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## The Unbearable Lightness of Consent in Contract Law

Chunlin Leonhard

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# THE UNBEARABLE LIGHTNESS\* OF CONSENT IN CONTRACT LAW

*Chunlin Leonhard*<sup>†</sup>

## ABSTRACT

The consent concept has enjoyed a dominant position in contract law. Scholars have described it as “the master concept that defines the law of contracts in the United States.”<sup>1</sup> That makes intuitive sense. Contracts are private agreements—a set of terms and conditions to which the parties have consented. Some *have* pointed out that the consent doctrine helps promote individual autonomy and freedom of contract, core values protected by contract law. Consent has served to legitimize and justify the government’s choice of sides in a contractual relationship.

This Article queries whether consent alone is sufficient to justify the government’s choice of sides in a private contractual relationship. This Article contributes to the current scholarly discussion on the problematic aspects of consent and proposes an alternative way to evaluate when a court should use its coercive power to enforce a contract. This Article proposes that contract law abandon its consent-centric focus. The elasticity of the concept and its easy manipulability render it an improper basis for state intervention. Instead, courts should adopt a totality of circumstances standard to determine whether government should exercise its coercive power to favor one contractual party over the other.

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\* I thank Professor Steve Ramirez of Loyola University Chicago School of Law for the title inspired by Milan Kundera’s book, *The Unbearable Lightness of Being*. MILAN KUNDERA, *THE UNBEARABLE LIGHTNESS OF BEING* (Michael Henry Heim trans., Harper & Row, Publishers, Inc. 20th anniversary ed. 2004) (1984). In that book, Kundera explored the concept of “lightness.” He described the insignificance of life as “light.” As discussed in this Article, the consent concept, despite the ideal imbued in it and the beauty of its appeal, is ultimately too “light” as the justification for the government’s choice of sides in a private contractual relationship.

† Chunlin Leonhard is an Associate Professor at Loyola University New Orleans College of Law. I thank my colleagues at Loyola University New Orleans College of Law for their support and their comments on the earlier drafts of this Article. I also benefitted from comments by participants in the 2011 CAPALF/NEPOC hosted by Hofstra University School of Law between November 3 and 5, 2011. I thank my research assistant Tina Campbell for her diligent help with this Article.

1. Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994).

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INTRODUCTION

*“We use consent theory not as a map, not realizing that like any other map it’s simpler than reality, but as a set of blinders or rose-colored glasses that make the world look clearer, less problematic, than it really is.”<sup>2</sup>*

The consent concept<sup>3</sup> has enjoyed a dominant position in contract law.<sup>4</sup> Scholars have described it as “the master concept that defines

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2. DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 247 (1989).

3. Many scholarly discussions of consent seem to conflate consent as an act with consent as the central concept of a consent theory. The consent theory portrays society as consisting of free, independent individuals who control their own destiny and who are free to make their own choices. *Id.* at 1. It is beyond the scope of this Article to explore the relationship between consent as an act and its role as a central concept of consent theory. This Article focuses on consent as used in contract law. The consent concept has been used or relied upon in different areas of law. It has contributed to the discussion of the reasonableness of police searches. *See, e.g.,* United States v. Drayton, 536 U.S. 194, 206–08 (2002) (determining that a police search was reasonable when conducted after the officers had approached the defendants on a bus and the defendants had consented); *see also* Ric Simmons, *Not “Voluntary”, but Still Reasonable: A New Paradigm for Understanding the Consent Searches Doctrine*, 80 IND. L.J. 773 (2005) (discussing the consent doctrine in the context of

the law of contracts in the United States.”<sup>5</sup> That makes intuitive sense. Contracts are private agreements—a set of terms and conditions to which the parties have consented.<sup>6</sup> Some have pointed out that the consent doctrine helps promote individual autonomy and freedom of contract, core values to which contract law is committed.<sup>7</sup> After all, individual autonomy and freedom would not mean much if an individual’s consent did not matter. Consent has morally justified and legitimized government intervention in private contractual relationships.<sup>8</sup>

This Article does not question the role of consent as the basis for

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warrantless police searches). It has relieved some forms of criminal liability, for example through the consent defense in rape cases. *See, e.g.*, *People v. Khan*, 264 N.W.2d 360, 366 n.5 (Mich. Ct. App. 1978) (“Although the [Michigan rape] statute is silent on the defense of consent, . . . it impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age . . . is not criminal sexual conduct.”). It has shielded some from civil liability, and imposed civil liability on some others. *See, e.g.*, Tom W. Bell, *Graduated Consent in Contract and Tort Law: Toward a Theory of Justification*, 61 CASE W. RES. L. REV. 17, 19–20, 23 (2010) (discussing the consent defense to medical malpractice liability, as embedded in the tort law defense of assumption of risk, and consent as the basis for contract liability).

4. *See* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) (proposing that “[a] consent theory of contract explains why we generally take an ‘objective’ approach to contractual intent and why we deviate from this approach in some situations” and that “[c]onsent is the moral component that distinguishes valid from invalid transfers of alienable rights”); *see also* Menachem Mautner, *Contract, Culture, Compulsion, or: What is so Problematic in the Application of Objective Standards in Contract Law?* 3 THEORETICAL INQUIRIES L. 545, 551 (2002) (indicating that an objective “reasonable person” approach to contracts “evolved into one of the most entrenched dogmas of contract law”).
5. Schuck, *supra* note 1, at 900; *see also* Bell, *supra* note 3, at 36 (providing examples indicating the importance of consent to contract law).
6. *See* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1010 (1985) (discussing the notion that contracts are “private” and controlled by the parties).
7. *See* MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 8–9 (1993) (examining the political justification for “private ordering”); Peter A. Alces, *Contract Reconceived*, 96 NW. U. L. REV. 39, 42 (2001) (explaining that consent is “vindicated by . . . individual autonomy”); Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 384 (1985) (discussing commitment to individual autonomy).
8. Barnett, *supra* note 4, at 304–05.

a moral obligation to keep one's promise.<sup>9</sup> It queries whether the government should primarily rely on consent to justify its decision to side with one private party over another. Contract law's consent focus is increasingly problematic due to multiple factors. To begin with, consent is an amorphous, difficult-to-define concept that is made increasingly more difficult by the marketplace manipulations of human decision making biases.<sup>10</sup> Is it consent simply because someone signed an agreement? Is it consent if a person signed an agreement without having all the information or without understanding the available information? Is it consent if someone signed an agreement, but unbeknownst to her, the agreement was carefully designed to induce her to sign the agreement?<sup>11</sup>

With the advent of the "age of persuasion,"<sup>12</sup> defining consent and ascertaining its existence have become even more difficult, if not

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9. This Article also does not participate in a debate about the importance or necessity of consent to legitimate government. For an interesting discussion on this topic see Ilya Somin, *Revitalizing Consent*, 23 HARV. J.L. & PUB. POL'Y 753 (2000). This Article merely questions contract law's reliance on consent as a justification for contract enforcement.
  10. See Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, 75 IND. L.J. 1125, 1125 (2000) (pointing out that consent is a "fuzzy and contested" concept). One could argue that the problem with consent is not a matter of definition, but rather an issue about what standard to use to ascertain its existence. The meaning of consent is practically limited by the standards used to ascertain its existence. For example, if one adopts the objective standard to ascertain whether a party has consented by looking at the outward manifestation of consent, the consent as ascertained would mean apparent consent without regard to whether truly voluntary consent existed. On the other hand, if one defines consent as voluntarily arising out of one's free will, the objective standard is not up to the task of ascertaining the existence of consent as defined. This Article treats the problem related to consent both as an issue of definition and standard. Part of the problem with the concept is defining how voluntary consent must be in order to qualify as consent that pays tribute to the core values of contract law—individual autonomy and freedom of contract. See TREBILCOCK, *supra* note 7, at 127 ("From an autonomy perspective, where choices are made on the basis of critically defective information, at some point such choices presumably cease to satisfy the conditions for an autonomous choice.").
  11. See, e.g., *Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330, 1337 (S.D. Fla. 2011) (examining a situation where a plaintiff alleged that a lender "engaged in 'bait and switch' tactics whereby [the lender] induced her into applying for a mortgage with promises of low interest rates, low monthly payments and a fixed interest rate, but then changed the terms of the mortgage at closing").
  12. I borrowed the phrase from the title of a book written by Terry O'Reilly and Mike Tennant. TERRY O'REILLY & MIKE TENNANT, *THE AGE OF PERSUASION* (2009). O'Reilly and Tennant also created "The Age of Persuasion" radio show, broadcast by the Canadian Broadcasting Corporation and Sirius Radio.

impossible. Behavioral studies during the last few decades have provided a more in-depth understanding of human decision-making processes, including predictable biases.<sup>13</sup> Relying on those insights, powerful commercial forces have deliberately manipulated people's decisions.<sup>14</sup> Those unprecedented marketplace phenomena have raised some thorny issues for contract law. These days, voluntary consent may not exist even when all of the traditional indicia of consent exist. People could have signed an agreement and intended to enter into certain transactions and yet there might not be actual "consent." An outward manifestation of consent does not necessarily equal the knowledge required for meaningful consent.

