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COMMENTARY

TOWARD A PHENOMENOLOGY OF
CONTRACT ADJUDICATION

Stewart T. Graham, Jr.*

Contract adjudication typically has been presented as a series of objective facts which, taken as a whole, compel certain jural consequences.¹ That is, adjudication has been understood as the aligning of conceptual abstractions, such as rules and principles, with the facts of the case to reveal the conclusion of law. This characterization is applicable whether one invokes an analytical or normative theory of law. Both types of theories generally treat law and adjudication as structures existing apart from the individuals involved. Legal adjudication is seen as an existing structure through which facts are sorted on their way to becoming the context for a legal decision. This objectification of adjudication fails to account for the subjective field of human action which gives meaning to these “facts.” Without a human subject there are no facts; without a human subject there is no meaning. An act cannot be cut out of history labeled, for example, an element of a contract, and presented as a specimen for study. Acts have meaning only within an intersubjective context which gives them meaning. A promise has meaning, or is a promise, only within a relationship of individuals who share an understanding of the world in general and of a certain experience in particular.

Legal adjudication must be understood as a particular arena of intersubjectivity in which individuals perform a certain activity which has meaning only because of that background of intersubjectivity. It is this background which provides structures for un-

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¹. This is true even of natural law theorists, who although they conceive law as deriving from some transcendental norm still objectify the process by which that norm is applied in resolving disputes. Professor Peter Gable’s article, addressing the subjectivity of law, deals with the phenomenon of contractual condition as a vehicle for the explication of law “from the interior.” Gable, Intention and Structure in Contractual Conditions, 61 MINN. L. REV. 601 (1977).
derstanding the world and the acts of others. It is a background of
commonality and familiarity which makes experience conventional.
If law and adjudication can be understood as lived responses to
conflicts occurring within a familiar structure of social life, then our
ability to teach and to understand law and adjudication, and to
restructure the legal process in ways more attuned to the human
situation underlying our cultural institutions will be improved.

This article presents legal adjudication as an activity of human
beings. The essential nature of adjudication is subjective and it is
inaccessible when the activity is objectified. Accordingly, this article
presents an understanding of legal adjudication as a subjective
process, using contract adjudication as the context for the presenta­
tion. Furthermore, as this discussion develops, the superiority of
this subjective analysis over the traditional approach will become
clear.

The discussion proceeds in three sections. The first two pres­
ent a descriptive analysis of the adjudication of contractual disputes
dealing first with consideration and then with unconscionability.
The final section offers an analysis of adjudication through the phe­
nomenon of minimal equality, which is described in the earlier sec­
tions as the basis for the results reached in the adjudication dis­
cussed therein. These two aspects of contract law have been

2. The methodology used is that of phenomenology and language philosophy.
The language philosophy most involved here is that of Ludwig Wittgenstein. See L.
An attempt has been made to demystify phenomenology by translating its rather special
vocabulary into ordinary language. This may result in some distortions of the
phenomenological account, but not to any great measure. Though generally thought
to be disparate, these philosophies are complementary in purpose. See 49 THE
MONIST (1964), which was devoted to a discussion of this relatedness, or rather
whether this relatedness in fact existed. See, e.g., E. Gendlin, What are the Grounds of
Explication? id. at 137; P. Kuntz, Order in Language, Phenomena and Reality, id. at
107. See also J. Wild, Is There a World of Ordinary Language? 67 PHILOSOPHICAL
REV. 460 (1958). None of these writers, nor this writer asserts a total harmony ex­
isting below the surface of these philosophical methods. Just that their purpose is to
make the world in which we live more accessible to understanding through the de­
scription of that world, i.e., the subjective world of everyday experience. They deal
with the world as it is lived, prior to any objectification for scientific analysis. This is
not to assert an anti-science attitude; it is to profess a commitment to the phenomena
themselves as they reveal themselves and as they are experienced, rather than to a
theoretical explanation of how or what they must be. Phenomenology speaks of this
"world" as a life world. By this is meant an horizon within which the phenomena of
our daily world are understood in a lived articulation of meaning. As John Wild has
stated it: "[T]he world horizon of human life is concrete, subjective, and relative to
man." Id.
selected for discussion because of their familiarity and the interest and controversy they generate. Finally, the article is intended to be descriptive, not normative. Thus, questions such as whether consideration or unconscionability are desirable concepts have not been addressed.

**CONSIDERATION**

This section offers an analysis of consideration which reflects, primarily, the understandings of language developed in ordinary language philosophy. The importance of the perspective taken and the relational analysis presented will become apparent as the discussion proceeds. Analysis of the concept of consideration begins with the role the term plays within legal discourse and, more particularly, with regard to the speech situation in which it is used. This would appear to be true of all linguistic phenomena. Language is not a calculus with each term being a label for an object. Clearly, some terms do perform a labeling function, but few, if any, serve that function alone. For example, the term tree can be used to label a particular physical object just outside a window, or it can be used more broadly without reference to any particular object. Also, it can be used metaphorically—"He stood like a tree . . . ." Further, using the term tree signals a botanical field in which differentiations and relationships have been established and which is contrasted with other fields of perceptual experience.

In the field of human action, however, the labeling function of terms is nearly nonexistent. It is here that language is all important because action takes place only in and through language. It is only we who talk that can give voice to intentions, motives, causes, fears and beliefs. In analyzing human action, the central concern is with the purpose of the act, not the physical, causal factors. The discourse about and of human action is performative. For exam-

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3. For a good bibliography in the area of ordinary language philosophy see H. Pitkin, Wittgenstein and Justice 341, 341-50 (1972).

4. This is not to suggest that linguistic phenomena cannot be understood as aspects of certain cultural structures, such as capitalism. See Gable, supra note 1. However, concepts are acts of consciousness which are linguistic, as opposed to non-verbal acts, such as perception. Therefore, it is necessary to become oriented with the linguistic field in which these phenomena are used.


6. J. L. Austin, Philosophical Papers 233-53 (2d ed. 1970). Performative is used not in the strict sense of J. L. Austin's definition which is that to speak or to
ple, the term "fact" is not a label for anything, nor do we create a "fact" by using the term, but we do perform an action by and through its use. To use "fact," one posits a perspective which one assumes toward the phenomenon to which reference is made. One also presupposes agreement regarding the phenomenon in the culture or subculture which provides the background for the discussion, and establishes criteria for judging disagreement, for example, there is a difference between opinion and fact. To use the term "fact" tells more about the speaker than it does about the phenomenon being discussed. This is true of most terms used in discourse of and about human action. Again, it is the point of the action, not causal factors that is important. The point of an action is always displayed against a background into which the action fits and from which it derives meaning. To understand the meaning of a term, one must analyze the speech situation of which it is a part. Any discussion of human action must be understood in terms of the human situation which is constitutive of that action.

A court's use of the term "consideration" serves as a starting point for analysis. One must not assume that that use is always the same or always different. Furthermore, not only must the subjective intention of the speaker be considered but also the objective ambiance of the act is relevant. Actions are social phenomena, and thus an understanding of actions requires all relevant perspectives to be considered. The subjective intention of the action cannot be ignored, but neither can it be given total dominance. It is necessary to step back from the action, to "loosen the intentional threads" that tie us to the phenomenon, in order to see it in its fullness. In this way, one can accredit the subjective intention while placing the act within a broader social context to gain a more complete understanding.

Use of the term "consideration" in an opinion signals the court's perspective of the relationship existing between the parties.

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8. I have borrowed this phrase from Maurice Merleau-Ponty. M. MERLEAU-PONTY, Preface to PHENOMENOLOGY OF PERCEPTION at XIII (C. Smith trans. 1970). Intentionality is the opening out of consciousness onto the world; it holds us in the world or ties us to it. The point here is to loosen those ties or that hold in order to understand the phenomena which are being held in relation.
of the lawsuit. It signals the existence of a legal system structured to give force to that relationship. The focus of this discussion is primarily on the quasi-performative function of the court's usage. The court's use of the term "consideration" creates a jural relationship with its attendant consequences, or terminates a conflict relationship in which the social and jural relational lines were skewed. Terminating a conflict relationship is as much a positive act as creating a jural relationship because it brings the parties into a different relationship of classified responsibilities and consequences. It is in this sense that courts use the term "consideration" affirmatively both to enforce and to deny enforcement to a purported contract.

By stressing that consideration is a necessary "element" in a contract, one may hinder a clear appreciation of the actual use of the term by the courts. "Element," suggests some objective referent, some piece to be fitted into the puzzle to complete the picture. "Consideration" is a linguistic device which a court uses in an appropriate speech situation to move the parties into a relationship which expresses the court's understanding of the circumstances. This may be a movement into or out of a contractual relationship. It is not "part" of a "contract," but an expression of whether a contractual relation will be recognized.

