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# Cardozo's Opinion in Lady Lucy's Case: "Formative Unconscionability," Impracticality and Judicial Abuse

Monroe H. Freedman\*

As demonstrated by this symposium, the opinion in *Wood v. Lucy, Lady Duff-Gordon*<sup>1</sup> is one of Benjamin Cardozo's most celebrated opinions. The essential facts are these. The defendant, Lady Lucy, "occupie[d] a unique and high position as a creator of fashions in America, England and France."<sup>2</sup> Because of her prestige in the fashion industry, her endorsements of women's fashions had "a distinct monetary value to the manufacturers of such articles."<sup>3</sup> The plaintiff, Otis F. Wood, had "a business organization adapted to the placing of such endorsements."<sup>4</sup> Accordingly, the parties agreed that Wood was to have the exclusive right to place Lady Lucy's endorsements. When he did so, the parties would share equally in the proceeds.

In his Complaint, Wood alleged that Lady Lucy had placed endorsements on her own, and that she had neither informed Wood of those endorsements nor had she shared the proceeds with him. Because such conduct by Lady Lucy would violate Wood's exclusive right under the agreement, he demanded an accounting of Lady Lucy's profits from any such endorsements and for his share of any of the profits.

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\* Professor of Law, Hofstra University Law School. Author, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERING* (2007) (photocopied materials, available on request in hard copy or via email). I am grateful to Larry A. DiMatteo, James Fishman, Richard K. Neumann, Norman Silber, Roy Simon and, particularly, Joanna Grossman for valuable comments.

1. 118 N.E. 214 (N. Y. 1917).

2. See Amended Complaint from *Wood v. Lucy, Lady Duff-Gordon*, in 3 *RECORDS AND BRIEFS OF LANDMARK BENJAMIN CARDOZO OPINIONS*, 5 (Docs. 34-38) (William H. Manz, ed., 2001). The appeal was from the trial court's denial of a demurrer to the Complaint, which sets out the entire agreement between the parties. My statement of the facts is taken from the Complaint.

3. *Id.*

4. *Id.*

The legal problem presented by the case is that nowhere in the agreement does Wood bind himself to obtain endorsements, or to do anything else, for Lady Lucy. That is, any action that Wood might undertake on her behalf was subject to what “may in his judgment” be advantageous to himself.<sup>5</sup> This raised the defense by Lady Lucy that the agreement on Wood’s behalf was illusory—that because Wood’s performance of his promise was entirely at his own discretion, he had given no consideration to make the agreement binding.<sup>6</sup> As discussed shortly, that was in fact the decision of the Appellate Division in the case,<sup>7</sup> a decision that Cardozo reversed on appeal.<sup>8</sup>

This article considers three aspects of Cardozo’s opinion in Lady Lucy’s case. The first is the way in which he used the concept of unconscionability to create a contract that would not otherwise have existed (what we might call “formative unconscionability”),<sup>9</sup> rather than to invalidate a contract in whole or in part, and the incongruity of that result in this case. The second is Cardozo’s impracticality, from the point of view of a practicing lawyer and of a client in Lady Lucy’s position, in creating a contract in Lady Lucy’s case. The third is how Lady Lucy’s case illustrates Cardozo’s sometime practice of abusing his power as a judge by neglecting, or even demeaning, the humanity of parties who appeared before him.

### I. Formative Unconscionability

We ordinarily think of unconscionability in nullifying or negative terms, that is, as being used to invalidate a contract or to invalidate or limit a provision in a contract because of oppres-

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5. *Id.* See also *id.* at 7.

6. An irony that will not be pursued here is that Lady Lucy’s obligations were also arguably illusory. Under the agreement, Wood is given the right to place “such endorsements . . . as may . . . in the judgment of [Lady Lucy] be most advantageous . . .” to her. Amended Complaint from *Wood v. Lucy, Lady Duff-Gordon*, *supra* note 2, at 5 (Doc. 36) (emphasis added). The practical difference between them is that if Lady Lucy withheld her approval of all endorsements, she could make no money at all from endorsements, which was part of her business. On the other hand, Wood might have chosen to devote his full time to some other, more lucrative, client; in that event, he would not have suffered from his failure to place any of Lady Lucy’s endorsements.