An example of such marketplace manipulation is the subprime mortgage transactions that caused the current financial crisis. Studies showed that lenders deliberately designed mortgage products so that they appeared more affordable to borrowers than they actually were.<sup>15</sup> When the borrowers signed the mortgage agreements, does their "consent" justify the government's choice to side with the lenders? Courts have generally answered the question affirmatively in the litigation arising out of subprime mortgage crisis.<sup>16</sup>

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13. See DANIEL KAHNEMAN, THINKING, FAST AND SLOW 8–10 (2011) (tracing the studies that Kahneman and his colleagues conducted since the 1970s that eventually uncovered many human decision biases that undermine the generally accepted notion that human beings are rational).
  14. A Federal Trade Commission study found that forty-four reporting companies in 2006 spent a total of \$9.6 billion to market food and beverages. FED. TRADE COMM'N, MARKETING FOOD TO CHILDREN AND ADOLESCENTS: A REVIEW OF INDUSTRY EXPENDITURES, ACTIVITIES, AND SELF-REGULATION ES-2 (2008), *available at* <http://ftc.gov/os/2008/07/P064504foodmktngreport.pdf>. When a person reaches for a can of Coke, how much of that decision is made by the person? How much of that decision is attributed to the unrelenting TV commercials promoting Coke products the person has seen? See Oren Bar-Gill, *The Law, Economics and Psychology of Subprime Mortgage Contracts*, 94 CORNELL L. REV. 1073, 1079–80 (2009) (arguing that the subprime mortgage crisis was caused by lenders pushing "risky credit onto borrowers who were incapable of repaying" because the borrowers had "imperfect rationality"); Alan M. White, *Behavior and Contract*, 27 L. & INEQUALITY 135, 158–160 (2009) (pointing out that the marketing industry spend billions of dollars on behavioral research to devise marketing strategies which can increase sales).
  15. See, e.g., Bar-Gill, *supra* note 14, at 1080 ("[L]enders willingly catered to borrowers' imperfectly rational demand even when the demanded product designs increased the default risk borne by lenders.").
  16. See, e.g., *Silver*, 760 F. Supp. 2d at 1334 (granting defendants' summary judgment motion on all of plaintiff borrower's claims including contractual claims for breach of contract and breach of the implied covenant of good faith and fair dealing); see also *Caraang v. PNC Mortg.*, 795 F. Supp. 2d 1098 (D. Haw. 2011) (dismissing plaintiff borrowers' claim for breach of the duty of good faith because a party

Because of the ease with which “consent” can be manipulated, contract law’s consent focus will inevitably lead the courts to use the coercive power of the state to favor the more powerful party in an economic relationship.<sup>17</sup> The party with more bargaining power, resources, and better access to information is in a better position to manipulate.

Some scholars have identified the problems with contract law’s commitment to consent.<sup>18</sup> Some have identified defects related to consent in the area of standard form contracts<sup>19</sup> and cyberspace contracts.<sup>20</sup> Professor Radin, in her article *Humans, Computers and*

cannot breach a covenant of good faith and fair dealing before a contract is formed); *Finuliar v. BAC Home Loans Servicing, L.P.*, No. C-11-02629 JCS, 2011 WL 4405659 (N.D. Cal. Sept. 21, 2011) (dismissing the plaintiff’s claim for breach of the implied covenant of good faith and fair dealing because plaintiff failed to identify a specific contractual provision as a basis for the claim); *Perez v. Wells Fargo Bank, N.A.*, No. C-11-02279 JCS, 2011 WL 3809808 (N.D. Cal. Aug. 29, 2011) (dismissing the borrowers’ contract claims because the plaintiffs failed to identify any specific contractual provisions that were breached or frustrated); *Heaton v. Bank of Am. Corp.*, No. 10-12394, 2011 WL 3112325 (E.D. Mich. July 26, 2011) (dismissing plaintiff claim because the plaintiff alleged nothing more than an ordinary business relationship between the plaintiff and defendant); *Park v. Wachovia Mortg., FSB*, No. 10CV1547-WQH-RBB, 2011 WL 98408 (S.D. Cal. Jan. 12, 2011) (dismissing all of the plaintiff borrowers’ claims including claims for breach of good faith and fair dealing and unconscionability because the complaint failed to sufficiently allege terms of contract to which the covenant could attach). It is not hard to imagine that some borrowers did not even assert any contractual claims, probably recognizing the futility of attempting such a claim under contract law.

17. “Enforcement, in fact, puts the machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy.” Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 562 (1933).
18. See, e.g., TREBILCOCK, *supra* note 7, at 126 (pointing out that “it is difficult, if not impossible, to resolve most problems of information asymmetry within the framework of an internal theory of contract premised on consensually assumed obligations”); see also Peter A. Alces, *Guerrilla Terms*, 56 EMORY L.J. 1511, 1514 (2007) (discussing issues raised by the reality of standard form contracts and finding it “appropriate to question the role and operation of doctrine that has strayed too far from the substantial, real bargain and agreement, to the insubstantial, indeed aleatory, inference of consent”); Radin, *supra* note 10, at 1125–28 (questioning contract law’s commitment to consent in the face of commercial computer-contracting practices); West, *supra* note 7, at 428 (arguing that “consent itself” does not best promote autonomy).
19. See, e.g., Edith R. Warkentine, *Beyond Unconscionability: The Case for Using “Knowing Assent” as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 500–02 (2008) (discussing how the “rolling contract theory” is defective when weighed against more modern approaches to contract theory).
20. Radin, *supra* note 10, at 1128–29.

*Binding Commitments*, raised some thoughtful questions about the consent-based approach.<sup>21</sup> She examined commercial practices in online computer contracting and queried whether “the move online exacerbate[s] the disjuncture between the consent-based picture and the reality of transactions.”<sup>22</sup>

So far, contract law has addressed the defects related to consent through a patchwork of contract defenses and doctrines such as unconscionability.<sup>23</sup> Courts’ analyses of contract law issues have generally not deviated from the consent-centric approach.<sup>24</sup> Continued reliance on consent will lead to a deeper disconnect between contract law and marketplace realities.<sup>25</sup> This Article suggests an alternative approach that attempts to untether the contract law analysis from the traditional consent focus.<sup>26</sup>

To provide a context for the discussion, Part I of this Article draws on the findings of behavioral studies to explain why our society seems to be so enthralled by the consent concept. It also attempts to clarify the meaning of consent. Part II examines contract law doctrines designed to ascertain the existence of consent and those doctrines’ limitations. Part III of the Article identifies some problems with relying on the consent doctrine as a lynchpin for enforcement. Finally, Part IV

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21. *Id.* at 1125.

22. *Id.* at 1126.

23. *See infra* Part III.D.

24. *See* cases cited *supra* note 16.

25. As this Article is being drafted, the Occupy Wall Street Movement is spreading throughout different cities in the United States. The organization’s website describes itself as a “leaderless resistance movement with people of many colors, genders and political persuasions. The one thing we all have in common is that We Are The 99% that will no longer tolerate the greed and corruption of the 1%. We are using the revolutionary Arab Spring tactic to achieve our ends and encourage the use of nonviolence to maximize the safety of all participants.” OCCUPY WALL STREET, <http://occupywallst.org> (last visited Sept. 22, 2012).

26. This proposal reflects not a dislike of the consent concept or all the ideals associated with it, but rather a realization of the difficulty, if not the impossibility, of determining the existence of consent. The elasticity of the concept and its easy manipulability renders it an improper basis for state intervention. This Article does not argue that an individual’s consent should not matter. Indeed, in an ideal world, if an individual’s consent is a result of equal bargaining power with equal access to information and full comprehension and adequate tools exist to ascertain its existence, an individual’s consent would be adequate to justify government enforcement of the promise. The problem is that we do not live in an ideal world: the appearance of consent can be easily manipulated and powerful commercial forces are manipulating human decision making biases to achieve the appearance of consent. The consent-focused inquiry distracts courts from more important considerations of fairness.



of this Article proposes that courts apply a totality of circumstances standard to determine on whose behalf the government should exercise its coercive power in a contractual relationship.

## I. UNDERSTANDING CONSENT

Why are we so enthralled by the consent concept? What explains its iconic status in contract law? What exactly does consent mean? What kind of consent reflects the core values of individual autonomy and freedom of contract? This Part offers some thoughts on these questions.

### A. *The Appeal of Consent*

The consent concept has strong emotional appeal in our society because we as a society pride ourselves on individual autonomy and freedom.<sup>27</sup> The concept belongs to the basket of core ideas that underlie the American Dream.<sup>28</sup> The central idea of the American Dream is that we are in control of our own destiny. It has been described as “the creed of the rugged individualist—a belief that anyone who works hard can succeed. . . . As free agents in a free society, we would all have equal access to economic opportunity.”<sup>29</sup>

The consent concept is thus consonant with the ideal image that we would like to have.<sup>30</sup> It gives us a comforting narrative about ourselves. Humans have a strong need for coherence.<sup>31</sup> We are free and

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27. See HERZOG, *supra* note 2, at 215 (clarifying that the author is not arguing that “consent theory has outlived its usefulness” because we are “still in large part a world of masterless men”); Bell, *supra* note 3, at 29 (using human autonomy to argue that “aretaic moral philosophies should value consent as a necessary constituent of human flourishing”).
28. See Rick Steves, *A United Europe in the 21st Century: Eclipsing the American Dream?*, RICK STEVES’ EUR., <http://www.ricksteves.com/about/pressroom/activism/eurodream.htm> (last visited Sept. 22, 2012) (claiming that “[t]he American Dream emphasizes autonomy, national pride, and material wealth”). Pop literature also promotes the message that the individual alone is responsible for his or her own fate. See BARBARA EHRENREICH, *BAIT AND SWITCH* 81 (2005) (quoting from a “pop-psych fad” book and indicating that “[i]t’s a long-standing American idea . . . that circumstances count for nothing compared to the power of the individual will”).
29. Steves, *supra* note 28.
30. Upon this concept was born an entire consent theory. Don Herzog described this “familiar figure” that “haunts modern society” as “the free agent, bound only by his own choices. He chooses a career, a spouse, a religion, a lifestyle, and more. He animates our moral and political arguments, our very idea of what a person is, and our social lives.” HERZOG, *supra* note 2, at ix.
31. Nobel Prize-winning psychologist Daniel Kahneman wrote extensively about the human need for coherence in his recent book, *Thinking, Fast and Slow*. KAHNEMAN, *supra* note 13, at 79–88.

independent and we control our own destiny.<sup>32</sup> We are free to agree or not to agree, to consent or not to consent because we alone can define our relationships with others.<sup>33</sup> Respect for consent means respect for our individualism and autonomy.<sup>34</sup>

Contract law naturally embraces the consent concept as the lynchpin for enforcement of promises. This is an easy story to tell and sell.<sup>35</sup> Indeed, one could argue that the danger of the consent concept (and its ability to do mischief) lies in its strong appeal and coherence. Because of its appeal, there is no ready constituent to expose its potential to do mischief. There is little political will to save people from themselves.

