

RELATIVE CONSENT AND CONTRACT LAW

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What does it mean to consent? Consent is an essential component of contracts, yet its part in contract law is obscure. Despite its importance, there is no independent doctrine of consent; rather, it plays a key, but ill-defined role in assessing doctrines such as assent or duress. This Article addresses this significant omission in contract law by disassembling the meaning of contractual consent into three conditions: an intentional act or manifestation of consent, voluntariness and knowledge. This Article argues that consent can only be understood relative to these three conditions. Accordingly, consent is not merely a conclusion but a process and a dynamic that depends upon a variety of factors, including the relative blameworthiness of the parties, their relationship, third party effects and societal impact. This Article, through an examination of classic and modern cases, demonstrates how the concept of relative consent provides a coherent framework for understanding contract law.

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INTRODUCTION

Contracts play an essential role in a free society. They are the tools by which individuals may transfer their rights, create obligations for themselves, and bind others. A contract is a legally enforceable promise, which means that the state, through the courts, has the power to require each party’s performance.¹ A contract allows the parties to create their own private law, but the state enforces it.² In this way, the state plays an essential role in the redistribution of private property. But why should the state intervene in purely private matters?

There are several grounds upon which state interference in contractual matters is justified.³ One of the most often cited is that a contract promotes the autonomy of individuals by allowing them to decide how to allocate their property rights.⁴ A contract permits an individual to rent out a room in her home or sell her car. A contract thus allows her to use her property as she sees fit. Another common justification is that state enforcement provides security of transactions which is necessary to the stability of a credit-based economy.⁵ A credit-based

¹ RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

² *Id.*

³ For a discussion of contract law theories, please see STEPHEN A. SMITH, *CONTRACT THEORY* (2004).

⁴ See Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. INT’L L. 517, 518–19 (2001) (“Contract law is also indispensable to assure parties who are bargaining with each other that their promises will be enforced. Neither contracts nor property law, nor any other body of law . . . that might be needed for the market to function, are self-enforcing.”).

⁵ See Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 576 (1933) (stating that the law will enforce contracts “in the interest of the general security of business transactions.”).

economy allows more utility from property ownership and allows a more sophisticated and expansive marketplace.⁶ For example, credit permits a farmer to use a tractor now and pay for it after the harvest. Without credit, the tractor would sit idle, there would be fewer crops, and the farmer would have less money after the harvest to buy goods and services from others. Without the backing of the state, the future performance of an individual would depend upon his word—or the brute strength of the one to whom performance was owed. Without contracts, commercial exchanges would be local, limited to barter exchanges, and enforced by the threat of vigilante justice.

Melvin Eisenberg argued that modern contract law has—and should—become more substantive, subjective, individualized, dynamic, and less formalistic, objective, binary, and static.⁷ He explained that the best possible rules of contract law should conform to the following, which he referred to as the “basic contracts principle”:

First, if but only if appropriate conditions are satisfied, and subject to appropriate constraints, contract law should effectuate the objectives of parties to a promissory transaction.

Second, the rules that determine the conditions to, and the constraints on, the legal effectuation of the objectives of parties to promissory transactions, and the manner in which those objectives are ascertained, should consist of the rules that would be made by a fully informed legislator who seeks to make the best possible rules of contract law by taking into account all relevant propositions of morality, policy, and experience.⁸

Eisenberg described the basic contracts principle as rejecting single-value theories of contract, such as autonomy theories. Instead, he argued that contract law should recognize the complexity of the human condition and consider “all meritorious values . . . even if those values may sometimes conflict.”⁹ The basic contract principle also “deemphasizes the role of contract law in providing efficient incentives to contracting parties. Under the principle, the purpose of contract law should be to effectuate the objectives of parties to promissory transactions, not to lead them into acting efficiently.”¹⁰ The basic contracts principle rejects the position that contract law is not promise-based, but requires that “promises are to be enforced only under appropriate conditions and only subject to appropriate constraints.”¹¹ Importantly, the basic contracts principle “rejects the position that contract law should always assume that contracting parties are

⁶ For a general discussion of how contract shapes and is shaped by a credit economy and marketplace changes, see NANCY S. KIM, *WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS* 17–34 (2013).

⁷ Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1745 (2000).

⁸ *Id.*

⁹ *Id.* at 1747.

¹⁰ *Id.*

¹¹ *Id.*

perfectly rational” and instead adopts the view that contract law should be based upon “how people act.”¹²

This Article affirms and extends Eisenberg’s basic contracts principle. If the purpose of contract law is to “effectuate the objectives of the parties to a promissory transaction,” consent is a prerequisite, an assumption so obvious that it scarcely needs to be mentioned. The law typically views promises made without consent as not being promises at all. A promise made under duress, for example, is void or voidable.¹³

The morality of contracts depends upon the validity of consent. Yet, while all contracts require consent as a prerequisite,¹⁴ the meaning of consent is obscure. Often conflated with assent, courts may make a conclusion on the issue of contract formation without delineating what consent requires or what it means to consent in a given situation.¹⁵ As Eisenberg observed, the balancing of interests contained in modern contract doctrine takes into account the complexity of human relationships, the limits of human cognition, and the unpredictability of the future.¹⁶ Contract law balances these interests through the vehicle of consent. Although the formation of a contract requires consent, contract and consent are not equivalents.

Contracts involve two different time periods: contract formation and contract performance. As circumstances evolve, consent that existed at the time of formation may no longer exist at the time of performance. If consent provides the moral foundation for promises, what is the justification for enforcing a contract where the promisor has subsequently changed her mind?¹⁷ The answer lies in the role consent plays in contract. Philosophers and academics typically consider issues of consent from the perspective of the consenting party. But consent cannot be considered in a vacuum as the law impliedly, even if not explicitly,

¹² *Id.*

¹³ See discussion *infra* Section III.A.2.

¹⁴ AAA Constr. of Missoula, L.L.C v. Choice Land Corp., 264 P.3d 709, 713 (Mont. 2011) (“Identifiable parties capable of contracting, consent, a lawful object, and sufficient consideration comprise the essential elements of any contract.”); Marseilles Homeowners Condo. Ass’n v. Broadmoor, L.L.C., 111 So.3d 1099, 1111 (La. Ct. App. 2013) (“Consent is an absolute necessity to the formation of a contract. . . . Importantly, consent envisions agreement on all elements of a given sale or contract.”); Southeast Grading, Inc. v. City of Atlanta, 324 S.E.2d 776, 779 (Ga. Ct. App. 1984) (“An offer and an acceptance are essential prerequisites to the creation of every kind of contract. Thus, the law requires that the parties consent to the formation of a contract. . . .”) (citation omitted).

¹⁵ See AAA Constr. of Missoula, 264 P.3d at 713; Marseilles Homeowners Condo. Ass’n, 111 So.3d at 1111; Southeast Grading, 324 S.E.2d at 779.

¹⁶ See Eisenberg, *supra* note 7, at 1762 (stating that “[p]romissory transactions seldom occur in an instant of time. They have a past, a present, and a future” and the demarcation between and among them may not be clear); *id.* at 1765.

¹⁷ For further discussion on this issue, see Robin Kar, *The Art of Promise and Power of Contract*, JOTWELL (June 13, 2016) <http://juris.jotwell.com/the-art-of-promise-and-power-of-contract/> [<https://perma.cc/28W9-DS7B>] (reviewing Doris Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW 96 (Klass, Letsas & Saprai eds., 2015)).

recognizes. In contract law, a contract requires *mutual* consent. Consequently, the subsequent change in desire of one of the parties does not release it from its obligation unless the other party also changes its mind. The act of consent both protects and promulgates the autonomy of both parties. Thus, a contract is no longer enforceable if both parties change their minds. But when may a contract be avoided where only one party changes its mind? This Article argues that it depends upon whether the party seeking contract avoidance validly consented to it.

This Article posits that three conditions are necessary in order for consent to exist: an intentional act or manifestation indicating consent, knowledge, and voluntariness. The difficulty is in determining *how much* of each condition is required in order to reach the conclusion that there was “valid” consent. This Article argues that consent validity is a conclusion reached by courts after assessing the conditions of consent (intentional act, knowledge, and voluntariness). This novel approach thus differentiates “valid” consent from both subjective consent and objective consent. Under this Article’s proposed approach, the validity of consent (i.e. whether the consent conditions are sufficient) is relative to the situation, a “sliding scale” which depends upon the relative blameworthiness of the parties, and considers their relationship, third party effects, and societal impact. Under this view, consent is a process and a dynamic, not simply the state of mind of one of the parties.

Part I introduces and explains the concepts of consent construction and consent destruction. Part II explains how contract formation doctrines reflect the concept of consent construction. Part III explains how contract defenses reflect the concept of either consent construction or consent destruction. This Article concludes that an understanding of contract law requires a more complete and nuanced understanding of consent.

I. CONSENT CONSTRUCTION AND CONSENT DESTRUCTION

For consent to be valid, certain conditions are required. It may seem nonsensical or redundant to refer to consent in terms of validity because “invalid consent” is simply non-consent.¹⁸ Invalid consent *is* an oxymoron, but it permits a way to discuss and distinguish the manifestation of consent from the conditions

¹⁸ But as Brian Bix notes, the

[G]ap between the assertion that there had (not) been consent and the conclusion that the agreement should (not) be binding is often hidden by use of terms like “*full* consent” or “*valid* consent,” which indicate, at the least, that there are different types or different extents of consent or, alternatively, that consent needs to be combined with other factors for it to transform the moral or legal effects of some action.

See Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 251, 253 (Franklin G. Miller & Alan Wertheimer eds., 2010). Margaret Jane Radin has stated that one way to consider consent is to consider what consent is *not* and considers “varieties of non-consent” and “problematic consent” to explain the meaning of consent. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 20–32 (2013).

surrounding it. It recognizes the complexity of consent: consent is not a line to be crossed but a dynamic state that varies depending upon circumstances. To say “yes” means to agree, but the way that “yes” is said and the acts to which it grants permission may be subject to dispute. A reluctant acquiescence, even if not physically forced, may not merit the same moral or legal deference as an enthusiastic engagement.¹⁹ Consent may be incremental, especially in situations where the consented-to activity is not discrete or where the boundaries are ill-defined. Consent is also variable, meaning that it may change depending upon new information or changes in circumstance.²⁰ For example, a party may consent to work at a company because she believes her supervisor will be reasonable. Consent may be valid only to a certain extent, beyond which it becomes invalid. The employee may consent to work with a supervisor who she hopes is reasonable but in fact is abusive and has a bad temper. The employee *had* consented to working with a supervisor, but not one who has a bad temper and makes degrading and abusive remarks. An individual consents under certain conditions—and may assume certain other conditions or circumstances. These assumptions might later prove to be false, which may undermine or negate consent.

Assessing the validity of consent requires recognizing two distinct types of analysis. The first involves whether the party consented. I will refer to this as analyzing *consent construction*. The second involves whether the party continues to consent at the time of performance. I refer to this as analyzing *consent destruction*.

A. *Consent Construction*

As previously noted, there are three conditions required for consent to be valid: an intentional act, knowledge, and voluntariness. These three conditions generally capture the requirements of consent put forth by other scholars. For example, John Kleinig states that where *A* consented to *B* to do something “[c]onsent is centrally and most appropriately a communicative act that serves to alter the moral relations in which *A* and *B* stand—and that for the moral relations to have been altered for *B*, a communicative act must have occurred.”²¹ In his view, consent must take the form of a communicative act in order to transform the

¹⁹ See Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 616 (2017) (stating that “consent is not simply a ‘yes-or-no’ question; consent is more complex than such an analysis suggests and can be both gradual and continuous.”).

²⁰ *Id.* (“Consent is shaped by the relationship between the consenter and the consentee. Factors of power, intimacy, trust, arm’s length relations, and more all differently influence consent.”); see also Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 199–200 (2013) (Given the realities of power imbalances in personal relationships, “feminist insights should be applied to duress doctrine.”).

²¹ John Kleinig, *The Nature of Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE, *supra* note 18, at 3.

moral relations between *A* and *B*.²² In order for the communicative act to constitute consent for which *A* should be held responsible, Kleinig states that the conditions of competence, voluntariness, knowledge, and intention must be met.²³ Tom Beauchamp, focusing on informed consent, argues that autonomous choice and voluntariness are the central features of consent.²⁴ His theory of autonomy features conditions of intentionality, understanding, and voluntariness.²⁵

1. Intentional Manifestation of Consent

At the most basic level, all contracts require a manifestation, some act or statement that indicates consent to the contract. The manifested act can be a statement, a signature, a click on an “Accept” icon, or a nod of the head. The act (whether word or deed) is the “manifestation of consent.” Where the manifestation of consent is a promissory statement, it may raise problems relating to the interpretation of words. Where the manifestation of consent is an action, such as a signature on a written agreement, or a click on an “Agree” icon, it may raise questions relating to the identity of the actor, or whether the actor understood the meaning of the act. The presumption of consent that arises from an action, such as signing a document or clicking on an “Accept” icon, is entwined with the “duty to read.”²⁶ Rather than being an affirmative obligation, the duty to read is a presumption that someone who has signed a document (or clicked to accept digital terms) has read the terms that the document contains.

An intentional manifestation of consent is only one of the requisite consent conditions. If the consent conditions of voluntariness and knowledge are deficient, there is no consent despite the manifested act (put another way, the act only seemed to, but did not actually, manifest consent). Therefore, as this Article will argue, where the manifested act itself was involuntary or conducted in ignorance, there is no contract—the agreement is void. Where the manifested act was intentional but undertaken without full knowledge, with a heavy heart, or under pressure, the contract may be voidable.

²² *Id.* at 5–12.

²³ *Id.* at 3–22.

²⁴ Tom L. Beauchamp, *Autonomy and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE*, *supra* note 18, at 55.

²⁵ *Id.*

²⁶ *Mladineo v. Schmidt*, 52 So. 3d 1154, 1158 (Miss. 2010) (“[M]ississippi law imposes on insureds a duty to read their insurance contracts and imputes to them knowledge of the contents of such contracts.”); *Van Den Berg v. Northside Realty Assocs.* 323 S.E. 2d 839, 840 (Ga. Ct. App. 1984) (“The rule in this state is that where one who can read signs a contract without reading it, he is bound by the terms thereof, unless he can show that an emergency existed at the time of signing. . . .”) (citation omitted); *Major v. McCallister*, 302 S.W. 3d 227, 229 (Mo. Ct. App. 2009) (noting that online agreements and the law governing them may be “‘an emerging area of the law,’ but courts still ‘apply traditional principles of contract law and focus on whether the plaintiff had reasonable notice of and manifested assent to the online agreement’ . . . Assent is manifested expressly on click-wrap sites, usually by clicking a box or button.”) (citation omitted).

2. *The Knowledge Condition*

Perhaps the most difficult condition to assess is the knowledge condition. Research has revealed that human beings suffer from cognitive limitations, such as biases, difficulty in assessing very complex information, and time constraints that may cause them to make decisions that they may later regret.²⁷

In a 1974 article Amos Tversky and Daniel Kahneman examined three heuristics (principles or rules) that people use to assess probabilities and predict values.²⁸ They argued that people use these heuristics—representativeness, availability, and adjustment/anchoring—when thinking under uncertainty, which leads to biases and “severe and systematic errors” in decision-making.²⁹

The article and subsequent research by Tversky and Kahneman unleashed an entire discipline—behavioral economics—which challenged the classical economics concept of the rational man.³⁰ Researchers revealed other cognitive biases which negatively affect an individual’s ability to make optimal decisions, especially where there is a “temporal disconnect” or lapse of time between the intentional manifestation of consent and performance of the consented-to act.

Assessment of the knowledge condition requires evaluating capacity and information in light of the *motive* of the consenting party and the *actions* of the other party.³¹ The other party might provide misinformation or may conceal information. In some cases, the other party may have an affirmative obligation to provide the consenting party with information. The extent of the other party’s responsibility for the information depends upon the type of activity to which the party is consenting and the relationship between the parties.

3. *Voluntariness*

The condition of voluntariness is difficult to define and requires a contextual analysis. Undoubtedly, an individual who is physically forced to manifest consent is not consenting voluntarily, nor is a person who has no control over an automated bodily response, such as a sneeze or other reflexive action. An individual who is threatened with physical violence is also not consenting voluntarily.³² But in addition to physical force, bodily reflexes, and threats of physical force, there is a range of circumstances that diminish or degrade the condition of

²⁷ See generally DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

²⁸ Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124–1131 (1974).

²⁹ *Id.* at 1124.

³⁰ See generally ADVANCES IN BEHAVIORAL ECONOMICS (Colin F. Camerer et al. eds., 2004); KAHNEMAN, *supra* note 27, at 4–5 (discussing basic concepts and studies in the area of behavioral economics); DAN ARIELY, PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS (2008); Stefano DellaVigna, *Psychology and Economics: Evidence from the Field*, 47 J. ECON. LITERATURE 315, 341–345 (2009) (discussing research finding overconfidence bias and implications for policy).

³¹ See discussion *infra* Section I.A.4.

