Autistic Contracts (Symposium)

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I. INTRODUCTION

Parties to modern form contracts sometimes interact with one another in the same way a parent of an autistic child interacts with that child. When a licensor offers a software license with the assertion that it will infer acceptance of all the license terms if the licensee removes the power cord from its plastic wrapper, the licensor is drawing an inference from the licensee's behavior just as doubtful as the inference a hopeful parent draws from an autistic child's apparently knowing response to the parent's statement.

In this paper I address the question whether the law should affirm the offeror's inference and should bind the offeree to the
terms proposed by the offeror even in circumstances where the offeree may not intend to accept those terms and where an objective observer might not draw the inference of agreement from the offeree’s act. Modern practice and current proposals concerning contract formation in Revised Article 2 and in the Uniform Computer Information Transactions Act (née Article 2B) press these issues on us more forcefully than old practices and different law did.¹ But contractual autism is not new; it is a

¹. The Uniform Computer Information Transactions Act (UCITA) may be found at the University of Pennsylvania Law School web page. (visited Jan. 15, 2000) <http://www.law.upenn.edu/bll/ulc/ucita/citaam99.pdf>. The relevant language for the purposes of this Article is in proposed section 112: Manifesting Assent; Opportunity to Review, 1999 Annual Meeting Draft, which reads:

(a) A person manifests assent to a record or term if the person, acting with knowledge of, or after having an opportunity to review the record or term or a copy of it:

(1) authenticates the record or term to adopt or accept it;

(2) intentionally engages in conduct or makes statements with reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term.

(b) An electronic agent manifests assent to a record or term if, after having an opportunity to review, the electronic agent:

(1) authenticates the record; or

(2) engages in operations that the circumstances clearly indicate constitute acceptance.

(c) If this [Act] or other law requires assent to a specific term, a manifestation of assent must relate specifically to the term.

(d) Conduct or operations manifesting assent may be proved in any manner, including a showing that a procedure existed by which a person or an electronic agent must have engaged in the conduct or operations in order to obtain, or to proceed with use of the information or informational rights. Proof of assent depends on the circumstances. Proof of compliance with subsection (a)(2) is sufficient if there is conduct that assents and subsequent conduct that electronically reaffirms assent.

UCITA § 112(a)-(d) (Proposed Official Draft 1999).

The effect of the last sentence in (d) is unclear. Subsection (d) is best read as an evidentiary section. Thus, this sentence could be interpreted to read that one way a litigant may prove the other party assented to a contract is by showing
autistic contracts

that the other party engaged in some conduct from which the first party inferred assent when the other reaffirmed the assent electronically. This seems redundant: surely few will question the existence of a contract when the offeree accepts in two different methods. Additionally, the first two sentences seem to show that proof of assenting conduct may depend on the facts of the case and may be proved in any manner; it hardly seems coherent for the drafters to then specify one method of proof. I therefore assume that this is one possible way of proving assent under section (a)(2) and that this kind of double proof is sufficient, but not necessary.

Section (a)(2) by its plain language also changes the law. Prior to this, the standard for judging assent was "objective manifestation of assent." RESTATEMENT (SECOND) OF CONTRACTS §19 (1981). This standard is widely and commonly adopted. See infra notes 26-31 and accompanying text. Yet section (a)(2) replaces the objective manifestation of assent standard: conduct that the offeree has "reason to know that the other party or its electronic agent may infer from the conduct or statement that the person assents to the record or term." UCITA §112(a)(2) (Proposed Official Draft 1999). The distinction is subtle, yet critical. It substitutes the offeror's belief as to assenting conduct for an objective opinion of assenting conduct.

Proposals for revisions of UCC Article 2 are more protective of the offeree, at least where the offeree is a buyer. See U.C.C. §2-207, 1999 Annual Meeting Draft, which reads in part:

(b) If a contract is formed by offer and acceptance and the acceptance is by a record containing terms additional to or different from the offer or, if the conduct of the parties recognizes the existence of a contract but the records of the parties do not otherwise establish a contract, the terms of the contract include:

(1) terms in the records of the parties to the extent that they agree;
(2) nonstandard terms, whether or not in a record, to which the parties have otherwise agreed;
(3) standard terms in a record supplied by a party to which the other party has expressly agreed; and
(4) terms supplied or incorporated under any provision of [the Uniform Commercial Code].

(c) If a party confirms a contract by a record received by the other party which contains terms that add to or differ from those in the confirmed contract, the terms of the contract include:

(1) terms in the confirmation and the confirmed contract, to the extent that they agree;
(2) terms in the confirmed contract to which the parties have previously agreed;
(3) standard terms in a confirming record that add to or differ from
the confirmed contract to which the other party expressly agrees; and

(4) terms supplied or incorporated under any provision of this article.

(d) In this section, a party does not expressly agree to a term by the mere retention or use of goods.


Particularly of note is the controversy surrounding a proposed change in subsection (d) suggested in the February 1, 1999 draft. This change would have inserted the following section as a new subsection (d), and renumbered the current subsection (d) as subsection (e). It read:

(d) If a contract for sale is formed in any manner and thereafter the seller in a record proposes terms to the buyer that vary [add to or differ from] terms previously agreed, the following rules apply:

(1) If the seller could have disclosed the varying terms to the buyer in a commercially reasonable manner at the time of contract formation and failed to do so, the terms do not become part of the contract unless expressly agreed to by the buyer;

(2) If the seller could not have disclosed the varying terms to the buyer in a commercially reasonable manner, the seller shall by conspicuous language in a record notify the buyer at the time of contract formation that additional or different terms will be proposed.

(A) If the seller gives conspicuous notice, the buyer may either accept the proposed terms by any method reasonable under the circumstances or reject the proposed terms and return the goods.

(B) If the seller fails to give conspicuous notice, the proposed terms do not become part of the contract unless expressly agreed to by the buyer.

(3) Upon returning goods to the seller, the buyer has a right to:

(A) a refund; and

(B) reimbursement of any reasonable expenses incurred related to the return and in compliance with any instructions of the seller for return or, in the absence of instructions, return postage or similar reasonable expenses in returning the goods.


This subsection was removed from the proposed draft following complaint from Gateway Computers that it would complicate contractual interaction and increase the costs of contracting. See, e.g., letters from contract professors criticizing and seeking rejection of the concepts embodied by section 2-207(d): letter from Douglas G. Baird, Harry A. Bigelow Distinguished Service Professor of Law, The University of Chicago, The Law School, to Lawrence J. Bugge, Chairman, Article 2 Drafting Committee (Mar. 9, 1999); letter from Alan Schwartz, Sterling Professor of Law, Yale Law School, to Lawrence J. Bugge,
familiar part of the law on silence as acceptance, on contract formation and interpretation under section 2-207 of the UCC, and on various other forms of non-verbal acceptance.

II. THE PAST

The history of Anglo-American contract law is a model of the progressive evolution of contracting behavior. The classical model, one that is still practiced and is often held as the contracting prototype, is an interactive face-to-face exchange between an offeror

Chairman, UCC Article 2 Drafting Committee (Mar. 8, 1999); letter from Hal Scott, Nomura Professor of International Financial Systems, Harvard Law School, to Lawrence J. Bugge, Chairman, Article 2 Drafting Committee (Mar. 10, 1999). The section was placed in the comments to section 2-207 as Comment 5, intended as historical background, but was withdrawn following continued controversy. See letter from Lawrence J. Bugge, Chairman, Article 2 Drafting Committee, Dick Speidel, Reporter, and Linda Rusch, Associate Reporter to Members of The American Law Institute (May 10, 1999).

The interesting effect of this controversy may be that Gateway and similar situated companies are in a worse position without the offending section than they would have been had it remained in the text of section 2-207. With proposed subsection (d) intact, a company that wished to include new terms in a confirmation letter or with shipment of goods had a decent opportunity to have those terms incorporated if it disclosed that it would be proposing those terms, or made the terms available at the time of contracting. Thus, these companies would have to change their sales representatives’ script to include either of these, but they would have a good chance at having them incorporated. Without subsection (d), unless a company can (1) get their customers expressly to agree to these additional terms (and note under the final subsection that retention of the goods does not connote express agreement), or (2) escape 2-207 entirely by keeping the contract from being formed, they are only conflicting terms in a confirmation under subsection (c) and do not become part of the agreement. Although Gateway’s own General Counsel has deemed the proposed section "unnecessary," see letter of William M. Elliott (Mar. 9, 1999), I am unsure of the merits of this conclusion.