7. See *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576 (App. Div. 1917).

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

9. The phrase was suggested by my colleague, Roy Simon.

sive use of bargaining power or unfair surprise.<sup>10</sup> In Lady Lucy's case, however, Cardozo relied on the concept of unconscionability (although without using the word) to create a contract that would not otherwise have existed at all.

The unconscionability concept that he used is unfair surprise, as distinguished from oppressive use of bargaining power.<sup>11</sup> Unfair surprise occurs in a case in which one party has placed itself at an unfair disadvantage without having realized it.<sup>12</sup> This could happen as the result of conscious trickery by the other party at the time of contracting, or as the result of an unexpected interpretation of the contract by the other party during performance or after a dispute has arisen.<sup>13</sup>

For example, in a case of unfair surprise, U.C.C. section 2-302(1) would permit the judge to "refuse to enforce the contract . . . enforce the remainder of the contract without the unconscionable clause, or . . . so limit the application of any unconscionable clause as to avoid any unconscionable result."<sup>14</sup> Note that the premise in each instance is that a contract does exist between the parties, and that the effect of a finding of uncon-

10. Also, on the premise that a contract exists, unconscionability can be used to interpret an ambiguous provision in the contract to avoid an unconscionable result.

11. See U.C.C. § 2-302 cmt. 1.

12. Of course, if one party *knowingly* places itself at an unfair disadvantage (i.e., accepting the "offer that can't be refused") it presumably is the result of oppressive use of bargaining power by the other party.

13. This raises an issue that will not be pursued in this article beyond this footnote, that is, the misleading drafting of U.C.C. section 2-302. Subsection (a) says expressly that unconscionability is to be determined "as of the time of contracting"—which, by definition, is the only time that oppressive use of bargaining power can be applied. However, unfair surprise can arise at a later point, for example, by an interpretation of the contract that neither party has thought of until after a dispute has arisen. Note that section 2-302(a) refers to avoiding any unconscionable "result." Moreover, section 2-302(b) indicates that a finding of unconscionability at the time of contracting can be overcome by showing the "effect" of the provision. Thus, hindsight evidence of how the clause has worked out subsequent to the time of contracting can apparently be controlling.

The drafting in various parts of the U.C.C. is inconsistent and confusing with respect to whether a court should consider hindsight evidence (what has actually happened) versus whether the court should consider only on what was known and what happened at the time of contracting. See MONROE H. FREEDMAN, *CONTRACTS: AN INTRODUCTION TO LAW AND LAWYERING* 80-83, 94-97, 243-44 (2007) (photocopied materials, available on request in hard copy or by e-mail).

14. U.C.C. § 2-302(1).

scionability is to invalidate or limit the effect of all or part of that contract.

In the typical case of unconscionability, therefore, the court is called upon to enforce an agreement that has all the necessary elements of a contract, including consideration, but the court is unwilling to enforce the contract as it stands. Accordingly, the court applies the doctrine of unconscionability to invalidate the contract or to invalidate or limit some provision of the contract.<sup>15</sup>

In Lady Lucy's case, by contrast, Cardozo used the concept of unconscionability to eliminate the illusory nature of Wood's promise, which had the effect of creating a contract that would not otherwise have existed. That is, unless Cardozo had created consideration despite the illusory nature of Wood's promise, there would have been no contract for Wood to enforce. As shown below, Cardozo found Wood's promise to be binding because, if it were not, Lady Lucy would have been placed unfairly at his mercy—the equivalent of saying that she would have been the victim of unfair surprise.

That Wood's promises were illusory is clearly set forth in the opinion of the appellate division (which was reversed by Cardozo on appeal). The appellate division noted that "[t]here could never be any breach of this contract by the plaintiff, because under it the plaintiff did not obligate itself to do anything."<sup>16</sup> Referring to the terms of the agreement, that court explained:

[T]he plaintiff by this contract promises to collect the revenues derived from the indorsements, sales, and licenses, and to pay the cost of collecting them out of his half thereof, and to account to the defendant each month. But this promise on his part is not bind-

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15. Suggesting a negative application of unconscionability to Lady Lucy's case, Professor Melvin Eisenberg has said that if in fact Wood had misled Lady Lucy with the illusory nature of his promise, then he should have been denied enforcement against Lady Lucy on grounds of unconscionability, rather than relying on the illusory-contract doctrine. Melvin A. Eisenberg, *The Principles of Consideration*, 67 CORNELL L. REV. 640, 651 (1982) ("Now that the doctrine of unconscionability has been explicitly recognized, the illusory-promise doctrine should be abandoned. Any potential for unconscionability in bargains involving illusory promises should be treated directly, by scrutinizing the transaction to ensure that it did not involve unconscionable fast-talking.")

