminous. See, e.g., Charles J. Goetz & Robert E. Scott, *The Limits of Expanded Choice: An Analysis of the Interactions Between Express and Implied Contract Terms*, 73 CAL. L. REV. 261, 295 (1985); Mark A. Lemley, *Intellectual Property and Shrinkwrap Licenses*, 68 S. CAL. L. REV. 1239, 1249-52 (1995); Symposium, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432, 2516 n.451 (1994) (“Software producers, frustrated by their inability to enforce private restraints on users’ and purchasers’ rights at the federal level, have now persuaded the revisors of Uniform Commercial Code, Article 2A, to recommend validation of similar constraints, including ‘shrink wrap’ licenses, at the state level.”); Pamela Samuelson, *Will the Copyright Office be Obsolete in the Twenty-First Century?* 13 CARDOZO ARTS & ENT. L.J. 55, 61 n.31 (1994); Symposium, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308, 2318 n.26 (1994); Michael D. Scott, *Frontier Issues: Pitfalls in Developing and Marketing Multimedia Products*, 13

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surmise of some other possible (not necessarily plausible) inference is sufficient to make any other a “faulty inference.”

*e. Purported Support from “Master of the Offer” and the Objective Theory*

Easterbrook’s suggestion that draft section 2-203 was designed to “fortify” a “current rule” of enforceability of “terms later” is incredulous. His treatment of UCC section 2-207 and applicable authority construing and applying it is indefensible. But it is his refusal to abide by the particular contract formation rule of UCC section 2-206(1), or to even acknowledge that hornbook law explains that section is a qualification<sup>124</sup> on the general language of UCC section 2-204(1), that opens the door for him to take his “master of the offer” step.<sup>125</sup> By writing as though the only Code provision addressing contract formation was section 2-204,<sup>126</sup> he asks:

What then does the current version of the UCC have to say? We think that the place to start is § 2-204(1): “A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract.”<sup>127</sup>

For Easterbrook it is also the place to end as far as the current

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CARDOZO ARTS & ENT. L.J. 414, 444 (1995); Dennis Cline, Comment, *Copyright Protection of Software in the EEC: The Competing Policies Underlying Community and National Law and the Case for Harmonization*, 75 CAL. L. REV. 633, 662-63 (1987).

<sup>124</sup> JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE HORNBOOK SERIES § 1-5 at 49-50, (5th ed. 2000). “The Code continues the offeror’s common law right to specify that one’s offer may be accepted only in a given manner. But if the offeror does not so specify, 2-206 (1) provides that offers generally invite acceptance ‘in any manner and by any medium reasonable in the circumstances.’” *Id.*

<sup>125</sup> By refusing to abide by section 2-206 formation rules he was also able to ignore section 2-209 and the requirement of express assent to any proposed modification of an existing contract.

<sup>126</sup> U.C.C. § 204(1) (1995).

<sup>127</sup> *ProCD*, 86 F.3d at 1452 (quoting from UCC section 2-204(1)).

version of the Code has anything to say.

The generality of UCC section 2-204(1) is seized upon by Easterbrook as an invitation to draw exclusively from whatever general common law principles would be most helpful to his “terms later” proposition. The common law principle he seizes upon provides: “A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.”<sup>128</sup>

For his application of that principle to this case, Easterbrook treats ProCD as the “vendor” and “master” of the offer.<sup>129</sup> The actual vendor, however, was the retailer from whom Zeidenberg purchased the software. This seems irrelevant to Easterbrook.<sup>130</sup> Yet one wonders by what legal authority a non-party to a sale transaction can prescribe the exclusive method of contract formation for the parties and even prescribe that method in a manner that is unknowable to at least one of the parties prior to the exchange of money and goods. A third party may be a beneficiary of a contract formed by other parties, but it has never been suggested that even an intended third-party beneficiary may control how the actual parties form their contract. Easterbrook does not address those knotty questions, preferring to treat the case as though ProCD had engaged in a direct sale to Zeidenberg.<sup>131</sup>

Even if it had actually involved a direct sale by ProCD but presentation of the software package on the sale shelf of a retailer and exchange of the package in return for payment by the buyer of the purchase price, the vendor as master of the offer principle does not support Easterbrook’s conclusion. Here again, it is Easterbrook suggesting that a rule of law supports his position but failing to disclose what the rule of law really is. For such candid disclosure would reveal the “rule” is actually of no support at all for his position. Easterbrook’s master of the offer theory fails because under the objective theory of contracts, it is not the undisclosed intention of a party that controls the legal import of his words or

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> Zeidenberg purchased the software package at a retail outlet in Madison, Wisconsin, rather than from *ProCD* directly. *Id.* at 1450.

<sup>131</sup> *Id.* at 1448-53.

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conduct, a fact he had previously articulated in such colorful language that it found its way into the Farnsworth treatise.<sup>132</sup> Rather, it is the apparent intention manifested by the words or conduct of a party, judged objectively, that counts. That is why Restatement (Second) Contracts speaks not of actual subjective intention, but rather of “manifestation of intention.”

Many contract disputes arise because different people attach different meanings to the same words and conduct. The phrase ‘manifestation of intention’ adopts an external or objective standard for interpreting conduct; it means that the external expression of intention as distinguished from undisclosed intention. A promisor manifests an intention if he believes or has reason to believe that the promisee will infer that intention from his words or conduct.<sup>133</sup>

In instances where the parties actually attach different meanings to their outward manifestations, Restatement (Second) Contracts establishes what may be called the fault principle for determining whose meaning is legally operative.<sup>134</sup> Applying the objective theory of contracts, it provides that the manifestations operate in accordance with the meaning attached to them by one of the parties if that party had no reason to know of any different meaning attached by the other, and the other had reason to know of the meaning attached by the first party.<sup>135</sup> This fault basis for determining whose understanding of the meaning of manifestations of intention is operative, is fundamental in the analysis of Easterbrook’s implicit steps on the way to his conclusion that the “master of the offer” principle confirms the rightness of his “terms

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<sup>132</sup> See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 3.6 (2d ed. 2001). “By the end of the nineteenth century, the objective theory had become ascendant and courts universally accept it today. In the words of a distinguished federal judge, ‘intent’ does not invite a tour through plaintiff’s cranium, with [plaintiff] as the guide [quoting from Judge Easterbrook’s opinion in *Skycom. Corp. v. Telstar Corp.*, 813 F.2d 810, 814 (7th Cir. 1987), a case applying Wisconsin law].” See also RESTATEMENT (SECOND) OF CONTRACTS § 19 (1981).

<sup>133</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).

<sup>134</sup> RESTATEMENT (SECOND) OF CONTRACTS § 20(2) (1981).

<sup>135</sup> *Id.* at § 20(2)(b) (1981).

later” proposition.

With the objective theory of contracts in mind, consider Easterbrook’s first implicit step: payment and receipt of the purchase price for the software displayed on the sale shelf could not have resulted in a contract for sale because ProCD as the “master of the offer” had *no actual intention to be bound* by a contract at that point in time.<sup>136</sup> But it is hornbook law that there is no requirement that a party must actually intend to be legally bound before his actions can have that effect.<sup>137</sup> Thus, a party will be legally bound if he believes or has reason to believe that the other party will infer that intention from his conduct.<sup>138</sup> “An offer is the manifestation of a willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will *conclude* it.”<sup>139</sup> Thus even if ProCD did not have in mind that its manifestations had the legal effect of being an offer inviting immediate acceptance in any reasonable manner, i.e., by paying the purchase price, it would not alter the legal effect of its conduct.

Easterbrook might counter that it was not a matter of ProCD

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<sup>136</sup> Easterbrook stated that while a contract can be formed simply by paying the price and walking out of the store, “ProCD proposed a contract that a buyer would accept by *using* the software after having opportunity to read the license at leisure.” *ProCD*, 86 F.3d at 1452.

<sup>137</sup> FARNSWORTH, *supra* note 70, at § 3.7, at 120-21.

Parties to agreements, especially routine ones, often fail to consider the legal consequences of the actions by which they manifest their assent . . . . [T]here is no requirement that one intend or even understand the legal consequences of one’s actions . . . . This rule, making a party’s intention to be legally bound irrelevant, has the salutary effects of generally relieving each party to a dispute of the burden of showing the other’s state of mind in that regard and of helping to uphold routine agreements.

*Id.* (emphasis added).

<sup>138</sup> RESTATEMENT (SECOND) OF CONTRACTS § 24 (1982).

<sup>139</sup> *Id.* (emphasis added); see also FARNSWORTH, *supra* note 70, § 3.10, at 132-33. “Conduct that would lead a reasonable person in the other party’s position to infer a promise in return for performance or promise may amount to an offer. . . . One who holds out goods may be taken to be offering them for sale.” *Id.* (citation omitted).

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merely being unmindful of potential legal consequences of its conduct; rather, ProCD had an actual intent *not to permit acceptance of its offer to sell to occur* when the buyer paid the price, and thus an actual intent *not to be bound contractually* at the time of payment. As “master of the offer” it could make acceptance effective only by the method it prescribed in its offer contained in the license agreement.

The law is to the contrary, though. First, an actual intention by a party *not to be bound* is of no legal effect unless the other party knew or had reason to know of that intention.<sup>140</sup> Second, with respect to an offeror’s intention to restrict the way the power of acceptance may be exercised, the objective theory of contracts puts some qualification on the meaning of the “offeror as master of the offer.”

The offeror is often described as ‘the master of the offer.’ In the sense the offeror confers on the offeree the power of acceptance, the offeror has control over the scope of that power and over how it can be exercised . . . . The offeror enjoys a ‘freedom *from* contract’ except on the offeror’s own conditions . . . . Under the objective theory, however, the question is not what the offeror actually sought, but what the offeree had reason to believe the offeror sought, or to express it more succinctly, if less precisely, what the *offer* sought.<sup>141</sup>

In this regard, Restatement (Second) Contracts is also quite explicit.

The offeror is the master of his offer; just as the making of any offer at all can be avoided by appropriate language or other conduct, so the *power of acceptance can be narrowly limited*. The offeror is bound only in accordance with his *manifested* assent . . . . But if he knows or has reason to know that he is creating an *appearance of assent*, he may be bound by that appearance. The considerations apply to the identity of the offeree . . . as well as to the *mode of*

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<sup>140</sup> FARNSWORTH, *supra* note 70, § 3.7, at 121.

<sup>141</sup> *Id.* § 3.12, at 140.

*manifesting acceptance . . .*<sup>142</sup>

Insistence on a particular form of acceptance is “unusual.”<sup>143</sup> Therefore, the established rule is that “[u]nless otherwise indicated by the language or circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.”<sup>144</sup> UCC section 2-206(1), a section that Easterbrook does not apply, puts an even greater burden on an offeror to communicate the special manner of acceptance if he wants to preclude acceptance in any other reasonable manner.<sup>145</sup> It provides: “Unless otherwise *unambiguously* indicated by the language or circumstances,” an offer “*shall be construed* as inviting acceptance in any manner . . . reasonable in the circumstances.”<sup>146</sup>

Additionally, the effectiveness of an offeror’s effort to require a particular manner of acceptance is judged under an objective standard.<sup>147</sup> The “offeror is the master of the offer” principle is thus “mitigated by the *interpretation of offers*, in accordance with common understanding, as inviting acceptance in any reasonable manner *unless there is a contrary indication*.”<sup>148</sup> In particular, whether offers are interpreted to have limited acceptance to a particular manner is governed by the objective theory of contracts and the “fault principle” of Restatement (Second) Contracts section 20.<sup>149</sup> The fault principle makes clear that an offeror cannot defeat the reasonable understanding of the offeree that is based on the observable circumstances accompanying the offer by merely uttering the mantra of “master of the offer” and pointing out that after it received the purchase price and delivered to goods it prescribed a different manner of acceptance.

Easterbrook applies a clearly inconsistent analysis with respect

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<sup>142</sup> RESTATEMENT (SECOND) OF CONTRACTS § 29 cmt. a (emphasis added).

<sup>143</sup> *Id.* § 30 cmt. b (emphasis added).

<sup>144</sup> *Id.* § 30(2).

<sup>145</sup> U.C.C. § 2-206(1) (1995).

<sup>146</sup> *Id.* (emphasis added).

<sup>147</sup> *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 58 (1981).

<sup>148</sup> *Id.* § 58 cmt. a (1981) (emphasis added).

<sup>149</sup> *Id.* § 20(2)(b) (1981). *See supra* text accompanying notes 134-35 for discussion of the fault principle.

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to the offer and the acceptance in *ProCD*. His analysis indefensibly applies the subjective theory of contracts to make effective ProCD's undisclosed intention that its offer could not be accepted by purchase, but rather only by use after purchase.<sup>150</sup> At the same time he applies the objective theory of contracts with a vengeance to declare the purchaser's use of the product is "acceptance," which for the first time gives the purchaser ownership rights, albeit more limited than what he thought at the time he paid his money.

What purchaser of goods off the shelf would ever think he is not entitled to treat them as his own? What purchaser would think the person who sold them to him could tell him he could not use them without agreeing to objectionable terms he had not seen before he paid for them?<sup>151</sup> Professor White has fittingly observed:

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<sup>150</sup> Macaulay, *Relational Contracts*, *supra* note 22, at 779 n.25.

When we look at a ProCD box, Judge Easterbrook's "offer" becomes pure fantasy. The notice is printed on the bottom flap of the box, flanked by a statement in large type that there are 250 million telephone numbers on 11 CD-Roms and the bar code for the scanner. The notice is printed in 6-point type in a space 2 3/4th inches by 1 inch. The notice that there are terms and conditions inside the box begins in the third sentence in this paragraph. Judge Easterbrook relies on U.C.C. § 2-204(1) that talks about making a contract "in any manner sufficient to show agreement." "Agreement," however, is a term defined in the Code. Section 1-201(3) says, "'Agreement' means the bargain of the parties in fact . . . ." Using a conventional objective theory, ProCD's officials had no reason to think that the buyers of its software knew of the offer that Judge Easterbrook sees them making. Perhaps, as Judge Easterbrook says, Article 2 does not require the notice that there is an offer inside the box to be displayed prominently. But if we are looking for the bargain of the parties 'in fact,' it has to be displayed so that a reasonable person might find it. If ProCD's motive had been to hide the clause, it couldn't have done better.

*Id.* See also discussion *supra*, text accompanying notes 56-57 (discussing the preclusion of form terms which the profferor of the form has reason to know the other party would not assent to if he knew of them).

<sup>151</sup> What, for example, would a purchaser of a new car think if, after paying for it and preparing to drive it off the lot, he were told by the sales manager, "Oh, by the way, by turning the ignition on you agree that if you drive this beyond 500 miles of this location you void the warranty?" If the buyer were to tell the manager, in civil terms, to "Jump in the lake; I own this car!" would he be surprised to be told that he did not own it because he had not yet accepted the

Contrary to Judge Easterbrook's suggestion, recognizing the offeror as "master of the offer" does not give him the power to turn the offeree's equivocal acts into acceptance. . . . [T]he offeror has only limited power to add to the acts that the offeree would otherwise intend to be acceptance. . . . [A] term that one accepts all of the terms in the box by tying his shoelaces the morning after its receipt would not be effective. In this setting, use of the product, like tying one's shoelaces, is equivocal. A buyer could easily claim that he had earned the right to use by paying and that no inference of agreement to other terms should be drawn from his use.<sup>152</sup>

In this respect, the type of acceptance that Easterbrook's "terms later" proposition permits sellers to impose is even more offensive than that attempted by those who sent unsolicited merchandise to consumers asserting that the recipient's failure to return meant the recipient agreed to pay for the goods.<sup>153</sup> That is because in the former case the purchaser has already paid for the goods, reasonably believes he owns them, and believes he is legally entitled to keep and use the goods. Additionally, because he has finished his search costs, made the purchase, and believes the transaction has been completed, he does not expect to be confronted with a decision whether to purchase the goods albeit on less favorable terms. Thus he can be easily blindsided by objectionable terms that he may physically receive but is not likely to bother examining.<sup>154</sup> The legislative response has been to

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dealership's offer to sell, which could only be done by turning the ignition on?

<sup>152</sup> White, *supra* note 96, at 63.

<sup>153</sup> See *ProCD v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996); see also Iris Taylor, *Directory Scam is Persistent But Preventable*, RICHMOND-TIMES DISPATCH, Aug. 24, 2003, at D1 (advising complaining customers that unsolicited merchandise is theirs to keep), available at 2003 WL 8032051; Ray Schultz, *Publishers Sued Over Unsolicited Books*, DIRECT, April 1, 2003, at 18 (describing lawsuits by consumers seeking declarations that they can keep unsolicited merchandise as gifts), available at WL 8203585.

<sup>154</sup> See *infra* notes 264-93 and accompanying text (noting the disincentive to study terms after the deal is done and the psychology of not wanting to take time to try to figure out "legal terms").

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condemn the abuses of organizations and individuals who send unsolicited merchandise to consumers with the suggestion that their failure to return the goods meant they agreed to pay for them.<sup>155</sup> Further, because of the power of “negative option” plans (i.e., you accept unless you affirmatively reject) to produce more “acceptances” than would an offer that had to be affirmatively accepted, marketing programs using that technique have generated significant regulation.<sup>156</sup> Easterbrook’s “terms later” proposition presents the seller with even more power than generic negative option plans because his proposition anticipates a very unwary purchaser who is most unlikely to affirmatively reject objectionable terms by refraining from use of the goods he believes he already owns. A purchaser’s use under such circumstances is at best equivocal conduct from which no confident inference could ever be drawn that he agrees to the objectionable terms.<sup>157</sup>

Implicit in the reasonably perceived ownership of the goods by such a purchaser is the price that he sees he must pay to prevent the objectionable “terms later” from being binding upon him.<sup>158</sup> For

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<sup>155</sup> See, e.g., 39 U.S.C. § 3009 (2003) (treating mailing unsolicited merchandise and billing for the same as an unfair method of competition and an unfair trade practice, and provides the recipient may treat the merchandise as a gift); CAL. CIV. CODE § 1584.5 (2003) (providing that recipient may treat unsolicited merchandise as a gift, and if the sender continues to bill for it may sue to enjoin the conduct and be awarded attorneys fees and costs); VA. CODE ANN. § 11-2.2 (2003) (providing that recipient may treat as a gift).

<sup>156</sup> FTC Rules on Use of Prenotification Negative Option Plans, 16 C.F.R. §425.1 (2004). See also Owen R. Phillips, *Negative Option Contracts and Consumer Switching Costs*, 60 S. ECON. J. 304-315 (1993), noting:

The Federal Trade Commission, although voting to permit the use of negative option contracts by marketers, has issued detailed guidelines about the content of negative option contracts. With respect to book and recording clubs, prenotification of shipment is by the vendor is a strict requirement in these contracts. Other prominent features of the guidelines *require vendors to make it plain to the consumer what the costs of exit are before the contract is put into place.*

*Id.* at 314 (citations omitted) (emphasis added).

<sup>157</sup> White, *supra* note 96, at 63.

<sup>158</sup> This assumes, of course, that the purchaser actually has become aware of the objectionable terms and the requirement that he return the goods to avoid being bound by them. But under Easterbrook’s “terms later” proposition it is

the choice is not his to merely decline and thus remain in the same position as before the objectionable terms were proposed. Whatever he chooses will change that position for the worse. Such a buyer confronted with objectionable “terms later” is in a “lose/lose” situation under Easterbrook’s proposition. If he retains the goods, he continues to own them but upon less advantageous terms. If he returns them, he gives up his ownership rights and gets his money back. In either case, his position is worse than before the seller belatedly proposed the objectionable terms. This is a matter that Easterbrook treats of no significance, finding that the buyer who is confronted after the purchase with an onerous demand, for example, “you owe us an extra \$10,000,”<sup>159</sup> can avoid it by returning the item and getting his money back. This, of course, ignores the fact that for the buyer to do so is to give up the benefit of the bargain he had negotiated and paid for.

*f. Purported Support from UCC Section 2-606*

Moreover, this latter point underscores the utter fallacy of Easterbrook’s statement that, “[s]ection 2-606, which defines ‘acceptance of goods’, reinforces this understanding.”<sup>160</sup> His explanation for how that section, which states what constitutes *acceptance of performance under a contract*,<sup>161</sup> reinforces his understanding with respect to what constitutes *acceptance of an offer for purposes of formation of a contract* is a non-explanation that attempts to cloud the radical differences between the two uses of “accepts.” He states:

A buyer *accepts goods* under § 2-606(1)(b) when, after an opportunity to inspect, he fails to make an effective rejection under § 2-602(1). ProCD extended an *opportunity*

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sufficient that he could have become aware of them after he bought the product.

<sup>159</sup> ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996).

<sup>160</sup> *Id.*

<sup>161</sup> U.C.C. § 2-606 (1995). Comment 1 to that section makes clear that section 2-606 has no relevance to contract formation, stating: “Under this Article ‘acceptance’ as applied to goods means that the buyer, *pursuant to the contract*, takes particular goods which have been appropriated *to the contract* as his own. . . .” *Id.* cmt. 1 (emphasis added).

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*to reject* if a buyer should find the license terms unsatisfactory; Zeidenberg inspected the package, tried out the software, learned of the license, and *did not reject the goods*. We refer to § 2-606 only to show that the opportunity to return goods can be important; acceptance of an offer differs from acceptance of goods after delivery [citation omitted]; but the UCC consistently permits the parties to structure their relations so that the buyer has a chance to make a final decision after a detailed review.<sup>162</sup>

Easterbrook, in an apparently strategic move, does not identify the object of the infinitive “to reject” in the second sentence above. It is, of course, an *offer to form a contract*. Had he done so, the second sentence above would have alerted even a casual reader to the disconnect between the subject matter of the first sentence, *acceptance of goods due to a failure to reject the tendered performance under a contract*, and the second, an opportunity to *reject an offer proposing formation of a contract*. The object of the first clause of the second sentence is an *opportunity to reject an offer*. The second clause of that sentence is merely a factual statement that the buyer did not *reject the goods*.<sup>163</sup> There is a world of legal difference between a buyer failing to reject nonconforming goods tendered under an existing contract, and an offeree failing to reject an offer to enter into a contract. Under the former, a buyer is bound to pay for the goods at the contract rate,<sup>164</sup> but retains a damage remedy for breach of contract.<sup>165</sup> Under the latter, if an offeree fails to reject an offer, the only result is that no contract is formed.<sup>166</sup>

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<sup>162</sup> *ProCD*, 86 F.3d at 1452-53 (emphasis added).

<sup>163</sup> In the context of this case it would have been even a more accurate description of Zeidenberg’s conduct to have said Zeidenberg did not *return* the goods. That is because the “rejection of goods” is a Code concept that has legal significance only with respect to instances of *breach of contract*. Note the title of Part 6 of Article 2 is “Breach, Repudiation and Excuse.” U.C.C. intro. Pt. 6 Article 2 (1995).

<sup>164</sup> U.C.C. § 2-607(1) (1995).

<sup>165</sup> U.C.C. § 2-714 (1995).

<sup>166</sup> FARNSWORTH, *supra* note 132, § 3.13. “[A]n offer is a manifestation of assent that empowers another to enter into a contract by manifesting assent in

The third sentence above is most unique in terms of its structure and content, but perhaps not without design. Actually it is three independent clauses, separated only by semicolons, stating three disconnected truisms.<sup>167</sup> There is no legal connection between an opportunity the Code gives to assess performance of the other party under an existing contract on the one hand, and rules governing formation of a contract on the other. Easterbrook's best strategy is merely to lump the concepts into the same sentence without explanation of their connection. Perhaps then a casual reader might be prompted to think their mere physical convergence means there is a similarity among them and thus some vindication for the "terms later" proposition.<sup>168</sup>

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return. If the offeree exercises this power by manifesting assent, the offeree is said to 'accept' the offer. *This acceptance is the final step in the making of a contract*" (citation omitted) (emphasis added). *Id.* After a period of time an offer not accepted simply lapses, thus precluding formation of contract on the basis of the offer. *Id.* at §3.19.

<sup>167</sup> The truism in the third clause appears to be strategically phrased to avoid identifying either what the final decision is that the buyer may make, or of what he is to have had an opportunity to make a "detailed review," i.e., the terms of an offer or the conformity of the tendered goods to the terms of the contract. The design appears to be to leave these matters cloudy enough that a casual reader might infer that the Code equates the effect of an opportunity to review an offer to form a contract with the effect of an opportunity to review goods tendered under an existing contract to see if they conform to the contract.

<sup>168</sup> After all, a person of Easterbrook's writing renown would surely not leave a sentence unclear without purpose. Ledwon, *supra* note 5, at 1074 (pointing out that "Easterbrook is a terrific writer."); see also Mitu Gulati & Veronica Sanchez, *Giants in a World of Pygmies? Testing the Superstar Hypothesis with Judicial Opinions in Casebooks*, 87 IOWA L. REV. 1141, 1168 (2002) (characterizing Easterbrook and Posner as "world-renowned academics" and surmising that driving the success of their opinions in casebooks is "not only their brand of Law and Economics, but also the skill with which they use it—the fact that they are skilled writers whose opinions rank among the highest on the scales of criteria such as humor, irreverence, and originality."); Barry A. Miller & Thomas R. Meites eds., *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 747 (1994) (describing Easterbrook as a "prolific and influential writer.").

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*g. Purported Support from the Code’s “Separately Stated”  
Terms Provisions*

Easterbrook’s final effort to put forth legal support for his “terms later” proposition is derived from the Code’s provisos that certain matters must be “conspicuous”<sup>169</sup> or “separately stated”<sup>170</sup> to be effective. He suggests the import of such provisos for his “terms later” proposition as follows:

These special provisos reinforce the impression that, so far as the UCC is concerned, other terms may be as inconspicuous as the forum-selection clause on the back of the cruise ship ticket in *Carnival Cruise Lines*.<sup>171</sup> Zeidenberg has not located any Wisconsin case—for that matter, any case in any state—holding that under the UCC the ordinary terms found in shrinkwrap licenses require any special prominence, or otherwise are to be undercut rather than enforced.<sup>172</sup>

This conclusion rests on a faulty and unspoken assumption that because ordinary terms actually disclosed to the buyer prior to purchase, albeit in ordinary font size, are effective, such terms concealed from the buyer until after purchase must also be effective.

Notwithstanding his valiant effort to create the *appearance* of

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<sup>169</sup> *ProCD Inc. v. Zeinberger*, 86 F.3d 1447, 1453 (7th Cir. 1996) (disclaiming the implied warranty of merchantability).

<sup>170</sup> *Id.* (A firm offer under §2-205 in which the assurance of irrevocability is on a form supplied by the offeree, must be separately *signed* by the offeree to be effective. A term excluding oral modifications under § 2-209(2) which appears on a form supplied by a merchant must be separately *signed* by the other party to be effective.)

<sup>171</sup> *ProCD*, 86 F.3d at 1453 (referring to *Carnival Cruise Lines v. Shute*, 499 U.S. 585 (1991)). Lest one get the impression that the forum selection clause in *Carnival Lines* was on the back of some little ticket stub, the opinion in the case makes it clear that the ticket was a “three page document;” and further that the question whether the Shutes had sufficient notice of the forum clause before entering the contract was not addressed because they “essentially ha[d] conceded that they had notice of the forum-selection provision.” *Carnival Cruise Lines*, 499 U.S. at 590.

<sup>172</sup> *ProCD*, 86 F.3d at 1453.

legal support for his “terms later” proposition, something necessary for a legal realist,<sup>173</sup> the stark reality is that there is none. Rather, his “legal support” is merely an illusion crafted by a brilliant federal judge<sup>174</sup> known as a terrific writer,<sup>175</sup> who is willing to cast aside basic intellectual honesty to create an appearance of legal support for his novel policy-making. It is a demonstration of legal realism that could shock a legal realist.<sup>176</sup>

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<sup>173</sup> See Joseph William Singer, *Review Essay, Legal Realism Now*, 76 CAL. L. REV. 467, 472-73 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)). Singer notes:

A judge can almost always construct arguments for a ruling “on either side of a new case.” At the same time, the judge must construct an argument based on existing principles of law, and “there are not so many that can be built defensibly.” This is because it is not always possible to construct an argument that will be plausible—meaning persuasive—to other judges and lawyers familiar with the relevant precedents. *To be persuasive*, the argument must tie the proposed result to existing practice in a way that *appears not to deviate* from fundamental principles underlying prior law; this is determined partly by professional consensus, partly by community views, and partly by the substantive content and organization of existing law. Thus, the fact that the judge must justify the decision by conventional legal arguments constrains her, not because the law itself logically requires the result, but *because the argument for a change in the law must appear to fit* with existing practice, and more importantly, the argument must persuade a particular audience that is likely to be conservative about such matters.

*Id.* at 472-73 (citations omitted) (emphasis added).

<sup>174</sup> See Marc M. Harrold, Essay, *Stripping Away at the First Amendment: The Increasingly Paternal Voice of Our Living Constitution*, 32 U. MEM. L. REV. 403, 415 at n.42 (2002) (naming Judge Easterbrook as a likely nominee to the U.S. Supreme Court if George W. Bush were to win the 2000 Presidential election (citing Stuart Taylor Jr., *The Supreme Question—Picking the Next Justice*, NEWSWEEK, July 10, 2000, at 23)).

<sup>175</sup> See, e.g., Ledwon, *supra* note 5, at 1074.

<sup>176</sup> Legal realism is a pragmatic movement in the law. Its two major facets are: (1) a rejection of a concept of law as grounded in permanent principles and realized in logical application of those principles, and (2) a determination to use law as an instrument for social ends. LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960*, 3-7 (1986); Richard A. Posner, Symposium on the Renaissance of Pragmatism in American Legal Thought: *What Has Pragmatism*

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to Offer Law?, 63 S. CAL. L. REV. 1653, 1670 (1990); Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 467, 468-70, 475 (1988) (reviewing Laura Kalman, *LEGAL REALISM AT YALE: 1927-1960* (1986)). Legal realism’s pragmatic attitude treats “law as made, not found.” *Id.* at 474. Singer elaborates the point as follows:

Law therefore is, and must be, based on human experience, policy, and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends. Law and legal reasoning are a part of the way we create our form of social life.