Characterizing consideration as an "element" in a contract is misleading both to consideration and to contracts. These terms are used as concepts and have reality only within a linguistic system. Thus, the word "contract" has sense because of its use, not because it "exists." The term is used quasi-performatively to move parties into a particular jural relationship with attendant consequences imposed by the legal system. Authoritative use of the term "contract" discloses the perspective the speaker has of the relationship of the parties with reference to whom the term was used. Such usage creates an authoritative relationship for the parties, thus moving them into a new position, but it does so along relational lines already existing and against the background of the legal system. The use of the term directs one's attention to considerations of both the parties' relation to each other and their relation to the legal system.

The various perspectives from which consideration is viewed are manifested in cases. What counts as consideration in particular cases becomes the question. In what sense can the term "consideration" be used with reference to disparate factual situations? Compare for example, football, chess, solitaire, hop scotch and extem-
poraneous children's games. What common properties do they share, if any, which allows us to call them all games? What is the difference between playing and playing a game? What are the consequences of calling an action a game, or calling it something else? What are we doing when we use the term "game"?

These kinds of questions also can be raised about consideration. Consideration has been variously seen as an exchange of promises, promise in return for performance, benefit to the promisor, detriment to the promisee and moral obligation. What common properties do all these situations share, if any, which allows the term "consideration" to be applied to them? What are the consequences of the use or non-use of consideration with reference to any of those cases? What is being done when the term "consideration" is used?

It is necessary to look at the use of consideration in legal discourse, restricted here to the common law, in order to disclose the relatedness of the uses. This cluster of uses delineates the grammar of the term which contains the germ of its meaning. Isolation of the grammar of "consideration" allows one to adopt an intellectual distance for the phenomenon and thus to identify a sense of meaning which transcends any particular instance of use.

The classic case of Hamer v. Sidway\(^9\) provides a starting point for analysis. It involved a promise by an uncle to pay his nephew $5,000 on the latter's twenty-first birthday if the nephew would refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until that time. The nephew complied with the terms as he had promised, and his assignee sought enforcement. The nephew had actively relied on the promise, conforming his actions to the terms of the agreement in order to reap the benefit of the promise. This active reliance induced by the promise was termed consideration by the court, and the promise was enforced.\(^10\)

The central question was whether the promise was a gift with a condition or an offer for a contract.\(^11\) No conclusive argument can be made for one instead of the other characterization. The crucial point is enforceability. In the circumstances of the case, only the contractual reading would yield enforceability since no delivery had taken place to make the gift irrevocable. The answer revolves about the question of why the court wanted to enforce. Professor

\(^10\) Id. at 548, 27 N.E. at 257.
\(^11\) Id. at 545, 27 N.E. at 257.
Lon Fuller asks what the result would have been if it were an executory bilateral contract and the uncle sued upon the nephew's breach.\textsuperscript{12} Odds are that the court would have seen the uncle's promise as one for a gift with a condition, in no way obligating the nephew to take or to forbear from taking any action. To find obligation here, without more involvement by the nephew, would be an intolerable limitation on his freedom and would put him at the uncle's mastery. This kind of relationship is too out of balance to be enforced. Thus, even though a promise generally may be consideration, in this case it probably would not be. One can say that the uncle was not asking for a promise, but for action. Therefore, the nephew's promise was not the consideration requested. But if the uncle were suing, then it would appear that he had accepted the promise as sufficient to obligate the nephew, and himself, upon its fulfillment. He saw it as being in exchange for and related to his own promise. At that point of their relationship, however, the probability is that no contract would be found.

The crucial factor is the relationship. The different legal conclusions can be reconciled by studying the changes in the relationship of the parties from the hypothetical case to the actual case. First, the active reliance by the nephew on the promise distorted the relational lines structuring the uncle-nephew relationship absent any counterbalancing obligation running from the uncle to the nephew. This relational imbalance is critical, as will be developed more fully later. Secondly, an innocent third party, the assignee, had also acted in reliance on the promise, thereby further skewing the relationship. The nephew still would be liable on the underlying debt if no recovery was forthcoming from the uncle's estate. This indicates additional reliance by the nephew and adds to the relational imbalance and compels the court towards enforceability. The degree to which imbalance must be manifested is the initial question but it will be deferred until a few more cases are reviewed.

\textit{Sylvan Crest Sand & Gravel Co. v. United States},\textsuperscript{13} demonstrates quite clearly the point that the underlying relational balance between the parties determines whether consideration exists and whether the relationship should be called "contractual." The case involved a federal procurement contract by which the plaintiff was to deliver trap rock to an airport project as required by the defendant and the latter was to give appropriate delivery instructions.

\textsuperscript{12} Fuller, \textit{Consideration and Form}, 41 Colum. L. Rev. 797, 817 (1941).

\textsuperscript{13} 150 F.2d 642 (2d Cir. 1945).
Upon the defendant’s failure to request delivery of trap rock within a reasonable time after the contract was operative, plaintiff sued for breach. Defendant moved for and was granted summary judgment, arguing that a contractual provision allowing the defendant to cancel the contract at any time rendered the contract illusory, that is, the contract was without consideration from the defendant for the plaintiff’s promised performance. 14

The court looked to the intended relationship between the parties, the one which was actually prevailing prior to the dispute: “No one can read the document as a whole without concluding that the parties intended a contract to result.” 15 Then the court considered the relational balance which would attend the perspectives of each party. The defendant’s position would require the plaintiff to be bound to deliver but it did not bind the defendant to accept or to pay. 16 If no action had been taken by plaintiff, this may be a reasonable argument, after all, the clause is rather absolute on its face, 17 and perhaps parties should be held to their contractual language. The plaintiff, however, had acted, 18 and was holding itself ready to continue performance. Thus, the language of the defendant’s form contract was intended to and did induce reliance by the plaintiff, and did effect a change in their relationship. The parties had entered into and were acting within a particular relationship. By so inducing reliance, in terms of plaintiff’s preparing for performance and its continued readiness to perform, the defendant created a relationship in which, if any balance was to be manifest, it must counterbalance plaintiff’s obligations and actions. The court found this counterbalance in an implied promise by the defendant either to give delivery instructions or notice of cancellation within a reasonable time after the contract was completed. 19 This was characterized as the consideration given by defendant for plaintiff’s promise to deliver the rock. 20

Consideration here was implied or read in by the court because of the existing relationship of the parties. 21 The relational

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14. *Id.* at 643.
15. *Id.*
16. *Id.* at 644.
17. “Cancellation by the Procurement Division may be affected at any time.”
18. *Id.* at 643.
19. *Id.* at 644.
20. *Id.*
21. *Id.* at 645.
imbalance which would have resulted from defendant's non-obligatory status within the relationship compelled the court to enforce the contract. Reliance intentionally induced by defendant's actions resulted in plaintiff's being placed in a grossly subservient position *vis-a-vis* the defendant. The court monitored the relationship by using "good faith" as the relational standard against which to judge the parties' action. Good faith would preclude the defendant from taking advantage of such an unbalanced relationship. This reading of the circumstances clearly denotes the proper judicial resolution. Worthy of examination is why the court allowed the relationship to continue even though the plaintiff incurred the greater risk.

Two final cases dealing with consideration present, perhaps, the most difficult analytical problem. These cases, *Webb v. McGowin* and *Harrington v. Taylor*, involve questions of moral consideration. Whether moral obligations should or should not be sufficient basis for consideration is a question outside the scope of this article. Also, bracketed out from discussion is whether consideration is effective and efficient in operation. For present purposes, moral obligation presents questions which are analytically important because it displays the internal vectors which aid in shaping the doctrine of consideration.

In *Webb*, the plaintiff had saved McGowin's life by holding onto and diverting from McGowin a heavy pine block which plaintiff had dropped from an upper level of a mill to the ground floor. Plaintiff had acted properly in dropping the block in the course of his duties. As a result of his actions, plaintiff was permanently crippled and could no longer work. McGowin promised to pay him fifteen dollars every two weeks from the time of the injury throughout plaintiff's life. These payments were made until McGowin died. His estate then refused to continue the payments and plaintiff sued. The court held that McGowin had a moral obligation arising out of his receipt of a material benefit and this obligation was sufficient consideration to support a promise to pay.