The alternative narrative, which unfortunately more closely resembles reality, is a more difficult story, as behavioral economists have shown.<sup>36</sup> We are not really free.<sup>37</sup> We have multiple obligations to family, friends, superiors, and various affiliated groups.<sup>38</sup> Our

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32. See Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 461 (1996) (“Both the legitimating and justifying faces of consent purportedly embody and advance notions of freedom and autonomy.”). Some have pointed out that the concept of consent and the related concept of individualism have contributed to the success of this country. It motivated people to do their best because of a strong belief in themselves. Steves, *supra* note 28. While the consent concept can do good, we need to be mindful of its ability to do harm when used as a basis for government intervention.
33. Schuck, *supra* note 1, at 900–01.
34. Garnett, *supra* note 32, at 489.
35. This message is repeated in many popular literature and self-help books. *E.g.*, EHRENREICH, *supra* note 28, at 81–82. The consent concept is also consistent with America’s historical distrust of government and provides a ready justification for keeping the government out of people’s private economic relationships. See DANIEL B. KLEIN, 3 LIBERTARIAN ESSAYS 30 (1998) (“Where people distrust government, they choose politically to have much liberty . . .”).
36. See KAHNEMAN, *supra* note 13, at 128 (pointing out that human decision-making biases, such as priming effect, “threaten the subjective sense of agency and autonomy”).
37. See DAN ARIELY, PREDICTABLY IRRATIONAL 321 (First Harper Perennial ed. 2010) (“[W]e are pawns in a game whose forces we largely fail to comprehend. We usually think of ourselves as sitting in the driver’s seat, with ultimate control over the decisions we make and the direction our life takes; but, alas, this perception has more to do with our desires—with how we want to view ourselves—than with reality.”).
38. See Garnett, *supra* note 32, at 509 (“We are not simply ‘choosers,’ as the ethic of autonomy and consent posits. We are members, friends, and loved ones as well.”).

choices can be easily swayed.<sup>39</sup> We often make decisions not based on best evidence and we are distracted by secondary considerations.<sup>40</sup> Our flaws are so predictable that we can be easily manipulated.<sup>41</sup> When we agree to do certain things, it may be due to multiple reasons that may not reflect our free will.<sup>42</sup> Our decisions may reflect our environment and other external factors.<sup>43</sup> In reality, we make very few decisions free of outside influences.<sup>44</sup>

Faced with the ideal and the real, we embrace the ideal wholeheartedly. Indeed any challenge to the consent doctrine could risk being viewed as advocating for irresponsible behavior. How can anyone argue that someone should not be held accountable for what they have agreed to do?<sup>45</sup> The consent concept is in essence part of our identity.

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39. See KAHNEMAN, *supra* note 13, at 140 (describing psychologist Paul Slovic's work, which shows that human judgment is guided more by emotions than reasons and is easily influenced by multiple factors).
40. See *id.* at 128 (describing the influence of priming effects, "in which your thoughts and behavior may be influenced by stimuli to which you pay no attention at all, and even by stimuli of which you are completely unaware"). Studies have shown that people do not necessarily act to maximize their economic interests. See MICHAEL SHERMER, *THE MIND OF THE MARKET* 176 (2008) ("[E]xtremely low ultimatum game offers are usually rejected—we are willing to forgo gain in order to prevent another from receiving an unjust award. That is, we'll pay to punish fair-trade transgressors."); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *STAN. L. REV.* 1471, 1492 (1998) ("People will often behave in accordance with fairness considerations even when it is against their financial self-interest and no one will know.").
41. See ARIELY, *supra* note 37, at 317 ("[W]e are all far less rational in our decision making than standard economic theory assumes. Our irrational behaviors are neither random nor senseless—they are systematic and predictable.").
42. See KAHNEMAN, *supra* note 13, at 128 ("[O]ur thoughts and our behavior are influenced, much more than we know or want, by the environment of the moment").
43. For example, Professor West pointed out that the characters portrayed in Kafka's world seem to better resemble human reality than the rational being portrayed in Professor Posner's world. See West, *supra* note 7, at 427 ("Our subjective experiences of the consensual transactions we enter do not accord with Posner's external descriptions of those transactions.").
44. See KAHNEMAN, *supra* note 13, at 119–28 (discussing the anchoring effect's influence on choices); *id.* at 129–35 (discussing studies that show how people's decisions are affected by availability bias).
45. I cannot help but be a little defensive myself. This Article does not argue that people should not be held accountable. Instead, this Article advocates for an alternative basis to hold people accountable when the coercive power of the state is invoked. When people's "consent" no longer reflects their free will, something more than "consent" is necessary to justify the state's use of coercive power in favor of one party.

B. *The Meaning of Consent*

What does consent mean? *Webster's II New College Dictionary* defines consent when used as a noun as “[v]oluntary allowance of what is planned or done by another.”<sup>46</sup> The dictionary further defines “voluntary” as “[a]rising from one’s own free will.”<sup>47</sup>

This definition raises some questions. How voluntary does a person’s decision have to be before that decision counts as consent within the meaning of an autonomous choice?<sup>48</sup> Is it “voluntary” if one does not have the necessary information to make the decision? Is it “voluntary” if one makes a choice without being aware that someone manipulated the information?

A survey of consent scholarship shows general agreement that certain prerequisites must exist before consent can reflect autonomous choices.<sup>49</sup> Scholars have identified what they call “informed consent” as consent that reflects an individual’s autonomy.<sup>50</sup> Under the informed consent analysis, in order to give consent, one needs volition (the power to use one’s will), information, and comprehension.<sup>51</sup>

The volition requirement of consent “requires conditions free of coercion and undue influence.”<sup>52</sup> Coercion occurs when one person threatens to harm the other person in order to obtain consent.<sup>53</sup> “Undue influence, by contrast, occurs through an offer of an excessive, unwarranted, inappropriate or improper reward or other overture in order to obtain compliance.”<sup>54</sup> Additionally, “inducements that would

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46. WEBSTER’S II NEW COLLEGE DICTIONARY 245 (3d ed. 2005).

47. *Id.* at 1267.

48. See TREBILCOCK, *supra* note 7, at 127 (“From an autonomy perspective, where choices are made on the basis of critically defective information, at some point such choices presumably cease to satisfy the conditions for an autonomous choice.”).

49. See, e.g., *id.* at 102 (emphasizing that “[e]ven the most committed proponents of free markets and freedom of contract recognize that certain information preconditions must be met for a given exchange” to be efficient).

50. JULIA A. PEDRONI & KENNETH D. PIMPLE, A BRIEF INTRODUCTION TO INFORMED CONSENT IN RESEARCH WITH HUMAN SUBJECTS 4-5 (2001).

51. NAT’L COMM’N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL & BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH 10-14 (1978) [hereinafter BELMONT REPORT].

52. *Id.* at 14.

53. *Id.*

54. *Id.*; see also *Odorizzi v. Bloomfield Sch. Dist.*, 54 Cal. Rptr. 533, 539 (Ct. App. 1966) (“[A] person’s will may be overborne without misrepresentation.”).

ordinarily be acceptable may become undue influences if the subject is especially vulnerable.”<sup>55</sup>

The next requirement of informed consent requires access to information.<sup>56</sup> Even when one has the will to become informed, one needs to have the necessary information. If one cannot have physical access to information, one cannot evaluate all the options.<sup>57</sup> Consent based on limited information cannot be consent that promotes individual autonomy and freedom of contract.<sup>58</sup>

Furthermore, mere physical possession of information without comprehension will not result in consent, either.<sup>59</sup> Comprehension is thus an important requirement for meaningful consent. The ability to understand depends on intelligence, rationality, maturity, and language.<sup>60</sup> Comprehension is influenced by internal constraints such as cognitive ability and decision-making biases and external constraints such as cultural biases and marketplace manipulations.<sup>61</sup>

Let us consider the following consent scenarios against the backdrop of the informed consent discussion.<sup>62</sup>

1. Party B had all the information and understood all the information. Party B carefully weighed all of his options by considering the costs and benefits of each option. Party B was in a position to negotiate with Party A. After negotiating with Party A on several issues, Party B signed the agreement.

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55. BELMONT REPORT, *supra* note 51, at 14. A California court described undue influence as “a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment.” *Odorizzi*, 54 Cal. Rptr. at 539. As the court later acknowledged, “[t]he difficulty, of course, lies in determining when the forces of persuasion have overflowed their normal banks and become oppressive flood waters.” *Id.* at 541. Product advertising influences people’s decisions, but it is tolerated, and most would agree that it does not rise to the level of undue influence.

56. BELMONT REPORT, *supra* note 51, at 11–12.

57. PEDRONI & PIMPLE, *supra* note 50, at 5–6.

58. *Id.* at 6.

59. *Id.*

60. BELMONT REPORT, *supra* note 51, at 12.

61. *See id.* at 13 (explaining that “[s]pecial provision[s]” might need to be made for those with impaired cognitive abilities such as mental disability).

62. This is a crude attempt to categorize certain situations implicating consent analysis for the sake of articulating the issues raised by contract law’s focus on consent. Some of the examples are derived from actual court cases, summarized and abbreviated to highlight the defect with consent.

2. Party B had all the information and thought that he understood everything, but unbeknownst to him, Party A had deliberately designed and presented the options to lead Party B to the option preferred by Party A. Party A's options were designed to exploit human decision-making biases identified by behavioral studies. Party B chose the predicted option and signed the agreement.
3. Party B had all the information and understood the information. However, Party B was not in a position to negotiate and had no alternatives anyway. Party B signed the agreement.
4. Party B had all the information, but Party B did not understand the information or Party B did not bother to read the agreement. Nonetheless, Party B signed the agreement.
5. Party A failed to disclose a material fact to Party B. Party B signed the agreement.
6. Party A misrepresented a material fact. Relying on the misrepresentation, Party B signed the agreement.
7. Party B was confined in a cast in a hospital. Party A spent two hours persuading Party B to sign an agreement to release claims for personal injuries in exchange for a relatively small sum. At the time of signing, Party B was in a highly nervous and hysterical condition and suffering much pain, and she signed the release in order to get rid of Party A.
8. Party A told Party B that Party B would be hanged or thrown into the river if he did not sign the agreement. Party B signed the agreement.

These scenarios of consent present a spectrum of consent, from informed consent to increasingly problematic consent. At both extremes (Scenarios 1 and 8), the answer is easy. At one end of the spectrum with Scenario 1, we have informed consent where a party gives consent knowingly—with full information and comprehension. In that situation, Party B is not coerced. Party B has access to information and understands all the information. Party B can weigh the costs and benefits and negotiate with Party A. Scenario 1 agreements embody the ideal paradigm upon which contract law is based.