*Id.* With respect to its first facet, legal realism has had widespread success within the profession and within the legal academy, except among the few natural law theorists that remain. As to its second facet, among those who embrace legal realism’s pragmatic approach there is no disagreement over the use of law as an instrument for social ends. The only disagreement is over how to determine what the proper social ends are, and as to that the various diverse modern schools have markedly different views. Professor Tamanaha captured the latter point with this observation:

One consequence of this shift toward instrumentalism is that the current state of U.S. legal theory consists of what some have called “postmodern jurisprudence,” a plethora of competing approaches, each representing a particular normative or interest group perspective, each arguing that law should serve the interests they tout. Legal theory has become thoroughly and openly politicized.

Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, And the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 316 (1996) (citations omitted). The core facets of legal realism that were embraced in an earlier era by luminaries such as Holmes, Cardozo and Pound are now reflected in legal realism’s “refurbished modern form.” Posner, 63 S. CAL. L. REV. at 1653. The modern form is often now described as Legal Pragmatism, and sometimes as Pragmatic Instrumentalism or Legal Functionalism. See, e.g., Peter Nash Swisher, *Judicial Rationales in Insurance Law: Dusting Off the Formal for the Function*, 52 OHIO ST. L.J. 1037, 1040-41 nn.17, 18, 19 (1991); and Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought*, 66 CORNELL L. REV. 861, 863-64 n.2 (1981). Under the contemporary umbrella of Legal Pragmatism comfortably fit “prominent representatives of the left, center, and right in U.S. legal theory—of critical legal studies, critical feminism, critical race theory, law and economics, and of the mainstream scholars who otherwise hold sharply divergent opinions about law.” Tamanaha, *supra*, at 316. From beneath its broad coverage each can freely argue its perspective for determining the proper social ends. See also Post, *supra* note 5, at 1226. (“The jurisprudence

Because the pretense is so apparent, *ProCD* is a classic example of legal realism in operation and supports the assessment of Critical Legal Studies theorists that what courts engage in is mere exercise of power, not law.<sup>177</sup>

*B. Hill v. Gateway 2000, Inc.*

In *ProCD*, Easterbrook placed considerable emphasis upon ProCD's extensive costs in developing its software, the essential vulnerability of software to copying, and his own perception of the necessity of its being able to discriminate in price to most effectively profit from its creativity.<sup>178</sup> That, coupled with his earlier expressions on the special importance of bringing an *ex ante* perspective to intellectual property cases to best assure the proper balance between fostering creativity and encouraging free use,<sup>179</sup> may have prompted some to suppose his novel rule about contract formation is confined to cases involving the proper use of intellectual property. Such supposition was, however, short-lived. Seven months later, in an opinion for another panel of the Seventh Circuit, Easterbrook announced that the "terms later" rule of contract formation annunciated in *ProCD* was "about the law of contract, not the law of software."<sup>180</sup>

*1. Judge Easterbrook's "Terms Later;" Round Two*

In *Hill v. Gateway 2000, Inc.*, Gateway advertised its tenth anniversary system in *PC World Magazine* and other media directed at computer buyers.<sup>181</sup> The Hills responded to the advertising by placing a phone order for the system and paying for

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of Frank Easterbrook shocks me because I am, admittedly, a legal realist or at least an admirer of the legal realists.").

<sup>177</sup> See ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 170-81 (1976).

<sup>178</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449-50 (7th Cir. 1996).

<sup>179</sup> See Easterbrook, *supra* note 81.

<sup>180</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1149 (7th Cir. 1997).

<sup>181</sup> *Hill v. Gateway 2000, Inc.*, 1996 WL 650631 (N.D. Ill. 1996).

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the same with their credit card.<sup>182</sup> Following the phone order and receipt of payment by credit card, Gateway shipped the tenth anniversary system in a box that also contained a “Standard Terms and Conditions Agreement.”<sup>183</sup> The Hills had not seen these materials before paying for and receiving the system and had no prior notice of their content, including the arbitration clause and the provision that failure to return the system within thirty days of receipt constituted their agreement to all of the terms, including the prescribed method for formation of contract.<sup>184</sup> When the Hills brought a class action suit against Gateway asserting a civil Racketeer Influenced and Corrupt Organizations Act (RICO) claim and other claims, Gateway moved to require arbitration pursuant to the arbitration clause contained in the materials in the box.<sup>185</sup> The trial court refused to enforce the arbitration agreement.<sup>186</sup>

*a. ProCD as Precedent*

On the strength of *ProCD* and his own view of practicality and common sense, Easterbrook found the Hills bound by the “terms later” that showed up in the box among the packing materials and the parts of the computer system.<sup>187</sup> For Easterbrook, *ProCD* applied to the dispute in *Hill* because:

“A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance. A buyer may accept by performing the acts the vendor proposes to treat as acceptance.” [citing *ProCD*]. Gateway shipped computers with the same sort of accept-or-return offer *ProCD* made to users of its software. *ProCD* relied on the Uniform

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<sup>182</sup> *Hill*, 105 F.3d at 1148.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 1148 (holding that “the present record is insufficient to support a finding of valid arbitration or that the plaintiffs were given adequate notice of the arbitration clause”).

<sup>187</sup> *Hill*, 105 F.3d at 1150 (stating the “[b]y keeping the computer beyond 30 days, the Hills accepted Gateway’s offer, including the arbitration clause”).

Commercial Code rather than on any peculiarities of Wisconsin law [and there is nothing atypical of the UCC in either Illinois or Wisconsin]; *ProCD* therefore applies to this case.<sup>188</sup>

In *Hill*, unlike the facts in *ProCD*, there was no notice, not even fine print notice, to alert the Hills prior to the time they ordered and paid for the system to expect that other terms were part of the sales contract.<sup>189</sup> Unlike *ProCD*, in *Hill* the seller had not configured its system to flash a message across the screen that the Hills could not possibly have missed when the system was operated (or that otherwise came so unavoidably to their attention) alerting them to the consequences of their retaining the system beyond thirty days.<sup>190</sup> Furthermore, in *ProCD* the parties agreed that the retail seller (*ProCD*'s surrogate for Easterbrook) was the offeror, providing Easterbrook with at least an apparent justification to spin his distorted "master of the offer" argument upon which *ProCD* was ultimately based;<sup>191</sup> but in *Hill* the buyers made the offer in response to Gateway's advertisements which were nothing more than invitations for offers.<sup>192</sup> In *Hill* it was only in response to the buyers' telephone order that Gateway shipped the system, thus triggering UCC section 2-206(1)(b), a Code

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<sup>188</sup> *Id.* at 1149.

<sup>189</sup> See *supra* note 59 and accompanying text. Recall that in *ProCD* "[n]otice on the outside, terms on the inside," was the first ground upon which Easterbrook relied to make it appear that existing law supported his "terms later" proposition.

<sup>190</sup> In *ProCD*, Easterbrook noted: "ProCD proposed a contract that a buyer would accept by *using* the software after having an opportunity to read the license at leisure. This Zeidenberg did. He had no choice, because the software splashed the license on the screen and would not let him proceed without indicating acceptance." *ProCD*, 86 F.3d at 1452.

<sup>191</sup> *Id.* at 1452.

<sup>192</sup> RESTATEMENT (SECOND) OF CONTRACTS § 26 cmt. b (1981) ("Advertisements of goods by display, sign, handbill, newspaper, radio or television are not ordinarily intended or understood as offers to sell . . . there must ordinarily be some language of commitment or some invitation to take action without further communication."); FARNSWORTH, *supra* note 132, at § 3.10 at 137 (stating that "proposals made to the public through advertisements, posters, circulars, and the like . . . are generally held not to be offers").

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formation of contract provision not involved at all in *ProCD*, and which provides: “an order or other offer to buy goods for prompt or current shipment *shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment* of conforming or nonconforming goods.”<sup>193</sup> The facts in *Hill* suggest that Gateway probably accepted the Hills’ offer to purchase in the phone conversation by an oral promise to ship. If it did not make such a promise, then in any event, as numerous commentators have noted, Gateway accepted the Hills’ offer by its prompt shipment in response to the order.<sup>194</sup>

In applying *ProCD*’s “terms later” rule to the facts of *Hill*, Easterbrook disregards the actual facts and statutory and common law rules related to offer and acceptance and contract formation. Instead, the economics/legal realist jurist, emboldened from his recent transformation of contract formation law with respect to intellectual property, now brazenly imposes his version of efficiency on all sales transactions. His peculiar version of efficiency is, of course, quite simple: Whatever way vendors prefer to operate their businesses and to form contracts is efficient, and the law should facilitate that. If a vendor prefers to conceal adverse terms of the deal until after the buyer has paid and then also prefers to disclose them in a way that only theoretically, rather than actually, brings them to the buyer’s attention, and further prefers a rule that failure to affirmatively reject by returning the goods and giving up the deal means the buyer accepts the terms, then it must be efficient and the vendor should be permitted to have his way.

Therefore, the Code and common law rules of contract formation are interpreted to not interfere with efficient vendor practices. And the common law rule that assent by a party is limited only to terms that the party knew or had reason to know does not apply if “vendors” prefer that a party be deemed to have assented to terms presented in a fashion designed to avoid discovery until too late to object. Nor does the common law rule precluding a party from forcing the other party to affirmatively

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<sup>193</sup> U.C.C. § 2-206(1)(b) (1995) (emphasis added).

<sup>194</sup> See, e.g., Braucher, *supra* note 5, at 1820; Ghosh, *supra* note 5, at 1132-34; David J. DePippo, Comment, *Dear Sir or Madam: You Cannot Contract in a Closet*, 35 U. RICH. L. REV. 423, 445-46 (2001); Gale, *supra* note 5, at 583.

object to a proposed term in order to avoid its imposition apply to “vendors” if they prefer to force not merely an affirmative objection but rather an affirmative rejection in the form of returning the goods and giving up the deal. All of that being so, for Easterbrook the distinctions between the facts of *ProCD* and *Hill* are of no consequence. Thus the fact that in each case the “vendor” found it preferable to utilize a “terms later” formation method of doing business, ergo it was efficient, was at once the sole fact relevant in each, and also the sole fact sufficient to make the “terms later” rule of *ProCD* applicable and controlling in *Hill*.

Coupled with his prioritizing the vendor’s preference in the name of “terms later” contracting is his folksy, story-style description of the facts of the dispute before the court. Only a person of Easterbrook’s exceptional writing ability could craft a story so artfully as to suggest to the reader the nature of the case and what the dispute might be about, without using legal terms or even ordinary English words like “called,” “ordered,” “paid for,” and “delivered” to describe what happened.

A customer picks up the phone, orders a computer, and gives a credit card number. Presently a box arrives, containing the computer and a list of terms, said to govern unless the customer returns the computer within 30 days.<sup>195</sup>

Did the customer pick up the phone to answer an incoming call, or did he pick up the phone to place a call? The story does not tell us. Who was on the other end of the line when the customer picked up the phone and ordered a computer? Was the order the customer made for a trial use of a computer, or was it a commitment to buy one? Was the credit card number given for identification reasons, for security to show the customer had the capability of paying for the computer in case he chose to buy it after a trial period, or was it payment for a computer he had just agreed to buy and the computer company had promised to sell? No help from the story for figuring out the answers to those questions either. Was the computer even sent by the person or entity the customer spoke with on the phone, or did it come just out of the blue on the front step from some other source? One cannot tell from the story

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<sup>195</sup> Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1148 (7th Cir. 1996).

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whether it was an unanticipated arrival or whether it was the anxiously anticipated delivery of their new computer for which they had already paid more than \$4,000.

Leaving the reader in the dark about the actual facts of the case (because they would show a completed sales transaction either when the phone conversation ended with an agreement to ship the goods in exchange for the credit card payment already received, or at the least, when the goods were promptly shipped in response to the order), allows Easterbrook to then phrase the issue in a fashion designed to make only one answer rational. He phrases the issue as:

Are these terms [that arrive with the box] effective as the parties' contract, or is the contract term-free because the order taker did not read any terms over the phone and elicit the customer's assent?<sup>196</sup>

Either the contract has terms, i.e., the terms that arrived in the box, or the contract is “term-free.” The second choice is patently absurd. All contracts have terms. The very expression “contract term-free” is an oxymoron. Therefore, the first choice must be correct. Easterbrook does not explore whether there was a contract with the terms the parties agreed to in the phone conversation, or a contract made up of the terms of the offer that was accepted by Gateway shipping the computer. Best to just not raise those issues, making it easy to move directly to his “terms later” rule of *ProCD*.

His “legal analysis” has drawn heavy and well-deserved criticism. Professor Macaulay, observed, “Whatever the virtues of Judge Easterbrook’s Gateway opinion, it *gets an ‘F’ as a law exam*. It is a *pitiful reading of the UCC*, ignoring the definition of ‘agreement’ that was so important to Llewellyn.”<sup>197</sup> Professor Braucher noted, “[t]his is *dubious contract and commercial law*,”<sup>198</sup> pointing out that the analysis did not even cite UCC section 2-206(1)(b), the controlling Code contract formation section directly applicable to the case, “let alone explain how it was ‘unambiguously indicated’ that the Hills’ order did not invite

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<sup>196</sup> *Id.*

<sup>197</sup> Macaulay, *Common Sense*, *supra* note 10, at 1148 (emphasis added).

<sup>198</sup> Braucher, *supra* note 5, at 1820 (emphasis added).

acceptance by a promise to ship or by actual shipment.”<sup>199</sup> Professor Braucher further noted that the analysis erroneously disregarded the statutory language of section 2-207, ignored the comment language to section 2-207, and also ignored the logic of section 2-207.<sup>200</sup>

*b. Purported Common Sense*

Easterbrook’s practicality and common sense arguments assert in essence that “[c]ustomers as a group are better off”<sup>201</sup> if “vendors” are permitted to impose adverse terms upon them under the pretended assent theory of his “terms later” policy. He posits:

Practical considerations support allowing vendors to enclose the full legal terms with their products. Cashiers cannot be expected to read legal documents to customers before ringing up sales. If the staff at the other end of the phone for direct-sales operations such as Gateway’s had to read the four page statement of terms before taking the buyer’s credit card number, the droning voice would anesthetize rather than enlighten many potential buyers. Others would hang up in rage over the waste of their time. And oral recitation would not avoid customers’ assertions

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<sup>199</sup> *Id.* at 1820-21.

<sup>200</sup> *Id.* at 1821-23. *See also* Post, *supra* note 5, at 1223-25 (emphasis added) (“Judge Easterbrook *did violence to Article 2* . . . . [He] *creates a false dichotomy* in the first paragraph of the opinion contrasting a contract with ‘no terms’—ignoring the terms the statute supplies, including warranties of merchantability—with a contract with the terms drafted by the seller.”); Ghosh, *supra* note 5, at 1132 (emphasis added) (faulting Easterbrook for “*reconstituting* the manner in which the contract was formed,” in order to avoid having to explain why UCC § 2-206(1)(b) did not compel a decision in favor of the Hills). Law student commentators have also participated in the discussion. *See, e.g.*, French, *supra* note 5, at 813 (characterizing the court’s consideration of the provisions of the Code as “sloppy”); Gale, *supra* note 5, at 583 (asserting that “Easterbrook[’s] analysis . . . seems to ignore the basic facts of *Hill* as well as the provisions of the U.C.C.”); Hazelwood, *supra* note 5, at 1316 (concluding that Easterbrook “misapplies and misinterprets the contract formation provisions of the [Code]”).

<sup>201</sup> *Hill*, 105 F.3d at 1149.

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(whether true or feigned) that the clerk did not read term X to them, or that they did not remember or understand it. Writing provides benefits for both sides of commercial transactions. Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread.<sup>202</sup>

If the approve-or-return “device” were such a benefit to customers, sellers would likely tout it in their promotions. Perhaps the fact that Gateway did not do so is an indication that its marketing personnel did not believe that advertising it was holding terms back would cause potential buyers to think they were getting a better deal. After all, it is difficult to imagine a buyer who would think delayed disclosure was desirable, or who would think that delayed disclosure meant he was getting a lower price either because the later disclosed terms would reduce Gateway’s litigation costs or because holding back terms reduced its selling costs.<sup>203</sup> In fact, as

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<sup>202</sup> *Id.*

<sup>203</sup> Of Easterbrook’s assertion that customers as a group are better off if sellers hold back terms, Professors Horsburgh and Cappel find Easterbrook’s logic problematic, noting “surely, considerations of efficiency dictate that the information costs be borne by the seller, the lowest cost avoider. No rational consumer would be willing to incur the high social costs involved in acquiring information about expensive and complicated merchandise.” Horsburgh & Cappel, *supra* note 5, at 1122 n.117 (citations omitted). Professor Ghosh observes:

The Judge reasons that customers are made better off by the approve-or-return policy. There is no elaboration on how these benefits arise except in reducing the costs to the vendor or engaging in what the Judge characterizes as long and ineffective recitation of terms. Presumably, these costs are passed on to the consumer. Furthermore, the Judge discusses how competent adults are bound by terms, whether they are read or not. There is an analogy with market exchange that is being made in this discussion. If I pay X dollars for a product, there is a presumption that I value the product at X dollars or more. The consent principle in contract is a proxy for the efficiency of the contract. The Judge is expanding the consent principle quite a bit here and is engaging in part in propter hoc reasoning. His logic can be described as follows: approve-or-return benefits consumers. Therefore, consenting

noted by Professor Ghosh, “[t]he effect of enforcing both the arbitration clause and the approve-or-return policy is to *protect companies* that sell products with latent defects which are difficult to detect.”<sup>204</sup>

Easterbrook is correct in describing Gateway’s practice as a “device,” but it is not one with a noble purpose, as the economic literature discloses.<sup>205</sup> It is a deceptive strategy under the guise of efficiency to bind customers to adverse terms concealed from them until after they have made the purchase decision and parted with their money. One commentator put it this way: “[T]he practice of holding back terms until after payment and delivery should be deemed an unfair and deceptive practice . . . . This practice inhibits shopping and misleads consumers about the nature of the deal at the crucial time, which is before psychological commitment.”<sup>206</sup> Another described Easterbrook’s “terms later” ruling in *Hill* in even less flattering terms: “Judge Easterbrook and the judges who have followed his opinion tell us that misrepresentation is the oil that lubricates capitalism . . . [i]t is okay for Gateway to hide what it is doing.”<sup>207</sup>

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to approve-or-return policies would promote efficiency. Since these terms arose from an approve-or-return policy, the terms must be efficient and enforced. However, there is a presumption of consent in this reasoning. There is an even stronger assumption that since consent implies efficiency, the efficiency of terms would imply that a customer would consent to them. This last point is specious not only because of the confusion of necessary and sufficient conditions, but also because it is not clear what is the basis for determining that certain terms are efficient, other than the court’s ipse dixit.

Ghosh, *supra* note 5, at 1139.

<sup>204</sup> Ghosh, *supra* note 5, at 1138.

<sup>205</sup> See discussion *infra* Part II.

<sup>206</sup> Braucher, *supra* note 5, at 1827.

<sup>207</sup> Macaulay, *Common Sense*, *supra* note 10, at 1148-49. Macaulay also comments:

If we think that choice is an important value, we cannot be content with polite evasions such as: there is a duty to read and understand a document written in a code (legal English) and buried in a box. The doctrine of reasonable expectations exists largely in insurance to limit what can be hidden by lawyers in documents which they know will not

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Easterbrook’s practicality analysis posits that the direct marketing vendors can only orally convey terms of the bargain to customers prior to purchase. A variety of inexpensive ways are available to vendors for written disclosure of terms prior to purchase, however, including the very ads and computer magazines in which Gateway touted all of the positive features of its product and support service.<sup>208</sup> In this information age it could post all contract terms on its web page for potential buyers to view at their leisure. Nor would it require four pages of legalese or even a few short sentences over the phone to communicate that arbitration is required, that the seller does not promise the product will work, or that if the buyer is hurt by the product the buyer cannot sue the seller.<sup>209</sup> Even the brick and mortar retail store

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be read and understood. In an impossibly just world, measured by my preferences, this doctrine would apply to all form contracts. Given the cost barriers to litigation, it wouldn’t raise the price of goods enough to matter. I suspect that the impact would be largely symbolic, but I like symbolizing that *fraud from fancy offices is a bad thing*. It would make some corporate lawyers unhappy, but it couldn’t happen to a better bunch of people. Instead of the “safe harbors” that they demand, they deserve harbors filled with mines put down in random patterns. There is a simple safe harbor that they work hard to avoid: *don’t try to deceive people*.

You could challenge me: Suppose Gateway advertised in big type as they puff their products, and said “if there is trouble, you must trust us to fix the computer because you have no legal remedy.” Would it make any difference? Wouldn’t customers just accept this? Would any of them understand what risks they would be taking? Would competitors jump in and advertise that they didn’t take away legal rights? Of course, this is but a mind experiment. We’ll never know. *Gateway and its legal staff work hard to hide that this is what they are doing with their arbitration clause that creates a Kangaroo Court*.

*Id.* (emphasis added).

<sup>208</sup> See Jean R. Sternlight, *Recent Decision Opens Wider Gateway to Unfair Binding Arbitration*, 8 WORLD ARB. & MEDIATION REP. 129, 132 (1997).

<sup>209</sup> Braucher, *supra* note 5, at 1828-29.

Why exactly does Gateway need four pages of terms? Why can’t Gateway primarily use the background terms of the U.C.C., which need not be mentioned to become part of the contract? There are good arguments for disclosure of key terms even in telephone transactions. If

operation can spare its cashiers the drudgery and inefficiency of reading terms to each customer before taking the payment: If it has an arbitration policy it can easily post it in the same places it typically posts its policies for returns and charges for bad checks.

One commentator has characterized Easterbrook's overall analysis in *Hill* as lacking in imagination,<sup>210</sup> an accurate assessment with respect to his premise that only oral communication of terms is possible, which in turn gives the appearance of supporting his "terms later" rule of contract formation. But it is not really a matter of lack of imagination but rather a lack of honesty coupled with a ruthlessness to employ whatever strategy is necessary to facilitate *preferred* vendor practices, or, in Easterbrook's framework, *efficient* vendor practices.<sup>211</sup>

*c. Purported Irrelevance of Notice and the Common Sense of Ignoring Its Lack*

Easterbrook addresses the issue of providing notice to the Hills prior to their purchase by faulting them for not discovering the

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a particular term cannot be easily explained, it may be because the term is inherently too complex and unfair for a consumer to understand and knowingly give assent to it.

*Id.*

<sup>210</sup> Post, *supra* note 5, at 1230-31. "Easterbrook's analysis lacks an appreciation for history and for the values and desires (not translatable into dollars and cents) that animate human beings. It lacks the imagination (sometimes called empathy) that would allow him to see the full consequences of the decision he reached in the Gateway case." *Id.*

<sup>211</sup> *Id.* at 1230.

Judge Easterbrook employed an "end game" strategy. The subject of the dispute, however that is defined—whether it is the quality that a consumer can reasonably expect from a computer manufacturer or the willingness of consumers to submit disputes to arbitration—has been settled with finality. A rule has been stated and the facts constructed—the vendor is the offeror, the offeror is master of the offer and § 2-207 does not apply when there is only one form. There can only be one outcome. The vendor wins. End of conversation.

*Id.* (citation omitted) (emphasis added).

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adverse terms and objecting to them by returning the computer. For him the matter is elementary—the vendor need not give notice in advance that other terms governing the transaction are in the box because buyers like the Hills know other terms are going to come with the box.<sup>212</sup>

If Easterbrook is so sure buyers like the Hills know other terms governing the transaction will be coming after they pay for the goods, therefore obviating any need for notice, one wonders why seven months earlier he did not say the same for a buyer like Zeidenberg. Surely Zeidenberg must have known that there would

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<sup>212</sup> Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1150 (7th Cir. 1997) (citation omitted). Putting the onus on purchasers to ferret out undisclosed terms, Easterbrook notes:

Perhaps the Hills would have had a better argument if they were first alerted to the bundling of hardware and legal-ware after opening the box and wanted to return the computer in order to avoid disagreeable terms, but were dissuaded by the expense of shipping. What the remedy would be in such a case—could it exceed the shipping charges?—is an interesting question, but one that need not detain us because the Hills knew before they ordered the computer that the carton would include *some* important terms, and they did not seek to discover these in advance. Gateway’s ads state that their products come with limited warranties and lifetime support. How limited was the warranty—30 days, with service contingent on shipping the computer back, or five years, with free onsite service? What sort of support was offered? Shoppers have three principal ways to discover these things. First, they can ask the vendor to send a copy before deciding whether to buy. The Magnuson-Moss Warranty Act requires firms to distribute their warranty terms on request . . . the Hills do not contend that Gateway would have refused to enclose the remaining terms too. Concealment would be bad for business, scaring some customers away and leading to excess returns from others. Second, shoppers can consult public sources (computer magazines, the Web sites of vendors) that may contain this information. Third, they may inspect the documents after the product’s delivery. Like Zeidenberg, the Hills took the third option. By keeping the computer beyond 30 days, the Hills accepted Gateway’s offer, including the arbitration clause.

*Id.* Easterbrook’s suggestion that it is more efficient for consumers to search out terms than for sellers to disclose them is not supported by any empirical evidence, nor could it be, and it is contrary to economic reality. *See infra* Part II notes and text relating to transaction costs.

be some important terms inside the shrink-wrap or on the disk such as installation and operating instructions, or how to obtain help in operation and the like. Perhaps the reason is that as a legal realist Easterbrook simply made use of what was available to create the appearance that his radical “terms later” proposition was dictated by well-accepted contract formation principles. After all, the shrink-wrap package did make a reference, albeit in fine print and perhaps not actually noticed by the purchaser, to a license inside.<sup>213</sup>

Of course, to give his “terms later” proposition the appearance of law, it was certainly easier to lay the groundwork by saying, “Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends) may be a means of doing business valuable to buyers and sellers alike.”<sup>214</sup> That is what provided the opportunity to deceptively suggest that scholarly authority and Restatement (Second) Contracts, which rejected such a proposition, actually supported it.<sup>215</sup> Because as a legal realist Easterbrook must always give an appearance of legal authority for his legal propositions, “Notice on the outside, terms on the inside,” is certainly more strategic than blatantly saying “terms prescribing contract formation rules concealed from the buyer until after purchase are binding on the buyer.” “Notice on the outside, terms on the inside” has a nice ring to it that still conveys the impression, along with his misstatements of law, that might persuade some readers that “terms later” contract formation was standard legal doctrine. And for those who might be skeptical, the significance he apparently attached to at least a theoretical warning by the vendor of “terms later” might allay their worst fears, persuading them that at most this was but a half-step beyond established contract formation doctrine, rather than a wholesale abandonment of it and the fundamentals of assent.

By the time the Hills appeared before his court, Easterbrook was equipped with the rule of *ProCD*: Vendors are permitted to

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<sup>213</sup> Hill v. Gateway 2000 Inc., 105 F.3d 1147, 1150 (7th Cir. 1997).

<sup>214</sup> *ProCD*, 86 F.3d at 1451. See also *supra* notes 50-57 and accompanying text.

<sup>215</sup> *ProCD*, 86 F.3d at 1451.

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bind buyers to prescribed contract formation rules that they conceal until after the buyer has committed to the purchase and has paid the price.<sup>216</sup> The reason for the rule is efficiency; what is good for vendors is good for everyone.<sup>217</sup>

Furthermore, because buyers already know vendors are going to do this, notice is irrelevant. If Easterbrook’s explanation of the difficulties of conveying information about terms to consumers lacked imagination, he demonstrated an overactive imagination in dispensing with any need for advanced warning of objectionable terms. He must imagine that buyers as a class make or endeavor to make Kaldor-Hicks efficient bargains and that they thus must know contract formation according to vendors’ concealed rules is efficient; and that compelling buyers to discover the concealed terms is more efficient than requiring that vendors simply disclose them prior to purchase; and armed with that knowledge, of course they know to expect undisclosed terms and of their duty to search for them.<sup>218</sup>

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<sup>216</sup> *But see supra* notes 55-57 and accompanying text (explaining the Restatement (Second) Contracts’ position on “terms later” contracting).

<sup>217</sup> *See supra* note 203.

<sup>218</sup> Thomas W. Joo, *Common Sense and Contract Law: Fear of a Normative Planet?*, 16 *TOURO L. REV.* 1037 (2000). Joo notes:

According to the Gateway court, the Hills should have assented to the accept-or-return device because it is efficient; therefore they constructively did assent. Could they rebut the presumption of majoritarian expectations with proof that they genuinely entertained deviant expectations (i.e., unlike most folks, they do not make Kaldor-Hicks efficient bargains)? Apparently not; the court (like most courts) is uninterested in their subjective expectations. Enforcing a contract in accord with the expectations of most people rewards conformist expectations and punishes nonconformist expectations. As every good law-and-economist knows, a judicial decision that sets majority sentiment as the default rule today will put all tomorrow’s deviants on notice that they should bargain around the default rule; thus future deviants who do not explicitly contract around the default rule can be presumed, like non-deviants, to have subjectively assented to it. However, that theory, even if we accept it, focuses on the contractual freedom of *future parties and not on that of the Hills and their class—who are, after all, the parties before the court. It sounds communitarian, rather than libertarian, to sacrifice today’s litigants,*

Only with that kind of imagination can he so easily dispatch any need for notice and create a purely artificial assent. As two commentators have observed, however, the premise for Easterbrook is that consumers in a transaction like that in *Hill* use rationalist seriosymbolic<sup>219</sup> reasoning in which they “engage in deliberations and carefully consider the consequences of their bargains. Yet in ruling against the need for notice, [Easterbrook] *dispensed with the very means by which this logical and cautious style of thought could ensue.*”<sup>220</sup> Because consumers in transactions like that in *Hill* are most likely to be engaging in connectionist reasoning,<sup>221</sup> they are all the more vulnerable to

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*deviant though they may be, to enhance the contractual liberty of future parties.*

*Id.* at 1047-48 (citations omitted) (emphasis added).

<sup>219</sup> Horsburgh & Cappel, *supra* note 5, at 1103-04.

Cognitivists have proposed two distinct types of mental architecture that may govern the thought process. The first is that reasoning operates by means of seriosymbolic processing, a deliberate, rule-based method of thinking and reasoning in which information is coded into abstract symbols that are manipulated sequentially, or in a chain of steps, according to the formal conventions of logic and grammatical syntax. Reasoning is thereby conceived of as the purely formal manipulation of abstract symbols representing concepts according to a series of logical inferences and rule-governed arrangements. . . . A key advantage of seriosymbolic processing is that it is cognitively powerful, inasmuch as it can apply to problems in a wide variety of situations.

*Id.* at 1103.

<sup>220</sup> *Id.* at 1120 (emphasis added).

