ALWD Virtual Front Porch

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Excerpt from Syllabus (for any course) on Civility in Discussing Difficult Issues

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Speaking Freely, with Civility and Collegiality – Please feel free to state any substantive view about the material we study, and please welcome the same candor from your classmates in all course-related contexts. As preparation for professionalism in court and in other contexts of the practice of law, always state your views in a civil, professional manner that treats others with respect and collegiality. When debating an issue in class, please direct your remarks to the professor or other moderator rather than to a classmate with whom you disagree. Feel welcome to continue discussion of issues after class on the Discussion forum for our course website, while taking care to observe the same standards of collegiality, professionalism, and mutual respect that we observe in the classroom. It would be a serious violation of these norms of collegiality and professionalism to quote, paraphrase, or post a recording of a classmate's course-related questions or comments in other forums, such as social media, while criticizing or making fun of that contribution, unless the other person grants permission.

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Two Cases: *Barfield* and *Morales*

On the following pages are excerpts of my Contracts casebook, which raise issues of racial discrimination and ethnicity (language diversity) in core Contracts issues relating to contract formation (consideration and mutual assent), topics in which students are not often exposed to issues of diversity. Either or both would be good subjects for an exercise in analyzing and briefing cases, while reminding students of the pervasiveness of disparities in our society. The *Morales* decision provides the additional benefit of exposing students to the different perspectives of a majority decision and a dissent.

Contracts

Cases, Text, and Problems

SECOND EDITION

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Chapters 1–12 and Appendices

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if I have a great craving for pepper in my bowl of soup on a camping trip, and if you possess the only peppercorn in the camp, isn't it entirely possible that I would be induced to promise to pay you a dollar for the peppercorn held in your hand? If so, we could find consideration in the exchange of a promise to pay money for delivery of a single, tiny peppercorn. In sum, the answer to the peppercorn question is, "it depends"—on the facts of each case.

3. Finding Reciprocal Inducement in an Exchange of Equivalents

In the next case, the bank and some customers agreed to exchange—and did exchange—denominations of currency that were precisely equal in face value. If each party is induced by the other denomination, consideration doctrine is easily satisfied. The customer is induced to exchange bills because he finds smaller bills easier to use. Can you think of a reason for the bank to prefer a larger bill and thus to be reciprocally induced to enter into this exchange?

If the bank, however, asserts that receiving the larger bill was no inducement at all, should we view the transaction in a different analytic framework, one in which the bank engages in the gratuitous service of providing change? Even under that framework, however, is the bank acting gratuitously or is it induced by the prospect of non-account-holders visiting the bank? How do you explain the court's reasoning?

In the following case, the consideration issue is embedded in a civil rights suit under a federal statute that redressed a deficiency in the common law of contracts. Common law rules of offer and acceptance permitted parties to restrict their offers in any way and to reject offers for any reason, including for reasons of racial prejudice. This deficiency in the common law led to legislation shortly after the Civil War banning racial discrimination in contracting. 42 U.S.C. § 1981 (2012).

Barfield v. Commerce Bank, N.A.

484 F.3d 1276 (10th Cir. 2007)

Before Kelly, McConnell, and Holmes, Circuit Judges.

McConnell, Circuit Judge.

¶ 1 Chris Barfield, an African-American man, entered a Commerce Bank branch in Wichita, Kansas, and requested change for a $50 bill. He was refused change on the ground that he was not an account-holder. The next day, Chris Barfield's father, James Barfield, asked a white friend, John Polson, to make the same request from the bank. Mr. Polson was given change, and the teller never asked whether he held an account with the bank. A few minutes later, James Barfield entered the bank, asked for change for a $100 bill, and was told that he would not be given change unless he was an account-holder.

¶ 2 James Barfield then enlisted the help of a white news reporter and his African-American colleague. The two men, separately, visited the bank to request change.

The African-American man was asked whether he was an account holder, and the white man was not.

¶3 The Barfields filed suit under 42 U.S.C. §1981, alleging racial discrimination in the impairment of the ability to contract....

....

¶4 Originally enacted in the wake of the Civil War, Section 1981(a) states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to *make and enforce contracts*, ... as is enjoyed by white citizens, ...

42 U.S.C. §1981(a) (emphasis added)....

¶5 All courts to have addressed the issue have held that a customer's offer to do business in a retail setting qualifies as a "phase[ ] and incident[ ] of the contractual relationship" under §1981....