At the other end of the spectrum with Scenario 8, there is only apparent consent obtained as a result of threats of physical harm. All reasonable people would agree that the transaction involved no meaningful consent. Enforcing a Scenario 8 agreement would not advance contract law's goal of protecting individual autonomy and freedom of contract. Under contract law, courts have refused to

enforce that type of agreement.<sup>63</sup> Contract law defenses such as fraud, duress, and undue influence recognize the defects in consent in Scenarios 6, 7 and 8.<sup>64</sup>

But the decision gets harder in agreements falling between the two extreme ends. Scenario 2 raises the consent problem with which this Article is concerned. As discussed below, current contract law's consent-centric approach means that most of the contracts between Scenarios 2 and 5 will be enforced by the courts despite the problems that speak against the existence of a truly voluntary consent.

## II. CONSENT AND CONTRACT LAW

This Part examines the ways contract law has relied on consent to justify its choice to side with one private party over the other. This Part briefly reviews contract law formation doctrines, defenses, and interpretation and construction principles and points out that the consent concept is reflected in numerous contract law doctrines. Application of contract law doctrines is essentially a quest for parties' consent.

### A. *Consent and Contract Formation*

The consent concept is reflected in contract law doctrines governing contract formation such as offer, acceptance, mutual assent, and intent. These concepts are essentially vehicles for courts to determine whether consent exists.<sup>65</sup> Because courts do not have mind-reading ability, courts have to rely on observable evidence to ascertain whether parties consented.<sup>66</sup> The task is made more difficult

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63. See, e.g., *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 214 (1868) (“[M]oral compulsion, such as that produced by threats to take life or to inflict great bodily harm, as well as that produced by imprisonment, is everywhere regarded as sufficient, in law, to destroy free agency, without which there can be no contract, because, in that state of the case, there is no consent.”).

64. See Lawrence Kalevitch, *Gaps in Contracts: A Critique of Consent Theory*, 54 MONT. L. REV. 169, 193 (1993) (noting that liberalism has promoted “the idea of limits to freedom of contract and has endorsed doctrines such as duress and unconscionability that are said typically to ‘police’ the bargain”).

65. See Barnett, *supra* note 4, at 304 (“Contract theory searches for the ‘extra’ factor that, if present, justifies the legal enforcement of a commitment or promise.”). One can question whether the concepts of offer, acceptance, and assent or intent necessarily equal the concept of consent. It is beyond the scope of this Article to examine the subtle differences between these concepts. Suffice it to say that, in most cases, consent is implicit in those terms, and a search for offer, acceptance, and assent or intent is really a search for consent.

66. See *id.* at 305 (“[We] learn the meaning of terms by comparing (1) the conduct of persons with their words, or (2) their conduct and words in

because courts have to ascertain the existence of consent after a dispute has arisen. When parties are in a dispute, they generally will have conflicting and self-serving testimony about whether one party consented. But courts cannot read the consenter's mind. By necessity, courts have developed doctrines to assist them in this task.

An examination of those doctrines reveals that courts have primarily adopted an objective approach to ascertain the existence of consent.<sup>67</sup> Under the objective test, courts look at objective manifestations of intent—essentially, what a reasonable person looking at the outward manifestation would have understood the intent to be.<sup>68</sup> The professed reason for the objective test is to protect certainty of contracts and the other party's reliance on the promisor's manifestations.<sup>69</sup>

To assess whether a party has consented, courts focus on evidence such as signature on an agreement, spoken words, or other actions related to the transaction. Courts have placed heavy emphasis on a party's signature.<sup>70</sup> They have held a party accountable for giving an

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one context with those in another, or (3) one person's conduct and words with another person's conduct and words.”).

67. See Mautner, *supra* note 4, at 551 (“[O]ver the course of the twentieth century, the objective approach evolved into one of the most entrenched dogmas of contract law.”); see also *Ray v. William G. Eurice & Bros.*, 93 A.2d 272, 279 (Md. 1952) (“[W]here there has been an integration of an agreement, those who executed it will not be allowed to place their own interpretation on what it means or was intended to mean. The test in such case is objective and not subjective.”); RESTATEMENT (SECOND) OF CONTRACTS § 21 (1981) (rejecting the subjective approach). For an interesting perspective on the origins of the objective theory, see Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 *FORDHAM L. REV.* 427, 428 (2000) (stating that “objective approaches have predominated in the common law of contracts since time immemorial” and describing “a brief but almost inconsequential flirtation with subjective approaches in the mid-nineteenth century”).

68. Mautner, *supra* note 4, at 551.

69. See Perillo, *supra* note 67, at 442–43 (discussing the desire for certainty throughout the jurisprudence of the early republic).

70. See *e.g.*, *MCC-Marble Ceramic Ctr., Inc. v. Ceramica Nuova d'Agostino, S.P.A.*, 144 F.3d 1384, 1387 n.9 (11th Cir. 1998) (“[P]arties who sign contracts will be bound by them regardless of whether they have read them or understood them.”); *Linville v. Ginn Real Estate Co.*, 697 F. Supp. 2d 1302, 1308–09 (M.D. Fla. 2010) (“A party who signs an instrument is presumed to know its contents. . . . He cannot avoid his obligations thereunder by alleging that he did not read the contract, or that the terms were not explained to him, or that he did not understand the provisions.” (alteration in original) (quoting *Benoay v. E.F. Hutton & Co.*, 699 F. Supp. 1523, 1529 (S.D. Fla. 1988))); *Reliable Fin. Co. v. Axon*, 336 So. 2d 1271, 1274 (Fla. Dist. Ct. App. 1976) (finding “that a party to a writing cannot deny its contents on the ground that he [or she] signed it without reading it”).



impression of assent when a party signed a contract even though the party might not have read or understood the terms.<sup>71</sup> Courts have often stated that parties have a duty to read the document before they sign it.<sup>72</sup> Accordingly, if a party objectively manifests assent to be bound to a contract (the best example is by signing a contract), a court will almost automatically find assent to all terms contained in the writing. Typically, Courts readily dismiss parties' statements such as, "I didn't read it" or "I didn't understand it," absent circumstances which give rise to contract law defenses such as fraud, unconscionability, or incompetence.<sup>73</sup>

The objective test furthers important goals of certainty and predictability of contract. Scholars and courts have identified the advantages of this approach.<sup>74</sup> It provides certainty of contract so that the parties can rely on contractual agreements. It encourages individual responsibility.<sup>75</sup> One better think carefully before one signs because one will be held responsible for one's actions. It also eliminates problems of proof and results in judicial efficiency because the signature is in black and white. However, because it focuses on outward manifestations, it could result in consent being found even though the party did not consent.<sup>76</sup> Because of market manipulation of information, it is

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71. See, e.g., *Dixon v. Countrywide Home Loans, Inc.*, 710 F. Supp. 2d 1325, 1331–32 (S.D. Fla. 2010) (dismissing plaintiff borrower's claims because the plaintiff reviewed and signed the loan documents at closing).
  72. See, e.g., *Reliable Fin.*, 336 So. 2d at 1274 ("It is the duty of every contracting party to learn and know its contents before he signs and delivers it." (quoting *All Fla. Sur. Co. v. Coker*, 88 So. 2d 508, 511 (Fla. 1956))); see also cases cited *supra* note 70.
  73. See, e.g., *Silver v. Countrywide Home Loans, Inc.*, 760 F. Supp. 2d 1330, 1344 (S.D. Fla. 2011) (granting summary judgment in favor of the lender and denying the borrower's claims of fraud, conspiracy to defraud, and unfair trade practices because she was deemed to have knowledge of the document she signed); O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 464 (1897) ("[T]he making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs,—not on the parties' having *meant* the same thing but on their having *said* the same thing.").
  74. See, e.g., *Universal Studios, Inc. v. Viacom, Inc.*, 705 A.2d 579, 589 (Del. Ch. 1997) ("The necessity of preserving predictability and stability in commercial transactions is fostered by this objective view of contracts . . ."); Alces, *supra* note 18 at 1517–18 (explaining that the objective test "make[s] questions relating to the formation of contract and the incidents of contract liability easier to resolve").
  75. Richard L. Barnes, *Rediscovering Subjectivity in Contracts: Adhesion and Unconscionability*, 66 LA. L. REV. 123, 129–30 (2005).
  76. See Mautner, *supra* note 4, at 562 (arguing that one of four assumptions implicit in contract interpretation is that the contracting parties share a "cultural environment" that gives unequivocal meaning to the content of the contract). Professor Barnett argued that the objective approach is

increasingly common for there to be a manifestation of consent without any meaningful consent.<sup>77</sup>

Another contract law principle that affects contract law's consent analysis is the well-established rule that parties do not owe each other a duty of good faith prior to the formation of the contract.<sup>78</sup> Contract law assumes that parties bargain at arms' length, which means that parties generally do not have a duty to disclose in the negotiation process.<sup>79</sup> Without access to information, one party may consent to the transaction without intending to do so.

### B. *Consent and Contract Defenses*

Contract law has long recognized some obvious defects with consent. It has attempted to deal with the defects by allowing certain defenses. These contract law defenses mark the outer boundaries of consent enforceable under contract law. Contract law defenses fail, however, to address the more subtle consent problems identified in this Article.<sup>80</sup>

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consistent with the liberty interest that contract law protects because the objective approach respects and protects “the rights and liberty interests of *others*, whose plans and expectations would be severely limited if they were not entitled to rely on things as they appear to be and to take the assertive conduct of others at face value.” Barnett, *supra* note 4, at 306. It is certainly true that the objective approach protects the reliance interests of the promisee. But the objective approach may be only paying lip service to the liberty interests of the promisor if it results in enforcing a promise that the promisor has no intention of making. Even more concerning is a situation where a promisor is deliberately misled into agreeing to certain terms because of lack of informed consent due to information asymmetry and marketplace manipulations. The protection of the promisee's reliance interest under an objective theory seems to serve the interests of certainty and fairness to the promisee rather than respecting the liberty interests of the promisor. See Mautner, *supra* note 4, at 552–53 (arguing that the shift from subjectivism to objectivism was a “shift from an ethos of individualism and self-reliance to one of responsibility, both private and collective, towards others,” and a shift aimed at promoting “certainty and predictability”).

77. See Radin, *supra* note 10, at 1128 (arguing that the advent of cyberspace contracts will make the conflict between the consent-based system and nonconsensual practices more urgent).
78. See Dennis M. Patterson, *A Fable from the Seventh Circuit: Frank Easterbrook on Good Faith*, 76 IOWA L. REV. 503, 522 (1991) (stating that good faith is “relative to the agreement of the parties”).
79. Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1357–58 (2009).
80. See discussion *infra* Part III.D.