16. *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576, 578 (App. Div. 1917) (internal quotations omitted).

ing on him unless he places indorsements, makes sales, or grants licenses, and nowhere in the contract has he bound himself to get these indorsements, or make the sales, or grant the licenses. The enforcement of his promise to collect and pay over is thus made to depend upon *an act which he has not agreed to perform, and which the defendant cannot compel him to perform*. He promises to collect the revenues from the indorsements, *provided he sees fit to place the indorsements*. It is quite apparent that in this respect the defendant gives everything and the plaintiff nothing, and there is a lack of mutuality in the contract.<sup>17</sup>

Cardozo rejected that conclusion, despite his acknowledgment that Wood “does not promise in so many words that he will use reasonable efforts to place the defendant’s indorsements and market her designs.”<sup>18</sup> Relying, in effect, on the concept of substantive unconscionability, Cardozo responds that “[w]e are not to suppose that one party was to be placed at the mercy of the other.”<sup>19</sup> That is: “[Lady Lucy’s] sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff’s efforts. Unless he gave his efforts, she could never get anything.”<sup>20</sup>

Thus, in order to avoid the unfair surprise of finding an illusory promise on Wood’s part (and therefore a finding that no contract was created), which would have put Lady Lucy at Wood’s mercy, Cardozo concluded that an obligation that Wood would use reasonable efforts was “fairly” to be implied.<sup>21</sup>

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17. *Id.* (emphasis added). With regard to another part of the agreement, the appellate division said:

And the same may be said of plaintiff’s agreement to take out patents and protect them by legal proceedings. The performance of this promise cannot be enforced, for the reason that *the promise relates to indorsements which he is under no obligation to place, and the performance of it is left entirely to his own judgment*. In fact, the plaintiff in the nature of the case could not perform any of his various dependent agreements, unless he placed indorsements, made sales, or granted licenses to manufacture. And as the contract did not bind him to do any of these things, *there is no provision of the contract which the defendant could enforce against him*.

*Id.* (emphasis added).

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

19. *Id.*

20. *Id.*

21. *Id.*

Thereby, he used the concept of unconscionability to create a contract that would not otherwise have existed.<sup>22</sup>

This is not simply an academic observation, because it points to an anomaly, if not a non-sequitur, in Cardozo's opinion. Because a finding of an illusory promise by Wood would unfairly have placed Lady Lucy at his mercy, Cardozo said Wood was therefore entitled to win his breach of contract action against her. As Professor Austin Scott used to say, "I understand everything but the therefore." That is, Wood was the perpetrator, and Lady Lucy was the victim of the unconscionable promises that had put *her* at *his* mercy. Moreover, as illustrated by the opinion in the appellate division, and as discussed in the following section of this article, the arguably illusory nature of Wood's promise put Lady Lucy at a serious tactical disadvantage with regard to the agreement between them.<sup>23</sup> One

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22. The cases that Cardozo relied upon with regard to the "at his mercy" analysis were cases interpreting the language of contract clauses, not cases in which contracts were created that would not otherwise have existed because of want of consideration. See *Russell v. Allerton*, 14 N.E. 391 (N.Y. 1888); *Hearn v. Stevens & Bro.*, 97 N.Y.S. 566, 571 (App. Div. 1906). The latter case comes close to formative unconscionability, however, because one party was attempting to construe a clause in such a way as to allow it to avoid the contract at its will, and the court limited the clause to prevent that result.