*Harrington* involved a somewhat similar situation. The de-

22. *Id.* at 643, 644.
23. *Id.*
26. See note 24 *supra*.
27. 232 Ala. at 375, 168 So. at 199.
28. *Id.*
fendant had assaulted his wife and she took refuge in plaintiff's house. On the next day defendant gained entrance to the house and continued his assault. "[D]efendant's wife knocked him down with an axe and was on the point of cutting his head open or decapitating him . . . ,"29 when plaintiff intervened. Apparently, she deflected the axe with her hand, saving defendant's life but injuring her hand quite seriously. Subsequently, defendant promised to pay plaintiff for her damages. He paid a small amount but then discontinued payment and plaintiff sued. The court held that plaintiff's actions were insufficient to provide consideration for defendant's promise.30

Again, the question of reconciling the different results on similar factual patterns deserves attention. Both cases involve injury to a person incurred while that person was saving the life of another, who subsequently promises to make payment, does pay and then payment is terminated. Clearly, legal decisions are not the mere application of legal rules to sets of facts. As was argued implicitly in Webb,31 the nature of the relationship of the litigants orients the court toward the conclusion and determines the principles of law which the court will choose to apply. The Restatement of Contracts32 and Harrington33 seem to imply that the critical factor in cases of moral obligation is the relationship of the parties, including the nature of the benefit received for which a promise to pay, or render other benefit was given. The concern is whether the relationship was such that a reciprocal benefit to the promisee was expected or needed so as to inject a sense of fairness or relational balance into the case. If the thesis advanced is an accurate description of the legal process, then in these two cases, the courts must have perceived either a relational imbalance which would be adjusted through enforcement of the promise, or that enforcement would create an imbalance. The Restatement reflects this perception when it states:

Although in general a person who has been unjustly enriched at the expense of another is required to make restitution, restitution is denied in many cases in order to protect persons who

29. 225 N.C. at 690, 36 S.E.2d at 227.
30. Id.
31. 232 Ala. at 374, 168 So. at 199.
Generally, contract law denies the legal efficacy of "moral consideration." 225 N.C. at 690, 36 S.E.2d at 227.
33. 225 N.C. at 690, 36 S.E.2d at 227.
have had benefits thrust upon them . . . or to guard against false claims . . . .

A subsequent promise in . . . a case [of emergency service] may remove doubt as to the reality of the benefit and as to its value, and may negate any danger of imposition or false claim.

In our two cases, however, there is no doubt as to the reality or value of the benefit conferred. There is no doubt that the promises were made; payments in fact were made in each case. What then accounts for the differing results? The answer requires defining the ground of legal decisionmaking.

Legal decisions are human actions which are judgments upon other human action. Thus, the basis of a decision lies within the intersubjectivity which structures the life world and makes the actions of the parties and the judges understandable. This understanding is based upon the subjective interpretation of the action by the actor. Individuals, at the first awareness, are in a shared world and on the way toward realizing certain possibilities. Persons have a natural attunement to the world which allows them to form constructs which order their fields of action. These constructs are the ground for reflective interpretation of action. Thus, interpretation of human action proceeds upon a preinterpreted field of action, preinterpreted by both the actor and the analyst. Thus, any action has to be understood as the actor understood it. A situation has to be perceived in terms of the constructs of the actor: his motivations, goals and fears. The actor has preinterpreted the action of the other by typifying the motives, goals and attitudes of others. The act of others in "this" situation is but an instance of that typification. What is taken as typical is determined by the situation, the problem-at-hand as Alfred Schutz terms it.

Thus, to make a judgment upon anyone's action in a particular case, for example, formation of a contract, fraud or murder, requires the judge to understand the actor's subjective interpretation of his situation. The actor imbues the action with meaning;

34. Restatement (Second) of Contracts § 89A, Comment b, at 198 (Tent. Draft nos. 1-7, 1973).
35. Id. Comment d, at 199.
37. Id. at 98.
38. Id. at 100.
39. Id. at 99.
to determine intent, to determine responsibility or to determine state of mind requires the judge to determine, first, the actor's meaning.

(In Webb,\textsuperscript{40} for example, the problem-at-hand, the litigation, defined for the construct that which was typical and that which was unique. Webb and McGowin imbued their actions and relationship with a certain meaning which became critical for resolution of the case. In determining this meaning, the judge can construct models of typical action upon the alternative construction advanced by the parties. He then can vary the situation to test action in the case against his model. The action of continuing payment throughout McGowin's life is consistent, given the facts of the case, only with typified action in a situation of recognition of benefit received and obligation incurred. Had McGowin not continued payment, that action could be seen as being inconsistent with the construct. It is in their actions that their understanding of the situation and their actions lie.\textsuperscript{41}

This is not to say that the actor's meaning is determinative of the legal issue, but it is of critical importance. The perspective of each party and of other witnesses must be considered.\textsuperscript{42} A legal decision is a founded construct. It is a construct formed upon a prior construct. One can form such a construct and one can understand the interpretation of the actor because the knowledge of the world upon which these constructs are found is rooted in a primordial commonality of existence and knowledge.

We are born into and share a common world; sociality characterizes the fundamental content which gives shape and meaning to our lives and the understanding of our lives. Knowledge is social, and it is grounded in this shared epistemological and experiential background.\textsuperscript{43} It is against this background, generally nonthemetic,

\textsuperscript{40} 232 Ala. at 374, 168 So. at 199.
\textsuperscript{41} This same kind of construct formation is evident, perhaps most clearly, in "reasonable person" standards.
\textsuperscript{42} For example, one of the major problems of evidence is the reconciliation of the subjective interpretations of the situations by each party, and by nonparty witnesses.
\textsuperscript{43} Schutz, supra note 36, at 101. Schutz says that knowledge is socialized in at least three respects: (1) It is structurally socialized through an idealization of a reciprocity of perspectives which assumes that each of us would experience a situation the same as another if we were to change places; (2) it is genetically socialized in that much of our knowledge is socially desired, as in socially approved terms; and (3) there is a social distribution of knowledge. Id. No one knows all of the world, and knowledge of any one part varies in degree with individuals.
that decisions are made and other action is taken. This common
sense orientation to the world, to others and our relationships to
them, makes community possible. Legal decisions, as other forms
of action, receive direction and sense from this backlog of common
sense understanding of the world. A judge comes to his decision
with a common sense, nonthematic acceptance of the nature of the
world, and the relationships of men within his society. Factual pat­
terns emerging from or isolated against this background in the form
of a legal dispute, carry with them an atmosphere of familiarity and
sociality which orients the judge, which predisposes him toward a
particular reading of those facts. Again, those facts which will be
seen as typical and those as unique depend upon the problem at
hand. In other words, if a judge is deciding a case in terms of lack
of consideration, his perspective of the case will be different than if
he must decide if certain conditions are precedent or promissory.
Because cases come to court against a background of familiarity and
with a certain preattunement to the social word, the judge can deal
with them within a framework of typification of the common sense
constructs he forms of the world. This explains better than any rea­
son why like cases are and should be treated alike. It is this pri­
mordial familiarity or sociality which accounts for different results
in factually different cases; it is the reason why a court chooses, in
an existential sense, to view cases and facts differently. Because the
structures of our existence are not rigid, we can and do see and
experience events differently, but generally within a range of ac­
ceptable variation. Outside this range, perception is eccentric or
aberrant.

In cases of moral obligation such as Webb\textsuperscript{44} and Harrington,\textsuperscript{45}
the typification\textsuperscript{46} of the relationship of the parties, in terms of the
courts' common sense understanding of these kinds of relationships,
clothes that relationship with a particular status which directs the
court toward its conclusion. In Webb,\textsuperscript{47} the plaintiff Webb was car­
rying out his work duties when he found himself in the position of
possibly harming McGowin. His relation to McGowin was up to
that point nonpersonal. He was permanently crippled as a result of
saving McGowin's life. McGowin planned to pay a specific amount

\footnotesize{\textsuperscript{44} 232 Ala. at 374, 168 So. at 199.}
\footnotesize{\textsuperscript{45} 225 N.C. at 690, 36 S.E.2d at 227.}
\footnotesize{\textsuperscript{46} Schutz, supra note 36, at 101.}
\footnotesize{\textsuperscript{47} 232 Ala. at 374, 168 So. at 199. See also text accompanying notes 26 & 27 supra.}
for a specific period of time. Payments were made without any repudiation beginning approximately one month after the accident. This action by McGowin induced a justifiable expectation, and possible reliance by Webb, and it appears that McGowin intended this result.

McGowin intentionally created a new relationship between himself and Webb based upon his recognition of a moral debt that he owed to Webb. The action was taken with some deliberation, thereby reducing the threat of an emotional, spontaneous expression of gratitude lacking sober thought as to McGowin’s ability to make the payments and his intent to do so. He purposely initiated a relationship in which expectation of and reliance on the payments was induced. This relationship had existed for several years, and a relational balance existed. To deny enforcement of the promise would destroy this balance. An interesting question is whether the court would have enforced the promise had only one payment been made and then McGowin repudiated. What seems crucial here, however, is how the parties looked at their relationship. Again, the subjective understanding of the actor is vital for an observer’s analysis of the act. It is to this subjectivity that the court looks to resolve the dispute, and it is by this subjectivity and by the court’s subjectivity that an understanding of legal decisions is generated.

In Harrington,48 by contrast, the relationship is significantly different. The plaintiff involved herself in an apparently violent situation prior to the actual injurious actions. She had a direct and personal relation to the defendant. The defendant’s promise to pay was emotionally spontaneous and nonspecific. He promised to pay for her “damages.” Whether he meant medical bills only, or loss of use of her hand in addition, is undetermined. He apparently repudiated any continuing obligation after a small payment. The degree or permanence of injury to plaintiff is not stated.

