Introduction

As many commentators have pointed out,¹ consent, in terms of voluntary choice, is – or, at least, appears to be or purports to be -- at the essence of contract law.² Contract law, both in principle and in practice, is about allowing parties to enter arrangements on terms they choose – each party imposing obligations on itself in return for obligations another party has placed upon itself. This “freedom of contract” – an ideal by which there are obligations to the extent, but only to the extent, freely chosen by the parties – is contrasted with the duties of criminal law and tort law, which bind all parties regardless of consent. We do not individually choose the legal obligations we have not to murder and not to defraud, but we only have an obligation to pay Acme Painting four hundred dollars to paint our fence if we choose to take on that duty.³

At the same time, one might argue that consent, in the robust sense expressed by the ideal of “freedom of contract,” is absent in the vast majority of the contracts we enter

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³ Of course, even consent in its fullest sense does not guarantee that the other party has not done us wrong in entering into (an unjust) contract with us. At best, consent only removes one sort of complaint that we can reasonably make about that agreement. See Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries,” in ed. Larry Alexander, *Constitutionalism* (Cambridge: Cambridge University Press, 1998), 152-193, at 163.
these days, but its absence does little to affect the enforceability of those contracts.

(Consent to contractual terms in this way often looks like consent to government: present, if at all, only under a fictional -- “as if” -- or attenuated rubric.) By an absence of consent in the robust sense, I mean that parties to contracts are often unaware of the terms of their agreements (including the default terms and remedial terms not expressly stated in the transaction documents or verbal exchanges, but provided by state and federal law), and even where aware of the terms, may not fully understand their significance. Additionally, there is a relative lack of consent in the sense that there may be no reasonable alternatives to entering the transactions in question. (And during the rare circumstances when the parties are aware of terms, and understand them, there are issues relating to consent that arise from the cognitive biases and other forms of bounded rationality.)

Even those who recognize the significant shortfall in consent in contractual relations disagree about how to respond to it. If one concludes that a contract was entered into with insufficient consent on one side (or on both sides), or if one reaches that conclusion as regards individual terms within the contract,\(^4\) what is the recourse? One option is to refuse to enforce the agreement in total, or, if possible, to refuse enforcement only to the offending provisions. Alternatively, the court might rewrite an offending term to one it considers fairer to both parties. However, as Richard Craswell points out, courts rewriting terms cannot solve the problem of unconsented-to terms: at best, they can

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\(^4\) As Andrew Robertson points out, in contract law, the issue is as often about the consent or voluntariness of limitations of rights accepted as it is about performance obligations undertaken. Andrew Robertson, “The Limits of Voluntariness in Contract,” *Melbourne University Law Review* 29 (2005): 179-217, at 187.
substitute a court-imposed (and, one hopes, fair) term for a party-imposed (and frequently one-sided) term.\(^5\)

In any event (and as will be discussed below), there are obvious benefits to enforcing at least a significant portion of the agreements that parties enter into with less than complete consent. There is too much at stake – to those seeking to enter agreements as well as to third parties – to set the bar too high too often on contractual consent. Among other problems, making too many commercial transactions subject to serious challenge on consent/voluntariness grounds would undermine the predictability of enforcement that is needed for vibrant economic activity.

This article will explore many of the issues relating to consent in contract law (while necessarily falling far short of any sort of comprehensive guide).\(^6\) Part I offers an overview of the nature of consent, before discussing, in general terms, the elements of consent in contract law. Part II reviews the way that questions of consent are dealt with in Anglo-American contract law doctrine. Part III considers how recent principles and practices have raised new consent-related problems, and what the response has been from legislatures and courts. Part IV samples theories of contract law that focus on consent, before briefly considering, in Part V, the possible normative implications.

I. Consent

A. Nature of Consent

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\(^6\) The focus of my paper will be on United States contract law. While the details of contract law differ somewhat in other common law countries, and more markedly in some civil law countries, it is my best guess that much of the analysis that follows holds true across legal systems – in general argument, even if not in detail.
It is sometimes argued that consent can be understood either at an internal or subjective level (state of mind, preferences, volition) or an external or objective level (performatives), or some combination of the two. While contract law discussions may sometimes point to the internal aspects of consent, the actual doctrinal tests focus on externals: what was said, written, signed. This is just a specific instance of a more general focus on external criteria, and objective tests, within contract law.

As others have noted, if one treats the presence or absence of consent as an empirical matter, there remain normative questions in moral and legal inquiries to determine the effect of the consent in question. Though consent is itself a morally loaded term (we are more likely to “find consent” in situations where we believe that a promise is morally binding or that the transaction should be enforced), it is always open for a commentator (or judge) to conclude that even though there was no consent (or no consent in the fullest sense), the transaction should be enforced, or that even though there was consent, the transaction should not be enforced. At the least, there are questions of proof and trust on one hand, and issues of third party effects on the other, that may lead us to enforcement decisions that go the opposite way of our most considered

7 There may be grounds for questioning the assumption (that I will carry over in this paper) that consent is basically the same matter across quite different contexts (e.g., informed consent to medical treatment, consent to government, consent to sexual relations, contractual consent, etc.), but such an inquiry must await another occasion or another author.


9 Of course, a focus on external, observable behavior is common to law generally.

10 E.g., Wertheimer, “What is Consent?”


12 That is, the criteria of consent may involve issues of knowledge, opportunity, and options that are difficult to prove or disprove in court.

13 Third parties may rely on the validity and enforceability of agreements, and if those agreements can be undermined on grounds not easily observable by those third parties, predictability would be significantly undermined.
judgment regarding the presence of consent. Equally important, the term “consent” can be used for a wide range of attitudes, actions, and circumstances, and the level or kind of consent that might be sufficient to ground enforcement in one type of situation may not be sufficient in another.\textsuperscript{14}

This gap 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 “\textit{full consent}” or “\textit{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.

B. Elements of Consent in Contract Literature:

It is a commonplace, going back at least to Aristotle, to think of consent (or “voluntariness,” a sister concept) as a function of some combination of understanding and freedom from coercion.\textsuperscript{15} In the contract context, this is often rephrased in terms of “knowledge” and “reasonable alternatives,” and these will be considered in turn.