³² See discussion *infra* Section III.A.2.

voluntariness. This approach largely adopts Joel Feinberg's proposal to treat voluntariness as a "variable concept" that depends upon "the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served."³³

Motive is relevant to assessing the condition of voluntariness. Many factors might influence a person into acting against that person's true desires. A lack of voluntariness means that those factors have essentially forced a person to act against his or her will and that the reason for consenting is not to participate in the act but to avoid some other consequence. Generally, however, the condition of voluntariness is only deemed to be lacking if the pressure to consent came from the party seeking or benefitting from the consent.

4. *Assessing the Consent Conditions*

Consent must be *manifested* either through words or actions, meaning that the consenting party must express it in some way to the other party. The manifestation of consent is typically the promissory statement if the contract is oral, a handwritten signature on a written contract, and a click if the terms are digital. The manifestation of consent must be *intentional*, meaning the reason or purpose for the manifestation of consent is to communicate consent to the act. Randy Barnett has argued for a consent theory of contract, which adopts the view that manifested assent is actual assent.³⁴ He argues that "courts should presumptively enforce private commitments where there exists a *manifested intention to create a legal relation*."³⁵ But a manifestation of consent is only one of the necessary conditions for consent, and does not have enough moral force to justify enforcement without the other two conditions.

Consent also requires that the consenting party have *knowledge* of what the act of consent entails. Knowledge requires both *understanding* and *information* in light of the consenting party's *motive* for consenting. Voluntariness has two aspects. The first is that of volition or control. The manifestation of consent must have been intentional rather than reflexive, for example. The second is that of desire, and is defined in relation to absence of undue pressure or coercion. Coercion is defined by context, and an evaluation of possible coercion will consider the degree and likelihood of harm. A threat to cause physical harm is coercive, provided that it is credible. Aside from credible threats of violence, there is less certainty about what constitutes coercion.

The legal definition of consent, particularly when it comes to contracts, does not correspond to the normative description of consent. An act of consent will rarely be free from any external influence and a decision maker will almost never

³³ JOEL FEINBERG, *HARM TO SELF: THE MORAL LIMITS OF THE CRIMINAL LAW* 117 (1986). Consequently, risky conduct requires a greater degree of voluntariness, and the more irrevocable the risked harm, the greater the degree of voluntariness required. *Id.* at 118–20.

³⁴ Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 662 (2012) (stating that "consent" is a "manifestation of intention to be legally bound. . .").

³⁵ *Id.* at 655.

have perfect information. Knowledge is an essential component of consent as a normative matter; however, contract law does not require *actual* knowledge in most cases.³⁶ Assessing what the consenting party understands requires inquiring into that party's subjective state, which courts are ill equipped or reluctant to do in many cases. Instead, contract law substitutes *capacity* and *access to information* or *notice* for knowledge.

Some categories of people are deemed to lack the capacity to consent.³⁷ The requirement of capacity serves two purposes. The first is to simplify determination of the "understanding" or competency component of consent: for example, minors are categorically presumed to be too immature to understand the consequences of their consent.³⁸ In some respects, this capacity determination is overbroad because some minors may be able to understand the consequences of their consent, yet they will be deemed to lack legal capacity. The second purpose of capacity is to safeguard against coercion and to simplify determinations of voluntariness. Children and other members of protected classes are deemed to be particularly vulnerable to pressure and less able to guard against it.

The difficulties with consent, and the need to identify and distinguish valid consent from invalid consent, relate to the difficulties in determining whether the necessary conditions have been met in any given situation. While there is general agreement that consent requires sufficient information to make an informed decision,³⁹ what extent and quantity of information is sufficient? Similarly, at what point does voluntary consent become involuntary? What type of external circumstances warrant a conclusion that the consenting party has been deprived of free will?

The determination of legal consent depends, at least to a certain extent, on the behavior of the party seeking consent (the "consent-seeker"). This factor is not a separate condition but helps in the assessment of each of the conditions.

³⁶ *Lietz v. Hansen Law Offices*, 271 P.3d 899, 907 (Wash. Ct. App. 2012) (stating that Washington follows the objective manifestation test for contract formation and a court "cannot import one party's unexpressed, subjective intentions into the writing."); *Behrens v. S.P. Constr. Co.*, 904 A.2d 676, 681 (N.H. 2006) (noting that courts must determine parties' intention under an objective standard); *Frederick Classical Charter Sch., Inc. v. Frederick Cty. Bd. of Educ.*, 164 A.3d 285, 335 (Md. 2017) (noting that Maryland courts employ an objective approach to contract interpretation, which, unless a contract is ambiguous, gives effect to the language as written "without concern for the subjective intent of the parties at the time of formation."); *P&N Invs., L.L.C. v. Frontier Mall Assocs., L.P.*, 395 P.3d 1101, 1107 (Wyo. 2017) (noting that "[a] party's subjective intent is not relevant in contract interpretation cases because we use an objective approach to interpret contracts.").

³⁷ See generally RESTATEMENT (SECOND) OF CONTRACTS § 12-16 (AM. L. INST. 1981).

³⁸ See discussion *infra* Section II.C.

³⁹ See *Byrne v. Prudential Ins. Co. of America*, 88 S.W.2d 344, 347 (Mo. 1935) (noting that "the essential factor of the contractual relationship must obtain, that is, that there be 'an agreement or meeting of the minds of the parties' thereto so that a contract obligatory upon the insurance company could not exist if the other party thereto . . . did not make, or authorize, the application, consent thereto, or have such knowledge of the insurance on his life as to evidence consent thereto or ratification thereof.").

The conduct of the consent-seeker affects the robustness of each of the conditions in a “sliding scale” fashion. An assessment of the validity of consent must include considering whether the consent-seeker diluted one of the conditions by her conduct. For example, the consent-seeker’s lies would dilute the knowledge condition required for consent and a consent-seeker’s threats would dilute the voluntariness condition.

In a typical commercial transaction, if the consent-seeker is acting in good faith, the requirements for finding the consent conditions are minimal.⁴⁰ If the consent-seeker acts in bad faith, however, the existence of the consent conditions must be stronger. A party who takes advantage of another’s ignorance may find the contract can be avoided in some situations. Behavior that is even more egregious, such as unlawful threats or lies, may invalidate the other party’s consent and the contract.⁴¹ Under contract law, whether a party has “freely” or “validly” consented typically hinges upon whether the other party manipulated, exploited, or coerced the ostensibly consenting party. The concept of consent itself is vitiating by force or deception.⁴² A person deprives another of her free will by forcing or deceiving her into an act, including a manifestation of “consent.” Consequently, the presumption of consent created by an outward manifestation may be overcome by evidence that the consent-seeker’s behavior undermined one of the consent conditions.

A party cannot be found to have consented without engaging in an intentional act that communicates consent. If she does engage in that communicative act, however, the consent-seeker is protected against later denial of consent unless the consent-seeker acted wrongfully. The consent-seeker cannot ascertain with certainty the internal state of the consenting party. This is a fundamental and unavoidable weakness of consent. Furthermore, the human mind is error prone, and neuroscience and social science research in the past twenty years has revealed how much.⁴³ Some people may lie if it suits their best interests to do so, such as if a contract no longer proves as profitable as expected, but others lie without intending to do so, simply because they are human. Not only is our recollection of events incomplete and inaccurate, false memories are common, as Daniel Levitin explains:

⁴⁰ In other situations where consent is required, such as medical procedures or sexual consent, much stronger consent conditions are required. This Article focuses on transactions where both parties have only a commercial or economic interest.

⁴¹ See discussion *infra* Part III.

⁴² See discussion *infra* Part III.

⁴³ In his book, *The Organized Mind*, Daniel Levitin writes, “Perhaps the biggest problem with human memory is that we don’t always know when we’re recalling things inaccurately. . . . This faulty confidence is widespread, and difficult to extinguish.” DANIEL J. LEVITIN, *THE ORGANIZED MIND: THINKING STRAIGHT IN THE AGE OF INFORMATION OVERLOAD* 50 (2016).

[T]he act of recalling a memory thrusts it into a labile state whereby new distortions can be introduced; then, when the memory is put back or re-stored, the incorrect information is grafted to it as though it were there all along.⁴⁴

An assessment of contractual consent thus should not be made without considering factors in addition to the internal state of the consenting party. The standard of reasonableness serves an important purpose in this respect—it enables the decisionmaker (the judge, the jury, the arbitrator) to make a determination about the internal state of another individual that would otherwise be susceptible to distortion. The distortion may be intentional (the individual is lying) or unintentional (the individual’s recollection is faulty).

Consequently, the perception of the consent-seeker is integral to an analysis of consent. Objective consent, at least in contract law, is typically viewed as the moment when the manifestation of consent occurred.⁴⁵ The intentional “manifestation of consent” is a communicative act, the meaning of which depends both on how the act is communicated and how it is perceived. A party should not be permitted to behave in a way that leads another party to predictably suffer loss; on the other hand, a party should not unreasonably respond to the words or conduct of another and incur a loss. Each party then is responsible for how her act is perceived by the other party. Imposing an objective standard upon the manifestation of consent condition protects both parties by requiring them to behave in a manner that conforms to business and social norms. The requirement of consent protects the consenting party while the standard of reasonableness protects the consent-seeker.

B. Consent Destruction

Courts generally interpret a manifestation of consent made under the requisite consent conditions to mean that the party has consented to the contract.⁴⁶ Consent, once constructed, nevertheless may be withdrawn. A party consents assuming certain conditions and circumstances. These implied assumptions might later prove to be false. Conditions or circumstances may change the consenting party’s understanding and invalidate consent. Consent construction does not require perfect knowledge nor does it require knowledge of unlikely future events, but in some cases, newly acquired information may weaken or even eliminate the knowledge condition. For example, X agrees to buy Y’s farm, believing that Y’s farm is suitable for farming avocado trees. X later finds out that the soil on Y’s farm contains strange chemicals that make it impossible to grow avocado trees. Although X had consented to purchase Y’s farm, that consent was based

⁴⁴ *Id.* at 56.

⁴⁵ *See* *Specht v. Netscape Commc’ns Corp.*, 306 F.3d 17, 29 (2nd Cir. 2002) (noting that manifestation of assent is the “touchstone of contract.”).

⁴⁶ *Meyer v. Uber Tech., Inc.*, 868 F.3d 66, 80 (2nd Cir. 2017) (finding manifestation of assent and contract formation); *cf.* *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (Cal. Ct. App. 1998) (noting that there must be a manifestation of assent by the parties otherwise “there is no mutual consent to contract and no contract formation.”).

upon misinformation. In other words, the knowledge condition was deficient at the time of contract formation but X did not know it.

Sometimes the new information may have to do with the circumstances surrounding the transaction, and not the transaction itself. This type of additional information is not a deficiency in the information condition because it does not alter the information upon which consent was based. However, it affects the consenting party's motives. For example, X agrees to buy Y's farm, believing that Y's farm is suitable for farming avocado trees. X finds out that he has an illness and is likely to die within the year. X decides that he does not want to spend his savings on the farm, but would rather travel the world while he can. X no longer wishes to purchase Y's farm. X's motive in purchasing Y's farm was to grow avocado trees. The new information—that X will die soon—does not affect whether Y's farm is suitable for farming avocado trees. There was no defect in consent construction; however, the subsequently acquired information has destroyed his consent. This does not, however, mean that Y's performance is automatically excused or that the contract is unenforceable.

Consent destruction should be distinguished from promise enforcement. In the above scenario, X will still have an obligation to purchase Y's farm. But the reason for enforcing the promise is not that X still consents; it is that X *at one time* consented. Some may argue that the reason for enforcing X's promise to purchase the farm is because X agreed to do so; consequently, to bind X at a later time when X no longer wishes to purchase the farm honors X's autonomy. This argument expresses a preference for honoring the desires of an earlier stage X (X¹) over a later stage X (X²). But the conditions necessary for consent no longer exist at this later stage. X² is not voluntarily agreeing to perform. X² is the only X at the time of performance; X¹ no longer exists. The argument then must mean that to honor the value of autonomy, one should be required to keep one's promises regardless of later circumstances. This, however, is not an argument in favor of autonomy; rather, it is an argument in favor of certainty.

Understanding the problems surrounding consent requires recognizing the inherent contradiction of a societal interest in individual autonomy. The contradiction manifests itself in the conflict between the contracting parties' rights and freedoms. An individual's freedom to allocate property rights may conflict with the freedom of another individual to do the same, as it does when the parties have entered into a contract which one of the parties later wishes to avoid. The question is how to resolve the conflict when it arises.

One might argue that the value of autonomy is furthered by making decisions more certain. This can only be true provided that the initial decision was made under perfect consent conditions. Perfect conditions, however, never exist. Before making a decision, an individual rarely has all relevant information. Even if the consenting party has access to all the information possessed by the consent-seeker, additional information may be discovered after contract formation. In many situations, time alters the reasons for consenting or the perceptions of what doing so entails. Consent is specific to a given moment under certain conditions,

and so consent is constructed within those limitations. The more time that elapses between the manifestation of consent/contract formation and contract performance, the greater the likelihood that the consenting party may change her mind.

The temporal disconnect which is a part of every contract does not mean that a consenting party's change of heart at a later date negates the earlier consent. This Article argues that "consent" typically refers to adequate consent construction or the fact that consent existed at one time and that it either (1) continues to exist at the time performance is required, or (2) no longer exists (has been destroyed) but should nevertheless be treated as though it does—put more precisely, the party does *not* consent at the time of performance but other reasons (primarily, the consent-seeker's interests) combined with the past self's consent *outweigh* the present self's lack of consent.

II. CONSENT CONSTRUCTION AND CONTRACT FORMATION

The justification for allowing the courts to adjudicate contractual disputes is that the parties have consented.⁴⁷ Their consent subjects the parties to state interference into what is a private affair. Consequently, consent is a prerequisite to contract formation. This Part examines each of the formation doctrines—offer, acceptance, mutual assent, and consideration—through the lens of consent construction. As this Part explains, each formation doctrine seeks to determine whether the requisite conditions of consent have been established in a given case. A failure of a consent condition means that the contract has not been properly formed.

Before further discussion, a note about terminology. Although courts and commentators often use the terms "assent" and "consent" interchangeably, for purposes of this Article, I use the term *consent* to refer to a party's permission to *another* to engage in an act or activity which would otherwise be impermissible. I will use the term *assent* to refer to the agreement of a party to undertake some action. Assent therefore includes the concept of consent (i.e. permission) but also involves the promissory element involving future participatory activity or performance. For example, assume X enters into a contract with Y where X agrees to pay Y \$250 for Y's used bicycle. X has *assented* to the contract by agreeing to pay Y money in exchange for the bicycle. X has *consented* to the terms by agreeing to give up her right to the \$250 in exchange for the bicycle. Without her consent, Y has no right to the money. Now assume that X has told Y that Y may use X's car when X is not in town. X has not *assented* to anything but she has *consented* to the use of her car by Y when X is out of town. When X returns from an out of town trip to discover that Y has driven her car, X may not claim that Y stole her car.

Consent grants permission; it means that a party will refrain from enforcing certain rights it has against the party to whom it has granted consent. Assent, on

⁴⁷ See Bix, *supra* note 18, at 251 (stating that "consent, in terms of voluntary choice, is—or at least appears to be or purports to be—at the essence of contract law.").

the other hand, is both a promise to perform and consent. A contract allocates rights, which give the promisee the power of enforcement. Consent is a necessary part of a contract but it is not sufficient; assent captures the promise in addition to the permission, both of which are essential to contract formation.⁴⁸

A. *Offer, Acceptance and Mutual Assent*

An offer is a definite expression of a present intent to enter into a contract that gives the offeree the power of acceptance.⁴⁹ Section 24 of the Restatement (Second) of Contracts defines an offer as a “manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that . . . assent to that bargain is invited and will conclude it.”⁵⁰ Assent is always contemporaneous with the manifestation of consent.⁵¹ Performance may occur at a later date, but assent exists when consent is manifested.⁵² If consent is to be the mechanism by which free individuals relinquish or transfer their rights, then it must be a communicative act that indicates how the party feels *at the time the act is communicated*. The manifestation is merely an outward expression of the consenting party’s internal state.

In addition, the terms of an offer must be reasonably certain.⁵³ The requirement of reasonable certainty pertains to the knowledge condition of consent, and the knowledge condition requires both information and understanding. An offer that lacks reasonable certainty does not provide enough information about what is being offered and so neither party would have sufficient information to understand what it is agreeing to undertake. Similarly, an agreement to agree is not enforceable because the parties have not yet assented to the agreement. Because essential terms are missing, the knowledge condition is inadequate and there is no consent and so, no contract.⁵⁴

⁴⁸ This article revisits and further clarifies themes in the author’s earlier work regarding intent. In particular, Part III modifies and further develops the relationship of intent and consent in the context of basic assumption defenses. See Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 U. KAN. L. REV. 473, 509–13 (2008).

⁴⁹ Farnsworth defines an offer as “a manifestation to another of assent to enter into a contract if the other manifests assent in return by some action, often a promise but sometimes a performance. By making an offer, the offeror thus confers upon the offeree the power to create a contract.” E. ALLAN FARNSWORTH, *CONTRACTS* § 3.3 (4th ed. 2004).

⁵⁰ RESTATEMENT (SECOND) OF CONTRACTS § 24 (AM. L. INST. 1981).

