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# Cardozo, Anti-Formalism, and the Fiction of Noninterventionism

Larry A. DiMatteo

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*We shall say to ourselves that it is vain to seek a sovereign talisman; that the treasure box does not spring open at the magic of a whispered word; that there is no one method of judging, su-*

* Huber Hurst Professor of Contract Law & Legal Studies, Warrington College of Business Administration, University of Florida. I would like to thank W. David Slawson for his comments on a draft of this article.

*preme over its competitors, but only a choice of methods changing with the changing problem . . . .*[1]

## I. Introduction

The *Wood v. Lucy, Lady Duff-Gordon*[2] case ("*Lucy, Lady Duff-Gordon*") can be seen as a landmark case, not so much for what it said, but for what it represents. The issue of what it represents has much to do with the stature of Justice Benjamin N. Cardozo and the year of the case—1917. Cardozo placed an epitaph on what has been dubbed the age of formalism,[3] or the era of classical legal thought.[4] The new era sought to advance the notion of judicial reasoning as being one focused on the balancing of interests, public policy rationales and the context-dependent nature of meaning.[5] It is the last of these items that will be the primary subject of this essay.

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1. Benjamin N. Cardozo, *The Growth of the Law (1927), in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 232-33 (Margaret E. Hall ed. 1947).

2. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917).

3. Professor Pratt states that the "critical origins of the transformation of contract doctrine lie in the period between 1870 and 1920." Walter Pratt, *American Contract Law at the Turn of the Century*, 39 S.C. L. REV. 415, 416 (1988). Karl Llewellyn distinguishes between "Formal Style" and "Grand Style" legal reasoning. KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 5-6, 35-45 (1960). Ian Macneil describes the era of "classical contract law [as] that developed in the 19th century and brought to its pinnacle by Samuel Williston in THE *Law of Contracts* (1920) and in the *Restatement of Contracts* (1932)." Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 n.2 (1978). *See also* GRANT GILMORE, AGES OF AMERICAN LAW (1979). Presently, there has been a call for a return to a more formalistic methodology for contract interpretation. This school of thought has been called neoformalism or Anti-Anti-Formalism. *See* Robert E. Scott, *The Case for Formalism in Relational Contract*, 94 NW. U. L. REV. 847 (2000); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999); Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781 (1999); Michael P. Van Alstine, *Of Textualism, Party Autonomy, and Good Faith*, 40 WM. & MARY L. REV. 1223 (1999). *See also* Paul N. Cox, *An Interpretation and (Partial) Defense of Legal Formalism*, 36 IND. L. REV. 57 (2003) (argues in favor of formalism; formalism is unlikely to triumph; and it remains a part of the law).

4. Duncan Kennedy, The Rise and Fall of Classical Legal Thought (unpublished manuscript on file with author).

5. LLEWELLYN, *supra* note 3 (argues that the modern era of legal thought was not new in the sense of novelty, but a return to an earlier era of legal thought he called Grand Style reasoning, referring to Cardozo as a Grand Style judge).

The essay asserts that the best part of Cardozo's opinions in *Lucy, Lady Duff-Gordon*, and in his other contract cases, was his expert use of contextual evidence. What this essay does not suggest is that *Lucy, Lady Duff-Gordon* was very original in its implication of the duty of reasonable efforts. Instead, the essay argues that legal formalism never reached the level of dominance over contract law as represented in most historical accounts of the nineteenth and twentieth centuries. In fact, an analysis of the cases cited by Cardozo in *Lucy, Lady Duff-Gordon*, and other cases that predated his opinion, show a relatively flexible contract law—one that took account of context, implied duties and completed incomplete contracts.

Professor Pratt offers *Lucy, Lady Duff-Gordon* as typical of the law's response to the uncertainty of the late nineteenth century.[6] Cardozo is seen as balancing the pressing injustice of a particular case with the dictates of freedom of contract.[7] He did this by rejecting freedom of contract as formulated under legal formalism. In its place, he advanced a vision of freedom of contract premised on a contextual understanding of the written agreement. Finding the true agreement of the parties required an interpretive methodology based upon the full context of the contract. The narrow viewfinder provided by a plain meaning and four-corners interpretation of contracts either had to be abandoned or broadly expanded in most cases.

This essay will focus on Cardozo's contextual mode of interpretation.[8] Part II examines the legal context of the case and

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6. Pratt, *supra* note 3, at 419.

7. Professor Cunningham states that Cardozo was an expert in the "ability to work within received doctrine and to achieve a richer balance of both fairness and efficiency of consensual exchange." Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379, 1398 (1995).

8. By singling out *Lucy, Lady Duff-Gordon* for analysis there is the fear that it may not be the clearest example of Cardozo's jurisprudence. It is important to remember that from 1913 to 1930 Cardozo wrote 470 majority opinions sitting on the New York Court of Appeals. Bernard L. Sheintag, *The Opinions and Writings of Judge Benjamin Nathan Cardozo*, 30 COLUM. L. REV. 597, 597 (1930). Cardozo's dominance over the court is apparent if one considers that during that same timeframe he wrote only fifteen concurring and fifteen dissenting opinions. *Id.* In fact, Llewellyn summarizes Cardozo's contract jurisprudence as a "campaign to put the reading of a commercial document [in context and not] . . . the Langston-Williston rigidities of 'basic' contract theory." LLEWELLYN, *supra* note 3, at 115. This campaign focused on a "commercial reading" of business contracts. *Id.* at 116. Again he refers to "Cardozo's ten-year campaign, begun in 1914, to render stan-

challenges the notion of the originality of Cardozo's opinion. Part II also offers some alternative explanations for Cardozo's decision. Part III reviews the factual context of *Lucy, Lady Duff-Gordon*. The facts used by Cardozo highlight his context-oriented interpretive methodology. Part IV offers an opinion of the meaning and importance of *Lucy, Lady Duff-Gordon*. The essay concludes that the true innovation in the case was the offering of a contextual means of interpretation.

## II. Lucy, Lady Duff-Gordon

This part will examine the originality of Cardozo's opinion by looking at cases that predated *Lucy, Lady Duff-Gordon*. It will argue that the implication of duties and the salvaging of incomplete contracts were firmly established prior to Cardozo's recognition of the implied duty to use reasonable efforts. The second section offers some alternative explanations or rationales for Cardozo's opinion, including the formality of contracts, the equity powers of courts and the "mercy" rationale.

### A. *The Unoriginal Nature of the Cardozo Opinion*

Beyond the symbolism that the case came to represent, the Cardozo opinion was not particularly original. His famous "instinct with an obligation" was borrowed.[9] Contract law in general was working out new legal concepts to respond to the reality of a modern economy. The concepts of the implication of reasonable efforts and good faith had been brewing for at least fifty-years prior to *Lucy, Lady Duff-Gordon*. As noted by Judge Posner: "The contractual duty of good faith is thus not some

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dard in the reading of a commercial document the full use of its commercial background and of general commercial sense." *Id.* at 242.

9. McCall Co. v. Wright, 117 N.Y.S. 775, 779 (App. Div. 1909). Holding that

> it is true that plaintiff does not by precise words engage to employ defendant for the term specified, but the whole contract is *instinct with such an obligation* on its part, and there can be no doubt that upon a fair construction it imports a hiring by the plaintiff as well as an obligation to serve by defendant.

*Id.* (emphasis added). The original authorship of the phrase is often ignored by legal scholars. *See, e.g.*, David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1825 (1991) (explaining an apparently silent contract may nonetheless, in Cardozo's famous phrase, be "instinct with an obligation").

newfangled bit of welfare-state paternalism or the sediment of an altruistic strain in contract law and we are therefore not surprised to find the essentials of the modern doctrine well established in nineteenth-century cases."[10] Posner cites Cardozo in *Lady, Lucy Duff-Gordon* for the proposition that courts are empowered to imply terms into a contract based upon the parties' purpose for entering into their contract or, in the alternative, to make "sense" of the contract.[11] In fact, it was the trial court in *Lucy, Lady Duff-Gordon* that held the agreement required Wood to "exercise his 'bona fide judgment'—a requirement the judge thought sufficient to give content to Wood's obligation and thus make the agreement enforceable."[12] The difference between the lower court's and Cardozo's reasoning was that the former premised the implication of duty on good faith grounds and the later on reasonable efforts. The former goes to motive; the later resorts to more objective criteria of commercial reasonableness.[13] Nonetheless, both Cardozo and the trial court salvaged the contract through the implication of duty.

The concepts of implied terms and the need for best or reasonable efforts have a long history that preceded *Lady, Lucy Duff-Gordon*. The courts had developed the notions of good faith and reasonableness to counter the illusory charge in the related area of output and requirements contracts.[14] Such cases, along with exclusive sales or agency contracts and exclusive license agreements, are all captured in Cardozo's ground rule that "[w]e are not to suppose that one party was to be

10. Market Street Assocs. Ltd. v. Frey, 941 F.2d 588, 595 (7th. Cir. 1991) (Posner, J.) (citing two 1886 New York cases: Marsh v. Masterton, 5 N.E. 59, 63 (N.Y. 1886) (good faith in employment context), and Uhrig v. Williamsburg City Fire Ins. Co., 4 N.E. 745 (N.Y. 1886) (bad faith in the settlement of an insurance claim)).

11. *Id.* at 596.

12. Pratt, *supra* note 3, at 420.

13. Of course, courts often look to trade usage and business custom to determine if the conduct in question is to be considered an act of bad faith.

14. In the early agency cases, reference to output and requirement contracts are often made. *See, e.g.*, Commercial Wood & Cement Co. v. Northampton Portland Cement Co., 100 N.Y.S. 960 (App. Div. 1906) (involving an exclusive selling agreement; the concurring opinion by Judge Ingraham refers to a case involving a shipping contract in which one party agrees to provide transit for an unspecified amount of cargo and simply groups this type of agreement, along with exclusive agency and supply contracts, as illusory).

placed at the mercy of the other."[15] In given cases, this meant avoiding the finding of lack of mutuality of obligation.

As noted above, the illusory restraint in the consideration requirement was presenting problems in other areas of contract law. Another example was presented in Professor Edwin Patterson's two-part article in the 1921 volume of the *Iowa Law Bulletin*.[16] His analysis involved the illusory charge in sale on approval contracts. He notes two theories of sufficiency of consideration. Under the Willistonian view such agreements were unenforceable because the buyer had the choice to reject the goods if not satisfied. Such an agreement is illusory because under the Willistonian construct of consideration the elements of benefit or detriment are not satisfied from the buyer's perspective. If the buyer rejects the goods, then the seller would not receive a benefit and the buyer would not incur a detriment. Patterson argues that the more enlightened view is that of Professor Ames. That view would recognize any promise as constituting sufficient consideration. Thus, a promise or implied promise to inspect the goods as to quality before making a decision would be sufficient consideration.[17]

The 1906 case of *Commercial Wood & Cement Co. v. Northampton Portland Cement Co.*[18] involved a contract providing a selling agent with a five-year right to sell a manufacturer's entire supply of cement. The court noted that the agent company

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15. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917).