It is questionable whether the defendant intentionally created a new relationship between the parties which induced justifiable expectation and reliance by plaintiff. The defendant did not perceive the relationship as obligatory nor long-lasting. There is no evidence of sober reflection by the defendant in terms of his position, both financially and personally, in regard to such an undertaking. Consequently, no continuing relationship of reliance and expecta-

48. 225 N.C. at 690, 36 S.E.2d at 227. See also text accompanying notes 28 & 29 supra.
tion was established between the parties. Thrusting a jural relationship on these parties under these facts may well have created a relational imbalance. Whether one agrees that such an imbalance would have resulted is not relevant at this point. It is relevant that it seems the court may have so perceived that result. Had the defendant made payments for a longer period of time, for example, for two years, then a different relationship may well have been created and a relational balance established which the court would have to consider in resolving the case.

Each of the factors discussed are drawn from the facts, but conveys an atmosphere which combines to construct a status, a typification of the event which is understandable and not unfamiliar. The motives and intentions of the parties thereby become objectively available for consideration by the court in its resolution. Through typification, the event takes its place in our world. It retains its uniqueness but is not alien. The fact that it came about is not unique, but the way it came about is unique. Understanding the event is subjective, as one must grasp the way the actor understood both thematically and nonthematically, this act, but it is also objective in terms of the typification of the event for judicial resolution. The effect of typification is to allow the event to be abstracted. It is classified, and thus makes possible the application of general principles. In this way, cases which are classified as similar through typification can be treated in accordance with the same principles. Like cases are treated alike. It is in the intersubjectivity of our shared world, however, that the existential choice is made as to the ultimate resolution of the difficult case. As indicated above, many, if not most, cases do not receive extended judicial consideration. Such cases fall into clearly recognizable classifications based upon previous judicial and legislative action of the kind discussed. It follows that legal theory begins at the level of judicial typification. Here subjectivity and objectivity come together to form the structure of the social institution called law.

It is unnecessary for present purposes to analyze each area of consideration. The ones discussed have served to sketch the line of analysis to be followed. Considerations of relational balance derived from the typification of the individual event determine the judicial decision. In each of the cases discussed, it appears that courts move to create or to maintain a relational balance between the parties. This may be achieved either through enforcement or non-enforcement of a contract and consideration either is or is not present in formal terms. To state it differently, the term consideration
was used affirmatively to move the parties into or out of a jural relationship in order to achieve a relational balance between them within the limits of the existing social relations. This view of courts' use of consideration eliminates the apparent problem, in theory, of enforcing contracts without consideration such as those that concern moral consideration or past consideration. When consideration is understood as signaling a system of dispute resolution in which relational balance is the essential factor in the decision regarding enforceability, and consideration is seen as a mode of expression regarding that balance, then no need exists to attempt to impose a symmetry through fictions or exceptions to the general rule. Yet, what is the ground of that determination? What determines when a relationship is so skewed, so imbalanced as to require nonenforcement, or when the balance is sufficient for enforcement? Considerations of minimal equality form that ground. Before explicating that ground, however, it is necessary to analyze unconscionability to see if that term also leads to minimal equality as the ground of contracts. If so, then it will be appropriate to discuss contract adjudication in terms of minimal equality.

**UNCONSCIONABILITY**

Much has been written about unconscionability as it relates to contract law, especially since the Uniform Commercial Code (U.C.C.) set forth unconscionability as a ground for partial or total nonenforcement. Following the method of analysis used in the previous section, the ground of unconscionability can be revealed through description of the term's linguistic and existential nature in a way which is both constructive and instructive.

Initially, two positions may be noted which establish the stage for dialogue about unconscionability. The first is that of Professor Arthur Allen Leff; the second, that of Professor M.P. Ellinghaus. Leff objects to the code provision because he feels that "unconscionability" has no "reality referent." Therefore, the term is meaningless and merely allows judges to use their own notions.

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49. U.C.C. § 2-302.
50. Hereinafter, legal unconscionability will be used only with reference to § 2-302.
53. See note 51 supra at 558. Though only explicitly stated in the conclusion, this appears to be the basis of his dissatisfaction.
of fairness to overturn or to modify a contract. One can only take Leff's criticism to be based upon a label theory of language, as earlier discussed. Thus, because there is no thing, no objective reality, to which unconscionability refers, it has no meaning. True, unconscionability is unlike words, such as tree or rock, which label tangible objects. The region of discourse in which the terms are used are different.

Unconscionability is used in discourse of and about human action which, as was earlier discussed, involves primarily the signaling and quasi-performative uses of speech. Therefore, one should not and cannot expect "reality referents" in the sense Leff seems to desire. When one uses the term "unconscionability," one is concerned with the quality of a human relationship; when section 2-302 of the U.C.C. is involved, one is concerned with a contractual relationship which is a particular kind of human relationship. Initially, the use of unconscionability signals the existence of a social-moral field of action which is delineated by an inherited tradition or vocabulary of moral precepts. This vocabulary of moral precepts constitutes a moral framework within which interpersonal dealings must remain.

Unconscionable is used in ordinary language to describe action which is excessive, outrageous, or contrary to moral propriety, for example, the unconscionability of poverty in an affluent society, the unconscionability of forced sterilization and the unconscionability of the use of war for political or economic gains. In each of these situations, the speaker is making a moral judgment which is a judgment delineated by the linguistic history of the terms used. To use the term "unconscionable" is to make a moral judgment. Its use moves the parties into a particular relationship; a certain attitude is assumed by the speaker toward the other party or the action, and certain kinds of consequences are sought. This linguistic entourage accompanies every use of the term.

"Unconscionability" comes to its use in section 2-302 with a history constructed out of familiar and acceptable ways of treating others. Our moral vocabulary distinguishes for us the trivial from the serious breaches of conduct. For example, if one betrays a trust, one's action may be indiscreet, an abuse of trust or unconscionable, depending on the nature of the trust and of the action. The question arises as to what point action ceases being indiscreet.

54. See note 4 supra and accompanying text.
55. See notes 5 & 6 supra and accompanying text.
and becomes an abuse of trust, or ceases being an abuse of trust and becomes unconscionable. Obviously, there is no precise dividing line. There are areas of overlap, yet we use the words competently and confidently. There are cases which are not clearly one or the other; some action may be indiscreet or an abuse of trust, but not indiscreet or unconscionable. That jump is too great. Our language restricts us in our judgments.

This same progression exists in contracts, especially in going from a hard bargain to an unconscionable one. There are clear cases of both with an area of overlap in which other policy factors may be determinative. But this is no different than many other areas of law such as due process, equal protection, or “unfair methods of competition” in the Federal Trade Commission Act. Each phrase takes on meaning within a particular field of relevance. When dealing in each field, the judge through typification selectively attends to factors historically, grammatically and legally relevant to the application of the standard. Each field is built upon a certain orientation and certain facts and grouping of facts which are unquestioned. They form the background against which the particular problem will be viewed and the decision reached.

Unconscionability signals a social-moral field of action which establishes a construct of contractual morality. Initially, this construct appears to be a counterpoint to another fundamental contractual construct, freedom of contract. Finding the most eloquent justification in the writings of men like Adam Smith, Jeremy Bentham, and John Stuart Mill, freedom of contract came to be equated with the free market system of capitalism. Simultane-

58. Grammar is being used here in the Wittgensteinian sense. See L. Wittgenstein, supra note 2. Pitkin notes that grammar, “includes all the various verbal expressions in which that word is characteristically used.” H. Pitkin, supra note 3, at 117. But she goes on to indicate that Wittgenstein is attempting to suggest a relationship between grammar and the world. Grammar tells us what we call a particular “set of phenomena in the world.” Id. at 118 (citing S. Cavell, The Claim to Rationality 131 (1961-62) (unpublished doctoral dissertation, Harvard University)). She continues, grammar “specifies not merely the expressions in which a word is characteristically used, but also . . . what counts as an application of ‘those expressions.’” Id. at 118.
60. See Kessler, Contract as a Principle of Order, in READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY 140-46 (M. Cohen & F. Cohen eds. 1951).
ously drawing upon individualistic philosophy with its concept of the autonomous will, and the "invisible hand" of Adam Smith, philosophers and jurists conceived of a contract as the freely formed agreement of autonomous individuals which provided the surest guarantee of economic and social progress.

Yet, there has always been what Friedrich Kessler calls counter­current in contract law which injects an element of morality or fairness into contract adjudication. Kessler points to the use of consideration as evidence of this phenomenon. Constructive fraud and promissory conditions are other examples. It is from this countercurrent that unconscionability receives its direction. The use of unconscionability in legal discourse signals this countercurrent of moral discourse in contract adjudication. This moral construct signaled by unconscionability and the construct of freedom of contract for the nonthematic background against which courts must decide the question of contract unconscionability. In fact, the grammar of the term "freedom" includes the sense of interpersonal dealings which accredit the commonality of people and the need for each person to be allowed to achieve his potential. This is because of the interdependent nature of our possibilities.