⁵¹ See *Hagans v. Haines*, 984 S.W.2d 41, 44 (Ark. Ct. App. 1998) (noting that the meeting of the minds is determined by the expressed or manifested intention of the parties).

⁵² *Id.*

⁵³ RESTATEMENT (SECOND) OF CONTRACTS § 33 (“Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.”).

⁵⁴ See *V’Soske v. Barwick*, 404 F.2d 495, 500 (2nd Cir. 1968) (noting that “if essential terms are omitted from their agreement, or if some of the terms included are too indefinite, no legally enforceable contract will result.”). *But see* Randy E. Barnett, *Consenting to Form Contracts*, 71 *FORDHAM L. REV.* 627, 636 (2002) (arguing that one may consent to unknown terms in a sealed envelope).

Acceptance of an offer requires both a “manifestation of assent to the terms”⁵⁵ and adherence to the terms of the offer.⁵⁶ For the same reason that an offer must be definite and express a present intent to enter into a contract, an acceptance must be definite and unequivocal.⁵⁷ Unlike the straightforward examples used in many first year classes—“John offers to sell his car to Mary”—in many real world transactions, it is not clear which party is the “offeror” and which party is the “offeree.” Rather than the clean volley of an offer met with the return serve of an acceptance, which creates the “magical moment of contract formation,” real world commercial transactions are often complex, with terms added and subtracted during the negotiating and drafting process.⁵⁸ In such cases, courts tend to focus on whether there was “assent” to the contract.⁵⁹

Proper contract formation requires mutual assent, which means that both parties agreed to the same exchange.⁶⁰ They must not have attached materially different meanings to their manifestations.⁶¹ The requirement of mutual assent helps establish the consent condition of knowledge and voluntariness. Parties who have materially different understandings of the agreement cannot be viewed as having both assented to it.

1. *The Knowledge Condition in Two Classic Cases*

A classic case involving mutual assent is *Raffles v. Wichelhaus*, where the parties entered into an agreement for the sale of cotton due to arrive on a ship called *Peerless*.⁶² *Peerless* was apparently a popular name for a ship in the mid 1800's.⁶³ The buyer believed the ship was the one due to sail from Bombay in October; the seller meant the ship due to sale from Bombay in December.⁶⁴ When

⁵⁵ RESTATEMENT (SECOND) OF CONTRACTS § 50 (AM. L. INST. 1981) (“Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.”).

⁵⁶ *Id.* § 58 (“An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered.”).

⁵⁷ *Id.* § 60.

⁵⁸ The Restatement recognizes this reality in § 22 which states: “A manifestation of mutual assent may be made even though neither offer nor acceptance can be identified and even though the moment of formation cannot be determined.” *Id.* § 22.

⁵⁹ *Id.* § 22.

⁶⁰ See *Weddington Prods., Inc. v. Flick*, 60 Cal. App. 4th 793, 811 (1998) (The parties’ outward manifestations must show that all the parties all agreed “upon the same thing in the same sense.”) (citation omitted).

⁶¹ RESTATEMENT (SECOND) OF CONTRACTS § 20.

⁶² *Raffles v. Wichelhaus*, 2 H. & C. 906, 906 (1864).

⁶³ According to one account, there were at least eleven sailing ships called *Peerless* sailing the seas at the time the parties entered into their contract. See A. W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 CARDOZO L. REV. 287, 295 (1989).

⁶⁴ See *Raffles*, 2 H. & C. at 906.

the ship arrived in December, the seller was ready and willing to deliver the cotton to the buyer but the buyer refused to accept it.⁶⁵ The seller sued the buyer.⁶⁶ The court held for the buyer, finding that there was a latent ambiguity regarding the name *Peerless*.⁶⁷ Because the parties had two different ships in mind, there was no agreement.⁶⁸

The buyer expected the cotton to arrive on the October ship, not the one arriving two months later. The buyer should not be forced to purchase cotton on the later arriving ship if it never agreed to do so. The consequence of the misunderstanding was that the seller had a shipload of cotton and no buyer but it was nobody's fault. The latent ambiguity meant that the buyer never agreed to purchase the seller's cotton. Furthermore, the seller could still find another buyer for the cotton. Potential market fluctuations complicate the analysis: if the market price of cotton dropped, the seller would be in the position of having to sell cotton at a lower price. But there is no neutral way to choose one interpretation over the other since neither the buyer nor the seller was at fault. They were speaking of two different shipments, even if the shipment was of the same good. At minimum, the parties to a contract should be aware of the subject matter of the contract. Although both the buyer and the seller contracted for the purchase and sale of cotton, there was no way to determine *which shipment* of cotton. Therefore, there was no way to determine which contract was breached: was it the one for the earlier or later shipment of cotton? If the result seems unfair to the seller who was left with a shipment of cotton and no buyer, consider the consequences of adopting the seller's interpretation. If the seller's interpretation were to prevail, the buyer would have had to purchase the cotton on the later arriving ship. The buyer likely needed the cotton at an earlier time, and when it didn't arrive it may have obtained the goods from another supplier or its purchaser might have found another supplier. On the other hand, the result would have been unfair to the seller if the buyer's interpretation prevailed. The seller did not agree to deliver cotton on the ship sailing from Bombay in October and therefore, it should not be held liable for failing to do so. Neither the buyer nor the seller could make a compelling argument that its interpretation of the contract was the one to which the other had assented so there was no contract.

Consent in the context of contractual assent does not require a high level of knowledge. A party to a contract does not need to understand the meaning of all—or even many—of its terms.⁶⁹ Furthermore, contract law does not require actual consent, it requires only a *manifestation* of consent.⁷⁰ A manifestation of

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 907–08.

⁶⁸ *Id.*

⁶⁹ Barnett, *supra* note 54, at 628–29 (people often fail to read most terms in a form contract yet they press “I agree” and consent to the terms they may not understand).

⁷⁰ Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 467 (2006) (user manifests assent to terms of the shrink-wrap by “engaging in a particular course of conduct that the license

consent does not mean that a party has actually assented.⁷¹ It means only that a reasonable person would have understood the manifestation of consent to indicate that the party assented.⁷² An objective standard is required to reduce instances of deception, faulty memories, and, perhaps most importantly, wasted effort on the part of the consent-seeker who believed there was a contract.

But assent is more complicated than what the doctrinal rules might suggest. Some courts are “act-oriented” while others are “intent-oriented.”⁷³ Act-oriented courts focus on *what* the parties did,⁷⁴ while intent-oriented courts consider *why* they did it.⁷⁵ An act-oriented approach assumes that a person who signed a written agreement has agreed to its terms. This approach looks at the product of the manifestation of assent—the signed agreement. This perspective reflects the so-called “Duty to Read,” which presumes that someone who signs a contract has read its contents.⁷⁶ Intent-oriented courts, on the other hand, are contextualist in

specifies constitutes acceptance.”); Susan E. Gindin, *Nobody Reads Your Privacy Policy or Online Contract? Lessons Learned and Questions Raised by the FTC’s Action Against Sears*, 8 NW. J. TECH. & INTELL. PROP. 1, 13 (2009) (party who clicked “I agree” twice manifests assent and cannot later argue he did not read all the terms in the contract); RESTATEMENT (SECOND) OF CONTRACTS § 211 cmt. b. (AM. L. INST. 1981) (“Customers do not in fact ordinarily understand or even read the standard terms. They trust to the good faith of the party using the form and to the tacit representation that like terms are being accepted regularly by others similarly situated. But they understand that they are assenting to the terms not read or not understood, subject to such limitations as the law may impose.”); Paul J. Morrow, *Cyberlaw: The Unconscionability/Unenforceability of Contracts (Shrink-Wrap, Clickwrap, and Browse-Wrap) on the Internet: A Multijurisdictional Analysis Showing the Need for Oversight*, 11 PITT. J. TECH. L. & POL’Y 1, 28 (2011) (“Most ordinary people do not read these exculpatory provisions, forum selection clauses, or other provisions in clickwrap/shrink-wrap or browser-wrap agreements. Even if the provisions are read, most people do not understand the language.”).

⁷¹ The Restatement states that a party’s conduct “may manifest assent even though he does not in fact assent.” RESTATEMENT (SECOND) OF CONTRACTS § 19(3).

⁷² 17A Am. Jur. 2d Contracts § 30 (2017) (“The court’s inquiry in determining whether mutual assent exists is whether a reasonable person would, based upon the objective manifestation of assent and all the surrounding circumstances, conclude that the parties intended to be bound by the contract.”); *In re Quantification Settlement Agreement Cases*, 201 Cal. App. 4th 758, 798 (Cal. Ct. App. 2011) (“Contract formation is governed by objective manifestations, not the subjective intent of any individual involved. The test is ‘what the outward manifestations of consent would lead a reasonable person to believe.’”).

⁷³ Melissa Robertson, *Is Assent Still a Prerequisite for Contract Formation in Today’s Economy?*, 78 WASH. L. REV. 265, 270 (2003) (“Whether a court finds that a user manifested assent to an online contract may depend largely on whether the court applies a subjective or objective theory of assent.”).

⁷⁴ *Id.* at 270–71.

⁷⁵ Wayne Barnes, *The Objective Theory of Contracts*, 76 U. CIN. L. REV. 1119, 1123 (2008) (“At one end of the spectrum is the subjective approach, requiring a ‘meeting of the minds.’” And at the other end is the objective approach, which, uses “the outward appearance, or manifestation, of the parties’ intention.”); Robertson, *supra* note 73, at 270 (“Under the subjective theory, a court examines the actual intentions of the parties and requires, as often stated, a ‘meeting of the minds.’”).

⁷⁶ Charles L. Knapp, *Is There a “Duty to Read”?*, 66 HASTINGS L.J. 1083, 1085–86 (2015) (describing the understanding that “A person signing an agreement has a duty to read it and,

approach. They consider the parties' intent at the time the contract was formed, and, in doing so, consider circumstances before and after formation. Accordingly, the fact that the contract was signed is less significant than the reason *why* the parties signed it. The intent of the parties in entering into the contract—rather than the act of signing the contract—is what matters.⁷⁷

Assume that the contract was written in English and the offeree did not know how to read English. Assume further that the offeree was told to sign the contract along with other documents, and given only a few minutes to do so. Under those circumstances, would a reasonable person believe that the offeree's signature on the contract manifested assent? Or would the signature merely serve as protection for the offeror, not because the offeror believed that the offeree assented but because the offeror knew that a court would view the signature on the page as assent? The signature on the page, in other words, is the act that signifies assent. But where the act is one that a reasonable person should know does *not* in fact signify assent, why should it be allowed to substitute for assent? Although it may for those courts which are act-oriented, it does not for those courts which are intent-oriented.

The Restatement's approach to interpretation reflects an intent-oriented perspective. Section 202 states, in part, as follows:

- (1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
- (2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
- (3) Unless a different intention is manifested,
 - (a) [W]here language has a generally prevailing meaning, it is interpreted in accordance with that meaning;
 - (b) [T]echnical terms and words of art are given their technical meaning when used in a transaction within their technical field.⁷⁸

Under this approach, courts should not interpret the words and conduct that comprise a contract in a vacuum but in “light of all the circumstances” and in

absent a showing of fraud, if the person is capable of reading and understanding the contract then he is charged with the knowledge of what the contract says. . . . He cannot avoid the consequences of what he signed by simply saying that he did not know what he signed.”); Wayne R. Barnes, *Toward a Fairer Model of Consumer Assent to Standard Form Contracts: In Defense of Restatement Subsection 211(3)*, 82 WASH. L. REV. 227, 227 (2007) (“[T]he objective theory of contracts . . . provides that a party's manifestations of assent are taken to mean what a reasonable party would think they mean.”).

⁷⁷ Aaron D. Goldstein, *The Public Meaning Rule: Reconciling Meaning, Intent, and Contract Interpretation*, 53 SANTA CLARA L. REV. 73, 95, 102 (2013) (“[C]ourts look to extrinsic evidence to determine the subjective intent of the parties. . . .”); Kim, *supra* note 48, at 481–83 (it is important to examine “both why the party entered into the contract, and the relevant circumstances.”); see also Shahar Lifshitz & Elad Finkelstein, *A Hermeneutic Perspective on the Interpretation of Contracts*, 54 AM. BUS. L.J. 519, 520 (2017) (there are two dominant approaches in interpreting contracts: “[T]he textualist and the contextualist.”).

⁷⁸ RESTATEMENT (SECOND) OF CONTRACTS § 202 (AM. L. INST. 1981).

accordance with the “principal purpose” of the parties.⁷⁹ The purpose of interpretation is to carry out the intent of the parties; not simply to enforce the contract.⁸⁰ The words themselves are not conclusive, even if they are unambiguous; rather, language is given its common meaning “unless a different intention is manifested.”

The court then may—and *should*—look at circumstances prior to formation that may be relevant to the parties at the time of formation. Words and conduct should be considered in the context of prior interactions between the parties rather than as if they were spoken for the first time between them. An intent-oriented approach recognizes that each party has a certain responsibility to the other party to avoid misunderstandings. Restatement Section 201 states:

- (1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
- (2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
 - (a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
 - (b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
- (3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.⁸¹

By focusing on what each party knows about what the *other* party knows, the Restatement approach considers the blameworthiness of each party as part of the knowledge condition of consent. This rule of interpretation essentially imposes a type of “duty” on each party to correct the misunderstanding of the other rather than allowing that party to take advantage of it.⁸² I use the term “duty” here as an affirmative obligation that, although not giving rise to an independent cause of action, results in an interpretative preference against the party who is

⁷⁹ *Id.* § 202 cmt. b–c.

⁸⁰ See *McDonald’s Corp. v. Sandbothe*, 814 S.W.2d 665, 668 (Mo. Ct. App. 1991) (noting that in the absence of an unambiguous lease term indicating the date of commencement, the court will be forced to interpret the parties’ intent in light of circumstances surrounding the execution of the contract).

⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 201 (AM. L. INST. 1981).

⁸² Joshua M. Glasser, *New York and Delaware’s Surprising Doctrinal Dissonance Concerning the Admissibility of Undocumented Contractual Intent*, 41 DEL. J. CORP. L. 859, 893 (2017) (“[There could be no meeting of the minds sufficient to form a valid contract if one party had reason to know the other party did not share its understanding of the ambiguous language and was unwilling to accept such understanding, but signed the contract nonetheless. . . . the contract should be construed against the party who apprehended the misunderstanding of the other party yet failed to stop it because that party was on notice that the contract could be construed in such fashion but assumed the risk by failing to act as a reasonable and forthright negotiator. As such, it seems only fair to effectuate the meaning of the party who did not understand the provision could mean something else.”).

blameworthy. If neither party is blameworthy, then there is no interpretive preference and no way to determine which meaning should prevail. Accordingly, there is no contract (as in *Raffles v. Wichelhaus*).⁸³

Another casebook favorite, *Embry v. Hargadine, McKittrick Dry Goods Co.*,⁸⁴ illustrates how these principles were reflected in the common law long before the adoption of the Restatement (Second) of Contracts. Charles Embry was employed by Hargadine, McKittrick Dry Goods Co. under a written contract that was due to expire on December 15, 1903.⁸⁵ His job was to select samples for the company's traveling salesmen.⁸⁶ Embry testified that several times prior to the termination of the contract, he had tried to renew his contract with the company's president, Thos. H. McKittrick, for another year on the same terms.⁸⁷ Each time, McKittrick postponed the decision.⁸⁸ On December 23, Embry told McKittrick that his contract had lapsed eight days previously.⁸⁹ Embry said that if he were to find employment with other firms, he needed to do it by January 1st, so if McKittrick wanted to retain his services, he must renew his contract or he would quit immediately.⁹⁰ Embry reminded McKittrick that he had requested a renewal on two other occasions.⁹¹ McKittrick then asked Embry how things were going in his department, and Embry replied that his department was busy.⁹² McKittrick responded, "Go ahead, you're all right. Get your men out, and don't let that worry you."⁹³

McKittrick's recollection of the meeting was somewhat different. He said that he was in the midst of preparing a report for a stockholders' meeting when Embry told him that he would quit if his contract were not immediately renewed.⁹⁴ In response, McKittrick said,

Mr. Embry, I am just getting ready for the stockholders' meeting to-morrow. I have no time to take it up now. I have told you before I would not take it up until I had these matters out of the way. You will have to see me at a later time. I said: 'Go back upstairs and get your men out on the road.' I may have asked him one or two other questions relative to the department, I don't remember. The whole conversation did not take more than a minute.⁹⁵

⁸³ It is assumed that the parties have given words their generally prevailing meaning and that they have assumed that the other has done so; section 201 applies only where one or both parties have adopted a meaning that differs from its generally prevailing meaning.

⁸⁴ *Embry v. Hargadine, McKittrick Dry Goods Co.*, 105 S.W. 777 (Mo. Ct. App. 1907).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.* at 777-78.