16. Edwin Patterson, *Illusory Promises and Promisor's Options*, 6 IOWA L. BULL. 129, 136-37 (1921).

17. The duty of reasonable inspection can also be judged under the standard of good faith. "[T]he limitation is laid down that the buyer in deciding, act in good faith, and not for the mere purpose of avoiding an obligation." *Id.* at 149 (citing Wetters v. Otto, 162 N.W. 12 (Iowa 1917)). Patterson notes that this was an amalgamation of two of the prevailing views on the subject: the "New York rule" of reasonable satisfaction and the "Massachusetts rule" of honest satisfaction. *Id.* at 146.

18. *Commercial Wood*, 100 N.Y.S. at 960. The court discussed the illusory claim but decided the case on the alternative defense that the corporate officers involved did not have capacity to bind the corporation. In *dicta*, Justice Houghton states that:

> We are inclined to the opinion that a covenant to use best endeavors to sell may be read into the contract, but our view of the contract itself and lack of authority on the part of the executive committee to enter into it renders a determination of that question unnecessary.

*Id.* at 963.

"did not agree, except by such implication as the law might raise, to make any sales, or endeavor to make any, and specifically bound itself to do nothing except to keep a set of books in the name of defendant, showing sales and credits."[19] As to the illusory nature of the agreement, the court stated that:

> It is urged that the contract lacks mutuality in that the plaintiff did not covenant to make any sales or to use its best endeavors to do so. Whether a covenant will be read into a contract where there is no express agreement to perform depends upon the intent of the parties gathered from the instrument and the surrounding circumstances.[20]

So, in excess of a decade before the *Lady Duff-Gordon* decision the recognition of a best efforts duty in agency contracts was evolving.

The language of incomplete contracts and implied terms can be traced back in time by looking at the chain cites listed in *Lucy, Lady Duff-Gordon*. In 1868, the United States Supreme Court in *Hudson Canal Co. v. Penn Coal Co.*[21] stated that an

> [u]ndoubtedly necessary implication is as much a part of an instrument as if that which is so implied was plainly expressed, but omissions or defects in written instruments cannot be supplied by virtue of that rule unless the implication results from the language employed in the instrument, or is indispensable to carry the intention of the parties into effect.[22]

Justice Clifford elaborated the general principles of a contextual mode of contract interpretation:

> Instruments inartificially drafted, or where the language employed is obscure, imperfect, or ambiguous, are always open to construction . . . but the power of a court of common law extends no further than to collect such intention from the language employed as applied to the subject-matter, in view of the surrounding circumstances.[23]

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19. *Id.* at 961.

20. *Id.* at 963 (citing Carney v. N.Y. Life Ins. Co., 57 N.E. 78 (N.Y. 1900); Caldwell v. Mut. Reserve Fund Life Ass'n., 65 N.Y.S. 826 (App. Div. 1900)).

21. Delaware & Hudson Canal Co. v. Pennsylvania Coal Co., 75 U.S. 276 (1868).

22. *Id.* at 288.

23. *Id.* at 290. Interestingly, Justice Clifford cites the New York case, *Tipton v. Feitner*, 20 N.Y. 425 (1859).

The Court advanced the notion that agreements that are "obscure, imperfect, or ambiguous" are not to be presumed to fail for indefiniteness. The word "imperfect" seems to be something broader than "ambiguous." Imperfect is broad enough to include the notion of incomplete contracts. The recognition of the enforceability of an incomplete contract leads to the power to imply terms and duties from the "surrounding circumstances."

The Michigan Supreme Court, as cited by Cardozo, had previously recognized exclusive agency agreements as a special class of cases. In the 1891 case of *Mueller v. Bethesda Mineral Spring Co.*,[24] the court put the notion of implied duty to use reasonable efforts simply: "One who receives goods on commission does not usually expressly agree to do anything, but there is in this class of cases an implied agreement, sufficient to support the promise and contract."[25] Thus, the innovation of implied duties attached to Cardozo's opinion in *Lucy, Lady Duff-Gordon* already existed in the law.

Cardozo cited his own opinion in *Moran v. Standard Oil Company* ("*Moran v. Standard Oil*").[26] In *Moran v. Standard Oil*, Cardozo interpreted what is called an employment contract, but which is really an independent contract agreement, in which a salesman agrees to sell a manufacturer's paint products in exchange for commissions. The lower court held that the contract was not enforceable since the manufacturer had the right to terminate the agreement at will.[27] Cardozo rejected this interpretation by arguing that a contract that obligates a salesperson to sell exclusively the products of another for a five–year period is implicitly a contract to employ the salesperson for that period of time.[28]

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24. Mueller v. Bethesda Mineral Spring Co., 50 N.W. 319 (Mich. 1891).
25. *Id.* at 321.
26. Moran v. Standard Oil Co. of N.Y., 105 N.E. 217 (N.Y. 1914).
27. *Id.* at 220.
28. Cardozo states that:

> The law, in construing the common speech of men, is not so nice in its judgments as the defendant's argument assumes. It does not look for precise balance of phrase, promise matched against promise in perfect equilibrium. It does not seek such qualities even in written contracts, unless perhaps the most formal and deliberate, and least of all does it seek them where the words are chosen by the master under legal advice, and accepted by the servant without the aid of like instruction.

*Id.* at 221.

Other decisions, predating *Lucy, Lady Duff-Gordon*, support the claim of unoriginality. In 1859, Judge Senden of the New York Court of Appeals held that whether conditions in a contract are dependent or independent "is always a question of construction, depending upon the terms of the contract, its subject matter, and the circumstances under which it was made."[29] In *Wells v. Alexandre*,[30] some twenty-six years predating *Lucy, Lady Duff-Gordon*, the New York Court of Appeals upheld a requirements contract. The agreement in this case consisted of an exchange of two one paragraph letters. The agreement provided that the seller would supply coal for the buyer's steamship company. The agreement detailed three of the buyer's steamship routes, but added that it would also supply coal for other steamships of the buyer if the buyer "wished it."[31] The court reasoned that:

> [T]he evident intention of the parties was that the plaintiff should furnish to the defendants all the coal which the steamers named should require in the work in which they were employed for the year ensuing, and that the parties should perform *all needful acts* to give effect to the agreement; therefore, if a notice was requisite to its proper execution, a covenant to give such notice will be inferred, for any other construction would make the contract unreasonable and place one of the parties entirely at the mercy of the other.[32]

The court held the requirements contract enforceable by disregarding the buyer's right to expand its requirements as it wished. The court instead asserted that the coal needs of the three specified steamship lines made the quantity term determinable. As noted in the above quote, the court was willing to imply all "needful acts to give effect to the agreement." This decision gives a broad scope to the courts' power to imply terms. Also note, the court in the final segment of the quote uses the "mercy" rationale employed by Cardozo in numerous opinions. The mercy rationale will be discussed in Part II.B.3.

Ultimately, no one man or common law court can take credit for general trends in the law. By the late nineteenth-cen-

29. Tipton v. Feitner, 20 N.Y. 423 (1859).
30. Wells v. Alexandre, 29 N.E. 142 (N.Y. 1891).
31. Read v. Spaulding, 30 N.Y. 630, 642-43 (1864).
32. *Id.* at 645 (emphasis added).

tury, the law of contract interpretation was in the process of transformation. This transformation included the recognition of the complexity of modern contracting and the need for greater interpretive flexibility. In essence, what Cardozo, and other judges, did was look for answers not within contract law but outside in the real workings of commercial transactions. Cardozo's interpretive methodology or contextualism will be more fully explored in Part III.

What is asserted here is that *Lucy, Lady Duff-Gordon* is an example of the renewed focus of contract interpretation on contextualism. What is not asserted here is that Cardozo's implication of a duty of reasonable efforts was an innovation in the law itself. The next two sections will further explore the claim of the unoriginality of Cardozo's opinion from the perspective of legal development. The first section notes the claim of Professor Kreitner that the transformation of contract law from its classical phase to its modern phase in the early twentieth century is a false historical narrative. The second section will argue that the implied duties attributed to status in the nineteen century continued into the modern era of contract law.[33] As such, the implication of the duty of reasonable efforts in *Lucy, Lady Duff-Gordon* was already embedded in classical contract law.

### 1. The Fiction of Noninterventionism in Classical Contract Law

Professor Kreitner has recently challenged the historical narrative that the late nineteenth century was the high point of freedom of contract's noninterventionism.[34] Instead, he argues that "[e]ven at the height of the classical period—the period that is considered the model of formalist adjudication—judges actively completed parties' incomplete contracts [often through] the implied obligation of good faith and fair dealing."[35] Professor Kreitner argues that the late nineteenth and early twentieth centuries were not times of unfettered freedom of contract, of a contract law based purely on will theory or consent theory,

33. Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917) (arguing that the movement from status to contract is cyclical).

34. ROY KREITNER, CALCULATING PROMISES: THE EMERGENCE OF MODERN AMERICAN CONTRACT DOCTRINE (2007).

35. *Id.* at 164.

or one when courts engaged solely in formalistic, non-contextual interpretation.[36] The previous section on the unoriginality of the Cardozo opinion and the notion of implied duties confirms Kreitner's assessment of the false historical narrative that underlies current debate on incomplete contracts and default rules.[37] The next section elaborates on this idea of a false narrative. It asserts that the implied duties that characterized status relations prior to the age of legal formalism or classical contract law continued throughout the classical period.

### 2. Formalism's Failure to Expunge Implied Duties From Contract Law

The case law suggests that the notion of status or implied duties was never completely expunged by the legal formalism of the late nineteenth and early twentieth centuries.[38] The demarcation between the age of legal formalism or classical contract law and modern legal thought cannot be confined to the years often attributed to those eras.[39] In the area of contract interpretation, any changes in methodology were changes in degree and not changes in kind. The contextualism and flexibility of interpretation associated with modern contract law existed in the age of legal formalism. Cardozo's implication of an implied

36. *Id.* at 197. *See also* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996) (arguing that nineteenth century America was characterized by a high degree of government regulation of business and society). Contract law has always been primarily a rule-based system whether in the age of legal formalism or modern contract law. Legal realism seen as a movement towards modern contract law, as reflected in Karl Llewellyn and the Uniform Commercial Code, maintained the "formalism" of fixed and clear rules. *See* Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11 (2007). *Cf.* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1704-05 (1976) (realist belief that standards like "good faith" provided more certainty than a system of dense rules). *See also* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1933-34 (2001) (Langdell as caricature; classical theorists were never "completely indifferent to the social justification of rules and their impact").

37. *See generally* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992); Charny, *supra* note 9.

38. *See generally* KREITNER, *supra* note 34 (making a strong case for the argument that the history of contract law understood as a "progression" from formalism to modern legal thought is false).