The former case was a variation on the output and requirements contracts that have been covered by U.C.C. section 2-306(1). Those cases could be viewed as involving formative unconscionability because, without a "good faith" or an "unreasonably disproportionate" rule, one party's power to have zero output or zero requirements would make its promise illusory, putting the other party unfairly at its mercy. See, e.g., *New York Central Ironworks Co. v. United States Radiator Co.*, 66 N.E. 967 (N.Y. 1903). In *New York Central Ironworks* the court stated:

Both parties in such a contract are bound to carry it out in a reasonable way. The obligation of good faith and fair dealing towards each other is implied in every contract of this character. The plaintiff could not use the contract for the purpose of speculation . . . since that would be a plain abuse of the rights conferred and something like a fraud upon the seller.

*Id.*

23. A number of scholars have suggested that a sophisticated business person in Lady Lucy's position might well find it desirable as a business matter to accept such a promise, and should therefore be contractually bound if she purposefully enters such a deal. See, e.g., Eisenberg, *supra* note 15, at 649-51. In such a case, of course, there would be no unfair surprise.

However, before concluding that a particular party in Lady Lucy's position has purposefully accepted the risks of a promise like Wood's, a court should at least accord her a hearing to determine whether that was in fact the case. Surely it should not be a fixed rule of law that every promisor whose performance is subject to his own discretion should win in every case. As Eisenberg says, in a case of that

would expect, therefore, that the court would deny him (the perpetrator) recovery against her (the victim) rather than reward him with damages for breach of a questionable contract.<sup>24</sup>

## II. The Practical Drawbacks of Cardozo's Opinion in Lady Lucy's Case

In his masterful biography of Cardozo, Professor Andrew Kaufman comments that contracts professors "like to press the Cardozo reasoning by asking whether a promise would have been inferred if the original suit had been by Lady Duff Gordon [*sic*] against Wood for failing to work hard enough."<sup>25</sup> His citation is to Arthur Rosett's book, *Contract Law and Its Application*.<sup>26</sup> The point of the question, Kaufman says, "seems to be that sympathy for the worker [Wood] made it easier for Cardozo to infer a promise on behalf of a salesman against an employer rather than the other way around."<sup>27</sup> Kaufman answers that

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kind, the transaction should be scrutinized to ensure that it did not involve unconscionability on the part of the promisor. *Id.* at 651.

Moreover, even if a court assumes, or makes a finding, that Lady Lucy was a sophisticated businesswoman purposefully accepting the risks of Wood's unenforceable promises, it does not follow that *he* should be permitted to sue *her*. The more sensible conclusion would be to conclude (or permit a finding) that both parties were sophisticated and accepting the risks of non-enforceability; Wood, according to their agreement, surely was an experienced businessman. *See supra*, note 2, at 5. Thus, contrary to Eisenberg, the common-law rule should be maintained, and each party should be denied legal enforcement of the agreement.

24. Professor James Fishman has called my attention to a similar argument regarding this anomaly in Victor P. Goldberg, *Desperately Seeking Consideration: The Unfortunate Impact of U.C.C. Section 2-302 on Contract Interpretation*, 68 OHIO ST. L.J. 103, 108 (2007),

[Cardozo] noted that Lucy "was to have no right for at least a year to place her own indorsements or market her own designs except through the agency of the plaintiff. . . . We are not to suppose that one party was to be placed at the mercy of the other." This argument has long seemed persuasive, indeed obvious, to contracts scholars. However, it could easily be turned on its head. Judge Cardozo could have reasoned that because we are not to suppose that Lucy would put herself at Wood's mercy, she had not in fact done so. She would only be at his mercy if it were a legally binding contract. Judge Cardozo could just as well have concluded, therefore, that there was not a legally binding contract.

*Id.*

25. ANDREW L. KAUFMAN, *CARDOZO* 317 (Harvard University Press 1999) (citing ARTHUR I. ROSETT, *CONTRACT LAW AND ITS APPLICATION* 37 (1994)).