Courts have refused to uphold contracts signed as a result of duress.<sup>81</sup> These defenses involve situations where one party has obtained consent improperly. As illustrated by Scenario 8, duress involves the situation where the promisee used actual physical force or unlawful threat of death or bodily harm.<sup>82</sup> In this type of situation, it is easy to conclude that no meaningful consent exists because there is no free will.

Where one party had misrepresented an existing fact, courts have also refused to enforce the promise against the consentor who relied on the misrepresentation.<sup>83</sup> Misrepresentation involves situations where the promisee obtained the other party's consent by making a fraudulent misrepresentation about a material fact, with knowledge of its falsity and with the intent to induce the other party to enter into the contract, and where the other party justifiably relied on the misrepresentation.<sup>84</sup> This defense reflects contract law's recognition that there is no free will in such a context. The misrepresentation deprived the promisor of the information necessary for consent.

Courts have also relied on the doctrine of unconscionability to refuse enforcement of a contract in certain limited situations.<sup>85</sup> Unconscionability involves situations where one party uses a strong bargaining position or unethical tactics to take advantage of another's weakness, ignorance, or distress.<sup>86</sup> This defense is the broadest and has the potential to undo many contracts where consent does not exist. As explained below, however, courts have applied the doctrine

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81. See, e.g., *Ortt v. Schwartz*, 62 Pa. Super. 70, 74–75 (1916) (stating that contracts produced under intimidation are voidable, but threats of arrest before commencement of such proceedings are not enough to constitute duress).
  82. See *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 209–10, 216 (1868) (finding that contracts or deeds procured through fear of loss of life by the other party are voidable).
  83. See, e.g., *Vokes v. Arthur Murray, Inc.*, 212 So. 2d 906, 908–09 (Fla. Dist. Ct. App. 1968) (finding that representations by a dance studio that the appellant was a graceful dancer in order to induce her to purchase more dance lessons to be false and thus a misrepresentation of fact).
  84. For an example of a misrepresentation, see *id.*
  85. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965) (holding that it is unconscionable when a party with little bargaining power signs a contract with little or no knowledge of its contents).
  86. See, e.g., *Weaver v. American Oil Co.*, 276 N.E.2d 144, 148 (Ind. 1971) (refusing to enforce a contract where the stronger party used unequal bargaining power to its advantage and where the weaker party did not graduate from high school, did not know the law or understand the technical terms, and had never read the lease, and where enforcing the contract would cost the weaker party thousands of dollars for negligence he did not cause).

very narrowly. The doctrine in practice has not been used to correct the more subtle consent problems.

Other contract defenses, such as mistake and incompetence (also referred to as incapacity or infancy), recognize the fact that the consenter does not have necessary information because of a fundamental mistake or lacks the mental capacity to consent due to mental disease or age. The defense of mistake (either mutual or unilateral) can defeat the formation of a contract where the mistake was about a basic assumption of contract and the mistake had a material effect on the agreed-upon exchange of performances.<sup>87</sup> These defenses also rest on the notion that the parties would not have consented had they known about the mistake or had the capacity to consent.

Additional recognition of defects with consent is reflected in doctrines that would excuse the promisor from performance under the contract. The doctrines of impossibility, impracticability, and frustration recognize the human inability to anticipate all future events that might affect performance.<sup>88</sup> These doctrines excuse a promisor from his promise if an event occurs whose nonoccurrence was a basic assumption upon which consent was based.<sup>89</sup> Contract excuses reflect judicial recognition of the human inability to see into the future and courts' unwillingness to stretch the consent concept too far.<sup>90</sup>

### C. *Consent and Contract Interpretation*

The consent concept also permeates contract interpretation principles. Sometimes, parties dispute the terms of their contract. Courts are left with the task of determining what the parties have agreed to. In this area, courts have adopted certain well-established principles as tools. Those principles reflect contract law's consent-concentric

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87. See *Sherwood v. Walker*, 33 N.W. 919, 923 (Mich. 1887) (holding that the defendant seller could rescind the contract of sale if the jury found that the cow, known as "Rose 2d of Aberlone," was sold upon the understanding of both parties that she was barren and useless for breeding while in fact she was not barren).

88. See *Barrack v. City of Lafayette*, 829 P.2d 424, 428–29 (Colo. App. 1991) (holding that a new regulation by the Colorado Department of Health, which required all surface water to be treated before delivery, made it illegal for the City of Lafayette to deliver untreated water, and thus under the doctrine of impossibility the city was discharged of all contractual duties that might require it to supply citizens with untreated water).

89. *Id.* at 428.

90. Another contract law defense is based on public policy grounds. Courts have refused to enforce certain contracts if they are illegal. *E.g.*, *Hendrix v. McKee*, 575 P.2d 134, 137 (Or. 1978). This defense is not driven by the concerns for consent. Instead, the defense reflects a collective social judgment that those contracts are so offensive that courts will not enforce them, even if consent exists, because of other overriding public policy concerns. *Id.*

approach. Like contract formation doctrines, defenses, and excuses, these well-established contract law doctrines tend to favor the written agreement considered to be the best evidence of the parties' consent.

For example, one of the rules of contract construction is the well-established four corners doctrine.<sup>91</sup> Under the doctrine, a judge is supposed to stay within the four corners of the contract when interpreting a written contract to ascertain the intent of the parties.<sup>92</sup> Another related doctrine, the plain meaning rule, requires courts to interpret a written contract in accordance with its plain meaning if the terms of the contract are clear and unambiguous.<sup>93</sup> Both doctrines focus on the written language in a contract.

The parol evidence rule is another well-established contract law principle that bars introduction into evidence of any prior or contemporaneous written or oral agreement to contradict the explicit terms of the written contract.<sup>94</sup> To invoke this doctrine, many contracts typically contain a standard merger or integration clause that expressly states that the written contract is the final expression of the parties' intent and that it merges all prior or contemporaneous agreements between the parties.<sup>95</sup> The parol evidence rule thus favors the written agreement and reflects contract law's focus on objective consent.

#### *D. Current Contract Law's Enforcement of Contract Under Consent*

Application of the above contract law doctrines leads to the enforcement of all of the contracts falling within Scenario 1. That is not controversial. However, under current standards, most contracts in Scenarios 2 through 5 will also be enforced even though the consent in those cases is problematic.<sup>96</sup>

Contract law now generally enforces contracts like the one in Scenario 2 despite the consent defect.<sup>97</sup> In certain extreme cases involving

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91. *See, e.g.*, *Midwest Builder Distrib., Inc. v. Lord & Essex, Inc.*, 891 N.E.2d 1, 19 (Ill. App. Ct. 2007) (“[W]hen interpreting an integrated contract, courts are limited to considering material that lies within the four corners of the text, rather than resorting to extrinsic evidence.”).

92. *Id.*

93. *See, e.g.*, *Foothill Capital Corp. v. E. Coast Bldg. Supply Co.*, 259 B.R. 840, 845 (E.D. Va. 2001) (holding that because both parties conceded that the language of loan documents was clear and unambiguous, the court's inquiry into the parties' intent was limited to the loan documents).

94. *See, e.g.*, *Williams v. Spitzer Autoworld Canton, L.L.C.*, 913 N.E.2d 410, 415–16 (Ohio 2009) (holding that the parol evidence rule prohibited evidence of an oral agreement that contradicted the terms of the written contract).

95. *See, e.g., id.* at 413 (noting that the contract at issue had a merger clause).

96. *See* subprime mortgage cases cited *supra* note 16.

97. *Id.*

unequal bargaining power and substantive unfairness, courts have refused to enforce contracts similar to those in Scenarios 3 through 5 by resorting to contract law defenses such as the doctrine of unconscionability. But courts have been unwilling to expand the doctrine of unconscionability.<sup>98</sup> As a result, many of the contracts falling within Scenarios 2 to 5 have been enforced.

As we approach the more problematic end of the consent spectrum (i.e., contracts falling within Scenarios 6, 7, and 8), courts have been more willing to invoke current contract law defenses such as fraud, duress, and undue influence and have struck down those agreements.<sup>99</sup> As it stands right now, contract law enforces contracts in multiple situations where consent is defective.

### III. PROBLEMS WITH CONTRACT LAW'S CONSENT FOCUS

Contract law's focus on consent seemingly offers an objective way to assess whether a contract should be enforced. But as described in the above Part, the objective approach to ascertaining the existence of consent frequently results in enforcing agreements that do not reflect meaningful consent (for example, agreements falling within Scenarios 2 through 5). Contract law has not answered many of the hard questions related to the consent concept in light of unprecedented marketplace manipulation of information as a result of better understanding of the human decision-making process.

Contract law should reevaluate its consent-centric approach in light of the many problems associated with consent. Consent is a motivationally complex concept to begin with.<sup>100</sup> The consent concept is easily manipulated, and this compounds its inherent complexity. There is strong evidence of marketplace manipulation targeting human biases.<sup>101</sup> The existence of apparent consent based on objective indicia, such as a signature on a written document, cannot be presumed to reflect the individual will where the other party has manipulated information.

The increasing use of standard form contracts and cyberspace contracts also makes it necessary for contract law to abandon its

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98. See Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73, 101 (2006) (arguing that consumers rarely file or settle claims in part because of courts' adverse attitudes toward unconscionability claims).

99. See, e.g., *Brown v. Pierce*, 74 U.S. (7 Wall.) 205, 209–10 (1868) (finding threats to life as a form of duress); *Weger v. Rocha*, 32 P.2d 417, 420 (Cal. Dist. Ct. App. 1934) (finding that the agreement was signed by the plaintiff under undue influence while she was seriously injured and in a nervous condition).

100. See discussion *infra* Part III.A.

101. See discussion *infra* Part III.B.

consent focus.<sup>102</sup> In those situations, there is an increasing disconnect between consent in contract law and consent in reality.<sup>103</sup> Contract law's traditional search for consent is inappropriate in those situations. Maintaining the consent focus will put contract law in the untenable position of having to maintain a fiction when it is not possible to find meaningful consent.