39. *Id.*

duty and use of contextual evidence were not foreign to the contract law of the late nineteenth and early twentieth centuries.

Simply put, even though the duty of reasonable efforts may not have been expressly stated, the use of good faith and business usage to imply duties in contracts had long been established. One can look at the Eighth Edition of *Parsons on Contracts* ("Parsons-Williston")[40] in support of this proposition. The Eight Edition was edited by Samuel Williston and was published in 1893. Williston's formalism is evident in much of the treatise. The chapter on construction and interpretation begins:

> The importance of a just and rational construction of every contract . . . is obvious. But the importance of having this construction regulated by law, guided always by distinct principles, and in a way made uniform in practice . . . we think [is] as certain and as great.[41]

Nonetheless, the possibility of implication of meaning from outside of the written text is also recognized. In the first footnote, Williston cites Lieber for the proposition that "construction is the drawing of conclusions respecting the subjects that lie beyond the direct expression of the text—conclusions which are in the spirit though not within the letter of the text."[42] Parsons-Williston notes that "[t]he law . . . frequently supplies by its implication the wants of express agreements between the parties."[43]

It is important to note that the law of agency is rather developed by 1893 as expressed in Parsons-Williston's treatise. Within the discourse, the idea of a duty to use reasonable or best efforts in the exercise of an agent's duties is implicit. The treatise notes that when an agent has "no instructions, or partial instructions, his duty will depend upon the intention and understanding of the parties. This may be gathered from the circumstances of the case, and especially from the general custom and usage in relation to that kind of business."[44] Later they

40. THEOPHILUS PARSONS, THE LAW OF CONTRACTS (Samuel Williston ed., 8th ed. 1893).

41. *Id.* at 609.

42. *Id.* at 609, n.(a).

43. *Id.* at 631.

44. *Id.* at 84-85.

state, "an agent is bound to great diligence and care for his principal; not the utmost possible, but all that a reasonable man under the similar circumstances would take of his own affairs."[45]

*Metcalf on Contracts*, a noted 1871 treatise, recognizes the nature of an agreement or transaction-type as a rule of construction: "The subject matter of an agreement is to be considered in construing the terms of it, which are to be understood in the sense most agreeable to the nature of the agreement."[46] *Bishop on Contracts* adds that a "contract may be implied by the law out of the terms of an express one, viewed in connection with the circumstances and the subject."[47] Bishop further states that "men, when they speak, and even when they write, do not put all their meaning into words. From this fact grows the proposition that, in law, they will often be understood to mean, while contracting, more than they say."[48]

The courts often were willing to imply duties and terms in commercial law cases throughout the age of legal formalism. In the area of the implication of trade usage, Lord Mansfield in an insurance contract dispute asserts that: "'Every underwriter is presumed to be acquainted with the practice of the trade he insures, and if he does not know it, he ought to inform himself.'"[49] The U.S. Supreme court in *Hearne v. Marine Insurance Co.*[50] stated that in the interpretation of contracts the court should ask: "[W]hat did they mean by the language they employed?"[51] Relating to that meaning the court notes that "[w]hat is implied is as effectual as what is expressed."[52] The New York Court of Appeals in the 1878 case of *Booth v. Cleveland Rolling Mill Co.*[53] used the language of implication. The case involved a licensor licensing its product to a steel company for manufacture and sale. When the manufacturer failed to fill orders of would-

45. *Id.* at 88.

46. THERON METCALF, PRINCIPLES OF THE LAW OF CONTRACTS 278 (1871).

47. JOEL PRENTISS BISHOP, THE DOCTRINES OF CONTRACT LAW § 5, at 3 (1878).

48. *Id.* § 95, at 35.

49. Hearne v. Marine Ins. Co., 87 U.S. 488, 492 (1874) (quoting Noble v. Kennoway, 2 Doug. 513 (1847)).

50. *Id.* (declining to admit an alleged usage since the contract was clear as to the issue in question).

51. *Id.* at 493.

52. *Id.*

53. Booth v. Cleveland Rolling Mill Co., 74 N.Y. 15 (1878).

be buyers of the licensor's product, the licensor sued for breach of contract. The manufacturer argued that it did not have an obligation to fill all orders for the product but only was obligated to pay royalties when it sold the product. In analyzing the written agreement, the court noted that it was "drawn without as much regard to form as to substance, and the parties were content to give expression to their general intent, without studying accuracy or fitness of expression in detail, or setting forth the positive obligations with technical precision."[54] The court held that although the contract failed to expressly state the manufacturer-licensee's obligation, the fact that it had an exclusive right to sell was grounds to imply a duty to use "all diligence in their manufacture and sale."[55]

The New York Court of Appeals dealt with the issues of formalities and the enforceability of contracts in *Sanders v. Pottlitzer Bros. Fruit Co.*[56] In that case two merchants exchanged letters for the sale of apples, the buyer's alleged acceptance stated that the seller should "wire acceptance." The court held that even though a formal agreement was contemplated it did not prevent the court from finding a contract based on their correspondence. It further held that if the parties came to an agreement through their correspondence, and one of the parties inserted terms into the formal written agreement that had not been previously agreed upon, then that party was in breach of the contract entered into through the correspondence. The court further noted that if the additional terms did not reflect the terms "clearly expressed in the correspondence" or "*implied from the transaction*," then they could not preclude the finding of a contract previously agreed upon.[57]

A most telling New York case is *Creamer v. Metropolitan Securities Co.*[58] which was decided ten years before *Lucy, Lady Duff-Gordon*. The case involved a contract for the assignment of railroad properties and related franchises. These franchises included a clause in their charters requiring the owner to pay all gross earnings over to the municipality. The buyer-assignee

54. *Id.* at 23.
55. *Id.* at 25.
56. Sanders v. Pottlitzer Bros. Fruit Co., 39 N.E. 75 (N.Y. 1894).
57. *Id.* at 77 (emphasis added).
58. Creamer v. Metro. Sec. Co., 105 N.Y.S. 28 (App. Div. 1907).

(buyer) agreed to pay a smaller sum for the franchises and properties and a much larger sum later in the event the legislature removed the restriction. The seller-assignor (seller) sued the buyer for breach of contract based on the buyer's failure to test the validity of the restriction in the legislature. The court, in a 5-to-0 decision, held that the buyer had an implied duty to challenge the validity of the legislation though litigation.[59]

The court first noted that the "franchise was obviously without value as it stood at the time this contract was made . . . ."[60] Judge Woodward states:

> The case is thus brought within the rule that 'where there is no express agreement which can be enforced . . . the law will imply one; that is, will impute a promise, or intend that one was made. And such implication will always exist where equity and justice [require] the party to do the thing in question, even though it expressly appears that he never actually made the promise or agreement which by such implication the law attributes to him.'[61]

Woodward held that there was an implied promise to take steps to test the right to construct and operate for profit a railroad under the franchises' charters.

One of the cases cited in Woodward's opinion is even more apropos regarding the implication of duties. In *Genet v. D.H. & C. Co.*,[62] Judge Finch states that implied promises

> always exist where equity and justice require the party to do or to refrain from doing the thing in question; where the covenant on one side involves some corresponding obligation on the other; where, by the relations of the parties and the subject-matter of the contract, a duty is owing by one not expressly bound by the contract to the other party in reference to the subject of it.[63]

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59. *Id.*

60. *Id.* at 29.

61. *Id.* at 33 (quoting Scrantom v. Booth, 29 Barb. 171, 174 (N.Y.Sup. 1859)); *see also* Booth v. Cleveland Rolling Mills Co., 6 Hun, 591; Wilson v. Mechanical Orguinette Co., 63 N.E. 550 (N.Y. 1902); Genet v. D. & H. C. Co., 32 N.E. 1078 (N.Y. 1893).

62. *Genet*, 32 N.E. 1078.

63. *Id.* at 1094. *See also* Dermott v. New York, 1 N.E. 242, 246 (N.Y. 1885).

> The law will, sometimes, in the absence of express stipulation on the subject, infer a contract or promise from one party to the other from the nature of the transaction, or the supposed intention of the parties, where the circumstances would seem to authorize the assumption that such an obligation was within the contemplation of the parties when making their contract.

The case involved a mineral lease between a property owner and a coal company. The coal company was to pay royalties for merchantable coal extracted based upon the opinion of its superintendent or a selected inspector. The owner brought suit to "recover damages against the defendant for not mining the coal with *reasonable diligence*."[64] The contract provided for a minimum royalty whether the land was mined or not. The coal company asserted the minimum royalty was its only obligation under the contract; that and a royalty on any quantity it elected to mine above the minimum amount. The court held that despite the minimum royalty (based on 20,000 tons per year) both parties expected and intended that a much larger quantity would be extracted since the property was estimated to possess 4,000,000 tons of coal. Unfortunately, the coal company negligently constructed the mines and a subsequent collapse destroyed the ability to do further mining. The court reasoned that the "equity of an implied promise is strong and clear. *Good faith, honest dealing, business candor and fairness* require that this contract should be enforced in the sense and with the meaning which was in the mind of both parties at the time of its execution."[65] The court then cites the trial court for the propositions that the coal company had acted "entirely subversive of the *spirit of the contract*" and that "the execution of the contract in *good faith* was fully contemplated."[66]

The above review of cases demonstrates that the implication of promises and the implied duty of good faith had already arrived in contract law well in advance of Cardozo's opinion in *Lucy, Lady Duff-Gordon*. In fact, the line of New York cases traced above, including *Booth v. Cleveland Rolling Mill Co.* in 1878, *Dermott v. State of New York* in 1885, *Genet v. D.H. & C. Co.* in 1893, and *Creamer v. Metropolitan Securities Co.* in 1907, illustrates the firm standing of implied terms prior to *Lucy, Lady Duff-Gordon*. Other state courts were arriving at similar conclusions.[67] First, contracting parties had a general duty of

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*Id.*

64. *Genet,* 32 N.E. at 1103 (emphasis added).

65. *Id.* at 1112 (emphasis added).

66. *Id.* (emphasis added).

67. *See, e.g.,* Luther v. Bash, 112 N.E. 110, 111 (Ind. App. 1916) (implying the term that a realtor's two-percent commission was to be based on the sale price; reasoning that such a term could be "fairly implied from the terms or nature of an

good faith, and when necessary due diligence, in the performance of their contracts. Second, the courts would imply such duties and terms when the general intent to enter a contract was apparent. Third, the courts would look to the surrounding circumstances when implying obligations into contracts. These conclusions reflect a trend both inside and outside of New York well in advance of *Lucy, Lady Duff-Gordon*.

### B. *Alternative Explanations*

This section will explore three, more or less plausible, alternative explanations for the *Lucy, Lady Duff-Gordon* decision. The first looks at the importance of formality in the recognition and enforcement of a writing as a contract. The second explanation reviews the rationales for the decision as lying in the court's equity jurisdiction, namely, unconscionability. The final explanation focuses on the "mercy" rationale found in a number of Cardozo's opinions. It argues that the seemingly disparate Cardozo opinions in *Lucy, Lady Duff-Gordon* and *Sun Printing & Publishing Ass'n v. Remington Paper & Power Co.* (*"Sun Printing"*)[68] are explainable as reflecting the tension between rule flexibility and rule certainty.