26. ROSETT, *supra* note 25, at 37.

27. KAUFMAN, *supra* note 25, at 317-18.

“that is precisely the kind of circumstance that would not have influenced Cardozo at all.”<sup>28</sup> “The judge who took verdicts away from children in *Perry*<sup>[29]</sup> and *Adams*<sup>[30]</sup> and from a poor widow in *Palsgraf*,”<sup>31</sup> Kaufman notes, “would not have been troubled about holding a salesman to his contract.”<sup>32</sup>

That is undoubtedly correct, but Kaufman misses the point of the contracts professors’ question. As Rosett and Bussel have made clear, their point relates rather to the practical concerns of the practicing lawyer. “How could Lady Lucy and her lawyer prove that Wood’s efforts were less than reasonable” they ask, and how could they prove “how much business she had lost because of Wood’s lack of diligence?”<sup>33</sup>

Those questions point to two practical concerns that would discourage one in Lady Lucy’s position from suing at all. First, there is the difficulty of carrying the burden of proving that Wood’s efforts on her behalf were, in fact, less than reasonable.<sup>34</sup> Second, there is the related problem that Lady Lucy would have had in proving with “reasonable certainty” (as Cardozo would have required) how much money Wood would have made on her behalf if he had been diligent in his efforts.<sup>35</sup>

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28. *Id.* at 318.

29. *Perry v. Rochester Lime Co.*, 113 N.E. 529 (N.Y. 1916).

30. *Adams v. Bullock*, 125 N.E. 93 (1919).

31. *Palsgraf v. Long Island Railroad Co.* 162 N.E. 99 (N.Y. 1928).

32. KAUFMAN, *supra* note 25, at 318.

33. ROSETT, *supra* note 25, at 38. They add the further practical concern for their students to ponder: “What information would they need?” *Id.* These same questions were raised by Rosett in the fifth edition of the book. See also Charles Knapp et al., *Problems in Contract Law* 439-42 (2007), in which the question is also raised of the practical difficulties Lady Lucy would have faced if she had attempted to recover against Wood.

34. In that regard, students should be asked what kinds of evidence they might look for in their fact investigation and in discovery. In addition, they should be reminded of the expense of a court-room battle of expert witnesses. See, e.g., FREEDMAN, *supra* note 13, at 214-15, 219, 240, 275. Also, although Lady Lucy would have had a history of such placements, presumably she expected significantly more from Wood’s “business organization adapted to the placing of such indorsements.” *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576, 578 (App. Div. 1917).

35. See *Moran v. Standard Oil Co. of New York*, 105 N.E. 217, 225 (N.Y. 1914). Again, students should be asked what kinds of evidence they might look for in their fact investigation and in discovery, and reminded of the expense of a court-room battle of expert witnesses.

Further, one should add to those practical difficulties the strong possibility that a court would find no liability on Wood's part because the alleged contract was illusory. Note that the appellate division, after marshaling the relevant facts, had held that "[t]here could never be any breach of this contract by the plaintiff, because under it the plaintiff did not obligate itself to do anything."<sup>36</sup> Moreover, Cardozo's own opinion to the contrary was by a four-to-three decision.

Clearly, therefore, a decision to sue for breach of contract in Lady Lucy's case was fraught with risk regardless of which side initiated the litigation, giving any conscientious lawyer pause in advising a client to undertake legal action against Wood for breach of contract.

Accordingly, those of us concerned with teaching lawyering skills in the contracts course use Lady Lucy's case, in part, to point to difficult issues that are raised when the adverse party has committed, or has threatened to commit, a breach of contract, and the lawyer has to advise the client on a course of conduct. The answer, of course, is not always to start litigation. In Lady Lucy's case, for example, the best legal advice might well have been for Lady Lucy to use self-help (as she did, by getting endorsements herself); thereby, she put the burden on Wood to take the initiative in retaining counsel and in trying to establish that there was a contract despite the arguably illusory nature of his own promise—a result that his lawyers could not have predicted with confidence.<sup>37</sup> For those reasons, Professor

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36. *Wood*, 164 N.Y.S. at 578.

37. Even if Wood's lawyers failed to realize initially that Lady Lucy's lawyers would argue that the contract was illusory, it is likely that the issue was raised in negotiations prior to the filing of their complaint in the case. Thus, if Wood had in fact produced endorsements and had given Lady Lucy her share of the income on those endorsements, one would expect that fact to have been included as an allegation in the complaint. Then, in response to the expected demurrer (which in fact was filed), that allegation in the complaint would have enabled Wood's lawyers to argue persuasively that Lady Lucy should not be permitted to disavow a contract under which she had willingly been enjoying the benefits.