2. The written history of Anglo-American contract law can surely be traced at least to yearbooks dating from the 1280’s, though it is certain that "since time immemorial, people have made contracts." John D. Wladis, Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law, 75 GEO. L. J. 1575, 1575 (1987).
and an offeree in which the parties respond to one another's oral offers, counteroffers, and acceptances. The advent of reliable means of communicating with a person at a distance, the English mail system, allowed an interactive exchange by persons who were not in one another's presence. Written exchange raised the possibility that the parties would communicate serially (and their communications might cross in the mail), but otherwise the mail was merely a new verbal method of contracting that took more time than an oral exchange because of the need to transport the writings between the offeror and the offeree. The invention of the telephone brought interactive oral exchange between parties not in one another's presence.

All three of these exchanges—face-to-face, interactive writing, and by telephone—share certain characteristics. The model contemplates an offeror stating his price and conditions and the offeree responding by accepting or rejecting that price and those conditions or by making a counteroffer. The original offeror might then accept the counteroffer or make yet another and different counteroffer. All three models share the expectation that: (1) each party would respond to the other's proposal until an agreement was reached or the parties broke off their negotiations without any agreement and, (2) the interactive parties will use verbal symbols to show agreement or disagreement.

Even in the earliest times, certain non-interactive and non-verbal contracts must have co-existed with the interactive models. For example, the King or powerful landowners must have offered grain or other things for sale at prices and on terms that were not negotiable. Presumably the earliest of these transactions were oral and to be executed at once. More recently these contracts have found their way into writing and have taken on executory qualities. Then, as now, these are "take-it or leave-it" deals in which the

3. According to the Chairman of the British Post Office and Royal Mail, Neville Bain, the Post Office has been active for more than 350 years. See Neville Bain, Chairman's Statement (visited Jan. 15, 2000) <http://www.postoffice.co.uk/anreport/chairman.html>.
offeree’s option is to accept the offer or to make no contract. Absent fraud or unconscionability, the law has always honored the contract that results from the offeree’s conscious acceptance of the offer, even in circumstances where the offeree had no power to modify the offer and when there was no prospect that the offeror would consider or accept a counteroffer. This rule is now embodied in section 211 of the Restatement. Here, of course, the offeree’s acceptance may be grudging but it is conscious and unequivocal. By signing the offeror’s form, the offeree signals his conscious surrender to the offeror.

4. "Take it or leave it contracts" appear in nineteenth century case law. See Greer, Mills & Co. v. Stoller, 77 F. 1, 7-8 (W.D. Mo. 1896) ("[T]hose who are parties to the bargain must take it or leave it as a whole." (quoting Mogul S.S. Co. v. McGregor, Gow, & Co., 21 Q.B. Div'l Ct. 544, 552 (1888) (Coleridge, C.J.))).

5. See, e.g., Merit Music Serv., Inc. v. Sonneborn, 225 A.2d 470, 474 (Md. 1967) ("[T]he law presumes that a person knows the contents of a document he executes and understands at least the literal meaning of its terms."). The common acceptance of standardized contracts also demonstrates that contracts which the offeree has no power to modify are generally honored. See generally RESTATMENT (SECOND) OF CONTRACTS § 211 (1981) (comments explain the merits and necessity of standardized contracts); 5 ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 24.21 (rev'd ed. 1998); Avery Katz, The Strategic Structure of Offer and Acceptance: Game Theory and the Law of Contract Formation, 89 MICH. L. REV. 215 (1990); Friedrich Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 COLUM. L. REV. 629 (1943).

6. Section 211 of the Restatement reads in full:

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

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

Coexisting with these verbal and interactive contracts are many others where the behavior of one or both of the parties is more autistic. I characterize behavior as "autistic" either because it is non-verbal and subject to differing interpretations or, when verbal, is not directly responsive to what has come before. The law has explicitly addressed at least four sets of cases. First are cases where a person, such as a credit card issuer, has periodic interaction with its customer and where it purports to find acceptance of a proposed modification by the offeree's continued performance after notice of the proposed change. Second is the provision of unrequested merchandise, i.e., the magazine subscription or book which is sent to one who did not order it but who is claimed to have agreed to buy it by using it. Third are the "silence as acceptance" cases where the courts sometimes conclude that a party has accepted an offer even though he has not made any identifiable response to it. Finally are the cases under section 2-207 of the UCC where the law often finds a contract despite the parties' assertions in their forms that no contract exists unless the other party agrees to all of the offeror's or counterofferor's terms.

Consider first, modifications of continuing contracts that call for repeated performance by the parties. The initial contract between a credit card issuer and a credit card holder typically provides that the credit card company has the right to modify the contract and that the cardholder's use of the card after reasonable notice of the modification is to be construed as acceptance of that modification. Bank deposit contracts and other repeat transaction agreements share these qualities. The courts almost always conclude that the consumer is bound to the proposed modification if he uses

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the credit card after reasonable notice of the modification. Most of these cases emphasize the fact that the original contract between the offeror and offeree explicitly provides for these modifications. Other practical aspects of these transactions certainly incline the courts to bless the modifications. For example, many credit card holders have multiple cards and, upon notice, are always free to use the other cards and so reject the modification. And for most credit card holders it is a small cost to drop one card and find another; the investment in a particular credit card is often quite modest. Avoidance of the disproportionate transaction costs (individual verbal affirmations by millions of cardholders) that would otherwise be imposed on the system for very modest benefit is another practical reason for recognizing modifications by use.

In the second set of cases the law draws the conclusion of no contract from the offeree's autistic behavior. Assume a book publisher sends a book unsolicited to a consumer together with a statement that unless the consumer returns the book or takes some other action to cancel, the consumer's use of the book will be considered an acceptance of an offer to buy. Forty-five states in the United States have passed statutes which provide that furnishing unordered merchandise to a prospective buyer is a gift. This means, of course, that the prospective buyer can keep the book, read it and suffer no liability to the publisher. Here the law not only declines to draw the inference of acceptance (which the common law would have drawn prior to the adoption of these statutes), but it


9. *See* Damon Cline, *Consumers Latch on to Credit Card Deals*, THE AUGUSTA CHRONICLE, Nov. 2, 1998 (discussing strategies for switching credit cards); Thomas G. Donlan, *Just Charge It: There's Already a Competitive Market in Credit*, BARRON'S, Nov. 23, 1998 (stating that the credit card market is competitive enough to benefit the average consumer).


11. *See* Prestype, Inc. v. Carr, 248 N.W.2d 111, 120-21 (Iowa 1976) (stating that offeree who had reasonable opportunity to reject unordered goods but
explicitly commands the opposite inference, namely that there is no acceptance. This case is easy to distinguish from the credit card transaction. By hypothesis, the consumer in this case never ordered the goods and never had a pre-existing contract. But do not forget, at common law the failure to order was not sufficient to free a user from restitution and, possibly, contract liability.

Silence as acceptance (or not) is a staple of first year contracts classes; here the insurance company offers a renewal and the insured—who later claims a contract—is silent or the insured applies for a renewal and the insurance company fails to respond.12 Another possibility is the seller who offers goods and the silent buyer, who could be expected to respond if he does not want them, is bound.13 Yet silence is usually not acceptance.14 Except in the

instead took the benefit of them was bound to pay the contract price); see also 2 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 6:49 (4th ed. 1991) (stating that if the offeree uses or otherwise takes the benefit of unordered goods, he will be bound to the offeror's price).

12. Insurance companies are bound by the terms of the policy applied for when the insurance company fails to respond to the insured's application within a reasonable time. See, e.g., Huberman v. John Hancock Mut. Life Ins. Co., 492 So.2d 416, 417 (Fla. Dist. Ct. App. 1986) (holding that "an insurance company obtaining an application for insurance is under a duty to accept it or to reject it within a reasonable time, and is liable if it delays unreasonably in acting thereon." (quoting 12A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW & PRACTICE § 7217 (1981))); Lechler v. Montana Life Ins. Co. of Helena, 186 N.W. 271 (N.D. 1921) (holding that an insurance company was liable for the payment of a policy when it led a policy holder to believe that if he conformed to certain requirements his policy would be reinstated, and who then complied with those requirements, and the company did not notify him that his application was rejected). In these cases, the applicant relies on the prospect of getting insurance from one company by not pursuing alternative applications with other companies. The insurance cases tend to require reliance by the applicant on his application and where he has shown that he would have sought insurance coverage elsewhere had he known the first company would delay unreasonably. See also Richard Craswell, Offer, Acceptance, and Efficient Reliance, 48 STAN. L. REV. 481, 525 (1996) (arguing that these cases rest on reliance by the offeror on the offeree's silence).