#### 1. Importance of Form in Contract Law

*Lucy, Lady Duff-Gordon* can be understood as a consideration case but not a case involving the illusory issue. It is more a case of dealing with the consideration doctrine's definiteness of

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instrument is . . . . In other words what is implied in an express contract is as much a part of the contract as what is expressed."); Mississippi & D. S.S. Co. v. Swift, 19 A. 1066 (Me. 1894) (holding that a written agreement is not needed if the parties intended to enter a contract before the formal signing of the agreement).

68. Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470, 471 (N.Y. 1923) ("Nothing in the wording discloses the intention of the seller to place itself to that extent at the mercy of the buyer."). In *Lucy, Lady Duff-Gordon*, Cardozo states: "We are not to suppose that one party was to be placed at the mercy of the other." Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917). For more recent analysis of the "mercy" rationale in the enforcement of standard forms and the duty of good faith, see W. David Slawson, *Contractual Discretionary Power: A Law to Prevent Deceptive Contracting by Standard Form*, 2006 MICH. ST. L. REV. 853 (arguing that the representations and context of consumer and form giver should be viewed as the contract and the standard form as an exercise of "contractual discretionary power") and Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980) ("discretion in performance").

terms requirement. Given the year, and the vestiges of legal formalism, the case demonstrates the importance of form and substance in contract law. Form is represented by the nature of the parties, the transaction, and the agreement. This was a commercial transaction between parties that were sophisticated or at the least had sophisticated advisers.[69] Cardozo notes that the agreement was "signed by both parties,"[70] that it possessed a "wealth of recitals"[71] and "many other terms,"[72] including the duty to account and prevent intellectual property infringement.[73] And although the terms would be illusory in the event that Wood failed to procure any endorsements, Cardozo notes that "it helps to enforce the conclusion that the plaintiff *had* some duties."[74] The agreement and surrounding circumstances possessed the form of contract. This then enabled Cardozo to give substance to that contract.

Without entering a debate over the importance of form in contract law,[75] it is difficult to doubt that the parties did not intend anything other than to enter into a binding agreement. The formality of the list of "Whereas" clauses[76] is the language of formal contracts, especially in an age when the litany of pre-contractual-quasi-contractual instruments had yet to blossom. Although the nature of "Whereas clauses" are mere statements of fact and not binding obligations, their presence indicates the nature of a formal contract. Finally, as championed by Llewellyn, form can be found in the transaction-type chosen by the parties.[77] In implying reasonable efforts, Cardozo was recogniz-

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69. *See* VICTOR P. GOLDBERG, FRAMING CONTRACT LAW 50 (2007).

70. *Lucy, Lady Duff-Gordon*, 118 N.E. at 214.

71. *Id.*

72. *Id.*

73. JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS 234 (3d ed. 1987) (characterizing the agreement as "an elaborate written instrument").

74. *Lucy, Lady Duff-Gordon*, 118 N.E. at 215 (emphasis original).

75. *See generally* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM—A GENERAL STUDY (2006); ROBERT S. SUMMERS & PATRICK S. ATIYAH, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW (3d ed. 2002).

76. *See* GOLDBERG, *supra* note 69, at 50-51.

77. The phrase is borrowed from Llewellyn's notion of "situation sense." *See* LLEWELLYN, *supra* note 3, at 121-57. Llewellyn describes the need to frame decisions around new types of transactions:

> It is dangerous business, this setting up 'types' of transactions. But the job needs doing, it needs doing until it gets done right. Our fields of law, our

ing the "essential economic function"[78] of a specific transaction-type.[79]

2. Law of Equity: Unconscionability and Restitution[80]

Cardozo cited the case of *Phoenix Hementic Co. v. Filtrine Manufacturing*[81] which involved an exclusive sales agreement. At some point, the agent stopped marketing and placing orders for the manufacturer's product. In a *per curium* opinion, an appellate division court in New York held that due to the fact that the manufacturer was to use the agent as its exclusive seller there was an implied duty on the agent to use reasonable efforts to market and sell the manufacturer's product. The court's implication of the duty of reasonable efforts was borrowed from equity jurisprudence: "[T]he law will intend a promise, when equity and justice require the party to do the thing in question, even though it expressly appears that he never actually made the promise or agreement, which by such implication the law attributes to him."[82] This statement indicates that even if a party can prove no intention to be obligated, the court is prepared to imply such obligation through its equity powers. Here, the objective standard of implied terms, such as trade usage and custom, is used to trump evidence of the promisor's subjective intent. The content of the implied term is implied through extrinsic evidence. But, the phrase "expressly appears" indi-

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> patterns of legal thinking, our legal concepts, have grown up each one around some 'type' of occurrence or transaction . . . .

Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 873, 880-81 (1939). Llewellyn gives loans as an example of a transaction-type. LLEWELLYN, *supra* note 3, at 368.

78. J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 490 (Cal. 1954).

79. Cardozo states that "new times and new manners may call for new standards and new rules." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 88 (1977). In the area of contracts, he notes that "[w]e no longer interpret contracts with meticulous adherence to the letter when in conflict with the spirit." *Id.* at 100. Again, he states that "a spirit of realism should bring about a harmony between present rules and present needs." *Id.* at 157-58.

80. Cardozo previously noted that courts should interpret, when possible, a contract to be an equitable-enforceable one and not an inequitable-unenforceable one: "Intention to make so one-sided an agreement is not to be readily inferred." Moran v. Standard Oil Co., 105 N.E. 217, 220 (N.Y. 1914) (Cardozo, J.).

81. Phoenix Menentic Co. v. Filtrine Mfg., 150 N.Y.S. 193 (App. Div. 1914).

82. *Id.* at 196.

cates that the court is referring to objective intent. In sum, this case, cited by Cardozo is a case of equitable unconscionability.

Cardozo's reference to his opinion in *Moran v. Standard Oil*[83] implies that the implication of reasonable efforts was not an attempt to salvage the contract but to make it less one-sided. If the parties were reversed and Duff-Gordon had brought suit for non-performance, then the reasonable efforts standard would be needed, not so much to fulfill the consideration requirement, but as a measure of performance. Interpreting the standard as "any or no effort" would render the contract hopelessly one-sided or unconscionable. Thus, the implication of a reasonable efforts term can be seen as an exercise of the court's equity powers.[84] Karl Llewellyn in reviewing *Lucy, Lady Duff-Gordon* makes this fairness argument:

> The plaintiff in [*Lucy, Lady Duff-Gordon*] rests his case upon his own carefully prepared form agreement, which has as its first essence his own omission of any expression whatsoever of any obligation of any kind on the part of this same plaintiff. We thus have the familiar situation of a venture in which one party, here the defendant, has an asset, with what is, in advance, of purely speculative value. The other party, the present plaintiff, who drew the agreement, is a marketer eager for profit, but chary of risk. The legal question presented is whether the plaintiff, while carefully avoiding all risk in the event of failure, can nevertheless claim full profit in the event that the market may prove favorable in its response. The law of consideration joins with the *principles of business decency* in giving the answer. And the answer is no.[85]

Llewellyn's connection of consideration to business decency relates to the belief in the one-sided or unconscionable nature of the contract. The main point here is that illusory contracts are

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83. *Moran*, 105 N.E. 217.

84. The unconscionability power was used in equity long before it was codified in the Uniform Commercial Code. *See* Larry A. DiMatteo & Bruce L. Rich, *A Consent Theory of Unconscionability: An Empirical Analysis of Law in Action*, 33 FL. ST. L. REV. 1067 (2006). *See also* LARRY A. DIMATTEO, THE EQUITABLE LAW OF CONTRACTS 97-99 (2001) (arguing that the implication of duties into contracts has at its basis concerns of substantive justice).

85. Karl N. Llewellyn, *From the Library: A Lecture on Appellate Advocacy*, 7 J. APP. PRAC. & PROCESS 173, 187-88 (2005) (emphasis added) (Harris Trust Lecture delivered by Professor Llewellyn to a meeting of the Indiana Bar Association and the Indiana University Law School Association held at Indianapolis on February 8, 1962).

unenforceable while unconscionable contracts are enforceable through reformation. Professor Freedman makes the unconscionability analysis more fully in his symposium article on "formative or positive unconscionability."[86]

The case against the unconscionability argument is that although Wood had previously used a best efforts clause, the record is unclear as to whether such clauses were commonly used or had reached the level of trade usage. Goldberg notes that his review of form books of the era failed to uncover standard efforts clauses.[87] My review of turn of the century contract treatises also failed to uncover any discussion of efforts clauses or their implication.[88] However, my analysis in Part II.A shows that the implication of duties and terms, and the use of contextual evidence to do so, were prevalent in the law at that time.

Assuming that efforts clauses or their implication were relatively a new innovation, then it is difficult to argue that Wood's omission of the clause in preparing the Duff-Gordon contact was overreaching in any way. Another reason can be offered for the lack of use of equitable unconscionability. It is simply the fact that courts have elected to use the good faith performance doctrine for the supplying of terms or gap-filling and have generally used the unconscionability doctrine to expunge contracts or unconscionable terms.[89]

The avenue of equity, circa 1917, would have been bolstered by proving that Wood manipulated the situation to create a one-sided contract. Professor Goldberg has argued that since it was

86. Monroe H. Freedman, *Cardozo's Opinion in Lady Lucy's Case: "Formative Unconscionability," Impracticality, and Judicial Abuse*, 28 PACE L. REV. 395 (2008).

87. GOLDBERG, *supra* note 69. Professor Pratt asserts that exclusive agency contracts were common by the time of *Lucy, Lady Duff-Gordon*: "The agreement did not fully define Wood's obligation; he was to do whatever his judgment directed, with the consent of Lucy's manager. In the field of advertising it was known as an 'open contract.'" Pratt, *supra* note 3, at 431-32. Pratt offers this rationale for Wood and Duff-Gordon to enter such an open contract: "Both aspects of the agreement [undefined obligation of Wood and the exclusivity] were consequences of Lucy's and Wood's inability to know in advance what opportunities might exist for placing her endorsements." *Id.* at 432. Thus, the agreement freed Lucy to develop other aspects of her business and reduced Wood's uncertainty and risk of having to deal with competitors. *Id.*

88. I reviewed the following treatises: PARSONS, *supra* note 40; BISHOP, *supra* note 47; METCALF, *supra* note 46.

89. KREITNER, *supra* note 34, at 178-79.

Wood's form, the omission of a best efforts clause "was most likely deliberate."[90] There is evidence that Duff-Gordon was represented by business advisers but not legal counsel and that Duff-Gordon was "naive" in matters involving exclusive agency.[91] Based on these facts, one can see the framework for an equitable unconscionability argument.[92] Duff-Gordon could also have argued in the alternative—that if the court recognized a contract—Wood should be found to have initially breached the contract by failing to use reasonable efforts.[93] Duff-Gordon's alternative argument would have required the court to define reasonable efforts to determine whether Woods had exercised such efforts. Unfortunately, there is nothing in the facts that indicate the level of Wood's efforts on behalf of Duff-Gordon.[94]

Finally, if Cardozo had decided that the contract was unenforceable on lack of mutuality or indefiniteness grounds this

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90. GOLDBERG, *supra* note 69, at 63.