It is because of this grammatical inheritance that Professor M.P. Ellinghaus' description of unconscionability as a residual category term is misleading. In his attempt to define unconscionability as a viable legal tool, Ellinghaus concedes too much to Leff's charge of debilitating vagueness. Ellinghaus resigns unconscionability to a residual category in order to salvage its usefulness. He admits that its content may be illusory and then proceeds to justify this illusoriness. Such a defense can be required only if one proceeds, as Ellinghaus apparently does, from a label theory of language: unconscionability is a thing to be filled up with definite meaning. When one sees unconscionability performatively as a term to be used to do certain things, to bring about certain results, then such a defense is seen as being erroneously based, just as the position against which it is defending. Residual category con­notes a usage which is akin to a repository of illusory concepts to

65. Id. at 760.
which resort is had when more precise tools are unavailable. Sup­posedly, this would contrast with a normal precision in legal gram­mar, but that is a precision which seldom exists.

Needs of new situations may require extensions, or additions to the legal grammar of unconscio_nability, but although such use may be a deformation, it is a coherent deformation\(^{66}\) in the gram­mar. This is the same manner in which case law has grown in all areas. For example, the grammar of the legal term "defamation," moved from direct assault upon one's character\(^{67}\) to innuendo which may disrupt one's social intercourse\(^{68}\) through the same process of coherent deformation. Defamation has no more of a reality referent than does unconscionability and is no more residual in its meaning. There is nothing empty which needs to be filled in either case, but only new situations which require creative application and perhaps addition of new characteristics to the existing con­ceptual family.\(^{69}\) Each time, however, the new adjudication is performed against a background which guides and limits the use of the term. The grammar of the term carries with it its own field of application.

What happens when the term is used and what is the quasi­performative function? Naturally, when one uses that term with reference to or as descriptive of a contractual relationship, one has expressed an attitudinal posture toward the relationship in terms of, or against the background of, the social-moral field of action and the included construct of contractual morality. When a judge says a contract is unconscionable, he is moving the level of discourse from a political-legal to a moral-legal field. The legal perspective of the contractual relationship has changed and the jural consequences of that relationship are different. The judge is no longer looking for a bargain to enforce, or to determine damages for breach. He is now thinking in remedial terms in favor of the weaker party. It is this

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66. This idea of coherent deformation in expanding uses of language is borrowed from Maurice Merleau-Ponty. M. MERLEAU-PONTY, SIGNS 68 (R. McCleary trans. 1964).


68. Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2d. Cir. 1945), cert. denied, 326 U.S. 979 (1946).

69. See L. WITTGENSTEIN, supra note 2, § 67, at 32. Wittgenstein develops the notion of family resemblances to describe the grammar of a word. The word, any word, is used in various instances to perform certain functions, to say certain things, for example, the word "games." Compare chess, solitaire, football and children's games. They are not identical and there is no one definition of game; but they all share certain resemblances, like family members.
movement in the nature of the discourse, and the creation of a different kind of jural relationship, which is effected by the courts' use of the term "unconscionable."

This change in the nature of the discourse also occurs when the court states that it or a lower court must review the relationship to see if it is unconscionable. This may result from the court's own initiative, or more likely, from an attorney's argument. When the latter chooses to argue unconscionability, he is attempting to create a particular kind of relationship, to take a certain view of the case and to discuss the case in different terms. The attorney's decision to argue unconscionability is an attempt to control the nature of the ensuing legal discourse; he seeks to argue more in terms of contractual morality than in the technical legal vocabulary relating to formation of contract. It is this move in the nature of the discourse which is performed when one uses the term "unconscionability." Unconscionability is used in discourse of and about human action, and it involves a judgment about the quality of a human relationship. Thus, its use by a court directs one to the quality of the relationship existing between the parties in dispute, and does so in terms of a moral evaluation of that relationship. A few cases will demonstrate this point.

Williams v. Walker-Thomas Furniture Co.\textsuperscript{70} involved a conditional sales agreement which required all installment payments to be applied \textit{pro rata} to all "outstanding leases, bills and accounts.\textsuperscript{71} The effect of this provision was to maintain a balance due on each item purchased until the balance due on all items was paid. Thus, each item became security for all others. In this case, a default on a stereo set purchased in 1962 triggered an attempt to replevy all items purchased since 1957. The court reversed a holding for the furniture company and remanded for further findings on the possible unconscionability of the contract.\textsuperscript{72} The trial court had made no such findings, contending it had no grounds upon which to refuse enforcement.\textsuperscript{73} The appellate court read the then recent enactment of the U.C.C. by Congress as persuasive authority for following the common law cases which developed the unconscionability doctrine codified in section 2-302.\textsuperscript{74}

\textsuperscript{70} 350 F.2d 445 (D.C. Cir. 1965).
\textsuperscript{71} \textit{Id.} at 447. The lease language referred to purchase of goods treated as leases until full payment, at which time title would pass from the company to the purchaser.
\textsuperscript{72} \textit{Id.} at 450.
\textsuperscript{73} \textit{Id.} at 448.
\textsuperscript{74} \textit{Id.} at 449.
Recalling the earlier point that unconscionability involves the evaluation of a human relationship, this case can be analyzed in relational terms to understand what factors determined the court's conclusion. Contracts involve the voluntary agreement by one party to perform certain acts for a return agreement to perform certain other acts: obligations voluntarily assumed in return for a desired performance. Here, as in cases of consideration, the relational balance existing in the agreement is determinative. The court prefers nonenforcement because the company dominated the relationship in a degree disproportionate to the obligations it had incurred. Had the company sought only to replevy the stereo set purchased in 1962, the court most likely would have enforced the contract. Such action by the company would have been commensurate with the obligation existing on both sides. But to maintain a security interest in items purchased five years earlier through the pro rata application of all payments evidences a commercial enslavement of the consumer. The company extended credit to a consumer who it knew or should have known could not afford the items purchased. 75 The possibility existed that the company could receive some payment for the stereo, then upon default, replevy it plus all other items purchased, and derive a profit from their ultimate resale because of the interest and principal already received.

The court remanded and directed the lower court to analyze the parties' relationship in terms of the relative ability of the parties to understand the terms of the contract and to bargain for the terms, and also to determine the relative balance in the obligations incurred and consideration received. 76 The critical question was whether the consumer was capable of an informed and voluntary choice in entering the contract, or had the contract been imposed on him because of his lack of understanding or economic bargaining power. If the latter is the case, the resulting relational imbalance would move the court toward nonenforcement. Freedom of contract has to be subordinated to contractual morality in such circumstances. As the court states: "In such a case the usual rule that the terms of the agreement are not to be questioned should be

75. Id. at 448. The court noted that the contract listed the name of the consumer's social worker and the amount of her welfare check, $218 per month. The stereo set cost $514. Id.
76. Id. at 449-50. The court listed as relevant; whether the contract terms unreasonably favored one party; the comparative education or lack of education of the parties; the location of the terms in the contract; the relative bargaining power of the parties. Id.
abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld."\textsuperscript{77}

Similarly, in Jones v. Star Credit Corp.,\textsuperscript{78} the court stated that section 2-302 enacts the moral sense of the community into the law of commercial transactions.\textsuperscript{79} The primary issue in the case was whether in the attendant circumstances the price term of a contract was unconscionable. The plaintiffs purchased a freezer for $900 plus financing charges which was shown to be worth $300. The seller knew that the consumers were welfare recipients. As welfare recipients, the consumers had limited financial resources, yet the seller sold them a freezer at three times its actual value. The seller had a gross inequality of bargaining power from which the court could infer an absence of meaningful choice by the consumers.\textsuperscript{80} The court discusses the quality of a contractual relationship and subordinates the notion of absolute freedom to contract to that of contractual morality.

Morris v. Capitol Furniture & Appliance Co.,\textsuperscript{81} which denied a claim of unconscionability, further illustrates the point. Although the seller received a profit of over 100\% on the sale of household effects, exclusive of financing charges, the court found the factors of voluntariness and choice were present to the degree that the resulting imbalance had not been imposed.\textsuperscript{82} The buyer had been free to participate in comparison shopping. Here, freedom of contract did not produce a result intolerable to the underlying morality of contractual relationships. This was a hard bargain, perhaps unfair to a degree, but there was not such an inequality in the parties' relational status to justify nonenforcement.