<sup>221</sup> *Id.* at 1105-06.

[The second type] of processing system within the mind, [is] termed “connectionist.” In a connectionist model, mental processing is organized in a network of linked processing units, which—when activated—“fire” in a manner analogous to neurons in the human brain. . . . Unlike linear seriosymbolic processing, connectionist networks are linked in parallel, which allows greater speed and flexibility in processing inputs.

Connectionist processing can easily accomplish the sorts of cognitive tasks that are difficult for seriosymbolic systems. In particular, connectionist systems can account for how we acquire cultural information, a learning skill that is so problematic for seriosymbolic

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unusual terms that are not affirmatively and pointedly called to their attention.<sup>222</sup>

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processing. In a connectionist system, we internalize implicit cultural knowledge by observing and participating in events of daily life. The inputs derived from these experiences and from our own reactions to these experiences, are processed in a distinctive pattern of network activation. As these patterns of observation and action are repeated, the weights of the connections between activated units become increasingly stronger, until eventually the system solidifies to the point that we almost instantaneously comprehend a situation and how to respond to it. . . .

*Id.* at 1105-06.

<sup>222</sup> *Id.* at 1114-15.

Large commercial enterprises typically attempt to act as rational profit maximizers. In keeping with this goal, processes of planning, production, and marketing are organized along formal, deliberative lines; indeed, such firms typically employ a wide variety of specialists to apply deliberative expertise to the various facets of running the business. . . . Such deliberative serious symbolic thinking is made possible by the fact that the seller is engaged in only a limited number of types of sales transactions, and has the resources to employ considerable bodies of expert knowledge.

In contrast, consumers must handle a multiple number of different kinds of sales events encountered in daily living, and are limited to the use of their own cognitive faculties. Consequently, they typically make use of connectionist reasoning and build up a prototypical cultural model of sales transactions. . . . Recall, however, that there is a price to pay for such cognitive efficiency. Because the kind of information that is processed must be able to fit within pre-defined abstract knowledge categories, *there is a tendency to omit information that is inconsistent with what is already known and to reinforce familiar expectations. Consequently, buyers, who employ a relatively simple cognitive model of sales transactions, are not on an equal footing with sellers and might well overlook unusual terms in their, agreements until a dispute arises that causes them to focus on these terms at some later point in time.* . . .

. . . .

A different but related problem exists where the parties do not in fact understand the commercial event in the same way, and are operating using different cognitive systems. Because consumers are typically the parties who are unable to fully process all aspects of an unfamiliar transaction, more knowledgeable *sellers are in the position to exploit*

Easterbrook's suggestion that consumers know that in the box they will find warranty and service and support information because they know from the vendor's advertising that such terms are part of the deal ignores the fact that in *Hill* the dispute dealt with whether an arbitration clause could be forced on the purchasers by their retention of the computer that they had already paid for.<sup>223</sup> As to that matter, nothing in Gateway's advertising or in its other communications with the Hills had alerted them to be on the lookout for remedy limitation terms such as arbitration, or even more importantly to be on the lookout for a surprise announcement, couched in legalese, that "you do not own this yet even though you paid for it and have received it; but you will own it subject to a lot of terms adverse to your interests if you keep it for more than thirty days." Justifying his conclusion with an analogy to a clearly distinguishable set of facts is typical Easterbrook, as one will recall from the analogies he used in *ProCD*.<sup>224</sup> He deflects attention from the actual facts of the case to hypothetical settings in which his "terms later" rule might seem more plausible, or at least more palatable.

Easterbrook's speculative assertions about the way consumers reason and what they must know suggest there is only one mode of human reasoning.

In the mind of the judge, there is *just one mode of reasoning* (seriosymbolic processing) and *just one model of human behavior*: parties should be mentally prepared and constantly on guard to protect their interests in every bargaining situation. But it should be clear by now that this

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*another type of disparity: a cognitive disparity in bargaining power. Moreover, it may be difficult (or even impossible) for consumers to overcome this disparity by shifting their thinking in specific contractual situations to the seriosymbolic mode, and away from the connectionist reasoning used in most everyday transactions, especially if they are not given adequate notice of the need to do so. For this reason, exploitation of cognitive disparity appears to be fundamentally unfair on a deep, cognitive level.*

*Id.* at 1114-15 (emphasis added).

<sup>223</sup> *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997).

<sup>224</sup> *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1451-52 (7th Cir. 1996).

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is nonsense. It is simply not possible given the way our minds really work.<sup>225</sup>

Believing that all actors engage in seriosymbolic processing is necessary to argue that at least a trace of assent still undergirds his “terms later” contract formation rule. But the assent for Easterbrook is an artificial construct—this is underscored by the progeny of *ProCD/Hill*.<sup>226</sup> In an even more expansive sense than Professor Kessler ever imagined, Easterbrook’s “terms later” contract formation rule enables vendors to “legislate by contract and . . . to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms.”<sup>227</sup>

Easterbrook purports to clothe this expansive authorization for vendors to legislate terms in the garb of common sense. Although he uses the word “sense” at only one point in his *Hill* opinion,<sup>228</sup> he makes several appeals to common sense to justify his “terms later” contract formation rule. His explicit “Where is the sense of that?” rhetorical question to the suggestion that *ProCD*’s holding should be limited to software, enables him to quickly paint *ProCD*’s holding broadly as a matter of contract law, while enabling him to avoid addressing the significant factual and legal distinctions between the two cases. The implicit answer to that rhetorical question is that if there is controlling precedent, then follow it.<sup>229</sup>

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<sup>225</sup> Horsburgh & Cappel, *supra* note 5, at 1103-17 (emphasis added).

<sup>226</sup> See, e.g., *infra* Part IV.B (providing an example of a case that has followed *ProCD* in its erroneous finding of assent).

<sup>227</sup> Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943). See also Post, *supra* note 5, at 1232 “Judge Frank Easterbrook is in the vanguard of those who are actively working not just to protect a political minority from the consequences of the democratic process, but to give that minority the power to dictate the terms of their legal relationships.” *Id.* at 1233.

<sup>228</sup> *Hill*, 105 F.3d at 1149.

<sup>229</sup> Ghosh, *supra* note 5, at 1140.

The Judge uses “sense” in five different ways in his opinion. The first and the fifth ways can be described as ‘process based’ definitions that look to case interpretation and precedent in gauging the sense of treating *ProCD* as the applicable precedent. The second way can be described as an appeal to empiricism. An act is commonsensical if it is similar to acts in other contexts. The third and fourth ways are appeals

The appeal to common sense also appears in his assertion that “[p]ayment preceding the revelation of full terms is common for air transportation, insurance, and many other endeavors,” suggesting such regularity of the practice as to validate it.<sup>230</sup> Additionally, he points out “practical considerations,” both with respect to what vendors would need to do and what customers would have to put up with if the rule were otherwise, and to the “benefits” that both vendors and customers experience from written disclosure of terms after the sale that they could not have had with prior oral disclosure.<sup>231</sup> That “[c]ustomers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device,” suggests that it would be nonsensical to prohibit its use.<sup>232</sup> Presenting a “what’s good for the goose is good for the gander” argument, Easterbrook notes that under his “terms later” rule

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to practicality and economic efficiency. Something is commonsensical if it generates positive net benefits or efficiencies. In characterizing the Hills’ argument as non-sensical, the Judge is affirming several legal and market based norms. The first is the norm of judicial craftsmanship and common law rule making through precedent. The Judge, by appealing to precedent, is asserting its naturalness as the only way of determining a particular legal issue. Of course, the Judge also overlooks the many ways he has to sidestep precedent to reach the result.

*Id.*

<sup>230</sup> *Hill*, 105 F.3d at 1149. But Professor Ghosh, *supra* note 5, at 1140-41, referring to the second norm of “sense,” comments on those analogies as follows:

The second norm is that of practice. The best measure of the right thing to do is determining what others have done in similar situations. The norm is similar to that of judicial craftsmanship and precedent in that it aims at consistency. But while the first norm focuses squarely on judicial practice, the second focuses on practice in the marketplace and in the community. The difficult question avoided is, what is the relevant marketplace and community? The Judge refers to air transport and insurance and “other endeavors” without a careful parsing of the differences among the various representative markets or communities.

Ghosh, *supra* note 5, at 1140-41.

<sup>231</sup> *Hill*, 105 F.3d at 1149.

<sup>232</sup> *Id.*

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Gateway is bound by the warranty provision in the box, and the Hills want the benefit of that, so it is only fair that the Hills be bound by the contract formation terms and the arbitration term.<sup>233</sup> The weakness of that argument is that the Hills could have had a claim for breach of warranty without relying on the warranty contained in the box. Under the circumstances of this purchase an implied warranty accompanied the computer as a matter of law.<sup>234</sup>

As to the *absence* of notice on the outside of the box to alert the purchaser that unusual contract formation terms are inside the box, Easterbrook suggests it is a most natural (and thus sensible) omission. In fact, his description suggests that *absence* of notice on the outside of the box is as natural in the *Hill* transaction as was the *presence* of a notice on the outside of the shrink-wrap in *ProCD*.

The difference is functional, not legal. Consumers browsing the aisles of a store can look at the box, and if they are unwilling to deal with the prospect of additional terms can leave the box alone, avoiding the transactions costs of returning the package after reviewing its contents. Gateway’s box, by contrast, is just a shipping carton; it is not on display anywhere. Its function is to protect the product during transit, and the information on its sides is for the use of handlers (“Fragile!” “This Side Up!”) rather than would-be purchasers.<sup>235</sup>

And because the Hills “knew” there would be other terms inside the box, no notice on the outside is of no consequence.<sup>236</sup>

Easterbrook’s “common sense” rationale for the *Hill* opinion has been specifically subjected to scholarly critique, even generating a law review symposium devoted to it.<sup>237</sup> Because an

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<sup>233</sup> *Id.* at 1149-50.

<sup>234</sup> U.C.C. § 2-314 (1995).

<sup>235</sup> *Hill*, 105 F.3d at 1150 (symbols omitted).

<sup>236</sup> *Id.*

<sup>237</sup> See Symposium, *Common Sense and Contracts Symposium*, 16 *TOURO L. REV.* 1037 (2000). One of the contributors to that symposium observed:

Easterbrook is a terrific writer and a good part of his strength comes from a style that is invigorated by a “feel” for common sense. Take a look at his diction in the [passage where Easterbrook rhetorically asks, “Where’s the sense in that?” regarding limiting the holding of *ProCD*

appeal to “common sense” connotes universal acceptance and discourages counter-argument, it often provides a powerful rhetorical cover for a position that cannot be supported by logical argument and persuasion.<sup>238</sup>

Where legal analysis fails to illuminate Judge Easterbrook’s reasoning, economic analysis provides an answer. However, characterizing the Judge’s approach either as application of a command mechanism or a property right mechanism would miss the heart of the opinion. The Judge is not commanding an outcome to be enforced by monetary or other sanctions. Nor is he creating a property right over which the parties could bargain. In affirming *ProCD*, the *Judge is affirming a norm* that allows the parties to create property rights through contract. Judge Easterbrook concludes that the arbitration clause is

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to software]: “sense,” “practical considerations,” “benefits,” “simple.” This is a passage infused with connotative meanings. The sound reinforces the sense. The totality of this passage resonates with the rhetoric of common sense or, perhaps more accurately, resonates with something believed by certain readers to be common sense. . . . Easterbrook’s decision has elements of all four definitions of “common sense.” It is similar to the first definition [(phenomenological)] in that it lacks a certain quality of imagination. . . . As for the second definition (normal, average understanding), Easterbrook’s passage evokes a kind of practical wisdom, the sort of sensible statement we would expect from someone who knows chalk from cheese. Per the third definition (the general sense of the community), the passage draws on a bit of old fashioned communal well-being: the decision is good for customers and good for vendors, both sides benefit and everyone should be happy. Finally, in accord with the fourth definition (“primary truths”), the argument seems compelling precisely because *common sense bypasses argument. It is non-deliberative, instinctive, “natural.” Easterbrook’s passage commands truth not so much through argumentation but through reliance on a common sense that usurps the place of deliberation. This also discourages counter-argument, for who, after all, can argue with common sense?*

Ledwon, *supra* note 5, at 1074-75 (emphasis added).

<sup>238</sup> Joo, *supra* note 218, at 1039. “The argument that contract law should follow ‘common sense’ seems rather innocuous, but it often provides rhetorical cover for unspoken normative assumptions.” *Id.*

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enforceable because the Hills agreed to it. In light of his insistence on relying on *ProCD* and his appeal to “sense,” the Judge’s approach can best be described as one of *seeding norms* having to do with contractual transactions, especially the norms involving the provision of information.<sup>239</sup>

And the “seeding” of the norm is done so authoritatively.<sup>240</sup> For legal realists a court’s dictating of norms is not surprising.

In the absence of a superhuman normative arbiter, it is hard to speak of normative assumptions as anything more than fungible preferences. Knowing this, we are usually too embarrassed to admit it when we make normative assumptions. After all, the Realists have taught us well that the winners among such preferences triumph, not from logical or “legal” processes, but from sheer political power. This, I suppose, helps to explain why secularists find such comfort in evidence that our preferred normative schemes are consistent with human behavior. The state’s imposition of norm X, though by its very nature an exercise of power, is a relatively harmless one when its net result is pretty much what people would have done on their own anyway.<sup>241</sup>

As demonstrated by the extensive scholarly critique, the normative assumptions Easterbrook makes in *ProCD* and *Hill* do not simply *reflect* “common sense;” they attempt to *create* it.<sup>242</sup> “Easterbrook is not describing what ‘is’, he is describing what ‘ought to be.’”<sup>243</sup> As Professor Leff appropriately noted, “[n]ormative preferences are just that; they don’t get any more proved by being talked about.”<sup>244</sup> Thus when one merely expresses

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<sup>239</sup> Ghosh, *supra* note 5, at 1134 (emphasis added).

<sup>240</sup> See *supra* note 211.

<sup>241</sup> Joo, *supra* note 218, at 1049-50.

<sup>242</sup> Post, *supra* note 5, at 1229.

<sup>243</sup> *Id.*

<sup>244</sup> Arthur Allen Leff, *Commentary on Richard A. Posner’s ECONOMIC ANALYSIS OF LAW: Some Realism About Nominalism*, 60 VA. L. REV. 451, 477 (1974).

his normative preferences in a book, they have no coercive impact; they are nothing more than ideas that one can accept or not as he chooses. But when one in a position of power imposes his normative preference on the basis of a distorted “creation” of “common sense,” then even legal realists would be hard pressed to pass off such exercise of power as merely “a relatively harmless one.”

The norm Easterbrook prescribes has serious consequences for Zeidenberg and for the Hills. It defrocks consumers of their reasonable assumptions about contract formation and jettisons the fundamental common law and statutory rules that had embodied and protected those assumptions. Although the scholarly critique of Easterbrook’s assumptions about “common sense” in *ProCD* and expanded upon in *Hill* is powerful, the silliness of his assumptions is perhaps most powerfully demonstrated by the pejorative treatment they receive as the butt of “Dilbert” cartoon humor.<sup>245</sup>

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<sup>245</sup> Stephen Y. Chow, *Contracting in Cyberspace: The Triumph of Forms?*, 41 BOSTON B. J. 16 (1997).

John Adams’s “Dilbert” remarked recently: “I didn’t read all of the shrink wrap license agreement on my new software until after I opened it. Apparently I agreed to spend the rest of my life as a towel boy in Bill Gates’ new mansion.” The scenario is a not-too-absurd extension of a commercial law trend towards enforcement of all terms in a form “contract,” as exemplified by the recent *ProCD* and *Gateway 2000* decisions by Judge Frank H. Easterbrook of the Seventh Circuit, as well as by a proposed new Article 2B (Licenses) of the Uniform Commercial Code (“UCC”).

*Id.* (citations omitted); see also Macaulay, *Relational Contracts*, *supra* note 22, at 777 n.17.

Dilbert’s subversive messages are taped and pinned up in many business offices as a way of commenting on the absurdity of office work in the 1990s. In Dilbert those who know things are powerless; those who know nothing run corporations. From time to time Scott Adams, who draws Dilbert, deals with matters of interest to contracts teachers. Two of my favorites involve contracts created by the magic of tearing the shrinkwrap on packages of computer software. In a cartoon dated Jan. 14, 1997, Dilbert is talking to Dogbert. He says, “I didn’t read all of the shrink-wrap license agreement on my new software until after I opened it.” He continues in the next panel: “Apparently I agreed

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2. Hill and ProCD as Examples of Legal Realism in Operation

Such humorous ridicule of the absurdity of a decision is significant. It indicates the disdain for law that such absurdity engenders.<sup>246</sup> To the extent that even those outside the legal community recognize that these decisions are nothing more than an arrogant exercise of power, they present a potentially very serious challenge for legal realism. If no standard exists, for validation of law higher than the decision-makers themselves expands beyond the legal elite to the rest of society (who read “Dilbert”), the implications for instability of “law” become more ominous. “Why should the public believe the decision makers have made the right decisions, or even that they have authority to do so?”<sup>247</sup>

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to spend the rest of my life as a towel boy in Bill Gates’ new mansion.” Dogbert says, “Call your lawyer.” In the next panel, Dilbert says, “Too late. He opened software yesterday. Now he’s Bill’s laundry boy.” Dogbert responds: “It must be dangerous for lawyers to iron pants. They’d always have one hand in a pocket.” In another dated April 7, 1997, Dilbert reads: “Software License: By opening this package, you agree . . .” In the next panel, the license terms continue: “[Y]ou will not make copies or export to despotic nations. You will submit to strip searches in your home . . .” In the next panel, Dilbert opens the package. An employee of the software company is pulling on a rubber glove and says, “Frankly, both of us would have been happier if you had just walked away.” Purchasers of software can sign a petition calling for warranty protection at <http://www.zdnet.com/anchordesk/smbg/index.html>. Somehow, signing a petition on the web hardly seems like the revolution people talked about at the University of Wisconsin-Madison in the 1960s.

*Id.*; see also Jeffrey W. Stempel, *Bootstrapping And Slouching Toward Gomorrah: Arbitral Infatuation And The Decline Of Consent*, 62 BROOK. L. REV. 1381, 1383 n.6 (1996).

<sup>246</sup> At the very least it appears to reflect the thought expressed by the Dickens character, Mr. Brumble, “If the law supposes that, . . . the law is a ass, a idiot.” See CHARLES DICKENS, *OLIVER TWIST* 354 (Kathleen Tillotson ed. 1966):

<sup>247</sup> Roger Bern, *A Biblical Model for Analysis of Issues of Law and Public Policy: With Illustrative Applications to Contracts, Antitrust, Remedies and Public Policy Issues*, 6 REGENT U. L. REV. 103, 106 (1995); see also HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 39 (1983). In his ABA-award winning book, Berman identifies what

This was the very problem identified by Harvard Law School Dean Roscoe Pound in 1922, when he acknowledged:

From the time when lawgivers gave over the attempt to maintain the general security by belief that particular bodies of human law had been divinely dictated or divinely revealed or divinely sanctioned, they have had to wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires.  
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In *Hill*, Easterbrook's treats the facts of the case and the Hills as mere fodder providing the occasion to impose his economic theory. It appears that by the time he reaches *Hill*, his sense of power has come to the point where he no longer even wrestles with the problem of how to make his decision appear to be adjudicating the dispute at hand.<sup>249</sup> He is creating policy because he is in a position

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he terms the "crisis of the Western legal tradition":

The crisis of the Western legal tradition is not merely a crisis in legal philosophy but also *a crisis in law itself*. . . [A]s a matter of historical fact the legal systems of all the nations that are heirs to the Western legal tradition have been rooted in certain beliefs or postulates: that is, the legal systems themselves have presupposed the validity of those beliefs. Today those beliefs or postulates—such as the *structural integrity of law, its ongoingness, its religious roots, its transcendent qualities*—are rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and other members of the legal profession, but *from the consciousness of the vast majority of citizens, the people as a whole; and more than that, they are disappearing from the law itself*. . . Thus the historical soil of the Western legal tradition is being washed away in the twentieth century, and the tradition itself is threatened with collapse.

*Id.* (emphasis added).

<sup>248</sup> ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 3 (revised ed., 7th printing, 1965).

<sup>249</sup> Joo, *supra* note 218, at 1039-42, 1045.

The court attempts to show that the Hills *knew* that the telephone

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of power to do so. Justice, or even perceived justice, in a given dispute between real parties is, at most, a secondary concern.

As a policy-maker operating from an *ex ante* perspective, Easterbrook must be forward looking, not backward looking to the facts of the dispute presented. It matters not that the Hills, and perhaps even Gateway, had no idea at the time of their transaction that it would be governed by a new set of rules.<sup>250</sup> Although his

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conversation did not constitute a contract. Of course, it does not argue that the Hills were familiar with the ProCD rule. Nonetheless, according to the court, “the Hills knew before they ordered the computer that the carton would contain some important terms, and they did not seek to discover these in advance.” The court apparently *does not mean that the Hills actually knew* this, but rather that they should have inferred it from Gateway’s advertisement . . . [B]ecause Gateway’s ads mention warranties and product support, the Hills *should have surmised* that their purchase could be subject to any number of other additional terms not mentioned in the ads or by the telephone agent. It was *up to the Hills to ask* the agent about undisclosed terms . . . The court implies that contract formation and terms are based on whether they make “sense” and *not on whether they are actually assented to*; and, further, that the Hills, *as reasonable buyers, should have known this*. There is *no finding that the Hills actually knew that efficiency required* the telephone clerks to omit important terms, *that they knew that a judicial analysis of contract formation would rely on a principle of wealth maximization rather than on the Hills’ own manifestations of assent, or that the Hills based their contracting choices on long-term wealth maximization rather than on short-term rent-seeking considerations* . . . One reason the Hills “knew” that additional terms would be in the box was that, according to the court, such was the more efficient practice. Thus *it is unnecessary to examine assent directly. Because freedom of contract results in efficient terms, efficiency and assent are effectively collapsed into a single inquiry* . . . The Gateway opinion refers to the Hills by name, but the decision is *really not about their individual assent; it about the hypothetical rational assent of a hypothetical rational plaintiff* . . . [A]lthough Rich and Enza Hill are very real people, “the Hills” of Hill v. Gateway, and their “subjective assent,” are *no more than metaphorical constructs*.

*Id.* (footnotes omitted) (emphasis added).

<sup>250</sup> *Id.* at 1047-48.

As every good law-and-economist knows, a judicial decision that sets majority sentiment [as stated by the court] as the default rule today will

status is described as that of judge, his role is not judging with a goal of achieving justice in an individual case. It is a purely utilitarian policy-creating role to impose a rule that, according to his economic theory, will be good for society. If the parties before him find themselves to be the objects of an *ex post facto* rule, so be it.

*Hill*, even more than *ProCD*, exposes the theoretical bankruptcy of the current legal system, grounded as it is upon a jurisprudence of legal realism. *Hill* presents an even better illustration than does *ProCD* of the truth expressed by Critical Legal Studies theorists that there is no longer law, only *power*.<sup>251</sup> It

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put all tomorrow's deviants on notice that they should bargain around the default rule; thus future deviants who do not explicitly contract around the default rule can be presumed, like non-deviants, to have subjectively assented to it. *However, that theory, even if we accept it, focuses on the contractual freedom of future parties and not on that of the Hills and their class—who are, after all, the parties before the court. It sounds communitarian, rather than libertarian, to sacrifice today's litigants, deviant though they may be, to enhance the contractual liberty of future parties.*

*Id.* (footnotes omitted) (emphasis added).

<sup>251</sup> UNGER, *supra* note 177, at 83, 131-32, 169-81. Noting the contemporary rejection of both a Creator God and a created order which reflects regularities in nature and social life according to a divine plan, Unger asks: "What happens when the positive rules of the state lose all touch with a higher law and come to be seen as nothing more than the outcomes of a power struggle? Can the ideals of autonomy and generality in law survive the demise of the religious beliefs that presided over their birth?" *Id.* at 83. He notes that when the mentality of viewing nature and society "as expressions of a sacred order, and thus self-subsisting if not self-generating, and independent of the human will," was replaced with a new consciousness that viewed the social order as something "that could and indeed had to be devised rather than just accepted ready-made," certain consequences were unavoidable. *Id.* at 130. One was "to bring out the conventional and contingent character of every form of social hierarchy so that the exercise of power had to be justified in new and more explicit ways." *Id.* at 129-31. "But *whose will* was to replace nature as the source of social order? Because the crisis was bound up with ever widening disparities among social ranks, the *source had to be the will of the rulers . . .*" *Id.* at 132. Unger notes that the recognition that the social order is *merely the reflection of decisions of those in power* "ends in the conviction that they are *based upon the naked acts of will* by which people choose among conflicting ultimate values." *Id.* at 169.

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smacks of unchecked and arbitrary exercise of power and of a lawlessness foreign to the principles upon which the nation was founded. This cannot go unnoticed by the public, especially when so many consumers will experience its effect.<sup>252</sup> That obviously does not bode well for legal realism or a “legal” system grounded

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<sup>252</sup> Bern, *supra* note 247, at 106 n.16.

Critical Legal Studies’ open assessment that contemporary “law” is without legitimate foundation reminds one of the candid observation of the little child in HANS CHRISTIAN ANDERSEN, *THE EMPEROR’S NEW CLOTHES* (1949). While all others observing the procession pretended they saw beautiful new clothes on the Emperor, lest they be thought stupid, the little boy spoke reality; “But the Emperor has nothing on at all!” To carry the parallel a step further, perhaps the folk tale also suggests the answer to Pound’s question whether the legal elite would be able to keep the rest of society convinced that contemporary “law” is fixed, settled, and its authority beyond question, when it is not. “What the child said was whispered from one to another, until everyone knew. And they all cried out together, ‘HE HAS NOTHING ON AT ALL!’”

*Id.* (internal page references omitted). See also Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968), reprinted in HERBERT L. PACKER & THOMAS EHRLICH, *NEW DIRECTIONS IN LEGAL EDUCATION*, 329 (1972). Professor Woodard, reflecting on the decline of the mysterious in law, observes:

Modern man, no longer *sub deo et sub legi*, feels himself morally free of the demands of externally imposed law that clash with his own innermost convictions. Predictably, the result is a generation of law teachers who find it difficult to believe—by this I mean profoundly believe—in the existence of law beyond what fallible courts say it is; a generation of law students who consequently do not learn to be restrained in any essential way by the law; and a generation of laymen who are markedly uninhibited by, and indeed contemptuous of, the sanctions of law. . . . [D]oes the functional approach not teach all manner of men to look to law as an instrument for their private or personal disposal? Surely no ‘social problem’ could be more critical, or chronic, as that of people regarding law first as a means of gratifying their own wants, and only incidentally as imposing upon them responsibilities towards their fellow men and their society. The appeal to a “Rule of Law” under such circumstances is rather pathetic and almost hopeless.

*Id.* at 378-79.

upon it.

## II. BAD ECONOMICS

Easterbrook's *ProCD/Hill* "terms later" is not only bad law—it is dreadful economics. "Traditional economics is powerful precisely because it rests on the simplest possible axioms about how people behave."<sup>253</sup> In a bargaining transaction one can expect that each party will choose a strategy that advances its own interests under the circumstances that exist.<sup>254</sup> Information is important, "playing a crucial role in the way individuals interact."<sup>255</sup> "[W]henever one party possesses private nonverifiable information, there is a potential for inefficient outcomes, even when parties can negotiate with each other."<sup>256</sup> The private gain to one party from hiding information may induce that party to behave in a way that, though privately beneficial, is not socially optimal.<sup>257</sup> Easterbrook's *ProCD/Hill* "terms later" rule ignores human nature and these economic realities. It is based upon a surreal bargaining setting created by an artificial attribution of knowledge and bargaining behavior to consumers. It also ignores

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<sup>253</sup> Douglas G. Baird, *Game Theory*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 192, 192 (Peter Newman ed., Macmillan Reference Ltd. 1998).

<sup>254</sup> *Id.*

A player will choose a strictly dominant strategy [the best choice for that player] whenever possible and will not choose any strategy that is strictly dominated by another. Few people would take issue with the idea that individuals are likely to choose a strategy when then they can always do better in their own eyes choosing that strategy than by choosing any other.

*Id.*

<sup>255</sup> *Id.* at 195.

<sup>256</sup> Joseph Farrell, *Information and the Coase Theorem*, 1 J. OF ECONOMIC PERSPECTIVES 113, 115 (1987) "[A] large literature has developed on 'non-cooperative' models of bargaining, formalizing the process of offers and counteroffers that we see in real transactions. The main conclusion of these models . . . is that bargaining is typically inefficient when, as is likely, each bargainer knows something relevant that the other does not. . . ." *Id.*

<sup>257</sup> Baird, *supra* note 253, at 196.

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yet another significant economic reality: transaction costs.<sup>258</sup> A search by consumers for hidden terms is not a costless one.

Law and economics is supposed to be able to predict and thus produce good policy for society, giving the supposed justification for courts operating from an *ex ante* perspective informed by economic reality to create policy.<sup>259</sup> Easterbrook should thus have been able to predict that his “terms later” rule and creation of a new method of contract formation would increase information asymmetry, increase transaction costs, enhance hold-up<sup>260</sup> or opportunistic behavior by vendors,<sup>261</sup> and result in inefficiencies as

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<sup>258</sup> David de Meza, *Coase Theorem*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 274, 274-75 (Peter Newman ed., Macmillan Reference Ltd. 1998).

<sup>259</sup> See Ogus, *supra* note 59.

<sup>260</sup> Benjamin Klein, *Hold-Up Problem*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 241, 241 (Peter Newman ed., Macmillan Reference Ltd. 1998). “A hold-up occurs only when a transactor, taking these future effects into account, decides it is wealth-maximizing to take advantage of contractual incompleteness to expropriate the rents on the specific investments made by its transacting partner.” *Id.* Klein identifies three factors that are necessary for the occurrence of a hold-up: (1) the victim’s investment must be specific to the circumstances enabling the other party to do the hold-up; (2) the contract governing the relationship between the parties must be incomplete in the sense that it did not preclude the opportunity for the hold-up; (3) the one engaging in the hold-up must find it profitable to do so. *Id.* He notes that his view of hold-up does not necessarily carry the “unsavory” features of lying, stealing, cheating, and more subtle forms of deceit such as incomplete or distorted disclosure of information that some writers associate with the term “opportunism,” but rather may be more often be merely the result of specific investment, incomplete contracts and unanticipated events. *Id.* at 244. Thus although in layman’s terms “hold-up” may connote something more reprehensible and blameworthy than does the term “opportunistic behavior,” in the economic literature the former is considered to be the more benign of the terms.