91. *Id.* This naivety indicates an inequality of bargaining between Wood, the supplier of the contract, and Duff-Gordon. *See also* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139 (2005) (analysis for the role of bargaining power in contract law).

92. A "theoretical" equitable estoppel rationale could also be used in the framing of a hypothetical based on the facts of the Wood-Duff-Gordon contract. In the hypothetical, Wood would have been the defendant and would claim the illusory defense. The equitable estoppel rationale rests on the notion that if a contract is deliberately made vague by one of the parties, then that party should be estopped from asserting that it is illusory. If Wood knew the contract was illusory on its face but represented it as a binding agreement, then Cardozo can be seen as interceding to protect the reasonable expectations of the "innocent" party. *See generally* T. Leigh Anenson, *From Theory to Practice: Analyzing Equitable Estoppel Under a Pluralistic Model of Law*, 11 LEWIS & CLARK L. REV. 633 (2007) (applying new legal theory to the five hundred year old equitable estoppel defense). One can see the equitable estoppel rationale elsewhere in contract law, such as in the *contra preferentem* rule.

93. *See, e.g.*, Wells v. Alexandre, 20 N.E. 142 (N.Y. 1891) (arguing nonenforceability, and then, in the alternative, arguing the case in the event of a finding of enforceability). The court notes that the

> defendants, on the other hand, contend that the correspondence did not create a contract; that if it did, it was a contract for successive deliveries of coal, to be made only when the defendants should give the plaintiff notice that a delivery was required, and as notice had not been given, the defendants are not in default.

*Id.* at 644.

94. Freedman, *supra* note 86 at n.36 (citing RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS, Vol. 3, at 34-38 (William H. Manz ed. 2001)).

does not mean that he could not have provided a remedy. A restitution remedy could have been provided through an implication in law.[95] This rationale would argue that Duff-Gordon was unjustly enriched by the efforts of Wood in the noncontract scenario. In such a case, Wood would need to provide evidence that through his efforts, such as advertising, he had made potential customers aware of the possibility of receiving Duff-Gordon's endorsement. By dealing directly with such customers Duff-Gordon was unjustly enriched.

3. The 'Mercy' Rationale

Professor Cunningham argues that the key to understanding *Lucy, Lady Duff-Gordon*, and other Cardozo opinions, is the rationale that a contract should not place one party at the mercy of the other party. Cunningham uses the "mercy" rationale to harmonize *Lucy, Lady Duff-Gordon* with Cardozo's opinion in *Sun Printing*.[96] In *Lucy, Lady Duff-Gordon*, Cardozo implied an obligation to salvage an indefinite contract; in *Sun Printing* he failed to enforce a contract missing a price term despite the fact that the agreement was for a fixed term and provided a basis for setting the price.[97] I will argue that the mercy rationale offered to explain the different outcomes—implication versus non-implication of terms—is a faulty one.

The mercy rationale is related to the prevention of injustice. In *Lucy, Lady Duff-Gordon*, the implication of reasonable

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95. The use of restitution as a remedy where a contract fails due to indefiniteness was recognized at the time of *Lucy, Lady Duff-Gordon*. Woodward's 1913 treatise on quasi-contracts make this clear:

> A promise so general or indefinite that it does not enable the courts to determine the nature and extent of the obligation assumed must be regarded as no promise at all. . . . A benefit conferred in the honest though mistaken belief that such a promise is binding ought in justice to be restored. Restitution is accordingly enforced.

FREDERIC CAMPBELL WOODWARD, LAW OF QUASI CONTRACTS 105 (1913).

96. Cunningham, *supra* note 7.

97. Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co., 139 N.E. 470 (N.Y. 1923). The case involved a sixteen-month supply agreement. The price was set for the first four months and then it was to be agreed upon for the remainder of the contract term. The agreement also provided that the maximum price was not to exceed the rate charged by the Canadian Export Paper Company to its largest customers. After the first four months expired, the Seller gave advance notice of its intention to terminate the contract. This notice did not precede any attempt to negotiate a new price.

efforts was needed to prevent the finding of an illusory contract. Justice dictates that in an exclusive agency agreement, the principal should not be placed at the agent's discretion to perform or not to perform. In *Sun Printing*, there is no illusory issue. Instead, there was an express, clear agreement. Injustice was not prevented, but was incurred with the non-enforcement of the contract containing a partially open price term. After analyzing Cardozo's opinion, I will argue that the case demonstrates for Cardozo the tension between rule flexibility and rule certainty. In *Lucy, Lady Duff-Gordon*, Cardozo emphasized the importance of rule flexibility. In *Sun Printing*, he recognizes the benefits of rule certainty and the dangers of unlimited rule flexibility.

In *Sun Printing*, Cardozo's contextual analysis is present but its application is misplaced. Cardozo ventures outside the contract to note that market prices were on the rise in 1920. This explains why the buyer was willing to agree to the maximum contract price since it represented the prime customer rate. If the market price rose significantly past that prime rate, then the possibility for exploitation existed. Instead of following that line of argument, however, Cardozo posed a hypothetical by asking "what the seller's position would be if they had happened to fall[?]"[98] He reasoned that since the parties failed to insert a term regarding the duration of each price change, the seller would be subject to continuous reductions in the price term. The question is why is this a bad thing?

The buyer argued that failing an agreement on a new price, the price should have been set at the maximum price. Cardozo sided with the seller by holding that the agreement was an unenforceable "agreement to agree." Cardozo noted that if it was merely a case of open price, then the buyer would have had the "option" to imply the maximum price. Cardozo held that since the duration of the to be agreed upon price was also left open, the agreement failed due to indefiniteness. This is strained logic since the parties had set prices for the first month and for the following three month period. Cardozo could have implied that new prices would be reset on a monthly or quarterly basis. This course seems especially reasonable given that a price

98. *Id.* at 471.

source was accessible. Furthermore, the buyer was willing to pay the maximum contract price as represented by that price source.

Cardozo rejected the argument that the seller "was under a duty, in default of an agreement, to accept a term that would be reasonable in view of the nature of the transaction and the practice of the business."[99] This is ultimately what Cardozo did in *Lucy, Lady Duff-Gordon* by implying reasonable obligations through a contextual inquiry into business practice. Instead, Cardozo retreated into the nuance of unsubstantiated facts. He wondered why the record was unclear as to whether the Canadian Export Paper Company rate was fixed for a year or varied from time to time? He then asserted that there may be a duty of good faith to negotiate a new price. But, it was the buyer, according to Cardozo, not the seller that acted inappropriately by setting the new price and duration "any way it pleased."[100] This is not a rational argument given the fact that the buyer had set the new price at the maximum price allowed by the contract, that the unexpired portion of the contract was a modest twelve months, and that the seller's response to the buyer's attempt to set the price and duration of the price change was to reject any obligation under the contract.[101]

If the names were removed, given the *Lucy, Lady Duff-Gordon* case, one would have thought that Cardozo had written the dissent. Justice Crane, in dissent, noted that the facts showed merchant parties clearly intending to enter a contract. They used a standard business form that was a detailed agreement.[102] Crane argued that in such cases it is the court's job to

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99. *Id.*

100. *Id.* at 472.

101. Karl Llewellyn offers a different take on the Cardozo opinion in *Sun Printing*. He argues that Cardozo was not backing away from his commercial or contextual reading of contracts but that he was warning that the contextual information is to be provided by the litigating parties—this was a case of "bad pleadings!" LLEWELLYN, *supra* note 3, at 242 & 242, n.243. He then admits that Cardozo's opinion was "labored and unsatisfactory," and "a bothering step backward." *Id.* at 242.

102. *Sun Printing*, 139 N.E. 470. The contract provided considerable detail, such as duration of sixteen months, 16,000 tons of paper at the rate of 1,000 tons per month, "sizes and quality were adequately described," payment on the 20th of the month subsequent to shipping, the contract had set the prices for the first four months ($3.74 and $4.00 for months 2 through 4), price to be agreed upon fifteen

"spell out a binding contract, if it be possible."[103] He concluded that the contract's reference to the rate charged by the Canadian Export Paper Company was a ground for implying a reasonable price term. This he argued would have led to a "practical result" and, looking to the future, the establishment of a standard of fair dealing.[104]

It is difficult to reconcile Cardozo's opinion in *Sun Printing* with *Lucy, Lady Duff-Gordon*, and the cases cited by Justice Crane, but I will offer the rationale of rule certainty. Cardozo feared that the implication of the price and the duration of the price, as well as tying it to a private price source, would encourage speculation and exploitation in *future* commercial transactions. Without some limits to the contextual implication of material terms, parties would intentionally leave gaps in their contracts. At least in *Sun Printing*, Cardozo was willing to allow an injustice in order to stimulate certainty in legal rules and business transactions.[105]

## III. Cardozo and Contextualism

Cardozo's approach in *Lucy, Lady Duff-Gordon* illustrates, if not symbolizes, the transition in contract interpretation to the use of broader sources of contextual evidence to imply meaning

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days prior to the expiration of previous period, price was to "in no event to be higher than the contract price for newsprint charged by the Canadian Export Paper Company to its large consumers," and costs of freight to be borne by buyer. *Id.*

103. *Id.* at 473 (Crane, J., dissenting).

104. Justice Crane asserts that it would "compel parties to contract in the light of fair dealing." *Id.*

105. Fellow New York Court of Appeals Judge Irving Lehman in a memorial stated that: "He was not content to accept an unjust decision merely because it rested firmly on old precedents nor, on the other hand, was he content to cast aside lightly long established rules and precedents merely because they dictated a conclusion which might be unfair to a particular litigant." Irving Lehman, *A Memorial (July 25, 1938), reprinted in* SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO xiii (Margaret E. Hall ed. 1947). Professor White notes, referencing Mortimer Adler's critique of the Realists, that "there was certainty and probability in the law—in the 'demonstration of rules'. . . . This was the insight about the law which Pound, Cardozo, and others have made, if not analyzed." G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1022 (1972) (citing Mortimer Adler, *Legal Certainty*, 31 COLUM. L. REV. 91 (1931)).

into contacts.[106] His interpretative viewfinder went beyond the four-corners of the contract and the belief that words of contract could have a single, plain meaning.[107] In applying contract doctrine, Cardozo focused on substance over form; contextual meaning over facial meaning; and law as consequence over law as detached.[108] This methodology focused on promoting rule-based functionality and the promotion of business efficacy.[109] *Lucy, Lady Duff-Gordon* extended the contextual analysis beyond the search for the meaning of the express words of contract to the implication of meaning where the contract was silent.[110]

The importance of the case can be seen in two areas. First, the opening of contract interpretation to broader sources of meaning. This broader contextualism will be explored in the

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106. For a discussion of the role of contextualism in contract interpretation, see Larry A. DiMatteo, *Reason and Context: A Dual Track Theory of Interpretation*, 109 PENN ST. L. REV. 392 (2004).