This same analysis applies when the bargaining positions of the parties were relatively equal, but certain terms of the agreement skew the parties' relational balance. There are only a few of these cases.\textsuperscript{83} One example is United States Leasing Corp. v. Franklin

\textsuperscript{77} Id.
\textsuperscript{78} 59 Misc. 2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).
\textsuperscript{79} Id. at 191, 298 N.Y.S.2d at 266.
\textsuperscript{80} Id. at 192, 298 N.Y.S.2d at 267.
\textsuperscript{81} 280 A.2d 775 (D.C. 1971).
\textsuperscript{82} Id. at 776.
\textsuperscript{83} Such a case would generally be in a commercial setting and the courts are reluctant to accept a claim of unconscionability here because of the relatively equal power and knowledge of the parties. See generally J. D. Pavlak, Ltd. v. William Davies Co., 46 Ill. App. 3d 1, 351 N.E.2d 243 (1976); S. White & R. Summers, Uniform Commercial Code § 4-2, at 113, § 12-11, at 383 (1972).
Plaza Apartments, Inc., 84 which involved a lease-purchase arrangement which was treated by the court as a contract for the sale of goods, an address printing machine. The name plates for use in the printer were never delivered, and thus, the machine was useless. The defendant refused to pay and the plaintiff sued for the price. Although the defendant had negotiated with Pitney-Bowes, Inc., the lease denoted the plaintiff as lessor and Pitney-Bowes as supplier. Defendant had never dealt with the plaintiff during negotiations. 85

The terms of the contract disclaimed on behalf of the plaintiff all warranties, express or implied, and any responsibility for installation or operation of the printer. The plaintiff assigned all rights it had under warranties given it by the supplier to the defendant. This was held to be illusory because it was not shown that any such warranties had been given. The purpose of these provisions was summarized by the court as being the desire to disassociate defenses and to isolate payment from any warranties given defendant by Pitney-Bowes. 86 Because it would be inequitable to compel payment for equipment which could not be used, while denying the defendant the right to interpose any defenses, the court found the terms to be unconscionable. 87

Although the relationship of the parties was relatively equal during the transformational stage, the substantive terms of the contract destroyed that equality. To enforce those provisions would permit a type of commercial domination contrary both to our common sense of fairness and to business needs and mores. The obligations imposed on the defendant greatly outweighed any benefit received. He has to pay to a party with whom he did not deal the full price of goods he cannot use, in return for a right to sue the party with whom he did deal and who has refused to deliver conforming goods. This isolation of right to price from responsibility for warranties and other contractual obligations undermined the relational equality necessary for the proper functioning of contractual relationships.

85. Id. at 1083, 319 N.Y.S.2d at 532.
86. Id. at 1087, 319 N.Y.S.2d at 536. Such an arrangement is familiar in the consumer context where an assignee of a retail sales agreement attempts to deflect any claims the consumer has with regard to the product to the original retailer while demanding payment from the consumer. Such clauses have been held to be unconscionable. Star Credit Corp. v. Molina, 59 Misc. 2d 290, 298 N.Y.S.2d 570 (Civ. Ct. N.Y. 1969).
87. 65 Misc. 2d at 1086, 319 N.Y.S.2d at 535.
The relational imbalance which is present in cases of unconscionability grossly distorts the assumptions embedded in the doctrine of freedom of contract. This distortion produces the social-political counterpoint to freedom of contract. A contractual relationship requires a relational balance stemming either from substantive fairness or fairness in the formation of the relationship. In using unconscionability to describe a contract, the court is saying that the transformation of the social into the contractual relationship, either in the manner of that transformation or in the terms of the relationship, has resulted in a relational imbalance which is intolerable when measured against the construct of contractual morality which forms the jural background of such relationships.

The cited cases are rather typical of the kind of analysis courts use to determine questions of unconscionability. A review of the cases reveals that courts focus on certain factors in determining this issue. As seen, the factors include voluntariness, equality of bargaining power, meaningful choice, educational and financial status of the parties and the obligations incurred in return for the consideration received. These factors give shape to the phenomenon of unconscionability, and the review of the speech situations in which the term is used reveals the term's grammar which serves to isolate the phenomenon for further study.

These terms all go to the relational status of the parties and the relational balance in the contract. In comparison to the favored party, the issue is whether the other party entered the relationship without coercion or imposition. The court considers whether the party made the decision to enter from a position in which he both understood the nature of the relationship and had the ability to have his interests considered with the same weight as the other party's interests. Ability includes financial, educational and social factors. Finally, court's look to whether the relational balance is so distorted in terms of the obligations the party has incurred as compared to the consideration he has given or received as to justify the inference of a negative answer to the above questions. These factors describe a relational phenomenon in which one party has such a superior position or advantage as to destroy the sense of agreement which underlies contract, and to substitute a sense of domination.

When one considers the notions of stronger-weaker, superior-inferior, choice-no choice, obligation without adequate reciprocity, and relational balance versus imbalance, one is lead inevitably to
the notion of equality. The term does not mean identity, but does signal a range within which such relationships should be confined. Equality tends to set only a minimal standard. To state it differently, the legal discourse of unconscionability seems to describe a contractual relationship in which the relational imbalance has become so skewed as to eliminate a minimal equality in the relation of the parties. It is when the imbalance reaches this point that a court moves to nonenforcement of the particular contract or provision.

An unconscionable contract is distinguished from a hard bargain, a bad bargain and an unfair bargain. Some degree of unfairness or harshness is tolerable, though not commendable. Here, as with consideration, the question is what amount of unfairness is too much. As with consideration, relational balance is sought and the amount of imbalance required necessitates an analysis of the concept of equality. We have seen that inequality as such is insufficient for court interference. It has also become clear, however, that some equality is necessary. The cases appear to delineate a sense of minimal equality which is necessary for a contractual relationship to receive judicial approval. Contractual morality limits freedom of contract and does so by requiring minimal equality in the relationship. An analysis of such language as voluntariness, meaningful choice, equality of bargaining power, and balance in consideration given and received, reveals that in legal discourse they all are grammatically related to equality. They are all used to evaluate the quality of a relationship and do so in terms of the equality of the relational status of the parties. None require absolute equality, but all require a minimal equality. What then is the meaning, or the use, of the phrase "minimal equality in legal discourse?"

One final caveat, in keeping with the original intent of this article. There has not been an attempt to evaluate the effectiveness of unconscionability as a legal tool, nor to speculate on its future applications. This article merely attempts to disclose the sense of the concept as used in legal discourse.

**Minimal Equality**

This section\(^8\) explicates the ground of contract adjudication as

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\(^8\) Though originally developed for this article, the analysis in this section was first presented in condensed form in a paper presented to a symposium sponsored by the Ohio Program in the Humanities on Quality Integrated Education, in Akron,
developed from the foregoing analysis of consideration and unconscionability. The discussion of each of these phenomena leads to the single theme of minimal equality. It was this felt need for equality which inwardly, and perhaps not always cognitively, led the court to a decision of enforcement or nonenforcement. Law is a relational phenomenon, and it was seen that an analysis of the application of legal principles in terms of the relational balance between the adversary parties served to expose the existential grounds for the decisions. These grounds are bound up with the lived understanding of the judges, their familiarity with social phenomena and the ability to form typifications based on that subjective experience. The ability to typify individual social phenomena enables the judge to apply general legal principles to concrete cases in a coherent, consistent fashion. The process is rational because it defines an identifiable, coherent region of discourse, a particular orientation toward human problems which specifies the manner of resolution. That which characterizes this region or orientation is its imposition of a typification and a particular construct of relevancies onto the parties in dispute. This imposed typification constitutes a requirement of a minimal equality between the parties in their relationship to the law as to those elements or traits which are relevant in determining that equality.

The term "equality" is used in several different speech situations such as in political or scientific discourse. Within each region of discourse the term is used to do different things. The context in which the term is used and the point of the discourse determines the concrete meaning of the term. Each region requires a typification of the situations and problems which arise or have to be resolved within that region. Thus, the purpose for creating the typification is crucial in attempting to understand the concept; and it follows that the relevant traits in determining what we mean by equality are those traits relevant to the resolution of that problem. The sense of minimal equality must be constructed from a description of the speech situations which determine its use.

Ohio, October 7, 1977. The paper, reprinted by permission, applied the present analysis to the fourteenth amendment.


90. The need to analyze typifications in terms of the purpose for their creation and the need to discuss equality in terms of homogeneous sets of typifications is as developed by Schutz, and used in his essay on equality. Id.
In logical systems, equality is used to indicate an identity between two propositions. Since such discourse is not about human action, it is not relevant to present purposes except as it yields a part of the grammar of equality or equivalence.

Political discourse is more fruitful since it is human action and it is precisely human action that is involved in the legal discourse of contract law. Equality is used in political discourse initially to create and to impose a certain typification onto society. That typification, or political paradigm, involves an inherent orientation toward the community by government which focuses on the commonality of man rather than on his individuality. This is done to create a political structure within which each individual can express his talents most fully and pursue his interests most effectively by removing the legitimization of a politically created disadvantage of one with reference to another. The paradigm determines that only those traits which relate to formal inclusion within the political system are relevant in determining the basic citizen-state relationship.