\textit{1. Knowledge}

One cannot consent to terms, in any robust sense of consent, without knowledge of the terms. Of course, there are different levels of knowledge (or, looking from the other direction, there are different levels of ignorance) possible. In contracting, one may be ignorant that there are terms that apply (or even ignorant that one has entered a

\textsuperscript{14} This is the problem of “equivocation” in the term, discussed in Alan Wertheimer, “Remarks on Coercion and Exploitation,” \textit{Denver University Law Review} 74 (1997): 889-906, at 892-894.

contractual relationship). This may be common in the downloading of computer software (a topic discussed further below). One can be aware in principle that there are terms, but be ignorant of the existence or content of some or most of the ones that apply to the transaction in question.\(^\text{16}\) This occurs frequently with long, standardized forms, not least when these forms are provided some time after the purchase. And one can know of specific terms but be ignorant of (or misread) the meaning of the terms (understandable, when documents are full of legal or business jargon).

Contracting parties’ ignorance of terms has been a prominent issue in discussions on electronic contracting, and, in prior generations, other forms of “contracts of adhesion.”\(^\text{17}\) Even sophisticated parties often choose not to read all the fine print, as it is more reasonable to use the time and efforts on other tasks, and it is likely that the tendency to “skip the terms” is even more pronounced in Internet commerce.\(^\text{18}\) One could see these decisions not to read both as a background fact that may justify greater regulation of terms, or as a factor pointing the other way – that the choice not to read is itself an aspect of autonomous choosing that should be respected as part of a general inclination to let parties shape their own (commercial) interactions.

2. Reasonable Alternatives

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\(^\text{16}\) For an overview of the literature on how often (or, more to the point, how rarely) parties read either their own standardized forms or the forms of the parties with whom they are dealing, see Robertson, “The Limits of Voluntariness in Contract,” 188-190.


\(^\text{18}\) Robert A. Hillman, “Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?,” *Michigan Law Review* 104 (2006): 837-856, at 840-842, 849-852. It is commonly argued that the failure to read contractual terms is “rational,” but the rationality (understood narrowly) may frequently be overstated, as the choice not to read could be based on a desire not to offend, a belief that the terms will always be fair, a belief that courts would not enforce unfair terms, an undue optimism that the circumstances covered by restrictive terms would not arise, etc. Robertson, “The Limits of Voluntariness in Contract,” 190-193.
A standard element in analyses of contractual consent – seen in doctrinal discussions of both unconscionability and duress (both discussed below) – is the question of what alternatives the party had entering the contract. Reference to alternatives can point to choice in at least three different directions. First, how free was the party not to enter this contract (or a similar contract with another party) at all? That is, what would have been the cost of not contracting? Second, was a comparable agreement available with this contracting partner, or a suitable alternative party, with different terms? That is, were there choices relating to particular terms? Third, even if the party had little choice but to contract, and with this partner, was there a reasonable chance to negotiate alternative terms to the one offered?

One can lack choice regarding a term if there is only one (monopoly) party with which one can deal on this matter (as may be the case with certain utilities or other services). Equally common, one can lack choice regarding a term if one had a choice of contracting parties, but all use the same term (and are not willing or not allowed legally to negotiate changes in that term). This happens with insurance policies – sometimes when state legislatures or insurance agencies dictate terms – and also with many commercial providers (as when all providers of a given good disclaim warranties and consequential damages, or when all employers in a field impose mandatory arbitration of employment disputes).

3. Other Factors

19 It should be noted that there is evidence that monopolies are as responsive to consumer preferences as companies in more competitive situations. Alan Schwartz, “A Reexamination of Nonsubstantive Unconscionability,” Virginia Law Review 63 (1977): 1053-1083, at 1071-1076.
20 See, e.g., Ting v. AT&T, 182 F. Supp.2d 902, 914, 929 (N.D. Cal. 2002) (lack of variety of dispute resolution terms in available long-distance telephone service providers in California).
In considering the extent of a party’s consent to a proposal (or, if one prefers a different terminology, the extent to which the choice was (fully) voluntary), one might consider a variety of factors beyond those (knowledge and existence of reasonable alternatives) already considered.\(^2^1\) For example, (1) is the other party threatening to harm the proposal recipient (make the situation worse relative to the status quo) if the recipient does not accept the proposal, or will the recipient be left at its original status quo?; and (2) would accepting the proposal be rational in terms of the recipient’s stable, long-term preferences? (we will return to the question of bounded rationality below).\(^2^2\)

The first factor pointed towards lack of consent, relating to threats that involve a change to the status quo, often comes up in “modification” cases, cases where one party asks for a one-sided change of terms (e.g., extra pay for the same amount of work already agreed to). In bad faith “hold up” cases, the party seeking the changed terms has no good reason for doing so, and will threaten unjustified non-performance if the requested changes are not agreed to. So the contractor will “request” additional pay, and suggest that non-performance (or significantly slowed or sloppy performance) will result if the extra sums are not promised and paid.\(^2^3\) The second factor pointing towards lack of consent is present in different contexts, including circumstances where one party’s dire


\(^{2^2}\) Wertheimer lists other factors that would be relevant for an exploration of the question of whether a proposal was “exploitative”: e.g., whether the terms are fair, the extent to which the recipient’s situation is “desperate,” the extent to which the recipient’s situation is due to unjust background conditions, and whether the proposal involves commodification of goods that are usually not commodified. Wertheimer, “Remarks on Coercion and Exploitation,” 900-902. Though all of these factors are relevant to an overall moral or legal judgment regarding enforcement of a contract or promise, some are less directly relevant to questions of consent.

\(^{2^3}\) By contrast, in the “good faith” forms of modifications, a party seeks a modification of terms only because it must, because of unexpected changed circumstances (e.g., unexpected price increases from its suppliers, labor trouble, or unexpected complications in performance), and does not threaten non-performance unless it sincerely believes that it has a legal justification.
economic circumstances forces that party to consider proposals it would otherwise consider demeaning or oppressive.

C. Consent and Validity

As Wertheimer points out, it serves neither autonomy nor welfare to demand the fullest form of consent before we treat the relevant moral or legal threshold as being met. This has, perhaps, been most frequently and prominently discussed in relation to the doctrine of duress (discussed further below), where the doctrinal rule allows a party to void a contract if it can show an appropriate combination of wrongful threat on the part of the other contracting party, and a lack of reasonable alternatives to entering the contract on its own part. In considering when such a defense should be allowed, Judge Richard Posner pointed out that reading the doctrinal standard to allow rescission of the contract whenever contracting parties are in such dire economic circumstances that they have no practical alternative to entering the agreement, is actually contrary to the interests of parties in bad economic circumstances. If a poorly situated party could always get out of such agreements, few other parties would enter agreements with it.