13. These cases rest on an ongoing relationship or an established course of dealing which indicated that the offeror was justified in expecting a reply if the
unusual cases, the burden is on the offeror to prod the offeree to action; generally, the law requires the offeror to get at least a grunt of approval from the offeree.

The most elaborate response to autistic contracts is section 2-207 of the Uniform Commercial Code. By separating the question whether a contract has been formed from the question what are the offer was not accepted. See, e.g., Adams v. Johns-Manville Corp., 876 F.2d 702, 706 (9th Cir. 1989) (stating that "[g]iven the parties' previous course of dealings," silence constituted acceptance where an objection to the offer of settlement was not communicated to the offeror); Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203, 1207 (10th Cir. 1972) (stating that silence will operate as acceptance where "the relations between the parties justify the offeror's expectation of a reply or where a duty exists to communicate... rejection"); Laredo Nat'l Bank v. Gordon, 61 F.2d 906, 907 (5th Cir. 1932) (holding that "where the relation between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as acceptance"). See also Craswell, supra note 12, at 526.


15. Section 2-207 reads in full:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such cases the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

terms of that contract, section 2-207 attempts to make sense of certain autistic behavior by the parties. For the first time it recognizes the possibility that a response which conflicts in some significant way with the offer can nevertheless be an acceptance—so making a contract. Sections 2-207(2) and (3) then answer a different question: what are the terms of the contract that has been formed? Unlike the common law which interpreted performance in the face of an unequivocal offer to be an agreement to all of the terms in the offer, section 2-207 often finds performance together with the sending of a responsive document or telephone call to make a contract that includes terms from both forms together with default terms from Article 2 of the UCC.

16. See Idaho Power Co. v. Westinghouse Elec. Corp., 596 F.2d 924, 926 (9th Cir. 1979) (stating that section 2-207 rejects the common law rule that an acceptance must be the mirror image of the offer); Tecumseh Int’l Corp. v. City of Springfield, 388 N.E.2d 460, 463 (Ill. App. Ct. 1979) (noting that many common law counteroffers are acceptances under section 2-207); Gardner Zemke Co. v. Dunham Bush, Inc., 850 P.2d 319, 322 (N.M. 1993) (noting that drafters of section 2-207 intended to change common law mirror image rule).

17. Commentators may disagree about the application of section 2-207, particularly in cases where there are additional or different terms found in both an offer and an acceptance. See, e.g., JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 10-12 (4th ed. 1995) (disagreement between Bob and me concerning whether different terms in an acceptance cancel each other out (my view) or whether different terms in an acceptance fall out and the contract is governed by the terms of the offer (Bob’s view)). In one of the few arguments I have ever won with Bob, the majority of cases have upheld my position. See Daitom, Inc. v. Pennwalt Corp., 741 F.2d 1569, 1578-79 (10th Cir. 1984) (containing an overview of the case law on the issue).

18. While the default filling terms of Article 2 will control in the event that conflicting terms drop out or the parties did not negotiate some term, the gap-fillers are not properly used to knock out a contrary term in the offer. See Idaho Power, 596 F.2d at 927 (upholding an offeror’s clause limiting liability against offeree’s claim that its silent acceptance included full consequential damages under the Code’s default rules). If the writings of the parties do not otherwise establish a contract, but their conduct evidences a contract, section 2-207(3) applies. See Challenge Mach. Co. v. Mattison Mach. Works, 359 N.W.2d 232, 236 (Mich. Ct. App. 1984) (holding section 2-207(3) only applies if there is no contract under section 2-207(1) but conduct of parties indicates a contract exists).
As interpreted by American courts over the last 40 years, section 2-207 weakens the power of the offeror to control the terms of the agreement. By giving the offeree some of its terms under section 2-207(2) and depriving the offeror of many of its terms under cases that wind up in section 2-207(3), the law weakens the inference of acceptance traditionally drawn from the offeree's autistic behavior.

To find a contract after a mindless exchange of printed forms and to construct it from fragments of printed forms and code parts, is probably consistent with the expectations of the parties in the transactions under section 2-207. The parties' behavior tells one that the transaction-cost of negotiating each of these deals outweighs the cost of an occasional bad warranty or an ineffective disclaimer. By their behavior—behavior that is often well informed by clever lawyers—the parties are saying that on balance and in gross they would rather have contracts, even contracts with some unfavorable terms, than to have no contracts or only fully negotiated ones. If one assumes that hundreds or thousands of contracts are performed with no significant dispute, for every contract where there is a dispute large enough to get a lawyer involved, this behavior is sensible—at least if the costs of negotiation are more than trivial (as they surely are) and if the injuries from the occasional dispute that could have been avoided by a negotiated term are modest (as they usually would be). Thus, the courts' interpretation and application

In section 2-207(3) cases, the parties must have had some written communication, but assuming such communication exists, the parties' contract is governed by the relevant provisions of Article 2 rather than the terms of any one document. See McJunkin Corp. v. Mechanicals, Inc., 888 F.2d 481, 489 (6th Cir. 1989) (stating that section 2-207(3) contract is supplemented by remedy provision of the Code); C. Itoh & Co. (America) Inc. v. Jordan Int'l Co., 552 F.2d 1228, 1237 (7th Cir. 1977); Leonard Pevar Co. v. Evans Prod. Co., 524 F. Supp. 546, 552 (D. Del. 1981) (stating that under section 2-207(3) the Code gap-fillers supply terms where writings of parties do not agree).

19. See John E. Murray, Jr., The Chaos of the 'Battle of the Forms': Solutions, 39 VAND. L. REV. 1307, 1312-15 (1986) (discussing reliance on printed forms between merchants and the ability of parties to rely on the UCC's default standards when they do not negotiate their own).
of section 2-207 is probably consistent with the parties’ expectation.

III. THE FUTURE

Relying on this history of Anglo American Law, how should the law address the modern autistic contract exemplified by the license for computer software or the sale of certain goods through a distributor to an end user? Assume that Microsoft packages Windows ’98 with a computer that is sold to a consumer by Gateway. The consumer orders from Gateway by phone and authorizes payment by giving her credit card number. Some of the money paid to Gateway goes indirectly to Microsoft as payment for the software, but unless Gateway is considered to be Microsoft’s agent, the consumer never deals with Microsoft. When the computer arrives, the software is installed, and the power cord has a statement on it: "by opening the plastic to get at this power cord you agree to be bound by the terms of the Windows ’98 license." There are, of course, many variations on this theme but all have in common (1) no interaction with the licensor at the time of supposed acceptance, (2) payment before supposed acceptance and with limited knowledge of the terms of the offer and, (3) attribution by the offeror of some meaning to the autistic behavior of the user (opening, installing, privately clicking "I agree.").

20. Gateway’s telephone operators deny that they are agents of Microsoft. However, this may not be a realistic assessment of the relationship between Gateway and Microsoft, since we cannot expect that Gateway’s sales staff are fully cognizant of the legal ramifications of the transactions between the two corporations. Telephone Interview by Katharine Saunders with Gateway sales agent (Feb. 16, 1999).

21. In two cases, the Seventh Circuit upheld this kind of contract against consumers who used the software. In ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996), the Seventh Circuit held that a shrink-wrap license contained in software was binding on a buyer under the Uniform Commercial Code. The plaintiff, ProCD, Inc., had "compiled information from . . . telephone directories into a computer database." Id. at 1449. This database was sold for two different prices: a cheaper one for consumer use, and a more expensive price for manufacturers and retailers. See id. ProCD included with the software a license
which permitted certain uses, depending on who the buyer was. See id. at 1450. Defendant Zeidenberg purchased the computer database software at a retail outlet (at the consumer price) and subsequently formed a company to resell the information on the Internet for less than ProCD's commercial price. See id. ProCD sued on violation of its license.