Embry worked until February 15th, when he was notified that his employment would be discontinued.⁹⁶

The court phrased the central issue in the case as follows: “Did what was said constitute a contract of re-employment on the previous terms irrespective of the intention or purpose of McKittrick?”⁹⁷ The court held yes, that

though McKittrick may not have intended to employ Embry by what transpired between them according to the latter’s testimony, yet if what McKittrick said would have been taken by a reasonable man to be an employment, and Embry so understood it, it constituted a valid contract of employment for the ensuing year.⁹⁸

In reaching its conclusion, the court referred to the context of the conversation between the two men.⁹⁹ In Embry’s version, the conversation took place after Embry had demanded a renewal of his contract, after having been put off for a while and having only a few days in which to seek employment with other companies.¹⁰⁰ In light of these circumstances, McKittrick’s response, “Go ahead, you are all right. Get your men out and do not let that worry you,” could only be reasonably interpreted as assent to Embry’s demand that he be employed for another year and that Embry “had the right to rely on it as an assent.”¹⁰¹

It was not unimaginable for McKittrick, a busy company president preparing for a meeting, to have spoken the words as a way to dismiss a pestering employee. But it wasn’t right for him to do so given the circumstances. The court focused on Embry’s interpretation of McKittrick’s words, not McKittrick’s explanation for his words.¹⁰² Yet, McKittrick’s words standing alone—“Go ahead, you’re all right. Get your men out and do not let that worry you”—are, at best, ambiguous as a statement of reemployment. What the court meant was McKittrick should have realized how Embry would have interpreted his words.

But shouldn’t Embry have realized how McKittrick would have interpreted *his* words? The court implicitly addressed this issue and found that Embry was not at fault.¹⁰³ Embry and McKittrick both understood Embry’s intent by his words. Even in McKittrick’s version of events, Embry threatened to quit immediately unless renewed.¹⁰⁴ McKittrick’s response, in light of Embry’s threat, was either assent to that threat (Embry’s view) or an unresponsive, misleading, and manipulative delaying tactic (McKittrick’s view). Either way, McKittrick is at fault.¹⁰⁵

⁹⁶ *Id.* at 777.

⁹⁷ *Id.* at 778.

⁹⁸ *Id.* at 779.

⁹⁹ *Id.* at 778.

¹⁰⁰ *Id.* at 777.

¹⁰¹ *Id.* at 779.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 778.

¹⁰⁵ Embry testified that when he learned that he would be discharged, he complained to McKittrick that it violated their contract. He stated that McKittrick blamed the termination of

The usual way to explain the case is to say that Embry made an offer to which McKittrick assented by using words that a reasonable person would understand as acceptance.¹⁰⁶ The moment McKittrick says the words that a reasonable person could interpret as acceptance, a contract is formed. But this explanation discounts the relevance of the circumstances leading to formation and ignores what transpired *afterward*. Imagine that McKittrick contacted Embry later that evening and said, “I’ve had some time to think about it now that I’m done preparing for the meeting. I don’t think we’ll be renewing your contract.” Under this counterfactual, it is doubtful that the court would have interpreted McKittrick’s earlier statements as an acceptance that created an enforceable contract. Rather, his subsequent statements would have clarified the ambiguity of what he said earlier and his actions would have been viewed as reasonable and undertaken in good faith.

The contract between McKittrick and Embry can best be described as an implied-in-fact contract. McKittrick’s words taken alone may not constitute either an acceptance of Embry’s offer to continue working on the same terms or an offer to renew Embry’s contract. But the words spoken in response to Embry’s threat to quit *and* the subsequent actions of both parties, make clear that they had agreed to renew the contract.

Mutual assent means that each party has assented to the contract.¹⁰⁷ Whether McKittrick assented is only part of the equation; Embry’s assent constitutes the other part. McKittrick understood what Embry was asking him. The information that Embry conveyed—that he would quit if his contract were not renewed—was clear. It could be argued that McKittrick was under time constraints, and that Embry should not have interrupted him during this busy time. Embry’s actions, however, were not improper or coercive. He was under his own time constraints, as he had tried to raise the issue on prior occasions and had only a few days to find another job. The contract required McKittrick to pay Embry for a year, presumably under the same terms, so it required no more from him than a financial commitment for a reasonable sum and a reasonable time period.

employment upon the board of directors, which would indicate that he had in fact agreed to renew Embry’s contract. *Id.*

¹⁰⁶ See Keith A. Rowley, *You Asked for It, You Got It . . . Toy Yoda: Practical Jokes, Prizes, and Contract Law*, 3 NEV. L.J. 526, 534–35 (2003) (a reasonable man would have believed McKittrick renewed Embry’s employment contract, “[T]he court found that ‘no reasonable man would construe [McKittrick’s] answer to Embry’s demand that he be employed for another year [] otherwise than as an assent to the demand,’ and, therefore, ‘Embry had the right to rely on it as an assent.’”).

¹⁰⁷ ARTHUR L. CORBIN ET. AL., CORBIN ON CONTRACTS pt. 1, ch. 4, § 4.13 (2017) (“It takes two to make a ‘bargain,’ although there are some ‘unilateral’ contracts that can be made without any expression of assent by the promisee. The great majority of contracts are bargaining contracts, the purpose of which is to effect an exchange of promises or of performances. To attain this purpose, there must be mutual expressions of assent to the exchange. These expressions must be in agreement, but it is not necessary that they shall consist of identical words or identical acts.”).

By contrast, Embry's consent to the implied contract would have been improperly obtained under McKittrick's version. Embry made clear that he would not have voluntarily continued working without a contract.¹⁰⁸ McKittrick wanted Embry to continue working but didn't want to accede to his demands. Instead, McKittrick used words that he knew were ambiguous or, at best, non-committal, to lead Embry to believe that the contract had been renewed so that he would continue working during the busy season. McKittrick claimed he did not intend to renew the contract, but he did allow Embry to continue working for him knowing what Embry expected. Thus, McKittrick was either deceptive and manipulative when he spoke to Embry using non-committal words, or he was lying to the court about not intending to renew the contract.

In the counterfactual presented above where McKittrick contacts Embry later that evening to clarify his intent, McKittrick's subsequent and timely actions would indicate good-faith behavior. Furthermore, Embry would not yet have relied upon McKittrick's response in any substantially detrimental way. He would still have had time to seek other employment. McKittrick's actions in the counterfactual appear less insensitive, and his preoccupation with the impending meeting seems more credible and sympathetic and less manipulative. In the actual case, McKittrick allowed Embry to continue working at the company for several months after the original employment contract lapsed.¹⁰⁹ Embry did so only because he thought he had a yearlong contract.¹¹⁰ If McKittrick never intended to renew Embry's contract, he obtained Embry's consent through deception. If he did intend to renew it, he was lying to the court. Under these situations, the court did the only thing that wouldn't sanction lying or deceptive and manipulative behavior—it enforced the contract.¹¹¹

B. *Consideration*

Consideration refers to both the exchange act and the subject matter of the exchange. It also encompasses something more: the thing being bargained for is something that a party *wants* and it is the reason she is giving up what the other party wants.¹¹² A simple example is X promises to pay Y \$50 in exchange for a chair. X is promising to give up \$50 because X wants the chair; Y is promising to give up the chair because Y wants the \$50. Lon Fuller wrote that legal formalities, such as the requirement of consideration, fulfill several functions.¹¹³ The first is evidentiary. A writing (whether under seal or not) provides evidence of

¹⁰⁸ *Embry*, 105 S.W. at 778.

¹⁰⁹ *Id.* at 777–778.

¹¹⁰ *Id.* at 779.

¹¹¹ *Id.* at 780.

¹¹² RESTATEMENT (SECOND) OF CONTRACTS § 71–81 (AM. L. INST. 1981).

¹¹³ Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799–801, 820 (1941). While Fuller's discussion of legal formalities focused on the use of a seal as consideration, the discussion included and for purposes of this section extends to the requirement of a bargained for exchange without regard to the use of a seal.

the parties' agreement. A bargain, too, provides evidence of the parties' agreement, as it is more believable that a party would have made a promise in exchange for something than for nothing.¹¹⁴ They also fulfill a cautionary or deterrent function by checking impulsive actions, or, as Fuller stated, ensuring "the circumspective frame of mind appropriate in one pledging his future."¹¹⁵ The third function of consideration is that of "channeling," which refers to marking or signaling the enforceable promise so there is a "simple and external test of enforceability."¹¹⁶ Fuller noted that there is an "obvious . . . intimate connection between them," as whatever accomplishes one of the functions will also tend to accomplish the other two.¹¹⁷

These three functions can be viewed as ensuring or establishing different conditions of consent. Consent construction requires an intentional manifestation of consent.¹¹⁸ Consideration can provide evidence of the promisor's intentional manifestation of consent. The knowledge condition requires both information and understanding. One of the many cognitive shortcomings of humans is that we often act impulsively and without deliberation.¹¹⁹ The cautionary and channeling functions are intended to restrain the human tendency toward impulsivity and myopia, and enhance the condition of knowledge. The concept of a bargain captures more than either the exchange or the goods being exchanged. It also captures the notion of motive or desire, which means the reason for each party offering the thing is because he or she wants what the other party is offering. The requirement of desire, inherent in the concept of a bargain, thus captures the consent condition of voluntariness.

1. *Consideration and the Voluntariness Condition in Two Classic Cases*

Two classic cases illustrate the way the doctrine of consideration works to ensure proper consent construction. In *Dougherty v. Salt*, a woman went to visit her orphaned nephew.¹²⁰ After his guardian told her how well he was doing in school, the aunt said that she loved her nephew very much and would take care of him.¹²¹ The guardian expressed doubt, and to show her sincerity, the aunt wrote a note for \$3,000, payable at her death or before, which contained the

¹¹⁴ See *id.* at 800.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 801.

¹¹⁷ *Id.* at 803.

¹¹⁸ Andrea M. Matwyshyn, *Technoconsent(s)us*, 85 WASH. U.L. REV. 529, 535 n.21 (2007) (manifestation of consent in online contracts "presumes the consumer is capable of finding the contract and is able to review it" but they are "ostensibly saying 'yes' to a contract that likely cannot be understood by many users and usually goes unread.").

¹¹⁹ See Stephen B. Manuck et al., *A Neurobiology of Intertemporal Choice*, in TIME AND DECISION: ECONOMIC AND PSYCHOLOGICAL PERSPECTIVES ON INTERTEMPORAL CHOICE 139 (George Loewenstein et al. eds., 2003) (noting that human beings often devalue later rewards over more immediate ones).

¹²⁰ *Dougherty v. Salt*, 125 N.E. 94, 94 (N.Y. 1919).

¹²¹ *Id.*

words “value received.”¹²² The aunt died before she paid the note.¹²³ The court found that there was no consideration for the promissory note and so it was an unenforceable gratuitous promise.¹²⁴ In the second classic case, *Hamer v. Sidway*, an uncle promised his nephew \$5,000 if the nephew refrained from smoking, drinking and gambling until he was twenty-one years old.¹²⁵ After the nephew performed, the uncle wrote him a letter acknowledging that the uncle owed his nephew money, but stating that he wanted to hold the money until his nephew was ready to use it.¹²⁶ The uncle died before paying the money to his nephew.¹²⁷ The uncle’s executor refused to pay, claiming the promise was made without consideration.¹²⁸ The court found that the nephew’s abstinence constituted a legal detriment which was sufficient consideration.¹²⁹

As a matter of consideration doctrine, the cases are straightforward. In *Dougherty v. Salt*, the aunt’s promise to pay the nephew was impulsive and induced by guilt.¹³⁰ Writing out the note and the words “value received,” failed to suffice as consideration primarily because the plaintiff acknowledged to the court that no value was in fact received, despite the words to the contrary.¹³¹ The aunt did not request that her nephew *continue* to do well in school.¹³² Her promise to pay him money could be seen as a gift because he had *already* done well in school.¹³³ Conversely, in *Hamer v. Sidway*, the uncle got what he bargained for, which was a nephew who did not smoke, drink, or gamble until he was twenty-one years of age.¹³⁴

These two cases show the role of consideration in consent construction. The aunt in *Dougherty v. Salt* acted impulsively, apparently with no intention of giving her nephew money when she set out to pay him a visit.¹³⁵ When she expressed her love for her nephew and her plans to take care of him, the following conversation ensued:

Guardian: I know you do, Tillie, but your taking care of the child will be done probably like your brother and sister done, take it out in talk.

¹²² *Id.* at 94–95.

¹²³ *Id.* at 94.

¹²⁴ *Id.*

¹²⁵ *Hamer v. Sidway*, 27 N.E. 256, 256 (N.Y. 1891).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 257.

¹²⁹ *Id.*

¹³⁰ *Dougherty v. Salt*, 125 N.E. 94, 94 (N.Y. 1919) (showing a conversation between the aunt and the boy’s guardian that portrays a situation where the aunt agreed to make out the note because she felt *pressure* from the guardian to *do the right thing*).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* (stating that the boy’s guardian said, “Yes; that he is getting along very nice, and getting along nice in school.” The guardian then showed the aunt the boy’s progress reports).

¹³⁴ *Hamer v. Sidway*, 27 N.E. 256, 258 (N.Y. 1891).

¹³⁵ *Dougherty*, 125 N.E. at 94.

Aunt Tillie: I don't intend to take it out in talk; I would like to take care of him now.

Guardian: Well, that is up to you.

Aunt Tillie: Why can't I make out a note to him?

Guardian: You can, if you wish to.

Aunt Tillie: Would that be right?

Guardian: I do not know, but I guess it would; I do not know why it would not.

Aunt Tillie: Well, will you make out a note for me?

Guardian: Yes, if you wish me to.

Aunt Tillie: Well, I wish you would.¹³⁶

The aunt then filled out the note and handed it to her nephew with the words, "You have always done for me, and I have signed this note for you. Now, do not lose it. Some day it will be valuable."¹³⁷ The aunt was not forced to write the promissory note, but she was pressured to do so under circumstances that suggest that her actions were not entirely voluntary (e.g. the guardian's shaming words, her well-behaved nephew present and listening to every word). She repeatedly asked whether it would be acceptable to write him a note (why *wouldn't* it be acceptable to give her nephew money?), which suggests reluctance. There is no doubt that she made the promise. Yet, the circumstances under which she did suggest that consent was not solidly constructed. The pressure that she felt does not rise to the level of coercion, but her promise may not have reflected her true desire. If the promise to pay her nephew did reflect her true desire, she could have left him the money in her will. The nephew sued the aunt's testatrix,¹³⁸ which suggests that she did not mention the note in her will or leave any provision for her nephew in it. While supporting her nephew may be admirable, the aunt has the right to decide what to do with her property. Even if her intent to pay the money was genuine at the time she made the note, she might have changed her mind after the visit, when she had a chance to reflect upon whether it was something she really wanted to do. The owner of property has the right to give it away, or she can decide to keep it.¹³⁹ In order to limit her freedom to do that, there must be a countervailing interest. This is what the requirement of consideration does best: it ensures that an individual's freedom to control her property is restricted only for good reason. The requirement of a bargain finds that "good reason" in the *other* party's self-imposed limitation on the exercise of a freedom. In other words, the requirement of consideration protects the autonomy interest of both the promisor and the promisee.¹⁴⁰ It leaves the promisor free if

¹³⁶ *Id.*

¹³⁷ *Id.* at 95.

¹³⁸ *Id.* at 94.

¹³⁹ *State ex rel. Wis. Edison Corp. v. Robertson*, 299 N.W.2d 626, 630 n.11 (Wis. Ct. App. 1980) (noting that real property ownership gives the owner the right to enter the property, use it, sell it, lease it, or give it away).

¹⁴⁰ Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1299 (1998) (legal rules such as the consideration requirement can protect the promisor and promisee); 14 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1636

the promisee is also free; it binds the promisor if the promisee is similarly bound. In *Dougherty v. Salt*, Aunt Tillie's good nephew was not restricting his freedom in any way; therefore, there was no reason to restrict Aunt Tillie.

Hamer v. Sidway provides a useful contrast to *Dougherty*. William Story, the uncle of William Story, 2d, approached his nephew at a large family celebration and made a promise to pay the nephew \$5,000 if the nephew refrained from drinking, smoking and gambling until he was twenty-one years old.¹⁴¹ The uncle's promise was made "in the presence of the family and invited guests."¹⁴² The uncle appears to have made the promise on his own initiative and without prodding from anyone.¹⁴³ After the nephew fully performed, he wrote to notify his uncle.¹⁴⁴ The uncle responded a few days after receiving the letter:

Dear Nephew:

Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars, as I promised you. I had the money in the bank the day you was twenty-one years old that I intend for you, and you shall have the money certain. Now, Willie, I do not intend to interfere with this money in any way till I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. . . . This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. I was ten long years getting this together after I was your age. . . . Truly yours, W.E. Story. P.S. You can consider this money on interest.¹⁴⁵

The nephew agreed that the money should remain with his uncle, but the uncle died several years later without having paid over the money to the nephew.¹⁴⁶ The executor of the uncle's estate rejected the nephew's claim on the grounds that the contract was without consideration.¹⁴⁷ The executor claimed that the nephew, by refraining from smoking and drinking, was benefitted while the uncle was not.¹⁴⁸ The court rejected that argument, holding that the nephew had

(3d ed. 1972) (In determining what is reasonable, consideration should be given to: (1) Whether the promise is broader than that which is necessary to protect some legitimate interest of the promisee, (2) the effect of the promise on the promisor, and (3) the effect of the promise on the public).