<sup>261</sup> Oliver E. Williamson, *Opportunistic Behavior in Contracts*, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 703-709, (Peter Newman ed., Macmillan Reference Ltd. 1998). Williamson notes:

Opportunism is a type of self-interest seeking and may be contrasted both with stewardship (unself-interest seeking) and with simple self-interest seeking (look to your interests but keep all of your promises). *Opportunism contemplates self-interest seeking with guile – to include*

well as distributional unfairness by systematically redistributing wealth from consumers to vendors.

*A. Information Asymmetry and Bounded Rationality*

In bargaining, information asymmetry—the imbalance of information known to the parties—is typical.<sup>262</sup> If costs for searching for information were zero, a purely rational actor contemplating a decision would make a comprehensive search for relevant information.<sup>263</sup> But searches entail costs “in the form of time, energy and perhaps money.”<sup>264</sup> Further, even if an actor were to incur the search costs and thus acquire all of the information

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*the incomplete or distorted disclosure of information, especially calculated efforts to mislead, distort, disguise, obfuscate or otherwise confuse.*

*Id.* at 703 (emphasis added). Williamson also notes that: “[O]pportunism in contracts is not a free-standing concept but requires, additionally, that bounded rationality and transaction attributes be introduced.” *Id.* at 704. He identifies a number of examples of “asset-specificity” transaction attributes that can give rise to bilateral dependency and thus the opportunity for abuse. *Id.* at 707. All have in common the following: “[T]he faceless contracting, out of which orthodox economics works, gives way to contracting in which the pairwise identity of the parties matters.” *Id.* In the context of “terms later” offers, the situation is loaded with “transaction attributes.” It does matter that the buyer has made a specific investment in the form of full payment and has even begun enjoying the benefit of the goods before becoming aware the adverse terms proposed, and that the “offeror” will get the benefit of the adverse terms unless the buyer promptly returns the goods, relinquishing all rights he thought he had already obtained in them. Unlike in a “faceless transaction” in which a hypothetical offeror offers to sell goods subject to terms adverse to a hypothetical offeree who will decide whether to affirmatively accept based on the pure merits of the offer, uninfluenced by any “transactional attributes,” in the “terms later” setting the “transactional attributes” will powerfully influence the offeree’s decision.

<sup>262</sup> Farrell, *supra* note 256, at 115 (explaining the inefficiency of the bargaining process when participants possess an unequal level of relevant knowledge).

<sup>263</sup> Melvin Aron Eisenberg, *Cognition and Contract*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 282, 282 (Peter Newman ed., Macmillan Reference Ltd. 1998).

<sup>264</sup> *Id.*

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relevant to a transaction, because human information processing (evaluating and deliberating on information) is imperfect, he will often imperfectly process it.<sup>265</sup> It appears that both ProCD and Gateway were aware of these economic realities and that they respectively used them to their advantage in crafting their “terms later” contract formation strategy. They reflect the reality that, unlike the hypothetical rational actor that Easterbrook imagines, “human rationality is normally bounded by limited information and limited information processing.”<sup>266</sup>

Commenting on the concept of bounded rationality, Professor Eisenberg observes:

That actors limit search and processing does not necessarily mean that they fail to rationally maximize their total utility in making decisions. An actor’s total utility from a decision depends not only on the substantive merits of the decision, but also on the costs of the decision-making procedure. Limits on search and processing costs may maximize an actor’s overall utility, because the utility gain from substituting a lower cost of limited search and processing may offset the utility shortfall from substituting a satisfactory decision for an optimal decision. However, even if actors follow the model of optimal decision-making procedure, so that their ignorance of undiscovered alternatives and consequences is rational, their calculations concerning the alternatives and consequences they do consider may not be rational.<sup>267</sup>

Elaborating on that latter point, Eisenberg identifies two bodies of empirical evidence showing “that under certain circumstances actors are often systematically irrational; that is, that they often fail to make rational decisions even within the bounds of the

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<sup>265</sup> *Id.*

<sup>266</sup> *Id.* “Most actors either don’t want to expend the resources required for comprehensive search and processing or recognize that comprehensive search and processing would not be achievable at any realistic cost.” *Id.* In this sense, an actor’s decision to limit search can be characterized as one of “rational ignorance.” *Id.* at 282-83.

<sup>267</sup> *Id.* at 283 (emphasis added).

information they have acquired.”<sup>268</sup> The first body of empirical evidence concerns “disposition,” showing that “as a systematic matter, people are unrealistically optimistic.”<sup>269</sup> The second body of empirical evidence concerns “defective capability.”<sup>270</sup> “Just as defects in disposition systematically tilt actors’ judgments toward optimism, so defects in capability systematically distort the way actors search for, process, and weigh information and scenarios.”<sup>271</sup> Defects in capability refer to what “cognitive psychology has established [with respect to] certain decision-making rules (heuristics) that real people use and that yield systematic errors.”<sup>272</sup> Four such defects in capability are particularly relevant to contract law. They are defects associated with the heuristics known as availability,<sup>273</sup> representativeness,<sup>274</sup>

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<sup>268</sup> *Id.*

<sup>269</sup> Melvin Aron Eisenberg, *Cognition and Contract*, in 1 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 282, 283 (Peter Newman ed., Macmillan Reference Ltd. 1998).

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 284.

When an actor must make a decision that requires a judgment about the probability of an event, he commonly judges that probability on the basis of comparable data and scenarios that are readily available to his memory or imagination. This heuristic leads to systematic biases because factors other than objective frequency and probability affect the salience of data and scenarios and therefore affect the ease with which an actor imagines a scenario or retrieves data from memory . . . The availability heuristic concerns the manner in which actors bring acquired data to mind and imagine future scenarios.

*Id.* (footnotes omitted).

<sup>274</sup> Eisenberg, *supra* note 269, at 283.

The representativeness heuristic “concerns the manner of making judgments concerning the adequacy of search. As the concept of bounded rationality implies, actors seldom collect all relevant data before making decisions. Rather, they usually make decisions on the basis of some subset of the data, which they judge to be representative. In making that judgment, however, actors systematically and erroneously view unduly small samples as representative.

*Id.* (footnotes omitted).

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defective telescopic faculties,<sup>275</sup> and defective risk-assessment faculties.<sup>276</sup>

Eisenberg insightfully notes how closely related and interactive the defects in cognition are and their link to bounded rationality.<sup>277</sup> His examination of cognition and contract, written prior to *ProCD*, assessed the combined impact of bounded rationality and cognitive defects in the context of standard form contracts presented to buyers prior to or at the time of their purchase decision.<sup>278</sup> The combined effect of those factors is to produce a setting in which

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<sup>275</sup> *Id.* “[The faulty telescopic faculties type] concerns the ability of actors to make rational comparisons between present and future states. Actors systematically give too little weight to future benefits and costs as compared to present benefits and costs.” *Id.* This defect and the following one, faulty risk-estimation faculties, are exemplified in the observations concerning “endowment effect,” “status quo effect,” and “loss aversion,” *infra* at notes 277-81 and 282-85 and accompanying text.

<sup>276</sup> *Id.* at 284. The empirical evidence “strongly suggests that actors systematically underestimate most risks, including low-probability risks of economic losses.” *Id.* at 285.

<sup>277</sup> *Id.* at 285.

The defects in cognition are closely related and interactive. For example, actors may underweigh future costs in part because the future involves a great number of risks, and actors underestimate risks, and in part because the present is vivid, concrete, and instantiated, while the future is pallid, abstract, and general. Conversely, actors may underestimate risks in part because risks are often pallid, abstract, and general, and in part because risks relate to the future, and actors give too little weight to future costs.

These defects in cognition are also closely related to and interact with the dispositional problem of unrealistic optimism: If actors are unrealistically optimistic, they will systematically underestimate risks. If actors systematically underestimate risks, they will be unrealistically optimistic.

Finally, these defects in cognition are closely tied to bounded rationality. Availability and representativeness, for instance, would not even come into play if search and processing were unbounded. Only where actors rely on selective, incomplete information does undue emphasis on available and unrepresentative data pose a problem.

*Id.*

<sup>278</sup> *Id.* at 287-88.

consumers are very vulnerable to being overreached by sellers and sellers are tempted to act opportunistically.<sup>279</sup> In this setting, the preprinted terms are typically nonperformance terms in the sense that they relate to the future and concern low-probability risks.<sup>280</sup> For that reason, all of the cognitive problems of bounded rationality, optimistic disposition, systematic underestimating of risk, and undue weight on the present as compared with the future are implicated.<sup>281</sup> Optimistic disposition and systematic underestimating of risk, for example, will prompt a consumer to tilt toward believing the product will perform well, and that even if it might not, that danger is slight, so any remedy limitation is likely to never pose a problem. Visually experiencing the highly touted product enhances the natural tendency to give more weight to favorable present experience than to potential future problems that could emerge from the purchase.

Compounding those cognitive problems in the setting of preprinted terms is the “the phenomenon of rational ignorance [that] plays a particularly powerful role, because of the high disincentives for the consumer to engage in a serious search effort.”<sup>282</sup>

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<sup>279</sup> Eisenberg, *supra* note 269, at 287.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* at 287.

<sup>282</sup> *Id.*

A form-giver typically offers a package consisting of a physical commodity and a form contract that states the terms on which the commodity is sold. Each part of the package, in turn, consists of a number of subparts. The physical commodity has physical attributes, such as size, shape and colour. The form contract has the business and legal attributes, such as price, quantity, and limitations on remedies.

To make an optimum substantive decision, the form-taker would, at a minimum, carefully deliberate on the legal attributes of all the form contracts that are coupled with the physical commodities he is considering. Analysing legal attributes in this manner, however, will often be unduly costly. First, a form contract often contains a very large number of legal terms. . . . Moreover, the meaning and effect of the preprinted provisions will very often be inaccessible to nonlawyers. In part, this is because the terms are often written in exceedingly technical prose. Even if the terms are written clearly, however, the form-taker

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Eisenberg concludes that Restatement (Second) of Contracts section 211, and UCC section 2-207, the respective common law and statutory responses that protect against imposition of preprinted terms, rest ultimately on the limits of cognition.<sup>283</sup> Under the former, “preprinted terms will not be enforced if the form-giver had reason to know the form-taker would not expect the term to be included in the contract.”<sup>284</sup> Under the latter, a contract for the sale of goods will be formed by a response to an offer that appears to be an acceptance even though its preprinted terms do not mirror those of the offer, thus eliminating the pre-Code last-shot rule and the “unilateral trick” that it invited.<sup>285</sup>

The vulnerability of consumers to overreaching and the temptation of sellers to act opportunistically are magnified dramatically in the context of a “terms later” rule where the standard terms are not disclosed until after the purchase decision

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usually will be unable fully to understand their effects, because preprinted terms characteristically vary the form-taker’s baseline legal rights, and nonlawyers often do not know their baseline legal rights.

If all that were not enough, most form contracts are tendered by agents who have no authority to vary the preprinted terms, so that deliberating on those terms will often be pointless. Furthermore, form-takers often encounter form contracts under circumstances that encourage them to exert only minimal effort to understand the preprinted terms. . . .

The bottom line is simple. The verbal and legal obscurity of preprinted terms renders the cost of searching out and deliberating on these terms exceptionally high. . . . [So] a rational form-taker will typically decide to remain ignorant of the preprinted terms. . . .

For the form-taker, any given contract term may be a one-shot transaction. . . . For the form-giver, however, a form contract is a high volume, repeat transaction. Thus a rational form-giver will spend a significant amount of time and money, including money for legal advice, to prepare a form contract that is optimal from his perspective. *These asymmetrical incentives almost always work to slant form contracts heavily in favour of form-givers.*

*Id.* (emphasis added).

<sup>283</sup> *Id.* at 288.

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

and payment have been made, and when, under the *Hill* version of the rule, the disclosure is strategically made in a manner calculated to minimize actual awareness of the terms by the purchaser. While inclination to search with respect to preprinted terms presented prior to or at the time of the purchase decision is small for the reasons noted by Eisenberg, it virtually vanishes when the terms are held back until after the purchase decision has been made and the purchaser has parted with his money.

Writing even before *ProCD/Hill* created a rule imposing a search duty on buyers for their self-defense against terms that reduced the value of their purchases, Professor Shavell concluded, “[w]hen information has no social value [i.e., cannot lead to an increase in value], acquisition of information after sale has no relevance: no buyer would rationally engage in costly acquisition of information after making a purchase if it could not be used to raise the value of his good.”<sup>286</sup> And all of the other cognitive defects of optimistic disposition, systematic underestimating of risk, and undue weight on the present as compared with the future are also dramatically magnified by the double-pronged tactic of parting the purchaser from his money and placing the goods into his hands prior to disclosure. That tactic enhances the vulnerability already inherent in those defects by adding to them the “loss aversion” principle that is manifested in the “endowment effect” and the “status quo bias.”<sup>287</sup> All combine to make it most unlikely that a purchaser will send the goods back even if he actually timely gains knowledge of objectionable terms.

#### *B. Loss Aversion, Endowment Effect, and Status Quo Bias*

“Loss aversion” is the term given an asymmetry of value such that “the disutility of giving up an object is greater than the utility associated with acquiring it.”<sup>288</sup> One of its manifestations is the

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<sup>286</sup> Steven Shavell, *Acquisition and Disclosure of Information Prior to Sale*, 25 RAND J. ECON. 20, 35 (1994).

<sup>287</sup> Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

<sup>288</sup> *Id.* at 193-94 (1991). “One implication of loss aversion is that

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“endowment effect,” a term that describes the “fact that people often demand much more to give up an object than they would be willing to pay to acquire it.”<sup>289</sup> Those who have conducted experiments with respect to the matter have concluded that “the main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up.”<sup>290</sup>

Another outworking of loss aversion is “status quo bias,” the term used to describe “a preference for the current state that biases [a person who has purchased an item] against both buying *and* selling [it].”<sup>291</sup> The authors who have studied these effects conclude:

A central conclusion of the study of risky choice has been that such choices are best explained by assuming that the significant carriers of utility are not states of wealth or welfare, but changes relative to a neutral reference point. Another central result is that *changes that make things worse (losses) loom larger than improvements or gains.*<sup>292</sup>

In the context of a *Hill* setting, the implications are clear. Once the purchaser has the computer in hand, even if he knows of the objectionable terms in time to resist them, he is most unlikely to do so. The downside of parting with “his computer” (including the hassle of getting it back into the box and shipping it back), along with the need to begin a search for its replacement, loom much larger than the possible upside of averting potential remedial limitations he may face if by chance the thing does not function properly. “Foregone gains are less painful than perceived losses.”<sup>293</sup>

Additionally, loss aversion reflected in the asymmetry between the willingness to voluntarily accept a new risk in contrast to merely failing to eliminate an existing one, and its impact on

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individuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than advantages.” *Id.* at 197-98.

<sup>289</sup> *Id.* at 194.

<sup>290</sup> *Id.* at 197.

<sup>291</sup> *Id.* at 194.

<sup>292</sup> *Id.* at 199 (emphasis added).

<sup>293</sup> Kahnemann, Knetsch & Thaler, *supra* note 287, at 203.

judgments about responsibility, has been confirmed by psychological research.<sup>294</sup> Examination of studies exploring this matter shows that “[this] asymmetry affects both blame and regret after a mishap, and the anticipation of blame and regret, in turn, could affect behavior.”<sup>295</sup> They note that even Justice Holmes showed an understanding of that point, albeit in other than sophisticated psychological or economic terms, when he observed:

It is in the nature of a man’s mind. A thing which you enjoyed and used as your own for a long time, whether property or opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man.<sup>296</sup>

That reality and its implication for the law appear to have escaped Easterbrook. It obviously did not escape ProCD or Gateway, who well appreciated the psychological power that completing the sale and placing the product in a buyer’s hands would have on the buyer’s likely response to the subsequent disclosure of objectionable terms. The effort to justify the wisdom of the basic purchase and thus to avoid having to admit being tricked as to the deal’s real value, when coupled with the other cognitive defects, the inconveniences connected with return, and the cost of search for a replacement, undermines the supposed efficiency of the transaction and benefits for producers *and* consumers.

*C. Silent Acceptance Not Supported by Economics: Professor Katz’s Model*

Because the preprinted terms under the *ProCD/Hill* “terms later” rule do not relate merely to substantive entitlements, but rather to the very mechanics of contract formation, they implicate rules that “are from an economic point of view theoretically prior

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<sup>294</sup> *Id.* at 202.

<sup>295</sup> *Id.* at 202 (emphasis added).

<sup>296</sup> *Id.* at 204 (quoting from Holmes, *The Path of the Law*, 10 HARV. L. REV. 728 (1897)).

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to all other legal rules.”<sup>297</sup> Professor Katz underscores the fundamental economic importance of legal rules of contract formation in the context of his article addressing the issue of “silent-acceptance.” Written prior to *ProCD*, it analyzes the silent-acceptance issue in its traditional setting, in which an offeror announces in advance of payment by the offeree that silence by the offeree in the face of the offer will constitute acceptance of the terms of the offer. The common law, however, has not countenanced forcing silence as acceptance except in very limited circumstances.<sup>298</sup> Katz concludes that the common law rule

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<sup>297</sup> Avery Katz, *Transaction Costs and the Legal Mechanics of Exchange: When Should Silence in the Face of an Offer be Construed as Acceptance?*, 9 J. L. ECON. & ORG. 77, 77 (1993).

<sup>298</sup> *Id.* The limited circumstances in which offerees have been held bound by silent-acceptance are those described in RESTATEMENT (SECOND) OF CONTRACTS § 69, and in section 2-207(2) of the Uniform Commercial Code with respect to transactions between merchants in which proposals for addition to a contract do not materially alter the contract previously formed. *Id.* The former provides:

§ 69. Acceptance by Silence or Exercise of Dominion. (1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only: (a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with the expectation of compensation. (b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer. (c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept. (2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful against the offeror it is an acceptance only if ratified by him.

*Id.* at 91 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 69). Katz notes that the § 69(2) category is in fact acceptance by conduct, rather than acceptance by silence. But the kind of conduct from an economic point of view that triggers it is incurring some cost or effort “*in order to accept, instead of incurring cost to avoid accepting.*” *Id.* at 91. It, like the exception for taking the benefit of services under § 69(1)(a), also “reflects the principle of restitution.” *Id.* at 91. Neither of those exceptions is implicated by failure to affirmatively reject a “terms later” “offer.” Mere failure to affirmatively reject would not trigger an

requiring, in all but the few identified special instances, the recipient of an offer to respond affirmatively before he is legally bound is efficient and is also distributionally fair.<sup>299</sup> His insightful economic analysis of the common law rule, its efficiencies and distributional equities, and of the inefficiencies and distributional inequities that would result from a contrary rule, applies with even more force to the “terms later” contract formation rule of *ProCD/Hill*.

Katz acknowledges that the offeror is master of the offer, but, unlike Easterbrook, he recognizes the qualification that the law, for very good reasons, has put on that concept. He observes:

Under the common law rule, the person who proposes an exchange has substantial control over the course of bargaining—a fact captured by the maxim that “the offeror is master of the offer.” The traditional justification for this result is the principle of freedom of contract. An offer, by its terms, defines the proposed contract in form as well as content. In order to have freedom to choose the terms on which she is willing to enter into exchange, the offeror must have power to specify what kind of response counts as an acceptance. For instance, an offeror would ordinarily be free to require that acceptance take place by a certain date or be communicated by a particular medium.

If this logic were taken to the extreme, the offeror could provide that the offeree need do nothing at all in order to accept. For instance, a seller of goods could send a letter

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acceptance under the former. Nor could it be said that a buyer is unjustly enriched by retaining goods for which he had paid the full price extracted by the seller on a basis that did not include the value-detracting “terms later.” § 2-207(2) of the Uniform Commercial Code provides:

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such become part of the contract unless: (a) the offeror expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

*Id.* at 95 (quoting UCC § 2-207(2)).

<sup>299</sup> *Id.* at 97.

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announcing that a shipment of merchandise will be sent unless the recipient objects. Or, the seller could make acceptance arise not from inaction, but from some affirmative action that the offeree would have taken anyway. There are several good reasons for the seller to do this. For offers that the buyer would accept anyway, the trouble of the extra communication is saved. If the goods are shipped along with the offer, the buyer can enjoy their use at an earlier time. *And putting them in front of the buyer may be an effective way to increase his desire for them.*

On the other hand, such offers raise the potential for rent seeking, since any increase in the seller's profits comes in part at the buyer's expense. The buyer may be induced by the trouble of responding to accept an offer he would not otherwise entertain. And buyers who reject must pay a cost to do so. The principle of freedom of contract is an inconclusive criterion for such a case, accordingly, since the seller's freedom to enter into the exchange only on such terms as she is willing is incompatible with a similar freedom for the buyer.

In general, the offeror's control over the offer *gives way to the offeree's right to be let alone.* . . .<sup>300</sup>

Katz evaluates the consequences of the common law rule requiring affirmative acceptance of an offer before the offeree is bound and a silent-acceptance rule under which the offeree is bound unless he affirmatively rejects. His economic model assumes conditions of perfect information, and thus, unlike the rule of *ProCD/Hill*, eliminates the opportunity for the offeror to conceal important information prior to payment by the offeree. Thus, any tendency under his model for the offeror to engage in rent seeking behavior, and its resulting inefficiencies and distributional inequities, will pale in comparison with the predictable rent seeking behavior and resulting inefficiencies and distributional inequities invited and encouraged by the rule of *ProCD/Hill*. He demonstrates that a silent-acceptance rule, where

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<sup>300</sup> *Id.* at 79 (emphasis added).

the buyer must expressly reject to prevent contract formation, effectively “converts the buyer’s response cost into an appropriable rent. In contrast, the common-law rule prevents this forced redistribution, and ensures that both parties share in the surplus when there is an exchange.”<sup>301</sup> That was the result even with his model’s assumption that the buyer’s response cost was the same regardless of whether the buyer accepted or rejected.<sup>302</sup>

But the cost of rejecting often differs from the cost of accepting. Perhaps the most significant reason for this difference is that “*offerors may deliberately influence those costs.*”<sup>303</sup> Katz suggests how an offeror might do so.

The seller can often affect the buyer’s response cost by the manner in which she makes the offer—for instance, by demanding that response come through some expensive medium—and her *incentives to do this will depend on the legal regime. . . . Under a silent-acceptance rule . . . the seller benefits from raising the buyer’s response cost, and she has an incentive to try to make it burdensome for him to reply.*

The seller’s ability to raise [response costs] under a silent-acceptance rule raises both the *likelihood of opportunistic exchanges and their cost to the buyer*, while her ability to lower [response costs] under the common law lowers the cost and likelihood of missed efficient exchanges. Furthermore, under a silent-acceptance rule, *distributional gains to the offeror may be dissipated by increased rent seeking that raises the cost of making the offer. Any resources the offeror invests in raising [response costs] is a pure deadweight loss*, as are any resources the parties might spend competing for the position of offeror in the first place. *The risk of rent seeking under a silent acceptance rule, accordingly, provides an additional efficiency argument for the common-law rule.*<sup>304</sup>

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<sup>301</sup> *Id.* at 83.

<sup>302</sup> *Id.* at 80.

<sup>303</sup> Katz, *supra* note 297, at 84 (emphasis added).

<sup>304</sup> *Id.* at 84 (emphasis added).

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Although written prior to *ProCD/Hill*, it is strikingly prophetic with regard to the strategic planning of a Gateway decision maker.

*1. Katz’s Model Applied*

Gateway, like any vendor who would want to make its offer effective only *after* it receives payment and places the goods in the buyer’s hands, obviously must make resource investments in making such an “offer” that are significantly greater than what would be required to make a simple offer that invited acceptance by return promise or performance (e.g., paying for the goods). It must first identify the particular potential “offeree,” determine that potential offeree’s systems requirements, configure the computer for that potential offeree, and then ship the computer to that person with terms that explain for the first time that an “offer” to form a contract for sale is being made and that the offeree is legally bound by all of its terms unless he rejects. Then it must make rejection of the offer costly, for example by requiring it to be expressed by an actual return of the goods within a relatively short period of time.

The payoff for incurring such costs is apparent. By making such an unusual offer that actually places the goods in the offeree’s hands, and by requiring that rejection be expressed only by return of the goods, a vendor could *dramatically increase the cost to the buyer of rejecting the offer*, and thus dramatically decrease the likelihood that the buyer will avoid the objectionable terms. As a consequence, a vendor can do so without being saddled with the significant up front costs of such an offer by getting full payment from the potential offeree before incurring most of those strategic costs.

*a. The Vendor’s Perspective Prior to Legal Sanction of “Terms Later” Practice*

This strategy, if legally sanctioned, could pay large dividends. Whether it pays worthwhile dividends even without the support of the legal regime is a significant question to consider in light of the fact that ProCD and Gateway employed that business strategy prior to being blessed by Easterbrook’s opinions.

ProCD and Gateway apparently believed that they improved their respective bottom lines by incurring additional costs in structuring their respective offers. Consider the possible outcomes for the vendors in the face of legal uncertainty. Some buyers may actually become aware of the objectionable terms in time to reject in the prescribed matter. Factors such as those associated with cognitive defects, endowment effect, status quo bias, and basic risk aversion make it very unlikely that many will reverse the transaction—so few sales will be lost.<sup>305</sup> Even with respect to the few that will be lost, the cost, basically shipping expenses, will be small. In a Gateway-like setting, many, perhaps most, will not become aware of the terms in time to reject, thus those sales will not be reversed. In many instances no displeasure with the goods implicating the terms will arise and the enforceability of the “terms later” will not be an issue. Still, that does not change the fact that the buyer received a product with terms not bargained for or agreed to.

In some instances buyers will be displeased with the product and the “terms later” will be implicated. Some or many who kept the product with knowledge of the “terms later” in time to have rejected them may believe themselves to be bound by them, and thus conform their conduct to them. As to that number, the terms have worked for the vendors even without the benefit of the law. Some or many buyers who do not become aware of the “terms later” until after the time to reject them has passed, and probably only after their displeasure with the goods, may also believe themselves bound and thus conform their conduct accordingly. Again, even without the benefit of law, vendors will have received the benefit of the protection of their terms.

Further, consider instances where a buyer actually believes himself not bound by the terms and is dissatisfied with the product. Few are likely to be willing to incur the expenses of litigation if their personal efforts to get a favorable resolution are rebuffed. Of those few who would pursue litigation, they may or may not be successful. If they were to draw a court that enforced the common law rule reflected in UCC sections 2-206 and 2-207(2) and thus

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<sup>305</sup> See discussion *supra* notes 262-96 and accompanying text.

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precluded imposition of “terms later” on consumers by silent-acceptance, those particular litigants would avoid the effect of the “terms later.”<sup>306</sup> As to those litigants, except for the vendor’s litigation expenses, the vendor’s position would be the same as it would have been without imposing the “terms later.” It would have all of the obligations that the default provisions of the law would provide, but nothing worse, and it would have received a price that it was able to command because the buyers believed those default rights were part of the value they were paying for. Even a ruling favorable to such litigants may alter little the perceptions of other buyers who read the “terms later” but do not read the cases. Like the “salutary” effect achieved by the abuse of including exculpatory clauses in contracts by those who know courts will refuse enforcement on public policy grounds, the “terms later” provisions are still likely to work their practical *in terrorem* effect on numerous buyers.

If litigating buyers were to draw an Easterbrook-kind of judge, they would lose. In that situation, vendors would have collected a price that reflected the value buyers thought they were getting, but without having to deliver it. From the standpoint of a vendor’s bottom line, that would be a wonderful position to be in. And if competitors followed the same strategy, or if these were basically one-shot transactions with buyers, reputational concerns would be minimal.

*b. Societal Perspective—“Terms Later” Rule Does Not Maximize Societal Wealth*

A “terms later” rule will not still somehow maximize societal wealth,<sup>307</sup> despite the predictable inefficiencies Katz identifies that

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<sup>306</sup> See, e.g., *Licitra v. Gateway, Inc.*, 734 N.Y.S. 389 (N.Y. Civ. Ct. 2001); *infra* Part IV.H (discussing the *Licitra* court’s finding that to enforce “terms later” would violate UCC § 2-207 and public policy).

<sup>307</sup> Wealth maximization is a theory of welfare that identifies welfare with economic surplus. “Economic surplus is the sum of (1) the difference between what a consumer must pay and the maximum she is willing to pay for something, and (2) the difference between the price a seller obtains for its product and the minimum price necessary to sustain the seller in the market.”

are inherent with informational asymmetry and which will only be magnified by such a rule. The employment of this stratagem to maximize vendors' wealth is no more a surrogate for the maximization of the wealth of society than is maximization of the wealth of the fraudfeasors who employ a more traditional form of deception. Fraudfeasors, however, must give up their gains when they are caught.

Recall that Katz also concludes that the common law rule which precludes forcing offerees to reject to avoid accepting offers, reflected in UCC sections 2-206 and 2-207(2), is justified as being distributionally fair "because it ensures that both parties to the exchange receive some gain and it prevents offerors from profiting at the expense of passive offerees."<sup>308</sup> The general common law rule "is thus *equally well explained by efficiency and equity*."<sup>309</sup> Elaborating on the distributional fairness of the common law rule, Katz notes:

[Under a silent-acceptance rule] *gains are primarily by the offeror*, who will offer less generous terms under a regime in which it is costly to reject, and by those offerees who attach a relatively high value to exchange. Offerees who attach a relatively low value to exchange are generally made worse off by a silent-acceptance rule, for they are forced to choose between accepting on terms that yield them a negative return and expending resources in sending rejections. In either event such *offerees are worse off than if they had just been left alone*. The common law rule, in contrast, blocks this redistribution and ensures that both parties to the exchange share in any surplus.<sup>310</sup>

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Herbert Hovenkamp, *Positivism in Law & Economics*, 78 CAL. L. REV. 815, 825 (1990). "[W]ealth maximization is an aggregate concept. That is, it is more concerned with societal well-being than with individual welfare. . . . Value is measured by a willingness and ability to pay, and the goal of a wealth maximizing society must be to maximize aggregate value." Whitney Cunningham, Note, *Testing Posner's Strong Theory of Wealth Maximization*, 81 GEO. L. J. 141, 143 (1992) (footnotes omitted) (emphasis added).

<sup>308</sup> See Katz, *supra* note 297, at 97.