The court determined that the restrictions on purchasers' use of the software were ordinary contracts. "[W]e treat the licenses as ordinary contracts accompanying the sale of products, and therefore as governed by the common law of contracts and the Uniform Commercial Code." Id. The court reasoned that because it is impractical for vendors to put "the entire terms of a contract on the outside of a box," a notice on the outside of a box that the software purchase is subject to the terms listed inside coupled with the "right to return the software for a refund if the terms are unacceptable . . . may be a means of doing business valuable to buyers and sellers alike." Id. at 1451.

The court first looked at other areas of the law where strict offer and acceptance machinery are not used. Citing insurance cases and entertainment tickets as two examples, the court acknowledged that there are many permissible transactions where "the exchange of money precedes the communication of detailed terms" of the agreement. See id. Because the nature of most software transactions is not to take place over the counter, but by phone or over the Internet, the industry relies on making a contract in which some of the terms are not specifically agreed to. See id.

The court applied Article 2 of the Uniform Commercial Code to the software sale. Although the defendants argued that Article 2 does not cover shrink-wrap contracts because what was then proposed Article 2B had a specific section which would validate standard form end user licenses, the court refuted this. "To propose a change in a law's text is not necessarily to propose a change in the law's effect. New words may be designed to fortify the current rule with a more precise text that curtails uncertainty." Id. at 1452. In applying the current UCC, the court cited section 2-204(1), saying "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Id. (quoting U.C.C. § 2-204(1) (1989)). The Seventh Circuit reasoned that "[a] vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance, [and that] a buyer may accept by performing the acts the vendor proposes to treat as acceptance." Id. The court concluded that a valid contract was created in this case when "ProCD proposed a contract that a buyer would accept by using the software after having an opportunity to read the license at leisure," and when the defendant Zeidenberg did so. See id.

In Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997), the Seventh Circuit held that terms sent in a computer box to a buyer who ordered the
None of the cases described above fits this transaction precisely. It is not like the credit card transaction because there is no prior agreement between Microsoft and the consumer on which a computer over the phone were binding on the buyer and governed the sale unless the buyer returned the computer within thirty days. Rich and Enza Hill purchased their computer from Gateway over the phone. There is no claim that all of the terms were read to the Hills during their ordering phone call. The computer arrived with several additional terms listed on forms inside the boxes. One of these was an agreement to arbitrate disputes with the company. The Hills "kept the computer [for] more than thirty days before complaining about its components and performance." *Id.* at 1148. "Gateway asked the district court judge to enforce the arbitration clause [but] the judge refused," holding that the agreement was unenforceable. *See id.* Gateway appealed to the Seventh Circuit. Judge Easterbrook, the same judge who wrote the opinion in *ProCD*, wrote the opinion of the court.

The court's opinion begins by citing *ProCD* as controlling because it relied on the Uniform Commercial Code, rather than any one state's law. *See id.* at 1149. Interpreting *ProCD* as holding "that terms inside a box of software bind consumers who use the software after an opportunity to read the terms and to reject them by returning the product," the court held that *ProCD* applies to commercial transactions where payment occurs for a product "with terms to follow." *Id.* at 1148. The court reasoned that because "Gateway shipped computers with the same sort of accept-or-return offer *ProCD* made to users of its software," the holding of *ProCD* applies. *See id.* at 1149. The court stated that "*ProCD* is about the law of contract, not the law of software," and noted that it should not be limited to software transactions. *See id.* Citing no case law, the court reasoned that it would be impractical to require vendors to disclose the full legal terms to consumers prior to receiving payment. *See id.* The court referenced air transportation and insurance as areas of the law where it is common for payment to precede "the revelation of full terms." *Id.* The court stated that both customers and vendors are better off with the current "approve-or-return device," and that in any case, since the box the Hills received "from Gateway was crammed with software," *ProCD* would still apply to this case. *See id.*

Next, the court determined that *ProCD* is not limited to executory contracts or licenses, but rather concerns the question of contract formation. *See id.* at 1149-50. The court stated that "[t]he question in *ProCD* was not whether terms were added to a contract after its formation, but how and when the contract was formed." *Id.* at 1150. Without rigorously analyzing the case specifics, the court concluded that the Hills accepted Gateway's offer by "keeping the computer beyond thirty days." *Id.*
modification could be rested. It is not exactly like the unordered book because the consumer may have known about the software, or even if he did not, surely intended to buy and pay for the hardware. It is not the same as the usual section 2-207 case because the buyer is unlikely to send a responsive document, thus there will be no direct written competition to Microsoft's form license. It is similar to the cases where an offeror construes silence to be acceptance, but not exactly the same, for by hypothesis, the licensee rips open the plastic to get at the power cord, loads and uses the software and perhaps does a private, ritualistic "I agree." It is also, of course, unlike the case in which the King sells grain at the King's own price to his subjects, for the subject consciously, albeit reluctantly, agrees to the King's terms.

It may be important to note that the cases in my models are not all alike. The silence by acceptance cases usually address the question whether a contract exists at all. For example, the insured who fails to respond to the insurance company's offer of insurance

22. See, e.g., Adams v. Johns-Manville Corp., 876 F.2d 702, 706 (9th Cir. 1989) (stating that "[g]iven the parties' previous course of dealings," silence constituted acceptance where an objection to the offer of settlement was not communicated to the offeror); Brooks Towers Corp. v. Hunkin-Conkey Constr. Co., 454 F.2d 1203, 1207 (10th Cir. 1972) (stating that silence will operate as acceptance where "the relations between the parties justify the offeror's expectation of a reply or where a duty exists to communicate . . . rejection"); Laredo Nat'l Bank v. Gordon, 61 F.2d 906, 907 (5th Cir. 1932) (holding that "where the relation between the parties is such that the offeror is justified in expecting a reply, or the offeree is under a duty to reply, the latter's silence will be regarded as acceptance"); Prestype, Inc. v. Carr, 248 N.W.2d 111, 120-21 (Iowa 1976) (citing the Restatement and holding that a party's conduct subsequent to his receipt of merchandise amounted to a confirmation or adoption of the contract offered because the party failed to reject the merchandise or complain of any discrepancy); Agri Careers, Inc. v. Jepsen, 463 N.W.2d 93, 96 (Iowa Ct. App. 1990) (citing language similar to the Restatement, and holding that an employer who hired and retained a candidate referred by an employment agency was required to pay the agency's fee because the employer had taken the benefit of the employment agency's services); Moore v. Kuehn, 602 S.W.2d 713, 718 (Mo. Ct. App. 1980) (holding that a party's "silent acquiescence in and acceptance of . . . repair work listed in [a written] proposal constituted an acceptance of the contract as it related to those items").
on the same terms as the prior year, will be confronted with the insurance company’s argument that no contract was formed for the new year. The dispute between the insurance company and the insured will be over the most important and central obligation in the contract, namely the obligation of the insurance company to pay. The cases under section 2-207 and those involving credit cards are different. In almost all of the section 2-207 cases and in all of the credit card cases, there is performance by both parties; both regard a contract as having been formed. The question before the court is not whether there is a contract, not whether the parties are bound to the principal obligation, but whether some additional term has been added to the contract or whether some term of the original contract or offer has been changed.23

In most of the cases considered in this paper, the parties would acknowledge the existence of a contract of some sort but would argue over its terms. Put another way, the licensee would argue that he has a right to make copies or to reverse engineer; far from denying a contract, he will claim that a contract was made by his payment of money and his taking possession of a disk that contained the software. The distinction between cases in which the parties dispute whether any contract has been made and the cases in which they concede the existence of a contract but argue for different terms may be important because the inferences that the offeror should be permitted to draw about the offeree’s probability of acceptance might be different in the two cases. So what behavior should we demand from an offeror and an offeree to conclude not merely that a contract has been made, but to reach the additional conclusion that the terms of the offer are the terms of that contract?

A. The Contract Purists

Conventional contract doctrine makes it hard for an offeror to achieve a contract with an offeree who is not explicit in his verbal

23. See supra note 18 and accompanying text (section 2-207 cases); note 7 and accompanying text (credit card cases).
or nonverbal behavior. For example, section 2 of the Restatement Second of Contracts describes a promise as "a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." To describe the private act of a licensee as a "promise" within that definition is a stretch. The act of ripping open the power cord or clicking "I agree" on a computer screen is a private act, an act not disclosed to the promisor or to any other third party. Moreover, the act might not be done by the licensee but by a third person, a shabbos goy, who is specifically not authorized to accept.