¹⁴¹ *Hamer v. Sidway*, 27 N.E. 256, 256 (N.Y. 1891).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ The claim was actually brought by someone who had acquired it through several mesne assignments from the nephew, which is irrelevant for this discussion.

¹⁴⁸ *Hamer*, 27 N.E. at 257.

given up his lawful freedom of action and it did not matter whether the uncle benefitted.¹⁴⁹

The conditions of consent in *Hamer v. Sidway* are clearly established. The uncle made the offer to the nephew unprompted. He made it freely and without any pressure from anyone. Although the uncle may have been in a celebratory mood given the occasion, the offer does not seem to have been made impulsively. Significantly, he acknowledged his obligation and stated in a letter that the money belonged to his nephew. The acknowledgement by the uncle years later, in writing, indicates that the promise was made sincerely, deliberately, and thoughtfully.

But what if the uncle had made the initial offer in an impulsive, celebratory, and perhaps even drunken state of mind? If he had promptly retracted his offer, there would have been no contract and he would not have been bound. The offer created a unilateral contract, meaning that the nephew could only have accepted by performance, and traditional contract law permitted an offeror to revoke an offer for a unilateral contract before performance had been completed.¹⁵⁰ Even under Section 45 of the Restatement (Second) of Contracts, it is doubtful that the nephew's abstinence from drinking and smoking for an evening or even a few days would constitute partial performance to create an option contract binding the uncle.¹⁵¹ On the other hand, a modern court would probably find a revocation just prior to the nephew's twenty-first birthday to be ineffective. The nephew did not abstain from drinking and smoking simply because his uncle requested it; he did it in order to receive \$5,000. To change the bargain after he has already substantially performed would change the nature of the act from one of agency to one obtained through manipulation. Thus, the nephew's performance would have been an expression of his uncle's will, rather than his own.

C. *Capacity to Contract, Knowledge, and Voluntariness*

Certain categories of people are deemed incapable of consent, and, thus, incapable of entering into contracts.¹⁵² Children (typically those under eighteen) and the mentally infirm may escape contracts because courts presume they lack the ability to meet the knowledge condition necessary for valid consent.¹⁵³ Furthermore, their vulnerability makes them more susceptible to exploitation by others and so raises concern that an agreement entered into by these vulnerable parties may not be entirely voluntary.

¹⁴⁹ *Id.*

¹⁵⁰ See LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 446 (8th ed. 2006).

¹⁵¹ RESTATEMENT (SECOND) OF CONTRACTS § 45 (AM. L. INST. 1981) ("Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.").

¹⁵² See generally *id.* §§ 12–16.

¹⁵³ *Id.* § 14.

Yet, the law recognizes the complexity of human behavior and that those in need of protection may sometimes be the ones who seek unfair advantage. The general rule is that contracts are voidable by the protected class member but there are several caveats and notable exceptions.¹⁵⁴ There are some transactions that the minor cannot avoid on public policy grounds, such as child support agreements.¹⁵⁵ Furthermore, as with the other formation doctrines, the law in this area considers the actions and intention of both parties and considers whether either party has gained from the agreement.¹⁵⁶ Two consent conditions are particularly relevant when assessing lack of capacity defenses: knowledge and voluntariness.¹⁵⁷ The actions of the consent-seeker are especially relevant and subject to careful scrutiny given the vulnerabilities of protected class members.

A minor may avoid both an executory contract and an executed transaction.¹⁵⁸ The adult party to the transaction may not. The infancy doctrine presumes that the minor lacks the knowledge and voluntariness conditions necessary for valid consent. An adult who contracts with a minor is essentially presumed to be taking advantage of the minor and so should not benefit from engaging in bad behavior. But where there was no bad faith behavior on the part of the adult, courts will not allow the minor to use the infancy doctrine to take unfair advantage of the adult.¹⁵⁹ Generally, a minor who disaffirms a contract must reject all of it and cannot retain any of the benefits.¹⁶⁰ A minor who avoids a contract may still be held accountable for benefits received.¹⁶¹ If the minor receives food, clothing, or other “necessaries,” she will be accountable for their reasonable value.¹⁶² In some states, the minor may not recover money that the minor has already paid for furnished goods or services, although the adult would not be able to recover unpaid but owed money from the minor for furnishing those goods and services.¹⁶³ In some states, the adult may obtain restitution where the minor made a misrepresentation of age.¹⁶⁴ Finally, if the minor ratifies the transaction after reaching the age of majority, the transaction is no longer voidable.¹⁶⁵

¹⁵⁴ *Id.* § 12.

¹⁵⁵ JOSEPH M. PERILLO, *CONTRACTS* § 8.2, at 262 (7th ed. 2014) (noting that “there are certain situations where the infant cannot avoid the contract” including “if a minor male contracts to support his out-of-wedlock child, this promise cannot be disaffirmed as he is under a legal obligation to support his children.”).

¹⁵⁶ *See generally* *RESTATEMENT (SECOND) OF CONTRACTS* §§ 12–16 (AM. L. INST. 1981).

¹⁵⁷ *Id.*

¹⁵⁸ PERILLO, *supra* note 155, § 8.1, at 261.

¹⁵⁹ *Id.*

¹⁶⁰ Cheryl B. Preston & Brandon T. Crowther, *Minor Restrictions: Adolescence Across Legal Disciplines, the Infancy Doctrine, and the Restatement (Third) of Restitution and Unjust Enrichment*, 61 U. KAN. L. REV. 343, 344, 348–49 (2012).

¹⁶¹ *Id.* at 348–49.

¹⁶² FARNSWORTH, *supra* note 49, § 4.5, at 225.

¹⁶³ *Id.* at 224–25.

¹⁶⁴ *Id.* at 225.

¹⁶⁵ PERILLO, *supra* note 155, § 8.11, at 279–80.

Another category of protected parties consists of the mentally infirm. While capacity based on age can be determined with a bright-line rule, capacity based upon mental fitness cannot. Mental infirmity is variable and exists on a continuum. It can mean the party lacks the ability to understand to what she is consenting. In some cases, however, an individual may understand what she is doing but is unable to adequately control her actions. The other party may know of her diminished capacity and take advantage of the situation. While moderately or minimally diminished capacity of the consenting party *alone* may not make the contract voidable, the knowledge of the consent-seeking party regarding that diminished state makes the situation exploitative and the contract voidable. Restatement § 15 reflects this variable approach to consent by finding a lack of capacity to contract where the party has either: (1) greatly diminished cognitive abilities, or (2) moderately diminished cognitive abilities with advantage-taking by the other party:

- (1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect
 - (a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
 - (b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.¹⁶⁶

The Restatement position recognizes that if an individual *cannot* understand the transaction, she cannot consent.¹⁶⁷ Even where the party *is* capable of understanding the transaction, if she no longer wishes to continue with the transaction and thus, no longer consents, the court will not find worthy of protection the interest of the consent-seeker who acted opportunistically.¹⁶⁸

III. CONSENT AND CONTRACT ENFORCEMENT

Despite a “manifestation of consent,” a party may seek to avoid contractual obligations by using one of several contract claims or defenses. The basis for avoidance may be either that the party never consented (consent was never constructed and so there was no contract formation) or that, due to additional information or changed circumstances, the party no longer wishes to perform (consent was destroyed). The defenses have different effects and may render a contract void, voidable or unenforceable.¹⁶⁹ The distinction between “void” and “voidable” has confused many law students, attorneys, judges and more than a few legislators.¹⁷⁰ One court noted that there are “innumerable cases in which the word

¹⁶⁶ RESTATEMENT (SECOND) OF CONTRACTS § 15 (AM. L. INST. 1981).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* § 15 cmt. f.

¹⁶⁹ See discussion *infra* Part III.

¹⁷⁰ One court noted that “[t]he word ‘void’ is not always used with technical precision.” See *Yannuzzi v. Commonwealth*, 390 A.2d 331, 332 (Pa. Commw. Ct. 1978). Another court noted that “what is only voidable is often called void.” See *Larkin v. Saffarans*, 15 F. 147, 152 (W.D. Tenn. 1883).

‘void’ when used in statutes, ordinances, and in a variety of other contexts has been interpreted to mean ‘voidable.’¹⁷¹ A void contract is a misnomer and not a contract at all (although I will continue to use the term for lack of a suitable alternative)—it cannot bind anyone.¹⁷² By contrast, a voidable contract may be rescinded but it may also be ratified by the protected party.¹⁷³ A voidable contract typically has legal consequences *until* the power of avoidance is exercised.¹⁷⁴ On the other hand, if the party ratifies it, the power of avoidance is terminated.¹⁷⁵ A void contract may not be ratified, and there is no legal remedy for its breach.¹⁷⁶

The consequences of a contract being void or voidable may be significant because a void contract cannot be enforced even by an innocent third party, such as a good faith purchaser or assignee.¹⁷⁷ It also affects the burden of proof, as a party seeking to enforce a contract has the burden of establishing the contract’s existence, while a party seeking to avoid a contract must bear the burden of proving grounds for avoidance.¹⁷⁸

The term “unenforceable” only adds to the confusion.¹⁷⁹ The term encompasses a wide variety of contracts. Void contracts are unenforceable, but they are

¹⁷¹ *Yannuzzi*, 390 A.2d at 332.

¹⁷² RESTATEMENT (SECOND) OF CONTRACTS § 7 cmt. a (noting that a void contract is “not a contract at all; it is the ‘promise’ or ‘agreement’ that is void of legal effect. If the term ‘contract’ were defined to refer to the acts of the parties without regard to their legal effect, a contract could without inconsistency be referred to as ‘void.’ ”); *see also* *Guthman v. Moss*, 150 Cal. App. 3d 501, 507 (Cal. Ct. App. 1984) (“A void contract is no contract at all; it binds no one and is a mere nullity.”).

¹⁷³ RESTATEMENT (SECOND) OF CONTRACTS § 7 (“A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.”); *see also* *Yvanova v. New Century Mortg. Corp.*, 62 Cal. 4th 919, 930 (Cal. 2016) (“Despite its defects, a voidable transaction, unlike a void one, is subject to ratification by the parties.”); *Norfolk S. Corp. v. Smith*, 414 S.E.2d 485, 488 (Ga. 1992) (noting that a voidable contract may be ratified).

¹⁷⁴ *Yvanova*, 62 Cal. 4th at 930.

¹⁷⁵ *Fumai v. Levy*, No. Civ.A. 95-1674, 1998 WL 42297, at *3 (E.D. Pa. Jan. 16, 1998).

¹⁷⁶ *See* RESTATEMENT (SECOND) OF CONTRACTS § 7; *see also* *Norfolk S. Corp.*, 414 S.E. at 488; *Yvanova*, 62 Cal. 4th at 930.

¹⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 7; *see also* *Norfolk S. Corp.*, 414 S.E. at 488; *Yvanova*, 62 Cal. 4th at 930.

¹⁷⁸ PERILLO, *supra* note 155, § 9.22, at 324.

¹⁷⁹ One court noted that there is “more than a little confusion surrounding the terms ‘void contract,’ ‘voidable contract,’ and ‘unenforceable contract’” and that the “term ‘unenforceable contract’ is perhaps the source of the most confusion.” *Fumai v. Levy*, No. Civ.A. 95-1674, 1998 WL 42297, at *3 (E.D. Pa. Jan. 16, 1998); *see also* *Jesse A. Schaefer, Beyond a Definition: Understanding the Nature of Void and Voidable Contracts*, 33 CAMPBELL L. REV. 193, 193 (2010) (noting that the meanings of “void,” “voidable” and “unenforceable” are “persistently and maddeningly slippery.”).

not actually contracts at all.¹⁸⁰ Voidable contracts are those that may not be enforced if a party exercises her power of avoidance. The Restatement states that voidable contracts “might be defined as one type of unenforceable contract.”¹⁸¹ Yet there are other contracts for which judicial remedies are unavailable but are neither void nor voidable.¹⁸² These contracts have some effect upon the parties’ legal relationship and may be enforceable by non-judicial methods. These “unenforceable” contracts include those subject to the Statute of Frauds or the Statute of Limitations.¹⁸³ The Restatement (Second) Contracts defines an “unenforceable contract” as “one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.”¹⁸⁴ Unlike voidable contracts, these unenforceable contracts create legal consequences through means other than ratification.¹⁸⁵ But, as Corbin noted, “there are important differences in the legal relations that are created by the various agreements that are called unenforceable contracts.”¹⁸⁶

Contracts that are unenforceable, but neither void nor voidable, involve neither the adequacy of a consent condition nor wrongdoing on the part of the party seeking enforcement.¹⁸⁷ Rather, this category of contract is unenforceable either because of external circumstances or requirements outside the control of either party.¹⁸⁸ Those circumstances may simply be the passage of time which exceeds the Statute of Limitations.¹⁸⁹ Another type of external circumstance is a formal requirement, such as the requirement of a writing. These unenforceable contracts may still have legal consequences.¹⁹⁰ If the basis for non-enforceability is not based upon inadequate consent construction or wrongdoing, these types of unenforceable contracts may be rehabilitated in circumstances where there is no harm to the underlying policy.¹⁹¹ For example, a subsequent promise to pay a debt barred by the Statute of Limitations is enforceable even without new consideration.¹⁹² The policy arguments in favor of timely resolution of disputes, such as

¹⁸⁰ See ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 7, at 11 (1952) (“In the term ‘void contract,’ there is a self-contradiction. This is because the term ‘contract’ is always defined so as to include some element of enforceability.”).

¹⁸¹ RESTATEMENT (SECOND) OF CONTRACTS § 8 cmt. a (AM. L. INST. 1981).

¹⁸² CORBIN, *supra* note 180, § 8, at 12–13.

¹⁸³ *Id.* at 13.

¹⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 8.

¹⁸⁵ *Id.* § 8 cmt. a.

¹⁸⁶ CORBIN, *supra* note 180, § 8, at 13.

¹⁸⁷ See discussion *supra* Part III.

¹⁸⁸ See discussion *supra* Part III.

¹⁸⁹ CORBIN, *supra* note 180, § 8, at 13.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See *Dow v. River Farms Co. of Cal.*, 243 P.2d 95, 99 (Cal. Dist. Ct. App. 1952) (“If there was once a past legal obligation, but the remedy is barred, such as where the debt is barred by

the deterioration of evidence and the peace of mind of the defendant,¹⁹³ are irrelevant where the promisor has made a subsequent promise, which is evidence of his obligation and his lack of peace of mind, despite the passage of time.

To compound the confusion, variations of the same defense may have different effects. Fraud, for example, can render a contract either void or voidable, depending upon the type of fraud.¹⁹⁴ Duress, too, can render a contract either void or voidable depending upon the type of duress visited upon the victim.¹⁹⁵ The broad category of illegal contracts may be unenforceable and/or void or voidable.¹⁹⁶

Generally, contract defenses¹⁹⁷ can be placed in three categories: No Consent defenses, Defective Consent defenses and Extinguished Consent defenses. *No Consent* defenses are used when there is no manifestation of consent and accordingly, no presumption of consent. Consequently, any ostensible contract is void.¹⁹⁸ These defenses include fraud in the execution and duress by physical compulsion. *Defective Consent* defenses are used when there is an intentional manifestation of consent but one of the consent conditions was absent or deficient. This category encompasses the defenses of mistake, fraud in the inducement, duress by improper threat, and unconscionability. Both No Consent and Defective Consent scenarios mean that consent was not properly constructed. In the *Extinguished Consent* category are those defenses (improbability and frustration of purpose) where consent was properly constructed but subsequent events resulted in consent destruction.

The myriad rules governing contract defenses may seem impossible to reconcile, but they can be explained using a relative consent framework. A relative consent framework demonstrates that most of the defenses seek to determine whether the conditions of consent have been established to such an extent as to justify enforcement.

the statute of limitations or a discharge in bankruptcy, a subsequent promise to pay is enforceable; or where the original obligation is barred by the statute of frauds the subsequent promise to pay is enforceable.”) (internal citation omitted).

¹⁹³ See generally Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 460–99 (1997) (discussing the different policies underlying statutes of limitations).

¹⁹⁴ *Giannone v. Ayne Inst.*, 290 F. Supp. 2d 553, 561 (E.D. Pa. 2003) (noting that “fraud in the factum” renders a contract void while “fraud in the inducement” renders a contract voidable).

¹⁹⁵ See discussion *infra* Section III.A.2.

¹⁹⁶ See PERILLO, *supra* note 155, § 22.1, at 773 (“As a general rule an illegal bargain is unenforceable and, often void.”); CORBIN, *supra* note 180, § 7, at 12 (“Most bargains that are described as ‘illegal’ are not wholly void of legal effect; but an agreement by two parties for the doing of acts that both know to be a felony would have no legal operation and be ‘void,’ although the acts themselves, when performed, would have very important effects indeed.”).

¹⁹⁷ For purposes of this section, I do not include claims that one might raise to bar a contract claim which render it contract unenforceable for a non-doctrinal reason, such as the Statute of Limitations.

¹⁹⁸ See discussion *infra* Section III.A.