Current contract law defenses are insufficient to overcome the bias of a consent-focused approach. As long as contract law remains consent centric and contract law doctrines remain oriented toward the search for consent, it does not solve the fundamental problems of power imbalance and contract law's potential to perpetuate that imbalance.<sup>104</sup>

A. *The Motivational Complexity of Consent*

Consent is an intentional behavior, and it is an act of meaning that necessarily derives its meaning from the sociocultural context in which it is recognized.<sup>105</sup> Concepts such as choice or consent can mean different things to different people depending on their cultural background and social class.<sup>106</sup>

For example, Professor West described the characters in the fictional world of Franz Kafka and contrasted that world against the ideal one envisioned by law and economics scholar Richard Posner. She pointed out that in both worlds, consent was used to “validat[e] otherwise unappealing states of affairs.”<sup>107</sup> She described consent as an “ambiguously motivated human act” and cautioned against relying on consent as a basis for moral justification.<sup>108</sup>

Consent is also a culturally dependent concept. Studies have shown that middle-class Americans tend to value choice more so than people from working-class or other cultural backgrounds.<sup>109</sup> The significance of these findings is that people may be motivated by multiple factors when they “consent.”

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102. See discussion *infra* Part III.C.

103. Radin, *supra* note 10, at 1128.

104. Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 198–99 (2009).

105. JEROME BRUNER, ACTS OF MEANING 28–29 (1990).

106. Nicole M. Stephens, Hazel Rose Markus & Sarah S.M. Townsend, *Choice as an Act of Meaning: The Case of Social Class*, 93 J. PERSONALITY & SOC. PSYCHOL. 814 (2007); see also West, *supra* note 7, at 386–88 (comparing consent in Posner's world of welfare maximizing individuals with Kafka's world of authoritarian personalities).

107. West, *supra* note 7, at 386.

108. *Id.* at 425.

109. See Stephens, Markus & Townsend, *supra* note 106, at 815 (“[I]ndependence is the dominant discourse in mainstream American society . . .”).

The country we live in today is very different from the country during the nineteenth century when contract law experienced its growth.<sup>110</sup> According to 2010 census data, the landscape of the U.S. population is rapidly changing. Although whites remain the majority,<sup>111</sup> there were substantial increases in minority populations between 2000 and 2010.<sup>112</sup> For example, the Hispanic and Asian groups each increased by 43 percent.<sup>113</sup>

Contract law's consent focus, viewed from the colored lens of dominant western values, will often result in enforcing an agreement where there is no consent. The result will be use of state power in favor of those with more resources.<sup>114</sup>

### *B. Marketplace Manipulation of Consent*

Consent's complexity poses even more challenges when marketplace actors devote substantial resources to manipulate people's consent. Behavioral studies in the last three decades have demonstrated that the human decision-making process can be easily manipulated.<sup>115</sup> Human beings suffer from predictable biases.<sup>116</sup> We

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110. See Mautner, *supra* note 4, at 552–53 (discussing the shift from subjectivism to objectivism in contract law during the nineteenth century).

111. According to the 2010 census, “White” refers to a person having origins in any of the original peoples of Europe, the Middle East, or North Africa. KAREN R. HUMES, NICHOLAS A. JONES & ROBERTO R. RAMIREZ, OVERVIEW OF RACE AND HISPANIC ORIGIN: 2010 CENSUS BRIEFS 3 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>. It includes people who indicated their race as “White” or reported entries such as Irish, German, Italian, Lebanese, Arab, Moroccan, or Caucasian. *Id.* So “White” is not as monocultural as the label suggests.

112. *Id.*

113. *Id.* at 3, 5.

114. One of the impetuses for the Occupy Wall Street Movement is economic inequality. OCCUPY WALL STREET, *supra* note 25.

115. See, e.g., ARIELY, *supra* note 37, at 317 (“But, as the results presented in this book (and others) show, . . . [o]ur irrational behaviors are neither random nor senseless—they are systematic and predictable.”); KAHNEMAN, *supra* note 13, at 8–10 (explaining that “heuristics and biases” are becoming increasingly studied in fields outside psychology). One could argue that human manipulation of information and of each other has been present since the beginning of time. The oldest example of that is when Eve persuaded Adam to eat the fruit from the Forbidden Tree. That is why businesses spend money on advertising. Although manipulation has always been present, manipulation at such sophisticated levels and on such a scale has only been present for the last couple of decades. Difficult as it is, contract law needs to draw a line between what is acceptable and what is not. The reasonableness standard proposed in this Article allows a court to draw the line appropriately. Contract law's



tend to be overly optimistic and myopic, and we place too little weight on future costs and benefits and too much weight on short-term costs and benefits.<sup>117</sup> Individuals also tend to misjudge the likelihood of a future event. They rely on the shortcut of a small sample of present events as indicative of future events while ignoring other evidence, such as prior occurrences and the quality of the sample.<sup>118</sup> These biases lead to systematic underestimation of future risks.<sup>119</sup>

The human tendency to rely on shortcuts to make decisions often leads to predictable mistakes.<sup>120</sup> For example, when making a decision, we tend to rely on information that is salient or available to us (referred to as the saliency effect).<sup>121</sup> These known biases make it possible to predict people's irrationality.<sup>122</sup> Studies have shown that what people choose tends to be influenced by how the choices are presented to them (referred to as the framing effect).<sup>123</sup>

Manipulating those biases was exactly what happened in transactions leading up to the subprime mortgage crisis.<sup>124</sup> In those transactions, lenders manipulated borrowers with less information through deliberate contract design.<sup>125</sup> Subprime loan products with cost deferral features took advantage of people's inherent biases. The borrowers focused on short-term benefits and underestimated future risks.<sup>126</sup> Those mortgage products were also deliberately designed to be so complicated that borrowers could not properly assess the risks.<sup>127</sup>

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tolerance of unbridled marketplace manipulation will end up using the coercive power of the state to aid the manipulator.

116. ARIELY, *supra* note 37, at 317.

117. *See id.* at 320 (“It is difficult to sacrifice consumption today for saving in the distant future, but it is psychologically easier to sacrifice consumption in the future . . .”).

118. KAHNEMAN, *supra* note 13, at 8–10.

119. *Id.*

120. *Id.*

121. *Id.*

122. ARIELY, *supra* note 37, at 317.

123. KAHNEMAN, *supra* note 13, at 88.

124. Bar-Gill, *supra* note 14, at 1120–21; White, *supra* note 14, at 158–59.

125. Bar-Gill, *supra* note 14, at 1079–80; White, *supra* note 14, at 158–60.

126. *See* DAVID FABER, AND THEN THE ROOF CAVED IN 45 (2009) (discussing how after a twenty-minute phone call, borrowers could have a loan cleared within a week). For a detailed discussion of how lenders exploited these decisional biases in consumer contract contexts, see White, *supra* note 14, at 158–60, and the articles cited therein.

127. *See* EDMUND L. ANDREWS, BUSTED: LIFE INSIDE THE GREAT MORTGAGE MELTDOWN 77 (2009) (pointing out that even former Federal

C. *The Growing Disconnect Between Consent and Commercial Contract Practices*

Commercial contract practices, such as the increasingly common use of form contracts and cyberspace contracts, also make it more urgent to reexamine the consent-focused approach.<sup>128</sup> The exponential increase in cyberspace commercial transactions means that more and more contracts are being entered into electronically. In cyberspace transactions a user is typically required to agree by clicking on the “OK” button.<sup>129</sup> In those cases, users often do not see the terms before the transaction,<sup>130</sup> or they have not read the terms before they click on the button indicating acceptance of those terms. In those cases, it is difficult to imagine that informed consent exists.<sup>131</sup>

As Professor Radin pointed out, the advent of cyberspace contracting exposes the consent problem. She pointed out that “[t]he problem, in a nutshell, is that our ordinary-discourse commitment to a consent-based system will come into clearer conflict with practices that do not seem consensual.”<sup>132</sup>

It is clear that cyberspace contracting is here to stay.<sup>133</sup> Contract law’s consent centric-approach presents a court with this dilemma: If the court is true to the consent concept, it will have to strike down cyberspace contracts for lack of consent. One cannot seriously argue that a buyer has consented at the time of contracting when the buyer

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Reserve Chairman Alan Greenspan acknowledged “that a person with a PhD in mathematics wouldn’t understand them”).

128. Radin, *supra* note 10, at 1128.

129. *See id.* at 1128–30 (describing various “contract as click” agreements).

130. *See, e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir. 1996) (finding that the defendant’s use of the software after purchase, coupled with a license agreement that appeared on screen, constituted acceptance). The *ProCD* case presented an extreme example of the disconnect between contract law and marketplace practices. Judge Easterbrook held that a “contract” was enforceable even though the buyer did not know about the contract when he purchased the product. *Id.* This raises the interesting issue of whether consent is a necessary element of a contract, which is beyond the scope of this Article.

131. I have to confess that I have personally clicked on an “accept” button on many occasions. A few times, I did make a valiant effort to read and understand the contract terms, but gave up when it became too time consuming and I needed to use the software. On those occasions, I hoped silently that the terms I had just accepted were reasonable terms.

132. Radin, *supra* note 10, at 1128.

133. *See, e.g.*, *ProCD*, 86 F.3d at 1451 (pointing out that these types of business practices, “[n]otice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable (a right that the license expressly extends), may be a means of doing business valuable to buyers and sellers alike”).

has never read the contract. That would mean that a large number of cyberspace contracts would not be upheld regardless of the practical necessity of having to rely on those contracts to move cyberspace commerce forward. On the other hand, if a court chooses to uphold such a contract, it will necessarily appear to be paying lip service to the consent concept.<sup>134</sup> By finding consent where there is none, the court is not only damaging its own credibility and the legitimacy of contract law as an institution, but also denigrating the ideals imbued in the concept.

*D. Insufficiency of Current Contract Defenses*

Can current contract law defenses address the defects related to consent? Yes, but only to a certain extent. In the scenarios set forth in Part I.B, courts have applied contract law defenses to strike down agreements falling within Scenarios 6, 7, and 8. But so long as the analysis begins with a search for consent, courts are unlikely to apply these contract law defenses to contracts with consent defects identified in Scenarios 2 through 5. A different mindset and standard are necessary to address those consent problems.