<sup>309</sup> *Id.* (emphasis added).

<sup>310</sup> Avery Wiener Katz, *Contract Formation and Interpretation*, in 1 THE

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The significance of the choice of contract formation rules from the standpoint of distributional equity is concisely captured by one writer's observation that “[l]egal rules . . . do more than simply facilitate trade. They may also affect the way the parties divide the potential gains from any trade. . . .”<sup>311</sup> That latter point illustrates why Katz is correct in concluding that from the economic point of view, contract formation rules are theoretically prior to all other legal rules.<sup>312</sup> With the increased bargaining power that the legal rule of *ProCD/Hill* gives vendors, one should not be surprised if vendors used it grab as much value for themselves as possible.

*D. The Human Self-Interestedness Tendency for Opportunistic Behavior*

A vendor's behavior to get as much for himself as possible is consistent with the “active tendency of the human agent to take advantage, in any circumstance, of all available means to further his own privileges.”<sup>313</sup> This human tendency of “self-interestedness” is as fundamental to normal economic analysis as is the limitation on human cognition.<sup>314</sup> That is because together they create the potential for “hold-up,”<sup>315</sup> or, in its more unsavory form, “opportunistic behavior.”<sup>316</sup>

*1. “Holding-up” the Hills*

Three factors are necessary for the occurrence of a hold-up: (1) the victim's investment must be specific to the circumstances enabling the other party to do the hold-up; (2) the contract governing the relationship between the parties must be incomplete

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NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 425, 427 (Peter Newman ed., Macmillan Reference Ltd. 1998).

<sup>311</sup> See Baird, *supra* note 253 at 197.

<sup>312</sup> See Katz, *supra* note 297, at 77.

<sup>313</sup> See Williamson, *supra* note 261, at 706 (footnotes omitted).

<sup>314</sup> *Id.* at 705.

<sup>315</sup> See Klein, *supra* note 260 (providing Klein's definition of hold-up).

<sup>316</sup> See Williamson, *supra* note 261 (providing Williamson's definition of opportunism).

in the sense that it did not preclude the opportunity for the hold-up; (3) the one engaging in the hold-up must find it profitable, wealth maximizing, to do so.<sup>317</sup>

In *Hill*, the victim's specific investment is obvious—the Hills paid full price for the computer prior to its delivery, and prior to disclosure of the objectionable terms. The Hills may have believed the contract for purchase was completed and the terms were set when they put their order in, paid with their credit card, and Gateway promised to ship the goods. Under Easterbrook's "terms later" formation rule, however, the contract certainly was "incomplete" in the sense that it did not preclude a hold-up. In fact, according to Easterbrook, the contract was not merely "incomplete," it was not in existence at all at the time the Hills parted with their money.<sup>318</sup> It is apparent then that the second of the necessary factors for hold-up is also met in the *Hill* context.

As for the third factor, the actor in a position to engage in hold-up will do so only if it is wealth maximizing.<sup>319</sup> Put another way, the one engaging in hold-up must expect the short-run gains from such conduct to outweigh any long-run costs that could be imposed by the victim of hold-up by way of retaliation. If, for example, the parties have an ongoing relationship that is valuable to the one who could benefit from a hold-up, and the victim is likely to retaliate by terminating it in the event of hold up, that could prevent a hold-up from being wealth maximizing.<sup>320</sup> Threat of retaliation by the victim is within the larger category of "reputational concerns" identified in the economic literature as the most significant "private enforcement" restraint against hold-up.<sup>321</sup> Engaging in hold-up obviously tarnishes the reputation of the one engaging in that practice and is likely to sour future relations between the parties. But private enforcement capital is limited.<sup>322</sup> The larger question is whether the reputational damage will be less than the

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<sup>317</sup> See Klein, *supra* note 260.

<sup>318</sup> See *supra* Part 1.A.2 (discussing Easterbrook's formulation of the "terms later" formation rule in *ProCD*).

<sup>319</sup> See Klein, *supra* note 260.

<sup>320</sup> *Id.* at 241-44.

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

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gain achieved by the hold-up.

It is unlikely that Gateway feared that spoiling its reputation with the Hills by taking advantage of the hold-up opportunity would hurt its bottom line, or that, by using its “terms later” strategy, it would sour its relationship with the Hills so they would not buy a Gateway computer in the future. If the computer worked as promised, the Hills could care less about the objectionable remedies limitations because they would never have been confronted with them (and perhaps they would never have even known about them). If the computer did not work as promised, the bad performance itself would probably have prompted the Hills to buy their next computer from Dell or some other manufacturer even if they had been able to pursue legal remedies against Gateway.

Even if the bad performance of the computer would not have discouraged the Hills from buying another Gateway computer, but the unsatisfactory remedy limitations would have, it probably would not be enough to deter Gateway from pursuing its “terms later” strategy. If a few such future sales were lost, the negative effect on the bottom line would be minimal and not enough to forego the present gains achieved by doing the hold-up. Gateway was able to hold-up the Hills, and was able to profit from that strategy by using it to stop the Hills’ litigation efforts cold. In typical consumer transactions occurring in markets in which purchases by any particular buyer are infrequent one-shot transactions, and buyers are isolated and dispersed, reputational concerns are not significant deterrents for hold-up.<sup>323</sup>

*2. Acting Opportunistically against the Hills*

Easterbrook’s “terms later” rule satisfies not only the requirements for a successful hold-up, but also invites opportunism by vendors. Opportunism is not like the more benign hold-up

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<sup>323</sup> Katz, *supra* note 310, at 505. Katz makes his observation about the insufficiency of reputational concerns in such markets to moderate opportunism for drafters of form documents. *A fortiori* it is insufficient to moderate against hold-up made possible by form documents first disclosed after the purchaser has paid the full price.

situation in which a party advances its self-interest by taking advantage of an opportunity that arises after a contract has been made and that is made possible by the inherent limits on parties' being able to anticipate all potential future risks and expressly guard against them.<sup>324</sup> Rather, opportunism is a special culpable variety of self-interest seeking. It is self-interest seeking "with guile" and includes advancing one's self-interest by "*incomplete or distorted disclosure of information, especially calculated efforts to mislead, distort, disguise, obfuscate or otherwise confuse.*"<sup>325</sup> As noted in the literature, "opportunism is not a free-standing concept but requires, additionally, that bounded rationality and transaction attributes be introduced."<sup>326</sup>

The first element of opportunism, bounded rationality, has been examined earlier in the larger context of human cognitive limitations.<sup>327</sup> As has been noted previously, bounded rationality is a normal feature present in virtually all bargaining settings.<sup>328</sup> Normally each party possesses incomplete information about one another and each party's respective motivations with respect to the transaction are not necessarily disclosed. For example, typically a seller does not know exactly the highest price a buyer would be willing to pay, nor does the buyer know exactly the lowest price a seller would be willing to accept. Still, the dynamics of negotiation do not carry overtones of culpability or moral shortcomings.

The kind of bounded rationality that permits opportunism is introduced *by design* for the very purpose of increasing information asymmetry. A number of different methods short of actionable fraud are available to a party for decreasing information available to the other party. As noted above, they may take the form of "incomplete or distorted disclosure of information, especially calculated efforts to mislead, distort, disguise, obfuscate or otherwise confuse."<sup>329</sup> When such methods are employed the

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<sup>324</sup> Klein, *supra* note 260, at 241-42.

<sup>325</sup> See Williamson, *supra* note 261, at 703.

<sup>326</sup> *Id.* at 704.

<sup>327</sup> See *supra* notes 262-96 and accompanying text.

<sup>328</sup> See *supra* note 262 and accompanying text.

<sup>329</sup> See Williamson, *supra* note 325 and accompanying text.

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resulting contracts will be “strategically incomplete.”<sup>330</sup> They are not “incomplete” in the sense that the parties could not have anticipated the potential opportunism in order to prevent it from occurring. Rather, they are “strategically incomplete” because one of the parties strategically held back information in order to set up the very opportunity to act opportunistically.

The first element of opportunism is met with Easterbrook’s “terms later” rule. In the *Hill* context, for example, Gateway withheld several important items of information from the buyers. Notwithstanding Easterbrook’s statements to the contrary, the information about the exclusive method of acceptance and the arbitration term could have been disclosed as easily prior to taking the money from the buyers and delivering the computers as after.<sup>331</sup> But if it had been disclosed prior to taking the money, buyers may have been unwilling to purchase the computers or may have been unwilling to pay as much for them. Whatever their decisions might have been, at least they would have been operating with the same information about formation method and arbitration that Gateway was. Thus the *Hill* setting presents a classic example of strategic withholding of information to increase information asymmetry.

Easterbrook’s “terms later” rule encourages vendors to strategically hold back information to create a setting in which they can act opportunistically. It is unlikely, however, that such strategic withholding of information will lead to more efficient contracts.<sup>332</sup>

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<sup>330</sup> Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 *YALE L. J.* 87, 94 (1989).

<sup>331</sup> Gateway might have efficiently notified of terms in advance, for example, by placing them on its web site and mentioning them in its ads, at least in summary fashion with a reference to its web site for full terms.

<sup>332</sup> Farrell, *supra* note 256, at 129. See also Ayers & Gertner, *supra* note 330, at 94. The authors note, “One party might strategically withhold information that would increase the total gains from contracting (the “size of the pie”) in order to increase her private share of the gains from contracting (her “share of the pie”).” *Id.* They also observe, “[w]hen strategic considerations cause a more knowledgeable party not to raise issues that could improve contractual efficiency, a default that penalizes the more informed party may encourage the revelation of information.” *Id.* at 128. Although they caution that

The second element necessary for opportunism is the introduction of “transaction attributes.”<sup>333</sup> “Asset specificity” has been identified as “the big locomotive out of which transaction-cost economics works.”<sup>334</sup> When a party makes an investment in a specific asset, a dynamic is introduced that removes the transaction from the realm of “faceless contracting, out of which orthodox economics works,” and puts it squarely into the realm where the identity and position of the particular parties and their realistic alternatives really matter.<sup>335</sup>

In the context of a “terms later” offer in a setting like that in *Hill*, the situation is loaded with “transaction attributes.” The buyer has made a specific investment in the form of full payment and has even begun enjoying the benefit of the goods before becoming aware of the adverse terms proposed. The “offeror” will get the benefit of the adverse terms unless the buyer promptly returns the goods and thereby relinquishes all rights he thought he had already obtained in them. Unlike the situation in a “faceless transaction” in which a hypothetical offeror offers to sell goods subject to terms adverse to a hypothetical offeree, who will decide whether to affirmatively accept based on the pure merits of the offer and uninfluenced by any “transactional attributes,” in the “terms later” setting the “transactional attributes” will powerfully influence the buyer’s response to the adverse terms.<sup>336</sup> Accordingly, they will dramatically increase the likelihood that the vendor will be able to obtain both its terms and a price greater than what the buyer may have been willing to pay had the terms been disclosed up front.

Easterbrook’s “terms later” rule disregards both the

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lawmakers should not impose penalty defaults indiscriminately, they conclude that in some instances penalizing parties who withhold information would likely lead to more efficient contracts. *Id.* One instance is where the private information is acquired passively and can be revealed with low transaction costs. *Id.* The information withheld in *ProCD* and in *Hill* is that type of information.

<sup>333</sup> See Williamson, *supra* note 261, at 704.

<sup>334</sup> *Id.* at 707.

<sup>335</sup> *Id.*

<sup>336</sup> See *supra* notes 262-87 and accompanying text (regarding bounded rationality); *supra* notes 288-96 and accompanying text (regarding cognitive defects, endowment effect, status quo effect, and loss aversion).

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fundamentals of self-interestedness and limits on human cognition, but not out of ignorance. Less than a year before his *ProCD* opinion he authored an opinion in which he addressed the matter of opportunism directly.<sup>337</sup> Therein he wrote:

“Opportunism” in the law of contracts usually signifies one of two situations. First, there is effort to wring some advantage from the fact that the party who performs first sinks costs, which the other party may hold hostage by demanding greater compensation in exchange for its own performance. . . . Second, there is an effort to take advantage of one’s contracting partner “in a way that could not have been contemplated at the time of drafting, and which therefore was not resolved explicitly by the parties.”<sup>338</sup>

The conduct that his “terms later” rule authorizes creates the first of the two situations for opportunism that he described.<sup>339</sup> Buyers perform first. They engage in search costs, make a decision to purchase based on the information they have, and pay in full for the product. Only then do vendors endeavor to “wring some advantage” from the fact that they have the buyers’ commitment to buy. They do so by disclosing the concessions they demand (in a way that they will not necessarily actually come to the attention of

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<sup>337</sup> *Indus. Representatives, Inc. v. CP Clare Corp.*, 74 F.3d 128 (7th Cir. 1996).

<sup>338</sup> *Id.* at 129-30 (citations omitted) (emphasis added). Therein Easterbrook shows he is also aware of the human tendency toward self-interestedness. He observes, “[p]arties to contracts are entitled to seek, and retain, personal advantage; striving for that advantage is the source of much economic progress. Contract law does not require parties to be fair, or kind, or reasonable, or to share gains or losses equitably.” *Id.* at 132.

<sup>339</sup> Only because Easterbrook’s “terms later” rule prevents a contract from being formed at the time of purchase, by definition it cannot come within the second opportunism setting he describes. The vendors and buyers are not technically “contracting partners” at the time the vendors exercise their advantage. That does not negate the fact that vendors are endeavoring to take advantage of buyers in a way that buyers could not have contemplated at the time they purchased. Nor does it negate that fact that buyers were not alerted in time to guard against it with contract language. It is merely an acknowledgment that it does not fit the technical requirement of his second opportunism setting.

the buyers) before they will actually part with ownership by mandating that the concessions are accepted unless buyers affirmatively “reject” and by assuring the unlikelihood of “rejection” by making it costly.

It appears that Easterbrook, who is perfectly aware of the hazards of opportunism, simply shut his eyes to the predictable opportunistic behavior his “terms later” rule legalizes and thus promotes. Although Easterbrook touts the law and economics *ex ante* perspective for its ability to predict the impact of a ruling on aggregate social behavior, he patently disregarded the most fundamental matters that guide economic prediction in *ProCD* and *Hill*. Thus, he rejected any consideration of human self-interestedness, bounded rationality, transaction costs, limitation on human cognition, and loss aversion particularly as it is manifested in the endowment effect and the status quo bias. By doing so he produced a new legal rule of contract formation that increases information asymmetry, increases transaction costs, enhances hold-up and opportunistic behavior by vendors, and results in inefficiencies as well as distributional unfairness by systematically redistributing wealth from consumers to vendors. One is greatly tempted to characterize Easterbrook’s reasoning and the “terms later” legal rule it produced as “anti-economics.” At the very least, both the reasoning and resulting rule of *ProCD/Hill* are bad economics.

### III. BAD MORALS

In addition to being bad law and bad economics, Easterbrook’s *ProCD/Hill* “terms later” rule is also bad morals. It annihilates the moral justification for courts enforcing promises. In its place it introduces a purely utilitarian rule that permits a court to impose obligations on a party whenever a court believes its doing so will be best for society.

#### *A. Moral Basis for Enforcement of Promises: Protect Reasonable Expectations*

The moral justification for courts enforcing promises has

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historically derived from the premise that contractual liability is consensual.<sup>340</sup> Contract enforcement is promise enforcement. The person against whom enforcement is sought has by words or conduct made a promise that has instilled in another an expectation, a confidence, that it will be kept.<sup>341</sup> That expectation may be created even if the person against whom enforcement is sought did not subjectively intend to make a promise but voluntarily uttered words or engaged in conduct that he had reason to know would justify another in inferring that a promise had been made.<sup>342</sup> Protection of reasonable expectations is thus at the heart of contract enforcement.<sup>343</sup>

That the law enforces only to protect reasonable expectations of a promisee is well illustrated by the common law doctrines of fraud and duress.<sup>344</sup> The fraudfeasor who turns the odometer back

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<sup>340</sup> See, e.g., FARNSWORTH, *supra* note 132, §§ 1.2-.6; CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 14-17 (Harvard Univ. Press 1981); Kevin M. Teeven, *The Advent of Recovery on Market Transactions in the Absence of a Bargain*, 39 AM. BUS. L.J. 289, 311-12, 320-21, 336, 346 (2002).

<sup>341</sup> See, e.g. FRIED, *supra* note 340, at 14-17. See also Bern, *supra* note 247, at 131-32. Therein Bern observes:

One of the ways man may more effectively carry out his stewardship-dominion duties to God is by entering into agreements with his fellows. Such agreements are possible because, in creating man in His own image, God has endowed man with language, the ability to communicate with words. In particular, He has given man the ability to communicate with words of a special quality—words of promise. The essence of such words, spoken by one created in the image of God, is to instill in the one who hears them a confidence, an expectation, that they will be kept.

*Id.* (footnotes omitted). The special nature of words of promise as creating an expectation in the hearer that they will be kept is also illustrated by the fact that promise keeping is a fundamental norm in international law, *Pacta sunt servanda* (see Vienna Convention on the Law of Treaties, May 23, 1969, art. 26, 1155 U.N.T.S. 331, available at <http://www.un.org/law/ilc/texts/treaties/htm>), and is limited only by the peremptory norm, *Jus cogens*. *Id.* art. 53.

<sup>342</sup> See *supra* notes 124-49 and accompanying text regarding the objective theory of contracts and its protection of reasonable expectations.

<sup>343</sup> FARNSWORTH, *supra* note 132, § 1.6, at 17.

<sup>344</sup> *Id.* at § 4.9; Bern, *supra* note 247, at 144-45.

from 200,000 miles to 30,000 miles and on that basis extracts a promise from his victim to pay the price for what the latter believes is a low mileage car will not get court enforcement of that promise. Put simply, the fraudfeasor had no reason to believe the victim was really promising to pay that much money for the car the fraudfeasor actually intended to deliver, and thus no had no reasonable expectation worthy of court enforcement.<sup>345</sup>

*1. The Common Law (Restatement) Protects Reasonable Expectations*

Protection of reasonable expectations is reflected in the objective theory of contract law.<sup>346</sup> The Restatement (Second) of Contracts section 211(3) captures the theory with respect to terms in standardized agreements: "Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement."<sup>347</sup> It is also reflected in Restatement (Second) of Contracts section 69 which precludes silence or exercise of dominion from operating as an acceptance except in narrowly circumscribed instances that would give rise to reasonable expectations on the part of the offeror that the offeree was actually signifying acceptance by silence or exercise of dominion, or where the offeree was invited to accept by silence and in fact intended to do so.<sup>348</sup>

Use of goods that a buyer has purchased and paid for signals that the buyer reasonably believes he has ownership rights and is exercising them. The seller's belated insistence that the buyer does not own the goods, that he can have no ownership rights in those very goods except on less favorable terms, and that his continued use of them signifies his agreement to those terms seems preposterous. The buyer's continued use, far from signaling agreement to the adverse terms, is more consistent with an

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<sup>345</sup> Bern, *supra* note 247, at 144-46.

<sup>346</sup> See *supra* Part I.A.2.e.

<sup>347</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 211(3) (1981).

<sup>348</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981).

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understanding, in accord with the objective theory of contracts, that the buyer fully owns the goods and seller is crazy to think he can force adverse terms on the buyer. Under those circumstances, the seller can have no reasonable expectation that the buyer's use is signaling his agreement to the adverse terms.

Sections 211(3) and 69 also illustrate the companion principle of “freedom *from* contract.”<sup>349</sup> Freedom *from* contract is as foundational a principle as is freedom *of* contract.<sup>350</sup> Freedom from contract rests on an understanding of individual autonomy and worth, and also, in a sense, of personal liberty and even justice. Without freedom from contract, freedom of contract lacks the character of a voluntary knowing expression of commitment that creates an actual expectation in the party who hears or observes it that it will be kept. Thus, without freedom from contract there is no moral basis for judicial enforcement.

*2. The UCC Protects Reasonable Expectations*

UCC section 2-206(1)(b) protects reasonable expectations, providing, “[u]nless otherwise unambiguously indicated by the language or circumstances . . . an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by a prompt promise to ship or by the prompt or current shipment of conforming or non-conforming goods.” It eliminates the potential for the so-called “unilateral contract trick”<sup>351</sup> that had been possible under the common law mirror image rule. Under the common law rule, shipment of nonconforming goods in response to an offer did not constitute acceptance of the offer, but rather was merely a counter-offer. Consequently, a seller could intentionally ship inferior goods in response to an order, e.g., #2 quality instead of the ordered #1 quality but at the price for #1, in the hope that the inferior goods would be unwittingly received and retained by buyer's non-

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<sup>349</sup> See Katz, *supra* note 297.

<sup>350</sup> *Id.*

<sup>351</sup> John D. Wladis, *The Contract Formation Sections of the Proposed Revisions To U.C.C. Article 2*, 54 SMU L. REV. 997, 1004 (2001).

decision making employees. Failure of a decision maker to promptly notice the defects and order the goods returned would constitute acceptance of the counter-offer of #2s at #1 prices. Obviously in those circumstances the seller who engaged in such a ploy would have no reasonable expectation that such inadvertent conduct by the buyer was really a promise by the buyer to pay #1 price for #2 goods, and UCC section 2-206(1)(b) now precludes a seller from benefiting from that kind of trickery.<sup>352</sup>

The provisions of UCC section 2-207 also reflect the policy of enforcement of promises to protect reasonable expectations. The essence of current section 2-207(1) is that a definite expression of acceptance operates as an acceptance even though it contains some boilerplate terms that are different or additional to the terms of an offer.<sup>353</sup> It abandons the common law mirror image rule so that a response to an offer that, with respect to the dickered terms, looks like an acceptance. Such a response matching dickered terms creates a reasonable expectation in the offeror that the other party has made a commitment to perform as proposed in the offer. That expectation is now protected under UCC section 2-207(1); a contract between the parties has been formed on the basis of the offer and acceptance that matched dickered terms.

Current section 2-207(2) also protects reasonable expectations.<sup>354</sup> In transactions involving at least one non-merchant (the typical consumer transaction) the terms of the contract are the terms that were contained in the offer with which the offeror is familiar. The offeror has a reasonable expectation that those are the terms of the deal because the offeree manifests agreement to them by making a definite expression of acceptance, albeit with some other boilerplate terms that the offeror may or may not be familiar with. Under the current version of the Code the offeree has no reasonable expectation that his boilerplate terms are part of the agreement merely because they accompanied his acceptance.<sup>355</sup> He can have no expectation that the offeror has actually agreed to the

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<sup>352</sup> *Id.* at 1004-05.

<sup>353</sup> U.C.C. § 2-206(1) (1995). See *supra* note 31 for the explicit language.

<sup>354</sup> § 2-206(1).

<sup>355</sup> See *id.* § 2-207(1).

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boilerplate terms short of a subsequent affirmative expression of agreement by the offeror. Such other terms are nothing more than mere proposals to the contract that will simply lapse after a period of time unless affirmatively accepted by the other party.<sup>356</sup> This reflects the general common law rule that precludes forcing silence as acceptance.

Although the current version of UCC section 2-207(2) has a special rule for transactions “between merchants,” under which proposed additional terms become a part of the contract without the need for an affirmative acceptance, even that special rule nevertheless gives significant protection to reasonable expectations. Such proposed terms do not become a part of the contract if they would materially alter it.<sup>357</sup> The party proposing terms that would materially alter the contract has no reasonable expectation that the other party’s silence means he agrees to such terms. The party who receives such a proposal has no reason to expect that, absent his affirmative agreement to make that kind of change in the deal, it can become part of the contract.

Nor do proposals for additional terms become a part of the contract if the offer expressly limited acceptance to the terms of the offer.<sup>358</sup> In such an instance, the offeror reasonably expects that no other terms will become part of the deal and that expectation is protected; and the party making the proposal can have no reasonable expectation that the offer permits him to force additional terms.

Finally, such proposed terms do not become part of the contract if notification of objection to such terms has already been given or is given within a reasonable time after notice of them has been received.<sup>359</sup> In both such instances the offeror is reasonably expecting because of that action on his part that the proposals will not be part of the contract, and the one making the proposals can have no reasonable expectation that the other has agreed to be bound by them.

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<sup>356</sup> See *supra* note 90 and sources cited therein; see also FARNSWORTH, *supra* note 132, at §3.19.

<sup>357</sup> See U.C.C. § 2-207(2)(b).

<sup>358</sup> See § 2-207(2)(a)-(b).

<sup>359</sup> See § 2-207(2)(a) &(c).

### 3. "Terms Later" Contracting Does Not Protect Reasonable Expectations

Easterbrook's analysis that produced the "terms later" rule rejects or ignores all of the above rules designed to protect reasonable expectations. It does not protect the reasonable expectations of buyers that they own goods and can use them as their own once they have paid for them and taken delivery. It compels such buyers, contrary to their reasonable expectations, to give up the deals they thought they had made. While denying protection to reasonable expectations of buyers, it rewards the unreasonable expectations of vendors that buyers acquire no ownership rights when they pay for the goods, and that retention of goods by such buyers after they have had time to learn about the objectionable terms means the buyers are promising to accept and abide by them. Abandoning the only moral justification for courts to enforce promises, Easterbrook's "terms later" rule is ultimately validated by nothing more than power, the power of the court to pronounce it, for reasons sufficient to the court, and to command obedience to it.

In addition to being the moral undergirding for courts' enforcing promises, protection of reasonable expectations is also foundational for accomplishing justice,<sup>360</sup> yet Easterbrook ignores this. Only by taking into account the reasonable expectations of the parties in the contractual dispute before it, can a court do justice for the parties, rendering to each his due. The parties are not mere grist that affords a court the opportunity to establish some policy it perceives will advance some larger good for society or a segment of society. Accordingly, the judicial function has traditionally been *ex post* in perspective, with the court adjudicating the particular dispute between the parties in a manner to do justice for the

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<sup>360</sup> A definition of "justice" found in an earlier edition of *Black's Law Dictionary* is, in pertinent part: "In Jurisprudence. The constant and perpetual disposition to render to every man his due. . . . *Cummutative justice* is that which should govern contracts. It consists in rendering to every man the exact measure of his dues, without regard to his personal worth or merits, *i.e.*, placing all men on an equality." BLACK'S LAW DICTIONARY 1002 (4th ed. 1968).

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parties.<sup>361</sup> That is also why litigants like the Hills, who were but fodder for an *ex ante* law and economics court’s pronouncement and application to them of a new rule of contract formation, could rightly say of their experience with the judicial system, “There is no justice.”

B. “Terms Later” and *ex ante* Analysis Contra Fundamental Principles of Justice

Easterbrook’s adjudication process and the rule of law it produced in *ProCD/Hill* violate fundamental principles of justice in several respects. The author has described the “Requisites for Law and Justice,”<sup>362</sup> premising his analysis upon the classical

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<sup>361</sup> See Ogus, *supra* note 59.

<sup>362</sup> See Bern, *supra* note 247, at 110-115.

Encompassed within the Biblical Model are three components. The first, Requisites for Law and Justice, is foundational to the Model. It sets forth [four] Biblical requisites for substantive law and for its proper administration. It reflects aspects of God’s character and sovereignty which are manifested in the perfection of both His law and His administration of justice. Put very simply, at the level of human beings and institutions, only if these requisites are reflected in law and in its administration can there be any hope of achieving justice.

. . . .

The Psalmist extols God’s law, its perfection and his love for it, and proclaims the righteousness of His judgments. Consistent with His character, God’s law is the embodiment of truth and His perfect administration always produces judgments that are true. Three features of God’s law, and requisites for its proper administration, are captured by the Hebrew words *tsedeq*, *mishpat*, and *meshar*.

. . . [These three Hebrew words taken together] express the thought of the evenhanded and impartial application (*mishpat*) of a righteous moral standard (*tsedeq*) producing an evenness or equality (*meshar*) in outcomes in like cases. While the three Hebrew words are descriptive of distinct features of the administration of justice, with respect to the nature of substantive law itself, the one word, *tsedeq*, the righteous moral standard, appears to encompass the rule, its scope of application, and consequences for violation. The fourth requisite for the proper administration of justice is jurisdiction, the authority to determine the matter.

natural law<sup>363</sup> theory articulated by Blackstone.<sup>364</sup> Easterbrook's

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*Id.* at 110-13, 115 (citations omitted).

<sup>363</sup> “Natural law, also called the law of nature, in moral and political philosophy [is] an objective norm or set of objective norms governing human behavior, similar to the positive laws of a human ruler, but binding on all people alike and usually understood as involving a superhuman legislator.” CAMBRIDGE DICTIONARY OF PHILOSOPHY 520 (1995).

<sup>364</sup> 1 BLACKSTONE'S COMMENTARIES 38-42 (St. George Tucker ed., 1803).

Man, considered as a creature, must necessarily be subject to the laws of his creator, for he is entirely a dependent being. . . .

. . . .

This will of his maker is called the law of nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with freewill to conduct himself in all parts of life, he laid down certain immutable laws of human nature, whereby that freewill is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

Considering the creator only as a being of infinite *power*, he was able unquestionably to have prescribed whatever laws he pleased to his creature, man, however unjust or severe. But as he is also a being of infinite *wisdom*, he has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the creator himself in all his dispensations conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. Such among others are these principles: that we should live honestly, should hurt nobody, and should render to every one his due; to which three general precepts Justinian has reduced the whole doctrine of law. (citation omitted)

. . . .

This law of nature, being coeval with mankind and dictated by God himself, is of course superior in obligation to any other—It is binding over all the globe in all countries, and at all times; no human laws are of any validity, if contrary to this: and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason; whose office it is to discover, as was before observed, what the law of nature directs

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analysis is based on the imagined knowledge of consumers and artificial assent on their part to patently objectionable terms and thus is the antithesis of a truthful judgment. Further, the “terms later” rule violates the *tsedeq* requisite of justice by withdrawing the law’s historic protection of reasonable expectations in order to encourage strategic nondisclosure and opportunism by vendors. It is thus the antithesis of a righteous moral standard. Finally, the “terms later” rule has built within itself an element of favoritism

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in every circumstance of life: . . . And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased, at sundry times and in divers manners, to discover and enforce it’s laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures. *These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man’s felicity.* But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in it’s present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated the natural law. Because one is the law of nature, expressly declared so to be by God himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these.