II. Doctrinal Treatment of Consent

A. Objective vs. Subjective

24 See Wertheimer, "What is Consent?"
25 The cases often involve a party trying to avoid enforcement of a settlement agreement, in which that party accepted less than its full claim to resolve a breach-of-contract dispute.
27 Wertheimer gives a comparable example regarding informed consent to a medical procedure, where a patient’s consent might have been said to have been less than fully voluntary, because of the dire health consequences of not going forward. In such circumstances, it certainly does not benefit patients suffering from severe medical conditions for them to be unable to validly consent to medical procedures. Wertheimer, , “What is Consent?,” 564.
As noted, consent or autonomous choice has, for a long time, been considered at the core of contract law – at least back to the early English writ of Assumpsit: claiming a cause of action based on obligations that a party had “assumed and faithfully promised” (assumpsit et fideliter promisit)\(^{28}\) – as contrasted with obligations that parties have regardless of our choices.\(^{29}\)

Some commentators and judges took the idea of “freedom of contract” quite seriously: viewing it as a legal principle, and not just a rhetorical justification, that people should be bound only to the extent that they subjectively so chose. Under this subjective theory of contract law (more precisely, the subjective theory of contract formation\(^{30}\)), there would only be contractual agreement when each party’s subjective understanding of the agreement matched exactly (“meeting of the minds”). This is \textit{Raffles v. Wichelhaus},\(^{31}\) where the parties agreed to pay for cotton being sent from Bombay on a ship called “Peerless.” However, unknown to the parties, there were two ships called “Peerless” carrying cotton from Bombay, and one contracting party intended the earlier ship, and the other the later ship. The court held that there was no contract because the parties’ minds did not meet.\(^{32}\)


\(^{30}\) There is a related but distinct subjective approach to interpretation of terms within a contract. See, \textit{e.g.}, E. Allan Farnsworth, \textit{Contracts}, 4\textsuperscript{th} ed. (New York: Aspen Publishers, 2004), 445-454.

\(^{31}\) (1864) 159 E.R. 375, 2 Hurlstone & Coltman 906 (Ct. Exch.).

\(^{32}\) The standard reading of \textit{Raffles v. Wichelhaus} is, as discussed, as a paradigm case of the subjective approach. \textit{E.g.}, Grant Gilmore, \textit{The Death of Contract}, 2\textsuperscript{nd} ed. (Columbus, Ohio: Ohio State University Press, 1995), 39-47. A few commentators, including, prominently, Justice Oliver Wendell Holmes, Jr., have tried to construe the case as consistent with an objective approach (\textit{e.g.}, Birmingham 1985). In any event, it is not crucial that this particular case be read in this way, as there seem to be numerous other cases where the subjective approach is exemplified. \textit{Ibid.}, 44.
While this subjective approach to contract formation seemed to give due regard to freedom of contract and the importance of a kind of “informed consent” to contractual terms, the suggested legal standard would lead to too much uncertainty in the enforceability of agreements. Anglo-American contract law soon settled instead on an objective standard for formation issues. 33 An objective approach focuses on the reasonable understanding of public acts or the words spoken and written, rather than on the parties’ (sometimes idiosyncratic) understanding of those acts and words. If one party signs another parties’ proposed contract, there will be a valid contract, even if the two parties understood the terms differently.

Another example of the contrast between subjective and objective approaches to consent can be found in the well-known case of Lucy v. Zehmer, where the Zehmers claimed that their offer to sell their farm to Lucy for $50,000 had been a joke (made while drinking), but Lucy claimed not to have known that the offer was intended in jest. The court held that, from an objective standpoint, the offer was valid and could be accepted to form a valid contract. 34

B. Absence of Express Consent

There are a number of contract law doctrines that make agreements void or voidable in circumstances where there are significant doubts about the consent of one of the parties. These include duress, undue influence, minority, mental incapacity, intoxication, and unconscionability.

33 E.g., Gilmore, The Death of Contract.
1. Duress and Undue Influence

Duress and undue influence involve “improper pressure in the bargaining process…” Duress involves obtaining a party’s assent to an agreement by an improper threat. The doctrine was originally confined to threats of physical violence, but has been extended, in most jurisdictions, to economic threats (sometimes called “duress of goods”). Under traditional treatments of duress, the question had been whether the other party’s will had been overborne. This traditional approach was abandoned long ago, not merely because of the difficulty of determining when a will had been (or, if one preferred an objective test, should have been) overborne, but also because such a test seemed to exclude too many cases where non-enforcement seemed justified on moral or policy grounds.

Under the modern approach, the party claiming duress needs to prove some wrongful act by the other party combined with a lack of reasonable alternatives. In some circumstances or in some jurisdictions, the party must also show that the other party caused the lack of reasonable alternatives or in bad faith took advantage of that circumstance. As one commentator puts it, there is a sense in which the modern doctrine of duress is more about “wrongness or unfairness” than about “freedom and voluntariness….”

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35 American Law Institute, Restatement (Second) of Contracts (1981), Topic 2, Introductory Note.
36 Wertheimer (1987, 19-53) has a good general discussion of contract law’s historical treatment of consent in the context of duress. On the particular point in the text above, see Wertheimer, Coercion, 23, 32-34.
37 See, e.g., Northern Fabrication Co. v. UNOCAL, 980 P.2d 958 (Alaska 1999).
38 See, e.g., Rich & Whillock, Inc. v. Ashton Development, Inc., 204 Cal. Rptr. 86 (Cal. App. 1984); Butitta v. First Mortgage Corp., 578 N.E.2d 116 (III. App. Ct. 1991). One might, if one prefers, describe the intentional taking advantage of another party’s distress more as “exploitation” than “duress” (Wertheimer 1987, 40), but “exploitation” is not an available doctrinal defense. Also, the cases one might be inclined to describe as “exploitation” tend generally to be analyzed under the rubric of “unconscionability,” a defense courts are even more reluctant to recognize than “duress.”
39 See Wertheimer, Coercion, 53.
Under the doctrinal test for duress, “wrongful acts” includes illegal actions, but extend beyond that to some immoral acts, including threats of criminal prosecution and claiming a right or failing to perform on a contract when one does not (subjectively) believe that one is legally justified. In principle, litigation for breach of contract is a reasonable alternative, unless the party’s business circumstances make the costs or delays of litigation unsustainable.