A. No Consent and Void “Contracts”

If a contract is a legally enforceable promise,¹⁹⁹ then there is no such thing as a void “contract.” There are, however, documents signed by parties that may look like contracts. Someone (A) may try to enforce this ostensible contract against another (B). One type of argument that B can make to avoid the contract’s obligations is that the contract was never formed and is void. B might, for example, argue that there was no consideration or that the agreement lacked mutuality. As previously discussed, contract formation doctrines are intended to establish consent construction.²⁰⁰ B could also argue that there was no assent to the terms due to misunderstanding,²⁰¹ fraud or duress.

1. Fraud

An agreement is void if it is the result of fraud in the execution (often referred to as fraud in the inception or *fraud in the factum*).²⁰² Fraud in the execution pertains to the inception or making of the agreement so one would be arguing that she was deceived as to the nature of the act and did not know what she was signing.²⁰³ To use the language of consent construction, fraud in the execution means that the condition of intentional manifestation of consent is absent because the act was not intentional and does not manifest assent to the terms. The knowledge condition is also absent. By contrast, fraudulent representations (often referred to as *fraud in the inducement*) render a contract voidable.²⁰⁴ The avoiding party must prove that the false representation was material and that she relied upon it.²⁰⁵ In essence, she must argue that the knowledge condition failed and the failure was the result of the other party’s actions.

A contract may be void even without physical force in fraud in the execution cases. For example, in *Duick v. Toyota Motor Sales, Inc.*,²⁰⁶ the plaintiff received

¹⁹⁹ RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. L. INST. 1981) (“A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”).

²⁰⁰ See discussion *supra* Section II.B.

²⁰¹ See discussion *supra* Section II.A.

²⁰² See *Rosenthal v. Great Western Fin. Sec. Corp.*, 926 P.2d 1061, 1073 (Cal. 1996) (defining fraud in the execution as where “the promisor is deceived as to the nature of his act, and actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is void.”).

²⁰³ *Id.*

²⁰⁴ *Digicorp, Inc. v. Ameritech Corp.*, 662 N.W.2d 652, 666 (Wis. 2003) (stating that fraud in the inducement “renders the underlying contract voidable”).

²⁰⁵ *Hillcrest Pac. Corp. v. Yamamura*, 727 So. 2d 1053, 1055 (Fla. Dist. Ct. App. 1999) (“To state a cause of action for fraud in the inducement, a plaintiff must allege . . . [a] misrepresentation of a material fact” which the representor knew or should have known was false and intended to induce the action).

²⁰⁶ See generally *Duick v. Toyota Motor Sales, U.S.A, Inc.*, 198 Cal. App. 4th 1316 (Cal. Ct. App. 2011).

an email inviting her to participate in a “personality evaluation.”²⁰⁷ In order to begin, she clicked on a drawing of a door with the word “Begin” underneath it, which led to a web page entitled, “Personality Evaluation Terms and Conditions.”²⁰⁸ She then had to scroll through the terms and conditions and click a box that stated, “I have read and agree to the terms and conditions.”²⁰⁹ The terms and conditions indicated that she would receive emails, text messages, and phone calls over the next five days as part of the digital experience.²¹⁰ It also contained a mandatory arbitration clause.²¹¹ Over the next few days, Duick received a series of emails of an “unsettling nature” from someone who seemed to know her and was preparing to visit her.²¹² The last email revealed that the series of emails was a prank that was part of Toyota’s advertising campaign for its Matrix vehicle.²¹³ Duick subsequently sued Toyota, claiming, among other things, intentional infliction of emotional distress.²¹⁴ Toyota moved to compel arbitration pursuant to the terms and conditions Duick agreed to at the beginning of the study.²¹⁵

Duick contended that the arbitration provision was unenforceable because, even assuming that she clicked on the appropriate box, “the entire agreement is void because of fraud in the inception or execution.”²¹⁶ The California appellate court agreed, noting that under California law, fraud in the execution meant that the promisor had no knowledge of what the promisor was doing: “[The promisor] actually does not know what he is signing, or does not intend to enter into a contract at all, mutual assent is lacking, and [the contract] is *void*. In such a case it may be disregarded without the necessity of rescission.”²¹⁷

The court distinguished fraud in the inducement, which occurs when the promisor “knows what he is signing but his consent is *induced* by fraud.”²¹⁸ A contract that is the result of fraud in the inducement is not void, but voidable, and the party seeking to avoid it must rescind it.²¹⁹ The court noted that fraud in the inception would render a contract “wholly void” when the victim acts “without negligence.”²²⁰ Thus, fraud in the inception requires not only that the victim was unaware of what he was signing, but also that it was reasonable for him to be unaware of what he was signing.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 1319.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 1320.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

The distinction between void and voidable becomes important when an innocent third party becomes involved. Assume that A makes a fraudulent representation, inducing B to sell her land to A. A then sells the land to C, a bona fide purchaser for value, who knows nothing of the fraud. B subsequently learns of the fraud and seeks to recover the property. B may only do so if the initial transaction is void (which it is not in this example).²²¹ But why should B be held to the transaction if there was a failure of a consent condition (knowledge) due to false information supplied by A? As between A and B, B is not held to the transaction. But C is also innocent and would be harmed if the transaction were undone (remember C is a good faith purchaser for value). To allow B to undo the transaction between A and C threatens the security of transactions. The societal interest in the security of transactions in turn protects the interests of all individuals in their property rights. Nobody would feel secure about their property rights if, at a later date, those rights could be taken away without their consent due to a claim of fraudulent misrepresentation.

Where the transaction is the result of fraud in the execution, the threat to the security of transactions is at greater risk if B is not allowed to nullify the transaction. A property owner might feel great uncertainty if he could lose his property interest without even knowing it. B would not even know the nature of the transaction (and may not even be aware that there is any transaction at all) and so could have done nothing to prevent the fraud. C is in a better position to investigate the transaction than B, since C is at least *aware* that a transaction is taking place.

By contrast, where the transaction is the result of fraud in the inducement, B has some knowledge, even if minimal, of the transaction. The knowledge condition may be deficient but it is not altogether absent. In this scenario, as between B and C (the subsequent good faith purchaser for value), B bears more responsibility for the fraudulent transaction than C even if B is not responsible for the fraud itself. B is in a better position to guard against the fraudulent transaction and to discover the fraud before a subsequent transaction (such as the one between A and C) occurs. Furthermore, B is not without recourse because B may recover against A. Importantly, the chain of potential transactions does not end at C. C may subsequently transfer the property to another good faith purchaser for value, D (and so on). Consequently, the societal interest in the security of transactions is better served by finding an agreement resulting from fraud in the inducement to be voidable, rather than void.

2. *Duress*

Duress by physical compulsion renders an agreement void.²²² One who is physically forced to sign a document is not acting autonomously but is a “mere

²²¹ PERILLO, *supra* note 155, § 9.22, at 323–24.

²²² *United States ex rel. Trane Co. v. Bond*, 586 A.2d 734, 738 (Md. 1991) (summarizing several cases and noting that they “as well as the RESTATEMENT (SECOND) OF CONTRACTS

mechanical instrument.”²²³ The consent conditions of voluntariness and the intentional manifestation of consent are both absent. Consequently, any ostensible contract will be void and without legal effect even if innocent third parties are affected.²²⁴

Jurisdictions are split on whether *threats* to inflict bodily injury render the contract void or voidable.²²⁵ Some jurisdictions and the Restatement find that duress sufficient to render a contract void requires physical force.²²⁶ Other jurisdictions find that threats of immediate physical force that place the party in imminent fear of death, serious personal injury, or actual imprisonment render a contract void.²²⁷ In those cases, the condition of an intentional manifestation of consent is established but the act is not voluntary.²²⁸

The Restatement (Second) of Contracts explains the distinction between duress by physical compulsion, which renders an ostensible contract void, and duress by improper threat, which renders a contract voidable:

In one, a person physically compels conduct that appears to be a manifestation of assent by a party who has no intention of engaging in that conduct. The result of this type of duress is that the conduct is not effective to create a contract. In the other, a person makes an improper threat that induces a party who has no reasonable alternative to manifesting his assent. The result of this type of duress is that the contract that is created is voidable by the victim. This latter type of duress is in practice the more common and more important.²²⁹

The type of duress is significant in cases involving surety contracts. In *U.S. for Use of Trane Co. v. Bond*, for example, the plaintiff sued the defendant to recover a payment bond that the defendant had signed as surety.²³⁰ The defendant asserted duress, claiming that her husband (also a surety) had “physically threatened her and abused her to coerce her to sign a number of documents, including the payment bond” and did not explain to her the contents.²³¹ She did not claim that her husband physically forced her hand to sign the document, nor did she

§§ 174, 175 (1981), distinguish between duress by physical compulsion, which may render a contract void, and duress by threat, which renders a contract voidable by the victim except where the other party to the contract in good faith, and without reason to know of the duress, either gives value or relies materially on the contract.”).

²²³ RESTATEMENT (SECOND) OF CONTRACTS § 174 cmt. a. (AM. L. INST. 1981).

²²⁴ *Id.* § 174 cmt. b.

²²⁵ *Bond*, 586 A.2d at 738.

²²⁶ *Id.*

²²⁷ *Id.* at 740 (noting that “duress sufficient to render a contract void consists of the actual application of physical force that is sufficient to, and does, cause the person unwillingly to execute the document; as well as the threat of application of immediate physical force sufficient to place a person in the position of the signer in actual, reasonable, and imminent fear of death, serious personal injury, or actual imprisonment.”).

²²⁸ *Id.*

²²⁹ RESTATEMENT (SECOND) OF CONTRACTS ch. 7, topic 2, intro. note (AM. L. INST. 1981).

²³⁰ *Bond*, 586 A.2d at 735.

²³¹ *Id.* at 734–35.

claim that the plaintiff knew of the coercion.²³² The court, in rejecting the “inflexible rule” of the Restatement, held that in Maryland, a contract may be void where “in addition to actual physical compulsion, a threat of imminent physical violence is exerted upon the victim of such magnitude as to cause a reasonable person, in the circumstances, to fear loss of life, or serious physical injury, or actual imprisonment for refusal to sign the document.”²³³ Thus, if the lower court found that the defendant was physically threatened, the contract would be void even against the plaintiff who was an innocent third party.²³⁴

B. Defective Consent

1. Undue Influence

A contract is voidable by a party whose assent was induced by the undue influence of the other party.²³⁵ Undue influence is the unfair persuasion of one party by another where the victim is under the domination of the persuading party, or in a relationship with the persuading party that would lead the victim to justifiably assume that the persuading party is acting consistently with the victim’s welfare.²³⁶ Examples of these types of special relationships include parent/child, attorney/client, and pastor/parishioner.²³⁷ Whether the persuasion is unfair depends upon a variety of factors, including the degree of the persuasion and relevant circumstances.²³⁸ Neither the existence of a special relationship nor the unfairness of the bargain alone suffices to establish undue influence; rather, it is the use of the special relationship to take advantage of the victim in a way that affected the victim’s judgment that makes the contract voidable.²³⁹

The behavior of the persuading party is not threatening to the victim in the way required to prove duress, nor is the persuading party deceiving the victim as would be required to prove fraud or misrepresentation. Accordingly, the victim has neither been forced to enter into the contract nor mistaken about what the contract entailed. Rather, the rationale underlying undue influence is that the per-

²³² *Id.*

²³³ *Id.* at 740.

²³⁴ *Id.*

²³⁵ RESTATEMENT (SECOND) OF CONTRACTS § 177(2) (AM. L. INST. 1981).

²³⁶ *Id.* § 177(1).

²³⁷ *Scribner v. Gibbs*, 953 N.E.2d 475, 484 (Ind. Ct. App. 2011) (noting that confidential relationships are a matter of trust and confidence and that “as a matter of law include relationships such as attorney-at-law and client . . . pastor and parishioner, and parent and child.”).

²³⁸ RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b (“The degree of persuasion that is unfair depends on a variety of circumstances. The ultimate question is whether the result was produced by means that seriously impaired the free and competent exercise of judgment. Such factors as the unfairness of the resulting bargain, the unavailability of independent advice, and the susceptibility of the person persuaded are circumstances to be taken into account in determining whether there was unfair persuasion, but they are not in themselves controlling.”).

²³⁹ *Id.*; see also CAL. CIV. CODE § 1575 (West 2017).

suading party manipulated the victim to act in a way that the victim later regretted.²⁴⁰ Unlike defenses like fraud or mistake, the victim need not uncover any new information to show his consent was improperly obtained; instead, the victim shows that he was manipulated—and his judgment impaired—by someone he trusts.²⁴¹ It is the exploitation of the relationship by the persuading party combined with the vulnerability of the victim that results in a successful defense of undue influence. If someone who is not a party to the contract is the party exerting the undue influence, the victim may still avoid the contract unless the other party to the contract acted in good faith and gave value for the transaction (or materially relied upon it).²⁴²

In *Kennedy v. Thomsen*, the defendant, David Thomsen, had inherited 320 acres of land from a great uncle.²⁴³ He leased most of the land to David Petersen, one of the defendants.²⁴⁴ Thomsen worked for Petersen as a farm laborer and a truck driver.²⁴⁵ There was evidence that Thomsen was “borderline mentally retarded” and that he was “almost constantly drunk or drinking” when he was with Petersen.²⁴⁶ There was also evidence that suggested that Peterson “dominated” Thomsen.²⁴⁷ Peterson handled Thomsen’s business matters, which involved making various loans and other unexplained payments, and included arranging for Thomsen to obtain a loan with an interest rate “far in excess of that allowed at the time.”²⁴⁸ Thomsen agreed to sell Peterson 240 acres of his land for \$255,000 but then agreed to substitute Peterson’s son-in-law and daughter, the Kennedys, for 160 of the acres.²⁴⁹ The Kennedys made a down payment of \$50,000, much of which went to Peterson in the form of “fees.”²⁵⁰ When Thomsen subsequently refused to perform, the Kennedys brought an action for specific performance.²⁵¹ Thomsen claimed that the sale was the product of undue influence, and sued to rescind the contract and to recover fees.²⁵² The trial court held that Petersen and Thomsen were in a confidential relationship and that Petersen and the Kennedys tried to exploit that relationship.²⁵³ It also found that the terms of the transaction were “grossly unfair.”²⁵⁴ It set aside the deed to Petersen, and

²⁴⁰ *Howe v. Palmer*, 956 N.E.2d 249, 253–54 (Mass. App. Ct. 2011) (undue influence makes a victim act in a way “contrary to his true desire and free will.”).

²⁴¹ *Rebidas v. Murasko*, 677 A.2d 331, 334 (Pa. Super. Ct. 1996).

²⁴² RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. c (AM. L. INST. 1981).

²⁴³ *Kennedy v. Thomsen*, 320 N.W.2d 657, 658 (Iowa Ct. App. 1982).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 659.

²⁵⁴ *Id.*

entered a judgment for \$43,764 against Petersen along with punitive damages of \$5,000.²⁵⁵ It also dismissed the Kennedys' action for specific performance, but granted the return of their \$50,000 down payment.²⁵⁶ The Iowa Court of Appeals affirmed, noting that the factual circumstances of the transaction and the relationship between the parties established that the deed to Petersen and the contract with the Kennedys was the product of undue influence.²⁵⁷ It found that the contract between the Kennedys and Thomsen could be set aside because the Kennedys had reason to know of Petersen's undue influence over Thomsen.²⁵⁸ Finally, the court stated that in order for Thomsen to defend against the Kennedy's claim for specific performance, it was necessary for him to seek rescission, which required restoring the status quo and returning the down payment money.²⁵⁹

2. *Unconscionability*

The doctrine of unconscionability allows a court to refuse to enforce a contract where the party seeking avoidance lacked meaningful choice and the terms of the contract are unreasonably one-sided.²⁶⁰ An unconscionable contract is one that "shock[s] the conscience."²⁶¹ As with undue influence, the party seeking enforcement is taking advantage of the other party; however, the vulnerability of the other party results from circumstances that preexisted the relationship between the parties.

In the classic unconscionability case, *Williams v. Walker-Thomas Furniture Company*, the appellant Williams purchased several household items from the appellee furniture company on an installment plan.²⁶² The installment plan contract contained a provision that gave the company a security interest in every item purchased until the customer had paid off all the items.²⁶³ The court noted:

Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her \$218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a \$514 stereo set.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.* at 660.

²⁶⁰ *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447–48 (D.C. Cir. 1965) (citing *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914, 916 (D.C. 1964)).

²⁶¹ *Mohamed v. Uber Techs., Inc.*, 848 F.3d 1201, 1210 (9th Cir. 2016) (quoting *Baltazar v. Forever 21, Inc.*, 367 P.3d 6, 11 (Cal. 2016)).

²⁶² *Williams*, 350 F.2d at 447.