*Id.* at 39-42.

for vendors by creating special benefits for them as a class and thus violates the righteous moral standard of uniformity of application to all without regard to person or situation.<sup>365</sup>

The method of adjudication in *ProCD/Hill* also violates the *mishpat* requisite of justice, the impartial application of the underlying law.<sup>366</sup> Easterbrook purports to apply established rules of contract formation, but in fact applies different theories of contract formation to the same contracting transaction.<sup>367</sup> Thus, he evaluates the legal effect of the vendors' undisclosed intent under the discredited subjective theory of contracts while evaluating the legal effect of the buyers' retention and use of goods they purchased under a distorted version of the objective theory of contracts. His refusal to afford the purchasers in each instance of the clear statutory protection of UCC sections 2-206 and 2-207 in order to permit vendors to have their way in imposing terms violates the impartiality principle so necessary to achieve justice in any given case.

All of this should not surprise anyone. Easterbrook is simply operating in accord with the contemporary legal realism that pervades the law schools, the courts, the legal profession, and society generally.<sup>368</sup> Legal Realism perceives courts as policy-makers who create law.<sup>369</sup> The law is nothing more than what the courts say it is.<sup>370</sup> Law is instrumental, serving as a tool for achieving results.<sup>371</sup> Like a good policy maker Easterbrook is most concerned with the impact of the rules he makes. Thus the *ex ante* approach is best suited for his creation of legal rules that will

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<sup>365</sup> Bern, *supra* note 247, at 115.

<sup>366</sup> *Id.* at 113-115.

<sup>367</sup> *Supra* notes 150-51 and accompanying text.

<sup>368</sup> See, e.g., RUDOLPH J GERBER, LAWYERS, COURTS, AND PROFESSIONALISM: THE AGENDA FOR REFORM 37, 49 (Paul L. Murphy ed., Greenwood Press 1989); Roger C. Cramton, *The Ordinary Religion of the Law School Classroom*, 29 J. LEGAL EDUC. 247, 247-50 (1978).

<sup>369</sup> See GERBER, *supra* note 368, at 33.

<sup>370</sup> See, *id.* at 37, 49; THOMAS SHAFFER, FAITH AND THE PROFESSIONS 3 (1987).

<sup>371</sup> See, e.g., GERBER, *supra* note 368, at 37; Cramton, *supra* note 368, at 249-50.

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benefit society. The matter of rule-making is purely utilitarian, i.e., what will be best for society. Any notion of justice for the particular parties to the litigation is at best secondary to the larger good of society and thus may be readily sacrificed to achieve a perceived greater good.

## IV. BAD FRUIT—THE CASE LAW

Remarkably, several courts have swallowed *ProCD/Hill's* “terms later” rule in both sale of goods and services settings. In lemming-like fashion they have followed Easterbrook’s “terms later” rule as though its validity were beyond question.<sup>372</sup> None of the courts has done the slightest analysis of Easterbrook’s legal or economic reasoning.<sup>373</sup> None of the sale of goods cases does any direct statutory analysis of UCC section 2-206.<sup>374</sup> None analyzes the implications for the objective theory of contracts precluding contract formation at the time of payment and delivery of goods or services.<sup>375</sup> Only a couple endeavor to engage in even rudimentary statutory analysis of UCC section 2-207, and in each instance the effort discloses fundamental ineptitude at the task.<sup>376</sup> For the most part each appears content to quote a few of Easterbrook’s arguments, or a few of his illustrations, or merely his conclusions,

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<sup>372</sup> *Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1073 (C.D. Cal. 2002); *Bischoff v. DirecTV, Inc.*, 180 F. Supp. 2d 1097, 1105 (C.D. Ca. 2002); *I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, 183 F. Supp. 2d 328, 338 (D. Mass 2002); *Peerless Wall & Window Coverings, Inc. v. Synchronics, Inc.*, 85 F. Supp. 2d 519, 527 (W.D. Pa. 2000); *Kaczmarek v. Microsoft Corp.*, 39 F. Supp. 2d 974, 975 (N.D. Ill. 1999); *Westendorf v. Gateway 2000, Inc.*, C.A. No. 16913, 2000 Del. Ch. LEXIS 54, at \*9-10 (Del. Ch. Mar. 16, 2000); *1-A Equip. Co. v. Icode, Inc.*, No. 1460, 2003 WL 549913, at \*2 (Mass. App. Div. Feb. 21, 2003); *Scott v. Bell Atlantic Corp.*, 282 A.D. 2d 180, 185 (N.Y. App. Div. 2001); *Brower v. Gateway 2000, Inc.*, 246 A.D.2d 250-51 (N.Y. App. Div. 1998); *M.A. Mortenson Co. v. Timberline Software Corp.*, 970 P.2d 803, 809 (Wash. Ct. App. 1999); *Brower v. Gateway 2000, Inc.*, 246 A.D. 2d 246, 251 (N.Y. App. Div. 1998).

<sup>373</sup> See sources cited *supra* note 372.

<sup>374</sup> *Id.*

<sup>375</sup> *Id.*

<sup>376</sup> *I.Lan Systems, Inc.*, 183 F. Supp. at 336-37; *Brower*, 246 A.D.2d at 250.

and deem that sufficient to justify applying the new rule of contract formation in its case.<sup>377</sup> In one instance a mere citation of the cases is treated as sufficient for establishing the correctness of the rule.<sup>378</sup>

A. *Brower v. Gateway 2000, Inc.*

The court in *Brower v. Gateway 2000, Inc.*, the first to embrace *ProCD/Hill*'s "terms later" rule, accepts Easterbrook's rationale.<sup>379</sup> It briefly describes the facts and holding in *Hill*, the facts in *ProCD*, its conclusion that UCC section 2-207 does not apply except in a "battle of the forms" setting, and then states approvingly that *Hill* "takes note of the *realities of conducting*

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<sup>377</sup> *Lozano*, 216 F. Supp. 2d at 1073; *Mudd-Lyman Sales & Serv. Corp. v. UPS*, 236 F. Supp. 907, 911 (N.D. Ill. 2002); *Peerless Wall & Window Coverings, Inc.*, 85 F. Supp. 2d at 527-28. In *Peerless Wall & Window Coverings, Inc.* the United States District Court for the Western District of Pennsylvania, citing *ProCD*, *Hill*, *Mortenson*, and an unpublished Ohio appellate court opinion, applies the "terms later" rule to hold the purchaser of cash register software bound by a warranty disclaimer first disclosed to the purchaser after order and payment. *Id.* The terms were printed on the diskette envelopes and in the user manuals accompanying the software. *Id.* Without independent statutory and factual analysis, and without any critique of the validity of the underlying rationale of those cases, the court concludes, "[t]he recent weight of authority is that 'shrink-wrap' licenses which the customer impliedly assents to by, for example, opening the envelope enclosing the software distribution media, are generally valid and enforceable." *Id.* at 527. Swallowing Easterbrook's *ProCD* rationale hook, line and sinker, it characterizes Easterbrook's opinion as "insightful[.]" and in an extensive quotation from *ProCD* excerpts virtually every argument Easterbrook had made as though each were indisputable, including: the difficulty of including all the terms on the outside of a package; how notice on the outside, and terms on the inside may be a means of business valuable to sellers and buyers alike; the commonness of transactions in which payment precedes terms; the illustrations he gave that suggested prices would be driven through the ceiling returning transactions to the horse-and-buggy age if "terms later" were not the rule; and his vendor, as master of the offer rationale. *Id.* at 527-8; *see also Brower*, 246 A.D.2d at 250-51.

<sup>378</sup> *Kaczmarek*, 39 F. Supp. 2d at 975.

<sup>379</sup> 676 N.Y.S.2d 569 (N.Y. App. Div. 1998)

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*business in today’s world.*”<sup>380</sup> It then observes that “[t]ransactions involving ‘cash now, terms later’ have become *commonplace, enabling the consumer to make purchases of sophisticated merchandise such as computers over the phone or by mail—and even by computer,*”<sup>381</sup> as though without delayed disclosure of terms, sellers would not be able to make merchandize available to consumers by phone or mail.

Perhaps the court was unaware that companies like Sears, J.C. Penney’s, and others had been offering sophisticated merchandize for consumers to order by phone or mail for decades before we entered the information age; and they had been able to do it without a “terms later” rule of law. In any event, such “reasons” are treated as sufficient to prompt the *Brower* court to voice its agreement “with the rationale” of *ProCD/Hill*.<sup>382</sup>

*B. Westendorf v. Gateway 2000, Inc.*

The court in *Westendorf v. Gateway 2000, Inc.* next embraced the *ProCD/Hill* “terms later” rule.<sup>383</sup> It also engages in no statutory analysis and makes no effort to explore the validity of Easterbrook’s assertions or reasoning.

Unlike the situation in *Hill* where the Hills were the purchasers and were also the ones to whom the computer and the “terms later” were delivered, in *Westendorf* the person who ordered and paid for the computer purchased it for delivery to another.<sup>384</sup> Even though

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<sup>380</sup> *Id.* at 572 (emphasis added).

<sup>381</sup> *Id.* (emphasis added).

<sup>382</sup> *Id.*

<sup>383</sup> *Westendorf v. Gateway 2000, Inc.*, C.A. No. 16913, 2000 Del. Ch. LEXIS 54, at \*3 (Del. Ch. Mar. 16, 2000). *See also* Kaczmarek v. Microsoft Corp., 39 F. Supp. 2d 974 (N.D. Ill. 1999). The United States District Court for the Northern District of Illinois followed the “terms later” rule of *ProCD/Hill* in a software transaction in which the disputed terms were first presented in a 2,200 page manual that accompanied the software delivered in response to an order from the purchaser and payment in advance. *Id.* at 977-78. The court summarily concluded that the terms in the manual were incorporated into the contract, citing as its authority *ProCD* and *Hill*, making only a brief parenthetical reference to the facts and holding in each. *Id.*

<sup>384</sup> *Westendorf*, 2000 Del. Ch. LEXIS 54, at \*6.

Gateway knew that the person purchasing the computer lived in a state other than that in which the person to whom the computer was to be delivered, it nevertheless did not send the “terms later” to the purchaser.<sup>385</sup> Rather, it just sent them in the box along with the computer to the designated recipient.<sup>386</sup> The recipient, dissatisfied with the computer’s performance, brought suit against Gateway.<sup>387</sup> The recipient had received the “terms later” in the box, but was not the purchaser and was not a party to any contract with Gateway.<sup>388</sup> The purchaser, who was the only person with whom Gateway had a contract, had never received the “terms later.”<sup>389</sup>

One might wonder how the purchaser could under these circumstances be said to have assented to those terms, and thus to have formed a contract that included them. Nevertheless, the *Westendorf* court finds that because the *recipient* retained the computer for more than thirty days, the “*same rationale*” of *Hill* was applicable in its case where the *recipient* was suing Gateway.<sup>390</sup> In doing so the *Westendorf* court makes explicit what had merely been implicit in Easterbrook’s rationale: that the assent necessary to bind a purchaser to “terms later” is only an artificial construct. Thus, with an apparently straight face, the *Westendorf*

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* at \*8-9.

<sup>388</sup> *Id.* at \*5-6.

<sup>389</sup> *Id.*

<sup>390</sup> *Id.* at \*3. The court noted:

In a separate action, with different underlying facts, a *Gateway customer* challenged the enforceability of the arbitration clause in the Standard Terms and Conditions Agreement arguing that it was not binding on him because he was not aware of it when he ordered the computer. The 7th Circuit rejected that argument, however, and found the agreement enforceable as written. Judge Easterbrook, writing for the unanimous panel, noted “[b]y keeping the computer beyond 30 days, the [*buyers*] accepted Gateway’s offer, including the arbitration clause.” Undeniably, *plaintiff in the present case retained the computer and accessories for more than thirty days. The same rationale, therefore, applies to this plaintiff as in the case before the 7th Circuit.*

*Id.* (alteration in original) (emphasis added).

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court can conclude that *disclosure* of “terms later” only *to the recipient* of the computer, a *non-party to the contract*, is sufficient to find that the *purchaser*, to whom the terms were not disclosed, *had assented* to their being part of his contact with Gateway. But if the bottom line of *ProCD/Hill* “terms later” is that vendors get their way because that will be best for everyone, including consumers, then such seemingly bizarre logic need not be troubling.

In giving this full expression to *Hill’s* “terms later” rule, the *Westendorf* court is compelled to distort basic third party contract law principles.<sup>391</sup> Thus, the court concludes that because the recipient accepted the benefits of her friend’s purchase, “*and otherwise met the requisite conditions for the agreement to become effective,*” the recipient was bound by the arbitration agreement included in the “terms later.”<sup>392</sup> The latter reference to the beneficiary *meeting conditions for the agreement to become effective* is a curious one as the legal status of an intended third party beneficiary is “created by contract.”<sup>393</sup> The beneficiary takes the benefits of an existing contract already formed by other parties, and is subject to limitations stated in the contract, but that is not what makes the agreement effective.<sup>394</sup> It appears Easterbrook’s “terms later” transformation of contract formation may also have some transforming effects on the law of third party beneficiaries of contracts.

C. M.A. Mortenson Company, Inc. v. Timberline Software Corp.

The Washington Supreme Court also welcomed the “terms later” rule of *ProCD/Hill*.<sup>395</sup> In an *en banc* opinion with one

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<sup>391</sup> *Id.* at 14-15 (holding that under the specific facts of the case, “both the passing of the donor’s rights *and* donor’s obligations to the donee” are warranted).

<sup>392</sup> *Id.* at 1 (emphasis added).

<sup>393</sup> RESTATEMENT (SECOND) OF CONTRACTS § 309 cmt. a (1981).

<sup>394</sup> *Id.* § 309(4).

<sup>395</sup> M.A. Mortenson Company, Inc. v. Timberline Software Corp., 998 P.2d 305 (Wash. 2000).

dissent, it applied the rule to preclude a nationwide construction contractor who purchased computer software for use in preparing bids from suing for consequential damages resulting from the software's defects.<sup>396</sup> The software was delivered to the purchaser, Mortenson, following Mortenson's submission of a written purchase order and payment for the goods.<sup>397</sup> "Terms later," in shrink-wrap form and also programmed to appear on the screen during the installation process, accompanied delivery.<sup>398</sup> They provided that if the purchaser did not agree to the terms he should promptly return the software for a refund.<sup>399</sup> They further provided that use of the software program meant the purchaser acknowledged he had read and agreed to be bound by the terms.<sup>400</sup> One of the substantive terms precluded recovery of consequential damages, the very kind of damages Mortenson sustained when the software caused errors in bids it submitted.<sup>401</sup>

The Washington Supreme Court does not inquire into the validity of Easterbrook's rationale for the rule.<sup>402</sup> Like Easterbrook, it also, without explanation, does not address the applicability of UCC section 2-206(1)(a) and (b), provisions relevant for assessing contract formation in this instance of a written offer to purchase, accompanied by full payment, and responded to by prompt shipment by the seller of the ordered software.<sup>403</sup>

Like Easterbrook, it endeavors to distinguish *Step-Saver Data*

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<sup>396</sup> *Id.* In a compelling dissent Justice Sanders demonstrates the lack of analysis of both law and facts by the majority. *Id.* at 316.

<sup>397</sup> *Id.* at 307-08.

<sup>398</sup> *Id.* at 308-09 (providing visual access to the licensing agreement "on the outside of each diskette pouch and the inside cover of the instruction manuals [as well as on] the first screen that appears each time the program is used").

<sup>399</sup> *Id.* at 308.

<sup>400</sup> *Id.*

<sup>401</sup> *M.A. Mortenson Company, Inc.*, 998 P.2d at 308-09.

<sup>402</sup> The Court of Appeals' opinion was also devoid of any exploration of the validity of Easterbrook's rationale. See *M.A. Mortenson Company, Inc. v. Timberline Software Corp.*, 970 P.2d 803 (Wash. App. Div. 1 1999).

<sup>403</sup> See generally *M.A. Mortenson Company, Inc.*, 998 P.2d at 305, in which the only reference to UCC § 2-206 is that in the dissenting opinion of Judge Sanders, 998 P.2d at 316.

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*Systems, Inc. v. Wyse*,<sup>404</sup> and similarly, its efforts are distinctions without a difference on the basic issue of contract formation.<sup>405</sup> To distinguish *Step-Saver*, the court adds a footnote that demonstrates its significant analytical shortcomings with respect to dealing with the UCC. It states:

We also note the contract here, unlike the contract in *Step-Saver*, was not “between merchants” because Mortenson does not deal in software. RCW 62A.2-104 (merchant is person who deals in or has particular skill with respect to the kind of goods involved in the transaction). RCW 62A.2-207 does not specify when additional terms become part of a contract involving a nonmerchant.<sup>406</sup>

Mortenson clearly was a merchant under the Code’s definition. The court excerpts only a part of the Code’s definition, apparently oblivious to the remainder of the definition in subsection (1),<sup>407</sup> the

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<sup>404</sup> 939 F.2d 91 (3d Cir. 1991).

<sup>405</sup> 998 P.2d at 312.

First, *Step-Saver* did not involve the enforceability of a standard license agreement against an *end user* of the software, but instead involved its applicability to a value added retailer who simply included the software in an integrated system sold to the end user. In fact, in *Step-Saver* the party contesting applicability of the licensing agreement had been assured the license did not apply to it at all. . . . Such is not the case here, as Mortenson was the end user of the Bid Analysis software and was never told the license agreement did not apply. Further, in *Step-Saver* the seller of the program twice asked the buyer to sign an agreement comparable to their disputed license agreement. Both times the buyer refused, but the seller continued to make the software available. . . . In contrast, Mortenson and Timberline had utilized a license agreement throughout Mortenson’s use of the Medallion and Precision Bid Analysis software. Given these distinctions, we find *Step-Saver* to be inapplicable to the present case.

*Id.*

<sup>406</sup> 998 P.2d at 312 n.9.

<sup>407</sup> WASH. REV. CODE ANN. § 62A.2-104(1) (2003).

(1) “Merchant” means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds

language of subsection (3),<sup>408</sup> and detailed explanatory comment 2<sup>409</sup> to RCW 62A.2-104. All make it clear that for purposes of contract formation and terms, Mortenson, as a national construction contractor purchasing software in its business capacity for business use, was a merchant.

Once the court mistakenly concludes that Mortenson is not a merchant, it observes that section 2-207 “does not specify when additional terms become part of a contract involving a nonmerchant,” as though that section gives no instruction with respect to what the legal significance of the additional terms is and

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himself out as having such knowledge or skill.

*Id.* (emphasis added).

<sup>408</sup> *Id.* § 62A.2-104(3). (3) “‘Between merchants’ means in any transaction with respect to which both parties are *chargeable with the knowledge or skill of merchants.*” *Id.* (emphasis added).

<sup>409</sup> Comment 2 provides:

The term “merchant” as defined here roots in the “law merchant” concept of a professional in business. *The professional status under the definition may be based upon specialized knowledge as to the goods, specialized knowledge as to business practices, or specialized knowledge as to both and which kind of specialized knowledge may be sufficient to establish the merchant status is indicated by the nature of the provisions.*

The special provisions as to merchants appear only in this Article and they are of three kinds. Sections 2-201(2), 2-205, 2-207 and 2-209 dealing with the statute of frauds, firm offers, confirmatory memoranda and modification rest on normal business practices which are or ought to be typical of and familiar to any person in business. *For purposes of these sections almost every person in business would, therefore, be deemed to be a “merchant” under the language “who . . . by his occupation holds himself out as having knowledge or skill peculiar to the practices . . . involved in the transaction . . .” since the practices involved in the transaction are non-specialized business practices such as answering mail. In this type of provision, banks or even universities, for example, well may be “merchants.”* But even these sections only apply to a merchant in his mercantile capacity; a lawyer or bank president buying fishing tackle for his own use is not status as to particular kinds of goods.

*Id.* at cmt. 2 (West 2003). (emphasis added).

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what happens to them in such a situation.<sup>410</sup> The court appears unaware of the relationship between UCC section 2-207(1) and UCC section 2-207(2), and in particular, that section 2-207(2) comes into play only if a contract has been formed—by informal oral agreement or by offer and shipment as acceptance or by a definite written expression of acceptance albeit with some additional boilerplate terms.<sup>411</sup> That contract, of course, already has terms that the parties agreed to by their words or conduct, supplemented by any Code gap-fillers. The court also appears to be unaware of the first sentence of section 2-207(2) that provides, “[t]he additional terms are to be construed as proposals for additions to the contract.”<sup>412</sup> Thus, it is not as though section 2-207 gives no guidance as to what is to become of the additional terms. Its guidance is clear: the additional terms are simply proposals for addition to the existing contract. Again, proposals (just another term for “offers”) do not become anything unless they are accepted by the one to whom they are made. Absent an actual acceptance, they simply lapse after a reasonable period of time.

The opinion assumes that Easterbrook is correct that section 2-204 is the only relevant Code provision. It justifies the “terms later” rule by sketching the facts and holdings in *ProCD*, *Hill*, and *Brower*, with an added conclusion that the approach of those cases “represents the overwhelming majority view on this issue [as] demonstrated by its adoption into the UCITA.”<sup>413</sup> Its conclusion drawn from the adoption of UCITA by the National Conference of Commissioners on Uniform State Laws (NCCUSL) was premature. As of January 2004 only two states, Virginia and Maryland, have adopted versions of the UCITA,<sup>414</sup> and three have enacted “bomb shelter” legislation precluding enforcement of choice of law provisions selecting a state that had adopted the UCITA.<sup>415</sup> Moreover, the UCITA never gained the support of

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<sup>410</sup> U.C.C. § 2-207.

<sup>411</sup> See *supra* note 31 (providing the text of UCC section 2-207(1)-(2)).

<sup>412</sup> U.C.C. § 2-207(2).

<sup>413</sup> 998 P.2d at 338 n.10.

<sup>414</sup> VA. CODE ANN. 59.1-501.1 (Michie 2002); MD. CODE ANN., Comm. Law § 22-101 to 816 (2003).

<sup>415</sup> IOWA CODE § 554D.104(4) (2003); N.C. GEN. STAT. § 66-329 (2004);

American Bar Association,<sup>416</sup> and in August of 2003 NCCUSL officially abandoned further efforts to get it enacted by state legislatures.<sup>417</sup>

*D. I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*

The court in *I.Lan Systems, Inc. v. Netscout Serv. Level Corp.*, another software purchase case, also falls short in Code analysis as it embraces *ProCD/Hill's* "terms later" rule in the context of a click-wrap license that purported to limit liability to the amount of the license fees paid.<sup>418</sup> In response to the purchaser's written purchase order, the seller delivered the software that contained the "terms later" in click-wrap form that displayed on the screen during the installation process.<sup>419</sup> The *I.Lan* court, like *Easterbrook*, fails to take into account the UCC section 2-206(1)(a) and (b) formation rules under which the seller's shipment of the software in response to the order constitutes acceptance of the offer, forming a contract on the terms in the purchase order plus Code gap-fillers. It states its choice with respect to contract formation rules is between UCC sections 2-204 and 2-207.<sup>420</sup> Analysis under UCC section 2-204 would be simple; *I.Lan* manifested assent to the click-wrap license agreement when in clicked the "I agree" box.<sup>421</sup>

The court notes that analysis under section 2-207 would be more complicated. In the course of describing how that analysis would operate, the court discloses its misunderstanding of the

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W. VA. CODE § 55-8-15 (2003).

<sup>416</sup> Nat'l Conference of Comm'rs on Uniform State Laws, Statement from NCCUSL President Burett to all NCCUSL Commissioners on UCITA (Aug. 1, 2003), available at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=46K>. King Burnett, NCCUSL President and the organization's representative to the House, withdrew the resolution approving UCITA from consideration by the House of Delegates "[w]hen it became evident that a clear consensus on the act was unlikely to emerge. . . ."

<sup>417</sup> See *infra* note 479 and accompanying text.

<sup>418</sup> 183 F. Supp. 2d 328 (D. Mass. 2002)

<sup>419</sup> *Id.* at 330.

<sup>420</sup> *Id.* at 335-36.

<sup>421</sup> *Id.* at 336.

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meaning and effect of UCC section 2-207(3).<sup>422</sup> It assumes that the language in the click-wrap terms has the effect of an acceptance expressly conditioned on agreement by the purchaser to its terms, thus not forming a contract on the basis of the exchange of writings.<sup>423</sup> It further concludes that under such circumstances conduct of the parties formed the contract and notes its awareness of the applicability of section 2-207(3) in such a setting.<sup>424</sup>

It ignores, however, the plain language of section 2-207(3) that provides the terms of such a contract “consist of the terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.”<sup>425</sup> Although it cites to section 1.3 of the White and Summers Treatise,<sup>426</sup> it ignores the most crucial portion of that section on the issue and concludes that the terms were those in the seller’s writing if after the completed purchase and sale transaction the purchaser clicked the “I agree” button in order to install the program it had bought.<sup>427</sup> But according to the cited authors:

Section 2-207(3) is only applicable when the writings of the parties do not otherwise establish a contract yet their conduct evidences a contract. Additionally, it presumes that there have been “writings of the parties” in which they failed to reach an agreement. Absent such, 2-207(3) is inapplicable and the proper analysis focuses on 2-204. *Note that contract formation under subsection (3) gives neither*

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<sup>422</sup> *Id.* at 336-37.

<sup>423</sup> *Id.*

<sup>424</sup> *Id.* at 336.

<sup>425</sup> U.C.C. § 2-207(3) (1995).

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

*Id.*

<sup>426</sup> JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE § 1.3 (4th ed. 1995 & Supp. 2001).

<sup>427</sup> *I.Lan*, 183 F. Supp. 2d at 336.

*party the relevant terms in its document, but fills the contract with the standardized provisions of Article 2. As a practical matter this solution may put a seller at a disadvantage, for seller will often wish to undertake less responsibility for the quality of his goods than the Code imposes or else wish to limit its damages liability more narrowly than would the Code.*<sup>428</sup>

Rather, the *I.Lan* court treats the click-wrap terms like a traditional common law counter-offer, and the purchaser's clicking of "I agree" in order to install the program that it had bought and paid for as though it were an acceptance under the common law's "last shot" rule. In addition, it erroneously treats as relevant to the determination of the terms of the contract UCC section 2-207(2), a subsection that, coupled with section 2-207(1), rejects the "last shot" rule and has applicability only in settings where additional terms are proposed after a contract has been previously formed by a definite and seasonable expression of acceptance to an offer. Its erroneous analysis contributes to the court's willingness to embrace *ProCD*'s "terms later" rule as "a practical way to form contracts."<sup>429</sup>

#### *E. 1-A Equipment Co. v. Icode, Inc.*

In yet another software case, a Massachusetts appellate court embraced *ProCD/Hill*'s "terms later" rule without any independent

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<sup>428</sup> *Id.* at 24-25 (emphasis added). White and Summers follow that observation with a reference to the history behind comment 7 to § 2-207, and quoted that comment which should have been of special import to the *I.Lan* court, but was not:

In many cases, as where goods are shipped, accepted and paid for before any dispute arises, there is no question whether a contract has been made. In such cases, where the writings of the parties do not establish a contract, it is not necessary to determine which act or document constituted the offer and which the acceptance. *See* § 2-204. The only question is what terms are included in the contract, and subsection (3) furnishes the governing rule.

*Id.*

<sup>429</sup> 183 F. Supp. 2d at 338.

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statutory analysis or critical inquiry regarding the validity of Easterbrook’s rationale.<sup>430</sup> Here, it was a forum selection clause of which the buyer was not aware until after placing the order, paying the full price, and receiving the software.<sup>431</sup> It first became aware of the “terms later” when they appeared as it was loading the software.<sup>432</sup> The buyer submitted a purchase order form prepared by the seller that stated, “Please read the End User License and Service Agreement,” but did not indicate the terms or their purported legal effect.<sup>433</sup> The terms purported to make the purchaser’s retention of the software for more than seven days after installation operate as acceptance of the terms.<sup>434</sup>

To support its application of the “terms later” rule the court merely references the Massachusetts federal district court’s opinion in *I.Lan Systems*, quotes Easterbrook in *ProCD* and *Hill*, and cites the *Brower* court’s conclusion that “[t]ransactions involving ‘cash now, terms later’ have become commonplace.”<sup>435</sup> It parrots Easterbrook’s quotation from the Farnsworth treatise that “[n]otice on the outside, terms in the inside, and a right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike,” as though it supported the “terms later” rule.<sup>436</sup> Yet that section of the Farnsworth treatise stands for the opposite proposition with respect to “terms later.”<sup>437</sup>

The court also quotes excerpts of Easterbrook’s illustrations about the binding effect of terms not called to a buyer’s attention prior to purchase, including his theater ticket illustration, as though they were credible proof of a general rule of law validating terms withheld initially from buyers.<sup>438</sup> Easterbrook’s suggestion as to

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<sup>430</sup> *1-A Equipment Co. v. Icode, Inc.*, No. 1460, 2003 WL 549913 (Mass. App. Ct. 2003).

<sup>431</sup> *Id.* at \*1.

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

<sup>434</sup> *Id.* at \*2.

<sup>435</sup> *Id.*

<sup>436</sup> *1-A Equipment Co.*, 2003 WL549913 at \*2.

<sup>437</sup> See *supra* notes 52-55 and accompanying text.

<sup>438</sup> *1-A Equipment Co.*, 2003 WL 549913, at \*2.

the binding effect of the theater ticket stub on the purchaser is directly contrary to existing law, and his other illustrations are merely his views on what courts would hold rather than upon actual holdings.<sup>439</sup> Likewise Easterbrook's conclusions in *Hill* that customers as a group are better off with "terms later" is quoted and apparently accepted as though it were an established economic fact. The willingness of courts to embrace—without the slightest question—the numerous novel legal and economic assertions upon which Easterbrook built his "terms later" rule is truly amazing, and disappointing.

*F. Bischoff v. Direct TV, Inc.*

Some courts have embraced Easterbrook's "terms later" rule in transactions involving services rather than sale of goods. In *Bischoff v. Direct TV, Inc.* the United States District Court for California's Central District applies the "terms later" rule to hold that customers of television programming services are bound by an arbitration clause of which they were not aware until after they had purchased the Direct TV equipment, ordered the service, and Direct TV activated the service.<sup>440</sup> The court does not analyze the order and installation of service under traditional common law formation rules and the objective theory of contracts. Had it done so, it would have found customers had reason to believe the contract had been formed by their order and activation of the service in response, and that the "terms later" were offers to modify that would lapse absent affirmative agreement to them by the purchasers. It also declines to treat by analogy earlier Code cases in which additional terms were sought to be introduced after an oral or written agreement between the parties for purchase and sale had been made. Rather it chooses to characterize the later disclosed terms of the Customer Agreement as merely "terms of the *ongoing contractual relationship* between Direct TV and its subscribers,"<sup>441</sup> embracing the "terms later" rule that envisages no

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<sup>439</sup> See *supra* notes 62-80 and accompanying text.