Some commentators have suggested that the rules of what do (and do not) constitute duress can best be seen as a set of collective choices regarding what sort of “advantage taking” or “strategic behavior” we will condone (or even encourage) in transactions: e.g., that getting the better bargain through greater intelligence or diligent research or crafty persuasion (short of misrepresentation of facts) is acceptable, but that obtaining a better bargain through (say) superior strength is not.

Undue influence involves a combination of over-persuasion by one party and vulnerability or susceptibility by the other party. While it is a notion perhaps more at home in the law of wills and estates (with family members trying to persuade those weakened by age or disease or clergy use fear of the afterlife to receive more favorable terms in a will or other legal document), it is a doctrine accepted in contract law to rescind certain agreements. The cases usually involve parties who are competent, but

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40 Restatement (Second) of Contracts §§ 175, 176. Using a subjective, not an objective standard here is important, among other reasons, to encourage parties to enter binding agreements settling legal disputes. It would make such agreements too easy to attack collaterally if it were sufficient to argue later that, objectively speaking, one of the parties had no valid legal claim. Additionally, a subjective test picks up the “bad faith” aspect of parties insisting on legal positions they themselves do not believe to be justified, simply in order to gain bargaining leverage.


43 Restatement (Second) of Contracts § 177. The paradigmatic case for applying undue influence to a contract (or, at least, contract-like) case is Odorizzi v. Bloomfield School District, 246 Cal. App. 2d 123, 54 Cal. Rptr. 533 (1966).
perhaps barely so, often weakened by age, physical exhaustion, grief, or the like: parties
who could not protect their interests in the face of significant pressure, or parties who
might be susceptible to particular sorts of persuaders (e.g., those with whom they have
relationships of trust: e.g., clergy, lawyers, trustees). 44

2. Minority, Mental Incapacity, Intoxication

There are a series of contract law doctrines dealing with parties who are not (or
are not considered to be) competent to protect their own interests: these involve those
who are below the age of majority (the doctrine of minority, or infancy), those who are
not (or no longer) competent due to mental disease or defect (mental incapacity) and
intoxication.

In each case, the lack of competency gives the affected party the right to rescind
the agreement, at least under certain circumstances. The legal rule, however, sharply
diffs between incompetency on the basis of age – an objective standard, in principle
easily checkable – and forms of incompetency that are not as easily discerned or tested.

Children under the age of majority have the power to rescind their agreements up
to, and slightly beyond, obtaining that age. 45 (If they wait any significant period of time
beyond the age of majority, they will be held to have tacitly ratified the agreement.)

There are different statutory-based exceptions in some states (allowing minors to enter
valid agreements, e.g., for some medical procedures), in some states a minor may be
liable for benefits received or depreciation of the subject of a rescinded contract, and the

44 E.g., Moore v. Moore, 81 Cal. 195, 22 P. 589 (1889) (invalidating on grounds of undue influence a
transfer of land procured by family members from widow, immediately after funeral of husband who had
been shot, widow had been hampered by grief, lack of sleep, and pregnancy; no reason was given why
transaction needed to be done right after funeral other than to take advantage of widow’s condition).
45 See Restatement (Second) of Contracts § 14; Farnsworth, Contracts, §§ 4.3 to 4.5.
parents or guardians of a minor will be obligated to pay the fair market value of any object the minor purchased if the object was a “necessary.”

With intoxication and mental incapacity, the afflicted party generally has the right to rescind an agreement if the other party knew (or should have known) of the incapacity. Additionally, some states allow mentally incapacitated parties to rescind agreements, without regard to the knowledge of the other party, if the parties can be returned to the status quo.

3. Unconscionability

Unconscionability has its roots in the Roman doctrine of *laesio enormis*, under which a contract could be rescinded if a party had to pay more than twice an object’s market price. Under the English common law, unconscionability covered cases where the terms were so one-sided that the agreement was one “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”

This picks up an ongoing theme in discussion of unconscionability, that it combines concerns about acceptable levels of (un)fairness, with suspicions that there may have been some important defect in the formation process. Richard Epstein, though no supporter of governmental paternalistic intervention, defended unconscionability as a

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47 On mental incapacity, see *Restatement (Second) of Contracts* § 15; Farnsworth, *Contracts*, §§ 4.6 to 4.8. On intoxication, see *Restatement (Second) of Contracts* § 16; Farnsworth, *Contracts*, § 4.6, at 230.


doctrine that would allow a defense to enforcement in circumstances where there likely
had been some issue of duress, undue influence, or fraud, but that these elements could
not be proven sufficiently for the use of those doctrines.\(^{50}\)

Contemporary American contract law\(^{51}\) does seem to go further than this, though
the standards for this doctrine’s application remain notoriously amorphous, and its
application in cases highly inconsistent. The doctrine is usually held to include a
requirement of significant defects on both procedural and substantive levels,\(^{52}\) though one
can find occasional cases that seem to deal only with significantly one-sided terms. In
the cases where unconscionability is found, there is often an underlying theme of
exploitation.\(^{53}\) (e.g., Wertheimer 1996, 36-76)

Courts have found, or at least strongly indicated, unconscionability in cases
involving cross-collateral agreements with poor consumers and luxury goods,\(^{54}\) a
provision giving a clothing retailer the right to cancel its order at any time for any
reason,\(^{55}\) arbitration provisions that constrained employees but not employers,\(^{56}\) and the
sale to a poor consumer of a freezer for three times its fair market value.\(^{57}\)

One may need to know more about particular transactions or sets of transactions
to evaluate whether prohibitions of agreements on certain terms is purely paternalistic or
serves other functions. The question is what the effect would be of the prohibition: in

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\(^{51}\) Uniform Commercial Code § 2-302; Restatement (Second) of Contracts § 208; Farnsworth, Contracts, §§ 4.27 to 4.28.

\(^{52}\) See, e.g., Williams v. Walker-Thomas, 350 F.2d 445, 449-450 (D.C. Cir. 1965); Davis v. O’Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir. 2007) (summarizing California law).