Section 69 of the Restatement is also slow to infer acceptance from such behavior. Comment "a" to that section is titled "Acceptance By Silence Is Exceptional." The three exceptions specified in section 69(1) are narrow, only the first comes close to our case. It finds silence to be acceptance when "an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation." Of course any buyer of a Gateway computer with Windows installed knows he must pay; in fact, our offeree has already paid by a credit card authorization. One response to Microsoft's claim under section 69(1)(a) is that it is inapplicable. Noting that he has already paid in full for the hardware and software, the licensee will argue that a contract was

25. The text of that comment follows:
   Ordinarily, an offeror does not have power to cause the silence of
   the offeree to operate as acceptance. . . . The usual requirement of
   notification is stated in § 54 on acceptance by performance and § 56 on
   acceptance by promise. The mere receipt of an unsolicited offer does
   not impair the offeree's freedom of action or inaction or impose on him
   any duty to speak. The exceptional cases where silence is acceptance fall
   into two main classes: those where the offeree silently takes offered
   benefits, and those where one party relies on the other party's
   manifestation of intention that silence may operate as acceptance . . . .

Restatement (Second) of Contracts § 69 cmt. a (1981).
formed on payment to Gateway and any later proposal by Microsoft was an ineffective attempt to modify.

So faced with the question I have posed above, a contract purist might start (and conclude) by noting that the Restatement places a heavy burden on a person who would earn the benefits of a contract. Since the licensor has not borne that burden, he loses. The purist position has virtues. It minimizes litigation; it forestalls infection of other contract doctrine. It respects and protects the individual’s autonomy by imposing no legal liability without clear, affirmative action by the offeree.

It also has a cost. If Microsoft sells one million Windows licenses each year and if all but a tiny fraction of the licensees are willing to be bound by the terms of Microsoft’s license, it would be wasteful to force Microsoft to get some explicit electronic, oral, or written response from every licensee to form a binding contract. By hypothesis this expense would protect only rights of the small minority who do not want to be bound by the Microsoft license, but who do not return the Gateway computer together with the Microsoft software. So a careful adherence to the Restatement leads to a result that is probably more expensive than allowing the courts to draw the inference that Microsoft would like them to draw. On the other hand, Microsoft is enjoying the benefits of contract liability even though it did not go through the conventional ritual.

But it is far too late for the purist position. At least since Justice Holmes, Judge Hand, and most of the contract establishment

27. See OLIVER W. HOLMES, JR., THE COMMON LAW 309 (1881). Holmes stated:

The law has nothing to do with the actual state of the parties’ minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct. . . . The true ground of the decision was not that each party meant a different thing from the other . . . but that each said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another.

Id.

28. See Hotchkiss v. National City Bank of N.Y., 200 F. 287, 293 (S.D.N.Y. 1911) ("If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the
came out four square for the objectivist approach around the turn of the 20th century, every American contracting party has been open to the possibility that he will be bound to a contract that he does not subjectively intend when he has given objective appearances of agreement. Recall Judge Hand’s famous statement that he would find a contract despite the assurance of twenty bishops that the party had not intended a contract where the party had performed the objective ritual showing agreement (and vice versa). Both the Restatement and the commentators have followed Holmes and Hand, though somewhat more cautiously.

Having departed the certainty of the subjective interpretation of contract, we are left with no obvious stopping point. We cannot insist that courts be foreclosed from using a contracting party’s ambiguous verbal and nonverbal behavior to draw inferences about the existence of a contract or about its terms. The Restatement and the case law of every state include examples where courts do and should accept autistic behavior of offerees as sufficient to bind the offerees. The question is where to stop on this journey from unequivocal verbal agreement to words or acts that are only privately done and only faintly representative of an intention to be bound.

law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort.

29. See, e.g., 2 WILLSTON & LORD, supra note 11, § 6:3 ("[A] manifestation of apparent intention to accept is necessary, and no informal contract can be made without it."); RESTATEMENT (SECOND) OF CONTRACTS § 2 (1981).

30. But note that some still argue for the use of subjective rather than objective intent. See, e.g., Michael Ansaldi, The Do-Nothing Offeree: Some Comparative Reflections, 1 J. TRANSNAT’L L. & POL’Y 43, 51 (1992) ("The will, actual, subjective and inaccessible, should be central to our thinking about contract; outer manifestations are only the will’s epiphenomena.").

31. See supra note 28.


33. See Ansaldi, supra note 30.
B. The Economists

In recent years the lawyer economists have brought new thinking to the discussion of contract rituals. It is commonplace that certain transaction costs are associated with some kinds of contracting but not with others. For example, Microsoft might argue that requiring it to form a written contract with each licensee would be needlessly expensive and inefficient.

The economists make more subtle efficiency arguments too. Professor Katz has shown that a clever offeror, using silence as acceptance, might lure his offeree into an inefficient contract that is nevertheless profitable for the offeror. Indeed, economic revisionists might argue that the state and federal statutes that make unordered merchandise into "gifts" from the offeror were written with the invisible aid of the law and economics scholar to forestall inefficiency. When a commodity with limited value, like a book, arrives unordered and unannounced but with a bill for $30 that must be paid if the merchandise is not returned (at a cost to the offeree of $10), it is plausible that a smart offeror (who has done some market research, and so suspects that the offeree will be interested in the book) can either lure the offeree into an inefficient contract or, at worst, capture more of the surplus from the transaction than he could otherwise get.

Consider first the possibility that the offeror could lure the offeree into an inefficient contract. Assume the offeree values a particular computer and its conventional software at $2,000. Assume the cost of rejecting an offer made by a seller's shipping the computer with software installed is $30. If the computer arrives on the offeree's doorstep as part of an offer to sell for $2,025, a rational buyer will accept by silence (in accordance with the offer) because rejecting costs $30 and leaves the offeree even worse off economically than if he grits his teeth and keeps the computer. If, in the case posed, the offeror's profit is less than $25, we have an

34. See, e.g., Katz, supra note 5.
35. See id. at 256-65.
inefficient contract, albeit one that makes the offeror more wealthy.\textsuperscript{36} Contracts such as the one described exist mostly in professors' minds. To force the offeree to buy for more than his reservation price (here $2,000), first the offeror must aim carefully; he has to hit within the range of the rejection cost, but above the offeree's reservation price. Since the reservation price will be unknown to the offeror and since the cost of rejection will often be quite small, the offeror has to be a crack shot to hit that mark.

Even where the contract is efficient, the same process may enable the offeror to grab more of the surplus than he could in an interactive contract. Assume for example that the offeree's cost of rejection is $30 and his only options are to reject or to accept by inaction once the computer and software arrive. Assume the offeree's reservation price with the license restrictions is $1,995 and that the offeror makes an offer of $1,980 with restrictions. Unless he is confident that the offeror's reservation price is less than $1,950 (the offer less $30), he will accept. In an interactive exchange where the cost of making a counteroffer is zero, the offeree could make several counteroffers without fear of losing the bird in the hand (the offer of $1,980) and without a new and possibly wasted outlay of $30.\textsuperscript{37}

One should divide the question of efficiency from the related question of strategic behavior to capture a large share of the wealth created by the transaction. To prefer one contract ritual over

\textsuperscript{36} If one disregards transaction costs as a part of the "cost," the contract is not efficient in a Pareto sense regardless of whether the offeror makes more than $25, but is inefficient in the Kaldor-Hicks sense only if the offeror makes less. Because Pareto efficiency requires that there be no way to make one party better without making the other one worse, the offeror's profit amount is irrelevant. Kaldor-Hicks efficiency exists when a party can make itself better to the detriment of another only if the amount improved is greater than the amount the other party loses. Thus, the profit margin of the offeror must be greater than $25 for this contract to be efficient.

\textsuperscript{37} Of course, the offeror could try the same ploy (a take it or leave it offer) in a face to face transaction, but there at least he could be tested for nothing by the offeree's counter-offer.
another because it is more efficient conforms to the standard economic norm that more wealth is better than less. To prefer one ritual over another because it allocates more of the surplus to a particular party does not conform to that norm. That preference requires a separate justification.