<sup>440</sup> 180 F. Supp. 2d 1097 (C.D. Cal. 2002).

<sup>441</sup> *Id.* at 1104 (emphasis added).

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final contract until after the time period for rejection passes, euphemistically referred to as the “rolling contract” approach.<sup>442</sup>

The *Birschhoff* court finds support for that approach in *Carnival Cruise Lines*,<sup>443</sup> in *ProCD* and *Hill*, and in some other unreported decisions from other lower courts (whose dates of decision were subsequent to *ProCD* and *Hill*).<sup>444</sup> Although the evidence was disputed with regard to how long it was after service had been activated before the terms were disclosed to the purchasers, there was no dispute that some time had elapsed after activation and before disclosure.<sup>445</sup> The court rebuffs the customers’ efforts to distinguish *Hill* on the basis that the “terms later” in that case came at the same time as delivery.<sup>446</sup> It finds that the length of time between the two events is not dispositive on the issue of whether the “terms later” are part of the parties’ agreement.<sup>447</sup> “The more controlling issue is the *economic and practical considerations involved in selling services to mass consumers which make it acceptable for terms and conditions to follow the initial transaction*,”<sup>448</sup> citing *ProCD* and quoting approvingly from *Hill* the argument about the “droning voice” and its conclusion that “[c]ustomers as a group are better off”<sup>449</sup> when sellers disclose terms after the purchase. “*Practical business realities make it unrealistic to expect DirecTV, or any television programming service provider for that matter, to negotiate all of the terms of their customer contracts, including arbitration provisions, with*

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<sup>442</sup> Hillman, *supra* note 5, at 743. “In a rolling contract, a consumer orders and pays for goods before seeing most of the terms, which are contained on or in the packaging of the goods. Upon receipt, the buyer enjoys the right to return the goods for a limited period of time.” *Id.* at 744.

<sup>443</sup> 499 U.S. 585 (1991); *see supra* note 67 and accompanying text (demonstrating the holding in that case rested on the stated assumption that the Shutes had knowledge of the terms prior to making their purchase).

<sup>444</sup> *Birschhoff*, 108 F. Supp. at 1105.

<sup>445</sup> *Id.* at 1101.

<sup>446</sup> *Id.* at 1105-06.

<sup>447</sup> *Id.* at 1105.

<sup>448</sup> 180 F. Supp. 2d at 1105. (emphasis added).

<sup>449</sup> *Id.*

*each customer before initiating service.*<sup>450</sup>

The bottom line is that it is not practical to require mass marketers of services to do what other sellers of services have always been required to do—state the terms on which they are willing to sell as part of their offers. For the court it is as though the objective theory of contract formation is nothing more than an archaic relic, and as though the moral authority for courts to enforce promises, derived from objectively judged assent in order to protect reasonable expectations, is a mere nicety that can be ignored for practicality's sake.

*G. Lozano v. AT&T Wireless*

A few months later, in *Lozano v. AT&T Wireless*, another California district court applied the “terms later” rule of *ProCD/Hill* in a services case.<sup>451</sup> This time the context was a cellular service transaction in which the service provider first disclosed a mandatory arbitration term after the purchaser had signed a service plan.<sup>452</sup> Its terms appeared in a welcome guide within the box containing the newly purchased phone to be used with the service.<sup>453</sup>

The service provider asserted that plaintiff had received a rate plan brochure that stated service “is subject to the Terms and Conditions contained in your . . . Welcome Guide, which is included with your phone or *available at point-of-purchase.*”<sup>454</sup> That latter phrase suggests that the case might not strictly have been one of “terms later.” If the terms were actually and reasonably available for inspection prior to the purchase decision, and the purchaser simply chose to not read them, the purchaser might be held bound by such terms under traditional contract principles.<sup>455</sup>

The court, however, taking the lead from *Bischoff*, does not

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<sup>450</sup> *Id.* (emphasis added).

<sup>451</sup> 216 F. Supp. 2d 1071 (C.D. Cal. 2002).

<sup>452</sup> *Id.* at 1073.

<sup>453</sup> *Id.*

<sup>454</sup> *Id.* (emphasis added).

<sup>455</sup> FARNSWORTH, *supra* note 132, at § 4.26.

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choose that path. Rather, it simply begins with its conclusion “that providing customers with terms and conditions after an initial transaction is acceptable, and that such terms and conditions are enforceable, including arbitration clauses.”<sup>456</sup> Relying heavily on *Bischoff* and its extensive quotations from *ProCD* and *Hill*, the court embraces the “economic and practical aspects of selling services to mass customers” rationale and the rationale that “[c]ustomers as a group are better off” with “terms later.”<sup>457</sup> It applies to a cellular telephone service provider the *Bischoff* court’s conclusion that vendors cannot realistically negotiate all of the contract terms before initiating service.<sup>458</sup> For the *Lozano* court, perceived “practical business realities” trump any legal or economic considerations to the contrary.<sup>459</sup>

Several other courts have made favorable reference to the “terms later” rule of *ProCD/Hill* in cases that did not involve clear fact settings of order by a consumer, full payment and then delivery with new terms.<sup>460</sup> A few others have distinguished

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<sup>456</sup> 216 F. Supp. 2d at 1073.

<sup>457</sup> *Id.* (quoting *Bischoff*, 180 F. Supp 1097, 1105 (C.D. Cal. 2002)).

<sup>458</sup> *Id.*

<sup>459</sup> See also *Scott v. Bell Atlantic Corporation*, 726 N.Y.S.2d 60, 63 (N.Y. App. Div. 2001). In yet another services case in the telecommunications realm, the New York Supreme Court, Appellate Division, relies upon the *ProCD/Hill* “terms later” rule earlier embraced by *Brower*, to hold subscribers to a high speed internet service are bound by disclaimer of warranties first disclosed to them on an installation CD-ROM provided by Bell Atlantic after subscribing to the service. *Id.* at 63. The subscribers contended that it was possible to use the service without having actually read the terms and conditions. The court rebuffs that contention on two grounds. *Id.* The pleadings did not allege that any of the subscribers used the service without reading the terms, “and, with regard to the location or conspicuousness of the terms and conditions within the installation package, it has been held that such does not impair the enforcement of the agreement,” citing the trilogy. *Id.* at 64. The *Scott* court thus treats those cases as teaching the unimportance of not only the timing of the disclosure but also of the actual likelihood it will be noticed by the purchaser. Like the decision in *Westendorf*, it confirms that assent for purposes of binding a purchaser to “terms later” is purely fictional at best.

<sup>460</sup> See *Goetsch v. Shell Oil Co.*, 197 F.R.D. 574, 577-78 (W.D.N.C. 2000) (finding plaintiff credit cardholder agreed to an amendment to his credit card agreement limiting his ability to arbitrate class actions because plaintiff did not

*ProCD/Hill*.<sup>461</sup> With respect to the latter, it is not clear whether the courts felt it necessary to distinguish them on the belief that they were good law, or whether it was just easier to distinguish them than to refute the erroneous position for which they stand.

*H. Licitra v. Gateway, Inc.*

Except for the United States District Court for the District of Kansas, in *Klocek v. Gateway, Inc.*,<sup>462</sup> the only other court expressing criticism of *ProCD/Hill* appears to be the New York City Civil Court in *Licitra v. Gateway, Inc.*<sup>463</sup> Confronted with the controlling authority in its jurisdiction that had fully embraced *ProCD/Hill*,<sup>464</sup> the court in *Licitra* pays deference to the conclusion that the contract was not formed until the time for rejection had passed, but refuses to hold that such conclusion compels the inclusion of the arbitration term, finding to enforce it would be contrary to the public policy of the state of New York<sup>465</sup> and also UCC section 2-207.<sup>466</sup> The court cogently notes:

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cancel his account after receiving notification of the amendment, but continued to use the card); *Stiles v. Home Cable Concepts*, 994 F. Supp. 1410 (M.D. Ala. 1998) (upholding arbitration clause in an amendment to plaintiff's cardholder agreement despite plaintiff not signing the amendment); *Hunt v. Up North Plastics*, 980 F. Supp. 1046 (D. Minn. 1997) (finding plaintiff agreed to arbitration clause incorporated in invoices because failed to reasonably object to the clause); *Boyd v. Homes of Legend*, 981 F. Supp. 1423 (M.D. Ala. 1997) (upholding arbitration clause in an agreement "subject to specific terms to be decided at delivery" and that plaintiff assented to arbitration clause upon signing purchase agreement when delivery of plaintiff's mobile home was made).

<sup>461</sup> See *Specht v. Netscape Communs. Corp.*, 306 F.3d 17 (2d Cir. 2002); *Mattingly v. Hughes Elecs. Corp.*, 810 A.2d 498 (Md. Ct. Spec. App. 2002).

<sup>462</sup> 104 F. Supp. 2d 1332 (D. Kan. 2000).

<sup>463</sup> 734 N.Y.S.2d 389 (N.Y. Civ. Ct. 2001).

<sup>464</sup> *Brower v. Gateway 2000, Inc.*, 676 N.Y.S.2d 569 (N.Y. App. Div. 1988).

<sup>465</sup> 734 N.Y.S.2d at 393-97.

<sup>466</sup> *Id.* at 396.

Finally, assuming that the UCC applies to the transaction, under UCC 2-207 in New York, between merchants, new terms in a written confirmation do not become part of the parties' agreement if they materially alter the terms of the agreement . . . and it has been held that

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The first issue presented is whether or not a contract exists between the parties and, if so, what are the terms of the contract? *Common sense tells us that if you pay money and receive a product in return, a contract has been created.* The unique issue with the purchase of computers is that there is no negotiation of the terms of the agreement. The written “Agreement” arrives with the product and by retaining the computer for 30 days, the consumer consents to be bound by the terms of the entire writing. As cited above, *courts have held this procedure creates a binding agreement between the parties. But in the words of Ira Gershwin, “It ain’t necessarily so.”*

*Accepting these holdings as being applicable, if the defendant, as a term and condition of filing a claim, required the consumer to sing “O Sole Mio” in Yiddish while standing on his or her head in Macy’s window, only Mandy Patinkin would qualify to object to the receipt of defective equipment. This cannot be so.* What these decisions must mean is that a contract has been formed with the price, the equipment and time of delivery agreed to, but almost nothing else. All other terms of the “Agreement” proposed by the computer company must be subject to interpretation by the courts as being additional terms because, if not, they might conflict with state law or be against public policy. . . .

. . . .

*. . . The Court, in Brower, applied the Marie Antoinette “let them eat cake” defense when it determined that this is not a “take it or leave it” situation and, therefore, not a contract of adhesion because the consumer has 30 days to*

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an arbitration clause is presumptively a material alteration when introduced as an additional term. . . If both parties are not merchants, such as this case where there is a merchant-seller and consumer-purchaser, additional terms are to be construed to be proposals for additions to the contract and therefore must be specifically agreed to by the other party in order to be binding. . . .

*Id.* (citations omitted).

reject the item and return the merchandise and has the ability to purchase the equivalent equipment from another vendor. *Is this a real option or only a paper one?*<sup>467</sup>

One must applaud the courage of the *Licitra* court in the face of the *Brower* precedent. One can only wonder why other courts, especially those which were not restricted by controlling precedent as it was, could not also see and reject the nonsense of Easterbrook's "common sense" and his clear misapplication of the law, or, if they saw it, why they lacked the will to stand against it. That a number of courts have expressly embraced Easterbrook's rationale and his "terms later" rule is astounding in light of its utter lack of legal, economic, or moral foundation.

#### V. BAD FRUIT—UCITA

Easterbrook's *ProCD* opinion was the first judicial affirmation of the "terms later" that was being vigorously pressed by industry groups in the drafting process of UCC Article 2B<sup>468</sup> and what ultimately came to be the free-standing UCITA.<sup>469</sup> *ProCD*, for the first time, gave the appearance of legal legitimacy to the "terms later" method of transacting business; and henceforth provided the "legal" authority argument for its proponents in their continued efforts to reflect that principle in UCC Article 2B and the UCITA.<sup>470</sup>

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<sup>467</sup> *Id.* at 391 (emphasis added).

<sup>468</sup> Linda J. Rusch, *A History and Perspective of Revised Article 2: The Never Ending Saga of a Search for Balance*, 52 SMU L. REV. 1683 (1999); Richard E. Speidel, *Introduction to Symposium on Proposed Revised Article 2*, 54 SMU L. REV. 787 (2001).

<sup>469</sup> Rusch, *supra* note 468, at 1686 n.10.

<sup>470</sup> *ProCD* and *Hill* made their first appearance in the January 20, 1997 draft of UCC 2B, with the drafting committee's approvingly referring to them in Reporter's note 2 to 2B's Mass Market Licenses provision. Note 2 stated, in pertinent part:

With respect to single form, shrink wrap cases, while the cases split, in situations dealing with single form settings involving shrink wrap licenses, no appellate case law rejects the contract-based enforceability of the forms and recent cases generally support it. See *Hill v. Gateway 2000, Inc.*, 1997 WL 2809 (7th Cir. 1997); *ProCD, Inc. v. Zeidenberg*,

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*A. History*

In spite of vigorous opposition from a host of groups, on July 29, 1999, the National Conference of Commissioners on Uniform State Laws (NCCUSL) promulgated the Uniform Computer Information Transactions Act (UCITA) for introduction to the state legislatures.<sup>471</sup> The project had begun in earnest in 1995 in response to objections by the Business Software Alliance to the inclusion of software under the larger project to revise Article 2 of the Uniform Commercial Code.<sup>472</sup> At that time the executive

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86 F.3d 1447 (7th Cir. 1996); *Arizona Retail Systems, Inc. v. Software Link Inc.*, 831 F. Supp. 759 (Ariz. 1993).

The Nat'l Conference of Comm'rs on Uniform State Laws, Commercial Code Article 2B, Jan. 20, 1997, available at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (last visited November 13, 2003). The Reporter's suggestion that *Arizona Retail* is support for enforcing shrink-wrap terms not disclosed until after purchase was erroneous. See *supra* notes 114-16.

<sup>471</sup> See, e.g., Cem Kaner, *Software Engineering and UCITA*, 18 J. MARSHALL J. COMPUTER & INFO. L. 435, 440-44 (1999) (identifying various groups in opposition to UCITA including forty-five state attorneys general, the staff of the Federal Trade Commission, Society for Information Management, retailers, fifty intellectual property law professors, the American Intellectual Property Law Association, The Committee on Copyright and Literary Property, the Communications and Media Law Committee, the Entertainment Law Committee of the Association of the Bar of the City of New York, libraries, trade associations representing the press, the Association for Computing Machinery, the Institute for Electrical and Electronic Engineers (USA), the American Society for Quality, the Independent Computer Consultants Association, the Free Software Foundation and the Software Engineering Institute.); David G. Mayhan & Patricia A. Fennelly, *The Uniform Computer Information Act: Ready Or Not, Here It Comes*, 28-Dec. COLO. LAW. 63 (1999) (recognizing the Motion Picture Association, the Recording Industry Association of America and law professors of contracts and commercial law as having spoken out in opposition to UCITA.); Joseph B. "Jobe" Tichy, Comment, *Computer Software Transactions in Washington State—What Commercial Laws Can The State Provide For This Industry? Is UCITA The Answer?*, 37 GONZ. L. REV. 377, 385 (2001) (noting the Americans for Fair Electronic Commerce Transactions also oppose UCITA on the basis of its unfair nature towards consumers.).

<sup>472</sup> Stephen Y. Chow, *UCITA: A 1990's Vision of E-Commerce*, 18 J. MARSHALL J. COMPUTER & INFO. L. 323, 324 (1999).

committee of NCCUSL spun off a separate UCC Article 2B designed as the “licensing spoke” of a proposed “hub and spoke” Article 2.<sup>473</sup>

The American Law Institute was highly critical of proposed Article 2B for its failure to require pre-transaction disclosure of terms, even in Internet transactions where such disclosure could easily be made.<sup>474</sup> In 1999 the ALI Council Ad Hoc Committee on UCC Article 2B stated that, “[t]he provisions on assent to post-transaction terms are *inconsistent with sound contract policy*,”<sup>475</sup> and that “[t]here is no good reason in contracts formed over the Internet why the terms could not be made available to the potential licensee through links on the relevant website at the time of contracting, rather than supplied later.”<sup>476</sup> Lacking ALI support for Article 2B, NCCUSL in 1999 adopted the Article 2B product as a freestanding statute dealing with transactions in computer information, in the form of UCITA.<sup>477</sup> NCCUSL never presented the proposed statute to the ALI for its final approval.<sup>478</sup> Nor did it ever receive final approval from the American Bar Association, its final effort in that regard being abandoned in February of 2003.<sup>479</sup>

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<sup>473</sup> *Id.*

<sup>474</sup> See Jean Braucher, Motion to Disapprove Proposed Final Drafts of Amendments to UCC Articles 2 and 2A, Presented to Members of the American Law Institute 9 (May 1, 2003).

<sup>475</sup> *Id.* (emphasis added).

<sup>476</sup> *Id.*

<sup>477</sup> Rusch, *supra* note 468, at 1686 n.10.

<sup>478</sup> Richard E. Speidel, *Revising UCC Article 2: A View From the Trenches*, 52 HASTINGS L. J. 607, 611 (2001).

<sup>479</sup> Press Release, Uniform Law Commissioners: UCITA Withdrawn From ABA Agenda Without Action (February 10, 2003), at <http://www.nccusl.org/nccusl/DesktopModules/NewsDisplay.aspx?ItemID=46>. In relevant part it stated:

A resolution concerning the Uniform Computer Information Transactions Act (UCITA) which was before the American Bar Association’s governing body, the House of Delegates, was withdrawn today without consideration or substantive debate by the President of the National Conference of Commissioners on Uniform State Laws (NCCUSL). K. King Burnett, NCCUSL President and the organization’s representative to the House, withdrew the resolution

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*B. UCITA: Assent Expanded*

Sections 112 and 113 of the UCITA introduce an expanded concept of “manifestation of assent” as a necessary predicate to binding purchasers to terms not disclosed by sellers until after sellers have received payment and the products have been delivered. Section 112, entitled “Manifestation of Assent,” provides that a person manifests assent by “acting with knowledge of, *or after having an opportunity to review*” the record or term.<sup>480</sup> Section 113, entitled “Opportunity to Review,” provides that a person has the opportunity to review a record or term even if it is “*available for review only after a person becomes obligated to pay or begins its performance*” if he has a right to return the item if he rejects the term.<sup>481</sup> Comment c. to section 113 states: “The right to

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approving UCITA, citing requests by a number of ABA sections and leaders to defer an extensive debate on the floor over the substantive merits of the Uniform Act. “When it became evident that a clear consensus on the act was unlikely to emerge, we were advised by a number of ABA Section officers and other leaders that the members of the House of Delegates would prefer not to take a formal position on UCITA, for or against, at this time. We withdrew the act from consideration in response to this advice.”

*Id.*

<sup>480</sup> Uniform Computer Information Transactions Act § 112, *at* [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm\(2002\)](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm(2002)) [hereinafter UCITA] (emphasis added). In pertinent part Section 112 provides:

(a) [How person manifests assent.] A person manifest assent to a record or term if the person, acting with knowledge of, *or after having an opportunity to review* the record or term or a copy of it . . . (2) intentionally *engages in conduct* or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term . . . .

*Id.* (emphasis added).

<sup>481</sup> UCITA § 113 (emphasis added). In pertinent part Section 113 provides:

(a) [Manner of availability generally.] A person has an opportunity to review a record or term only if it is made available in a manner that ought to call it to the attention of a reasonable person and permit review. . . . (c) [When right of return required.] If a record or term is available for review only after a person becomes obligated to pay or begins its performance, the person has an opportunity to review only if

return creates a situation where meaningful assent can occur.”<sup>482</sup>

Section 202 of the UCITA, entitled “Formation in General,” and its comment 4, embrace the layered or rolling contract concept to bind purchasers to terms first disclosed only after payment for and receipt of the product.<sup>483</sup> Comment 4 states: “This subsection lays a foundation for the layered contracting that typifies many areas of commerce and is recognized in Uniform Commercial Code Section 2-204 (1998 Official Text), as well as in the common law and practice of most States.”<sup>484</sup> This is an obvious reference to Easterbrook’s *ProCD* opinion, the first to distort section 2-204 and the common law in this fashion, and to its progeny, albeit without

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it has a right to a return if it rejects the record. . . .

*Id.*

<sup>482</sup> UCITA § 113, cmt. 2.

<sup>483</sup> UCITA § 202. In pertinent part Section 202 (a) provides: “A contract may be formed in any manner sufficient to show agreement, including offer and acceptance, *or conduct of both parties or operations of electronic agents which recognize the existence of a contract.*” *Id.* (emphasis added).

<sup>484</sup> UCITA § 202 cmt. 4. That comment provides, in pertinent part:

*This subsection lays a foundation for the layered contracting that typifies many areas of commerce and is recognized in Uniform Commercial Code § 2-204 (1998 Official Text), as well as in the common law and practice of most States. This foundation is further developed in Sections 208 [Adopting Terms of Records], 209 [Mass-Market License], 304 [Continuing Contractual Terms], and 305 [Terms to be Specified]. . . . Contract formation is often a process, rather than a single event. A rule that a contract must arise at a single point in time and that this single event defines all the terms of the contract is inconsistent with commercial practice. Contracts are often formed over time; terms are often developed during performance, rather than before performance occurs. Often, parties expect to adopt records later and that expectation itself is the agreement. Rather than modifying an existing agreement, these terms are part of the agreement itself. . . . During the time in which terms in a layered contract are developed or to be proposed, it is not appropriate to the [sic] apply default rules of this Act. . . . In layered contracting, the agreement is that there are no terms on the undecided issues until they are made express by the parties. Applying a default rule would be applying the rule despite contrary agreement, rather than when no such agreement exists.*

*Id.* (emphasis added).

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express citation in this comment.

The reference is explicit in comments to subsequent sections. Section 208 of the UCITA, entitled “Adopting Terms of Records,” provides in subsection (1) that a party “*adopts the terms of a record, including a standard form, as to the terms of the contract if the party agrees to the record, such as by manifesting assent.*”<sup>485</sup> When linked with sections 112 and 113 regarding assent after one has opportunity to review later supplied terms, section 208(1) would appear sufficient to fully bind purchasers in settings like that in *ProCD*. Lest there be any doubt, section 208(2), entitled “Later terms,” is explicit on the matter, stating, “[t]he terms of a record may be adopted *after beginning performance or use* if the parties had reason to know” that other terms that could not have been reviewed earlier would be provided later.<sup>486</sup> Comment 3 to section 208 states that “subsection [2] reflects the *reality of layered contracting,*” noting “many transactions involve a *rolling or layered process,*” and expressly adopting the rule of *ProCD* and one of its progeny.<sup>487</sup> Comment 5 to section 208 is explicit that “subsection [2] “applies in the mass market.”<sup>488</sup>

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<sup>485</sup> UCITA § 208(1) (emphasis added).

<sup>486</sup> UCITA § 208(2). That subsection provides, in pertinent part:

[*Later terms.*] The terms of a record may be *adopted after beginning performance or use* if the parties had reason to know that their agreement would be represented in whole or part by a later record to be agreed on and there *would not be an opportunity to review the record or a copy of it before performance or use begins.* . . .

*Id.* (emphasis added).

<sup>487</sup> UCITA § 208(2), cmt. 3 (emphasis added). Comment 3 provides:

3. Later Terms: Layered Contracting. Subsection (b) [*sic*] reflects the reality of layered contracting. While some contracts are formed and their terms defined at a single point in time, many transactions involve a rolling or layered process. The commercial expectation is that terms will follow or be developed after performance begins. This Act rejects cases that narrowly treat contracting as a single event despite ordinary practice. It adopts a rule in cases that recognize that contracts are often formed over time. *See, e.g., ProCD, Inc. v. Zeidenberg, M.A. Mortenson Co., Inc. v. Timberline Software Corp.*

*Id.*

<sup>488</sup> UCITA § 208(2) cmt. 3.

Section 209 of the UCITA, entitled “Mass-Market License,” provides that a party may adopt the terms of a mass-market license by manifesting assent thereto “before or during the party’s initial performance or use of or access to the information.”<sup>489</sup> This, of course, is the very setting presented in the typical shrink-wrap transaction. Comment 5 to section 209 elaborates the point, explicitly relying on *ProCD* and its progeny, stating with respect to the effect of terms presented after initial agreement:

*Mass-market licenses may be presented after initial general agreement from the licensee. In some distribution channels this allows a more efficient mode of contracting between end users and remote parties; this is especially important where the remote party controls copyright or similar rights in the information. . . .*

Most courts under current law enforce contract terms that are presented and assented to after initial agreement [citing *Carnival Cruise Lines*, *ProCD*, *Hill v. Gateway*, *Brower v. Gateway*, *Mortenson*, and *I. Lan Systems*, and parenthetically noting *I. Lan*’s observation that] “*Step-Saver* once was the leading case on shrinkwrap agreements. Today that distinction goes to . . . *ProCD* . . . . ‘Money now, terms later’ is a practical way to form contracts, especially with purchasers of software.”<sup>490</sup>

Section 304 of the UCITA, entitled “Continuing Contractual Terms,” is another section resting on the foundation of layered contracting. It presents the opportunity for a mass-market seller to reserve the right to change terms of the contract in the future.<sup>491</sup>

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<sup>489</sup> UCITA § 209(a) (emphasis added). That section provides, in pertinent part: “Adoption of the terms of a mass-market license under Section 208 is effective only if the party agrees to the license, such as by manifesting assent, before or during the party’s initial performance or use of or access to the information.” *Id.*

<sup>490</sup> UCITA § 209, cmt. 5. (emphasis added).

<sup>491</sup> UCITA § 304. Section 304 provides in pertinent part:

(a) Terms of an agreement involving successive performances apply to all performances, even if the terms are not displayed or otherwise brought to the attention of a party with respect to each successive performance, unless the terms are modified in accordance with this

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The seller could first present that reservation only after payment, and it could be made effective by the “assent” permitted by Sections 112 and 113. When the seller asserts this reserved right, and presents a change in terms to the other party, the latter has no right to reject the change and continue with the terms of the original contract. Rather, the change, if proposed in good faith, becomes part of the contract unless the one to whom it is proposed can show that it “alters a material term” and that his determination that it is unacceptable is made in good faith—in which case, the party to whom the change is unacceptable can avoid it only by terminating the contract as to future performances.

Section 305 of the UCITA, entitled “Terms to be Specified,” is likewise founded on the layered contracting theory.<sup>492</sup> Among other things, it assures that an agreement such as one authorized by section 304 reserving to one party the right to unilaterally change the terms of the contract in the future will not cause the contract to be invalid.<sup>493</sup>

*C. Opposition to UCITA*

UCITA and its predecessor, proposed UCC Article 2B, have been vigorously opposed on a variety of grounds and by a host of

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[Act] or the contract. (b) If a contract provides that terms may be changed as to future performances by compliance with a described procedure, a change proposed in good faith pursuant to that procedure becomes part of the contract if the procedure: (1) reasonably notifies the other party of the change; and (2) in a mass-market transaction, permits the other party to terminate the contract as to future performance if the change alters a material term and the party in good faith determines that the modification is unacceptable.

*Id.*

<sup>492</sup> See *supra* note 487.

<sup>493</sup> UCITA § 305. Section 305 provides in pertinent part:

An agreement that is otherwise sufficiently definite to be a contract is not invalid because it leaves particulars of performance to be specified by one of the parties. If particulars of performance are to be specified by a party, the following rules apply: (1) Specification must be made in good faith and within limits set by commercial reasonableness.

*Id.*

individuals and organizations.<sup>494</sup> For example, thirteen attorneys general and the Administrator of the Georgia Fair Business Practices Act jointly registered their written opposition to NCCUSL's promulgating UCITA, noting that its rules "thwart the common sense expectations of buyers and sellers in the real world," and reflect policy choices that "almost invariably favor a relatively small number of vendors to the detriment of millions of businesses and consumers who purchase computer software and subscribe to internet services."<sup>495</sup> A group of forty-five law professors also voiced their opposition in a letter to the President of NCCUSL and its Commissioners on the eve of NCCUSL's promulgating the UCITA. The letter notes, among other things, that "UCITA is *out of step with modern commercial contract*

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<sup>494</sup> See, e.g., Amelia H. Boss, *Taking UCITA On The Road: What Lessons Have We Learned?*, 7 ROGER WILLIAMS U. L. REV. 167, 206 (2001) (criticizing UCITA's authorization of anticompetitive terms preventing reverse engineering); Braucher, *supra* note 5, at 1837-43, 1852-59 (criticizing delayed disclosure of terms as deceptive acts and a violation of FTCA § 5); Chow, *supra* note 472, at 324 (stating that UCITA is "stuck in the 1992-1995 model of making terms available in the retail market only after a purchaser paid for the product and opened the box holding the software"); James S. Heller, *UCITA: Still Crazy After All These Years, and Still Not Ready for Prime Time*, 8 RICH. J.L. & TECH. 5, 56-58 (2001) (expressing concern over UCITA's threat to fair use of copyrighted material); Jeffrey A. Modisett & Cindy M. Lott, *Cyberlaw and E-commerce: A State Attorney General's Perspective*, 94 NW. U. L. REV. 643, 651 (2000) (stating that UCITA "stacks the deck against consumers"); Kaner, *supra* note 471, at 440-45 (criticizing UCITA as permitting publishers to eliminate competition from used software by barring consumers from transferring used copies of the software they buy); Jeffrey M. Rosenfeld, *Spiders and Crawlers and Bots, Oh My: Efficiency and Public Policy of Online Contracts That Restrict Data Collection*, 2002 STAN. TECH. L. REV. 3, 45 (2002) (criticizing UCITA's treatment of preemption issue); Pratik A. Shah, *Intellectual Property: A. Copyright: 5. Preemption: a) Contract enforceability: The Uniform Computer Information Transactions Act*, 15 BERKELEY TECH. L.J. 85, 92-96 (exploring consumer protection concerns).

<sup>495</sup> Letter from the Attorneys General of Connecticut, Idaho, Indiana, Iowa, Kansas, Maryland, Nevada, New Mexico, North Dakota, Oklahoma, Pennsylvania, Vermont, Washington and the Administrator of the Georgia Fair Business Practices Act to Gene Lebrun, President, National Conference of Commissioners on Uniform State Laws (July 23, 1999).