\(^{56}\) Armendariz v. Foundation Health Psychcare Servs., 6 P.3d 669 (Cal. 2000).

some cases, the only alternative to transacting on extremely one-sided terms may be no transaction at all (some have argued that this is the case with certain consumer sales contracts with consumers who have little resources and poor credit).\textsuperscript{58} In other cases, however, the alternative to an agreement on extremely one-sided terms may well be an agreement on more reasonable terms: the potential husband might be interested in marrying even if the terms of his proposed premarital agreement must be made more fair; the boat captain offering rescue might be willing to act on market terms if extortionate terms are unenforceable; and the employer may settle for a two-year and local restrictive covenant if a five-year and nation-wide covenant would be struck down. In such cases, restrictions strengthen the bargaining position of the weaker party without foreclosing its ability to enter an agreement on the matter in question.\textsuperscript{59}

4. “Duty to Read”

It is the general rule that one cannot avoid contractual obligation by reporting that one had not read the terms of an agreement, or even that one was unable to read the terms because one was illiterate.\textsuperscript{60} Though one might raise questions on the existence or the quality of the consent if one party did not read a form, could not read a form, or was unable to understand the form’s language, contract law prefers to put the onus on the parties to read a document, or have it read to them, to understand it, or have it explained to them.

5. Consideration

\textsuperscript{58} E.g., Epstein, “Unconscionability: A Critical Reappraisal,” 306-308.
\textsuperscript{59} See Wertheimer, Exploitation, 72-73.
\textsuperscript{60} See, e.g., Farnsworth, Contracts, § 4.26, at 287.
The doctrine of consideration separates enforceable bargained-for exchanges from unenforceable gift promises. The doctrine itself is both intricate and controversial, and a number of different justifications have been offered for it, so the connection between that doctrine and consent is never going to be straightforward. In rough and general terms, an agreement is only enforceable when something of value is given or promised by both sides. “Something of value” includes an agreement not to sue and an agreement to refrain from some activity one has a legal right to do (my promising never to run a marathon or never to visit Siberia would be consideration, even if these were things I would never be interested in doing in any case). For the purposes of consideration, there is no requirement that what one party gives or promises be of comparable value to what the other party gives or promises.

Among the arguments offered for the doctrine of consideration is that as a kind of formal requirement it distinguishes agreements on which parties have given serious thought from those that might have been entered impulsively. At the same time, like technical formal requirements, the doctrine of consideration can result in the non-

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61 Modern American contract law creates some exceptions to consideration doctrine, making a few categories of promises enforceable without consideration. The most prominent exception, promissory estoppel, is discussed below.
62 Refraining from bringing a lawsuit constitutes consideration only if one sincerely believes that one has a colorable legal claim; the fact that one’s belief may be unreasonable and without foundation in the law is not relevant.
63 Discussions of consideration often refer to “benefit” and “detriment,” but these terms are meant in a sort of abstract or logical way. “Detriment” just means giving up something that one has a legal right to do or have; a promise to do something or to refrain from doing something remains consideration even if the promised act or omission arguably benefits the promisor. See, e.g., Hamer v. Sidway, 27 N.E. 256 (N.Y. 1891) (promise not to smoke, swear, gamble, or drink until 21 years old is consideration).
64 However, any one-sidedness in the bargain may help to prove unconscionability, or be evidence of misrepresentation, duress, undue influence, or mistake.
enforcement of transactions where both parties firmly intended and expected enforcement (and there was no strong reason to doubt the voluntariness of the parties’ actions or the fairness of the transaction).  

C. Implied Terms and Hypothetical Consent

Implied terms are terms that are not expressly part of the parties’ agreement, but which nonetheless are enforced. Courts and commentators frequently distinguish terms “implied by law” and those “implied in fact.” The former are terms not grounded on the parties’ shared preferences, but instead based on legislative or judicial judgments of fairness, policy, or efficiency. These will be discussed below, under “mandatory terms.”

Terms “implied in fact” sometimes refers to terms, or assent to terms, that can be read off someone’s behavior (as pumping gas at a self-serve gasoline station is held to be acceptance of purchase at the price listed on the pump). More interesting, for our purposes, are the terms implied into a contract on the basis that these are provisions on which the parties would have agreed if they had been asked at the time they entered the agreement. This is an argument from hypothetical consent. Often terms are implied into a particular contract in the course of resolving a dispute regarding that agreement. Implied in fact terms also include doctrinal rules that could be justified on the basis that these terms are what parties would likely have agreed upon if they had been asked at the time of execution.

66 For an example of a case of this sort, see Dougherty v. Salt, 125 N.E. 94 (N.Y. 1919).
67 On implied terms generally, see Farnsworth, Contracts, §§ 7.15 to 7.17.
68 One sign that a doctrine or equitable exception is justified on “implied in fact” grounds would be an exception allowing parties to waive or circumvent the terms of that standard by express agreement. See,
Justice Oliver Wendell Holmes, Jr., had argued for a “tacit agreement” test for consequential damages that went beyond usual levels of damage: that recovery should only be available where the special circumstances had been brought to the defendant’s attention, and the other party had directly or indirectly assented to the higher level of liability.\(^{69}\) This is a somewhat stricter standard than the *Hadley* test of foreseeability that is in fact doctrinal law in most American jurisdictions, and the tacit agreement test has been expressly rejected by most courts and commentators.\(^{70}\)

There are a number of equitable doctrines that allow parties to rescind an agreement under extraordinary circumstances that have arisen since the execution of an agreement. These doctrines include impracticability, impossibility, and frustration of purpose. Though highly exceptional in their application, they are established parts of the contract law landscape, and are often understood as claims of implied agreement: that certainly the parties could not have expected performance if certain very unusual and unexpected circumstances were to arise.\(^{71}\)

In limited circumstances, a party can rescind an agreement, or at least avoid its enforcement, on the basis of a mistake of fact made at the time the agreement was entered.\(^{72}\) The equitable relief is more easily available if the mistake was shared by both parties at the time of the agreement, but in extreme circumstances relief may be available even for unilateral mistake. Some commentators view the doctrines of mutual and unilateral mistake as basically general statements regarding implied terms: that these are

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\(^{69}\) *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 544-546 (1903) (Holmes, J.).

\(^{70}\) See, e.g., *Restatement (Second) of Contracts* § 351, Comment a; *UCC* § 2-715, Comment 2; *Rexnord Corp. v. DeWolff Boberg & Assoc. Inc.*, 286 F.3d 1001 (7th Cir. 2002).

\(^{71}\) See, e.g., Farnsworth, *Contracts*, 623-624, 630-632, 636-637.

\(^{72}\) *See Restatement (Second) of Contracts* §§ 151-158; Farnsworth, *Contracts*, 599-619.
circumstances in which parties to a contract would normally expect that performance would be excused. This view may be supported by the provisions that state that the agreement will not be subject to rescission if the party seeking rescission has, in some sense, accepted the risk of the mistake.\textsuperscript{73}

\section{D. Mandatory Terms and Rules}

\subsection{1. Background Rules}

While contract law emphasizes the freedom of parties to choose their own terms, there are two prominent sets of exceptions: background rules and mandatory rules. I will deal with background rules in this section, and mandatory rules in the next.