107. *See, e.g., Sun Printing*, 139 N.E. 470 (looking outside of the contract to note that the price of paper was on the rise in 1920). *See generally* ANDREW L. KAUFMAN, CARDOZO 313 (1998) ("Cardozo made important contributions to contract law by considering promises in the context in which they were made.").

108. For an argument for the importance of contextual inquiry to small businesses, see Blake D. Morant, *The Quest for Bargains in an Age of Contractual Formalism: Strategic Initiatives for Small Businesses*, 7 J. SMALL & EMERGING BUS. L. 233 (2003) (analyzing negative impact of formalistic contract doctrines that deny small businesses protection of contract rules based upon inequality of bargaining power).

109. Kaufman relates to this methodology to Cardozo's twenty-year career as a commercial lawyer: "He understood business arrangements. His judicial opinions reflected his ability to interpret commercial contacts in accordance with business usage. As a result, he often found that a contract existed when the technicalities required to make a contract seemed at first glance not to have been met." KAUFMAN, *supra* note 107, at 315.

110. *See* Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORN. L. REV. 785, 794-95 (1982) ("reason to know" analysis as method of determining the scope of promises). Under a reason to know analysis one would ask the following questions to determine if Wood had manifested an intent to use reasonable efforts: Did Duff-Gordon understand that Wood had made such a promise? Did Wood know that Duff-Gordon had such an understanding? If the answers are in the affirmative then such a duty is implied into the contract? If the answer to the second question is in the negative, then the following questions would be asked: If Wood did not know of the precise duty, then what contextual facts did he know? Given that knowledge, and Wood's level of sophistication in such matters, should Wood have inferred that Duff-Gordon would understand that such a commitment was made? "If so, [Wood] did have a duty to act with reasonable care to avoid misunderstanding." *Id.* at 795.

next section. Second, and for which it is most remembered, the judicial implication of duties ancillary to express contracts. Although the focus here will be on the former, a brief note on the later will be offered. The implication of reasonable efforts by Cardozo is different then the implication of good faith for which the case is currently associated.[111] This confusion is likely due to what can be called the definitional problem.[112] Clear definitions of reasonable efforts or best efforts have yet to be offered. Despite the problems of definition, the contextualism provided by current modes of interpretation, as symbolized by Cardozo, allow for plausible levels of definitional certainty in particular cases. It is the recognition of external sources of meaning in cases like *Lucy, Lady Duff-Gordon* that allows for the implication of such terms in the first place.

Cardozo was willing to balance the needs of generality against the justice of smaller categories of law. The search for smaller categories,[113] due to the increase in specialization of commercial transactions at the turn of the last century, was a contextual undertaking. *Lucy, Lady Duff-Gordon* is an example of the abandonment of abstract conceptualism in favor of the recognition of sub-categories of cases, such as exclusive agency arrangements. More broadly, the case can be seen as an example of an overarching methodology used by Cardozo time and again to create new law.

The next three sections will analyze the contextual element of Cardozo's method of contract interpretation. The first section briefly discusses the type of contextual interpretation exhibited by Cardozo. The second section will critique Professor Goldberg's analysis of *Lucy, Lady Duff-Gordon*. The final sec-

111. E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law,* 46 U. PITT. L. REV. 1 (1984); Victor P. Goldberg, *Great Contracts Cases: In Search of Best Efforts: Reinterpreting* Bloor v. Falstaff, 44 ST. LOUIS U. L.J. 1465 (2000).

112. Market St. Assocs. Ltd. v. Frey, 941 F.2d 588, 593 (7th Cir. 1991) (the definitional problem in the area of the duty of good faith is that "Wisconsin cases are cryptic as to its meaning though emphatic about its existence").

113. *See* Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) (criticizing abstract legal concepts; law's concepts needed to be disaggregated around "operative facts"); Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 457 (1930) ("The old categories are imposing in their purple, but they are all too big to handle.").

tion examines Cardozo's consequence-focused approach to contract interpretation.

### A. *Cardozo's Contextualism*

The importance of contextual meaning was evident in *United States Rubber Co. v. Silverstein*[114] which involved an ambiguously worded guaranty. The jury was given the task of interpreting the word "they" in the agreement. Cardozo described the jury's role as "fix[ing] the meaning in the light of all the circumstances."[115] In such an inquiry, the plain meaning rule and the need for clarity of written contracts is greatly diminished.[116] In their place, is a search for meaning in the context of the agreement.

Cardozo excelled at tying law application to context. Different contexts or categories of cases required different sets of rules. Thus, construction contracts were different and required a substantial performance standard; agency contracts were different and required the implication of a reasonable efforts duty. Different types of breaches required different types of damage rules—some breaches triggered a cost of replacement remedy while others dictated a diminishment in value calculation.

At a more basic level, all of Cardozo's innovations, whether eliminating the privity rule in products liability or crafting the substantial performance doctrine in non-sales cases, were made possible by his embrace of an interpretive methodology. Cardozo asserts in *Lucy, Lady Duff-Gordon* that the "implication of a promise here finds support in many circumstances." He looked beyond the four-corners of a relatively detailed agreement to the nature of exclusive agencies and the nature of Wood's business organization. The legacy of *Lucy, Lady Duff-Gordon*, especially combined with other Cardozo cases of the era, shows the importance of contextualism to Cardozo.[117] The

114. United States Rubber Co. v. Silverstein, 128 N.E. 123 (N.Y. 1920).

115. *Id.* at 124.

116. Cardozo asserts that "the demon of formalism tempts the intellect with the lure of scientific order." CARDOZO, *supra* note 79, at 66.

117. In 1930, Bernard Sheintag had this to say about Cardozo's approach: "The predominant characteristics of his philosophy are pragmatic—a flexibility, rather than a dogmatic rigidity; a concern with facts and realities and consequences, rather than with abstractions and formal rules and metaphysical subtleties; a belief in experimentation, inconstant readaptation and revision, rather than

next section will look at the excellent analysis presented by Professor Goldberg in *Framing Contract Law*.[118]

## B. *Goldberg's Contextual Analysis*

Professor Goldberg provides an analysis of the broader context of the would-be contract in *Lucy, Lady Duff-Gordon*. He finds that around the same time of the formation of that contract Wood had entered into another agency contract. What he finds is that the contract, unlike the one in *Lucy, Lady-Duff Gordon*, contained an express "best efforts" clause.[119] The previous contract had led to litigation with the key issue being Wood's failure to perform as required under the best efforts clause.[120] From this fact, Goldberg surmises that Wood had deliberately not incorporated such a clause in the Duff-Gordon contract in order to avoid contractual liability.

Goldberg argues that Cardozo got it wrong when he found consideration through the implication of a reasonable efforts duty. He argues that these were relatively sophisticated parties, or parties represented by sophisticated advisers, and therefore, they could have easily placed a "consideration term" into the contract. The right course, according to Goldberg, would have found consideration elsewhere in the agreement.[121]

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in 'petrified perfection' and finality." Sheintag *supra* note 8, at 601. "The impact of the contextual approach to best efforts clauses is that the analysis of a bound party's performance will center on the abilities and expectations of the particular parties to the contract." Zachary Miller, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615, 618 (2006).

118. GOLDBERG, *supra* note 69, at 43-73. *See also* Victor P. Goldberg, *Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-306 on Contract Interpretation*, 68 OHIO ST. L.J. 103 (2007) [hereinafter Goldberg, *Desperately Seeking Consideration*].

119. The Wood-Wilson contract provided that Wood was to "use his best efforts and devote so much of his time as shall be necessary diligently to promote the sale and licenses" and will use his "best efforts to obtain . . . the highest possible royalty." PAPERS OF NEW YORK SUPREME COURT—APPELLATE DIVISION, 179 App. Div. 973 at 28 (1915) (on file with author).

120. *See* GOLDBERG, *supra* note 69, at 43-73.

121. Maybe this is a false choice. As Professor Garvin has noted that contract doctrine often masks false dichotomies in the law: "Indeed, a good many contract doctrines have come about as attempts to bridge the crevasses of the starker dichotomies. Classical consideration doctrine, for instance, is loosened by many supplemental doctrines recognizing that not all promises fall neatly into bargained-for and not bargained-for." Larry T. Garvin, *Small Business and the False Dichotomies of Contract Law*, 40 WAKE FOREST L. REV. 295, 296 (2005).

Failing that finding, Cardozo should have declared it a noncontract.

Professor Goldberg further argues that the real damage has been done by the progeny of *Lucy, Lady Duff-Gordon*—both in the case law and the Uniform Commercial Code[122]—in expanding the standard from reasonable efforts to best efforts, the problem associated with defining such standards and the unnecessary implication of the duty into contracts already incorporating adequate consideration.[123] In *Lucy, Lady Duff-Gordon*, Goldberg suggests that consideration could be found in the incentive structure built into the contract. Wood's compensation was dependent upon him procuring endorsements for Duff-Gordon. The fact that his fifty percent commission rate covered any endorsements procured by Duff-Gordon directly protected this incentive by discouraging her from making endorsements independently. Scott and Kraus make a similar argument, but note an alternative reason for implying the duty of reasonable efforts.[124] They note that Wood had other products to promote "so Lucy needs some assurance that he will promote her products even if he has other products that generate more profit."[125] The terms of the contract may provide incentive, but that incentive may be diminished or lost depending on the marginal utilities of such products relative to other clients' products. The implication of reasonable efforts allocates some of the risk of relative non-profitability to Wood in exchange for exclusivity.[126]

So, is Professor Goldberg correct that Cardozo got it wrong based on the facts of the case? Goldberg argues that if Cardozo knew of the earlier contract, then it would have been difficult for him to rationalize an implied term to use reasonable ef-

122. *See* U.C.C. § 2-306(2) (1977).

123. Goldberg, *Desperately Seeking Consideration*, *supra* note 118, at 109.

124. ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY 106 (Supp. 2007) ("By foregoing the opportunity to work with other marketers, Lucy hoped to provide an incentive for him to put some effort into marketing her products.").