The Greek *polis*\(^91\) exemplifies this situation. Once a determination had been made relative to inclusion, then the government recognized no differentiation between the members in terms of their relationship to each other and to the state. Equality was used only in political discourse of and about the *polis*. Those outside the *polis* had a different relationship, not an unequal one. Inequality would be manifest only if the governmental body treated a member of the *polis* either in a more advantageous or disadvantageous manner. Similarly, citizens of the United States are treated equally by the state while non-citizens can be treated differently, *vis-a-vis* citizens, but that is not unequal treatment. Since equality and inequality are relational notions, they can be used consistently only within homogeneous groups.\(^92\)

\(^91\) A Greek city-state, in its ideal form as a community, embodies the organization and fulfillment of man's social relations.

\(^92\) Schutz, *supra* note 89, at 46. Our political system does treat citizens and noncitizens in the same way in certain cases, for example, contracts with noncitizens. In such cases, they are treated "as citizens" for purposes of the case. In those instances, they are part of the citizen group and political equality applies to the court's actions. Discriminations which recognize differing and legitimate needs of classes of citizens, such as welfare payments or veterans benefits, do not disrupt the basic citizen-state relationship as they do not create any political inequality in governmental treatment of citizens. All people who bring themselves within these classifications are treated equally, and no one is precluded from demonstrating eligibility for inclusion in the classes.
One uses the term "equality" in political discourse to create or to attempt to create a particular kind of relationship in a particular situation by concretizing the general notion embodied in the paradigm. Thus, to say that the government cannot treat a person disadvantageously because of his color or sex is an attempt to concretize the abstract notion of equality and to create a relationship and impose consequences of a particular kind in that situation. The questions of whether equality is good or bad, practical or not, and of the proper criteria for structuring the group, are all different questions. The point is that the term "equality" is used with reference to relations within homogeneous groups and signals an imposed typification, the purpose of which is to promote the realization of the potential of the individual members by emphasizing their commonality in terms of an identity of interests in a political community.

Equality is also used in discourse about social status. Here, several subsets of discourse can be involved, such as individual equality, equality in terms of acquisitions and economic equality. Individual equality may mean, for example, discussion of relative physical or intellectual abilities. Acquisition refers to such factors as education, developed skills and experience. Economic equality may involve the relative amount of wealth, broadly defined as financial credit potential, at the party’s disposal in pursuing his needs and interests. Equality, as used here, seems to assume a range of equivalence within which people would be called equal; it does not require an identical matching of ability of acquisitions. In social discourse, as in other regions, the point of the discussion determines the scheme of relevancies to be applied. If one is discussing athletic potential, economic advantages are irrelevant. If one is discussing educational and intellectual potential, physical size or personal wealth are irrelevant. Social equality, however, stresses the individuality of people as opposed to their commonality.

One often discusses social equality in judgmental terms. It is an evaluation of the ability or effectiveness of a government to meet the needs of the citizens. Also, one may attempt to create new relationships with the state by discussing the social inequalities of the community. Such discourse focuses on equality in the sense of acquired and economic status. This is an attempt to transform social discourse into political discourse by relating social inequality to political action. The reason why the question of equality is posed determines the relevant elements and the regions of concern. The question presupposes a background against which it is
used, a background created by decisions or orientations premised upon other grounds, for example, moral grounds involving whether social equality is good or necessary for human happiness.

The political orientation toward commonality, and the social orientation toward individuality, is a manifestation of certain existential structures of the living world. At the first awareness, man is already in the world, already involved with others, already a member of a community, such as the family, tribe or state. One's first awareness is not of individuation but of commonality, and it is only with maturation that individuation occurs. Each of one's personal projects is comprised of possibilities for action which relate to and are to some extent determined by the possibilities of others. One's potentiality is then dependent upon the actions of others, and vice versa. Thus, the realization of individual potentiality is inextricably related to other's realization of one's potential. This is part of the human situation into which we are born. One learns of oneself, his situation through others, and they through him. We share a world, the meaning of which has its locus in intersubjectivity. Part of the existential situation of man is this primordial commonality from which man's projects are launched, and which orients him toward an understanding of his existence. Denying this commonality and accepting only individuation fails to accredit part of man's nature.

Even given this commonality, however, one is set off against others to some extent. One knows oneself in a different way then one knows others or other things. For example, the question "Is this my hand?" is nonsense without a very rare context. Can one prove it is his hand? No, the question is nonsense. This tacit knowledge one has of oneself, if it can indeed be called knowledge, testifies to one's individuation. One's history, though embedded in a shared world and a shared history, is still somehow

93. The following discussion, while not drawn directly from any one section, is derived in its basic theory from Martin Heidegger. See M. HEIDEGGER, BEING AND TIME (J. Macquarries & E. Robinson trans. 1962) (one of the most thorough descriptions of the existential structures of the life world).

94. M. MERLEAU-PONTY, CONSCIOUSNESS AND THE ACQUISITION OF LANGUAGE (H. Silverman trans. 1973). Merleau-Ponty sees consciousness of self as being a function of language, which is an intersubjective phenomenon. See also MERLEAU-PONTY, supra note 8.

95. This is not the place to restate the fullness of Heidegger's description. See generally note 93 supra, at 149.

one's own and somewhat different than others. One relates to others in a variety of ways, such as love, hate and indifference, but can do so on an individual basis. One is individuated within another's primordial commonality. For example, one can be a member of a team playing football, but still be an individual who happens to be playing with others.

It is this apparent gap between oneself and the other which has been a central problem for philosophy and cultural institutions. The Cartesian world view with its autonomous ego is paradigmatic for Western Society. It is this perspective of human relations which Sartre described. By understanding consciousness as a constituting consciousness, isolated for the world, he constituted, instead, the problem of the other. If our consciousness is constitutive of reality, then it also constitutes the other; but the other is also a consciousness and thus is constitutive of "me"; that is, "I" have become an object for him. But this is impossible for Sartre, as consciousness cannot be an object. Thus, there is conflict and alienation, with no hope of reconciliation.

Merleau-Ponty, however, refuted this description. Consciousness is an opening out onto the world, it is a perceptual consciousness, and thus, there is no problem of another perceiving consciousness; others are in the world. The other is given to "me" as being in the world as "I" am in the world. "I" am given to "myself" as already being in a situation within an intersubjective world. In this situation other people are, to some extent, superior and inferior to "me." But that facticity is resolved through a bodily dialogue which finds its clearest expression in speech. Through dialogue we constitute a single world in which we coexist. This human situation is a primordial commonality upon which all cultural institutions are grounded and which makes community possible.

Although in a formal sense the law accepts the Cartesian perspective as, for example, in its insistence on free, autonomous will, in practice, that perspective is abandoned and law operates more in terms of an intersubjective world. When a jury has to determine intent, such as criminal or contractual intent, it must reject the autonomous ego and look for human action in a common world. In such a case the other is seen in terms of his actions. We read from his actions, certain experiences and intentions which do not

97. See generally J. P. SARTRE, BEING AND NOTHINGNESS (1956).
98. See generally M. MERLEAU-PONTY, supra note 8, at 346, 369.
99. Id. at 356. See also L. WITTGENSTEIN, supra note 2, at 243-315.
depend on our gaining access to any "inner experiences or actions" but which are intelligible because such external actions are modes of being in the world, modes which we share, which derive from the human situation. Such a method of determination implicitly renounces any separation between consciousness and the body, but performs an integration which replaces the Cartesian position with an intersubjective perspective. Such an integration allows us to understand the actions of the other, to deal with him intelligently as both an individual and as a member of the community. Because we can understand him, we can judge him, and in judging him we recognize his individuation with his commonality.

It is against a background of political and social, common and individual fields of action that the law operates. Since law is a creature of government, but also a social or cultural institution which reflects that culture and functions within it, law partakes of both political and social notions of equality: commonality and individuality. Being governmental, law imposes a typification of equality onto parties in a lawsuit. Both political and legal systems establish basic relationships of equality in the state's relation to its citizens. Thus the state, through its courts, imposes a typification of equality onto citizens which sees as relevant factors only those dealing with membership within the society, such as equal protection of the law, or a fair and impartial tribunal. Other factors such as religion or race are deemed irrelevant as not going to the basic sense of the citizen-state relationship.

As a social institution, law must reflect social realities. Therefore, law does recognize certain social equalities and inequalities. The problem is one of establishing political equality and recognizing social inequality. In seeking to reconcile these different typifications, which created equality with recognized inequality, courts impose a legal typification on both of the other systems. This is a typification of minimal equality according to which a court determines when the inequality of the social system is so dominant as to nullify the equality of the political system. The court must balance the competing interests because it is imposing equality on an accepted system of inequality; it must respond to all the needs and realities of the society.