If it were found that a new ritual in most circumstances would enable the offeror to reduce the absolute amount of the surplus that goes to the offeree by comparison with the amount that would go to him in an interactive contract, should that be enough to reject the ritual? Assume, for example, that in a face to face sale of a computer with Windows '98 the offeree pays $1,925 but under the new ritual he will pay $1,935. Assume too that the new and the old sales are Pareto optimal exchanges and that the latter ritual is $5 less expensive than the former. Thus the change from one ritual to the other is itself efficient only by the Kaldor-Hicks standard; the adoption of the new ritual is itself not Pareto optimal since the offeree's wealth is decreased compared to his status if the transaction had followed the former ritual.

I see at least two arguments that could be made to justify a requirement that the offeree not be disadvantaged by the new ritual compared with the old one. First, one could defend this outcome by a conventional claim for consumer protection—as single shot players in a game repeatedly played by their sophisticated offeror (who is manipulating the game to his benefit), consumer buyers and licensees need help. Second, one might regard this condition as the offeror's payment for a change in the law that enables an efficiency that the offeror seeks and whose benefit it will enjoy. After all, it is the offeror who asks the legislature or the courts for a change in the law, and it does not seem unfair to insist that the change be Pareto optimal, i.e., that it be unequivocally "fair" to the offeree. I suspect that these "two" arguments are really one—the law should protect the weak.

Of course, the ability of the offeror to induce an inefficient contract or to grab surplus through autistic contracts is usually limited by the information that the offeree acquires at the beginning of the transaction. Unlike the silence as acceptance cases
where the entire deal lands unannounced on the offeree's doorstep, here the contract comes in parts. The offeree almost always knows of the important terms of the contract before he is made to do an autistic acceptance of other terms. So the offeree usually has an inexpensive power of rejection if he acts before delivery. For example, in the Gateway case the offeree has learned of, and perhaps even bargained over, the price and specifications before he has given up his credit card number. Gateway and Microsoft increase the cost to the offeree only by adding unexpected terms to the license. The cost of those terms to the offeree cannot exceed the cost the offeree would incur to reject the offer, or else the offeree would reject. If the cost of those terms to the licensee (i.e., the amount he would pay to be free of them) is trivial, the chance of an inefficient contract or of the offeror's successful manipulation of the process to seize the surplus is inconsequential.  

One would also predict that offerees would eventually adapt to autistic contracting behavior. Once it became known to offerees that undesirable terms would follow the discussion of price and specifications, one would expect some offerees to adjust their reservation prices or to demand a copy of the terms before the goods are delivered.

Of course, particular contract rituals bring their own transaction costs. For example, if autistic contracting caused more
rejections than would happen under interactive contracting rituals and, particularly, if those rejections were much more expensive (because they came after delivery of goods), that would be a transaction cost that should be charged to this particular ritual. More often conventional rituals carry higher transaction costs than autistic ones. Assume the law refuses to recognize a license with Microsoft after the Gateway autistic exchange. Assume also that for all but a trivial number of offerees, the restrictive terms in the box are unimportant. These offerees would pay nothing to avoid the terms, but the terms are worth $5 to Microsoft. Assume further that it would cost the offeror an additional $2 per transaction to abandon its autistic ritual and to deal in the least expensive interactive way with the offerees. Ignoring the tiny fraction who are offended by the terms, the $2 cost of contracting is now a dead weight loss. With these assumptions we have required an expensive ritual to produce the result that could have been achieved without the $2 expenditure. 39

To estimate the probable cost of permitting contracts to be made by an autistic acceptance one needs to make guesses about some of the variables. Of course it is unlikely that the best alternative mode of interactive contracting would cost $2 per transaction, but requiring an interactive communication by telephone, electronically, or through the mail has measurable and significant costs if the transactions are numerous and if each transaction has only modest value. So one must estimate both the number of transactions and the offeror's gain per transaction.

Second, one would want to estimate the proportion of offerees for whom the restrictions would be costly. The costs to the offeree of conventional restrictions on the use of software (no copying, no reverse engineering) are probably close to zero—at least in the case of mass marketed, canned programs like Windows. Why? For one thing, the buyer is not a computer engineer and could not reverse engineer a new variant even if his life depended on it. For another,

39. This proposition still ignores the small fraction of offerees for whom the terms are costly.
he surely understands he can safely disregard the contract prohibition on copying, at least if he is going to copy the program only once or twice for a friend or family member. Third, one would want to estimate the cost of rejecting the autistic contract. This is a limit on the allocative inefficiency that could result from autistic contracting. If the rare offerees for whom the restrictions are costly can reject at modest cost, the cost to them will not be large.

The costs may be different in the business cases involving goods. As I suggest below, the considerable effort devoted to manipulation of the form contracting process and the substantial number of cases involving section 2-207 tell me that business people place a value on getting their own remedy terms, or at the least, on keeping the other party from getting all of its terms. Because the contracting transactions are fewer and the dollars per transaction are larger, the aggregate cost of more expensive traditional contract rituals are less consequential here too.

To calculate the probable efficiency gain or loss from a new ritual, one might use a formula that compares (1) efficiency gains per transaction to the offeror multiplied by the number of expected transactions, to (2) the rejection cost per transaction to the offeree multiplied by the number of probable rejections plus the losses from inefficient contracts without rejection. To be efficient therefore, one would have to find the following:

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(gain per trans. to offeror) \times (\text{no. of trans.}) \geq (\text{rejection cost per trans.}) \times (\text{no. of rejections}) + (\text{cost of inefficient contracts performed}).

If my hypotheses are correct about the typical software transaction—transactions with a large number of offerors and a modest number of rejections—the autistic ritual will usually result in an efficiency gain. Where there is a large number of transactions, only a few rejections, and even fewer inefficient acceptances, any reduction in the cost of the contracting ritual is likely to be efficient because the gain per transaction on the left side is multiplied by every single transaction, whereas the offeree's cost is multiplied only by the few where there is rejection or inefficient acceptance.

One might also insist that the offeree's surplus from the autistic ritual exceeded the surplus it would have achieved from the previous ritual—insisting the change be not merely efficient by the Kaldor-Hicks test but by the Pareto test as well. Whether one insists upon the latter condition depends upon his concern about the need of the offeree for protection. Some would argue, and I might agree, that the market or the self-interest of the offeror would take care of that problem and would insure the change in the contract ritual would not disadvantage the offeree by comparison with the previous ritual.

If my speculation about the interest and cost of the various contracting alternatives is correct, this suggests that the law should be comparatively respectful of a mass market software maker's attempt to make autistic contracts but more suspicious of similar attempts in the business sales of goods. In the mass market sale of goods to consumers, consumer advocates would surely sacrifice efficiency for greater consumer protection. On the wisdom of that position I am skeptical, but agnostic.

The business sale of goods or unique software might be different from the mass market of software for two reasons. In the first place, the efficiency gains will be the greatest in cases where there are many transactions and an increment of savings is earned with each; in the mass market there is a new contract with almost every unit
sold or licensed, but in business sales, one contract might cover thousands or millions of units. Secondly, as I suggest below, the business buyers' resistance to form disclaimers and limitations of remedy that is revealed by decisions under section 2-207 suggests that the offeree's cost per transaction of disclaimers and limitations of liability may be greater than the cost of conventional restrictions on licenses that are contained in software agreements.

C. Proposal

Under what circumstances should the law confer the legal rights of a contract on an offeror who has not performed a traditional contract ritual? Which contracts that are concluded by an autistic acceptance should be treated as containing the offeror's terms? As I suggest above, I do not believe that the law can or should deny effect to every act that was not subjectively intended by the actor to be an acceptance. Objective manifestations are the norm, and rightly so.

At minimum, it seems to me that the very idea of contracting carries with it one condition: that the offeree not be bound to the contract until and unless the offeree has had a reasonable opportunity to learn of the offeror's terms. Even if the terms contained in the Gateway box were reasonable and would be acceptable to almost all offerees, the law should not bind any individual offeree until that offeree has had the opportunity to open the box and read the terms—unless of course the terms have been made available to him earlier. The licensors in ProCD and Gateway granted the offeree a right to return the goods and cancel the license once the offeree had learned of the terms. Section 211 in UCITA imposes that same requirement in mass-market licenses. Irrespective of the efficiency argument, I believe the law should insist that a reasonably diligent offeree at least be able to find the terms before he is bound.