125. *Id.*

126. *Id.* Scott and Kraus then question this analysis that the implication of a reasonable efforts duty was not necessary if the agreement was viewed as an option contract "to market the goods as market conditions dictate." *Id.* at 107. This counter-argument does not satisfy the previous analysis' fear that the relative profitability of other products may diminish incentive to promote Duff-Gordon's products (especially assuming limited resources on his part).

forts.[127] This is an argument that since these were sophisticated parties they could have easily inserted a best efforts clause. The alternative case can also be made. Since these were sophisticated parties, they could have inserted an express no duty of best efforts clause. Since they did neither, then the strongest argument is to imply what a reasonable person would expect under the circumstances. This is exactly what Cardozo did.[128]

An ancillary argument is that the lack of an express term was not truly a matter of consideration but one of filling in a gap in the contract.[129] Cardozo's imagination could have focused on other aspects of the agreement to find consideration. As noted by the lower appellate court, the contract

> provided that the plaintiff (Wood) is to procure such patents, copyrights or trade marks as may in his judgment be necessary to protect the names and such ideas or articles as are affected by the contract and to take such proceedings as in his judgment may be necessary to protect [them] . . . .[130]

If Wood had an independent obligation to protect Duff-Gordon through the procurement of intellectual property protection, then could that obligation provide sufficient consideration to bind the contract? The question here is whether this was a right that Wood was free to exercise or a duty to protect? The contract use of the phrase "in his judgment" seems to indicate that he had no obligation only a right. Yet, the language is more of duty than of right. Cardozo could have found consideration by "implying" or interpreting the infringement protection language as a contractual duty and not a right.

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127. Professor Goldberg indicates that Cardozo was probably unaware of the other contract: "If Judge Cardozo had been made aware of this other contract, he would have been hard-pressed to explain why it would be necessary to imply best efforts . . . ." Goldberg, *Desperately Seeking Consideration*, *supra* note 118, at 109.

128. I would like to thank W. David Slawson for this thought.

129. Goldberg admits that if this was the case, then the case was rightly decided: "If the Wood rule were only a gap-filler, the problem should disappear if the contract provides another source of consideration . . . ." Goldberg, *Desperately Seeking Consideration*, *supra* note 118, at 110.

130. Wood v. Lucy, Lady Duff-Gordon, 177 A.D. 624, 625 (N.Y. App. Div. 1917).

### C. *Cardozo's Consequentialism*

A key part of Cardozo's contextualism was forward-looking.[131] Cardozo's utilitarianism is evident in his adjustment of rules and implication of duties. If a rule resulted in an injustice in what could be deemed a group or category of cases, then the rule needed adjustment or replacement. Thus, Cardozo believed in and exercised a form of rule utilitarianism.[132] He understood the need for rule certainty in contract law that would be jeopardized through the imposition of ad hoc utilitarianism.[133] *Lucy, Lady Duff-Gordon* and *Sun Printing* taken together show the tension between rule adjustment to prevent injustice and the need for rule certainty. Rule adjustment or rule creation can be done, and should only be done, when the adjustment or creation would govern a specifiable group of cases or transaction-types. It is the recognition of injustice in defined categories of cases that allowed Cardozo to create the doctrine of substantial performance,[134] to avoid a strict consideration requirement in charitable subscriptions,[135] and to imply a duty of reasonable efforts in exclusive agency contracts. The following section will examine Cardozo's consequence-focused approach by reviewing the famous case of *Jacob & Youngs v. Kent*.[136]

#### *Jacob & Youngs v. Kent* as More Fully Developed Version of Cardozo's Consequentialism

Cardozo's pronouncement in *Lucy, Lady Duff-Gordon* that the law "has grown from its primitive stage of formalism" is

131. "[T]he wider effect of a rule beyond the particular promise at issue [was] important to him." KAUFMAN, *supra* note 107, at 313.

132. Professor Edwin Patterson had this to say about Cardozo's philosophy of law: "In his insistence upon the appraisal of legal rules and legal institutions in terms of their social consequences he carries forward the utilitarianism of Jeremy Bentham and the sociological jurisprudence of Holmes and Pound." Edwin Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71, 72 (1939).

133. Cardozo notes that a rule needs to be adjusted if it "yields a result which is felt to be unjust." But, he warns that a rule "may not be modified at once, for the attempt to do absolute justice in every single case would make the development and maintenance of general rules impossible." CARDOZO, *supra* note 79, at 23.

134. Jacobs & Young, Inc. v. Kent, 129 N.E. 889 (N.Y. 1921).

135. Allegany College v. Nat'l Chautauqua County Bank, 159 N.E. 173 (N.Y. 1927).

136. *Jacob & Youngs, Inc.*, 129 N.E. 889.

fully developed four years later in *Jacob & Youngs v. Kent*. In that case, Cardozo's flexible, pragmatic approach to law application is evident.

Justice McLaughlin's opinion in *Jacob & Youngs v. Kent* is an example of a methodology of interpretation at the heart of formalism. For McLaughlin, the only operative fact was the contractor's use of a brand of pipe at variance with what was stated in the contract.[137] Other contextual evidence as to the quality of the replacement pipe or the comparative value of the delivered building was immaterial under a plain meaning interpretation that the pipe was to be "Reading Pipe." The consequence of this fact, unreasonable damages, was of no importance since the variation in pipe brands triggered a formalistic response. First, since the contractor owed a duty of full or strict performance to the buyer, the buyer's dependent duty to pay for the building was never triggered. Second, due to this duty of strict or complete performance the law provided the single remedy of replacement cost. The buyer's expectation interest required full performance and therefore, any damage remedy must be based upon a replacement cost calculation.

McLaughlin's formalism allowed him to deal with the case summarily since the buyer's obligation to pay was conditional on full performance. Any breach on the part of the builder precluded the triggering of that obligation. Stated more succinctly, all breaches are treatable as equals under this formalistic approach.

Cardozo looked beyond the law's operative facts of dependent conditions and the replacement value remedy. The additional information that contextual evidence provided was that the replacement pipe was of equal or higher quality then the pipe specified in the contract, along with evidence that the contractor's breach was not willful. Cardozo's broadened contextualism also included recognizing the consequence of applying the law's replacement cost remedy. In this case, the replacement remedy was impossible without the contractor incurring prohibitive costs.

137. In the words of McLaughlin: "What his reason for requiring this kind of pipe is of no importance." *Id.* at 892.

Cardozo's recognition of the contextual reality presented by the case made apparent the ill-fit or inefficiency of a doctrine that treated different categories of cases in the same way.[138] Cardozo attacked the formal analysis of dependent-independent conditions as nonsensical under the circumstances. Cardozo, however, worked within the received doctrine of dependent-independent conditions.[139] However, he rejected McLaughlin's assumption that the duty to build completely or fully was a dependent condition for the buyer's obligation to pay. The issue was not whether a condition is formally worded or considered as dependent or independent. The issue is whether the departure or defect is substantial or collateral.

Cardozo then crafted a rule adjustment based upon the nature of the beach. The use of a different pipe of equal quality was a minor breach. The fact that the law may view the interrelated conditions as dependent is significant but not the end of the analysis. The second stage of the analysis requires a fuller contextual inquiry to determine such things as whether the breach was willful, whether the breach substantially deprived the other party of what she was entitled to expect under the

138. The recognition of different categories of cases allowed Cardozo to retain received doctrine through a process of bifurcation. Professor Cunningham has noted that this is the heart of the common law system. "The common law is a remarkably stable system that constrains judicial discretion through a complement of initial conditions linking cases over time with the possibility of bifurcations that enable it to chart significant changes in course." Lawrence A. Cunningham, *The Common Law as an Iterative Process: A Preliminary Inquiry*, 81 NOTRE DAME L. REV. 747, 747 (2006)

139. Professor Patterson notes that Cardozo "choose neither to follow the arid terminology of the older jurisprudence nor to invent novel and forbidding terminology." Patterson, *supra* note 132, at 73. This is an example of why Professor Bridgeman sees Cardozo as acting as a "contextual formalist." "He was, therefore, not out to undermine or erode the formalities of contract law . . . [but] that these formalities be applied sensibly, with an understanding of the context in which the exchanges took place." Curtis Bridgeman, *Allegheny College Revisited: Cardozo, Consideration, and Formalism in Context*, 39 U.C. DAVIS L. REV. 149, 186 (2005). Professor Cunningham also notes Cardozo's ability to effect change in the law while working within received doctrine. "[Duff-Gordon is an] illustration of Cardozo's wider ability to work within the received doctrine and to achieve a richer balance of both fairness and the efficacy of consensual exchange." Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. AND MARY L. REV. 1379, 1398 (1995). Professor Pratt in referring to *Lucy, Lady Duff-Gordon* states that "[a]lthough the forms often remained the same, the content underwent substantial change." Pratt, *supra* note 3, at 429.

contract,[140] and whether the effect of nonperformance significantly diminished the value of the result. Based upon a factual assessment of these factors, Cardozo concluded that the breach was not willful, the performance met the reasonable expectations of the buyer and that the value of the finished product reasonably correlated to the value of the result without the breach.

The context that Cardozo uses to fabricate the substantial performance doctrine allowed him to bifurcate contract law's remedial response. This context includes a forward-looking estimation of the consequences of rule application. Since the builder had rendered substantial performance and the nature of the replacement remedy application (removal and replacement of pipes in fixed floors and walls) would be inefficient and catastrophic, the law needed an alternative remedy for non-material, non-willful breaches. Given such results, Cardozo asserts that such doctrinal symmetry of dependent-independent conditions looses all coherence. In the end, he reasoned that a building contract is different than a sale of goods contract and the law needed to respond accordingly.

## IV. The Meaning of *Lucy, Lady Duff-Gordon*: Enforcing Incomplete Contracts

*Lucy, Lady Duff-Gordon* involved the implication of a duty of reasonable efforts. Cardozo based this implication on his analysis of the transaction-type and the characteristics of the parties.[141] And yet, over the years there has been a merger of the implication of reasonable efforts with the good faith performance doctrine in the judicial and scholarly analysis of the case.[142] In *Furrer v. International Health Assurance Co.*,[143] for example, the issue was not whether someone had a duty to use

140. This definition of material or fundamental breach was taken from Article 25 of the Convention on Contracts for the International Sale of Goods. United Nations Convention on Contracts for the International Sale of Goods, 15 U.S.C.A.App. (West 2007).

141. Cardozo asserts that "implication of a promise here finds support in many circumstances." Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917).