¶6 The question, then, is whether the Barfields' proposal to exchange money at a bank is a contract offer in the same way as an offer to purchase doughnuts or apple juice. The claim made by the appellees, and accepted by the district court, is that the Barfields' proposed exchange was not a contract because it involved no consideration: "The bank would not have received any benefit or incurred a detriment if it had agreed to change the Barfields' bills." App. at 56. That reasoning, however, departs in several significant ways from our understanding of contract law.

¶7 To determine the contours of a contract, we look to state common law. *Hampton*, 247 F.3d at 1104; 42 U.S.C. §1988(a). Under Kansas law:

> A contract must be supported by consideration in order to be enforceable. *State ex rel. Ludwick v. Bryant*, 237 Kan. 47, 697 P.2d 858 (1985); *Mitchell v. Miller*, 27 Kan. App. 2d 666, 8 P.3d 26 (2000). 'Consideration is defined as some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other.' 17A Am. Jur. 2d, Contracts §113, p. 129. A promise is without consideration when the promise is given by one party to another without anything being bargained for and given in exchange for it. 2 Corbin on Contracts §5.20 (rev. ed. 1995).

Varney Bus. Servs., Inc. v. Pottroff, 275 Kan. 20, 59 P.3d 1003, 1014 (2002). *See also French v. French*, 161 Kan. 327, 167 P.2d 305, 308 (1946) (noting that "inconvenience to the promisee" is valid consideration).

¶8 In the most straightforward sense, the transaction proposed by the Barfields was a contract of exchange: they would give up something of value (a large-denomination bill) in exchange for something they valued more (smaller-denomination bills). It is hard to see why this is not a contract. If two boys exchange marbles, their transaction

is a contract, even if it is hard for outsiders to fathom why either preferred the one or the other. Consideration does not need to have a quantifiable financial value:

> [T]he legal sufficiency of a consideration for a promise [does not] depend upon the comparative economic value of the consideration and of what is promised in return, for the parties are deemed to be the best judges of the bargains entered into.... Where a party contracts for the performance of an act which will afford him pleasure, gratify his ambition, please his fancy, or express his appreciation of a service another has rendered him, his estimate of value must be left undisturbed....

In re Shirk's Estate, 186 Kan. 311, 350 P.2d 1, 10 (1960).

¶ 9 The Bank, however, argues that the proposed exchange was not a contract because it received no remuneration for performing the service of bill exchange. In other words, rather than view the transaction as an exchange of one thing for another, the Bank urges us to treat the transaction as a gratuitous service provided by the Bank, for no consideration. We cannot regard the Bank's provision of bill exchange services as "gratuitous" in any legal sense. Profit-making establishments often offer to engage in transactions with no immediate gain, or even at a loss, as a means of inducing customers to engage in other transactions that are more lucrative; such offers may nonetheless be contractual, and they do not lack consideration. *See Idbeis v. Wichita Surgical Specialists, P.A.*, 279 Kan. 755, 112 P.3d 81, 90 (2005) (holding that unquantifiable consideration, such as an employee's goodwill and professional contacts, is adequate to sustain a contract). If, as is alleged in the complaint, the Bank effectively extends bill exchange services to persons of one race and not the other, that is sufficient to come within the ambit of § 1981.

....

We therefore reverse the district court's dismissal of the Barfield's Section 1981 claim.

Exercise 3.8 — Sham or Genuine Inducement?

Consider how the requirement of reciprocal inducement may be used to distinguish bargained-for exchanges from sham bargains: unenforceable promises to make gifts that are disguised as bargains.

1. $2,000 Discount

John desperately needs to sell his old car so that he can pay some overdue bills. When a potential buyer strikes a hard bargain, John reluctantly agrees to sell his car for $1,000, even though it has a market value of $3,000. Bargained-for exchange?

2. $2,000 Give-Away

Bob owns a car with a market value of $2,000. He announces his intention to give the car to his sister, Alicia, on her birthday in November. Alicia, a first-year law student, insists on

....

process suggests a third area of overlap, addressed in Chapter 2: the possibility that terms are so thoroughly hidden that they have not been objectively conveyed to the other party and thus are not even included in the bargaining and the contract.

1. Lack of Mutual Assent in Hidden Contract Terms

a. Manifestation of Assent without Reading or Understanding

Under the objective theory of contract formation, an offeree who expresses assent is not bound to terms that the offeror failed to reasonably communicate during bargaining. *See, e.g.*, *National Fed'n of the Blind v. The Container Store, Inc.*, 904 F.3d 70 (1st Cir. 2018) (store did not convey that an arbitration agreement, or any other contract terms, were associated with customers' signing up to participate in a loyalty program); *Specht v. Netscape Commc'ns Corp.*, 306 F.3d 17 (2d Cir. 2002) (web user would not see link to terms associated with downloading software unless they had scrolled down below the screen displaying the download button).