Beyond that condition, I am drawn to the idea that the law should validate almost any new autistic ritual that is more efficient than the old.
But I still have a few doubts. It seems wrong for our contract law to indorse any autistic ritual that is likely to leave many weaker and less sophisticated parties worse off than they were under the prior ritual. Clearly the law should not permit a new ritual that is likely to enable the offerors to make favorable but inefficient contracts. For the reasons I have discussed above and for others as well, it seems unlikely that any new ritual will produce a significant number of inefficient contracts where the offeror entices the offeree into a contract that not only diminishes the offeree’s share of the surplus, but does so by an amount that exceeds the increase in the offeror’s wealth from the transaction.

It is possible—although unlikely—that the offeror could exercise its strategic advantage under an autistic ritual in a way that produces a more efficient outcome than under the old ritual but would still leave the offeree worse off. This is Professor Katz’s hypothesis that strategic behavior by the offeror might enable the offeror to actually reduce the amount of the surplus that goes to the offeree in the new ritual by comparison to the old. This too seems unlikely for several reasons. First, our baseline is a deal for the identical commodity under a prior ritual. That ritual produced a price dictated by market factors that may also dictate the new price. For reasons I discuss above (particularly that the price and specifications are known at the outset of the transaction and before the offeree is committed), the strategic benefits associated with most autistic acceptances are small. Also, buyers who are repeat players will be educated by their past experiences and that education diminishes the possibility of strategic behavior by the offerors.

So I favor a rule that would recognize autistic contracts in almost all cases where the change from the old ritual to the new is likely to be Pareto optimal. If the offerees are no worse off under the new ritual and the offerors are better off, wealth is created and society at large benefits even if there are no immediate benefits to the offerees. Conversely, the courts should reject the new ritual where the change is not efficient even by the Kaldor-Hicks test.

41. See Katz, supra note 5, at 256-65.
Where the change is efficient by Kaldor-Hicks but not by Pareto (the offerees are worse off under the autistic ritual than under the old ritual), I am uncertain. Perhaps these cases do not exist. Understand that I am hypothesizing a case in which the offeror not only takes the entire surplus that results from the efficiency of the new ritual but takes even more and leaves the offeree worse off than he was before. In a competitive market this should not be possible; some of the participants should choose to share the surplus and so increase their percentage of the market. Even in a noncompetitive market one would not expect that an offeror would choose to raise its price simply because it was incidentally enjoying an unrelated efficiency. Even a monopolistic offeror sets its price at a particular level for some reason (keeping potential competitors at bay, facilitating sales of peripheral products for which there is competition, maximizing its return by the appropriate trade-off between volume and price). Unless that reason changes, one would expect that a monopolist would leave its price unchanged even though it might take the entire surplus.

If I am wrong, and if the offeror successfully manipulates the new ritual to increase the offeree's price, we should probably turn to other policies to determine whether we recognize the autistic ritual here. If these cases exist, they are probably not in the business context and are likely to be contracts entered into by unsophisticated and comparatively ignorant consumers. Perhaps they deserve the protection of the law.

Ignoring the last cases (where the new ritual might be more efficient but where the offeree will be worse off), how does one distinguish the case where the autistic ritual is more efficient than the traditional one? How can a court tell one from the other and so validate one contract and invalidate the other? Is it to hear testimony from economic and behavioral experts on efficiency and probable behavior of hypothetical offerors and offerees? Should we ask the courts and legislatures to make ad hoc and instinctive guesses, as some courts seem to have done? For example, in ProCD, Judge Easterbrook emphasized that the offeror gave the offeree a thirty day return right and intimates that the case might have been
different if it had not done so. This is as close as the courts have come to measuring the efficiency of a ritual (i.e., does the thirty day right reduce the cost of rejection sufficiently to render the offeror’s gains greater than the offeree’s costs?). Perhaps we could ask the courts to look for proxies for efficiency. Is the cost of rejection high? Are the belatedly revealed terms or conditions costly for the usual offeree? Would the offeree likely have accepted these terms in a face to face transaction so we can at least conclude the sale is Pareto optimal—even if the change from one ritual to another may not be? At minimum we could do what UCITA will do, namely, mandate a right to return.

Consider four cases:

1. Buyer calls Gateway to purchase a computer. The parties make an agreement for purchase of the computer without mentioning software and the buyer pays for the computer by giving Gateway the authorization to draw on his credit card. When the computer arrives, the box contains Windows '98 with conditions that restrict copying, reverse engineering, and resale.

The buyer reverse engineer a competing program and Microsoft sues to enjoin sale or other use of the reverse engineered program. Assume that Microsoft makes no claim under the copyright law, it relies only on its contract rights to prohibit the licensee from reverse engineering. What result?

2. Individual taxpayer orders Turbo Tax '98 from Intuit. She pays Intuit by giving them a credit card number. In two weeks a disk containing the Turbo Tax program arrives. When consumer loads the program she finds it will not operate unless she clicks on

42. See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452-53 (7th Cir. 1996).

43. Apart from the considerable uncertainty of inviting the courts into the economist’s apothecary, there is at least one other confession that I should make. To determine whether each change in contract ritual—from conventional to autistic—is efficient, I have assumed that one would compare the practice that prevails in a particular setting with the newly proposed ritual. That means of course that different offerors will have different points of comparison. For example, an industrial offeror now often deals with its offeree by the battle of the forms under section 2-207, but a consumer buyer or licensee deals in a telephone interactive transaction.
an "I agree" box which is associated with certain conditions of the Intuit license. Among these is a prohibition on copying the program even once. Consumer copies the program twice and gives a disk to each of two friends. Somehow learning of this and wishing to make her an example, Intuit sues for damages. Intuit does not depend upon copyright protection, it sues only on the contract. What outcome?

3. A representative of Lear Seating negotiates with a purchasing manager at Daimler Chrysler. Without reaching a final agreement but with the tentative understanding that they are going ahead with the transaction, Lear sends an "offer to sell" to Daimler Chrysler. The "offer to sell" states that a contract will be formed on the terms specified in the seller's form if Daimler Chrysler does any of the following acts: (a) issues its own purchase order number, (b) otherwise processes the Lear order or, (c) commences any performance under the order.

Daimler Chrysler later sends back its own document, labeled an "offer to buy." This document requires certain warranties from Lear and explicitly objects to any disclaimers or limitations of remedy that appear in Lear's document. The seats are defective and Daimler Chrysler sues Lear. Lear defends on the ground that its document, the offer, became the contract when Daimler Chrysler issued a purchase order number even before an actual purchase order was delivered. What are the terms of the contract?

4. Clark Equipment Company manufactures mining equipment. It sells the equipment through distributors and does not have direct contact with any of the end users. The user buys from and contracts only with a local distributor. Concerned about the economic loss claims that have been made on breach of warranty and contract theories, Clark commences attaching documents to the equipment itself. The documents specify that the Clark Equipment Company makes an express warranty of "no manufacturing defects" and limits its duty to the repair and replacement of any goods that, within three years, prove to be defectively made. These documents state that the buyer's commencement of use of the machinery constitutes acceptance of Clark's offer and will bind the user to Clark's terms.
What are the terms of the contract with a buyer?

How should each of these cases be resolved?

Consider first the Microsoft Windows '98 package with the Gateway computer. Is the new ritual more efficient than a conventional ritual here? Because Windows '98 is a canned program marketed to a large business and consumer market, it seems plausible that one would expect the licensor of such a product to protect itself by conventional restrictions. Recognizing that some people in the computer industry believe that reverse engineering is an important part of the rights of users—at least of programs that are not mass marketed—I still would expect prohibitions on copying and reverse engineering. So, few are likely to reject on learning of these conditions on the license.

But isn't the cost of rejection here large? To reject, the offeree would somehow have to get his money back from Gateway, money that goes partly into the pocket of Microsoft for the program and partly to Gateway for the hardware. He would have to package the computer and send it back—unless he could find another suitable operating system to work on the particular computer he had purchased. He might then have to wait without another computer for an indefinite period if he did not have enough money to buy a computer before he got his refund. Moreover, the buyer would be confronted with the same temptation that confronts the person who receives "free goods"; the clever offeror has imposed a considerable cost.