142. *See, e.g.*, Cunningham, *supra* note 7, at 1381 (characterizing *Lucy, Lady Duff-Gordon* as the case in which Cardozo created the "good faith obligation"). *See also* Farnsworth, *supra* note 111, at 5-7 (discussing Zilg v. Prentice-Hall, 717 F.2d

a certain level of effort but whether the employer's termination of the sales agency relationship was unreasonable. The Oregon Supreme Court, nonetheless, cited *Lucy, Lady Duff-Gordon* as it's primary authority in holding that the termination was unfair.[144]

Justice Scalia offers the insight that the duty of good faith and the implication of duties based upon the reasonable expectations of the parties are different versions of the same concept. He cites Cardozo in *Lucy, Lady Duff-Gordon*:

> [T]he authorities that invoke, with increasing frequency, an all-purpose doctrine of 'good faith' are usually if not invariably performing the same function executed (with more elegance and precision) by Judge Cardozo in *Wood v. Lucy, Lady Duff-Gordon*, when he found that an agreement which did not recite a particular duty was nonetheless 'instinct with [. . .] an obligation,' imperfectly expressed,' The new formulation may have more appeal to modern taste since it purports to rely directly upon considerations of morality and public policy, rather than achieving those objectives obliquely, by honoring the reasonable expectations created by the autonomous expressions of the contracting parties.[145]

Although serving the same purpose, Scalia prefers Cardozo's approach of implied obligations over the use of the amorphous duty of good faith.[146]

The danger of confusing best efforts with good faith was demonstrated in *Pinnacle Books v. Harlequin Enterprises Ltd.*[147] which involved a publishing contract that incorporated a best efforts provision in the renewal clause. The renewal clause required the parties to use their best efforts to reach a new agreement. The writer at the end of the publishing contract

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671 (2d Cir. 1983)), 7-12 (contrasting good faith with best efforts, and arguing that the best efforts standard is the "more exacting" of the two standards).

143. Furrer v. Int'l Health Assurance Co., 474 P.2d 759 (1970). *See also* Lee v. Seagram, 552 F.2d 447 (2d Cir. 1977) (citing *Lucy, Lady Duff-Gordon* for the imposition of good faith in the exercise of a party's discretion).

144. *Lee*, 552 F.2d at 764.

145. Tymshare Inc. v. Covell, 727 F.2d 1145, 1152 (D.C. Cir. 1984).

146. Scalia notes that "[m]any courts . . . were wont to use 'good faith' terminology . . . . There, as in its modern extension to the full range of contractual duties, the concept of good faith was a surrogate for an implied obligation or limitation." *Id.* at 1153.

147. Pinnacle Books v. Harlequin Enters. Ltd., 519 F. Supp. 118 (S.D.N.Y. 1981).

and after initial attempts at negotiating a renewal signed with another publishing company. The case involves an unlawful interference claim brought by the first publisher against the second publisher. The court held that since the best efforts clause went to negotiations it was too vague; there was "simply no objective criteria against which . . . efforts can be measured."[148] The court here focuses on the definitional problem[149] of determining a standard to measure efforts.[150] By doing this the court ignores the real issue of whether the author's termination of negotiations was done in bad faith. The court noted the plaintiff's argument that the parties would have reached a renewal agreement if they had proceeded with the "negotiations in *good faith* and using their best efforts."[151] The key facts being that: (1) the author's demands had been largely satisfied and (2) the author signed with the second publisher only after the president of the first publisher had taken a position with the second publisher. These facts bolster the claim of bad faith. Yet, the court focused only on the enforceability of the best efforts clause.

The view offered here has been that the importance of *Lucy, Lady Duff-Gordon*, and other Cardozo contract cases, was the method of interpretation. The contextual inquiry exhibited by Cardozo was part of a trend in analyzing fact patterns within a broader context. This contextual mode of interpretation resulted in diminishing the formal requirements of formation, such as the definiteness component of consideration, mutuality of obligation and the statute of frauds.[152] The use of extrinsic

148. *Id.* at 121.

149. *See, e.g.*, Zachary Miller, *Best Efforts?: Differing Judicial Interpretations of a Familiar Term*, 48 ARIZ. L. REV. 615 (2006); Goldberg, *supra* note 111; Farnsworth, *supra* note 111.

150. The court states that: "Essential to the enforcement of a 'best efforts' clause is a clear set of guidelines against which the parties' 'best efforts' may be measured." *Pinnacle Books*, 519 F. Supp. at 121.

151. *Id.* at 120.

152. It should be noted that there exists a minority of states where the language of best efforts is considered too vague to satisfy the definiteness of terms requirement. *See, e.g.*, Krafco Corp. v. Kolbus, 274 N.E.2d 153 (Ill. App. Ct. 1971) (involving the holding of an express best efforts provision as illusory). *See also* James M. Van Vilet, Jr., *"Best Efforts" Promises Under Illinois Law*, 88 ILL. B.J. 698 (2000). Professor Mooney notes the weakening of the conceptual obstacles to the finding of the true intent of the parties and the meaning of their contracts: "In the modern era . . . many commentators and courts substantially lowered the conceptualist barriers to implication. An early and renowned landmark on this partic-

evidence allowed for the finding of contracts of various types where previously none were found. Contextual evidence was used by Cardozo to salvage numerous varieties of contracts.[153] As a result, the incompleteness of most agreements became openly recognized.

Cardozo was not the creator of this method of contract interpretation, but he was one of its most articulate proponents. Cardozo's quotation of the English case of *The Moorcock*[154] is especially telling. He approves of Lord Bowen's "business efficacy" approach to contract interpretation.[155] Bowen argued that if there is a presumption of intent to enter into a contract, then "a failure of consideration . . . cannot have been within the contemplation of the parties."[156] It is the job of the law through implication of terms to "give such business efficacy to the transaction as must have been intended."[157] This willingness to imply meaning into contracts through use of extrinsic evidence was made necessary by an industrial-national economy. The growth of a modern marketplace resulted in "new contracting practices, characterized by reduced specificity in the terms of agreement."[158] Cardozo and Lord Bowen understood that contract law and contract interpretation needed to evolve to become more functional.

It is difficult to disregard the importance of Cardozo as the opinion's author in *Lucy, Lady Duff-Gordon*.[159] The importance

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ular road to modernism was Justice Cardozo's opinion in *Wood v. Lucy, Lady Duff-Gordon*." Ralph J. Mooney, *The New Conceptualism in Contract Law*, 74 OR. L. REV. 1131, 1171 (1995).

153. Llewellyn describes Cardozo's approach to contract interpretation as a three-fold exercise. First, to determine if there is a general intent of having entered into a contract. Second, avoid the "manipulation" of the mutuality requirement. Third, assume that the parties intended a balanced contract and read that balance into the contract. LLEWELLYN, *supra* note 3, at 368.

154. The Moorcock, (1889) 14 P.D. 64 (Eng.).

155. Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (1917).

156. *Moorcock*, 14 P.D. at 68.

157. *Id.*

158. Pratt, *supra* note 3, at 417-18. Professor Pratt notes that there was a general trend in the use of "open contracts" during this period. "The agreement between Wood and Lucy typified the responses to uncertainty about the markets. Like Lucy and Wood, many parties were unable to define the future with precision. They therefore preferred to leave parts of any agreement 'open' to await future developments." *Id.* at 434.

159. Cardozo was a truly gifted writer: "[B]ecause his words, phrases, use of language and parallels from other disciplines are sufficiently extensive and too

of Cardozo's rhetorical gifts are universally recognized. What the *Lucy, Lady Duff-Gordon* opinion lacked in originality was compensated for by the power of its rhetoric.[160] It is the rhetoric of many of Cardozo's opinions that explains some of their lasting impact on modern contract law. Language such as "instinct with obligation imperfectly expressed" and "law has grown from its primitive stage of formalism when the precise word was the sovereign talisman" achieved a level of "omnisignificance"[161] that explain their continued relevance. The power of the rhetoric results not just in the rhetorical flare of the language but also the ability of the language to remain accessible to future judges and scholars.[162] It is Cardozo's language and reputation that at least partially explains the lifespan of *Lucy, Lady Duff-Gordon*.

Cardozo's differentiation of categories of transaction-types helped release judicial interpretation of contracts from the restraints of legal formalism—as represented by the four-corners and plain meaning rules. The benefits of such a contextual analysis include the interpretation of contracts more aligned to the true intent of the parties and the lowering of transaction costs relating to the negotiation and drafting of contracts.

The cost of the contextual mode of interpretation is what was previously described as the definitional problem. How does one determine material from trivial breach? Once an implied duty of reasonable efforts is implied what is the threshold for satisfying such a standard? If an agreement possesses an "instinct with an obligation," then how does a court follow that in-

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exquisite." Joseph W. Bellacosa, *Benjamin Nathan Cardozo the Teacher*, 16 CARDOZO L. REV. 2415, 2429 (1995).

160. Professor Hillman notes the impact of *Lucy, Lady Duff-Gordon* in the law of incomplete contracts: "Many of the contract-law cases reflected the approach Cardozo had in mind when he adopted the instinct language in Wood v. Lucy: focusing on the context to determine the parties' intentions about an incomplete contract." Robert A. Hillman, *'Instinct with an Obligation' and the 'Normative Ambiguity of Rhetorical Power,'* 56 OHIO ST. L.J. 775, 790 (1995).

161. Professor Lake defines omnisignificance as "a special characteristic of persistent rhetoric that takes the form of, or is akin to, literature." Peter F. Lake, *Posner's Pragmatist Jurisprudence*, 73 NEB. L. REV. 545 (1994).

162. Opinions that "have a considerable generality, ambiguity or adaptability [have] an 'omnisignificance' that enables them to survive vicissitudes of culture and taste." *Id.* at 605 (quoting RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 394 (1990)).

stinct to find and define an obligation? Cardozo provided an answer of sorts. The answer lies in a contextual analysis of the parties, the transaction-type and the practices and usages of the particular trade.[163]

## V. Conclusion

Cardozo's efforts to give economic functionality to new and evolving transaction-types lead to a diminishment of the formal requirements of contract law. This diminishment allowed for the enlistment of contextual evidence to fill in the gaps of incomplete contracts. In the end, *Lucy, Lady Duff-Gordon* represents the contextual view that contracts are to be interpreted from the perspective of practical, sophisticated businesspersons.[164] In doing so, it helped change the way judges look at how the law relates to disputes and their contexts.

The importance of *Lucy, Lady Duff-Gordon* to the American contract canon is best understood as it being one of a series of opinions, given by one of America's greatest and most articulate judicial innovators, to reform contract law in response to the novelties of turn of the century contract practices. In the end, the brevity of the analysis, the existence of a general trend toward contextualism and the associated judicial activism in implying terms makes this Cardozo opinion not one that goes "a step beyond."[165] That said, *Lucy, Lady Duff-Gordon's* position in contract law jurisprudence remains secure due to the uniqueness of the parties involved—Lucy, Lady Duff-Gordon and Benjamin Nathan Cardozo.

163. Professor Hillman states the "forced" shift to contextualism as follows: "I conclude that instinct rhetoric has contributed to clearer decisions because the language succinctly captures and conveys the idea that courts should engage in a deep contextual analysis in deciding contract cases." Hillman, *supra* note 160, at 779.

164. *See* Ames-Brooks Co. v. Aetna Ins., 86 N.W. 344, 345 (Minn. 1901) (in upholding the enforceability of output-requirements contracts the court states that interpretations of contracts be done "from the standpoint of the practical business men who made it").

165. The Moorcock, (1889) 14 P.D. 64, 68 (Eng.).