²⁶³ *Id.*

We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings.²⁶⁴

The defense of unconscionability is a way to show the deficiency of the voluntariness and knowledge conditions. The factors—unfair, one-sided terms and a lack of bargaining power—suggest that either the party did not know what the contract said (deficient knowledge condition) or had no alternatives (deficient voluntariness condition).²⁶⁵ If, as this Article argues, consent is a condition (or more precisely, a state which is the result of a set of conditions) rather than an on/off switch, it is not absent or destroyed in the case of unconscionability. It is, however, diminished or diluted compared to the consent of someone with plenty of choices who enters into a contract with eagerness and enthusiasm. Where a party seeks to escape performance on the grounds of unconscionability, there is no new information or situation that invalidates consent, only an inability or a disinclination to perform, which is justified if the other party's behavior is exploitative or opportunistic.²⁶⁶ The voluntariness condition is diminished, but not to the extent required to prove duress. The knowledge condition is also diminished, but not as much as it would have to be to show fraud. It is the behavior of the party seeking to enforce the contract that tips the balance. Because of this, unconscionability is said to be a sliding scale, meaning that the knowledge and voluntariness conditions are determined by the egregiousness of the drafting party's conduct.²⁶⁷ Walker-Thomas Furniture Company, for example, knew that Williams was in a precarious financial position when it sold her the furniture and yet made no effort to explain the unusual contractual provisions to her.

3. Mistakes

A mistake is “a belief that is not in accord with the facts.”²⁶⁸ In order to avoid a contract, the mistake must be a “basic assumption on which the contract was made” that has a “material effect on the agreed exchange of performances.”²⁶⁹ The mistake must pertain to facts existing at the time the contract was made.²⁷⁰ The party seeking avoidance must not “bear the risk of the mistake.”²⁷¹ If both parties were operating under the mistake (called a mutual mistake), that is all that is required.²⁷² If only one party was operating under the mistake (called a unilateral mistake), that party also needs to show that: (1) enforcement of the contract

²⁶⁴ *Id.* at 448. The case was remanded for further proceedings since the lower courts did not issue findings on the possible unconscionability of the contracts.

²⁶⁵ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923 (9th Cir. 2013).

²⁶⁶ *Williams*, 350 F.2d at 449.

²⁶⁷ Melissa T. Lonegrass, *Finding Room for Fairness in Formalism—The Sliding Scale Approach to Unconscionability*, 44 *LOY. U. CHI. L.J.* 1, 12–19 (2012).

²⁶⁸ RESTATEMENT (SECOND) OF CONTRACTS § 151 (AM. L. INST. 1981).

²⁶⁹ *Id.* § 152(1).

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

would be unconscionable or (2) the other party had “reason to know of the mistake or his fault caused the mistake.”²⁷³

A party claiming she entered into a contract due to a mistake is essentially arguing that the knowledge condition is lacking but she was unaware of it at the time consent was manifested.²⁷⁴ The mistake doctrines essentially balance the autonomy interests of the parties. If both parties operated under the same mistake, there should be no injury if the contract is avoided because neither party agreed to the bargain *as it turned out to be*.²⁷⁵ Contract enforcement in such a situation would present one party with a windfall and force the other party to suffer a detriment for which she had not bargained.²⁷⁶ For example, X agrees to purchase Y’s building in order to open a restaurant. They both assume the building is suitable for this purpose. Subsequently, X discovers that there are hazardous substances on the property that prevent her from operating a restaurant in the building. Both parties have obtained information that they previously lacked—the building cannot be used by any establishment serving food. X would not have agreed to purchase the building if she had known about the hazardous substances. Y also did not know about the hazardous substances. If Y had known, he would not have been able to sell the building to anyone wishing to open a restaurant. It is likely that Y also would not have been able to sell the building at the price agreed upon with X and would have had to sell it at a much lower price. To enforce a contract based upon a mutual mistake would mean that one party benefits to the other party’s detriment through no fault or virtue of either party.

Where only one party is operating under the mistake, however, the non-mistaken party has consented to the bargain²⁷⁷ but the mistaken party has not.²⁷⁸ In order to find avoidance, the court must find a reason to favor the mistaken party’s interest over the non-mistaken party’s interest. If there is no such reason, then the combination of the non-mistaken party’s consent and X’s earlier consent tilt the balance in favor of enforcement. If, however, the non-mistaken party (Y) was at fault for the mistake, Y should not be permitted to benefit. Similarly, if Y knew of X’s mistake, then Y should not be permitted to take unfair advantage of it. Jurisdictions that follow the Restatement (Second) of Contracts permit rescission if enforcement would be unconscionable even if the mistake is not the fault of Y.²⁷⁹ The standard for unconscionability in the context of unilateral mistake appears to be lower than what is required where unconscionability is a standalone

²⁷³ *Id.* § 153.

²⁷⁴ 14 CAL. JUR. 3D *Contracts* § 126, at 350–51 (2016).

²⁷⁵ *Id.* at 351–52.

²⁷⁶ For a discussion of the role of windfalls in mistake and frustration cases, see Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 (1991).

²⁷⁷ RESTATEMENT (SECOND) OF CONTRACTS § 157.

²⁷⁸ *See id.*

²⁷⁹ *Id.* § 153.

defense.²⁸⁰ Rather than a result that would “shock the conscience,” courts assess whether the result of the mistake significantly harms the mistaken party and whether any injury to the non-mistaken party may be restored.

With both unilateral and mutual mistakes, courts are balancing the interests of the parties and the societal interest in the security of transactions. There are two important factors in judicial application of these rules: the passage of time and the transfer of possession.²⁸¹ The more time that elapses from contract formation to notification of the mistake, the less likely courts have been to allow rescission for mistake.²⁸² Conversely, the less time that elapses from formation to notification of mistake, the more likely courts are to allow rescission.²⁸³ The passage of time increases the risk that the non-mistaken party will rely upon the contract.²⁸⁴ If the non-mistaken party relied upon the contract, the court is less likely to find unconscionability.²⁸⁵ Even if the non-mistaken party has not relied upon the contract in a concrete way or can be reimbursed for reliance costs, courts seem to consider whether it would be fair to defeat the party’s expectation interest.²⁸⁶ While the expectancy interest is often discussed in terms of monetary value, there is also an emotional aspect to expectation. Although the parties have a contractual expectation interest at the time of contract formation, the emotional expectation interest develops over time as the time for performance draws near. The party has a growing emotional stake in the contract’s performance, which may not be satisfied with reliance damages. A person who has been anticipating and contemplating a contract’s performance for weeks has a greater expectation than one who is told immediately after formation that the other party was operating under a mistake. Dashing the expectation of one who has been thinking about the contract for weeks or months is a more serious matter than rescinding the contract seconds after acceptance. Similarly, obtaining physical possession creates a sense of ownership and further entrenches the emotional stake in the object which is the subject of the transaction. It also increases the risk that the object may be subsequently transferred to another, which makes allowing avoidance after transfer of possession a greater risk to the societal interest in the security of transactions.

²⁸⁰ Unconscionability is discussed in Section III.B.2. The discussion on mistakes and changed circumstances elaborates upon the author’s earlier work, Nancy Kim, *Mistakes, Changed Circumstances and Intent*, 56 U. KAN. L. REV. 473, 510 (2008).

²⁸¹ Kim, *supra* note 48, at 488–89.

²⁸² See *id.* at 486–500 (showing a variety of case law where this principle is demonstrated).

²⁸³ See *id.*; see also RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 5 (AM. L. INST. 2011).

²⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. d (AM. L. INST. 1981) (noting that in cases of unilateral mistake, “(r)eliance by the other party may make enforcement of a contract proper although enforcement would otherwise be unconscionable. . . . If . . . the other party has relied on the contract in some substantial way, avoidance may leave that reliance uncompensated.”).

²⁸⁵ *Id.*

²⁸⁶ RESTATEMENT (FIRST) OF RESTITUTION § 68 (AM. L. INST. 1937).

In *Donovan v. RRL Corp.*, the California Supreme Court permitted rescission on the grounds of unilateral mistake in favor of a defendant automobile dealer who had made a typographical error.²⁸⁷ The error resulted in the advertising for sale of a used Jaguar at a price that was approximately \$12,000 less than what the dealership intended.²⁸⁸ Donovan visited the dealership after seeing the advertisement for the Jaguar.²⁸⁹ He took it for a test drive and then told the salesperson, “Okay. We will take it at your price, \$26,000.”²⁹⁰ When the salesperson didn’t respond, he showed him the advertisement.²⁹¹ The salesperson immediately informed him that the price was incorrect.²⁹² Donovan asked to speak to the sales manager, and the manager apologized and offered to pay for Donovan’s fuel, time, and effort expended in traveling to the dealership.²⁹³ When Donovan refused, the manager then offered to sell him the Jaguar for \$37,016, which was approximately \$900 less than the intended sales price.²⁹⁴ Donovan refused and sued.²⁹⁵ The California Supreme Court, reversing the appellate court’s judgment, held that the dealership had made a unilateral mistake in advertising the sale price of the Jaguar.²⁹⁶ After walking through the different requirements needed to prove unilateral mistake, the Court stated that to enforce the contract against the dealership would be unconscionable because the mistake was an error amounting to 32 percent of the intended price.²⁹⁷ But the percentage obscures the actual numbers: the dealership had paid \$35,000 for the Jaguar, so the dealership’s actual loss if the contract were enforced at the unintended price would have been about \$9,000.²⁹⁸ It hardly seems to “shock the conscience” to enforce a validly formed contract that would have resulted in a loss of \$9,000 to a luxury car dealership.²⁹⁹

Unconscionability, in the context of unilateral mistake, means that it would be unfair to enforce the contract because the mistaken party would not have entered into it if it had known the true facts.³⁰⁰ Given the lack of consent at the time of performance, the interests of the other party must justify enforcement.³⁰¹ In *Donovan*, the dealership never intended to sell the vehicle at the advertised price. It did not know that the advertised price was \$12,000 lower than the intended

²⁸⁷ *Donovan v. RRL Corp.*, 27 P.3d 702, 708, 725 (Cal. 2001).

²⁸⁸ *Id.* at 717.

²⁸⁹ *Id.* at 707.

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 708–09, 725.

²⁹⁷ *Id.* at 717.

²⁹⁸ *Id.* at 724.

²⁹⁹ *See id.* at 723.

³⁰⁰ *Id.* at 714.

³⁰¹ *Id.*

price.³⁰² Donovan was notified of the error immediately after acceptance and he did not obtain possession of the vehicle, so his emotional expectation interest was minimal and there was no risk to a subsequent transferee.³⁰³ Furthermore, the dealership offered to pay for his transportation costs, demonstrating its good faith and limiting any harm caused to Donovan.³⁰⁴

C. *Extinguished Consent*

1. *Changed Circumstances*

Like mistakes, the changed circumstances doctrines—frustration of purpose, impracticability, and impossibility—allow a party to escape performance if there is a basic assumption error.³⁰⁵ In these cases, however, the basic assumption error concerns a supervening event³⁰⁶ that arises *after* the contract was formed.³⁰⁷ The non-occurrence of the supervening event was an implied condition to the contract. The supervening event could also involve the non-occurrence of a condition that the parties had assumed would occur.³⁰⁸

In *Taylor v. Caldwell*, generally recognized as the first case involving the defense of impossibility, the court established the rule that if the existence of a particular thing is necessary for a party's performance, and the thing is destroyed, the party's performance under the contract is excused.³⁰⁹ Taylor agreed to pay Caldwell £100 per day for four days for the use of Caldwell's music hall.³¹⁰ Less than a week before the first day, the music hall was accidentally destroyed by fire.³¹¹ Taylor, who had incurred costs in preparation of the performances that were to take place at the music hall, sued Caldwell for breach of contract.³¹² The

³⁰² *Id.* at 707.

³⁰³ *Id.* at 724.

³⁰⁴ *Id.*

³⁰⁵ See generally Kim, *supra* note 48, at 506.

³⁰⁶ RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 271 (AM. L. INST. 1981).

³⁰⁷ *Id.* § 261 (“Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”).

³⁰⁸ See *id.* § 271 (“Impracticability excuses the non-occurrence of a condition if the occurrence of the condition is not a material part of the agreed exchange and forfeiture would otherwise result.”).

³⁰⁹ *Taylor v. Caldwell*, 122 Eng. Rep. 309, 309 (K.B. 1863).

³¹⁰ *Id.* at 310.

³¹¹ *Id.* at 311.

³¹² *Id.* at 310.

court found that the continued existence of the music hall was an implied condition of the contract.³¹³ Because the fire destroyed the music hall, Caldwell's performance was excused.³¹⁴ The parties had not expressly discussed or even consciously considered the continued existence of the music hall, but they had tacitly assumed its existence. Their tacit assumption was incorrect, meaning that their knowledge about the transaction was incorrect. While they may have consented to the transaction at one time, they did so with incomplete or inadequate information. The lack of information was material—neither party would have agreed to the transaction if they had known that the supervening event would occur (that a fire would destroy the music hall). Both parties assumed that at the time of the performance, the music hall would be in substantially the same condition as it was at the time of contract formation. Caldwell would not have agreed to a contract that required him to deliver possession of a non-existent structure, or one that needed to be entirely rebuilt. Taylor would not have agreed to rent out the music hall if he knew that the premises would be charred ruins. The continued existence of the music hall (the assumption that it would *not* be burned down) was an implied condition of their agreement.

Imagine that Caldwell had been willing to deliver the premises in their ruined state and insisted that Taylor continue to perform. Taylor presumably would have sought to escape enforcement for the same reason that Caldwell did in the actual case—because an implied condition to the contract was destroyed, thus destroying his consent. While it was impossible for Caldwell to deliver the premises in the condition both parties expected, it would not have been impossible for Taylor to pay the money that he was expected to pay. The applicable defense for someone in Taylor's position would be frustration of purpose. The doctrine of frustration of purpose has been referred to as the “companion rule”³¹⁵ of the doctrine of impossibility. Under the doctrine of frustration of purpose, performance remains possible but the expected value of the performance to the party seeking to be excused has been destroyed by the supervening event. The event forces the parties to recognize a failure on their part to expressly address a condition to performance. This failure is excusable because it would be undesirable (as well as impossible) to address every single implied condition or contingency to performance. The parties would have to include every possible event that would affect or impede their performance regardless of how likely it would be to occur.

The third changed circumstances doctrine, impracticability, applies where performance is technically possible but would impose a much greater than expected cost upon one party.³¹⁶ When the issue arises, at least one of the parties has already incurred costs in performance. The question is who should bear the costs.

³¹³ *Id.* at 314.

³¹⁴ *Id.* at 315.

³¹⁵ *Chase Precast Corp. v. John J. Paonessa Co.*, 566 N.E.2d 603, 605 (Mass. 1991).

³¹⁶ Kim, *supra* note 48, at 507.

With all three changed circumstances doctrines, the central issue concerns the allocation of risk of the supervening event. In some cases (such as war or riot), neither party could have foreseen, insured against, or prevented the risk.³¹⁷ The Uniform Commercial Code³¹⁸ and the Restatement (Second) of Contracts³¹⁹ state that performance may be excused if it was premised upon a basic assumption that turns out to be false. In other words, the party seeking avoidance is arguing that the supervening circumstance altered the bargain so substantially that she would not have consented to the contract if she had known it would occur. Like other basic assumption defenses, impracticability is a failure of the knowledge condition (and so a failure of consent). Thus, the court must determine whether the avoiding party was aware of the possibility of the occurrence but discounted its likelihood. This is not the same thing as having failed to consider it at all. The UCC distinguishes between lacking information (which results in a failure of consent and excuses performance) and making an inaccurate decision based upon the information (which results only in a lost gamble and does not excuse performance).³²⁰ In order for these defenses to apply, the circumstance must not have been within the contemplation of the parties at the time of contracting.³²¹ Increased costs and a rise or collapse in the market by themselves do not justify excusing performance because these are presumably foreseeable in all business contracts.³²² Performance is excused only when the change is due to an “unforeseen contingency which alters the essential nature of the performance.”³²³ A party may also be found to have assumed greater liability in the express terms of the agreement, the circumstances surrounding the contract, trade usage, and other relevant evidence pertaining to the parties’ intent.³²⁴ The requirement of unforeseeability is a way to assess the knowledge condition. An event that is foreseeable means that the parties had some information that the contingency

³¹⁷ Richard Posner and Andrew Rosenfield argued that the party in the better position to foresee, insure or prevent the risk should bear the risk. *See, e.g.*, Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 83 (1977).

³¹⁸ U.C.C. § 2-615 (AM. L. INST. & UNIF. LAW COMM’N 1977) (“Except so far as a seller may have assumed a greater obligation . . . (a) Delay in delivery or non-delivery in whole or in part by a seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .”). Although the section refers expressly to sellers, courts have interpreted it to include buyers as well. *See Lawrance v. Elmore Bean Warehouse, Inc.*, 702 P.2d 930, 932 (Idaho 1985).

³¹⁹ RESTATEMENT (SECOND) CONTRACTS § 261 (AM. L. INST. 1981).

³²⁰ *See* Eyal Zamir, *The Inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1786 n.269 (1997).

³²¹ UCC § 2-615 cmt. 1.

³²² *Id.* cmt. 4.

³²³ *Id.*

³²⁴ *See id.* cmt. 8.

might occur; an unforeseeable contingency means that the parties had *no* such information.³²⁵

2. *The Effect of a Basic Assumption on the Knowledge Condition*

Basic assumption defenses involve a failure or deficit of the knowledge condition, similar to a misunderstanding between the parties. They involve errors caused by a lack of knowledge—in the case of changed circumstances, about the future, in the case of mistakes, about the state of the world, and in the case of misunderstandings, about what the other party is thinking. Whether to allow avoidance depends upon countervailing interests. The lack of consent of the party seeking avoidance should be weighed against the interest of the other party, who may have taken steps in anticipation of the contemplated agreement.