By “background rules,” I mean the formation and remedial rules of contract – the “rules of the game” as it were – which the parties have not chosen,\textsuperscript{74} and most of which are not within the powers of the parties to contract around. For example, despite strong criticism from many commentators, parties cannot (enforceably) agree to extra-compensatory liquidated damages, punitive damages or emotional distress damages,\textsuperscript{75} or to the waiver of the requirement of consideration.

These are only indirectly consent issues, mostly showing the limitations of “freedom of contract”: that there are terms that the state will not enforce, even though

\textsuperscript{73} See Restatement (Second) of Contracts § 154.
\textsuperscript{74} Randy Barnett writes: “In assessing the enforceability of form contracts, we must never forget that contract law is itself one big form contract that goes unread by most parties most of the time.” Randy E. Barnett, “Consenting to Form Contracts,” Fordham Law Review 71 (2002): 627-645, at 644. He goes on to argue that there is a sense in which parties consent to the default rules of contract law. \textit{Ibid.}, see also Randy E. Barnett “… And Contractual Consent,” Southern California Interdisciplinary Law Journal 3 (1993): 421-444.
\textsuperscript{75} There are a quite limited category of contracts (slightly larger in England than in the U.S.) where emotional distress damages are available for breach of contract. See Restatement (Second) of Contracts § 353; Farnsworth, \textit{Contracts}, 808-810. The limitation described in the text refers to the vast majority of contracts, where such damages are not available. On liquidated damages and punitive damages, see Restatement (Second) of Contracts §§ 355-356; Farnsworth, \textit{Contracts}, 760-764, 811-820.
the parties have consented to them. Not only terms, of course, but whole types of agreements are held to be unenforceable: from agreements in restraint of trade (now mostly covered by federal antitrust legislation) to agreements to procure illegal drugs, killers for hire, or prostitute’s services, and the like.  

2. Mandatory and “Implied in Law” Terms

There are some terms which are implied into agreements – some terms implied into all agreements, others into only certain categories of agreements. And the source of the mandatory terms can range from common law judicial rule to state or federal statute. Such terms include the non-waivable duty of good faith, and the provisions of various state and federal consumer protection statutes.

Additionally, there are default terms that the parties can circumvent by express agreement, but which otherwise apply to the parties even when they have not consented to them (though here, in particular, the distinction between waivable terms implied in fact and waivable terms implied in law may be hard to discern). These may include terms relating to termination of an ongoing commercial relationship and duties of “best efforts” one party has towards forwarding the interests of another within a contractual relationship.

III. Recent Challenges to Contract Law’s Treatment of Consent

A. Promissory Estoppel and Other Grounds for Recovery

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76 On these “public policy” restrictions, see Restatement (Second) of Contracts §§ 178-179; Farnsworth, Contracts, §§ 5.1 to 5.9.
77 Uniform Commercial Code § 1-203.
78 See generally Farnsworth, Contracts, §§ 7.15 to 7.17.
In the 20th Century, promissory estoppel developed as an alternative grounds for recovery within, or related to, contract law. Though it (and the other contract-like grounds of recovery discussed in this section) has roots in the case-law that go back a long ways, recent expansions in use have caused some to see it as a challenge to contract law’s consent-based approach.\(^7^9\)

Promissory estoppel is liability on a promise even where the traditional requirements of offer, acceptance, and consideration are not present. This equitable remedy is available where a promise has been reasonably relied upon, and injustice can only be avoided by enforcing the promise.\(^8^0\) While some might argue that liability in such contexts is contrary to the consent-based ideal of freedom of contract, the ultimate complaint goes more to the relative fuzziness of the standard (a promise on which the other party could reasonably rely), a complaint that can be brought against most equitable remedies. There is a sense in which a party consents to potential liability as much by making a promise on which the other party might reasonably rely as by making an offer that the other party might accept.

There are other exceptional grounds for recovery for circumstances where the parties have not reached a valid agreement (or a previously valid agreement has been legally rescinded), but justice seems to warrant granting some right to recovery. For example, there is the right of promissory restitution, where a “promise made in recognition of a benefit previously received … is binding to the extent necessary to prevent injustice.”\(^8^1\) Additionally, there are circumstances where a party can seek

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\(^{79}\) See Gilmore, *The Death of Contract.*

\(^{80}\) *Restatement (Second) of Contracts* § 90(1). “The remedy granted … may be as limited as justice requires.” *Id.*

\(^{81}\) *Restatement (Second) of Contracts* § 86.
restitution for the unjust enrichment of another party, for example, where a contract has been rescinded after payments were made or services rendered, or where emergency services are provided in circumstances where an agreement was not possible. Such rights and obligations are not grounded in consent, but in claims of justice and fairness.

B. Standardized Forms and Electronic Contracting

Standardized forms are also not especially new, though (again) relative to the common law development of contract law doctrine (arm’s length negotiation between equals), they are contrary to the paradigm that underlies much of the doctrine, and thus raises distinct challenges.

Karl Llewellyn’s response to the problem of standardized forms was to argue that one could not reasonably see parties as having assented to the boiler-plate provisions of the other party’s standardized forms, as it is unlikely that such provisions were read, and even less likely that they were understood even if read. Instead, he argued that the courts should treat parties as offering “blanket assent … to any not unreasonable or indecent terms the seller may have on his form, which do not alter or eviscerate the reasonable meaning of the dickered terms.”

Randy Barnett has made a similar argument, comparing assent to terms in form contracts (including those in electronic contracting) to agreeing to do whatever a friend has written in a paper now sealed in an envelope. Such assent would not be seen to be

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82 See, e.g., Farnsworth, Contracts, § 2.20.
86 See Barnett, “Consenting to Form Contracts.”
plenary, but would include, in the contract context, an intention “to be bound by the terms I am likely to have read [e.g., those involving price and quantity] (whether or not I have done so) and also by those unread terms in the agreement … that I am not likely to have read but that do not exceed some bound of reasonableness.”