Social inequalities are not as such illegal, but great advantage gained from such inequality by the stronger party can distort the political equality the government is committed to create. Although the political system allows social inequalities, it is required to act in an equal fashion. Thus, the court, which is governmental, can-
not impose legal consequences which shatter the basic political equality the government must create. If the court imposed legal consequences which allowed a stronger party to impose severe consequences on a weaker party due to great social inequality, the court would be participating in maintaining social inequality when it is required by its governmental status only to recognize such inequality but not to act to "establish" it. Using the state to enforce social inequality is sufficient to trigger the constitutional, political prohibition against unequal protection of the laws.\textsuperscript{100}

The court faces the problem of insuring at least a minimal equality between the parties so as to operate within its institutional boundaries. This problem and the court's resolution are exemplified in \textit{Bell v. Tsintolas Realty Co.}\textsuperscript{101} The essential question presented was whether tenants proceeding \textit{in forma pauperis} in defense to a landlord's summary suit for possession must pay past due and future rent into the court registry pending resolution of the case. The court held that this procedure should be followed only in those limited circumstances where it would not unduly tip the adversarial balance in the litigation. The constitutional procedural role of the court was seen as "equaliz[ing] the conditions of the adversary system for the poor,"\textsuperscript{102} in both criminal and civil litigation.\textsuperscript{103} This principle of equalization is essential to provide the poor with meaningful access to and participation in the judicial system.\textsuperscript{104} This principle of adjudicative equalization has been applied primarily in the context of the state-citizen relationship in terms of due process and equal protection.\textsuperscript{105} In fact, this is the conceptual basis of the \textit{in forma pauperis} provision. As a principle of judicial

\begin{thebibliography}{100}
\bibitem{100} See, \textit{e.g.}, \textit{Shelly v. Kraemer}, 334 U.S. 1 (1948).
\bibitem{101} 430 F.2d 474 (D.C. Cir. 1970).
\bibitem{102} \textit{Id.} at 479.
\bibitem{104} \textit{Harris v. Harris}, 424 F.2d 806, 811 (D.C. Cir. 1970).
\bibitem{105} See, \textit{e.g.}, \textit{Griffin v. Illinois}, 351 U.S. 12 (1956), wherein the court held that the effective exercise of a statutory right to appeal in criminal cases cannot be contingent upon a party's wealth. Thus the state of Illinois was required to provide transcripts for indigent criminal defendants. The decision was based upon both equal protection and due process claims. Justice Harlan, dissenting, argued that only a due process analysis was relevant and such an analysis did not require such action. \textit{Id.} at 36-39. The jurisprudential overlap of due process and equal protection concepts in articulating the fundamental requirements for judicial process in this country is apparent in any number of cases. \textit{E.g., Boddie v. Connecticut}, 401 U.S. 371 (1971) (invalidated filing fee requirements in divorce proceedings for indigent persons). The Court's opinion by Justice Harlan used a due process analysis. \textit{Id.} at 374. Justice Douglas' concurring opinion relied on equal protection principles. \textit{Id.} at 383. Justice Brennan, concurring, argued both concepts. \textit{Id.} at 386.
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process, however, it applies to every dispute which involves judicial resolution. As previously argued, this principle is inherent in the nature of a democratic political system and in the developed political sensibilities of our society. Thus, one may derive adjudicative equalization from the Due Process and Equal Protection Clause of the Constitution, or one may ground those provisions upon the former principle. Resolution of that issue is beyond the scope and purpose of the present task which is one of preliminary jurisprudence, that is to describe and thereby to disclose the ground of the adjudicative process, not to analyze that ground. The fact is that courts in contract and other cases do practice adjudicative equalization in terms of minimal equality. It is precisely this need to insure equality which directs the court in its use of legal principles, such as consideration and unconscionability. The court uses these principles to move the parties into a relationship which reflects a minimal equality, and this is done either by denying enforcement, granting enforcement or modifying the contract and then enforcing. The court is acting affirmatively in each situation to create equality if it is not present.

In Webb v. McGowin,106 a relational balance had been achieved but the estate sought to destroy that balance by having the contract declared unenforceable. The court, seeking to maintain a minimal equality in that situation, enforced the contract. Harrington v. Taylor107 was the opposite case. No contractual relationship had arisen or was intended. To enforce would have been to create inequality. Williams v. Walker-Thomas Furniture Co.,108 established a minimal equality between the poverty level consumer and the stronger businessman by determining whether the latter's method of maintaining a security interest in goods sold was unconscionable. Denying enforcement in such a case deprives the businessman of an undue advantage gained because of great social inequality. The court refused to allow legal process to be used as a means of enforcing undue advantages gained by virtue of great social inequality.

Courts cannot, however, eliminate social inequality. In fact, they must allow it, because the political system allows it, as long as that allowance does not eliminate political equality. Thus, hard bar-

106. 232 Ala. at 374, 168 So. at 199 (questions of moral consideration).
107. 225 N.C. at 690, 36 S.E.2d at 227 (questions of moral consideration).
108. See note 59 supra and accompanying text discussing questions of unconscionability.
gains or unfair exchanges are allowed. Such consequences are within the tolerable limits of the system. In this way, the courts recognize social realities and individual differences which the political system allows, while providing a minimum of equality which that system requires. This was the case in *Morris v. Capitol Furniture & Appliance Co.*, 109 in which the social inequality was insufficient to annul the sense of political equality the court must maintain. Therefore, even though it was a hard and somewhat unfair bargain, the court enforced the contract.

Minimal equality, then, as sought in contract law cases, manifests the courts' attempt to reconcile their political duty to create equality with its recognition of social inequality. It is an attempt to reconcile commonality and individuation in a way designed to maintain social cohesiveness and political stability.

**CONCLUSION**

Contract law forms a particular region of legal discourse in which principles of law are used to maintain a minimal equality in a reciprocal, bargained relationship between members of the community who submit themselves to its law. By focusing on the use of the terms "contract," "consideration" or "unconscionability," one can see contracts as a field of legal discourse comprised of a family of uses of each term, the use or meaning determined by the speech situation and the term's grammatical history. This linguistic field is grounded upon a movement toward minimal equality as the courts try to reconcile different dimensions of equality as they perform their political function.

Contract law, then, is an act of the legal system in particular cases of adjudication. This legal act can only be fully understood through an analysis of the life-world: the subjective world of the parties and the judges as the latter seek to understand the actions of the former. It is only in this doing of law, in this use of the terms of law, that the meaning of these terms are manifest. To state it differently, a contract is not a thing, it is a legal concept whose meaning is contained in the actual speech situations of its use.

The case method of teaching contract law provides an excellent method for explicating this understanding of contracts. Each case can be seen as a speech situation and the use of the terms can

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109. 280 A.2d at 775 (questions of unconscionability). *See also* text accompanying note 81 *supra*. 
be analyzed in terms of the case, rather than extracted as rules and considered apart from the context. The student's attention is then diverted from seeking the "existence" of a contract, and turned toward the way courts use the terms "contract" or "consideration."

This refocusing makes the student "process conscious"; it helps to bring him inside the system rather than having him observe only the superstructure. When the student looks for family relationships rather than symmetry in the use of legal terms, such as "contract," he can reconcile cases as being different uses of the same term within the family, and not despair of inconsistencies. What appears to be contradictions are exposed as usages from different dimensions of the term's grammar. Furthermore, this kind of process orientation requires the student to consider the subjective understanding of the actors, and helps him to understand why that is not speculative. This reorientation to the life-world can enable the student to understand the law as a cultural institution and help him to appreciate its human dynamic—the ground of its operation in society.

The law of contracts viewed from the above perspective is compatible with the position of a Kessler or a Llewellyn, but the methodology is sufficiently different so as to complete the break with positivism and present a clearer understanding of contract-law-in-use. What has been proposed is not a new definition of contract, but a method, a way of going about teaching and understanding the law of contracts. It was only this approach which was the theme of this essay and not any particular substantive point.

Finally, an uncritical generalization from the above discussion to every use of "contract" is not suggested, nor that the function discussed here is the only function of the courts. Minimal equality, however, plays a central role in contractual-legal discourse. There are areas of contract law which seem to emphasize other policies, such as the problem of illegal contracts. Even here, however, the court is cognizant of its political role to maintain political equality. To allow legal condonation of illegal acts violates the notion of political equality by allowing certain citizens to violate the law or contravene public policy without sanction. Further, such judicial action would allow the illegal actor to derive social benefits from his

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illegal act and thus gain advantage over his law abiding counterpart. Thus, the nonenforcement by courts of illegal contracts is an attempt by the courts to avoid that misuse of the legal process. Even in this area, in appropriate instances, a court can construe the contract, or the particular law or policy the contract contravenes, to allow enforcement in order to promote a minimal equality.\textsuperscript{112}

The law of contracts, therefore, presents a system of related speech situations each of which is unique in some respects, but each of which fits into a coherent pattern of legal discourse. This article has advanced the thesis that the unifying theme of this coherent pattern is the search for a minimal equality in contractual relationships. While only contract adjudication has been discussed, the methodologies used in the discussion apply to all areas of the law, and if used generally in legal analysis, will add both to our understanding and to our teaching of law.