Consent destruction, like consent construction, is a sliding scale. Intent impacts the knowledge condition, which is essential to consent.³²⁶ Determining the intent of the parties is necessary in order to determine to what the parties consented.³²⁷ Importantly, courts should consider the intent of both parties, not just the intent of the party seeking to escape the contract. Consent (or the absence thereof) at the time of performance is an important consideration, but it is not determinative in light of consent at the time of contract formation. The reality is that in most cases, neither party would have consented to the transaction if they had known of the supervening event. While Caldwell may not have consented to the contract if he had known the music hall was going to be destroyed, Taylor would not have incurred costs in preparing for the music performances. Assuming that neither party was responsible for the fire, why should Taylor bear the preparation costs instead of Caldwell? Given the nature of the supervening event—the destruction of Caldwell’s property—it seems fair to allocate the burden to Taylor. Taylor is blameless but so is Caldwell. His loss likely far exceeds Taylor’s loss. It would be adding insult to injury to make Caldwell responsible for Taylor’s loss in addition to his own.

Certainly, the result would be different in modern times. Even if the parties did not consciously contemplate a fire, they probably would have used a standard contract that contained terms addressing the possibility of a fire. Furthermore, Caldwell would likely have an obligation (statutory, contractual, or customary) to insure the premises from fire damage. If Caldwell were insured, it would be fairer to allocate the loss to Caldwell and his insurance company. If Caldwell failed to obtain insurance, he would be found at fault and would bear the loss in that case, too.

³²⁵ See RESTATEMENT (SECOND) CONTRACTS § 351 (AM. L. INST. 1981).

³²⁶ See *id.* § 24.

³²⁷ See *id.* § 21.

D. Enforceability and Illegal Contracts

The common belief and the traditional view is that an illegal contract is void or unenforceable and that a court will leave the parties to an illegal contract where it finds them.³²⁸ The reality is more complicated.³²⁹ Courts may consider the relative culpability of the parties, and allow recovery by the less culpable party.³³⁰ The Restatement (Second) of Contracts avoids using the term “illegal bargain” and refers to bargains that are unenforceable on grounds of public policy.³³¹ The void/voidable confusion persists with illegal contracts. Generally, a contract whose object or purpose is illegal is void.³³² Where the illegality is only collateral to the contract whose purpose is not illegal or against public policy, the contract may be voidable but not void.³³³ Even this general statement is subject to exceptions and caveats.

The “illegal contracts” category often leads to confusion because it is imprecise and too broad, capturing contracts that have different legal effects.³³⁴ It includes agreements that are void, voidable, or unenforceable as against public policy. The nature of the illegality spans a wide spectrum, from felonies to improper licenses.

In assessing the enforceability of an illegal contract, the courts generally consider three important factors: the culpability of the parties, the policy underlying the relevant law, and the risk of forfeiture.³³⁵ If there is a risk of forfeiture, courts are more inclined to enforce the contract, provided that doing so does not undermine the reason for the law or harm public welfare.³³⁶ The greater the risk

³²⁸ See, e.g., *Trees v. Kersey*, 56 P.3d 765, 771 (Idaho 2002) (“When a court invokes the illegality doctrine, it denies enforcement of the contract, leaving the parties where it finds them.”).

³²⁹ See 6 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 12.4 (Richard A. Long ed., 4th ed. 1995) (“It is commonly said that illegal bargains are void. This statement, however, is not entirely correct.”).

³³⁰ See *Trees*, 56 P.3d at 771 (“Courts on occasion . . . apply an exception to the illegality doctrine where both parties concur in the illegal act, but the parties are not equally at fault by reason of that fact that one party commits fraud, or there is duress, oppression, or undue influence over the other. In such a situation the courts have allowed the less guilty party to recover.”) (citations omitted).

³³¹ RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981). In making that assessment, the Restatement Second includes factors such as the parties’ justified expectations, forfeiture resulting from nonenforcement, public interests, the misconduct of the parties, and the effect on relevant policy. *Id.*

³³² *Id.* § 203 cmt. c.

³³³ *Nagel v. ADM Investor Servs., Inc.*, 217 F.3d 436, 439–40 (7th Cir. 2000).

³³⁴ See Chunlin Leonhard, *Illegal Agreements and the Lesser Evil Principle*, 64 CATHOLIC U.L. REV. 833, 834–35 (2015) (discussing illegal agreements and advocating for explicit adoption of the lesser evil principle to resolve disputes involving illegal agreements).

³³⁵ RESTATEMENT (SECOND) OF CONTRACTS § 178.

³³⁶ *Geis v. Colina Del Rio, L.P.*, 362 S.W.3d 100, 106 (Tex. App. 2011) (“The defense of *in pari delicto* requires Texas Courts, as a general rule, to decline to enforce illegal contracts when the contracting parties are equally blameworthy.”).

of forfeiture and the better the moral standing of the party seeking enforcement, the more likely a court is to find the contract enforceable.³³⁷

In *U.S. Nursing Corp. v. Saint Joseph Medical Center*, a nurse staffing agency, U.S. Nursing, entered into a contract with a hospital, St. Joseph.³³⁸ Under the contract, either party could terminate the agreement upon seven days notice.³³⁹ If the hospital terminated the contract without giving notice, it was required to pay U.S. Nursing the equivalent of what it would have been paid for the seven-day period.³⁴⁰ At the time of contracting, U.S. Nursing had not yet applied for a license to conduct a nursing agency in Illinois.³⁴¹ Its application was subsequently rejected by the Illinois Department of Labor in part because it had failed to demonstrate financial solvency and failed to properly train and vet its nurses.³⁴² The Department of Labor also contacted St. Joseph's and told them to immediately stop using the services of U.S. Nursing.³⁴³ St. Joseph immediately terminated the contract and paid U.S. Nursing for all services rendered up to the cancellation date, but it did not pay for the additional seven days as provided in the agreement.³⁴⁴ U.S. Nursing sued St. Joseph's for breach of contract.³⁴⁵ The district court found the contract unenforceable and the Seventh Circuit affirmed.³⁴⁶

The court stated that contracts for the performance of an illegal act were "void and unenforceable."³⁴⁷ It then noted that some contracts based on a "legitimate subject matter" that are performed in an "unlawful manner" could be unenforceable in certain circumstances.³⁴⁸ It noted, however, that if the statutory violation did not seriously undermine public policy or the public welfare, then the contract would be enforced.³⁴⁹ The Seventh Circuit noted that St. Joseph had paid U.S. Nursing for all services rendered and that what U.S. Nursing was seeking was recovery of "what amounts to a penalty provision for termination of the contract without sufficient notice."³⁵⁰ The Court stated that the public policy behind the licensing requirement was to protect the public health and that the public policy underlying the Act "clearly outweighs the interest in enforcement of this contract."³⁵¹

³³⁷ RESTATEMENT (SECOND) OF CONTRACTS § 227.

³³⁸ *U.S. Nursing Corp. v. Saint Joseph Med. Ctr.*, 39 F.3d 790, 791 (7th Cir. 1994).

³³⁹ *Id.*

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² *Id.* at 792.

³⁴³ *Id.*

³⁴⁴ *Id.*

³⁴⁵ *Id.*

³⁴⁶ *Id.* at 792, 795.

³⁴⁷ *Id.* at 792.

³⁴⁸ *Id.* at 792.

³⁴⁹ *Id.*

³⁵⁰ *Id.* at 795.

³⁵¹ *Id.*

E. Blameworthiness and Forfeiture

A relevant consideration in determining whether a contract is void or voidable is the policy against forfeitures.³⁵² The standard remedy for a party seeking to avoid a contract is rescission.³⁵³ A party seeking to rescind a contract must make restitution.³⁵⁴ A voidable contract allows the parties to return to status quo.³⁵⁵ A void contract, on the other hand, means there is no contract. An equitable remedy, however, may be available even if a legal remedy is not.³⁵⁶ Restitution may be granted in situations where there is no contract and so nothing to rescind. For example, with an illegal contract, if the party negatively affected by the forfeiture is also the wrongdoer, the courts will consider the relative culpability of the parties and may grant restitution without recognizing a contract.³⁵⁷ In such cases, courts assess whether the harm to the underlying law (which makes the contract illegal) outweighs the harm of forfeiture.³⁵⁸ In addition, courts consider the effect of designating a contract as void or voidable on innocent third parties.

For example, in *Bankers Trust Company v. Litton Systems, Inc.*,³⁵⁹ Angelo Buquicchio, a salesman for Royal, recommended that Litton (a company affiliated with Royal) lease photocopiers from Regent.³⁶⁰ Regent was to purchase the equipment from Royal and then lease it to Litton.³⁶¹ Unknown to Litton, Regent allegedly bribed Buquicchio so that he would make the recommendation.³⁶² In order to finance the purchase of the photocopies from Royal, Regent borrowed money from plaintiff Bankers Trust and Chemical.³⁶³ Bankers Trust and Chemical had no knowledge of the payments Regent made to Buquicchio.³⁶⁴ As security for the transaction, Regent assigned the Litton leases to Bankers Trust and Chemical.³⁶⁵ The lease permitted assignment, and provided that the assignee's trust would be independent of any claims that Litton might have against Regent.³⁶⁶

Litton defaulted under the leases, and Bankers Trust and Chemical sued for amounts due.³⁶⁷ Litton argued that the alleged bribery payments to Buquicchio

³⁵² RESTATEMENT (SECOND) OF CONTRACTS § 229 (AM. L. INST. 1981).

³⁵³ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. c (AM. L. INST. 2011).

³⁵⁴ *Id.* § 54.

³⁵⁵ RESTATEMENT (SECOND) OF CONTRACTS § 7.

³⁵⁶ *Mickelson v. Barnet*, 460 N.E.2d 566, 569 (Mass. 1984).

³⁵⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31.

³⁵⁸ *Johnson v. Johnson*, 192 Cal. App. 3d 551, 557 (Cal. Ct. App. 1987).

³⁵⁹ See generally *Bankers Trust Co. v. Litton Systems, Inc.*, 599 F.2d 488 (2d Cir. 1979).

³⁶⁰ *Id.* at 490.

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

³⁶⁶ *Id.*

³⁶⁷ *Id.*

rendered the leases between Regent and Litton void so as to make the obligations under them void even for bona fide holders in due course who had no knowledge of the illegal conduct.³⁶⁸ The lower court found that, although the making of payments to Buquicchio “could constitute a defense as against Regent . . . [it] could not be asserted against a holder in due course” like Bankers Trust and Chemical.³⁶⁹ The Second Circuit Court of Appeals agreed with the lower court.³⁷⁰

The court framed the issue as “whether a holder in due course may enforce lease contracts not enforceable by the holder’s assignor because the contracts were induced by commercial bribery committed by the assignor.”³⁷¹ It noted that there was an important distinction between the lease contracts for the photocopiers, which were “not themselves illegal,” and the contract to bribe a person in connection with those lease contracts, which was illegal.³⁷² Although the contract at issue was not itself illegal, it presumably would have been unenforceable in a lawsuit brought by the wrongdoer (here, Regent) since there would have been a “direct connection” between the bribe and the basis for the lawsuit.³⁷³

The court stated that the illegality defense under New York law³⁷⁴ against a holder in due course is available only if “the effect of the illegality is to make the obligation entirely null and void.”³⁷⁵ It is not available if the illegality is merely voidable.³⁷⁶ The court stated that cases addressing the enforceability of “bribery-induced” contracts suggested that such contracts were “void,” but that a closer analysis of the cases indicated that this was just the result of imprecise language.³⁷⁷ The court cited to a comment in the Restatement of Contracts that “no one shall be permitted to profit by his own fraud.”³⁷⁸ It added, however, that the policy did not apply where innocent third parties were involved:

Where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument is inapplicable because the plaintiff has done no wrong for which it should be penalized. Moreover, insofar as it is enforcing the rights of an innocent party, the court does not blacken its name or participate in a wrong when it enforces an illegal contract.³⁷⁹

³⁶⁸ *Id.* at 491.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 494.

³⁷¹ *Id.* at 491.

³⁷² *Id.*

³⁷³ *Id.*

³⁷⁴ *Id.* (citing N.Y. U.C.C. § 3-305(2)(b)).

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 491–92.

³⁷⁷ *Id.* at 492 (“Since the New York cases on illegal contracts induced by commercial bribery do not involve holders in due course, one could reasonably assume that the authors of those opinions were using the term ‘void’ loosely, without regard to its importance when a holder in due course enters the picture.”).

³⁷⁸ *Id.*

³⁷⁹ *Id.* at 492–93 (footnote omitted).

The court further noted that the holder in due course doctrine “embodies important policies,” namely those that facilitate commercial transactions, which must be balanced against the policy to prevent bribery-induced contracts.³⁸⁰

As the *Litton* case illustrates, the determination that a contract is void has the potential to harm innocent third parties.³⁸¹ For this reason, courts may find a contract to be voidable even where a statute expressly uses the term “void.”³⁸² In addition, even where the court finds the agreement to be void, it may still grant restitution of benefits conferred if necessary to avoid a forfeiture.³⁸³

The law regarding illegality may be understood through the lens of consent. If the act itself is illegal, the party has no power to consent to it. If the underlying act is a crime, the reason for its illegality is that it harms third parties, and causing this harm is not something which the parties have the power to do. For example, an agreement to steal property and split the profits is not something to which the parties may consent. Although they may reallocate their property rights, they lack the authority to decide what happens to property which is not theirs. If, however, the underlying act is not criminal (meaning that the parties have the right to reallocate the property rights which are the subject of the contract) then the courts assess the conditions of consent, including the relative blameworthiness of the parties, in determining the effect of the illegality. For example, in *U.S. Nursing Corp. v. Saint Joseph Medical Center*, Saint Joseph Medical Center was ordered by the Labor Department to terminate the services of U.S. Nursing Corp. due to the latter’s inability to meet regulatory requirements.³⁸⁴ Saint Joseph Medical Center paid for the services which it received; it only refused to pay the fees due under the termination provision.³⁸⁵ In other words, Saint Joseph Medical Center paid for what it consented to and should not be made to pay for something which it probably would not have consented to if it had full information regarding U.S. Nursing Corp.’s status. Thus, the case can be viewed as one involving omitted terms (i.e. a deficiency in the knowledge condition). Saint Joseph had assumed that the seven-day termination provision would only apply in situations

³⁸⁰ *Id.* at 494 (stating that “the holder in due course is protected not because of his praiseworthy character, but to the end that commercial transactions may be engaged in without elaborate investigation of the process leading up to the contract or instrument and in reliance on the contract rights of one who offers them for sale or to secure a loan.”).

³⁸¹ *Id.* at 492.

³⁸² *New Hampshire Ins. Co. v. C’Est Moi, Inc.*, 519 F.3d 937, 938 (9th Cir. 2008); *see also* WILLISTON, *supra* note 329, at 38–41 (“Statutes may and sometimes do make bargains absolutely void, but even though a statute states in its terms that a particular bargain is ‘void,’ this has often been held to mean ‘voidable.’”).

³⁸³ *See Veridyne Corp. v. United States*, 83 Fed. Cl. 575, 586 (2008) (“Forfeiture is an inappropriate remedy for common-law fraud except when a conflict of interest is perpetuated . . . or where an agent of a contractor obtains a contract through a conflict of interest. The case law, properly read, does not support defendant’s argument that the appropriate remedy for any contract that is void *ab initio* is forfeiture of monies already paid or the denial of recovery in *quantum meruit* or *quantum valebat*.”).

³⁸⁴ *See* discussion *supra* Section III.D.

³⁸⁵ *See* discussion *supra* Section III.D.

where it had decided to terminate without cause and at its discretion. It had not envisioned a situation where it was ordered to terminate due to something which was entirely the fault of U.S. Nursing Corp. As between the two parties, U.S. Nursing Corp. is more blameworthy than Saint Joseph Medical Center for the termination of services and so Saint Joseph Medical Center's "interpretation" of the provision should prevail.

CONCLUSION

In the past forty years, there has been a rise in scholarship arguing that the underlying objective of contract law is the furtherance of economic efficiency and the facilitation of economic growth. But the moral justification for contract has always been consent. Because the meaning of consent has been obscured, it has too often been conflated and confused with an intentional act or "manifestation," which was assumed to indicate consent. The validity of consent, however, depends upon the validity of the conditions which are constitutive of it. It is the process of evaluating the conditions of consent which I have sought to render more transparent in this Article.

A relative consent framework captures more than the subjective state of the consenting party; it breaks down the conditions which constitute consent and assesses them in light of the conduct of both parties in order to determine the "validity" of consent. This approach is both an affirmation and an elaboration of Melvin Eisenberg's basic contracts principle. Eisenberg's basic contracts principle "recognizes that contract is a process [and] that the picture we see at the time of contract formation . . . is only one of a series of frames. Unless contract law responds to the whole moving picture, it cannot capture the reality of contract."³⁸⁶ Consent, too, is part of a moving picture, not simply an act manifested at a given point in time. Like contracts, the reality of consent can only be captured as a whole, in context.

³⁸⁶ Eisenberg, *supra* note 7, at 1813–14.

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