In this context, it is interesting to watch the contests regarding the regulation of electronic contracting in the United States, especially as they have developed in the course of the battles over proposed revisions to Article 2 of the Uniform Commercial Code, UCITA (Uniform Commercial Information Transactions Act), and the proposed American Law Institute’s Principles of Software Contracts. Those who sell computers and those who sell or lease software have argued, under the rubric of “freedom of contract” for the right to have terms incorporated into contracts even if the terms appear through “clickware,” “browseware,” or sent later “in the box.” On the other side, consumer advocates have argued for more prominent notice to consumers that there are relevant terms, and perhaps for a requirement that such terms be posted on Internet sites or available in stores that sell the goods. Unsurprisingly, the two sides also disagree about the extent to which the doctrine of unconscionability or consumer legislation should limit possible terms or impose mandatory terms.

87 Barnett, “Consenting to Form Contracts,” 638.
88 “Electronic contracting” covers the somewhat different legal contexts of (1) the sale of computers and sale or lease of software, where the provider of the goods has inserted terms in the packaging that cannot be scrutinized until long after the item has been purchased; (2) the downloading of software, where the provider’s terms are posted on an Internet site, and the consumer may (“clickware”) or may not (“browseware”) be required to click a box to indicate assent to those terms.
89 See Hillman, “Online Boilerplate.”
90 EU legislation tends towards significant use of mandatory terms and restrictions on allowable terms in consumer contracts, while U.S. law tends towards allow party choice and market pressures to be the primary, and often the sole, constraint on contract terms. Jane K. Winn & Brian H. Bix, “Diverging Perspectives on Electronic Contracting in the US and EU,” Cleveland State Law Review 54 (2006): 175-190.
One standard argument for allowing the enforcement of terms in electronic contracting, despite issues with the timing of the terms’ presentation, and despite doubts about the likelihood of the terms having been read, is that more stringent requirements would create an unworkable situation, or at least a situation significantly less attractive for consumers and providers alike.\textsuperscript{91} Additionally, while recent empirical work has found that software license agreements tend, almost universally, to have pro-seller provisions (relative to default rules), there appears to be little evidence that the agreements were any more pro-seller in dealings with consumers than they were with larger business and corporate buyers.\textsuperscript{92}

In Arthur Leff’s suggestive analogy, contracting on standardized forms (and, one would now add, electronic contracting) is, in contrast to a much earlier paradigm of contract, more product (“thing”) than process.\textsuperscript{93} As the contractual terms become less subject to negotiation, there is, in a sense, a “collapse of the terms into the product.”\textsuperscript{94} One might add that there is more attention to the general social benefits of easy and enforceable transactions than there is about how full or informed the assent is to terms. This is not necessarily a bad thing, and it may be that no richer sense of autonomy is available in the context of modern commercial interactions.

\textbf{C. Bounded Rationality and Cognitive Biases}

\textsuperscript{91} See, e.g., \textit{ProCD, Inc. v. Zeidenberg}, 86 F.3d 1447, 1452 (7\textsuperscript{th} Cir. 1996) (Zeidenberg’s position, if accepted, “would drive prices through the ceiling or return transactions to the horse-and-buggy age”); \textit{Hill v. Gateway 2000}, 105 F.3d 1147, 1149 (7\textsuperscript{th} Cir. 1997) (requiring disclosure of full terms prior to purchase would be impractical and would serve little purpose).


\textsuperscript{94} Radin, “Boilerplate Today,” 195.
Modern debates about consent in contract law have been enriched, or at least complicated, by recent discussions of “bounded rationality” and “cognitive biases.” These are challenges to the rationality assumption of much of economic analysis – and much of contract law -- challenges based on experimental research.95

Among the experimental results were that parties value objects more when they own them than when they do not (the “endowment effect”), and, analogously, treat perceived losses as far more serious than “opportunity costs” (gains they would have had, had they acted or chosen differently); people’s preferences among alternatives A and B may depend on other alternatives (C, D & E), particularly where the additional alternatives make an option seem either moderate or extreme; and we tend to suffer from self-serving biases, over-optimism, and an under-estimation of the possibility of lower-frequency events.96

Many of these differences from modeled rationality have effects on consent arguments. For example, commentators often argue that consent to a term can be derived from the failure to object to a term, or to demand alternative terms. The endowment effect can counter the argument that parties must not want more protective contract terms because they never (or rarely) negotiate for them: if parties sufficiently valued a protective term, the argument goes, they would trade off some other good (perhaps low price in a consumer good, or higher wages in an employment contract) to get it.97

However, if the valuation of the good varies according to whether it is initially assigned

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to the consumer or employee or not, then the derivation from failure to negotiate is, at best, not so simple. Also, Melvin Eisenberg has written convincingly of how many rules imposing limits on particular kinds of agreements – liquidated damages, express conditions, form contracts, waiver of fiduciary obligations, prenuptial agreements, and limiting terms in employment contracts – can be seen as responding to our cognitive limits.

Both premarital agreements and employments agreements with restrictive covenants are good examples of contracts that may raise special concerns about consent. Someone about to marry, fully in love, may not be well-positioned to think reasonably about which rights to demand and which to waive, regarding alimony and property division, for a future divorce, that he or she, at that moment, cannot imagine occurring. Similarly, an employee taking up a job may not be able to think clearly about post-termination rights when the current relationship between employee and employer is at its most positive. And many commentators have raised questions regarding the assent in a surrogacy agreement to giving up parental rights to a child (especially if the

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98 In premarital agreements (also known as “antenuptial” and “prenuptial” agreements), the parties enter an agreement right before getting married, in which one or both parties waives rights relating to property or alimony upon divorce.


100 With restrictive covenants, employees agree to restrict where they work after their present employment is terminated, restrictions usually in terms of not working in the same industry/field, and covering some geographical range and some duration.

101 In surrogacy agreements, a woman agrees to carry a child for other intended parents. Surrogates are often divided into “gestational surrogates,” who are not genetically related to the children they carry, and “traditional surrogates,” who are egg donors for the resulting children as well as carriers. Statutes and case-law are somewhat more inclined to enforce the parental rights of intended parents against surrogates when the carrier is a gestational surrogate.
woman in question has never before been pregnant and has not experienced the bond many pregnant women feel with the children they carry). ¹⁰²

Some theorists in the area have used arguments grounded in bounded rationality theory to advocate more use of mandatory contract terms (and a broader application of unconscionability doctrine). ¹⁰³ And there is a long tradition of imposing “cooling off periods” (a period after signing an agreement during which time the party can change its mind and no longer be legally bound) – for transactions ranging from door-to-door sales to giving up a child for adoption – grounded on similar concerns regarding consent.