It is interesting, therefore, that the only allegation in the complaint in this regard is the one-sentence, pro-forma and uninformative assertion that Wood had performed his obligations under the contract. See Amended Complaint from Wood v. Lucy, Lady Duff-Gordon, *supra* note 2, at (Docs. 34-38). Moreover, there is no argument or even any suggestion in Wood's brief that Lady Lucy had enjoyed any benefits at all under the agreement. *Id.* at (Doc. 37). This means either that Wood's lawyers missed an important argument, or that, in fact, Wood had not done

Kaufman's praise for Cardozo as having taken a practical approach, based on Cardozo's experience as a commercial lawyer,<sup>38</sup> seems misplaced.

### III. Cardozo's Abuse of Lady Lucy as a Person

The previous discussion relates to the practical lawyering aspects of Lady Lucy's case (which, of course, necessarily includes considerable analysis of contracts theory). Another aim of some law professors<sup>39</sup> is to impress upon students the point made by Judge John T. Noonan, Jr., in *Persons and Masks of the Law*.<sup>40</sup> That is, abstract rules of law can become masks that conceal the humanity of those affected by the law.<sup>41</sup> The effect of this is to permit lawyers and judges to engage too frequently in conduct that neglects or disrespects the humanity of other persons<sup>42</sup>—conduct that they would otherwise recognize as wrongful.<sup>43</sup> Indeed, Noonan uses Cardozo's holding in *Palsgraf* as a principal illustration of his point.<sup>44</sup>

Lady Lucy's case illustrates the tendency of some judges, including Cardozo, to neglect the humanity of litigants and lawyers who appear before them.<sup>45</sup> We have heard in the prior panel about the extraordinary accomplishments of Lady Lucy as an entrepreneur and designer in an age when what is now a glass ceiling was practically an iron curtain of exclusion.<sup>46</sup> When Lady Lucy died in 1935 at the age of 71, an obituary

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anything to fulfill his part of the agreement except to exercise his discretion to do nothing at all on Lady Lucy's behalf.

38. KAUFMAN, *supra* note 25, at 315.

39. See, e.g., FREEDMAN, *supra* note 13, at 106-07, 423.

40. See JOHN T. NOONAN, *PERSONS AND MASKS OF THE LAW* (2002). Judge Noonan's book was originally presented as the Holmes Lecture at Harvard Law School in 1972 and first published in 1976. Noonan was then a law professor at the University of California, Berkeley. He now sits in the United States Court of Appeals for the Ninth Circuit.

41. In a comment to the author, Professor Norman Silber noted that this category can include not just the active participants in the case, but also third parties who are affected by a decision, like consumers.

42. NOONAN, *supra* note 40, at 13-14, 18-21.

43. *Id.*

44. *Id.* at 111-51.

45. See also, FREEDMAN, *supra* note 13, at 423-24.

46. Even when Liz Claiborne died in 2007, *The New York Times* commented on the front page that she had "defied the male-dominated ranks of the fashion industry by starting her own company in 1976." Eric Wilson, *Liz Claiborne, Cloth-*

noted that she was “[o]ne of the most remarkable women of the century.”<sup>47</sup> “For 30 years she directed the great firm of Lucile, court dressmakers, with branches in London, Paris, New York, and Chicago.”<sup>48</sup> She designed gowns for royalty, including the Queens of England and Spain, and her friends included Oscar Wilde, Sarah Bernhardt, and Isadora Duncan.<sup>49</sup> At the same time, Lady Lucy emphasized fashions for “girls of drastically limited income.”<sup>50</sup> She was also credited with “chang[ing] the Victorian dowdiness of women’s clothes into modern freedom and smartness” introducing, for example, the slit skirt.<sup>51</sup> In addition, she produced the first fashion show.<sup>52</sup> Seventy years after her death, Lady Lucy’s designs were the subject of an exhibition at the Fashion Institute of Technology in New York City in 2005.

The record in the case did not include all of that detail.<sup>53</sup> However, relying on the record, the appellate division had described Lady Lucy as occupying “a unique and high position as a creator [*sic*] of fashion in America, England, and France, and that her personal approval and indorsement over her own name of certain articles, fabrics and adjuncts of fashion has a distinct monetary value to manufacturers of such articles . . . .”<sup>54</sup>

By contrast, Cardozo began his opinion with the snide pun at Lady Lucy’s expense that she “styles herself” a “‘creator of fashions,’” whose “favor helps a sale.”<sup>55</sup> Continuing the derisive tone, he added that “[t]he things which she designs, fabrics, parasols, and *what not*, have a new value in the public mind when issued in her name. She employed the plaintiff to help

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*ing Designer, Dies at 78*, N.Y. TIMES, June 28, 2007, at A1. Claiborne’s achievement followed Lady Lucy’s by several decades.