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law.”<sup>496</sup>

Consumers Union, the nonprofit publisher of *Consumer Reports* magazine, was also among the many groups registering opposition to the adoption of UCITA by NCCUSL. It noted, among other things, that UCITA “is *fundamentally unbalanced*,” is “*riddled with loopholes favoring license drafters*,” “*interferes in a wholesale way with all other applicable state statutes on four key issues*,” including consent and agreement, and “*turns upside-down the Conference’s long tradition of deferring to state consumer protection law*.”<sup>497</sup>

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<sup>496</sup> Letter from forty-five professors of contracts and commercial law in Opposition to UCITA to President Gene Lebrun and Other Commissioners, National Conference of Commissioners on Uniform State Laws (July 16, 1999) (emphasis added). The professors pertinently stated:

UCITA . . . [makes] it very easy for a *vendor to escape default rules without meaningful assent by the other party*. Although UCITA Section 112 defining “manifesting assent” is unclear, judging from the Reporter’s Notes, the intent seems to be that a business organization’s employee who opened a shrinkwrap package or clicked through terms while installing software would “manifest assent” to the vendor’s terms. . . . Even if a purchaser negotiated terms in advance of delivery, it would have to be concerned that those terms might be changed by shrinkwrap or clickwrap terms that came with the product.

. . . .

In short, UCITA’s contract rules are *not needed* to protect software makers against copying or to allow them to limit use in reasonable ways. Indeed, UCITA’s contracting rules govern all terms, *making it easy for publishers to get all the form terms they desire, for example excluding all warranties of quality, without meaningful assent by the other party*. They also protect software vendors from having to honor oral agreements actually made. This *one-sided approach even extends to permitting vendors to use a term in shrinkwrap or clickwrap to give themselves power to keep changing material terms unilaterally*. UCITA Section 304. This section misuses the terms “modified” and “modification” to refer to *unilaterally-dictated changes*, rather than the usual meaning of modification, a change agreed to by both parties. Professor Perillo has it exactly right when he describes UCITA as a “*command and control*” regime.

*Id.*

<sup>497</sup> Letter from Gail Hillebrand, Senior Attorney at the West Coast

A year and a half earlier, while UCITA was still in the UCC Article 2B format process, the Subcommittee on Proposed UCC Article 2B of the ABA Section on Science and Technology expressed its opposition to the “terms later” approach of UCC Article 2B, particularly in the context of mass-market licenses.<sup>498</sup> It noted that “[l]icensors frequently include provisions in mass market licenses to *impose restrictions or limitations which they know would discourage sales if they were disclosed prior to purchase,*” and that “a statutory ‘right of return’ *does not give adequate protection to a licensee who has expended time and effort to shop for and purchase a product in reliance on promotional materials which conceal material aspects of the product and the terms governing its use.*”<sup>499</sup> It concluded: “[i]n sum, we believe that a statute that permits a *licensor to eliminate virtually all of its obligations and impose significant use restrictions* without effective advance disclosure only *encourages sharp practice* and tends to *reduce the customer confidence* that is essential to the functioning of a mass market.”<sup>500</sup>

*D. UCITA “Terms Later” Contra Fundamental Principles of Justice*

UCITA also violates fundamental principles of justice.<sup>501</sup> In particular, it violates the *tsedeq* principle in that it replaces common law and statutory law that protects reasonable expectations with a rule that defeats reasonable expectations and protects unreasonable ones. It thus does not constitute a righteous moral standard. It also violates the *mishpat* principle of evenhanded (impartial) treatment of all in that it is premised upon favoritism of sellers over buyers in all transactions to which it

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Regional Office of Consumers Union, to each Uniform Law Commissioner (July 21, 1999). (emphasis added).

<sup>498</sup> Letter from the Subcommittee on Proposed UCC Article 2B of the ABA Section on Science and Technology to the Drafting Committee of UCC Article 2B (January 29, 1998).

<sup>499</sup> *Id.*

<sup>500</sup> *Id.*

<sup>501</sup> Bern, *supra* note 247; *see also supra* text accompanying notes 340-45.

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applies, permitting sellers to dictate after the sale the terms on which they will be bound, apparently upon the utilitarian presumption that this will be best for society.

Fortunately, this abrogation of fundamental principles of justice was ultimately thwarted. Although versions of UCITA obtained quick passage in Maryland<sup>502</sup> and Virginia,<sup>503</sup> it could not garner support from any other state legislature. Some states responded with “bomb shelter” statutes,<sup>504</sup> anti-UCITA statutes to prevent UCITA from governing any computer information transaction contract within their borders.<sup>505</sup> Facing continued overwhelming opposition even to its attempts to make UCITA more palatable, NCCUSL discharged its standby committee of the UCITA at its annual meeting on August 1, 2003.<sup>506</sup> The press release announcing the discharge of the standby committee, continued: “We have determined to focus the Conference’s energies on the items related to our larger agenda and not expend any additional Conference energy or resources in having UCITA.” With that, NCCUSL’s effort to promote its ill-conceived UCITA thankfully came to an end but not until after it, and the powerful industry lobby it had galvanized, had contaminated the Article 2 revision process.

## VI. BAD FRUIT—PROPOSED ARTICLE 2 AMENDMENTS

Some of the proposed amendments to UCC Article 2 are yet additional bad fruit from *ProCD/Hill*’s bad seed.<sup>507</sup> In particular,

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<sup>502</sup> MD. CODE ANN., Maryland Uniform Computer Information Transfer Act §22-211 (2002).

<sup>503</sup> VA. CODE ANN. § 59.1-505.6 (Michie 2003).

<sup>504</sup> IOWA CODE § 554D.104 (2003); N.C. GEN. STAT. § 66-329 (2002); W. VA. CODE § 55-8-15 (2003).

<sup>505</sup> Brian D. McDonald, *V. Business Law: B. Computer Information: a) Contract Enforceability: The Uniform Computer Information Transactions Act*, 16 BERKELEY TECH. L.J. 461, 463 (2001). See also, David A. Szwak, *Uniform Computer Information Transactions Act [U.C.I.T.A.]: The Consumer’s Perspective*, 63 LA. L. REV. 27, 29 (2002).

<sup>506</sup> Press Release, U.C.I.T.A. Standby Committee is Discharged (Aug.1, 2003).

<sup>507</sup> These Proposed Amendments to UCC Article 2 were approved by the

the proposed amendments to sections 2-204, 2-211, and 2-207 sprout directly from it and the appearance of legal legitimacy the decisions gave to business interests who pressed hard for imposition of their will in the drafting process, as they had in the drafting process of Article 2B and UCITA.<sup>508</sup>

*A. Proposed Sections 2-204 and 2-211(4): Validating “Terms Later” under the Guise of Adapting to Technological Change*

The proposed amendments to UCC section 2-204 adopt *ProCD*'s conclusion that clicking through messages on a screen by the purchaser of software in order to load or use that software is agreement to whatever those messages state.<sup>509</sup> Proposed comment

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National Conference of Commissioners on Uniform State Laws at its annual meeting in August of 2002 and by the American Law Institute at its meeting on May 13, 2003. The amendments referred to in this article are from the August 2002 Final Draft adopted by NCCUSL at its annual meeting in August 2002, with the portions underlined in the notes *infra* indicating the changes proposed to existing Article 2. They may be accessed online at The National Conference of Commissioners on Uniform State Laws, Drafts of Uniform and Model Acts, Official Site, [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (last visited November 13, 2003).

<sup>508</sup> See *supra* note 468 and accompanying text.

<sup>509</sup> U.C.C. § 2-204 (2002) (Proposed Draft).

FORMATION IN GENERAL. (1) A contract for sale of goods may be made in any manner sufficient to show agreement, including offer and acceptance, conduct by both parties which recognizes the existence of such a contract, the interaction of electronic agents, or the interaction of an electronic agent and an individual. (2) An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined. (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy. (4) Except as otherwise provided in Sections 2-211 through 2-213, the following rules apply:(a) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements. (b) A contract may be formed by the interaction of an electronic agent and an individual acting on the individual's own behalf or for another person. A contract

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5 makes explicit that subsection (4)(b) “substantiates an anonymous click-through transaction.”<sup>510</sup> It notes:

The requisite intent to contract by the individual is found by the acts of the individual that the individual has reason to know will be interpreted by the machine as allowing the machine to complete the transaction or performance, or that will be interpreted by the machine as signifying acceptance on the part of the individual.<sup>511</sup>

Of course the machine that is likely to be interpreting the keystrokes of the purchaser of the software is the purchaser’s own computer. For purposes of “interpretive ability,” the owner’s computer is deemed capable of interpreting his keystrokes in an effort to load or to use the software he has already paid for as meaning he accepts the new terms. Still, adding a new subsection (4) to the proposed amended section 2-211 makes clear that his computer is deemed to be *not capable* of interpreting any other keystrokes he makes, such as “I R-E-J-E-C-T T-H-E-S-E N-E-W T-E-R-M-S.”<sup>512</sup>

Perhaps in an effort to allay fears about the impact of amended section 2-204, or perhaps to just strategically understate its impact, the proposed comment notes that “[t]his intent is only found, though, when the individual is free to refuse to take the actions that the machine will interpret as acceptance or allowance to complete

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is formed if the individual takes actions that the individual is free to refuse to take or makes a statement that the individual has reason to know will: (i) cause the electronic agent to complete the transaction or performance; or (ii) indicate acceptance of an offer, regardless of other expressions or actions by the individual to which the electronic agent cannot react.

*Id.* (underlined material is proposed amended language).

<sup>510</sup> U.C.C. § 2-204 prop. cmt. 5 (2002) (Proposed Draft).

<sup>511</sup> *Id.*

<sup>512</sup> U.C.C. § 2-211(4) (2002) (Proposed Draft). That section provides:

(4) A contract formed by the interaction of an individual and an electronic agent under Section 2-204(4)(b) does not include terms provided by the individual if the individual had reason to know that the agent could not react to the terms as provided.

*Id.* (underlined material is proposed amended language).

the transaction.”<sup>513</sup> Then it gives the example of a common Internet transaction where the seller presents the terms *before* the purchaser or user has made any commitment at all,<sup>514</sup> atypical of a “terms later” setting such as *ProCD* or *Mortenson*. But subsection 4(b) also applies to validate, as did *ProCD* and its shrink-wrap case law progeny, and as does UCITA, the click-on as assent in pure “terms later” settings.<sup>515</sup> In such settings, based on the relevant economic considerations and considerations of human behavior noted above, one must ask realistically how “free” is the individual to refuse to take key stroke actions? “Free,” only if it means it is costless to give up the deal he had already made, return the software, and engage in a new search for a substitute.

*B. Section 2-207: Legitimizing “Terms Later” Contracting*

The Prefatory Note to the August 2001 proposed Amendments to Article 2 signals in a not very subtle way the affirmation of *ProCD/Hill*’s terms later rule in proposed changes to section 2-207.<sup>516</sup> It states, “section 2-207 is amended to state the terms of contract formed in any manner, not just those as to which there is a battle of the forms.”<sup>517</sup> This supports Easterbrook’s *ProCD/Hill* premise that the current section 2-207 was confined to battle of the forms settings; a premise contrary to the clear language of current section 2-207 and its comments, and contrary to the decisional and scholarly commentary on the matter prior to Easterbrook’s *ProCD* decision.<sup>518</sup>

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<sup>513</sup> § 2-204 prop. cmt. 5.

<sup>514</sup> THE EMERGED AND EMERGING NEW UCC: AMENDMENTS TO UCC ARTICLE 2—SALES, § 2-204 prop. cmt. 5, 33 (American Law Inst. 2002).

<sup>515</sup> *Id.* (providing that a purchaser advised that the transaction will be completed by clicking “I agree” will be bound if purchaser had reason to know that the click would be interpreted as acceptance of the terms).

<sup>516</sup> Nat’l Conference of Comm’rs on Uniform State Laws, Amendments to Uniform Commercial Code Article 2-Sales, Aug. 10-17, 2001, *available at* [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (last visited Nov. 13, 2003).

<sup>517</sup> *Id.* (emphasis added).

<sup>518</sup> THE EMERGED AND EMERGING NEW UCC: AMENDMENTS TO UCC ARTICLE 2—SALES, § 2-207 prop. cmt. 3, 37 (American Law Inst. 2002).

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The Prefatory Note also understates the significance of the decision to move some of the language of the current section 2-207(1) up into a new section 2-206(c). Proposed section 2-206(c) pertinently provides, “[a] definite and reasonable expression of acceptance in a record operates as an acceptance even if it contains terms additional to or different from the offer.”<sup>519</sup> That language appears in the current section 2-207(1)<sup>520</sup> in conjunction with the current section 2-207(2)<sup>521</sup> and had a two-fold impact.

First, it constituted a rejection of the common law mirror image rule. Second, it established the “first-shot” rule that favored the offeror by giving full effect to that language so that a definite expression of acceptance that contained terms different from or additional to those in the offer did operate as an acceptance of the terms of the offer.<sup>522</sup> Current section 2-207(2) prescribes the effect of proposals for additional terms, precluding imposition of such terms on a consumer absent express agreement to them by the consumer.<sup>523</sup> It also precludes imposition of additional terms that materially alter the contract already formed on the basis of the offeror’s terms in the case of transactions between merchants.<sup>524</sup>

Referring to the repositioning of the language from section 2-207(1) to proposed section 2-206(c), the Prefatory Note states, “[t]he formation rule—that ‘a definite and seasonable expression of acceptance’ operates as an acceptance even though it does not mirror the offer—is set forth as an amendment to the section dealing with offer and acceptance generally.”<sup>525</sup> But it leaves unsaid that the proposed rewrite of section 2-207 radically transforms the meaning of the repositioned language from its normal legal meaning and that which it has under current section

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<sup>519</sup> U.C.C. § 2-206(3) (2002) (Proposed Draft).

<sup>520</sup> U.C.C. § 2-207(1) (1995).

<sup>521</sup> See § 2-207(1)-(2).

<sup>522</sup> See, e.g., FARNSWORTH, *supra* note 132, at § 3.21a.

<sup>523</sup> See *supra* note 107 and accompanying text.

<sup>524</sup> See *supra* note 108 and accompanying text.

<sup>525</sup> See Nat’l Conference of Comm’rs on Uniform State Laws, 2001 Annual Meeting Draft, Amendments to the Uniform Commercial Code Article 2-Sales, Aug. 10, 2001, available at <http://www.law.upenn.edu/bll/ulc/ucc2/ucc0612.htm> (last visited April 20, 2004).

2-207. The proposed rewrite of section 2-207 effectively neuters the normal legal effect of a definite expression of acceptance that contains terms different from or additional to the terms of the offer. Although the repositioned language still expressly states that such expression of acceptance “operates as an *acceptance*,” proposed section 2-207 does not recognize that such expression of “*acceptance*” is an acceptance in the normal legal sense of the exercise of a power that forms a contract on the basis of the terms offered. Rather, an expression of “*acceptance*” may have no legal significance beyond evidencing that the parties are in some sort of a generic relationship sufficient to permit a court to treat it as a contract for purposes of the court’s prescribing its terms under the provisions of proposed section 2-207.

Proposed section 2-207 is indeed the card that trumps whatever the reasonable belief of the offeror may be as to the terms of the contract in instances where the offeree has made what appears to be a definite expression of acceptance, albeit with different or additional form terms.<sup>526</sup> It also trumps whatever the reasonable

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<sup>526</sup> U.C.C. § 2-207 (2002) (Proposed Draft).

~~(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms. (2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received. (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act. If (i) conduct by both parties recognizes the existence of a contract although their records do not otherwise establish a contract, (ii) a contract is formed by an offer and acceptance, or (iii) a contract formed in any manner is confirmed by a record that contains terms additional to or different from those in the contract being confirmed,~~

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belief of the offeror may be as to the terms of the contract in instances where the offeree has made what appears to be an unqualified acceptance but thereafter sends a writing with additional or different terms. This is because proposed section 2-207 makes no distinction among: (1) a contract established by conduct although the records of the parties do not agree, (2) a contract formed by an offer and acceptance, or (3) a contract formed in any manner that is confirmed by a record that contains terms additional to or different from those in the contract being confirmed.<sup>527</sup> All are treated on par and their terms are the:

- (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of this Act.<sup>528</sup>

As proposed comment 3 makes clear, subsection (b) is the blank check given to the court to enable it to exercise its “wise discretion” in determining the terms to which the parties “agree.”<sup>529</sup> That comment is explicit that the agreement contemplated by the revision is not limited to an express agreement. It notes, in pertinent part:

*By inviting a court to determine whether a party “agrees” to the other party’s terms, the text recognizes the enormous variety of circumstances that may be presented to a court under this section, and the section gives the court greater discretion to include or exclude certain terms than original Section 2-207 did. In many cases mere performance should not be construed to be agreement to terms in another’s record by one that has sent or will send its own record with additional or different terms. . . . By the*

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the terms of the contract, subject to Section 2-202, are: (a) terms that appear in the records of both parties; (b) terms, whether in a record or not, to which both parties agree; and (c) terms supplied or incorporated under any provision of this Act.

*Id.* (strikethrough shows current text) (underlined shows proposed text).

<sup>527</sup> *Id.* § 2-206(3) (Proposed Draft).

<sup>528</sup> *Id.*

<sup>529</sup> *Id.* § 2-207 prop. cmt. 3 (Proposed Draft).

same reasoning *performance after an original agreement between the parties* (orally, electronically or otherwise) *should not normally* be construed to be agreement to terms in the other's record *unless that record is part of the original agreement*.

....

In some cases *a court might find nonverbal agreement to additional or different terms that appear in only one record*.

....

... *There is a limitless variety of verbal and nonverbal behavior that may be claimed to be an agreement to another's record. The section leaves the interpretation of that behavior to the wise discretion of the courts.*<sup>530</sup>

Thus, if an offeror submits a written offer to which the offeree responds with what appears to be a definite expression of acceptance, but with different or additional terms, the "contract" formed by such acceptance is not necessarily the one that the offeror offered. It will be for the court in its "wise discretion" to determine whether some nonverbal conduct by the offeror should be deemed to be agreement by the offeror to such terms. The "first shot" favored position of the offeror under current section 2-207 is rejected by the language of the proposed revision of section 2-207, a matter explicitly noted in proposed comment 2.<sup>531</sup> As noted above, it has been the "first shot" preference of current section 2-207 (1), coupled with section 2-207(2), that, prior to the distortion

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<sup>530</sup> *Id.* (emphasis added).

<sup>531</sup> *Id.* § 2-207 prop. cmt. 2 (Proposed Draft). In pertinent part, that comment provides:

This section applies only when a contract has been formed under other provisions of Article 2. This section functions solely to define the terms of the contract. When forms are exchanged before or during performance, the result from the application of this section *differs from the original Section 2-207 and the common law in that this section gives no preference to the first or the last form*; it applies the same test to the terms in each.

*Id.* (emphasis added).

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of section 2-207 by Easterbrook’s *ProCD* opinion, had protected such an offeror from imposition of adverse terms included in the form acceptance.

Likewise, under the proposed revision of section 2-207, if an offeror buyer makes an offer by telephone that the offeree seller orally accepts without qualification in that same conversation, it is apparent that such an offeror cannot be sure at that moment that a contract has been formed, or, if it has been formed, on what “terms.” These matters must await potential future conduct by the seller. If the seller presents “terms later” in a subsequent writing, perhaps those will be the terms of the contract. Comment 3 says that “*performance after an original agreement between the parties (orally, electronically or otherwise) should not normally be construed to be agreement to terms in the other’s record.*”<sup>532</sup> Translation: In some cases mere performance may be construed to be agreement to terms in another’s record. After all, the comment also recognizes “a limitless variety of verbal and nonverbal behavior that may be claimed to be an agreement to another’s record.”<sup>533</sup> Therefore a buyer’s retention of goods in the face of a seller’s “terms later” provision declaring the same to be acceptance could be deemed to be behavior signifying agreement, if that appeared appropriate in the wise discretion of the court.

Further, the appropriateness of such a determination is fortified by proposed comment 5, which legitimizes *Hill’s* distortion of current section 2-207 and common law principles to bind a buyer to a seller’s “terms later” in such a setting.<sup>534</sup> Proposed comment

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<sup>532</sup> *Id.* § 2-207 prop. cmt. 3 (Proposed Draft) (emphasis added).

<sup>533</sup> *Id.*

<sup>534</sup> U.C.C. § 2-207 prop. cmt. 5 (Proposed Draft).

The section omits any specific treatment of terms on or in the container in which the goods are delivered. Amended Article 2 takes no position on the question whether a court should follow the reasoning in *Hill v. Gateway 2000*, 105 F.3d 1147 (7th Cir. 1997) (Section 2-207 does not apply to these cases; the “rolling contract” is not made until acceptance of the seller’s terms after the goods and terms are delivered) or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*, 939 F.2d 91 (3d Cir. 1991) (contract is made at time of oral or other bargain and “shrink wrap” terms or those in the container become part of the contract only if they comply with provisions like

5's assertion that "[a]mended Article 2 *takes no position* with respect to whether a court should follow the reasoning in *Hill v. Gateway 2000* . . . or the contrary reasoning in *Step-Saver Data Systems, Inc. v. Wyse Technology*" is pure sophistry.<sup>535</sup> For the "reasoning" of *Step-Saver* rested squarely upon current section 2-207's "first shot" rule that favored the offeror, which proposed section 2-207 expressly rejects; and upon section 2-207(2)'s prescription with respect to the treatment of additional terms, the very language that proposed section 2-207 eliminates. The proposed revision and its comments cut away the entire basis for *Step-Saver*'s "reasoning." Nothing in the language of proposed section 2-207 or its proposed comments supports the "reasoning" of *Step-Saver*, but everything in them accommodates the "reasoning" of *Hill*'s terms later "rolling contract" analysis. After much initial resistance to the aberration of *ProCD/Hill*'s "terms later" doctrine,<sup>536</sup> the drafters of the revision ultimately caved in.<sup>537</sup>

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Section 2-207).

*Id.*

<sup>535</sup> *Id.*

<sup>536</sup> Rusch, *supra* note 468, at 1683-90; Speidel, *supra* note 478, at 614-17. See, e.g., March 21, 1997 Draft subsection (a) of Section 2-206, "Consumer Contracts, Records," available at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (providing: "[i]n a consumer contract, if a consumer agrees to a record, any non-negotiated term that a reasonable consumer in a transaction of this type would not reasonably expect to be in the record is excluded from the contract, unless the consumer had knowledge of the term before agreeing to the record"). Comment 1 to that draft section stated:

The question is when a consumer who agrees to a record, usually by authentication or by conduct indicating assent to terms in the record, [is] bound by the terms in the record? The answer in a consumer contract under Section 2-206 is that the terms [sic] is excluded when a term is not negotiated, a reasonable consumer in this type of transaction would not expect it, and the consumer had no knowledge of the term before the agreement. The ALI supported this principle by a 2 X 1 votes at the Annual Meeting in May, 1997.

*Id.* See also March 21, 1997 Draft comment 4 to Section 2-205 "Offer and Acceptance in Formation of Contract," available at [http://www.law.upenn.edu/bll/ulc/ulc\\_frame.htm](http://www.law.upenn.edu/bll/ulc/ulc_frame.htm) (describing the *ProCD* and *Hill* cases and notes that they "raise questions about the adequacy of the proposed contract formation provisions," one of which was "[d]oes Article 2 adequately neutralize the risk of

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Apparently for strategic reasons, they couched their capitulation in terms designed to make it appear that they have merely raised *Hill*'s pure distortion of the Code and common law principles to a level of parity with decisions like *Step-Saver* that had accurately applied them. Only the most naïve could believe the feigned neutrality of the proposed revision on the issue of “terms later.”

*C. Proposed Article 2's Sanction of “Terms Later” Contra  
Fundamental Principles of Justice*

Proposed Article 2's sanction of “terms later” violates fundamental principles of justice.<sup>538</sup> The click-through method of assent to bind purchasers to “terms later” prescribed by sections 2-204 and 2-211(4) mandates a fictitious assent, contrary to the essence of justice based on truth. It violates the *tsedeq* principle in that it replaces a clear rule of law that protects reasonable expectations with a rule that defeats reasonable expectations and protects unreasonable expectations. It thus does not constitute a righteous moral standard. It also violates the *mishpat* principle of evenhanded (impartial) treatment of all in that it is premised on a policy of favoritism toward sellers, permitting sellers to dictate after the sale the terms on which they will be bound, apparently upon the utilitarian presumption that this will be best for society.

The proposed revision of section 2-207 also violates three of the four “Requisites for Law and Justice.”<sup>539</sup> It violates the *tsedeq* principle in two respects. First, it removes a clear rule of law that guards against imposition of “terms later” and replaces it with a non-rule. Second, it extends an invitation to courts to exercise their “wise discretion” to state when and to what extent it deems parties have agreed, and to even engage in multiple fictions for that purpose. The first fiction is that no contract is formed when a buyer orally orders goods and pays for them and the seller in response orally agrees to ship the goods and/or actually ships them.

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unfair surprise in these cases? If not, what revisions should be made?”). *Id.*

<sup>537</sup> Speidel, *supra* note 478, at 617-20.

<sup>538</sup> Bern, *supra* note 247 and accompanying text; *see also supra* text accompanying notes 340-43.

<sup>539</sup> *Id.*

The second fiction is that the buyer's continued retention of the goods that he has bought and paid for constitutes an agreement to disadvantageous terms in the shipping carton even if the buyer was not aware of them.

It also violates the *mishpat* principle of evenhanded (impartial) treatment of all in that it invites the courts to apply *ProCD/Hill's* "terms later" doctrine to openly favor sellers and what is desired by them, upon the utilitarian presumption that this will be best for society. That principle of evenhanded treatment of all, so deeply embedded in American law and reflected in the equal protection clause of the Fourteenth Amendment to the United States Constitution,<sup>540</sup> is openly repudiated by Easterbrook with his favor-the-sellers "terms later" rule of contract formation.

The proposed revision of section 2-207 also violates the *meshar* principle. Because it disclaims any standard for determining the legal status of "terms later" and invites courts to engage in fictions in determining when and to what parties will be deemed to have agreed, one can have no confidence that like outcomes will occur in like cases. It all depends on the "wise discretion" of the court, which may vary considerably from judge to judge.

## VII. PROPOSAL

Had the NCCUSL not abandoned its push to have UCITA adopted, the first proposal of this paper would have been its defeat in any state in which it had not been adopted and repeal in each of the two states in which it had been. Now the proposal is more limited—a call for the repeal of UCITA in Virginia and Maryland.

With respect to the proposed amendments to Article 2 of the Code, prior to the aberration of *ProCD/Hill* no cases or commentary had in any way suggested that UCC section 2-207 required anything less than actual, knowing agreement by consumers to additional or different terms first proposed after a contract had been formed. Nor had cases or commentary suggested that section 2-207 gave too many rights to consumer buyers.

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<sup>540</sup> U.S. CONST. amend. XIV, § 1.

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Nothing prior to those cases suggested that, as far as consumer transactions were concerned, section 2-207 was “broken.” Certainly nothing in the cases or commentary had suggested that section 2-204 was some kind of a roving wild card that trumped the contract formation terms of section 2-206 or the objective theory of contract law. It is remarkable, indeed, that these aberrant cases should prompt any perception that the section needed to be “fixed” in order to accommodate the aberration.

In the end, the proposed revision would “fix” what had not been broken, and would embrace the aberration. The fix achieved would have all of the appearances of a “fix” in its most unsavory sense, exposing consumers to all of the abuse and opportunism afforded sellers who can force adverse “terms later” upon them. The Code is already tipped so heavily in favor of sellers with, for example, section 2-719 that permits sellers to limit remedies and preclude consequential damages.<sup>541</sup> The proposed revisions permit the imposition of those and other adverse terms secretly via “terms later.” They would thus add one more heavy weight to the sellers’ side of the scale, and leave on the buyers’ side only the light weight of the unpredictable unconscionability doctrine to police against the statutorily sanctioned abuse.

For the reasons stated above, current sections 2-204, 2-206, and 2-207 should be left alone and their counterparts in the proposed amendments should be rejected. Proposed section 2-211(4), which has significance only as it facilitates imposition of terms later, should also be rejected. Only by rejecting these proposed amendments, which encourage sellers to withhold adverse terms until after payment, can the legislatures keep consumers from being subjected to calculating overreaching and abuse by sellers. Only by rejecting these proposed amendments and expressly repudiating the *ProCD/Hill* “terms later” doctrine as a distortion of law contrary to public policy can state legislatures assure justice in the contracting process.

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<sup>541</sup> U.C.C. § 2-719 (1995).

## CONCLUSION

Easterbrook's pronouncements in *ProCD* and *Hill* are without moral justification, his purported legal analysis is transparently fallacious, and his purported economic analysis is patently bogus—all demonstrating that his “terms later” rule is nothing more and demonstrate that his “terms later” rule is nothing more than the rank exercise of raw judicial power. As such, his *ProCD/Hill* “terms later” rule is a classic example of legal realism in operation and of the accuracy of the assessment of Critical Legal Studies theorists that what courts engage in is the mere exercise of power, not the application of law.<sup>542</sup>

That should come as no surprise because for some time now it has been a part of the “ordinary religion” of the law school classroom.<sup>543</sup> And in more recent years it has come to be understood by a greater share of the general population,<sup>544</sup> the very problem Roscoe Pound had identified over seventy-five years ago.<sup>545</sup> Though it is not a surprise, law reduced to nothing more than power is a matter of no small import. Once law is severed from its historic transcendent moorings and relegated to a transparent exercise of power, it loses its authoritative force, and the implications for instability of society are ominous. Why should the public believe the decision-makers have made the right decisions, or even that they have authority to do so? When law loses its authoritative force, an accompanying disregard for what masquerades as law is inevitable, as is a disdain for those who purport to pronounce it. Thus the implications of law as naked power so openly displayed in cases such as *ProCD* and *Hill* reach well beyond contract law and the Commercial Code.

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<sup>542</sup> UNGER, *supra* note 177, at 169-81.

<sup>543</sup> Cramton, *supra* note 368 and accompanying text. *See also* GERBER, *supra* note 368.

<sup>544</sup> BERMAN, *supra* note 247 and accompanying text.

<sup>545</sup> POUND, *supra* note 248.