Judges, like other humans, suffer from decisional biases. For a judge with a traditional commitment to the consent focus, contract law defenses will not be sufficient to address the more subtle consent problems identified in Scenarios 2 through 5. That explains why courts have mostly enforced contracts similar to those in Scenarios 2 through 5.<sup>135</sup> Behavioral studies have shown that humans are easily influenced by what they are exposed to, a phenomenon known as the priming effect,<sup>136</sup> the anchoring effect,<sup>137</sup> and availability bias.<sup>138</sup> Since courts are primed to think that consent is sufficient to justify enforcement of contracts, they have proven very reluctant to rely on

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134. Judge Easterbrook faced this dilemma in *ProCD* and he apparently chose the more practical approach. As a result, he was widely criticized. See, e.g., Roger C. Bern, “*Terms Later*” *Contracting: Bad Economics, Bad Morals, and a Bad Idea for a Uniform Law, Judge Easterbrook Notwithstanding*, 12 J.L. & POL’Y 641, 641–43 (2004) (providing multiple articles that disagree with Judge Easterbrook’s opinion). For other examples of courts paying lip service to consent, see cases cited *supra* notes 70–72.

135. See discussion *supra* Part I.B. and cases cited therein.

136. See KAHNEMAN, *supra* note 13, at 52–53 (demonstrating that the priming effect will lead people to complete “SO\_P” with “SOUP” instead of “SOAP” after having recently seen or heard “EAT”).

137. See *id.* at 122–24 (discussing various studies showing how people readjust their guesses after hearing another possible answer).

138. See *id.* at 129–35 (describing various studies showing that if people can come up with many instances of a particular class, they will judge that category to be large).

any contract law defenses to undo a contract where apparent consent seems to exist.

For example, courts have been extremely reluctant to apply the doctrine of unconscionability.<sup>139</sup> Conceived in equity, this doctrine could have been used to undo contracts where consent was problematic. An expansive application of the doctrine of unconscionability could, for example, result in voiding those agreements in Scenarios 2 through 5. But courts have not done so.<sup>140</sup> Courts have applied the doctrine only in limited situations involving unequal bargaining power and unfair terms.<sup>141</sup> The cases where courts have applied the doctrine typically involve a consumer who signed a standard form contract—drafted by the more powerful party and with draconian terms favoring the powerful party.<sup>142</sup> It is very rare to have a successful unconscionability defense in a commercial context.<sup>143</sup> Courts have only found an agreement unconscionable where it offended notions of “decency,” or had grossly unfair results—all viewed in the context of a firm commitment to the consent concept.<sup>144</sup>

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139. See generally Schmitz, *supra* note 98 (discussing in depth the development of the unconscionability doctrine).

140. See cases arising out of subprime mortgage crisis, *supra* note 16.

141. See generally Paul Bennett Marrow, *Squeezing Subjectivity from the Doctrine of Unconscionability*, 53 CLEV. ST. L. REV. 187 (2005–06) (arguing to update, or even eliminate, current unconscionability doctrine and govern potentially unconscionable contracts by various legislative regimes).

142. See, e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (“[W]hen a party of little bargaining power, and hence little real choice, signs a commercially unreasonably contract with little or no knowledge of its terms, it is hardly likely that his consent . . . was ever given to all the terms. In such a case . . . enforcement should be withheld.”).

143. See Schmitz, *supra* note 98, at 101 (describing legislative attempts to limit unconscionable contracts by permitting merchants to elect states that enforce form contracts).

144. See Nancy S. Kim, *Evolving Business and Social Norms and Interpretation Rules: The Need for a Dynamic Approach to Contract Disputes*, 84 NEB. L. REV. 506, 551–52 (2005) (“Generally, an unconscionable agreement offends notions of ‘decency’ . . .” (quoting *Gimbel Bros. Inc. v. Swift*, 307 N.Y.S.2d 952, 954 (Civ. Ct. 1970))); Mautner, *supra* note 4, at 554 (“[T]he culture that judges and lawyers internalize in their daily lives determines, in subtle but effective ways, the options available to them in making decisions in the law and in developing the law. This explanation does not negate the role of reflective, conscious legal deliberation in law. Still, it is premised on the claim that to act in law is to act within a cultural system, so that a good deal of what transpires in law is done on the non-reflective and non-conscious level.”).

E. *Consent and Contract Law Goals*

Contract law's consent focus may be detrimental to stated contract law goals. Scholars have identified various goals of contract law, including constraining opportunistic behavior, reducing transaction costs, and promoting efficient exchanges.<sup>145</sup> Contract law's consent focus actually encourages opportunistic behavior. For example, lenders targeting borrowers relied on consent to justify inducing borrowers to sign up for subprime mortgage products that they could not afford.<sup>146</sup> Investment bankers relied on consent to justify their sale of risky derivative financial products to third-party investors.<sup>147</sup> As long as the parties know that their contracts will be enforced if they can manage to get the other party to sign the contract, the parties are motivated to manipulate the information to obtain consent.<sup>148</sup>

Contract law's consent approach will result in increased transaction costs. The consent focus will lead to enforcing more and more contracts that are not the result of voluntary consent. Eventually, this will result in less trust in society.<sup>149</sup> When trust is low, the transactional costs ex ante are high because people have to provide for multiple contingencies not encountered when people trust each other.<sup>150</sup> The transaction costs ex post are also high when unhappy contractual parties sue each other, as evidenced by the aftermath of the subprime mortgage crisis.<sup>151</sup>

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145. TREBILCOCK, *supra* note 7, at 16–17.

146. For example, lenders were reportedly blaming borrowers for choosing their real estate investments or loans with subprime terms. Rick Brooks & Ruth Simon, *Subprime Debacle Traps Even Very Credit-Worthy*, WALL ST. J., Dec. 3, 2007, at A1.

147. A Wall Street firm was quoted as saying that professional investors chose the risk exposure and voluntarily bought derivative financial products. Gretchen Morgenson & Louise Story, *Banks Bundled Bad Debt, Bet Against It and Won*, N.Y. TIMES, Dec. 24, 2009, at A1.

148. See discussions *supra* Part II.

149. See JOSEPH E. STIGLITZ, FREEFALL: AMERICA, FREE MARKETS, AND THE SINKING OF THE WORLD ECONOMY 289 (2010) (“[W]e have created an economic system that encourages shortsighted behavior—behavior that is so shortsighted that the costs of the breakdown in trust are never taken into account.”).

150. See SHERMER, *supra* note 40, at 177–78 (quoting Paul Zak, a professor of economics at Claremont Graduate University, explaining the positive correlation between trust and economic growth).

151. Navigant Consulting, Inc., a global consulting firm, found that more subprime-related lawsuits were filed in the first half of 2008 than in all of 2007 and that the total number of subprime-related lawsuits exceeded the number of lawsuits resulting from the savings and loan crisis in the early 1990s. *Subprime Mortgage Litigation Filings Surpass S&L Benchmark*,

The consent focus may also undermine the efficiency goal of contract law. Contract law's private ordering paradigm is said to promote efficiency because it is presumed that parties would not have entered into a contract unless they felt that the transaction would have made them better off.<sup>152</sup> Hence, when contract law limits itself to enforcing the bargain struck by the parties, it is said to be promoting efficient exchanges. But that presumption is only valid if the parties enter into the transaction voluntarily and with all the information necessary to make a decision.<sup>153</sup> Because of the problems identified in this Article, the focus on consent will lead to enforcing contracts without informed decision making. For example, a large number of subprime mortgage transactions left millions of people worse off than before. Many borrowers might not have entered into these transactions had they had access to all the information necessary to make an informed decision.

Ultimately, contract law's consent-centric approach is unfair to people who are not in a good position to help themselves. A legitimate governmental goal is to create a society fair for its people. Fairness is also embodied in multiple constitutional principles such as the Equal Protection Clause of the Fourteenth Amendment. Contract law's consent approach, seemingly neutral on its face, is unfair to people who are not as well informed or endowed with resources.<sup>154</sup>

#### IV. ALTERNATIVE TO A CONSENT-FOCUSED APPROACH

If contract law does not rely on an individual's consent as a lynchpin of enforcement, what test should contract law adopt to determine whether to enforce a contract? This Article suggests that courts adopt a totality of circumstances test to determine whether a contract should be enforced. A totality of circumstances test would be more flexible than a consent-focused approach. Instead of trying to ascertain whether an individual consented or not—an almost

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*Navigant Consulting Study Finds*, NAVIGANT, 1 (Sept. 10, 2008), [http://www.navigant.com/~media/Site/Insights/Financial%20Services/Subprime%20Mortgage%20Litigation%20F\\_Financial%20Services.ashx](http://www.navigant.com/~media/Site/Insights/Financial%20Services/Subprime%20Mortgage%20Litigation%20F_Financial%20Services.ashx).

Navigant reported that 607 lawsuits were filed in the federal court during the 18 months ending in June 2008. *Id.* This number is higher than the number of lawsuits filed in any other major financial crisis. *Id.*

152. TREBILCOCK, *supra* note 7, at 244 (“The strongest welfare claim that can be made on behalf of the private ordering paradigm is from the perspective of Pareto efficiency. . . . [I]f two parties are to be observed entering into a contract, one should normally presume that they would not have done so unless they felt that the contract was likely to make them better off.”).

153. *Id.*

154. Dalton, *supra* note 6, at 1012–21.

impossible task due to the complexities of reality—a court should examine multiple factors surrounding the entire transaction before it enforces a contract. Courts will not have any difficulties applying the test. They have applied such a test in multiple contexts.<sup>155</sup> The test allows courts to utilize their greatest strength—their fact-finding expertise.<sup>156</sup>

A. *The Totality-of-the-Circumstances Test in Other Contexts*

The totality of circumstances test is no stranger to courts. Courts have applied the test in multiple contexts, especially in situations that implicate consent. The test reflects the courts' recognition of the perils of relying on outward manifestations of consent. Courts in the criminal law context have refused to take the apparent consent of the accused at face value.<sup>157</sup>

For example, courts have adopted a totality of circumstances test to decide whether confessions by an accused in a criminal law context are voluntary. In criminal law, courts endorse “the strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will.”<sup>158</sup> To determine whether the confession is voluntary, courts apply a totality of the

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155. See discussion *infra* Part IV.A.