IV. Consent Theories of Contract

It may be worth adding, for the sake of completeness, the role that consent plays in contract law at the role of theories about the doctrinal level. While there are many important theories of contract law that do not focus on consent (in particular, the law and economics theories of contract law¹⁰⁴), there are two prominent approaches that focus, directly or indirectly, on consent: the promise theory of Charles Fried, and the consent theory of Randy Barnett.¹⁰⁵

For Fried, the “promise principle” is the “moral basis of contract law”, connected with the idea that “contractual obligations [are] essentially self-imposed.” A promise itself is an obligation consented to by the party making the promise, and Fried also would have a requirement that the promise be in some sense assented to by the promisee before there would be an obligation.

Standard criticisms of Fried’s theory include (1) that it operates at too general a level to be able to explain detailed contract doctrine or remedial rules (which, critics claim, can be better explained by economic analysis); and (2) that it excludes, by fiat, significant portions of what is conventionally considered part of contract law and practice.

In Barnett’s “consent theory,” “legal enforcement [of an agreement] is morally justified because the promisor voluntarily performed acts that conveyed her intention to create a legally enforceable obligation by transferring alienable rights.” A basic difference between Barnett’s theory and Fried’s lies in Barnett’s greater acceptance of objective approaches to assent. Barnett’s theory might be called an “appears to consent” theory of contract, or a reasonable reliance theory.

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106 Fried, *Contract as Promise*, 1, 2. Fried does not deny the value or validity of imposing (what he would consider) non-contractual liability (e.g.) when “people … give assurances that cause foreseeable harm….” He continues: “Justice often requires relief and adjustment in cases of accidents in and round the contracting process ….” Ibid., 24.
111 See, e.g., Robertson, “The Limits of Voluntariness in Contract,” 203-204. For the argument that Barnett’s theory is susceptible to many of the same criticisms as Fried’s theory, see Craswell, “Contract Law, Default Rules, and the Philosophy of Promising,” 523-528.
V. Therefore What?

First, it is important to reaffirm that this article is not arguing that enforcement must follow consent: it is not arguing that where consent, or consent “in its fullest sense,” is absent, then the contract should not be enforced. Similarly, this article is not arguing that wherever consent is present, or present in its fullest form, then that transaction should always be enforced. There are reasons for and against enforcement of transactions distinct from consent issues, and these other reasons in many circumstances can override the factor of consent, or its absence. There are moral and policy arguments that need to be made connecting the nature or extent of consent and the decision whether to enforce (and whether to regulate), and also general moral and policy arguments relating to enforcement that are distinct from consent, and these arguments will often be specific to the type of transaction, the kind of parties involved, or both. It should (thus) be clear that this paper is also not endorsing a position at the opposite extreme, that consent is entirely irrelevant to how we (“we” here including courts, legislatures, and other regulatory agencies) do or should respond to such transactions.

Our interest in the existence and extent of consent in transactions is tied to two distinct concerns: first, an interest in the autonomy interests of the contracting parties; and second, the welfare interests of the parties, which we believe will usually be best protected by the deferring to their (competent and voluntary) choices.112

To take the second point first, to the extent that the parties’ welfare interests in contract cases are equated with preventing oppressive, one-sided terms, recent literature has indicated that market forces will frequently sufficiently protect consumers (or other

112 “Consent,” “autonomy,” and “voluntariness” refer to overlapping, but still distinct, concepts. However, there is neither need nor space to go into the differences here.


In thinking about consent and regulation, there are two points to consider. First, even if the Market is usually sufficient protection for parties, that there may be areas where, for whatever reasons (lack of competition, significant market failures, greater than usual problems with bounded rationality), the market forces are not sufficient to make sure that terms are within a fair range (and where there is reason to believe that courts, legislatures or regulatory agencies would do a better job of ensuring fair terms).
Secondly, there are circumstances where there are consent-based reasons to object to transactions, even where, for market reasons or otherwise, the terms are not especially one-sided. This gets us back to the autonomy concern mentioned above.

It is now common in the contract literature to point out that there can be a significant autonomy interest in contract practice and regulation, but that this autonomy interest reduces significantly for commercial transactions, and may disappear entirely for business-to-business (that is, non-consumer) commercial transactions. This still leaves many transactions that are not primarily commercial (e.g., open adoption agreements), or that have sufficient strains of personal identity or commodification issues (e.g., surrogacy agreements, and perhaps employment contracts) that we might be especially concerned about consent, even in circumstances where we are not questioning the substantive fairness of the terms. Consent adds moral force, and consent in its fullest form has greater moral force than consent in a weaker sense, that can ground the enforcement of consented-to transactions, but raise questions for transactions that have not been consented to (or only consented to in a weak sense).

Conclusion

Law is full of standards imposed with little or no consent of those affected – from the criminal law and tort law restrictions on our liberty to the obligations parents owe their children -- yet most of the time we think that such standards are nonetheless legitimate and fair. If we are especially concerned about consent in contract law, it is because it is an area of law that is built on the idea, or ideal, of parties choosing the

standards by which they will be bound. Though contract practice clearly falls far short of the ideals of “freedom of contract” and full consent,\footnote{117} it remains one of the few areas of law where the question of consent is taken very seriously, and re-examined regularly. Likely, the contract law (and contract theory) rhetoric of “freedom of contract” and “meeting of the minds” never matched contracting practice in more than a small percentage of agreements (and that small percentage seems now to be getting even smaller).\footnote{118} And if we often consent in only the weakest sense to the terms that bind us (as we consent in only a weak sense to the laws that bind us and the government that governs us), there are important interests of the contracting parties themselves, as well as societal interests, for giving the full force of law to the vast majority of such agreements. At the same time, there may be some categories of transactions, where the absence of consent is particularly worrisome (for the intrinsic value of consent), or where market mechanisms, for some reason, do not sufficiently protect the parties. In such circumstances, restrictions on transactions, or mandatory or prohibited terms, may be justified.

Bibliography


\footnote{117} This point has been made by a number of other commentators. For an excellent recent paper on the topic, see Robertson, “The Limits of Voluntariness in Contract.”

\footnote{118} In the lament of one commentator, the idea of contract as the “voluntary exchange … between autonomous individuals” has become “vestigial.” Radin, “Boilerplate Today,” 196. That commentator continued: “The idea of voluntary willingness first decayed into consent, then into assent, then into the mere possibility or opportunity for assent, then to merely fictional assent, then to mere efficient rearrangement of entitlements without any consent or assent.” \textit{Ibid.}


Robertson, Andrew, “The Limits of Voluntariness in Contract,” *Melbourne University*