The cost is not as high as it seems; recall how this contract was made. In this case the bargain over the important terms between the offeror and the offeree occurred during the telephone conversation when the buyer was discussing price and specifications of his computer with the Gateway representative. At that point, the offeree’s cost of rejection was trivial. Merely by terminating the conversation he could reject any offer and then turn to a local computer store or to another direct seller. If we assume, as I have suggested above, that for all but a tiny fraction of the Gateway buyers, the restrictions that are disclosed only with the computer are inconsequential, the cost of rejection is correspondingly low.
because by hypothesis the rejection will occur during the original part of the bargain, not after delivery.

What is the gain from avoiding a more elaborate contracting ritual? Presumably thousands or perhaps even millions of copies of Windows are sold each year. To require the offeror to procure a written or oral affirmation of the terms of the contract from each offeree would be expensive. For example, to make the deal (and to deliver the software) over the Internet would present other and perhaps more difficult problems. First, at least a "pre"-Windows 98 program would have to be loaded on the computer so that the computer could make an Internet connection with Microsoft. Exactly how complicated it is to make such a program available for new buyers on the net and how much time it would take to download the program over the Internet is beyond me. It is conceivable that the time and effort would be considerably greater than putting the program on a disk and sending it with the computer or sending the computer with Windows already installed.

Of course there are many other contracting alternatives that Microsoft might consider. It might include a postcard for the licensee to sign and return. It might require Gateway to inform the licensee of the terms or their presence. It could also make Gateway its agent for contracting.

I favor the offeror here. It seems quite likely that the offeror could reasonably believe that almost all offerees would agree to terms that restrict copying and reverse engineering. It is also plausible that the available contracting alternatives (given widespread use of Windows and the difficulty of on-line downloads) might be costly.

Still, the offeree's burden of rejection after his receipt of the goods and license are monumental. Then we are asking the licensee, who, like a dog presented with his meal, has commenced to salivate, to send the program and, probably, the computer back to Gateway. The licensee must do that with the hope, but not the certainty, that he will eventually get a credit on his credit card. But I think this costly rejection is the rare exception, not the norm. Since the important terms in this contract for almost all licensees are almost
always those disclosed during the phone conversation, the true cost of rejection is usually trivial. Spread over the body of purchaser offerees those costs seem insignificant.

The second case, Intuit's requirement of a private "I agree," is easier. An interactive "I agree" communicated to the offeror would clearly satisfy conventional contract doctrine and would cause a contract to be formed. But here we consider a private ritual. The offeree is not on-line with the offeror, she is in her study. On the first loading of Turbo Tax she is called upon to say to herself, "I agree," to bow three times to the east. (I overlook the complications that might arise if someone other than the buyer loaded the program, if a particularly clever licensee loaded the program without clicking on the "I agree" box, or if the licensee simultaneously shouted out "I do not agree" as she was pushing the "I agree" key.) Because clicking on the "I agree" box is a condition to making the program operate, the ritual the offeree is made to perform is not quite the same as the private statement "I agree," it is a conscious act with known consequences that must be performed in order to make the program work. Thus it is more like ripping open the marked plastic to get at the power cord, an act that almost always must be done in order to have the program work.

Surely the buyer of Turbo Tax knows that Intuit makes money by selling these and expects that it is a violation of her contract with Intuit to make copies and provide them to others who are potential purchasers of the product.45

The burden of rejection after receipt here is much lower than in the Gateway case. While the taxpayer might be sitting down on April 14 to do her taxes and only then discover the offensive term, that would be an unusual taxpayer. Most taxpayers could easily reject the program, return the disk, and procure competing tax preparation software. If, as in Gateway, the important terms are

44. See supra notes 24 and 30 and accompanying text.
45. See UCITA § 112(d), supra note 1 (explaining that proof of conduct equals "I agree").
known at the time of the telephone order, the costs of rejection are yet further reduced. So it seems to me that the burden of rejection is not significant in this case. It is particularly insignificant given the fact that a potential licensee bargained directly with Intuit for the purchase of this program. Unlike the Gateway case, where the licensee could plausibly argue that he did not believe he was going to have to make a separate contract with Microsoft, the taxpayer is buying software from Intuit, and only software.

Are there alternatives available that are not significantly more expensive for Intuit? It could train its sales staff to get the licensees' an oral or electronic agreement, for in this case the licensee is not dealing with a third party but directly with the offeror. Presumably, Intuit could train its sales personnel to say at the conclusion of the deal: "You know, of course, that there are conditions to which you will have to agree in order to operate the software. If you do not agree to those you must send the software back to us; we will pay the shipping." Intuit could include a similar statement in its on-line offer for those who buy over the Internet. It is also possible that the software could be downloaded over the web concurrently with a payment and without the requirement of sending a disk. I am ignorant of the technical and practical problems of procuring the software by Internet, not by disk.

I believe we should recognize this contract. The new ritual here is doubtlessly more efficient than the alternatives. Because of the expectations of the offeree, few rejections are likely, and for the few rejections that do occur, the cost will be small if the product is widely sold. There will be substantial savings in not having to require the offeree to send a card, make a phone call, or engage in a long interactive exchange.

What about Lear and Daimler Chrysler? Lear, sending what purports to be an offer, hopes to get its terms. The commercial trade practice hurts Lear's claim. Lear, a member of the automobile business, understands that Daimler Chrysler deals with suppliers by purchase orders, acknowledgments, and the like. It expects to receive the document it will ultimately receive from Daimler Chrysler, namely a responsive document that purports to state the
exclusive terms of the deal. Lear has no reasonable expectation that Daimler Chrysler would accept its terms in a face to face transaction. It expects a conflicting response from Daimler Chrysler, one that says "mine" and "not yours." The burden of rejection is not high for Daimler Chrysler but there may be alternative modes of contracting that will procure a more reliable agreement. If, as likely, this contract involves millions of dollars of goods, the cost of negotiating a conventional contract might be trivial. Even if one did not negotiate a contract, the cost of contracting by complying with the traditional ritual—namely that provided in section 2-207—is not significantly more expensive than the one attempted by Lear. The behavior of commercial parties sending purchase orders and acknowledgments, behavior that produces most of the litigation under section 2-207, tells me that the cost to an offeree of taking the offeror’s terms on rejection, revocation, arbitration, warranty disclaimers, limitation of liabilities, and other remedies is substantial. Moreover, the fact that a single commercial contract might cover sales of thousands, even millions of pieces tells me that the cost to the offeree is likely to be large by comparison with the modest savings to the offeror. Savings here are modest not because the offeror does not place a great value on limiting its liability, but because the number of transactions is smaller. Here a single contract could cover years of purchases. For sellers or licensors to individual consumers, there is a separate contract and thus an incremental gain with each item or license sold. It seems likely that Lear could not show that a new ritual would be more efficient than the existing section 2-207 ritual.

Last is Clark Equipment Company. If we adopt a rule that lets Microsoft get what it wants by an autistic web contract, should we also solve manufacturers’ long standing difficulties in procuring agreements from remote users of their products? I think not. This case is like Daimler Chrysler’s. Because the number of transactions will be comparatively small, the cost of using a more expensive ritual will be trivial, yet the cost of rejecting a $400,000 machine might be enormous. If, moreover, we assume that the offeree would object to the offeror’s limitations of liability and would regard
them as significantly reducing the value of the transaction, the autistic ritual is probably less efficient than the traditional alternative.

IV. CONCLUSION

Where does my proposal leave us? It says that many autistic contracts should be recognized, for in many cases, the reduction in transaction costs made possible by an autistic ritual will easily outweigh the costs imposed on dissenting offerees. This is particularly true where there are many contracts (and so much savings). On the other hand, where a single contract controls a large quantity of goods or services, an autistic ritual is unlikely to be more efficient and so should be questioned. In most cases the law should insist that the offeree not be bound to an autistic contract until he has had a reasonable opportunity to know the terms offered. Thus, if Gateway did not offer an opportunity either to know the terms before delivery or to return the goods after one had opened the box and seen the terms of the license, we should decline to recognize terms in the box—at least where they make any material change. This is a fair price for the benefits of having a contract.

I appreciate, of course, that reasonable people could differ about the outcomes in my hypotheticals, and I do not claim that my proposal will give bright lines. Where a transaction will surely create wealth and where doing it other ways might substantially diminish that wealth, my proposal holds out the hope, if not the promise, of offerors’ achieving their ends in many cases where they receive only autistic responses.