156. See *United States v. Estus (In re Estus)*, 695 F.2d 311, 316 (8th Cir. 1982) (“[A] court must utilize its fact-finding expertise and judge each case on its own facts after considering all the circumstances of the case.”). One ready criticism against the adoption of this test is: How can we be sure that the courts will get it right? As some scholars have pointed out, individual autonomy may be threatened if courts are not good at what they are doing. See, e.g., Richard Craswell, *Remedies When Contracts Lack Consent: Autonomy and Institutional Competence*, 33 OSGOODE HALL L.J. 209, 233 (1995) (suggesting that if courts do not get it right, “the state is not merely failing to prevent infringements of autonomy but is actively contributing to those infringements”). The totality of circumstances test also encourages more court intervention into private contractual relationships and conjures up images of “big brother.” The essential question remains: Are we more willing to subject ourselves to unbridled marketplace greed or to the government? When the marketplace fails to function in a fair and equitable manner, we have no choice but resort to government assistance, imperfect as the solution is.

157. With limited exceptions, courts in criminal cases are generally untroubled by the same problems that plague consent in contract law. Yet in both situations, consent is heavily influenced by the circumstances surrounding the event. The difference is perhaps caused by the fact that in criminal law an individual's physical liberty and other state interests are at stake, while in contract law only economic interests are at stake. But is there any reason to treat commercial interests as less worthy of protection? This question is reserved for another day.

158. *Blackburn v. Alabama*, 361 U.S. 199, 206–07 (1960).

circumstances test and examine the circumstances of the interrogation, instead of focusing on the existence of consent by the accused.<sup>159</sup>

Courts also apply a totality of circumstances test in evaluating whether a juvenile has waived his or her Miranda rights.<sup>160</sup> In that context, courts put “a heavy burden . . . on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.”<sup>161</sup> The Supreme Court noted that the question of whether an accused waived his rights “is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.”<sup>162</sup> The Court then pointed out that the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation.<sup>163</sup> In the criminal law context, the “totality of the circumstances” test permits a court to look into multiple factors such as the juvenile’s age, experience, education, background, and intelligence and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights.<sup>164</sup>

In another context involving definitional difficulties, courts have also applied a totality of circumstances test in evaluating whether a debtor satisfied the good faith requirement under 11 U.S.C. § 1325(a)(3)’s Chapter 13 bankruptcy plan.<sup>165</sup> Recognizing the inherent difficulty in defining “good faith,” one court promulgated a test in which a bankruptcy court could utilize its fact-finding expertise and reach a decision after considering all the circumstances of a case.<sup>166</sup> In considering whether a Chapter 13 debtor proposed his plan in good faith, courts examine factors such as the type of debt sought to be discharged,

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159. *Id.* at 207–08.

160. *See generally* *Fare v. Michael C.*, 442 U.S. 707 (1979) (finding that a juvenile respondent waived his Fifth Amendment rights, notwithstanding his request to see his probation officer); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding that the government needs to notify arrested individuals of their Fifth Amendment constitutional rights prior to an interrogation).

161. *Miranda*, 384 U.S. at 475.

162. *North Carolina v. Butler*, 441 U.S. 369, 373 (1979).

163. *Miranda*, 384 U.S. at 475–77.

164. *Id.* at 468–69.

165. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1348–49 (8th Cir. 1990).

166. *United States v. Estus (In re Estus)*, 695 F.2d 311, 316–17 (8th Cir. 1982).



whether the debt is nondischargeable under Chapter 7, and the debtor's motivation and sincerity in seeking Chapter 13 relief.<sup>167</sup> Other courts have adopted a totality of circumstances test similar to that used by the 8th Circuit in *LeMaire* and *Estus* to determine whether the Chapter 13 debtor has proposed a plan in good faith.<sup>168</sup>

Courts have also used a totality of circumstances test in ascertaining the existence of probable cause necessary for the issuance of a search warrant,<sup>169</sup> in determining foreseeability in employer-liability cases,<sup>170</sup> in establishing vicarious liability under the Commodities Exchange Act,<sup>171</sup> and in determining the validity of patents.<sup>172</sup> Some courts have adopted a totality of circumstances test to determine whether prison conditions violate the Eighth Amend-

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167. *LeMaire*, 898 F.2d at 1349.

168. *See, e.g.*, *Hardin v. Caldwell (In re Caldwell)*, 851 F.2d 852, 859 (6th Cir. 1988) (concluding that “the list provided in *In re Estus* [was] a particularly succinct and clear statement of some of the factors that a court may find meaningful in making its determination of good faith” (internal quotation omitted)); *Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir. 1986) (holding that a totality of circumstances test may also include consideration of debtor's pre-petition conduct); *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983) (upholding the bankruptcy court's finding that a plan proposing no payments to unsecured creditors was proposed in good faith); *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983) (adopting the factors set forth in *Estus*); *Kitchens v. Ga. R.R. Bank & Trust Co. (In re Kitchens)*, 702 F.2d 885, 888–89 (11th Cir. 1983) (holding that determination of good faith required consideration of factors similar to those used in *Estus*); *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390 (9th Cir. 1982) (holding that good faith analysis involving consideration of various factors may also include the substantiality of the proposed repayment); *Ravenot v. Rimgale (In re Rimgale)*, 669 F.2d 426, 431–32 (7th Cir. 1982) (holding that a fixed 70 percent repayment requirement was unnecessary to establish good faith).

169. *See, e.g.*, *State v. Baldoni*, 609 A.2d 219 (R.I. 1992) (per curiam) (involving a Rhode Island state police officer's effort to obtain a warrant that would authorize a search of the defendant's residence).

170. *See, e.g.*, *Isaacs v. Huntington Mem'l Hosp.*, 695 P.2d 653 (Cal. 1985) (establishing the totality of the circumstances as the proper test for foreseeability regarding employer liability).

171. *See, e.g.*, *Stotler & Co. v. Commodity Futures Trading Comm'n*, 855 F.2d 1288, 1292 (7th Cir. 1988) (establishing the totality of the circumstances as the proper test in determining vicarious liability for “soliciting customers to trade commodity futures accounts”).

172. *See, e.g.*, *Envirotech Corp. v. Westech Eng'g, Inc.*, 904 F.2d 1571, 1574 (Fed. Cir. 1990) (internal quotation omitted) (“Whether an invention is on sale is a question of law, and no single finding or conclusion is a *sine qua non* to its resolution. The totality of the circumstances must always be considered . . .”).

ment's prohibition against cruel and unusual punishment.<sup>173</sup>

This survey of the cases involving totality-of-the-circumstances tests shows that courts have fashioned a more flexible test to ascertain the existence of consent to protect important interests. Why should economic interests be treated differently? Some scholars have argued that economic rights should be treated as human rights.<sup>174</sup> The ultimate, overarching goal of contract law should be fairness in economic exchanges. A totality of the circumstances approach would be much more suited for this goal than focusing on the elusive search for consent of the parties.

*B. The Totality-of-the-Circumstances Test for Contract Enforcement*

How does a totality-of-the-circumstances test work in contract law?<sup>175</sup> Instead of searching for an individual's consent, the test will permit the courts to examine multiple factors to determine whether a contract should be enforced. As part of the inquiry, consent will become a factor of the analysis, not *the* factor in justifying use of state power.

For example, under this test, a court can ask whether a reasonable person under the circumstances would have understood the terms of the contract and consented based on a full understanding of the terms. The court can also look into the circumstances surrounding the negotiations. Was the promisor able to negotiate the terms of the agreement? The court can also look at the resources of the parties. Did one party have substantially more resources than the other party? Was there any manipulation of the information that would render it unfair for the court to enforce the contract? What are the terms? Are the terms commercially reasonable? Any other practical concerns that would render enforcement appropriate?

A totality-of-circumstances-test is a more honest standard.<sup>176</sup> It relieves contract law and courts from the untenable position of having to

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173. See, e.g., *Jackson v. Hendrick*, 503 A.2d 400 (Pa. 1986) (remanding the case because the lower court did not assess whether the overcrowding of the prison population violated the Eight Amendment based on a totality-of-the-circumstances test).

174. See Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 466 (1992) (“[T]he Fourteenth Amendment must be understood as including the[] positive rights of autonomy, *economic self-sufficiency*, and political self-governance.” (emphasis added)).

175. Professor Craswell has suggested that a discussion of what counts as knowing or voluntary consent should take into consideration the institutional competence of the courts to award an appropriate remedy if a contract lacks any meaningful consent. Craswell, *supra* note 156, at 210, 213. It is beyond the scope of this Article to examine the relationship between institutional competence and consent analysis.

176. When arguing that consent cannot justify all human experiments, Garnett described the reliance on consent as “subterfuge designed to

ascertain the existence of a human act as elusive as consent and, when inevitably failing to do so, of having to maintain a fiction. Continuing the fiction will put the legitimacy of contract law into doubt.<sup>177</sup>

## CONCLUSION

The consent concept may have played a useful role when economic relationships were simpler and when there was less manipulation in the marketplace.<sup>178</sup> But with unprecedented manipulation of human decision-making biases, as identified by behavioral economists in the last few decades, consent has become very elusive and difficult to define and ascertain. Because of those difficulties, consent should no longer serve as a justification for the government's exercise of power in favor of one party over the other in a contractual relationship. Contract law has so far relied on a patchwork of defenses and doctrines to deal with the defects of consent, but these efforts do not address the difficult situations caused by increasingly sophisticated marketplace manipulations and practices. If contract law continues its consent focus, it will end up siding with the more powerful parties in an economic relationship. One of government's functions is to reduce the scope of exploitation.<sup>179</sup> Contract law's focus on consent will produce a result in opposition to government's goals. It will further the perception that government is putting its thumb on the scale for the rich and the powerful.

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hide our unease and to allow us to profess simultaneous commitment to values that often conflict." Garnett, *supra* note 32, at 460.

177. One can argue that another way to solve the consent problem is to adopt the informed-consent concept. The problem is that the inquiry into informed consent gets us mired in some tough factual inquiries. For example, when has a person truly consented? Do we go by objective manifestations or subjective understanding? What if someone truly believes that he consented and acted consistently with the subjective consent (think subprime borrowers); does that justify the state's enforcement of consent? What about people who voluntarily agree to be slaves? What about people who do not understand the terms of the contract? Some scholars suspect that informed consent is often honored in the breach and difficult to enforce as a practical matter. Schuck, *supra* note 1, at 932-33 (discussing the informed consent requirement in the patient-physician context).
178. See STIGLITZ, *supra* note 149, at 205 ("The appropriate role of the state differs from country to country and from era to era. Twenty-first-century capitalism is different from nineteenth century capitalism. . . . Globalization and new technologies have opened up the possibility of new global monopolies with a wealth and power beyond anything that the barons of the late nineteenth century could have dreamed.").
179. *Id.* at 204.



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