On the other hand, if an offeree had a reasonable opportunity to examine terms, and the offeree manifested assent to them, the offeree is bound to the terms regardless of whether he or she read or understood them: "It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say that he did not read it when he signed it, or did not know what it contained." *Upton v. Tribilcock*, 91 U.S. 45, 50 (1875). Accordingly, in the excerpts of the *Uber* case presented in Chapter 2, the court found that an Uber driver had effectively expressed assent to proposed contract terms posted on the Internet, even if he had not viewed the terms before manifesting assent by "clicking through," even though reading the terms on the screen of a smartphone would be somewhat "onerous," and even though the driver spoke little English and might not have understood the arbitration clause had he read it. *See also Paper Express v. Pfankuch Maschinen GmbH*, 972 F.2d 753 (7th Cir. 1992) (U.S. firm was bound by a forum-selection clause written in the German language; it could have secured a translation prior to agreeing); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C.L. Rev. 2255 (2019).

In the face of such unforgiving standards for mutual assent, parties complaining that they had insufficient notice of contract terms, or could not understand them, should also raise an unconscionability challenge to the provisions. Even when obstacles to finding, reading, or understanding proposed terms are not sufficient to negate a party's apparent assent to the terms under the objective theory of contracts, those obstacles can be significant factors in an analysis of procedural unconscionability. If combined with substantive unconscionability, they provide a potential basis for refusing to enforce all or part of the contract.

In a controversial application of the traditional rule governing mutual assent, the majority of a federal appellate panel bound an employee to an arbitration clause contained in an English-language written agreement signed by the employee, even though the employee spoke only Spanish and though the translation *arranged by the employer* turned out to be faulty:

> Morales, in essence, requests that this Court create an exception to the objective theory of contract formation where a party is ignorant of the language in which a contract is written. We decline to do so. In the absence of fraud, the fact that an offeree cannot read, write, speak, or understand the English language is immaterial to whether an English-language agreement the offeree executes is enforceable.

Morales v. Sun Constructors, Inc., 541 F.3d 218, 222 (3d Cir. 2008); *cf. Ballesteros v. Am. Standard Ins. Co. of Wis.*, 226 Ariz. 345, 248 P.3d 193 (2011) (*en banc*) (in light of objective standard, statutory requirement that insurer offer certain coverage by written notice did not require translation into Spanish).

In *Morales*, the dissent presented a compelling but unavailing argument that the facts of this case justified a departure from the traditional rule:

> No one disputes that Sun asked Hodge [another employee] to translate the Employment Agreement for Morales, who did not read English. And no one disputes that Hodge failed to translate the arbitration clause in the Agreement. On this basis, I disagree with my colleagues' conclusion that the parties here manifested mutual assent to the arbitration clause of the Agreement, and I would therefore affirm the District Court's decision.

Id. at 224 (Fuentes, J., dissenting).

Which reasoning do you find to be more persuasive on the facts of this case, that of the majority of the three-member appellate panel, or that of the lone dissenter?

A California statute provides that a business that "negotiates primarily in Spanish, Chinese, Tagalog, Vietnamese, or Korean," must provide a translation of "every term and condition" of the final agreement in the language of negotiation, with respect to several kinds of consumer contracts. CAL. CIV. CODE § 1632 (as amended 2015). Would you support more widespread adoption of such statutes, and would you extend them to employment contracts?

The *Morales* court did not address unconscionability. Assuming that the attorneys for Morales did not raise unconscionability as a basis for avoiding the arbitration clause, did they miss the opportunity to launch a second attack against the clause? Even if the problem with the employer-selected translator did not exclude that clause for lack of mutual assent, surely it would have been a factor strongly supporting procedural unconscionability, especially when combined with the presumably adhesive nature of the contract. If that procedural unconscionability were coupled with substantive problems in the arbitration clause, the clause could be unenforceable under the unconscionability doctrine, even if the clause had been objectively conveyed to Morales. Would it be enough if the procedural problems were coupled with a requirement in the arbitration clause that the employee pay half of the arbitration costs up to a maximum employee share of $5,000, leaving remaining costs to be paid by the employer, which has vastly greater resources?

. . . .