47. *Death of Lucile*, DAILY SKETCH, Apr. 22, 1935, at 1 (discussed in FREEDMAN, *supra* note 6, at 423-24).

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. See Amended Complaint from *Wood v. Lucy, Lady Duff-Gordon*, *supra* note 2, at (Docs. 34-38).

54. *Wood v. Lucy, Lady Duff-Gordon*, 164 N.Y.S. 576, 576 (App. Div. 1917).

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

her to turn this vogue into money."<sup>56</sup> So much for 'one of the most remarkable women of the century.'<sup>57</sup>

### Conclusion

Judge Cardozo's opinion in *Wood v. Lucy, Lady Duff-Gordon* used the concept of unconscionability to create a contract that would not otherwise have existed (formative unconscionability). That is, he justified holding against Lady Lucy on the ground that a finding that Wood's promises were illusory (and that therefore there was no contract between them) would have unfairly put Lady Lucy at Wood's mercy.

As Cardozo said: "[Lady Lucy's] sole compensation for the grant of an exclusive agency is to be one-half of all the profits resulting from the plaintiff's efforts. Unless he gave his efforts, she could never get anything."<sup>58</sup> However, Wood "[did] not promise in so many words that he [would] use reasonable efforts to place [Lady Lucy's] indorsements and market her designs . . ."<sup>59</sup> thereby placing her at his mercy. In other words, Lady Lucy was the victim of unfair surprise on the part of Wood. Anomalously, therefore, Wood won his contract action against Lady Lucy by successfully arguing, in effect, the unconscionable nature of his own promise.

Also, Cardozo's decision created serious practical difficulties for a lawyer representing a client in Lady Lucy's position. Assuming that Wood had in fact failed to produce endorsements

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56. *Id.* (emphasis added). Llewellyn also saw Cardozo's description of Lucy as designed to incline the reader against her, but used it to illustrate clever advocacy. Karl Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 637-38 (1962). Disagreeing with Llewellyn, Professor Goldberg sees the description as a neutral statement of facts that are recited in the contract. VICTOR GOLDBERG, *FRAMING CONTRACT LAW* 45 (2006). Although Cardozo did find each of his phrases in the contract, he was carefully selective (Llewellyn's point); also, the contract said nothing about "styl[ing] herself." My colleague, Richard Neumann, takes a different view from both Goldberg and me and goes beyond Llewellyn. He sees Cardozo's remarks about Lucy as one of his "beautifully written classics of judicial eloquence, dripping with well-deserved sarcasm." E-mail from Richard K. Neumann, Jr., Professor of Law, Hofstra Law, to Monroe H. Freedman, Professor of Law, Hofstra Law (Oct. 23, 2007, 19:14 EST) (on file with author).

57. "A judge should be courteous to counsel . . . and also to all others appearing or concerned in the administration of justice in the court." ABA Canons of Judicial Ethics, Canon 10 (1908).

58. *Wood*, 118 N.E. at 214.

59. *Id.*

(and he did not claim that he had benefited her in any way), a conscientious lawyer would be hesitant to recommend that Lady Lucy sue him; moreover, a prudent lawyer would be hesitant to take the case on a contingent fee. Such litigation would have required: (1) persuading a court that Wood's (and Lucy's) promises were not illusory; (2) carrying the burden of proving that Wood's efforts on her behalf were, in fact, less than reasonable; and (3) proving with "reasonable certainty" (as Cardozo would have required) how much money Wood would have made on her behalf if he had been diligent in his efforts.

In addition, Lady Lucy's case illustrates Cardozo's sometime practice of abusing his power as a judge by neglecting, or even demeaning, the humanity of parties who appeared before him.

Taken as a whole, therefore, Cardozo's opinion in *Wood v. Lady Lucy Duff-Gordon* is one more to be criticized than to be celebrated.